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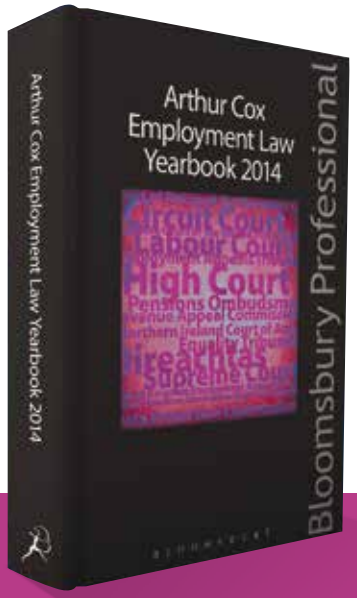

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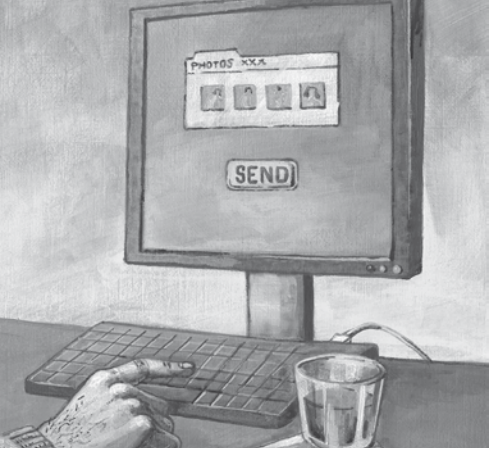

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Companies Act 2014

Cathy Smith BL

Arising from a process which lasted 17 years, resulting in 1,147 pages, 25 parts and 1,448 sections, the Companies Act, 2014 is the State's largest piece of legislation. The Act repeals all 17 previous companies' acts which had been enacted in the 50 year period from 1963 to 2013, together with 17 statutory instruments. Given the purpose as being the re-structure, consolidation, simplification and modernisation of company law in Ireland, could such a lengthy and complex piece of legislation possibly fulfil these laudable aims, when it is finally operable, as it is expected to be in June of this year?

The short answer is Yes. The really interesting thing however is that while there are many innovations and welcome changes to the current law, the outstanding feature of this legislation is its design, rather than its content. The overwhelming approach of the drafters appears to have been guided by a desire to present the law in a manner that is best suited to the needs of its primary users – the owners and directors of small private limited companies.

Ninety percent of Irish companies are small private companies limited by shares and the re-design of company law finally recognises this reality. Irish company law is currently disparately contained within 17 statutes and 15 statutory instruments, together with a plethora of common law principles. This code is far from "*user friendly*" from the perspective of a lay person, and in particular from the perspective of a company director. Given that a company director bears such onerous responsibilities under company law, the existing legislative framework is far from ideal and in itself often served as both an explanation and an excuse for a culture of non-compliance. While such non-compliance frequently related to "*technical*" or "*inadvertent*" breaches of company law, as opposed to those based in fraud or dishonesty, such breaches nonetheless exposed directors to a risk of prosecution. However, perhaps even more fundamentally, the system failed to provide third parties with the necessary level of comfort that they could deal with Irish business within a compliant environment.

How the Act targets the needs of small companies

Firstly, a new and simpler form of private company limited by shares (a "LTD") has been created and secondly, the relevant provisions pertaining to a LTD have been set out in their entirety within the first 15 parts of the Act.

No longer will directors, or their advisors, be required to trawl through companies' legislation, seeking to ascertain the relevant aspects dealing with their particular type of company. In fact, where one is a director of a LTD., one need never read beyond Part 15, thereby effectively reducing the size of the Companies Act 2014, insofar as it relates to such a company, to just 757 of its 1,447 pages.

The Act also provides for a second new form of company – a Designated Activity Company (a "DAC".) A DAC will closely resemble the existing form of private limited company. One of the major implications of these particular innovations is that existing private limited companies will undergo change either by way of their own proactive action or in the alternative, by default mechanisms under the Act. The private limited company, as we currently know it will be no more.

LTD V DAC

Capacity

A LTD will have the same capacity as a natural person. Currently a private limited company derives its capacity from its objects clause in its Memorandum of Association. The question as to whether a company is acting within or outside its capacity (*intra* or *ultra vires)* has previously been a necessary consideration by companies, directors, the courts and third parties. These are considerations which will cease to be relevant from June 2015 when dealing with a LTD. The board and any person registered with the CRO as having authority to bind the company will be statutorily deemed to have the necessary authority to bind the company[1].

Other simplification features

- A LTD enjoys the possibility of having just one director and one member[2].
- The requirement to have both a Memorandum and Articles of Association is replaced with just one single document constitution. In terms of the content of this single document, the Act now includes those provisions which are currently found in a company's Articles of Association governing the internal management of the Company. Table A has been almost completely incorporated into the Act itself and deemed to apply automatically unless expressly excluded by the company's constitution.
- There is no power available to a LTD to list debt securities for offer to the public. Currently while a private limited company is not entitled to list shares for offer to the public, it is however permitted to list debt securities.
- It is open to a LTD with multi members to dispense with the requirement to hold an AGM. This is currently only available to single member companies. The normal business of AGMs can accordingly be dealt with in written form.
- Shareholders will be entitled to pass majority

1 Section 40
2 1 to 149 members permitted

written resolutions in addition to unanimous written resolutions[3].

- Directors duties, both statutory and those at common law, have now been codified under the Act and offences pertaining to breaches of those duties have been categorised in four categories together with relevant sanctions.
- The company's name must be followed by Limited "LTD", "ltd.", or their Irish equivalents.
- Mergers will be possible for the first time between such companies.
- A summary approval procedure is available to authorise 7 otherwise restricted activities. In some cases, this method avoids the necessity of seeking court approval of certain transactions e.g. reduction in share capital.

Features of a DAC

A DAC closely resembles the current private limited company. In particular it continues to have specified objects defining its permitted activities, by way of an Objects clause. However even in the case of a DAC with a specific limited capacity, the ultra vires rule has effectively been dis-applied by virtue of section 973 (1). This provides that the validity of any act on the part of a DAC shall not be called into question on the ground of a lack of capacity by reason of anything contained in the DAC's objects. Sections 973(3) and (4) place the onus on directors to observe limitations on their powers flowing from the DAC's objects and the right to seek ratification of the DAC's activities by special resolution. However third parties are protected in their dealings with a DAC by the provisions of s. 973(5) which relieves them from any requirement to make enquiries as to whether the DAC is acting within its powers.

Other Features of a DAC

- A DAC is entitled to list debt securities for offer to the public
- It must have at least 2 directors and where it has more than one member, it cannot dispense with AGMs.
- The company's name must be followed by designated activity company or the appropriate abbreviations in English or Irish.
- Parts 1-15 of the Act, also apply to DACs, except where expressly dis-applied by the legislation. Therefore the Summary Approval Procedure, Merger provisions etc. also apply to DACs.

Transition Period

An 18 month transition period is available to private limited companies to opt to re-register as either a LTD or a DAC. Where steps are not taken to actively re-register a private limited company, after 18 months, it will automatically default to a LTD. Parts 1 to 15 of the 2014 Act will apply to it and its constitution will be deemed to consist of a single document comprised of its existing M&A with the Objects clause excluded together with any provision which seeks to prohibit the alteration of its articles. During the transition period, the company is deemed to be a DAC.

Where the default provisions are triggered by a company's inactivity, it remains open to members holding 15% or more of the share capital or any class of share or creditors holding 15% or more of any debentures, to apply to court for re-registration as a DAC. There are also provisions which permit a shareholder who considers that the failure to take necessary action has prejudiced him in some way to apply to court for appropriate relief as against the company and or the directors. There is a rebuttable presumption of oppression on the part of directors who have failed to act.

Where directors and members are of the view that a LTD is the appropriate form of company for their business, it may seem tempting to do nothing and simply permit the default mechanisms to apply. However Section 61 provides that the directors must prepare a new constitution and deliver this to the members and the Registrar of Companies. Failure to do so is not in itself an offence under the Act but the directors remain exposed to action on the part of the shareholders or creditors of the company where they fail to take the appropriate steps.

Directors

The aim of raising the level of compliance on the part of directors with their duties under the Act is a universal theme in Parts 5 and 6. A director is obliged to acknowledge and recognise that he has duties and obligations arising from his appointment, at various stages of his tenure. In particular, on his initial appointment he must acknowledge these duties and obligations in writing. He is assisted in informing himself as to those duties and obligations by their codification in Part 5[4] and also as to the implications of non-compliance by the categorisation of offences into 4 categories together with relevant sanctions. In some cases[5], he is required to prepare a compliance policy statement and establish appropriate arrangements and structures necessary to achieve material compliance with the Company's relevant obligations[6]. He is required to carry out a review of such arrangements and structures annually. Finally a Compliance Statement confirming all of the foregoing must be made by the director in the Directors Reports in the company's annual financial statements.[7]

This holistic approach to compliance will render it more difficult for a director to plead ignorance or misunderstanding as to his duties or obligations. Offences and sanctions have

3 Currently only unanimous written resolutions are possible

4 Chapter 2 deals with the general duties of a director with Section 228 containing for the first time in statute, a statement of 8 principal fiduciary duties of directors.

5 This and the following conditions only apply to private companies with a turnover in excess of €25m and balance sheet total of over €12m and plcs.

6 Relevant obligations are defined in Section 225(1) as those obligations under the Act, where failure would result in a Category 1 or 2 offence, or a serious market abuse or prospectus offence, or in the case of a traded company a serious transparency offence and tax law.

7 Again the Compliance Statement is required only in the case of plcs or private companies with a turnover in excess of €25m and balance sheet total of over €12m and plcs.

been clearly categorised and directors' complaints, as to a lack of appreciation of the likely implications of their actions will no longer have the credibility, they might once have had.

Offences[8]

Category 1: conviction on indictment can result in imprisonment for a term up to 10 years and/ or a fine of €500,000

Category 2: conviction on indictment can result in imprisonment for a term up to 5 years and/ or a fine of €50,000

Category 3: conviction of a summary offence which can result in imprisonment for a term up to 6 months and/ or a Class A fine.[9]

Category 4: conviction of a summary offence which can result in a Class A fine only.

Disclosure by Directors

- An existing requirement to disclose the interests of directors and secretaries and their spouse or civil partner and their children, in shares held by them in the Company has been removed, unless their aggregate holdings exceed 1% in nominal value of the issued share capital of a share class which carries voting rights at a general meeting of the company.[10]
- The act provides for the possibility that a director be exempted from the requirement to disclose his personal residential address on the company's register either within the company or by the Registrar of Companies. This is envisaged where there are personal safety or security concerns for the particular director. [11]
- Directors are required to state in their Directors Report which accompanies the company's financial statements annexed to the annual return, that all relevant information has been disclosed to auditors and that each director has taken all necessary steps to make him/herself aware of all relevant audit information.[12] Of note here is that a false statement from only one director, to this effect, exposes all directors to risk of a category 2 offence.

Directors' Loans

Advances between directors and companies are often un-documented and the terms relating to such advances are often vague and unclear. This can pose particular difficulties for liquidators when met with explanations for such advances, whereby loans to directors are offset against alleged advances from the directors to the company. There are rarely any agreed terms as to interest and the loans in themselves often constitute breaches of section 31 of the Companies Act, 1990[13]. The new act does not require such transactions to be in writing but where they are not in writing, certain presumptions apply. An advance from a director to the company, which is not in writing, will now be presumed not to be a loan[14] and a advance from a company to a director which is not in writing is presumed to be a loan repayable on demand and bearing interest.[15] These presumptions will now automatically apply where such transactions are not properly documented. Therefore, while there is no requirement to record these transactions, a director who fails to do so may well regret his inactivity at a later stage.

The Summary Approval Procedure, which is dealt with below, will also assist directors in addressing breaches of the Directors Loan provisions of the Act. Such loans which would otherwise be unauthorised can now be ratified by the appropriate use of the Summary Approval Procedure.

Summary Approvals Procedure

This is a method of "*whitewashing*" various transactions which might otherwise not be permitted by the Act. It applies to seven different transactions and the specific requirements vary depending on which transaction is at issue. It is intended to be a simpler and more cost-effective method of ratifying various activities without the need to apply to court. In general the procedure requires a special resolution, a statutory declaration of solvency, which in some cases, the statutory declaration of solvency must be supported by an independent person's report. Currently a private company which wishes to reduce its share capital may only do so with the approval of the High Court. This will no longer be necessary where the Summary Approval Procedure is properly utilised[16]. The other transactions with which this procedure can be used are:

- Financial assistance for acquisition of own shares[17]
- Variation of company capital on a reorganisation[18]
- Prohibition on pre-acquisition profits or losses being treated in holding company's financial statements as profits available for distribution[19];
- Prohibition of loans to directors and connected persons[20]
- Mergers[21]
- Members voluntary winding up[22]

Financial Statements, Registers and Audit Requirements (Part 4-6)

The innovations contained in these parts of the Act again are

8 Section 871
9 Class A Fine as per the Fines Act, 2010 – currently up to €5,000
10 Section 260(f)
11 Section 150(11) provides for the possibility that the Minister for Jobs, Enterprise and Innovation may make regulations to deal with this issue.
12 Definition of "relevant audit information": any information the auditors may need for their report.
13 The equivalent section in the new act is Section 239
14 Section 237
15 Section 236
16 Section 84
17 Section 82
18 Section 91
19 Section 118
20 Section 239
21 Section 464
22 Section 579

distinctive as much in their design as their substance. In terms of design, Part 4 codifies all of the requirements on the part of a private limited company in relation to the maintenance, location and inspection of various statutory registers in one place, rather than in the disparate manner in which these were previously dealt with in the various acts.

Financial language

The language relating to the company's accounts has been modernised somewhat with a change from the current requirement that a company keep "*proper books of account"* to the more accurate description of "*adequate accounting records*."[23] A company is now required to prepare "financial statements" rather than "accounts". While such a distinction might seem trite, in fact this reflects the reality of financial reporting in modern business. Books of account in themselves are clearly a relic of the past with their obvious connotations of large handwritten ledgers.

Defective Financial Statements

There is a new innovation whereby defective financial statements can be revised. Currently there is no method available to deal with such a difficulty. Where the new procedure is used, the old information will remain on the public record but new financial statements, accompanied by an auditor's report and reasons for the previous error or omissions can be delivered to the CRO (and circulated to members) within 28 days of the error or omission coming to light. [24]

Increase in size thresholds–medium-sized companies and groups

The turnover and balance sheet thresholds for medium sized companies and groups of companies (where the holding company and subsidiaries are taken as a whole) have increased to €20m and €10m respectively. The effect of this is that some companies and groups will now for the first time avail of certain exemptions from the documentation they are required to file with their annual returns. This reduces their burden of compliance, disclosure and presumably the related costs.

Audit Exemptions extended

Rather than meeting all 3 qualifying criteria, small companies now only need to satisfy 2 out of the 3 unchanged criteria in order to avail of an exemption from the requirement that their financial statements be audited.[25] The requirement now only applies to the current year in which the exemption is sought rather than, as required previously, both the current and previous year.[26] For the first time, groups of companies that meet the criteria (when the holding company and subsidiaries are taken as a whole) may also avail of an audit exemption. They must however qualify in both the current and previous year.[27] An entirely new and "special" audit exemption has been introduced for dormant companies which are now defined as a company with no significant accounting transactions within the year, and only intra-group assets and liabilities.[28]

Restoration of Audit Exemption

Currently a company is at risk of losing its audit exemption for 2 years, which it might otherwise qualify for, if its annual return is delivered late. It will now be possible to make an application to the District Court to seek an extension of time within which an annual return is filed. In effect, this provides a method to restore such a "lost audit exemption" and relieves the directors from having breached one of their statutory duties.

Role of Director of Corporate Enforcement–Audit Exemptions

There is a new power available to the Director of Corporate Enforcement to seek to confirm a company's entitlement to avail of an audit exemption by obtaining access to the company's books and records. Failure on the part of directors to furnish this information is now a Category 4 offence.

Auditors reporting obligations to ODCE

Auditors who are currently obliged to report possible indictable offences on the part of directors to the Director of Corporate Enforcement have now had this task simplified where the requirement is now limited to Category 1 and 2 offences only.[29]

Audit Committees

Companies with a balance sheet total exceeding €25m and turnover exceeding €50m must now confirm in the Directors Report to the annual accounts that an Audit Committee has been appointed by them, or alternatively explain why this is not the case. The provisions also require the audit committee to include at least one independent director with auditing or accounting competence.

Charges and Debentures

Section 99 of the Companies Act, 1963 required certain charges created by a company to be registered with the CRO. Non-registration does not in itself invalidate the charge but in the event that the company is wound up, any unregistered charge, which is required to be registered under Section 99 is void as against the liquidator and accordingly loses priority.

Part 7 contains significant change in this area. The definition of those charges which are required to be registered has been significantly broadened but expressly excludes a mortgage or a charge in an agreement (oral or written) created over an interest in cash, bank accounts, shares, bonds or debt instruments, units in collective investment undertakings or

23 Section 281
24 Section 366
25 Balance sheet and turnover do not exceed €4.4m or €8.8m respectively and total employees <50.
26 Balance sheet and turnover do not exceed €10m or €20m respectively and total employees < 250.
27 Section 39
28 Section 365
29 Section 393

money market instruments, or claims and rights, in respect of any of these[30].

Registration Procedure for Charges

There is an optional two-stage registration procedure, whereby notification as to an intention to create a charge is given to the CRO in order to secure priority at the earliest possible stage. Priority of charges created by a company will be determined by reference to the date of receipt by the registrar of the prescribed particulars.

Company Reorganisations and Mergers

Part 9 consolidates for the first time the manner in which Irish companies can be reorganised by way of Schemes of Arrangement, Acquisitions, Mergers and Divisions. Cross Border Merger Regulations of 2008 are the model for the provisions in Chapter 3 dealing with mergers, which can be by way of acquisition, absorption or formation of a new company. Merger can take effect by court order or by the Summary Approval Procedure, without the need of any application to court and at a lesser cost.

Winding Up

In general, Part 11 seeks to reduce court involvement in official liquidations and introduces greater consistency between members' voluntary, creditors' voluntary and official liquidations.

Liquidators

Liquidators are for the first time required to be qualified persons – members of prescribed accountancy body or other professional body recognised by IAASA, a solicitor, a person qualified in another EEA state, or a person with 2 years' experience in the area and approved by a relevant body.

Director of Corporate Enforcement – as petitioner to wind up company

A new power has been extended to the Director of Corporate Enforcement to seek the winding up of a company, if the court is satisfied that it is in the public interest to do so. To this extent, the ODCE may be guided by referrals from other public bodies including the Central Bank, National Consumer Agency, NERA etc. A company with obligations to NAMA will not be wound up without prior agreement of NAMA.[31]

Conduct of liquidations – key reforms

- Directors of insolvent companies, where faced with restriction proceedings must show that they not only acted honestly and responsibly but that they also cooperated as far as could reasonably be expected in relation to the winding up of the company, when requested to do so by the liquidator.
- It will no longer be necessary to apply to court to restrict or disqualify directors, where the director concerned provides an undertaking not to act in a way which would be prohibited, if they were the subject of a disqualification or restriction order. This will relieve liquidators of the burden and costs of bringing some section 150 and section 160 proceedings to the Examiners List in the High Court.
- Chapter 16 attempts in the now familiar style of the act to bring together the various offences on the part of officers of a company which typically arise in a winding up. This also includes a new offence at section 720 relating to the disposal of the books and records of the Company.
- The current "fraudulent preference" provisions in Section 286 have now been replaced with a more correct description of "unfair preference."[32]

Conclusion

It is hoped that the simplification of company law should serve to raise the standards of corporate compliance in Ireland. A strong compliance culture should now be recognised for its importance in protecting the creditors of a company. It should become more straightforward for an individual or corporation, domestic or international, to willingly engage in business with an Irish limited company as hopefully real comfort can be taken from a functional, purposeful, compliant and cost effective company law regime. The purpose of company law compliance should not be to seek to indict individual directors (and entrepreneurs), but to guide them in managing the affairs of their companies to the greater good. The Companies Act 2014 contains the guidance required to achieve this. ■

30 Section 408

31 Section 573(2)

32 Section 604

Section 76 and the joining of an Insurance Company as defendant

Eoin Cannon BL

Section 76 of the Road Traffic Acts 1961 allows, *inter alia*, a plaintiff to recover against the insurance of a defendant who has had their insurance withdrawn once judgement has been given against the defendant. In order to circumvent a constructed claim between plaintiff and defendant, it has become common practice for insurance companies to seek to be joined as an additional defendant to the proceedings in order to outline any fraud which they believe has occurred.

In this article, I intend to look at s.76 and the joining of insurance companies in personal injuries cases and the need for reform of this area. I intend to highlight the unwieldy function of section 76, the lack of clear procedure in joining an insurance company as defendants and the relationship between the parties once an insurance company is joined. Further I will argue that based on the available case law, there is a need for a re-examination of section 76 and for the drawing out of clear guidelines as to the circumstances when it is appropriate to join an insurance company to proceedings as a defendant.

A common situation

John crashes his car. Gary is in the back, Gary sues against John. John's insurance company withdraws cover, refusing subrogation of the defendant's claim, stating the terms of insurance were not adhered to. The MIBI will not take on the case as there was a valid policy of insurance. Gary's only option is therefore to sue John directly.

It is open to the plaintiff once judgment is given against the defendant to use s.76 of the Road Traffic Act 1961 to recover under the defendant 's withdrawn policy. The rationale is that the plaintiff should not be refused the right of recovery on the basis of the actions of the defendant. John's insurance policy will ultimately face paying the cost of a claim in which the liability and damages may be assessed in a vacuum without challenge.

Section 76(e) of the Road Traffic Act 1961 provides the only escape for an insurance company, stating that if an allegation of fraud between both plaintiff and defendant is successfully argued, then the insurance company need not pay out. It is commonplace therefore for insurance companies to seek to come off record for the defendant (if they have come on record at all) and apply to be joined as a defendant themselves prior to Judgement being given so that they may be in a position to defend their interests at an early stage rather than seeking to reverse a judgement that has already been given.

The reasons for resisting on the part of the plaintiff may vary given the circumstances. It may be thought to be more straightforward to deal with one defendant rather than two. Further, the presence of an insurance company in a trial may also be regarded as a perceived stain on the credibility of a plaintiff. Tactically, it is indeed an awkward position for a plaintiff to be suing a defendant with whom they have no case, who will only be there to attack their position.

The 'false' defendant – coming on record

It is common for an insurance company seeking to be joined to argue that they are bringing forward information which will properly decide the matter, and that it would be they who are in danger of falling foul of prejudice should they not be joined. Further, it may be stated that they will cover the costs of the plaintiff, the reasonable costs of the defendant and pay out any awards in damages should the plaintiff be successful, arguing that in those circumstances, neither plaintiff or defendant are going to be prejudiced by their inclusion as a defendant. Any promise regarding costs may be ordered in the normal course by a court should a plaintiff be successful.

What is not addressed in the case law to date is the imbalance which lies at the heart of an insurer being joined as a defendant in order to allege fraud. Once joined, an insurance company is a 'false' defendant, that is one in name only, the plaintiff has no cause of action against the defendant nor do they have any case to put to them as the defendant has nothing to defend.

Most strikingly, an insurance company would appear to have little to lose in making such a move, as once joined, they are able to allege freely against both plaintiff and defendant, having no real unforeseen loss should the plaintiff succeed, bar aggravated damages. So if there is a small root of an arguable case to be made, it may be deemed worth the risk as even in a legitimate case, their hand will be strengthened, leaving a plaintiff with a more difficult case to prove in court and greatly lessened offer outside of it.

Because they are being joined as defendants, there are no pleadings in which an insurance company need allege anything, a simple defence putting the plaintiff on proof of all claimed may suffice in stating their position. As a 'false defendant', it is submitted that an insurance company be put under some obligation to outline the basis of their case in grounding affidavit. The courts have accepted in these applications on affidavit that an insurance company has a suspicion in relation to the case as set out by the plaintiff and defendant but they do not want to prejudice the right to cross examine by revealing too much.

This is quite an understandable position to take, but if an insurance company is being joined to allege fraud between the parties, it is submitted that some basis for this must be

outlined at the outset of the proceedings and which can be reviewed when the matter has come to a conclusion. In this manner, the decision to allege fraud may be looked at afresh with aggravated damages in mind.

The original defendant

In the midst of all the debate between plaintiff and insurance company, the original defendant is sometimes forgotten. It may be taking a slightly technical view of the situation but it could be asked why a defendant should be open and frank with the insurance company to begin with, if the information given in interview may be used against that defendant at a later date. Another issue is that a defendant in many cases is then left unrepresented against an accusation of fraud. However it would appear to be the practice of an insurance company seeking to be joined to claim that they will undertake to pay the legal costs of the defendant should they be unsuccessful in proving their claim of fraud.

One case fits all

While there is caselaw to suggest that there is never a correct time to join an insurance company to the proceedings proper where the plaintiff has no case to put to them nor any desire to sue them,[1] it is more accurate to state that a defendant will only be joined against the wishes of a plaintiff in exceptional circumstances[2] and where joining a party may aid the court in deciding the issues at trial and that this is indeed the correct course to take.

In dealing with the application by two notice parties to join proceedings in the case of *Eircom v the Director of Telecommunications Regulation and ESAT Telecommunications and Nevada Telecom,*[3] Herbert J. highlighted the broad discretion that the court has in respect of the joining of parties;

> "Only in a very general sense may it be stated that a litigant, "cannot be compelled to proceed against other persons whom he has no desire to sue", [Dollfus Mieg et Compagnie S.A. -v- Bank of England, (1951) Ch., 33] ."[4]

Referring to the case of *Long v. Crossley,*[5] the learned trial Judge went on to state that the reason for this was to limit the amount of claims taken and to prevent a multiplicity of claims[6]. This would fit squarely with the approach taken in *Gurtner v. Circuit and Another*[7] and *Persona v Minister for Enterprise, Ireland and the Attorney General*[8] whereby the party seeking to be joined was likely to be sued on foot of the outcome of the trial should the plaintiff be successful.

In the recent High Court Judgement of *McDonough v Stokes,* it was found that a s.76 application is suitable for a plenary hearing or hearing on affidavit.[9] Further, the President of the High Court in *Daly v Ryan* has even more recently ordered that it is correct that an extra defendant be added at the main hearing rather than be made wait until Judgement, assessment and a s.76 application at that stage.[10]

The test

Order 15 rule 13 deals with the joinder of parties in the Rules of the Superior Courts and states;

> No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties … who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added.

In the case of *Gurtner v. Circuit and Another*[11] (1968) 2 Q.B. 587 at 599, Lord Denning M.R., held as follows:-

> "It seems to me that when two parties are in dispute in an action at law, and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the Court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the Court achieves the object of the Rule [R.S. C. (U.K.) Ord. 15r. 6 (2) (B)]. It enables all matters in dispute to "be effectually and completely determined and adjudicated upon" between all those directly concerned in the outcome." [12]

In *Persona v Minister for Enterprise, Ireland and the Attorney General,*[13] application was made by a third party to change his position to being a defendant in the proceedings. Ryan J. stated;

> "the fundamental question is what is the just procedural decision in the circumstances of the case? Is it the case that Denis O'Brien ought to have been joined? Or is his "presence before the Court necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter"[14]

Justice Ryan went on to state;

> "there is no question about his(applicant's) centrality to the fundamental issues. It is impossible to think that the actions could proceed to a conclusion in which all the questions involved would be effectually and completely decided without his being a leading

1 O'Neill J *obiter* in *McDonagh v Stokes* [2014] IEHC 229, this argument was rejected soon after by the President of the High Court *ex tempore* in *Ryan v Daly & Liberty Insurance* 3rd November 2014
2 [2014] IEHC 78 at para 8 of the Judgement
3 High Court on the28th day of June, 2002
4 At page 2361
5 13 Ch. D. 391
6 See page 3 of the Judgement
7 See page 4 of the Judgement
8 Paragraph 37, the point is also made there is a danger that a different judge could arrive at a different conclusion on the same facts and the courts should do their best to avoid such a scenario.
9 [2014] IEHC 229
10 *Daly v Ryan and Liberty Insurance* 3rd November 2014, *ex-tempore*
11 [1964] 2 QB 587
12 Page 5
13 [2014] IEHC 78
14 Paragraph 32

> participant. It is equally difficult to conceive how his interests, whether legal, proprietary or as to good name will not be materially affected by the outcome of the litigation."

This was a case in which the Applicant was the subject of allegations of corruption which were to be raised during the full hearing, further should the plaintiff succeed, it was foreseen that the applicant might find himself in a position whereby they were being sued for a contribution towards the damages of the plaintiff by the defendant,[15] mention of this is particularly apt in relation to the s.76 procedure.

We can see therefore, that it is permissible to join a party as an unwanted defendant and that there is good reason in joining a defendant where his interests are at stake and where the central issues of the case may be better determined by inclusion. It must be asked whether this means that in every case, that if an insurance company does wish to challenge a claim that the forum in which to do so is the hearing proper between the plaintiff and the defendant, and that this should be done as a rule rather than waiting for Judgement against a defendant and then proceeding with a full hearing under section 76, which would mean increased costs for both sides undermining the original Judgment of the court.

Procedure

S.76 application

An application under Section 76 may be made by way of motion on notice within 6 months of judgment[16] as per Order 91 of the Rules of the Superior Courts served on the party whom against judgment was attained by way of personal service although the court has some discretion, while the insurer or guarantor may be served by way of registered post. Application may be made prior to judgment also, while Order 91 does not explicitly state that there should be an affidavit grounding the notice of motion, it is the normal practice to do so.[17]

Joining an insurance company as a defendant

Order 15 rule 14 states that;

> Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court at any time before trial or at the trial of the action in a summary manner.

As they are not a party to the action, request may be made of the plaintiff by the insurance company to issue the motion to join. For tactical reasons, a plaintiff may see that it's purposes are better served by allowing an insurance company make the application which they will then challenge. Notice of Motion must be served by the insurance company on the plaintiff and the defendant with an application seeking for the Insurance Company's Solicitors first to come off record for the insured and secondly for the insurance company to be joined as a defendant and Solicitors to come on record for them.

Coming off record

In *Byrne v O'Connor,*[18] it was found by the Supreme Court that the interests of justice do not favour an excessive delay on the part of an insurance company which could be avoided by 'reasonable and diligent enquiries', highlighting the legal costs implications for a plaintiff should they be tardy in seeking to come off record. This theme was extended in the case of *McTiernan and Anor v Quin-Con Developments (Waterford) Ltd and Ors*[19], where Laffoy J stated that delay in firstly coming to the decision to repudiate and secondly making the application to come off record should be considered.

In the recent case of *Berney v South Dublin County Council,*[20] the first named defendants along with the plaintiff were awarded costs against the insurer of the other defendants. It was found that the investigator for the insurer had simply accepted the version of events given to him by the insured without investigating the matter fully beyond this.

Hogan J stated that

> "the central question facing the Court is as to whether the insurer conducted as thoroughgoing an investigation as was possible before instructing solicitors"

It is clear therefore that if an insurance company are coming off record that they are to firstly conduct a thorough investigation, which should go beyond a simple interview with the client and once the insurer has knowledge of reasons to come off record, prompt action must be taken so as not to prejudice the plaintiff.

However, for the plaintiff, this poses the following predicament. Once the insurer is off record for the defendant, it is not liable to pay out anything beyond costs once judgement is given. The plaintiff was prejudiced because he proceeded under the impression he could recover from an insurance company if he did succeed in his case and the insurance company did not assuage this impression by staying on record for the defendant until quite late in the day. Note should be taken of the obligation put on an insurance company by the court in relation to getting the house in order and the courts willingness to punish such behaviour via costs orders if an insurance company falls on the wrong side of best practice. Clear time limits and indeed penalties are appropriate to be applied in such cases.

15 The situation whereby the Plaintiff wins against the Defendant and the Applicant successfully defending any claim the Defendant may make is regarded as being particularly unwanted in the courts eyes. see para 37

16 s.76 (d) would appear to gives room for the application to be heard before Judgement is given, if a party cannot be found or is out of the country or for just and equitable reason.

17 Order 91 Rule 4 which extends the provisions of Order 22 rule 10 to claims under this section. That is that any compromise or settlement subject to section 76 is not valid without the approval of the court.

18 [2006] 3 IR 379, Solicitors for the Defendant were allowed come off record on condition that the insurer was joined as a co-defendant in order for costs order to be made against them on account of their tardiness in withdrawing indemnity.

19 [2007] IEHC 142

20 [2014] IEHC

Aggravated damages

It is submitted that aggravated damages should be used regularly where an insurance company is shown not to have any justification for being joined in the first place. Aggravated damages are appropriate as the law is clear that they may be applied against a defendant in relation to the way a defence was run[21] and the act of claiming fraud, where there is no real basis to do so, may be the foundation for a further award, without proof of injury.

In the case of *O'Donnell v O'Donnell,*[22] it was made clear that the maintenance of a denial of liability was one thing but that a distinction should be drawn;

> "between a denial of liability with the putting of a plaintiff on proof of his case and threatening in a very formal way to bring cross proceedings which to the knowledge of the defendant could have had no substance in fact"

What is proposed here is that insurance companies are compelled in a formal way to allege fraud and if such allegation proves unfounded, such company should be subject to an award of aggravated damages. It is necessary to think of aggravated damages as having two functions, a) to adequately compensate the plaintiff for the extra hoop they have to jump through in dealing with an unfounded claim of fraud and b) to give insurance companies reason to think twice before making application to join, to ward off the inclination to join where they have withdrawn against the defendant by way of reflex or habit.

Conclusion

Section 76 of the Road Traffic Acts would appear to be a defunct procedure unless an insurance company accepts that there is no fraud between the plaintiff and defendant. It is submitted that a plaintiff should not be allowed to proceed to judgment without clear indication on the part of the insurance company that this is the position, or if they have been subject to an unacceptable delay on part of the insurance company in making the application. Either of these conditions should be clear to the court before giving judgment and should be alluded to when giving judgment in order to stave off any later complication.

Even if this is the case, a further flaw is that an insurance company has no say in an assessment should they fail to be joined prior to judgment. The S.76 application can only be challenged by an insurance company based on liability, the amount awarded falls outside of the remit of the application, so as in *Gurtner,* there may be good reason to be joined as a defendant to contest matters other than bringing forward an allegation of fraud, in this case the award alone.

The recent judgment of *McDonough v Stokes* highlights the problem with s.76 which may allow for two hearings and two judgments for one matter, wasting time, money and leaving the first judgment redundant. If an insurance company is to be joined it should be joined at the main event and this is backed up by the available caselaw. Further, it is also submitted that if insurance companies are to be joined, they are obligated to outline their reasons for being joined so that they are subject to sanction should the reason for joining be found to be baseless.

The success of PIAB has lead to an increase in applications such as these discussed, yet as things stand, there is a lack of joined up thinking in applying both the legislation and the caselaw. It is not clear how to correctly process the claim of an insurance company against both plaintiff and defendant, the result is a mess in which the genuine parties can only lose out. ■

21 *Conway v INTO* [1991] 2 IR 305 @ 317
22 [2005] IEHC 216

Gerry Kelly Senior Counsel 1942 – 2014 A memoir

He would run. Every Sunday morning. He would run. In the Wicklow hills. He ran in the frosty mornings of the winter and the warmth of the summer dawns, he ran. With his friends Somers and occasionally with O'Brien, he ran. Into his 50's and into his 60's he ran, and because it was Gerry there would have been laughter and gossip and joy in the running and he ran and laughed and gossiped until the day that he stumbled and fell, like a great Irish oak, he fell. And we visited him in St. James's, fearing the very worst. And it was a close run thing. But all that endurance and energy and determination and persistence of the running was now turned to his recovery. It took a long tortured difficult time and a lot of love and care from his dear dear Rose, But he came back to his strength. Wounded now, his left arm paralysed and his left side, still with some strength, but reduced. Walking with a limp, dragging his left leg, moving slowly. But he was back. And if anything he was talking and gossiping and telling stories even more than before. And back to the law. Nothing ever gave him greater pleasure; greater satisfaction than being able to return to the law, to the wars of words that he so loved and had so desperately missed. To the life of the library. And he became a familiar figure in the library. In his red braces and his battered hat, he wore a scarf now for he could no longer fasten a tie.

In the early hours of the morning he and I would meet to review the papers of our briefs, read the cases, draft the letters, talk of tactics. Often we would be the only souls in the library, working quietly at his desk. Occasionally, even frequently we would be joined by those other dawn risers who haunt the early hours of the library, Constance Cassidy and Eddie Walsh. Eddie would jest with him, tease him a little about his Labour Party work, asking when he was going to be appointed to the Supreme Court. It was done with affection.

Often we would take our papers downstairs to breakfast and Gerry, as we descended the stairs would hold on to the banister, awkwardly, with his right hand crossed across his body, a step at a time, carefully, slowly and each time would say to me the same thing. "John, you have to phone the attorney general and get her to put a banister on the other side, John, when are you going to phone her John" And I would tell him that banisters were the responsibility of the Taoiseach's office, not the attorney generals.

> "We'll have to get the Troika involved John, I need a banister on the wall, will you phone the Troika John?"

And there was another routine he always followed, as we entered the restaurant, always the first customers of the day. He would say to me in a loud aside,

> "We are not staying John unless that Jean is there, Jean will look after us John and if she's not here we'll go upstairs, do you hear me John"

And of course Jean was there. She always was, with a great beaming smile and she loved to hear him and he was a treasure to the staff, they treated him with great affection for he knew everyone did Gerry. Had the first names of all the staff in the restaurants and in the library. He would know a bit about their families and never failed to ask of them. It was one of the library staff, Paul, who when he heard that Gerry had passed away, placed a rose upon his desk.

He was famous for his stories was Gerry. Tall stories. And it was sometime difficult to shut him up. I recall walking across the yard with him once. His great friend Raj was with us and we bumped into Judge Peter Kelly. Gerry proceeded to tell Judge Kelly that Raj was directly descended from Mahatma Gandhi. That would have been a bit of surprise to Gandhi and was an even bigger surprise to Raj. But for a brief moment Peter Kelly believed it, until he remembered it was Gerry Kelly that he was talking to.

I breakfasted with him on the morning he died. I thought he looked a bit grey that morning, but he was in good enough form. The day before we had both attended the Bar remembrance ceremony, for the Great War. Gerry had read a poem at the ceremony, in Irish for he had the Irish did Gerry and loved to use it *ibpairceanna Flondris,* In Flanders fields, *seideann na poipini leo,* the poppiels blow, *idir na crosa ro ar ro,* Between the crosses, row on row*, is air duinn thas ar eitleog ghroi,* that mark our place, and in the sky, C*anann fuisega fós le bri,* The larks,still bravely singing, fly, *Nach gCluintear I measc gunnai's gleo*, Scare heard amid the guns below.

After the ceremony he had asked to take my arm for support and said he had been standing too long and wasn't feeling too good. And of course I had not thought, nor had anyone, to get a chair for Gerry. He was feeling the strain a bit, but we still went down stairs, Gerry still making his ironic

complaints about the missing banister. We took the priests who had led the ceremony to lunch in the small snug next to the bar. We probably gossiped a bit too much and drank a bit too much and stayed a bit too long but Gerry loved the stories and the laughter of such occasions and they made life a little lighter, worth living for.

At that final breakfast he was persuading a young devil Cadimhe Ruigror, that she should be sure to come to the law library Christmas carol service, as he did himself, every year with his dear wife Rose and his daughters Aoife and Aisling, and with Raj and other friends. He loved the social side of the bar, loved its traditions and enjoyed nothing better than introducing his friends, over mulled wine and mince pies, to the place of which he was so proud to be a member. And he had found a new restaurant, for Gerry was forever discovering Dublin pubs and restaurants. He wanted me to go and dine with him. There was an amazing chef there, a lady said Gerry, and she makes the most incredible puddings. Anne Kavanagh she was, and they were already, Anne and Gerry, on first name terms and affectionate friends. "You must come with me John, try some of Anne's puddings, we must go up to Glasnevin John, to the Gravediggers, you must come and dine with me in the Gravediggers John"

Ah, I will Gerry, I will.

I got home that evening about six and put my phone on to charge. It was a couple of hours later that I checked it. There were four missed calls, two from Peter Somers and two from Bernard McCabe, both close friends of Gerry. I sensed something was wrong. I knew. I just knew it was about Gerry. I did not dare to call them back nor listen to their messages. I just knew something terrible had happened. I sat before the turf fire looking at the missed calls and knowing it was bad news and not sure that I wanted to hear it. The phone rang. It was Gerry's daughter Aoife phoning around his friends with the awful news that he had passed away that afternoon. She was using Gerry's mobile and contact list and so my own screen, on receiving the incoming call had lit up with the photograph of Gerry, as it would every time he rang. A bright, vibrant, full of colour image, the photograph used in this tribute, a photograph I had taken in the barrister's tea rooms only a few months earlier. And I looked at the screen and I looked at Gerry, but I knew it would not be him. I knew.

And of course it wasn't. ■

-May he rest in peace-

JM

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Legal The Bar Review Update

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CONSTITUTIONAL LAW

Children

Appeal from decision to return children to another jurisdiction – Constitutional interpretation – No prior ties to Ireland – English citizens – Concern over treatment of married parents for children – Fundamental principles relating to human rights and fundamental freedoms – Breach of Constitution – Inalienable and imprescriptible rights of family – Law of United Kingdom permitted adoption of children of married couples in circumstances which would not be permitted in this jurisdiction – Application of Hague Convention in Ireland – Speedy return of children – Exceptions – Principle of proportionality – Aids of construction – Spectrum of outcomes – Whether contrary to any fundamental principle of Irish constitutional law to order return of children – Whether acts occurring abroad can be said to be in breach of Irish Constitution – Whether non-citizen entitled to invoke provisions of Irish Constitution – Whether return of child would breach Irish Constitution – *Northampton County Council v ABF & MBF* [1982] ILRM 164; *Saunders v Mid Western Health Board* (Unrep, SC, 26/6/1987); *ACW v Ireland* [1994] 3 IR 232; *Director General's Department of Families Youth and Community Care v Bennett* [2000] Fam CA 253; *In re Adoption (No 2) Bill 1987* [1989] IR 656; *McGee v Attorney General* [1974] IR 284; *McDonnell v Ireland* [1998] 1 IR 134; *Kent County Council v CS* [1984] ILRM 292; *Oxfordshire County Council v H(J)* (Unrep, Costello J, 19/5/1988); *Saunders v Mid Western Health Board* [1989] ILRM 229; *Foyle Health Trust v EC* [2006] IEHC 448, [2007] 4 IR 528; *In re G (Children)* [2006] UKHL 43, [2006] 1 WLR 2305; *N v Health Service Executive* [2006] IESC 60, [2006] 4 IR 374; *Irwin v Gavit* (1925) 268 US 161; *Hadkinson v Hadkinson* [1952] P 285; *AO and DL v The Minister for Justice Equality and Law Reform* [2003] 1 IR 1; *State (Nicolaou) v An Bord Uachtála* [1966] IR 567 and *Maguire v Ardagh* [2003] IR 721 considered – Child Abduction and Enforcement of Custody Orders Act 1991 (No 6) – Adoption Act 1988 (No 30) – Adoption Act 1991 (No 14) – Constitution of Ireland, Arts 29, 40.4.2°, 41 and 42 – Council Regulation 2201/2003/EC, arts 11 and 60 – Hague Convention on the Civil Aspects of International Child Abduction 1980, arts 12, 13 and 20 – Appeal dismissed (26/2010 – SC – 15/12/2011) [2011] IESC 48
Nottinghamshire County Council v B(K)

Government

Challenge to constitutionality of provision of financial support to credit institutions – Bank guarantee – Executive branch of government – *Vires* and constitutionality of procedures by which promissory notes issued – Whether public moneys could be voted and appropriated without specification of upper limit – Legislative framework – *Locus standi* – Mootness – *Vires* of ministerial powers – Budgetary process – Scope of ministerial discretion – Whether legislation contained sufficient principles and policies – Whether legislation conferred unfettered and unreviewable discretionary power – Whether concept of appropriate implied upper limit – Objects and effects of appropriation requirements – *MacDonncha v Minister for Education* [2013] IEHC 226, (Unrep, Hogan J, 29/5/2013); *Hall v Minister for Finance* [2013] IEHC 38, (Unrep, Kearns P, 31/1/2013); *City View Press Ltd v An Chomhairle Oiliuna* [1980] IR 381; *McDaid v Sheehy* [1991] 1 IR 1; *Laurentiu v Minister for Justice* [1999] 4 IR 26; *McGowan v Labour Court* [2013] IESC 21, (Unrep, SC, 9/5/2013); *State (Lynch) v Cooney* [1982] IR 337 and *Mallak v Minister for Justice* [2012] IESC 59, [2013] 1 ILRM 73 considered – Credit Institutions (Financial Support) Act 2008 (No 18), ss 2 and 6 – Constitution of Ireland 1937, Arts 5, 15, 17, 22 and 28–Claim dismissed (2013/2961P – Divisional High Court – 26/11/2013) [2013] IEHC 530
Collins v Minister for Finance

Habeas corpus

Custodial sentence – Child – Probation report – Detention – Failure to object to sentencing court – Whether sentencing court had discretion not to request probation report prior to imposition of sanction of detention – Whether child acquiesced to imposition of sanction of detention in absence of probation report – *T(S) (A Minor) v District Judge Anderson* [2012] IEHC 287, (Unrep, Dunne J, 10/2/2012); *The State (McDonagh) v Frawley* [1978] IR 131; *The State (Byrne) v Frawley* [1978] IR 326; *Brennan v Governor of Portlaoise Prison* [2008] IESC 12, [2008] 3 IR 364; *A v Governor or Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 and *Caffrey v The Governor of Portlaoise Prison* [2012] IESC 4, [2012] 1 IR 637 considered – Children Act 2001 (No 24), ss 96, 99 and 143 – Constitution of Ireland 1937, Art 40.4.1° – Release ordered (2012/2219SS – Finlay Geoghegan J – 5/12/2012) [2012] IEHC 517
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Custodial sentence – Conditions of detention – Medical condition – Medical care – Sufficiency of diet – Function of court on habeas corpus application – Whether appropriate medical care – Whether diet sufficient – Whether court could examine settlement agreement between parties – Constitution of Ireland 1937, Art 40.4.1° – Application withdrawn (2013/1SSP – Charleton J – 28/1/2013) [2013] IEHC 33
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Legality of detention

Legality of arrest – Deportation orders – Garda entry of dwelling of failed asylum seekers–Transfer to airport under garda escort – Power to arrest – Power to enter premises – Whether implied licence to enter premises – Whether implied licence exceeded – Whether fact applicant was in unlawful custody at time of arrest rendered arrest unlawful – Contingency of detention on validity of arrest – *Re Article 26 and Electoral (Amendment) Act* [1984] IR 268; *The People (Attorney General) v Hogan* (1972) 1 Frewen 260; *Director of Public Prosecutions v Forbes* [1994] 2 IR 542; *Director of Public Prosecutions (Dooley) v Lynch* [1998] 4 IR 437; *Director of Public Prosecutions v Sullivan* [2007] IEHC 248, (Unrep, Herbert J, 31/7/2007); *Director of Public Prosecutions v Gaffney* [1987] IR 193; *Director of Public Prosecutions (Riordan) v Molloy* [2003] IESC 17, [2004] 3 IR 321; *Freeman v Director of Public Prosecutions* [1996] 3 IR 565; *Director of Public Prosecutions v Delaney* [1997] 3 IR 453; *The People v O'Brien* [2012] IECCA 68, (Unrep, CCA, 2/7/2012); *Director of Public Prosecutions v Dunne* [1994] 2 IR 537; *The People (Director of Public Prosecutions) v Cunningham* [2012] IECCA 64, (Unrep, CCA, 11/5/2012); *The People (Director of Public Prosecutions) v Coffey* [1987] ILRM 727; *Dunne v Clinton* [1930] IR 366; *Austin v United Kingdom* [2012] Crim LR 544; *The People (Director of Public Prosecutions) v O'Loughlin* [1979] IR 85; *The People (Director of Public Prosecutions) v Bolger* [2013] IECCA 6, (Unrep, CCA, 14/3/2013) and *Oladapo v Governor of Cloverhill* Prison [2009] IESC 42, [2009] 2 ILRM 166 considered – Immigration Act 1999 (No 22), ss 5 and 15 – Constitution of Ireland 1937, Art 40.5 – Release directed (2013/1968SS – Hogan J – 17/12/2013) [2013] IEHC 579
Omar v Governor of Cloverhill Prison

Personal rights

Application for judicial review – Refusal to amend particulars of birth record of daughter – Romanian national – Incorrect particulars of mother provided – Mistaken belief of mother as to name – Regularisation of identity documentation – Refusal to amend birth record – Difficulties in obtaining passport for daughter – Whether respondent acted in breach of personal rights of child – Whether failure to have regard to private life rights of applicants – Jurisdiction of registrar general to correct errors in register – Legal test for correction of register – Whether applicants deprived of *locus standi* on issue of passport – Separate and legitimate interest in accurate details of ancestry appearing on birth certificate – Right to have correct identity of parent recorded on birth certificate of child – Double construction rule regarding interpretation of statutory provisions to allow for respect for personal rights – Interpretation of provisions in manner compatible with obligations of State under ECHR–*Foy v An tArd Cháraitheoir (No 1)* (Unrep, McKechnie J, 9/7/2002) and *Foy v An tArd Chláraitheoir (No 2)* [2007] IEHC 470, [2012] 2 IR 1 considered – Civil Registration Act 2004 (No 3), ss 63 and 65 – European Convention on Human Rights Act 2003 (No 20), s 2–Constitution of Ireland 1937, Art 40 – Relief granted (2012/654JR – Kearns P – 7/6/2013) [2013] IEHC 275
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Personal rights

Right to self-determination – Right to bodily integrity – Right to privacy – Right to autonomy – Right to dignity – Right to equality – Right of access to courts – Mental health – Involuntary patient – Treatment – Capacity to consent – Assisted decision making – Whether Mental Health Act 2001, s 60 unconstitutional – Whether Mental Health Act 2001, s 6- incompatible with European Convention on Human Rights – Whether United Nations Convention on the Rights of Persons with Disabilities directly enforceable – Whether plaintiff entitled to on-going mandatory court review – Practice and procedure – *Locus standi* – Provisions directed to group of persons – Whether plaintiff having *locus standi–Cahill v Sutton* [1980] IR 269; *Carmody v Minister for Justice* [2009] IESC 71, [2010] 1 IR 635; *Commission of the European Communities v Council of the European Union* (Case C-94/03) [2006] ECR I-00001; *Commission of the European Communities v European Parliament and Council of the European Union* (Case C-178/03) [2006] ECR I-00107; *Commission of the European Communities v French Republic* (Case C-239/03) [2004] ECR I-09325; *Demirel v Stadt Schwäbisch Gmünd* (Case 12/86) [1987] ECR 3719; *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317; *EH v Clinical Director of St Vincent's Hospital* [2009] IESC 46, [2009] 3 IR 774; *Fitzpatrick v FK* [2008] IEHC 104, [2009] 2 IR 7; *Glor v Switzerland* (App No 13444/04) (Unrep, ECHR, 30/4/2009); *Gooden v St Otteran's Hospital* (2001) [2005] 3 IR 617; *Gorshkov v Ukraine* (App No 67531/01) (Unrep, ECHR, 8/11/2005); *Haegeman v Belgian State* (Case 181/73) [1974] ECR 449; *Health Service Executive v MX* [2011] IEHC 326, [2012] 1 IR 81; *Herczegfalvy v Austria* (App No 10533/83), (1992) 15 EHRR 437; *In re a Ward of Court (withholding medical treatment) (No 2)* [1996] 2 IR 79; *In re Philip Clarke* [1950] IR 235; *J McD v PL* [2009] IESC 81; [2010] 2 IR 199; *Kiss v Hungary* (App No 38832/06) (Unrep, ECHR, 20/5/2010); *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (Case C-240/09) [2011] ECR I-01255; *Murphy v Roche* [1987] IR 106; *Narinen v Finland* (App No 45027/98) (Unrep, ECHR, 1/6/2004); *O'Leary v Attorney General* [1993] 1 IR 102; *Rakevich v Russia* (App No 58973/00) (Unrep, ECHR, 28/10/2003); *R (on the application of NM) v Islington London Borough Council* [2012] EWHC 414 (Admin), [2012] 2 All ER 1245; *RT v Director of Central Mental Hospital* [1995] 2 IR 65; *R (Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545, [2002] 1 WLR 419; *Ryan v Attorney General* [1965] IR 294; *Shtukaturov v Russia* (App No 44009/05), (2012) 54 EHRR 27; *Stanev v Bulgaria* (App No 36760/06), (2012) 55 EHRR 22; *The State (Healy) v Donoghue* [1976] IR 325; *The State (Woods) v Attorney General* [1969] IR 385; *Storck v Germany* (App No 61603/00), (2005) 43 EHRR 96; *Wilkinson v United Kingdom* (App No 14659/02) (Unrep, ECHR, 28/2/2006); *Winterwerp v Netherlands* (App No 6301/73) (1979) 2 EHRR 387 and *X v Finland* (App No 34806/04) (Unrep, ECHR, 3/7/2012) considered–Mental Health Act 2001 (No 25), ss 2, 4, 56, 57 and 60 – European Convention on Human Rights Act 2003 (No 20), s 5 – Constitution of Ireland 1937, Art 40 – European Convention for the Protection of Human Rights and Fundamental Freedoms–United Nations Convention on the Rights of Persons with Disabilities, art 12 – Relief refused (2011/9548P – McMenamin J – 23/11/2012) [2012] IEHC 491
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Sovereignty

Constitution – International relations – Executive power – Government – State sovereignty – Treaty Establishing the European Stability Mechanism – Treaty binding upon State — Policy – Whether referendum required to permit State to ratify treaty – Whether sovereignty fettered by treaty – Whether executive powers impermissibly alienated under treaty – Role of courts in foreign policy decisions–Injunction – Interlocutory relief – Breach of Constitution – Breach of law of European Union – Attempt to restrain implementation of measure claimed to be invalid under European Union law – Reference under preliminary reference procedure – Test to be applied – Balance of justice – Whether entitlement to injunction preventing ratification of treaty – *Atlanta Fruchthandelgesellshcaft mbH v Bundesamt für Ernährung and Forstwirtschaft* (Case C-465/93) [1995] ECR I-3761; *Amministrazione delle Finanze dello Stato v Simmenthal* (Case 106/77) [1978] ECR 629; [1978] 3 CMLR 263; *Boland v An Taoiseach* [1974] IR 338; *Crotty v An Taoiseach* [1987] IR 713; *Campus Oil v Minister for Industry (No 2)* [1983] IR 88; *TD v Minister for Education* [2001] 4 IR 259; *Ellis v O'Dea* [1989] IR 530; *Horgan v Ireland* [2003] 2 IR 468; *Laurentiu v Minister for Justice* [1999] 4 IR 26; *McGimpsey v Ireland* [1988] IR 567; *Okunade v Minister for Justice* [2012] IESC 49 [2012] 3 IR 152; *R v Secretary of State for Transport, ex parte Factortame* (Case C-213/89) [1990] ECR I-2433; *Ryan v Attorney General* [1965] IR 294; *Sinnott v Minister for Education* [2001] 2 IR 545; *Siples* (Case 226/99) [2001] ECR I-277; *The State (Gilliland) v Governor of Mountjoy Prison* [1987] IR 201; *Wireless Dealer's Association v Minister for Industry* (Unrep, SC, 7/3/1956) and *Zuckerfabrik Suderdithmarschen and Zuckerfabrik Soest* (Joined Cases C-143/88 and C-92/89) [1991] ECR I-415 considered–Constitution of Ireland 1937, Arts 5, 6, 28.2, 29.4.1°–Appeal on sovereignty and injunction issues dismissed; questions referred to ECJ (339/2012 – SC – 19/10/2012) [2012] IESC 47
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Whether plaintiff entitled to damages following declaration of unconstitutionality of section – Claim for damages arising from wrongful committal to mental hospital – Multiple proceedings issued by plaintiff – Limitation period – Time limitation on actions for breach of constitutional rights – Nature of defence that claim statute barred – Whether defendants would have pleaded statute of limitations had proceedings proceeded–Application of statute of limitations to claim in proceedings plaintiff prevented from prosecution–*Murphy v Attorney General* [1982] IR 241; *DK v Crowley* [2011] 1 ILRM 309; *Devlin v Roche* [2002] 2 IR 360; *McDonnell v Ireland* [1998] 1 IR 134; *Cox v Ireland* [1992] 2 IR 503; *Kennedy v Ireland* [1987] IR 587; *Meskell v Córas Iompair Éireann* [1973] IR 121; *Hanrahan v Merck Sharp & Dohme (Ireland) Limited* [1988] ILRM 629; *O'Domhnaill v Merrick* [1984] IR 151 and *Tuohy v Courtney* [1994] 3 IR 1 considered – Mental Treatment Act 1945 (No 19), s 260 – Statute of Limitations 1957 (No 6), s 11 – Declaration that plaintiff not entitled to damages (2002/9652P – Laffoy J – 26/6/2013) [2013] IEHC 319
Blehein v Minister for Health and Children

Statute

Statutory interpretation–Fisheries–Fishing offence–Prosecution for fishing within State – Challenge to constitutionality of penalty provision – Proportionality of mandatory forfeiture of fishing gear and fish – Construction of section – Whether section required forfeiture – Whether section left discretion with sentencing judge–Double construction rule – Penal statute – Official translation – *DPP (Broderick) v Flanagan* [1979]

IR 265; *Mullins v Harnett* [1998] 4 IR 426; *DPP v Moorehouse* [2005] IESC 52, [2006] 1 IR 421; *Montemuino v Minister for Communications* [2008] IEHC 57, [2009] 1 ILRM 218; *McDonald v Bord nag Con* [1965] IR 217; *East Donegal Co-Operative v The Attorney General* [1970] IR 317; *The People (Attorney General) v Murtagh* [1966] IR 361; *Attorney General v Sheehy* [1990] 1 IR 70; *Inspire Art* (Case C-167/01) [2003] ECR I-1155 and *Silvio Berlusconi* (Case C-387/02) [2005] ECR I-3565 considered – Fisheries (Consolidation) Act 1959 (No 14), s 224B(3) – Finding that section not unconstitutional; appeal refused and submissions to be made in relation to alternative relief (365/2008 – SC – 17/10/2013) [2013] IESC 40
Montemuino v Minister for Communications

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Invalidity – Effect of declaration of inconsistency on third parties – Whether declaration of inconsistency having retrospective effect – Whether finality attaching to conviction subject of appeal – Whether evidence obtained on foot of warrant unconstitutionally obtained – Whether applicant obliged to pursue alternative remedy to appeal – Whether applicant debarred from relying on declaration of inconsistency when grounds not argued in application for leave to appeal – *A v Governor of Arbour Hill Prison* [2006] IEHC 169, [2006] IESC 45, [2006] 4 IR 88; *Blanchfield v Harnett* [2002] 3 IR 207; *Brigham City v Stuart* (2006) 540 US 398; *CC v Ireland* [2005] IESC 48, [2006] IESC 33, [2006] 4 IR 1; *Corrigan v Irish Land Commission* [1977] IR 317; *Dalton v Minister for Finance* [1989] ILRM 519; *Damache v Director of Public Prosecutions* [2012] IESC 11, [2012] 2 IR 266; *De Burca v Attorney General* [1976] IR 38; *Director of Public Prosecutions v Dunne* [1994] 2 IR 537; *Director of Public Prosecutions v Special Criminal Court* [1999] 1 IR 60; *Groh v Ramirez* (2004) 540 US 551; *Kennedy v Director of Public Prosecutions* [2007] IEHC 3 (Unrep, MacMenamin J, 11/1/2007); *King v The Attorney General* [1981] I.R. 233; *Osmanovic v Director of Public Prosecutions* [2006] IESC 50, [2006] 3 IR 504; *Marbury v Madison* 1 (1803) Cranch 137; *McDonnell v Ireland* [1998] IR 134; *McDonald v United States* (1948) 335 US 451; *McMahon v Attorney General* [1972] IR 69; *Muckley v Ireland* [1985] IR 472; *Murphy v The Attorney General* [1982] IR 241; *Pringle v Ireland* [1994] ILRM 467; *Ryan v O'Callaghan* (Unrep, Barr J, 22/7/1987) and *The State (Byrne) v Frawley* [1978] IR 326 considered– Offences Against the State Act 1939, (No 13) s 29 – Criminal Law Act 1976, (No 32) s 5 – Constitution of Ireland, Art 40.3 – Appeal allowed; convictions quashed and re-trial ordered (135/2009 – CCA – 11/5/2012) [2012] IEHC 64
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Statute

Appeal against refusal of challenge to constitutionality of section creating strict liability offence – Offence of unlawful carnal knowledge – Absence of provision for defence of honest but mistaken belief as to age – Whether plaintiff entitled to declaration of unconstitutionality – Principle of presumption of constitutionality – Double construction rule – Whether defence of mistake of age open to appellant – Acts passed after Constitution re-enacting pre-Constitution statutes – Whether Act enjoyed benefit of presumption of constitutionality – Whether double construction rule should be applied – Meaning to be ascribed to section – *CC v Ireland* [2005] IESC 48, [2006] IESC 33, [2006] 4 IR 1; *Electricity Supply Board v Gormley* [1985] IR 129; *Pigs Marketing Board v Donnelly (Dublin) Ltd* [1939] IR 413; *McDonald v Bord na gCon* [1965] IR 217; *East Donegal Co-Operative Livestock Mart Ltd v AG* [1970] IR 317; *State (Sheerin) v Kennedy* [1966] IR 379; *Representatives of Chadwick (Deceased) v Fingal County Council* [2007] IESC 49, [2008] 3 IR 66; *Buckley v Attorney General* [1950] IR 67; *Goodman International v Hamilton* [1992] 2 IR 542; *Curtin v Clerk of Dáil Éireann* [2006] IESC 14, [2006] 2 IR 556; *Norris v Attorney General* [1984] IR 36 and *People (Attorney General) v Conmey* [1975] IR 341 considered – Criminal Law (Amendment) Act 1935, s 2 – Constitution of Ireland 1937, Art 34.4.5°–Appeal allowed; declaration that section inconsistent with Constitution granted (70/2009 – SC – 21/12/2011) [2011] IESC 49
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DPP v Ryan [2011] IECCA 6, (Unrep, CCA, 11/3/2011) considered – Offences Against the State Act 1939 (No 13), s 52; Criminal Justice Act 1984 (No 22), ss 18 and 19 – European Convention on Human Rights Act 2003 (No 20) – Constitution of Ireland 1937, Art 38 – European Convention on Human Rights 1950, art 6 – Leave to appeal refused (32/2010 & 35/2010 – CCA – 25/7/2012) [2012] IECCA 74
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T(D) v The Refugee Appeals Tribunal

Asylum

Application for judicial review – Deportation order – Ahmadi faith – Non refoulement – Leave granted on one ground – Additional ground – Requirement of extension of time where new ground – Mistake – Rationality – Whether new ground – Whether extension of time required – Whether mistake of fact – Whether rational – *M(S) v Minister for Justice, Equality and Law Reform* [2005] IESC 27, (Unrep, SC, 3/5/2005) and *Ni Éilí v The Environmental Protection Agency* [1997] 2 ILRM 458 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5–Rules of the Superior Courts 1986, O 84, r 20(3) – *Certiorari* granted (2010/1110JR – Mac Eochaidh J – 21/12/2012) [2012] IEHC 577
A(K) v Minister for Justice and Law Reform

Asylum

Application for leave to seek judicial review – Nigeria – Credibility assessment – Obligation to give reasons – Questions to discern if

adequate reasons given for credibility findings – Rationality of credibility findings – Role of court – Whether adequate reasons given for credibility findings – Whether credibility findings rational – *Omidiran (An Infant) v Minister for Justice and Equality* [2012] IEHC 573, (Unrep, Mac Eochaidh J, 20/12/2012); *State (Keegan) v The Stardust Victims Compensation Tribunal* [1986] IR 642 and *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) applied – Leave granted (2009/53JR – Mac Eochaidh J – 20/12/2012) [2012] IEHC 564
CA v Minister for Justice & Equality

Asylum

Application for leave to seek judicial review – Telescoped hearing – Nigeria – Credibility assessment – Obligation to give reasons – Questions to discern if adequate reasons given for credibility findings – Rationality of credibility findings – Role of court – Whether adequate reasons given for credibility findings – Whether credibility findings rational – *Omidiran (An Infant) v Minister for Justice and Equality* [2012] IEHC 573, (Unrep, Mac Eochaidh J, 20/12/2012); *State (Keegan) v The Stardust Victims Compensation Tribunal* [1986] IR 642 and *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) applied – Leave refused (2009/230JR – Mac Eochaidh J – 29/1/2013) [2013] IEHC 20
N(J) v Refugee Appeals Tribunal

Asylum

Application for leave to seek judicial review – Nigeria – Minor – Mental health – Availability of psychiatric treatment – Effective remedy – Consideration of country of origin information – Best interest of child – Whether rational – Whether principle of best interest of child relevant to entitlement to refugee status – *S(DVT) v The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* [2007] IEHC 305, [2008] 3 IR 476 considered – Treaty on the Functioning of the European Union, Art 267 – Convention on the Rights of the Child 1990, art 3 – Leave refused; aspect of case relating to effective remedy adjourned pending decision of European Court of Justice (2012/231JR – Mac Eochaidh J – 21/12/2012) [2012] IEHC 576
O(T)(a minor) v Refugee Appeals Tribunal & ors

Asylum

Application for leave to seek judicial review – Pakistan – Ahmadi faith – Credibility assessment – Correct approach to evaluation of refugee claim – Country of origin information – Medical report – Treatment of submitted documentation – Internal relocation – State protection – Error of fact – Error of law – Irrationality – Error of fact and law by Commissioner – Substantial grounds – Whether substantial grounds for quashing decision on credibility – Whether conclusions on internal relocation and state protection rationally based – Whether error of law – *R(I) v The Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) applied – *KK (Ahmadi, unexceptional, risk on return) Pakistan* [2005] UK AIT 00033 (4/2/2005); *A & Ors (Ahmadis, Rabwah) Pakistan CG* [2007] UK AIT (23/10/2007) and *Singh & Others v Belgium* (App No 33210/11), (Unrep, ECHR, 2/10/2012) considered – Rules of the Superior Courts 1986, O 84, r 20 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5 – Refugee Act 1996 (No 17), s 11B – Council Directive 2004/83/EC, art 4 – Leave granted; leave also granted for amendment of statement of grounds to include additional grounds (2012/302JR – Clark J – 29/1/2013) [2013] IEHC 26
R(S) v Refugee Appeals Tribunal

Asylum

Application for leave to seek judicial review – South Africa – Manifestly unfounded procedure – No oral appeal before Tribunal – Independent credibility findings of Tribunal – Effective remedy – Lack of independent consideration of separate claim of child – Consideration of country of origin information – Whether substantial grounds to contend breach of fair procedures – *MM v Minister for Justice, Equality and Law Reform, C-277/11*, (Unrep, ECJ, 22/11/2012); *Elgafaji v Staatssecretaris van Justitie, C-465/07*, [2009] ECHR I-921 and *N(SU) [South Africa] v The Refugee Applications Commissioner* [2012] IEHC 338, (Unrep, Cooke J, 30/3/2012) considered – Rules of the Superior Courts 1986, O 84, r 20(4)(a) – Refugee Act 1996 (No 17), ss 2 and 13(6)(e) – Council Directive 2004/83/EC, art 15 – European Convention on Human Rights 1950, art 3 – Leave granted on specified different grounds (2012/429JR – Clark J – 18/12/2012) [2012] IEHC 554
S(TE) v Minister for Justice and Equality

Deportation

Application for leave to seek judicial review of decision to issue deportation order – Right to respect for family life – Establishment of family life – Orphan – Unmarried – Staying with aunt – Whether residency sufficient to constitute family life – Whether Minister erred in law in assessing impact deportation would have upon entitlement to respect for family life – *Ezzouhdi v France* (App No 47160/00) [2001] ECHR 85, (Unrep, ECHR, 13/2/2001); *Bousarra v France* (App No 25672/07) [2010] ECHR 1999, (Unrep, ECHR, 23/12/2010); *AA v United Kingdom* (App No 8000/08) [2011] ECHR 1345, (Unrep, ECHR, 28/4/2001; *Bouchelkia v France* (App No 23078/93) [1998] 25 EHRR 686; *Boujlifa v France* (App No 25404/94) [2000] 30 EHRR 419; *DaSilva and Hoogkamer v The Netherlands* (App No 50435/99) (2007) 44 EHRR 34 and *Nunez v Norway* (App No 55597/09) [2011] [2014] 58 EHRR 17 considered – Immigration Act 1999 (No 22), s 3 – European Convention on Human Rights 1950, art 8 – Application refused (2011/935JR – Cooke J – 12/3/2012) [2012] IEHC 109
A(K)(Nigeria) v Refugee Appeals Tribunal

Deportation

Application for leave for judicial review of subsidiary protection order and deportation order – Application for leave to amend grounds – State protection – Lack of effective remedy – Fear of persecution – Humanitarian relief – Consideration of medical condition – HIV positive – Rationality of credibility decision – Selective treatment of country of origin information – No appeal available from Minister's subsidiary protection decision – Refugee scheme – Merits of claim – Differences in medical treatment – Serious harm – Whether arguable that decision on state protection irrational – Whether judicial review an adequate remedy – Whether to grant leave to amend grounds out of time –*M(M) v Minister for Justice* [2011] IEHC 547, (Unrep, Hogan J, 18/5/2011); *Ahmed v Minister for Justice* (Unrep, Birmingham J, 24/3/2011); *BJSA (Sierra Leone) (Akhiele) v Minister for Justice* [2011] 1 IEHC 38, (Unrep, Cooke J, 1/2/2011); *J(O) v Minister for Justice* [2012] IEHC 71, (Unrep, Cross J, 3/2/2012)*; Jayeola N(V) v Minister for Justice* [2012] IEHC 62, (Unrep, Cooke J, 16/2/2012); *SL (Nigeria) v Minister for Justice* (16th October, 2011); *A(BJS) v Minister for Justice* [2011] IEHC 381,(Unrep, Cooke J, 12th October, 2011); *O(N) v Minister for Justice* [2011] IEHC 472, (Unrep, Ryan J, 14/12/2011); *I(P) v Minister for Justice* [2012] IEHC 7, (Unrep, Hogan J, 11/1/2012); *Donegan v Dublin City Council* [2012] IESC 18, [2012] 3 IR 600; *D v United Kingdom (Application No 30240/96)* [1997] 24 EHRR 42 and *JTM v Minister for Justice* [2012] IEHC 99, (Unrep, Cross J, 1/3/2012) considered – Immigration Act 1999 (No 22), s 3(6) – Housing Act 1966 (No 21) – Council Directive EC/84/2003, art 4(1) – Leave partially granted; leave to amend grounds refused (2011/830JR – Cross J – 27/3/2012) [2012] IEHC 129
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INJUNCTIONS

Interlocutory injunction

Appeal against refusal of claim for interlocutory injunction to restrain sale of company – Injunction – Related constitutional challenge to underlying legislation – Related challenge to ownership of company–Standing – Delay – Applicable principles for consideration of delay – Bias – Test for establishment of objective bias – Whether trial judge correct to refuse interlocutory injunction – Whether arguable defence – Whether irreparable harm might be caused – Question of damages – Balance of justice–Where least risk of injustice lay – Whether court obliged to refer question to ECJ – Discretion of court– *Dowling v The Minister for Finance* [2014] IEHC 418, (Unrep, O'Malley J, 16/7/2013); *Campus Oil Ltd v Minister for Industry (No 2)* [1983] IR 88; *Okunade v The Minister for Justice Equality and Law Reform* [2012] IESC 49, [2012] 3 IR 152; *Gilroy v Flynn* [2004] IESC 98. (Unrep, SC, 3/12/2004); *Union Ailmentaria SA v Spain* [1990] 12 EHRR 24; Santex Spa v USSL (Case C-327/00) [2003] ECR I-1877; *Universale-Bau* (Case C-470/99) [2002] ECR I-11617; *Bula v Tara Mines Ltd (No 6)* [2000] 4 IR 412; *Johnson v Chief Constable of Royal Ulster Constabulary* [1986] ECR 1651; *Amministrazione Delle Finanze Dell Stato v Simmenthal SpA* [1978] ECR 629; *Queen v Secretary of State for Transport* [1990] ECR I-2433; *Zuckerfabrik Suderdithmarschen AG v Hauptzollamt Itzehoe* (Case C-143/88) (Unrep, ECR, 21/12/1991); *Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] ECR 1-145; *Unibet (London) Ltd and Unibet (International) Ltd v Justitiaekanslern* [2007] ECR 1-2271; *Pringle v Government of Ireland* [2012] IESC 57, (Unrep, SC, 19/10/2012); *Le Pen v Parliament* (Case C-208/03) [2003] ECR I-7939; *Pafitis v Trapeza Kentrikis Ellados AE* (Case C-441/93) [1996] ECR I-01347; *AIB v. Diamond* [2011] IEHC 505, (Unrep, Clarke J, 14/10/2011) and *Fratelli Pardini SpA v Minister O Del Commercio Con Lestro* (Case C-338/85) (Unrep, ECJ, 21/4/1988) considered – Credit Institutions (Stabilisation) Act 2010 (No 36), ss 9, 11 and 64–Appeal dismissed (292/2013 – SC – 31/7/2013) [2013] IESC 37
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Interlocutory injunction

Application for interlocutory injunctive relief – Application for adjournment and for invitation to parties to attend mediation – Franchise agreement – Training to become yoga instructors – Undertakings given pending hearing of substantive action – Breach of agreement – Termination of agreement – Confidential information – Passing off – Undertaking as to damages given – Whether entitled to interlocutory injunction prohibiting defendant from operating yoga teacher training courses in respect of specific groups of enrolled students – Balance of convenience – Whether fair issue to be tried – Whether damages adequate remedy – *Allied Irish Banks Plc v Diamond* [2011] IEHC 505, [2012] 3 IR 549; *Net Affinity Ltd v Conaghan* [2011] IEHC 160, [2012] 3 IR 67; *Campus Oil v Minister for Energy (No 2)* [1983] 2 IR 88 and *Metro International SA v Independent News & Media Plc* [2005] IEHC 309, [2006] 1 ILRM 414 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 56A and O 99, r 1B – Rules of the Superior Courts (Mediation and Conciliation) (SI 502/2010) – Data Protection Act 1988 (No 25) – Applications granted (2012/1389P – Laffoy J – 28/5/2012) [2012] IEHC 218
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INSURANCE

Statutory Instruments

Health insurance act 1994 (minimum benefit) (amendment) regulations 2014
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Voluntary health insurance (amendment) act 2008 (appointment of date pursuant to subsection (5)(b) of section 2 of the Voluntary Health Insurance (Amendment) Act 1996) order 2014
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Dunmanus Bay Mussels Limited v Aquaculture Licences Appeals Board

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Motion to stay proceedings – Whether company registered outside European Union improperly joined – Whether Ireland proper forum – Main claim in conspiracy – Whether established on affidavit allegations reasonably capable of being proven in evidence – Appropriate forum – Power to set aside leave to serve outside jurisdiction – Burden of proof – Interests of efficiency in litigation – Relative stage of proceedings – Discretion of court – *Analog Devices BV v Zurich Insurance Company* [2002] 1 IR 272; *Abama v Gama Construction Ireland Ltd* [2011] IEHC 308, (Unrep, Dunne J, 25/2/2011); *Spiliada Maritime Corporation v Cansulex Limited* [1987] 1 AC 460; *Karafarin Bank v Masoury-Dara* [2009] EWHC 1217; *Gubisch Maschinenfabrik KG v Palumbo* (Case C 144/86) [1987] ECR I-04861; *Owusu v Jackson* (Case 281/02) [2005] ECR I-3855; *Goshawk Dedicated Ltd v Life Receivables Ireland Ltd* [2008] IEHC 90, (Unrep, Clarke J, 27/2/2008); *Catalyst Investment Group Ltd v Lewinsohn* [2010] 2 WLR 839 and *Goshawk Dedicated Ltd v Life Receivables Ireland Ltd* [2009] IESC 7, (Unrep, SC, 30/1/2009) considered – EEC Regulation 44/2001, arts 2(1) and 6(1) – European Communities (Civil and Commercial Judgment) Regulations (SI 52/2002), reg 1–Application refused (2011/5843P – Charleton J – 7/1/2013) [2013] IEHC 1
Irish Bank Resolution Corporation Limited v Quinn

LAND LAW

Easements

Proceedings seeking declaration that land not subject to public right of way –Whether necessary to obtain fiat from Attorney General – Establishment of public right of way – Distinction between rights acquired by prescription and dedication – Whether user as of right referable to toleration or dedication – Test of 'knowledge' – Whether actual dedication – Whether act of public acceptance – Evidence of public user – Relevance of documents –Whether evidence of public user 'as of right' – Whether evidence linked or connected with acts of public expenditure on land – Whether user long, continuous and uninterrupted – Whether evidence of user referable to acquiescence – Whether evidence of public user connected with requisite degree of knowledge – Period of time public user took place – Steps taken by landowner to counteract user – Whether steps taken proportionate to acts of trespass – State of mind – Jurisdiction for negative declaration – Whether plaintiff entitled to judgment *in rem* – *Walsh v Sligo County Council* [2010] IEHC 437, [2011] 2 IR 260; *Collen*

v Petters [2006]IEHC 205, [2007] 1 IR 791; *Attorney General v Open Door Counselling Ltd* [1988] IR 593; *Connell v Porter* (1972) [2005] 2 IR 601; *Smeltzer v Fingal County Council* [1998] 1 IR 279; *White v Porter* (Unrep, Dixon J, 23/3/1956); *Regina v Oxfordshire County Council* [1993] 3 WLR 160; *Folkstone Corporation v Brockman* [1914] AC 338; *Mills v Silver* [1991] Ch 271; *Bruen v Murphy* (Unrep, McWilliam J, 11/3/1980); *Simpson v Attorney General* [1904] AC 476; *Attorney General v Antrobus* [1905] 2 Ch 188; *Williams-Ellis v Cobb* [1935] 1 KB 310; *Boswell v Rathmines and Pembroke Joint Hospital Board* [1904] 1 IR 165; *Szabo v Esat Digifone* [1998] 2 ILRM 102; *Minister for Arts, Heritage, the Gaeltacht and the Islands v Kennedy* [2002] 1 ILRM 94; *Shaw v Sloan* [1982] NI 383; *Castrique v Imrie* [1870] LR 4 HL 414; *D v C* [1984] ILRM 173; *Henderson v Henderson* (1843) 3 Hare 100 and *Ahmed v Medical Council* [2003] 4 IR 302 considered–Declaration granted (2008/7738P – MacMenamin J – 8/2/2012) [2012] IEHC 24
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Public rights of way – Dedication – Whether public right of way affected avenues on landed estate – Time of dedication – Incapacity to dedicate on grounds of lack of title – Nature of public user as of right – Right to maintain claim for public right of way – Law regarding dedication–Acts of opposition from landowner – Admission of hearsay evidence – *Bruen v Murphy* (Unrep, McWilliams J, 11/3/1980); *Connell v Porter* (1972) [2005] 3 IR 601; *Smeltzer v Fingal County Council* [1998] 1 IR 279; *Folkestone Corporation v Brockman* [1914] AC 338; *R (Godmanchester TC) v Environment Secretary* [2007] UKHL 28, [2008] 1 AC 221; *Poole v Huskinson* (1843) 11 & W 827; *Mann v Brodie* (1885) 10 App Cas 378; *The Queen v Petrie* (1855) 4 El & B 737; *Farquhar v Newbury Rural District Council* [1909] 1 Ch 12; *Young v Cuthbertson* (1854) 1 MACQ 455; *Collen v Petters* [2006] IEHC 205, [2007] 1 IR 790; *Turner v. Walsh* (1881) 6 App Cas 636; *Stoney v Eastbourne Rural District Council* [1927] 1 Ch 367; *Williams-Ellis v Cobb* [1935] 1 KB 310; *Bright v Walker* (1834) CM & R 211; *R v Oxfordshire County Council, Ex P Sunningwell Parish Council* [2000] 1 AC 335; *R (Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 AC 889; *Blount v Layard* [1891] 2 Ch 681; *Simpson v Attorney General* [1904] AC 476; Attorney General v Antrobus [1904] 2 Ch 188; *Cumbernuald and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* [1992] SC 357; *Wild v Secretary of State for Environment* [2009] EWCA 1406, [2009] All ER 198; *Murphy v Wicklow County Council* (Unrep, Kearns J, 19/3/1999); *Giant's Causeway Co Ltd v Attorney General* (1898) 32 ILTR 95; *Moore v Attorney General (No 2)* [1930] 1 IR 471; *Incorporated Law Society v Carroll* [1995] 3 IR 145; *Boyd v Great Northern Railway Co* (1895) 2 I 555; *Smith v Wilson* [1903] 2 IR 45; *McCauley v Minister for Posts and Telegraphs* [1966] IR 345; *R v Surrey County Council* (1979) 40 P & CR 390; *R v Lancashire County Council* [1980] 1 WLR 1024; *Holloway v Egham Urban District Council* (1908) 72 JP 433; *Coats v Herefordshire County Council* [1909] 2 Ch 579; *Jones v Bates* [1938] 2 All ER 237; *Director of Public Prosecutions v Jones* [1999] 2 AC 240; *In re Ward of Court* [1996] 2 IR 79; *Bord na gCon v Murphy* [1970] IR 301; *The King v Lambe* (1791) 2 Leach 552; *Morrissey v Boyle* [1942] IR 514; *Woolway v Rowe* (1834) 1 Ad & El 114; *M'Kenna v Earl of Howth* (1893) 27 ILTR 48; *Evans v Merthyr Tydfil Urban District Council* [1899] 1 Ch 241; *Dublin County Council South v Balfe Ltd* (Unrep, Costello J, 3/1/1995); *Falcon v Famous Players Film Co* [1926] 2 KB 474; *Smith v Wilson* [1903] IR 45; *Dawes v Hawkins* (1860) 8 CB (NS) 848; *London Transport Board v Moscrop* [1942] AC 332; *Hue v Whiteley* [1929] 1 Ch 440 and *Jones v Bates* [1938] 2 All ER 237 considered–Appeal allowed in part (89/2011 – SC – 11/11/2013) [2013] IESC 48
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(Unrep, ECJ, 15/11/2012); *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317; *Eviston v Director of Public Prosecutions* [2002] 3 IR 260; *Garvey v Ireland* [1981] IR 75; *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *LGH v Minister for Justice, Equality and Law Reform* [2009] IEHC 78, (Unrep, Edwards J, 31/1/2009); *Hussain v Minister for Justice, Equality and Law Reform* [2011] IEHC 171, (Unrep, Hogan J, 13/4/2011); *International Fishing Vessels Ltd v Minister for the Marine* [1989] IR 149; *Jiad v Minister for Justice* [2010] IEHC 187, (Unrep, Cooke J, 19/5/2010); *McCormack v Garda Síochána Complaints Board* [1997] 2 IR 489; *Mishra v Minister for Justice* [1996] 1 IR 189; *Parti écologiste "Les Verts" v European Parliament* (Case 294/83) [1986] ECR 1339; *Pok Sun Shum v Ireland* [1986] ILRM 593; *R v Gaming Board for Great Britain* [1970] 2 QB 417; *R v Secretary of State for the Home Department, ex parte Fayed* [1998] 1 WLR 763; *Rottmann v Freistaat Bayern* (Case C-135/08) [2010] ECR I-01449; *State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] IR 51; *State (Daly) v Minister for Agriculture* [1987] IR 165; *State (Keegan) v Stardust Victims' Compensation Tribunal* [1986] IR 642 and *State (Lynch) v Cooney* [1982] IR 337 considered–Irish Nationality and Citizenship Act 1956 (No 26), ss 14 and 15 – Irish Nationality and Citizenship Act 1986 (No 23), s 4 – Irish Nationality and Citizenship 2004 (No 38), s 8 – Civil Law (Miscellaneous Provisions) Act 2011 (No 23), s 33 – Freedom of Information Act 1997 (No 13), s 18 – Freedom of Information (Amendment) Act 2003 (No 9) – Refugee Act 1996 (No 17), ss 3 and 17(2) – Appeal allowed; decision quashed (339/2011 – SC – 6/12/2012) [2012] IESC 59
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Appeal against order for possession – Mortgage – Arrears – Demand – Whether proceedings properly commenced by ejectment civil bill – Whether jurisdiction to grant possession in respect of registered land – Whether jurisdiction to grant possession in respect of unregistered land – Whether jurisdiction to be exercised where Central Bank code of conduct not complied with – *Northern Bank Ltd v Devlin* [1924] 1 IR 90; *EBS Ltd v Gillespie* [2012] IEHC 243, (Unrep, Laffoy J, 26/6/2012); *Start Mortgages Ltd v Gunn* [2011] IEHC 275, (Unrep, Dunne J, 25/7/2011); *Bank of Ireland v Smyth* [1993] 2 IR 102; *Bank of Ireland v Waldron* [1944] IR 303; *Heaney v Ireland* [1994] 3 IR 593; *First National Building Society v Gale* [1985] IR 609; *Damache v Director of Public Prosecutions* [2012] IESC 11, [2012] 2 ILRM 153; *People (Director of Public Prosecutions) v Cunningham* [2012] IECCA 64, [2012] 2 ILRM 406; *The People (Director of Public Prosecutions) v O'Brien* [2012] IECCA 68, (Unrep, CCA, 2//7/2012); *Sullivan v Boylan* [2012] IEHC 385, (Unrep, Hogan J, 4/10/2012); *Wicklow County Council v Fortune* [2012] IEHC 406, (Unrep, Hogan J, 4/10/2012); *Fleming v Ireland* [2013] IEHC 2, (Unrep, Kearns P, 10/1/2013); *Crawford v Centime Ltd* [2005] IEHC 325, [2006] 1 ILRM 543; *Curley v Governor of Arbour Hill Prison* [2005] IESC 49, [2005] 3 IR 308; *Zurich Bank v McConnon* [2011] IEHC 75, (Unrep, Birmingham J, 4/3/2011); *Stepstone Mortgage Funding Ltd v Fitzell* [2012] IEHC 142, (Unrep, Laffoy J, 30/3/2012); *AG v Residential Institutions Redress Board* [2012] IEHC 492, (Unrep, Hogan J, 6/11/2012) and *Kadri v Governor of Cloverhill Prison* [2012] IESC 27, (Unrep, SC, 10/5/2012) considered – Courts of Justice Act 1936 (No 48), s 38 – Circuit Court Rules (Actions for Possession and Well Charging Relief (SI 264/2009) – Registration of Title Act 1942 (No 26) – Registration of Title Act 1964 (No 16), s 62 – Land and Conveyancing Law Reform Act 2009 (No 27), ss 8 and 97 and sch 2 – Interpretation Act 2005 (No 23), s 27 – Constitution of Ireland 1937, Arts 15.2.1°, 34.3.2° and 40.5 – Central Bank Act 1989 (No 16), s 117 – Central Bank Act 1942 (No 22), s 33AQ and part IIIC – Central Bank and Financial Services Authority of Ireland Act 2004 (No 21), s 10–Family Home Protection Act 1976 (No 27), s 3 – Appeal allowed; order for possession refused (2012/61CA – Hogan J – 31/1/2013) [2013] IEHC 43
Irish Life and Permanent Plc v Duff

NEGLIGENCE

Solicitors

Action for damages for professional negligence and breach of contract – Defendant retained as solicitors to complete loan transactions and perfect security – Assurances – Obtaining of fixed first charge over properties – Acceptance of undertakings without authority of bank – Undertakings not complied with – Unable to realise security – Devaluation of properties – Contributory negligence – Failure to mitigate loss – Basis on which to assess damages – 'No transaction' case – Scope of duty – Appraisal of borrowers – Responsibility of bank – Whether guilty of negligence – Whether contributory negligence – Whether failure to mitigate loss – *ACC Bank plc v Brian Johnston & Co* [2010] IEHC 236, [2010] 4 IR 605; *Banque Bruxelles SA v Eagle Star* [1997] AC 191; *ACC Bank plc v Fairlee Properties Ltd* [2009] IEHC 45, [2009] 2 ILRM 101; *Bristol & West Building Society v Rollo Steven & Bond* [1998] SLT 9 and *ACC Bank plc v Brian Johnston & Co* [2011] IEHC 376, (Unrep, Clarke J, 22/9/2011) considered – European Communities (Licensing and Supervision of Credit Institutions) Regulations 1992 (SI 395/1992) – Damages awarded (2010/1429P & 2010/1430P – McGovern J – 16/3/2012) [2012] IEHC 120
KBC Bank Ireland plc v BCM Hanby Wallace (a firm)

PERSONAL INJURIES

Articles

Clark, Robert
Personal injuries compensation for employees in Ireland–some unfortunate developments shifting loss back to victims as a legislative policy
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Maguire, Eamonn
Shoot to thrill
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PERSONAL INSOLVENCY & BANKRUPTCY

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Re Sean Dunne (A Bankrupt)

PLANNING & ENVIRONMENTAL LAW

Development plan

Judicial review proceedings concerning zoning of lands – Application refused but concern raised regarding zoning aspect – Whether zoning of house and curtilage as public open space appropriate or proportionate having regard to objectives of development plan – Zoning and planning objectives – Whether decision to zone all lands including house

and curtilage disproportionate, unreasonable or irrational – Interference with decision of planning authority – Whether no relevant material before authority to support decision – *Holland v Governor of Portlaoise Prison* [2004] IEHC 97, [2004] 2 IR 573; *McEvoy v Meath County Council* [2003] 1 IR 208; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 and *The State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642 considered – Planning and Development Act 2000 (No 30), s 10 – Finding that no basis for inclusion of house and curtilage in zoning as public open space (2009/645JR – Dunne J – 21/10/2011) [2011] IEHC 555
Mahon v Cork City Council

Permission

Application for injunction restraining interference with development of lands – Preliminary issue – Planning permission – Period of permission – Default period of permission – Interpretation of planning permission – Plans and particulars – Whether period of permission specified by board – *Readymix (Eire) Ltd v Dublin County Council* (Unrep, SC, 30/7/1974); *XJS Investments Ltd v Dun Laoghaire Corporation* [1986] IR 750; *Kenny v Dublin City Council* [2009] IESC 19, (Unrep, SC, 5/3/2009) and *Lanigan v Barry* [2008] IEHC 29, (Unrep, Charleton J, 15/2/2008) considered – Local Government (Planning and Development) Regulations 1994 (SI No 86/1994), reg 19 – Local Government (Planning and Development) Act 1982 (No 21), ss 2 and 3 – Finding that planning permission granted for period of ten years and continued to have effect (2012/4438P – Kearns P – 1/2/2013) [2013] IEHC 37
Arklow Town Council v Arklow Holidays Limited

PRACTICE AND PROCEDURE

Library Acquisitions

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Blackhall's Circuit Court rules: updated to 1 January 2015
7th ed
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Hughes, Christopher
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Sime, Stuart
French, Derek
Kay, Maurice
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N365

Amendment of pleadings

Application for leave to amend statement of claim – Application following discovery – Investment made in financial product marketed and produced by bank – Bond – Plea of fraud – Representations to induce – Reasonable prospect of success – Jurisdiction to strike out *in limine* – Inherent jurisdiction to strike out – Liability for costs arising on foot of amendment – Whether amendments would survive application to be struck out under inherent jurisdiction for no reasonable prospect of success – *Croke v Waterford Crystal Limited* [2004] IESC 97, [2005] 2 IR 383; *Cornhill v Minister for Agriculture and Food* [1998] IEHC 47, (Unrep, O'Sullivan J, 13/3/1998); *Woori Bank and Hanvit LSP Finance Ltd v KDB Ireland Ltd* [2006] IEHC 156, (Unrep, Clarke J, 17/5/2006); *Barry v Buckley* [1981] IR 306 and *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 28 and O 28 – European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI 27/1995), reg 3 – Investment Intermediaries Act 1995 (No 11), s 37 – Application granted (2010/2473P – Kelly J – 30/3/2012) [2012] IEHC 105
Cuttle v ACC Bank plc t/a ACC Bank

Amendment of pleadings

Application for leave to amend defence – Application for leave to join defendants – Insertion of counterclaim – Surety – Constitutionality – Right to equality – National Asset Management Agency – Misrepresentation – Inherent jurisdiction of court to strike out claim – No reasonable prospect of success – Deficit of evidence – Jurisdiction of court to permit amendments involving joinder of non-parties – Whether amendments necessary for determining real questions in controversy between parties – Whether amendments would survive application that they be struck out under inherent jurisdiction of court – Whether connection between third person sought to be made defendant and original cause of action – *Cornhill v Minister for Agriculture* [1998] IEHC 47, (Unrep, O'Sullivan J, 13/3/1998); *Woori Bank v KDB Ireland Limited* [2006] IEHC 156, (Unrep, Clarke J, 17/5/2006); *Croke v Waterford Crystal Limited* [2004] IESC 97, [2005] 2 IR 383; *Cuttle v ACC Bank* [2012] IEHC 105, (Unrep, Kelly J, 30/3/2012) and *Barry v Buckley* [1981] IR 306 considered – *City Wide Leisure Limited v Irish Bank Resolution Corporation* [2012] IEHC 220, (Unrep, McGovern J, 24/5/2012) followed – *Shell E and P Ireland Limited v McGrath* [2006] IEHC 99, [2006] 2 ILRM 299 applied – Rules of the Superior Courts 1986, O 28, r 1 and O 21, r 10 – National Asset Management Agency Act 2009 (No 34) – Proposed amendment alleging misrepresentation allowed; all other proposed amendments refused (2011/3213S – Kelly J – 25/1/2013) [2013] IEHC 40
Irish Bank Resolution Corporation Limited v Moran

Appeal

Application by the appellant to have appeal heard notwithstanding that subject ceased to be live issue – Doctrine of mootness – Settlement reached since filing of appeal – Points of law – Implications of fundamental importance to Revenue Commissioners – No live controversy – Judgment mortgages registered against interest of one owner only – Only effective remedy to order partition of land or division of proceeds of sale – High Court held that it would not be appropriate to interfere with property rights of co-owner – Registered land – Point of law of exceptional public importance – Interests of due and proper administration of justice – Discretion – Continued exercise of statutory power to seek to recover outstanding taxes – Whether issue justiciable – Whether interest in appeal hypothetical or academic – *G v Collins* [2004] IESC 38, [2005] 1 ILRM 1; *O'Brien v The Personal Injuries Assessment Board* [2006] IESC 62, [2007] 1 IR 328 and *Borowski v Canada*[1989] 1 SCR 342 considered – Registration of Title Act 1964 (No 16) – Application allowed (110/2006 – SC – 14/5/2010) [2010] IESC 35
Irwin v Deasy

Costs

Appeal from order for costs made by High Court – Appellant inspector acting on behalf of Revenue Commissioners – Costs of application under Taxation Consolidation Act 1997, s 908 – Discretion – Order directing provision of information in relation to DIRT-exempt resident accounts – Collection of tax – Interference with discretion of High Court – Costs of carrying out order – Costs follow the event – Investigative procedure – Treatment of costs as penalty – Public policy – *O'C (JB) v D(PC) HCSC* [1985] 1 IR 265 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 1 and 3 – Taxation Consolidation Act 1997, ss 257(2) and 908 – Finance Act 1999, s 207(i) – Appeal dismissed (48/2007 – SC – 29/7/2011) [2011] IESC 31
H(G) v I

Costs

Application to strike out taxation of bill of costs – Application pursuant to inherent jurisdiction of court – Whether taxation statute barred – Requirement for amount of liability for costs to be ascertained prior to time commencing to run – Execution of judgments – Whether undue delay – Whether delay inordinate – Whether delay inexcusable – Whether balance of justice required taxation claim to be dismissed – *Clarke v Garda Commissioner* [2002] 1 ILRM 450; *Chohan v Times Newspapers Ltd* [2001] 1

WLR 1859; *Manning v Benson & Hedges Ltd* [2004] IEHC 316, [2004] 3 IR 566; *Gilroy v Flynn* [2004] IESC 98, [2005] 1 ILRM 290; *Donnellan v Westport Textiles Ltd* [2011] IEHC 11, (Unrep, Hogan J, 18/1/2011); *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 and *McBrearty v North Western Health Board* [2010] IESC 27, (Unrep, SC, 10/5/2010) considered – Statute of Limitations 1957 (No 6), ss 2 and 11–Rules of the Superior Courts 1986 (SI 15/1986), O 42, rr 23 and 24 – Constitution of Ireland 1937, Art 34.1 – Relief granted (1998/6076P – Hogan J – 30/7/2013) [2013] IEHC 410
Harte v Horan

Cross-examination

Deponents – Injunction – Mareva injunction – Defendants ordered to disclose assets – Plaintiffs alleging non-compliance – Plaintiffs seeking to cross-examine defendants – Whether cross-examination appropriate – *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923; *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67; *Den Norske Bank ASA v Antonatos* [1999] QB 271; *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1989] 2 WLR 412; *Deutsche Bank AG v Murtagh* [1995] 2 IR 122; *Director of Corporate Enforcement v Seymour* [2006] IEHC 369, (Unrep, O'Donovan J, 16/11/2006); *Holland v Information Commissioner* (Unrep, SC, 15/12/2003) and *House of Gardens Ltd v Waite* [1985] FSR 173 considered–Rules of the Superior Courts 1986 (SI 15/1986), O 40, r 1 – Cross-examination directed (2011/5483P – Kelly J – 11/12/2012) [2012] IEHC 510
Irish Bank Resolution Corporation Ltd v Quinn

Delay

Application to dismiss proceedings for want of prosecution – Inordinate and inexcusable delay – Interests of justice – Statement of claim withheld pending delivery of related judgment – Notice of intention to proceed – Prejudice – Balance of justice – Planning tribunal – Plaintiff required to give evidence and make discovery – Application for costs refused – Findings of corruption – Finding that obstructed tribunal – Plaintiff seeking declaratory relief – Unconstitutionality – Judicial review more appropriate – Application of judicial review time limits to plenary proceedings – Pre-commencement delay – Tribunal acting *ultra vires* – Whether delay inordinate – Whether delay inexcusable – Whether balance of justice in favour dismissal – *Caldwell v Judge Mahon* [2011] IESC 21, (Unrep, SC, 9/6/2011); *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301; *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510; *Desmond v MGN Ltd* [2008] IESC 56, [2009] 1 IR 737; *Comcast International Holdings Inc v Minister for Public Enterprise* [2007] IEHC 297, (Unrep, Gilligan J, 13/6/2007); *Stephens v Paul Flynn Ltd* [2008] IESC 4, [2008] 4 IR 31; *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 450; *De Roiste v Minister for Defence* [2001] 1 IR 190; *Rainsford v Limerick Corporation* [1995] 2 ILRM 561; *Goodman International v Mr Justice Hamilton* [1992] 2 IR 542 and *O'Callaghan v Mahon* [2005] IESC 9 & [2005] IEHC 265, [2006] 2 IR 32 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 27, r 1 and O 84, r 21 – European Convention of Human Rights Act 2003 (No 20) – Tribunals of Inquiry (Evidence) (Amendment) Act 1979 (No 3) – Tribunals of Inquiry (Evidence) (Amendment) Acts 1921-2004 (No 13) – Claim partially dismissed (2005/1367P – Gilligan J – 28/3/2012) [2012] IEHC 253
Redmond v Judge Flood

Discovery

Application for discovery by third party for material in proceedings – Disclosure to third parties – Family law proceedings arising in bankruptcy – Divorce – Adjudicated bankrupt – NAMA – Filing for bankruptcy in United States – Two wives – Wife holding husband's property – Concealment of assets – Obligations of debtor to disclose information as a matter of United States bankruptcy law – Purpose of *in camera* rule – Exceptions to *in camera* rule – Legislative interpretation – Literal interpretation – Ambiguity – Court acting 'of its own motion' – Rights of third parties – Intention – Application to lift *in camera rule* – Common law power to lift *in camera* rule – Publication of *in camera* material – Implied power of court – Probity of court – Whether to lift *in camera* rule and order disclosure – Whether third party may apply to court to enable court to act on its own motion to order disclosure to third parties – Whether common law power to lift *in camera* rule abolished by Civil Liability and Courts Act 2004, s 40(8) – Whether inherent jurisdiction –*E(L) v F(U)* [2011] IEHC 229, (Unrep, Abbott J, 15/4/2011); *U v U* [2011] IEHC 228, (Unrep, Abbott J, 2/6/2011); *Eastern Health Board v Fitness to Practice Committee* [1998] 3 IR 399; *Tesco (Ireland) Ltd v McGrath* (Unrep, Morris J, 14/6/1999); *RM v DM* [2000] 3 IR 373; *NP v AP (Practice in Camera)* [1996] 1 IR 144; *TF v Ireland* [1995] 1 IR 321; *NP v AP* [1996] 1 IR 144; *Eastern Health Board v E* [2000] 1 IR 451 and *XY v YX* [2010] IEHC 440, (Unrep, Abbott J, 14/7/2010) considered – National Asset Management Agency Act 2009 (No 34), ss 10, 11 and 12 – Family Law (Divorce) Act 1996 (No 33), ss 20 and 40 – Civil Liability and Courts Act 2004 (No 31), s 40(8) – Family Law Act 1995 (No 26), ss 15(5), 16 and 40 – Interpretation Act 2005 (No 23), s 5 – Application granted (1997/58M – Abbott J – 14/6/2013) [2013] IEHC 648
D(J) v D(S)

Interlocutory injunction

Application to restrain applications for orders disqualifying plaintiffs as company directors – Notice of application for disqualification order – Validity of notice – Abuse of process – Mandatory and indispensible precondition – Requirement that notice contain accurate identification of grounds – Requirement of genuine and fully formed intention to initiate statutory procedure – Appropriate test – Whether *prima facie* case – Whether damages adequate remedy – Whether balance of convenience in favour of plaintiffs – *Director of Corporate Enforcement v Byrne* [2009] IESC 57, [2010] 1 IR 222 and *Truck and Machinery Sales Limited v Marubeni Komatsu Limited* [1996] 1 IR 12 considered – *Secretary of State for Trade v Langridge* [1991] Ch 402 distinguished – *Campus Oil Limited v Minister for Industry and Energy* [1983] IR 88 followed – Companies Act 1990 (No 33), s 160 – Interlocutory injunction granted (2013/569P – Cooke J – 4/2/2013) [2013] IEHC 42
Permanent TSB Plc v Skoczylas

Judicial review

Application to amend grounds on which leave to seek judicial review granted – Reformulation of grounds by court – Omission of ground by court – Requirement for precise and succinct grounds – Possible costs sanction where over-extensive grounds – Requirement for all parties to act reasonably – Whether court omitted ground – Whether grounds over-extensive – *Usk District Residents Association v Environmental Protection Agency* [2006] IEHC 296, [2007] IR 157 and *Veolia Water UK plc v Fingal County Council (No 2)* [2006] IEHC 240, [2007] 2 IR 81 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 20 – Appellant permitted to add two further grounds (2012/179JR – SC – 18/12/2012) [2012] IESC 65
Babington v Minister for Justice Equality and Law Reform Ireland and the Attorney General

Parties

Applications to be joined as appellants and notice parties to appeal – Teachtaí Dála – Non-participation in High Court hearing – Appeal from dismissal of challenge to provision of financial support to financial institutions – Promissory notes – No Dáil resolution – No *locus standi* as not member of Dáil – Appeal seeking declaration of *locus standi* and inviting court to grant relief sought in High Court – Adding new parties to existing proceedings – Inherent jurisdiction – Personal interest – Exceptional circumstances – Whether court should exercise jurisdiction to join parties who were not parties in High Court to appeal – Whether personal interest in subject matter of appeal – Whether joinder necessary in order to enable court effectually and completely adjudicate upon all questions in matter – *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 and *TDI Metro Ltd v Delap (No 1)* [2000] 4 IR 337 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 15, r 1 and r 13, O 58, r 8 and O 125, r 1 – Credit Institutions (Financial Support) Act 2008 (No 18), s 6(1) – Constitution of Ireland 1937, Art 17 – Application dismissed (32/2013 – SC – 20/2/2013) [2013] IESC 10
Hall v Minister for Finance

In camera hearing

Application by newspaper for permission for reporter to attend hearing of motion – Motion

to set aside order in family law proceedings – Whether motion should be viewed as separate proceeding not attracting *in camera* rule – Whether discretion to permit hearing in public subject to necessary conditions – Qualifications to mandatory *in camera* rule – *The People (DPP) v Quilligan (No 2)* [1989] 1 IR 46; *Blackall v Grehan* [1995] 3 IR 208; *RM v DM* [2000] 3 IR 372; *In re R Ltd* [1989] IR 126; *MR v An tArd Chlaraitheoir* [2013] IEHC 91, [2013] 1 ILRM 449; *Independent News and Media Ltd v A* [2010] 1 WLR 2262; *MP v AP* [1996] 1 IR 144; *RD v District Judge McGuinness* [1999] 2 IR 411; *DX v District Judge Buttimer* [2012] IEHC 175, (Unrep, Hogan J, 25/4/2012); *Tuohy v Courtney* [1994] 3 IR 1; *Health Service Executive v McAnaspie* [2011] IEHC 477, [2012] 1 IR 548 and *Dowse v An Bord Uchtála* [2006] IEHC 64 & [2006] IEHC 65, [2006] 2 IR 507 considered – Judicial Separation and Family Law Reform Act 1989 (No 6), s 34 – Family Law Act 1995 (No 26), s 38 – Courts (Supplemental Provisions) Act 1961 (No 39), s 45 – Constitution of Ireland 1937, Art 34.1 – Civil Liability and Courts Act 2004 (No 3), s 40 – Application refused (2012/97CAF & 2012/98CAF – Keane J – 9/12/2013) [2013] IEHC 578
B(A) v D(C)

Mootness

Appeal against refusal of leave to seek judicial review – Deportation orders – Revocation of deportation order subsequent to lodgement of appeal – Whether appeal moot – Whether exceptional case where appeal should be heard despite mootness – Discretion of court – Impact of costs order – *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *Zambrano v Belgium* (Case C-34/09) [2011] All ER 491; *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701; *Goold v Collins* [2004] IESC 38, [2005] 1 ILRM 1; *Borowski v Canada* [1989] 1 SCR 342; *O'Brien v Personal Injuries Assessment Board (No 2)* [2006] IESC 62, [2007] 1 IR 328; *Okunade v Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 1 ILRM 1; *Irwin v Deasy* [2010] IESC 35, [2011] 2 IR 752; *Caldwell v Mahon Tribunal* [2011] IESC 21, (Unrep, SC, 9/6/2011); *Murphy v Roche* [1987] IR 106; *Application of Zwann* [1981] IR 395; *Maloney v Member in Charge (Terenure Garda Station)* (Unrep, SC, 18/5/2004); *Dunne v Governor of Cloverhill Prison* [2009] IESC 43, (Unrep, SC, 21/5/2009); *McDonald v Bord na gCon* [1964] IR 350; *PV (a minor) v The Courts Service* [2009] IEHC 321, [2009] 4 IR 264; *Condon v Minister for Labour* [1981] IR 62; *City of Mesquite v Aladdin's Castle Inc* (1982) 455 US 283; *Cunningham v President of the Circuit Court* [2012] IESC 39, [2012] 3 IR 222; *Farrell v Governor and Company of Bank of Ireland* [2012] IESC 42, [2013] 2 ILRM 183 and *Rye Investments Ltd v The Competition Authority* [2012] IESC 52, (Unrep, SC, 26/10/2012) considered – Appeal dismissed (138/2011 – SC – 20/11/2013) [2013] IESC 49
Lofinmakin v Minister for Justice, Equality and Law Reform

Reporting

Motion for imposition of reporting restrictions preventing disclosure of identity – Claim of severely autistic adult for damages for false imprisonment, negligence and breach of constitutional rights – Whether reporting restrictions should be imposed – Whether plaintiff came within terms of legislation – Whether reporting restrictions would be prejudicial to interests of justice – Complaint regarding potential lack of mutuality – Challenge to good name and professionalism of named Gardaí – Protection of vulnerable litigants – Whether plaintiff came within ambit of section – Open administration of justice – Equality of treatment – Inherent jurisdiction of court – *Temple Street University Hospital v D* [2011] IEHC 1, (Unrep, Hogan J, 12/1/2011); *Bank of Ireland v Purcell* [1989] IR 317; *Re R Ltd* [1989] IR 126; *Roe v Blood Transfusion Services Board* [1996] 3 IR 67; *Re Ansbacher (Cayman) Ltd* [2002] 2 IR 517; *Doe v Revenue Commissioners* [2008] IEHC 5, [2008] 3 IR 328; *McKeogh v John Doe 1* [2012] IEHC 95, (Unrep, Peart J, 22/1/2012); *Fleming v Ireland* [2013] IEHC 2, (Unrep, Divisional High Court, 10/1/2013) and *Kiely v Minister for Social Welfare (No 2)* [1977] IR 267 considered – Civil Law (Miscellaneous Provisions) Act 2008 (No 14) , s 27 – Constitution of Ireland 1937, Arts 34.1 and 40.3.2°–Application refused (2012/8876P – Hogan J – 11/6/2013) [2013] IEHC 312
F(D) v Garda Commissioner

Security for costs

Appeal to Supreme Court – Appeal of refusal of application for security for costs– Jurisdiction to award security for costs of appeal – Corporate litigant – Procedural history – Jurisdiction to order security – Inherent jurisdiction – Jurisdiction pursuant to rules – Status of unlimited resident company – Rationale for security – Whether appropriate to invoke inherent jurisdiction – Nominal plaintiff – Whether plaintiff nominal plaintiff – *Farrell v Bank of Ireland* [2012] IESC 42, (Unrep, SC, 10/7/2012); *Mavior v Zerko Limited* [2012] IEHC 471, (Unrep, Finlay Geoghegan J, 22/11/2012); *Goode Concrete v CRH plc* [2012] IEHC 116, (Unrep, Cooke J, 21/3/2012); *ABM Construction v Habbingley Limited* [2012] IEHC 61, (Unrep, Laffoy J, 15/2/2012); *Salthill Properties Limited v Royal Bank of Scotland* [2010] IEHC 31, [2011] 2 IR 441; *Barry v Buckley* [1981] IR 306; *G McG v DW (No 2)* [2000] 4 IR 1; *Harlequin Property (SVG) Limited v O'Halloran* [2012] IEHC 13, [2013] 1 ILRM 124; *Cowell v Taylor* (1885) 31 Ch D 34; *Sykes v Sykes* Law Rep 4 CP 465; *Cooke v Whellock* (1890) 24 QBD 658; *Rhodes v Dawson* (1886) 16 QBD 548 and *Kennealy v Keane* [1901] 2 IR 640 considered – Companies Act 1963 (No 33), s 390 – Rules of the Superior Courts 1986 (SI 15/1986), O 29 – Appeal dismissed; order of trial judge affirmed (584/2012 – SC – 13/3/2013) [2013] IESC 15
Mavior v Zerko Limited

Security for costs

Order for security for costs – Whether amount of security should be one third of estimated costs – Quantification of amount of security – One third rule – Corporate plaintiff incorporated outside State – Special circumstances – *Thalle v Soares* [1957] IR 182; *Fallon v An Bord Pleanála* [1992] 2 IR 380; *Harlequin Property (SVG) Ltd v O'Halloran* [2012] IEHC 13, [2013] 1 ILRM 124; *Lismore Homes Ltd v Bank of Ireland Finance Ltd* (No 3) [2001] 3 IR 536; *Goode Concrete v CRH plc* (Unrep, the Cooke J, 15/5/2012) and *Framus Ltd v CRH Plc* [2004] 2 IR 21 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 29 and O 31, r 12 – Companies Act 1963 (No 33), s 390 – One third costs ordered (2011/8979P – Laffoy J – 24/5/2012) [2012] IEHC 216
Ticket Generator Limited v Dublin Airport Authority plc

Summary judgment

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[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.

Animal Protection (in relation to Hares) Bill 2015
Bill 23/2015
[pmb] Maureen O'Sullivan

Assaults on Elderly Persons Bill 2015
Bill 15/2015
[pmb] Niall Collins

Companies (Amendment) Bill 2015
Bill 10/2015
[pmb] Peadar Tóibín

Finance (Local Property Tax) (Amendment) Bill 2015
Bill 13/2015
[pmb] Barry Cowen

Industrial Relations (Members of the Garda Síochána and the Defence Forces) Bill 2015
Bill 9/2015
[pmb] Michael McNamara

Migrant Earned Regularisation Bill 2015
Bill 19/2015
[pmb] Niall Collins

Misuse of Drugs (Amendment) Bill 2015
Bill 21/2015

Personal Insolvency (Amendment) Bill 2015
Bill 24/2015
[pmb] Willie Penrose

Protection of Life During Pregnancy (Amendment) (Fatal Foetal Abnormalities) Bill 2015
Bill 20/2015
[pmb] Michael McNamara

Road Traffic (Amendment) Bill 2015
Bill 11/2015

Road Traffic (Amendment) (No. 2) Bill 2015
Bill 26/2015
[pmb] Peadar Tóibín

Social Welfare (Miscellaneous Provisions) Bill 2015
Bill 12/2015

Statute Law Revision Bill 2015
Bill 22/2015

Thirty-fourth Amendment of the Constitution (Dáil Éireann) Bill 2015
Bill 16/2015
[pmb] Brendan Griffin

Thirty-fifth Amendment of the Constitution (Age of Eligibility for Election to the Office of President) Bill 2015
Bill 6/2015

Wildlife (Amendment) Bill 2015
Bill 8/2015
[pmb] Clare Daly

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Bill 17/2015
[pmb] Aevril Power, John Crown and Mark Daly

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[pmb] Darragh O'Brien, Diarmuid Wilson, Marc MacSharry and Thomas Byrne

Succession (Amendment) Bill 2015
Bill 18/20
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Personal Insolvency (Amendment) Bill 2014
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Passed by Dáil

Road Traffic (No. 2) Bill 2014
Bill 113/2014
Enacted

Social Welfare (Miscellaneous Provisions) Bill 2015
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Betting (Amendment) Bill 2013
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Enacted – 15/3/2015

Garda Síochána (Amendment) (No. 3) Bill 2014
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Report Stage
Passed by Seanad Éireann

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Enacted – 11/3/2015

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

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"In Memoriam Amore": Revenge, Sex and Cyberspace

Pauline Walley SC

Introduction

One of the fastest growing areas of concern in internet law is the increasing online proliferation of sexually explicit material, uploaded by third parties without consent–typically for the purpose of humiliating, or blackmailing the victim.[1] The Supreme Court of Western Australia[2] has recently considered the appropriateness of granting an injunction as well as damages to a woman who was the victim of a "revenge porn" publication on Facebook by a former boyfriend. The court was persuaded that the online publication of this sexually explicit material amounted to a breach of confidence, and warranted the relief sought. The approach and analysis of the court is interesting in that it demonstrates a judicial willingness to refashion familiar equitable principles to meet the modern realities of human relationships, and their interaction with cyber space. The purpose of this article is to examine this novel, and technologically driven, phenomenon of "revenge porn" postings, which has started to preoccupy courts and law makers[3] alike; to consider what domestic laws might be available to a victim in this jurisdiction, absent *sui generis* laws, and to analyse what lessons our courts might glean from the nuanced approach of Mitchell J. in the case of *Wilson v Ferguson*.[4]

What is "Revenge Porn"?

The term "revenge porn" covers a range of activities involving the online posting of sexually explicit visual material, without the consent of the person portrayed. The term typically includes photographs and video clips which have been consensually generated, either jointly or by self ("sexting"),[5]as well as content covertly recorded by a partner or unknown third party. Revenge porn is often posted as an act of spite or retaliation by a jilted partner, although threats of blackmail and extortion can also arise.[6] This type of cyber activity appears to be on the rise, particularly with the advent of inexpensive, smartphone capability, and the recent emergence of image sharing apps such as Instagram, Snapchat and WhatsApp. A number of domestic violence agencies, in both Ireland and England, [7] have reported an increase in "revenge porn" incidents, and have called for the introduction of laws to adequately protect victims.

Revenge porn may also be motivated by a desire on the part of the uploader, or the website/host to monetize the publication of the sexually explicit material by way of extortion or blackmail. A new breed of revenge porn entrepreneur has emerged in recent times, where the sole object is to extort money. In the US, Craig Brittain controlled a website, IsAnyOnedown.com, which encouraged users to send naked photographs of women which were uploaded with the names, addresses, 'phone and social security numbers of those portrayed. Victims were invited to pay fees to effect removal of the material via another site controlled by him, which he described as a "Takedown Lawyer" service. In the absence of dedicated revenge porn laws, he was prosecuted by the Federal Trade Commission for breach of consumer laws and deception. [8]In response to this and similar cases, a number of US states now have tailored criminal laws in place to deal with revenge porn.[9]

What makes Revenge Porn so Devastating?

In the pre digital age, the break-up of relationships was usually attended with little public fanfare, or disclosure of private information. Visual images of the parties, such as photographs and videos, were typically consigned to the photograph album, a biscuit tin or the waste bin, with no attendant promulgation or publicity. By contrast, the dissemination of the intimate digital records of a former relationship, via the internet, attracts immediate and global reach, at the flick of a switch, and often anonymously. The online dissemination of these intimate images ensures that the material will remain on the internet forever, unless and until it is taken down not only by the uploader, but also the internet service provider ("ISP") to avoid domino publication, via

1 The term "revenge porn" did not emerge into public consciousness until 2013, when it suddenly mushroomed, especially in the US.

2 *Wilson v Ferguson* [2015] WASC 15.

3 On 1 July 2014, the Justice Secretary Chris Grayling admitted in Parliament that revenge porn was a growing problem in the UK: see http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140701/debtext/140701-0001.htm

4 *Wilson v Ferguson* [2015] WASC 15.

5 Danielle Keats Citron & Mary Anne Franks, "Criminalizing Revenge Porn," 49 Wake Forest L. Rev. 345.

6 *AMP v Persons Unknown* [2011] EWHC 3454. See the case taken against Craig Brittain by the FTC at note 9.

7 Section 33 of the Criminal Justice and Courts Act 2015 provides for a new offence criminalising such activity in England and Wales.

8 The FTC announced a settlement with Brittain in February 2015 to include the payment of a fine, an undertaking not to post online sexually explicit images without express consent, and the destruction of the images posted on the original. See http://www.ftc.gov/system/files/documents/cases/150129craigbrittaincmpt.pdf

9 At the time of writing, 15 States in the U.S. have enacted revenge porn laws. In Canada, Bill C-13 received Royal Assent in December 2014, and makes it an offence to share sexual images with a third party without the subject's consent.

cache and hyperlinking. Furthermore, powerful search engines can keep this material to the forefront of search results, consigning the victim to a *"Promethean"* cycle of abuse. It is these novel features which make the publication of revenge porn so pernicious, and a problem which many argue can only be dealt with by effective, bespoke criminal laws.

The posting of sexually explicit material online can have devastating consequences for its victims, ranging from a debilitating loss of self-esteem,[10] shame, harassment, blackmail, threats of rape, as well as stalking.[11] Victims often lose their jobs; some victims reported being unable to attend college, and many report being obliged to close down social media and email accounts which have become flooded with threatening messages. Although incidents of revenge porn affect both sexes, the majority of revenge porn cases encountered in the common law world appear to relate to female victims. [12]

Takedowns, Not Damages is the Main Focus.

The priority for most victims is to achieve immediate takedown of the online material, and to take back control of the images. This may include seeking the co- operation of the original uploader, if he or she can be identified,[13] but inevitably, a victim will also require the assistance of the ISP as this is the only way to effect permanent online removal of the material as problems with cache, residual threads and re-uploads by third parties can otherwise occur. Prior to the decision of the CJEU in *Google Spain SL v Agencia Española de Protección de Datos*,[14](the "*Google Spain"* case*)* discussed below, some rights groups contended that the ISPs were often unwilling to take down sexually explicit adult material, no matter how distressing or embarrassing, absent a court order.[15] Post *Google Spain,* requests for removals within the EU have met with greater success, given the strong data protection principles enunciated by the court, although ultimately removals may be limited to the geographical boundaries of the EU.

Remedies Under Irish law

Unlike England and Wales,[16] Ireland does not have, as yet, specific statutory provisions to deal with revenge porn. In the interim, victims are obliged to seek injunctive relief, destruction orders and damages by invoking traditional pre-digital laws such as privacy, defamation, data protection laws, breach of confidence, and/ or the emerging area of constitutional tort law as re-energised by Hogan J. in *Sullivan v Boylan (No 2).* [17] Yet these laws are far from a perfect fit. Ultimately, the legislature may be obliged follow other jurisdictions such as England, Canada and some US states by fashioning dedicated cyber remedies.

Privacy

It can be argued with some force that the publication of sexually explicit intimate material is a breach of a plaintiff's right to privacy, both as an un-enumerated right under the Constitution, and under Art.8 of the ECHR. A defendant might seek to counter- argue that the material was created, and shared online consensually, with no privacy constraints. The dicta of Dunne J. in *Herrity v Associated Newspapers (Ireland) Ltd*[18] contain a useful and up to date analysis of the parameters of the often amorphous, right to privacy under Irish law, but the right is not absolute, and may give way to competing interests such as Art.10 and freedom of expression rights. On the face of it, there seems little that could be said to justify the engagement of Art. 10, or other freedom of expression interests. In those circumstances, although a court might have little sympathy for an adult[19] plaintiff who later rued their lack of judgment, it is difficult to see how such publication could be justified as the ultimate objective of publication is one of revenge. Furthermore, if, as in *Herrity v Associated Newspapers (Ireland) Ltd*,[20] there was some criminal aspect to the conduct, such as attempts to extort money in exchange for content removal as in *AMP v Persons Unknown*,[21] this would greatly support the argument for relief as against both the uploader, if identified, and the ISP.

Privacy type injunctions have been granted in the UK for this type of material as in the case of *Contostavlos v Mendahun,*[22]where the singer and X Factor judge obtained an injunction against the internet dissemination of a leaked sex tape which had been given to her then boyfriend. Tugendhat J. observed that:

> "details of a person's sexual life have thus been recognised for very many years as high on the list of matters which may be protected …. It has also long been recognised that photographs are more intrusive

10 For an insightful analysis of the effects of offline bullying, please see the dicta of Kearns J. in *Glynn v Minister for Justice, Equality and Law Reform* [2014] IEHC 133*).*

11 Erica Goode, "Victims Push Laws to End Online revenge Posts," New York Times 23 September 2013 at http://www.nytimes.com/2013/09/24/us/victims-push-laws-to-end-online-revenge-posts.html?pagewanted=all&_r=0 last accessed 17 February 2015.

12 Citron and Franks, note 5.

13 *Norwich Pharmacal* orders may be obtained to identify anonymous posters.

14 *Google Spain SL v Agencia Española de Protección de Datos* (AEPD) (C-131/12), Grand Chamber, May 13, 2014.

15 Managh, *Twitter ordered to remove 'defamatory' profile of Irish teacher*, Irish Times, December 31st 2013

16 Section 33 of the Criminal Justice and Courts Act 2015, which was signed into law by Royal Assent in England and Wales on February 2015, and expressly creates an offence of "Disclosing private sexual photographs and films with intent to cause distress."

17 *Sullivan v Boylan (No 2)* [2013] IEHC 104.

18 *Herrity v Associated Newspapers (Ireland) Ltd*, [2009] 1IR 316. See also the dicta of Kearns P. in *Hickey and Agnew v Sunday Newspapers Ltd*, [2010] IEHC 349, [2011] 1 I.L.R.M.333.

19 Sexually explicit material relating to minors would constitute child pornography, as provided for in the Child trafficking and pornography Act, 1988, even if originally self-generated. The offence sections are very widely drafted to include possession, selling, distribution, making available to others and as such act as a real deterrent to uploaders and a powerful incentive to ISPs to block or remove such material.

20 In *Herrity v Associated Newspapers (Ireland) Ltd*, [2009] 1IR 316, the unlawful content of private telephone messages which had been illicitly recorded in breach of Section 98 of the Postal and Telecommunications Services Act 1983, as amended, was published by the defendant..

21 Note 5 above.

22 *Contostavlos v Mendahun* [2012] EWHC 850 (QB): *Mosley v News Group Newspapers Ltd.* [2008] EWHC 1777 (QB), [2008] E.M.L.R. 20; *Campbell v MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457

> than a verbal or written description. In the case of intrusive and intimate photographs of the kind in question in this case there is no real prospect of a defence of public domain."

This observation echoes that made by Clarke J. some years earlier in *Cogley v RTE*[23] where the plaintiffs had sought to halt the broadcast of covert recordings made by a journalist of activities in a private nursing home, alleging , inter alia, breaches of privacy and defamation. Clarke J. engaged in a balancing exercise of the privacy/ freedom of expression interests, and refused to grant the injunction sought, as there was a bona fide public interest in the material which RTE sought to broadcast. He found that the weight to be attached to the right to privacy could vary depending on the facts of the case, and the "more intimate the aspect of private life being interfered with, the more serious must be the reasons for interference."[24]

Defamation

Defamation laws may be of less assistance as the explicit material, albeit embarrassing, may not contain any false suggestion or innuendo as to sexual mores or availability of the person portrayed. If, however, the material was posted on a website which untruthfully claimed that the victim was available for sexual encounters or for commercial gain, as in *R v Da Silva*,[25] then defamation laws would clearly be engaged. However, a victim seeking injunctive relief in terms of takedowns, might fall foul of the rule in *Bonnard v Perryman*[26] which underpins the traditional reluctance of the courts to grant prior restraint orders in a defamation case, where a defendant may yet plead justification for the facts as alleged. As Kelly J. noted in *Reynolds v Malocco*,[27] the rule cannot be used to trammel the discretion of the court, and there have been occasions as in *Reynolds* and *McKeogh v Doe 1 and Others*[28] where prior restraint orders have been granted where the material was demonstrably defamatory, or as in *Reynolds*, where a plaintiff, if successful at the trial of the action, would be deprived of any meaningful remedy.

Perhaps the most apposite Irish case on the posting of sexually explicit material is the *ex tempore* decision of White J. in the case of *X v Twitter*[29], where the court granted an injunction directing Twitter International to remove offensive sexually related tweets and pictures of the Plaintiff, a teacher, from its platform, which the court described as defamatory.. A fake Twitter profile, purportedly created by the Plaintiff, had been used as a vehicle to post sexually explicit pictures of her, as well as identifying the town where she lived and worked. The judge granted the injunction sought against Twitter, and directed that although the hearing would be conducted in public, neither her identity nor her profile should be identified by the media. [30]

Data Protection

A stronger avenue for vindication of a victim's rights, especially in terms of ISP takedowns, are the data protection rights of access, rectification and erasure contained in the Data Protection Acts 1988-2003, which owe their origin to the Data Protection Directive 95/46/EC. The recent dicta of the CJEU in the seminal judgment of *Google Spain SL v Agencia Española de Protección de Datos*,[31] are a powerful statement from the EU court that data protection and privacy rights are core rights which, post Lisbon, are firmly anchored in the fundamental rights regime of the Charter of Fundamental Rights. The court recognised that material in search engine results may be taken down at the data subject's request if it contains "personal data" which is not relevant, accurate or places the subject in a false light. In the context of revenge porn posts, nothing could be more intimately connected with the rights of a data subject, or with the personal integrity and autonomy of a human being.[32] The real import of the *Google Spain* case lies in the fact that the court acknowledged that the right to seek deletion of a link from the search engine applies not only to false information, but also to information which, in itself is accurate, but publication of which by the search engines, by virtue of time and other circumstances, is irrelevant and or excessive. Although some US based internet intermediaries have been critical of the judgment, DP removal requests have acquired real heft within the EU post *Google Spain,* and a formal takedown letter from a solicitor should in most cases achieve the necessary takedown by the ISP.

Breach of Confidence

The law on breach of confidence in England has expanded dramatically in the last few years as the overlay of Art. 8 of the ECHR- brought into law under the Humans Rights Act 1998- has expanded the traditional parameters of breach of confidence, to include a privacy-type tort of misuse of confidential informational. The traditional reluctance of the English courts to recognise a general tort of privacy, as firmly reiterated by Lord Hoffman in *Wainright v Home Office,*

23 *Cogley v RTE* [2005] 4 I.R. 79

24 P.91.

25 *R v Da Silva……;*"Man fined €2000 for first Facebook 'fraping'criminal case," Irish Independent June 30 2014 where a former partner was convicted of criminal damage to a former girlfriend's Facebook page as he altered the status of her page to suggest that she was sexually available, at http://www.independent.ie/irish-news/courts/man-fined-2000-for-first-facebook-frapingcriminal-case-30394813.html last accessed 21 February 2015.

26 *Bonnard v Perryman* [1891] 2 Ch 269.

27 *Reynolds v Malocco* [1999] 2 IR. 203.

28 *McKeogh v Doe 1 and Others,* Judgment of Peart J. of 16 May 2013 relating to the granting of interlocutory relief. This decision has been appealed by the internet service providers Goggle, You Tube and Facebook to the Supreme Court, and is due to be heard in late Spring 2015.

29 Ray Managh, *Twitter ordered to remove 'defamatory' profile of Irish teacher*, Irish Times, December 31st 2013 at http://medialawnorthernireland.blogspot.ie/2013_12_01_archive.html

30 *X v Twitter,* White J 30 December 2013, reported Irish Times 31st December 2013. A similar anonymity order as to identity was made in *AMP v Persons Unknown* [2011] EWHC 3454 as the judge held to do otherwise was to cause greater damage to the victim.

31 *Google Spain SL v Agencia Española de Protección de Datos* (AEPD) (C-131/12), Grand Chamber, May 13, 2014.

32 The material would also come under the definition of "sensitive" personal data under the Data Protection Acts 1988-2003, which requires a heightened level of protection.

[33]remains. Nonetheless, the growing influence of the Art. 8/ ECtHR jurisprudence has had a profound influence, and since *Campbell v MGN Ltd,*[34] the English courts have demonstrated a willingness to expand the doctrine of breach of confidence for certain types of privacy misconduct such as the misuse of confidential information which, under Irish law, would arguably be covered by privacy laws. Perhaps for that reason, the law of breach of confidence in Ireland, although sharing a common ancestry, has remained more resolutely rooted in the traditional protection of economic interests such as customer and business information as considered by Clarke J in *AIB plc v Diamond.*[35] This does not mean that a victim of revenge porn could not invoke confidence laws, relying on older authorities such as *Argyll v Argyll* [36]where confidence was found to attach to the correspondence between a married couple, and as recently expressed in *Wilson v Ferguson*,[37]but it can be argued that the reliance of the English and Australian courts on the law of confidence is due in part to a lack of adequate privacy laws to support such a claim.

The Australian Decision

In *Wilson v Ferguson*,[38]the Plaintiff and Defendant were employees at a large mine in Western Australia, who became involved romantically, exchanging photographs of a sexual nature via mobile phone. Evidence established that the defendant also took, without permission, sexually explicit videos of the plaintiff from her phone, and emailed them to himself. The plaintiff contended that this exchange of material was for private use only. The parties later had a row by text, and the plaintiff terminated the relationship. Ferguson then shared the material with approximately 300 "friends" on his Facebook page- many of whom worked at the mine with the Plaintiff.[39] As the judge noted:

> "After the plaintiff sent that message, the defendant posted 16 explicit photographs and two explicit videos depicting the plaintiff on his Facebook page. The photographs and videos were those exchanged between the plaintiff and defendant in the manner described above. The defendant included the comment 'Happy to help all ya boys at home.. enjoy!!'. At some time on that day he also posted a note which read 'Let this b a f** lesson.. I will s*** on anyone that tries to f* me ova. That is all!'"[40]

Although the Defendant did ultimately remove the photographs and videos after some hours, the Plaintiff was so distressed by the postings that she took a leave of absence, and ultimately lost her job.

The court did not shy from engaging with the crude language of the texts and posts sent by Ferguson, which Mitchell J. concluded were indicative of the defendant's intention to humiliate and destroy his former girlfriend, whom he wanted to see "fold as a human being". The court noted the reluctance of the common law courts to award damages for emotional distress falling short of a recognised psychiatric injury, and the equitable principle that compensation should be limited to cases involving economic loss. However, the judge considered that the nature of online abuse was such as to warrant redress:

> "The technological advances to which I have referred have dramatically increased the ease and speed with which communications and images may be disseminated to the world. The defendant was easily able to upload the images of the plaintiff to a platform where they would be readily seen by members of the parties' social group. He could have as easily uploaded the images to a platform, such as YouTube, where they would have been visible to the world. The process of capturing and disseminating an image to a broad audience can now take place over a matter of seconds and be achieved with a few finger swipes of a mobile phone. No special licence or resources are practically or legally required to achieve such a broadcast. In many cases, such as the present, there will be no opportunity for any injunctive relief to be sought or obtained between the time when a defendant forms the intention to distribute the images of a plaintiff and the time when he or she achieves that purpose."

In a thoughtful, and cyber conscious analysis of human interaction, the judge re-tailored existing equitable principles to meet this new digital scenario. He said:

> "The not uncommon contemporary practice of couples privately engaging in intimate communications, often involving sexual images, by electronic means, the damaging distress and embarrassment which the broader dissemination of those communications would ordinarily cause and the ease and speed with which that dissemination can be achieved should inform the way in which equity responds to a breach of the obligation of confidence. The obligation which equity recognises is not new, dating back at least to the time of Queen Victoria's and Prince Albert's etchings. The relief which is given in response to a breach of that obligation should, however, accommodate contemporary circumstances and technological advances, and take account of the immediacy with

33 *Wainright v Home Office* [2003] UKHL 53; [2004] 2 AC 406; *Kaye v Robertson* [1991] FSR 62.

34 *Campbell v MGN Ltd* [2003] QB 633; see also Tugendhat J. in *Vidal Hall and others v Google Inc.* [2014] EWHC 13 (QB).

35 *AIB plc v Diamond* [2011] IEHC 505; *Net Affinity v Conaghan and Anor,* [2012] IEHC 160; [2012] ELR 11..

36 *Argyll v Argyll* [1967] 1 Ch 302; *Prince Albert v Strange,* (1849) 1 Mac & G 25; 41 ER 1171. Etchings

37 *Wilson v Ferguson* [2015] WASC 15.

38 *Wilson v Ferguson* [2015] WASC 15.

39 The judge noted at para. 30 that Ferguson sent a text expressing the desire to see the plaintiff "fold as a human being". The judge observed that the content of the text sent- "Fkn photos will b out for everyone to see when I get back you slappa. Cant wait to watch u fold as a human being. Piece if shit u r" inferred that the defendant knew the material was given to him in confidence, and that its publication would cause humiliation to the plaintiff.

40 *Wilson v Ferguson* [2015] WASC 15 at para. 27. The judge observed at para. 28 that those '"Facebook friends' were themselves able to download the photographs and videos and distribute them to others."

> which any person can broadcast images and text to a broad, yet potentially targeted, audience."[41]

Mitchell J. concluded that the nature of the explicit images, the manner in which those images were obtained, and uploaded by the Defendant were sufficient to grant an injunction prohibiting further publication of the images, and an award of equitable compensation of Aus$48,404 for the humiliation, anxiety and distress caused to the plaintiff by the publication, which was held to be in breach of the obligation of confidence which he owed to her.[42]

Harassment

In a similarly expansive fashion, Hogan J. in *Sullivan v Boylan (No 2).*[43] looked to the Constitution to locate an effective remedy for a woman who was the victim of harassment by a threatening debt collector. Although not a cyber nor a revenge porn case, the approach and dicta are apposite. The court was satisfied that the egregious door-stepping antics of a menacing debt collector came within the definition of criminal harassment under Section 10 of the Non Fatal Offences Against the Person Act 1997.[44] The judge concluded, after an extensive analysis of the applicable law, that traditional tort laws were ineffective to vindicate the plaintiff's rights, and the 1997 Act excluded civil claims. In those circumstances, the court was obliged to adopt a *Meskell*-type[45] approach, finding a remedy on the basis that the defendant had violated the plaintiff's constitutional right to the protection of her personhood under Article 40.3.2° as well as the security of her home under Article 40.5.[46] Hogan J. said that:

> "Even if the common law has not (yet) developed a general principle of tortious liability by reference to which the person is to be protected, that it is irrelevant given that Article 40.3.2 of the Constitution articulates such a general principle in clear and express terms. I am accordingly obliged as a result to fashion remedies which will uphold that constitutional right."[47]

The evidence established that the plaintiff was upset by these events, but Hogan J. was satisfied that as part of her constitutional right of personhood, she was entitled to be free of such "mental distress".[48] It is, however, unclear as to whether this authority would be applicable to various kinds of cyber abuse as the court approached the finding of harassment by utilizing the criteria provided in Section 10. Whilst Section 10 has been used effectively in a number of criminal prosecutions involving harassment via the sending of large volumes of texts and emails, the words of the section delimit it to persistent abuse, and appear to preclude a single act of uploading, which might devastate a victim's life and mental health as in the *Wilson* case. Equally, the Section does not apply to cases of indirect harassment where third parties are incited by the original tortfeasor, via a website or platform, to harass the victim, which is a common occurrence in cyber cases, or as in *Da Silva*, and *X v Twitter* where the tortfeasor creates a fake profile of the victim, which encourages sexual attention from unknown third parties. In other words, there are significant gaps in Section 10 which provide no remedy for this type of cyber abuse, either as a criminal prosecution, or using the threshold approach adopted by Hogan J. in *Sullivan* in a civil claim.

Conclusion

Space permits only a brief treatment of these nuanced issues. Other remedies which might be explored include claims of copyright infringement in relation to self-created material, which has apparently proved quite effective in the US, as large internet intermediaries are often well equipped to deal with copyright claims, as they possess good filtering technology and have established protocols for blocking infringing IP material.[49] Additional legal sanctions which might apply include criminal law provisions relating to criminal harassment, blackmail, extortion, and child pornography laws if the images of underage minors are involved.[50] But although a number of remedies might be invoked by a victim in this jurisdiction, it can be argued that victims should not be left to the hazard of complex, expensive and uncertain High Court litigation, or lonesome complaints to An Garda Siochana, to ensure removal of intimate material never intended for publication which can devastate the life and reputation of a victim. As Mitchell J. observed in *Wilson v Ferguson* ,[51] internet damage can be effected in seconds with a few finger swipes with little time to secure court relief. Cyber rights advocates argue that nothing less than bespoke cyber laws with criminal sanctions will act as an effective deterrent for vengeful uploaders, and revenge porn tycoons.

The challenge is that these are not easy laws to enact. They involve countervailing free speech issues, issues about consent, and a concern about "the chilling effect" on speech which may be merely offensive,[52] as opposed to unlawful. In the context of the "sexting" between minors, even more nuanced issues arise, including the patent undesirability of criminalizing youthful misconduct which may be reckless and foolish, rather than criminal in intent. The complex questions relating to liability of ISPs who refuse to take material down also remains to be debated. [53] As Section 33 of the Criminal

41 *Wilson v Ferguson* [2015] WASC 15 at paras. 80-81.
42 *Wilson v Ferguson* [2015] WASC 15 at para. ….
43 *Sullivan v Boylan (No 2)* [2013] IEHC 104
44 Section 10 refers to the intentional, unlawful and persistent following, watching, pestering, besetting of a victim which seriously interferes with the other's peace and privacy or causes alarm, distress or harm. Harassment may be carried out "by any means including by use of telephone". This has been interpreted as including other forms of communication such as email, text messages or those sent through a social media site.
45 *Meskell v. Córas Iompair Eireann* [1973] I.R. 121.
46 Relying in particular on the strong dicta of Hardiman J. in the *The People (Director of Public Prosecutions) v. O'Brien* [2012] IECCA 68, who emphasised the intrinsic importance of the inviolability of the dwelling home in a free and democratic society.
47 para. 44
48 He took a similar view in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235.
49 See
50 Child Trafficking and Pornography Act, 1998 as amended.
51 *Wilson v Ferguson* [2015] WASC 15.
52 *Handyside v UK*, [1976] ECHR 5.
53 Internet intermediaries may avail of qualified protections re damages claims under Arts. 12-14 of the E Commerce Directive

2000/30/EC for the posting of infringing third party content, providing they act to expeditiously remove same, once they become actually aware of infringing content. This protection is lost if they fail to remove infringing content once notified. See *CG v Facebook Ireland Limited and Anor*, [2015] NIQB 11, February 20, 2015; *Delfi AS v Estonia,* Application no. 64569/09, , ECtHR, First Section, 10 October 2013

Justice and Courts Act, 2015 is signed into law this week in England and Wales, it remains to be seen how these laws will work in practice in terms of the proportionate vindication of rights of cyber victims. There is no doubt, however, that the modern trend of human interaction identified by Mitchell J. is likely to trouble our own courts and lawmakers in the not too distant future. ■

Get the Costs or Pay the Price: *Harte v. Horan*

Gary Hayes BL*

Introduction

The estimated €10m costs order in respect of *Walsh & Cassidy v Sligo County Council*[1] in relation to rights of way over the lands of Lissadell House shows the potentially devastating costs which can be generated by litigation. Often, recovery of party and party costs on foot of court orders can also be an arduous and drawn out process. The recent case of *Harte v. Horan* suggests that where a party delays recovery that causes undue prejudice to the paying party, then the order for costs may be precluded from taxation. The result of this preclusion is that the order is never quantified and therefore becomes unenforceable.

The Rules of the Superior Courts

To put the matter in context, the current Rules of the Superior Courts, unlike the Civil Procedural Rules (CPR) of the United Kingdom, do not contain specific provisions in relation to the payment and assessment of costs and specifically contain little guidance in relation to party and party costs. In the CPR, limitation periods are set out within which costs must be paid on foot of a judgment. Part 44 CPR states that a party must comply with an order for the payment of costs within 14 days of either the judgment or the order in the matter[2]. This provision is subject to a decision in respect of Part 47 which relates to 'Procedure for assessment of costs and default provisions' which in effect equates to the office of the taxing master in Ireland. Part 47.5 sets out that these assessment proceedings must be commenced within three months of the judgment, direction, order or other determination or on the expiration of a stay where granted. Where the party awarded costs fails to comply with the time limits, then the paying party may apply to have the costs assessed. In circumstances where a paying party makes the application, they will have a right under the CPR to either apply to have the costs and/or the interest disallowed in its entirety. An equivalent and unequivocal approach to the recovery and payment of costs as set out in the CPR is absent under the equivalent Rules of the Superior Courts.[3]

The much anticipated Legal Services Bill 2011 contains provisions in relation to adjudication of party and party costs by the Chief Legal Costs Adjudicator. It appears however that time limits set out in the Bill refer only to the period after a bill of costs has been served, for example as to when a client may apply to have the bill of costs taxed before the Chief Costs Adjudicator. The Bill is therefore silent in relation to any time limits within which a bill of costs should be served or any mechanism whereby a party could be compelled to do so.

Harte v Horan

In *Harte v Horan,*[4] the plaintiff succeeded in two related but separate personal injury proceedings. The proceedings concluded in 2001 and the Court made an Order as to costs in favour of the Plaintiff in both sets of proceedings. On foot of the two costs orders, two bills of costs were sent to the defendant. In August 2002, the defendant insurer tendered two cheques in satisfaction of both bills. The cheque in respect of the first matter was not acceptable to the plaintiff and he stated that he had intended it would be sent for taxation. The cheque was not cashed. The cheque in respect of the second matter was sent back and the matter

* With special thanks to Derry Hand BL. All mistakes and omissions are the authors own.

1 [2013] IESC 48

2 CPR, UK, 44.7

3 An example of a high profile case in which a bill of costs was disallowed is *Botham v Kahn; Lamb v Kahn* (2014) EWHC (QB) involving former England cricketers Ian Botham, Allen Lamb and Imran Kahn.

4 [2013] IEHC 410

was sent to taxation but prior to reaching taxation, the second matter was settled. Due to an administrative oversight, the plaintiff's solicitor took no further action in relation to the first matter and subsequently the files in both matters were moved to storage. It was not until September 2010 that the oversight was discovered, at which point the cheque in the first matter was returned as unsatisfactory. The defendants were informed the matter was to be sent to taxation.

However, when the matter came before the Taxing Master it was suggested that the Summons in relation to the matter required renewal. The matter before the Taxing Master was adjourned and the matter was brought before the High Court in order that a judgment should be made on whether or not a renewal was necessary. The matter was re-listed before the Taxing Master without the matter having been heard before the High Court, at which point he sought submissions on the matter. The defendant however, took the matter directly to the High Court, which ultimately resulted in the judgement of Hogan J, the subject matter herein.

The defendant issued a motion seeking an order striking out the Summons to Tax on grounds of delay as the proceedings had concluded some six years prior to the summons issuing. In support of this application the defendant pointed to a number of facts which rendered referring the matter to taxation prejudicial after such a long period namely; the length of delay, that the incident in question had occurred almost fifteen years previously, that the solicitor's file, even though recovered from storage, was incomplete, that the defendant claims management company had destroyed their file and that the solicitor who had worked on the file was no longer employed by the defendant solicitor. A further unique circumstance arose in that the defendants had sent a cheque which was in Irish punts, to the plaintiff which had not been returned to indicate rejection for a period of eight years, during which Hogan J. held that the defendants were led to believe the matter had been resolved.

The Issue of Delay

In the judgment, Hogan J. referred to the comments of Finlay Geoghegan J. in *Manning v. Benson & Hedges Ltd*[5], and his own judgment to the same effect in *Doyle v. Gibney*[6] that, necessarily implicit in Article 34.1 of the Constitution is the assumption that justice will be administered in a timely, effective, fair and efficient fashion. He also noted that those constitutional obligations are further underscored by the State's commitment to the right to a hearing within a reasonable time under Article 6 of the European Convention on Human Rights. Further, in reference to the decision in *Gilroy v Flynn*[7], the Supreme Court had made it clear that what was considered a previous culture of tolerance and indulgence towards otherwise unacceptable delays in the conduct of litigation must come to an end. Hardiman J stated:

> "Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one."

Hogan J. outlined the three pronged test articulated by Hamilton J in the case of *Primor v Stokes Kennedy Crowley*[8] and referred to the separate (albeit overlapping) jurisdiction to strike out for undue delay set out in the case of *McBreaty v. North Western Health Board*[9]. He further considered Order 42, r. 23 of the Rules of the Superior Courts which provides that:

> "As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment, or the date of the order."

In his judgment, Hogan J. considered Order 42 was not applicable to the execution of judgments. In distinguishing the taxation of costs from execution he stated that taxation is rather the completion of the judgment process itself in that it involves the ascertainment of the amount of a money sum due from one litigant to another in respect of costs. Accordingly, the six year rule in respect of execution does not apply to cases where the court has made an order for costs but where the amount of those costs has yet to be ascertained.

The effect of the statute of limitations and the applicant's inability to enforce the order for costs is the fact that until the costs in relation to a case are taxed, no crystallised amount of costs exists. Hogan J. points out in *Horan* that very little authority exists in Ireland on the subject other than the case of *Clarke v Garda Commissioner*[10]in which the court was required to consider whether interests on costs ran from the date of the judgment in the matter. He quoted the judgment of Fennelly J. who held that (emphasis added by Hogan J.):

> "I am of the view that costs constitute a liability of the unsuccessful party from the moment of the decree or judgment, <u>that they are not payable until quantified</u>, from that point the debt relates back to the date of the judgment, with interest running from that earlier date. These views are I believe, consistent with the wording of sections 26 and 27 of the Debtors (Ireland) Act 1840. Section 26 gives interest from the date of entering up judgments"

Therefore, the applicant who seeks to have the costs taxed, in the absence of agreement between the parties, has no enforceable amount until taxation has occurred. If the Summons to Tax is dismissed, then the costs cannot be taxed and the applicant finds they possess an ineffective order. Hogan J. quoted Aldous J. in the English case of *Chohan v Times Newspapers Ltd.*[11] where he held that "[p]ayment cannot

5 [2004] IEHC 316, [2004] 3 I.R. 566
6 [2011] IEHC 10
7 [2004] IESC 98 1 ILRM 290
8 [1996] 2 IR 459
9 [2010] IESC 27
10 [2001] 1 ILRM 450
11 [2001] EWCA Civ946, [2001] 1 WLR 1859

be enforced without knowledge of what should be paid." and therefore that "[n]o further proceedings could be brought on the judgment [for costs] prior to the sum payable being entertained"

In the circumstances, a dismissal effectively bars the applicant for taxation from 'entertaining' the relevant sum.

The court held that on the balance of justice, it would be prejudicial to the defendant to send the matter to taxation.

The judgment does not delve further into the status of the order for costs attached to the judgment and this is where the analysis ends, albeit on an objective basis. The facts of the particular case are then considered in light of the above sources of law and on the basis of those facts, Hogan J. held that the delay in question was indeed of such a magnitude as to warrant the order for costs to be struck out. This highly subjective test may signal a situation whereby delays in the recovery of costs could result in potentially successful applications to have matters precluded from taxation and a resulting inability to recover.

Conclusion

In this case, Hogan J. found that a prejudicial effect on the defendant (in the absence of a breach of the statute of limitations) had occurred. Therefore, the door may now be open to a myriad of claims where simple prejudice on the grounds of delay is pleaded. In *Harte v Horan,* the application was based on twelve different affidavits and the matter resulted in a written High Court judgment.

The present lack of clarity within the RSC creates a situation in which an unsuccessful party to an action who seeks to compel the delivery of a bill of costs has no option but to issue a motion to the High Court to have that bill delivered. The respondent however, is under no specific duty to deliver the bill of costs and in circumstances where a motion is issued, the party seeking the bill will initially have to argue that the application is warranted prior to even being heard on the substantive issue of the delay in delivering the bill.

In conclusion, the issue in this case may not have arisen if similar provisions the Rules of the Superior Courts included provisions similar to those in the UK Civil Procedural Rules. If rules in the form of those in the CPR were added to the RSC it would provide a ready- made procedure for the parties to invoke in the event of delay and obviate the need for an application before the High Court. ■

Launch of *Enforcement of Judgments*

Pictured celebrating the launch of Enforcement of Judgments *by Sam Collins on 26 March 2015 at the Merrion Hotel, Dublin, are, left to right: Sadhbh O'Sullivan, McCann FitzGerald Solicitors, The Hon Mr Justice Frank Clarke, Sam Collins BL and Frieda Donohue, Publishing Manager, Thomson Reuters.*

Trial by ambush no more – The District Court (Civil Procedure) Rules 2014

Suzanne Mullally BL

Introduction

"All's changed, changed utterly"[1] might have been heard along the hallways of the District Courts on 3rd February 2014. On that date, the jurisdiction of the District Court increased from €6,345 to €15,000[2] and the practice and procedure was also substantially overhauled by the commencement of the District Court (Civil Procedure) Rules 2014. Over a year has passed since the introduction of the new District Court Rules (DCR) which apply to every civil claim commenced in the District Court on or after that date. Most of the Orders which applied to civil claims[3] (apart from family law and licensing matters etc.) were deleted in their entirety.

The new rules also clearly envisaged an eradication of "trial by ambush", which had been the practice in the District Court as both parties (now Claimant and Respondent rather than Plaintiff and Defendant) are obliged to set out in detail the various elements of their claim in the form of Claim Notice/Defence including the documents upon which they intend to rely on at trial in relation to their respective claims/defences.

The transition to fuller forms of pleading impacts upon substance as well as form. While the terminology has changed, so too has the manner in which District Court claims are heard. In most cases other than simple debt claims, the procedure mirrors that of the Circuit Court and High Court. As discussed below, the Claim Notice must now contain a Statement of Claim which follows the format of a Civil Bill and the Defence must contain Grounds of Defence. A notice of trial must be served while provision is also made for interlocutory applications such as motions for particulars and discovery.

A. Personal Injuries

There is a visible increase in the number of personal injuries claims appearing before the District Court.[4] The procedure in respect of Personal Injury Claims is set out in Ord. 40A.[5] In fact, the first amendment to the new DCR[6] has removed the limitation enforced by Order 40A r.3 directing that all personal injury summonses could only be issued in the district within which the respondent ordinarily resides or carries on any profession, business or occupation.[7] This rule was clearly inconsistent with Order 40 r. 4 of the DCR in relation to civil actions founded on tort. The Claimant may now once again elect to issue where the tort occurred/contract was performed or where the Respondent resides/carries on a profession, business or occupation.[8]

Personal injury practitioners might also note the unreported decision of the Circuit Court in *Kenny v King and Ors*[9]. The question which arose for determination before the District Court, and subsequently the Circuit Court, on appeal, was whether the Plaintiff was compelled to issue one set of proceedings when claiming damages for material damage and personal injuries arising out of a road traffic collision? Arising out of a road traffic collision, the Plaintiff suffered personal injuries while her motor vehicle sustained material damage. The Plaintiff's insurer sought recovery of the outlay paid in relation to the material damage claim in the District Court while, in separate proceedings issued subsequently in the Circuit Court, the Plaintiff instituted Circuit Court proceedings seeking damages in relation to her injuries. An application for a stay on the District Court proceedings was made by one of the Defendants on the basis that the Plaintiff had also issued Circuit Court proceedings arising out of the same incident.

The District Court (Judge Collins) refused the application for a stay on the grounds that the Court was persuaded by the argument in the decision of Smyth J in *Hayes v Callinan*[10] holding that two separate causes of action arose out of the road traffic collision, one in relation to material damage and the other in relation to personal injuries. Furthermore, Judge Collins considered submissions on the fact that two distinct limitation periods applied to the personal injury and material damage claims; therefore had the Personal Injury Summons issued outside the time two year period implemented by

1 Yeats, W.B. "Easter 1916".
2 Section 15 Courts and Civil Law (Miscellaneous Provisions) Act 2013. A claim for ejectment for overholding or non-payment of rent may also issue in the District Court by way of Landlord and Tenant Claim Notice where the annual rent claimed does not exceed where the annual rent does not exceed €15,000.
3 Orders 39 to 53C inclusive.
4 For a comprehensive discussion of the effect of the amendments to monetary jurisdictions across the District, Circuit and High Court see further recent article by McParland, D. in *Bar Review,* Vol 20, Issue 1.
5 See further *Civil Procedure in the District Court* (2nd Ed.), 2014, Dowling and Mullally.
6 S.I. 599/2014.
7 See Ord.40A r. 13.
8 It may be of interest those who practice in the Dublin Metropolitan District that Ord. 12 r. 3 of the DCR stipulates that notwithstanding the provisions of the Rules, as amended, any practice or procedure now in force in the Dublin Metropolitan District may continue in that Court district either in addition to or in substitution for any practice or procedure prescribed by the Rules.
9 Unreported, *ex tempore,* Dublin Circuit Court, Berkeley J. November 2013. No written judgment is available.
10 [2000] 1 I.R. 321

the Civil Liability and Courts Act 2004, a Defendant could successfully raise the Defence of the statute with regards to the injury claim while the material damage element of the action would endure.[11] Furthermore, Judge Collins also noted that bearing in mind that the decision in *Hayes v Callinan* in 2000 was available when Civil Liability and Courts Act 2004 was enacted, it would appear that the legislature could have amended the statute of limitations in relation to material damage in 2004 but did not do so. Ultimately, the legislature allowed the *Hayes v Callinan* decision to stand to the effect that the personal injuries claim and material damage claim are two separate causes of action.

Upon appeal, the Circuit Court (Judge Berkeley) held that while there may be a *lacuna* or lack of clarity on the law, the Plaintiff was entitled to maintain separate proceedings in the District Court in respect of material damage and the Circuit Court in respect of the personal injuries sustained in the same road traffic collision. Having regard to the Statute of Limitations point raised, Judge Berkeley referred briefly to the decision of the High Court (Hogan J). in *O'hAonghusa v DCC plc*[12] in which Hogan J held, *inter alia*, that had the Oireachtas intended to amend a legal rule "as fundamental as a primary limitation period", this would have been clearly set out in the amending legislation rather than in what Hogan J. described an oblique fashion (e.g. through another act or statutory instrument).

Return date/Notice of trial

Proceedings issued prior to 3rd February 2014 were issued with a return date and on that date the matter would appear on the Courts list (usually a Friday) in order to fix a date for hearing. Under the current DCR, the matter must be set down for hearing by the service and filing of a notice of trial. The Claimant may serve notice of trial once the appearance and defence have been filed. Where the Claimant fails to serve notice of trial within ten days after the delivery of the Respondent's defence, the Respondent may set the matter down for hearing.[13] Alternatively, the Respondent may apply to dismiss the claim for want of prosecution.[14] Reflecting the procedure in the Circuit Court[15], not less than 10 days' notice of the trial must be given (unless otherwise agreed by the parties)[16]. Parties may apply for a case to be specially fixed by attaching a letter setting out the reasons for the consent and also enclosing a letter of consent from the opposing party.[17]

A Notice of Intention to Proceed must be filed in circumstances where no step has been taken[18] in a civil proceeding for twelve months or more. The party serving the Notice of Intention to Proceed must give not less than one month's notice in writing thereof. [19] Furthermore, the Court may of its own volition request the parties to attend and explain why no step has been taken.[20]

B. New forms of pleading

The Claim Notice

Prior to 3rd February 2014, proceedings in the District Court were generally instituted by way of a civil summons, the format of which varied depended on the relevant cause of action e.g. consumer-hire contracts, hire purchase agreements etc. Most claims could be pleaded by way of a single paragraph which set out in very general terms the nature of the claim[21]. For the most part[22], an action commenced after the 3rd February 2014 is now initiated by way of a Claim Notice[23]. In most instances, other than personal injury claims for which a separate Personal Injury Summons must issue,[24] a claim will fall into one of two categories;–(i) a Claim for a Debt (a liquidated sum) or (ii) what are broadly termed as claims other than debt claims (i.e. claims for general damages).

In both instances, the Claim Notice must include a statement of claim [25]A claim may well fall within either category of claim notice for a liquidated sum arising out of breach of contract. As neither party to a Debt Claim may raise particulars, or request copies of the documents referred to in the Claim Notice without the leave of the Court, the procedure in relation to debt claims is more summary in nature.[26] This is also reflected in the Scale of Costs for such claims which are significantly lower than those which may be recovered in relation to claims other than debt claims.

Debt Claims

Debt Claims are defined as claims for a debt or liquidated sum where no other relief is sought (other than interests and costs)[27]. A statement of claim in a debt claim must state that the claim is for debt or liquidated damages, must specify the amount claimed by way of debt or liquidated damages and must include particulars of the claimant's demand for payment[28].Where the claim is founded on any written document, the statement of claim must state the date of the document and the parties to the document and (*a*) if the claim is for the payment of money, the amount claimed, or

11 As S. 11 of the Statute of Limitations Act 1957 provides for a six year limitation period for actions founded in negligence.
12 [2011] 3 I.R. 348
13 Order 49 Rule 5.
14 Order 49 Rule 6.
15 Order 33 r. 2 CCR, which applies to cases instituted outside Dublin.
16 Order 49 Rule 2. The party filing the notice of trial must also lodge with the Clerk of the District Court for use by the Judge a booklet of pleadings in chronological sequence, a booklet of correspondence in chronological sequence, and copies of other documents which may have been directed to be filed (see Order 49 Rule 7(1)).
17 Order 49 Rule 4(6).
18 A step is defined as one requiring the filing of a document with the Clerk or notification to the Court under these Rules.
19 Order 39 Rule (3)
20 Order 39 Rule(4)
21 Similar to a plenary summons of sorts
22 Although a civil summons will still be used in relation to matters such as family law proceedings. Applications pursuant to Ord. 93A regarding the Land and Conveyancing Law Reform Act 2009 may also be brought by way of a civil summons at this remove.
23 A "*claim notice*" is defined as a document issued under these rules initiating civil proceedings in the District Court in which damages or other relief are claimed against a respondent, and where the context so requires, includes a personal injuries summons, and any reference in an enactment to a "civil summons" must, unless the context otherwise requires, for the purposes of these Rules be taken to be a reference to a claim notice.
24 Order 40A
25 Order 40 rr.5(3) and (4).
26 Order 42 r.7.
27 Sch. 1 of District Court (Civil Procedure) Rules 2014.
28 Order 40 r. 5.

(*b*) if the claim is for breach of contract, the alleged breach or breaches of the contract[29].

Claims other than debt claims

Such claims include claims for general damages for e.g. arising from breach of contract and/or negligence. The Claim Notice in relation to general damages must set out a statement of all material facts on which the claimant relies, but not the evidence by which those facts are to be proven.[30] In addition, the claimant must specify if a claim arises by or under any enactment and identify the specific provision of the enactment that is relied upon.

Disclosure of documents

A Claim Notice and Defence must contain a list of all correspondence and other documents on which the Claimant/Respondent will rely at the trial including the date if any and a brief description of each document[31]. If the Claimant alleges that he/she was unable, at the time at which a claim notice was issued, to include in the claim the information required by DCR Order 40 rule 8, the Claimant must include in the claim notice a statement of the reasons why it is claimed that any such information could not be provided at the time of issue of the claim notice. Pursuant to DCR Ord. 40 r. 10, the claimant must, when the claim notice is served or as soon as may be thereafter (whether by amendment or otherwise) provide such of the information required by this rule as was not included in the claim notice. This requirement, at the point of pleading, is not found in any of the higher courts but is presumably aimed at eradicating "trial by ambush". By carrying over this requirement into personal injury claims and other general damages claims which cannot be categorised as debt claims, it appears that the most onerous disclosure obligation is imposed upon the litigants in the lowest court.

A Respondent may seek copies of the documents listed in the Claim Notice prior to entering an appearance or defence and the Claimant must respond within seven days of the request.[32] A reciprocal obligation is imposed upon the Respondent. A party who fails to comply with a request to provide the documentation listed in the claim notice/defence is precluded from relying on any such document in evidence on his or her behalf, unless the Court is satisfied that there was a sufficient reason for not complying with the request, in which case the Court may allow the document to be put in evidence on such terms as to costs and otherwise as he or she thinks just.[33]

Appearance

A Respondent must enter an Appearance[34] in the same way as provided for in the Circuit and High Courts. The time period within which the Appearance must be entered is not distinct from the time period within which the Defence must be lodged, i.e. not later than 28 days after the service of the claim notice.[35]

Defence

Prior to 3rd February 2014, most District Court claims were defended by lodgment and service of Notice of Intention to Defend which served as both an Appearance and a Defence. The document was remarkable in its brevity – a singular phrase stating that the Defendant intended to Defend the action – from which the Plaintiff could glean nothing about the nature of the Defence which would be raised at hearing. The procedure and form of pleading to be adopted varies depending on whether the claim falls under Order 42 Rule (2) being a simple debt claim[36] or Order 42 Rule (3)[37] in relation to claims other than debt claims (e.g. claim for general damages).

Defence to Debt claim

A Defence to a debt claim must state whether the claim is: (a) disputed as to both liability and amount; (b) disputed only as to amount and if so, what amount is admitted to be due; or (c) admitted in full and if so, whether the respondent proposes to pay immediately or requires time for payment.

Defence to a Claim other than a debt claim

The Grounds of Defence relating to such claims are somewhat more substantial and apart from stating which of the facts are admitted/ denied/ not admitted, if a fact stated in statement of claim is denied the Respondent must (a) give reasons for denying the fact; and (b) if the Respondent intends to prove a fact different from that stated in the statement of claim, state, with necessary particulars, the fact that the respondent intends to prove.[38] Furthermore, the respondent must also state specifically, with particulars, any fact or matter which makes the claim of the claimant not maintainable; or if not stated specifically, might take the claimant by surprise; or raises questions of fact not arising out of the statement of claim[39]. A Defence may be amended without leave following replies to further particulars within 28 days of the receipt of the further particulars or any time thereafter with the leave of the Court. [40]

C. Judgment in Default of Appearance/ Defence

DCR Order 47 applies when seeking judgment in default of appearance or defence in relation to a debt claim while proceedings which concern claims other than debt claims are dealt with by Order 47A. Judgment pursuant to Order 47 may be obtained in the District Court office and if there are any issues arising in relation to the papers lodged, the District Judge can direct that the matter should be referred

29 Order 40 r. 7.
30 Order 40 r. 5(4) (a).
31 Order 40 r. 8 and Ord. 42
32 Order 45B r.2
33 Order 45B r2(5).
34 Order 42 r. 1
35 A respondent may file an appearance and defence after the 28 day period with the consent of the Claimant, however leave of the Court is required if judgment in default of appearance has been obtained, see further Order 42 r. 4
36 Order 42.03
37 Order 42.01
38 Order 42 rule 3(4)
39 Order 42 rule 3(5)
40 Order 42 Rule 5

to Court for a decision.[41] Applications under Order 47A are brought by way of motion and grounding affidavit. A period of 14 days warning of the intention to issue the motion must be provided together with consent to late filing of the appearance/defence.[42] The motion will be given a return date not less than 14 days from the date of service of the notice of motion[43], although if there are special reasons requiring an urgent hearing of the motion an application may be made for an shorter return date though not less than four clear days from service.[44]

D. Joining a third party

A third party notice must be served within a mere 10 days of service of the Claim Notice upon the Respondent without the necessity to seek the leave of the court to join the Third Party[45]. Arguably as the operative rule does not use mandatory but rather permissive language by the use of the word "may", there may be scope to argue for service outside this brief period of time.

E. Particulars and Discovery

While a respondent may at any time before or at the time of delivery of a defence seek particulars, a Claimant may only do so within 28 days of the delivery[46] of the Defence. Furthermore, particulars may not be raised in relation to a debt claim unless otherwise ordered by the Court.[47] Upon failure to comply within 21 days of the service of the notice, the party seeking particulars may bring a motion in that respect.

Discovery may be sought pursuant to Order 45B r.3(1) of documentation in addition to those disclosed on the face of the Claim Notice/Defence. The general provision in relation to requests for discovery under the former rules[48] has been replaced by Order 3 r. (2) whereby the request must specify the precise documents or categories of documents in respect of which discovery is sought; provide the reasons why each category of documents is required to be discovered and explain why discovery of the documents sought is necessary for disposing fairly of the claim or for saving costs. Practitioners might note that no notice of motion seeking discovery or further particulars may be issued by any party later than 14 days after notice of trial has been served.[49]

F. Costs and fees

A fresh Scale of Costs, Outlay and Counsel's Fees has been introduced in relation to proceedings which issue under the new rules. The fees have increased for both solicitors and barristers in the District Court. Whereas the requirement to certify for Counsel endures, the inclusion of a Scale of Counsel's Fees removes the necessity to measure the fees.[50] Furthermore, the court may in the special circumstances of the case (to be specified by the Court) award costs and/or Counsel's fees in excess of the Scale of Costs[51]. It is unclear whether the Scale of Fees is intended to be all-encompassing and include brief fee and drafting fees. Where the District Court rules are silent, the procedure adopted in the other courts of full pleading arguably applies whereby drafting arises by way of addition to a brief fee. An order in respect of drafting fees may be required to prevent any uncertainty when enforcing costs.

Conclusion

There are further amendments to procedure incorporated in the new DCR, however is not possible to cover all of them within the confines of this article; e.g. rules have also been introduced to allow for case management[52], mediation and conciliation[53]. Much has changed in the past year in relation to practice and procedure in the District Court. The manner in which claims in general, and personal injury claims in particular, will be dealt across the numerous districts remains to be seen at this remove. As the District Court has now moved towards a court of fuller pleadings, one would hope that the resources required to service plenary actions and to accommodate an increase in claims will move in a similar direction. ■

41 Order 47 Rules 3 and 4
42 For the procedure to be adopted see *Civil Procedure in the District Court,* (2nd ed.), Dowling &Mullally (Roundhall) Ch. 5 and Ch. 6.
43 Order 47 Rule (2)(4)
44 Order 47 Rules 2(3) and (6)
45 Order 42A r. 1.
46 Order 42 r.3 (9)
47 Order 42 r.3(7)
48 Order 46A r.1 of 1997 Rules as amended.
49 Order 49 Rule 9. See also DCR Order 42 r.13 which stipulates unless otherwise ordered by the Court, the costs of requesting particulars must be certified as necessary by the Court in order to recover same, failing which costs will be awarded to the opposing party.
50 Order 53 Rule 29
51 Order 53 Rule 2(2)
52 Order 49A
53 Order 49B

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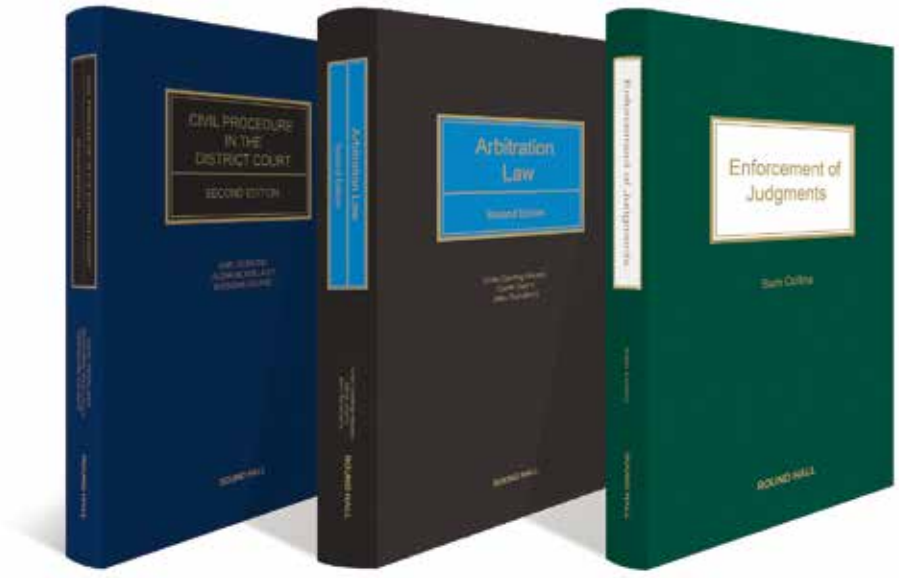

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