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Miscarriages of Justice

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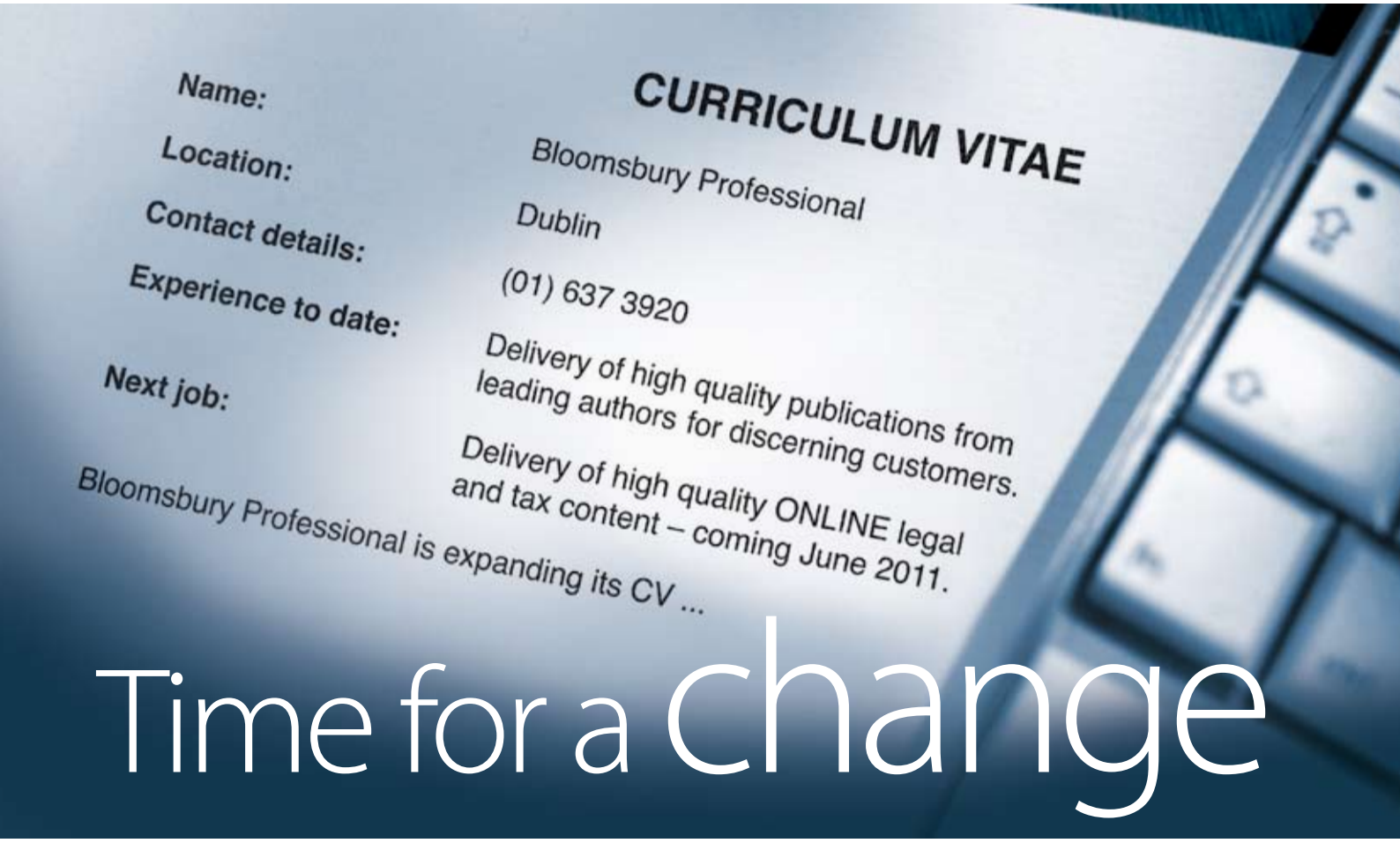

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Miscarriages of Justice In Ireland

David Langwallner BL

It is better that ten guilty persons escape, than that one innocent suffer[1].

The Criminal Procedure Act 1993

Miscarriages of justice are a far too familiar part of all legal landscapes from Sacco and Vanzetti in The United States to the Guildford Four. There has even been a suggestion in recent times that the notorious Dr. Crippen was a victim of a miscarriage of justice! However, for present purposes, I am not undertaking a historical survey but am confining my analysis to the present position in relation to miscarriages of justice in Ireland under the Criminal Procedure Act 1993. Section 2 is the starting point. It states that:

(i) A person who has been convicted of an offence either on indictment, or after signing a plea of guilty and being sent forward for sentence … and who, after appeal to the Court including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence and

(ii) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive,

(iii) may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.

From this, it can be appreciated that the trigger for an application under the section is a new or newly discovered fact, which demonstrates that there has been a miscarriage of justice. The burden of proof (on the balance of probabilities) is firmly on the alleged victim of the miscarriage of justice.

Further, it is pellucid from the defined terms of the Act that a new fact also includes a fact known to the convicted person at the time of the trial or appeal proceedings, the significance of which was appreciated by him, where he alleges that there is a reasonable explanation for his failure to adduce evidence of that fact. In contrast, a newly discovered fact is a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact, the significance of which was not appreciated by the convicted person or his advisors during the trial or appeal proceedings.

Section 3 (1) of the Act of 1993 is also of relevance and provides that on the hearing of an appeal against conviction of an offence the Court[2] has a number of options available. These include affirming the conviction, quashing the conviction with no further order or quashing the conviction and ordering a retrial, or substituting a lesser offence and sentence.

Further, Section 7 of the act concerns a petition to the Minister for Justice for a pardon under Article 13.6 of the constitution and again invokes the motor of Section 2 in that the applicant has to adduce a new or newly-discovered fact to demonstrate that a miscarriage of justice has occurred in relation to the conviction. If the Minister then is of the opinion after making inquiries that either no miscarriage has been shown and no useful purpose would be served by further investigation or disjunctively that the matters dealt with by petition could be more appropriately dealt with by way of application to the court pursuant to Section 2, then the minister, is obligated to inform the petitioner and take no further action. If, however, he/she thinks differently to the above, he shall recommend to the government that either the President grant a pardon or a committee pursuant to Section 8 of the act should be ordered to inquire into and report on the case.

Section 9 is also of relevance and was recently considered as we shall see later in the *Hannon*[3]case. Under Section 9, where a conviction has been quashed under Section 2 or on appeal, or where someone has been acquitted on re trial and the court has certified that a newly discovered fact shows there has been a miscarriage of justice, or there has been a pardon and disjunctively the minister is satisfied there has been a miscarriage of justice, the Minister shall pay compensation to the convicted person, or if dead, to his legal personal representatives, unless the non-disclosure of the fact in time is wholly or partly attributable to the convicted person. It might be noted that a person has the alternative option of suing for damages. The quantum of compensation ordered by the Minister can be appealed to the High Court.

Section 29 of the Courts of Justice Act 1924 regulates the right of appeal from the CCA to the Supreme Court. It states that in order for there to be an appeal from the CCA to the Supreme Court. the CCA or the Attorney General have to certify that a case involves "a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court." The decision in any such appeal "shall be final and conclusive".

The early case of *Pringle* is an important milestone in the jurisprudence and illustrates the interaction between the various acts and is perhaps a convenient point of departure.[4]

1 *Blackstone,Sourced, Commentaries on the Laws of England (1765-1769) Book IV, ch. 27*

2 The Court of Criminal Appeal hereinafter to as the CCA.

3 Many of the cases involve a myriad of different applications to the CCA and Supreme Court . Thus for convenience purposes given that I seek to extract the principles from all stages of the litigation I will refer to the beginning of the litigation though I will also give cites where appropriate. The crucial hearing in *Hannon* is April 27th 2009. It might be added that I have tried to deal with the case largely but not exclusively in sequence.

4 It might be noted as intimated in a previous footnote that the cases

The *Pringle* Litigation[5]

The case has a complicated procedural and factual history.[6] In November 1980, the plaintiff was convicted of capital murder and robbery. In May 1995, the CCA quashed the conviction on the grounds that the plaintiff had established a newly discovered fact which rendered his conviction unsafe and unsatisfactory. The court ordered a re-trial but the Director of Public Prosecutions entered a *nolle prosequi*. The CCA subsequently refused the plaintiff's application for a certificate that the newly discovered fact showed there had been a miscarriage of justice. This decision was upheld by the Supreme Court on appeal on the grounds that the fact that the plaintiff's conviction had been quashed as being unsafe and unsatisfactory did not, on its own, entitle him to a certificate that there had been a miscarriage of justice. However, the matter was referred back to the CCA to allow the plaintiff to renew his application. The plaintiff then instituted proceedings seeking damages.

In the Supreme Court hearing, the court determined on points of general applicability that:

(i) An inquiry as to whether a certificate should be given is not a criminal trial but an inquiry as to whether there has been a miscarriage of justice, the onus being on the appellant to prove that there has been a miscarriage of justice on the balance of probabilities. It is not a situation that involves the presumption of innocence.

(ii) A newly discovered fact, either on its own or in combination with other matters can show that there has been such a miscarriage of justice and a certificate cannot issue unless the court is also satisfied on the balance of probabilities that such miscarriage of justice has been shown to exist by a newly discovered fact either on its own or to a significant degree in combination with other matters.

(iii) The mere fact of the appellant's conviction having been quashed as being unsafe and unsatisfactory, could not on its own entitle the appellant to a certificate that there has been a miscarriage of justice;

(iv) The primary meaning of miscarriage of justice is that, the applicant for a certificate is on the balance of probabilities, as established by relevant and admissible evidence, innocent of the offence of which he was convicted. Though it might be noted that O' Flaherty J in The CCA also determined that the grant of a certificate is of wider import than a claim of factual innocence.

"For example, if in a given case the courts were to reach the conclusion that a conviction had resulted in a case where a prosecution should never have been brought in the sense that there was no credible evidence implicating the applicant, that would be a case where a certificate most likely should issue."

Gannon[7]

In this case, the Applicant was convicted of rape and assault. A key issue in his defence was as to identity. Following conviction, various documents came to light, in particular, notes from a guidance counsellor to whom the complainant had first reported the rape and a report of a Garda containing details of description.

The CCA found that the newly-discovered fact did not render the conviction unsafe and unsatisfactory and thus dismissed the application. The Supreme Court found that the discrepancies between the description of the assailant in the newly-discovered material and the description given in the complainant's statement in the book of evidence and in her testimony were minimal and there was nothing in the newly-discovered material which could have assisted the applicant in any way or enabled the defence to present the case to the jury in any different light.

In reaching its conclusions, the CCA concluded that they were required to carry out an objective evaluation of the newly-discovered fact with a view to determining whether the conviction was unsafe and unsatisfactory and that they could not conclude for certain that the advent of a newly-discovered fact would have had no effect on the manner in which the defence was conducted at the trial.

The CCA also indicated that whether a conviction is unsafe and unsatisfactory cannot be determined by having regard solely to the course taken by the defence at trial. Blayney J opined:

> "The court could not conclude for certain that the advent of the newly-discovered material would have no effect on the manner in which the defence was conducted. The furthest one could go would be to say that it is possible that it might not have had any effect and this would not relieve the court from examining what the position would have been if the defence had availed of the newly-discovered material and altered its strategy accordingly."

The CCA also accepted that nondisclosure of evidence that would probably affect the manner in which the defence might meet the case might lead to a quashing of a conviction, but the facts in this case do not support such a conclusion.

Meleady

In *People (DPP) v Meleady & Grogan*[8], the "*newly discovered fact"* was evidence of a fingerprint found on the inside of a front passenger door window in a car.

However, the CCA considered that it was precluded from granting a certificate by reason of the absence of a decision

often have many hearings: a CCA hearing under Section 2, a hearing on whether a point of law of exceptional public importance is involved in the CCA, a Supreme Court hearing, further applications if the matter is referred back to the CCA. I am dealing with the cases globally and what principles they establish and where necessary I will highlight where they fit into the process.

5 *People (DPP) v Pringle* [1995] 2 I.R. 547, *People (DPP) v Pringle (No.2)* [1997] 2 I.R. 225

6 And illustrates the point made in the earlier footnote of the number of separate hearings that can take place.

7 *People (DPP) v Gannon* [1997] 1 I.R. 40

8 [1995] 2 I.R. 517

by a jury in a trial in which the non-disclosed material had been available to the accused. An appeal to the Supreme Court was taken on a point of law of exceptional public importance asking whether the Court erred in its reason for refusing the certificate.

The Supreme Court determined, in remitting the case to the CCA, that the CCA seemed to say in effect that it could not enter on the inquiry as to whether a certificate should be granted because there has been no trial at which the non-disclosed material was made available. The Supreme Court concluded that there did not seem to be any provision in the 1993 Act which would support this conclusion. Thus the CCA erred in law in refusing to grant a certificate by reason only of the fact that the guilt or innocence of the appellants had not been determined by a jury at a trial where the non-disclosed material had been available to the accused.

The matter was then referred back to the CCA and the CCA in granting a certificate then held that the mere possibility, however reasonable, that had the matter gone to a retrial a jury would have had a reasonable doubt on foot of the newly discovered facts is not a ground for granting the certificate. In that situation the applicants would not have established, as a matter of probability as distinct from possibility, that the newly discovered facts would have led to an acquittal.

The court also held that a miscarriage of justice need not necessarily be certified in every case where, had the possibility of a new trial been open, it would not have been appropriate to apply the proviso leading to a dismissal of the appeal and refusal of a new trial, as to do so would interpret the rights under section 9 far too broadly and conflict with the concept of a civil onus of proving miscarriage of justice as a matter of probability.

The court also indicated that cases of "miscarriage of justice" are not confined to the type of situation described by Lynch J. in *Pringle*.

Geoghegan J. indicated that:

> "… the exercise with which this court is concerned under the Criminal Procedure Act, 1993 , is whether newly discovered facts are tantamount to proving a miscarriage of justice and that is not confined to the question of actual innocence but extends to the administration in a given case of the justice system itself."

We will explore in some detail in our examination of the *Wall*[9] and *Hannon* judgements what precisely is encompassed within the phrase miscarriage of justice.

Callan

In *Callan*, the Applicant had been convicted of murder in the course of a robbery and sought to have his conviction quashed on the basis that he had been under pressure at his original trial. The Court found that this was not a fact which would have in anyway affected the result of his trial, had it been known to the court at the time. In this context, the CCA considered what constitutes a "fact" and indicated that for a fact to come within the provision, it must be relevant to the trial and the trial court's decision and have been admissible at trial

The court also concluded that even if they were wrong on this point, they were satisfied that there was no reasonable explanation for the Applicant's failure to adduce evidence of the fact at the time.[10]

Callan made an application to the CCA pursuant to s.29 of the Criminal Justice Act 1924 seeking leave to appeal to the Supreme Court. He had submitted that due to coercion, he was unable to advance the defence of a lack of common design. Interestingly in denying the application for leave to appeal, the CCA found that the coercion was submitted as a new fact, and not as a reasonable explanation for failing to adduce a fact at the original trial, in any event they held in totality that the matters raised in the application related to matters peculiar to the case at hand and these were not of exceptional public importance, and an appeal was not seen as being in the public interest.[11]

Hannon[12]

In *Hannon*, the applicant was convicted of sexual assault and assault against a 10 year old girl in a context where there was a history of animosity between families. Nine years later, the complainant retracted these statements and admitted that they had been fabricated because of the family animus.

Hardiman J got quickly to the essence of the matter:

> "It is …difficult to know how a person could more clearly and obviously be in the position where a new or newly discovered fact "shows conclusively that there has been a miscarriage of justice", …than a person whose accuser has, almost a decade after the event, confessed that her allegation was wholly false and contrived."

The court concluded that the applicant was entitled to a certificate since a fact which is both new and newly discovered - the complainant's confession of having fabricated the allegation - shows that his conviction was a miscarriage of justice.

The learned judge, after citing various dictionary definitions, endorsed Geoghegan J. in *Meleady* and stated that the meaning of a miscarriage of justice was broader than the primary meaning of factual innocence. Hardiman J thus indicates that factual innocence does not encompass all circumstances that might amount to a miscarriage of justice.

It might be noted in the earlier case of *Wall*[13], an exhaustive definition of the term "*miscarriage of justice* " has not been attempted by the Court of Criminal Appeal or by the Supreme Court, which had indicated that courts should not attempt such a definition and that examples of circumstances which may constitute a miscarriage of justice include, but are not limited to the following:—

9 *D.P.P. v. Nora Wall* [2005] I.E. C.C.A. 140.

10 *DPP v Callan* [2003] 2 I.C.L.M.D. 39

11 [2003] 10 I.C.L.M.D. 52: *DPP v Callan*

12 *People (DPP) v Hannon* [2009] 2 I.L.R.M. 235

13 *D.P.P. v. Nora Wall* [2005] I.E. C.C.A. 140.

(i) Where it is established that the applicant was innocent of the crime alleged.
(ii) Where a prosecution should never have been brought in the sense that there was never any credible evidence implicating the applicant.
(iii) Where there has been such a departure from the rules which permeate all judicial procedures as to make that which happened altogether irreconcilable with judicial or constitutional procedure.
(iv) Where there has been a grave defect in the administration of justice, brought about by agents of the State

The court also indicated that the exercise in which they were engaged is not confined to the question of actual innocence but extends to the administration in a given case of the justice system itself, citing *Meleady*[14] .

It might be added that the categories as to what constitutes a miscarriage of justice are to some extent, it seems to this author, plastic and open ended and capable of further development. One interesting category is what the American legal system terms "ineffective assistance of counsel".

In *McDonagh*[15] the CCA the court determined in refusing leave to appeal, that the advice of counsel was perfectly permissible and did not amount to a miscarriage of justice. However, they did indicate that in exceptional circumstances, the conduct of a trial and steps taken preliminary to the trial by the legal advisors of an accused would give rise to an appeal, consistent with the requirement of the Constitution that no person was to be tried on any criminal charge *"save in due course of law"* and that the conduct of the defence may in certain circumstances, either at the trial or in the steps preparatory thereto, be such as to create a serious risk of a miscarriage of justice.

Furthermore, in *Murray*[16] in a miscarriage of justice application Geoghegan J, though not finding a miscarriage on the facts, indicated:

> "There is no doubt that as a matter of law and in exceptional circumstances, a conviction may be quashed by the Court of Criminal Appeal on the grounds that a miscarriage of justice may have arisen from incompetent handling of the defence at the trial. Cases in support of that proposition have been cited but it is not necessary to review them. It is well known that that is the legal position."

Kelly[17]

In *Kelly*, Kearns J (as he then was) had this to say about the term miscarriage of justice

> "While that term has acquired a particular meaning for the purpose of applications of this nature, one which does not require detailed consideration here, it must also be taken as meaning that the material or fact newly discovered must be such as would have genuinely enabled the defence to raise a doubt in the minds of a jury. It does not contemplate remote, hypothetical or fanciful possibilities."

In *Kelly*, the court was very anxious to stress its role in the evaluation of the new evidence presented. The court also stressed the linkage of fresh evidence on appeal with fresh evidence under a miscarriage of justice application.

Kearns J further indicated, in a crucial set of findings, that it is up to the court to conduct an objective evaluation of a newly discovered fact to determine *inter alia* whether there has been a miscarriage of justice. In the *Kelly* litigation, Kearns J blends the criteria for the reception of fresh evidence on appeal with the criteria for the reception of new or newly discovered evidence on a miscarriage of justice application. In essence, the learned judge indicates that the court must engage with and evaluate the new evidence to determine whether it would materially affect the decision reached. Was the evidence credible, material and important and would it influence the outcome of the case? The judge indicates that the concept of materiality is read in reference to evidence adduced at the trial and not in isolation and such evidence has to show that it would genuinely enable the defence to raise a doubt such as to render the conviction unsafe.

The learned judge also indicated that the court must focus on how the defence could have utilised the fresh evidence:

> "the court's role is not to enquire whether the new material renders the conviction of the appellant unsafe and unsatisfactory having regard to the course actually taken by the defence at trial, but rather to ascertain whether the defence could have used the material in such a way as to raise a doubt about a significant element in the prosecution case and the possibility that a different approach by the defence may have led to an acquittal."

In the earlier CCA judgement in *Kelly*, the court drew a distinction between new factual evidence and opinion evidence and indicated that opinion evidence should not constitute a newly-discovered fact within the terms of the Act of 1993. The court did however also conclude that:

> "There might be cases where a state of scientific knowledge as of the date of trial might be invalidated or thrown into significant uncertainty by newly developed science. There might also be cases where the opinion of an expert at trial might be shown to have been tainted by dishonesty, incompetence or bias to such a degree as to render his evidence worthless or unreliable. Once such "facts" were established, expert opinion evidence must be admissible so that such new "facts" could be properly interpreted."

Nevin: 22nd November 2010[18]

In the recent *Nevin* case, Hardiman J, in interpreting Section 2 and pre existing case law on what needs to be established to invoke its jurisdiction, states:

14 *People (DPP) v Meleady & Grogan* [1995] 2 I.R. 517
15 From May 22nd 2000 and post.
16 11th April 2005.
17 *People (DPP) v Kelly* [2008] IECCA
18 *DPP v Nevin* [2010] IECCA 106

(1) That the applicant need not establish that a miscarriage of justice has actually occurred before proceeding to quash the conviction,
(2) That the Act operates to provide redress in cases where facts come to light for the first time after an appeal, which show that there may have been a miscarriage of justice,
(3) That s.2 provides redress to an applicant who can point to material which, if it had been available at the trial might - not necessarily would - have raised a reasonable doubt in the minds of the jury.

With respect to the disclosure of facts and the conduct of the defence, the learned judge indicated that:

> "Finally, the question of significance as opposed to triviality of an undisclosed fact or document cannot be determined, or at least cannot be determined solely, by a consideration of the course actually taken by the defence at the trial. It would be a dangerously hypothetical exercise to speculate, having regard to that course, what approach the defence might have taken if they had known a fact which was actually concealed from them at the relevant time. But in an appropriate case it might be proper to consider the defence's attitude at the trial if, for example, a newly discovered fact arose which however might only have supported a defence which the conduct of the accused's defence had specifically disavowed at the trial, or had not pursued in cross-examination or otherwise."

It might be added that there is a certain ambiguity or a degree of nuance in Hardiman J's judgement as to how far a court can speculate as to the course of action that might have been taken in the light of the new evidence by the defence as compared to previous case law.

Conmey[19]

In the recent *Conmey* case, the nub of the matter was that the State had failed to disclose original statements from witnesses who implicated the accused in later altered statements, which one of the witnesses then said was a result of coercion. There is not much development of existing principle in the case but the following points need to be noted. Hardiman J reiterates an earlier point he made in *Hannon* about the danger of reconstructions of a defence. The learned judge opines that:

> "if material, due to concealment or otherwise, was unavailable to the defence at the trial, it follows that it cannot have influenced the course taken by the defence at that time. Nor is it realistically possible to reconstruct with any degree of certainty what course the defence would have taken if they had had available to them material which was in fact unavailable."

On the facts, the learned judge, in granting a certificate, indicated that a court could not precisely weigh the effect of non disclosure but:

> "However, the task of the Court on an application such as this is not to attempt the fruitless task of achieving certainty about a hypothetical change in the evidence in a trial that took place more than thirty years ago. It is instead to resolve the question whether this is a case "… where facts came to light for the first time after the appeal which showed that there might have been a miscarriage of justice"

Critical Observations[20]

In conclusion, there are a number of critical observations about the jurisprudence of the court in particular and miscarriages of justice in general.

First, it is tolerably clear that preservation of evidence remains problematic, and the procedures in place by the authorities are piecemeal at best. Thus we can see from the *Conmey* case that the authorities may not retain documentary evidence in a manner which one would expect, and indeed they may be retained in a manner which makes them inaccessible, or in the case of physical or biological evidence, might render further testing impossible, or irrevocably tainted. This is an area which begs regulation and reform. Thus, documentary, physical, and other evidential materials must be retained in an appropriate manner, and failure to regulate in this area may well negate any possibility of exonerating a wrongly convicted person. This is a potentially burgeoning area of jurisprudence.

Second, the jurisprudence of the Courts in the area of opinion evidence, would seem to shy away from embracing these opinions as new or newly discovered facts.[21] This could pose significant difficulties in the area of forensic retesting of physical or biological evidence, the interpretation of which does rely on the opinions of forensic experts. We will revert to this issue when we deal finally with points arising from the utilisation of DNA evidence but just to note at this juncture that the admissibility of expert opinion has been laden with difficulties in common law courts. In the UK, the Law Commission has recently published a paper on this issue.

Third, the area of ineffective legal counsel has been brought up in the CCA. Early rulings have not been successful, however, it may in future become a more prevalent feature of miscarriage of justice cases. Indeed it is one of the major issues leading to findings of a miscarriage of justice in the United States and is frequently invoked by innocence projects where of course there is also a claim of factual innocence.

Fourthly, an area which appears not to have been canvassed before the Irish Courts is wrongful conviction as a result of false confessions. The International Innocence

19 [2010] IECCA 105, 22ND November 2010.

20 I am indebted to Edward Mathews and Steve Donoghue Ph.d caseworkers on the Irish Innocence Project for their assistance on these points.

21 In particular the judgments in *People (DPP) v Kelly* [2008] IECCA previously dealt with, where the Court asserted that *"for expert opinions to be admissible as newly discovered facts, the state of scientific knowledge as of the date of the trial must be invalidated or thrown into significant uncertainty by newly developed science"*

Network has long since recognised not only the possibility, but propensity, of false confessions giving rise to wrongful convictions. This is as yet an inadequately explored area in our jurisprudence.[22]

The role of DNA

The use of DNA to exonerate convicted individuals has been crucial in the investigation of miscarriages of justice, especially in the USA. In general, many of the provisions of the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010 are to be welcomed. The majority of the provisions in the DNA Bill have been drafted upon the recommendations of a Law Reform Commission (LRC) report on the establishment of the DNA database. Most importantly, it should be noted that this report recommended the indefinite retention of biological material from a crime scene to prevent miscarriages of justice.[23]

However, the DNA Bill is silent on this issue and this author is of the view that the Bill should reflect the need to indefinitely preserve biological material found at the crime scene.

The LRC report is also silent on the types of DNA technique to be used. In Northern Ireland the more sensitive low copy number DNA profiling was originally rejected as evidence in *Hoe*.[24] However, it was recently accepted under certain conditions in England in *Reed and Reed*.[25] Another sensitive and specialised DNA profiling technique, Y-STR profiling, has also been readily accepted in American courts.[26]

In Ireland, we currently use the standard SGM test, however our State Forensic Lab does not carry out other more advanced and sensitive techniques. Indeed, given the reluctance to embrace expert evidence as new or newly discovered facts in the light of *Kelly*, it remains to be seen how our courts would accept expert opinion presenting more sensitive DNA profiling that casts doubt on the safety of a conviction.

The above suggests that that there are further issues, including the ramifications of expert evidence that need to be canvassed before the courts. Nonetheless, it must be stressed that our courts in general display a sensitivity and heightened awareness of these issues and have evolved guidelines that weaved together are tolerably clear in dealing with miscarriages of justice applications. ■

22 *Psychology of False Confessions, 2 Journal of Credibility Assessment and Witness Psychology 14 (1999)*

23 The Establishment of a DNA Database LRC 78-2005 para 3.05

24 *R v Sean Hoey* [2007] NICC 49.

25 *R v Reed and Reed* [2009] EWCA Crim 2698.

26 *Shabazz v State 592 S.E.2d 876, 3 FCDR 276 Court of Appeals of Georgia*

Divorce in a cold climate*

Ann FitzGerald, BL

Family law issues mirror society at large. During the Celtic Tiger years, we had the 'Big money' cases and argument about whether 'full and final settlement' clauses were effective. Now we have insolvency cases, frequent applications to vary or re-open settlements and the interaction of the family Court with the insolvency Courts.

Insolvency And Family Law

(I) Dealing With Debt[1]

A major new judgment of Mr. Justice Abbott has become available as of December 2010 (2010 IEHC 440) under the redacted title of *XY v YX* ('XY'). In this eagerly-awaited judgment, many of the thorny questions arising for separating spouses who are insolvent are addressed.

Mr. Justice Abbott stated that the case involved 'very substantial assets but even more substantial debts in consequence of which the assets of the parties are in very substantial negative equity. A major implication is that it is likely that the debts attaching to the vast majority of the assets of the husband will be taken over by NAMA'. Since the judgment was delivered in July 2010, it appears that the debts of the husband's companies have indeed been transferred to NAMA.

The case concerned a Judicial Separation application in respect of a couple in their sixties after a long marriage with no dependent children. The assets were held to range in value, depending on the method used, from €1.4 billion to €2 billion, with corresponding debt of €2.3 billion, giving a net loss of some €300 million. While the asset/debt profile in this case is extensive by any standards, the principles enunciated by the Court will have a 'trickle down' effect across the spectrum of cases of insolvency and family law.

Mr Justice Abbott explained that 'with the onset of

* Edited version of Lecture delivered to Family Lawyers Association Cork on 21st January 2011 and Law Society of Ireland on 5th March 2011. With thanks to Marie Baker S.C. Gabriel Gavigan BL, Ross Aylward BL, Louise Crowley (UCC), Gerard Durcan S.C., Siobhan Lankford BL, and Paul McCarthy BL.

1 For a UK discussion on 'Dealing with Debt' see 'Unlocking Matrimonial Assets on Divorce' Sugar and Bojarski, 2009 Second Edition at page 539 ff and Chapter 25 ; also 'Divorce and Recession: Creditors, Competitors and Bankruptcy' [2009] Jordan's Family Law p.497

NAMA, and the worsening financial situation, a number of case management sessions were held at the end of 2009 and it was decided that the husband should present his assets in a schematic way and in a format which would assist the Court in ascertaining how value might be generated from the assets, notwithstanding the massive debt over a period of time'.

And he continued 'The agreed attitude of the parties to this approach was that, due to the massive negative equity, exact valuations were not very much at issue in the case, but that what was important was the dynamic of interaction between the assets and various attributes thereof, as described in the spreadsheet, and NAMA and any non-participating banks.'

While we are not clear as to what is meant by the 'dynamic interaction between the assets and NAMA', it seems to indicate that the Court may have regard to the prospect that some of the NAMA assets might provide an income or have a capital value at some point in the future, ten years being the period envisaged by the Court. Thus family law Courts may consider making interim orders and adjourn/postpone future consideration of Property Adjustment orders and other ancillary orders until a later date. The Court in *XY* then entered into a lengthy treatise on various methods of valuation, the likelihood or otherwise of a positive return from NAMA over a ten year period and an analysis of the spreadsheet prepared on behalf of the husband arising from the case management sessions.

'Provision' for the spouses was also considered by reference to the 'factors' in Section 16 (2) of the Family Law Act 1995 ('the 1995 Act') and the Court ordered that the wife should become the beneficial owner of the family home currently held in the 'B Trust' effectively controlled by the husband, valued at €4.4 million with estimated tax payable of €1 million on taking it out of the Trust. The Court regarded 'the family home as a consumer item, as a residence for the first few years but, ultimately, it will have significant investment value on a sale, and the new economic reality is such that the wife should make immediate plans for the orderly and efficient disposal and preservation of the house'.

And the judgment continues: 'An indication of the changed times through which this case has progressed is given by the fact that in his first Affidavit of Means, prior to the collapse of Lehman Brothers, the husband could freely declare his income from all sources at €6 million per annum while, at the same time, the wife indicated *de facto* household expenses of [€700,000] per annum, although she said she received only monthly payments from the husband's company averaging €6,750.'

Mr Justice Abbott then made a finding of equality between the parties: 'I am of the view that there is no other conclusion to make other than that both partners contributed equally to the family and its welfare and resources,' and found that the wife ' is certainly entitled to have the benefit of such encumbrance free assets of the family as are available in the B Trust holding the family home, rather than let them be immersed in the debt of the husband's businesses, in a situation where the husband's encumbrance free assets must be dealt with in the context of the decisions of this judgment on bankruptcy and/or NAMA court review'.

Mr Justice Abbott went on to address the accommodation needs of the parties and found that the 'needs of the wife are catered for in the short term in the family home, and thereafter by more modest accommodation as may be substituted therefor. For the moment, the husband requires and will obtain, subject to NAMA approval, bachelor-type accommodation in his office in the city and more convivial accommodation at the house in D., subject to NAMA's approval, which I anticipate will be forthcoming by reason of the lack of commerciality of a quick sale of the house at D. and the need to preserve it through human occupation.'

It is worth noting in this context that in these recessionary times, in *XY* , ongoing interconnection of the parties was unavoidable. In such cases, spouses and ex-spouses will have no choice but to continue in business arrangements together given the commercial reality that a business cannot be readily sold and neither spouse can borrow sufficiently to effect a buy out of the other. Such arrangements may require a suitable shareholders' agreement or partnership agreement to regulate the working of the business.

(II) Priority And Insolvency:

Mr Justice Abbott explores this issue in detail in *XY* under the following subheadings.

(a) Bankruptcy

Under the heading entitled 'Bankruptcy and NAMA - Implications for Insolvency', Mr Justice Abbott declared that 'this is a case involving manifest insolvency where the husband's businesses cannot continue without the support of the banks or, in the event of the takeover by NAMA of much of the debt, the support of NAMA.'

Mr Justice Abbott then referred to Section 59 of the Bankruptcy Act, 1988 which provides inter alia as follows:

> 'Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall — (a) if the settlor is adjudicated bankrupt within two years after the date of the settlement, be void as against the Official Assignee.'

In a crucial finding, the Court declared that the words 'purchaser for valuable consideration and in good faith' in Section 59 was indeed wide enough to include a spouse whose claim to a Property Adjustment Order had been compromised or determined by a Court.

Mr Justice Abbott stated 'While there is no case law in Ireland, and the Report of the Bankruptcy Law Committee, which reported in the mid 1960s, does not mention any such authority, I am satisfied that the Courts could set aside an Order obtained fraudulently and in bad faith from the Family Court if satisfied that it was for the purpose of defeating creditors and not for the purpose of making proper provision for a spouse.'

(b) Priority Over Judgment Mortgages[2]

Abbott J. addressed the comparable scenario arising in the case of a judgment mortgage and its interface with family law proceedings. Having made reference to the Irish authorities,[3] he found that there is abundant authority for the proposition that a judgment mortgage does not rank in priority to a claim by a dependant spouse in judicial separation proceedings, even where the proceedings are not registered as a *lis pendens*. He noted that while it cannot be asserted that the vesting of property in the official assignee upon the adjudication of a bankrupt has the same limited effect as the registration of a judgment mortgage on a property, the authorities show the importance that the Irish courts attach to the protection (from creditors' claims) of provision made by the family courts.

> 'It would seem to me, therefore, that it is the duty of a family law Court, while bearing in mind the provisions of s. 59 of the Act of 1988, to act with probity and only for the purpose of making such provision as is necessary for the spouses in accordance with the Act of 1989, as amended by the Act of 1995, or, in the case of divorce, the Family Law (Divorce) Act 1996. It would seem that a proper exercise of such jurisdiction involves not the division of assets between the spouses to the exclusion of the creditors, but the provision of necessities such as living accommodation, basic maintenance and in appropriate cases security therefor, or property transfer orders in lieu thereof, bearing in mind that while in social terms creditors have rights, the only protection thereof lies under the bankruptcy code. Such rights should not be allowed to act in an oppressive manner over the rights of spouses, so as to potentially leave them in a position where they must rely on state social welfare supports.'

Abbott J. held that the provision of maintenance is not contrary to the bankruptcy code or to s. 59 of the Act of 1988. He noted that it is prudent and in the interest of the avoidance of instability immediately after separation to have some security for the provision of maintenance, and that the Order made in this case was commensurate with the protection of creditors and was reasonable.

(c) NAMA and Family Law

Mr Justice Abbott considered the impact of NAMA (the National Asset Management Agency) on the proceedings and in particular, the impact of the 'setting aside' provision of Section 211 of the 2009 Act (which unlike the similar provision in the Bankruptcy Act 1988, does not have a time limit).

Section 211 reads inter alia as follows:

> "(1) Where, on the application of NAMA ...it is shown to the satisfaction of the Court that—
> (a) an asset of a debtor or associated debtor, guarantor or surety was disposed of, and
> (b) the effect of the disposition was to defeat, delay or hinder the acquisition by NAMA ...or to impair the value of an eligible bank asset or any ... that NAMA ...would have acquired or increased a liability or obligation but for that disposition, the Court may declare the disposition to be void if in the Court's opinion it is just and equitable to do so."

Mr Justice Abbott explained that in certain circumstances, it may well be that NAMA will seek to enforce guarantees against the husband and this might involve selling any of the unencumbered property including the property ordered to be charged as security for maintenance. Therefore, it could be argued that the Order of the Court could be reviewed by a court exercising jurisdiction under Section 211. On this point, he noted as follows:

> 'For the reasons advanced in this judgment when considering the implications of this Order for the bankruptcy code, it is unlikely that any Court exercising jurisdiction under section 211 would declare that such limited charging would be a "disposition to be void" on the basis that it was the Court's opinion that it would be just and equitable to do so'.

It now appears to be settled law that once proceedings for Judicial Separation or Divorce are instituted, creditors, including NAMA, will subsequently take subject to the result of the family law proceedings. It also may not go too far to say that once a debtor is married, creditors' interests will rank *after* a spouse to the extent that such spouse may secure what Mr Justice Abbott called 'necessities' in matrimonial proceedings.

It will no doubt engender debate that the Court in *XY* allowed the wife a house valued at €4.4 million less the estimated €1 million tax, net €3.3 million, while retaining her own separate assets, and secured maintenance of €60,000 per annum (reducing to €50,000 p.a.) notwithstanding the overall astonishing levels of insolvency of the family as a whole. Whether the Supreme Court will agree with these findings in some other case remains to be seen. Equally it is possible that NAMA may have considered a review of the judgment in conjunction with Section 211. Surely, by Irish standards, it is arguable that the 'provision' of a house worth €3.3 million to the wife is not a 'necessity'? Less well-off debtors in our society may understandably look enviously at the outcome for the wife in *XY*.

The judgment reaches its conclusion with a finding that the wife should receive well in excess of 50% of the net assets notwithstanding the husband's insolvency. Finally the Court considered what was to happen with the assets likely to be transferred in the near future to NAMA:

> 'It was argued, by [Counsel for the Husband] that

2 For more on the interaction of Judgment Mortgages and the Land and Conveyancing Reform Act, 2009- see Suzanne Mullally, B.L. in FLJ Spring 2010

3 *S. v. S.* (Unreported, High Court, Geoghegan J., 2nd February, 1994); *A.C.C. Bank Plc. v. Vincent Markham & Mary Casey* [2005] IEHC 437, (Unreported, High Court, Clarke J., 12th December, 2005); *Dovebid Netherlands BV v. William Phelan trading as the Phelan Partnership and Denise O'Bryne* [2007] IEHC 239, (Unreported, High Court, Dunne J., 16th July, 2007).

> in light of the fact that the husband, now in his mid sixties, faces ten difficult years interacting with NAMA and recovering his business, or at least minimising the losses thereof, primarily in the interest of NAMA and the non-participating banks, and in the unlikely event of a surplus ever being generated, he should obtain a larger, if not the total share, of the net assets.... If the wife were cut off from enjoying the prospect of even a speculative return at the end of ten years effort by the husband, I consider that subjectively she would consider it a shattering injustice. Bearing in mind the objective consideration of justice, the Court must balance the intended efforts of the husband against the passivity of the wife over the next ten years and, hence, I consider that a division of 80/20 should be made in favour of the husband in respect of these speculative gains. ...A further consideration on a practical level which has some bearing on the justice of the case is that to cut the wife off completely would be potentially damaging to her health by making her emotionally insecure and would also engender a propensity to continuously litigate this grievance, either directly or by proxy. This is not in anyone's interest, least of all in the interest of NAMA.'

Thus in forthcoming family law proceedings, where a spouse has already been declared bankrupt or has had his/her assets and related debts transferred into NAMA, it will be necessary to join the Official Assignee in Bankruptcy or NAMA as a Notice Party to the proceedings and have a modulised or 'split' hearing where the Notice Party may be heard. Thus when an Order for Bankruptcy has been made or the assets transferred to NAMA, the family Court will be unable to make ancillary Orders in respect of such assets/debts save on notice to the Official Assignee in Bankruptcy or NAMA. This was not necessary in *XY* as the judgment was given *before* the involvement of NAMA.

Where A Settlement Cannot Be Implemented

In what circumstances may a Court set aside a Consent Judicial Separation or Divorce Order when same has been *ruled in Court?* This issue will now be considered. As to whether a Court may set aside a Judicial Separation or Divorce Consent agreement *prior* to the ruling thereof will not be considered here[4].

A series of cases in the UK[5] are authority in that jurisdiction for two propositions: firstly, once the provision of the parties' agreement is embodied in an Order of Court, the legal effect of those provisions is thenceforth derived from the Order and not from the agreement. Secondly, any factor which undermines to a significant degree or otherwise invalidates the basis upon which one or the other or both of the parties agreed to the making of the Order, may constitute a ground for setting aside the Order.

From this second proposition, a number of possible scenarios arise for consideration, such as failure to disclose all material facts, mistake, undue influence, bad legal advice and a subsequent 'supervening event'. This latter was most dramatically addressed in the UK case of '*Barder*'[6] where, after the time limit for appeal had expired but prior to the Order being executed, the wife killed the two children of the marriage and then committed suicide. The House of Lords identified four conditions to enable a Court to effectively allow an appeal out of time against an Order for financial provision or property adjustment:

(a) The supervening events invalidate the basis, or fundamental assumption, upon which the order was made;
(b) The events should have occurred within a relatively short period of time from the making of the Order usually "no more than a few months";
(c) The application for leave to appeal should be made reasonably promptly;
(d) Third party rights in connection with property which is the subject matter of the order should not be prejudiced.

The case of *Myerson* [2009] EWCA CIV 282, in the UK Court of Appeal, concerned a catastrophic collapse due to the 'credit crunch' of the value of the assets which the husband had agreed to retain in an ancillary relief settlement.[7] In *Myerson*, while the Court refused the husband's application to re-open the settlement, it did not rule out the possibility of so doing in another more appropriate case on so-called '*Barder*' grounds.

The first Irish cases on this subject are a number of judgments of Abbott J. in 2007 and 2008[8]. More recently, the issue of the Court's power in Irish law to vary, set aside and make fresh Orders is tackled in comprehensive fashion in the judgment of Ms. Justice Dunne in *CO'C v DO'C* [2009] IEHC 248 ('*O'C*') and FLJ Winter 2009 page 19 ff[9]. The judgment also focuses on the power of the Court by virtue of Section 9 of the 1995 Act to make repeated Orders for Property Adjustment 'at any time during the lifetime of the spouses'.[10]

In *O'C*, the couple had executed a Judicial Separation Consent which was ruled as an Order of the High Court in February 2008. It is not apparent in the judgment if the Consent included a 'full and final settlement' clause. The Applicant wife discharged her obligations under the Consent

4 See also 'Riding out the Economic Storm: Delayed and Deferred Property Sales' Jordan's Family Law 2010 page 45 and Foskett 'The Law and Practice of Compromise' 7th edition 2010 Sweet and Maxwell p.403-407

5 *De Lasala v De Lasala* [1980] A.C. 546, *Livesey v Jenkins* (see above) and *Barder v Barder* [1988]A.C. 20 and Foskett 'The Law and Practice of Compromise' page 408-420 ff and the corresponding UK provision see 'Unlocking Matrimonial Assets on Divorce' at page 553 ff and 'Divorce and Recession Part I : Practical and Legal Considerations' [2009] Jordan's Family Law at 301.

6 See footnote 6

7 See [2009] Jordan's Family Law 'Credit Crunch in the Court of Appeal *Myerson v Myerson'* at 490 ff

8 *JC v MC* (2007) unreported 22nd January 2007; *AK v JK* (2008) IEHC unreported 31st October 2008; NF v EF (No 2) 92008) unreported December 19th 2008 and see 'Dissolved Marriages and the Recession: The Variation of Orders for Ancillary Relief' Ross Aylward IJFL Spring 2009

9 This summary and sequence is taken from the case note prepared by Suzanne Mullally B.L in FLJ Winter 2009

10 See Ross Aylward footnote 9 at page 14 on how variation of a final order fits in with general jurisprudence.

contd. on p.59

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A directory of legislation, articles and acquisitions received in the Law Library from the 22nd March 2011 up to 13th May 2011
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Court of Criminal Appeal – Misuse of drugs – Evidence - Manner in which value of controlled drugs could be proved – Whether evidence of value of controlled drugs restricted to member of Garda Síochána or officer of Customs and Excise who has knowledge of unlawful sale or supply of controlled drugs – Whether retired garda competent to give such evidence - Whether defence not raised at trial could be relied upon in appeal – *People (DPP) v Cronin (No. 2)* [2006] IESC 9, [2006] 4 IR 329

considered – Appeal dismissed (2/2010 – CCA – 15/10/2010) [2010] IECCA 99
People (DPP) v Hanley

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O'B(C) v DPP

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Admissibility – Market value of controlled drugs – Whether aggregate market value such as to constitute offence – Opinion evidence – Whether garda evidence as to market value of controlled drugs admissible – Sufficiency of test sample of controlled drug – Whether miscarriage of justice – *People (DPP) v Finnamore* [2008] IECCA 99, [2009] 1 IR 153 considered – Misuse of Drugs Act 1977 (No 12), s 15A – Criminal Procedure Act 1993 (No 40), s 3 – Appeal dismissed (56/2009 – CCA – 12/7/2010) [2010] IECCA 86
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Admissibility - Search without warrant – Reasonable cause to suspect offence committed or being committed – Third party complaint - Principles to be applied – Whether hearsay or anonymous information could ground garda's reasonable suspicion that statutory offence being committed or that animal mistreated – Particularity of complaint – Whether hearsay of belief based on undisclosed grounds sufficient to establish reasonable grounds - *DPP v Byrne* [2003] 4 IR 423 distinguished; *DPP v Farrell* [2009] IEHC 368, [2009] 4 IR 689; *DPP v Finnegan* [2008] IEHC 347, [2009] 1IR 49; *DPP v Cash* [2007] IEHC 108 (Unrep, Charleton J, 28/3/2007); *DPP v Reddan* [1995] 3 IR 560; *DPP v Penny* [2006] 3 IR 553; *O'Hara v Chief Constable of the RUC* [1997] AC 286; *R v Da Silva* [2006] 4 All ER 900 considered - Control of Horses Act (No 37) 1996, s 34 - Appeal allowed; cross-appeal dismissed (2010/23 & 185 – SC – 1/7/2010) [2010] IESC 42
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Misuse of drugs – Possession or control – Whether possession or control of controlled drug proven to requisite standard – Withdrawal of case from jury – Whether trial judge erred in failing to withdraw case from jury – Principles to be applied – *R v Galbraith* [1981] 1 WLR 1037 applied; *People (DPP) v Foley* [1995] 1 IR 267; *People (DPP) v Hunter* (Unrep, CCA, 8/11/1993) and *R v Whelan* [1972] NI 153 considered -Appeal dismissed (93/2009 – CCA –29/7/2010) [2010] IECCA 85
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Court of Criminal Appeal – Severity - Leave to appeal refused – Certificate to appeal to Supreme Court – Test to be applied – Whether decision of court involving point of law of exceptional public importance – Whether in public interest – Whether point of law already well established - Whether point of law must arise from decision of Court of Criminal Appeal – Review of sentence – Failure by trial judge to await delivery of probation or other reports as ordered before proceeding to sentence - Whether sentence should have been set aside once legally incompetent procedure identified on part of sentencing judge – Whether Court of Criminal Appeal erred in imposing a sentence by reference to judgment and reasons adopted by trial judge – Whether Court of Criminal Appeal obliged to impose sentence it considers appropriate – Whether Court of Criminal Appeal obliged to consider sentence *de novo* once new or fresh evidence received and accepted – Whether sentencing judge erred in taking into account circumstances which may, but have not, led to separate charge sheets being leveled against the appellant – Whether sentencing judge erred in law in failing to provide for non-custodial element in sentence as part of its obligation to provide rehabilitation of appellant having regard to her personal circumstances – *DPP v Higgins* (Unrep, SC, 22/11/1985); *People (DPP) v Littlejohn* [1978] ILRM 147; *People (DPP) v Kenny* (Unrep, CCA, 5/2/2004); *People (DPP) v Kelly* (Unrep, CCA, 11/7/1996); Reg v Kidd *[1998] 1 WLR 604; DPP v Gilligan (No 2)* [2004] 3 IR 87 and *DPP v O'Donoghue* (Unrep, CCA, 18/10/2006) considered - Criminal Procedure Act 1993 (No 40), s 3 – Certificate refused (229/2006 – CCA – 16/7/2010) [2010] IECCA 72
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Correspondence - Description - Whether acts described with sufficient particularity to permit finding of corresponding offence - Whether surrender could be ordered for two offences for which composite sentence had been imposed - Whether 'stole' in arrest warrant should be given normal popular meaning - Whether 'stole' in arrest warrant sufficient to permit finding of corresponding offence - *Minister for Justice, Equality and Law Reform v Desjatnikovs* [2008] IESC 53, [2009] 1 IR 618; *Minister for Justice, Equality and Law Reform v Sliczynski* [2008] IESC 73 (Unrep, SC, 19/12/2008) and *Minister for Justice, Equality and Law Reform v Ferenca* [2008] IESC 52, [2008] 4 IR 480 considered - *Pilecki v Circuit Court of Legnica, Poland* [2008] 1 WLR 325 followed - Criminal Damage Act 1991 (No 31), s 2 - Non-Fatal Offences Against the Person Act 1997 (No 26), s 5 - Criminal Justice (Theft and Fraud Offences) Act 2001 (No 5), ss 4 & 8 - European Arrest Warrant Act 2003 (No 45), ss 5 & 38 - Appeal dismissed, cross appeal allowed (444/2008 & 445/2008 - SC - 18/3/2010) [2010] IESC 16
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Delay – Benefit of period spent in custody – Imprisonment for offences subsequently committed in State – Prejudice – Whether UK authorities waited unnecessarily before seeking surrender – Whether permissible for UK authorities to wait until domestic sentence almost complete before transmitting warrant – Whether sentence would amount to consecutive sentence – European Arrest Warrant Act 2003 (No 45), ss 13, 18 and 19(2) – Council Framework Decision (2002/584/JHA), art 2.2 – Order for surrender granted (2010/182EXT – Peart J – 8/10/2010) [2010] IEHC 352
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Surrender - Suspended sentence - Conditions - Whether evidence before court to permit finding that respondent had 'fled' - *Minister for Justice, Equality and Law Reform v Sliczynski* [2008] IESC 73 (Unrep, SC, 19/12/2008) followed - European Arrest Warrant Act 2003 (No 45), ss 5, 10, 16 & 20 - Appeal allowed (123/2009 - SC - 25/3/2010) [2010] IESC 19
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Custody - Youth care agency – Wrongful removal - Location of child in course of search forming part of drugs operation – Application for order providing for detention of child – Appointment of guardian *ad litem* –Interviews with child – Desire not to return to Netherlands – Obligation to take account of views of child – Discretion of court - Policy considerations – Deterrence of abduction – Interests of child – Inappropriate relationship with older man – *B v B* [1998] 1 IR 299; *SR v SR* [2008] IEHC 162 (Unrep, Sheehan J, 21/5/2008) and *Re M* (Abudction: Rights of Custody) [2008] 1 AC 1288 considered – Hague Convention on Civil Aspects of Child Abduction 1980, articles 12 and 13 – Order for return of child (2010/6915P – Birmingham J – 27/7/2010) [2010] IEHC 322
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Dublin II Regulation – Order of transfer - Application for interim injunction – Applicant out of UK for more than three months – Whether obligation to take back under Regulation ceased – Whether entry visa constituted a valid residence document for purpose of exception to cessation of obligation – Definition of "residence document" – Failure to inform UK authorities of claim by applicant to have been outside that state for more than three months – Whether failure had material bearing on transfer order – Lack of candour in application – No fair issue to be tried – Council Regulation 343/2003/EC, art 2, 16 and 20 – Leave refused (2010/911JR – Cooke J - 02/07/2010) [2010] IEHC 258
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Negative recommendation – Rejection of appeal – Refusal of refugee status – Refusal of subsidiary protection – Whether procuring of inclusion of minor applicant void and in breach of fair procedures – Whether jurisdiction to make decisions in respect of minor applicant – Whether good and sufficient reason for extension of time – Delay – Discretion – Explanation – Relevance of merits or strength of case – Absence of full explanation – Acquiescence – Inclusion of minor child in notice of appeal – Absence of challenge to inclusion of minor child's case – Seeking of leave to remain on behalf of minor applicant – Alleged failure to understand *ex debito justitiae* principle – Whether principle relevant – Absence of distinct claim to fear of persecution on behalf of child - *D v Minister for Justice, Equality and Law Reform* (Unrep, SC, 31/1/2003); *GK* v *Minister for Justice* [2002] 2 IR 418 and *De Roiste v Minister for Defence* [2001] 1 IR 190 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Extension

of time and relief refused (2007/925JR – Cooke J – 27/7/2010) [2010] IEHC 306
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Asylum

Report of Commissioner – Discretion to review report – Alleged failure to take into account relevant considerations – Allegations of persecution – Claim that past persecution contributed to well founded fear of persecution – Negative recommendations of authorised officers – Negative credibility findings – Express exclusion of past persecution from consideration – Whether refusal to consider past events mistaken – Whether mistake warranted exercise of discretion to quash reports – Whether mistake could be cured on appeal – Request for asylum file from another Member State – Entitlement of responsible Member State to seek information from other Member States – *Stefan v Minister for Justice* [2001] 4 IR 203 considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5 – *Certiorari* granted (2010/180JR – Cooke J – 23/7/2010) [2010] IEHC 304
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Deportation

Constitutional rights of three citizen children – Identification of substantial reason for deportation – Interest of State – Integrity of asylum and immigration procedures – Personal circumstances and history of applicants – Weight of rights against interests of State – Unfounded claim for asylum of father – Failure to disclose marriage breakdown – Request to consider entitlement to residence as father of Irish born children – Substantial reasons for belief that immigration procedures being abused – Right of Irish citizen child to care and support of parents – Age of children – Medical condition of children – Whether failure to give due weight to age, dependence and medical conditions – Whether failure to give due weight to contribution father could make practically and financially to children – Whether undue weight given to negative considerations - *Dimbo v Minister for Justice, Equality and Law Reform* [2008] IESC 26, (Unrep, SC, 1/5/2008); *Oguekwe* v *Minister for Justice, Equality and Law Reform* [2008] IESC 25, [2008] 3 IR 795 and *Haghighi v Netherlands* (2009) 49 EHRR SE8 considered – Leave granted (2010/659JR – Cooke J – 23/7/2010) [2010] IEHC 305
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Deportation

Injunction – Interlocutory injunction - Application to restrain deportation — Residence - Family rights – Irish born child – Whether lawful to remove mother of dependent Irish born child pursuant to deportation order - Whether deportation of applicant would breach right of family members – Conduct of applicant – Whether arguable case for grant of leave to seek judicial review- Whether substantial grounds established - Whether applicant entitled to remain in State pending determination of proceedings – Whether breach of Convention rights – Independent review mechanism – Whether applicant entitled to a full and independent assessment to be made of all facts and circumstances of the case - Whether fair issue to be tried – Whether damages adequate – Balance of convenience – *Oguekwe v Minister for Justice* [2008] IESC 25 [2008] 3 IR 795 followed; *AO & DL v Minister for Justice* [2001] 1 IR 1 considered – Immigration Act 1999 (No 22), s 3 - Leave to seek judicial review & interlocutory injunction granted (2010/569JR – Cooke J – 14/7/2010) [2010] IEHC 296
B (J) v Minister for Justice, Equality and Law Reform

Deportation

Interlocutory injunction – Father of Irish citizen children – Leave to remain application – Admission regarding lies in asylum application – Claim of strong connection with State based on status as father of citizen children – Request to have regard to constitutional and convention rights of children – Examination of file of father – Consideration of school standards and education in Nigeria – Analysis of proposed interference with family life of applicant – Interests of State – Legitimate aim of deportation – Proportionality of deportation – Information on education in Nigeria – Extension of time for judicial review – Explanation for delay – Lawyer delay – Justice of case – Impact of deportation on rights of children – Power to consider documents not before Minister – Obligation to have regard to representations – Whether substantial grounds for review – Whether failure to consider impact of deportation on private life of children – Failure to furnish country of origin information in support of assertions regarding education – Adequacy of remedy of judicial review – Available remedies – Absence of test of anxious scrutiny – Necessity for candour – *Klass v Germany* (1979-80) 2 EHRR 214; *Abdulaziz v United Kingdom* (1985) 7 EHRR 471; *Vilvarajah v United Kingdom* (1992) 14 EHRR 248; *N v Finland* (2006) 43 EHRR 12; *CG v Bulgaria* (2008) 47 EHRR 51; *Abdolkhani v Turkey* (No 30471/08); *McD v L* [2009] IESC 81 (Unrep,. SC, 10/12/2009); *Muminov v Russia* (No 42502/06); *Izhevbekhai v Minister for Justice, Equality and Law Reform* [2008] IEHC 23 (Unrep, Feeney J, 30/1/2008); *Yang v Minister for Justice, Equality and Law Reform* [2009] IEHC 96 (Unrep, Charleton J, 13/2/2009); *Ugbo v Minister for Justice, Equality and Law Reform* [2010] IEHC 80 (Unrep, Hanna J, 5/3/2010; *Adebayo v Minister for Justice, Equality and Law Reform* [2004] IEHC 359 (Unrep, Peart J, 27/10/2004) *Alli v Minister for Justice, Equality and Law Reform* [2009] IEHC 595 (Unrep, Clark J, 2/12/2009); *Ofobuike v Minister for Justice, Equality and Law Reform* [2010] IEHC 89 (Unrep, Cooke J, 13/1/2010); *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25 [2008] 2 ILRM 481; *Soering v United Kingdom* (1989) 11 EHRR 438; *Smith and Grady v United Kingdom* (1999) 29 EHRR 493; *Bensaid v United Kingdom* (2001) 33 EHRR 10; *Swedish Engine Drivers Union v Sweden* (1979-80) 1 EHRR 617; *Chahal v United Kingdom* (1997) 23 EHRR 413 and *Bakare v Minister for Justice, Equality and Law Reform* [2010] IEHC 296 (Unrep, Cooke J, 14/7/10) considered – Leave refused (2010/75JR – Clark J – 30/7/2010) [2010] IEHC 320
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Deportation

Leave to appeal to Supreme Court – Refusal of leave to seek judicial review of deportation order – Whether decision involved point of law of exceptional public importance – Whether failure to consider rights of Irish born children – Impact of transfer on Irish born children having regard to hazards and disadvantages in parent's country of origin – Whether Irish born children of adaptable age – Whether interference with family life - *Oguekwe v Minister for Justice* [2008] IESC 25 [2008] 3 IR 795 followed; *R(I) v Minister for Justice* [2009] IEHC 510 (Unrep, Cooke J, 26/11/2009); *Beldjoudi v France* [1992] EHRR 801 and *Boultif v Switzerland* [2001] 33 EHRR 1179 considered -Immigration Act 1999 (No 22), s 3 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - European Convention on Human Rights, articles 3 and 8 - Leave to appeal refused (2010/238JR – Cooke J – 14/7/2010) [2010] IEHC 282
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Deportation

Subsidiary protection – Ministerial discretion – Deportation orders prior to 20th October 2006 - New circumstances or facts shown to exist – Whether such discretion contained within Council Directive transposed by regulations into national law – Whether appellant has right to have subsidiary protection application heard – Interpretation of regulations - *NH v Minister for Justice, Equality and Law Reform* [2007] IEHC 277, [2008] 4 IR 452 overruled - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 3 and 4 - Council Directive 2004/83/EC – Applicant's appeal dismissed (2009/64 & 2008/393 – SC – 9/7/2010) [2010] IESC 44
Izevbekhai v Minister for Justice, Equality and Law Reform

Subsidiary protection

Mental illness – Involuntary detention under Mental Health Act 2001 - Availability of medical treatment in country of origin – No substantial grounds of real and substantial risk of being subject to conduct contrary to Convention – Whether less favourable medical treatment sufficient to engage Convention rights – Whether failure by respondent to consider impact of medical condition on capacity to avail of state protection relevant – Whether material before respondent capable of grounding claim decision unreasonable – Balance humanitarian considerations and integrity of asylum process – Right to family life – Relationship not amounting to family life – Whether application really assertion of choice of State within which to reside rather than interference with rights – Scope of justified interference with right – Whether medical evidence affected level of dependence

on mother – *GK v Minister for Justice* [2002] 2 IR 418, *The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, *S(BI) v Minister for Justice*[2007] IEHC 398 (Unrep, Dunne J, 30/11/2007) and *Agbonlahor v Minister for Justice* [2007] IEHC 166 [2007] 4 IR 309 applied – *R (Mahmood) v Home Secretary* [2000] EWCA Civ 315 [2001] 1 WLR 840 and *R (Razgar) v Home Secretary* [2004] UKHL 27 [2004] 2 AC 368 followed – *Bensaid v United Kingdom* (2001) 33 EHRR 205, *HLR v France* (1998) 26 EHRR 2, *N v Finland* (2006) 43 EHRR 12 and *Kouaype v Minister for Justice, Equality and Law Reform* [2005] IEHC 380 (Unrep, Clark J, 9/11/2005) considered – *DVTS v Minister for Justice* [2008] 3 IR 476 and *D v United Kingdom* (App No 30240/96) (Unrep, 02/05/1997) distinguished – Refugee Act 1996 (as amended) (No 17), s 5 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2) - Mental Health Act 2001 (No 25) - European Convention on Human Rights Act 2003 (no 20), sch I art 3 - Criminal Justice (United Nations Convention against Torture) Act 2000 (No 11), s 4 - Immigration Act 1999 (No 22), s 3 – Leave refused (2008/1375JR – Herbert J – 01/07/2010) [2010] IEHC 268
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Interlocutory injunction

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Interlocutory injunction

Immigration - Subsidiary protection - Deportation order - Judicial review - Whether fair issue to be tried - Whether damages adequate remedy - Whether balance of convenience lay between grant or refusal of injunction - Whether compelling reason for immediate deportation - *Cosma v Minister for Justice, Equality and Law Reform* [2006] IESC 44 (Unrep, SC, 10/7/2006) distinguished - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) - Rules of the Superior Courts 1986 (SI 15/1986), O 84 - Relief granted (2010/171JR - Cooke J - 15/4/2010) [2010] IEHC 110
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INTELLECTUAL PROPERTY

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Copyright – Music – Internet piracy – Illegal downloading – Recording companies – Internet service provider – Peer-to-peer sharing – Blocking injunction – Right to privacy – Data protection – Proportionality – Whether injunction just or convenient – Whether legal power to grant injunction – Whether power to block or disable access to internet sites available under Irish law – Whether Ireland in compliance with European law obligations – Whether defendant should make identities of infringers available – Whether defendant mere conduit – *Norwich Pharmacal v Custom and Excise* [1974] AC 133; *EMI v Eircom Ltd* [2005] 4 IR 148; *BMG Canada Inc v Doe* [2005] FCA 193; *X v Flynn* (Unrep, Costello J, 19/5/1994); *In re Employment Equality Bill 1996* [1997] 2 IR 321; *McGee v Attorney General* [1974] IR 284; *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Douglas v Hello!* [2001] 1 QB 967; *EMI Records (Ireland) Ltd v Eircom Ltd* [2010] IEHC 108 (Unrep, Charleton J, 16/4/2010); *PPI Ltd v Cody* [1998] 4 IR 504; *Prince Albert v Strange* (1849) 2 De & Sm 293; *Marleasing SA v La Commercial Internacional de Alimentacion SA* [1990] 4 ECR I-4135 (C-106/89); *Wilhelm Roith v Deutsches Rotes Kreuz* [2004] ECR I-8835 (C-397/01); *Pupino* [2005] I-5285 (C-105/03); *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 545 (US) 913 and *EMI (Ireland) Ltd v Eircom plc* [2009] IEHC 411 (Unrep, Charleton J, 24/7/2009) considered – Copyright and Related Rights Act 2000 (No 28), ss 17, 27, 37, 40 and 43 – Data Proetection Act 1988 (No 25) – Interpretation Act 2005 (No 23), s 5 – Communications Regulation Act 2002 (No 20) – Communications (Amendment) Act 2007 (No 22), s 10 – Digital Economy Act 2010 (UK) – Communication Acts 2003 (UK) – European Communities (Copyright and Related Rights) Regulations 2004 (SI 16/2004) – European Communities (Directive 2000/31 EC) Regulations 2003 (SI 68/2003) – Council Directive 95/46/EC – Council Directive 2001/29/EC – Council Directive 2002/21/EC – Council Directive 2000/31/EC, arts 12, 13, 14, 15 – Framework Directive 2009/140/EC – European Convention on Human Rights – Constitution of Ireland 1937, Articles 40.3.1°, 40.3.2° and 43.1 – Relief refused (2009/5472P – Charleton J – 11/10/2010) [2010] IEHC 377
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LANDLORD & TENANT

Commercial lease

Validity of lease – Block owned by shareholders and directors of defendant – Occupation by defendant – Ownership changes – Due diligence - Proposal to treat lease as void and surrender property based on absence of resolution approving lease – Whether lease non-cash asset of requisite value - Whether defendant in breach of s. 29(1) when lease entered – Whether lease voidable – Whether defendant estopped from avoiding lease – Onus on defendant to establish section applied – Value of non-cash asset – Capital value of lease to lessee – Assignment value of lease – Authorisation by shareholders – Duomatic principle – Honest and *intra vires* informal agreement of all shareholders not requiring formal resolution – Purpose of section – Intention of Oireachtas – Protection of shareholders – Absence of time limit on right to avoid arrangement – Multiple changes of ownership – Compliance with obligations under lease – Rent reviews – Existence of preferential shareholder with right to attend meeting without voting – *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638(Ch) [2006] FSR 17; *Buchanan Ltd v McVey* [1954] IR 89; *Re Greendale Developments (In Liquidation) No 2)* [1998] 1 IR 8; *Re PMPA Garages Ltd* [1992] IR 315; *Re Duomatic Limited* [1969] 2 Ch 365; *Re Express Engineering Works Ltd* [1920] 1 Ch 466*; Parker and Cooper Ltd v Reading* [1926] Ch 975; *Re George Newman & Company Ltd* [1895] 1 Ch 674; *NBH Limited v Hoare* [2996] EWHC 73 (Ch) and *Demite Ltd v Protec* [1988] BCC 638 considered – Companies Act 1990 (No 33), s 29 – Declaration that lease valid and binding (2009/3946P – Finlay Geoghegan J – 22/7/2010) [2010] IEHC 300
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Notice to quit

Ejectment summons – District Court hearing – Refusal of adjournment to await outcome of related case – Time – Service of notice to quit – Act of eviction – Refusal of adjournment – Whether applicant guilty of delay – Prejudice – Whether wrong ongoing – Whether usual time limits applied – Acquiescence – Whether participation in District Court proceedings amounted to acquiescence – Whether statutory provision compatible with European Convention on Human Rights – *Dublin City Council v Fennell* [2005] 1 IR 604 and *Pullen v Dublin City Council* [2008] IEHC 379 (Unrep, Irvine J, 12/12/2008) applied – *Carmody v Minister for Justice* [2009] IESC 71 (Unrep, SC, 23/10/2009), *De Róiste v Minister for Defence* [2001] 1 IR 190, *BTF v Director of Public Prosecutions* [2005] IESC 37 [2005] 2 IR 559, *Q(M) v Judges of the Northern Circuit* (Unrep, McKechnie J, 14/11/2003), *McCann v United Kingdom* (2008) 47 EHRR 40, *Cosic v Croatia* (App No 28261/06) (Unrep, 15/01/2009) considered; *Donegan v Dublin City Council* [2008] IEHC 288 (Unrep, Laffoy, 08/05/2008) and *Connors v United Kingdom* (2005) 40 EHRR 9 not followed – Housing Act 1966 (No 21), s 62 – Housing Act 1970 (No 18), s 13 – European Convention on Human Rights – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21 – Application refused (2009/823JR – Hedigan J – 08/07/2010) [2010] IEHC 270
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Duty of care – Solicitor – Undertaking – Letter of appointment – Solicitor engaged by financial institution lending money for property transaction – Whether negligent to accept undertaking that loan monies will be used exclusively to purchase property and charge will be registered against property – Whether negligent to advance further monies secured by extension of security when no evidence that security in place – Whether common practice to accept such undertakings – Damages – "No transaction" cases – Negligent advice from solicitor that there is good title in property transaction – Assessment of damages - *Roche v Peilow* [1985] IR 232 applied; *Reddy v Bates* [1983] IR 141 referred to – Finding for plaintiff; assessment adjourned (2008/10559P - Clarke J – 1/6/2010) [2010] IEHC 236
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Unauthorised development

Shopping centre – Material change of use – Prohibition on use - Decision that internal alterations constitute exempted development – Discretion of court – Public interest in compliance with planning code – Conduct of parties – Definition of retail warehouse – Sale of comparison goods – Development plan – Defined retail strategy – Probability that continued retail trading had adverse impact on strategy – Entry into lease in reliance upon confirmation of compliance – Identification of alternative premises – Time sought to conclude negotiations and fit out alternative premises – Whether order to reinstate appropriate – Whether premature to determine necessity for reinstatement in advance of cessation of unauthorised use – Cost – Whether disproportionate and punitive to order reinstatement – *Morris v Garvey* [1983] IR 319 and Leen v Aer *Rianta* [2003] 4 IR 394 considered - Planning and Development Act 2000 (No 30), ss 4 and 160 – Order prohibiting sale of comparison goods granted with stay; reinstatement refused (2009/64MCA and 157COM – Finlay Geoghegan J – 30/7/2010) [2010] IEHC 310
Warrenford Properties Limited v TJX Ireland Limited

Article

Conaghan, Danielle
The National Asset Management Agency act 2009 and the Planning and
Development (amendment) act 2010: parallel planning powers?
2010 IP & ELJ 152

Statutory Instrument

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Library Acquisition

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PRACTICE & PROCEDURE

Appeal

Certificate to appeal – Point of law - Exceptional public importance – Public interest – Judicial review – Material error – Substantial grounds – Whether point of law of exceptional public importance rendering appeal desirable in public interest– Whether permissible for court to determine error not material at leave stage – *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 510 (Unrep, Cooke J, 26/11/2009) and *Ryanair Ltd v Flynn* [2000] 3 IR 240 followed; *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3 (Unrep, Sc, 21/1/2010)and *T(AM) v RAT* [2004] 2 IR 607 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(3)(a) – Certificate refused (2010/93JR – Cooke J – 28/10/2010) [2010] IEHC 374
O (S) v Minister for Justice, Equality and Law Reform

Costs

Discretion – Costs follow event – Complex litigation – Plaintiff's claim dismissed – Whether defendant entitled to full order for costs – Burden on unsuccessful party to show basis for departure from general rule – Defence added to evidence adduced and legal submissions – Whether relevant that significant part of case devoted to issues on which plaintiff succeeded – Whether defendant responsible for degree of complexity of issues and time expended – Whether discretion as to costs to be exercised with consideration to the role by successful party to length and complexity of case – Whether unjust if successful defendant recover costs from plaintiff of unsuccessfully pursuing issues – Whether appropriate separate costs orders on different issues or one order including offset of plaintiff's entitlement to an order for percentage of costs –*Grimes v Punchestown Developments Co Ltd* [2002] 4 IR 515 applied; *Dunne v Minister for the Environment* [2008] 2 IR 775 and *Veolia Water UK plc v Fingal County Council (No 2)* [2007] 2 IR 81 followed - Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 1 – Percentage of costs in favour of defendant (2008/9658P - Finlay Geoghegan J – 16/07/2010) [2010] IEHC 279
McAleenan v AIG (Europe) Ltd

Costs

Notice party – Application by Attorney General – Private law claim – Nuisance – Constitutional question – Whether notice party's appearance necessary for entire hearing – *Fitzpatrick v K* [2009] 2 IR 7 followed ; *Dunne v Minister for the Environment* [2008] 2 IR 775 and *Curtin v Dáil Éireann* [2006] IESC 27 (Unrep, SC 6/4/2006) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 60, r 2 – Constitution of Ireland 1937, arts 40 and 43 – Limited costs awarded (2006/1375P – Laffoy J – 17/6/2010) [2010] IEHC 291
Smyth v Railway Procurement Agency

Isaac Wunder order

Liberty to issue plenary summons – Proceedings claiming injunction restraining enforcement of order for costs – Complaint to European Commission – Investigation of complaints of plaintiff – Request for comments on amount of costs in respect of leave stage of judicial review – Response of Irish authorities – Order for costs pre-dating Directive requiring access of review procedure not prohibitively expensive – Validity of order for costs – Constitutional right of access to courts – Purpose of *Isaac Wunder* order – Whether reliefs proposed unfounded and unstateable – Application refused (2010/71IA – Cooke J – 23/7/2010) [2010] IEHC 321
Kenny v An Bord Pleanála

Isaac Wunder order

Motions - Special case - Appeals - Plaintiff restrained from taking any further step 'in these proceedings' without leave of Supreme Court - Whether *Isaac Wunder* order affected only special case proceedings or extended to entirety of claim - *Rooney v Minister for Agriculture* [1991] 2 IR 539 and *Tara Mines v Minister for Industry and Commerce* [1975] IR 242 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 34, r 2 - Appeal allowed (217/2007 & 111/1990 - SC - 9/3/2010) [2010] IESC 12
Rooney v Minister for Agriculture and Food

Judicial review

Public law remedy – Solicitor client relationship – Prisoner - Compelling solicitor and counsel to release files – Alleged inability to conduct defence or prepare case – Absence of inhibition on issuing of plenary proceedings – Whether matter appropriate for judicial review – Nature of judicial review – Public law remedy – Importance of rights of prisoners – *Ryan v Governor of Midlands Prison* [2010] IEHC 337 (Unrep, MacMenamin J, 16/6/2010) considered - Application dismissed (2010/1016JR – MacMenamin J – 5/8/2010) [2010] IEHC 316
Walsh v McEniry

Summary judgment

Directors of companies – Partners – Guarantees in respect of liabilities and borrowings – No dispute amounts due – No dispute demands made – Solicitors – Understanding of consequences – Reliance on belief plaintiff never seek to enforce guarantee – Defendants legal advisors to companies and partnerships – Partnership carried on in fraudulent, unlawful or irregular manner – Whether plaintiff knew of nature of activities – Whether advancing funds to partnerships negligent and in breach of duty – Wording of guarantees inconsistent with belief – Absence documentary evidence from plaintiff or defendants of collateral agreement – Assurance by fellow shareholder and chairman of partnership that guarantees were a formality – No representation by officer or employee of plaintiff – Whether *bona fide* defence – Whether defence credible – Whether assurance capable of binding plaintiff – Whether previous adjournment to plenary hearing of separate claim by plaintiff against fellow shareholder relevant to application – Whether risk of injustice if summary judgment granted – Whether degree of confidence present that very clear defendants had no case – *First National Commercial Bank Plc v Anglin* [1996] 1 IR 75 and *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607

Applied – Action adjourned to plenary hearing (2010/1571S, 2010/1573S and 2010/1574S – Kelly J – 20/07/2010) [2010] IEHC 271
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SOCIAL WELFARE

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SI 545/2010

Social welfare (consolidated supplementary welfare allowance) (amendment) (rent supplement) regulations 2010
SI 295/2010

Social welfare (employers' pay-related social insurance exemption scheme) regulations 2010
SI 294/2010

Social welfare (miscellaneous provisions) act 2010 (part 3) (commencement) order 2010
SI 581/2010

SOLICITORS

Discipline

Appeal - Solicitors disciplinary tribunal – Complaint of professional misconduct – Appeal against finding of no *prima facie* case for inquiry – Complaint regarding alleged false registration of title – Application for registration grounded on incorrect averment in affidavit – Error of solicitor – Request for registration to be undone - Acknowledgement of error by courts during litigation – Full investigation of misconduct by courts and by disciplinary tribunal – Error in absence of negligence or fraud – Absence of fresh fact or new material suggesting decision of tribunal be set aside – Solicitors (Amendment) Act 1960 (No 37), s 7– Appeal dismissed (2010/37A – Kearns P – 19/7/2010) [2010] IEHC 299
Breen v Murphy

Discipline

Disciplinary tribunal – Appeal from tribunal – Allegation of misconduct by client – Whether *bona fide* grounds for inquiry into appellant's complaints - Whether actions of solicitor constituting misconduct – Appeal dismissed (2010/41SA – Kearns P – 19/7/2010) [2010] IEHC 298
O'Brien v O'Connell

Negligence

Breach of duty – Delay in preparation of discovery and completion of discovery – Likelihood of success of proceedings - Whether legal advices incorrect or inadequate – Whether failure to take up files with expedition – Whether failure to serve affidavits – Reliability of evidence – Claim dismissed (2001/4421P – Kearns P – 16/7/2010) [2010] IEHC 280
Tighe v Burke

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Cronin, Donal
Emotional rescue
2010 (Dec) GLSI 40

Statutory Instruments

The Solicitors act 1954 to 2008 (sixth schedule) regulations 2011
SI 604/2010

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SI 605/2010

The Solicitors acts 1954 to 2008 solicitors (practising certificate 2011) regulations 2010
SI 641/2010

SPECIFIC PERFORMANCE

Sale of land

Contract – Condition - Subject to grant of planning permission – Contract not signed by defendant – Part performance – Deposit returned – Breach of contract – Whether binding agreement – Whether plaintiff's obligations fulfilled – Whether agreement wrongfully repudiated – Whether contract still in being – *Conor v Coady* [2005] 1 ILRM 256 and *Maloney v Elf Investments* [1979] ILRM 253 considered – Relief granted (2006/1286P – Laffoy J – 19/5/2010) [2010] IEHC 293
McKenny v Martin

STATUTORY INTERPRETATION

Construction

Ordinary and natural meaning - Discontinuance of services - Whether Health Service Executive had power to discontinue maternity services at particular hospital – Words and phrases – 'Premises' and 'services' –*McMeal v Minister for* [1985] ILRM 616 distinguished – *Keane v An Bord Pleanála* [1997] 1 IR 184; *(N(F) v Minister for Education* [1995] 1 IR 409 and *Brady v Cavan County Council* [1994] 4 IR 99 considered – Health Act 1970 (No 1), ss 5, 38, 52 &62 – Appeal dismissed and title of case amended (450/2004 – SC – 9/7/2010) [2010] IESC 43
Tierney v Health Service Executive

TAXATION

Value added tax

Lease – Capitalised value – Open market value – Unique building – Review of supplier's charge by customer – Value-Added Tax Act 1972 (No 22), ss 4(3A), 10(9)(a), 31(1)(t) – Value-Added Tax Regulations 1979 (SI 63/1979), reg 19 – Value-Added Tax (Amendment) (Property Transactions) Regulations 2002 (SI 219/2002), s 4(e) - Defendant's appeal allowed (416/2005 – SC – 30/4/2010) [2010] IESC 25
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SI 643/2010

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SI 639/2010

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Imeachtaí Chúirte

Ceantair Ghaeltachta – Fianaise as Gaeilge – Cabhair ó ateangaire – Aistriúchán – Cé acu an féidir alt 71 d'Acht 1924 a shocrú i gcúirt – Cé acu an bhfuil alt 71 inbhreithnithe – Cé acu an raibh cumas Gaeilge ag an mBreitheamh Dúiche – Meabhraíodh *Mac Aodháin v Éire* [2010] IEHC 40 (Neamtuar, Clarke B, 19/2/2010); *Ó Murchú v An Taoiseach* [2010] IESC 26 (Neamhtuar, CU, 6/5/2010); *Cork Plastics v Ineos Compounds* [2007] IEHC 247 (Neamhtuar, Clarke B, 26/7/2007); *Barry v Buckley* [1981] IR 306; *Ó Monachain v An Taoiseach* [1980-1998] TÉTS 1 agus *Condon v Minister for Labour* [1981] IR 62 – Acht Cúirteanna Breithimh 1924 (Uimh 10), alt 71 – Iarratas ar dheonú (2008/532JR – Clarke B – 30/7/2010) [2010] IEHC 335
Mac Aodháin v Éire

TORT

Personal injuries

Road traffic accident - Wife of plaintiff – Negligence – Whether entitlement to damages as result of vasectomy – Whether entitlement to damages as result of termination of pregnancy – Elective vasectomy – Post operative pain – Whether damages recoverable – Possibility of reversing of procedure – Claim for damages resulting from tort committed against third party – Policy considerations – Availability of alternative options – Opportunity to reverse vasectomy – Whether injury reasonably foreseeable – Whether causation established on balance of probability – *Devlin v National Maternity Hospital* [2007] IESC 50 [2008] IR 222 and *Condon v CIE* (Unrep, Barrington J, 16/11/1984) considered - Case dismissed (1999/1214P – Lavan J – 28/7/2010) [2010] IEHC 308
Ward v Sheridan

TRADE MARKS

Article

Daly, Maureen
"To revoke or not - that is the question!"
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TRANSPORT

Licence

Road service – Licensing regime – Special status of Dublin Bus – Exemption from licensing requirements – Necessity for ministerial consent where passenger road service to compete with licensed service – Entitlement to subsidies – Proposed alteration to service – Settlement of initial proceedings – Agreement to engaging of consultants to consider question of competition – Whether alteration of route introduced so as to compete with existing road service – Whether ministerial consent appropriate – Distinction between competitive advantage and competition *per se* – Delay in relation to processing of application for second licence – Whether delay unreasonable - Department guidelines establishing principle of first come/first served – Duty to process applications with reasonable expedition – *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39 considered – Road Transport Act 1958 (No 19), s 25 – Ministerial decisions quashed with declaration of unlawful delay regarding application for second licence (2009/1303JR – McMahon J – 30/7/2010) [2010] IEHC 311
Digital Messenger Limited v Minister for Transport

Statutory Instruments

Public transport regulation act 2009 (certain provisions) (commencement) order 2010
SI 566/2010

Taxi regulation act 2003 (suitability inspection and taxi roof sign) (amendment) regulations 2010
SI 549/2010

TRAVEL

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Tour operators (licensing) (amendment) regulations, 2010
SI 660/2010

Travel agents (licensing) (amendment) regulations, 2010
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SI 598/2010

Wildlife (wild birds) (open seasons) (amendment) order 2011
SI 39/2011

AT A GLANCE

European Directives

European communities (carriage of dangerous goods by road act 1998)(amendment) regulations 2010
DIR/2008-68, DEC/2010-187
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DIR/2009-22
SI 555/2010

European Communities (forest consent and assessment) regulations 2010
DIR/85-337
SI 558/2010

European Communities (motor vehicles UN-ECE type approval) (amendment) regulations 2010
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SI 556/2010

European Communities (organisation of working time) (activities of doctors in training) (amendment) regulations 2010
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SI 553/2010

Safety, health and welfare at work (exposure to asbestos) (amendment) regulations 2010
DIR/2009-148
SI 589/2010

BILLS OF THE OIREACHTAS AS AT 14TH MAY 2011 (31ST DÁIL & 23RD SEANAD)

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

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

Advance Healthcare Decisions Bill 2010
Bill 26/2010
Order for 2nd Stage – Seanad **[pmb]** *Senator Liam Twomey (Initiated in Seanad)*

Biological Weapons Bill 2010
Bill 43/2010
Passed by Dáil Éireann

Broadband Infrastructure Bill 2008
Bill 8/2008
2nd Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik (Initiated in Seanad)*

Central Bank and Credit Institutions (Resolution) Bill 2011
Bill 11/2011
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Child Care (Amendment) Bill 2009
Bill 61/2009
Report Stage – Dáil *(Initiated in Seanad)*

Civil Liability (Amendment) (No. 2) Bill 2008
Bill 50/2008
2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins (Initiated in Seanad)*

Climate Change Response Bill 2010
Bill 60/2010
Passed by Seanad *(Initiated in Seanad)*

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad **[pmb]** *Senator Ivana Bacik (Initiated in Seanad)*

Communications Regulation (Postal Services) Bill 2010
Bill 50/2010
2nd Stage – Dáil *(Initiated in Seanad)*

Construction Contracts Bill 2010
Bill 21/2010
2nd Stage – Dáil **[pmb]** *Senator Fergal Quinn (Initiated in Seanad)*

Consumer Protection (Amendment) Bill 2008
Bill 22/2008
2nd Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Alan Kelly, Phil Prendergast, Brendan Ryan and Alex White (Initiated in Seanad)*

Consumer Protection (Gift Vouchers) Bill 2009
Bill 66/2009
2nd Stage – Seanad **[pmb]** *Senators Brendan Ryan, Alex White, Michael McCarthy, Phil Prendergast, Ivana Bacik and Dominic Hannigan (Initiated in Seanad)*

Coroners Bill 2007
Bill 33/2007
Committee Stage – Seanad *(Initiated in Seanad)*

Credit Institutions (Financial Support) (Amendment) Bill 2009
Bill 12/2009
2nd Stage – Seanad **[pmb]** *Senators Paul Coghlan, Maurice Cummins and Frances Fitzgerald (Initiated in Seanad)*

Credit Union Savings Protection Bill 2008
Bill 12/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Feargal Quinn, Shane Ross, Ivana Bacik and Rónán Mullen (Initiated in Seanad)*

Criminal Justice (Community Service) (Amendment) (No. 2) Bill 2011
Bill 12/2011
2nd Stage - Dáil

Criminal Justice (Female Genital Mutilation) Bill 2011
Bill 7/2011
1st Stage Seanad *(Initiated in Seanad)*

Criminal Law (Admissibility of Evidence) Bill 2008
Bill 39/2008
2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins (Initiated in Seanad)*

Criminal Law (Defence and Dwellings) Bill 2010
Bill 42/2010
Committee Stage – Dáil

Electoral (Amendment) (Political Donations) Bill 2011
Bill 13/2011
2nd Stage – Dáil **]pmb]** *Deputies Dara Calleary, Niall Collins, Barry Cowen, Timmy Dooley, Sean Fleming, Billy Kelleher, Seamus Kirk, Michael P. Kitt, Brian Lenihan, Micheál Martin, Charlie McConalogue, Michael McGrath, John McGuinness, Michael Moynihan, Willie O'Dea, Éamon Ó Cuív, Seán Ó Fearghaíl, Brendan Smith, Robert Troy and John Browne.*

Environmental (Miscellaneous Provisions) Bill 2011
Bill 2/2011
Order for 2nd Stage - Dáil

Female Genital Mutilation Bill 2010
Bill 14/2010
2nd Stage – Seanad **[pmb]** *Senator Ivana Bacik (Initiated in Seanad)*

Human Body Organs and Human Tissue Bill 2008
Bill 43/2008
2nd Stage – Seanad **[pmb]** *Senator Feargal Quinn (Initiated in Seanad)*

Immigration, Residence and Protection Bill 2010
Bill 38/2010
Committee Stage - Dáil

Irish Nationality and Citizenship (Amendment) (An Garda Síochána) Bill 2006
Bill 42/2006
1st Stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke (Initiated in Seanad)*

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
Committee Stage – Seanad **[pmb]** *Senators Joe O'Toole, Shane Ross, Feargal Quinn and Ivana Bacik (Initiated in Seanad)*

Mental Health (Amendment) Bill 2008
Bill 36/2008
2nd Stage – Dáil **[pmb]** *Senators Déirdre de Búrca, David Norris and Dan Boyle (Initiated in Seanad)*

Mobile Phone Radiation Warning Bill 2010
Bill 40/2010
Order for 2nd Stage – Seanad **[pmb]** *Senator Mark Daly (Initiated in Seanad)*

National Cultural Institutions (Amendment) Bill 2008
Bill 66/2008
2nd Stage – Seanad **[pmb]** *Senator Alex White (Initiated in Seanad)*

Nurses and Midwives Bill 2010
Bill 16/2010
Report Stage – Dáil

Official Languages (Amendment) Bill 2005
Bill 24/2005
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Paul Coghlan and David Norris (Initiated in Seanad)*

Ombudsman (Amendment) Bill 2008
Bill 40/2008
2nd Stage – Seanad *(Passed by Dáil Éireann)*

Privacy Bill 2006
Bill 44/2006
Order for Second Stage – Seanad *(Initiated in Seanad)*

Property Services (Regulation) Bill 2009
Bill 28/2009
Committee Stage – Dáil **[pmb]** *Senator Donie Cassidy (Initiated in Seanad)*

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
2nd Stage – Seanad **[pmb]** *Senator Maurice Cummins (Initiated in Seanad)*

Spent Convictions Bill 2011
Bill
1st Stage - Dáil

Statistics (Heritage Amendment) Bill 2010
Bill 36/2010
Order for 2nd Stage – Seanad **[pmb]** *Senator Labhrás Ó Murchú (Initiated in Seanad)*

Sunbeds Regulation Bill 2010
Bill 29/2010
Order for 2nd Stage – Seanad **[pmb]** *Senator Frances Fitzgerald (Initiated in Seanad)*

Tribunals of Inquiry Bill 2005
Bill 33/2005
Report Stage – Dáil

Twenty-Ninth Amendment of the Constitution (No. 2) Bill 2011
Bill 14/2011

Welfare of Greyhounds Bill 2010
Bill 57/2010
Committee Stage – Seanad *(Initiated in Seanad)*

Whistleblowers Protection (No. 2) Bill 2011
Bill
1st Stage – Seanad **[pmb]** *Senators Phil Prendergast and Ivana Bacik*

ACTS OF THE OIREACHTAS AS AT 12TH MAY 2011

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

1/2011 Bretton Woods Agreements (Amendment) Act 2011
Signed 21/01/2011

2/2011 Multi-Unit Developments Act 2011
Signed 24/01/2011
(Not yet available)

3/2011 Communications (Retention of Data) Act 2011
Signed 26/01/2011

4/2011 Student Support Act 2011
Signed 02/02/2011

5/2011 Criminal Justice (Public Order) Act 2011
Signed 02/02/2011

6/2011 Finance Act 2011
Signed 06/02/2011
(Not yet available)

7/2011 Road Traffic Act 2011
Signed 27/04/2011

ABBREVIATIONS

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

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

but the Respondent husband did not do so. He argued that his financial circumstances had deteriorated such that he was unable to complete a transfer of a certain property called 'The Rivers' to the wife given that Anglo Irish Bank had withdrawn an arrangement to restructure his overall borrowings. The parties issued cross-Motions to include applications for (fresh) Property Adjustment Orders.

Ms. Justice Dunne reviewed the UK case law[11] as well as '*Barder*' referred to above, and, in addressing the issue of the Court's power to vary or set aside Consent Orders, the Court found that 'the Courts in this jurisdiction would take the same approach as that in the UK where the general rule referred to in *Benson v. Benson* (deceased) [1996] 1 F.L.R. 692 is that the courts would uphold agreements freely entered into at arms length by parties who were properly advised.'

The judgment in *O'C* is authority for the following principles:

(i) That the Court has jurisdiction to make a Property Adjustment Order ('PAO') on more than one occasion having regard to the legislation as elucidated by Ms. Justice Dunne:
'Therefore, the position appears to be that although s. 18 [of the 1995 Act] cannot be invoked for the purpose of varying an order providing for the transfer of property pursuant to s. 9(1)(a) of the 1995 Act, there is nothing to preclude the possibility of an application being made for a property adjustment order on more than one occasion in the event both parties have made such an application.'

(ii) That a PAO cannot be varied pursuant to s.18 (1) (e) of the 1995 Act. The position therefore is that while such an Order cannot be varied, a fresh application for a PAO may be made on more than one occasion.

(iii) That agreements freely entered by parties at arms length who were properly advised would generally be enforced.

(iv) That the criteria to be applied in an application to set aside/discharge a Consent Order were similar to the those in an application to extend time to appeal a consent order in particular:
  (a) that new events had occurred since the making of the Order which would invalidate the basis of the order;
  (b) that such events should have occurred within a relatively short period of time after the making of the Order;
  (c) that the application to set aside/discharge should have been made promptly in the circumstances of the case;
  (d) That the grant of leave should not prejudice third parties who had acquired the property in question in good faith and for valuable consideration.

(v) That although the Respondent's financial circumstances had deteriorated since the consent, those circumstances were already in decline at the time of the consent and the change represented a continuation of a trend rather than the occurrence of a new event.

(vi) That the Court had jurisdiction to consider a further PAO in the context of the events which had occurred and in doing so the Court should have regard both to the 'factors' set out in section 16(2) of the 1995 Act and also to the terms of the Consent Order which provided for the separation of the interests of the parties to be 'disentangled' in relation to a variety of properties.

(vii) That the needs of the family as a whole should be considered given that the family home was the only property to retain any realistic equity and given the Respondent's precarious financial circumstances, the needs of the Applicant wife and children were best served by transferring the entire interest in the family home to her.

It should be noted that this was a fresh PAO in favour of the Applicant wife under Section 9 of the 1995 Act made on foot of a Notice of Motion in the existing proceedings by way of 'provision' for each of the spouses.

The Loss Of Finality?

Irish family law permits the issue of a fresh application or so- called 'second-bite' whereas the UK law weighs heavily in favour of finality at the initial Court hearing. Under Irish law therefore, a party may seek a further Property Adjustment Order, lump sum or fresh Maintenance Order post-Judicial Separation or post-Divorce at any time during the lifetime of the other spouse, so long as the Applicant spouse has not re-married.

Originally, the right to return for further relief was constructed to eliminate or reduce the negative impact of the introduction of divorce where a breadwinner had remarried and the other/ first spouse, often characterised as the wife, remained unmarried and dependant.[12]

In *T. v T.*[13], the majority in the Supreme Court supported the concept of finality in litigation in a time of plenty. Times have changed utterly since 2002 and the notion of finality may be another casualty of the current recession when the imperative now is to find a 'living solution' for couples, but not necessarily a final one. That said, the Court in *XY*, was desirous of providing the parties with as much finality as was possible and thus, although the husband was massively insolvent, the Court made Orders to cover the next ten years or so. The Court was of the view that it was proper to permit the parties some degree of certainty so as to avoid ongoing litigation. Mr Justice Abbott fixed the 80/20 percentage split on the 'speculative assets' in favour of the husband, while allowing the parties the right to re-apply to ascertain the amount of the surplus, if any, but not to reopen the percentage split itself.

In late 2009, Gerard Durcan SC expressed the view that

11 *Benson v Benson* (deceased) [1996] 1 F.L.R. 692, *Barder v Calouri* [1988] 1 A.C. 20 and *Dixon v Merchant* [2008] E.W.C.A. Civ 11. and V.B. v. J.P. [2008] E.W.H.C. 112 (Fam)

12 L. Crowley, "Divorce Law in Ireland – facilitating or frustrating the resolution process?" [2004] 16(1) C.F.L.Q. 49.

13 2002 3 IR 334

the lack of assets and the greater difficulty in disposing of assets has made it well-nigh impossible in many cases for the parties to reach a full and final settlement.[14] All the Courts can do at present is to reach a short-term solution and to invite the parties to come back to Court when circumstances change and to then reach a more permanent solution. Accordingly, practitioners must now consider carefully in each case whether a full and final settlement clause is appropriate.[15] ■

14 Gerard Durcan S.C. Lecture to Thomson Round Hall December 2009.

15 This is particularly important when we consider that in *JC v MC* (see footnote 8 above), Mr Justice Abbott found that such a clause in a divorce settlement operates as an 'ouster' of the Court's jurisdiction in regard to future applications for 'strategic' relief post-divorce. That case concerned an uncontested divorce with a full and final settlement clause and the wife sought a further Lump Sum Order by virtue of Section 13 of the 1996 Family Law (Divorce) Act.

Internet Intermediaries and the Law

Marie Holland BL

The Defamation Act 2009

It is well documented that the Defamation Act 2009, is a significant piece of legislation. It has refashioned and streamlined the law. Currently it has never been more elementary to take or defend a case for defamation in Ireland and as a result, the new Act has been afforded a broad salutation. However the new legislation has proven itself to be a bitter elixir for some, namely intermediaries and content hosts.[1] The Act leaves internet intermediaries in a glaringly unguarded position. From a commerce viewpoint, this does not bode well. The growth of e-commerce has been extremely rapid in recent years. By the year 2000 it's worth exceeded 17 billion euro and reached an estimated 340 billion euro by the end of 2003[2]. The undue hampering of intermediaries could jeopardise the development of online infrastructure.

It is this author's view that the 2009 Act marks out Ireland as caustic soil for internet businesses and as a result exposes us in an already depressed economic climate. The Act broadly ignored proposals for reform in this area. The composition of the Act in relation to the online word is parochial and basic. The 2009 Act[3] outlines the following:

1. It acknowledges that an actionable statement can include an electronic communication or statement published on the internet.
2. It provides for a wide net of publication liability and
3. It provides for the defence of innocent publication.

What this means for intermediaries is that the providers can be held liable for defamatory content they did not produce by failing to remove the offending material. The defence of innocent publication is open to providers, however the more the specific provider or host is involved in filtering and moderating material, the less likely it is they can rely on the defence of innocent publication[4]. This ambiguity knotted together with a clear lack of additional safeguards or protections marks a sobering reality for intermediaries and instils a great deal of caution in those who look at Ireland as a potential hub for their business.[5] The spill over effect is a distinct lack of growth in this economic sector.

Having appraised the advantageous role intermediaries play in current global economic markets, legislators in other jurisdictions have moved towards providing a legal shield for intermediaries by expanding an assortment of defences. The latter is well demonstrated by examining the United States' approach and to a lesser extent the European Union's approach.

United States' Legislation

The US approach is generally viewed as very far reaching. The Communications Decency Act 2006[6] provides that no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. Accordingly publishers who have discretion over content published can be held liable for defamation, however distributors of published material cannot.

This approach is demonstrated in the case of *Cubby,*

1 See generally 'copyright and defamation law is repelling investors' Karl Lillington, Nov 2010 the Irish Times; 'Defamation Act a welcome but imperfect reform for libel cases' Eoin O'Dell, Jan 2010 the Irish Times.

2 See 'European Commission: Electronic Commerce' available at: http://europa.eu.int/comm/internal_market/en/ecommerce/2k-442.htm. accessed 24/01/2011.

3 The Defamation Act 2009.

4 Section 27, The Defamation Act 2009.

5 See generally 'Think tank; web firms aren't liable to stay' TJ McIntyre, Feb 2010, The Sunday Times.

6 Section 230, The Communications Decency Act 2006.

Inc. V CompuServe[7]**.** In that case CompuServe were sued in respect of a message appearing in a local forum hosted by them, called 'rumorville USA'. CompuServe had employed a third party specifically to edit and control the content of this forum. The third party posted the information on the internet once it was edited, with no intervening opportunity for CompuServe to review the material prior to publication. CompuServe argued that they were merely a distributor of the information, not a publisher and therefore should not be held liable. The New York District Court held that the defendant internet service provider exerted no control or knowledge regarding what was published and was, thus, merely a distributor and could not be held liable. It is evident from examination of this case that Congress in recognising the speed with which information may get disseminated and the near impossibility of regulating information content, it decided not to treat providers of interactive services like other information providers such as newspapers, television or radio[8]. It is this author's opinion that while this blanket immunity actively promotes growth in the interactive media sector, it may lend itself to misuse.

This point plays itself out in the following landmark case of *Sidney Blumenthal v Matt Drudge & American Online Inc.*[9] In this case, AOL had entered into an agreement with Drudge by which Drudge would provide all AOL members with a 'DRUDGE' report on all gossip from Hollywood and Washington D.C. This report was alleged to have posted defamatory material about the plaintiff, who sought to hold AOL liable. Due to the aforementioned blanket immunity provided by section 230 of the Communications Decency Act, 1996, AOL eluded liability despite directly engaging Drudge themselves.

By way of comment, it is this author's belief that whilst the economic intentions of the US approach are well intended, some refinement to the approach is required. To this end, a small minority of Courts in the US have begun to take a closer look at the general responsibility of internet service providers for control of material content. This new wave of thinking is demonstrated in the case of *Carafano v Metrosplash.com, Inc*[10] where the defendant, who operated an online matchmaking or dating service, was held liable for defamation of the plaintiff, as on examination, it was found that he exercised a great degree of control over content of the services provided by him. However this latter approach is very much a minority viewpoint and the vast majority of US Courts continue to view intermediaries as immune from defamatory liability. It is therefore appropriate to examine European Union legislation, which approaches intermediaries in a somewhat more nuanced fashion in comparison to the United States and thus has a more limiting effect on their activites.

European Union Legislation

The European Unions' approach is in the form of the E-Commerce Directive 2000. The integral focus of this Directive is on the general development and fortification of e-commerce in Europe. The Directive maintains a liberal regional policy towards internet service providers and provides service providers with broad protection against liability for third party content with respect to defamation. In other words it limits the liability of online providers for transferring, caching and hosting illegal content.

Article 12 of the E-Commerce Directive[11] provides that a service provider who does not initiate the relevant transmission, who does not select recipients and who does not alter the content i.e. acting as a mere conduit, is protected from liability. Article 14 of the E-Commerce Directive[12] qualifies this protection directing that the service provider does not qualify for such protection if it knows that the information's presence signifies illegal activity. The latter caveat is somewhat made redundant if the service provider acts in an accelerated manner to remove or disable access to the offending material. However, the Directive does not provide for a 'notice or take down' regime. The only article of the Directive that touches on this is article 14.3 which leaves member states with a discretion to establish such 'notice and take down' procedures.

It is this author's opinion that while there are clear difficulties and deficiencies with the Directive, it has, in this author's opinion set up a fair mechanism to limit an internet service provider's liability and at least lays a legislative foundation. Given the fact that the Directives regulations are of general application, it is a great disappointment and a missed opportunity that the Defamation Act 2009, did not at least attempt to manifest the said regulations in some systematic form.

Conclusion

As discussed above, since 1996 the United States has given internet providers a defence in respect of material written by users. European legislation has also addressed the need, by providing a fair mechanism to limit the liability of internet service providers in the form of the E-Commerce Directive 2000. This legislation has been implemented by many European countries. Ireland however exposes internet intermediaries to a much greater business risk of being held liable for material they did not produce. It is clear that other jurisdictions have attempted to provide a more refined and a more contemporary application of defamation laws to the Internet. Currently, Ireland does not have the legal structure to attract internet businesses and perhaps more alarming, as the law stands, the country has the potential to lose the business of those who have already put down roots here. ■

7 Ibid.

8 See generally, 'Defamation on the internet' http://jurisonline.in/2009/10/defamation-on-the-internet-a-compaative-study, accessed 18/01/2011, p.3.

9 See http://Jurisonline.in/2009/10/defamation-on-the-internet-a-comparative-study, accessed 18/01/2011, p.2

10 Ibid, p4.

11 E-Commerce Directive (Directive 2000/31/cc)

12 Ibid

Examinerships in Hard Times

Gary McCarthy SC and Sam Collins BL

Introduction

The legislation governing examinerships has been in force since 1990 (enacted speedily to deal with the collapse of the Goodman Group), but has moved again to centre stage in attempts by companies to engage in an involuntary restructuring process following the collapse of the economy. There were 37 petitions presented in 2009, 16 in 2010 and six to date in 2011.[1]

In 2010 in particular, a number of property and construction related companies unsuccessfully sought to avail of the examinership process, which leads to the question as to whether examinership is a viable option for such companies in the current climate. To answer this question, it is necessary to investigate the reasons why companies have failed in their attempts to use the examinership process.

The most significant trend appears to be the increasing difficulty of satisfying the basic mandatory requirement for the appointment of an examiner, namely demonstrating a reasonable prospect of survival of the company and the whole or any part of its undertaking as a going concern (Section 2(2) of the Companies (Amendment) Act, 1990 ("the Act"))[2]. The harsh economic realities have made it much more onerous to convince the Court of the credibility of any plans to address capital shortfalls and return companies to profitability. While it has historically been for creditor opposition to make these arguments, recent cases have seen the Court ask searching questions of economic projections even in the absence of significant opposition to the petition.

It is possible that potential applicants have also been discouraged by negative publicity following the failure of a number of high profile companies to avail of the process, due to either a tightening of the evidential proofs required by the Court, robust creditor opposition, or an inability to demonstrate a reasonable prospect of survival.

Practitioners should also note the changes inserted by section 234 of the National Asset Management Agency ("NAMA") Act 2009, which provide that the Court cannot make an order unless satisfied that the applicant has no obligations in relation to a bank asset transferred to NAMA or a NAMA group entity or, if it has such obligations, that a copy of the petition has been served on NAMA and NAMA has been heard by the Court.

It is thought that the reduction in the number of successful petitions is also influenced by the stage in the economic cycle where Ireland appears to be at present. Some practitioners have indicated that examinerships are more prevalent on the way into and out of recession, with reduced activity in the depth of a recession. Examinerships require investors or further bank finance, both of which are thin on the ground. Recent judicial comment has noted that investors currently appear *"as scarce as hen's teeth"*[3].

Trading companies with a viable underlying business remain ideal candidates for examinership and, although the standards applied by the Court have been considerably tightened by the judiciary, the tests to be applied remain largely unchanged. Despite a number of failed candidates, such companies can utilise the legislation for the purposes of restructuring and returning to solvency.

In this article we wish to deal with two aspects of importance in the application to appoint an examiner, namely the test for demonstrating a reasonable prospect of survival of a company as a going concern and the obligation to act in good faith in presenting the application. The latter is of some importance as, where an application is opposed, such opposition often seeks to demonstrate that the conduct of the applicant is such that the Court ought exercise its discretion against making the appointment or confirming the scheme of arrangement.

The Purpose of the Legislation

It is important to remember the purpose of Act. The intention of the legislation is to provide a procedure for the rescue and return to financial health of ailing but potentially viable companies. It has no role in providing for the winding down of a business over a period of time.

The purpose of the Act has been considered in a number of decisions of the both the Supreme Court and the High Court in recent times.

In *Re Atlantic Magnetics Limited* [1993] 2 IR 561 McCarthy J. said as follows at pp.578-579:

> "It is, I believe, of great importance to bear in mind in the application of the Act that its purpose is protection - protection of the company and consequently of its shareholders, workforce and creditors. It is clear that parliament intended that the fate of the company and those who depend upon it should not lie solely in the hands of one or more large creditors who can, by appointing a receiver pursuant to a debenture, effectively terminate its operation and secure, as best they may, the discharge of the monies due to them, to the inevitable disadvantage of those less protected. The Act is to provide a breathing space, albeit at the expense of some creditor or creditors."

The purpose of the legislation was also considered by Clarke J. in the decision of *In Re Traffic Group Limited (In Examination) (under the Companies (Amendment) Act 1990)* [2008] 3 IR 253; [2008] 2 ILRM 1; (2008) 15(2) CLP 47. In that case the Court

1 www.insolvencyjournal.ie (statistics as of 3rd May 2011).

2 As substituted by s 5(b), Companies (Amendment) (No 2) Act, 1999.

3 *Ex-tempore* judgment of Kelly J., 18 February 2009 on a petition in respect of the Stephen Pearce brand.

was asked whether it could take into account, in deciding whether to confirm or to refuse to confirm a scheme of arrangement, the actions of the principals of the company in the lead up to and during the examinership. In coming to the conclusion that the Court could take such matters into consideration (albeit at the confirmation stage), Clarke J. considered the function and purpose of the legislation in the following terms:[4]

> "It is clear that the principal focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important both for the court and, indeed, for examiners, to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs."

On that theme, it is instructive to note the comments of Clarke J. in *Laragan Developments Limited (In Examination)* (2009) 16(11) CLP 266; [2009] IEHC 390. In that case the Court considered objections from a number of creditors[5] following which Clarke J. refused to implement the scheme of arrangement put forward by the examiner. Clarke J. noted at para. 8.10 that "Laragan was little more than a vehicle of convenience for Mr. Hanly and other companies within the Hanly Group." He noted that large corporate groups often devolve certain functions (administration, for example) to individual special purpose companies, and "[i]n those circumstances the relevant company does not provide services to any outside parties but rather confines itself to providing the appropriate services for the group as a whole." Such companies are unable to avail of examinership protection.[6]

The Supreme Court also considered the purpose of the legislation in *In the matter of Gallium Limited t/a First Equity Group and in the Companies Acts* [2009] 2 ILRM 11; [2009] IESC 8. Fennelly J. noted as follows:[7]

> "The entire purpose of examinership is to make it possible to rescue companies in difficulty. The protection period is there to facilitate examination of the prospects of rescue. However, that protection may prejudice the interests of some creditors. The court will weigh the existence and degree of any such prejudice in the balance. It will have regard to the report of the independent accountant.
>
> The court has to take account of all relevant interests. The independent accountant must consider whether examinership would be "more advantageous to the members as a whole and the creditors as a whole than a winding up of the company...". This does not limit the range of interests to be taken into account by the court under s.2. The interests of employees cannot be excluded. In the case of an insolvent company, it is natural that the creditors would have the greatest interest in the future, if any, of the company. The court will take a balanced approach, as suggested by the reference to the creditors as a whole."

As can be seen from these judgments, the Court retains a wide discretion and places emphasis on the fact that the statutory framework allows for an examination of the company. It will usually allow the company the necessary breathing space to carry out an examination so long as the relatively low threshold has been met.

It is notable that a reasonable prospect of survival must be demonstrated of the company or a whole or part of its undertaking as a going concern. Examinership is not to be used for the purposes of selling off the profitable parts of the business. Thus, in *In the Matter of Tivway Limited (In Examination under the Companies (Amendment) Act 1990)* [2010] IESC 11, the Supreme Court (Denham J.; Murray C.J., Hardiman, Geoghegan, Fennelly JJ. concurring) held[8] that a scheme of arrangement whereby certain construction companies would be sold off and others placed in a holding plan, keeping a land bank in the hope of an improvement in the property sector, was not a scheme the Court had jurisdiction to approve. Denham J. noted that "[a]n examinership is not a process for sale"[9] and held at paragraph 53, in finding that there was not a reasonable prospect of survival as a going concern:

> "In this case the active part of the company is to be sold. It will no longer be within the company. The remaining undertaking is moribund - as a consequence of the property crash. While there may be circumstances where a sale assists the survival of a company as a going concern, this is not one such. In the circumstances of this case there is not an investment in the company to assist it proceed as a going concern, but rather a sale of its third party contracting business to another company…"

Reasonable Prospect of Survival

The principal test to be satisfied is to prove the company has a reasonable prospect of survival. Section 2 of the Act is very clear on the obligations of the petitioner who must satisfy the Court that the company and the whole or any part of its undertaking has a real prospect of survival as a going concern. This is a mandatory requirement and if same is not demonstrated, the Court does not have jurisdiction to appoint an examiner.

In *Re Tuskar Resources plc* [2001] 1 IR 668, McCracken J. considered the requirements of section 2(2) of the Act against the background of earlier legislation, stating (at p.676) as follows:

4 [2008] 3 IR 253, 260; [2008] 2 ILRM 1, 8-9.
5 Over a four day period.
6 Para. 8.11.
7 [2009] 2 ILRM 11, 21-22.
8 Reversing the decision of the High Court (McGovern J.) at [2009] IEHC 494.
9 Paragraph 51, citing with approval the decision of Costello J. in *In Re Clare Textiles* [1993] 2 IR 213 at 220.

> "In *Re Atlantic Magnetics Ltd (in Receivership)* [1993] 2 I.R. 561 Finlay C. J. also stated that there cannot be an onus of proof on a petitioner to establish as a matter of probability that the company is capable of surviving as a going concern. It seems to me that this is no longer the position under the Act of 1999 by reason of the wording of the new sub-s. 2(2). Under the Act of 1990 as originally enacted there would appear to be a wide discretion given to the court. However, the new sub-s. prohibits the court from making an order unless it is satisfied there is a reasonable prospect of survival. If the court is to be "satisfied", it must be satisfied on the evidence before it, which is in the first instance the evidence of the petitioner. If that evidence does not satisfy the court, the order cannot be made, and in my view this is tantamount to saying that there is an onus of proof on the petitioner at the initial stage to satisfy the court that there is a reasonable prospect of survival. For this reason, the court has to view the evidence in a different manner to that applicable prior to the Act of 1999." (emphasis added).

McCracken J. made reference to the case of *In Re Atlantic Magnetics Ltd (in Receivership)* [1993] 2 IR 561, where Lardner J. in the High Court commented at p.573 that the standard to be met was as follows:

> "[D]oes the evidence lead to the conclusion that in all the circumstances it appears worthwhile to order an investigation by the examiner into the company's affairs and see can it survive, there being some reasonable prospect of survival?"

McCracken J. in *Tuskar* commented that the amendments introduced by the Companies (Amendment) (No.2) Act 1999 (the "1999 Amendment Act") are much more in keeping with the decision of Lardner J. than with the decision of the Supreme Court. Although this judgment was delivered prior to the 1999 Amendment Act, it appears that this is the test that the Court ought use. This is particularly so when the Court considers the statutory function of the examiner as outlined in section 2(1) of the Act, namely "examining the state of the Company's affairs and performing such duties in relation to the company as may be imposed by or under this Act".

In *In the matter of Galium Limited*, Fennelly J., after an extensive review of the authorities, came to the conclusion that the petitioner had met the threshold required under the Act. In coming to this conclusion he stated as follows:[10]

> "The evidence suggests that there is a reasonable prospect of survival. The test does not require probability of survival to be established. Investment markets are hazardous markets at present. The company is in an extremely risky business. However the comparative figures set out in the statement of affairs strongly suggest that liquidation is an even more hazardous alternative than an attempt at rescue by means of the appointment of an examiner. The presence of the combined elements of extremely adverse prospects, especially for unsecured creditors, on liquidation and the absence of any argument of prejudice to creditors or others from examinership persuade me that the order should be made. I am satisfied that the appointment of the examiner is warranted."

Although the primary obligation rests on the petitioner to satisfy the Court that the company has a reasonable prospect of survival, the Court can and ought to consider other sources of evidence in forming a view on whether or not the statutory test has been met. In that regard it is usual for the Court to place significant weight on the opinion of the independent accountant and the report of the interim examiner, if appointed.[11] The 1999 Amendment Act has made it obligatory for a petitioner to prepare a report of an independent accountant who must in accordance with Section 3A of the Act provide detailed information concerning the company. It is particularly important that he offer an opinion as to whether or not the company has a reasonable prospect of survival, and set out the conditions that must be complied with for same.

In *Fergus Haynes (Developments) Limited v Companies Acts* [2008] IEHC 327, Laffoy J. approved the principles set out in the judgment of McCracken J. in *Tuskar* and indicated that "objective evidence" was essential to support any application to appoint an examiner. On the facts of the case before her, Laffoy J. found that the figures presented in the petition were almost entirely based upon directors' estimates without any independent assessment or verification by appropriate independent professionals. She concluded that it was difficult to view the case advanced by the petitioner as other than a "bald assertion", which is not sufficient to satisfy the test in section 2(2) of the Act.

Further examples of a failure to demonstrate a reasonable prospect of survival, despite limited opposition, include the first and second petitions for Court protection by the Zoe Group of companies.[12]

The first petition was heard by Kelly J. on the 24th of July 2009. In refusing the application, Kelly J. held that the petitioning companies had no reasonable prospect of survival. Discussing the independent accountant's report (which came to an opposite conclusion), he noted that the accountant's projections, moving from a position of insolvency with debts in excess of €1 billion to having net assets of almost €300 million, was predicated upon anticipated improvements in valuations. Kelly J. was disinclined to share the accountant's view:[13]

> "Given current market conditions and with little or no prospect for improvement in the future, on the

10 [2009] 2 ILRM 11, 22.

11 In Missford Ltd t/a Residence Members Club [2010] IEHC 11, Kelly J. noted that, while he was *"highly sceptical"* of certain conclusions of the independent examiner, he had *"little option but to accept them since there is no evidence to the contrary and no creditor has opposed the appointment of an examiner."* However, Kelly J. refused to appoint an examiner on discretionary grounds.

12 See generally (2009) 16(10) CLP 234.

13 *In Re Vantive Holdings & Ors* [2009] IEHC 384.

> basis of all of the current economic indicators, this degree of optimism on the part of the independent accountant borders, if it does not actually trespass, upon the fanciful. What market is there likely to be over the next three years for the sale of sites even with planning permissions, and the sale of residential commercial and retail units?"

Kelly J. further noted that the valuations supplied to the Court were 7 months old at the time of the application, were supplied by firms which had carried out work for the petitioner in the past, and that:

> "[T]he only persons with whom, apparently, [the independent accountant] had any discussions concerning these assumptions were their creators, the present management of the companies. There is no evidence of any independent view being formed by him or of him consulting with anybody else."

While Kelly J. held that the petitioner had not discharged the onus of proof of demonstrating a reasonable prospect of survival of the companies, he noted that, had that hurdle been surpassed, he would have retained a discretion which he would have been disinclined to exercise in favour of the petitioner.

On appeal, the Supreme Court upheld the learned High Court judge's ruling.[14] Murray C.J. stated "for the purpose of deciding whether a petitioner has satisfied the court as to the first step in the test it is not sufficient for a petitioner to simply demonstrate that the assets of the company could be disposed of in a more orderly fashion to the benefit of its creditors since the provisions of subs. (2) preclude that as a sufficient test at that stage."[15] In addition, a demonstration that liquidation would lead to a less favourable outcome for creditors was not sufficient. Murray C.J. noted:[16]

> "Mere assertions on behalf of a petitioner that a company has a reasonable prospect of survival as a going concern cannot be given significant weight unless it is supported by an objective appraisal of the circumstances of the company concerned and an objective rationale as to the manner in which the company can be reasonably expected to overcome the insolvency in which it finds itself and survive as a going concern."

The petitioner argued that a majority of the relevant banks were favourably disposed to the scheme. It is interesting that the Court found very significant the lack of written assurances by banks of prospective continuing funding, and noted that "none of those banks have spoken in support of the proposition that there is a reasonable expectation of the survival of the petitioner as a going concern if an examiner is appointed."[17]

The petitioner further submitted that its portfolio property could be disposed of in an orderly fashion, and that the learned High Court judge was incorrect in disputing the independent accountant's view of the property market with his own views. The Supreme Court upheld the High Court ruling on this ground also:[18]

> "Although issue was taken with certain observations in the judgment of the trial judge on the future of the property market, no issue was taken with the statements which he made concerning the current state of the market it being accepted that the difficulties which it faces are so notorious that he properly took judicial notice of those conditions. In his judgment he observed as regards current market conditions that "the commercial market, particularly in Dublin where much of the properties are located, is grossly over subscribed and the residential sector is hardly moving at all".
>
> The fact is that the property market, both residential and commercial, is in a grave recession."

The second petition by the Zoe Group was heard by Clarke J. in the High Court, who delivered judgment on the 11th of September 2009.[19] The second petition was based on a new independent accountant's report which differed from its predecessor in several material respects, as summarised by Clarke J. at para. 4.17 of his judgment: [20]

> "[T]he principal focus of the original December 2008 business plan envisaged the disposal of a significant portion of the group's assets (i.e. much of its residential stock, its equity positions in third party companies and a number of development sites). The revised business plan"... seeks to focus on bringing about a situation where the Zoe Group will be able to meet its liabilities as they fall due."

Notwithstanding the new approach of the petitioner, Mr. Justice Clarke held that the petitioner had established only *"a very remote possibility"* and not a reasonable prospect of survival:

> "While it is possible to make an argument under each of the relevant headings which is favourable to Zoe (although on the interest rate movement question, this possibility is remote), it is the fact that it needs to be right on so many independent factors before it could even approach both balance sheet solvency and cash flow solvency that leads me to the conclusion that it is significantly improbable that the financial status of the Zoe Group, at any time when it is likely to come out of an interest payment moratorium,

14 *In Re Vantive Holdings & Ors* [2010] 2 ILRM 156; [2009] IESC 68.
15 [2010] 2 ILRM 156, 172.
16 [2010] 2 ILRM 156, 172.
17 [2010] 2 ILRM 156, 180.
18 [2010] 2 ILRM 156, 176.
19 Leave to proceed with a second petition had been given by Cooke J. on 28th August 2009. The Supreme Court reversed this decision by a judgment delivered on 14th October 2009, by which time Clarke J. had already heard and dismissed the second petition.
20 *In Re Vantive Holdings & Ors* [2009] IEHC 409.

> would be such as would give it a reasonable prospect of survival."[21]

One of the more extensive recent considerations of a reasonable prospect of survival is the decision of Clarke J. in *McInerney Homes Ltd* [2010] IEHC 340. The McInerney Group ("McInerney") presented a petition which was opposed by three banks (Anglo, Bank of Ireland and KBC Bank) (the "Banking Syndicate") to whom, it was common case, McInerney owed in excess of €110m. The Banking Syndicate's objections were brought on two bases: first, that McInerney as a whole had not demonstrated a reasonable prospect of survival; second, that even if McInerney demonstrated a reasonable prospect of survival, the prospect of survival of individual companies within the group had not been established.

Clarke J. noted that a reasonable prospect of survival derives from two factors: a method of addressing the capital shortfall which has left the company insolvent; and a realistic business plan to return the company to profit.[22] Of paramount importance to McInerney's attempt to satisfy both limbs of the test was the stated interest of an outside investor, Oaktree, to invest €40m into the business, of which €30m would go to the UK house building division and €10m to the Irish house building and contracting division.

Counsel for McInerney had put forward three possibilities for addressing the capital shortfall: that the Banking Syndicate, Oaktree and McInerney enter into interlocking agreements to the satisfaction of both the Banking Syndicate and Oaktree; that a scheme of arrangement be put in place whereby the Banking Syndicate would be required to take a reduction in its entitlements; or that, in addition to the second option posited, a set of obligations be imposed on the Banking Syndicate to provide continuing funding to the business.

After a detailed analysis of the proposals, Clarke J. summarised as follows at 4.17:

> "There are, therefore, very real difficulties with each of the possible means of dealing with McInerney's capital shortfall...However, it did not seem to me to be unreasonable to conclude that a solution might be found to the problems which arise in respect of Items 1 and 2. In those circumstances, I came to the view that there was a reasonable prospect of McInerney overcoming its capital problems in one or other of those two ways and that an overall view should, therefore, be taken that, at present, there was a reasonable prospect of solving those capital problems."

In relation to the business plan, Clarke J. stated that it was, in his view, realistic (para. 4.20). A major factor was the stated interest of Oaktree since, as an outside investor, it viewed "component parts of McInerney as being likely to be viable into the future". Clarke J. noted at para. 4.19:

> "[I]t is important to distinguish the attitude adopted by an existing banker to a company on the one hand and a potential investor on the other hand. For the reasons which I sought to analyse *Re Vantive Holdings Ltd (No. 2)* [2009] IEHC 409, it does not necessarily follow from the fact that a bank may support examinership that that bank truly believes that the company has a reasonable prospect of survival. Rather the bank may simply take the view that a restructuring in examinership might lead it to having to suffer a reduced hit when the company ultimately succumbs. However, the same equation does not seem to me to apply in respect of an investor."

Clarke J. dealt with the Banking Syndicate's second argument at paras. 6.1 – 6.2, noting that "[p]rovided... that the group as a whole had a reasonable prospect of survival, I was also persuaded that each of the companies which are the subject of this application, likewise, had a reasonable prospect of survival."

It should be noted that, while Clarke J. appointed an examiner, he ultimately refused to confirm the scheme of arrangement, as same was held to be unfairly prejudicial to the Banking Syndicate: [2011] IEHC 4.[23]

Good Faith

The 1999 Amendment Act introduced provisions dealing with obligations on the part of the petitioner to act in good faith. Pursuant to section 4A of the Act, the Court may decline to hear a petition presented under Section 2 or, as the case may be, may decline to continue hearing such a petition, if it appears to the Court that, in the preparation or presentation of the petition or in the preparation of the report of the independent accountant, the petition or the report of the interim examiner –

(a) has failed to disclose any information available to him which is material to the exercise with the Court of its powers under this Act, or
(b) has in any other way failed to exercise utmost good faith.

This section puts on a statutory footing earlier decisions of the Court in cases such as *In Re: Selukwe Limited* (20th December 1991, Unreported, High Court) (Costello J.) and *Re: Wogans (Drogheda) Limited (No.2)* (7th May 1992, Unreported, High Court) (Costello J.).

In the case of *Wogans (Drogheda) Limited,* Costello J. refused to confirm a scheme of arrangement by reason of a number of defects in the scheme. In the course of his judgment he emphasised the importance of exercising the utmost good faith in presenting information to the Court when making such an application. He said (at page 5) as follows:

> "When an application is made by a company for a protection order under the 1990 Act, it seems to me that the directors and all those associated

21 Para. 8.11.
22 Paras. 4.1 – 4.3.
23 As noted by Clarke J. in *Tony Gray & Sons Ltd* [2009] IEHC 557, *"s.24 [of the Act] precludes the approval of a scheme where [the terms of s.24(4)(c)] are breached. Therefore, it is a mandatory requirement of the act that the court be satisfied that a scheme is not unfairly prejudicial to the interests of any interested party."*

> with the application (including their professional advisers) are obliged to exercise the utmost good faith and that such a duty exists not just on an *ex parte* application to appoint an interim examiner but also on the application itself. This is because (a) of necessity, the Court must depend to a considerable extent on the truth of what it is told by the company and (b) because of the potential injustice involved in the making of a protection order when the proper course is to wind up the company. This duty involves an obligation to disclose all relevant facts material to the exercise by the Court of its discretion. *A fortiori*, it involves a duty not to deliberately mislead the Court by false evidence."

In the case of *Traffic Group Limited,* Clarke J. found that the actions of the principals of a company in the run up to, and during, an examinership can be legitimately taken into account when deciding whether to confirm or refuse to confirm a scheme.

He referred to the decision of Costello J. in *Re: Selukwe Limited*, where the scheme under consideration was approved, notwithstanding a finding that the relevant petitioners had failed to act with the utmost good faith at the time of the presentation of the petition.

Clarke J. held as follows at para 5.3:[24]

> "That the actions of those responsible for running the company in the immediate lead up to the presentation of a petition in respect of an examinership and any failure to properly disclose all relevant facts in such an application, are factors which the court can properly take into account is, therefore, clear."

In the *Traffic* case, Clarke J. found that there had been wrongful acts in the lead up to the presentation of the petition, but not withstanding that finding he confirmed the proposals for a scheme of arrangement. He held as follows: [25]

> "5.6 It is as against that background that Costello J. felt that the high prospects of saving a significant number of jobs outweighed the lack of candour displayed by the petitioners in *Re Selukwe Ltd.* (Unreported, High Court, Costello J., 20th December, 1991). It is also important to note that, in addition to the lack of candour displayed in *Re Wogan's (Drogheda) Ltd.* (Unreported, High Court, Costello J., 7th May, 1992), it is clear from the remainder of the judgment of Costello J., in that case that he was also motivated by what he perceived were significant deficiencies in the scheme then under consideration. In addition Costello J. characterised the scheme as one which was in reality a proposal for a new commercial enterprise whereby, in truth, the existing enterprise and existing jobs would have been written off.
>
> 5.7 It seems to me, therefore, that a court should lean in favour of approving a scheme where the enterprise, or a significant portion of it, and the jobs or a significant portion of them, are likely to be saved. That is not to say that the court should disregard any lack of candour or other wrongful actions. It does, however, seem to me that the court's approach to such matters should take into account the following.
>
> 5.8 Firstly it needs to be recognised that there may be cases where the wrongful actions of those involved in promoting the examinership are so serious that the court is left with no option but, on that ground alone, to decline to confirm a scheme which would otherwise be in order. It is necessary, as Costello J. pointed out in *Re Wogan's (Drogheda) Ltd.* (Unreported, High Court, Costello J., 7th May, 1992) to discourage highly wrongful behaviour.
>
> 5.9 However, in addition it seems to me that the court should consider the extent to which it may be possible (either by virtue of the provisions of the scheme as presented or modifications suggested by the court) to, as it was put by counsel for the petitioners, "neutralise" the effects of any such wrongful actions. The extent to which measures can be put in place to ensure that those who may have been guilty of a lack of candour or other wrongful action do not, themselves, benefit by it, is a factor to which significant weight should be attached. It is important, in my view, that in an appropriate case, examiners should have regard to such factors in formulating schemes for presentation to the court.
>
> 5.10 Where there is a high level of likelihood that the company can survive with a consequent saving of a significant enterprise and at least a significant proportion of the jobs at stake, the court should lean in favour of confirmation, especially if appropriate remedial measures can be put in place to mark and deal with the consequences of any lack of candour or other inappropriate action on the part of those charged with the management of the company."

It is of note that in *Traffic*, *Selukwe*, and *Wogans,* the issue of good faith was raised at the confirmation stage, namely at the time when the Court was being asked to confirm proposals for a scheme of arrangement. This is normally when the Court takes these matters into consideration. However, the issue can arise at any stage.

In *Laragan Developments,* Clarke J. noted that Laragan, while applying to be placed under the protection of the Court in an examinership application (for which insolvency is a prerequisite) had almost simultaneously obtained an affidavit from a senior official in the company suggesting that Laragan was solvent (this latter document being procured for the purposes of resisting a winding up application). The company had also commenced proceedings, while under Court protection, without making any application to the Court in advance. Furthermore, the independent accountant had made serious errors in his report, resulting in an understatement of inter-company liabilities in excess of €12,000,000.

Clarke J. referred to his decision in *Traffic* and concluded at 6.8 that:

> "In all of those circumstances, and with some considerable misgiving, I came to the view that

24 [2008] 3 IR 253, 260; [2008] 2 ILRM 1, 8.
25 [2008] 3 IR 253, 260-261; [2008] 2 ILRM 1, 9.

> the questions concerning failure of disclosure and misconduct, real as they were in some cases, were insufficient to warrant failing to approve a scheme which would otherwise properly be approved."

It should be noted, however, that the scheme ultimately failed to obtain approval, on different grounds.

In *Missford Ltd t/a Residence Members Club* [2010] IEHC 11, Kelly J. noted that the petitioner owed substantial sums to the Revenue Commissioners. He noted that a statement in the independent examiner's report that he had not identified matters which would warrant further inquiries with a view to proceedings under ss. 297 or 297A of the Companies Act 1963 (as amended) "was heavily qualified by him in giving oral evidence to me". Kelly J. noted that "if an examiner is appointed a proper investigation and the bringing of proceedings if required under s.297A will not be possible" and that it is not "the purpose of the legislation to provide directors with a ready form of absolution in respect of corporate wrongdoings."

Missford may be contrasted with *Irish Car Rentals Ltd* [2010] IEHC 235, a decision of Clarke J. In *Irish Car Rentals*, an examiner was appointed and a scheme of arrangement was ultimately approved. However, various concerns had been raised concerning the conduct of management prior to examinership, both in preferring certain creditors and in certain actions which may have triggered personal liability on the part of the directors.

Clarke J. again referred to his decision in *Traffic* and held:

> "It seems to me that any possible wrongdoing can best be dealt with through that means rather than using same as a basis for declining to approve schemes which action would have the necessary consequence of costing a significant amount of jobs."[26]

Good faith was also relevant to the second petition presented by the Zoe Group on the 14th of August 2009 when de Valera J. ordered that the question as to whether the petitioner should be permitted to proceed be determined on the 20th of August 2009.

On the 28th of August 2009, Cooke J. gave the petitioner leave to proceed with a second petition. In his judgment, Cooke J. found that the Act of 1990 did not preclude the bringing of a second application, although he accepted the submission of ACC's counsel that "it would clearly require the intervention of some special circumstance or explanation."[27]

The decision of Cooke J. was reversed by the Supreme Court. In their judgments, both Murray C.J. and Denham J. agreed with Cooke J.'s finding that the Act did not preclude the bringing of a second application, but found that no such special circumstance or explanation was present in the instant case. Denham J. stated at para. 44 of her judgment:[28]

> "To take a deliberate strategic decision to withhold evidence from the Court (contrary to legal and financial advice) when moving the first petition for the protection of the companies by the appointment of an examiner, and, having lost, to seek then to go again with fundamentally the same petition but this time with the previously withheld evidence, is an abuse of the court's process."

Murray C.J. stated:

> "In conclusion, the petitioner had a full and complete opportunity to present the petition and have it decided on its merits when the first petition was brought. For the reasons explained above the bringing of a second petition for exactly the same purpose on the basis of material evidence deliberately withheld from the Court in the first petition constitutes an abuse of process."

Conclusion

A successful application for examinership requires significant mandatory and discretionary hurdles to be cleared. Although the Supreme Court has confirmed that the test for the appointment of an examiner has not changed, a more onerous evidential burden has been demanded of applicants in practice in establishing a reasonable prospect of survival. The Courts will exercise a high degree of judicial scrutiny of all aspects of their petition, including any economic projections they intend to rely on to demonstrate a reasonable prospect of survival. Furthermore, a requirement of good faith must be satisfied at all stages.

For the moment it appears that examinership is not a viable solution for a majority of insolvent companies in the property and construction sectors. However, for trading companies with a fundamentally viable business in other sectors, it remains an important corporate rescue vehicle. ■

26 Para. 4.1. However, Clarke J. noted that the examiner was to forward his report to the Director of Corporate Enforcement.
27 *Vantive Holdings Ltd* [2009] IEHC 408.
28 *In Re Vantive Holdings & Ors* [2009] IESC 69.

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