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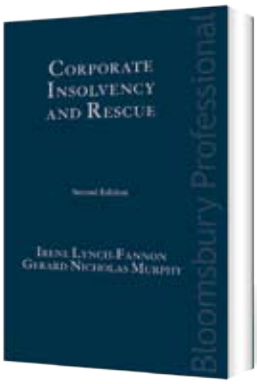

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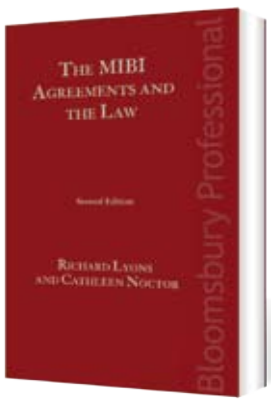

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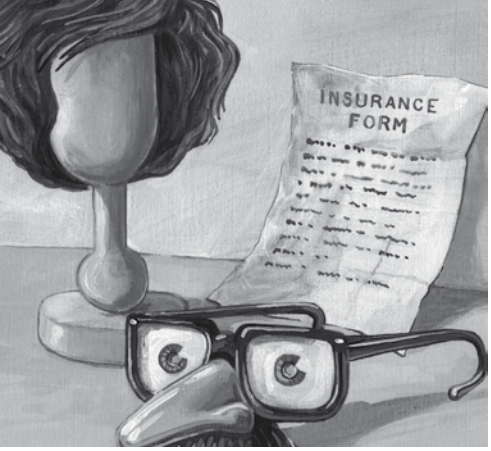

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Insurance Policies and the Duty to Disclose "Material Facts".[1]

Desmond Dockery BL

Introduction

The subject matter of this article has been prompted by a recent decision of the High Court (Hedigan J) on 29th July, 2011 dismissing an appeal by FBD Insurance Plc against a ruling of the Financial Services Ombudsman ("FSO") upholding a complaint against the insurer's refusal to honour a claim made against a motor policy. In that case, the insured had failed to disclose certain previous *non-motoring* convictions in circumstances, where the insurer had specifically asked for disclosure of previous *motoring* convictions. The FSO held that the policy was valid and the High Court refused to disturb this finding.

Definition of Material Fact

Material facts relating to a person whom it is proposed to insure against a risk are those which could be said to suggest that the subject to be insured is:

- Exposed to more than ordinary danger.
- Operating under some special or unusual motive.
- A greater than usual liability for the insurer.
- Subject believes the insurer would consider it material.[2]

In England, the classic definition of material fact was set forth in s.18(2) of the Marine Insurance Act, 1906. It provides that "*every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether to take the risk"*. Since then, this has been accepted as correct law in England relating to insurance against damage to property of all types.

In Ireland, the main authority relating to materiality and the duty to disclose is the Supreme Court's decision in *Chariot Inns Ltd v. Assicurazioni Generali and Coyle Hamilton Phillips Ltd [1981] IR 199* where Kenny J described the English statutory definition as the generally accepted test in all forms of insurance against risks to property. The Court highlighted two further points:

- That the test of whether a fact is material is an objective one.
- In the last resort, the matter has to be determined by the Court as the trier of fact[3]

The duty to disclose material facts rests equally with insured and insurer. It is a more extensive duty than the obligation upon both parties to act with the utmost good faith, "*uberrimae fidae",* because an insured might believe in all honesty that he was complying with a duty of good faith and yet fail to discharge the duty of disclosure.[4] Therefore, innocent omission does not dilute the duty. The burden of proving non-disclosure lies with the insurer.[5]

Historical treatment of "material fact" by the courts

The "*fons et origo"* is the leading case of *Carter v. Boehm [1776]* which concerned an action taken on a policy held by George Carter who was the Governor of Fort Marlborough on the island of Sumatra in the East Indies. He took out the policy against the fort being attacked by a foreign enemy. It was subsequently alleged by the underwriters that the weakness of the fort and the likelihood of it being attacked by the French were material facts known to him which he ought to have disclosed to the underwriters. The argument failed but Lord Mansfield set forth the principles underlining the duty to disclose by describing insurance as a contract of speculation. In quite trenchant terms, he said as follows;

> "The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only: the underwriter trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back of such circumstances is a fraud and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void because the risk run is really different from the risk understood and intended to be run at the time of the agreement……The policy would be equally void against the underwriter if he concealed……."

Lest anybody suspect that the High Court's recent decision in *FBD Insurance plc v. FSO & Mongan* owes its genesis to some woolly thinking by the modern judiciary in contradistinction

1 This article was delivered as a lecture to the Insurance Institute of Ireland on the 28th February, 2012.
2 Buckley, Insurance La (2nd ed) parag 3-27
3 Per Kenny J: "In the last resort, the matter has to be determined by the court; the parties to the litigation may call experts in insurance matters as witnesses to give evidence of what they would have regarded as material, with the question of materiality is not to be determined by such witnesses".
4 McGillivray on Insurance Law (10th ed) parag 17-37
5 *Joel v. Law Union Insurance Co* [1980] 2 KB

to Lord Mansfield incisiveness, it should be noted that Lord Mansfield went on to state that the insured need not disclose:

- What the underwriter knows.
- What the underwriter ought to know.
- What the underwriter waives being informed of[6].

The third point has particular relevance to the High Court decision in light of the fact that one of the grounds upon which the court ruled with the Ombudsman in upholding the policy was that FBD has impliedly waived their right to disclosure of the information in dispute, namely a prior record of previous convictions.

As stated above, in Ireland, the seminal case is *Chariot Inns Ltd v. Assicurazioni Generali SPA & Coyle Hamilton Phillips Ltd (1981) IR 199*. The facts were that Chariot Inns Ltd, in proposing for insurance on a licensed premises in Ranelagh, failed to disclose to the insurer that there had already been a fire at a Leeson Street premises owned by an associated company run by the same Managing Director. Furniture from the Ranelagh premises had been stored at Leeson Street and Chariot Inns had received a pay-out in respect of the furniture damaged there. Following a subsequent fire at the Ranelagh premises, the insurer repudiated liability. In the High Court, Keane J held that the failure to disclose this matter was not material to the risk which was underwritten and that the insurance policy was therefore valid. Three expert witness stated that in their opinion the matter not disclosed was material but the underwriter indicated in evidence that had it been disclosed to him it wouldn't have affected his acceptance of the risk.

On appeal, the Supreme Court reversed Keane J and found there had been a failure to disclose a material fact. Therefore, the policy was void but the Plaintiff's recovered in the same proceedings against the brokers who were found to have acted in breach of contract and negligently in failing to pass on the information to the insurers.

Chariot Inns Ltd is important in that it adopted the definition of material fact in the Marine Insurance Act, 1906 and by emphasising the objective nature of the test and the fact that while parties might call experts in insurance matters as witnesses of what they would regard as material, the question was ultimately to be determined by the Judge as the trier of fact.

The case was followed by *Arro Road & Land Vehicles v. Insurance Corporation of Ireland Ltd [1986] IR 403*. The insured company had agreed to sell and deliver engine parts to a firm in Northern Ireland. They contacted the road freight section of CIE to arrange transport of the goods by road. Contact was made by telephone with Mr. Spellman who was told what the goods were, how much they were valued at and where they were going. Mr. Spellman suggested the company deploy transit insurance and offered to arrange it. Without disclosing ICI's identity, he read the terms of the cover over the phone to Ms. Broe, the insured company's secretary. Mr. Mansfield, the company's director, was not keen. CIE had previously carried goods for him by road to Northern Ireland without the necessity for insurance. Two days later, Mr. Spellman gave the details to Mr. McAdam, a road freight superintendent in CIE who passed the particulars to a firm of insurance brokers who arranged the insurance with ICI. A certificate was issued by CIE which referred to the existence of a master policy with ICI and that the cover was subject to *"the conditions and terms of the original policy"*.

The consignment was to be delivered by four loads and regrettably, the fourth one was hi-jacked six days later by a man with a pistol who set it on fire and destroyed its contents. Indemnity was refused on the grounds that Mr. Mansfield (MD) had failed to disclose his 10 convictions 19 years earlier for receiving stolen motor parts for which he received 21 months imprisonment. The High Court (Carroll J) expressed her opinion that the conviction was <u>not</u> material because the insurance (a transit policy) operated only when the insured property was in the hands of a third party (CIE). ICI produced witnesses to express a *contra* opinion and the High Court Judge deferred to that testimony – despite her expressed view – and dismissed the vehicle company's case. The Supreme Court reversed her and criticised her undue deference to ICI's expert witnesses. They said she had allowed their opinions to transcend the conclusion she had expressed in her capacity as the trier of fact.

Henchy J also observed that CIE, acting as agents for the insurers, accepted the insurance without expecting or requiring disclosure of all relevant circumstances. He added that the "informal, almost perfunctory, way in which CIE effected this insurance, their readiness to collect the premium and proceed to carry the goods to their destination as soon as they had ascertained the premium, showed a failure or unwillingness to give the insured company an opportunity to make full disclosure before the contract of insurance was concluded" Henchy J went on to make the following important observation;

> "It may well be the law that even in a case such as this certain types of information may not be knowingly withheld by the insured, but this case calls only for an answer to the question whether in the circumstances of the case an innocent non-disclosure of an incident in the past life of the Managing Director of the insured company entitled the insurers to void the policy. In my opinion it did not. Insurers who allow agents such as shippers, carriers, airlines, travel agents and the like to insure on their behalf goods being carried and to sell that insurance to virtually all and sundry who ask for it, with minimal formality or enquiry, and with no indication that full disclosure is to be made of any matter which the insurers may *ex post facto* deem to be material, cannot be held to contract subject to a condition that the insured must furnish <u>all</u> material information".

Even more directly, McCarthy J emphasised that the insurer must ask the questions. He stated as follows:

> "If the determination of what is material were to lie with the insurer alone, I do not know how the average citizen is to know what goes on in the insurer's mind unless the insurer asks him by way of questions in

6 Op Cit, McGillivray, parags 17.4 &17.71

> a proposal or otherwise. I do not accept that he must seek out the proposed insurer and question him as to his reasonableness, his prudence and what he considers material….if the duty is one which requires disclosure by the insured of all material facts which are known to him, then it may well require an impossible level of performance….how does one depart from a standard if reasonably and genuinely one does not consider some fact material?

So, in the absence of a comprehensive question or of any question at all, non disclosure of a fact considered material by the insurer will be presumed innocent because to hold otherwise may involve an impossible standard from the proposer/insured. Has a reasonable proposer test substituted the reasonable and prudent insurer standard so that the Court's concern should be with what the person seeking the insurance reasonably regards as material rather than what would influence the judgment of a prudent insurer? The case turned on its own facts but McCarthy J's views were of general application and suggested that insurers were under a strict obligation to ask specific questions in the proposal form and, if they failed to ask such questions, they could not later repudiate the claim owing to a failure to disclose material information. This approach echoes the principle identified by Lord Mansfield in the 1776 *Carter v. Boehm* case that there is no duty to disclose what the insurer "*waives being informed of".*

Kelleher v. Irish Life Assurance Co [1993] ILRM

This case concerned a special promotional offer of life insurance to members of the Irish Medical Organisation (IMO). The deceased was a doctor and the claim was made by his widow. The policy contained a general declaration of health encompassing a period of six months prior to the conclusion of the contract which was signed by the deceased without divulging that before that period, he had been treated for cancer. The High Court (Costello J) dismissed the widow's claim on the policy following the death of her husband by restating the fundamental duty to disclose material facts which would affect the mind of a prudent insurer in deciding to underwrite the risk at all or in fixing the premiums. Again, he was reversed by the Supreme Court and the judgment of Chief Justice Finlay presents a conundrum for insurance companies which persists to this day in that he did not criticize a failure to raise any questions (as per the *Arro Road* case) but emphasised that when specific questions are asked, the likelihood is they will limit the duty of disclosure. He relied upon a paragraph from the 8th edition of MacGillivray and Parkington on *Insurance Law* published in 1988. The same paragraph is published in the more up to date 10th edition of 2002 as follows:

> "It is more likely, however, that the questions asked will limit the duty of disclosure, in that, if questions are asked on particular subjects and the answers to them are warranted, it may be inferred that the insurer has waived his right to information, either on the same matters but outside the scope of the questions, or on matters kindred to the subject matter of the question. Thus if the insurer asks "how many accidents have you had in the last 3 years?", it may well be implied that he does not want to know of accidents before that time, though these would still be material. If it were asked whether any of the proposer's parents, brothers or sisters had died of consumption or being inflicted with insanity, it might well be inferred that the insurer had waived similar information concerning more remote relatives, so that he could not have void the policy for non-disclosure of an aunt's death from consumption or an uncle's insanity. Whether or not such a waiver is present depends on a true construction of the proposal form, the test being would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue?."

Finlay CJ also referred to the English case of *Hair v. The Prudential Assurance Company Ltd [1983] 2 LI.LR. 667* and concluded his judgment on behalf of the Court by stating as follows:

> "I too would accept this as an accurate statement of the principle of limitation of the obligation for disclosure arising from the particular form of questions. I would also be satisfied that the true and acid test must be as to whether a reasonable man reading the proposal form would conclude that the information over and above it which is in issue was not required. Applying that test to the form of the special proposal form in this case, I have no doubt that a reasonable man reading that would assume that, provided he could truthfully answer the two questions, namely, his absence from work due to illness being confined to not more than two weeks in the previous three months, and the second question, as to his not having undergone, taken or sort medical treatment within six months, he would be entitled, having fulfilled the other necessary qualifications of being a member of the IMO under the age of 65 years, to the insurance.".

Pondering the issue of why the insurer had limited the questions in this way on this occasion, the Chief Justice expressed the following view for good measure:

> "…..it is not without importance that what was described as the special promotional offer being offered by the assurance company after negotiation through the brokers to all the members of the Irish Medical Organisation (IMO) constitutes a very sound and probable commercial manner in which to attract a very substantial quantity of new business by one single project. That fact constitutes a probable reason why the Defendant should significantly limited the disclosure required from proposers for that insurance.."

This begs the question. If an innocent omission does not

absolve the insured from disclosing a material fact, how can a decision not to disclose a material fact on the basis it is not asked for absolve an insured from his duty? Buckley accepts that it has always been the law that insurers may be deemed to have waived their right to disclosure where they ask limited questions which imply that further information is not required or where they do not follow up a statement which indicates there may be further information available. He adds that *"where the insured is asked a limited question and he answers it honestly and fully, the insurer may be taken to have waived disclosure of information beyond the scope of the question. For example, a question requiring disclosure of losses over a defined period may be taken as a waiver of disclosure of losses falling outside that period. The scope of the duty of disclosure may therefore be limited by the express questions asked"*.[7]

Buckley seeks to resolves the conundrum by suggesting that if the insurer asks for limited disclosure, there is a strong argument in favour of a waiver but if he asks for full disclosure and receives partial disclosure only, there can be no waiver unless the partial disclosure at least puts the insurer on notice that there might be more information to be disclosed.[8]

Yet, what does asking for full disclosure mean? If an insurer specifically asks for disclosure of prior motoring convictions and the insured does not disclose prior non-motoring convictions, has there been full disclosure or partial disclosure? To my mind, there has been full disclosure and the insurer has impliedly waived its right to information in connection with wider convictions. A request for full disclosure in that context would pose the question whether the proposer or the person seeking to renew an existing policy had any prior convictions of any description whatsoever, perhaps limited to a specified period of time.

Buckley accepts that a waiver to information can be implied where *"the wording of the question is such as to lead the proposer to believe that the insurer is interested only in the matters which are the subject of specific questions"* and he cites *Delaney v. New India Assurance Co Ltd [2004] ECA Civ 1705* as an example of where the Court of Appeal in England confirmed that an insurer, as a result of asking certain questions could show that he was not interested in certain other matters and could be therefore said to have waived disclosure of those other matters.[9]

Context and Background

The *Arro Road* and *Kelleher* cases have not displaced the fundamental principle imposed upon a proposer to disclose all material facts which would influence the judgment of a prudent insurer in fixing the premium or determining whether to take the risk. Whether and to what extent the duty arises and/or has been discharged turns on the facts of each given case and the Courts have undoubtedly had some difficulty in interpreting the duty and applying it to given cases. In each case, it is a matter of fact to be decided in light of sometimes complex circumstances and the conflicting evidence of a variety of witnesses.

However, the relatively liberal approach of the Supreme Court might be considered against the following context and background:

(i) The English Law Reform Commission Report, 1957

Buckley points out there was a large body of opinion in the 1950s that considered the honest policyholder to be disadvantaged by the duty to disclose all material facts when materiality was to be judge purely from the standpoint of the insurer. In response to pressure, he states the matter was twice referred to the Law Reform Commission in England. No amending legislation was introduced despite the Commission's belief that *"the state of the law is capable of leading to abuse in the sense that a variety of circumstances may entitle insurers after a loss has occurred to repudiate liability as against an honest and at least careful insured"*.

(ii) Irish Insurance Federation's Voluntary Code of Conduct

The need for reform of the duty of disclosure was recognised in the Insurance Act, 1989. The Act enabled the Minister to prescribe codes of conduct to be observed by undertakings in an insurer's dealings with the proposers of policies of insurance and policy holders renewing policies of insurance in respect of disclosure.[10] Extraordinarily, the insurance industry managed to extract a guarantee from the Minister not to implement s.61 in return for a promise by the industry to introduce its own code of conduct. This was done in the form of the *"non-life code of conduct and statement of insurance practice"* one of whose provisions stipulated that "*those matters which insurers have commonly found to be material should, as far as possible, be the subject of clear questions in proposal forms"*.[11]

(iii) The role of the Financial Services Ombudsman

The role of the FSO can be considered in the light of what was stated to be the law by the High Court (Hedigan J) in *FBD Insurance Plc v. FSO and Mongan.* The FSO discharges an administrative function and is not a court of law. An appeal to the High Court lies from his rulings but the court will not intervene simply because it would take a different view of the evidence or might have reached a different conclusion on the facts before it. Therefore, while there is an appeal to the High Court, in reality, in order to succeed, the appellant must establish that the Ombudsman committed a significant error or a series of significant errors such as to vitiate the decision he reached. Moreover, in applying the test, the court must adopt what is known as a deferential stance and must have regard to the degree of expertise and specialist knowledge of the Ombudsman[12].

Hedigan J stated that while an appeal lay from the FSO,

7 Buckley Op Cit at parag 3-59
8 Ibid
9 Ibid at parag 3-60

10 See s.61 Insurance Act, 1989 which provided that "where the Minister considers it necessary in the public interest and following consultation with the insurance industry and consumer representatives, he may, by Order, prescribe codes of conduct to be observed by undertakings in their dealings with proposers of policies of insurance and policy holders renewing policies of insurance in respect of the duty of disclosure and warranties".
11 Clause 1(c) of Non-life Code of conduct and statement of insurance practice.
12 *Orange v Director of Telecommunications Regulation & Anor* [2000] 4IR

it bore many of the features of a judicial review so that there could be a permissible error by the FSO if it was within jurisdiction, albeit only insofar as the error fell short of being one that was serious and significant.[13]He described how the FSO's function is entirely different to that of the court's function. He does not have regard to technicality or legal form and uses criteria such as whether the conduct complained of was unreasonable *simplicitor*. He can also consider whether conduct which is in accordance with law is nonetheless unreasonable or otherwise improper on the facts of a given case. He possesses a type of supervisory jurisdiction not normally vested in a court. His position was very far removed from that of a court determining issues between parties such as breach of contract. His duty was to provide an informal, expeditious and independent mechanism for resolution of complaints and when reasons are required from administrative tribunals, they should only be required to give the broad gist of their decisions.[14]

Plainly, therefore, the legal landscape has fundamentally changed since 2004, when the office of the Financial Ombudsman was established. This is not because the laws of contract applicable to disputes on the subject of material fact have changed but because the courts are no longer deciding disputes, at first instance, concerning the disclosure of material fact. An administrative body discharging a quasi-judicial function is doing so and is not bound to examine the issues from a strictly legal point of view to a standard expected of a court of law.

FBD Insurance plc v Terence Mongan – The Judgment.

This case upheld the decision of the FSO declaring Mr. Mongan's motor insurance policy to be valid. It did so, because, applying due deference to the expertise of the FSO, and bearing in mind it's function as an informal and speedy manner of resolving consumer complaints, together with the degree of analysis and legal reasoning required of it, FBD had failed to establish that the decision reached was vitiated by a serious and significant error or by a series of such errors.

Secondly, the FSO is obliged to take into account the limited duty of disclosure that FBD had created by the form of their questions. The FSO's decision had to attract a high degree of deference by the Court and no serious error was apparent in light of the fact that he applied the reasoning which was deployed by Chief Justice Finlay in *Kelleher v Irish Life Assurance Company*.[15]

(i) Facts of the case

Mr. Mongan completed a proposal form on 8th January, 2007. It requested information specified to previous motoring convictions during the preceding 5 years. At the foot of the proposal form was a heading entitled "*Duty of Disclosure"* followed by a paragraph warning Mr. Mongan that he was obliged to disclose all material information which FBD would regard as likely to influence their assessment of the risk and that if he was in doubt, he should disclose. By that time, he had a very minor conviction for being intoxicated in a public place for which he had received a fine over five years earlier. It fell outside the stipulated period and was not a motoring conviction.

He completed a renewal form in October, 2007. Six months earlier, he was convicted of "*burglary intent"* for which he got a two month suspended sentence. This fell within the stipulated five year period which had been alluded to in the original proposal form but doesn't appear to have been repeated in the renewal form. However, the renewal form did specifically repeat that particulars of previous motoring convictions were being sought – although that information and other information which was specifically sought was described as not being "an exhaustive list".

By the time he completed another renewal form in October, 2008, he had picked up a conviction for theft and for failing to appear in court for which he received a suspended sentence and a fine respectively. Curiously, these convictions were not referred to in the FSO's ruling. FBD submitted to the High Court on appeal that this very fact alone rendered the entire FSO's ruling flawed because the FSO was ruling under the misapprehension that two convictions had not been disclosed when in fact four had not been disclosed. Apart from referring to the fact that the FSO's ruling didn't deal with the latter two convictions, the High Court Judge made no other observation about this.

(ii) FSO's Ruling

The kernel of the ruling was that:

> "Objectively, given the form which the proposal and renewal forms took, the correlation was insufficient between the convictions and his motor insurance policy, for the complainant to have been obliged to disclose them. The company when referring to motor convictions states that on top of this duty of disclosure, there remains an overarching duty to disclose other convictions which are material. I cannot reasonably accept this argument".

This is effectively a re-statement of the principle in *Kelleher*[16] to the effect that a question posed by an insurer can be so specific that it necessarily implies that further information on that particular subject is not required. This amounts to a waiver by the insurer of the necessity to disclose such information. It might also be described as a failure to ask the obvious question. Insurers are obliged to play an active role in the disclosure process and can no longer rely solely on the insured's presentation but are required to ask obvious questions.[17]

The FSO also made the following observation in his ruling:

159; *Ulster Bank v. Financial Services Ombusdman & Ors* [2006] IEHC 323

13 *Hayes v. Financial Services Ombudsman & Ors* (McMenamin J) 03/11/2008.

14 *Faulkner v. Minister for Industry and Commerce* (1997) ELR 107 per O'Flaherty J as follows: "We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis".

15 Op cit

16 Ibid

17 Buckley Op cit para 3-65

> "… if in the experience and expertise of the Company, which was greater than that of the proposer, the Company elected at the time to limit its reasonable enquiries to motoring offences only, I take the view that it was reasonable for the complainant to accept this limitation on its face".

In upholding the FSO's ruling, the High Court dismissed the submissions made to it on behalf of FBD.

Hedigan J held that any errors made by the FSO were not so significant or numerous such as to vitiate the ruling. As to moral hazard, it has always been the law that proposers for insurance should disclose any previous convictions or any pending charges at the time they complete a proposal form or a renewal form but it behoves insurers to assist the proposer in that process by stating the obvious question rather than posing a limited form of question surrounding previous convictions.

As to FBD's submission that the ruling in this case was inconsistent with previous rulings, the court noted that the FSO is not bound to follow its own precedent. FBD had referred to a previous decision where undisclosed sexual convictions voided a claim even though the policy asked expressly about previous motor convictions only. The FSO's annual report 2010 emphasised that the Ombudsman has to regard each complaint on its own merits on an individual case by case basis and does not operate a system of precedent finding similar to precedent judgments used in a Court of law. The FSO has greater flexibility and choice in fashioning an appropriate remedy in cases which come before him. This probably reflects s.57BK(4) of the Central Bank Act, 1942, as inserted by the 2004 Act, which states that when dealing with a particular complaint, the FSO is required to act *"in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form*".

Implications of *FBD Insurance v FSO*

The real implication of the decision is that insurance providers must be alive to the fact that disclosure is a two way process which the insurer must assist by posing the obvious questions. If the insurance provider (as is invariably the case) regards <u>any</u> previous convictions within a specified period as relevant to moral hazard and to the assessment of risk, then the proposer must be asked whether he has any relevant convictions of any kind whatsoever imposed by a Court of law within that specified period and he must also be asked whether there are any criminal charges pending against him at the time he completes either the proposal or renewal form. It is no longer sufficient for insurers to rely upon an overarching duty to disclose, such as leaves the onus on the proposer to assess what, objectively assessed, would influence the Judgment of a prudent insurer in fixing the premium or deciding whether to take the risk.

It would appear that this merely reflects modern trends towards "transparency" and clarity for the benefit of the consumer in documents which can have legal consequences. For example, while plainly nothing to do with the law surrounding disclosure of material facts, it strikes this author that while it is a legal requirement to have a valid NCT certificate, unless the motor insurance policy specifically refers to this requirement, an insurer might not be able to void the policy on this basis alone, even though the requirement of the policy holder to keep the vehicle in a *"road worthy condition"* is a standard condition of motor insurance policies.

Fundamentally, therefore, the law has not changed in regard to limited questions since the Supreme Court's decision in *Kelleher v. Irish Life Assurance Company.* The legal position has been reiterated in more recent times by Clarke J in *Coleman v. New Ireland* [2009] IEHC *273,* where he restated the principal that a proposer for a policy of insurance must make full disclosure of material facts but added that any material non-disclosure or materially inaccurate answer to a question on the proposal form is to be *"judged by reference to the knowledge of the proposer and whether answers given were to the best of the proposer's ability and truthful"*.

In assessing this, it is clear the FSO is obliged to take into account the limited duty of disclosure which has been created by the form of the questions.

In other cases, the High Court has upheld the FSO's decision to declare an insurance policy void for failure to disclose material facts, specifically previous convictions. An example is *Molloy v.Financial Services Ombudsman* (McMenamin J) 15/04/2011 where the Appellant had failed to disclose that he had three previous convictions for public order offences. McMenamin J referred to the observations of Hanna J in the earlier case of *Flynn v. Financial Services Ombudsman & Allianz Plc* 28/07/2010 where it was stated at paragraph 27 that:

> "it is well established that an individual with a criminal offence or who has a criminal record or who fails to disclose same to an insurance company is putting himself or herself under a general moral hazard and this may entitle the insurer to void an insurance policy. This might occur even where a conviction bears no resemblance whatsoever to the hazard insured against (see *Latham v. Hibernian Insurance Company Ltd & Ors*, unreported High Court, Blaney J 04/12/1991)"

In *Flynn,* the insured failed to disclose on a renewal form that he had been charged under the Misuse of Drugs Act. However, his original household insurance proposal form had posed the question whether he had ever been charged with an offence involving dishonesty. Had that question been posed to the insured in *Mongan*, I do not believe FBD would have found itself in difficulty.

While the *Flynn* decision sits uncomfortably on the face of it with *Mongan,* maybe the two cases simply confirm that whether the FSO decides that the question about previous charges or convictions is specific enough *(Flynn*) - or is not specific enough *(Mongan),* the High Court will not interfere with the decision lightly. Clearly, the best way for insurance providers to minimise their exposure is to ask the obvious questions rather than more detailed questions.

Implications beyond the scope of FSO

The High Court in *Mongan* did not disturb the well established legal principles on which the duty of disclosure in insurance

contracts is based.[18] It must be noted also that *Mongan* was very much motivated by judicial deference to the FSO as a creature of statute set up with a clear role and function. As stated by Hamilton CJ in *Henry Denny & Sons v. Minister for Social Welfare* [1998] I IR*:*

> "I believe it would be desirable to take this opportunity of expressing the view that the Courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal, such conclusions must be corrected. Otherwise, it should be recognised that tribunals have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and argument heard by them. It should not be necessary for the Courts to review their decisions by way of an appeal or judicial review".

Cases where the High Court has overturned FSO

There have been a number of recent cases where the High Court has overturned a ruling of the Ombudsman on grounds it was vitiated by serious error by failing to afford the appellant constitutional rights to fair procedures, in particular by reference to the absence of an oral hearing prior to adjudication.

In *Lyons & Murray v. FSO & Bank of Scotland Plc* (Hogan J) 14/12/2011, the Court held that in reaching its conclusion, it was mindful of the fact that the decision would have many inconvenient consequences (including, perhaps, considerable resource implications at a time of austerity) for the Ombudsman's office. He added that perhaps cases of this sort would *"prompt a review of the proper scope and role of the Ombudsman viz a viz the Court's system".* [19] Another recent case was *Hyde v. Financial Services Ombudsman* (Cross J) 16/11/2011, where the Ombudsman's ruling was set aside for failure to afford the appellant an oral hearing in circumstances where he thereby conducted his investigation based on documentation only. As the question whether there should be an oral hearing was not a matter going directly to specialist expertise of the Ombudsman, no question of deference to such expertise arose for the court's consideration.

Another similar decision was *Irish Life & Permanent Plc v. FSO & Feely & Gallagher* (White J) 16/11/2011, where the Court decided that the FSO did not apply the provisions of the Consumer Protection Code and general consumer law relating to a banking matter. ■

18 *Coleman v. New Ireland* [2009] IEHC 273

19 *Lyons & Murray v. FSO & Bank of Scotland Plc*, per Hogan J at p 16

The Rule of Law – 3 Remand Prisoners in Uganda[1]

Tomás Keys BL

Recently, the Education Committee of the Honorable Society of King's Inns allowed me to intermit for a period of 6 months during my degree studies so I could volunteer in Africa. I volunteered with an organisation called Hospice Africa Uganda. The aim of the charity is "to promote and support low-cost affordable palliative care in a community setting in Africa."[2]

On a number of occasions I visited Mulago hospital which is the main referral hospital in Kampala. During my visits I met the founder of another NGO, the African Prisoners Project , Alexander McClean BL who trained in the UK. He organised for me to meet and interviews a number of remand prisoners who had been admitted to the hospital for various illnesses.

While there was no way at the time to verify the veracity of the accounts of the remand prisoners and their guilt was still to be determined by a court of law, the testimonials below are examples of the deficiencies in upholding the Rule of Law in Uganda.

Gordon

Gordon was a 32 year old remand prisoner who suffered from a motor neuron disease which made it difficult for him to walk. He had been on remand for the past 4 years. In May 2005, private security guards came to his house to arrest him and handed him over to the police. They told him that he had been arrested for defiling the daughter of a fellow villager. Defilement is the legal term used in Uganda to describe the offence of having sex with somebody under the age of 18

1 The author would like to thank the members of the Education Committee of The Honourable Society of King's Inns, Dr Anne Merriman FRCPI MBE, Alexander McClean BL, Doireann Ansbro BL and Patrick Leonard BL

2 Dr Anne Merriman FRCPI MBE as quoted at http://www.hospiceafrica.ie

years old. The father of the girl had reported the alleged offence to the police.

Gordon admited that he had beaten the girl as she tried to stay in his house when she had run away from home. He said that it was acceptable in the culture of the village to use corporal punishment on a minor if they had run away from home. When Gordon sent the young girl home, a female neighbour saw the girl crying and asked her what happened. She told her that she had been beaten. According to Gordon, the neighbour advised the girl that she should accuse Gordon of rape as he would receive a harsher punishment.

When Gordon was taken to court he did not have a lawyer present. It had been 4 years since Gordon's arrest and his plea had still not been heard in the High Court. When his mother contacted the complainant (the girl's father), he agreed that he would change his statement and they would then be able to go to the State Attorney to make an additional statement. However, before a new statement could be made the complainant was advised by people in his village that the State Attorney would order his arrest for making a false statement.

Gordon had been advised by a lawyer who was assigned to his case by an NGO that he would need to pay the equivalent of €75 or 5 months pay for his bail bond. He was unable to pay this and he would be held on remand until his case was heard. Gordon had no previous convictions

Richard

Richard was a 21 year old father of four who had a diagnosis of HIV/AIDS and Karposi's Sarcoma (a cancer of the skin which is common in many HIV/AIDS patients in Africa). He had widespread sores all over his body and was also anaemic and suffered heart failure due to the spread of the cancer throughout his body. He was on remand for stealing a bushel of Matoke (green bananas) worth 10,000 shillings (€2.50). When he was charged in court he pleaded not guilty. His co-accused paid bail of 100,000 shillings (€25) and was freed. Richard could not afford the bail bond or a lawyer so he was remanded in prison. In June 2009, he was diagnosed with HIV by the prison doctor. As the disease progressed, he was sent to Mulago National Referral hospital. He was too sick to attend his court hearing in July 2009. While he was in Mulago, he escaped by getting on a wheelchair and wheeling himself to the main entrance where he got on a boda-boda (motor cycle taxi) to bring him home to die. The prison authorities traced him there and he was brought to court and charged with escaping from custody. The magistrate took pity on him due to his illness and the charges were dropped. However, he was sent back to prison for the first offence. He had to be re-admitted to the hospital due to his worsening condition and when I met him he was handcuffed to the bed at night to ensure that he did not escape.

A few weeks after I interviewed him, his condition deteriorated dramatically. He was sent back to the prison and after the intervention of advocates from the African Prison's Project and the medical team from Hospice Africa Uganda, the prison authorities agreed to release him on compassionate leave so he could go home to die.

Sam

Sam was a 25 year old remand prisoner who has a metal plate in his leg which was the result of a boda-boda (motorbike) accident. When I met him the metal plate was protruding through his skin and he was awaiting an operation. He had been on remand for the past year and he was charged with theft.

In 2008 a person he knew came to his workplace and offered to sell him a mobile phone. The seller said that his child was sick and that he needed the money. Sam bought the phone for the equivalent of €28, which is about 2 month's salary. The phone had been reported as stolen and the phone company worked with the Police in tracking down where it was. The police came to Sam's workplace and arrested him for robbery. In a statement to police he said that he did not know the phone was stolen and gave them the name of the person who sold it to him. They were unable to find the other person.

He was charged and he pleaded not guilty in the Magistrate's Court. He could not meet his bail bond. There had been a number of scheduled hearings of his case but he was too ill to attend any of them. He cannot afford a lawyer and he has not been told when his case will be heard again.

Conclusion

The testimonials above, while anecdotal in nature, are a reminder of the challenges we encounter in promoting the Rule of Law in sub Saharan Africa. Uganda is a developing country with major commercial and Aid links with Ireland and it is essential that the efforts by groups such as Hospice Africa Uganda, the African Prisons Project, the Irish Rule of Law International[3] and Power4Good Ireland are supported by professionals of all disciplines. ■

3 Formerly known as Pamodzi

Start Mortgages Ltd v. Gunne and the right to apply for possession of registered land

Robert Kearns BL

Introduction

On the 25th July 2011, Ms Justice Dunne delivered her judgment in *Start Mortgages Ltd v. Gunne* [2011] IEHC 275. The decision addressed a series of test cases[1] in which lenders who held mortgages that were in arrears sought to realise their security under the respective mortgage agreements and gain possession of the properties pursuant to the provisions of s. 62(7) of the Registration of Title Act 1964[2] ("s. 62(7)"). The controversy arose out of the repeal of s. 62(7) by the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act"). The repealed section provided a statutory footing whereby a registered owner of a charge over registered land could, in the event of the principal money secured by the instrument of charge becoming due, apply to the court in a summary manner for possession of the land or any part of the land. The difficulty for charge holders was that s. 8 of the 2009 Act repealed s. 62(7), and without the inclusion of any bridging provisions, s. 96 of the 2009 Act stated that all rights and powers available to mortgagees under the Act would only apply to mortgages created after the commencement of chapter three of the Act[3].

Registration of Title Act 1964

The Registration of Title Act, 1964 allows an owner of registered land to secure a loan or mortgage over the land by registering a charge[4]. A registered charge differs from a mortgage in that there is no transfer or conveyance of the legal title to the mortgagee. S. 62(6) of the Registration of Title Act 1964 ("s. 62(6)") provides that the owner of a registered charge has broadly the same rights and powers as would be acquired by a mortgagee of unregistered land pursuant to the Conveyancing Acts[5]. The section further provides that a registered owner of a charge, for the purpose of enforcing his charge, has all the rights and powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge[6]. However, the holder of a registered charge could not obtain an order for possession for the purposes of a sale out of court until the introduction of the Registration of Title Act, 1942[7]. The repeal of s. 62(7) appeared to remove the mechanism whereby a charge holder could seek to gain possession of the charged property in the event of the principle money falling due.

Interpretation Act 2005

The Interpretation Act 2005, provides that where an enactment is repealed, the repeal will not affect any right, privilege, obligation or liability acquired under the repealed enactment[8]. The 2005 Act further provides that a repeal does not prejudice or affect any legal proceedings (civil or criminal) that are pending in respect of any right acquired or accrued under a repealed enactment[9]. The Act further provides that these proceedings may be instituted, continued or enforced as if the enactment had not been repealed[10].

Background

The facts of each of the test cases were relatively similar, however, the specific details in relation to the degree to which each lender had advanced their position was ultimately critical in terms of the impact of the judgment. In each of the cases, the mortgages were registered prior to the 1st of December 2009. In *Gunne*, the defendants had been in default since July 2008 and a letter seeking possession of the property and all monies remaining unpaid under the mortgage had been sent by the 14th September 2009 (hereinafter letter of demand). Similarly, in *Mulkerrins,* the charge was registered on the 29th September 2008, the loan went into default almost immediately and the letter of demand was made by the 16th March, 2009. In *Clair*, the charge was registered on the 28th October, 2008, the loan subsequently went into default and letter of demand was sent dated the 13th July, 2010. In *Grogan*,

1 *Start Mortgages Ltd v. Gunne & Secured Property Loans Ltd v. Clair & G.E. Capital Woodchester Home Loans Ltd v. Mulkerrins & Grogan* [2011] IEHC 275

2 The issue raised in each case was the same; however, there are some differences in terms of the facts and chronology.

3 The Land and Conveyancing Law Reform Act 2009 was introduced into law by Ministerial Order 356 / 2009 and came into operation on 1st December 2009.

4 s. 62(1) of The Registration of Title Act, 1964

5 s. 89 of the Land and Conveyancing Law Reform Act 2009 prescribes the method of creating a legal mortgage of land since 1st December 2009. The result is that using the traditional methods of a conveyance of the freehold, assignment of a leasehold or sub-demise are no longer effective to create a legal mortgage, however, it may have the effect of creating an equitable mortgage.

6 s. 62(6)

7 s. 62(7) of The Registration of Title Act, 1964 was identical in terms to s. 13 of the Registration of Title Act, 1942 both permitting the owner of a registered charge to make a summary application to court for possession in the event of the principle money becoming due.

8 s. 27(1)(c) of The Interpretation Act 2005

9 s. 27(1)(e)

10 s. 27(2)

the charge was registered on the 21st December 2006. The account went into default in November 2008, and demand for payment and vacant possession was made by letter dated the 19th January 2010.

Whether Discretion Precludes a Right?

It was not disputed by either side that if the plaintiffs in each of the cases could not rely on the provisions of s. 62(7), then there would be no basis upon which an order for possession in a summary manner could be made[11]. In *Banking Company Limited v. Devlin*[12] it was held that the holder of a charge did not by virtue of the charge have an estate or interest in the land sufficient to enable them to recover possession.

In her decision Dunne J. adopted a two stage approach. It was first necessary to decide whether s.62(7) created a right capable of being saved by s. 27 of the 2005 Act, or in the alternative did it provide something more akin to a hope or expectation that in certain circumstances, a charge holder could make an application for possession[13]. The second stage was that if a right was created, when could it be deemed to vest in the charge holder or be acquired or accrued by the charge holder. It was submitted by the defendants that the wording of s. 62(7) and in particular that part which provides:-

> "The court may, if it so thinks proper, order possession of the land … to be delivered to the applicant...."

conferred a discretion on the court as to whether to make an order for possession and in those circumstances there was no right of possession[14]. In response, *Birmingham Citizens Permanent Building Society v. Caunt*[15] was opened to the court where the nature of the court's jurisdiction to decline to make an order for possession was considered in the following terms:-

> "There appears no trace, prior to 1936, of any right in any court to deny a mortgagee asserting or claiming his right to possession, the appropriate order though to this a qualification has to be made in that a court in the exercise of its inherent jurisdiction for proper reason to postpone or adjourn a hearing might by adjournment for a short time afford the mortgagor a limited opportunity to find means to pay off the mortgagee...." [16]

The issue of whether s. 62(7) conferred a drescretion on the court was also canvassed in *Bank of Ireland v. Smyth*[17] where Geoghegan J. considered the wording of the Act in the following terms:-

> "The words "may if it so thinks proper" in s. 62(7) mean no more, in my view than, that the court is to apply equitable principles in considering the application for possession. This means that the court must be satisfied that the application is made *bona fide* with a view to realising the security"

In reaching the conclusion that the right to apply for possession of lands is capable of being construed as a right within the meaning of s. 27 of the 2005 Act, the court was referred to Bennion on *Statutory Interpretation*[18] where it was accepted that if the right at issue has become vested by the date of repeal, then the right is one that can be enforced notwithstanding the repeal of the particular statutory provision[19]. Therefore, it was held that a limited form of discretion may exist but that does not alter the fact that the right to apply to the court for relief is a right[20].

The Source of the Right

It was submitted by the plaintiffs that the right to apply for an order for possession was acquired at the date of registration and that the business of the charge was such as to create the right to recover the sum secured[21]. The plaintiffs sought to rely on the provisions of s. 62(6) which provides that on registration, the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts. The section further provides that the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under a mortgage by deed[22]. S. 19 of the Conveyancing Act 1881 implies a statutory power of sale once the mortgage has been created, however, it is important to distinguish between the point at which the power of sale arises and the point at which it becomes exercisable. The power of sale arises once the date for redemption of the mortgage has passed. Although, the mortgagee is not entitled to exercise the power of sale, without being liable in damages to the mortgagor, unless the conditions set out in s. 20 of the 1881 Act are met[23].

It appears that the court construed the very existence of s. 62(7) as an intention on the part of the legislature to qualify the rights of a charge holder. Unlike a mortgage by deed; it was not possible for a charge holder to seek possession by virtue of a registered charge[24]. To obtain possession of the

11 Start Mortgages Ltd v. Gunne [2011] IEHC 275 at p.15
12 [1924] 1 I.R. 90
13 In *Director of Public Works v. Ho Po Sang* [1961] A.C. 901 under Hong Kong legislation prior to its repeal a lessee was entitled to call on his under-lessees to quite if the Director of Public Works gave a rebuilding certificate. The lessee applied for a certificate and was notified by the Director that he intended to give a certificate. The legislation was subsequently repealed. The lessee challenged and it was held that there was no accrued right at that state. The issue rested in the future, the lessee had no more than a hope or expectation of being granted a rebuilding certificate.
14 *Start Mortgages Ltd v. Gunne* [2011] IEHC 275 at p. 8
15 [1962] 1 Ch. 883 p. 891.
16 The reference to 1936 is a reference to the fact that the rules of the Supreme Court in the United Kingdom were changed at that time
17 [1993] 2 I.R. 102 p. 111
18 Bennion on *Statutory Interpretation* (5th Ed.) p. 309
19 *Start Mortgages Ltd v. Gunne* [2011] IEHC 275 at p 22
20 Ibid p. 23
21 Ibid p. 24
22 s. 62(6) of The Registration of Title Act, 1964
23 s. 20 Conveyancing Act 1881 (1) where a written notice seeking repayment of the mortgage debt has been served and the payments have been in default for three months, or (2) where interest on the mortgage is two months or more in arrears, or (3) where the mortgagor has breached a condition of the mortgage agreement other than the covenant to repay the money and the interest.
24 *Banking Company Limited v. Devlin* [1924] 1 I,R. 90

charged lands the lender can only make an application on the principal monies secured by the instrument of charge becoming due. There are clear differences between a lender's ability to acquire possession under a mortgage by deed and a registered charge. Therefore, it appears that the source of the right to make an application for summary possession is derived from s. 62(7) and not s. 62(6).

Acquired and Accrued Rights

After reaching the conclusion that s.62(7) conferred a right capable of being saved by the provisions of s.27(1) and (2) of the 2005 Act, it became necessary to identify the point in time when it could be said that the right has been acquired or accrued by the lender[25].

The question of when rights are acquired was considered in *O' Sullivan v. Superintendent in Charge of Togher Garda Station*[26]. In that case, the judge drew a distinction between a right acquired and a right accrued. It appeared that a right was acquired when it came into being and accrued when all necessary steps for the enforcement of the right had been taken. Therefore, a charge holder did not acquire a right to apply for possession when the charge was registered as the right had not come into being, any application for possession rested upon a contingent event in the future, which may or may not happen.

The court also considered *Chief Adjudication Officer v. Maguire*[27] and in particular the dicta of Simon Brown L.J. where he stated at p. 1788:

> "Whether or not there is an acquired right depends upon whether at the date of repeal the claimant has an entitlement (at least contingent) to money or other certain benefit receivable by him provided only that he takes all appropriate steps by way of notices and/or claims thereafter"[28].

In light of the above authorities, it was held that for a right to be acquired within the meaning of the 2005 Act, the right had to exist at the time of the repeal of the enactment. In this context, the court then examined the specific wording of s. 62(7). It found that the right under s. 62(7) is a right to apply for an order for possession. The application for such an order can only be made when the principal monies secured by the charge have become due. Therefore, when the principal monies have become due, then the lender has acquired the right to bring proceedings to recover possession[29].

When The Loan Becomes Due

In deciding when the principal monies became "due", the judgment focused on the *Grogan* case[30] and in particular referred to Clause 3.02 of the mortgage agreement which states:-

> "All monies remaining unpaid by the borrower to the lender and secured by this mortgage shall immediately become due and payable on demand to the lender on the occurrence of any of the following events that is to say:
>
> (a) on the happening of any event of default....."[31]

The clause cited above is a standard clause and appears in the mortgage documentation of most mortgage providers in the state. The court concluded that for the loan to become due within the meaning of s. 62(7); there must be (1) a default and (2) there must be a demand for repayment of the principal monies secured. Therefore, if the principal monies have become due by the 1st of December, 2009 following a demand, there is no bar to the lender bringing proceedings to recover possession of the lands secured by the charge.[32]

However, it is submitted that a strict interpretation of the phrase "due and payable on demand to the lender" is not an exercise in tautology but rather the expression of two separate and distinct concepts. The above phrase states that the whole of the loan immediately becomes due on the happening of any event of default and that subsequently becomes payable on a demand being made to the borrower. To interpret the clause otherwise would not provide business efficacy because if the loan money did not become due until after the letter of demand was sent, there would be no basis for sending the letter of demand as the money was not due.

It is submitted that if s. 62(7) conferred a right to possession, it would be necessary to send a letter of demand because a letter of demand is a formal proof for a lender seeking possession. However, s. 62(7) confers a right to make an application for possession when the principal monies have become due. Therefore, the operative date of when the right is acquired should be the date of default.

Conclusion

The current position is unclear for lenders. The repeal of s. 62(7) means that any mortgages created before 1st December 2009, but which become due after that date, *i.e.* there has been a default and the letter of demand has been issued after the 1st December 2009 do not provide a lender with a right to seek possession. The consequences for the lender and the wider housing market are significant; the legislature may have to step in to provide some degree of certainty in an uncertain environment. ■

25 Ibid p. 23 Para. 2
26 [2008] 4 I.R. 212.
27 [1999] 1 WLR 1778
28Start Mortgages Ltd v. Gunne [2011] IEHC 275 at p. 24 - 25
29 Ibid p. 26 - 27
30 This was the 4th and final test case in the series.
31 Ibid p. 26 para. 1
32 Ibid p. 27 - 28

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 17, Issue 3, June 2012

A directory of legislation, articles and acquisitions received in the Law Library from the 1st April 2012 up to 11th May 2012
Judgment Information Supplied by The Incorporated Council of Law Reporting

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

ADMINISTRATIVE LAW

Statutory Instruments

Appointment of special adviser (Minister of State at the Department of Environment, Community and Local Government) order 2012
SI 68/2012

Authorisation of certain interceptions (transfer of departmental administration and ministerial functions) order 2012
SI 76/2012

ADVOCACY

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L93

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ARBITRATION

Award

Enforcement – Judgment in respect of award – New dispute – Whether applicant entitled to particular percentage as additional rent arising from award – Whether calculation of award amounted to new dispute – Whether trial judge had jurisdiction to refer contended new dispute for arbitration – Arbitration Act 2010 (No 1), s 23 – UNCITRAL Model Law, art 8 – Applications dismissed (2011/35MCA – Laffoy J – 11/3/2011) [2011] IEHC 185
Córas Iompair Éireann v Spencer Dock Development Company Ltd

Award

Set aside – Delay – Building contract – Employment terminated – Alternative builder retained to complete works – Counterclaim – Award to defendant – Whether arbitration conducted in fair impartial manner – Treatment of evidence – Whether comments on credibility prejudicial – Weight attached to evidence – Whether report inadmissible – Jurisdiction to examine merits of award – Whether arbitrator made subjective assessment – Bias – Failure to make finding as to whether defendant in breach of contract – No finding whether works by defendant were defective – Whether arbitrator correct refuse to listen to tapes or transcripts – Tapes not used in evidence – Factual issues outside court's remit – Whether arbitrator failed to make distinct finding on liability – Plaintiff's case different to that before arbitrator – Finding that damages for non-completion and remedial works not reasonably established – Whether finding that contract not properly terminated by plaintiff correct – Unclear if evidence before court consistent with evidence before arbitrator – Service of notice – Absence of transcript – Court unable resolve conflict of evidence – Retention figure increased as defendant unable to provide bond – If conclusion erroneous not arrived at in irregular manner – Error not so serious and fundamental as to justify setting aside award – *O'Sullivan v Joseph Woodward & Sons Ltd* [1987] IR 255 distinguished; *Galway City Council v Samuel Kingston Construction Ltd* [2010] IESC 18 [2010] 2 ILRM 348 and *McCarthy v Keane* [2004] IEHC 104 [2004] 3 IR 617 applied – Arbitration Act 1954 (No 26), s 38 – Application dismissed – (2010/134MCA – Laffoy J – 25/3/2011) [2011] IEHC 188
Hymany (Pontoon) Ltd v Galkil Ltd t/a Impact Developments

Award

Set aside – Due process – Practice & procedure – Insurance contract – Hearing in absence of insurer – Application to compel compliance with award – Proceedings to set aside award and remit dispute – Whether proceedings within jurisdiction – Whether arbitrator should been joined as defendant – Whether proceedings in compliance with Rules of the Superior Courts – Arbitration commenced before operative date in legislation – Originating notice of motion – Adjournment sought – Unavailability of witness – Refusal to adjourn – Withdrawal from hearing – Whether misconduct in arbitration– Whether insurer given reasonable opportunity to be present – No allegation bad faith against arbitrator – Order discharging arbitrator from proceedings – Costs of arbitrator awarded against insured on indemnity basis – *Galway City Council v Samuel Kingston Construction Ltd* [2010] IESC 18 [2010] 2 ILRM 348 and *Redahan v Minister for Education* [2005] IEHC 271 [2005] 3 IR 64 considered; *Grangeford Structures Ltd (In Liquidation) v SH Ltd* [1990] 2 IR 351 distinguished ; *Lennon and Harvey Ltd v Margaret Murphy* [2004] IEHC 402 (Unrep, Murphy J, 21/12/2004) followed –Arbitration Act 2010 (No 1), s 3(1) – Rules of the Superior Courts 1986 (SI 15/1986), O 56, r 4 – Rules of the Superior Courts (Arbitration) 2006 (SI 109/2006) – Award set aside (2011/88SP – Laffoy J – 14/3/2011) [2011] IEHC 184
FBD Insurance PLC v Connors

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Carey, Gearoid
Agreements to mediate
2012 (19) 4 Commercial law practitioner 71

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Article

Cassidy, Pamela
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2012 (April) Gazette Incorporated Law Society 20

COMMERCIAL LAW

NAMA

Powers – Non-impaired loans – Decision to transfer – Fair procedures – Whether entitlement to be heard – Timing of decision – Alleged obligation on NAMA to acquire impaired loans only – Breach of constitutional rights – Judicial review – Standard of review – Whether substantial issue for determination – Purpose of legislation – Acquisition process – Powers of NAMA – Loans with participating institutions – Decision of expert reviewer – Eligible bank assets – Whether failure to take relevant considerations into account – Loans of systemic risk – Solvency of debtors – Likelihood of impairment – Quality of underlying assets – Historical performance of debtors – Factors to be taken into account – Statutory discretion – Purpose of discretion – Factors taken into account – Whether loans contributed to systemic risk in financial institutions – Whether entitlement to be heard – *Audi alteram partem* – Rights of plaintiff – Equitable right of redemption – Right to earn a livelihood – Contractual entitlements – Reputational damage – Nature of interference with rights – Whether implied right to be heard – Making of decision to transfer prior to existence of NAMA – Whether decision invalid – Urgency and expediency – Adopting of decision to transfer – Discretionary nature of review – Absence of entitlement to be heard – Absence of application for certiorari – Capacity for valid decision to transfer – European state aid – Direct applicability of decision – Constitutional challenge – Whether power to acquire non-impaired assets disproportionate interference with rights of borrowers – Proportionality – National banking and economic difficulties – *G v Director of Public Prosecutions* [1994] 1 IR 374; *McNamara v An Bord Pleanála* [1995] 2 ILRM 125; *Reg v Australian Broadcasting Tribunal; Ex parte 2 HD Pty Ltd* (1979) 27 ALR 321; *Swan Hill Corporation v Bradbury* (1937) 56 CLR746; *Water Conservation and Irrigation Commission v Browning* (1947) 74 CLR 492; *Peko-Wallsend v Minister for Aboriginal Affairs* [1986] 162 CLR 24; *McCormack v Garda Siochána Complaints Board* [2997] 2 IR 489; *PMPS v Attorney General* [1983] IR 339; *Falcon Travel Ltd v Owners Abroad Group Ltd* [1991] 1 IR 175; *Phonographic Performance (Ireland) Ltd v Cody* [1998] 4 IR 504; *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105; *Dreher v Irish Land Commission* [1984] ILRM 94; *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 1 IR 421; *North Wall Property Holding Co v Dublin Docklands Development Authority* [2008] IEHC 305, (Unrep, Finlay Geoghegan J, 9/10/2008); *Hempenstall v Minister of the Environment* [1994] 2 IR 20; *Energy Reserves Group Inc v Kansas Power & Light Company* 469 US 400; 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Dellway Investment Limited v National Asset Management Agency

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Collins, Sam
Material non-disclosure in ex parte applications
2012 (19) 4 Commercial law practitioner 78

Gibbons, Glen
The impact of incoterms 2010
2012 (4) 3 Irish business law quarterly 15

COMMUNICATIONS

Statutory Instrument

Communications regulations (licensing of premium rate services) regulations 2012
SI 111/2012

COMPANY LAW

Director

Disqualification – Practice and procedure – Evidence – Application to strike out evidence from affidavits – Whether Director of Corporate Enforcement impermissibly delegated investigative function – Whether finding of report of tribunal of inquiry admissible – Whether hearsay evidence permissible at initial stage of disqualification proceedings – Right to cross-examine – *Goodman International v Mr Justice Hamilton* [1992] 2 IR 542 applied – Companies Act 1990 (No 33), s 160 – Company Law Enforcement Act 2001 (No 28), ss 3 and 12(6) – Rules of the Superior Courts 1986 (SI 15/1986) O 40, r 4 – Respondent's appeal dismissed (25 & 26/2008 – SC – 14/7/2011) [2011] IESC 24
Re Bovale Developments Ltd: Director of Corporate Enforcement v Bailey

Inspectors

Appointment – Fair procedures – Proportionality – Statutory interpretation – *Ex parte* order – Appointment of inspectors to company – Whether *ex parte* appointment of inspectors interim or final order – Whether *ex parte* final order appointing inspectors unconstitutional – *DK v Crowley* [2002] 2 IR 744; *Dellway Investments Ltd v National Asset Management Agency (No 2)* [2011] IESC 14 (Unrep, SC, 12/4/2011) applied – European Communities (Markets in Financial Instruments) Regulations 2007 (SI 60/2007), reg 166 – Constitution of

Ireland 1937, Articles 40.1, 40.3.1° and 40.3.2° – Interim order appointing spectators with return date granted (2011/219MCA – Hogan J – 18/7/2011) [2011] IEHC 298
Re Custom House Capital Ltd

Investigation

Report – Evidence – Interview – Inspectors – Not all inspectors present at interview of witness – Court order requiring re-interview by all inspectors if veracity of evidence in dispute – Whether veracity of evidence given in interview in dispute – Meaning of veracity – Whether statements of fact or belief – *People (AG) v Casey (No 2)* [1963] IR 33 considered – Companies Act 1990 (No 33), ss 7(4), 8 and 12 – Applicant's appeal allowed (49/2007 – SC – 10/10/2011) [2011] IESC 38
Byrne v Judge O'Leary

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SI 96/2012

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SI 97/2012

Article

O'Neill, Ailbhe
Pillar A of the Companies bill 2011 – the role of the company secretary
2012 (4) 3 Irish business law quarterly 3

COMPETITION LAW

Undertaking

Dominant position – Essential facility – Abuse of dominant position – Excessive pricing – Cross-subsidisation – Inter-state trade – Competition Act 2002 (No14), ss 3(1) and 5 – Treaty on the Functioning of the European Union, Articles 102 and 106 – Statute – Power – Exercise of statutory power – *Ultra vires* – Reasonableness – Proportionality – Purpose – Charges – Passenger ferry services – Change to per capita passenger charges – Actual cost of providing facilities – Use actually made of harbour – Charges intended to generate funds – Deficits in overall management and operation of all fishery harbour centres – Whether Order *ultra vires* – Whether Minister acted in excess of statutory power – Fishery Harbour Centres (Rates and Charges) Order 2003 (SI 493/2003) – Fishery Harbour Centres Act 1968 (No18), s 4 – Fishery Harbour Centres Act 1980 (No 22) – Declaration that charges were invalid granted (2005/3195P – Cooke J – 18/10/2011) [2011] IEHC 388
Island Ferries Teo v Minister for Communications, Marine and Natural Resources

CONSTITUTIONAL LAW

Detention

Identity – Applicant changed name – Claim not person named in proceedings – Whether change of name by deed poll grounds invalidated proceedings brought against applicant in original name – Whether right to fair hearing in court of criminal appeal impeded – Supply of prison food to which applicant allergic – Internal prison administration – Whether constituted grounds for inquiry under article 40 – Detention in prison – Constitution of Ireland 1937, article 40 – Application refused (2011/596SS – Ryan J – 7/4/2011) [2011] IEHC 247
Gan v Governor Arbour Hill Prison

High Court

Jurisdiction – Inherent jurisdiction – Civil detention – Detention of minor – Duration of detention – Purpose of detention – Extent of jurisdiction to order civil detention – Whether High Court could order civil detention of minor – Whether detention could be ordered in best interests of minor – *SS (a minor) v HSE* [2007] IEHC 189, [2008] 1 I.R. 594 followed; *Kinsella v Governor of Mountjoy Prison* [2011] IEHC 235, (Unrep, Hogan J, 12/6/2011) and *DG v Ireland (app 39474/98)* (2002) 35 EHRR 1153 considered – Constitution of Ireland, 1937, Articles 40.3 and 42.5 – Detention ordered (2001/62IA – Hogan J – 18/7/2011) [2011] IEHC 297
H(G) (a minor) v HSE

Personal rights

Right to privacy – Minor – Rape victim – Alleged breach of right to privacy – Damages – Alleged breach of statutory restrictions on publication – Alleged unauthorised and unlawful publication of reports leading to identification of victim – Publication of name and age and address of perpetrator – Entitlement to anonymity – Whether breach of statute gave rise to cause of action in damages – Whether information published or broadcast in breach of statute – Whether information likely to lead to identification of complainant – Defence – Subjective view of defendant – Whether information published in breach of right to privacy – Administration of justice in public – Proportionality – Absence of application to trial judge for direction regarding publication – Whether information private – Whether violation conscious and deliberate – *Kennedy v Ireland* [1987] IR 587; *Herrity v Associated Newspapers (Ireland) Ltd* [2009] 1 IR 316; *Wainright v Home Office* [2003] 4 All ER 969*; Atlantic Marine Supplies Ltd v Minister for Transport* [2010] IEHC 104, (Unrep, Clarke J, 26/3/2010); *Moyne v Londonderry Port and Harbour Commissioners* [1986] IR 299; Sweeney v Duggan [1991]2 IR 274; *Independent Star Ltd v O'Connor* [2002] 4 IR 166; *O'Riordan v Director of Public Prosecutions* [2005] EWHC 1250, (Unrep, English Court of Appeal, 19/5/2005); *Attorney General v Greater Manchester Newspapers Ltd* [2001] QB 451; *Norris v Attorney Genera*l [1984] IR 36; *Irish Times Ltd v Ireland* [1998] 1 IR 359 considered – Criminal Law (Rape) Act 1981 (No 10), ss 7 and 8 – Claim dismissed (2007/5734P– Hedigan J – 3/11/2010) [2010] IEHC 500
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Specific performance

Damages in lieu – Damages for delay – Means of assessing damages – Development of shopping centre – Imputation of commercial development – Cost of securing freehold to land – Delay in opening shopping centre by reason of delay in obtaining title to freehold to land – Loss of opportunity – Losses directly attributable to adverse market movements – Assessment of consequential damages deriving from potential development of property – Foreseeability and remoteness – Jurisdiction to discharge order for specific performance and grant damages in lieu – *Lett & Co Ltd v Wexford Borough Corporation* [2007] IEHC 195 (Unrep, Clarke J, 23/5/2007); *Ratcliffe v Evans* [1892] 2 QB 524; *Chaplin v Hicks* [1911] 2 KB 786; *Biggin & Co Ld v Permanite Ld* [1951] 2 KB 351; *Duffy v Ridley Properties Ltd* [2008] IESC 23, [2008] 4 IR 282 and *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 considered; *Diamond v Campbell Jones & Ors* [1961] Ch 22 distinguished – Order of specific performance discharged and damages in the amount of €1,347,893,000 together with

relevant updated interest awarded in lieu and €1,100,000 awarded for delay damages (2005/1657P – Clarke J – 9/3/2011) [2011] IEHC 210
Mount Kennett Investment Company v O'Meara

Article

O'Reilly, Sean
E-commerce and contract making
2012 (4) 3 Irish business law quarterly 19

COURTS

District Court

Jurisdiction – Transfer of sittings – Temporary court house – Objection by local solicitors – *Locus standi* – Whether sufficient interest – Breach of constitutional right to earn livelihood – Public interest – Involvement in consultation process – Whether correct procedure invoked for valid transfer – Claim that decision administrative in nature and within jurisdiction of Courts Service – Statutory procedure to be followed – Whether District Court judge acted outside jurisdiction – Statutory framework – Whether power to transfer all business to court house in separate district court area – Inherent jurisdiction to make arrangements for sitting of court – *Mulcreevy v Minister for Environment* [2004] 1 IR 72; *Lancefort Limited v An Bord Pleanála (No 2)* [1999] 2 IR 270; *O'Brien v O'Halloran* [2001] 1 IR 556; *Construction Industry Federation v Dublin City Council* [2005] 2 IR 496; *Casey v Minister for Arts* [2004] 1 IR 402 and *Cahill v Sutton* [1980] IR 269 considered – Courts of Justice Act 1953 (32), s 26 – Relief refused (2009/1035P – Hedigan J – 2/11/2010) [2010] IEHC 499
Flynn v Courts Service

Abuse of process

Jurisdiction – *Res judicata* – Earlier proceedings between same parties – Identical grounds litigated in previous proceedings – Whether prior set of proceedings presented adequate and appropriate opportunity to argue issues – Applicant charged with sexual offences – Application for *certiorari* of decision by trial judge to admit evidence by video link- *Henderson v Henderson* (1843) 3 Hare 100 applied ; *AA v Medical Council* [2003] 4 IR 302 and *Carroll v Ryan* [2003] 1 IR 308 followed – Relief refused (2010/1308JR – Kearns P – 28/2/2011) [2011] IEHC 238
O'Donnell v DPP

CRIMINAL LAW

Criminal damage

Statutory defence – Lawful excuse – Lay defendant – Whether immediacy in protection of person or property required to rely on defence – Whether amendment to legislation changed substance of defence – Whether requirement for immediacy could be implied – Onus of proof – Whether interpretation of statutory defence of lawful excuse without ambiguity – Whether judge's charge on defence of lawful excuse satisfactory – Whether trial or verdict safe or satisfactory – *People (DPP) v Cagney* [2008] 2 IR 111 considered – Criminal Damage Act 1991 (No 31), ss 2 and 6 – Non Fatal Offences Against the Person Act 1997 (No 26), s 21 – Appeal allowed; conviction quashed (25/2011 – CCA – 25/2/2011) [2011] IECCA 25
People (DPP) v Kelly

Defence

Possession of drugs – Statutory defence – Whether statutory defence casts evidential burden of proof on accused – Whether evidential onus reverts to prosecution to negative defence beyond reasonable doubt – Appropriate formula of Judge's charge agreed between counsel – Counsel's duty to raise requisitions – No requisitions – Whether circumstances existed to allow accused to rely on ground of appeal where no requisitions made at trial – Correctness of Judge's charge in relation to defence – Misuse of Drugs Act 1977 (No 12), s 29(2)(a) – Application refused (129/2008 – CCA – 31/5/2011) [2011] IECCA 33
People (DPP) v Akinola

Evidence

Admissibility – Fairness – Reconstruction of alleged events – Defendant not present during reconstruction – Evidence of reconstruction unfairly admitted – Conviction quashed (261/2009 – CCA- 4/4/2011) [2011] IECCA 24
People (DPP) v Ahern

Evidence

Arrest – Statutory warning – Breath sample provided – Applicant and solicitor not in court for prosecution evidence – Whether evidence of prosecution compliant with statutory requirements – Fair procedures – Whether decision irrational – Garda witness reading from typed script – Objection by applicant not acceded to by respondent – Remark by respondent to witness to try and not look like reading from precedent – No cross-examination – Whether witness continued to give evidence with reference to extract – Whether evidence of compliance with statutory requirements – Absence of evidence from applicant as to events in police station – No denial that warning given – Not guilty plea – Whether witness entitled to give evidence in manner – Whether respondent entitled to proceed on basis prosecution being put on proof – *DPP v Clifford* [2002] IEHC 81 (Unrep, Ó Caoimh J, 22/7/2002) considered; *Dineen v Delap* [1994] 2 IR 228 distinguished – Relief refused (2010/276JR – Peart J – 14/3/2011) [2011] IEHC 153
Bailey v Judge Browne

Evidence

Membership of illegal organisation – Whether Court must disregard activities giving rise to membership charge if no charges laid arising from same – Special Criminal Court sitting as tribunal of fact and as tribunal of law – Evaluation of oral evidence – Cross-examination – Basis for garda belief of membership confidential – Whether defence deprived of effective cross-examination by garda claiming confidentiality – Weight of evidence of garda belief where confidentiality deprives defence of effective cross-examination – Circumstantial evidence – Whether weak strands of evidence stronger if bound together – Whether sufficient evidence before trial court – Application for leave to appeal refused (203 & 204/2009 – CCA-25/3/2011) [2011] IECCA 21
People (DPP) v McCrossan & Myles

Evidence

Murder – Provocation – Intention – Photos of deceased – Admissibility to rebut defence of lack of intention – Responses given in garda interviews – Trial judge's discretion to exclude otherwise admissible prosecution evidence if its prejudicial effect outweighs its probative value – Whether discretion to admit evidence exercised judicially – Application refused (271/2008 – CCA – 4/7/2011) [2011] IECCA 53
People (DPP) v Carney

Evidence

Unavailability – CCTV – Evidence by people who had viewed CCTV – Evidence circumstantial – Whether CCTV central to prosecution case – Reason for loss of evidence not determining factor – Onus on applicant – Whether exceptional circumstances present – Whether scenario posited by applicant borne out by evidence – Whether real and serious risk of unfair trial – Burglary – Applicant under surveillance – *Savage v DPP* [2008] IESC 39 [2009] 1 IR 185, *CD v DPP* [2009] IESC 70 (Unrep, SC, 23/10/2009) and *Dunne v DPP* [2002] 2 IR 305 applied; *Keogh v DPP* [2009] IEHC 502 (Unrep, Birmingham J, 17/11/2009) followed; *Irwin v DPP* [2010] IEHC 232 (Unrep, Kearns P, 23/4/2010), *Ludlow v DPP* [2008] IESC 54 [2009] 1 IR 640, *Fagan v Judges of the Circuit Court* [2006] IEHC 151 (Unrep, Dunne J, 28/4/2006) and *Leahy v DPP* [2010] IEHC 22 (Unrep, Charleton J, 5/2/2010) considered; *Braddish v DPP* [2001] 3 IR 127 distinguished – Application refused (2010/225JR – Irvine J – 6/10/210) [2010] IEHC 506
Spellman v DPP

Murder

Defence – Provocation – Stabbing of victim following ejection from caravan – Refusal to permit defence of provocation to be fully advanced – Refusal to allow jury consider

defence arising from events occurring prior to ejection – Necessity for provocation to emanate from deceased – Availability of defence where mistaken killing of person other than provoker – Function of trial judge – Burden on accused – Whether trial judge mistaken in law – *Viva voce* evidence – Inconsistent and contradictory evidence – Statements – Whether error in refusing to allow video recording of interview be shown to jury – Prosecution speech to jury – Misstatement of position in law – Correct explanation by trial judge – Discretion of trial judge – *People (DPP) v Kelly* [2000] 2 IR 1; *R v Duffy* [1949] 3 All ER 932; *People (DPP) v MacEoin* [1978] IR 27 and *People (DPP) v Davis* [2001] 1 IR 146 considered –Leave refused (14/2010 – CCA – 20/12/2010) [2010] IECCA 123
People (DPP) v Delaney

Practice and procedure

Hybrid offences – Procedure – Remedy sought – Juvenile charged with two hybrid offences – Sent forward for trial – Charges struck out – Dispute regarding whether or not DPP consented to summary disposal of charges in District Court – Whether DPP consented to such summary disposal or directed trial by indictment – Whether Circuit judge erred in striking out charges – Whether more appropriate alternative remedies –*Gormley v Smyth* [2008] IEHC 266, [2010] IESC 5, [2010] 1 IR 315 applied – *Kelly v The Director of Public Prosecutions* [1996] 2 IR 596; *Dillon v McHugh* [2011] IEHC 8, (Unrep, Kearns P, 14/1/2011); *Brady v Fulham* [2010] IEHC 99, (Unrep, O'Neill J, 26/3/2010); *Grodzicka v Ní Chondúin* [2009] IEHC 475, (Unrep, Dunne J, 30/10/2009); *Doyle v Connellan* [2010] IEHC 287, (Unrep, Kearns P, 9/7/2010) considered – *Reade v Reilly* [2009] IESC 66, [2010] 1 I.R. 295 distinguished – Criminal Justice Act 1951 (No 2) – Criminal Procedure Act 1967 (No 12), ss 4A & 13 – Criminal Damage Act 1991 (No 31), s 3 – Non-Fatal Offences Against the Person Act 1997 (No 26), s 5 – Children Act 2001 (No 24), s 75 – *Certiorari* granted (2010/58JR – McMahon J – 18/2/2011) [2011] IEHC 56
DPP v Judge Hunt

Road traffic offence

Intoxilyser – Documents relating to software – Non-disclosure – Medical Bureau of Road Safety – Screening of mouth alcohol – Disclosure order made – Manufacturer stated no documents in relation to detection of mouth alcohol – Software code intellectual property of manufacturer – Bureau obligation to test machine – Bureau obligation not to disclose software – Whether software covered by categories of disclosure – Section 17 certificate rebuttable presumption of guilt – No evidence of malfunction – Whether access to software necessary for fair trial – Whether inequality of arms as result in difference between prosecution and accused's ability to test and analyse working effectiveness of fail-safe procedures of intoxilyser – Onus of proof – Whether evidential foundation for hypothesis – Whether error within jurisdiction – Whether conviction defective – *C(D) v DPP* [2005] 4 I.R. 281, *McGonnell v Attorney General* [2006] IESC 64 [2007] IR 400 applied; *People (DPP) v Kelly* [2006] IESC 20 [2006] 3 IR 115, *DPP v Special Criminal Court* [1999] 1 IR 60, *Whelan v Judge Kirby* [2005] 2 IR 30, *The State (Holland) v Kennedy* [1977] IR 193, *Sweeney v Judge Brophy* [1993] 2 IR 202, *O'Callaghan v Judges of Dublin Metropolitan District Court* [2004] IEHC 187 [2004] 2 IR 442, DPP *v McCarthy* [2007] IECCA 64 (Unrep, Kearns J, 25/7/2007), *Lennon v District Judge Clifford* [1992] 1 IR 382, *DPP v Doyle* [1994] 2 IR 286, *Kenny v Judge Coughlan* [2008] IEHC 28 (Unrep, Ó Néill J, 8/2/2008), *The People (DPP) v Sweeney* [2001] 4 IR 102, *H(D) v Judge Groarke* [2002] 3 IR 522 and *Re Employment Equality Bill 1996* [1997] 2 IR 321 considered – European Convention on Human Rights, art 6 – Road Traffic Act 1961 (No 24), ss 49(4) and 49(6)(a) – Road Traffic Act 1994 (No 7), ss 13 and 17(2) – Relief refused (2007/973JR – O'Keeffe J – 11/11/2010) [2010] IEHC 522
Dowling v Judge Brennan

Sentence

Co-accused's sentence – Proportionality – Co-operation with Probation Services – Risk of re-offending – Burglary – Whether sentence excessive – Whether likely that applicant was involved in planning of incident – Whether error of principle – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 12(1)(b) – Leave refused (286/2009 – Finnegan J – 7/2/2011) [2011] IECCA 17
People (DPP) v Carthy

Sentence

Fine – Licence – Breach of licence – Waste – Disposal – Appropriate penalty to be imposed – Evidence – Whether fine imposed should be set at level which acts as disincentive to breach law – Whether prosecution obliged to demonstrate why fine should be set at certain level – Fine reduced (193/2009 – CCA – 8/10/2010) [2010] IECCA 126
People (DPP) v South East Recycling Ltd

Sentence

Exceptional and specific circumstances – Medical reports – Plea of not guilty – Age and health of applicant – Tragic death of son – Whether error in principle in imposing sentence – Sentence of 5 years substituted for sentence of 10 years (2/2010– CCA – 15/10/2010) [2010] IEHC 124
People (DPP) v Hanley

Sentence

Guilty plea – Full co-operation – Valuable admissions – Mitigating circumstances – Personal circumstances of applicant – Statutory minimum sentence – Whether error in principle – Whether applicant caught red handed – Whether due regard to value of assistance given to gardaí – Misuse of Drugs Act 1977 (No 12), s 15A – Sentence reduced (299/2009 – Finnegan J – 7/2/2011) [2011] IECCA 18
People (DPP) v Smith

Sentence

Severity – Membership of illegal organisation – Late plea – Whether entitled to credit for plea entered on fifth day of trial – Co-accused – Disparity of sentencing – Whether error in principle – Sentence of four years imprisonment – Application refused (205/2009 – CCA – 25/3/2011) [2011] IECCA 28
People (DPP) v Kelleher

Sentence

Severity –Possession of controlled drugs – Whether sufficient weight given to mitigating circumstances –Whether applicant entitled to be considered of good character despite previous convictions – Material co-operation – Early plea – Disparity of sentence given to co-accused – Whether error in principle – Sentence of ten years imprisonment – Reduced to seven years (43/2010 – CCA – 15/4/2011) [2011] IECCA 22
People (DPP) v Greene

Sentence

Severity –Possession of controlled drugs – Sale of drugs to undercover gardaí -Whether sufficient weight given to mitigating circumstances – Early plea –Whether error in principle – Sentence of five years imprisonment with two suspended – Suspended sentence encourages rehabilitation – Application refused (48/2010 – CCA – 15/4/2011) [2011] IECCA 23
People (DPP) v Russell

Sentence

Severity – Possession of drugs – Value of drugs – Defence not credible – Active drug dealer – Five year sentence – Whether error in principle – Sentence affirmed; application refused (119/2010 – CCA – 27/7/2011) [2011] IECCA 50
People (DPP) v Foley

Sentence

Severity – Presumptive statutory minimum sentence – Conviction for two misuse of drugs offences – Principle of proportionality and totality – Whether trial judge erred in failing to take in to account proportionality principle when imposing statutory minimum sentences – Criminal Justice Act 2006 (No 26), s 84 – Leave to appeal refused (7/2010 – CCA – 7/3/2011) [2011] IECCA 27
People (DPP) v O'Leary

Sentence

Severity – Presumptive statutory minimum sentence – Misuse of drugs – Whether trial judge applied principles of sentencing – Whether sentence handed down appropriate – Larceny Act 1916 (6 & 7 Geo 5 c 50) – Road Traffic Act 1961 (No 24) – Misuse of Drugs Act 1977 (No 12), ss 3 and 15 – Criminal Justice Act 1984 (No 22), s 13 – Criminal Justice (Public Order) Act 1994 (No 2), s 19 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50) – Appeal dismissed (CCA/305/09 – Court of Criminal Appeal – 7/2/2011) [2011] IECCA 26
People (DPP) v Wilson

Sentence

Severity – Misuse of drugs – Mitigating factors to be taken in to account – Health – Whether trial judge erred in failing to have sufficient regard to physical health of accused – Whether sentence excessive – Appeal allowed; five year sentence with two years suspended substituted for six year sentence (62/2010 – CCA – 7/3/2011) [2011] IECCA 20
People (DPP) v Harding

Sentence

Totality principle – Proportionality – Guilty plea – Weight of plea when caught red handed – Personal circumstances of applicant – Previous convictions – Victim impact statement – Chances of rehabilitation – Whether error of principle – Whether combined sentences disproportionate – Whether breach of totality principle – Road Traffic Act 1961 (No 24), ss 53(1), 56(1) and 112 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 12 – Leave refused (243/2009 – Finnegan J – 7/2/2011) [2011] IECCA 16
People (DPP) v Kenny

Sentence

Undue leniency – Aggravated burglary – Right not to be threatened in own home – Possession of knife – Two year sentence imposed – Whether commission of offence while on bail aggravating factor – Sentence quashed; four year term of imprisonment imposed (197CJA/2010 – CCA – 4/7/2011) [2011] IECCA 39
People (DPP) v Barry

Sentence

Undue leniency – Possession of drugs – Onus on Director – Whether excessive or insufficient regard to elements involved in sentence – Criminal Justice Act 1993 (No 6), s 2 – Application refused (318/2009 – CCA – 29/11/2010) [2010] IECCA 122
People (DPP) v McNamee

Sentence

Undue leniency – Preventative detention – Guilty plea – Risk of immediate and serious harm to others – Medical evidence accused did not know acts were wrong – Sufficient evidence for finding of not guilty by reason of insanity on not guilty plea – Detention in medical setting required for appropriate treatment – Detention under mental health legislation not open to sentencing court – Whether sentencing court obliged to impose life sentence to achieve similar outcome – *Veen v R (No2)* (1988) 164 CLR 465 followed; *Veen v R (No 1)* (1979) 143 CLR 458 considered – Criminal Justice Act 1993 (No 6), s 2(1) – Non-Fatal Offences Against the Person Act 1997 (No 26), ss 3 and 4 – Mental Health Act 2001 (No 25), s 3 – Criminal Law (Insanity) Act 2006 (No 11), s 5(1) – Appeal refused; sentence affirmed (161/2009 – CCA – 14/12/2011) [2011] IECCA 94
People (DPP) v McMahon

Sentence

Undue leniency – Review of sentence – Perjury and perverting course of justice – Failure to give evidence for prosecution at murder trial – Relevant sentencing considerations –Seriousness of offence – Principle of general deterrence – Criminal Justice Act 1993 (No 6), s 2 – Appeal allowed; adjourned for submissions (150CJA/2010 – CCA – 7/3/2011) [2011] IECCA 19
People (DPP) v Morey

Trial

Conspiracy – Drugs offences – Charge to jury – Treatment of supportive evidence by trial judge – Failure to warn jury not to carry out internet searches – Whether duplicity in charge – Whether jury unease arising from individuals staring at them could demonstrate objective bias against accused – Whether evidence relevant to be assessed in context of defence advanced by accused – Whether evidence sufficiently connected to accused to amount to possession or control – Whether background narrative misconduct evidence admissible – Whether evidence of surveillance permissible where it referred to the operational activities of gardaí – Whether surveillance contrary to article 8 of European Convention on Human Rights – Whether evidence required of conspiracy relating to specific identified drugs – Whether weight of evidence supported conviction for conspiracy – Appeal dismissed (28/2009 – CCA – 12/4/2010) [2011] IECCA 13
People (DPP) v Timmons

Trial

Fitness to plead – Constitutional validity of legislation – Equality – Declaration – Doubt as to mental capacity of accused – Consent to summary disposal of indictable offence upon guilty plea – Capacity to understand nature of offence – Jurisdiction of District Court to accept guilty plea and determine fitness to plead – Consequences of sending forward for determination of fitness to plead – Effective deprivation of right to plead guilty in District Court – Discrimination against those whose mental capacity in doubt – Remedies available – Separation of powers – Vindication of rights – Declaratory relief – Invalidity of law – Extension of scope of legislation – Prematurity of application – Entitlement to certainty as to potential penalty – Whether Act discriminated unconstitutionally against persons whose mental capacity in doubt – Whether application premature – Whether accused entitled to certainty as to potential penalty – Whether Circuit Court bound by sentencing constraints of District Court – Whether appropriate to make declaration of constitutional invalidity – Whether declaratory relief sufficient – Whether courts can extend scope of legislation to vindicate rights – *State (Hartley) v Governor of Mountjoy Prison,* (Unrep, SC, 21/12/1967) and *Molyneux v Ireland* [1997] 2 ILRM 241 distinguished; *Cox v Ireland* [1992] 2 IR 503 considered; *Railway Express v New York* 336 US 106 (1949) approved – Criminal Law Procedure Act 1967 (No 12), s 13 – Criminal Law (Rape) (Amendment) Act 1990 (No 32), s 2 – Criminal Law (Insanity) Act 2006 (No 11), ss 4(3)(a) and 4(4)(a) – Constitution of Ireland 1937, Articles 34.1, 40.1 and 40.3 – Declaration of invalidity granted (2010/1290JR – Hogan J- 8/12/2011) [2011] IEHC 445
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Statutory Instrument

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Fair procedures

Job application – Garda clearance – Investigation into allegation of child abuse – Pre screening process prior to employment – Right to good name – Right to earn livelihood – Natural justice – Right to be heard – Child protection – Whether breach of fair procedures – Whether complaint adequately investigated – Whether applicant afforded any input into investigation – Whether respondent acted unreasonably or irrationally – Whether unjust attack on applicant's rights – Whether decision to inform gardaí disproportionate – Whether unreasonable delay in bringing application – Whether applicant employee of respondent – Whether obligation to apply fair procedures – *Q(M) v Gleeson* [1998] 4 IR 85 applied – *In re Haughey* [1971] IR 217; *Maguire v Ardagh* [2000] 1 IR 433; *Igbinogun v Health Service Executive* [2010] IEHC 159, (Unrep, HC, Hedigan J, 5/5/2010) ; *P(PD) v Board of Management of a Secondary School* [2010] IEHC 189, (Unrep, HC, Ó Néill J, 20/5/2010); *McDonald v Bord na gCon* [1965] IR 217; *The State (Gleeson) v Minister for Defence* [1976] IR 280 and *Beirne v Commissioner of An Garda Síochána* [1993] ILRM 1 considered – Child Care Act 1991 (No 17), s 3 – Constitution of Ireland 1937, Articles 40 and 43 – *Certiorari* of final report granted (2010/202JR – O'Keeffe J – 18/11/2010) [2010] IEHC 503
Cooke v Health Service Executive

Industrial relations

Registered employment agreement – Cancellation – Refusal – Electrical contracting industry – Employment conditions – Alleged invalidity of agreement – Alleged unconstitutionality – Rates of pay highly punitive – Statutory framework – Delay – Whether good reasons justifying extension of time – Onus on applicants – Knowledge of agreement – Public advertisement of agreement – Refusal of application for cancellation – Body with specialist expertise – Whether decision to refuse cancellation irrational – Whether identifiable error of law – Inclusion of subcontractors – Whether substantial change in circumstances of trade or business – Meaning of substantial change – Whether Labour Court adopted incorrect test – Test of undesirability – Whether objective bias – Absence of leave in respect of claim regarding bias – Waiver of objection to tribunal – Assessment of evidence – Whether evidence to support maintenance of agreement – Weight to be assigned to witnesses – Consequences of cancellation – Whether agreement made by parties not representative of industry – *Solan v Director of Public Prosecutions* [1989] ILRM 491*; De Róiste v Minister for Defence* [2001] 1 IR 190; *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301; *Henry Denny & Son Ltd v Minister for Social Welfare* [1998] 1 IR 34; *Ashford Castle v SIPTU* [2006] IEHC 201, [2007] 4 IR 70; *Calor Teoranta v McCarthy* [2009] IEHC 139, (Unrep, Clarke J, 19/3/2009); *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701; *State (Keegan) v Stardust Victims' Compensation Tribunal* [1986] IR 642; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *Laval un Partneri Ltd v Svenska Byggnadsarbetaeförbundet* (Case C-341/05) [2008] IRLR 160 considered – Industrial Relations Act 1946 (No 26), ss 25 – 29 – Rules of the Superior Courts 1986 (SI 15/1986), O 84 r 21 – Application dismissed (2008/686JR – Hedigan J – 30/6/2010) [2010] IEHC 501
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Injunction

Interlocutory relief – Employment contract – Confidentiality – Non-compete clause –Employee left to work for competitor – Contractual notice period – Twelve month non-compete period – Storage of electronic data – Retention of confidential information on leaving employment – Direction to hand over electronic devices – No intention use confidential information after employment finished – Break down of trust – Restraint of trade – Terms of injunction – No geographical limitation – Clause prohibited all competition – Clause unenforceable – Whether defendant to be prevented from taking up employment for period – Injunctive relief to prevent breach of duty of confidentiality – Injunctive relief to prevent defendant and new employer soliciting or dealing with plaintiff's customers for twelve months – No injunction to prevent taking up new employment – *McEllistrim v Ballymacelligot Co-Operative Agricultural and Dairy Society Limited* [1919] AC 548 applied; *Herbert Morris Ltd v Saxelby* [1916] AC 688, *Stenhouse Limited v Philips* [1974] AC 391, *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026, *CR Smith Glaziers (Dunfermline) Ltd v Greenan* [1993] SCLR 231, *Johnson & Bloy (Holdings) Ltd v Wolstenholme Rink Plc* [1987] IRLR 499, *TFS Derivatives v Simon Morgan* [2004] EWHC 3181 [2005] IRLR 246, *Faccenda Chicken Limited v Fowler* [1985] 1 All ER 724, *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418, *Printers and Finishers Ltd v Holloway* [1964] 3 All ER 731 and *Norbrook Laboratories (GB) Limited v Adair* [2008] IRLR 878 considered; *Murgitroyd and Co Ltd v Purdy* [2005] IEHC 159 [2005] 3 IR 12 followed – Injunctive relief granted (2011/1574P – Dunne J – 22/3/2011) [2011] IEHC 160
Net Affinity Ltd v Conaghan

Labour Court

Fixed term employee – Contract of indefinite duration – Appeal on point of law – Hospital consultant – Public appointments service – Series of fixed term contracts for continuous period of four years – Employment terminated – Specified purpose contract – Contract to expire on permanent filling of vacancy – Whether contract became contract of indefinite duration by operation of law – Whether objective grounds for extension of fixed-term contract – Purpose of Act – Test for objective grounds – Statutory duty to inform employee of objective grounds – Whether appellant complied with duty – Whether desire for best available candidate constituted objective ground – Material time – Proportionality of means – Failure to comply with s 8 of Act of 2003 – Whether appellant circumvented terms of statute – Whether reason for renewing fixed-term contract connected to activity of employee – Purposive approach – Whether ambiguity in statute – Whether attempt to amend statute – *Castleisland Cattle Breeding Society v Minister for Social Welfare* [2004] IESC 40 [2004] 4 IR 150, *National Univeristy of Ireland Cork v Aherne* [2005] IESC 40 [2005] 2 IR 577, *Henry Denny and Sons (Ireland) Limited v Minister for Social Welfare* [1998] 1 IR 34 applied – *Inoue v MBK Designs* [2003] 14 ELR 98, *Health Service Executive, North Eastern Area v Khan* [2006] 17 ELR 313 and Lommers v Minister Van Landbouw, Natuurbeheer *en Visserij* [2002] ECR I-2829 considered; *Russell v Mount Temple Comprehensive School* [2009] IEHC 533 (Unrep, Hanna J, 4/12/2009); [2002] IRLR 430, *Ahmed v HSE* [2006] IEHC 245 [2007] 2 IR 106, *Adeneler v Ellinikos Organismos Galaktos* (Case C212/04)[2006] IRLR 716 and *Mulcahy v Minister for the Marine* (Unrep, Keane J, 4/11/1994) followed – Local Authorities (Officers and Employees) Act 1926 (No 39) – Protection of Employees

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2012 (2) Employment law review – Ireland 85

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European Arrest Warrant

Extra territoriality – Murder in State – French citizen – Accused third country citizen- Offence outside issuing state – Jurisdiction of French courts – Executing state not permitting prosecution in state of offence outside state where accused not citizen – Whether surrender prohibited – Offence committed in executing state – *Contra legem* – No decision by issuing judicial authority to try respondent for offence – Whether surrender sought for investigative purposes – Whether intention to bring proceedings – Need for cogent and compelling evidence – French prosecution procedures – Decision not to prosecute in executing state for offence in executing state – Whether statutory amendment applied to application – Whether surrender would constitute violation of constitutional right to fair procedures – *Ne bis in idem* – Whether decision final disposal of case – Delay – Whether risk of unfair trial – Principle of mutual trust and confidence – *Minister for Justice v Ollsson* (Unrep, SC, 13/1/2011) applied; *Magee v Culligan* [1992] ILRM 186 and *Attorney General v Abimbola* [2007] IESC 56 [2008] 2 IR 302 followed; *Minister for Justice v Aamond* [2006] IEHC 382 (Unrep, Peart J, 24/11/2006), *Minister for Justice v Stiuna* [2007] IEHC 220 (Unrep, Peart J, 20/6/2007), *Minister for Justice v Balciunas* [2007] IEHC 34 [2007] 1 ILRM 516, *Minister for Justice v Ostrovskij*, [2006] IEHC 242 (Unrep, Peart J, 26/6/2006), *Minister for Justice v McArdle* [2005] IESC 76 [2005] 4 IR 260, *Gozutok and Brugge* [2003] ECR I – 1345 (Cases C187/01 and C385/01) and *Miraglia* (Case C-469/03) considered; *Eviston v DPP* [2002] 3 IR 260 distinguished – European Arrest Warrant Act 2003 (No 45), ss 21A, 22, 23, 24, 42 and 44 – Offences Against the Person Act 1861 (24 & 25 Vict c 100), s 9 – Criminal Justice (Terrorist Offences) Act 2005 (No 2), ss 68 and 83 – Offences Against the Person Act 1861 (Section 9) Adaption Order, 1973 (SI 356/1973), art 3 – Council Framework Decision of 13 June 2002 – European Convention on Extradition 1957, art 7.2 – Interpretation Act 2005 (No 23), s 27 – Surrender ordered (2010/144EXT – Peart J – 18/3/2011) [2011] IEHC 177
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European arrest warrant

Request for surrender – Three separate warrants – Sentence of imprisonment imposed *in absentia* – Whether undertakings made by issuing state for retrial – Whether all undertakings of unequivocal nature – Whether respondent fled issuing state – European Arrest Warrant Act 2003 (No 45), s 45 – Order for surrender granted on two warrants but refused on third warrant on ground that no sufficient undertaking to grant retrial for conviction *in absentia* (2009/135Ext, 2009/313Ext & 2010/181 Ext – Peart J – 8/3/2011) [2011] IEHC 155
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FAMILY LAW

Child abduction

Views of children – Age and degree of maturity – Habitual residence – Wrongful removal – Court's discretion to refuse return – Best interests of children – Whether children had requisite age and degree of maturity – Whether appropriate to take account of and attach weight to children's view – Whether children should be returned – Whether exceptional circumstances – Whether New York court had seisin of proceedings – *In re M (Children) (Abduction: Rights of custody)* [2007] UKHL 55, [2008] 1 AC 1288 followed – Child Abduction and Enforcement of Custody Orders Act 1991 (No 6) – Hague Convention on the Civil Aspects of International Child Abduction 1980, article 13 – Applicant's appeal dismissed (302/2011- SC – 1/10/2011) [2011] IESC 39
U(A) v U(TN)

Divorce

Execution – Order for sale of property – Change of circumstances including dramatic fall in value of property – Application to appoint receiver for purpose of execution

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F(N) v F(E)

Divorce

Maintenance – Separation agreement – "Full and final" settlement clause – Principles to be applied where prior separation agreement – Proper provision – Clean break – Change in circumstances – Debilitating illness – Inherited assets – Whether High Court order excessive – Moral hazard – Whether party failed to utilise or maximise resources – *MD v ND (Divorce)* [2011] IESC 18, (Unrep, SC, 7/6/2011) and *DT v CT (Divorce: Ample resources)* [2002] 3 IR 3342 considered – Family Law (Divorce) Act 1996 (No 33), s 20 – Husband's appeal allowed; remitted to HC (382/2009 – SC – 19/10/2011) [2011] IESC 40
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SI 101/2012

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Article

King, John
Prophet motives
2012 (April) Gazette Incorporated Law Society 24

FISHERIES

Statutory Instruments

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SI 80/2012

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GARDA SÍOCHÁNA

Complaints

Disciplinary procedure – Garda policy – Status of policy – Delay – Effect of judicial review proceedings on time limits – Status of investigation conducted under policy – Jurisdiction of court to intervene with policy investigation – Complaint made against applicant – Investigation commenced under Garda Síochána (Discipline) Regulations 2007 – Order granted to, *inter alia,* quash all records relating to investigation and prohibit investigation under Regulations until procedure under garda policy fully exhausted – Delay in processing second investigation under garda policy – Whether prejudice suffered by delay – Whether time given to applicant to respond to complaint sufficient – Contention use of witness statements from first investigation during second investigation breach of court order and fair procedures – Whether use of witness statements breach of fair procedures – *McNeill v Commissioner of An Garda Siochana* [1997] 1 IR 469; *Healy v The Commissioner of Garda Siochana* (Unrep, Herbert J, 7/11/2000); *Conway v An Taoiseach* (*Ex tempore,* Feeney J, 12/4/2006) considered – *Russell v Duke of Norfolk* [1949] 1 All ER 109 approved – Garda Síochána (Discipline) Regulations 2007 (SI 214/2007) – Relief refused (2009/783JR – Hedigan J – 22/2/2011) [2011] IEHC 58
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2012 (April) Gazette Incorporated Law Society 18

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Asylum

Country of origin information – Changing conditions – Insufficient information – Reluctance of tribunal member to make decision in light of changing conditions – Persecution – Breach of fair procedures – Failure to put country of origin report to applicant – Failure to properly assess situation in Somalia – Treatment of issue of gender – Whether substantial grounds for review – Onus on applicant to show women in Somalia recognised as particular social group – Failure to discharge onus – Addition of grounds of review by court – Making of decision when belief that insufficient information available – Whether good and sufficient reason for extending time for review – *N v Refugee Appeals Tribunal* [2009] IEHC 301, (Unrep, Cooke J, 1/7/2009); *J(AMS) v Minister for Justice, Equality and Law Reform* [2010] IEHC 188,. (Unrep, Birmingham J, 18/5/2010); *Adan v Secretary of State for the Home Department* [1998] 2 WLR 702 and *VI v Minister for Justice, Equality and Law Reform* [2005] IEHC 150, (Unrep, Clarke J, 10/5/2005) considered – Refugee Act 1996 (No 17), s 16 – Leave granted (2008/626JR – Ryan J – 5/11/2010) [2010] IEHC 504
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Asylum

Credibility – Internal relocation – State protection – Burden of proof – Substantial grounds – UNHCR guidelines on international protection – Whether error in consideration of viability of internal relocation – Whether onus on respondent to establish alternative options – Whether country of origin information should have been expressly considered – Whether error in assessing applicant's credibility – Whether relevant material taken into account – *O(AB) v Minister for Justice* [2008] IEHC 191, (Unrep, Birmingham J, 27/6/2008); *Canada (Attorney*

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Asylum

Credibility – No express finding – State protection – Need for protection inferred – Whether objective basis for fear of return – Whether state protection element of decision inconsistent with inferred finding lack of credibility – Whether conclusions on credibility clear – Whether reasons for finding police protection available were adequate – Whether tribunal member differed from analysis of refugee applications commissioner without explanation – Whether refusal by respondent to make declaration s 17(1) created uncertainty – Whether ambiguity in tribunal decision as ground for conclusion state protection available – Whether matter to be remitted to new tribunal – Whether orders or directions added to order to remit – Whether within court's discretion to remit decision for further consideration by same tribunal – Error of omission – *O(AS) v Refugee Appeals Tribunal* [2009] IEHC 607 (Unrep, Cooke J, 9/12/2009), *Sheehan v District Judge Reilly* [1993] 2 IR 81, *Ahern v Kerry County Council* [1988] ILRM 392 and *Usk & District Residents Association Ltd v An Bord Pleanála* [2007] 2 ILRM 378 followed – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 26(4) – *Certiorari* granted (2007/1189JR – Cooke J – 7/4/2011) [2011] IEHC 144
I(US) v Minister for Justice, Equality and Law Reform

Asylum

Decision – Delay – Accurate recollection of evidence – Prejudice – Assessment of credibility – Afghani national – Fear of persecution – Personal account – Country of origin information – Fair procedures – Whether inordinate delay between date of hearing and written decision – Whether decision hampered by delay – Whether delay rendered decision unsafe – Whether actual prejudice suffered – Whether breach of fair procedures and natural and constitutional justice – Whether applicant deprived of benefit of giving oral evidence – Whether error in assessment of credibility – Whether finding irrational or unreasonable – Whether young age taken into account – Whether court could substitute own findings of fact – *R(AM) v Minister for Justice* [2008] IEHC 108, (Unrep, McGovern J, 25/4/2008) and *S(FK) v Refugee Appeals Tribunal* [2009] IEHC 474, (Unrep, Dunne J, 30/10/2009) followed – *Krameranko v O'Brien and Refugee Appeals Tribunal* (Unrep, McCarthy J, 14/7/2009); *Messaoudi v Refugee Appeals Tribunal* [2004] IEHC 156, (Unrep, Finlay Geoghegan J, 29/7/2004); *Biti v Refugee Appeals Tribunal* [2005] IEHC 13, (Unrep, Finlay Geoghegan J, 24/1/2005); *B(SO) v Refugee Appeals Tribunal* (Unrep, Charleton J, 29/1/2008); *E(M) v Refugee Appeals Tribunal* [2008] IEHC 192, (Unrep, Birmingham J, 27/6/2008); *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 416, (Unrep, Peart J, 9/12/2005); *A(EA) v Minister for Justice* [2008] IEHC 220, (Unrep, Birmingham J, 24/6/2008); *Minister for Justice, Equality and Law Reform v R(SM)* [2007] IESC 54, [2008] 2 IR 242 and *Hay v O'Grady* [1992] 1 IR 210 considered – Refugee Act 1996 (No 17), s 16(10) – Leave refused (2008/1123JR – Ryan J – 22/10/2010) [2010] IEHC 514
R(AS) v Refugee Appeals Tribunal and Minister for Justice and Law Reform

Asylum

Persecution – Changing conditions – Reluctance of tribunal member to make decision in light of changing conditions – Breach of fair procedures – Failure to put country of origin report to applicant – Failure to properly assess situation in Somalia – Treatment of issue of gender – Whether substantial grounds for review – Onus on applicant to show women in Somalia recognised as particular social group – Failure to discharge onus – Addition of grounds of review by court – Making of decision when belief that insufficient information available – Whether good and sufficient reason for extending time for review – *N v Refugee Appeals Tribunal* [2009] IEHC 301, (Unrep, Cooke J, 1/7/2009); *J(AMS) v Minister for Justice, Equality and Law Reform* [2010] IEHC 188,. (Unrep, Birmingham J, 18/5/2010); *Adan v Secretary of State for the Home Department* [1998] 2 WLR 702 and *VI v Minister for Justice, Equality and Law Reform* [2005] IEHC 150, (Unrep, Clarke J, 150) considered – Refugee Act 1996 (No 17), s 16 – Leave granted (2008/701JR & 2008/702JR – Clarke J – 15/7/2010) [2010] IEHC 490
A (A) v Minister for Justice, Equality and Law Reform

Asylum

Persecution – Fear – State protection – Internal relocation – Alleged attempted abduction of second applicant – Credibility – Authenticity of documentary evidence – Substantial grounds – Whether well founded fear of persecution – Whether relevant documents taken into account – Whether respondent acted irrationally – Whether substantial grounds established – Leave refused (2008/806JR – Ryan J – 5/11/2010) [2010] IEHC 517
A(F) v Refugee Appeals Tribunal and Minister for Justice and Law Reform

Asylum

Persecution – Sexual orientation – Adverse credibility findings – Internal relocation – Discrepancy in evidence – Extension of time for leave sought – Reason for finding internal relocation possible – Whether respondent finding relocation possible if kept gender identity hidden – Whether analysis of country of origin information reflected selective presentation or manipulation of information – Whether interpretation or use of information at variance with content of documentation – Whether respondent considered country of origin documentation – Whether respondent entitled to conclude not unduly harsh for applicant to relocate internally – Relocation to place homosexuals not actively pursued by government – Whether legal basis for finding applicant not established well founded fear of persecution – Whether good and sufficient reasons shown to justify extension of time – *A(M) v Minister for Justice* (Unrep, Cooke J, 17/12/2009), *A(M) v Minister for Justice* [2010] IEHC 519 (Unrep, Ryan J, 12/11/2010), *Da Silveira v Refugee Appeals Tribunal* [2004] IEHC 436 (Unrep, Peart J, 9/7/2004), *A(CI) v Refugee Appeals Tribunal* [2009] IEHC 281 (Unrep, Irvine J, 30/6/2009) and *A(O) v Refugee Appeals Tribunal* [2009] IEHC 296 (Unrep, Cooke J, 25/6/2009) considered; *HJ (Iran) v Home Secretary* [2010] UKSC 31 [2011] 1 AC 596 and *Muia v RAT* [2005] IEHC 363 (Unrep, Clarke J, 11/11/2005) distinguished; *R(I) v Refugee Appeals Tribunal* [2009] IEHC 353 (Unrep, Cooke J, 24/7/2009), *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005), *T(G) v Refugee Appeals Tribunal* [2007] IEHC 287 (Unrep, Peart J, 27/7/2007), *Kramarenko v Refugee Appeals Tribunal* [2004] IEHC 101 [2004] 2 ILRM 450 and *E(E) v Refugee Appeals Tribunal* [2010] IEHC 135 (Unrep, Cooke J, 24/3/2010) followed; *CS v Minister for Justice* [2004] IESC 44 [2005] 1 IR 343, *GK v Minister for Justice* [2002] 2 IR 418; [2002] 1 ILRM 401, *S v Minister for Justice, Equality and Law Reform* [2002] IESC 17 (Unrep, SC, 5/3/2002), *Re the Illegal Immigrants (Trafficking) Bill* 1999 [2000] IESC 19 [2000] 2 IR 360 and *GK v Minister for Justice* [2002] 2 IR 418 applied – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 7 – Leave refused (2008/1036JR – Smyth J – 30/3/2011) [2011] IEHC 149
E(O) v Refugee Appeals Tribunal

Asylum

Transfer – Prior application for refugee status in another member state – Transfer order – Order suspending implementation of transfer order – Effect of consent order – Discretion of Minister as to implementation of transfer order – Prior application refused – Whether transfer order suspended – Whether time expired for implementation of transfer order – *Biba Ltd v Stratford Investments Ltd* [1973]1 Ch 281, *Cutler v Wandsworth Stadium Ltd* [1945] 1 All ER 103, *Wilding v Sanderson* [1897] 2 Ch 534 *Migrationsverket v. Petrosian and ors. (Case C-19/08)* [2009] ECR 1-495 and *EM v Minister for Justice, Equality and Law Reform* [2005] IEHC 403, [2008] 4 IR 417 considered – Refugee Act 1996 (Section 22) Order 2003 (SI 423/2003),

art 7 – European Convention on Human Rights Act 2003 (No 20) – "Dublin II Regulation" Council Regulation (EC) 343/2003, arts. 16(1)(c), 16(1)(e), 20(1)(d), 20(1)(e) – European Convention on Human Rights and Fundamental Freedoms, articles 3 and 8 – Application refused (2009/922JR – Cooke J – 25/2/2011) [2011] IEHC 60
Wadria v Minister for Justice, Equality and Law Reform

Citizenship

Refusal – Minister – Reasons – Failure to provide reason for refusal – Whether Minister obliged to provide reason for refusal – Whether Minister had to have regard to European Union law in making decision – *Pok Sun Shum v Ireland* [1986] ILRM 593 followed; *Rottmann v Freistaat Bayern* [2010] QB 761 considered – Irish Nationality and Citizenship Act 1956 (No 26), ss 14, 15, 16 – Constitution of Ireland, 1937, Articles 34.3.1° and 40.3 – Charter of Fundamental Rights of The European Union, articles 41(2)(3), 47 and 51 – Treaty on The Functioning of The European Union, Articles 20, 21, 22, 23, 263 – European Convention on Human Rights and Fundamental Freedoms, article 13 – Relief refused (2009/492JR – Cooke J – 22/7/2011)
Mallak v Minister for Justice

Deportation

Change in circumstances – Interference with family rights – Right of residency of applicant's wife – Irish citizen child – Maintenance and control of State's borders – Proportionality – Whether decision to interfere with family rights in accordance with law, in pursuit of pressing need and proportionate to legitimate aim – Whether error of fact – Whether any less restrictive process available – Whether Immigration Act 1999 incompatible with ECHR – *G v DPP* [1994] 1 IR 374; *D(AO) v Minister for Justice, Equality and Law Reform* [2006] IEHC 140, (Unrep, Ó Néill J, 3/5/2006); *A(M) v Minister for Justice* (Unrep, HC, Cooke J, 17/12/2009); *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701; *O(S) v Minister for Justice* [2010] IEHC 343, (Unrep, Cooke J, 1/10/2010); *Heaney v Ireland* [1994] 3 IR 593; *(O)A v Minister for Justice* [2003] 1 IR 1; *B(M) v Minister for Justice* [2010] IEHC 320, (Unrep, Clark J, 30/7/2010); *B(J) (A minor) v Minister for Justice* [2010] IEHC 296, (Unrep, Cooke J, 14/7/2010) considered – *McCann v United Kingdom* (2008) 47 EHRR 40 distinguished – Immigration Act 1999 (No 22), s 3(11) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Aliens Act 1935 (No 14), ss 5(1)(f) and (h) – European Convention on Human Rights, art 8 – Leave refused (2009/764JR – Ryan J – 15/12/2010) [2010] IEHC 521
O(D) v Minister for Justice and Law Reform

Deportation

Family rights – Irish citizen children – Rights and best interests of children – First applicant's emotional and behavioural difficulties – Need for stable family life – Pivotal role of applicant in family life – Exceptional circumstances – Whether arguable case – Whether respondent misdirected himself as to constitutional rights of family – Whether respondent's decision disproportionate and unreasonable – Whether reasonable to expect other applicants to relocate to Nigeria – Whether exceptional circumstances – Whether more detailed analysis required – *N v Health Service Executive* [2006] IESC 60, [2006] 4 IR 374; *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25, [2008] 3 IR 795; *Dimbo v Minister for Justice, Equality and Law Reform* [2008] IESC 26, (Unrep, SC, 1/5/2008); *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701; *A(M) v Minister for Justice* (Unrep, Cooke J, 17/12/2009); *I(H) v Minister for Justice* [2010] IEHC 422, (Unrep, Cooke J, 23/11/2010); *O(A) v Minister for Justice* [2003] 1 IR 1; *O'B(J) v Residential Institutions Redress Board* [2009] IEHC 284, (Unrep, O'Keeffe, 24/6/2009); *O(S) v Minister for Justice* [2010] IEHC 343, (Unrep, Cooke J, 1/10/2010); considered – Immigration Act 1999 (No 22), s 3(11) – Constitution of Ireland, 1937, Arts 40.3, 41 and 42 – European Convention on Human Rights, art 8 – Leave granted (2008/1435JR – Smyth J – 4/2/2011) [2011] IEHC 148
I(E) v Minister for Justice, Equality and Law Reform

Deportation

Humanitarian grounds – Female headed household – Discrimination in Nigeria – Risk of sexual violence – Subsidiary protection – State protection – Country of origin information – Obligation of respondent – Whether real risk of cruel, inhuman or degrading treatment – Whether entitlement to remain to obtain benefits – Whether respondent made selective use of material – Whether conclusions unreasonable or irrational – Whether material change of conditions or circumstances – *G v DPP* [1994] 1 IR 374; *D(AO) v Minister for Justice, Equality and Law Reform* [2006] IEHC 140, (Unrep, Ó Néill J, 3/5/2006); *A(M) v Minister for Justice*, (Unrep, Cooke J, 17/12/2009); *I(H) v Minister for Justice* [2010] IEHC 422, (Unrep, Cooke J, 23/11/2010); *Akujobi v Minister for Justice* [2007] IEHC 19, (Unrep, MacMenamin J, 12/1/2007) considered – Refugee Act 1996 (No 17), s. 5 – Criminal Justice (United Nations Convention against Torture) Act 2000 (No 11) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Convention on Human Rights, arts 3 and 8 – Leave refused (2009/477JR – Ryan J – 15/12/2010) [2010] IEHC 520
A(J) v Minister for Justice and Law Reform

Deportation

Interlocutory injunction – Principles to be applied – Restraint of deportation – Report from psychiatrist outlining potential effect of deportation of applicant on his children – Cogency of such evidence – Contention judicial review not effective remedy – Whether such argument justiciable in judicial review proceedings – Contention Minister failed to adequately consider infant citizen's rights – Whether such rights adequately considered – Contention Minister failed to take into account declaration by applicant regarding health insurance – Whether such declaration relevant consideration – Error of fact made by Minister regarding education in Nigeria – Whether such error of fact relevant consideration – Whether serious question to be tried – *Akpata v Minister for Justice, Equality and Law Reform* [2010] IEHC 392, (Unrep, Cooke J, 9/11/2010); *A(AP)) v Minister for Justice, Equality and Law Reform* [2010] IEHC 297, (Unrep, Cooke J, 20/7/2010); *B(M) v Minister for Justice and Law Reform* [2010] IEHC 320 (Unrep, Clark J, 30/7/2010); *D(OS) v Minister for Justice, Equality and Law Reform* [2010] IEHC 390 (Unrep, Clark J, 30/7/2010); *O(E) v Minister for Justice, Equality and Law Reform* (Unrep, Ryan J, 7/2/2011) approved – *Campus Oil v Minister for Industry (No 2)* [1983] IR 88 applied – *Oguekwe v Minister for Justice* [2008] IESC 25, [2008] 3 IR 795; *Dimbo v Minister for Justice, Equality and Law Reform* [2008] IESC 26, (Unrep, SC, 1/5/2008); *Zambrano v ONEM* (Case C-34/09, Opinion of Advocate General, 30/9/2010) considered – Guardianship of Infants Act 1964 (No 7) – Immigration Act 1999 (No 22), s 3 – European Convention on Human Rights Act 2003 (No 20), s 5 – The Rules of the Superior Courts 1986 (SI 15/1986) O 84, r 20 – European Convention on Human Rights 1950, arts 8 and 13 – Charter of Fundamental Rights of the European Union (2010/C83/02), art 24 – European Social Charter 1961 – Constitution of Ireland 1937 – Application refused (2010/731JR – Ryan J – 14/2/2011) [2011] IEHC 282
L(EG) v Minister for Justice, Equality and Law Reform

Deportation

Leave to appeal – Principles to be applied – Point of exceptional public importance – Contention proper construction of words "to remain thereafter out of the State" – Whether point of law arose directly from judgment of High Court sought to be appealed – Whether point of law of exceptional public importance – Whether desirable in public interest that appeal be taken – *U(MA) v Minister for Justice, Equality and Law Reform* [2010] IEHC 492, (Unrep, Hogan J, 13/12/2010); *U(MA) v Minister for Justice, Equality and Law Reform (No 2)* [2011] IEHC 95, (Unrep, Hogan J, 9/2/2011); *Raiu v Refugee Appeals Tribunal* (Unrep, Finlay

Geoghegan J, 26/2/2003); *Arklow Holidays Ltd v Bord Pleanála (No 1)* [2006] IEHC 102, (Unrep, Clarke J, 29/3/2006); *Glancré Teo v An Bord Pleanála* [2006] IEHC 250, (Unrep, MacMenamin J, 13/7/2006); *Irish Press plc v Ingersoll Irish Publications Ltd (No 3)* [1995] 1 ILRM 117 approved – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Planning and Development Act 2001 (No 30), s 50 – Application refused (2009/881JR – Hogan J – 22/2/2011) [2011] IEHC 59
U(MA) v Minister for Justice, Equality and Law Reform (No 3)

Deportation

Leave to apply – Judicial review – Test – Principles to be applied – Extension of time – Principles to be applied – Factors to be considered – Burden of proof – Obligations on Minister in making decision – Whether obligation on State to ensure person returned to third country will enjoy same medical and social assistances as Ireland – Rights of children of non-national parents – Principles to be applied in deciding whether to deport parent of children – Principles to be applied in making decision regarding applicant with criminal convictions – Factors to be taken into account – Applicant father of minor children convicted of offences – Deportation order made – Contention reliance on convictions by Minister disproportionate – Contention Minister failed to consider rights of children of applicant – Finding by Minister no less restrictive process to achieve legitimate aim of preventing crime disputed – Reference to charge for which applicant not convicted in decision – Whether deliberate deception by applicant – Whether substantial grounds – Whether extension of time appropriate – *Omoregie v Norway* [2009] Imm 170; *Haghighi v Netherlands* (App-38165/07), (2009) 49 EHRR SE8; *Grant v United Kingdom* (App-10606/07) (2009) ECHR 25; *R(Mahmood) v Home Secretary* [2001] 1 WLR 840; *Unur v Netherlands* (App-46410/99) (2007) 45 EHRR 14 considered – *A(F) v Refugee Appeals Tribunal* [2007] IEHC 290, (Unrep, Peart J, 27/7/2007); *Kelly v Leitrim County Council* [2005] IEHC 11, [2005] 2 IR 404; *JA v Refugee Applications Commissioner* [2008] IEHC 440, [2009] 2 IR 231; *Boultif v Switzerland* (App-54273/00), (2001) 33 EHRR 50; *Omojudi v The United Kingdom* (App-1820/08), (2010) 51 EHRR 10; *JA v Refugee Applications Commissioner* [2008] IEHC 440, [2009] 2 IR 231 approved – *S v Minister for Justice* [2002] 2 IR 163; *The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *CS v Minister for Justice* [2004] IESC 44, [2005] 1 IR 343; *GK v Minister for Justice* [2002] 2 IR 418; *Z v Minister for Justice, Equality and Law Reform* [2002] 2 ILRM 215; *Oguekwe v Minister for Justice* [2008] IESC 25, [2008] 3 IR 795; *AO & DL v Minister for Justice* [2003] 1 IR 1; *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701; *O'Keeffe v An Bord Pleanála* [1993] IR 39; *The State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642 applied – *Ofobuike (A Minor) v Minister for Justice, Equality and Law Reform* [2010] IEHC 89 (Unrep, Cooke J, 13/1/2010); *(B)M v Minister for Justice* [2010] IEHC 320, (Unrep, Clark J, 30/7/2010); *O(S) v Minister for Justice, Equality and Law Reform* [2010] IEHC 343 (Unrep, Cooke J, 1/10/2010) approved; *Yilmaz v Germany* (App-52853/99), (2004) 38 EHRR 23 distinguished – Road Traffic Act 1961 (No 24), ss 38, 40, 56, 69 – Criminal Justice (Public Order) Act 1994 (No 2), s 6 – Refugee Act 1996 (No 17), s 5 – Non-Fatal Offences Against the Person Act 1997 (No 26), s 2 – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Criminal Justice (UN Convention Against Torture) Act 2000 (No11), s 4 –European Convention on Human Rights 1950, arts 3 and 8 – Constitution of Ireland 1937, arts 2, 40, 41 and 42 – Leave granted (2009/1248JR – Smyth J – 25/3/2011) [2011] IEHC 150
K(C) v Minister for Justice, Equality and Law Reform

Deportation

Refoulement – Reasons – Prioritisation of applications – Decision stating refoulement not found to be an issue in case – Statement capable of multiple interpretations – Whether cases unlawfully prioritised – Whether respondent required to give reasons as to why no risk of refoulement only where claim or factual material to ground risk advanced – Whether threat in relation to refoulement advanced – Whether decision conveys rationale behind it – Delay – *K(G) v Minister for Justice* [2002] 1 ILRM 81 and *S(C) v Minister for Justice* [2004] IESC 44 [2005] 1 IR 343 applied; *Meadows v Minister for Justice* [2010] IESC 3 [2010] 2 IR 701 and *Ugbo v Minister for Justice*[2010] IEHC 80 (Unrep, Hanna J, 5/3/2010) followed; *D (a minor) v Refugee Applications Commissioner* [2010] IEHC 172 (Unrep, Cooke J, 19/10/2010) distinguished – Refugee Act 1996 (No 17) , s 5 – Application refused (2010/286JR and 2010/272JR – Ryan J – 15/10/2010) [2010] IEHC 509
I(E) v Minister for Justice, Equality and Law Reform

Deportation

Subsidiary protection – Refusal – Revocation of order – Quash refusal to revoke – Representations to remain received after deportation order made – Representations treated as application to revoke – Whether finding that state protection available irrational – Credibility of mother – Application of child based on facts of mother's claim – Whether decision to consider whether to make deportation order taken before decision to refuse subsidiary protection – Literal construction of regulation 4(5) – Sequence of decisions – Decision on subsidiary protection should been made before decision on deportation order – Whether representations against deportation order adequately considered – Whether procedure fair given delay – *Efe v Minister for Justice* [2011] IEHC 214 (Unrep, Hogan J, 7/6/2011) considered; *Oguekwe v Minister for Justice* [2008] IESC 25 [2008] 3 IR 795 applied; *Butusha v Minister for Justice* (Unrep – Peart J – 29/10/2003) distinguished – Immigration Act 1999 (No 22), s 3 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 4(5) – European Convention on Human Rights, article 3 and 8 – Leave refused (2010/1336JR – Cooke J – 16/3/2011) [2011] IEHC 165
O(O) v Minister for Justice, Equality and Law Reform

Reckonable residence

Evidence – Stamped periods – Permission to remain – Continuous residence – Correspondence indicating permission to remain only operative on registration with GNIB – Exclusion of periods after grant of permission to remain by respondent but prior to registration – Letter from respondent not evidence of lawful residence for purpose of passport application –Delay by respondent in considering renewal application – No statutory basis for approach to calculation of reckonable residence – Whether respondent correct in excluding from calculation of reckonable residence periods between making of decision and date of registration – Distinction permission and document that is evidence of permission – Irish Nationality and Citizenship Act 1956 (No 26), ss 6A, 6B and 28 – Immigration Act 2004 (No 1), s 1 – Relief granted (2009/1173JR – Ryan J – 9/7/2010) [2010] IEHC 507
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Leave

Costs – Interlocutory application – Telescoped hearing – Whether applicant granted leave for judicial review entitled

to order for costs – Whether respondents' refusal to have telescoped hearing entitled applicant to award of costs – Rules of the Superior Courts 1986 (SI 15/1986), Os 50 & 99, r 1(4A) – Costs refused (2008/626JR – Ryan J – 30/11/2010) [2010] IEHC 518
A(AA) v Minister for Justice, Equality and Law Reform

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LANDLORD AND TENANT

Lease

Keep open clause – Shopping centre – Ceasing of trading by supermarket – Anchor tenant – Breach of keep open clause – Difficult trading conditions in border region – Alleged failure of management and promotion at centre – Whether landlord in breach of obligations under lease – Whether breaches entitled tenant to resile from complying with keep open clause –Lease – Obligation to trade – Obligation to procure other lessees to open – Whether deliberate running down of store – Payment of service charges – Absence of major complaint regarding management of store – Absence of documentation specifying complaints – Whether decision to closed based on trading difficulties – Complaints regarding management of store – Vacant units – Failure to enforce keep open clauses in leases of other units – Whether supermarket required trade under particular name – Terms of lease – Absence of obligation to obtain consent to assignment – *Chartered Trust Plc v Davies* [1997] 2 EGLR 83; *Moulton Buildings Limited v Westminster* [1975] 30 P&CR 182; *British Leyland Exports Limited v Britain Group Sales Limited* [1981] IR 335; *Irish Telephone Rentals v ICS Building Society* [1991] ILRM 880; *Hong Kong Fir Shipping Company v Kawasaki* [1962] 2 QB 26 and *Aldin Latimer Clarke, Muirhead & Company* [1984] 2 Ch 437 considered – Finding that third party obliged to keep open as high end supermarket trading (2009/4644P – Clarke J – 8/10/2010) [2010] IEHC 498
Parol Limited v Friends First Pension Limited

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NEGLIGENCE

Liability

Vicarious liability f- Acts or omissions of employees – Unsafe system of work – Kick to scrotum by bullock at mart – Absence of other employees from proper work station at time of accident — Whether defendant responsible for failing to ensure system of work safe and properly implemented – Contributory negligence – Whether plaintiff failed to exercise reasonable care for own safety – Whether plaintiff exposed himself to risk of danger – *Hay v O'Grady* [1992] 1 IR 210; *Kinsella v Hammond Lane Industries Ltd* [1962] 96 ILTR 1; *Byrne v Ireland* [1972] IR 241 and *O'Keeffe v Hickey* [2009] 2 IR 302 considered – Plaintiff's appeal allowed on liability and matter remitted to High Court for assessment of damages (133/2007 – SC – 9/3/2011) [2011] IESC 8
Lynch v Binnacle Ltd t/a Cavan Co-op Mart

PENSIONS

Statutory Instrument

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PERSONAL INJURIES ASSESSMENT BOARD

Legal costs

Solicitors' fees – Legal advice – Recommendation – Reduction of 60% of fees claimed in related case – Power to recommend payment of fees claimed by applicant to be paid by defendant – Fees and costs reasonably and necessarily incurred – Polish nationals – Costs of application – Translation service – Cost medical report – Whether respondent failed to comply with statute – Whether breach of fair procedures – Whether unlawful fettering of discretion – Unreasonableness – Objective bias – No entitlement to legal costs – Duty to give reasons – Absence of itemised bill – O'*Brien v Personal Injuries Assessment*

Board [2008] IESC 71 [2009] 3 IR 243, *R v Chief Constable of North Wales Police, ex p Evans* [1982] 1 WLR 1155, *O'Keeffe v An Bord Pleanála* [1993] 1 IR 93, *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3 [2010] 2 IR 701, *Keegan v Stardust Victims' Compensation Tribunal* [1986] IR 642, *Ryanair v Flynn* [2000] 3 IR 240, *Mishra v Minister for Justice* [1996] 1 IR 189, *McCarron v Kearney* (Unrep, SC, 11/5/2010) and *O'Donoghue v An Bord Pleanála* [1991] 1 ILRM 750 followed – Personal Injuries Assessment Board Act 2003 (No 46), ss 7, 29, 30, 44 and 51A – Relief refused (2008/1128JR & 2008/1385JR– Ryan J – 19/10/2010) [2010] IEHC 516
Plewa v Personal Injuries Assessment Board

PLANNING & ENVIRONMENTAL LAW

Planning permission

Refusal – Lands zoned as public open space – Surrounded by housing estate – Private lands – Variation to development plan deeming open space public open space – *Jus spatiandi* – Whether policy applied to privately owned land – *Ultra vires* – Right to private property – Absence of compensation – Collateral attack on policy – Challenge to validity of policy – Failure to obtain covenant from developer – Intention of planning authority – Effect of zoning – Whether zoning resulted in unjust attack on property rights — Telescoped hearing – *Re XJS Investments Limited* [1986] IR 750; *Kenny v An Bord Pleanala* [2001] 1 IR 565; *Readymix (Eire) v Dublin County Council* (Unrep, SC, 30/7/1974); *Tennyson v Corporation of Dun Laoghaire* [1991] 2 IR 527; *Wicklow Heritage Trust Limited v Wicklow County Council* (Unrep, McGuinness J, 5/2/1998*); Smeltzer v Fingal County Council* [1997] 1 IR 279; *Finn v Bray Urban District Council* [1969] IR 169; *Ferris v Dublin City Council* (Unrep, SC, 7/11/1990); *Dublin City Council v Liffey Beat Ltd* [2005] IEHC 82, [2005] 1 IR 478; *Houlihan v An Bord Pleanála* (Unrep, Murphy J, 4/10/1993); *Goonery v County Council of Meath* (Unrep, Kelly J, 15/7/1999) and *Cicol v An Bord Pleanála* [2008] IEHC 146, (Unrep, Irvine J, 8/5/2008) considered – Planning and Development Act 2000 (No 30), ss 10 and 50 – Reliefs refused with further submissions to be heard (2009/92JR – Dunne J – 21/10/2010) [2010] IEHC 495
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PRACTICE AND PROCEDURE

Case management

Related proceedings – Settlement in other jurisdiction – Impact on proceedings – Timing of hearing as to impact – Case management – Correspondence with registrar – Registrar copied on argumentative correspondence between parties – Whether appropriate – Directions given (2008/10983P – Clarke J – 4/8/2011) [2011] IEHC 344
Thema International Fund plc v HSBC Institutional Trust Services Ltd

Costs

Multiple proceedings – Similar set of facts – Appropriate costs to be awarded – Two proceedings issued – Order made in first proceedings directing plaintiffs to be placed on particular levels of remuneration and remitting assessment of arrears payable to plaintiffs back to High Court – Order had effect of resolving issues in both proceedings – Contention defendants failed to comply with court direction – Third proceedings issued as a result – Motion brought by plaintiffs for early hearing date –Motion brought by defendants to strike out third proceedings on ground frivolous and/or vexatious – Both motions adjourned to be heard on date of remittal hearing of first proceedings – Whether third set of proceedings necessary – Whether defendants failed to comply with order of Supreme Court – Whether appropriate to award full costs for all three proceedings – Limited costs awarded in two sets of proceedings and full costs awarded in third proceedings (1994/7021P – Laffoy J – 14/2/2011) [2011] IEHC 183
King v Aer Lingus plc; Byrne v Aer Lingus plc; Barber v Aer Lingus plc

Delay

Dismissal − Inordinate and inexcusable delay − Principles to be applied − Factors to be considered – Plenary summons issued December 2005 – Statement of claim delivered November 2009 – Whether delay in initiating proceedings inordinate – Whether delay from period of initiating proceedings to delivering statement of claim inordinate and inexcusable − Whether defendant prejudiced by delay such that substantial risk of unfair trial − Whether failure to bring motion to dismiss earlier sufficient ground for refusal of relief − *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510 applied – *Desmond v MGN Ltd* [2008] IESC 56, [2009] 1 IR 737; *Ewins v Independent Newspapers (Ireland) Ltd* [2003] 1 IR 583; *Hogan v Jones* [1994] 1 ILRM 512; *Dowd v Kerry County Council* [1970] IR 27; *O'Domhnaill v Merrick* [1984] IR 151 considered − *J McH v JM* [2004] IEHC 112, [2004] 3 IR 385 distinguished − Commission Regulation (EC) No 1400/2002 − Application to dismiss granted (2005/4153P − Laffoy J − 21/2/2011) [2011] IEHC 242
Kanes Motors Ltd v Opel Ireland Ltd

Disclosure

Contact details of third party – Litigation in Germany – Joinder of party – Whether court had jurisdiction to direct disclosure – Challenge to jurisdiction under Brussels Regulation – Whether grant of relief amounting to relief in substantive case – *Prima facie* evidence of wrongful activity on plaintiff's website – First defendant attempt hide behind activities of service provider – Identity of service provider revealed by defendant in German proceedings – *EMI Records (Ireland) Ltd v Eircom Ltd* [2005] IEHC 233 [2005] 4 IR 148 and *Ryanair Ltd v BravoflyLtd* [2009] IEHC 41 (Unrep, Clarke J, 29/1/2009) considered – Brussels I Regulation, Council Regulation EC No 44/2001 – Application granted (2009/7499P – Gilligan J – 22/3/2011) [2011] IEHC 167
Ryanair Ltd v Unister GmbH

Jurisdiction

Appropriate forum – Doctrine of *forum non conveniens* – Principles to be applied – Test – Burden of proof – Factors to be considered – Applicability of Council Regulation (EC) 44/2001 – Compatibility of *forum non conveniens* doctrine with Regulation – Effect of exclusive jurisdiction clause in contract – Plaintiffs obtained liberty to serve notice of plenary summons outside jurisdiction pursuant to Rules of Superior Courts, O 11 – No endorsement regarding Regulation in plenary summons – Defendants applied for stay on basis Turkey appropriate forum to litigate claims – Whether Regulation applied – Whether Turkey appropriate forum – Application refused – *Gama Construction (Ireland) Ltd v Minister for Enterprise* [2009] IESC 37, [2010] 2 IR 85; *Owusu v Jackson (ECJ)* (Case C-281/02) [2005] I-01383, [2005] QB 801; *Intermetal Group Ltd v Worslade Trading Ltd* [1998] 2 IR 1 applied – *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460; *In re Harrods (Buenos Aires) Ltd* [1992] Ch 72; *McCarthy v Pillay* [1995] 1 ILRM 310; *Donohue v Armco* [2002] 1 All ER 749 approved – *Microsoft Ireland Operations Ltd v EIM International Electronics Ltd* [2010] IEHC 228 (Unrep, de Valera J, 9/6/2010); *Goshawk*

Dedicated Limited v Life Receivable Ireland Limited [2008] IEHC 90, (Unrep, Clarke J, 27/2/2008) and [2009] IESC 7, (Unrep, SC, 30/1/2009); *Schmidt v Home Secretary of the Government of United Kingdom* [1997] 2 IR 121 considered – *Spielberg v Rowley* [2004] IEHC 384, (Unrep, Finlay Geoghegan J, 26/11/2004) distinguished – The Rules of the Superior Courts 1986 (SI 15/1986) Os 4 r 1A, 11, 11A, r 4, 11B – Council Regulation (EC) 44/2001, arts 21 and 22 – Brussels Convention 1968, art 5 – Lugano Convention 1998 – Application refused (2008/6463P – Dunne J – 25/2/2011) [2011] IEHC 308
Mevlut Abama v Gama Construction Ireland Ltd

Limitations

Products liability – Personal injuries – Accrual of cause of action – Whether action statute barred – Statute – Interpretation – Date of knowledge – Amendment – Oblique amendment – Statute of Limitations Act 1957 (No 6), s 5A – Statute of Limitations Amendment Act 1991 (No 18), s 2 – Liability for Defective Products Act 1991 (No 28), s 7 – Civil Liability and Courts Act 2004 (No 31), s 7 – Negligence claim dismissed; claim for defective product permitted to proceed (2008/5631P – Hogan J – 19/7/2011) [2011] IEHC 300
Ó hAongusa v DCC plc

Security for costs

Arbitration – Building agreement – Financial status of claimant – Intended application by claimant for order in separate proceedings – Advertisement of intended application directed by court – Respondent not treated as creditor – Whether specific circumstances existed to deter court exercising discretion to grant security for costs – Whether delay by moving party – Whether inability to discharge costs flows from alleged wrong – *Connnaughton Road Construction Ltd v Laing O'Rourke Ireland Ltd* [2009] IEHC 7 (Unrep, Clarke J, 16/1/2009), *Re Blakeston Ltd; Beauross Ltd v Kennedy* (Unrep, Morris J, 18/10/1995) and *Hidden Ireland Heritage Holidays v Indigo Services Ltd* [2005] IESC 38 [2005] 2 IR 115 followed; *In Re T & N Ltd* [2006] 1 WLR 1728, *Parolen Ltd v Doherty* [2010] IEHC 71 (Unrep, Clarke J, 12/3/2010) considered – Companies Act 1963 (No 33), ss 201(1) and 390 – Arbitration Act 1954 (No 26), s 22 – Relief granted (2010/226MCA – Laffoy J – 9/9/2010) [2010] IEHC 524
Frank McGrath Construction Ltd v One Pery Square Hotel Ltd

Security for costs

Bona fide defence – Impecunious plaintiff – Whether plaintiff show existence of special circumstances – Whether actionable wrongdoing – Whether impecuniosity of plaintiff caused by alleged negligence of defendant – No evidence negligence cause of loss – Whether delay in making application – *James Elliott Construction Co Ltd v Irish Asphalt Ltd.* [2010] IEHC 234 (Unrep,Clarke J, 4/6/2010), *SEE Co Ltd v Public Lighting Services Ltd* [1987] ILRM 255 and *Connaughton Road Construction Ltd v Laing O'Rourke (Ireland) Ltd* [2009] IEHC 7 (Unrep, Clarke J, 16/1/2009) followed; *Millstream Recycling Ltd v Gerard Tierney and Newtown Lodge Ltd* [2010] IEHC 55 (Unrep, Charleton J, 9/3/2010) distinguished – Companies Act 1963 (No 33), s 390 – Application granted (2009/1546P – Hogan J – 5/4/2011) [2011] IEHC 145
Pierse Desmond Ltd v Deirdre Nicfhionnlaoich (practising under the style and title of MacGinley Solicitors)

Strike out

Execution order – Lay litigant – Costs order – Proceedings alleging sums not lawfully due being claimed – Allegation of exploitation of legal process in violation of good name of plaintiff – No cause of action – *Res judicata* – Vexatious and frivolous – Abuse of process – Final and conclusive nature of decision of Circuit Court judge – Unappealable order – Failure to appeal certificate of taxation – *In re Greendale Developments Ltd (No 3)* [2002] 2 IR 514 and *LP v MP (Appeal)* [2002] 1 IR 219 considered – Permissive order for publication granted – (2010/2910P – Laffoy J – 15/11/2010) [2010] IEHC 502
FH v LS

Summons

Renewal – Application for extension of time and to renew – Summons issued within time – No attempt to serve summons – Application on notice to defendant – Defendant notified of claim within time – Plaintiff examined by defendant medical expert – Defendant refusing to accept service of proceedings – Whether defendant prejudiced by failure to serve summons – Change in solicitor – Whether other good reason to grant renewal – Application to renew not brought in timely fashion – Whether plaintiff's lack of culpability and resulting prejudice if application refused constituted good reason to grant renewal – Whether fact plaintiff's claim statute-barred determinative – *Kerrigan v Massey Brothers (Funerals) Ltd*, (Unrep, Geoghegan J, 15/3/1994) followed; *Roche v Clayton* [1998] 1 IR 596 applied – Rules of the Superior Courts 1986 (SI 15/1986), O 8 – Relief refused (2004/17316P – Peart J – 14/3/2011) [2011] IEHC 156
Gannon v Minister for Finance

Statutory Instruments

Circuit Court (fees) order 2012
SI 109/2012

District Court (fees) order 2012
SI 108/2012

Rules of the Superior Courts (bankruptcy) 2012
SI 120/2012

Rules of the Superior Courts (criminal procedure act 2010) 2012
SI 114/2012

Supreme Court and High Court (fees) order 2012
SI 110/2012

Article

Collins, Sam
Derivative actions and the rules of Superior Courts
2012 (4) 3 Irish business law quarterly 8

PRISONS

Transfer of prisoners

Sentencing –Mandatory life sentence for murder – Tariff imposed in United Kingdom – Legal nature of life sentence with tariff – Punitive nature of sentence – Preventative detention – Management of life sentence by Irish authorities – Whether continued detention lawful under Irish law after expiration of tariff – Whether tariff relevant to legal nature of life sentence – Whether Irish authorities could make reference to tariff period – Whether nature of life sentence changed when prisoner transferred from United Kingdom to Ireland – Whether matter appropriate for application under Article 40.4 – *Lynch and Whelan v Minister for Justice, Equality and Law Reform* [2010] IESC 34, (Unrep, SC, 14/5/2010) considered – Transfer of Sentenced Persons Act 1995 (No 16), ss. 1, 2, 5, 6 and 7 – Transfer of Sentenced Persons (Amendment) Act 1997 (No 41), s 1 – Constitution of Ireland 1937, Article 40.4.2° – Convention on the Transfer of Sentenced Persons 1983, articles 2, 3, 5, 6, 7, 9, 10 and 11 – Applicant's appeal dismissed (267/2010 – SC – 1/2/2012) [2012] IESC 4
Caffrey v Governor of Portlaoise Prison

PRIVACY

Library Acquisitions

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2nd ed
Oxford : Oxford University Press, 2012
N38.9

Goldrein, Iain
Privacy injunctions and the media: a practical manual
Oxford : Hart Publishing, 2012
N38.9

PUBLIC PROCUREMENT

Selection criteria

Tendering process − Wording of award criteria − Whether obliged to advertise prior weighting of award criteria − Contract notice published in respect of tender for Annex IIB Council Directive 04/18/EC contract − No statement tenderers providing solely group speech therapy to be excluded in notice − No reference to weight to be attached to each award criteria − Applicant tenderer unsuccessful − Application made for relief by way of judicial review − Whether failure to include above information offended principle of transparency − Whether failure to assess tender under costs criteria fatal irregularity − *Commission v Ireland (*C-226/09) (Unrep, ECJ, 18/11/2010); *Wall AG v La ville de Francfort-sur-le-Main* (C-91/08) [2010] ECR I-02815; *SIAC Construction Ltd v Mayo County Council* (C-19/00) [2001] ECR 1-7725 applied − *The State (Abenglen Properties) v Corporation of Dublin* [1984] IR 381; *Howard v Early* (Unrep, SC, 4/7/2000) considered − European Communities (Award of Public Authorities' Contracts) Regulations 2006 (SI 329/2006) sch 2 − Council Directive 04/18/EC, art 23, 34 and Annex IIB − Relief refused (2008/768JR − McMahon J − 18/2/2011) [2011] IEHC 57
Release Speech Therapy Ltd v Health Service Executive

RATING

Article

Curtis, Sinead
Overview of commercial rates
2012 17 (1) Conveyancing and property law journal 11

ROAD TRAFFIC

Statutory Instruments

Road traffic (national car test) (amendment) (no. 2) regulations 2012
SI 104/2012

Road traffic (national car test) (amendment) regulations 2012
SI 103/2012

Road traffic (special permits for particular vehicles) (amendment) regulations 2012
SI 105/2012

SCHOOLS

Library Acquisitions

School of Law Trinity College
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Dublin : Trinity College, 2012
N184.2.C5

SOCIAL WELFARE

Statutory Instrument

Social welfare (consolidated claims, payments and control) (amendment) (no. 3) (claims) regulations 2012
SI 102/2012

SUCCESSION

Article

Keating, Albert
Constructive interpretation of section 99 of the Succession act 1965
2012 17 (1) Conveyancing and property law journal 2

TAXATION

Statutory Instrument

Taxes consolidation act 1997 (accelerated capital allowances for energy efficient equipment) (amendment) (no. 1) order 2012
SI 107/2012

TORT

Duty of care

Liability – Road traffic accident – Icy conditions – Injury to both drivers – Direct conflict of evidence – Absence objective evidence – No useful photograph – No accurate sketch – No Garda statements – No witness – Whether evidence to suggest either driver driving excessive speed – Defendant admitted braked and skidded – Defendant claimed plaintiff over white line – Whether plaintiff discharged onus of proof – Whether plaintiff guilty of contributory negligence – Award of reduced damages (2009/1576P – Peart J – 30/3/2011) [2011] IEHC 154
Newport v Waldron

Duty of care

Road works – Plastic barriers – Plaintiff claim caught foot in barrier on ground – Plea plaintiff attempted to jump barrier – Defence witness evidence plaintiff ran and attempted jump barrier – Conflict over time of accident – Whether locus of accident closed off by barriers – Signage to warn public of works – Injury suffered required significant direct force to elbow – Injury consistent with fall from height – Fabricated loss of earnings claim affected overall credibility – Whether plaintiff gave false account of incident – Claim dismissed (2009/9118P – Peart J – 5/4/2011) [2011] IEHC 176
Boland v Dublin City Council

Personal injuries

Duty of care – Retired army captain – Duties in Lebanon – Denial of negligence – Whether defendant negligent in failing to identify physical symptoms and personality changes as symptoms of post-traumatic stress disorder – Whether documents indicative of condition – Whether records revealed personality change – Action dismissed (1999/10410P – Ryan J – 28/4/2010) [2010] IEHC 515
Holmes v Minister for Defence

Library Acquisition

Murphy, John
Street on torts
13th ed
Oxford : Oxford University Press, 2012
N30

TRIBUNALS

Equality Tribunal

Dismissal *in limine* – Claim misconceived with no prospect of success – Discrimination on grounds of race – Whether membership of farming community constituted race – Claim of harassment and victimisation by local authority employees – Words and phrases – "Ethnic origins" – Whether reference to the Court of Justice was *acte clair* – Whether Council Directive 2000/43/EC correctly transposed in to Irish law – Appeal on point of law to High Court – Dismissal of claim by Equality Tribunal affirmed by Circuit Court –*CILFIT v Ministry of Health* (Case 283/81) [1982] E.C.R. 3415 followed; *Dillon v Minister for Posts and Telegraphs* (Unreported, SC, 3/6/1981) and *Mandla v Dowell Lee* [1983] 2 AC 548 considered – Equal Status Act 2000 (No 8), ss 3 and 22 – Equality Act 2004 (No 24) – Council Directive 2000/43/EC, arts 2 and 3 – Circuit Court decision affirmed (2010/MCA210 – Hogan J – 5/5/2011) [2011] IEHC 180
Fitzgerald v Minister for Community, Equality and Gaeltacht Affairs

AT A GLANCE

European Directives implemented into Irish Law up to 10/05/2012

European Communities (authorisation, placing on the market, use and control of biocidal products) (amendment) regulations 2012
EA European Communities act, 1972 s3 (DIR/2011-66, DIR/2011-67, DIR/2011-69, DIR/2011-71, DIR/2011-78, DIR/2011-80, DIR/2011-81, DIR/2012-2, DIR/2012-3)
SI 93/2012

European Communities (conservation of wild birds (Corofin Wetland special protection area 004220)) regulations 2012
EA European Communities act, 1972 s3 (DIR/2009-147, DIR/92-43 [DIR/1992-43])
SI 117/2012

European Communities (conservation of wild birds Lough Conn and Lough Cullin special protection area 004228)) regulations 2011
EA European Communities act, 1972 s3 (DIR/2009-147, DIR/92-43 [DIR/1992-43])
SI 590/2011

European Communities (conservation of wild birds (Lough Mask special protection area 004062)) regulations 2012
EA European Communities act, 1972 s3 (DIR/2009-147, DIR/92-43 [DIR/1992-43])
SI 84/2012

European Communities (conservation of wild birds (Rockabill special protection area 004014)) regulations 2012
EA European Communities act, 1972 s3 (DIR/2009-147, DIR/92-43 [DIR/1992-43])
SI 94/2012

European Communities (conservation of wild birds (Slieve Aughty Mountains special protection area 004168)) regulations 2012
EA European Communities act, 1972 s3 (DIR/2009-147, DIR/92-43 [DIR/1992-43])
SI 83/2012

European Communities (control of organisms harmful to plant and plant products) (amendment) regulations 2012
EA European Communities act, 1972 s3
SI 99/2012

European Communities (direct support scheme) offences and control regulations 2012
EA European Communities act, 1972 s3 (REG/1257-99 [REG/1257-1999], REG/1783-2003, REG/567-2004, REG/583-2004, REG/2223-2004, REG/1698-2005, REG/1463-2006, REG/1944-2006, REG/2012-2006, REG/146-2008, REG/74-2009, REG/473-2009, REG/1312-2011, REG/1974-2006, REG/434-2007, REG/1236-2007, REG/1175-2008, REG/363-2009, REG/482-2009, REG/108-2010, REG/679-2011, REG/73-2009, REG/889-2009, REG/992-2009, REG/360-2010, REG/307-2011, REG785-2011, REG/1120-2009, REG/730-2010, REG/331-2011, REG/1126-2011, REG/1122-2009, REG/146-2010, REG/173-2011, REG/1368-2011, REG/65-2011, REG/147/2012)
SI 115/2012

European communities (driving theoretical tests) (amendment) regulations 2012
EA European communities act, 1972 s3 (DIR/2006-126)
SI 85/2012

European Communities (official controls on the import of food of non-animal origin) (amendment) regulations 2012
EA European Communities act, 1972 s3 (REG/294-2012, REG/669-2009, REG/212-2010)
SI 126/2012

European communities (vehicle drivers certificate of professional competence) (amendment) regulations 2012
EA European communities act, 1972 s3 (DIR/2003-59)
SI 86/2012

European Communities (vessel traffic monitoring and information system) (amendment) regulations 2012
EA European Communities act, 1972 s3 (DIR/2011-15)
SI 71/2012

European Communities (welfare of farmed animals) (amendment) regulations 2012
EA European Communities act, 1972 s3 (DIR/93-119 [DIR/1993-119], DIR/98-58 [DIR/1998-58], DIR/1999-74 [DIR/1999-74], DIR/2002-4, DIR/2007-43, DIR/2008-119, DIR/2008-120)
SI 98/2012

European Union (citizens' initiative) regulations 2012
EA European Communities act, 1972 s3 (REG/211-2011, REG/1179-2011)
SI 79/2012

European Union (Cote d'Ivoire) (financial sanctions) regulations 2012
EA European Communities act, 1972 s3 (REG/174-2005, REG/560-2005)
SI 87/2012

European Union (Democratic People's Republic of Korea) (financial sanctions) regulations 2012
EA European Communities act, 1972 s3 (REG/329-2007)
SI 66/2012

European Union (Iraq) (financial sanctions) regulations 2012
EA European Communities act, 1972 s3 (REG/1210-2003)
SI 64/2012

European Union (Liberia) (financial sanctions) regulations 2012
EA European Communities act, 1972 s3 (REG/234-2004, REG/872-2004)
SI 89/2012

European Union (system for the identification and traceability of explosives for civil uses) (amendment) regulations 2012
EA European communities act, 1972 s3 (DIR/2012-4)
SI 106/2012

European Union (Zimbabwe) (financial sanctions) regulations 2012
EA European Communities act, 1972 s3 (REG/314-2004)
SI 91/2012

ACTS OF THE OIREACHTAS AS AT 10TH MAY 2012

31st Dáil & 24th Seanad

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

1/2012 Patents (Amendment) Act 2012
Signed 01/02/2012

2/2012 Water Services (Amendment) Act 2012
Signed 02/02/2012

3/2012 Energy (Miscellaneous Provisions) Act 2012
Signed 25/02/2012 **(Only available electronically)**

4/2012 Health (Provision of General Practitioner Services) Act 2012
Signed 28/02/2012 **(Only available electronically)**

5/2012 Bretton Woods Agreements (Amendment) Act 2012
Signed 05/03/2012

6/2012 Euro Area Loan Facility (Amendment) Act 2012
Signed 09/03/2012 **(Only available electronically)**

7/2012 Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012
Signed 10/03/2012 **(Only available electronically)**

8/2012 Clotting Factor Concentrates and Other Biological Products Act 2012
Signed 27/03/2012 **(Only available electronically)**

9/2012 Finance Act 2012
Signed 31/03/2012 **(Only available electronically)**

10/2012 Motor Vehicle (Duties and Licences) Act 2012
Signed 02/04/2012 **(Only available electronically)**

11/2012 Criminal Justice (Female Genital Mutilation) Act 2012
Signed 02/04/2012 **(Only available electronically)**

12/2012 Social Welfare and Pensions Act 2012
Signed 01/05/2012 **(Only available electronically)**

BILLS OF THE OIREACHTAS AS AT 10TH MAY 2012

31st Dáil & 24th 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 2012
Bill 2/2012
2nd Stage – Dáil **[pmb]** *Deputy Liam Twomey*

Advertising, Labelling and Presentation of Fast Food at Fast Food Outlets Bill 2011
Bill 70/2011
2nd Stage – Dáil **[pmb]** *Deputy Billy Kelleher*

Animal Health and Welfare Bill
Bill 31/2012
Committee Stage – Seanad *(Initiated in Seanad)*

Burial and Cremation Regulation Bill 2011
Bill 81/2011
2nd Stage – Dáil **[pmb]** *Deputy Thomas P. Broughan*

Central Bank and Financial Services Authority of Ireland (Amendment) Bill 2011
Bill 67/2011
2nd Stage – Dáil **[pmb]** *Deputy Michael McGrath*

Central Bank (Supervision and Enforcement) Bill 2011
Bill 43/2011
Committee Stage – Dáil

Civil Registration (Amendment) Bill 2011
Bill 65/2011
Passed by Seanad **[pmb]** *Senator Ivana Bacik (Initiated in Seanad)*

Companies (Amendment) Bill 2012
Bill 29/2012
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Competition (Amendment) Bill 2011
Bill 55/2011
Report Stage – Seanad *(Initiated in Dáil)*

Comptroller and Auditor General (Amendment) Bill 2012
Bill 17/2012
2nd Stage – Dáil **[pmb]** *Deputy John McGuinness (Initiated in Dáil)*

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

Coroners Bill 2007
Bill 33/2007
Committee Stage – Seanad

Corporate Manslaughter Bill 2011
Bill 83/2011
2nd Stage – Seanad **[pmb]** *Senator Mark Daly (Initiated in Seanad)*

Credit Guarantee Bill 2012
Bill 27/2012
Order for 2nd Stage – Dáil

Criminal Justice (Aggravated False Imprisonment) Bill 2012
Bill 3/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Seán Ó Feargháil*

Criminal Justice (Spent Convictions) Bill 2012
Bill 34/2012
Order for 2nd Stage – Seanad *(Intiated in Seanad)*

Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Bill 2012
Bill 32/2012
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Debt Settlement and Mortgage Resolution Office Bill 2011
Bill 59/2011
Committee Stage – Dail **[pmb]** *Deputy Michael McGrath*

Dormant Accounts (Amendment) Bill 2011
Bill 46/2011
Committee Stage – Dáil *(Initiated in Seanad)*

Education (Amendment) Bill 2012
Bill 1/2012
Passed by Dáil Éireann *(Initiated in Seanad)*

Electoral (Amendment) (Political Donations) Bill 2011
Bill 13/2011
Report 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 Fearghail, Brendan Smith, Robert Troy and John Browne.*

Electoral (Amendment) (Political Funding) Bill 2011
Bill 79/2011
2nd Stage – Dáil *(Initiated in Seanad)*

Employment Equality (Amendment) Bill 2012
Bill 11/2012
2nd Stage – Seanad

Employment Equality (Amendment) (No. 2) Bill 2012
Bill 14/2012
Committee Stage – Seanad **[pmb]** *Senator Mary M. White (Initiated in Seanad)*

Entrepreneur Visa Bill 2012
Bill 13/2012
2nd Stage – Dáil **[pmb]** *Deputy Willie O'Dea*

European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Bill 2011
Bill 45/2011
Order for 2nd Stage – Dáil

European Communities (Amendment) Bill 2012
Bill 36/2012
Order for 2nd Stage – Dáil

European Stability Mechanism Bill 2012
Bill 37/2012
Order for 2nd Stage – Seanad

Family Home Bill 2011
Bill 38/2011
Order for 2nd Stage – Seanad **[pmb]** *Senators Thomas Byrne and, Marc MacSharry (Initiated in Seanad)*

Family Home Protection (Miscellaneous Provisions) Bill 2011
Bill 66/2011
2nd Stage – Dáil **[pmb]** *Deputy Stephen Donnelly*

Financial Emergency Measures in the Public Interest (Reviews of Commercial Rents) Bill 2012
Bill 22/2012
2nd Stage – Dáil **[pmb]** *Deputy Peadar Tóbín*

Fiscal Responsibility (Statement) Bill 2011
Bill 77/2011
2nd Stage – Seanad **[pmb]** *Senator Sean D. Barrett (Initiated in Seanad)*

Freedom of Information (Amendment) Bill 2012
Bill 15/2012
2nd Stage – Dáil **[pmb]** *Deputy Pearse Doherty*

Health (Professional Home Care) Bill 2012
Bill 6/2012
2nd Stage – Dáil **[pmb]** *Deputy Billy Kelleher*

Housing Bill 2012
Bill 35/2012

1st Stage – Dáil **[pmb]** *Deputy Niall Collins*

Human Rights Commission (Amendment) Bill 2011
Bill 52/2011
2nd Stage – Dáil **[pmb]**

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

Industrial Relations (Amendment) Bill 2011
Bill 39/2011
Committee Stage – Dáil **[pmb]** *Deputy Willie O'Dea*

Industrial Relations (Amendment) (No. 3) Bill 2011
Bill 84/2011
Committee Stage – Dáil

Landlord and Tenant (Business Leases Rent Review) Bill 2012
Bill 20/2012
2nd Stage – Dáil **[pmb]** *Deputy Dara Calleary*

Legal Services Regulation Bill 2011
Bill 58/2011
Committee Stage – Dáil

Local Authority Public Administration Bill 2011
Bill 69/2011
2nd Stage – Dáil **[pmb]** *Deputy Niall Collins*

Local Government (Household Charge) (Amendment) Bill 2012
Bill 21/2012
2nd Stage – Dáil **[pmb]** *Deputy Niall Collins*

Local Government (Household Charge) (Repeal) Bill 2012
Bill 18/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Brian Stanley*

Local Government (Miscellaneous Provisions) Bill 2012
Bill 40/2012
1st Stage – Dáil

Local Government (Superannuation) (Consolidation) Scheme 1998 (Amendment) Bill 2012
Bill 16/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Mary Lou McDonald*

Medical Treatment (Termination of Pregnancy in Case of Risk to Life of Pregnant Woman) Bill 2012
Bill 10/2012
2nd Stage – Dáil

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 2011
Bill 24/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator Mark Daly (Initiated in Seanad)*

Motorist Emergency Relief Bill 2012
Bill 30/2012
2nd Stage – Dáil **[pmb]** *Deputy Timmy Dooley*

NAMA and Irish Bank Resolution Corporation Transparency Bill 2011
Bill 82/2011
2nd Stage – Seanad **[pmb]** *Senator Mark Daly*

National Archives (Amendment) Bill 2012
Bill 8/2012
2nd Stage – Dáil **[pmb]** *Deputy Anne Ferris*

Ombudsman (Amendment) Bill 2008
Bill 40/2008
2nd Stage – Dáil

Privacy Bill 2006
Bill 44/2006
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Privacy Bill 2012
Bill 19/2012
2nd Stage – Seanad **[pmb]** *Senators Sean D. Barrett, David Norris and Feargal Quinn*

Protection of Children's Health from Tobacco Smoke Bill 2012
Bill 38/2012
2nd Stage – Seanad **[pmb]** *Senators John Crown, Mark Daly and Jillian van Turnhout*

Protection of Employees (Amendment) Bill 2012
Bill 33/2012
2nd Stage – Dáil **[pmb]** *Deputy Peadar Tóibín*

Protection of Employees (Temporary Agency Work) Bill 2011
Bill 80/2011
Report Stage – Seanad *(Initiated in Dáil)*

Public Service Pensions (Single Scheme) and Remuneration Bill 2011
Bill 56/2011
Committee Stage – Dáil

Qualifications and Quality Assurance (Education and Training) Bill 2011
Bill 41/2011
Report Stage – Seanad *(Initiated in Seanad)*

Reduction in Pay and Allowances of Government and Oireachtas Members Bill 2011
Bill 27/2011
2nd Stage – Dáil **[pmb]** *Deputy Pearse Doherty*

Registration of Wills Bill 2011
Bill 22/2011
Committee Stage – Seanad **[pmb]** *Senator Terry Leyden (Initiated in Seanad)*

Regulation of Debt Management Advisors Bill 2011
Bill 53/2011
2nd Stage – Dáil **[pmb]** *Deputy Michael McGrath*

Reporting of Lobbying in Criminal Legal Cases Bill 2011
Bill 50/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator John Crown (Initiated in Seanad)*

Residential Institutions Statutory Fund Bill 2012
Bill 28/2012
2nd Stage – Dáil

Road Safety Authority (Commercial Vehicle Roadworthiness) Bill 2012
Bill 25/2012
Committee Stage – Seanad

Scrap and Precious Metal Dealers Bill 2011
Bill 64/2011
2nd Stage – Dáil **[pmb]** *Deputy Mattie McGrath*

Smarter Transport Bill 2011
Bill 62/2011
2nd Stage – Dáil **[pmb]** *Deputy Eoghan Murphy*

Spent Convictions Bill 2011
Bill 15/2011
Committee Stage – Dáil **[pmb]** *Deputy Dara Calleary*

Statistics (Heritage Amendment) Bill 2011
Bill 30/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator Labhrás Ó Murchú (Initiated in Seanad)*

Statute Law Revision Bill 2012
Bill 39/2012
Order for 2nd Stage – Dáil

Tax Transparency Bill 2012
Bill 24/2012
2nd Stage – Dáil **[pmb]** *Deputy Eoghan Murphy*

Thirtieth Amendment of the Constitution (Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union) Bill 2012
Bill 23/2012
Committee Stage – Dáil

Thirty-First Amendment of the Constitution (The President) Bill 2011
Bill 71/2011
2nd Stage – Dáil **[pmb]** *Deputy Catherine Murphy*

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

Veterinary Practice (Amendment) Bill 2011
Bill 42/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Whistleblowers Protection Bill 2011
Bill 26/2011
Order for 2nd Stage – Dáil **[pmb]** *Deputies Joan Collins, Stephen Donnelly, Luke 'Ming' Flanagan, Tom Fleming, John Halligan, Finian McGrath, Mattie McGrath, Catherine Murphy, Maureen O'Sullivan, Thomas Pringle, Shane Ross, Mick Wallace*

Wind Turbines Bill 2012
Bill 9/2012
Committee Stage – Seanad **[pmb]** *Senator John Kelly*

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
KISLR = King's Inns Student Law 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 legal status of 'no foal, no fee' agreements

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Introduction

Agreements between a litigation lawyer and his client that the former will only recover fees from the latter in the event of the litigation being successful – the so-called 'no foal, no fee' agreement – are not uncommon in this jurisdiction[1] and, indeed, may be defended on policy grounds as a means of broadening access to legal services for impecunious clients who might, for various reasons, not qualify for civil legal aid. Thus in *Fraser v. Buckle,*[2] O'Flaherty J, referring to the admittedly different system of contingency fees in the US, said:

> "There is a view in the United States that litigation is a form of political and even commercial speech, which is to be encouraged and protected rather than disfavoured. Fees which promote access to the legal system are seen as an expression of national policy favouring such access.
>
> The contingent fee is regarded as the cornerstone of *'people's law'*; it is strongly supported by consumer organisations who regard it as the strongest weapon in the hands of consumers when they do battle with large corporations and other defendants with substantial resources. The contingency fee has been called *'the key to the courthouse door'* for the poor and the middle class."

While O'Flaherty J was referring to the US contingency fee system in which the lawyer's fee is set as a percentage of the award of damages or value of property recovered through the litigation, the same argument may be made in defence of the 'no foal, no fee' agreement where the fee charged is a standard fee that is not calculated by reference to the amount of damages or the value of the property recovered and where such an agreement enables a client of modest means who does not qualify for civil legal aid to litigate a reasonable claim.[3]

However there may be certain legal difficulties attaching to this type of arrangement. First, there is some doubt as to whether the successful client who is party to a 'no foal, no fee' agreement may be able to recover his legal costs from his defeated opponent. Thus in 2002, the Irish High Court Taxing Master ruled that two bills for costs against a defendant should be taxed as nil as the plaintiff's solicitor had acted on a 'no foal, no fee' basis. According to media reports of his ruling,[4] the unsuccessful litigant was not obliged to discharge costs for which the other party would not be held liable. Support for this position may be found in the Queen's Bench decision in *British Waterways Board v. Norman.*[5]

Here the tenant of one of the Board's residential properties took an action against the Board in which she argued that the property's state of disrepair was such as to constitute a statutory nuisance. Her solicitors considered her case to be so strong that they never discussed the matter of their costs with their client, acting on the assumption that they would recover their costs from the Board when the action succeeded. When the magistrates' court ordered the Board to pay the plaintiff's legal costs, the Board appealed that order to the divisional court of the Queen's Bench on the ground that Mrs. Norman had no liability for costs to her solicitors and that, therefore, it had no liability to her. The appeal was successful, the court holding that the "no foal, no fee" arrangement pursuant to which the case had been taken amounted to a contract in law in the instant case and that as Mrs. Norman could not have been sued for costs by her solicitors had the action failed, the solicitors could not recover such costs from the Board simply because the action had been successful.[6]

Second, an even greater concern is that such an agreement might be regarded as tortious or even criminal in nature having regard to the old common law doctrine of champerty which, unlike the position in the UK, remains in force in this jurisdiction.[7] Champerty consists of an agreement to recover property or assist in the recovery of property in return for financial reward and some UK authorities support the view that this applies to any financial reward that a lawyer might derive from litigation, including a fixed fee agreed beforehand, and not merely the US style contingency fee

1 Such agreements were described as "an important aspect of access to justice and an unusual market feature" by the Competition Authority in *Competition in Professional Services: Solicitors and Barristers*, (December 2006) at para.5.100.

2 [1996] 1 IR 1; [1996] 2 ILRM 34.

3 For an argument in support of the introduction of a US style contingency fee system in this jurisdiction, see Twomey, "Competition, Compassion and Champerty: The Contingent Fee in Profile" (1994) 1 ISLR 1.

4 The Irish Times, 16 November 2002.

5 [1993] 26 HLR 232; *The Times*, 11 November 1993.

6 The *British Waterways Board* case was subsequently overruled by the Court of Appeal in *Thai Trading Company v. Taylor* [1998] 2 WLR 893, [1998] QB 781 but the suggestion in *Thai Trading* that the courts could continue to develop the common law relating to champerty was itself declared to have been made per incuriam by the Court of Appeal in *Sibthorpe v. Southwark LBC* [2011] 1 WRL 2111, [2011] EWCA Civ 25 – see below, 000

7 For a discussion of the doctrine of champerty generally in the Irish context, see Leonowicz, "Maintenance and Champerty" (2005) 12 CLP 157.

where the financial reward is calculated as a share of the property recovered.[8]

'No foal, no fee' agreements and Irish statute law

Before considering the applicability of the doctrine of champerty to 'no foal, no fee' agreements, it is worth noting that such agreements are not precluded by the legislative regulation of the manner in which a solicitor's fee may be calculated contained in s.68(2) of the Solicitors (Amendment) Act 1994 which provides:

> "A solicitor shall not act for a client in connection with any contentious business (not being in connection with proceedings seeking only to recover a debt or liquidated demand) on the basis that all or any part of the charges to the client are to be calculated as a specified percentage or proportion of any damages or other moneys that may be or may become payable to the client, and any charges made in contravention of this subsection shall be unenforceable in any action taken against that client to recover such charges."[9]

Section 68(2) applies to fees (other than those payable in respect of debt collection) calculated by reference to the value of the property or the amount of damages recovered and so a 'no foal, no fee' agreement in respect of a flat rate fee agreed by the parties in advance of a judgment does not fall foul of this provision.[10]

However by virtue of article 9(1)(a) of the Solicitors (Advertising) Regulations 2002,[11] solicitors are prohibited from using phrases such as, inter alia, 'no foal, no fee' or 'no win, no fee' in their advertisements.

Judicial consideration of 'No foal, no fee' agreements in Ireland

On two occasions, the High Court assumed that 'no foal, no fee' agreements are legally enforceable, holding that a solicitor is entitled to recover fees for work done to date where a client acts in breach of such an agreement. In *McHugh v. Keane*,[12] Barron J stated that the normal contract between a solicitor and his client is that the solicitor will be paid by the client for his professional fees and outlay. He continued:

> "It is, of course, open to the parties to negotiate other terms of such contract. In the present case it is common case that the retainer of the Defendant on behalf of the Plaintiff was upon the basis that he would be remunerated out of monies recovered in the action or not at all. Where a solicitor accepts instructions upon this basis, in my view there is a corresponding obligation upon his client based upon an implied term to that effect not to withdraw those instructions until the conclusion of the proceedings.
>
> The implications of such a contract go further. If the solicitor breaches the terms of the agreement by failing to act with all due diligence and care on behalf of his client, then his client would no longer be bound not to withdraw his instructions. Likewise, if the client is dissatisfied with his solicitor without proper grounds and instructs another solicitor, he is in breach of his contract to retain his solicitor until the conclusion of the case and his former solicitor would no longer be bound to look only to damages and costs awarded against the other party for his remuneration."[13]

In the instant case, Barron J held, on the facts, that the client had acted in breach of the 'no foal, no fee' agreement by withdrawing instructions without proper grounds and that the solicitor was entitled to reasonable remuneration for the work done on behalf of the client.. However he was not entitled to charge on the basis of the proceedings having gone to a conclusion but, rather, was restricted to recovering the appropriate costs for the stage at which the proceedings had arrived when instructions were withdrawn.

McHugh was subsequently followed by Laffoy J in *Synnott v. Adekoya*[14] though she invited further submissions as to whether the solicitor was entitled to have the costs taxed on a solicitor/client basis or only on a party and party basis and also whether, on the facts of the case, the client had unreasonably withdrawn his instructions.[15]

In neither of these cases, however, was the court invited to consider whether the 'no foal, no fee' agreement was invalid having regard to the doctrine of champerty. This doctrine would appear to have been considered in only three cases by the Irish courts since Independence - *McElroy v. Flynn,*[16] *Fraser v. Buckle*[17] and *O'Keeffe v. Scales*[18] - none of which concerned 'no foal, no fee' agreements. In *McElroy*, Blayney J held that an heir locator agreement whereby the plaintiff

8 Even if the 'no foal, no fee' agreement does not actually amount to champerty so as to give rise to criminal liability, the courts may still hold that it is void and unenforceable for reasons of public policy – see *Reynell v. Sprye* 1 DM & G 660.

9 Section 89(1)(a) of the proposed Legal Services Regulation Bill 2011 provides for a similar prohibition on contingency fees that will apply to barristers as well as to solicitors. Nothwithstanding the terms of s.68(2), both the Competition Authority and the Legal Costs Working Group considered that, in practice, legal fees for litigation are related to the size of the award made to the client – see, respectively, *Competition in Professional Services: Solicitors and Barristers*, (December 2006) at paras.6.60-64 and *Report of the Legal Costs Working Group,* (7 November 2005), para 3.23.

10 In relation to barristers, para. 12(1)(e) of the Code of Conduct for the Bar of Ireland 2011 similarly provides: "Barristers may not accept instructions on condition that payment will be subsequently fixed as a percentage or other proportion of the amount awarded."

11 S.I. No.518 of 2002.

12 High Court, 16 December 1994.

13 Barron J also held that, once instructions are withdrawn, the solicitor has an obligation to ensure that his former client can continue with the proceedings without undue delay.

14 [2010] IEHC 26, High Court, 29 January 2010.

15 She also held, having regard to *Boyne v. Bus Átha Cliath (No.2)* [2008] 1 IR 92, that a failure by a solicitor to send an appropriate letter in compliance with S.68 of the Solicitors (Amendment) Act 1994 did not render the contract of retainer between solicitor and client unenforceable.

16 [1991] ILRM 294.

17 [1996] 1 IR 1; [1996] 2 ILRM 34

18 [1998] 1 ILRM 393.

agreed actively to assist the defendants in recovering property to which they were entitled under an intestacy was in the nature of champerty and accordingly void.

This was subsequently approved by the Supreme Court in *Fraser*, another case concerning an heir locator agreement. However in the course of his judgment, O'Flaherty J, with whom Hamilton CJ and Barrington J concurred, made two observations that are pertinent to the topic under consideration. First, he stated that the law can develop to ameliorate the strictness of an existing precept of the common law, thereby implicitly acknowledging that the courts may modify the doctrine of champerty. Second, he noted that this doctrine and the related doctrine of maintenance[19] have rarely been applied in recent times:

> "In the most recent decades of the present century, maintenance and champerty have become almost invisible in both their criminal and their tortious manifestations. In practice, they have maintained a living presence in only two respects. First, as the source of the rule, now in the course of attenuation, which forbids a solicitor from accepting payment for professional services on behalf of a plaintiff calculated as a proportion of the sum recovered from the defendant. Secondly, as the ground for denying recognition to the assignment of a *'bare right action'*."

Of interest here is the fact that the first rule enunciated by O'Flaherty J does not capture 'no foal, no fee' agreements where the fee is agreed by the parties in advance of the conclusion of the litigation and is unaffected by the amount of money recovered by the plaintiff.

Finally, in *O'Keeffe*, the Supreme Court alluded to the impact of the constitutional right of access to the courts on the doctrine of champerty. In this case, the defendant sought to have the plaintiffs' action against her dismissed on the ground that it constituted an abuse of process, arguing that it was commenced and/or continued by reason of an agreement or arrangement between the plaintiffs and their solicitor in the nature of maintenance and/or champerty. The plaintiffs, who were impecunious as a result of a bad investment, instituted proceedings against the defendant, their former solicitor, claiming damages for, inter alia, breach of contract and negligence. Included as part of the special damages claimed was a sum of money consisting of the legal costs owed by the plaintiffs to their current solicitor which, they argued, would not have been incurred but for the matters complained of by them against the defendant. In dismissing the defendant's application, Lynch J, with whom Barrington and Murphy JJ concurred, said:

> "While the law relating to maintenance and champerty therefore undoubtedly still subsists in this jurisdiction it must not be extended in such a way as to deprive people of their constitutional right of access to the courts to litigate reasonably stateable claims. In the present case unlike *Fraser v. Buckle* or *McElroy v. Flynn* the appellant seeks to stifle the respondents' action before any plenary hearing and consequently she would have to make out a clear case if she were to succeed analogous to the onus on a party bringing a motion to dismiss an action on the basis that the statement of claim discloses no cause of action or that the proceedings are frivolous and/or vexatious.
>
> In this case, even assuming that Mr Murnaghan is maintaining the respondents' action in a champertous and unlawful manner I doubt if that would in itself amount to a defence to the respondents' action much less entitle the appellant to stifle the respondents' claim *in limine* on this motion to stay or dismiss in advance of a plenary trial."[20]

The legal status of 'No foal, no fee' agreements in England and Wales

In contrast with the more accommodating Irish approach, the courts in England and Wales appear much less tolerant of 'no foal, no fee' agreements.[21] One of the earliest authorities dealing with contracts between lawyer and client relating to costs is *Simpson v. Lamb*.[22]

The plaintiffs had successfully sued the defendant for damages and costs amounting to £85 and 4 shillings. Shortly before trial of the action, the lawyer on record for the plaintiffs agreed with another lawyer, William Shaen, that the latter would conduct the proceedings though without any attempt being made to change the name of the lawyer on record because of the expense involved. The day after the trial and before judgment was issued, Shaen paid the plaintiffs £50, being the sum awarded as damages, for their interest in the verdict. When the defendant was successful in a second action against the plaintiffs, he sought to set off the costs awarded to him in the second action against the damages and costs awarded to the plaintiffs in the first action. This brought the issue of the validity of Shaen's purchase of the plaintiffs' interest in the first verdict into focus for if this arrangement was legally valid, no set-off as between the two verdicts would have been possible as the damages and costs for the first action would have been owed to Shaen rather than to the plaintiffs.

However Campbell CJ, delivering the judgment of the Queen's Bench, held that Shaen's agreement with the plaintiffs was invalid and that therefore the defendant could set off his judgment against the damages and costs awarded in the

19 The doctrine of maintenance precludes "the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by law as justifying his interference" – see Costello J in *Fraser v. Buckle* [1994] 1 IR 1 at p.13.

20 At pp.397-8.

21 As a result of statutory intervention, the current law on maintenance and champerty in the UK is quite different from the legal position in Ireland. The Criminal Law Act 1967 abolished the criminal and tortious liabilities attaching to maintenance and champerty, though s.14(2) preserved the common law rule that they were contrary to public policy. Moreover the Courts and Legal Services Act 1990 now permits the use of contingency fees under certain conditions though where these conditions are not satisfied, such fees continue to be regarded as contrary to public policy. Note, however, that in *MGN Ltd v United Kingdom* (2011) 53 E.H.R.R. 5, the European Court of Human Rights held that the flaws in this contingency fee system were such as to constitute an unlawful interference with freedom of expression under Article 10 of the Convention.

22 7 E and B 84.

earlier case. According to the court, Shaen's purchase of the damages was made after verdict and before judgment and so was a purchase of the matter in suit *pendente lite*. Though he was not formally on record, the court considered that, for the purpose of the question before it, Shaen had to be considered the plaintiffs' lawyer. Campbell CJ said:

> "[I]t has been held, in several cases, that no attorney can be permitted to purchase any thing in litigation, of which litigation he has the management … and it would seem … to be against the policy of the law to permit such a dealing by an attorney with the subject of a suit of which he has the conduct as the attorney, whilst the case is still undetermined by judgment, as that which is now in question before us, whatever might have been the case had the purchase been by a stranger."

Simpson v. Lamb was subsequently relied on by the Court of Appeal in *Pittman v. Prudential Deposit Bank Ltd.*[23] This case concerned the validity of an agreement between solicitor and client whereby the latter agreed to pay the solicitor a debt previously incurred by him to the solicitor from any award of damages that might be made in a pending suit. In declaring the agreement invalid, Lord Esher M.R. was reported as saying that:

> "In order to preserve the honour and honesty of the profession, it was a rule of law which the Court laid down and would always insist upon that a solicitor could not make an arrangement of any kind with his client during the litigation which he was conducting so as to give him any advantage in respect of the result of that litigation. That might be said to be on account of the fiduciary relation between the solicitor and the client. But the doctrine was founded upon a higher rule. The responsibility of persons engaged in the profession of the law was very great, and their conduct must be regulated by the most precise rules of honour. The Court thought that, unless the rule was carried out to its fullest extent, there would be a temptation to solicitors which they should not be subjected to."[24]

A modern restatement of this position may be seen in *Wallersteiner v. Moir (No.2)*,[25] in which the Court of Appeal had to consider, inter alia, how an impecunious shareholder pursuing a derivative action on behalf of the company might be protected against the possibility of having to pay costs. One of the three options canvassed before the court was that of the contingency fee in respect of which Lord Denning MR said:

> "English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee,' that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty. In its origin champerty was a division of the proceeds (*campi partitio*). An agreement by which a lawyer, if he won, was to receive a share of the proceeds was pure champerty. Even if he was not to receive an actual share, but payment of a commission on a sum proportioned to the amount recovered—only if he won—it was also regarded as champerty … Even if the sum was not a proportion of the amount recovered, but a specific sum or advantage which was to be received if he won but not if he lost, that, too, was unlawful: see *Pittman v Prudential Deposit Bank Ltd* (1896) 13 TLR 110, per Lord Esher MR. It mattered not whether the sum to be received was to be his sole remuneration, or to be an added remuneration (above his normal fee), in any case it was unlawful if it was to be paid only if he won, and not if he lost.[26]

This expansive statement of the law would appear to cover 'no foal, no fee' agreements in respect of fixed costs as well as US style contingency fees for while the sum in question in *Pittman* was a debt already incurred before the litigation commenced, and not the cost of the actual litigation, the logic of the reasoning in that decision would seem equally applicable to the costs of proposed litigation. This also seems to be the view taken by Garland J in *Aratra Potato Co Ltd v Taylor Joynson Garrett (a firm)*[27] in which he held that a contingency fee which is contrary to public policy is not confined to a direct or indirect share of the spoils but includes a differential fee dependent on the outcome of the litigation and in which he said:

> "… it is clear beyond any doubt that both Lord Denning MR and Buckley LJ [in *Wallersteiner*] had clearly in mind that a contingency fee included a fee payable only in the event of success".[28]

In his judgment in *Wallersteiner*, Buckley LJ said that if the law on this matter was to be changed, careful consideration would have to be given to its public policy aspect and he indicated that the nature of the public policy question could be summarized in two statements:

> "First, in litigation a professional lawyer's role is to advise his client with a clear eye and an unbiased

23 (1896) 13 TLR 110.
24 At p.111.
25 [1975] QB 373; [1975] 1 All E R 849.
26 [1975] QB 373 at pp.393-4; [1975] 1 All E R 849 at 860**.** Lord Denning returned to the doctrine of champerty in Trendtex Trading Corporation v. Credit Suisse [1980] Q.B. 629 in which he said, at p.654:
> "Champerty is a species of maintenance: but it is a particularly obnoxious form of it. It exists when the maintainer seeks to make a profit out of another man's action — by taking the proceeds of it, or part of them, for himself. Modern public policy condemns champerty in a lawyer whenever he seeks to recover - not only his proper costs — but also a portion of the damages for himself: or when he conducts a case on the basis that he is to be paid if he wins but not if he loses."
In *Wallersteiner*, Lord Denning was prepared to permit contingency fees in the case of derivative actions taken by minority shareholders but on this point he was outvoted by the two other members of the Court.
27 [1995] 4 All ER 695.
28 At p.706.

judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client, but also an officer of the court with a duty to the court to ensure that his client's case, which he must, of course, present and conduct with the utmost care of his client's interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations."[29]

In *Pittman* and *Wallersteiner,* judicial opposition to lawyers agreeing contingency fees or 'no foal, no fee' agreements with clients in respect of pending litigation was based on the concern that such arrangements could compromise the lawyers, particularly in relation to their duties as officers of the court. However in *Thai Trading Co. v. Taylor*,[30] Millett LJ in the Court of Appeal questioned this assumption in holding that it was not contrary to public policy or unlawful for a solicitor to agree to act for a client on the basis that he would forego all or part of his fee if he lost, provided that he did not seek to recover more than his ordinary profit costs and disbursements if he won. In the course of his judgment, Millett LJ highlighted the fact that the social context in which the doctrines of maintenance and champerty operate has changed dramatically over the years when he said, in relation to caselaw referring to the doctrine of maintenance:

> "The language and the policy which [the caselaw] describes are redolent of the ethos of an earlier age when litigation was regarded as an evil and recourse to law was discouraged. It rings oddly in our ears today when access to justice is regarded as a fundamental human right which ought to be readily available to all."[31]

In relation to the doctrine of champerty, he suggested, somewhat questionably, that the comments of the members of the Court of Appeal in *Wallersteiner* were not directed towards contingency fees whereby the solicitor would get no more than his ordinary profit costs if he won. However he defended the distinction between such an arrangement and a contingency fee entitling the solicitor to a reward over and above ordinary profit costs if he win, saying of the contingency fee in relation to ordinary profit costs:

> "These are subject to taxation and their only vice is that they are more than he will receive if he loses. Such a fee cannot sensibly be described as a "division of the spoils." The solicitor cannot obtain more than he would without the arrangement and risks obtaining less. On the principle that "the worker is worthy of his hire" I would regard the solicitor who enters into such an arrangement, not as charging a fee if he wins, but rather as agreeing to forgo his fee if he loses. I question whether this should be regarded as contrary to public policy today, if indeed it ever was."[32]

Following a highly critical review of the decisions in *British Waterways Board* and *Aratra Potato Co. Ltd.*, he said that if they represented the law, "then something has gone badly wrong."[33] According to Millett LJ, it was time to consider matters afresh and he started with three propositions:

> "First, if it is contrary to public policy for a lawyer to have a financial interest in the outcome of a suit, this is because (and only because) of the temptations to which it exposes him. At best he may lose his professional objectivity; at worst he may be persuaded to attempt to pervert the course of justice. Secondly, there is nothing improper in a lawyer acting in a case for a meritorious client who to his knowledge cannot afford to pay his costs if the case is lost: see *Singh v. Observer Ltd.* (Note) [1989] 3 All E.R. 777 ; *A. Ltd. v. B. Ltd.* [1996] 1 W.L.R. 665 . Not only is this not improper; it is in accordance with current notions of the public interest that he should do so. Thirdly, if the temptation to win at all costs is present at all, it is present whether or not the lawyer has formally waived his fees if he loses. It arises from his knowledge that in practice he will not be paid unless he wins. In my judgment the reasoning in *British Waterways Board v. Norman,* 26 H.L.R. 232 is unsound.
>
> Accordingly, either it is improper for a solicitor to act in litigation for a meritorious client who cannot afford to pay him if he loses or it is not improper for a solicitor to agree to act on the basis that he is to be paid his ordinary costs if he wins but not if he loses. I have no hesitation in concluding that the second of these propositions represents the current state of the law."

He went on to defend this conclusion on the ground*, inter alia*, that it was

> "fanciful to suppose that a solicitor will be tempted to compromise his professional integrity because he will be unable to recover his ordinary profit costs in a small case if the case is lost. Solicitors are accustomed to withstand far greater incentives to impropriety than this. The solicitor who acts for a multinational company in a heavy commercial action knows that if he loses the case his client may take his business elsewhere. In the present case, Mr. Taylor had more at stake than his profit costs if he lost. His client was his wife; desire for domestic harmony alone must have provided a powerful incentive to win.
>
> Current attitudes to these questions are exemplified by the passage into law of the Courts and Legal Services Act 1990. This shows that the fear that lawyers may be tempted by having a financial incentive in the outcome of litigation to act improperly is exaggerated, and that there is a countervailing public

29 [1975] QB 373 at 402; [1975] 1 All E R 849 at 867-8.
30 [1998] 2 W.L.R. 893; [1998] Q.B. 781.
31 [1998] 2 W.L.R. 893 at 897; [1998] Q.B. 781 at 786.
32 [1998] 2 W.L.R. 893 at 899; [1998] Q.B. 781 at 788.
33 [1998] 2 W.L.R. 893 at 900; [1998] Q.B. 781 at 789-90.

> policy in making justice readily accessible to persons of modest means."[34]

However the decision in *Thai Trading* has not fared well in subsequent judicial decisions. In particular, Millett LJ's attempt to distinguish between arrangements where the lawyer would recover his normal costs in the event of success and arrangements where the lawyer would be entitled to a reward over and above those normal costs was rejected by Kennedy LJ in *Leeds City Council v Carr*[35] and by the Court of Appeal in *Awwad v. Geraghty & Co.*[36] In the latter case, a solicitor had agreed to charge her normal hourly rate if the client was successful and a lower rate if he was unsuccessful.

The Court of Appeal held that this type of conditional fee was against public policy and contrary to the common law, unless sanctioned by legislation.[37] Schiemann LJ offered the following arguments[38] against drawing a distinction between what he called a 'conditional normal fee' and a contingency fee:

> "(1) The public interest in the highest quality of justice outranks the private interests of the two litigants. This renders it particularly important that lawyers should not be exposed to avoidable temptations not to behave in accordance with their best traditions. (2) The concept of a "normal" fee is singularly elusive—some solicitors' normal fees are a multiple of those charged by others for what on the face of it is the same work. (3) It would be very difficult and undesirable for the answer to the question whether or not an agreement is illegal to depend on a detailed examination in each case of solicitors' costs structures. (4) If solicitors' practices are set up, the bulk of whose business is conducted on the basis of conditional normal fees arrangements, then their normal fees would presumably have to be higher than they would have been had such arrangements not been normal in the firm."

So in addition to the traditional concern that contingency fees might tempt lawyers to act improperly, Schiemann LJ adds two further issues, namely, that it may be difficult to distinguish between a 'conditional normal fee' and a contingency fee and that a legal business relying on conditional normal fees may have to charge higher fees than normal.

34 [1998] 2 W.L.R. 893 at 900-1; [1998] Q.B. 781 at p.790.

35 Queen's Bench Division, 15 October 1999.

36 [2001] QB 570; [2000] 1 All ER 608; [2000] 3 WLR 1041. In *Sibthorpe v. Southwark LBC* [2011] 1 WLR 2111, [2011] EWCA Civ 25, Lord Neuberger MR in the Court of Appeal stated that Millett LJ's decision had been made per incuriam. In *Sibthorpe*, the Court of Appeal held that an agreement by a solicitor to indemnify his client in the event of the case being lost did not constitute champerty.

37 See also *Sibthorpe v. Southwark LBC* [2011] 1 WLR 2111, [2011] EWCA Civ 25 in which Lord Neuberger MR stated, at para.40, that the the common law of champerty remained substantially as described in *Wallersteiner* and *Awwad*.

38 The Court of Appeal also considered that the courts should not develop the common law in this area at a time when Parliament was in the process of addressing the issue of conditional fees - [2001] QB 570 at pp.593, 600; [2000] 1 All ER 608 at 628, 635; [2000] 3 WLR 1041 at 1061, 1068.

Conclusion

If the view of the common law on champerty as expressed in the English courts represents the law in Ireland, then clearly 'no foal, no fee' agreements would have to be considered to be unenforceable and, indeed, as incurring both criminal and tortious liability. I must confess to being at a loss to explain the cultural differences between our two jurisdictions that results in 'no foal, no fee' agreements arousing intense suspicion in the English courts while being accepted with apparent equanimity here. However it is respectfully submitted that Irish courts should not follow the approach taken by their English counterparts for a number of reasons. In the first place, as the English courts accept, the law on champerty is based on considerations of public policy and it is submitted that the analysis of public policy in this area by the English courts is at least open to question.

If we take the three objections to the 'no foal, no fee' agreements outlined by Schiemann LJ in *Awwad*, in relation to the first of these, the argument that this arrangement might tempt lawyers to act improperly, there is no evidence of such an outcome in the Irish context where this arrangement is not infrequently used to support litigation by impecunious clients. Implicit support for this view may arguably be seen in the assumption by both Barron and Laffoy JJ that such agreements are legally enforceable and in the fact that the Oireachtas saw fit, in s.68(2) of the Solicitors (Amendment) Act 1994, to prohibit the US type contingency fee but remained silent about the 'no foal, no fee' agreements.[39] Indeed, even in the UK, Parliament has moved to permit conditional fee agreements under certain conditions,[40] indicating that judicial concerns here may have been overstated and one is inclined to agree with Millett LJ that it is 'fanciful to suppose that a solicitor will be tempted to compromise his professional integrity because he will be unable to recover his ordinary profit costs in a small case if the case is lost.'

Lord Schiemann's second concern was that it would be difficult to draw a distinction between permissible conditional fee agreements relating to the lawyer's normal fee and unlawful US contingency style agreements given that the concept of a 'normal fee' was 'elusive'. However the distinction in question here is not a distinction between a moderate fee and an excessive fee but, rather, a distinction between a fee calculated in accordance with professional codes of practice and legal regulation, on the one hand, and a fee calculated by reference to the size of the award made to the client, on the other.

His final concern was that legal firms relying heavily on conditional fee agreements may have to charge higher fees that would be passed on to the unsuccessful defendant. While there may be some substance in this point, it is also the case that the defendant would have such protection as is afforded by the system of taxation of costs under the Courts and Court Officers Act 1995.

On a more positive note, the use of 'no foal, no fee' agreements may be defended, in policy terms, on the ground

39 As does s.89(1)(a) of the proposed Legal Services Regulation Bill 2011.

40 See s.58 of the Courts and Legal Services Act 1990, as amended by s.27 of the Access to Justice Act 1999, and the Conditional Fee Agreement Order 2000.

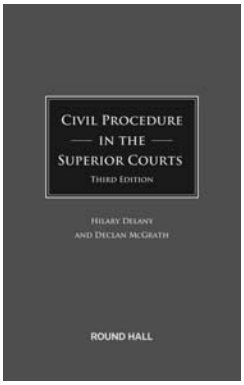
that this facilitates access to justice, a point accepted by both the Competition Authority[41] and the Legal Costs Working Group.[42] Moreover, in legal terms, such agreements could be defended in this jurisdiction as protecting the constitutional right of access to the courts.

In conclusion, while courts in England and Wales have generally looked with disapproval on 'no foal, no fee' agreements, there does not appear to be any pressing reason for Irish courts to follow suit. However if one accepts that such agreements are legally valid and even desirable from a policy point of view in broadening access to the courts, it surely follows that the lawyer acting for a successful plaintiff on this basis should be permitted to recover costs incurred from the unsuccessful defendant and it is hoped that the Irish courts will reject the reasoning in *British Waterways Board* at the earliest possible opportunity. ■

41 See *Competition in Professional Services: Solicitors and Barristers*, (December 2006) at para.5.100.

42 See *Report of the Legal Costs Working Group,* (7 November 2005), paras.5.13, 5.16.

Delany and McGrath wins Irish Law Award – Law Book of The Year



Catherine Dolan, Director of Round Hall, Thomson Reuters accepts the award on behalf of the authors of the third edition of *Civil Procedure in the Superior Courts*, Professor Hilary Delany (Biehler) and Declan McGrath BL. The award was presented and sponsored by Mark Buckley of Buckley Fine Art. Also nominated in the Law Book Award category was the second edition of *Bankruptcy Law and Practice* written by Mark Sanfey SC and Bill Holohan, Solicitor (also published by Round Hall).

Sticks and Stones: Trespass to the Person and the Provocative Plaintiff

Gregory McGuire BL

Introduction

Until relatively recently, the established position at common law was that a Plaintiff, who by his provocative words or conduct incurred an attack, could bring an action for trespass to the person safe in the knowledge that, however antagonising his behaviour, the Court would not on those grounds reduce any general damages awarded to him. This somewhat unjust position has gradually been eroded, culminating in a recent decision of the Irish High Court explicitly embracing provocation as a species of contributory negligence.

The Early Common Law Position

Fontin v. Katapodis[1] is modern authority of the Australian High Court, subsequently embraced elsewhere in the common law world, for the proposition that provocation on the part of the subject of a trespass to the person may only reduce any aggravated damages to which that person is entitled, and has no bearing on the assessment of his general (compensatory) damages.

Fontin was adopted into English law by the Court of Appeal in *Lane v. Holloway*.[2] The Plaintiff, a cantankerous old man, called the Defendant's wife a "monkey-faced tart" and told the Defendant, "I want to see you on your own", implying a fight. The Defendant approached the Plaintiff, causing him to think that he might be struck, and the Plaintiff punched the Defendant's shoulder. The Defendant responded by inflicting a blow with his fist to the Plaintiff's eye. At the trial court, it was held that the Plaintiff's conduct was something which ought to substantially decrease his award, and his damages were assessed accordingly.

The Plaintiff appealed, and the Defendant sought to rely on the Law Reform (Contributory Negligence) Act 1945 as a basis for upholding the trial judge's findings. Section 1 (1) of the Act states: "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person... the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage …" Section 4 of the same Act defines "fault" as *inter alia* including "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort". Ruling against the Defendant, however, Salmon L.J. held:

> "I entirely reject the contention that because a plaintiff who has suffered a civil wrong has behaved badly, this is a matter which the court may take into account when awarding him compensatory damages for physical injuries which he has sustained as the result of the wrong which has been unlawfully inflicted upon him. I would unhesitatingly come to that view without any authority at all. I cannot see how logically or on any principle of law the fact that the plaintiff has behaved rather badly and is a cantankerous old man can be even material when considering what is the proper compensation for the physical injury which he has suffered."[3]

It is submitted that, as well as bringing about an unjust outcome, this finding is legally unsatisfactory in that it is based on an inherent sense of correctness without recourse to basis or rationale. Indeed, the issue of the 1945 Act was only substantively dealt with by Winn L.J., who stated simply on the subject without further elaboration: "[I]n my opinion there is here nothing... which can constitute a fault within the definition of "fault" in section 1 (1) of the Act."[4]

Certainly it is not difficult, on the strength of *Fontin*, *Lane* and other subsequent judgements,[5] to adopt the view of Hudson on the common law that "[a]t one time it would have been possible to say with firm confidence that contributory negligence was never a defence to battery".[6] However, it is noteworthy that *Fontin* was the subject of heavy criticism by academics including Blay[7] and Pingree, the latter opining that "the court bound Australian law to a position based neither on logical reasoning nor on precedent and that was not supported by a policy position".[8] Indeed, Pingree has set out a number of compelling arguments why, on policy grounds, such a position is inherently flawed.[9]

1 [1962] 108 C.L.R. 177.
2 [1968] 1 Q.B. 379.
3 *Ibid.* at 390.
4 *Ibid.* at 393.
5 Horkin v. North Melbourne Football Club Social Club [1983] 1 VR 153; Cotogno v. Lamb (No. 3) 1986 Aust. Torts Report 80-039.
6 A.H. Hudson, 'Contributory Negligence as a Defence to Battery' [1984] 4:3 *Legal Studies* 332.
7 S.K.N. Blay, 'Provocation in Tort Liability. A Time for Reassessment' (1988) 4 Queensland University of Technology Law Journal 151.
8 A. Pingree, 'Provocation as a Complete Defence to Trespass to the Person' (2010) 15:2 Deakin Law Review 205.
9 These include the notion that the doing of a provocative act may be regarded as indicating implied consent on the part of the provocateur to a trespass to the person; that provocation may be regarded as giving rise to automatism on the part of the provoked; the desirability of having consistency between civil and criminal law (where courts often mitigate sentences to reflect the fact that a Defendant was not entirely to blame); and the "inherent moral justifiability" of provocation as a "complete defence" to trespass to the person, Pingree citing a "point of overlap" with the tort of self-defence.

The Softening Approach

Less than a decade after the judgement in *Lane v. Holloway*, it was Lord Denning M.R., himself a member of the unanimous Court of Appeal that delivered it, who qualified or at least distinguished that decision in the case of *Murphy v. Culhane*.[10] The matter related to an appeal of the Master, who had granted leave to enter final judgement on grounds of there being no defence in law to the Plaintiff's claim. Lord Denning M.R., in allowing the appeal and finding that the case was one where the facts ought to be investigated before judgement was given, stated on the issue of provocation:

> "There are two cases which seem to show that, in a civil action for damages for assault, damages are not to be reduced because the plaintiff was himself guilty of provocation... But those were cases where the conduct of the injured man was trivial – and the conduct of the defendant was savage – entirely out of proportion to the occasion. So much so that the defendant could fairly be regarded as solely responsible for the damage done. I do not think that they can or should be applied where the injured man, by his own conduct, can fairly be regarded as partly responsible for the damage he suffered."[11]

As Blay surmised: "Lord Denning's views here amounted to an unequivocal qualification to the rule in *Fontin* v. *Katapodis* and *Lane* v. *Holloway*. It was in this regard a recognition of the injustice the defendant stood to suffer from an unqualified application of the *Fontin* v. *Katapodis* rule."[12]

This discrepancy was judicially acknowledged by May LJ in *Barnes v. Nayer*.[13] The Defendant had been convicted of manslaughter and a subsequent civil claim for trespass to the person was brought against him by the deceased woman's estate. The Defendant argued that there had been contributory negligence, claiming, *inter alia*, that the woman, who was a neighbour, had provoked the attack by making violent threats to one of his sons and by encouraging the sons of both families to fight each other. The Court of Appeal on those facts made no finding of contributory negligence, holding that the Defendant's response was wholly disproportionate to the purported provocation. The Court did, however, leave the door open for such a finding in an appropriate case. May LJ stated:

> "In so far as contributory negligence is concerned, *prima facie* I can see no reason why, again given the facts, a defendant to a claim for damages for assault cannot rely upon the Law Reform (Contributory Negligence) Act 1945."[14]

This view was approved in the subsequent Court of Appeal decision of *Malcolm v. Walsh*,[15] before being applied in two decisions of the Northern Irish High Court. In the first, *Ward v. Chief Constable of the Royal Ulster Constabulary*,[16] the Plaintiff's son was being physically detailed by police officers when the Plaintiff shouted at them to let him go and made "minor physical contact" with one of the officers – pulling or tugging at his shoulder. This prompted the officer to shove the Plaintiff with a high degree of force over a wall and into a garden area. Girvan J. held that the Plaintiff's pulling or tugging constituted sufficient provocation to amount to a finding of one third contributory negligence.

In the course of his judgement, Girvan J. echoed the view taken in *Barnes v. Nayer* that in a case where the purported provocation is of a minor character, and the Defendant nevertheless responds in a wholly disproportionate manner, the issue of contributory negligence ought not even be considered. The learned judge also appeared to conclude that an act of *physical* provocation – "tortious conduct", as he described it – and not the mere uttering of provocative words alone, were required. He stated:

> "If A assaults B and B responds disproportionately it is a question of fact and degree whether A's action can be said to have contributed to his own injury. If A lightly touches B and B responds savagely causing injuries the actions of B are so disproportionate and so unrelated to the actions of A that A cannot be said to share in the responsibility for the ensuing damage."[17]

In the subsequent Northern Irish case of *Donkin v. Reid*,[18] a similar approach was followed. The Plaintiff was asked to leave the Defendant publican's premises but was very drunk and got into an altercation with one of the bouncers. She attacked the bouncer with an ashtray, in response to which he "overreacted in the heat of the moment" and deliberately head butted her.[19] In assessing the amount of contributory negligence at 50%, the Court considered that, although the Plaintiff provoked the incident, there were "two, apparently sober men" available to control her without one of them head butting her.

Noting the cumulative effect of the above authorities, the authors of the most recent edition of *Clerk and Linsdell on Torts* summarise the position as follows:

> "The balance of authorities now suggests that contributory negligence is available in a claim of trespass to the person or other tort concerned with intentional harm to the person. The conduct of the claimant must be shown to be sufficiently grave in proportion to the wrongdoing of the defendant to amount to: (1) fault on his part; and (2) an effective cause of ensuing injury."[20]

10 [1977] 1 Q.B. 94.
11 *Ibid.* at 98.
12 Blay, *op. cit.*, at 158.
13 Unrep, Court of Appeal, 3rd Dec 1986.
14 *Ibid.* at 11D-G of the transcript.
15 Unrep, Court of Appeal, 13th May 1997.
16 [2000] N.I. 543.
17 *Ibid.* at 550.
18 [2006] NIQB 2.
19 It was noted by the Court that the Defendant did not plead self-defence and accordingly this issue was not considered.
20 Clerk & Linsdell on Torts (20th Ed., Sweet and Maxwell 2010), para. 3-54.

The Irish Decision

The question of whether provocative conduct may give rise to contributory negligence fell to be considered by the Irish High Court in *Gammell v. Doyle & White*.[21] The Plaintiff, who was socialising in a pub, approached the Defendant and asked whether he was "riding the babysitter", before making a further lewd remark about the Defendant's wife who was also present. The Plaintiff then began prodding the Defendant and put his face up extremely close to that of the Defendant, saying words to the effect of: "[Y]ou all think you're big lads driving around in big jeeps and cars. You're a shower of wankers." The Defendant asked the Plaintiff to leave but the Plaintiff continued to poke him. Shortly thereafter, the Defendant by his own admission "lost it" and punched the Plaintiff in the face, inflicting serious injury.

The Defendant argued contributory negligence and sought to rely on the applicable Irish provision, Section 34 (1) of the Civil Liability Act 1961, which states: "Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff... and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the plaintiff and defendant..."

Having had regard to the section and to the relevant authorities, Hanna J. concluded that the provision was doubtlessly compatible with the provocation of a trespass to the person. In so finding, the learned judge also appeared to implicitly hold that provocative *words* alone and not necessarily physical contact could amount to an instance of contributory negligence under the Act – seemingly a derogation to the *dicta* of Girvan J. in *Ward*, although one which perhaps quite justifiably recognises the difference in wording of the respective Acts. The learned judge stated:

> "I see no good reason why intentionally provocative and insulting behaviour carried out over a period of some minutes cannot come within the ambit of contributory negligence. This assault would not have occurred were it not for the persistent misconduct and verbal vitriol of the plaintiff. While again stressing that one must not seek to justify the act of violence which occurred, there is no doubt in my mind that the plaintiff's behaviour should weigh heavily against him."[22]

In light of the above, Hanna J. assessed contributory negligence at 50%. It is to be noted that Hanna J. then proceeded to dismiss the Plaintiff's claim in its entirety under Section 26 of the Civil Liability and Courts Act 2004 for the giving of false and misleading evidence. However, it is submitted this ought not have a bearing on the precedent of his earlier findings.

21 [2009] IEHC 416.
22 *Ibid.* at 16.

A Recent Regression in English Law?

It is noteworthy that, despite appearing settled, the English law on the issue of contributory negligence and trespass to the person was recently revisited by the Court of Appeal in *Co-operative Group (CWS) Ltd v. Pritchard*.[23] After a comprehensive review of the authorities, the Court unanimously held that contributory negligence cannot in fact be relied upon in such an action.

The Court's rationale was as follows. Prior to the enactment of the Law Reform (Contributory Negligence) Act 1945, the common law position on contributory negligence was one of all or nothing. A Plaintiff who was in no way the cause of his damage would recover everything, but a Plaintiff who contributed in even the slightest degree to the cause of his damage would recover nothing. The Act was passed to ameliorate the often harsh consequences of the common law regime by providing that a Plaintiff would only be excluded from a certain *percentage* of his damages commensurate with the level of his own fault – the modern standard of contributory negligence.

In two decisions of the House of Lords, *Reeves v. Commissioner of Police*[24] and *Standard Chartered Bank v. Pakistan Shipping Corporation*,[25] it was held that the applicability of the 1945 Act is limited to actions for torts to which the old, common law contributory negligence regime would have applied. *Quinn v. Leathem*[26] is authority for the proposition that at common law, contributory negligence did not apply to an action for trespass to the person; such an action would never be defeated on the basis of a contributory act by the Plaintiff, no matter how egregious. As Lord Lindley stated in *Quinn*: "The intention to injure the plaintiff negatives all excuses."[27]

Deducing from the above, the Court in *Co-operative Group (CWS) Ltd* found that an action for trespass to the person, in which a claim for contributory negligence was not allowed at common law, could therefore not attract a claim of contributory negligence under the Act. Lord Aikens accordingly held that the *dicta* of Lord Denning MR in *Murphy v. Culhane* was "not sound law":

> "With respect, Lord Denning did not... ask himself the correct question when considering whether the widow's damages could be reduced by virtue of section 1 of the 1945 Act. The proper approach... is to ask whether that conduct by a claimant could have given rise to a defence of contributory negligence at common law."[28]

The Court considered the authority of *Barnes v. Nayer* to be unsound on the same basis, whilst *Malcolm v. Walsh* was discounted on the grounds that counsel for the Plaintiff in that case conceded the contributory negligence point and the Court "did not review the principles involved". Lord Aikens concluded on the subject:

23 [2011] EWCA Civ 329.
24 [2000] 1 AC 360.
25 [2003] 1 AC 959.
26 [1901] 1 AC 495.
27 *Ibid.* at 537.
28 Above n. 24 at 15.

> "Insofar as there are cases since the 1945 Act that suggest that the Act can be used to reduce damages awarded for the torts of assault or battery in a case where it is found that the claimant was "contributorily negligent" they are unsatisfactory and cannot stand with statements of principle made in two subsequent House of Lords decisions. I would conclude that the 1945 Act cannot, in principle, be used to reduce damages in cases where claims are based on assault and battery, despite the remarks in such cases as *Lane v Holloway* and *Murphy v Culhane*, which I would say are not binding on this court."[29]

It remains to be seen what the ramifications of *Co-operative Group (CWS) Ltd v. Pritchard* will be, although the decision is unquestionably profound and radical. It is submitted that, given the number of conflicting Court of Appeal authorities now in existence, a conclusive judgement on this issue from the U.K. Supreme Court is necessitated.

29 *Ibid.*

Conclusion

The decision of *Gammell v. Doyle & White* marks welcome recognition in Irish law that provocative behaviour on the part of a Plaintiff in an action for trespass to the person may result in a finding of contributory negligence on his part. It would appear, in this jurisdiction at least, that such behaviour may exclusively constitute provocative *words* and not necessarily physical contact. *Gammell* and related authorities provide a useful gauge of the amount of contributory negligence that may be found for different types of provocative conduct.

It is submitted that, while doubtlessly adding uncertainty to the position in England, it is unlikely that the decision of *Co-operative Group (CWS) Ltd v. Pritchard* will have a bearing on Irish law. First, Irish judges are not bound by the same interpretation of the Civil Liability Act 1961 as their English counterparts are of the Law Reform (Contributory Negligence) Act 1945 by *Reeves* and *Standard Chartered Bank*. Secondly, Irish judges are less likely to slavishly follow rather antiquated common law authorities such as *Quinn v. Leathem*, particularly when the result of so doing would work such an obvious injustice.

It may be hoped that the decision of *Gammell* will continue to represent the applicable law in Ireland. ■

Pupil Exchange in Luxembourg — Pour se changer les idées…

Aoife Mc Mahon BL

Urban bar (the best place to watch rugby with a good pint) – la journée du patrimoine (free entry to a large number of cultural events) – International Bazaar (65 countries at 57 stands selling traditional food, drink and crafts for a different charity each Christmas) – moien (salut in Luxembourgish) – Casements (a labyrinth of tunnels through the old fortified city walls) – the red bridge (the 45 metre high link between the old high town and the European centre) – Oberweiss (delicatessen creations as fine art) – the Lab (shots in test tubes and cocktails in Erlenmeyer flasks) – streuselkuchen and pain au chocolat (the delicious mix of German and French influences in Luxembourg's boulangeries)

I didn't feel introducing this article simply as an account of a stay in Luxembourg would have had the same reader capture effect. I wasn't quite sure what to expect myself on arriving. Among my first impressions was how difficult it was to gain a sense of general orientation. At the level of the town itself, this was mainly due to the topographically challenging nature of its landscape: on many occasions, what seemed like a turn on the map was in fact on overhead bridge crossing the many valleys surrounding the high old town. Beautiful to look at, if frustrating to navigate.

At the level of the Court of Justice building, the two kilometre stretch of continuous office blocks across Kirchberg plateau that is the European centre doesn't facilitate navigation by any means. Eventually, I found myself entirely lost in the mass of identical looking judges' cabinets around l'agneau. Finding Judge Ó Caoimh before finding his cabinet was momentarily embarrassing but ultimately fortunate.

Incessant building work around the court is a result of the continuous enlargement of the EU. The significant place of language in the work and life of the court manifests itself in the first 25-storey golden tower, home of the translation services of the Union's 23 official languages. The adjacent twin tower holds the cabinets and offices of the General Court.

The stagiaires generally meet at 12.30 outside the canteen, assisting newcomers in finding their peers. Members of this group greatly vary in terms of age, background, which service of the court they are working with and language spoken. Most stagiaires work in judges' chambers, but some work with other services such as the library, research and documentation, translation and interpretation.

Unlike all the other institutions of the EU, the court uses French as its working language. All internal documents, reports and deliberations are drafted and conducted in French. For this reason, a large proportion of the people working in the court have French as their maternal language. This same large proportion of people tend to appreciate every opportunity they're given to practice English and as this tends to be another common language to people of different nationalities, it is also generally used. Fluency in one of either of these languages is essential; knowledge of other languages is advantageous, most notably for carrying out legal research in periodicals from different member states. The court's many electronic legal research tools and indeed its library offer an impressive array of legislation, case law and legal commentary. Language may nevertheless at times prove a barrier.

Of Judge Ó Caoimh's three référendaires, Síofra, Henry and Bruno, I mainly worked with Síofra, though all three set me interesting tasks throughout my stage. They divide the cases coming to the cabinet equally among themselves, generally according to the area of law each specialises in. My work consisted of helping to draft preliminary reports for cases in which Judge Ó Caoimh was reporting judge, drafting research notes for observations on preliminary reports of other judges and drawing up notes on possible issues of importance to be drawn attention to at oral hearings. Even in the short time I spent at the court, the varied nature of the work was striking. The majority of cases were preliminary references, but I also worked on infringement cases and general court appeals. Issues ranged from the validity of certain vertical agreement clauses under competition law rules, the interpretation of the rights of long-term resident third-country nationals, the status of state-run work schemes for social inclusion in the context of employment law rules, the extent to which movement could be restricted as an ancillary penalty for non-payment of a debt over a certain threshold, to the method of calculation of lump sum and penalty payments in infringement cases.

I had the opportunity to observe a great number of hearings, of both the court of justice and the general court. Having prior sight of the hearing report, which briefly sets out the main arguments of all the parties, greatly assisted in understanding the issues presented to the court in each case. Hearings were most interesting even to compare the varying styles of advocacy of lawyers from different member states. Several of the court's regular training seminars were also attended, which covered such subjects as the accelerated and urgent procedures, Regulation 1/2003 and the European competition network, Member state and EU public liability law, the EFTA court, the effect of the charter of fundamental rights on national administrative law and the functioning of the Westlaw international database. If cpd points survived beyond a year, or could be sold, I'd be sorted…

In all, it was simply a pleasure to work in such a wonderful cabinet as Judge Ó Caoimh's. The warm welcome and kind encouragement I received from everyone was greatly appreciated. Entirely interesting conversations with a certain Mr. Pellett, (I'll call him as he wishes to remain nameless), nevertheless stand out as the highlight of my stage; a sentiment I'm sure I share with stagiaires who have gone before me. ■

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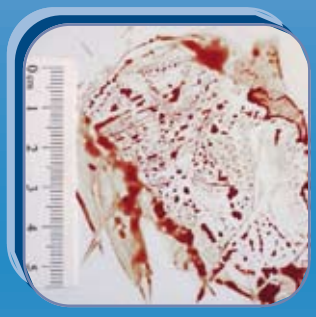
Interpretation of fingerprints and footwear marks associated with blood.

Have you considered how the mark associated with blood was formed?

Ridge detail formed by a palm with wet blood on it

Ridge detail formed by a palm being placed in to wet blood on a surface



Ridge detail formed by blood smearing over a pre-existing non-blood mark.

Did the wet blood come in to contact with a pre-existing fingerprint or footwear mark itself not composed of blood (coincidental association)?

These issues can and should be addressed.

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