# The Bar Review

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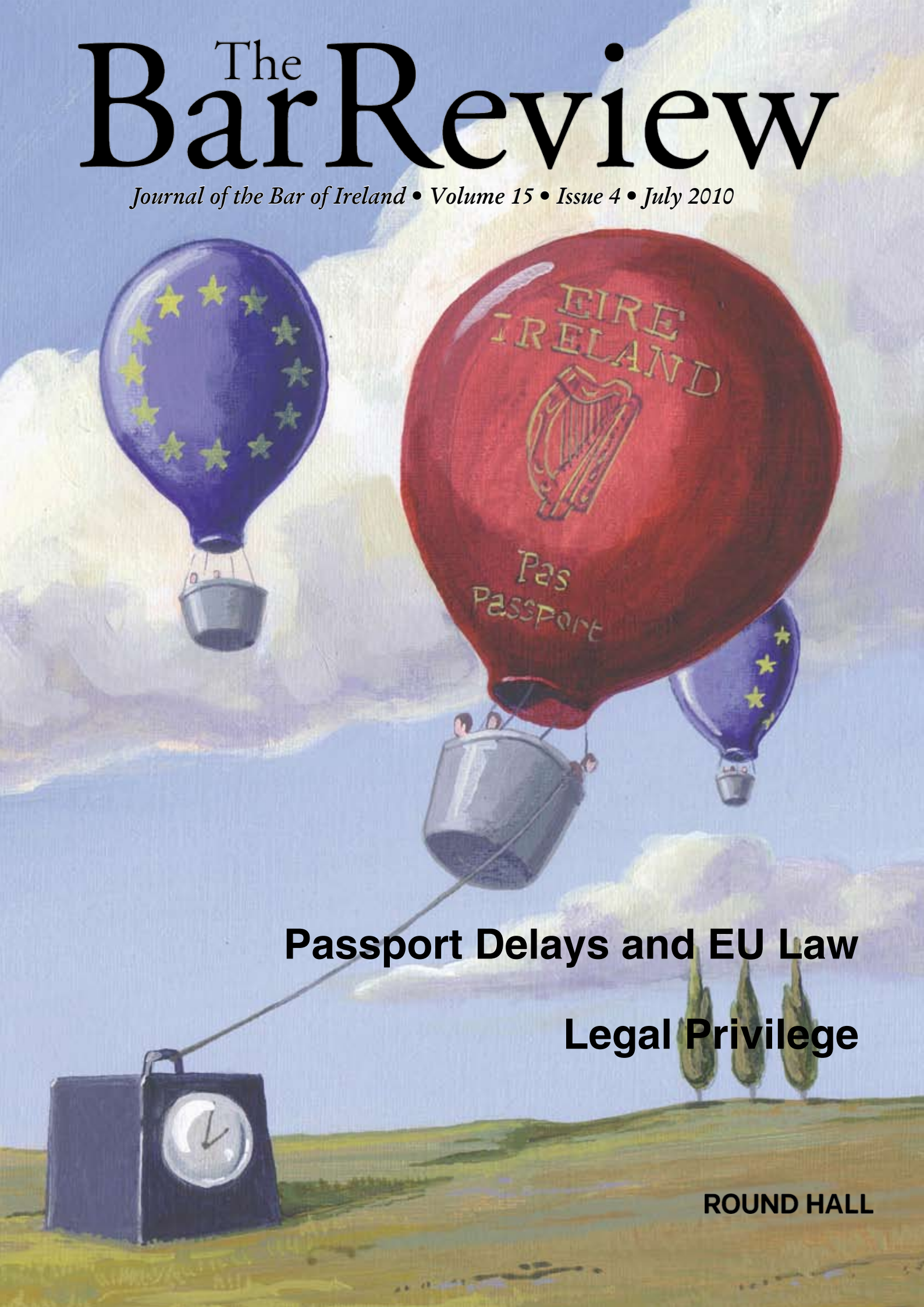


## Passport Delays and EU Law

## Legal Privilege

ROUND HALL

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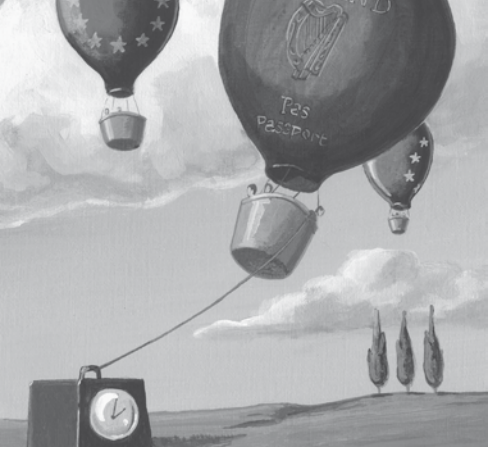

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# Legal Privilege and Keeping Secrets

Damien Ryan BL

## Introduction

In order to establish a claim to privilege a party must show that he or she created the document for the dominant purpose of anticipated litigation. However, since legal privilege has its origins in maintaining the privacy of communications with one's legal advisors, a further condition has evolved in most common law jurisdictions that a document must be confidential before it can be privileged. This article examines the origins and logic of this condition in light of as a recent Supreme Court pronouncement.

## The Requirement of Confidentiality

In *Phipson on Evidence* (Seventeenth Edition, 2010) at 787, the issue of confidentiality is explained as follows:

> "It is a precondition of a claim to privilege that the documents in question are confidential. If particular documents are no longer confidential, then privilege cannot be be claimed... If A is entitled to, or is given, access to privileged documents of B, it may be said that there is no confidentiality between A and B so that no claim for privilege could be maintained by A against him in relation to those documents. But so long as the document remains a confidential document, it would still be possible for the client to claim privilege against others."

In 11 Halsbury's Laws of England 5d (2009) § 568, the matter is described in the following terms.

> "[C]ommunications passing between opposite parties or made by or on behalf of the opposite party cannot be confidential, and are accordingly liable to disclosure unless they attract the protection of 'without prejudice' negotiations."

It follows from the combined wisdom of these statements that even if a document may come into existence in anticipation and for the dominant purpose of litigation, it is a precondition of the right to privilege that there is confidentiality as between the creators of the document, the preservation of which justifies the refusal to grant an applicant inspection of the document. However, this proposition was implicitly, but unequivocally, rejected by the Supreme Court in a recent decision of *Morris v. Dublin Bus* (Unreported *ex tempore* judgment, Macken J., 10 March 2010).

### *Morris v Dublin Bus*

The case arose out of personal injuries sustained by the plaintiff in the course of his employment with the defendant. In the aftermath of the injury, the plaintiff was obliged under his terms of employment to complete a standard form 'Accident Report Form' outlining the details of the incident. The Report Form was filled out, read and signed by the plaintiff before being handed over to the defendant's agent. In the course of the proceedings, the defendant refused to produce the Report Form for inspection claiming that it was subject to legal privilege. On application to the court, the plaintiff refuted the claim to privilege on the grounds *inter alia* that confidentiality is a pre-requisite to establishing a claim to privilege and it follows that the defendant cannot invoke a claim to privilege as against the plaintiff in circumstances where the plaintiff created the document and where the contents of the document are known to the plaintiff.

In the High Court Cooke J. accepted this reasoning as in accordance with the underlying basis of legal privilege. He held:

> "The rationale of the privilege sought to be invoked is that a defendant ought not to be obliged to disclose to a plaintiff the confidential contents of documents which may have come into existence for the purpose of defending the actual or threatened claim of the plaintiff as to do so would inhibit the freedom to take all necessary steps and advice to prepare to defend itself. That cannot logically apply to a document which is itself the creation of the party against whom confidentiality is sought to be asserted."[1]

The approach of Cooke J. reflects an earlier decision of Finlay Geoghegan J. in *Woori Bank v. KDB Ireland Limited* [2005] IEHC 45. In *Woori* Finlay Geoghegan J. made two findings which are relevant to the present discussion. First, it was held that all legal privilege was related to "the rule which protects confidential communications from discovery as regards the other side".[2] Second, the court in *Woori* found implicit authority for the proposition that confidentiality was a pre-condition to making out a claim of privilege in the Supreme Court decision in *Fyffes Plc v. DCC Plc* [2005] 1 I.R. 59. From the judgments delivered in *Fyffes*, Finlay Geoghegan J. observed that the steps taken by DCC to "preserve confidentiality" were a material fact in the conclusions of the Supreme Court that privilege had not been lost; from this the court deduced that if there is no necessity in the first place for a communication with a third party to be confidential then there could be no need to preserve confidentiality.[3]

1 *Morris v Dublin Bus* (High Court, Cooke J., 23 March 2009)

2 *Woori Bank v. KDB Ireland Limited* [2005] IEHC 45 at page 24

3 The court in *Woori* found a requirement of confidentiality in making out a claim of privilege to be already established in Irish law by the Supreme Court decision in in *Fyffes Plc v. DCC Plc* [2005] 1 I.R. 59. Finlay Geoghegan J. said:

> "Fennelly J. at p.3612 cites what he describes as "a central plank of the appellant's submission":

In delivering the judgment of the Supreme Court in *Morris*, Macken J. held: "The Court is satisfied that an accident or incident report form of this type does have the capability to be privileged, but there are unusual features attaching to the present case and to the present form." The judgment elaborated that, on the facts, it had not been established by the defendant that the routine form in question was generated for the dominant purpose of litigation when completed by its employees. Moreover, the court found, it was not contended by the defendant that such intention on the part of the defendant was known or made known to the plaintiff.

In finding that the type of Accident Report Form under scrutiny in *Morris* could in principle come under the cloak of legal privilege, the court is implicitly rejecting the idea of confidentiality conceived in terms of secrecy being a prerequisite to establishing a claim to privilege. This finding is a departure from the orthodox view which has developed among the commonwealth jurisdictions. That view has its origins in the following passage from the Northern Ireland Court of Appeal in *McKay v. McKay* [1988] 12 NIJB 78:

> "Therefore, as the basis of the privilege is that the communications which a party makes to his professional lawyer should be kept secret from the adverse party and that the adverse party cannot ask to see them before the trial it follows that the privilege cannot apply where the adverse party has himself supplied the information and is therefore aware of it. In such a case there is no need to keep the information secret from the opposing party because he already knows of it."[4]

This absolutist conception of confidentiality has found support in the English High Court,[5] the British Columbia Court of Appeal,[6] the Supreme Court of Tasmania[7] and the Court of Appeal of New Zealand.[8]

### *A discreet legal privilege*

Although a departure from the decision of Finlay Geoghegan J. in *Woori*, it is a corollary of the decision in *Morris* that the related but separate doctrines of legal advice privilege and litigation privilege have a distinct motivation.

> "It follows from the necessity for a communication to be confidential before privilege can be properly claimed in respect of it, that disclosure of material to a third party generally destroys any confidentiality and therefore any privilege, otherwise attaching to that communication."

Whilst the Supreme Court did not uphold the totality of that submission insofar as they concluded that limited disclosure for a particular purpose would not cause DCC to lose or waive its privilege, it is clear from the judgments that the steps taken by DCC to preserve confidentiality (subject to limited disclosure) were a material fact in the conclusions of the Court that privilege had not been lost. If there is no necessity in the first place for a communication with a third party to be confidential then there could be no need to preserve confidentiality."

4 *McKay v. McKay* [1988] 12 NIJB 78 at p. 86
5 *Faraday Capital Ltd. v. SBG Roofing Ltd. (In Liquidation)* [2006] EWHC 2522 (Queen's Bench Division Commercial Court)
6 *Flack v Pacific Press Ltd* (1970) 14 DLR (3d) 334
7 *Goodrick v. Nichols* [1998] TASSC 123
8 *Crisford v. Murray* [2000] NZCA 73 (1 June 2000)

It is certainly true that the early authorities perceived legal privilege as designed to preserve the secrecy of "professional communications of a confidential character for the purpose of getting legal advice"[9]: the assurance that the communication would remain private thereby removed any inhibition from "making a clean breast of it"[10] with one's legal advisors. But, as Finlay C.J. discerned in *Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd.,*[11] in the earlier authorities the 'confidential element' in the communication attracting privilege appeared to relate to the fact that it was a communication passing for the purpose of getting legal advice.[12] Thus, where the supposedly privileged document did not arise in the context of legal advice, there does not appear to be historic support for the proposition that confidentiality is a prerequisite to a claim to legal privilege.

The dual basis for legal privilege was succinctly described in *Bray on Discovery* (1885):

> "Professional privilege rests on the impossibility of conducting litigation without professional advice, whereas the ground on which a party is protected from disclosing his evidence is that the adversary may not be thus enabled so to shape his case as to defeat the ends of justice." [13]

In England, the latter form of privilege is also in evidence in the influential decision of *Anderson v. Bank of British Columbia*[14] where James LJ stated that "as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief".[15] In *Silver Hill Duckling Ltd. v. Minister for Agriculture*[16] the Irish High Court considered documents generated within the defendant government department and found "that once litigation is apprehended or threatened, a party to such litigation is entitled to prepare his case".[17]

The subsequent cases in this jurisdiction, disclose a principled approach by the courts to grant a cloak of privilege over documents which were created for the dominant purpose of litigation which, at the time of creation, was apprehended or threatened.[18] It is unsettled law, however, whether there are other legal prerequisites to bringing documents within the lexicon of 'materials for the brief'.

It appears that, as a starting point, all documents which satisfy the *Silver Hill* criteria are *prima facie* privileged documents. However, I would suggest that the legal privilege does not attach to the document *per se* but rather attaches to the process of the disclosing of facts including the documents thereby created. This idea has its origins in the reasoning of the Lord Simon of Glaisdale in *Waugh v British Railways Board*

9 *Gardner v. Irvin* (1878) 4 Ex. D. 49, 53 *per* Cotton J.; Minter v. Priest [1930] 1 A.C. 558, 580 *per* Lord Atkin
10 *Anderson v. Bank of british Columbia* (1876) 2 Ch.D. 644, 649 Sir George Jessel M.R.
11 [1990] 1 I.R. 469
12 ibid. at p.477
13 Bray on Discovery (1885) at p. 407
14 *Anderson v. Bank of British Columbia* (1876) II Ch. D. 644
15 ibid 656
16 [1987] I.R. 289
17 ibid. 292
18 see *Silver Hill Duckling Ltd. v. Minister for Agriculture* ibid. applying *Waugh v British Railways Board* [1980] AC 521

(the decision in which the *Silver Hill* criteria originated) where the House of Lords observed that a party cannot see his adversary's brief "because that would be inconsistent with the adversary forensic process based on legal representation".[19]

This conception of litigation privilege as covering the "forensic process" engages two further issues for consideration before a document is deemed privileged. First, it is necessary for the party claiming privilege over a document to establish that it is his or her document, or in the terminology of the United States, that it is his or her "work product". So, whereas an account of an incident communicated to a defendant employer by a plaintiff employee in an accident report form will not be considered the defendant's document: "had the document been originally prepared simply as a record of a conversation between an investigator and the plaintiff with no intention to have it signed by the plaintiff but with the sole purpose of submitting this record to a solicitor, then it may well be that privilege would have initially attached to such a document".[20]

Second, a concept of litigation privilege encompassing the process through which the document is created must engender scrutiny of procedural fairness. In *Shell E. & P. Ireland Ltd -v- McGrath (No. 2)*, a case involving an allegation of fraud, the High Court asserted that "the focus of the remedy is not simply the protection of the confidentiality of the communication, but also on restraining its use".[21] This perspective of the law of legal privilege prompts consideration of the facts in *Morris* once again. Since it was company policy that an employee involved in an accident was required to complete the accident report form and hand it over to the employer, is it in accordance with procedural fairness that the employee was compelled to potentially incriminate himself? Moreover, is procedural fairness compromised by the employer neglecting to notify the employee that his account might serve a dual purpose: one which was investigative and for the purposes of future safety and, another, which was adversarial and designed to be used against the employee in event of litigation?

Yet, it is this dichotomy between a process which is 'investigative' and that which is 'adversarial' which goes to the very nub of the issue. In *In re L (A Minor) (Police Investigation: Privilege),*[22] the House of Lords described litigation privilege as "essentially a creature of adversarial proceedings"[23] and held that the privilege could not be claimed in order to protect from disclosure a report prepared for use in non-adversarial proceedings. The House of Lords subsequently questioned this justification for litigation privilege stating that civil litigation "is in many respects no longer adversarial".[24]

Nevertheless, whatever the character of civil litigation in Ireland, the process through which one party to litigation extracts evidence from his adversary, regardless of its efficacy, must serve the administration of justice. This ambition is the ultimate aim of legal privilege. Where a party is guilty of moral turpitude or dishonest conduct, that party will not be allowed to benefit from legal privilege.[25] Moreover, the Supreme Court has found that any diminution in the disclosure of facts restricts the ability to ascertain the truth and thereby render justice; as result, any restriction on full disclosure must be justified as securing a countervailing objective which furthers the administration of justice.[26] This balance might easily be deflected in favour of full disclosure if the document or communication over which privilege is claimed was obtained dishonestly or unfairly.

## Conclusion

It will be noted that a degree of confidentiality in terms of secrecy will attach to every document or communication which comes before the courts for consideration, otherwise the applicant would not have had reason for issuing the motion. This article relates to an instance in which both parties to the proceedings were present at the conception of the document and as a result are familiar to some extent of its nature and contents. Can privilege arise in favour of one of the parties notwithstanding that his adversary is previously acquainted with the document? According to the Supreme Court in *Morris*, the answer is yes, at least in principle. Nevertheless, it appears to this writer that there is an onus on the party asserting the claim to privilege to establish two facts: first, that the document is his document in so far as it is the product of his work or in so far as his adversary had knowingly waived her interest in the document;[27] and second, that the process through which the party procured the document is not in breach of procedural fairness. Once these conditions are satisfied, a party's claim to privilege will not be defeated on the technicality that the contents of the document are not truly secret. ■

19 *Waugh v British Railways Board* ibid 537

20 *per* Hodgson J. *Aydin v. Australian Iron and Steel Pty Limited* [1984] 3 NSWLR 684 at 691 (New South Wales Court of Appeal)

21 *per* Smyth J., *Shell E. & P. Ireland Ltd -v- McGrath (No. 2)* [2007] 2 IR 574, 587

22 [1997] AC 16

23 *per* Lord Jauncey of Tullichettle, ibid 26

24 *Three Rivers DC v. Bank of England* [2005] 1 AC 610, 647

25 *Murphy v. Kirwan* [1993] 3 IR 501, 511

26 *Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd* ibid 477

27 This is not the same thing as waiving a right of legal privilege. The issue of waiving privilege cannot apply since neither party ever had the choice of keeping the contents of the document secret.

# Costs in a Criminal Case

LISA SHEEHAN BL

In the recent case of *Director of Public Prosecutions v Bourke Waste Removal Limited and others* [2010] IEHC 122*,* it was held that the acquitted accused, were entitled to their costs in the Central Criminal Court. This article will consider the judgment and will examine whether an accused, acquitted in a criminal court other than the Central Criminal Court, can similarly claim their costs.

### *The Director of Public Prosecutions v Bourke Waste Removal Limited & ors*

The accused in this case, five men and three companies, were acquitted by a jury in respect of the charges in relation to alleged anti-competitive practices contrary to the Competition Act 2002. None of the applicants had been eligible for legal aid. Upon an application for costs upon acquittal, the court indicated that it had to consider the following:

1. The jurisdiction of the Court to make an award for costs.
2. The manner in which it should approach the decision to award costs.

### The Jurisdiction of the Central Criminal Court to make an Award for Costs

The presiding judge, Judge McKechnie, indicated that the jurisdiction of the Central Criminal Court to award costs in a criminal case, stems from section 14(2) of the Courts (Supplemental Provisions) Act 1961, which provides as follows;

> "The jurisdiction which is by virtue of this Act vested in or exercisable by the Supreme Court, the High Court, the Chief Justice, the President of the High Court, the Central Criminal Court and the Court of Criminal Appeal respectively shall be exercised so far as regards pleading, practice and procedure generally, including liability to costs, in the manner proved by Rules of Court…" [Emphasis added.]

Order 99 of The Rules of the Superior Court 1986 (RSC 1986), provide as follows in relation to costs;

> "1. Subject to the provisions of the Acts and any other statutes relating to costs and except as otherwise provided by these Rules:
> (1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
> (2) No party shall be entitled to recover any costs of or incidental to any proceeding from any other party to such proceeding except under an order or as provided by these Rules.
> (3) The costs of every action, question, or issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct.
> (4) The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event" [Emphasis added.]

The court referred to the case of *The People (Attorney General) v Bell [1969] I.R 24 ("Bell"),* which considered the above-mentioned Act and Rule 99 of the Rules of the Superior Courts 1962 (RSC 1962), which were then in force[1], and explicitly recognised that these provisions gave the Central Criminal Court jurisdiction to grant costs to an acquitted defendant. Having considered this case and the current legislative provisions, Judge McKechnie concluded that the jurisdiction aspect of the application was not in doubt.

### The Manner in which the Decision to Award Costs should be Approached

In deciding whether to award costs it has been held that there is a distinction between a civil case and a criminal case. The Supreme Court in *Bell,* previously referred to above, held that Order 99 rule 1 sub-r (3) and (4) do not apply to criminal cases. It has been held that in a criminal trial only sub-r 1, 2 and 5 are applicable. The reasoning for the distinction is based on the interpretation provisions of the Superior Court Rules, then in Order 111[2], which provided that the term, "action" was limited to civil proceedings whereas the term "proceeding" was interpreted as encompassing criminal matters. It seems that the effect of sub-r 3, not applying to a criminal case, is that the presumption that costs follow the event, does not apply in criminal cases. However it seems that the outcome of the case remains of paramount importance. Judge McKechnie in awarding the within applicants their costs stated as follows:

> "The most significant event in my view is and remains the outcome/conclusion of the case. On the criminal side this is straightforward: guilty, or not guilty. An acquittal, in my opinion, is therefore a highly significant factor which, when appropriately weighted, should be measured as being closely akin to the position of an applicant to whom sub-rr (3) and

1 *The People (Attorney General) v Bell*, interpreted Order 99 of the Rules of the Superior Courts 1962 (RSC 1962). The RSC 1962 were replaced by the RSC 1986. However Order 99 r 1, has been replaced in identical form to the same provision contained in the RSC 1962.

2 Order 111 has been replaced by Order 125 in the RCS 1986, with an identical interpretation in relation to the relevant terms.

(4) apply…The primary approach should be result driven. …The starting question must be: why should an acquitted person not get his costs?"

Judge McKechnie took guidance from the Court of Criminal Appeal decision in *The People (DPP) v Redmond [2001] 3 I.R. 390*. In this case the D.P.P sought a review of the sentence imposed on Mr. Redmond under section 2 of the Criminal Justice Act 1993 on the basis of undue leniency. The application failed and Mr. Redmond sought his costs. The court accepted that it had jurisdiction to make the order under O.99 of the RSC 1986 and addressed the issue as how the court should exercise its discretion, noting that O.99 r.1 subrule (3) and (4) did not apply. The Court held that its previous decision in *The People (DPP) v Hughes (Unreported, CCA, 22nd March 2000*) was correct and quoted with approval from page 7 of the Judgment of Barron J. in that case who said:

> "The basic facts, we think, are that the Director has brought this application on the basis that he has taken the view that the learned trial judge was unduly lenient. This Court has found that this was not so. The event therefore has gone in favour of the accused. It seems to the Court that the event having gone in his favour there is no particular reason why he should not get his costs…in those circumstances the Court will award him his costs."[3]

For guidance as to how to exercise the discretion in relation to costs, Judge McKechnie further referred to the decision in, *The People (DPP) v Kelly [2008] 3 I.R. 202*, wherein the acquitted accused was denied his costs upon acquittal. Upon the application for costs in that case, evidence which would have supported the prosecution case came to the trial judge`s attention. Furthermore, the trial judge found that suggestions that had been put to the jury had been "misleading and lacked candour." The court contrasted the co-operative attitude of the prosecution with that of Mr. Kelly who declined to speak at interview stage of the investigation. Furthermore, the court referred to the fact that the accused associated with another accused who had pleaded guilty and that applicant would have known of the other accused`s character who had been described by the trial judge as, a well known career criminal.[4] In his decision Charleton J., set out a number of questions, to guide the Court in exercising its discretion[5], which were referred to, in abbreviated form, by Judge McKechnie.

Counsel for the applicants in *DPP v Bourke Waste Removal Limited & Ors,* referred to the decision in *D.P.P v Kelly*, but distinguished it and suggested that some of the questions listed by Charleton J. were neither relevant nor material. Counsel for the Applicants complained about the inadequacy of the preceding investigation and in particular, criticised the Competition Authority in this regard.[6] They argued that their clients were at all times co-operative and supplied all relevant documentation and that they were responsible businessmen with no previous convictions. Also, much reliance was placed on the short period occupied by the jury with their deliberations, which only took fifty minutes. In response, the D.P.P. submitted that the prosecution was not at fault and did not misconduct itself. The application for acquittal by direction had been refused. The prosecution failed ultimately because an essential witness did not, "swear up."

## Decision in *DPP v Bourke Waste Limited & Ors*

Judge McKechnie found that the starting point in deciding the issue of costs is that each of the acquitted persons should be entitled to their costs unless substantial reason can be found to the contrary. While it was accepted that the prosecution has not been guilty of any specific conduct or fault, it was found that this cannot in and of itself prevent a successful party from recovering costs. He stated, *obiter,* that the direction of an acquittal by the trial judge will mitigate strongly against any resistance to costs being granted to a successful accused.

In relation to the adequacy or otherwise of the prosecution`s investigation into the matter, Judge McKechnie stated, "short of being glaringly deficient, in which case a direction to acquit may have been granted, this is within the provenance of the prosecution."

Ultimately, since the Applicants were successful in their defence, the court took the view that costs should follow that success and that the court could see no special reason or circumstance which would require the Court to depart from that position in the interests of justice.

Therefore an acquitted accused can be awarded their costs, and in particular it seems that an accused who is acquitted by direction, can recoup the costs of their defence.

## Jurisdiction of Criminal Courts (aside from the Central Criminal Court) to Award Costs

### *(i) Jurisdiction of the Court of Criminal Appeal*

Judge McKechnie in DPP *v Bourke Waste Removal Limited & Ors*, examined the jurisdiction of the Court of Criminal Appeal to award costs. Firstly, he noted that the Court of Criminal Appeal comes within Order 99 rule 1, as it is a Superior Court as defined in Order 125 of the Rules of the Superior Courts. [7]Therefore the Court of Criminal Appeal has the power to award costs in cases determined by it.

Judge McKechnie noted that a further provision in relation to costs and the Court of Criminal Appeal is set out in section 4 of the Criminal Procedure Act 1993 which provides as follows:

> "**4.**—(1) Where a person is ordered under this Act to

3 *The People (DPP) v Redmond* [ 2001] 3 I.R. 390 at 408

4 It is of note that having referred to the case of D.P.P v Kelly, Judge McKechnie stated obiter, that on a costs application no adverse inference should be drawn from the exercise of protected rights, such as the right to silence. He further stated that one of the great protections inherent in an accusatorial system of justice is that an individual cannot be guilty simply by association and therefore post acquittal, the calibre of that person`s associates is immaterial.

5 *DPP v Kelly* [2008] 3 I.R. 202 at 216-218

6 Judge McKechnie detailed these criticisms at paragraph (F) of his judgment.

7 Order 125 of the Rules of the Superior Courts provides, ""Superior Courts" means the Supreme Court, the High Court, the Court of Criminal Appeal and the Central Criminal Court." Therefore it seems the Supreme Court also has the power to award costs in a criminal case.

be re-tried for an offence he may, notwithstanding any rule of law, be again indicted and tried and, if found guilty, sentenced for that offence.

(2) In a case to which subsection (1) relates the Court may—

(a) where a legal aid certificate does not apply in respect thereof, order that the costs of the appeal and of the new trial, in whole or in part, be paid by the State, unless the Court is of *opinion that the necessity for the appeal and the new trial has been contributed to by the defence…" [Emphasis added]*

### *Jurisdiction of the Circuit Court*

It seems the Circuit Court can similarly award costs to an acquitted accused.

The decision in the case of *Bell* affirmed the decision in the State *(Minister for Land and Fisheries) v Judge Sealy [1939] IR 21* that the words, "any proceeding in the Court" contained in the then Rules of the Circuit Court were sufficient to include all proceedings of a civil or criminal nature which the then Circuit Court had the power to entertain. The current Circuit Court rules provide as follows as set out in Order 66 Rule 1 of The Circuit Court Rules 2001[8]:

> "Save as otherwise provided by Statute, or by these Rules, the granting or withholding of the costs of any party to any proceeding in the Court shall be in the discretion of Judge…"[*Emphasis added]*

Furthermore it seems that section 24 of the Criminal Justice Act 2006, which is referred to in the decision of *DPP v Bourke Waste Limited*, implicitly indicates that the Circuit Court has jurisdiction to award costs to an acquitted accused.

Section 24 of the Criminal Justice Act 2006 provides as follows,

> **"24**.— (1) Where a person tried on indictment is acquitted (whether in respect of the whole or part of the indictment) the Attorney General or the Director of Public Prosecutions, as may be appropriate, may appeal against an order for costs made by the trial court against the Attorney General or the Director of Public Prosecutions in favour of the accused person to the Court of Criminal Appeal." *[Emphasis added]*

### *Jurisdiction of the District Court*

In contrast the District Court has no such power to award an acquitted accused their costs. The jurisdiction of the District Court in relation to costs is expressly limited in relation to summary matters. Order 36 Rule 1 of the District Court Rules 1997 provides as follows;

> "1. Where the Court makes an order in any case of summary jurisdiction (including an order to "strike out" for want of jurisdiction) it shall have power to order any party to the proceedings other than the Director of Public Prosecutions, or a member of the Garda Síochána acting in discharge of his or her duties as a police officer, to pay to the other party such costs and witnesses' expenses as it shall think fit to award."[*Emphasis Added]*

The limitation preventing the court from awarding costs against a member of the Garda Siochana acting in discharge of their duties, which was provided for in Rule 67 of the District Court Rules 1948 was upheld by the Supreme Court in the case of *Dillane v The Attorney General and Ireland* [1980] ILRM167 *("Dillane")*. The then District Court Rules had been challenged on the grounds of breach of the equality guarantee contained in Article 40.1 of the Constitution and on the grounds that it failed to respect, and amounted to an unjust attack on, property rights as set out in Article 40.3. The Court referred to the fact that the District Court Rules Committee could have vested a full discretion as to costs in the District Court Justice, as had been granted to the Central Criminal Court, as confirmed in *Bell*. The Court rejected the ground that Article 40.1 had been breached stating, "that for a variety of reasons – among them the desirability that members of the Garda Siochana should be encouraged to discharge their police duties assiduously by being given immunity from liability for costs or witnesses` expense in the District Court – this discrimination could be reasonably thought a justifiable concomitant of the social functions of the members of the Garda Siochana when carrying out their duties as police officers." [9]

The limitation preventing the court from awarding costs against the D.P.P. was not expressly considered in *Dillane*.[10] While the immunity from the Garda Siochana can be justified, as set out in *Dillane*, it is hard to see how the immunity of the D.P.P. when bringing a case in the District Court can be justified, when the D.P.P. is not granted the same immunity in higher courts but it may be argued that a distinction is justified as the District Court deals with summary matters only. It is of note that in *Dillane,* the difference in the powers of the courts to grant costs was referred to and no infringement of Article 40.1 was found. It remains to be seen whether an attempt to challenge the immunity of the D.P.P. from costs in the District Court will be challenged and whether such a challenge will be successful.

## Conclusion

The confirmation that an acquitted accused may be entitled to their costs and how that decision is to be made, is welcomed. Such an award may be rare given that many accused are legally aided and that despite an acquittal, factors may be taken into account which result in the refusal of the application for costs. It is submitted that the limitation of powers of the District Court to award costs against the D.P.P. should be amended by legislation to bring the powers of the District Court in line with the other criminal courts in the interests of justice and fairness. ■

8 As amended by The Circuit Court Rules (Costs) 2008, Statutory Instrument 353 of 2008.

9 *Dillane v The Attorney General and Ireland* [1980] ILRM 167 at 169

10 Rule 67 did not refer to the D.P.P. but excluded the power to award costs against the Attorney-General, to whom the functions of the Attorney General in criminal matters was devolved to pursuant to section 3 of the Prosecution of Offences Act, 1974. Therefore rule 67 had in effect the same limitation as the current rule.

# Death of the Debtors' Prison: The Enforcement of Court Orders

Emma Keane BL*

## Introduction

Enforcement of Court Orders is an issue which has been gaining considerable attention given the recent increase in default of payment of debts, and the introduction of new rules in this area.[1] In the first half of 2009, there were approximately 4,300 applications to the District Court for enforcement orders, and 186 people were imprisoned for failure to pay their debts. The average period of imprisonment was 20 days.[2]

One way of enforcing a Court order is to apply to the District Court for an instalment order and then, if necessary, a committal order. In applications for a committal order, the Court will distinguish between wilful refusal, and genuine inability, to comply with a Court order.

The statutory regime established by section 6 of the Enforcement of Court Orders Act 1940 ("the 1940 Act") came under scrutiny in the High Court decision of *McCann v Judge of Monaghan District Court and Others*[3](hereinafter *'McCann*'), which established that section 6 of the 1940 Act was unconstitutional. Subsequent to and consistent with this decision, the Enforcement of Court Orders (Amendment) Act 2009 ("the 2009 Act") was passed on 14th July 2009. One of the principal effects of the 2009 Act was to substitute new provisions for section 6 of the 1940 Act.

### *McCann v Judge of Monaghan District Court and Others*

In October 2003, the Credit Union obtained judgment in default of appearance in the Circuit Court in Monaghan against the plaintiff in the sum of €18,063.09. The Credit Union then applied to the District Court in Monaghan for an instalment order. The instalment order was made in January 2004. It recited that proof had been given of the service of the summons on the plaintiff and that the plaintiff had failed to satisfy the Court that she was not able to pay the sum of €18, 063.09 in one sum or by instalments. The order directed the plaintiff to pay the sum due to the Credit Union by weekly instalments of €82.00. The plaintiff did not pay any of the weekly instalments, nor did she lodge a statement of means. The Credit Union applied under s. 6 of the 1940 Act for her arrest and imprisonment, an order which was made in 2005 ("the 2005 Order").

The 2005 order ordered that the plaintiff be arrested and committed to prison at Mountjoy and that she be imprisoned for a period of one month from the date of her arrest unless the sum of €5,658.00 was paid to the District Court Clerk or to the governor of the prison. The plaintiff discovered that the 2005 order had been made only when Gardaí appeared on her doorstep in May 2006 to arrest her.

The plaintiff was a single woman whose parents were members of the travelling community. She left school at the age of 14. She had a history of alcohol abuse and psychiatric illness. She lived with her mother in accommodation provided by the local authority. Her only income was social welfare benefits (€217.00 per week). Laffoy J. stated, having regard to the evidence;

> "I have no doubt that the plaintiff, because of her lack of literacy, her drink problem and her psychiatric problem, could not have dealt with any of the steps in the enforcement process under the Act of 1926[4], as amended, without advice and assistance. I am satisfied that she was unable to read and comprehend the summonses. She had no understanding of the significance of, and was unable to complete the statement of means. She was a vulnerable woman, who was incapable of responding to the summonses in an appropriate manner in her own interest without advice and assistance and she had no appreciation of the need for advice and assistance. She got no advice or assistance until she contacted MABS[5] after the Gardaí came to execute the 2005 order."[6]

In the High Court proceedings, the plaintiff challenged the validity of the order for her arrest and imprisonment made in 2005, as well as the validity of the legislation under which the 2005 order was made. The legislation was challenged on the basis that it was invalid having regard to the provisions of the Constitution, and that it was incompatible with the European Convention on Human Rights ("the ECHR").

The test applied by Laffoy J. was whether the impugned legislation had already actually or potentially affected the plaintiff's rights or interest. "It clearly has. She has already

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1 See generally 'On Borrowed Time', Jan/Feb 2010 *Law Society Gazette*, p34; 'Till debt do us part', July 2009 *Law Society Gazette*, p29; 'One to Watch', Aug/Sep 2009 *Law Society Gazette*, p12.

2 Relate, Volume 36, Issue 12.

3 High Court, Laffoy J., 18th June, 2009, [2009] IEHC 276.

4 The Enforcement of Court Orders Act 1926.

5 Money Advice and Budgeting Service (MABS) is an organisation which is funded by the Department of Social and Family Affairs.

6 No. 3 *supra* at 19-20.

lived for three years under the "sword of Damocles" which is the 2005 order."[7]

Laffoy J. held that there were "fundamental deficiencies" in section 6 of the 1940 Act which rendered it invalid having regard to the provisions of the Constitution because it violated the debtor's constitutional guarantee of fair procedure. The judge listed the reasons for this:

> "First, on its proper construction, it confers jurisdiction on the District Court to make an order for the arrest and imprisonment of a defaulting debtor even if the debtor is not present before the Court and even if the Judge is not in a position to determine whether the absence of the debtor is due to a conscious decision.
>
> Secondly, it confers jurisdiction to order the arrest and imprisonment of an impecunious debtor without there being in place some legislative or administrative scheme under which the District Court is empowered to make provision for the legal representation of the debtor at the expense of the State.
>
> Thirdly, s. 6 is also invalid in that, while it recognises that an order for arrest and imprisonment should only issue if the default on the part of the debtor is attributable to wilful refusal or culpable neglect, it expressly puts the onus on the debtor to disprove such conduct on his part. If, instead of leaving it to the creditor to pursue the committal of a defaulting debtor for non-compliance with an instalment order, the Oireachtas had made it an offence punishable on three months' imprisonment to wilfully or culpably negligently fail to comply with the instalment order, the hypothetical provision would be invalid having regard to the provisions of the Constitution if it purported to put the onus of disproving the offence on the debtor."[8]

In concluding on the right to fair procedures, the judge stated:

> "Having regard to the aspects of s. 6 which I have outlined, in my view, s. 6 fails to uphold the guarantee of fair procedures implicit in Article 34 and Article 40.1.3 of the Constitution and to vindicate the rights of the defaulting debtor. In the light of that finding, I consider that it is unnecessary to determine whether Article 38.1 has any application to the process provided for in s. 6."[9]

Laffoy J. then considered the constitutional right to liberty. She pointed out that in considering whether section 6 of the 1940 Act also violated the right to personal liberty guaranteed by Article 40.4.1, "it must be acknowledged that in s. 6 the Oireachtas has implicitly recognised that a debtor should not be imprisoned if the failure to pay the debt is due to inability to pay."[10] The judge held that section 6 of the 1940 Act did not contain safeguards, such as the implementation of the debtor's constitutional right to fair procedures, so as to ensure that a debtor who is unable to pay the debt is not imprisoned. The judge stated that section 6 of the 1940 Act was a disproportionate interference with the constitutionally protected right to liberty, in that the restriction on the right to liberty went beyond what is permitted by the Constitution.[11]

Laffoy J. concluded that section 6 of the 1940 Act was invalid having regard to the provisions of the Constitution and, in particular, the provisions of Article 34, Article 40.3 and Article 40.4.1. Having regard to the finding of invalidity in relation to section 6 of the 1940 Act, the District Court had no jurisdiction to make the 2005 order. The judge made an order of certiorari quashing the making of the 2005 order and the warrant to enforce it for lack of jurisdiction.

It may be noted that submissions were received by the Court from the Human Rights Commission. Laffoy J. held however that it was not appropriate to consider whether a declaration of incompatibility with the ECHR should be made because section 5 of the European Convention on Human Rights Act 2003, which confers jurisdiction on the Court to make a declaration of incompatibility, does so only "where no other legal remedy is adequate and available".

## The Enforcement of Court Orders (Amendment) Act 2009

The 2009 Act inserts a new section 6 into the 1940 Act. The changes are directed towards correcting the defects identified by the High Court in *McCann.*[12] A person may still be imprisoned for failure to pay debts but there are now a range of procedural safeguards in place. The aim is said to be to ensure that people who cannot afford to pay will not be subject to imprisonment but those who can but who simply choose not to, will still face the possibility of prison.[13]

The 2009 Act sets out the process by which the District Court deals with the summons and the hearing in relation to failure to comply with an instalment order. Section 2 of the 2009 Act amends section 6 of the 1940 Act. Where a debtor is liable, by virtue of an instalment order, to pay a debt and costs and the debtor fails to make the payment, the creditor may apply to a District Court clerk for a summons directing the debtor to appear before the District Court. The summons must clearly set out the consequences of a failure to turn up in Court, including the possibility of imprisonment, the options available to the judge at the hearing, and the possibility that the debtor will be arrested if he fails to appear in Court. If the debtor fails to appear, without reasonable excuse, the judge can either issue and arrest warrant or adjourn the hearing. If the debtor is arrested and brought to Court, a date is fixed for hearing. The judge must make clear in ordinary language to the debtor that he is entitled to apply for legal aid and the consequences, including imprisonment, of failing to comply with the instalment order or of failing to appear for the hearing on the date fixed.

At the hearing of the summons, both the creditor and

7 No. 3 *supra* at 23.
8 No. 3 *supra* at 78.
9 No. 3 *supra* at 79.
10 No. 3 *supra* at 79-80.
11 No. 3 *supra* at 82-83.
12 No. 3 *supra.*
13 Per John Curran, Dail Debates, 10.07.09, in relation to the Enforcement of Court Orders (Amendment) Bill 2009.

the debtor may give evidence. The Court may vary the instalment order, ask the parties to engage in mediation, or make a committal order for a maximum of three months. Importantly, the creditor must establish, beyond reasonable doubt, that the debtor has means but is wilfully refusing to pay. The Court may also require the creditor to establish that the debtor has no goods that could be attached in lieu of the debt. Also of considerable significance, is the fact that the Court has the power to grant legal aid.[14]

14 The arrangements for this are set out in S.I. 09/301 Enforcement of Court Orders (Legal Aid) Regulations 2009.

## Conclusion

Since *McCann* and the introduction of the 2009 Act, it has been made clear that no one should be imprisoned for non compliance with a Court order due to genuine inability to pay a debt. It is hoped that the Courts will continue to decide cases with regard to the important distinction between wilful refusal and genuine inability to comply with a Court order. ■

Legal The Bar Review Update

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**A directory of legislation, articles and acquisitions received in the Law Library from the 10th May 2010 up to 18th June 2010**
**Judgment Information Supplied by The Incorporated Council of Law Reporting**

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*People (DPP) v Geasley*

## CRIMINAL LAW

### Appeal

Guilty plea – Appeal against conviction – Whether ruling on admissibility of telephone conversations left no option but to plead guilty –Whether trial unfair – Whether denial of legal protection – Under-cover operation – Whether telephone conversations unlawfully intercepted – Whether decision to plead guilty followed erroneous ruling of fundamental nature – Whether fundamental error by trial judge – Whether conversations intercepted – Whether trial judge bound to follow prior decision where decision mistakenly based on legislation not in force –Doctrine of precedent – Decision *per incuriam* – Whether doctrine of *stare decisis* abandoned - Duty to give effect to legislation – *People (DPP) v Dillon* [2002] 4 IR 501 – *People (DPP) v B* [2002] 2 IR 246; *People (DPP) v Lynch* (Unrep, CCA, 27/7/1999); *R v Preston* (1992) 95 Cr App 355; *Kennedy v Ireland* [1987] IR 587; *Attorney General v Ryan's Car Hire* [1965] IR 642 considered – Courts of Justice Act 1924 (No 10), s 32 – Postal and Telecommunications Services Act 1983 (No 24), s 98 – Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 (No 10), s 13 – Application dismissed (72/2008 – CCA – 24/3/2009) [2009] IECCA 22
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*People (DPP) v Gamble*

### Appeal

New evidence - New grounds of appeal – Extracts from book by complainant – Allegations that claims cast doubts on reliability of complainant – Applicable principles – Exceptional circumstances – Evidence unknown at time of trial – Credibility of evidence – Materiality of evidence – Whether entire case brought forward at trial – Adequacy of charge on delay – Scope for judicial review – Charge - Two complainants – Assault – Corroboration – Complaints regarding adequacy of charge to jury – Absence of materials – Manner and content of cross-examination – Perversity of charge to jury – Whether corroboration permissible between complainants – Whether failure to warn jury that credibility of each complainant to be examined discretely – Definition of corroboration – Whether corroboration possible where allegation of collusion – Overlap in time span in respect of some charges only – Delay – Absence of requisitions – Missing tape – Statement of complainant now unavailable – Whether warning regarding delay sufficiently detailed – Factors for consideration – Whether specific prejudice due to absence of items – Islands of fact – Proviso – *People (DPP) v O'Regan* [2007] IESC 38, [2007] 3 IR 805; *People (DPP) v Halligan* [2008] IECCA 96, (Unrep, CCA, 4/7/2008); *People (DPP) v Willoughby* (Unrep, CCA, 4/7/2008); *Murphy v Minister for Defence* [1991] 2 IR 161; *People (DPP) v Naughton* [2008] IECCA 34 (Unrep, CCA, 3/3/2008); *People (DPP) v Gannon* [1997] 1 IR 40; *People (DPP) v Kelly* [2008] 2 ILRM 217; *R v Parks* [1961] 3 All ER 633; *DPP v Gilligan* [2006] IESC 78 [2006] 1 IR 107; *Attorney General of Hong Kong v Wong Muk Ping* [1987] 1 AC 501; *People (DPP) v Morrissey* (Unrep, CCA, 10/7/1998); *People (DPP) v Meehan* [2006] IECCA 104 [2006] 3 IR 468; *People (DPP) v Murphy* [2005] IECCA 1 [2005] 2 IR 125; *People (DPP) v C(E)* [2006] IECCA 69 (Unrep, CCA, 29/5/2006); *People (DPP) v B(R)* (Unrep, CCA, 12/2/2003); *People (DPP) v Cronin* [2006] IESC 6 [2006] 4 IR 329; *People (DPP) v C(C)* [2006] IECCA 1 [2006] 4 IR 287; *People (DPP) v R(B)* (Unrep, CCA, 12/2/2003) and *People (DPP) v J(P)* [2003] 3 IR 550 considered – Criminal Justice Act 1993 (No 6), s 3 – Leave to appeal refused (84/2007 – CCA – 11/5/2009) [2009] IECCA 55
*People (DPP) v Cooke*

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Diminished responsibility – Murder – Life imprisonment – Second trial - Onus of proof – Mental state – Objection to admission of evidence of mental state at time of trial – Deferral of final decision on admission – Depression – Mental disorder – Grounds of appeal – Whether evidence of current mental condition should have been admitted – Absence of further application to call witness – Irrelevancy of evidence – Evidence of prison sentence following first trial – Prejudice – Absence of notice – Whether case should have been withdrawn from jury – Prejudicial comments by psychiatrist – Opinion of psychiatrist – Criminal Law (Insanity) Act 2006 (No 11), ss 1 and 6 – Appeal dismissed (17/2008 – CCA – 27/4/2009) [2009] IECCA 45
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Evidence - Expert opinion – Oral evidence of expert regarding amounts of substance presence – No written report as to basis of expert opinion provided to defendant - Generic evidence of purity of substance - Evidence used by prosecution not on book of evidence – Tests used to determine purity of substance not accessible by defendant – Whether permissible to rely on generic evidence when quantifying amounts of controlled substance– Whether basis of expert opinion must be disclosed to defendant – Misuse of Drugs Act 1977 (No 12) s 15A - Courts of Justice Act 1924 (No 10) s 29 – Certificate to appeal granted (259/2007 – CCA – 12/11/2009) [2009] IECCA 121
*People (DPP) v Connolly*

## Evidence

Admissibility - Arrest – Whether lawful arrest – Accused not permitted to leave vehicle while being questioned – Detention – Whether accused detained unlawfully – Right to silence – Whether breach of constitutional rights – Membership of unlawful organisation – Adverse inference – Whether adverse inference corroborative of belief – Belief evidence – Privilege – Protection of informants – Restriction on right to cross examination – Whether restriction caused prejudice to accused – *Hay v O Grady* [1992] IR 210, *Aberdeen Green Line Steamship Co v Macken* [1899] 2 IR 1, *DPP v Madden* [1977] IR 36, *DPP v Finnerty* [1999] 4 IR 364, *DPP v Kelly* [2006] IESC 20, [2006] 3 IR 115, *DPP v Mulligan* (Unrep, CCA, 17/05/04), *DPP v Special Criminal Court* [1999] 1 IR 60, *DPP v Bineád* [2007] IECCA 147, [2007] 1 IR 364, *DPP v Matthews* (Unrep, CCA, 14/07/06) applied; *Murray v UK* [1996] 23 EHRR 29, *Doorson v Netherlands* (1996) 22 EHRR 330, *Kostovski v Netherlands* (1989) 12 EHRR 432, *Van Mechelen v Netherlands* (1998) 25 EHRR 647, *Roe v UK* (2000) 30 EHRR 1 considered; *DPP v Gannon* [2006] IECCA 103, (Unrep, CCA, 2/04/03) distinguished – Courts of Justice Act 1924 (No 10) – Courts (Establishment and Constitution) Act 1961 (No 38), s 5 – Offences Against the State (Amendment) Act 1998 (No 39), ss 2 and 5 – European Convention on Human Rights Act 2003 (No 20) – Constitution of Ireland 1937, Article 38 – European Convention on Human Rights and Fundamental Freedoms 1950, article 6 – Leave to appeal refused (CCA 70/2007 – CCA – 28/07/2009) [2009] IECCA 84
*People (Director of Public Prosecutions) v Bullman*

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Admissibility – Sexual offences – Entry into accused's dwelling – Whether invitation to enter –Whether entry onto premises unlawful – Test to be applied – Whether entry constituted civil trespass – Access to solicitor – Duty to make reasonable efforts to contact solicitor – Whether reasonable attempts made – Whether sufficient time allowed before interview commenced – *DPP v Gaffney* [1987] 1 IR 173, *DPP v Closkey* (Unrep, HC,6/02/1984), *DPP v Healy* [1990] 2 IR 73, *DPP v Buck* [2002] 2 IR 268 applied, *Morris v Beardmore* [1981] AC 446, *Burton v Scott* [1847] 9 LTOS 313, *Moxon v Savage* [1860] 2 F &F 182 considered – Criminal Law (Rape) Amendment Act 1990 (No 32), ss 2 and 4 – Criminal Law Act 1997 (No 14), s 4 – Leave to appeal refused (CCA 2008/20 – CCA – 27/07/2009) [2009] IECCA 86
*People (Director of Public Prosecutions) v Gormley*

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Admissibility – Statements – Absence of statutory declaration – Failure of legal representatives to protect interests of applicant – Consent to admission of prejudicial evidence – Failure to challenge admissibility of evidence – Whether trial judge erred in admitting statements not containing statutory declaration –Whether charged flawed – Applicable principles – Basis of complaint against legal representation – Effect of complaint on trial – Whether approach taken irrational or incompetent – Absence of objection to evidence – Whether absence of statutory declaration rendered trial unfair – Role of trial judge – Particulars of offence – Whether discrepancy in dates constituted real risk of unfair trial – Playing of video of interview to assess body language – Absence of objection – Whether basis for raising of issue of video on appeal – *People (DPP) v Cronin (No 2)* [2006] IESC 9; [2006] 4 IR 329; *People (DPP) v McDonagh* [2001] 2 IR 411; *People (DPP) v G(W)* [2004] IECCA 43; (Unrep, CCA, 4/11/2004); *People (DPP) v O'Regan* [2008] IECCA 120; [2008] ILRM 247; *People (DPP) v Flynn* (Unrep, CCA, 30/7/2003); *DPP v Madden* [1977] IR 336; *People (DPP) v Cronin* [2003] 3 IR 377 and *People (DPP) v Hanley* (Unrep, CCA, 5/11/1999) considered - Criminal Justice Act 1984 (No 22), s 21 - Leave to appeal refused (190/2006 – CCA – 26/2/2009) [2009] IECCA 17
*People (DPP) v Doherty*

## Evidence

Belief evidence –Privilege against disclosure of materials upon which belief based invoked - Corroboration of belief evidence – Evidence incorrectly ascribed to prosecution witness by trial court – Evidence erroneously adopted by trial court as having statutory standing –Deliberations of trial court influenced by erroneously adopted evidence - Interpretation and application of evidence adduced inappropriate – Membership of unlawful organisation – No evidence of association adduced – Telephone records - Mere fact of telephone contact between convicted member of unlawful organisation and defendant not corroborative of belief evidence – Evidence deemed circumstantial - No clear legal reasoning given by trial court for deeming evidence circumstantial - Drawing inferences – Inferences may be drawn from questions posed and answers given – Interpretation - Statutory provision regarding inferences must be strictly construed - Inferences could not be drawn from mere fact that telephone calls were made between parties – Whether trial court erred in law and in fact in its deliberations – Whether trial court erred in deeming evidence circumstantial without reasons – Whether trial court erred in drawing inferences in the manner in which it did – Whether interpretation and application of evidence adduced inappropriate – *People (DPP) v Kelly* [2005] IESC 20 [2006] 3 IR 115 applied – Offences Against the State Act 1939 (No 13 ) ss 3 &30 – Offences Against the State (Amendment) Act 1998 (No 39) ss 2,3 & 4 – Offences Against the State (Amendment) Act 1972 (No 26) s 3 – Conviction set aside, new trial directed (237/07 – CCA – 31/7/2009) [2009] IECCA 113
*People (DPP) v Doran*

## Evidence

Circumstantial evidence – Quality of evidence – Admissibility of evidence - Admission of diary of deceased into evidence challenged – Whether diary probative or prejudicial - Whether trial judge erred in admitting diary to evidence - Whether diary relevant – Right to silence - Defendant while detained refused to answer questions put to him –Defendant exercised right to silence – Allegation that prosecution signalled defendant's exercise of right to silence to the jury in cross-examination – Principles to be applied - Whether jury invited to draw adverse inferences into silence of defendant – Proper and appropriate warning given to jury – No requisitions made – Whether prosecution invited drawing of adverse inferences from silence of defendant – Whether correct procedures followed - Application for direction - Refusal of application for direction –Evidence of a compelling nature - Whether quality of circumstantial evidence adequate – *People (DPP) v Ferris* (Unrep, CCA, 10/6/2002) and *People (DPP) v Finnerty* [1999] 4 IR 364 applied; *People (DPP) v O'Reilly* [2009] IECCA 18 (Unrep, CCA, 6/3/2009) approved; *People (DPP) v Lacey* (Unrep, CCA, 3/7/2002), *People (DPP) v Buckley* [2007] IEHC 150 [2007] 3 IR 745, *State of Western Australia v Montani* [2007] WASCA 259 and *State of Western Australia v Christie* [2005] WASCA 262 considered; *R v Galbraith* [1981] 1 WLR 1039 followed – Criminal Justice Act 1993 (No 6) – Appeal dismissed (76/2008 – CCA – 9/10/2009) [2009] IECCA 112
*People (DPP) v Kearney*

## Evidence

Drugs – Market value – Whether jury could be satisfied beyond reasonable doubt of market value of drugs – Burden of proof – Evidence of forensic scientist – Representative sample of drugs seized - Probability of all bags containing amphetamine – Absence of quantitative analysis – Expert opinion - Absence of cross-examination – Whether sufficient evidence to go to jury – Role of jury – *Reg v Ward* [1993] 1 WLR 619 and *People (DPP) v Finnamore* [2008] IECCA 99 (Unrep, CCA, 1/7/2008) considered – Misuse of Drugs Act 1977 (No 12), s 15A – Euro Changeover (Amounts) Act 2001 (No 16), s 1 – Leave application treated

as appeal and dismissed (259/2007 – CCA – 12/5/2009) [2009] IECCA 53
*People (DPP) v Connolly*

### Evidence

Probative value – Prejudicial effect - Allegation that verdict of jury perverse and unsafe — Claim that probative value of evidence outweighed by prejudicial effect – Evidence of prosecution witnesses differed - Claim that witness evidence dubious and unreliable and ought not have been admitted - Admissibility of evidence – Conflict in evidence not a basis upon which evidence can be ruled dubious – Whether probative value of evidence outweighed by prejudicial effect – Whether conflict of evidence rendered evidence dubious – Whether evidence of witness admissible – Appeal dismissed (288/2008 – CCA – 9/11/2009) [2009] IECCA 125
*People (DPP) v Pearse*

### Indictment

Particulars of offence - Specificity in indictment - Point of law of exceptional public importance – Indecent assault – Details of assault vague and uncertain – One distinct count of indecent assault - Jury convicted on one count only out of forty nine counts – Alleged inconsistency of jury – Whether count of indecent assault bad in law by reason of lack of specificity - Whether jury inconsistent – Whether point of law of exceptional public importance raised - *People (DPP) v EF* (Unrep, SC, 24/2/1994) and *R v Galbraith* [1981] 1 WLR 1039 considered – Courts of Justice Act 1924 (No 10) s 29 – Certificate refused (236/07 – CCA – 22/10/2009) [2009] IECCA 115
*People (DPP) v Kearns*

### Offences

Hybrid offence – Prosecutorial delay – Decision to prosecute on indictment made after six months – Whether statute barred – Whether real risk of unfair trial – Whether prejudice to accused – Applicable time period – *DPP v Logan* [1994] 3 IR 254, *McGrail v Ruane* [1990] 2 IR 555, *DPP v G* [2009] IESC 17 (Unrep, SC, 2/03/09) considered – Petty Sessions (Ireland) Act 1851 (14 and 15 Vict, c 93), s 10(4) – Non Fatal Offences Against the Person Act 1997 (No 26), s 3 – Criminal Justice Act 1951 (No 2) – Criminal Justice Act 2006 (No 26), s 177 – Appeal dismissed (341/2005 – SC – 2/7/2009) [2009] IESC 51
*Robinson v O'Donnell, DPP and Circuit Court Judge County Donegal*

### Sentence

Leniency - Imprisonment with period of suspension – Application on basis that suspension unduly lenient – Jurisdiction of court – Single sentence – Finding that entire sentence unduly lenient – Point of law of exceptional public importance – Whether Court of Criminal Appeal entitled to regard sentence or aspect of sentence unduly lenient where DPP had not expressed such view - *People (DPP) v Lernihan* [2007] IECCA 21 (Unrep, CCA, 18/4/2007) considered – Criminal Justice Act 1993 (No 6), ss 2 and 3 – Point of law certified for appeal to Supreme Court (147/2006 – CCA – 14/5/2009) [2009] IECCA 54
*People (DPP) v Lernihan*

### Sentence

Severity - Attempted rape – Consecutive sentence – Post-release supervision order – Repeat nature of offences – No admission on part of defendant – Possibility of rehabilitation - Application to suspend portion of sentence – Treatment programme to assist defendant –Whether consecutive sentencing appropriate in all the circumstances - Sentence increased but partially suspended (166/07 – CCA – 17/7/2009) [2009] IECCA 122
*People (DPP) v Cronin*

### Sentence

Severity - Consecutive sentences – Multiple theft and fraud offences – Significant violence threatened – Interpretation of provisions of statute – Whether error in principle in interpretation – Whether trial judge erred in principle – Whether consecutive sentences appropriate – *People (DPP) v Yusuf* [2008] IECCA 37 [2008] 4 IR 204 applied – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 13 and 14 – Criminal Justice Act 1984 (No 22) ss 11 – Appeal allowed, sentence reduced with conditions (124/2008 – CCA – 9/11/2009) [2009] IECCA 126
*People (DPP) v White*

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Severity – Dangerous driving causing death and serious harm – Imprisonment – Disqualification – Previous convictions – Plea of not guilty – Full trial – Aggravating and mitigating circumstances – Grounds of appeal – Whether applicant punished for contesting case – Whether failure to give weight to mitigating factors – Absence of evidence of alcohol consumption – Injuries to applicant – Consistency in sentencing – Range of sentences for offence – Factors for consideration – Whether trial judge adopted excessively punitive approach – *People (DPP) v Sheedy* [2000] 2 IR 184 and *People (DPP) v O'Reilly* [2007] IECCA 118 (Unrep, CCA, 11/12/2007) considered - Road Traffic Act 1961 (No 24), s 53 – Sentence reduced; disqualification upheld (234/2008 – CCA – 27/4/2009) [2009] IECCA 44
*People (DPP) v Shovelin*

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Severity - Drugs offences - Conspiracy to commit armed robbery – Guilty plea – Offences committed while defendant on bail – Totality principle – Part of sentence suspended -Whether consideration given in respect of guilty plea – Whether sentences appropriate and imposed in error of principle – Misuse of Drugs Act 1977 (No 12) s 15A – Criminal Justice Act 1984 (No 22), s 11 – Leave refused (270/08 – CCA – 23/11/2009) [2009] IECCA 129
*People (DPP) v Taylor*

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Severity - Drugs offences – Statutory presumptive minimum sentence – Mitigating factors – Early guilty plea – Treatment for drug addiction undertaken – Exceptional or specific circumstances – Whether exceptional circumstances existed -Whether trial judge erred in principle in sentencing – Misuse of Drugs Act 1977 (No 12), s 15A – Leave refused (262/08 – CCA- 23/11/2009) [2009] IECCA 128
*People (DPP) v Keogh*

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Severity - Indictment – Sexual offences – Multiple complainants – Indictment severed – Concurrent sentences imposed in two counts – Consequential trial – Sentence imposed – Principles to be applied — Whether consecutive sentence imposed – Application for judicial review – Mitigating and aggravating factors – Whether tactical decisions amounted to aggravating factor – *People (DPP) v GMcC* [2003] 3 IR 609; *People (AG) v O'Driscoll* (1972) 1 Frewen 351 and *State (Healy) v Donoghue* [1976] IR 325 considered; *POC* v *DPP* [2008] IESC 5, [2008] 4 IR 176 approved - Criminal Law (Rape) Act 1981 (No 10), s 10(1) – 3 year sentence affirmed but last year suspended (18/2009 – CCA- 5/11/2009) [2009] IECCA 116
*People (DPP) v O'C (P)*

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Severity – Manslaughter – Mitigation – Early guilty plea – Gravity of offence – Personal circumstances – Absence of premeditation – Remorse – Personality disorder – Pregnant mother – Relevant factors to be considered – Whether adequate consideration given to early plea – Whether distinction between voluntary or involuntary might be considered– *DPP v Kelly* [2004] IECCA 14, [2005] 2 IR 321, *DPP v Princs* [2007] IECCA 142 (Unrep, CCA, 31/7/2007) applied – Leave to appeal refused (CCA 2008/222 – CCA – 31/07/2009) [2009] IECCA 91
*People (DPP) v Black*

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Severity – Manslaughter - Offensive weapons – Knife – Straightener - Significant misunderstanding by trial judge of facts of case – Specific error – Misunderstanding directly affected severity of sentence - Error of trial judge enabled limited interference with sentence – Whether trial judge misunderstood facts of case – Whether sentence should be reduced – *DPP v Kelly* [2004] IECCA 14 [2005] 2 IR 321 considered – Sentence reduced (163/08 – CCA – 26/5/2009) [2009] IECCA 117
*People (DPP) v Green*

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Severity - Possession of drugs – Imprisonment – Sentencing – Probation service report – Psychiatric report – Personal circumstances – Previous convictions – Whether failure to have proper regard to whether exceptional and specific circumstances present – Whether failure to give sufficient weight to mitigating circumstances and early plea of guilt – Whether sentence appropriate – Involvement of applicant – Circumstances of crime – Circumstances of applicant – Testimonials – Whether sentence disproportionate given sentence imposed on co-accused – Differences in personal circumstances - *People (DPP) v Duque* [2005] IECCA 92 (Unrep, CCA, 15/7/2005); *People (DPP) v Chipi* (Unrep, CCA, 23/11/2001); *People (DPP) v Galligan* (Unrep, CCA, 23/7/2003) and *People (DPP) v Lenihan* [2007] IECCA 21 (Unrep, CCA, 18/4/2007); *People (DPP) v Poyning* [1972] IR 402 and *People (DPP) v Conroy (No 2)* [1989] IR 160 considered - Misuse of Drugs Act 1977 (No 12), s 27 – Leave to appeal refused (43/2007 – CCA – 2/5/2009) [2009] IECCA 28
*People (DPP) v Costelloe*

### Sentence

Severity – Sexual offences – Mitigation – Guilty plea entered – Whether adequate consideration given to early plea – Personal circumstances of accused – Foreign national – Leave to appeal granted, sentence of five years affirmed but eighteen months suspended – Criminal Law Rape (Amendment) Act 1990 (No 32), s 2 – (CCA 279/2008 – CCA – 27/07/2009) [2009] IECCA 89
*People (DPP) v Caira*

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Suspended - Reactivation – Sentence of imprisonment with last six years suspended on terms - Release – Further offences - Application for reactivation of sentence – Introduction of statutory power to reactivate sentence in part only – Introduction of power following imposition of sentence - Whether discretion to reactivate sentence in part only– Whether discretion limited to reactivation in entirety or refusal – Decision of trial judge that bound by earlier decision – Whether new statutory provisions applicable to reactivation of sentence – Intention of legislature – Whether provisions prospective only – Object of section – Absence of temporal restriction – *People (DPP) v Murray* (Unrep, CCA, 18/3/2003); *People (DPP) v Stewart* (Unrep, CCA, 12/1/2004); *People (DPP) v Lonergan* (Unrep, CCA, 1/2/1999) considered – Offences Against the Person Act 1861 (24 & 25 Vict, c 100), s 18 - Criminal Justice Act 2006 (No 26), s 99 – Decision that court had power to reactivate sentence in part (190/2007 – CCA – 20/3/2009) [2009] IECCA 21
*People (DPP) v Ryan*

### Sentence

Undue leniency – Drugs offences –Mitigating factors – Early plea – Weight to be attached to early plea – Incomplete transcript of trial proceedings due to technical difficulties – Sentencing report furnished by trial judge – Statutory provision for such procedure in relation to appeal against conviction or severity – Lack of similar statutory provision in relation to review on grounds of undue leniency – Nature of record to be relied upon during review – Procedure to be adopted – Whether inherent jurisdiction to proceed with review where transcript inadequate – Whether sufficient evidence before court to conduct appeal – Whether court had jurisdiction to proceed with appeal – Interpretation of legislation – Literal approach – Whether relevant provision was penal provision – Sentence of eight years but six years suspended – *DPP v Mulligan* 2 Frewen 16, *State (Rollinson) v. Kelly* [1984] I.R. 248, *Bowers v Gloucester Corporation* [1963] 1 QB 881, *DPP v Ottewell* [1970] AC 642 considered – Criminal Justice Act 1924 (No 10), ss 31, 32, 33 & 36 – Misuse of Drugs Act 1977 (No 12), s 15(A) – Criminal Justice Act 1993 (No 6) s 2 – Criminal Justice (Miscellaneous Provisions) Act 1997 (No 4), s 7 – Interpretation Act 2005 (No 23), s 5 – Rules of the Superior Courts (SI 15/1986), O 86 r 14 – Held that court had sufficient evidence upon which to conduct appeal (CCA 244/2007 – CCA – 27/07/2009) [2009] IECCA 92
*People (DPP) v Farrell*

### Sentence

Undue leniency – Firearms offences – Drive-by shooting - Extremely serious offence – Second such offence in short period of time– Highly material to consideration of sentencing – Defendant sentenced for later offence before earlier one – Earlier offence not taken into account in sentencing defendant for later offence –Offence while on bail did not arise -Defendant in custody at time of sentencing – Sentence backdated – Error in principle in applying discretionary backdating – Mental health issues of defendant considered – Whether discretionary backdating appropriate –Whether sentence unduly lenient in the circumstances -Criminal Justice Act 1993 (No 6) s 2 – Firearms Act 1925 (No 17), s 15A – Appeal allowed, sentence increase (47CJA/08 – CCA – 12/10/2009) [2009] IECCA 114
*People (DPP) v Devoy*

### Sentence

Undue leniency – Robbery – Attempted robbery – Possession of firearm – Serious offences – Defendant under eighteen years of age at time of offences – Concurrent sentencing with conditions imposed by trial judge –Sentence backdated - Defendant on bail at time of offences – Alleged failure by trial judge to take account of statutory provisions in this regard - Propensity to reoffend – Voluntary surrender by defendant to gardai – Statutory minimum sentence not applied — Exceptional and specific circumstances – Whether jurisdiction to backdate sentence - Whether sentence appropriate – Whether error in principle by trial judge - Whether exceptional and specific circumstances existed – *DPP v Byrne* [1995] 1 ILRM 279 and *People (DPP) v McCormack* [2000] 4 IR 356 applied – Criminal Justice Act 1993 (No 6) s 2 – Road Traffic Act 1961 (No 24) s 112 – Firearms Act 1964 (No 1) s 27B – Firearms and Offensive Weapons Act 1990 (No 12) s 11 – Criminal Justice Act 1984 (No 22), s 11 – Sentence substituted (248 CJA/2009 – CCA – 9/11/2009) [2009] IECCA 124
*People (DPP) v Kelly*

### Trial

Charge - Sexual offences – Attempted rape – Corroboration – No corroboration warning given – Whether requirement for corroboration warning – Discretion of trial judge as to whether warning should be given to jury – Whether definition of attempted rape was confusing to jury – Leave to appeal refused (264/2008 – CCA – 25/06/2009) [2009] IECCA 109
*People (DPP) v Urbonas*

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Charge - Theft and fraud offences – Admission in relation to falsifying evidence – Directions to jury – Whether warning required in relation to relevance of admission – Whether adequate directions given – Relevance of failure to raise objection at end of charge – Search warrant – Execution – Clerical error on face of warrant – Incorrect date – Whether warrant defective – Interpretation of terms of search warrant – Whether breach of constitutional rights – *R v Lucas* [1981] QB 720; *People (DPP) v McGoldrick* [2005] IECCA 84,[2005] 3 IR 123, *People (DPP) v Lawless* (1985) 3 Frewen 30, *People (DPP) v Cronin* (No 2) [2006] 4 IR 329 considered; *People (DPP) v Curtin* (Unrep, Circuit Criminal Court, 2/12/2004) distinguished; Larceny Act 1916 (6 & 7 Geo 5, c 50), s. 32(1) – Criminal Justice Act 1994 (No 5), s. 63 – Disclosure of Certain Information for Taxation & Other Purposes Act 1996 (No 25) – Leave to appeal refused (CCA 103 &105/2008 – CCA – 24/07/2009) [2009] IECCA 94
*People (DPP) v Massoud*

### Trial

Charge - Verdict - Judge's charge to jury – Charge as whole must be considered – Charge not rigid or formulaic – Claim that applicable law not made sufficiently clear in charge to jury – Requisitions - No requisitions raised by defendant– Evidence -Inconsistencies in prosecution witness evidence not clarified by prosecution – Claim of resulting prejudice to defendant -Whether prosecution obliged to clarify inconsistencies - Whether trial judge failed to correctly charge jury – Whether obligations of prosecution made sufficiently clear to jury - Whether judge failed to give adequate weight to legal submissions – *DPP v O'Connor* (Unrep, Fennelly J, 29/7/2002) and *People (DPP) v Cronin* [2003] 3 IR 377 applied – Firearms Act 1925 (No 17), s 25A - Leave

refused (141/06 – CCA- 2/11/2009) [2009] IECCA 118
*People (DPP) v Quinn*

### Trial

Evidence – Major discrepancy in prosecution evidence – Failure by prosecution to gather evidence – Defendant entitled to evidence which can be reasonably gathered – Evidence which might be of assistance to defendant – Issues regarding evidence not adequately explored or exposed by trial judge – Possible impact on reasonable doubt as to guilt of defendant - Cumulative effect of unusual circumstances of case – Whether evidence could be reasonably gathered – Whether discrepancy in evidence significant – Whether issues regarding evidence properly dealt with by trial judge - Conviction set aside, new trial directed (194/07 – CCA – 2/11/2009) [2009] IECCA 119
*People (DPP) v O'Brien*

### Trial

Evidence - Time of death – Insect activity – Stab wound – Whether consistent evidence of stabbing absent – Damage to intercostal muscle – Opinion of expert – Whether point to be argued in front of jury – Whether error in allowing evidence to go to jury - Whether inconsistent evidence as to date of death - Blood on shirt – Type of knife – Telephone evidence – Statement of admission – Allegation of trick in allowing father of partner to visit - Allegation of illegal inducement and oppressive questioning – Allegation of misstatement of uncovered facts - *Voir dire* – Viewing of videotapes of interview – Ruling of trial judge – Contradictory accounts of witnesses – Whether meeting fairly conducted – *People (DPP) v Meehan* [2006] IECCA 104; [2006] 3 IR 468; *People (DPP) v Shaw* [1982] IR 1 and *People (DPP) v Pringle* (1981) 2 Frewen 57 considered – Leave to appeal dismissed (126/2008 – CCA – 2/4/2009) [2009] IECCA 29
*People (DPP) v Kavanagh*

### Trial

Inconsistent evidence –Exculpatory statement – Defence of accident – Evidence of garda witness – Cross-examination – Whether accident possible - Application for withdrawal of murder charge on basis that evidence established inherent inconsistency - Ruling of trial judge – Trial before jury - Expert evidence – Hypothetical nature of expert testimony – Whether inherent contradiction in evidence necessary to sustain charge – *People (DPP) v Clarke* [1994] IR 289; *People (Attorney General) v Crosby* (1961) 1 Frewen 231; *People (DPP) v Leacy* (Unrep, CCA, 3/3/2002); *R v Shippey* [1988] Crim LR 767; *People (DPP) v M* (Unrep, CCA, 15/2/2001) and *Davie v Magistrates of Edinburgh* [1953] SC 34 considered – Constitution of Ireland 1937, art 38.5 – Leave to appeal refused (62/2007 – CCA – 2/4/2009) [2009] IECCA 30
*People (DPP) v O'Reilly*

### Trial

Indictment – Severance - Rape and sexual assault – Three complainants – Non-disclosure of previous abuse of complainant – Prejudice to ability to cross-examine – Fair trial – Whether trial judge erred in refusing severing of indictment – New evidence – Absence of prosecutorial knowledge pre-trial -Knowledge of gardaí prior to sentencing – Possibility of application regarding previous sexual history of complainant – Test of fairness – Whether absence of information could have materially effected consideration of jury – Whether real risk of effect on fairness of trial – *People (DPP) v K(G)* [2006] IECCA 99 [2007] 2 IR 92 and *People (DPP) v Nevin* [2003] 3 IR 321 considered – Leave application treated as appeal and conviction quashed (141/2008 – CCA – 23/6/2009) [2009] IECCA 63
*People (DPP) v C (T)*

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Manslaughter – Re-trial due to unavailability of prosecution witnesses – Additional evidence – Medical evidence adduced in earlier trial – Whether prosecution restricted to evidence adduced in earlier trial – Conflicting medical evidence – Whether case should have been withdrawn from jury – Whether accurate description of substantial cause given to jury – Whether correct direction given relating to causation – Whether fair procedures – *McNulty v DPP* [2009] IESC 12, (Unrep, Supreme Court, 18/02/2009) *DPP v M* (Unrep, Court of Criminal Appeal, 15/02/2001) applied, *DPP v Davis* [2001] 1 IR 146, *People (AG) v Gallagher* [1972] IR 365 applied, *State (O Callaghan) v O hUadhaigh* [1977] IR 42 distinguished; *R v Galbraith* [1981] 1 WLR 1039 considered – Non-Fatal Offences against the Person Act 1997 (No 26), s 3 – Leave to appeal refused – (CCA 128/2008 – CCA – 29/07/2009) [2009] IECCA 90
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*People (DPP) v Farrell*

### Verdict

Multiple counts – Sexual offences – Theft and fraud offences – Conviction in respect of rape – Acquittal relating to theft offence – Whether jury verdict consistent – Direction that each count must be considered separately – No corroboration warning given – Whether corroboration warning required – Whether opinion evidence tendered by witness who was not an expert – Offences against the Person Act 1861 (24 & 25 Vict, c 100), s 48 – Criminal Justice Act 1993 (No 16), s 2 – Criminal Law (Rape) Act 1981 (No 10), s 2 – Theft and Fraud Offences Act 2001 (No 50), s 4 – Leave to appeal refused (CCA 165/2008 – CCA – 16/07/2009) [2009] IECCA 93
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Prohibition of discrimination – Obligation on State – Voluntary enactment of redress scheme – Absence of State responsibility for abuse – Events occurring before statute became operative – Engagement of rights – Whether definition of 'child' incompatible with Convention – *Dublin City Council v Fennell* [2005] IESC 33, [2005] 1 IR 604; *Abdulaziz v UK* (1985) 7 EHRR 471; *Von Hannover v Germany* (2004) 40 EHRR 1; *X and Y v Netherlands* (1985) 8 EHRR 235 and *Sidabras v Lithuania* (2004) 42 EHRR 104 considered - Residential Institutions Redress Act 2002 (No 13), ss 1 and 7– Constitution of Ireland, Article 40.1- European Convention on Human Rights Act 2003 (No. 20), s. 2 – European Convention on Human Rights and Fundamental Freedoms 1950, articles 8 and 14 - Respondents' appeal allowed (405 & 410/2008 – SC – 27/7/2009) [2009] IESC 59
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### Asylum

Credibility - Fear of persecution – Political activities – Report – Negative recommendation – Lack of credibility – Appeal to tribunal – Claim that officer made fundamental errors of fact – Decision of tribunal – Claim that negative conclusion as to credibility legally flawed – Whether failure to consider corroborative evidence – Whether decision vitiated by fundamental errors of law and fact – Whether failure to take account of corrected mistakes – Whether failure to consider evidence and explanations – Whether unwarranted conclusion that applicant had reconstructed evidence – Probative value of report – Credibility – Mistakes regarding dates - Effect of translation of dates from Ethiopian calendar to Gregorian calendar – Discrepancy between accounts of interview – Absence of corroboration of account of applicant – Failure to raise difficulties on appeal – Whether decision lawfully reached – Delay – Extension of time – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - Leave refused (2007/1492JR – Cooke J – 8/7/2009) [2009] IEHC 330
*M (AW) v Refugee Appeals Tribunal*

### Asylum

Credibility – Fear of persecution – Notice of appeal drafted without regard to circumstances of case – Fear of persecution by reason of membership of social group – Fear of persecution based on HIV positive status - Fear of persecution based on return as failed asylum seeker – Absence of attempt to challenge substantive findings – Whether substantial ground for review – Alleged failure to consider claim to fear persecution if returned as failed asylum seeker – Alleged error in finding that medical status relevant to application for leave to remain – Ambiguity as to basis for refusal – Absence of distinct conclusion on issue of nationality – Importance of establishing country of origin – Onus on applicant – Obligation to make finding or consider whether further enquiries possible – Application for extension of time – Refugee Act 1996 (No 17), s 13 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave granted (2008/2JR – Cooke J – 15/7/2009) [2009] IEHC 335
*S (E) v Refugee Appeals Tribunal*

### Asylum

Credibility - Minor – Negative credibility findings – Whether findings unreasonable - Whether failure to have regard to relevant considerations –Whether tribunal exaggerated significance of description of clan as religious group – Whether tribunal expected unreasonable degree of knowledge from teenage girl with no formal education - Legality of process of assessment – Whether decision inconsistent with decision in prior case involving clan member – *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) considered – Refugee Act 1996 (No 17), s 11 - Application refused (2007/1540JR – Cooke J – 14/7/2009) [2009] IEHC 329
*S (SS) v Minister for Justice, Equality and Law Reform*

### Asylum

Credibility – Country of origin information - Irrelevant considerations – Age of applicant – Whether failure to adequately consider evidence submitted by *guardian ad litem* – Whether error in relying on country of origin information – Fear of persecution based on involvement of father with communist group – Fear of human trafficking – Negative credibility findings – Whether substantial ground for review – Claim of entitlement to refugee status as member of particular social group namely young men vulnerable to trafficking – Necessity for social group to exist independently of fear of persecution – Absence of consideration of whether social group existed as matter of law – *G(K) v Minister for Justice, Equality and Law Reform* [2002]2 IR 418; *Banzuzi v Minister for Justice, Equality and Law Reform* [2007] IEHC 2 (Unrep, Feeney J, 18/1/2007); *S (A W) v Refugee Appeals Tribunal* [2007] IEHC 276 (Unrep, Dunne J, 12/6/2007); *Imafu v Refugee Appeals Tribunal* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005); *Memishi v Refugee Appeals Tribunal* (Unrep, Peart J, 5/6/2003); *AG of Canada v Ward* [1993] 2 SCR 689; *McNamara v An Bord Pleanála* (No 1) [1995] 2 ILRM 125; *R v Immigration Appeals Tribunal ex parte Shah v Secretary of State* [1999] 2 AC 629; 9/11/2005); *Rostas v Refugee Appeals Tribunal* (Unrep, Gilligan J, 31/7/2003) and *Msengi v Minister for Justice* [2006] IEHC 241 (Unrep, MacMenamin J,

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*S (M) v Refugee Appeals Tribunal*

### Asylum

Hearing – Fairness- Adjournment refused - Alleged fear of persecution for political opinion – Settlement of judicial review proceedings on basis of remission for re-hearing – Refusal of application for adjournment by commissioner prior re-hearing – Objection to hearing proceeding in absence of commissioner – Whether tribunal acted *ultra vires* in conducting hearing in absence of officer – Whether tribunal took into account likelihood of subsequent challenge to High Court – Whether tribunal erred in concluding that evidence of persecution on basis of status as failed asylum seeker absent – Whether incorrect standard of proof applied – Whether tribunal erred in concluding that statements inconsistent - Standard of proof – Whether substantial grounds for review - Application for extension of time – *McNamara v An Bord Pleanála* (Unrep, Carroll J, 24/1/1994); *Da Silveira v Refugee Appeals Tribunal* [2004] IEHC 436 (Unrep, Peart J, 9/7/2004); *Fasakin v Refugee Appeals Tribunal* [2005] IEHC 423 (Unrep, O'Leary J, 21/12/2005) and *Atanasov v Refugee Appeals Tribunal* [2006] IESC 53 (Unrep, SC, 26/7/2006) considered – Refugee Act 1996 (No 17), ss 13 and 16 – Refugee Act 1996 (Appeals) Regulations 2003 (SI 424/2003), reg 9 - Leave granted (2008/510JR – Irvine J – 20/7/2009) [2009] IEHC 328
*A (MD) v Refugee Appeals Tribunal*

### Asylum

Hearing – Fairness - Alleged refusal to allow cross-examination of presenting officer at oral hearing – Alleged breach of natural and constitutional justice – Absence of reliable evidence of application to cross-examine – Whether substantial grounds for review – Failure to seek to call commissioner or representative as witness - Different officer present at hearing – *Legitimus contradictor* – Absence of prejudice – Application for extension of time - *T v Refugee Appeals Tribunal* [2009] IEHC 156 (Unrep, Clark J, 31/3/2009); *R (A M) v Refugee Appeals Tribunal* [2008] IEHC 108 (Unrep, McGovern J, 25/4/2008); *Muresan v Refugee Appeals Tribunal* (Unrep, Finlay Geoghegan J, 8/10/2003); *Emmanuel v Refugee Appeals Tribunal* (Unrep, Clark J, 7/7/2009) considered – Refugee Act 1996 (No 17), ss 11 and 13 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Refugee Act 1996 (Appeals) Regulations 2003 (SI 424/2003), reg 9 - Leave refused (2007/1265JR – Clark J – 16/7/2009) [2009] IEHC 331
*M (AN) v Refugee Appeals Tribunal*

### Asylum

Nationality – Country of origin information - Claim of Ghanaian nationality by applicant born in Nigeria – Claim of fear of persecution in Nigeria – Subsequent submission of fear of persecution in Ghana – Claim of inability to survive without resort to prostitution - Country of origin information in relation to Ghana – Whether tribunal erred in failing to consider country of origin information - Whether failure to address and make finding on issue of nationality – Obligation to consider all relevant evidence – Failure to express fear of persecution in Ghana – Absence of factual or evidential basis requiring tribunal to examine country of origin information - Refugee Act 1996 (No 17), ss 11 and 13 - Application refused (2007/1017JR – Cooke J – 14/7/2009) [2009] IEHC 332
*B (C) v Minister for Justice, Equality and Law Reform*

### Deportation

Ministerial decision – Fairness – Duty to consider representations - New circumstances – Whether obligation to embark on new investigation – Reasons for refusal – Discretion to amend or revoke deportation order – Whether delegation of decision – Absence of signature of minister – Absence of stamp – Whether obligation to give reasons – Whether deportation of minor disproportionate – Attempts to re-open decision - Subsidiary protection – *Non-refoulement - Kouaype v MJELR* [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005); *Tang v Minister for Justice* [1996] 2 IR 46; *Devaney v Shields* [1998] IR 230; *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560; *Dimbo v Minister for Justice* [2008] IESC 26 (Unrep, SC, 1/5/2008) considered – Refugee Act 1996 (No 17), s 5 - Immigration Act 1999 (No 22), s 3 – European Convention on Human Rights Act 2003 (No 20), s 3 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) - Application refused (2009/194JR – Cooke J – 9/7/2009) [2009] IEHC 334
*I (EA) v Minister for Justice, Equality and Law Reform*

### Residence

Failure to make decision – *Mandamus* - Romanian national – Application for asylum – Marriage to Irish citizen – Withdrawal of application for asylum - Application for residence – Deportation order – Settlement of judicial review proceedings on basis that fresh representations would be considered – Submission of fresh representations – Accession of Romania to European Union – Transitional arrangements – Necessity for work permit - Failure to consider fresh representations – Ministerial discretion – Cessation of application of asylum process to applicant - Power of decision maker to make decision – Absence of power as applicant entitled to remain – *Pok Sun Shun v Ireland* [1986] ILRM 593 considered –Immigration Act 1999 (No 22), s 3 - Employment Permits Act 2003 (No 7), 2 - European Communities (Free Movement of Persons) (No 2) Regulations 2006 (SI 226/2006) – Application refused (2009/151JR – Cooke J – 16/7/2009) [2009] IEHC 333
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### Compulsory purchase

Acquisition of lands - Constructing bypass – Alleged unsuitability of alternative means of access – Declaratory relief – Injunctive relief – Standard of access – Reasonable or suitable alternative means of access – Whether suitable alternative means of access provided – Evidence – Access road built in accordance with planning approval for scheme – Unsuitability of access road - Failure to challenge scheme – Failure to properly engage with defendants - Pending arbitration – Appropriateness of dealing with shortcomings of access within arbitration - Roads Act 1993 (No 14), ss 49 and 52 – Relief refused (2007/6160P – McGovern J – 31/7/2009) [2009] IEHC 379
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### Exempted development

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### Costs

Summary judgment – Appearance entered – No further steps taken in proceedings – Consent to judgment — Party and party costs – Taxation – Whether Master might measure costs *in lieu* of taxation – Calculation of costs – Relevance of decision to enter appearance – Relevance of comparative cases – Whether appropriate to figure amounting to standard recoverable costs – *CD v Minister for Health* [2008] IEHC 299, (Unrep, Herbert J, 23/7/2008) – Rules of the Superior Courts 1986 (SI 15/1986) O 99, r 37 – Order for taxation granted (2007/1331S – Master of High Court – 21/10/2009)
*EBS Building Society v Connelly*

### Dismissal of proceedings

Abuse of process – Duplication of cause of action before court – Refusal of application to join defendants – Attempt to go behind orders in first proceedings – Whether commencement of second proceedings amounted to abuse of process – *Royal Bank of Scotland v Citrusdal Ltd* [1971] 1 WLR 1469 and *Thames Launches Ltd v Trinity House Corporation (Deptford Strand)* [1961] Ch 197 considered – Proceedings struck out (5082/2008 – Dunne J – 7/7/2009) [2009] IEHC 340
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### Dismissal of proceedings

No reasonable cause of action – Allegations that wardship order made – Allegations of professional negligence – No wardship order made – Whether action frivolous and vexatious – Whether claim abuse of process – Jurisdiction where conflict of fact – Nature

of conflicted fact – Lay litigant – *Issac Wunder* order – Whether appropriate to make Issac Wunder order – *Fay v Tegral Pipes Ltd* [2005] IESC 34 [2005] 2 IR 261 and *Barry v Buckley* [ 1981] IR 306 applied – Rules of the Superior Courts 1986 (SI 15/1986) O 19, r 27 – Plaintiff's appeal dismissed & Issac Wunder order granted (288/2006 – SC – 7/07/09) [2009] IESC 52
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Liberty to enter final judgment – Stay – Judicial discretion – Plaintiff's right to enforcement of judgment – Principles to be applied – Balance of prejudice to parties – Due process –*Prendergast v Biddle* (Unrep, SC, 31/07/1957), *Moohan v S&R Motors* [2008] IEHC 435, [2008] 1 IR 650 and *Killerk Ltd v Houlihan* [2009] IEHC 358 considered – Constitution of Ireland, art 37 – Rules of the Superior Courts 1986 (SI 15/1986) O 99 – Stay refused (2008/2559 – Master of High Court – 30/10/09)
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**Information compiled by Clare O'Dwyer, Law Library, Four Courts.**

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**3/2010** George Mitchell Scholarship Fund (Amendment) Act 2010
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**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.**

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Air Navigation and Transport (Prevention of Extraordinary Rendition) Bill 2008
Bill 59/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Michael D. Higgins*

Anglo Irish Bank Corporation (No. 2) Bill 2009
Bill 6/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Appointments to Public Bodies Bill 2009
Bill 64/2009
2nd Stage – Seanad **[pmb]** *Senator Shane Ross (Initiated in Seanad)*

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

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Committee Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

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2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

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Bill 19/2010
Report Stage - Dáil

Construction Contracts Bill 2010
Bill 21/2010
2nd Stage – Seanad **[pmb]** *Senator Fergal Quinn*

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

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

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

Corporate Governance (Codes of Practice) Bill 2009
Bill 22/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Eamon Gilmore*

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

Credit Union Savings Protection Bill 2008
Bill 12/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole,*

*David Norris, Feargal Quinn, Shane Ross, Ivana Bacik and Rónán Mullen (Initiated in Seanad)*

Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010
Bill 2/2010
Committee Stage - Dáil

Criminal Justice (Money Laundering and Terrorist Financing) Bill 2009
Bill 55/2009
Passed by both Houses of the Oireachtas

Criminal Justice (Public Order) Bill 2010
Bill 7/2010
2nd Stage - Dáil

Criminal Justice (Violent Crime Prevention) Bill 2008
Bill 58/2008
Committee Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

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

Criminal Law (Insanity) Bill 2010
Bill 5/2010
Report Stage – Seanad *(Initiated in Seanad)*

Criminal Procedure Bill 2009
Bill 31/2009
Committee Stage - Dáil *(Initiated in Seanad)*

Data Protection (Disclosure) (Amendment) Bill 2008
Bill 47/2008
Order for 2nd Stage - Dáil **[pmb]** *Deputy Simon Coveney*

Defence of Life and Property Bill 2006
Bill 30/2006
2nd Stage – Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Dog Breeding Establishments Bill 2009
Bill 79/2009
Report Stage – Seanad *(Initiated in Seanad)*

Dublin Docklands Development (Amendment) Bill 2009
Bill 75/2009
2nd Stage - Dáil **[pmb]** *Deputy Phil Hogan*

Electoral (Amendment) Bill 2010
Bill 24/2010
1st Stage – Dáil **[pmb]** *Deputies Maureen O'Sullivan, Joe Behan and Finian McGrath*

Electoral Commission Bill 2008
Bill 26/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Electoral (Gender Parity) Bill 2009
Bill 10/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Electoral Representation (Amendment) Bill 2010
Bill 23/2010
2nd Stage – Dáil **[pmb]** *Deputy Phil Hogan*

Electricity Regulation (Amendment) (Carbon Revenue Levy) Bill 2010
Bill 28/2010
Committee Stage – Dáil

Employment Agency Regulation Bill 2009
Bill 54/2009
Committee Stage - Dáil

Employment Law Compliance Bill 2008
Bill 18/2008
Committee Stage – Dáil

Energy (Biofuel Obligation and Miscellaneous Provisions) Bill 2010
Bill 6/2010
Passed by Dáil Éireann *(Initiated in Seanad)*

Ethics in Public Office Bill 2008
Bill 10/2008
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Ethics in Public Office (Amendment) Bill 2007
Bill 27/2007
2nd Stage – Dáil *(Initiated in Seanad)*

Euro Area Loan Facility Bill 2010
Bill 22/2010
2nd Stage - Dáil

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

Financial Emergency Measures in the Public Interest Bill 2010
Bill 17/2010
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Financial Emergency Measures in the Public Interest (Reviews of Commercial Rents)
Bill 39/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciaran Lynch*

Fines Bill 2009
Bill 18/2009
Passed by both Houses of the Oireachtas

Food (Fair Trade and Information) Bill 2009
Bill 73/2009
1st Stage – Dáil **[pmb]** *Deputies Michael Creed and Andrew Doyle*

Freedom of Information (Amendment) (No.2) Bill 2008
Bill 27/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Freedom of Information (Amendment) (No. 2) Bill 2003
Bill 12/2003
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Fuel Poverty and Energy Conservation Bill 2008
Bill 30/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Liz McManus*

Garda Síochána (Powers of Surveillance) Bill 2007
Bill 53/2007
1st Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Genealogy and Heraldry Bill 2006
Bill 23/2006
Order for 2nd Stage – Seanad **[pmb]** *Senator Brendan Ryan (Initiated in Seanad)*

Guardianship of Children Bill 2010
Bill 13/2010
1st Stage – Dáil **[pmb]** *Deputy Kathleen Lynch*

Health (Miscellaneous Provisions) Bill 2010
Bill 25/2010
2nd Stage - Dáil

Housing (Stage Payments) Bill 2006
Bill 16/2006
2nd Stage – Seanad **[pmb]** *Senator Paul Coughlan (Initiated in Seanad)*

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

Human Rights Commission (Amendment) Bill 2008
Bill 61/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

Immigration, Residence and Protection Bill 2008
Bill 2/2008
Order for Report – Dáil

Industrial Relations (Amendment) Bill 2009
Bill 56/2009
Committee Stage - Dáil *(Initiated in Seanad)*

Industrial Relations (Protection of Employment) (Amendment) Bill 2009
Bill 7/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Inland Fisheries Bill 2009
Bill 70/2009
Passed by both Houses of the Oireachtas

Institutional Child Abuse Bill 2009
Bill 46/2009
2nd Stage – Dáil **[pmb]** *Deputy Ruairi Quinn*

Intoxicating Liquor (National Conference Centre) Bill 2010
Bill 20/2010
2nd Stage - Dáil

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

Land and Conveyancing Law Reform (Review of Rent in Certain Cases) (Amendment) Bill 2010
Bill 11/2010
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Local Elections Bill 2008
Bill 11/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Local Government (Planning and Development) (Amendment) Bill 2009
Bill 21/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Martin Ferris*

Local Government (Rates) (Amendment) Bill 2009
Bill 40/2009
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Medical Practitioners (Professional Indemnity) (Amendment) Bill 2009
Bill 53/2009
2nd Stage – Dáil **[pmb]** *Deputy James O'Reilly*

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Shane Ross, Feargal Quinn and Ivana Bacik*

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

Merchant Shipping Bill 2009
Bill 25/2009
Report Stage – Dáil

Ministers and Secretaries (Ministers of State Bill) 2009
Bill 19/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Alan Shatter*

Multi-Unit Developments Bill 2009
Bill 32/2009
Report Stage – Seanad *(Initiated in Seanad)*

National Archives (Amendment) Bill 2009
Bill 13/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

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

National Pensions Reserve Fund (Ethical Investment) (Amendment) Bill 2006
Bill 34/2006
1st Stage – Dáil **[pmb]** *Deputy Dan Boyle*

Non-medicinal Psychoactive Substances Bill 2010
Bill 18/2010
1st Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh*

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

Offences Against the State Acts Repeal Bill 2008
Bill 37/2008
2nd Stage – Dáil **[pmb]** *Deputies Aengus Ó Snodaigh, Martin Ferris, Caomhghin Ó Caoláin and Arthur Morgan*

Offences Against the State (Amendment) Bill 2006
Bill 10/2006
1st Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Mary Henry and Feargal Quinn (Initiated in Seanad)*

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

Ombudsman (Amendment) Bill 2008
Bill 40/2008
Order for Report – Dáil

Planning and Development (Amendment) Bill 2010
Bill 10/2010
Order for 2nd Stage – Dáil **[pmb]** *Deputies Joe Costello and Jan O'Sullivan*

Planning and Development (Amendment) Bill 2009
Bill 34/2009
2nd Stage – Dáil *(Initiated in Seanad)*

Planning and Development (Amendment) Bill 2008
Bill 49/2008
Committee Stage – Dáil **[pmb]** *Deputy Joe Costello*

Planning and Development (Enforcement Proceedings) Bill 2008
Bill 63/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

Planning and Development (Taking in Charge of Estates) (Time Limit) Bill 2009
Bill 67/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Sean Sherlock*

Prevention of Corruption (Amendment) Bill 2008
Bill 34/2008
Committee Stage – Dáil

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

Proceeds of Crime (Amendment) Bill 2010
Bill 30/2010
1st Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Prohibition of Depleted Uranium Weapons Bill 2009
Bill 48/2009
Committee Stage – Seanad **[pmb]** *Senators Dan Boyle, Deirdre de Burca and Fiona O'Malley*

Prohibition of Female Genital Mutilation Bill 2009
Bill 30/2009
Committee Stage – Dáil **[pmb]** *Deputy Jan Sullivan*

Property Services (Regulation) Bill 2009
Bill 28/2009
Report Stage – Seanad *(Initiated in Seanad)*

Protection of Employees (Agency Workers) Bill 2008
Bill 15/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Willie Penrose*

Registration of Lobbyists Bill 2008
Bill 28/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Residential Tenancies (Amendment) (No. 2) Bill 2009
Bill 15/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Ciaran Lynch*

Road Traffic Bill 2009
Bill 65/2009
Committee Stage – Dáil

Sea Fisheries and Maritime Jurisdiction (Fixed Penalty Notice) (Amendment) Bill 2009
Bill 27/2009
2nd Stage – Dáil **[pmb]** *Deputy Jim O'Keffee*

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

Small Claims (Protection of Small Businesses) Bill 2009
Bill 26/2009
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Spent Convictions Bill 2007
Bill 48/2007
Committee Stage – Dáil **[pmb]** *Deputy Barry Andrews*

Student Support Bill 2008
Bill 6/2008
Committee Stage – Dáil

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

Tribunals of Inquiry Bill 2005
Bill 33/2005
Order for Report – Dáil

Twenty-eight Amendment of the Constitution Bill 2007
Bill 14/2007
Order for 2nd Stage – Dáil

Twenty-ninth Amendment of the Constitution Bill 2009
Bill 71/2009
1st Stage – Dáil **[pmb]** *Deputy Alan Shatter*

Twenty-ninth Amendment of the Constitution Bill 2008
Bill 31/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Arthur Morgan*

Údaras na Gaeltachta (Amendment) Bill 2010
Bill 31/2010
1st Stage - Seanad

Vocational Education (Primary Education) Bill 2008
Bill 51/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Ruairí Quinn*

Whistleblowers Protection Bill 2010
Bill 8/2010
Order for 2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Wildlife (Amendment) Bill 2010
Bill 15/2010
Order for 2nd Stage - Dáil

Witness Protection Programme (No. 2) Bill 2007
Bill 52/2007
Order for 2nd Stage – Dáil **[pmb]** *Deputy Pat Rabitte*

## ABBREVIATIONS

**BR = Bar Review**
**CIILP = Contemporary Issues in Irish Politics**
**CLP = Commercial Law Practitioner**
**DULJ = Dublin University Law Journal**
**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**
**IJEL = Irish Journal of European Law**
**IJFL = Irish Journal of Family Law**
**ILR = Independent Law Review**
**ILTR = Irish Law Times Reports**
**IPELJ = Irish Planning & Environmental Law Journal**
**ISLR = Irish Student Law Review**
**ITR = Irish Tax Review**
**JCP & P = Journal of Civil Practice and Procedure**
**JSIJ = Judicial Studies Institute Journal**
**MLJI = Medico Legal Journal of Ireland**
**QRTL = Quarterly Review of Tort Law**

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

# Using EU law to prevent another passport crisis.

Anthony Moore BL

### Introduction

The recent controversy over industrial action in the Passport Office, which created delays in determining applications for passports, led to considerable frustration amongst members of the public affected by it. The Croke Park deal between the government and the unions notwithstanding, there remains the possibility that such industrial action could occur again, and this gives rise to the question of what, if any, steps the State ought to take in the event of a reoccurrence of the matter in order to preclude it from being potentially liable for breach of its obligations under European Community law.

### Directive 2004/38/EC – right to exit the State

Under European law, specifically, the Free Movement Directive 2004/38/EC, every citizen of this country holding a passport has the right to leave here to travel to another Member State. Article 4.1, which deals with the right of exit, provides:

> "Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State."

This right is a gateway to avail of other rights, such as the right to seek work or establish oneself in another Member State, or to avail of services there. The fundamental right enshrined in Article 4.1, and the rights consequent upon it, are effectively frustrated, or at least impeded, if the beneficiary of them is unable to obtain a passport as a result of the actions of a third party. Assuming it is possible to identify a third party, the question is whether the frustration of the right in those circumstances would expose the State to liability under Community law.

### C-265/95 *Commission v. France*

The question of liability of a Member State for actions of third parties which frustrated fundamental rights arose in the case of C-265/95 *Commission v. France*. In that case, the Commission brought an action under what was then Article 169 EC for a declaration that, by failing to take all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals, the French Republic had failed to fulfil its obligations under the common organization of the markets in agricultural products and the then Article 30 EC, in conjunction with the then Article 5 EC.

This was prompted by the acts of French farmers, lasting more than a decade, which took the form of protests and violent actions directed against agricultural produce from other Member States. This included the interception of lorries transporting such products in France and the destruction of their loads, violence against lorry drivers, threats against French supermarkets selling agricultural products originating in other Member States, and the damaging of those goods when on display in shops in France. The French authorities failed to take the necessary steps to prevent this.

The ECJ began by noting that Article 30 EC did not prohibit solely measures emanating from the state which, in themselves, created restrictions on trade between Member States. It also applied where a Member State abstained from adopting the measures required in order to deal with obstacles to the free movement of goods which were not caused by the State. A Member State's omission to take action or to adopt adequate measures to prevent obstacles to the free movement of goods that were created by actions of private individuals on its territory aimed at products originating in other Member States was just as likely to obstruct intra-Community trade as a positive act by it. Accordingly, Article 30 EC, when read in conjunction with Article 5 EC, required the Member States not only to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also to take all necessary and appropriate measures to ensure that that fundamental freedom guaranteed by Article 30 EC was respected on their territory. The Member States nonetheless enjoyed a margin of discretion in determining what measures were most appropriate to ensure this. It remained a matter for the ECJ to decide if they had complied with their obligations in this regard.

Insofar as the facts of the case were concerned, the ECJ noted that the situation had been ongoing for over a decade, and that the French state had been called upon to put an end to it as far back as 1985. The French police, it found, were often not present at protests, despite their being publicised in advance, and if they were, often failed to intervene. Despite the fact that the farmers responsible were known to the police, only a small number of protesters had been prosecuted. The ECJ said:

> "52 In the light of all the foregoing factors, the Court, while not discounting the difficulties faced by the competent authorities in dealing with situations of the type in question in this case, cannot but find that, having regard to the frequency and seriousness of

> the incidents cited by the Commission, the measures adopted by the French Government were manifestly inadequate to ensure freedom of intra-Community trade in agricultural products on its territory by preventing and effectively dissuading the perpetrators of the offences in question from committing and repeating them."

It gave short shrift to the French government's argument that tougher action on its part would have provoked ever more violent reaction by the protesters, saying that apprehension of internal difficulties could not justify a failure by a Member State to apply Community law correctly. Nor could France evade its obligations under Community law by compensating the protesters' victims.

The ECJ concluded:

> "65 Having regard to all the foregoing considerations, it must be concluded that in the present case the French Government has manifestly and persistently abstained from adopting appropriate and adequate measures to put an end to the acts of vandalism which jeopardize the free movement on its territory of certain agricultural products originating in other Member States and to prevent the recurrence of such acts.
>
> 66 Consequently, it must be held that, by failing to adopt all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals, the French Government has failed to fulfil its obligations under Article 30, in conjunction with Article 5, of the Treaty and under the common organizations of the markets in agricultural products."

### C-112/00 *Schmidberger v. Austria*

The question of Member State liability for actions of third parties arose again in the case of C-112/00 *Schmidberger v. Austria*. That case came before the ECJ on foot of a reference pursuant to the then Article 234 EC from an Austrian court in the course of proceedings for damages taken by Schmidberger, a haulier, who had been unable to use the Brenner motorway, a key transport route, as a result of an environmental demonstration which resulted in its closure for over 24 hours.

The ECJ set out to determine, first, whether the principle of the free movement of goods, in conjunction with Article 5 of the Treaty, required a Member State to keep open major transit routes and whether that obligation took precedence over fundamental rights, such as freedom of expression and freedom of assembly guaranteed by articles 10 and 11 ECHR.

It noted that the free movement of goods was one of the fundamental principles of the European Community. Applying its reasoning in *Commission v. France*, it held that Articles 30 and 34 EC required the Member States not merely themselves to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 EC, to take all necessary and appropriate measures to ensure that the fundamental freedoms thus provided for were respected on their territory. Accordingly, it said at paragraph 64:-

> "…the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified."

That question had to be determined solely by taking account of the act or omission attributable to the Member State. This involved looking at the objective pursued by the national authorities in their implicit decision to authorise or not to ban the demonstration in question. It noted that the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which were enshrined in and guaranteed by the ECHR and the Austrian Constitution. At paragraph 74 of its decision, it said:-

> "74. [S]ince both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods."

The rights therefore needed to be balanced, and the ECJ noted that the Member States enjoyed a "wide margin of discretion" in that regard. As in *Commission v. France*, it assessed the position to establish if Austria had breached its obligations under Community law. It considered the following points to be relevant. First, the demonstration took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it. Secondly, the restriction of free movement of goods was limited in nature, traffic by road being obstructed on a single route, on a single occasion, and for a period of almost 30 hours. This helped to distinguish it from the geographic scale and the intrinsic seriousness of the disruption obtaining in *Commission v France*. Thirdly, by demonstrating, citizens were exercising the fundamental right of expression on an issue which they considered to be of importance to society. The malevolent intent behind the actions of the French farmers was therefore absent, and the demonstration did not give rise to a general climate of insecurity as to have a dissuasive effect on intra-Community trade flows as a whole. Fourthly, various administrative and supporting measures had been taken by the competent authorities to limit, as far as possible, the disruption to road traffic.

Thus, in particular, the Austrian authorities, including the police, the organisers of the demonstration and various motoring organisations, cooperated to ensure that the demonstration passed off smoothly. Well before the date on which it was due to have taken place, an extensive publicity campaign had been launched by the media and the motoring organisations, both in Austria and in neighbouring countries, and various alternative routes had been designated, with the result that the economic operators concerned were duly informed of the traffic restrictions applying on the date and at the site of the proposed demonstration, and were therefore in a position to take all steps necessary to avoid those restrictions.

The ECJ concluded at paragraph 89 that:

> "…taking account of the Member States' wide margin of discretion, in circumstances such as those of the present case the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public."

## Conclusions

Assuming the fallout from any future industrial action in the Passport Office cannot be attributed to the State's actions directly, the above cases show that it does not necessarily follow that this would absolve the latter of any liability at all. As indicated above, the fundamental right enshrined in Article 4.1 of Directive 2004/38/EC is frustrated, or at least impeded, if the beneficiary of it is unable to obtain a passport as a result of the actions of a third party, such as a union whose members have authorised industrial action. This leads to inability to exit the State and this may frustrate fundamental freedoms like the right to seek work, or the right to provide or avail of services in other Member States. The importance of free movement is highlighted by the limited grounds upon which it can be restricted under the Directive, namely public health, public security and public policy. As against that, the undoubted right of unionised workers in the Passport Office to take legitimate industrial action, which may, however, frustrate or impede the right to exit the State and various rights consequent upon that, would have to be weighed in the balance.

Given that any industrial action might be unlimited in duration, and lead to excessive delays in issuing passports, this would frustrate, or at least impede, the right to exit the State, and the rights dependent on that, which are vested in every Irish citizen under the Treaty and Directive 2004/38/EC. This could affect thousands of citizens over a significant period of time.

The State would clearly have to respect the right to take legitimate industrial action. However, it would have to be mindful of the significant impositions placed on applicants for passports as a result of that. In order to absolve itself from the charge that it breached its obligations relating to free movement of persons and loyal cooperation, *Schmidberger* suggests that it would have to put in place alternative arrangements to enable passports to be obtained within a reasonable time by those who have applied for them. This would involve, in effect, devolving the functions of the Passport Office on another, interim, body, or granting *laissez passers*.

Finally, from a political point of view, bearing in mind that 60,000 people were affected by the recent passport dispute at its height, one might surmise that any industrial relations difficulties this might cause would be more than offset by the gratitude to be had from persons who might be similarly affected by delays in processing applications in the future. ■

# Assigning a Tenancy to a Third Party: What is an Unreasonable Refusal by the Landlord?

**JOHN O'REGAN BL***

## Introduction

This article seeks to provide an analysis on the law relating to the proposed assignment by a tenant of the remainder of the term of its lease to a potential new tenant. In particular, the article seeks to examine what is an unreasonable refusal of consent by the landlord in these circumstances, and what remedies are available to aggrieved tenants who have lost a potential assignee because of the landlord's refusal of consent, or delay in making a decision. The focus is primarily on cases where the landlord has refused to assign or delayed a decision where he is concerned as to the financial standing of a proposed assignee. Reference is made to the Irish and English case law and commentary in the area in an attempt to provide some clarity in what is an ambiguous area of landlord and tenant law. This author is of the view that this area of law has become increasingly important in recent times, with the economic climate forcing commercial tenants whose businesses are in difficulty and who are "locked into" leases at high rents to seek to assign the remainder of their lease to other parties.

## Assigning the Tenant's Interest

While, in many cases, the relevance of the distinction between assignment and subletting is limited, for the landlord of commercial premises the difference can be fundamental. The original tenant might have paid his rent and performed his obligations as required under the lease. While a sublease might give rise to a change of user or a risk of poor performance of covenants such as repair, the landlord's rights are preserved against the original tenant. An assignment, however, involves an out-and-out transfer of the interest in question and generally releases the original tenant and leaves the landlord to the mercy of the assignee. In that context, it is understandable that landlords have traditionally been wary of allowing tenants a general right to assign when and to whomever they wish. Indeed, as Wylie points out:[1]

> "Most landlords choose their tenants very carefully, if only because the tenant is going to be in exclusive possession of the landlord's valuable asset (the demised premises) during the tenancy. Furthermore, the income from that asset derives from the rent the tenant is obliged to pay. The last thing a landlord wants is a tenant who refuses to take care of the premises and who fails to pay the rent regularly. There is, however, little point in choosing the original tenant carefully if he is free at any time to assign the tenancy to whomever he pleases and thereby foist a bad tenant on the landlord. So the practice developed of imposing a covenant on the tenant either prohibiting him from assigning at all or restricting assignment by requiring the prior consent of the landlord".

As well as the practice of imposing such a covenant, further statutory protection for the Landlord was provided by Section 10 of Deasy's Act which provided that it was unlawful to assign without the consent in writing of the landlord. However, the Landlord and Tenant (Amendment) Act 1980,[2] qualifies covenants in leases which seek to restrict assignment of "tenements".[3] Section 66 (1) provides that "a covenant absolutely prohibiting or restricting the alienation of the tenement, either generally or in any particular manner, shall have effect as if it were a covenant prohibiting or restricting such alienation without the license or consent of the lessor". Section 66 (2)(a) provides that such consent *shall not be unreasonably withheld* in the case of a lease affected by s66(1) or any other lease restricting alienation without license or consent. It is this clause which forms the basis of this article.

## Shall Not Be Unreasonably Withheld

There are a number of Irish authorities dealing with the issue of whether the landlord's consent was unreasonably withheld in the context of assignment. Other relevant case-law is provided by restrictive covenants on the change of user of property, where similarly, consent cannot be unreasonably withheld.[4] It must be stressed that the onus of establishing

* The author would like to thank Micheál O'Connell BL for his helpful advice and comments on an earlier draft of this article.

1 Wylie, *Landlord and Tenant Law*, (2nd ed., Butterworths, 1998), at 417; chapter 21 of this textbook deals with assignment generally.

2 Hereafter "the 1980 Act". Similar provisions were contained in its predecessor, the Landlord and Tenant Act 1931.

3 "Tenement" is defined in Section 5 of the 1980 Act. Very generally, it comprises premises which consist either of land covered wholly or partly by buildings or of a defined portion of a building. Or, if they consist of land covered in part only by buildings, the portion of the land not so covered is subsidiary and ancillary to the buildings. *This is a basic definition and regard should be had to Section 5.*

4 See Wylie, *Landlord and Tenant Law*, (2nd ed., Butterworths, 1998), Chapter 18.

that the landlord's withholding of consent was unreasonable lies with the tenant.[5] What is reasonable or unreasonable will be determined by the courts on the facts of each particular case.

A landlord's primary concern will usually be the financial standing of the proposed assignee itself or any potential guarantors of the proposed assignee, and it is that issue which forms the focus of this article. It is worth pointing out that many other reasons given for refusal by the landlord might also be deemed reasonable; for example where the proposed assignee's business would not offer as much employment as the tenant's had.[6] However, as Aldous LJ concluded in *Roux Restaurants v Jaison Property Development Co Ltd,*[7] "When you look at the authorities... this, at any rate, is plain, that in the cases in which an objection to an assignment has been upheld as reasonable it has always had some reference either to the personality of the tenant, or to his proposed user of the property". In *Ashworth Frazer Ltd v Gloucester City Council,*[8] the House of Lords made clear that the court should not determine by strict rules the grounds on which a landlord may, or may not, reasonably refuse his consent, and that the landlord and the court are given a wide discretion to determine what is reasonable in all the circumstances.

English commentary suggests that recent authority on reasonable refusal of consent has swung in favour of the landlord.[9] In *NCR Ltd v. Riverland Portfolio No. 1 Ltd.(No.2),*[10] the Court of Appeal stressed that the reasonableness of the conditions of consent are a matter for the court on the particular circumstances of each case, and that the landlord did not have to justify its decision by an objective standard, or show that it was right. It is sufficient if landlords have genuine, not unfounded, concerns about their interests. It is submitted that such an approach may be favoured by the courts in the UK where the statutory burden of proof is on the landlord to show reasonableness. Whether such an approach would find favour in this jurisdiction remains to be seen.

## Reasons for Refusal

Before focusing on the financial standing of the assignee and any potential guarantors, it is now proposed to briefly set out some other instances where the courts have deemed a refusal of consent by the landlord to be reasonable.

The courts will not permit a landlord to use the opportunity of a request for consent to assignment to secure a "collateral" advantage or benefit over and above what the existing lease provides. So for example in *Straudley Investments Ltd. v Mount Eden Land Ltd,*[11] the appellant landlord was only prepared to give consent to a sub-lease subject to a condition that 50% of the sub-tenant's deposit of £13,500 was held jointly by itself and the respondent. The Court of Appeal (Phillips LJ) stated that the condition was designed to ensure that the landlord would retain a security interest in the deposit in circumstances where the tenant became entitled to it, and it was an illegitimate attempt to improve the landlord's position under the headlease, and was therefore unreasonable.

Furthermore, a landlord cannot engage in a renegotiation of the terms of the lease. For example, in *Roux Restaurants v Jaison Property Development Co Ltd.,*[12] the proposed assignee was a company and it provided a guarantor in respect of the assignment. The guarantor's company accounts were provided to the landlord in order to show its financial standing. The landlord then purported to withhold consent to assign unless the new assignee agreed to the inclusion in the lease of a full covenant to repair. Such a clause did not exist in the original lease. The Court of Appeal (Aldous LJ) held that this was an unreasonable refusal of consent by the landlord. The principle that a landlord cannot call for additional rights beyond those provided in the main lease was recently reiterated in *Landlord Protect Ltd v St Anselm Development Co Ltd.*[13]

## Good Financial Standing

Most leases will contain a clause reflecting the position in s.66 of the 1980 Act,[14] and also stating that any proposed assignee must be of good financial standing. It has therefore been held reasonable for a landlord to refuse license or consent where there were doubts as to the solvency of the proposed assignee,[15] and where the proposed assignee's financial strength fell well short of the tenant's. In the Circuit Court case of *Curragh Bloodstock Agency v. Warner,*[16] a refusal of consent to assign was deemed to be reasonable in circumstances where the plaintiff company, which was in a very strong financial position, sought to assign the property to an individual who intended to establish a grocery business on the premises. The proposed assignee had experience of the grocery trade but would have been left with a very modest capital sum after the purchase of the tenancy. Evidence was adduced that the grocery trade in the Newbridge area was very competitive. Two businessmen of sound financial position agreed to guarantee the rent for a period of five years. The Court held that the tenant failed to show that the refusal was unreasonable. In the course of his judgment, Judge Deale stated as follows:[17]

> "...can the Defendant be called unreasonable for refusing to exchange the certainty of a solvent and substantial company as his lessee for Mr. Davis and his hazardous enterprise?... *Where he has a tenant of exceptional financial strength he should not have to relinquish such a tenant and take on one who will involve him in undue*

5 *OHS v Green Property Ltd.* [1986] IR 39; this is different to the position obtaining in England and Wales, where the landlord must show that his refusal was reasonable (Section 1(6)(c) of the Landlord and Tenant Act, 1988).
6 *Cahill & Co v Drogheda Corporation* (1924) 58 ILTR 26.
7 [1996] EGCS 118.
8 [2002] 1 All ER 377
9 Kidd, Licenses and Consents: where are we now?, 2006 L. & T. Review 140
10 [2005] 2 E.G.L.R. 42,
11 [1996] ECGS 153; in England and Wales consent to sub-letting is subject to the same test under the Landlord and Tenant Act 1988.
12 [1996] EGCS 118.
13 [2008] EWHC 1582 (Ch); [2008] 28 E.G. 113 (C.S.).
14 *i.e.* that consent cannot be unreasonably withheld.
15 *Burns v Morelli* [1953-54] Ir Jur Rep 50.
16 [1959] Ir Jur Rep 73.
17 Ir Jur Rep 73 at 75.[Emphasis added]

> *risk*. His refusal to take this risk cannot, in my opinion, be said to be unreasonable".

In a recent decision of the High Court, *Gerard Cregan, Joseph Gray v Taviri Limited*, [18] Charleton J. made the following *obiter* comments on the case-law in this area which reflect the position in *Curragh Bloodstock*:[19]

> "...It is a standard clause that protects the position of a landlord that a lessee should not assign the premises without the consent of the landlord. The phrase limiting that discretion, which "consent shall not be unreasonably withheld" is taken from s. 66(2)(a) of the Landlord and Tenant (Amendment) Act, 1980 . The case law in that regard is multifaceted and goes back to the 1930s. In essence, however, the decisions of the courts come down to the same thing; that it is unreasonable for a landlord to withhold consent where the use of the premises is to be the same or similar to that employed by the current tenant and where the investment of the landlord in property will be shown to yield the same economic return, without damage to the premises, that is proposed to be demised by assignment. Consent to assignment of a lease would be unreasonably withheld where the landlord will be receiving from the new assignees the same benefit, in terms of financial reward and care of the premises, as from his or her current tenants".

There are also some English authorities which deal with the issue. It must be reiterated, however, that in England and Wales, under Section 1(6) of the Landlord and Tenant Act 1988, it is for the landlord to show that his refusal of consent was reasonable. [20]

In *Kened Ltd. v Connie Investments Ltd.*,[21] the landlord company objected to the proposed assignee of a lease for a hotel on the grounds that they were not being offered the guarantee for the remainder of the lease of a surety with adequate assets in the country visibly being of sufficient financial status and standing. The Court of Appeal (Millet LJ) held that the test to be applied was an objective one, *i.e.*: whether no reasonable landlord could have withheld consent for the reasons stated by the landlord; the court was not entitled to substitute its own view for that of the landlord. Millet LJ stated that an "acceptable replacement surety" means a replacement surety which is objectively suitable for acceptance by a reasonable landlord. He held that the judge at first instance had correctly come to the conclusion that the landlord could not insist that the new surety be every bit as good as, *still less better than* the existing surety.

It seems, therefore, that in assessing the reasonableness of the refusal of consent, the court will not allow a landlord to insist on a tenant or guarantor of *better* financial standing, but he will be entitled to ones of similar or equal financial standing to the current tenant/guarantor. He is entitled, in essence, to be safe in the knowledge that the rent will be paid, and that any guarantor is capable of stepping in if necessary. It is submitted that the focus of the "good financial standing" test should be on the ability of the proposed assignee to pay the rent as set in the lease in question and the proposed guarantor to step in if necessary, rather than on a comparison of their financial position and the current tenant/guarantor's financial position. So, for example, if a landlord's current tenant is exceptionally profitable, it should not be reasonable for him to refuse consent where a proposed assignee was in merely a less profitable business than the current tenant, but still more than capable on the evidence of paying the rent as set in the lease. Conversely, it should not be unreasonable for a landlord to refuse consent where the current tenant is in danger of insolvency, but the proposed assignee is in a slightly better financial position. The emphasis should be on evidence of ability to pay the set rent into the future, and of any guarantors to be able to step in. The courts should take a common sense approach which reflects commercial reality for a tenant. Accordingly, the landlord's entitlement to be sensitive to the financial standing of his tenant ought to diminish the further the proposed assignee and his guarantor are from a realistic risk of insolvency

It is submitted that the adequacy of the financial information provided to the landlord will be a factor to be taken into account. Landlords will ask for, and should generally be entitled to receive relatively comprehensive accounts, statements of affairs, and/or business references of the proposed assignee and guarantors which properly evidence their financial standing and ability to pay rent into the future, so that the landlord can make an informed and timely decision. In practice, and in the event of a dispute, expert evidence would probably be needed on the quality and sufficiency of the financial information provided by the tenant and proposed assignee/guarantor to the landlord in an application to assign the premises. It has been suggested in the UK that as a rule of thumb, property professionals often look for profit of at least three times the rent. However, practitioners have been warned off blindly applying this "test" without conducting a more sensitive analysis,[22] and the courts have also cautioned against looking at the accounts alone, without considering all of the surrounding circumstances.[23] Solicitors for the current tenant and the proposed assignee (or guarantors of the proposed assignee) should in the least ensure that applications to the landlord should contain the following basic financial information to show an ability to pay rent into the future:

- Detailed and up to date accounts
- Recent annual returns and companies registration office print-outs (if a company)
- Business references
- Statements of affairs

That information should be assessed by the landlord in light of all the surrounding circumstances.

18 Unreported, Charleton J, 30 May 2008
19 [2008] IEHC 159 at paragraphs 14 and 15.
20 It must also be noted that that statute also deals with consent to sub-letting and so the English caselaw in that area is also of relevance.
21 [1997] 1 EGLR 21.
22 *Footwear Corp Ltd v. Amplight Properties Ltd* [1999] 1 W.L.R. 551.
23 *Old English Inns PLC v Brightside Ltd*, The Times, June 30, 2004.

## Delay in Decision Making by a Landlord and Loss of a Potential Assignee

Clearly the decision to consent to an assignment is a serious one for any landlord. He will need time to consider the financial standing of the proposed new tenant and any guarantors, and to what use the property is to be put, and all the surrounding circumstances. On the other hand, the situation for the tenant may be urgent; his business may be in danger and he may be desperate to assign the lease as quickly as possible. The new assignee may also need the premises quickly, and might lose patience if a landlord is taking excessive time to make a decision or imposing what the assignee might deem to be overly burdensome and unreasonable conditions.

Situations have arisen where a tenant has applied to the landlord to assign, but the proposed assignee backs out as a result of delay by the landlord in making a decision, with consequent financial loss to the tenant. In England and Wales, tenants have successfully sued the landlord for damages in these circumstances. It must be pointed out that there is a statutory obligation on landlords in England and Wales under s.1(3) of the Landlord and Tenant Act 1988 to make a decision on consent within a reasonable time, however it is submitted that such a duty also implicitly exists in this jurisdiction. In *Norwich Union Life Insurance Society v Shopmoor Ltd.,* Sir Richard Scott VC pertinently commented that:[24]

> "...there seems to me to be no reason of convenience why the ability of the landlord to still keep in doubt the entitlement of the tenant to assign should survive any longer than the reasonable time which the landlord may need for considering the tenant's application for consent".

To avoid doubt, and in the absence of an express statutory duty on landlords in Ireland, commercial leases usually contain a clause stating that decisions on consent to assignment should be made within a reasonable time. What is a reasonable time depends on all the circumstances of the case.

*Blockbuster Entertainment Ltd v Barnsdale Properties Ltd.*[25] is an example of a successful claim by a tenant for damages for loss of a potential sub-lessee because of unreasonable delay by the landlord. There, the claimant (the tenant) was the lessee of commercial premises belonging to the defendant (the landlord). The tenant sought to sublet the upper floors of the premises for use by a local college. It granted the college a licence to use the premises and contacted the landlord on 28 May 2002, seeking its consent in relation to the underlease. By late June, the college had become anxious about the delay and the tenant sent a draft underlease to the landlord, stating that the landlord was under a statutory duty, pursuant to s 1(3) of the Landlord and Tenant Act 1988, to give its consent within a reasonable time to the proposed subletting arrangement. The landlord failed to grant its consent to the underlease until late July, at which time the college withdrew due to the delayed response. The tenant was successful against the Landlord in its action for damages for the financial losses suffered as a result of the loss of the sub-lease.

What, then, is a reasonable time to make a decision? In *Go West Ltd v Spigarolo*,[26] the court stated that the reasonable time should be measured in weeks rather than months. In *Mount Eden Land Ltd v Folia Ltd and another*,[27] the judge indicated that the urgency of the application is a factor to be taken into account, and hence more urgent cases should be dealt with more quickly. Indeed, in one case, the court held that having received all the relevant information, the landlord should have made his decision within a week.[28] However, in *NCR Ltd v Riverland Portfolio No. 1 Ltd (No.2)*,[29] the Court of Appeal took a more lenient approach to the amount of time taken by the landlord. There, the judge at first instance held that a period of over two weeks was unreasonable in the circumstances. The Court of Appeal disagreed, and Carnwath LJ made some interesting observations in the course of his judgment.

First, he stressed that a clear distinction needed to be drawn between informal exchanges, both internally and between the parties, and the formal process of application and decision contemplated by the Act. He seemed to suggest that the courts should have regard to the *formal* application by the parties in considering what the relevant dates were:

> "On the one hand, it is in all parties' interests that there should be such free exchanges, with a view to reaching an agreed solution, without prejudicing their respective positions under the Act. On the other hand, the serious legal consequences resulting from the statutory scheme require that the process of application and decision should be subject to a reasonable degree of formality. For this reason, although we were taken to exchanges of e-mails within the two groups, and between the parties, both before and after 28 July, I gain very little assistance from either. The judge was right, in my view, to treat Herbert Smith's [solicitors for the applicants] letter of 28 July as being the point at which NCR's application was in a form that required due consideration by Riverland".

Secondly, he stated that the judge at first instance was too ready to categorise the decision as being an uncomplicated transaction capable of summary treatment. Indeed, his view of the relative simplicity of the issue sat oddly with the overall effect of his judgment, which was that Riverland (the landlord), even with the assistance of experienced legal advisers, arrived at the wrong answer and thereby incurred a lawsuit involving a claim of some £3m. He stressed that the application was complicated and "raised unusual financial, legal and estate-management issues that merited serious consideration". Less than three weeks could not be said to be unreasonable for this process. He also pointed out that the under-lessee in this case, when pressed, was prepared to

24 [1999] 1 WLR 531, 545
25 [2003] EWHC 2912.
26 [2003] ECWA Civ 17; [2003] 2 W.L.R. 986.
27 [2003] EWHC 1815 (Ch).
28 *Blockbuster Entertainment Ltd v Barnsdale Properties Ltd,* [2003] EWHC 2912.
29 [2005] 2 E.G.L.R. 42

wait a longer period of time and accordingly, it was not very urgent that the decision be made quickly.

Solicitors for tenants should take particular heed of the comments of Carnwath LJ (above) relating to formal and informal exchanges. They should make abundantly clear in correspondence when the formal application to assign is being made, and applications should be very comprehensive, including all the necessary financial and other information discussed above. They should also be very wary of using e-mails in the formal application process, as the Court in *Riverland* was reluctant to "start the clock running" against the landlord from the date e-mails were sent informing him of the intention to assign, preferring a reasonable degree of formality in the form of letters. If the application is urgent, that should be explained at the outset and fully justified, in order to exert maximum pressure on the landlord.

Kidd further advises solicitors for landlords as follows:[30]

> "The advice to landlords should therefore be that all applications must be dealt with as quickly as possible. If a month has passed from the date the application was first made, alarm bells should certainly be starting to ring. If the landlord has made genuine requests for further information which is necessary to make a decision, then once that information is to hand, it should be prepared to make a decision very quickly. If a landlord exceeds the "reasonable time", it will be taken to have unreasonably refused consent, regardless of the reasons it could have relied on".

## Remedies

Where a landlord has refused consent to assign, or delayed unreasonably with the resultant loss of a potential assignee, a tenant can sue for a declaration that that consent has been unreasonably withheld and damages, if appropriate. The cases in England and Wales demonstrate that the measure of damages will be the tenant's reasonably foreseeable losses as a result of the landlord's breach of duty. For example, in *Blockbuster Entertainment Ltd v Barnsdale Properties Ltd*,[31] the landlord delayed unreasonably and a potential sub-lessee withdrew from negotiations. Damages were assessed on the basis of the loss of rent which the tenant would have received under the sub-lease until it was able to relet, plus rates and insurance. In all, for an intended sub-lease of £56,000 per annum, the damages amounted to over £70,000.

Furthermore, in certain cases in England and Wales, exemplary damages have been awarded. In *Design Progression Ltd v Thurloe Properties Ltd*,[32] Peter Smith J. held that the landlord's conduct had been deliberately designed to frustrate the proposed assignment in order to secure a surrender of the lease (because the landlord hoped to relet on more favourable terms). To mark the court's disapproval, he awarded an additional £25,000 in exemplary damages. Such damages will be available if the tenant can show that the landlord has deliberately breached its statutory duty in the hope of making a profit or gaining some other advantage.

Clearly, there are serious risks for the landlord in delaying too long after an application to assign has been made. It is unclear what approach the Irish courts would take to actions such as these; however it is submitted that there is no reason why such a remedies would not be open to aggrieved tenants in this jurisdiction who have lost potential assignees and suffered financial loss as a result.

## Conclusion

There is a relative dearth of Irish authority on what will constitute an unreasonable refusal by a landlord to a potential assignment. However, the English and Irish authorities taken together seem to suggest that in assessing the financial standing of a proposed assignee or guarantor, a landlord is entitled to evidence that he will get the same or similar financial return on the property that he has been receiving under the current lease. It has been argued that the focus of the "test" should be on the ability of a proposed assignee to pay rent into the future, and a proposed guarantor to step in if necessary, rather than a comparison of their financial strength with the current tenant. It is clear that a landlord cannot seek to improve his position under the existing lease, nor can he seek to renegotiate the terms of the lease, but that certain conditions imposed may be deemed to be reasonable.

On the issue of delay, the English authorities make clear that a landlord must be very careful when he receives an application to assign the property, and focus his mind on the application immediately, with appropriate legal advice. On the other hand, tenants must prepare comprehensive applications. In particular, accounts and financial information provided on proposed assignees and guarantors should be very detailed, and if the matter is urgent, that should also be clearly communicated to the landlord. Formal applications should be made by letter and not by e-mail. Indeed, tenants should be wary of relying on e-mail correspondence in the formal application process and avoid it if possible.

Having regard to the current economic climate, many commercial tenants with high rents to pay and whose businesses face challenging times may seek to assign their leases to other parties. Landlords, tenants, potential assignees, guarantors, and indeed their legal representatives should bear in mind the principles established in the case law both of this jurisdiction and of England and Wales when entering into negotiations for consent to assign leasehold interests. ■

30 Kidd, Licenses and Consents: where are we now?, 2006 L. & T. Review 140 at 142.
31 [2003] EWHC 2912.
32 [2004] 1 E.G.L.R. 121.

# Rimini Cricket

# The Bar Soccer Trip 2010

Conor Bowman BL

The hospital system in Rimini is impeccable. For 'cobblestone' injuries the technology has progressed to a level where the injured party can be shaved, stitched, comatose and drip-fed within minutes of arriving at the A&E Department (in Italian the 'E' stands for Elbow).

The sumptuous surroundings of the truly palatial Grand Hotel were a mere taxi ride away from where the Bar Soccer Club were billeted for the duration of the Whit break stay in the city known as the Tramore of the Adriatic. This choice on the part of the tour organisers was inspired; it had the effect of keeping most of the travelling party out of the clutches of the "Artistes" in the purported nightclub beneath the Grand Hotel itself. While the serious lawyers discussed whatever serious lawyers discuss across the sea in Dubrovnik, we contented ourselves with pleasures of an altogether different hue; the pursuit of footballing excellence.

It is fair to say that some of the soccer trips are not mostly about soccer, however this year was quite different. On the evening preceding the match, we were lured by our hosts to a restaurant at the end of a long pier. There we were plied with alcohol, fish and table conversation of the slit-your-wrists-from–the-shoulder-down variety. We were bored to glaze-over-ville with threats to bring us to see mosaics and printing museums before dessert. The evening was capped by a bizarre episode in which a man with peach pants tried to attack one of our own group using a butchered version of a U2 song. Members of the San Marino Secret Service were quick to intervene just before things got nasty.

At the appointed time on the Friday (one hour ahead of Ireland, but several hours too early for the Italians) the match was played in the unbelievable simmering cauldron that is the Parko Publico de Suburbia Mancini. The play began ebbing and flowing like a smooth-but-spluttering end-of-barrel Furstenburg finale. Then, suddenly and without warning, the spectators were treated to what can only be described as an absolute cracker of a contest. It was the stuff of black and white television matches from the 1950's; all honest endeavour and not a sniff of amphetamines or transfer fees.

Zero-Zero at half time became 1-0 to the Bar, after an outrageous scything tackle on one of our lads in the Italian penalty area. The referee pointed to a spot near the spot and from the resulting spot-kick (also from a spot near the penalty-spot) we got to the aforementioned score-line. The tension in the tackles increased and it seemed at one stage that trouble might erupt, however an Alternative Dispute Resolution expert who had flown in especially for the occasion (from the Balkans) saved the day with some razor-sharp suggestions. Then the Italians scored; it was a combination of a lucky cross, followed by a fortuitous back heel, allied to a gammy strike from thirty-eight yards, which led to the fluke goal.

The final portion of the match was edge-of-the-seat stuff (particularly for those with seats). Hectic defending by the Italians seemed to have secured a point for them, and then the patience and hard-nosed stick-to-it-iveness of the Irish players paid off. A half-chance was all he needed and then, after ghosting in at the right hand side of the penalty box, one of the Tour Operators (within the meaning of the Act) belted the ball into the net to clinch the win with moments remaining. It was deserved and fitting and magical and everything else we had dared to hope it might be, and more.

Our trip ended with pizza and Chianti and an opportunity to see that the whiting was on the wall in the ancient fish market. All thoughts of cobblestones and head injuries were hoovered up into the Italian sky in a haze of rum and pineapple and hot chocolate and the smile of the goddess on the terrace of the Grand Hotel (just down the road, actually, from where we were all staying!). Sometimes it's not cricket but you're all out for six when you have a maiden over. ■

# Book Review

BILL HOLOHAN

***Landlord and Tenant Law—The Residential Sector***

*by Una Cassidy BL and Jennifer Ring, Solicitor*

*Published: June 2010; Round Hall, Thomson Reuters; price: €185; HB; ISBN: 978-1-85800-502-7*

Ms. Justice Mary Laffoy in her Foreword, (no doubt thinking of the case of *Canty v. The PRTB*, (2007), in which case she described the Residential Tenancies Act 2004 as "an extremely complex piece of legislation" and "as being very technical and confusing"), says "... in 2007 I had to get to grips with the intricacies of the 2004 Act. I would have been very grateful then for the analysis and guidance which this text provides."

Any practitioner now trying to "get to grips with the intricacies of the 2004 Act", as now amended, should be very grateful indeed to the authors, who in their Preface say that the aim of their text "is to simplify the complexities of the RTA 2004", an objective which they have achieved, with deceptive ease. To have made the complex provisions of the Act appear relatively simple, is a major achievement. As a member of the Disputes Resolution Committee of the Private Residential Tenancies Board who sits on PRTB Tribunals on an almost weekly basis, I am painfully aware of the fact that regularly, even lawyers who appear on behalf of parties to hearings, are obviously "finding their way in the dark" when trying to find their way through the intricacies of the Act.

On a regular basis, I am also party to learned and lengthy debates between PRTB members as to the exact meaning and effect of the "complex" provisions of the many sections of the 2004 Act. Jurisprudence is still developing in that respect, but if the one eyed man or woman is king or queen in the land of the blind, then the authors are undoubtedly to be regarded not as mere royalty, but Empresses.

I know of no lawyers who could possibly claim to have a greater degree of knowledge of the RTA 2004 than the authors. That they have chosen to share that knowledge is something for which all those involved in the residential tenancy market should be deeply grateful. For those who are still "finding their way in the dark" the Authors have illuminated the pathways to knowledge. They are to be commended in unrestrained terms for providing the means for everybody who might have reason to come to grips with the Act, and not just lawyers, to gain an understanding thereof. They have also, very helpfully, included a number of appendices including a draft residential tenancy agreement, draft form of rent book, draft form of rent review notice, various drafts of warning notices and notices of termination, as well as a number of court forms. These are invaluable.

There are a small number of matters on which the authors have not commented, but perhaps this is because these areas have not yet been the subject of reported cases, and comment may yet be premature. As Judge Laffoy herself said in her foreword, "I have no doubt that this text will become the standard work on landlord and tenant law in the residential sector... It is to be hoped that it will be kept up to date in later editions, as the 2004 Act is amended and as the jurisprudence develops." ■

*Bill Holohan (co-author of* Bankruptcy Law *with Mark Sanfey SC: new edition is forthcoming in the Autumn 2010)*

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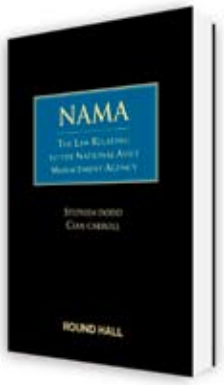


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