The Bar Review

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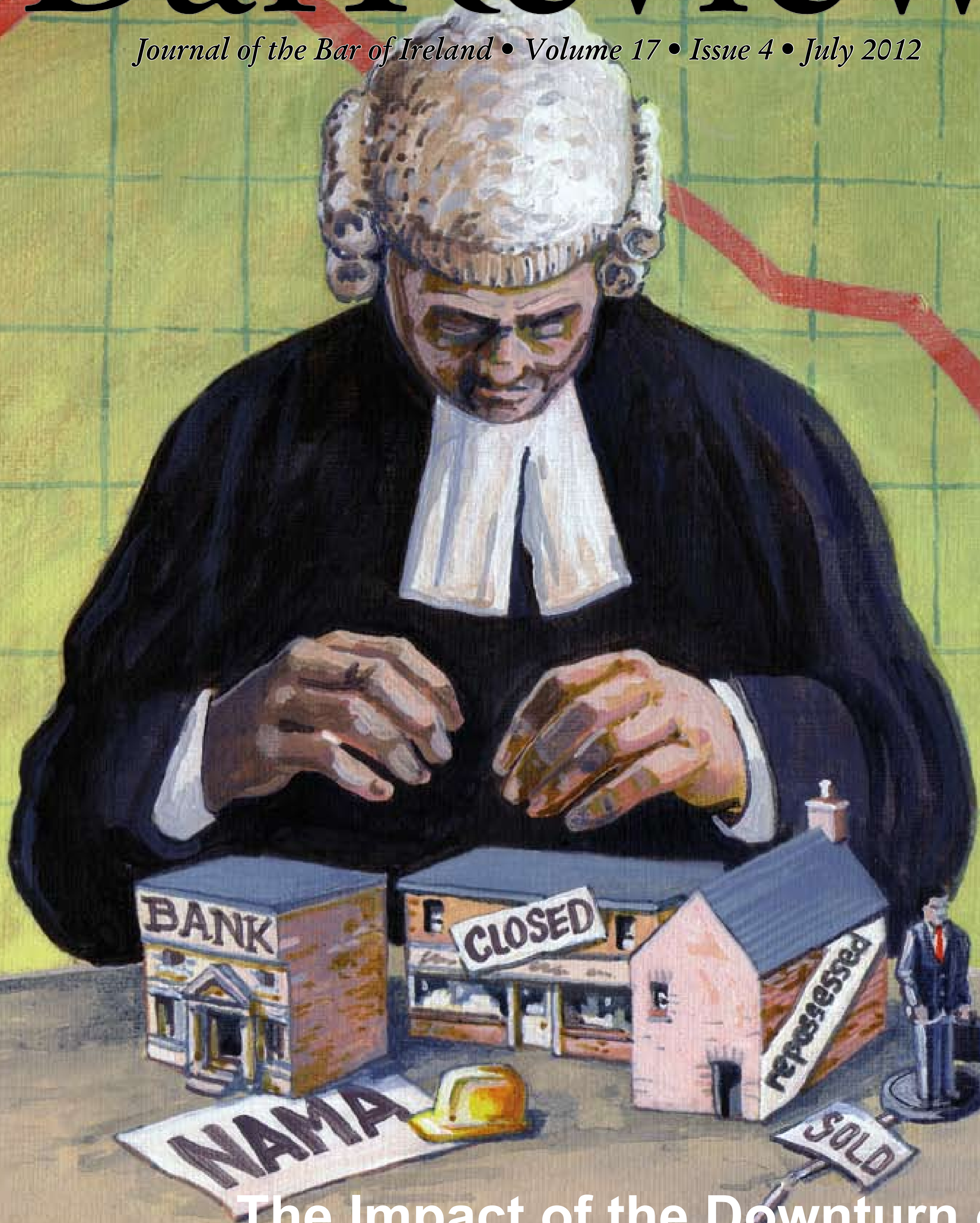

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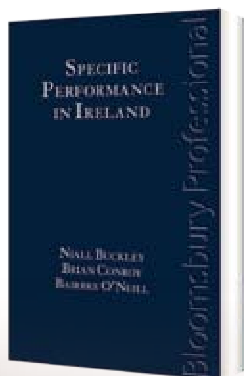

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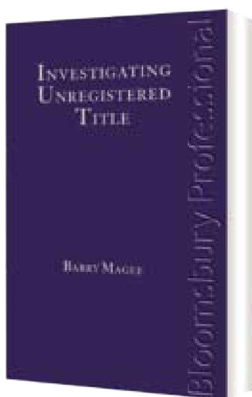

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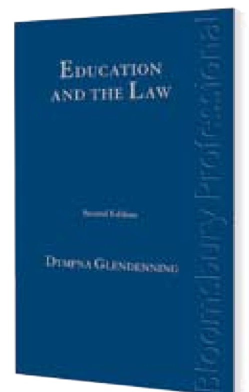

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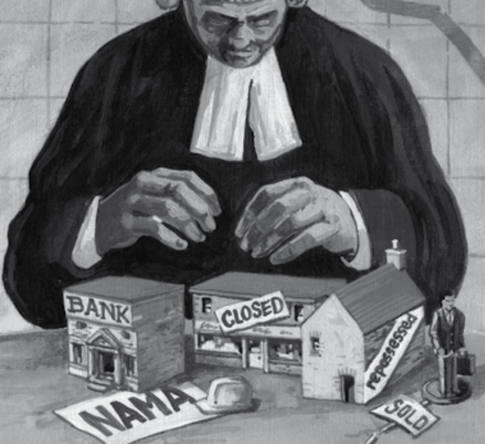

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Contents

74 Costs in Criminal Trials. The end of a centuries- old rule?
Diana Stuart BL

76 Undoing 'I do' in the European Union: New rules for Divorce
By Grainne Farrelly

80 The Impact of the proposed Victims Rights Directive on the Criminal Justice System
Matthew Holmes BL

83 The Life of Cecil Lavery
Charles Lysaght, Honorary Bencher of Kings Inns

liii **Legal Update**

85 The Impact of the Irish Economic Downturn on Litigation in Ireland and the UK
The Honourable Mr Justice Frank Clarke
Tomás Keys BL

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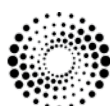

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Costs in Criminal Trials. The end of a centuries-old rule?

Diana Stuart BL*

A recent decision of the Court of Criminal Appeal in *Bourke Waste*[1] heralds an end to what was described in 1969 in *Bell*[2] by Walsh J as the "*centuries-old rule, that an accused person who is acquitted at a trial on indictment*"[3] was not entitled to costs. In the *Bell* decision, the Supreme Court interpreted Order 99 of the then Rules of the Superior Court 1962 and Section 14(2) of the Courts (Supplemental Provisions) Act 1961 as granting to the Central Criminal Court jurisdiction to award costs to an accused in a criminal trial. Walsh J agreed in *Bell* that the phrase "every proceeding" in the then Order 99 Rule 1 sub-rule (1) of the 1962 RSC included criminal as well as civil proceedings. Unlike civil proceedings however, the principle that costs follow the event does not apply to criminal proceedings[4]. As the issue in *Bell* was confined to the question of the jurisdiction of the Court to make such an order, the principles that should guide a judge as to what circumstances would merit such an order being made were not considered.

Since the *Bell* decision until recently, there have been remarkably few decisions which deal with this issue. This may well be because the vast majority of accused since then were in receipt of legal aid, which would preclude such an application being made. Anecdotally, it seems that applications were generally only made where the accused was acquitted by direction of the trial judge. The perception was that only such an acquittal could justify such an application. Applications when made, were dealt with in a very perfunctory manner by the parties and indeed by the Court. Until recently, no substantial judgments were delivered setting out the reasons for the granting or refusing of such an application or indeed the principles relied upon.

This state of affairs has changed in recent years in that a number of reserved and fully reasoned judgments have been delivered[5]. These reflect the greater complexity of modern criminal litigation involving as it now frequently does, the prosecution of corporate bodies as well as individuals for breach of *inter alia* competition law and health and safety legislation. The necessity to give reasons for the refusal or indeed granting of a costs application was highlighted by McCarthy J in judicial review proceedings entitled *F -v- Judge Murphy*[6]. The Court of Criminal Appeal in the *Bourke Waste*[7] case has taken the opportunity to consider all these recent decisions and to provide some authoritative guidance as to what criteria should be applied by the trial court in assessing an application for costs.

This judgment came about as a result of an appeal by the DPP pursuant to Section 24 of the Criminal Justice Act 2006. This section enables the DPP to appeal against an order for costs made where a person tried on indictment is acquitted and awarded their costs. Curiously enough, this provision does not appear to afford the accused person the same right of appeal where there is a refusal of costs[8].

In *Bourke Waste*[9]*,* three companies and five individuals were accused of breaching the Competition Acts in relation to the provision of domestic waste collections services in Co Mayo by sharing the available market and its customers. All of the accused were acquitted by the jury following the refusal of the trial judge to grant them directions. The accused applied for their costs which were awarded by McKechnie J. In a reserved decision[10], the Trial Judge comprehensively set out his reasons for so doing and the principles relied upon. The judgment also referenced another recent decision of the Central Criminal Court, *DPP v Kelly*[11]. In *Kelly,* the accused had been acquitted by a jury of murder and Charleton J refused him his costs having assessed the merits of the application by reference to a number of different criteria. In *Bourke Waste,* McKechnie J. set out in an abbreviated form the criteria adopted by Charleton J. Essentially these were whether the prosecution was justified; whether the investigation gave rise to the existence of a serious doubt as to guilt; whether there had been an abuse of the accused's rights which may have affected the reliability of a confession; whether there was an acquittal by direction of the trial judge which was based upon an abuse of the accused's rights and finally whether the DPP had prosecuted on a wrong premise, whether in fact or law. However, McKechnie J. differed from Charleton J. as to the significance to be placed on the fact of the accused's acquittal. Whereas Charleton J. saw it as a neutral factor, McKechnie J regarded it as the starting point and concluded that the accused were entitled to their costs notwithstanding that their acquittal was by the jury as opposed to by direction.

*With thanks to Patrick Gageby SC

1 *DPP v Bourke Waste Removal Limited and others*, CCA on 24th May 2012, *supra*
2 *The People (AG) v Bell* [1969] IR 24, *supra*
3 *Ibid* at page 51
4 As so held by McKechnie J in *DPP v Bourke Waste Removal Limited and others* [2010] IEHC 122, that sub-rules (3) and (4) of O.99 RSC 1986 do not apply to criminal cases.
5 Including *DPP v Kelly* [2008][3 IR 202, *DPP v Bourke Waste Removal Limited and others* [2010] IEHC 122, *DPP v McNicholas and others* [2011] IECCC 2
6 *F v Judge Murphy* [2008] 1 IR 619
7 *ibid*
8 This lack of parity is the subject of a constitutional challenge arising from Charleton J's decision in *DPP v Kelly* [2008] 3 IR 202.
9 *ibid*
10 *DPP v Bourke Waste Removal Limited and others* [2010] IEHC 122
11 *DPP v Kelly* [2008] 3 IR 202

The jury had returned after a very short time deliberating on an indictment containing 20 counts against 7 parties[12].

The DPP appealed the awarding of costs and the matter came before the Court of Criminal Appeal which delivered a reserved judgment on the 24th May 2012 upholding the Trial Judge's ruling. It did so having analysed the criteria adopted and the conflicting approaches taken by the trial judges in the *Kelly* and *Bourke Waste* cases and also by reference to a recent *ex tempore* decision of its own, *DPP v Hanley Pepper*[13]. In the *Hanley Pepper* case, the defendants were tried before the Circuit Criminal Court in relation to alleged breaches of the Safety Health and Welfare at Work Acts arising from the collapse of a partially installed staircase on a building site which had led to the death of a workman. They were acquitted by direction of the Trial Judge who awarded them their costs. The DPP's appeal against the award of costs in that case was dismissed by the Court of Criminal Appeal. Mc Kechnie J, who was presiding, having stated as follows:

> "We are satisfied that in an appeal against a discretionary order made by a trial court an appellate court should not interfere with the exercise of that discretion unless it was satisfied that such exercise was substantially flawed or was such as in the interests of justice ought to have the resulting order set aside."[14]

In the judgment in the *Bourke Waste*[15] case, which was delivered by Hardiman J., the Court of Criminal Appeal referred to Charleton J.'s decision in *Kelly* and proposed the following four questions which should be considered where an application for costs is made:

> "(a) Was the prosecution warranted, both in regard to the matters set forth in the Book of Evidence, what actually transpired at the trial, and what responses were made by or on behalf of the defendants prior to the trial?
> (b) Had the prosecution conducted themselves unfairly or improperly in relation the defendants, by oppressive questioning or otherwise, and had the prosecution been pursued with reasonable diligence and expedition?
> (c) What was the outcome of the prosecution? If an acquittal, was this on foot of a direction granted by the Trial Judge, and if so, on what basis?
> (d) How had the defendants met the proceedings, both prior to and at trial, and had they associated themselves with undesirable elements, or otherwise contributed to drawing suspicion on themselves?"[16]

The questions proposed signal the Court's approval of a logical and reasoned approach to a subject that for so long was without any real principled guidance. Of greatest significance, perhaps, in the judgment is the Court's conclusion that the actual result of the prosecution is the most important consideration regarding the award of costs. The Court upheld the approach of McKechnie J who had stressed that the acquittal of the accused is the starting point of any inquiry as to costs and is to be considered in conjunction with the other relevant circumstances. In so concluding, the Court disagreed with the approach of Charleton J. in the *Kelly* case and as followed by Cooke J in *McNicholas*[17] to the effect that an acquittal is simply a neutral fact, so far as the exercise of the discretion to award costs is concerned. In elevating the outcome of the trial to the principal factor to be taken into account, the Court was not in any way seeking to fetter the discretion of the trial court. The judgment recognised that an acquittal by a direction on a technical point might properly not merit an award of costs whereas, as in the present case, an acquittal by a jury following the refusal of a direction might nonetheless justify such an award. This may be particularly apposite in a competition law case where the presumptions in favour of the prosecution give a jury acquittal a far greater significance than in an ordinary criminal trial.

The Court also rejected the suggestion that the prosecuting authority should enjoy any special position or immunity so far as the decision whether to award costs or not was concerned. Such an approach suggestive of the old notion of Crown prerogative would be contrary to the concept of parity of treatment as and amongst all litigants as set out in the Constitution and as reflected in the jurisprudence of the Superior Courts in the last 40 years.

Discretion

In the final analysis, the Court concluded that the decision to awards costs was the exercise of a discretionary jurisdiction and would only be interfered with by an appeal court where some error of principle was identified. As well as referring to the Court's own decision in *Hanly Pepper* (referred to above), the Court also referred with approval to a decision of Hedigan J in *F v Judge Murphy*[18]. This was a judicial review of a Circuit judge's refusal to award costs where she had granted a direction. In refusing the application, Hedigan J stated as follows:

> "In exercising her discretion, the first-named Respondent had the considerable advantage of having been the Trial Judge in the proceedings, and was best placed to determine the application for costs. Her finding that the direction given by her in the trial was given on technical grounds is parsed far too closely by the applicant in these proceedings. Whether she characterized the nature of the direction as technical or due to an inherent flaw in the technical evidence or indeed as a matter of both is again something that I consider within her jurisdiction. Nobody could be better placed than the Trial Judge to make such an assessment."

While this was stated in the context of a judicial review

12 The total time taken for deliberation by the jury was approximately 50 minutes, for a case which had been presented over eight days.

13 *DPP v Hanley Pepper Ltd and Michael Jackson,* CCA, *ex tempore,* 28th March 2011

14 At page 3 of the decision

15 *ibid*

16 *Ibid* at page 4 of the decision

17 *Ibid* (another competition law case involved hedgecutters in Mayo)

18 *F v Judge Murphy* [2009] IEHC 497

application, there is no reason why the approach would not be equally applicable in an appeal. It seems therefore that a very heavy burden rests with the DPP in attempting to successfully overturn a decision to award costs.

Conclusion

The Court of Criminal Appeal decision in *Bourke Waste*[19] is a welcome clarification of the law in an area where there has been little definitive guidance and indeed where it could be said that such guidance as existed was not always consistent.

19 *ibid*

Up until this decision, many lawyers might have felt that unless a direction was granted, a successful application for costs was unlikely to be entertained. In future, it will be necessary to look at all the circumstances giving rise to an acquittal, whether by direction or by a jury in order to assess whether a costs application is likely to succeed or not. The four criteria identified in *Bourke Waste,* while not exhaustive, provide a firm template in which to assess the merits of a particular application, bearing in mind that the outcome of the proceedings is the most important consideration and the starting point of any inquiry into an application for costs. ■

Undoing 'I do' in the European Union: New rules for Divorce

By Grainne Farrelly*

Introduction

About one million couples file for divorce in the European Union (EU) every year.[1] If the individuals concerned possess differing nationality or residence or are living abroad, they must navigate a messy legal quagmire to obtain a legal dissolution.[2] Half the Member States of the EU have agreed a way forward that will now leave the laggards, including Ireland, behind.[3] They will apply new rules from June this year that will allow couples to choose which law applies to their divorce.[4] Divorcing couples, under this regime, will be able to choose which Member States' laws deal with the case. If they disagree, the law of the Member State with the closest links with the couple will apply to the case. Despite this new development, divorce law in Europe continues to lack a coherent framework and does not provide a sufficient degree of legal certainty to parties seeking a divorce. In this article, I will highlight the legal issues associated with divorce in the EU that have brought about this remarkable two track approach and show that the introduction of the new rules may have introduced additional uncertainties to an already difficult situation

EU Role

The main focus of the EU's involvement in divorce matters is to ensure decisions made regarding divorce in one Member State of the Union can be implemented in another. This may be relatively straightforward when all matters related to the divorce involve only one Member State. However, in divorce proceedings in the EU, both parties in the relationship may originate from different Member States and then live in a third Member State[5] This places considerable importance on rules for choice of jurisdiction, forum and applicable law. Further obfuscation arises because of the considerable disparity in policy together with differing historical and cultural approaches to divorce law, in the Member States of the EU.[6] The spectrum ranges from Malta, the most recent EU Member to introduce restricted divorce, to Ireland which allows divorce but in limited circumstances, to the Nordic countries where divorce can be obtained in a very short time and with much less constraints. There are also significant differences between the EU Member States with regard to substantive divorce legislation. These differences arise, in no small part, from the different ideological positions and different family policies espoused by the various

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1 Eurostat http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Marriage_and_divorce_statistics (Last accessed 060612)

2 170,000 of the 875,000 divorces (20%) are between international couples. Ireland does not hold information regarding the nationality of spouses getting divorced. (Commission staff working document - Annex to the proposal for a Council Regulation amending Regulation (EC) No 2201 - Impact assessment {COM(2006) 399 final} {SEC(2006) 950}).

3 Spain, Italy, Hungary, Luxembourg, Austria, Romania, Slovenia, Bulgaria, France, Germany, Belgium, Latvia, Malta and Portugal.

4 Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation Article 5.

5 Published on The EU business web site (23/1/10) *EU split over divorce law for mixed-nationality couples - http://www.eubusiness.com/news-eu/justice-divorce.2e6* (last accessed 150512)

6 T.M.C. Asser Instituut*, Practical problems resulting from non-harmonisation of law rules in divorce matters JAI/A3/2001/04, Final Report,* (T.M.C. ,The Hague, The Netherlands, December 2002)

Member States.[7] Ireland, exhibits its own rather exacting constitutional concepts relating to the balance between the public importance of marriage and the autonomy of the spouses in the divorce process, which would not be shared in other Member States.[8] The upshot of all this is that there are considerable complications in endeavouring to harmonise and unify family law matters at EU level.

Uncertainty

Each of the States of the EU has its own legislation in all areas of family law. [9] The EU regulatory framework for divorce separates legal status, property and maintenance support issues in a way unfamiliar to common law practitioners.[10] Proceedings relating to the marital bond itself are regulated separately to the recognition of maintenance and property issues, even though status proceedings may include rulings on relevant financial matters.[11] Maintenance matters are regulated under a recently introduced maintenance regulation,[12] whereas a proposed regulation on matrimonial property is still at the drafting stage.[13] The EU Regulation on the recognition and enforcement of maintenance obligations highlights the manner in which financial aspects of the marriage relationship may be viewed from an EU perspective.[14] In the EU context, a maintenance obligation relating to a marriage relationship may be considered like any other asset related claim. The matrimonial property proposals under discussion tend to lean more towards the 'community property' systems where property acquired during marriage becomes the joint property of the spouses, more favoured by civil law jurisdictions rather than the 'separate property' systems, which operate in common law jurisdictions. [15]

Council Regulation (EC) No 2201/2003 of 27 November 2003, (*Brussels II bis*) is the overarching EU legal instrument governing divorce.[16] This Regulation's objective is to harmonise Member States' rules of private international law in relation to jurisdiction, in addition to the recognition and enforcement of court judgements on divorce made in another Member State. However, the Regulation fails to tackle continuing difficulties relating to the operative law to try cases and makes no impression on the diversity of conflict of law rules that are applied. It provides that each of the Member States maintains their own substantive law in family matters. This means that there is great diversity with regard to conflict of law rules applied in the different Member States, during divorce hearings.[17]

Jurisdiction

The key weakness with Brussels II bis Regulation is that it fails to provide any prioritization to the list of circumstances under which jurisdiction may be claimed. Article 3 specifies jurisdiction shall lie with the courts of the Member State who meet particular criteria.[18] However, often several member States will potentially be eligible to attain jurisdiction of a divorce case.[19] The scenario of a couple that includes an Irish national seeking a divorce in the UK illustrates the problems that may arise. In Ireland, a divorce application can only be initiated after a minimum period of separation.[20] Nonetheless, if a party can satisfy the rules of jurisdiction to seek a divorce in England, they may obtain a divorce there much quicker. Effectively, the Regulation can be seen, in these circumstances, as facilitating avoidance of a Member State's jurisdiction on divorce and tends to encourage forum shopping.[21] Unfortunately, the new measure agreed under enhanced cooperation deliberately avoids addressing jurisdiction matters and deals only with applicable law issues. The reason this issue is effectively dodged is probably in order not to create further confusion and cut across the rules regarding jurisdiction which continue to be followed by all Member States, irrespective of the new rules.[22]

Lis pendens

When the case is considered properly before a court, the *lis pendens* rule may be invoked to avoid further conflict over jurisdiction.[23] This causes its own problems for the litigants because of the harshness of the implementation of this rule. The difficulties that this presents are well illustrated in the Irish High Court case of *YNR v MN*.[24] In this case,

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7 Antokolskaia M, *The Search for a Common Core of European Divorce Law: State Intervention v. Spouses Autonomy* (Vrije Universiteit Amsterdam, The Netherlands)

8 Article 41.3 Constitution of Ireland, sets out conditions that must be fulfilled before a court may grant a divorce

9 European Policy Evaluation Consortium (EPEC), *Study to inform a subsequent Impact Assessment on the Commission proposal on jurisdiction and applicable law in divorce matters DRAFT FINAL REPORT to the European Commission DG Justice, Freedom and Security* (Brussels, April 2006)

10 Harding. M, *The harmonisation of private international law in Europe: taking the character out of family law?* (Journal of Private International Law, 7 (1) (2011))

11 Ibid p8

12 Formerly Brussels I (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters)but this regulation was amended and maintenance is now regulated by Regulation 4/2009 EC [2009] .

13 COM(2011) 126/2 , *Proposal for a COUNCIL REGULATION on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* (Brussels, 16.03.2011)

14 Reg 4/2009 EC [2008]

15 Commission Européenne General Direction Justice and Home Affaires, Unit A3 Judicial Cooperation in civil matters, *JAI/ A3/2001/03, Study On Matrimonial Property Regimes And The Property Of Unmarried Couples In Private International Law And Internal Law*, (National Report Ireland)

16 This regulation repealed Regulation (EC) No 1347/2000 and is often referred to as Brussels II bis., Denmark does not participate in the adoption of the Brussels II regulation.- Articles 1 and 2 of the protocol on the position of Denmark annexed to the TEU Union and the TFEU, refers,

17 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 article 3

18 Council Regulation (EC) No 2201/2003 of 27 November 2003

19 *GREEN PAPER on applicable law and jurisdiction in divorce matters (presented by the Commission)* {*SEC(2005) 331*}

20 Family Law (Divorce) Act, 1996

21 *Proposal for a Council Regulation (EU) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation* {COM(2010) 104 final}

22 Ibid

23 McEleavy .P, *The Brussels II regulation How the European Community has moved into family law* (International and Comparative Law Quarterly 2002, v 51, n.4 October) p886

24 *Y.N.R v M.N* [2005] IEHC 335 per *O Higgins J*

the husband filed for divorce in France in November 2002 and the wife instituted proceedings in Ireland the following December 2002. The "main seat of the marriage" in the case was Ireland, and the land, bank accounts and other property were also in Ireland. The wife argued that she would not receive, in France, the same 'proper provision' protection she was entitled to under Irish law. However, Mr. Justice O'Higgins found that under Brussels II, the husband was entitled to bring proceedings in the jurisdiction of the French Courts. The Irish judge accepted that by bringing proceedings in France

> "... there were indeed consequences for the applicant which may well be different than those following a judicial separation under Irish Law."

Nevertheless, the Irish High Court ruled that it had no jurisdiction to hear the matter as the case was first before the French courts, which then had sole jurisdiction to hear the case. The *lis pendens* rule provides certainty for states as it removes conflict over jurisdiction.[25] This certainty is intended to facilitate the free movement of persons throughout the EU.[26] However, this somewhat rigid application of the rule, irrespective of its fairness when applied in individual cases, is an unfortunate and serious deficiency in this area.[27]

No Single law

When putative litigants overcome the jurisdictional issues and *lis pendens* complications, further hurdles confront them regarding the issue of the applicable law. This is the aspect that has been found as the most unsatisfactory aspect by many Member States and is the key issue that has led to the two track approach. Member States seized of a divorce case under Brussels II bis apply their own conflict of law rules.[28] Conflict of laws (or private international law) are the rules of legal procedure which specify the legal system and the legal jurisdiction which is applicable to a given legal dispute and apply when a divorce has a cross border element. [29] Specified applicable law rules are as "deep seated in some jurisdictions as application of local law is deep seated in others.'[30] Common law States like Ireland and the UK apply their domestic laws ("*lex fori*") to matrimonial proceedings.[31] Other states allow couples to specify the applicable law in martial agreements.[32] Many states will apply the divorce laws of other states in some circumstances.[33] All this increases complexity and can lead to a judicial result that does not correspond to the parties' legitimate expectations. To address the issue, some Member States have now agreed an EU level law which settles the question of applicable law in cross border divorce cases.[34] This law will apply only to the participating Member States under the enhanced cooperation mechanism provided in the Treaty of Amsterdam.[35]

New Rules

The new Regulation is intended to provide a clear, comprehensive legal framework with appropriate outcomes in terms of legal certainty, predictability and flexibility. [36] It allows the parties to choose the law for the litigation of the divorce within prescribed parameters. If the spouses agree, they can choose one of the following laws applicable to their divorce: the law of the State where the spouses are habitually resident at the time the agreement is concluded, or the law of the State where the spouses were last habitually resident, insofar as one of them still resides there at the time the agreement is concluded, or the law of the State of nationality of either spouse at the time the agreement is concluded, or the law of the state where the court is seized. If the spouses do not agree, then another mechanism applies providing for four options to decide the law applicable to their divorce or legal separation. In these circumstances, the law for the litigation will be determined in the following sequence: in the first instance the law will be that of the Member State where the spouses are habitually resident at the time the court is seized; or, failing that, the state where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seized, in so far as one of the spouses still resides in that state at the time the court is seized; or, failing that, the state of which both spouses are nationals at the time the court is seized; or, failing that, the state where the court is seized.[37] The scope of the new rules is very well circumscribed and they do not cover ancillary issues relating to a divorce or legal separation, such as property issues, maintenance obligations or parental responsibility. Also excluded are preliminary questions within the context of divorce such as the validity of the marriage.[38]

Outside the New Rules

Thirteen Member States, including Ireland, remain outside the new rules and continue with their own domestic conflicts of law rules to determine the law applicable to divorce or

25 Raitio. J, *The principle of legal certainty in EC law* (Kluwer Academic Publishers 2003) p 158

26 Free movement TITLE IV. Consolidated version of the Treaty on the Functioning of the European Union TITLE IV

27 Centre for Social Justice. *European Family Law: Faster Divorce and Foreign Law (*Centre for social justice 2009) p11

28 Ibid (discussed in point 2. Shortcomings Of The Current Situation)

29 Beale. J, *A treatise on the conflict of laws: a commentary on the Restatement of the Conflict of laws (*American law institute 1935) p20

30 Centre for Social Justice. *European Family Law: Faster Divorce and Foreign Law (*Centre for social justice 2009) p19

31 Ibid

32 Germany, the Netherlands, Spain and Belgium

33 Austria, France Germany the Netherlands Greece Italy Portugal and Spain

34 Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU) OJ L 189/12.

35 The Treaty of Amsterdam incorporated enhanced cooperation into the Treaty on European Union and into the Treaty establishing the European Community, in respect to judicial cooperation on criminal matters. The Treaty of Nice simplified the mechanism and the Treaty of Lisbon introduced additional procedures for its initiation.

36 Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation (2010/405/EU)

37 Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

38 Ibid

legal separation. In Ireland, the competent court always applies its own law. Ireland retains the right under the Treaties not to adopt family law instruments if they are not in compliance with Irish law[39]. In the case of the new rules, the fact that they could allow EU nationals, resident in Ireland, to obtain a divorce in Irish courts on substantially different and less onerous grounds than that provided for in the Irish Constitution could create constitutional difficulties for Ireland.[40] Such a change could cause legal complications in relation to the family provisions of our constitution,[41] and some controversy in relation to policy and public interest issues.[42] So the choice of jurisdiction continues to determine which law will be applied in a divorce case in Ireland and the other member states who have not adopted the new approach.

This situation makes somewhat elusive the stability and certainty in divorce matters hoped for by the new enhanced cooperation measure. Indeed, in some senses, the enhanced cooperation initiative and its two track approach may have crystallised the divided view on divorce law matters in Europe. It may really have pushed back the possibility of greater harmonisation of substantive divorce law in all 27 Member States into the distant future.[43] The problem is that the Member States of the EU are presently all at different stages of divorce law development and this makes it nigh impossible to find a Union level solution on divorce while there remains such a wide variation in Member State legislation on the matter.[44]

Conclusion

The European Union goal of free movement for its people has increased contact and connection, with increased intermarriage between couples of the different member states. For a quarter of a million of the EUs citizens, untangling these relationships remains an issue mired in unfairness, volatility and legal uncertainty. Harmonisation remains elusive and probably inevitably so, given the continuing divergence regarding family issues law in the Union.[45] An attempt to improve the situation using the enhanced cooperation procedure has brought about an extraordinary two track approach which has not resolved the situation. It has in fact increased uncertainty. It has introduced new requirements for some member states, while at the same time, others disregard the new rules and all remain bound by the older jurisdictional provisions. There is still a long way to go and an ultimate solution may have to await greater convergence around family law issues in the Member States of the European Union. ■

39 JHA (Title V) opt-in Protocol 21, Lisbon Treaty

40 COM(2005) 82 final *GREEN PAPER on applicable law and jurisdiction in divorce matters*(presented by the Commission) {SEC(2005) 331}

41 Fiorini. A, "*Rome III – Choice of Law in Divorce: Is the Europeanization of Family Law Going Too Far?"* (2000) 22 International Journal of Law, Policy and the Family 178, 195.

42 Kenny. C, *Divorce law remains 'an issue for Ireland'*, (Sunday Independent Newspaper Article,May 08 2005)

43 Boele- Woelki. K, *Unification and Harmonization of Private International Law* et alJ. Basedow et al., eds., *Private Law in the International Arena* – Liber Amicorum Kurt Siehr 2000, (T.M.C.Asser Press, The Hague, The Netherlands) p 76

44 Ibid p 7

45 Henderson. T, *From Brussels to Rome: the Necessity of Resolving Divorce Law Conflicts across the European Union* (Wisconsin International Law Journal Volume 28:4)

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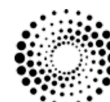

THOMSON REUTERS

The Impact of the proposed Victims Rights Directive on the Criminal Justice System

Matthew Holmes BL

In May 2011, The European Commission sent a proposal to the European Parliament for a Directive on rights, support and protection for the victims of crime. Under the Lisbon Treaty, Ireland must opt-in if it wishes to be covered by any legal instrument in the Area of Freedom, Security and Justice. In a speech given on the 12th of April this year to the Irish Council for Civil Liberties, the Minister for Justice stated that he had convinced the Cabinet to opt in and that the parliamentary scrutiny of the proposal was likely to be completed in July.[1] This Directive will likely have far reaching and profound consequences for the administration of Justice in Ireland.[2]

The Directive

The Directive defines "victim" as "a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss directly caused by a criminal offence." The definition also includes the family members of a person whose death has been caused by a criminal offence. Therefore, it appears that a company cannot be considered a victim of a crime. Even if a company were to be granted rights as a victim, it would have to be represented by a lawyer due to the rule in *Battle v IAPC*.[3] This would pose problems where a company is wound up as a result of the damage caused by the crime. Dead humans may have families, dead companies will not.

Victims will be granted three different chapters of rights by this Directive, any rights granted are considered minimum rules and member states are free to exceed them. The first chapter of rights deals with the provision of information and support to victims, or as the directive puts it "the right to understand and be understood". The purpose of the articles in this chapter is to ensure that victims receive sufficient information in a form they can understand to enable them to fully access their rights and to ensure they feel treated in a respectful manner. Article 3 and 4 contain a detailed list of the information victims should receive from first contact with a competent authority and throughout the case. Amongst these is the right to be notified of a decision to prosecute and on the time of release from detention of the prosecuted person. Articles 5 and 6 set out the victim's right to be understood and to receive free interpretation and translation. Article 7 establishes minimum standards of victim support services that must be provided by Member states.

The second chapter of rights contained in Articles 8 to 16, deals with the rights of victims in criminal proceedings. This will introduce the most substantive and potentially controversial changes to Irish law. Victims will have the right to be heard and to supply evidence during criminal proceedings (Art. 9) and the right to have any decision not to prosecute reviewed (Art. 10). These two particular sets of rights may have the most profound implications for Irish law. Article 11 gives victims safeguards during mediation and other restorative justice services. Article 12 requires that Member States must ensure that victims have access to legal aid. Article 13 requires victims to be reimbursed for expenses incurred as a result of participating in the criminal proceedings. Victims will have the right to have property seized returned to them without delay, unless it is needed for the purpose of criminal proceedings. Victims are entitled to obtain a decision on compensation from the offender during the proceedings (Art. 15). Article 16 contains provisions to facilitate victims residing in other Member States. Article 16.2 allows victims to make criminal complaints at the competent authorities of the Member State of residence if they are unable, or in serious offences, are unwilling, to file a complaint in the Member State where the offence was committed.

The third chapter of rights, Articles 17 to 23, deals with the protection of victims. Victims have the right to protection under Article 17 including "measures to ensure that the risk of psychological or emotional harms to victims during questioning or when testifying is minimised and their safety and dignity are secured". Article 19 offers the victim the right to avoid contact with the offender, no mention is made of circumstances where victim and offender live or work together or would normally be in constant close contact. Article 20 deals with victim protection during investigations. Victims interviews must be kept to a minimum and they may be accompanied "where appropriate" by a legal representative unless a reasoned decision is given why they should not be. Vulnerable victims, defined by article 18 as children, persons with disabilities, and victims of sexual violence or human trafficking, will be given even more protections by article 21, during the criminal investigation and during the court proceedings. Article 22 gives children protection during criminal proceedings and requires all interviews with them

1 Video and the full text of this speech is available at http://www.iccl.ie/iccl-victims-project.html

2 A complete guide of the rights currently available to victims of crime in Ireland can be found at http://www.victimsofcrimeoffice.ie/en/vco/Pages/WP10000006

3 *Battle v IAPC* [1968] IR 252 Although a company which is being prosecuted on indictment may appear by representative CA 1963 382(2).

to be recorded. Article 23 protects the privacy of victims. Member states will encourage the media to protect victims' privacy, personal integrity and personal data. In the aftermath of the Levenson Inquiry in the United Kingdom, this may not be sufficient on its own.

Member states must provide training to practitioners who come into contact with victims of crime and must also co-operate with other member states to facilitate the support of victims' rights. The draft directive also sets down minimum standards for any restorative justice services which may be provided, to ensure that the concerns of the victim are adequately addressed. There is no obligation in the directive to provide any particular services, but any services which are provided must meet the standards laid down. Member states are also required to co-operate and co-ordinate in their services in order to ensure the protection of victim's rights and interests.

Changes Proposed by the Directive

Large parts of this directive are already standard procedure in Ireland or will not be particularly controversial when introduced. To give a few brief examples of requirements that are already in place; article 21(2)d requires that all interviews with victims of sexual violence should be conducted by a person of the same sex. Victims of crime who do not speak English or Irish are given access to interpretation and translation by the Gardaí and the Court services (Article 6). The Gardaí do make efforts to facilitate vulnerable victims (Articles 18 and 21). In the interests of brevity, I will concentrate on the most controversial changes set out in the directive.

The joint effect of Articles 4 and 10 will result in a sea change in Irish law. Article 4 requires victims to be informed of any decision, including reasons for that decision, ending the criminal proceedings instituted as a result of the complaint made by the victim. Further, article 10 allows a victims to review that decision. The Directive states that precise mechanisms for a review are left to national law. However, such a review should at a minimum be carried out by a person or authority different to the one that took the original decision not to prosecute. In Ireland, this will almost certainly be judicial review. These reviews will of course be provided for by legal aid (article 12). Currently, where the DPP decides not to prosecute, the reasons will only be given to the Gardaí who investigated the case. The exception to this is where the crime is a fatal one, the DPP promises to give the reason to the victims family in these cases 'whenever possible'. This will only occur in cases where the death took place on or after 22 October 2008. The DPP promises to take victims views into account in non fatal cases when deciding whether to prosecute and to look again at a decision with which the victim does not agree.[4]

The case of *Eviston v DPP* arose where the DPP initially decided not to prosecute but then reversed the decision after receiving a letter from the father of the deceased.[5] It has been established since *The State (McCormack) v Curran* that the DPP is under no obligation to give reasons in respect of a decision not to prosecute but if it can be demonstrated that a decision was made *mala fide* or influenced by an improper motive or policy, then the decision would be reviewable by a court.[6] The Supreme Court in *Eviston* re-iterated this principle. In *H v DPP* , the applicant brought a private prosecution against her husband and his brother charging them with having committed sexual offences against her son.[7] The applicant instituted proceedings by way of judicial review seeking an order of *mandamus* (a) to compel the DPP either to institute a prosecution against her husband and his brother or, alternatively, to give her reasons why he had not done so and (b) to supply her with any statements taken by the Gardaí and any other relevant documentation in his possession to enable her to pursue her independent prosecutions. It was held *inter alia* by O'Flaherty J. that if the DPP were to be subjected to frequent applications seeking to compel him to bring prosecutions, his office would be stretched beyond endurance. The case was dismissed although it did not disturb the caselaw that decisions of the DPP are judicially reviewable in principle.

In Ireland, there are numerous cases of attempts to review the DPP's decision to bring a case, but relatively few where the converse is the case. In the UK, there is a substantive body of jurisprudence, relying on article 6 of the ECHR, dealing with attempts to judicially review the DPP's decision not to prosecute.[8] One final point of note here is that section 6 of the Prosecution of Offences Act 1974 makes it unlawful for people unconnected with a case to contact the DPP with the purpose of influencing the decision to withdraw or not to initiate criminal proceedings. In *Eviston,* this was interpreted in a manner which would allow strangers to a case to contact the DPP in order to encourage a prosecution.

One of the largest potential changes to the system will be the right of victims of crime to be heard and possibly even represented during criminal proceedings. Article 9 states that victims will have the right to be heard and to supply evidence in criminal proceedings. The exact extent to which victims can be heard will be left to national law and may range from basic rights to communicate with, and supply evidence to, a competent authority through to more extensive rights such as a right to have evidence taken into account, the right to ensure that certain evidence is taken or the right to make interventions during the trial. This may range from the ability to provide a victim impact statement in every case up to full representation as a party to the case.

Currently in Irish law, there is only one occasion where a victim of crime can be represented in court. Section 34 of the Sex Offenders Act 2001 amends the Criminal Law (Rape) Act of 1981 to allow for legal representation for victims where the accused has sought to adduce evidence of the victim's sexual experience. This is covered by legal aid. Victim impact statements are only heard after conviction but before sentence and only for cases involving violence or the threat of violence, sexual offences, the Non Fatal Offences Against the Person Act 1997 or offences consisting of attempting

4 http://www.dppireland.ie/victims_and_witnesses/victims-charter/

5 *Eviston v D.P.P.* 2002 3 IR 260

6 [1987] I.L.R.M 225, approved of in *H v DPP* [1994] 2 I.R. 589

7 *H v DPP* [1994] 2 I.R. 589

8 See eg *R v DPP ex parte Manning* [2003] 3 WLR 463; - R *(Da Silva) v DPP* [2006] EWHC 3204 (Admin) and *Sharma v Brown-Antoine* [2007] 1 WLR 780

or conspiring to commit, or aiding, abetting, counselling, procuring or inciting the commission of one of the above. It is still too early to tell to what exact extent the right to be heard will extend in Ireland, but the possibility for change to the system here is substantial. It is likely that in Ireland, this will lie closer to the victim impact end of the scale rather than full representation, as two Bills previously sponsored by Minister Shatter, the Victim Rights Bills of 2002 and 2008, were in favour of allowing victims give information to the court, rather than being represented. However the potential for victims to be represented is clear from the act

Analysis

In Ireland, crimes are considered to be wrongs committed against the state. The state assumes the mantle of the victim in the prosecution of the crime. This can relegate the actual victim to the status of a mere witness and their personal interests may be sidelined in the contest between the state and the suspect. This has been criticised by academics, the media and victims interest groups. This directive will assist in the involvement of victims in all stages of criminal procedure, instigating investigations and prosecutions and being more involved in the court process. O'Malley points out that certain victim's rights, such as compensation, counselling and therapy, will not interfere with the due process rights of the accused. Participation in the criminal process on the other hand may result in difficulty for the accused.[9] It is established in Irish Constitutional law that in the event of a conflict between the public right to have crimes effectively prosecuted and the accused's right to trial in due course of law, the latter right must always take precedence.[10]

One problem that may arise from this bill relates to the presumption of innocence. Presumably, if one is to be considered a victim of crime, two things must be proven; 1. There was a crime, and 2. You were a victim of that crime. Proving these is the bulk of a great many criminal cases. Under the proposed directive, a person "*Should be considered a victim regardless of whether a perpetrator is identified, apprehended, prosecuted or convicted".* If a victim is allowed to exercise the court based rights granted by this directive, it may affect the accused's right to the presumption of innocence. Juries may infer guilt from the victims' exercise of their rights.

9 T. O'Malley *The Criminal Process* Thompson Reuters, (2009) at 17
10 See eg *Rattigan v D.P.P.* 2008 4 IR 639

Another issue is that the act, though applying to terrorism, is silent on crimes which affect several victims. Many crimes have more than one victim. Some, such as the September 11th attacks or Bernie Madoff's fraud, may have hundreds of thousands of victims. How can all be given an opportunity to inform the court how they were affected by the crime? What occurs if victims are given an opportunity to have representation? If such a crime is not prosecuted, the decision may face thousands of separate reviews initiated at the same time. Perhaps one solution would be to appoint a representative of victims in large cases, similar to American style mass tort group litigation, in order to facilitate the taking of the case.

At a time when the resources available to the criminal justice system are limited, this Directive may cause problems. Legal aid has been slashed so it may be difficult to stretch it to cover an entire new class of individuals before the courts. This Directive requires member states to ensure that victims have access to legal aid. The hard reality is the criminal justice system may not be able to afford this Directive. With 725,908 recorded and 595,365 detected crimes in 2010 (the most recent year for which statistics are available), this Directive could result in providing for a large amount of victims, even taking into account the number of crimes which have no direct victim.[11]

Conclusion

Any move in favour of victim's rights is to be welcomed. Minister for Justice, Alan Shatter, has consistently shown his enthusiasm for measures such as this Directive. He has already sponsored two victims' rights bills in Ireland, the 2002 Victims Rights Bill which lapsed and the 2008 Victims Rights Bill which was defeated at the second stage. In his speech to the ICCL, he stated "I am very enthusiastic about the EU Directive on victims' rights. If it has not been brought in by the end of the year, it will be a priority of the Irish presidency."[12] It is important to note that the Directive is still only at draft stage so not all of these proposed changes may come to pass. However, it is certain that this Directive will have profound consequences for the criminal justice system in Ireland. ■

11 http://www.cso.ie/en/media/csoie/releasespublications/documents/crimejustice/2010/gardacrimestats_2010.pdf
12 C. Coulter "Shatters pledge on victims' rights" *Irish Times 12* April 2012

The Life of Cecil Lavery

Charles Lysaght, Honorary Bencher of Kings Inns

Last year, Mr Vincent Lavery, the nephew of the Mr Justice Cecil Lavery (1894-1967), presented the papers of his uncle to the library of King's Inns. They have been carefully catalogued by barrister Frank Kennedy and are now available to readers. To mark the benefaction, an exhibition from the papers was mounted in the library by the librarian Jonathan Armstrong. A reception opening the exhibition was held there on 13 June attended by descendants and relatives of Mr Justice Lavery, the former Taoiseach Liam Cosgrave, former chief Justice Ronan Keane, Sir John Sheil, formerly of the High Court/Court of Appeal of Northern Ireland, members of the judiciary, benchers and invited guests. I spoke as follows about Cecil Lavery's life:

Cecil Patrick Linton Lavery was born in Armagh in 1894, one of five sons of Patrick Lavery, solicitor, and educated at St Patrick College Armagh, Castleknock and University College Dublin. He was called to the Bar in 1915, having been awarded the John Brooke Scholarship. He devilled with James Andrews, subsequently Lord Chief Justice of Northern Ireland, and practised on the North Eastern circuit. Between 1916 and 1921, he defended a number of republican prisoners and sat as a judge in the Dail courts after the truce that terminated hostilities in July 1921.

He supported the government of the Free State led by William T Cosgrave and was briefed by them in prosecutions and civil matters, including the hearings of the Boundary Commission determining the border with Northern Ireland. Taking silk in 1927, he established himself for some twenty years in a position of eminence at the Bar that was unequalled for most, if not all of the twentieth century. There was no question of his just being *primus inter pares*; he was in a class of his own; as former Taoiseach, Jack Costello, also a leader of the Bar for much of that period, wrote in 1961:

> "He is the outstanding legal personality of the last half century in this country. I can say without hesitation that he was for many years the acknowledged leader of the Bar and one who had by far the biggest practice and the greatest experience in all branches of legal practice. In my opinion, he was the greatest legal genius in this country for at least half a century. His clarity of mind and lucidity of expression were unmatched and equalled, if they did not exceed, the greatest legal minds of the English Bar."[1]

It is difficult to recapture for posterity the quality of an advocate because much of what makes advocacy effective is ephemeral. Even where a verbatim record survives, it does not tell the whole story as so much depends on the personality of the advocate and his ability to relate to those to whom he makes his case. I recall that perceptive character, the late James P O'Reilly, who lectured at the Inns when I was a student, saying that Lavery got to the heart of a matter in an instant and had the instinct of a wild animal in discerning the weakness of an opponent or a witness. In an obituary, Tommy Doyle, who was often led by Lavery, remarked that he made things so simple that a child could have understood him.

There was no writer at the Bar in his time to immortalise him as Maurice Healy had immortalised some pre-war barristers but my friend Ralph Sutton, who overlapped briefly with Lavery at the Bar, has left us this graphic description:

> "I remember a lot of very good barristers… The best of all was Cecil Lavery. He was quite different to anyone else. I have never heard anyone like him. He was very tall with a civilized northern accent…He had wonderful gestures. When he held out his hands, he could stretch from one side of the Court to the other. He also had extraordinary little mannerisms. He would ask a witness a question and then turn on his heel. He would do a complete pivot and then look at the witness again. This was very disconcerting for the witness. In the end, when he had the witness nearly beaten he'd take off his glasses and he had queer lizard-like eyes which he would fix on the unfortunate victim. He was most dramatic….it was something to see him in action."[2]

What was remarkable also was the range of Lavery's practice across the whole spectrum from complicated revenue cases to criminal prosecutions. This is brought out in an excellent essay written on him by Daire Hogan for a history of Castleknock College based on a survey of the reported cases in which Lavery was counsel.[3] The supreme all-round craftsman of his profession, it was said that he was equally effective arguing law, examining witnesses or addressing a jury.

When provoked, he had an acerbic tongue. In the entry on Lavery in the Dictionary of Irish Biography, Chief Justice Finlay recalls a remark he made about some unreceptive judge: "To put a law report in his hands is like putting a loaded pistol in the hands of a child."

Lavery was a Fine Gael member of the Dáil for South County Dublin between 1935 and 1938 and contributed perceptively, if rather briefly, to the debates on the Constitution about whose fundamental rights clauses he was quite sceptical.[4] When Jack Costello was appointed Taoiseach in the inter-party government formed in 1948, Lavery was

1 John A Costello to An Taoiseach Sean Lemass 15 November 1961 National Archive S 14797 B/61

2 Ralph Sutton, called to the Bar, July 1948, The Bar Review December 1998

3 Daire Hogan, 'Not Merely as an Advocate' –the Legal Careers of Four Castleknock Pastmen in James H Murphy ed., Nos Autem: Castleknock College and its Contribution, p.265 at pp.280-291.

4 Dail debates vol. 67, cols 124-137

the obvious choice as Attorney General—the genesis of that government can be traced to contacts Costello had with Labour leader William Norton appearing for trade unions and Lavery appearing with Sean McBride on behalf of republican prisoners. Unlike his immediate predecessors, Lavery was allowed to retain his private practice. As nominee of the Bar Council, he was elected to Seanad Eireann—I wonder if he was the last nominee of the Bar council to have been so elected.

In 1950, Lavery was appointed to the vacancy in the Supreme Court created by the retirement of Mr Justice James Geoghegan. Then, a year later, just before the government left office, George Gavan Duffy, the President of the High Court died. Lavery was his likely successor but doubts were raised by Thomas Coyne, the secretary of the department of justice, as to whether a judge of the Supreme court could be appointed President of the high court. According to Costello, Lavery withdrew his name and Cahir Davitt was appointed.[5]

I dwell on this episode because some thought that it blighted the remainder of Cecil Lavery's life. I remember the late Mr Justice Brian Walsh, who liked Lavery a lot and shared his hardline nationalist views, saying how much happier 'Cecil' would have been conducting cases in his own court than he was listening to long legal arguments in the Supreme Court. Only last week, Hugh Geoghegan relayed to me Chief Justice Finlay's recollection that the finest summing up he had ever heard in a jury trial was one delivered by Lavery sitting as a High Court judge on circuit.

It seems that Lavery, with his quickness of mind, was impatient at the slowness of proceedings in the Supreme Court and had no appetite for writing extended judgments re-stating the whole law in a particular area. The picture that emerges is of a man who had not the love of the law found in jurists like Chief Baron Palles, Mr Justice Brian Walsh or Chief Justice Keane. Lavery never wrote articles about law and I doubt if he read about it except to address a case. What he clearly relished was the legal process and the competitive challenge and excitement involved. When the legal work he had to do was done, he preferred to turn to other excitements --- to racing where he had horses in training under Vincent O'Brien and was a steward of the Turf Club. Or fishing, or the opera.

He might have found life on the Supreme Court more tolerable if he had been presiding as Chief Justice and so able to control the pace of hearings. He had hopes of being appointed to succeed Conor Maguire in 1961; there is interesting material on this in his papers and in the National Archives.

5 Costello to Lemass, op.cit.

If Cecil Lavery was denied this ultimate judicial preferment, what he cannot be denied is his place in a group that has a greater mystique and a much more honoured place in our national traditions than judges or jurists--- the great advocates, especially those prepared to champion the cause of the weak against the mighty. In this pantheon, Lavery was the successor of Philpot Curran, below whose portrait I speak, Daniel O'Connell, Issac Butt and Tim Healy. There may be others with claims – one thinks of Anthony Malone, Francis McDonagh and James Campbell (Lord Glenavy) and some in more recent times – but Lavery belongs to those about whose place there can be no dispute.

It is this very special place that he has in the history of our profession that makes it so appropriate that his papers should be here, joining the portrait by his friend, Leo Whelan, that hangs in the Great Hall.

Legal biography is a difficult business because lawyers spend much of their time as spokesmen for others and are bound by confidentiality in what they can reveal. In forming a picture of Cecil Lavery, about whose convictions there are unanswered questions, it is invaluable to have papers containing much personal correspondence, including, I was interested to discover, a voluminous correspondence with Charles Bewley, Ambassador in Berlin, almost up to the outbreak of war in 1939. There is on view in the exhibition a revealing letter from Lavery to his mother in the wake of the 1916 rebellion, when his main concern is that James Connolly and Sean McDermott would not die 'without the priest'; it does not read like the letter of a man who was on standby to take part in the rebellion, as was stated in an obituary at the time of his death. There are briefs for the defence of executed IRA prisoners in this jurisdiction and Northern Ireland during the Second World War and material about his being refused silk in Northern Ireland. There are canvassing letters and replies when he was running for the Senate in 1948 and handsome letters of tribute when he retired from the Bench in 1966, the year before he died. There are volumes of notebooks of cases in which he was involved. His income tax returns lend credence to the legend that he marked such low fees that he depressed earnings at the Bar.

It is nice to think of scholars of the history of the times in which Cecil Lavery lived coming to consult his papers in King's Inns and absorbing the ambiance that was an important part of his life as a star student, as a member of the committee of the law students debating society and then as a bencher for over thirty years from the time of his election as a Bar Bencher in 1933. ■

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A directory of legislation, articles and acquisitions received in the Law Library from the 11th May 2012 up to 20th June 2012
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ADMINISTRATIVE LAW

Statutory Instruments

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SI 148/2012

ARBITRATION

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SI 123/2012

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SI 137/2012

BUILDING LAW

Article

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Recognising the modern family: extending legislative guardianship rights in Ireland
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Statutory Instrument

Children act 2001 (designation of remand centres) order 2012
SI 136/2012

CIVIL LAW

Statutory Instrument

Civil law (miscellaneous provisions) act 2011 (sections 6 and 12) (commencement) order 2012
SI 146/2012

Private security (licensing and standards) regulations 2012
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SI 147/2012

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COMPANY LAW

Directors

Disqualification – Duties – Delegation – Test to be applied – Whether wrongdoing necessary proof – Admissibility of findings in inspectors' report – Distinction between findings of facts and opinion – Special position of banks – Chief executive officer of bank – Findings bank opened bogus non-resident accounts – Monies undisclosed to revenue targeted by bank for investment – Investors assured funds would be kept hidden from revenue – Whether proper system in place – Supervision of delegation of reading internal audit reports – Whether respondent had notice of non-compliance – Whether respondent should have been aware of bogus non-resident accounts – Whether respondent ought to have known practice facilitated evasion of DIRT – Whether respondent bore responsibility for promotion of policies – Whether respondent responsible for deficiencies in operation of accounts – Whether respondent failed to manage charging of interest – Whether respondent responsible for system of recording time chargeable to customers – Whether inspectors' report flawed in its understanding of bank's management structure – Whether respondent breached his duty as officer of bank – Whether conduct of respondent made him unfit to be concerned in management of company – *Cahill v Grimes* [2002] 1 IR 372; *Director of Corporate Enforcement v Byrne* [2009] IESC 57, [2010] 1 IR 222; *Re Wood Products Ltd:*

Dir of Corp Enforcement v McGowan [2008] IESC 28, [2008] 4 IR 598; *Re Tralee Beef & Lamb Ltd: Kavanagh v Delaney* [2008] IESC 1, [2008] 3 IR 347 applied; *Re NIB Ltd: Director of Corporate Enforcement v Seymour* [2007] IEHC 102, (Unrep, Murphy J, 20/3/2007); *Re NIB Ltd: Director of Corporate Enforcement v D'Arcy* [2005] IEHC 333, [2006] 2 IR 163; *Re Barings plc* [1999] 1 BCLC 433; *Re Vehicle Imports Ltd (in Liquidation)* (Unrep, Murphy J, 23/11/2000); *Countyglen plc v Carway* [1998] 2 IR 540; *VC v JM & GM* [1987] IR 510; *In re Lo-Line Ltd* [1988] Ch 477; *Re Westmid Packing* [1998] 2 All ER 124; *Re Kentford Securities Ltd: Dir of Corp Enforcement v McCann* [2010] IESC 59, [2011] 1 IR 585; *Re Bath Glass Ltd* [1988] BLCL 329; *In re Sevenoaks Stationers Ltd* [1991] Ch 164; *Re SPH Ltd; Fennell v Shanahan* [2005] IEHC 152, (Unrep, Finlay Geoghegan J, 25/5/2005) approved; *In re City Equitable Fire Insurance Co* [1925] Ch 407; *Director of Corporate Enforcement v Curran* [2007] IEHC 181, (Unrep, Murphy J, 23/5/2007) distinguished – Companies Act 1963 (No 33), s 297A – Finance Act 1986 (No 13), ss 32, 37 and 38 – Companies Act 1990 (No 33), ss 8, 10, 22, 150 and 160 – Disqualification order granted (2005/269COS – Murphy J – 8/4/2011) [2011] IEHC 172
Director of Corporate Enforcement v Lacey

Examinership

Appointment of examiner – Opposition by largest creditor – Prospect of survival – Independent accountant's report – Purpose of examinership – Difference between examinership and receivership – Protection of company – Preservation of jobs – Benefit of economy – Whether reasonable prospect of survival as going concern – Whether court should exercise discretion – *Re Gallium Ltd* [2009] IESC 8, [2009] 2 ILRM 11; *Re Vantive Holdings* [2009] IESC 68, (Unrep, SC, 11/8/2009) and *Re Atlantic Magnetics Ltd* [1993] 2 IR 561 considered – Companies (Amendment) Act 1990 (No 27), s 2 – Examiner appointed (2010/53COS – McGovern J – 11/2/2010) [2010] IEHC 37
In re Slyne Properties Ltd

CONSTITUTIONAL LAW

Family rights

Prisoner – Remand prisoner – Conditions of detention – Visitation – Physical contact – Reasonable management and governance of place of detention – Whether governor could restrict visitations with physical contact – Whether visitation policy violated family rights – Whether decision of prison governor relating to management of prison amenable to challenge – Whether decision arbitrary, discriminatory or wholly unreasonable – *Murray v Ireland* [1985] IR 532 applied; *Turner v Safley* (1978) 482 US 78 considered – Prison Rules 2007 (SI 252/2007) – Prisons Act 2007 (No 10) – Constitution of Ireland 1937, Article 41 – Relief refused (2009/1316JR – Charleton J – 29/6/2010)
Foy v Governor of Cloverhill Prison

Separation of powers

Delegated legislation – Creation of criminal offence – EC Regulation not providing criminalisation of prohibited fishing activity – Minister power to give effect to obligations under EU law – Whether legislation invalid having regard to Constitution – Whether impermissible delegation of legislative power – Whether regulations of 2006 citing wrong EC regulation – *Ultra vires* – Whether criminal offence necessitated by EU law – Whether offence created by Act – *Browne v Attorney General* [2003] 3 IR 205, *McCormack v Garda Siochána Complaints Board* [1997] 2 IR 489 and *Cityview Press Ltd v An Chomhairle Oiliúna* [1980] IR 381 applied; *Quinn v Ireland* [2006] IESC 65, (Unrep, SC, 28/11/2006) and *Kennedy v Attorney General* (Unrep, Ó Caoimh J, 30/7/2004) followed; *Meagher v Minister for Agriculture* [1994] 1 IR 329, *Z v Director of Public Prosecutions* [1994] 2 IR 476, *Montemuino v Minister for Communications* [2008] IEHC 157, [2009] 1 ILRM 218 considered – Fisheries (Consolidation) Act 1959 (No 14), s 224B – Blue Whiting (Fisheries Management and Conservation) Regulations 2006 (S.I. 104 of 2006), r 4 – Council Regulation 2371/2002, art 25 – Council Regulation 51/2006 – Constitution of Ireland 1937, Article 15 – Application refused (2006/1440JR – Hedigan J – 3/6/2011) [2011] IEHC 222
Faherty v Attorney General and Ors

Articles

Keating, Albert
The basic norm and concept of a constitution
2012 (9) Irish law times 137

Smyth, Claire-Michelle
The constitution at 75 – time for a new interpretation
2012 (9) Irish law times 130

Mullen, Yvonne
Unconstitutional omissions
17(2) 2012 Bar review 40

CONSUMER LAW

Statutory Instrument

Consumer protection (consumer information) (articles of precious metals) regulations 2012
SI 143/2012

CONTRACT

Loan

Credit Union – Purpose of loan – Prudent and provident – Status of rules – Supplying liquidity to non-member company – Summary judgment stage – Whether defences arguable – Whether ultimate destination of loan relevant – Whether statements made without legal advice by qualified accountant defendant should be disregarded – *Danske Bank a/s trading as National Irish Bank v Durkan New Homes* [2010] IESC 22, (Unrep, SC, 22/4/2010) applied – *McGrath v O'Driscoll* [2006] IEHC 195, [2007] 1 ILRM 203; *Banque de Paris v de Naray* [1984] 1 Lloyd's Rep 21 approved – Credit Union Act 1997 (No 15), ss 6, 35 and 36 – Summary judgment entered (2009/3551S – Hogan J – 14/4/2011) [2011] IEHC 162
Kilsaran Credit Union v Lowth

Terms

Loan – Assignment – Interpretation – Reasonable commercial person with knowledge of background circumstances – Natural and ordinary meaning – Intention of parties – Equity of redemption – Reassignment – Whether plaintiff entitled to sue for repayment following assignment – Whether plaintiff had continuing interest – Whether absolute assignment of loan agreement – Whether construction contrary to legitimate commercial purpose – *Kramer v Arnold* [1997] 3 IR 43; *Analog Devices v Zurich Insurance* [2005] IESC 12, [2005] 1 IR 274; *Investors Compensation Scheme Ltd v West Bromich Building Society* [1998] 1 WLR 896; *Mannai Ltd v Eagle Star Ass Co Ltd* [1997] AC 749; *Igote Ltd v Badsey Ltd* [2001] 4 IR 511; *Plumb Brothers v Dolmac (Agriculture) Ltd* [1984] 271 EG 373 and *Linden Gardens Trust Ltd v Lenesta Ltd* [1993] WLR 408 considered – Supreme Court of Judicature (Ireland) Act 1877 (40 & 41 Vict C 57) – Claim dismissed (2009/4196S, 2009/402COM – Finlay Geoghegan J – 10/5/2011) [2011] IEHC 191
O'Rourke v Considine

Terms

Loan – Mortgage as security – Arrears – Repossession – Sale of land – Claim for balance of loan – Best price reasonably obtained – Legally enforceable contract – Reckless lending – Mutual intention – Whether plaintiff's claim to recover balance unfair – Whether plaintiff acted negligently in selling property – Whether defendant required to repay loan – Whether contract legally enforceable – Whether lending reckless – Whether tort of reckless lending existed – Constitution of Ireland 1937, article 50 – Judgment entered (2009/679S – Charleton J – 26/1/2010) [2010] IEHC 17
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CRIMINAL LAW

Appeal

Certificate of leave to appeal – Point of law of exceptional public importance – Point must arise from judgment of appeal court – Whether judgment of appeal court included statements, principles or findings of law which generate right to raise point – Drugs – Possession with intent to supply – Plea of guilty – 12 years sentence with 3 years suspended – Previous drug conviction – Whether trial judge erred in principle in taking previous conviction into account when sentencing –Courts of Justice Act 1924 (No 10), s 29 – *People (DPP) v Kelly* (Unrep, CCA, 11/7/96) and People (*DPP) v Higgins* (Unrep, SC, 22/11/85) applied – Certificate refused (45/2009 – CCA – 11/5/2011) [2011] IECCA 30
People (DPP) v Ulrich

Committal

Mental illness – Not guilty by reason of insanity – Aggravated sexual assault – Paranoid schizophrenia – Nature or format of in patient care or suitable treatment – Role of Court – Whether defendant in need of in patient care or treatment in designated centre – Whether Central Mental Hospital appropriate environment – Discrepancy in protection offered to patients between Criminal Law (Insanity) Act 2006 and Mental Health Act 2001 – Mental Health Act 2001 (No 5), ss 3 & 4 – Criminal Law (Insanity) Act 2006 (No 11), ss 3, 5 & 13 – Defendant committed to designated centre (2008/109CC – Sheehan J – 7/4/2011) [2011] IECCC 1
People (DPP) v B(W)

Conviction

Arrest – Scheduled offences – Appeal against conviction –Whether the applicant lawfully before courts – Whether the offences charged were scheduled offences – Whether open to trial judge to direct jury to return guilty verdict – Whether Gardaí entitled to rely on two powers of arrest – Whether prosecution obliged to adduce medical evidence by way certificate – Whether indictment was duplicitous – Whether appropriate to recall jury panel details after jury empanelled – *People (DPP) v Davis* [1993] 2 IR 1 and *People (DPP) v Nally* [2006] IECCA 128, [2007] 4 IR 145 followed – Non-Fatal Offences against the Person Act 1997 (No 26), s 25 – Appeal refused (226/07 – CCA – 31/5/2011) [2011] IECCA 31
People (DPP) v Ward

Delay

Warning – Tailoring warning to facts of case – Appeal against conviction – Sexual and indecent assaults – Swimming coach – No cross-examination as risk of revealing inadmissible evidence – Consequence of tactical decision – Admissibility of evidence of offences not covered by indictment – Multiple allegations of abuse – Difficulty in framing indictment – Whether degree of prejudice minimal where case dependent on credibility of complainant – Unedited memoranda of interview handed to jury in error but retrieved – Whether retrieval of un-edited memoranda or interviews and replacement of same by edited memoranda excited jury suspicions – Corroboration – Similar fact evidence – *People (DPP) v B(R)* (Unrep CCA 12/2/2003); *People (DPP) v J (P)* [2003] 3 IR 550; *People (DPP) v G (L)* [2003] 2 IR 517; *People (DPP) v CC* [2006] 4 IR 287 – Conviction quashed; retrial ordered (24/2010 – CCA – 4/2/2011) [2011] IECCA 35
People DPP v D(G)

Evidence

Cross-examination – Answers – Propensity for violence – Whether witness entitled to explain circumstances – Whether trial judge trespassed on counsel's role – Whether entitlement to separate trial where co-accused's evidence of previous good character contrasts with accused's lack of evidence of good character – Whether possible to order separate trials after judge's charge – Whether accused has right to separate trial or matter for trial judge's discretion – *People (DPP) v Brett* [2011] IECCA 12, (Unrep, CCA, 7/4/2011) followed – Appeal refused (130/2010 – CCA – 19/10/2011) [2011] IECCA 65
People (DPP) v Hayes

Evidence

Disclosure – Power or procurement – Whether onus on prosecution to obtain materials from United States – Whether all reasonable efforts made to obtain material – Testing of forensic evidence – Whether prosecution can call evidence at late stage – Whether trial judge entitled to revisit ruling in light of evidence heard – Alibi evidence – Failure to give notice of intended alibi evidence –Whether witness reply adequately dealt with by directions of trial judge – Definition of solicitation – Whether inconsistent to acquit one co-accused of conspiracy but convict the other for solicitation – *R v Hassan* [1970] 1 QB 423 distinguished – Appeal refused (254/2008 – CCA – 19/10/2011) [2011] IECCA 64
People (DPP) v Collins

Evidence

Drugs – Possession – Presumption – Shifting of evidential burden – Whether applicant knew she was carrying drugs – Whether necessary for prosecutor to deal with defence in opening to jury – Whether prosecution evidence raised reasonable doubt – Whether reference to applicant giving sufficient evidence appropriate where applicant's evidence relied upon to raise reasonable doubt – Whether judge's charge adequate on shifting of evidential burden – Misuse of Drugs Act 1977 (No 12) ss 15A and 29(2) – Appeal refused (289/2010 – CCA – 24/11/2011) [2011] CCA 86
People (DPP) v Malric

Evidence

Forensic evidence – Fingerprint evidence – Expert witnesses – Whether expert witness entitled to give evidence in terms of certainty – Whether expert opinion subverted jury's role – Validity of arrest warrant – Whether arrest warrant required to show jurisdiction on its face – Whether same scrutiny as applies to search warrants should be applied to arrest warrants – Whether arrest warrant rendered invalid by illegality – Whether accused denied access to solicitor – Whether forensic samples given before consulting with solicitor distinguishable from statements to Gardaí – Whether consent to give samples vitiated by lack of legal advice – Whether trial judge ought to have granted direction – Whether jury sufficiently warned not to draw adverse inference from accused not giving evidence – Onus of proof – Presumption of Innocence – Whether standard of proof higher in cases of circumstantial evidence – Whether trial judge's charge confused jury – *R v Buckley* 1999 AER (D) 1523 and *People (DPP) v Allen* [2003] 4 IR 295 considered, *People (DPP) v Abdi* [2005] 1 ILRM 382 distinguished; *Mayfield v USA* (Oregon DCt

26/9/2007) and *McKie v Strathclyde Police* 2003 ScotSC 353 considered; P*eople (DPP) v Cash* [2010] IESC 1 [2010] 1 ILRM 389 and [2007] IEHC 108 [2008] 1 ILRM 443, People (DPP) *v Boyce* [2008] IESC 62 [2009] ILRM 253 and [2005] IECCA 143 (Unrep, CCA, 21/12/2005), *People (DPP) v McCrea [*2010] IESC 60 (Unrep, SC, 9/12/2010) applied; *R v Galbraith* [1981] I WLR 1039 and *People (DPP) v M* (Unrep, CCA, 15/2/2001) applied; *People (DPP) v Finnerty* [1994] 4 IR 364 and *People (DPP) v Coddington* (Unrep, CCA, 31/5/2001) applied; *People (DPP) v O'T (D)* [2003] 4 IR 286 and *People (Attorney General) v McMahon* [1946] IR 267 considered – Appeal refused (218/2009 – CCA – 19/10/2011) [2011] IECCA 78
People (DPP) v White

Evidence

Fresh evidence – Application to adduce– Test for adducing fresh evidence – Whether introduction of material by oral submission permissible – Evidence on transcript but not on affidavit – Whether new evidence material to outcome of case – Basis for issuing search warrant – *People (DPP) v O'Regan* [2007] IESC 38, [2007] 3 IR 805 applied – Rules of the Superior Courts 1986 (SI 15/1986), O 58, r 8 – Application refused (69/2010 – CCA – 4/7/2011) [2011] IECCA 37
People (DPP) v O'Shea

Evidence

Judicial knowledge – Legislation – Formal proof – Whether judge correct in dismissing charge – Whether prosecution required to prove commencement of s 104 – Whether further procedural evidence allowed after close of prosecution case – *Attorney General v McTiernan* [1951] 87 ILTR 162 followed – Garda Síochána Act 2005 (No 20), s 104 – Summary Jurisdiction Act 1857 (20 & 21 Vict, c 43), s 2 – Courts (Supplemental Provisions) Act 1961 (No 39), s 51 – Interpretation Act 2005 (No 23) – Garda Síochána Act 2005 (Commencement) (No 3) Order 2007 (SI 217/2007) – Question answered in negative (2009/1463SS – Hedigan J – 25/1/2010) [2010] IEHC 14
The Director of Public Prosecutions v Waldron

Evidence

Possession of drugs – Whether physical possession sufficient to establish *mens rea* – Whether prosecution required to prove *animus possedendi* – Whether charge to jury on possession adequate – Failure to raise requisition following re-charge – Whether charge to jury unbalanced or favourable to prosecution – Obligation to raise issue with trial judge –*People (DPP) v Smyth* [2010] 3 IR 688 approved; *People (DPP) v Byrne & ors* [1998] 2 IR 417, *People (DPP) v Warner* [1962] 2 AC 256, *R v Wright* (1976) 62 CAR 169, *R v Galbraith* [1981] 1 WLR 1039, *People (DPP)* v *M* [1994] 3 IR 306 and *People (DPP) v Cronin* [2004] 4 IR 329 applied; *People (DPP) v Hourigan & Donovan* (Unrep, CCA, 19/3/2004), *People (DPP) v Gallagher* [2006] IECCA 110 (Unrep CCA 28/7/2006), *People (DPP) v Madden* [1977] IR 336 and *People (DPP) v Noonan* [1998] 2 IR 439 followed – Misuse of Drugs Act 1977 (No 12), ss 15A and 29 – Criminal Justice Act 1999 (No 10), s 2 – Misuse of Drugs Act (UK) 1971 s28(3) – Appeal refused (229/2009 – CCA – 28/7/2011) [2011] IECCA 47
People (DPP) v Finnegan

Evidence

Preservation – Vehicle – Inspection – Dangerous driving causing death – Possibility of mechanical failure – Prejudice and risk of unfair trial – Whether applicant engaging specifically with prosecution evidence – Whether material if vehicle had mechanical failure – Whether applicant in position to challenge prosecution evidence – Delay – Whether delay on applicant's part in seeking inspection and in commencement of proceedings – Crash in November 2008 – Vehicles released in May 2009 – Applicant charged in October 2009 – Book of evidence served in February 2010 – Inspection of vehicles sought in March 2010 – Judicial review proceedings in August 2010 – *Braddish v DPP* [2001] 3 IR 127; *Savage v DPP* [2008] IESC 39, [2009] 1 IR 185; *Perry v Judges of Circuit Criminal Court* [2008] IESC 58 (Unrep, SC, 28/10/2008); *Leahy v DPP* [2010] IEHC 22 (Unrep, HC, Charleton J, 5/2/2010) considered – Prohibition refused (2010/1181JR – Kearns P – 23/6/2011) [2011] IEHC 241
Rynn v DPP

Evidence

Video-link – Adult witness – Whether sufficient evidence to go to jury – Point raised at trial on different basis – Whether entitled to raise on appeal – Whether overriding principles of justice require point to be considered – Inconsistencies in witness accounts of events matter for jury – Whether reading of transcript of evidence adequate – Whether trial judge's comments rendered trial unbalanced – Whether trial judge demonstrated bias – Nature of test for bias objective – Whether trial judge properly presented defence case – *R v Barker* (1977) 65 CAR 287 and *People (DPP)* v *M* [1994] 3 IR 306 considered; *People (DPP) v Cronin* [2004] 4 IR 329 applied; *Kelly v Trinity College Dublin* [2007] IESC 61 (Unrep, SC, 14/12/2007) followed – Criminal Evidence Act 1992 (No 12), s13 – Appeal refused (208/2009 – CCA – 12/4/2011) [2011] IECCA 32
People (DPP) v McManus (orse Dunbar)

Forfeiture of assets

Detention – Cash – Application for forfeiture while cash detained – Application brought before expiry of detention order – Motion served after expiry of period – Whether cash lawfully detained – Meaning of "application made" – Whether provision penal – Ordinary and natural meaning – Interested person entitled to notice of application – *KSK Enterprises Ltd v An Bord Pleanála* [1994] 2 IR 128 considered – Courts of Justice Act 1936 (No 48), s 38 – Criminal Justice Act 1994 (No 15), ss 38 and 39 – Interpretation Act 2005 (No 23), s 5 – Rules of the Superior Courts 1986 (SI 15/1986), O 136 – Application not made while cash lawfully detained (153/2006 – SC – 16/5/2011) [2011] IESC 16
DPP v England

Judicial review

Road traffic conviction – Trial in due course of law – Driving while under influence of drugs – Caution – Power of arrest – Adequacy of evidence – Delay in seeking judicial review – Alternative remedy of appeal – Whether breach of constitutional justice – Whether proceedings fundamentally flawed – Whether incapable of having proper control of vehicle – Whether alternative remedy – Whether appeal appropriate remedy – Whether delay – *Sweeney v Brophy* [1993] 2 IR 202; *Buckley v Kirby* [2000] 3 IR 431 and *Lennon v District Judge Clifford* [1992] 1 IR 382 – Road Traffic Act 1961 (No 24), s 49 – Road Traffic Act 1994 (No 7), s 14(2) – Misuse of Drugs Act 1977 (No 12), s 23 – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21(1) – Relief refused (2009/197JR – Kearns P – 9/7/2010) [2010] IEHC 287
Doyle v Judge Connellan

Search warrant

Record of application – Failure to keep record – Effect – Whether sufficient evidence District Judge satisfied reasonable grounds for suspicion – Whether search warrant constitutes evidence District Judge satisfied reasonable grounds for suspicion – Whether presumption of regularity applies to application for search warrant – Whether search warrant issued under must specify which of three offences therein was basis for the suspicion – Whether documentation admissible – Whether prejudicial effect outweighed probative value – Whether admissibility determined by purpose of admitting evidence – Whether accomplice warning required – Definition of accomplice – Whether trial judge correct to refuse to discharge jury – - *People (DPP) v Tallant* [2003] 4 IR 343, *Attorney General v Joyce and Walsh [1929] IR 526* and *Attorney General v Kirwan* [1943] IR 279 followed; *Makin v Attorney General NSW* [1894] AC 54 applied; *R v Bond* [1906] KB 389, *R v Pettman* (Unrep EWCA CRIM 2/5/1985), *R v M* [2001] 1 All ER 148 considered; *Attorney General v Carney* [1955] IR 324 applied – Criminal Justice Act 1994 (No 15), s 31 – Appeal refused (101/2008 – CCA – 5/7/2011) [2011] IECCA 36
People (DPP) v Morgan

Sentence

Burglary – Four year sentence – Numerous previous convictions – Probation report recommended community sanction – Whether sentencing judge gave sufficient consideration to probation report – One year of sentence suspended (70/2010 – CCA – 27/7/2011) [2011] IECCA 57
People (DPP) v Maher

Sentence

Drugs – Possession – Four year sentence – Whether sentencing judge entitled to consider previous drugs conviction from 10 years earlier – Whether all mitigating and aggravating factors considered – Whether error in principle – Misuse of Drugs Act 1977 (No 12) ,s 15 – Appeal refused (210/2010 – CCA – 4/7/2011) [2011] IECCA 38
People (DPP) v Cummins

Sentence

Drugs – Possession with intent to supply – Ten year minimum sentence imposed – Whether sentencing judge entitled to consider background matters explaining context of crime – Whether entitled to consider entire book of evidence including admissions – Whether entitled to consider offences other than charged – Whether entitled to consider involvement in drugs trade if no charges laid – Whether improperly influenced by background matters – Duty on sentencing judge clearly to exclude extraneous matters in judgment – Importance of guilty plea where accused caught red-handed- Whether lack of previous convictions amounts to exceptional circumstances – Whether road traffic offences relevant previous convictions for drugs offence – *People (DPP) v Patrick Long* [2006] IECCA 49 (Unrep, CCA, 7/4/2006) applied; *People (DPP) v McGrane* [2010] IECCA 8 (Unrep, CCA, 8/2/2010) followed; *People (DPP) v Renald* (Unrep, CCA 23/11/2001), *People (DPP) v Botha* [2004] IECCA 1 [2004] 2 IR 375, *People (DPP) v Davis*[2008] IECCA 58 (Unrep, CCA, 19/2/2008 and *People (DPP) v Galligan* (Unrep, CCA, 23/7/2003) considered – Misuse of Drugs Act 1977 (No 12), ss 3, 5, 15A and 27 – Criminal Justice Act 1999 (No 10), ss 4, 5 and 9 – Sentence quashed and sentence of 7 years with 2 suspended imposed (170/2008 – CCA – 29/7/2011) [2011] IECCA 46
People (DPP) v Ormonde

Sentence

Drugs – Possession with intent to supply – Five year sentence imposed with one year suspended – Modest quantity of drugs – Chronic heroin addict – Whether error in principle where no remorse or insight into offending and no basis for rehabilitation – Misuse of Drugs Act 1977 (No 12), s 15A – Application refused (123/2010 – CCA – 27/7/2011) [2011] IECCA 49
People (DPP) v O'Mahony

Sentence

Drugs – Possession with intent to supply – Whether permissible to consider other offences not before court – Late guilty plea – Accused caught red-handed – *People (DPP) v Gilligan (No 2)* [2004] 3 IR 87 applied – Misuse of Drugs Act 1977 (No 12), s 15A – Appeal dismissed (37/2010 – CCA – 27/7/2011) [2011] IECCA 48
People (DPP) v Kelly

Sentence

Drugs – Possession with intent to supply – Eight year sentence with one suspended – Plea of guilty – Limited co-operation with Gardaí – Whether relevant that accused had no previous convictions – Whether sufficient weight given to effort to rehabilitate –Misuse of Drugs Act 1977 (No 12), s 15A – Appeal allowed; sentence reduced to seven years with two suspended – (115/2010 – CCA – 27/7/2011) [2011] IECCA 52
People (DPP) v Philpott

Sentence

Drugs – Possession with intent to supply – Six year sentence – Evidence of rehabilitation between arrest and sentencing – Whether failure to build in rehabilitative element into sentence – Misuse of Drugs Act 1977 (No 12), s 15A Two years of sentence suspended (206/2011 – CCA – 7/7/2011) [2011] IECCA 43
People (DPP) v Fitzsimons

Sentence

Drugs – Possession with intent to supply – Twelve years imprisonment – Early plea – Seriousness of offence – Appellant at high risk of re-offending – Misuse of Drugs Act 1977 (No 12), s 15A – Suspended portion of sentence varied to three years (229/2010 – CCA – 7/7/2011) [2011] IECCA 42
People (DPP) v Farrell

Sentence

Drugs – Possession with intent to supply –Valuations – Conflicting valuations for drugs given – Evidence of valuation not challenged at trial – Appeal against severity – 10 year sentence – Strongly contested trial –No requisition – No error in principle – Misuse of Drugs Act 1977 (No. 12), s 15A – Appeal refused (213/2009 – CCA – 11/2/2011) [2011] IECCA 34
People (DPP) v Rafferty

Sentence

Manslaughter – Life sentence – Background circumstances – Whether events before, during and after offence relevant – Whether conviction for lesser offence than charged precluded Judge from imposing heavy sentence – Whether severity of offence demonstrated by factors other than a weapon or evidence of violence – Whether judge entitled to take account of accused's demeanour during trial – Whether judge's comments demonstrated bias – whether open to judge to impose life – *People (DPP) v O'Donoghue* [2006] IECCA 134, [2007] 2 IR 336 distinguished; *People (DPP) v Conroy* [1989] IR 160 approved – Appeal refused (208/2009 – CCA – 19/10/2011) [2011] IECCA 68
People (DPP) v McManus (Dunbar)

Sentence

Rape – Life sentence –Applicant abused position of trust – Age difference – Breakdown of relationship between complainant and her mother – Severe post-traumatic stress – Absence of violence – Whether appropriate to consider evidence of feud which was extraneous to offences committed – Whether imposition of life sentence appropriate – *People (DPP) v Tiernan* [1988] IR 250 followed; *People (DPP) v McShane* 2007 IESC 47 [2008] 2 IR 92, *People (DPP) v PS* [2009] IECCA 1 (Unrep, CCA, 28/1/2009) and *People (DPP) v Finn* [2009] IECCA 96, (Unrep, CCA, 29/7/2009) considered – Appeal allowed; substitution of sentence of 15 years (106/2007 – CCA – 7/10/2011) [2011] IECCA 62
People (DPP) v Griffin

Sentence

Suspension – Revocation – Review – Partially suspended sentence in CCA – Accused before District Court – Whether District Judge had jurisdiction to sentence accused – Whether District Judge ought to have adjourned sentence pending outcome of CCA review – Whether CCA had jurisdiction to review sentence where statute not complied with – Criminal Justice Act 2006 (No 26), s 99(1) – Criminal Justice Act 2007 (No 29) s 60 – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28), s 51 – No order made (92/2007 – CCA – 19/10/2011) [2011] IECCA 67
People (DPP) v Devine

Sentence

Undue leniency – Dangerous driving causing death – Two year sentence; one year suspended – 10 year disqualification from driving –Distinction between homicide and dangerous driving causing death – Whether trial court and appeal court entitled to consider victim impact statement – Absence of aggravating features – Whether departure from normal sentencing – *People (Attorney General) v O'Driscoll* [1972] 1 Frewen 351 and *People (DPP) v McCormack* [2000] 4 IR 356 followed – *People (DPP) v Sheedy* [2000] 2 R 184 *People (DPP) v McCormack* (Unrep, CCA, 27/4/2006), *People (DPP) v O'Reilly* [2007] IECCA 118, [2008] 3 IR 632, and *People (DPP) v O'Leary* [2011] IECCA 27 (Unrep, CCA, 21/2/2011) considered – Application

to increase sentence refused (79/2011 – CCA – 23/5/2011) [2011] IECCA 79
People (DPP) v Stronge

Sentence

Undue leniency – Drugs – Possession with intent to supply – Six year suspended sentence imposed – Plea of guilty – No previous convictions – Co-operated fully with Gardaí – Remorse – Low risk of re-offending – Whether appropriate to suspend sentence – Whether judge entitled to consider background factors – Exceptional and specific circumstances – Whether financial motivation a mitigating or aggravating factor – *DPP v Byrne* [1995] ILRM 279, *DPP v Lernihan* [2007] IECCA 21 (Unrep, CCA, 18/4/2007) and *DPP v McGinty* [2007] 1 IR 633 applied; *People (DPP) v Long* [2006] IECCA 49 (Unrep, CCA, 7/4/2006) approved – Misuse of Drugs Act 1977 (No 12) s 15A – DPP's application refused (195/2008 – CCA – 29/07/2011) [2011] IECCA 45
People (DPP) v Wall

Sentence

Undue leniency – Drugs offence – Whether trial judge considered maximum sentence to be 10 years rather than life – Whether sufficient mitigation before court to amount to exceptional circumstances – Value of late guilty plea – Appeal refused (139/2010 – CCA – 7/7/2011) [2011] IECCA 44
People (DPP) v Duncan

Sentence

Undue leniency – Sexual assault – Guilty plea – – Remorse – Financial compensation – Whether aggravating feature that assault occurred in complainant's home – Whether appropriate to suspend entirety of sentence – Two year suspended sentence – Value of early plea of guilty in sexual cases – Sentence increased to four year suspended sentence – (183/2011 – CCA – 25/1/2012) [2012] IECCA 2
People (DPP) v Canniffe

Sentence

Undue leniency – Sexual assault – Spectrum of sentence – Aggravating factors – Nine year sentence with three years suspended – Relevant previous offence – Whether release from prison shortly before re-offending relevant – Overall sentence not increased but suspension shortened – Nine year sentence with 18 months suspended (154/2010 – CCA – 7/7/2011) [2011] IECCA 40
People (DPP) v O'L (W)

Sentence

Undue leniency – Sexual assault – Spectrum of sentence – Mid-range offence – Whether seven years appropriate mid-range tariff if maximum sentence is 14 years – Absence of violence – Four year sentence with two years suspended – Whether substantial departure from appropriate sentence –Whether error in principle – Sentence affirmed – *People (DPP) v Byrne* [1995] 1 ILRM 279 applied – Application refused (205/2010 – CCA – 7/7/2011) [2011] IECCA 41
People (DPP) v H (P)

Trial

Bias – Objective bias – Appearance of bias – Language used by judge – Drunk driving – Checkpoint authorisation challenged – Arguable claim – Whether judge failed to give adequate reasons – Whether appearance of pre-judgment and objective bias – Whether language used indicated bias – Whether reasonable, objective and informed observer might fear impartial hearing compromised – *Fitzwilton v Mahon* [2007] IESC 27, [2008] 1 IR 712; *Monaghan UDC v Alf-A-Bet Promotions Ltd* [1980] ILRM 64; *The People (DPP) v Farrell* [1978] IR 13; *Albatros Feeds v Minister for Agriculture and Food* [2006] IESC 52, [2007] 1 IR 221; *Croadawn Homes Ltd v Kildare County Council* 1983] ILRM 1; *The People (DPP) v Mallon* [2011] IECCA 29, (Unrep, CCA, 8/3/2011) and *Fogarty v Judge O'Donnell* [2008] IEHC 198 considered; *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412 followed – Road Traffic Act 1961 (No), s 49(3) – Road Traffic Act 2006 (No), s 4 – Conviction quashed (2010/812JR – Hogan J – 6/5/2011) [2011] IEHC 207
Maher v Judge Kennedy

Trial

Single trial – Applicant and wife charged – Jurisdiction to order single trial – Separate returns for trial made more than seven months apart – Whether within discretion of trial judge – Delay – Failure by respondent to provide copy of indictment to accused – Whether prejudice caused by omission – Whether application brought promptly – *Kenneally v DPP* [2010] IEHC 183, (Unrep, Hedigan J, 18/5/2010), A*ttorney General v Joyce & Walsh* [1929] IR 526 and *R v Assim* [1966] 2 QB 249 followed; *Conlon v Kelly* [2001] IESC 17, [2002] 1 IR 10 distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21(1) – Application dismissed (2010/1078JR – Kearns P – 20/5/2011) [2011] IEHC 208
Ryan v DPP

Trial

Severance – Sexual assaults – Sisters – Whether trial judge correct to refuse to sever indictment – Whether trial judge correct to admit corroborative evidence – Whether evidence of disturbance after assault can amount to corroboration – Judge's charge – Whether sufficient to draw jury's attention to important elements of case including any defence raised – Whether onus on accused to give explanation – Appeal refused (67/2010 – CCA – 19/10/2011) [2011] IECCA 69
People (DPP) v Hardiman

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EMPLOYMENT LAW

Contract

Fitness for work assessment – Referral to forensic psychiatrist – Fair procedures – Natural justice – *Audi alteram partem* – *Nemo iudex in causa sua* – Failure to give notice of basis of assessment – Failure to furnish documentation – Failure to allow comment on documentation – Failure to initiate grievance procedure prior to assessment – Prejudice – Bias – Duty of trust and confidence – Disciplinary sanction – Placement on compulsory sick leave

– Right to earn livelihood – Whether breach of employment contract – Whether right to fair procedures breached – Whether second interview remedied breach – Whether authority to require attendance at psychiatrist – Whether defendant acted fairly, properly and reasonably as responsible employer would – Whether procedural deficiencies in defendant's approach – *People (DPP) v Moore* [2005] IECCA 141, (Unrep, CCA, 20/12/2005); *O'Donoghue v South Eastern Health Board* [2005] IEHC 349, [2005] 4 IR 217; *United Bank Ltd v Akhtar* [1989] IRLR 507; *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308; *Deadman v Bristol City Council* [2007] EWCA Civ 822, [2007] IRLR 888; *Glover v BNL Ltd* [1973] IR 388; *Rock v Civil Service Commission* (Unrep, Murphy J, 27/3/1990); *Ahern v Minister for Industry and Commerce (No 2)* [1991] 1 IR 462; *R v Kent Police, ex p Godden* [1971] 2 QB 662 and *Fitzpatrick v Board of Management of St Marys Touraneena National School* (Unrep, Irvine J, 24/7/2008) considered– Safety, Health and Welfare at Work Act 2005 (No 10), s 23 – Employment Equality Act 1998 (No 21), s 16(3) – Declaratory relief granted (2008/2378P – Laffoy J – 15/4/2011) [2011] IEHC 212
Delaney v Central Bank of Ireland

Harassment

Safe system of work – Bullying and sexual harassment – Complaint procedure – Denial of promotion – Credibility – Teacher – Transfer to alternative school – Whether separate injury or damage from procedural deficiency where underlying complaint without foundation – Whether plaintiff treated unfairly and in discriminatory way by school principal – Application dismissed (2007/1899P – Ó Néill J – 15/4/2011) [2011] IEHC 141
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EXTRADITION LAW

European arrest warrant

Correspondence – Theft – Minimum gravity – Prison conditions in Poland – Availability of medical treatment – Right to privacy – Overcrowding – Fair procedures – Proportionality – Conditions of suspended sentence – Whether respondent fled issuing state – Whether attempt to evade justice – Whether real risk of exposure to inhuman and degrading treatment – Whether breach of constitutional right to fair procedures – Whether corresponding offence – Whether adequate particulars or information provided – Whether warrant void for uncertainty – Whether court required to look beyond information provided by applicant – *Minister for Justice v Ferenca* [2008] IESC 52, [2008] 4 IR 480; *Minister for Justice v Sliczynski* [2008] IESC 73, (Unrep, SC, 19/12/2008); *Minister for Justice v Slonski* [2010] IESC 19, (Unrep, SC, 25/3/2010); *Minister for Justice v Rettinger* [2010 IESC 45, [2010] 3 IR 783; *Minister for Justice v Fil* [2009] IEHC 120, (Unrep, Peart J, 13/3/2009); *Attorney General v Dyer* [2004] IESC 1, [2004] 1 IR 40; *Minister for Justice v Dunkova* [2008] IEHC 156, (Unrep, Peart J, 30/5/2008); *Minister for Justice v Butenas* [2006] IEHC 378, (Unrep, Peart J, 24/11/2006) and *The People (DPP) v Dundon* [2008] IECCA 14, (Unrep, CCA, 13/2/2008)considered – *Minister for Justice v Sawczuk* [2011] IEHC 41, (Unrep, Edwards J, 4/2/2011); *Minister for Justice v Tobin* [2008] IESC 3, [2008] IR 42; *Minister for Justice v Mazurek* [2011] IEHC 204, (Unrep, Edwards J, 13/5/2011) and *Minister for Justice v Sas* [2010] IESC 16, (Unrep, SC, 18/3/2010) followed – European Arrest Warrant Act 2003 (No 45), ss 10, 11(1A) and 16 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 4 – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28), s 6 – Criminal Justice Act 1999 (No 10), s 41(1) – Criminal Damage Act 1991 (No 31), s 3 – European Arrest Warrant Act 2003 (Designated Member States) (No 3) Order 2004 (SI 206/2004) – European Convention on Human Rights, art 3 – Framework decision, art 2.2 – Respondent surrendered (2010/229 & 230EXT – Edwards J – 19/5/2011) [2011] IEHC 209
Minister for Justice and Law Reform v Wlodarczyk

European arrest warrant

Evidence – Prison conditions in Poland – Living standard of prisoners – Overcrowding, undignified, inhumane and degrading – Respondent's experience – Alleged risk of ill-treatment – Assumption that issuing member state would respect human rights and fundamental freedoms – Additional information from issuing state – Evidential burden on respondent to adduce evidence – Foreseeable consequences of surrender – Evidence of determination to address overcrowding issues – Correspondence – Sentence imposed *in absentia* with no undertaking – Duplication – Whether real risk of being subjected to inhuman and degrading treatment – Whether corresponding offences – *Orchowski v Poland (Application no 17885/04)*; *Minister for Justice v Sawczuk* [2011] IEHC 41, (Unrep, Edwards J, 4/2/2011); *Minister for Justice v Rettinger* [2010] IESC 45, [2010] 3 IR 783 and *Minister for Justice v Stapleton* [2007] IESC 30, [2008] 1 IR 669 considered – European Arrest Warrant Act 2003 (No 45), ss 16, 20(1), 37, 38(1)(a), and 45 – European Arrest Warrant Act 2003 (Designated Member States)(No 3) Order 2004 (SI 206/2004) – European Convention on Human Rights, art 3 – Respondent surrendered (2010/245 & 249EXT – Edwards J – 13/5/2011) [2011] IEHC 204
Minister for Justice and Law Reform v Mazurek

European arrest warrant

Offence not covered by warrant – Consent to proceedings – Waiver of specialty – Alleged failure to attend trial while on bail – Points of objection – Request received from trial judge – *Sui generis* proceedings – Whether recognisable form of originating process required – Whether request properly shown to be from issuing state – Whether trial judge having authority to make request – Whether admissible evidence before court – Whether letter of request offending against rule against hearsay – Presumption of mutual trust and respect between member states – Whether respondent having legitimate expectation that issuing state would not seek to prosecute him for bail offence – *Minster for Justice, Equality and Law*

Reform v Sliczynski [2008] IESC 73 (Unrep, SC, 19/12/2008) applied; *Minister for Justice, Equality and Law Reform v Sawczuk* [2011] IEHC 41 (Unrep, Edwards J, 4/2/2011) considered – European Arrest Warrant Act 2003 (No 45), ss 2 & 22 – Council Decision 2002/584/JHA – Consent granted (2009/189EXT – Edwards J – 2/6/2011) [2011] IEHC 230
Minister for Justice, Equality and Law Reform v O'Sullivan

European arrest warrant

Sentence warrant – Immediately enforceable – Correspondence – Flee – Weight to be attached to information provided by issuing judicial authority – Burden of proof on respondent – Whether sentences immediately enforceable – Whether description sufficient to constitute corresponding Irish offences – Whether sufficient to constitute drug offences – Whether minimum gravity satisfied – Whether respondent fled Poland – *Minister for Justice v Tobin* [2007] IEHC 15 & [2008] IESC 3, [2008] 4 IR 42; *Minister for Justice v Sliczynski* [2008] IESC 73, (Unrep, SC, 19/12/2008); *Minister for Justice v Stankiewicz* [2009] IESC 79 applied – Misuse of Drugs Regulations 1988 (SI 328/1988), r 4 – Misuse of Drugs Act 1977 (No 12), ss 3, 15 and Schedule – European Arrest Warrant Act 2003 (Designated Member States) (No 3) Order 2004 (SI 206/2004), art 2 and Schedule – European Arrest Warrant Act 2003 (No 45), ss 3, 10, 11, 13, 16, 21A, 22, 23, 24 and 38 – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28), s 6 – Council Framework Decision of 13/6/2002, art 2 – Order for surrender granted
(2010/55EXT – Edwards J – 15/4/2011) [2011] IEHC 169
Minister for Justice and Law Reform v Wicinski

European arrest warrant

Sentence warrants – Relevance of date/time in description of offence – Form of warrant – Correspondence – Interpretation of flee – Burden of proof – Weight to be attached to information provided by issuing judicial authority – Delay – Whether requirement to include explanation for delay on warrant – Appropriate forum for ventilating complaint of delay – Assumption to be applied – Onus of proof – Standard of proof – Approach to be taken in determining assertion breach of rights if surrendered – Family life rights – Whether sufficient particulars of date/time – Whether sufficient detail regarding whether sentences suspended – Whether warrant failed to state maximum sentence – Whether sufficient to constitute burglary – Whether sufficient to constitute assault – Whether sufficient to constitute theft – Whether minimum gravity satisfied – Whether cogent evidence casting doubt on information provided by judicial authority – Whether respondent fled from Poland – Whether surrender ought to be refused on ground of delay objection – Polish prisons – Whether substantial grounds real risk of inhuman or degrading treatment – Whether interference with family rights – *Minster for Justice v Dolny* [2009] IESC 48, (Unrep, SC, 18/6/2009); *Minister for Justice v Sas* [2010] IESC 16, (Unrep, SC, 18/3/2010); *Minister for Justice v Sliczynski* [2008] IESC 73, (Unrep, SC, 19/12/2008); *Minister for Justice v Tobin* [2007] IEHC 15 & [2008] IESC 3, [2008] 4 IR 42; *Minister for Justice v Stapleton* [2008] IESC 30, [2008] 1 IR 669, [2008] 1 ILRM 267; *Minister for Justice v Rettinger* [2010] IESC 45, [2010] 3 IR 783; *Minister for Justice v Gheorghe* [2009] IESC 76, (Unrep, SC, 18/11/2009) applied – *Minister for Justice v Ciechanowicz* [2011] IEHC 106, (Unrep, Edwards J, 18/3/2011); *Minister for Justice v Sawczuk* [2011] IEHC 41, (Unrep, Edwards J, 4/2/2011); *Minister for Justice v Adam (No 1)* [2011] IEHC 68, (Unrep, Edwards J, 3/3/2011); *Agbonlahor v Minister for Justice* [2007] IEHC 166, [2007] 4 IR 309; *Minister for Justice v Gorman* [2010] IEHC 210, [2010] 3 IR 583; *Minister for Justice v Bednarczyk* [2011] IEHC 136, (Unrep, Edwards J, 5/4/2011) approved – European Arrest Warrant Act 2003 (Designated Member States) (No 3) Order 2004 (SI 206/2004), art 2 and sch – Non-Fatal Offences Against the Person Act 1997 (No 26), s 3 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 4 and 12 – European Arrest Warrant Act 2003 (No 45), ss 3, 10, 11, 13, 16, 20, 21A, 22, 23, 24, 37, 38 and 45 – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28), s 6 – European Convention on Human Rights 1950, arts 3, 6 and 8 – Council Framework Decision of 13/6/2002, art 8 – Constitution of Ireland 1937 – Surrender ordered (2010/93 & 94 EXT – Edwards J – 13/4/2011) [2011] IEHC 161
Minister for Justice, Equality and Law Reform v Zych

European arrest warrant

Sentence warrant – Retrial – Undertaking by issuing state – Correspondence – Inquiry into correspondence – Allegation of malicious and politically motivated conviction – Whether sufficiently cogent evidence to rebut presumption issuing state generally respected human rights – Sentence given *in absentia* – Whether undertaking of issuing judicial authority given regarding retrial sufficient – Whether corresponding Irish offences – Whether sufficient to constitute theft – Whether sufficient to constitute social welfare or revenue offence where requirement of intention not in description of French offence – Whether intention might be implied into description – Whether severance possible in circumstances where sentence composite/aggregate of multiple convictions – *Minister for Justice v Puta and Sulej* [2008] IESC 30, (Unrep, SC, 6/5/2008); *Minister for Justice v Ferenca* [2008] IESC 52, [2008] 4 IR 480 applied – *Minister for Justice v Brennan* [2007] IESC 21, [2007] 3 IR 732; *Minister for Justice v Stapleton* [2008] IESC 30, [2008] 1 IR 669; *Minister for Justice v Sliczynski* [2008] IESC 73, (Unrep, SC, 19/12/2008); *Minister for Justice v Sas* [2010] IESC 16, (Unrep, SC, 18/3/2010); *Attorney General v Dyer* [2004] IESC 1, [2004] 1 IR 40 considered – Income Tax (Employments) (Consolidated) Regulations 2001 (SI 559/2001), r 7 – European Arrest Warrant Act 2003 (Designated Member States) (No 2) Order 2004 (SI 130/2004), art 2 and sch – Criminal Law Act 1997 (No 14), s 7 – Taxes Consolidation Act 1997 (No 39) – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 4 – European Arrest Warrant Act 2003 (No 45), ss 3, 10, 11, 13, 16, 21A, 22, 23, 24, 37, 38 and 45 – Social Welfare (Consolidation) Act 2005 (No 26), s 252 – European Convention on Human Rights 1950 – Council Framework Decision of 13/6/2002, art 2 – Constitution of Ireland 1937 – Surrender refused (2010/276EXT – Edwards J – 14/4/2011) [2011] IEHC 168
Minister for Justice, Equality and Law Reform v Charron

European arrest warrant

Surrender – Objection – Identity – Child abduction and sexual offences – Correspondence –Proportionality – Right to privacy – Seizure of respondent's good – Adverse pre-trial publicity – Delay – Prosecutorial delay – Abuse of process – Typographical error – Description of offences – Whether warrant invalid – Whether identity and particulars of alleged offence disclosed – Whether risk of unfair trial – Whether surrender incompatible with State's obligations under Convention – Whether surrender unjust, invidious or oppressive – Whether court should look behind ticking of box – *Minister for Justice v Butenas* [2006] IEHC 378, (Unrep, Peart J, 24/11/2006) and *Minister for Justice v Puta* [2008] IESC 30, (Unrep, SC, 6/5/2008) considered – *Minister for Justice v Ferenca* [2008] IESC 52, [2008] 4 IR 480; *Minister for Justice v Desjatnikovs* [2008] IESC 53, [2009] 1 IR 618; *Minister for Justice v Stapleton* [2007] IESC 30, [2008] 1 IR 669 and *Minister for Justice v Hall* [2009] IESC 40, (Unrep, SC, 7/5/2009) followed – European Arrest Warrant Act 2003 (No 45), ss 11(1A), 16, 20(2), 22 and 37 – European Arrest Warrant Act 2003 (Designated Member States) Order 2004 (SI 4/2004) – Framework decision, art 2.2 – European Convention on Human Rights – Constitution of Ireland 1937 – Respondent surrendered (2010/324EXT – Edwards J – 24/5/2011) [2011] IEHC 211
Minister for Justice and Law Reform v H(PP)

FAMILY LAW

Child abduction

Custody – Breach of rights of custody – Removal from local authority by parents – Habitually resident in England

– Determination of court of habitual residence – Proper construction of Convention – Meaning of "having the care of the person of the child" – Defences – Views of children – Rights of family – Fundamental principles on protection of human rights and fundamental freedoms – Child's best interests – Whether removal wrongful – Whether custody rights would have been exercised but for removal – Whether requested court should accept article 15 determination as conclusive – Whether defence to removal – Whether applicants had care of the person of the children – Whether grave risk or intolerable situation – Risk of adoption – Whether return unconstitutional – *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619; *B v B (Child Abduction)* [1998] 1 IR 299; *London Borough of Sutton v M(R)* [2002] 4 IR 488; *Re P* [2004] EWCA Civ 971, [2005] 2 WLR 201; *M(TM) v D(M) (Child Abduction: Article 13)* [2000] 1 IR 149; *Foyle Health and Social Services Trust v C(E)* [2006] IEHC 448, [2007] 4 IR 528; *W(AC) v Ireland* [1994] 3 IR 232; *The Director General Department of Family, Youth and Community v Rhonda May Bennett* [2000] Fam. C.A. 253; *Re Article 26 and the Adoption (No 2) Bill 1987* [1989] IR 656; *Sanders v Mid-Western Health Board* (Unrep, SC, 23/6/1987); *Northampton County Council v F(AB)* [1982] ILRM 164; *Kent County Council v S(C)* [1984] ILRM 292 and *O(A) v L(D) v Minister for Justice, Equality and Law Reform* [2003] 1 IR 1 considered – *I(H) v G(M)* [2000] 1 IR 110; *T(G) v O(KA)* [2007] IESC 55, [2008] 3 IR 567 and *S(A) v S(P)* [1998] 2 IR 244 followed – Child Abduction and Enforcement of Custody Orders Act 1991 (No) – Constitution of Ireland 1937, Arts 40.3.1, 41 and 42 – Council Regulation 2201/2003, art 11 – Hague Convention on the Civil Aspects of International Child Abduction, arts 3, 5, 12, 13, 15 and 20 – European Convention on Human Rights, art 8 – Application granted (2009/1HLC – Finlay Geoghegan J – 26/1/2010) [2010] IEHC 9
Nottinghamshire County Council v B(K)

Maintenance

Decree of divorce – Change in circumstances – Applicant's income reduced – Applicant seeking reduction of maintenance – Applicant likely to receive annual bonus – Respondent obliged to live away from her extended family – Whether respondent in position to work full or part time – Whether reduction of maintenance appropriate – Maintenance reduced, applicant to provide annual statement of income to respondent (2006/33M – Irvine J – 7/6/2011) [2011] IEHC 233
H(P) v D(F)

Maintenance

Variation – Failure to comply with maintenance order – Dismissal of application for lack of full disclosure and abuse of court process – Court having inherent power to dismiss application by reason of behaviour possibly constituting contempt of court – New circumstances arising – Deterioration in economic situation – Allegation by respondent that his financial circumstances considerably worsened – Whether appropriate to dismiss *in limine* respondent's application for variation – *Riordan v Ireland (No 5)* [2001] 4 IR 463; *DK v AK* [1993] ILRM 710; *AK v JK* [2008] IEHC 341, [2009] 1 IR 814 considered – Family Law (Divorce) Act 1996 (No 33), s 22 – Application to dismiss variation application adjourned generally with liberty to re-enter, disclosure by respondent ordered (1997/58M, 2001/168M – Abbott J – 15/4/2011) [2011] IEHC 229
E(L) v F(U)

Practice and procedure

Case management – Failure by respondent to comply with order – Application to vary order – Failure to disclose assets – Dismissal *in limine* of application for lack of disclosure – Whether burden of proof beyond reasonable doubt or on balance of probabilities – Right of court to declare claimant's right to proceed in separation or divorce as undefended action where egregious non-compliance with family law practice direction – Whether appropriate to dismiss application for variation *in limine* – Constitutional and statutory imperative on court to make proper provision for parties in divorce proceedings – Whether applicant could immediately proceed to have respondent committed for contempt of court or have his property sold – Respondent's application dismissed (2004/63M – Abbott J – 2/6/2011) [2011] IEHC 228
U v U

Proper provision

Division of assets – Intention of High Court to divide assets equally – Fall in property values – Devaluation of assets – Whether financial provision unfair – Whether provision in keeping with intention of trial judge – Whether requiring appellant to pay lump sum in light of devaluation amounted to equal division of assets – Time at which assets valued – New evidence without special leave – Whether intervening events could be relied upon – Nature of appeal – Meaning of proper provision – Whether appeal court could consider fall in value of land since trial – Lump sum order – Order incapable of performance – Whether new evidence relevant – Weight to be given to new evidence – *Hay v O'Grady* [1992] 1 IR 210 and *Hughes v O'Rourke* [1986] ILRM 538 applied – Courts of Justice Act 1936 (No 48), s 37 – Family Law (Divorce) Act, 1996 (No 33), s 20 – Rules of the Superior Courts 1986 (SI 15/1986), O 58, r 8 – Constitution of Ireland 1937, Article 34.4.3º – Appeal allowed (299/2009 – SC – 7/6/2011) [2011] IESC 18
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SI 134/2012

GARDA SÍOCHÁNA

Complaints

Ombudsman – Time limit – Extension of time – Good reason – Harassment – Alleged incidents occurring more than six months prior to making of complaint – Extension of time for making of complaint granted – Reasons for exercising discretion – Opportunity to make submissions prior to making of decision – Whether decision to extend time fair and reasonable – Whether decision reached *bona fide* – Whether decision factually sustainable – Whether decision rational – Whether obligation on respondent to invite applicant to make submissions prior to making of decision to extend time – Whether reasons provided for decision to extend time adequate – *Flood v Garda Síochána Complaints Board* [1999] 4 IR 560 followed; *Ó Ceallaigh v An Bord Altranais* [2000] 4 IR 54 distinguished – Garda Síochána Act 2005 (No 20), s 84 – Application dismissed (2010/1000JR – Hedigan J – 9/6/2011) [2011] IEHC 237
Moran v Garda Síochána Ombudsman Commission

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HEALTH

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Adverse credibility finding – Demeanour of applicant – Error of fact – Whether error of fact undermined decision – Whether reliance on demeanour of applicant unsound –Whether alternative finding of remoteness rendered decision safe – *The State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642 applied; *Ryanair Ltd v Flynn* [2000] 3 IR 240; *AMT v Refugee Appeals Tribunal* [2004] IEHC 219, [2004] 2 IR 607; *Aer Rianta cpt v Commissioner for Aviation Regulation,* (Unrep, O'Sullivan J, 16/1/2003) approved – Refugee Act 1996 (No 17) ss 11, 13 and 17 – *Certiorari* granted (2008/767JR – Cooke J – 15/4/2011) [2011] IEHC 151
R(H) v Refugee Appeals Tribunal

Asylum

Ethnic minority – Fear of persecution – Credibility – Criteria in determining refugee status – Country of origin information – Language analysis report – Knowledge of country and culture – Fair procedures – Reasons – Cumulative impact of errors – Whether substantial grounds– Whether breach of fair procedures and constitutional justice – Whether credibility findings result of breach of fair procedures – Whether process lawful – Whether finding rational, reasonable and within respondent's jurisdiction – Whether clear and manifest error – Whether *prima facie* breach of natural justice– *K(I) v Minister for Justice, Equality and Law Reform* [2008] IEHC 173, (Unrep, Birmingham J, 12/6/2008); *G(T) v Refugee Appeals Tribunal* [2007] IEHC 377, (Unrep, Birmingham J, 7/10/2007); *S(DVT) v Minister for Justice, Equality and Law Reform* [2007] IEHC 305, [2008] 3 IR 476; *Iroegbu v Refugee Appeals Tribunal* [2007] IEHC 72, (Unrep, Murphy J, 23/1/2007); *Muia v Refugee Appeals Tribunal* [2005] IEHC 363, (Unrep, Clarke J, 11/11/2005); *K(G) v Minister for Justice, Equality and Law Reform* [2002] 2 IR 418; *Rajah v Royal College of Surgeons* [1994] 1 ILRM 223; *O'Donoghue v An Bord Pleanála* [1991] ILRM 750; *Kikumbi v Refugee Appeals Tribunal* [2007] IEHC 11, (Unrep, Herbert J, 7/2/2007); *F(P) v Minister for Justice, Equality and Law Reform* [2002] 1 IR 164; *Keagnene v Minister for Justice, Equality and Law Reform* [2007] IEHC 17, (Unrep, Herbert J, 31/1/2007); *Bisong v Refugee Appeals Tribunal* [2005] IEHC 157, (Unrep, O'Leary J, 25/4/2005); *Zhuchova v Minister for Justice, Equality and Law Reform* [2004] IEHC 404, (Unrep, Clarke J, 26/11/2004); *Da Silva v Refugee Appeals Tribunal* (Unrep, Peart J, 9/7/2004); *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 416, (Unrep, Peart J, 9/12/2005 and *Tabi v Minister for Justice, Equality and Law Reform* [2007] IEHC 287, (Unrep, Peart J, 27/7/2007) considered – Refugee Act 1996 (No 17), ss 11, 13 and 16 – Leave granted (2007/1114JR) [2010] IEHC 143
A(A) v Minister for Justice, Equality and Law Reform

Asylum

Fear of persecution – Medical evidence – Credibility – Country of origin information – Fair procedures – Whether substantial grounds – Whether grounds reasonable, arguable and weighty and not trivial or tenuous – Whether respondent fully considered evidence – Whether finding made on significant error of fact – Whether material errors in assessing credibility – Whether open to respondent to reach conclusion he reached – *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *S(DVT) v Minister for Justice, Equality and Law Reform* [2007] IEHC 305, [2008] 3 IR 476; *E(M) v Refugee Appeals Tribunal* [2008] IEHC 192, (Unrep, Birmingham J, 27/6/2008); *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 416, (Unrep, Peart J, 9/12/2005); *Kikunbi v Refugee Appeals Tribunal* (Unrep, HC, 7/7/2007); *Evuarherhe v Minister for Justice, Equality and Law Reform* [2006] IEHC 23, (Unrep, Clarke J, 26/1/2006); *O(KO) v Refugee Appeals Tribunal* [2008] IEHC 311, (Unrep, Hedigan J, 15/10/2008) and *K(G) v Minister for Justice, Equality and Law Reform* [2002] 2 IR 418 considered – *Mibanga v The Secretary of State for the Home Department* [2005] EWCA Civ 367, [2005] All ER(D) 307(Mar); *L(LC) v Refugee Appeals Tribunal* [2009] IEHC 26, (Unrep, Clark J, 21/1/2009) and *M(N) v Minister for Justice, Equality and Law Reform* [2008] IEHC 130, (Unrep, McGovern J, 7/5/2008) distinguished – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(1)(j) – Refugee Act 1996 (No 17), ss 11A, 13(1) and 16(16) – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Leave refused (2009/970 – Herbert J – 4/2/2010) [2010] IEHC 18
K(A) v Refugee Appeals Tribunal

Asylum

Fear of persecution – Mother and daughter – Separate countries of origin – Failure to give separate consideration to daughter's claim – International protection – Liberia – Voluntary repatriation of refugees – Ivory Coast – Whether fear of persecution – Whether separate consideration given to second applicant's claim – Whether first applicant eligible for international protection – Whether material failure to deal with every aspect of claim – *T(MS) v Minister for Justice, Equality and Law Reform* [2009] IEHC 529 considered – Refugee Act 1996 (No 17), s 17(1) – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5(2) – Decision in relation to second applicant quashed (2008/1023JR – Cooke J – 5/5/2011) [2011] IEHC 205
W(FG) v Refugee Appeals Tribunal

Asylum

Fear of persecution – Country of origin information – Medical evidence – Previous tribunal decisions – Credibility findings – Selective analysis of respondent's decision – Whether respondent acted in irrational and unreasonable manner – Whether respondent took account of previous tribunal decisions – Whether respondent took account of applicant's evidence – Whether respondent engaged in speculation – Whether respondent failed to consider applicant's credibility in context of objective country of origin information – Whether applicant engaged in selective analysis of respondent's decision – *T(AM) v Minister for Justice, Equality and Law Reform* [2004] IEHC 606, (Unrep, Finlay Geoghegan J, 14/5/2004) considered – Application refused (2008/754JR – Ryan J – 15/10/2010) [2010] IEHC 511
K(EN) v Refugee Appeals Tribunal

Asylum

Fear of persecution – Negative credibility findings – Country of origin information – Material error of fact – Delay – Credibility – Fair procedures – *Audi alterim partem* – Whether respondent engaged in inordinate delay – Whether material error of fact – Whether failure to considered country of origin information – Whether error undermined validity of respondent's reasoning – Whether substantial grounds – *N(L) v Secretary of State for the Home Department* [2010] EWCA Civ 576; *P(YBCP) v Refugee Appeals Tribunal* (Unrep, HC, 18/6/2010); *A(PP) v Refugee Appeals Tribunal* [2006] IESC 53, [2007] 4 IR 94; *H(D) v Refugee Applications Commissioner* [2004] IEHC 95, (Unrep, Herbert J, 27/5/2004) and *S(P) v Refugee Applications Commissioner* [2008] IEHC 235, (Unrep, McMahon J, 11/7/2008) considered – Refugee Act 1996 (No 17), ss 11A(3), 11B and 16(16) – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5(1)(a) – Leave granted (2008/767JR – Ryan J – 8/10/2010) [2010] IEHC 510
R(H) v Refugee Appeals Tribunal

Asylum

Persecution – Education – Real risk not receive basic education – Discrimination – Violation of basic human right – Whether

denial of education constituted severe violation of basic human rights – Whether discrimination amounted to persecution – Whether respondent erred in application of what constituted persecution – *Anisminic v Foreign Comp Comm* [1969] 2 AC 147, *Killeen v DPP* [1997] 3 IR 218, *Lambert v An tÁrd Chláraitheoir* [1995] 2 IR 372, *Shannon Regional Fisheries Board v An Bord Pleanála* [1994] 3 IR 449 and *AMT v Refugee Appeals Tribunal* [2004] IEHC 219, [2004] 2 IR 607 followed; *Brown v Board of Education* (1954) 347 US 483 considered; *MST (a minor) v Minister for Justice* [2009] IEHC 529, (Unrep, Cooke J, 4/12/2009) and *GV v Refugee Appeals Tribunal* [2011] IEHC 262, (Unrep, Ryan J, 1/7/2011) distinguished – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), art 9 – Refugee Act 1996 (No 17), s 2 – Constitution of Ireland 1937, Article 42 – Council Directive 204/83/EC, article 9 – Charter of Fundamental Rights of the European Union, article 14 – European Convention on the Protection of Human Rights and Fundamental Freedoms 1950, article 2 of First Protocol – United Nations Convention on the Rights of the Child, article 28 – *Certiorari* granted (2009/955JR – Hogan J – 10/11/2011) [2011] IEHC 431
D(E) an infant v Refugee Appeals Tribunal

Asylum

Refugee – Function of Tribunal – Speculation – Adverse credibility finding by Tribunal – Whether decision based on speculation – Use of country of origin information – Whether failure to consider and weigh country of origin information – Whether errors of fact undermined decision – Whether substantial grounds – *The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 applied; *McNamara v An Bord Pleanála* [1995] 2 ILRM 125 approved; *E(M) v Refugee Appeals Tribunal* [2008] IEHC 192, (Unrep, Birmingham J, 27/6/2008); *Da Silveira v Refugee Appeals Tribunal* [2004] IEHC 436, (Unrep, Peart J, 9/7/2004); *Imafu v Minister for Justice* [2005] IEHC 182 (Unrep, Clarke J, 27/5/2005); *Kikumbi v Refugee Applications Commissioner* [2007] IEHC 11 (Unrep, Herbert J, 7/2/2007); *R(I) v Minister for Justice* [2009] IEHC 353 (Unrep, Cooke J, 24/7/2009) approved – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), r 5 – Refugee Act 1996 (No 17) ss 8, 11 and 16 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave to seek judicial review refused (2008/995JR – Herbert J – 8/4/2011) [2011] IEHC 181
L(AN) v Refugee Appeals Tribunal

Deportation

Appeal – Leave to appeal – Test – Desirable point of law be resolved by appeal – Refusal of leave to seek judicial review – Interpretation of 'substantial ground' – Interpretation of 'Carltona doctrine' – Whether interpretation of "proceed to consider" of exceptional importance – Status of work done by executive officer – *Devanney v Sheils* [1998] 1 IR 230 applied; *Glancré Teo v An Bord Pleanála* [2006] IEHC 250, (Unrep, MacMenamin J, 13/7/2006); *Arklow Holidays Ltd v Bord Pleanála (No 1)* [2006] IEHC 102, (Unrep, Clarke J, 29/3/2006); *R(I) v Minister for Justice* [2009] IEHC 510, (Unrep, Cooke J, 26/11/2009); *O(S)v Minister for Justice* [2010] IEHC 343, (Unrep, Cooke J, 1/10/2010); *McNamara v An Bord Pleanála* [1995] 2 ILRM 125 approved; *Kenny v An Bord Pleanála (No 2)* [2001] 1 IR 704 considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), r 4 – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Convention on Human Rights 1950, art 8 – Constitution of Ireland 1937 – Application refused (2010/1336JR – Cooke J – 4/5/2011) [2011] IEHC 175
O(O) v Minister for Justice, Equality and Law Reform

Deportation order

Revocation – Statement admitting false asylum application – Mistake of fact – Respondent's knowledge of statement – Humanitarian considerations – Son's medical condition – Whether failure to take account of relevant considerations – Whether decision made in mistaken belief that applicant continued to use false identity – Whether consideration of statement could have altered balance in favour of allowing applicant to remain – Whether omission material so as to deprive decision maker of jurisdiction – Whether exceptional circumstances – *Ryanair Ltd v Flynn* [2003] 3 IR 240 considered – Immigration Act 1999 (No), s3(11) – Decision quashed (2010/286JR – Ryan J – 12/11/2010) [2010] IEHC 508
M(B) v Minister for Justice, Equality and Law Reform

Deportation order

Revocation – Police protection – Position of cults – Internal relocation – Subsidiary protection – Prohibition of refoulement – Separation of the family – Country of origin information – Whether breach of fair procedures – Whether second applicant denied individual assessment – Whether substantial grounds – *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701; *Edosa v Minister for Justice, Equality and Law Reform* [2010] IEHC 94, (Unrep, HC, Cooke J, 25/3/2010); *Ugbo v Minister for Justice, Equality and Law Reform* [2010] IEHC 80, (Unrep, HC, Hanna J, 5/3/2010) and *Baby O v Minister for Justice, Equality and Law Reform* [2002] 2 IR 169 considered – Refugee Act 1996 (No 17), s 5– Application refused (2010/204JR – Ryan J – 22/10/2010) [2010] IEHC 512
O(E) v Minister for Justice, Equality and Law Reform

INJUNCTIONS

Interlocutory injunction

Mandatory relief – Disciplinary proceedings – Suspected serious misconduct – Investigation – Summary dismissal – Natural and constitutional justice – Right of appeal – Right to respond to allegations – Fair procedures – Challenge to involvement of investigation team – Strong case – Damages – Balance of convenience – Whether decision to suspend null and void – Whether process leading to dismissal and decision to dismiss in accordance with fair procedures – Whether opportunity to respond to allegations – Whether disciplinary procedures complied with – Whether appropriate that investigation team made decision as to misconduct – Whether strong case – Whether damages adequate – *Bergin v Galway Clinic Doughiska Ltd* [2007] IEHC 386; [2008] 2 IR 205; *Glover v BLN* [1973] IR 388; *Mooney v An Post* [1998] 4 IR 288 and *Maha Lingham v Health Service Executive* [2006] ELR 137 considered – Relief granted (2010/140P – Laffoy J – 10/2/2010) [2010] IEHC 36
Giblin v Irish Life & Permanent plc

Interlocutory injunction

Mandatory relief – Disciplinary proceedings – Suspension – Natural justice – Fair procedures – Standard of proof – Strong case – Balance of convenience – Damages – Degree of supervision of court – Whether strong case likely to succeed at trial – Whether suspension lawful – Whether defendant's actions were proportionate, fair, reasonable or rational – Whether investigation taking place – *Maha Lingham v Health Service Executive* [2006] ELR 137; *Morgan v Trinity College Dublin* [2003] 3 IR 157; *Quirke v Board Lúthchleas na hÉireann* [1988] IR 83; *Mulcahy v Avoca Capital Holdings Ltd* [2005] IEHC 136, (Unrep, Clarke J, 14/4/2005)*; Bergin v Galway Clinic Doughiska* [2007] IEHC 386, [2008] 2 IR 205; *O'Donoghue v South Eastern Health Board* [2005] IEHC 349, [2005] 4 IR 217; *Ali v London Borough of Southwark* [1988] ILRL 100; *Deegan v Minister for Finance* [2000] ELR 190; *Lewis v Heffer* [1979] 3 All ER 351; *Ahmed v Health Service Executive* [2007] IEHC 312, (Unrep, Laffoy J, 29/8/2007); *Yap v Children's University Hospital (Temple St Ltd)* [2006] IEHC 308, [2006] 4 IR 298 and *Carroll v Dublin Bus* [2006] ELR 149 considered – Application dismissed (2009/11325P – MacMenamin J – 22/1/2010) [2010] IEHC 15
Keenan v Iarnród Éireann

INTELLECTUAL PROPERTY

Patents

Patent – Infringement – Added matter – Whether patent amended – Whether extended beyond content of application as filed – Whether amendment should be made – Consistency of approach between domestic courts of signatory states – Whether patentee limited to claiming only embodiment of invention which illustrated by reference to particular embodiment of invention – Comparison application and patent in suit – Perspective of skilled addressee – Whether removal of out-of-phase restriction was added matter – Whether any claim that covered in-phase arrangements was extension of subject matter of application – Whether changes broaden claim for patent – *Bonzel v Intervention Ltd (No 3)* [1991] RPC 553, *Vector Corp v Glatt Air Techniques Ltd* [2007] EWCA Civ 805, [2008] RPC 10, *In Re Glaxo Group's Patent* [2009] IEHC 277 (Unrep, Charleton J, 26/7/2009), *Dr Reddy's Laboratories (UK) Ltd v Eli Lilly and Co Ltd* [2009] EWCA Civ 1362, [2010] RPC 9 and *Houdaille/Removal of Feature* (T331/87) [1991] EPOR 194 followed; *Medinol Ltd v Abbott Ireland and Ors* [2011] IEHC 128 (Unrep, McGovern J, 10/3/2011) considered – European Patent Convention, art 123 – Finding added matter in patent in suit (2008/10436P – McGovern – 27/5/2011) [2011] IEHC 218
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Fotooh v Minister for Justice, Equality and Law

Practice and procedure

Leave application – Standard of proof – Application on notice – Arguable grounds – Investigation by respondents into conduct of applicant – Applicant's role as auditor – Objection to appointment – Validity of appointment – Complaint – Delay – Extension of time – Natural justice – Fair procedures – Legitimate expectations – Rights of party in disciplinary investigation – Limitation of rights at preliminary stage of investigation – Whether appointment *ultra vires* powers of second respondent – Whether valid complaint under Bye-Laws – Whether arguable case – Whether higher standard of proof required where respondent on notice – Whether good reason to extend time – Whether disciplinary procedure unfair – Whether legitimate expectation – Whether applicant out of time – *Mass Energy v Birmingham County Council* [1994] Env LR 298; *O'Brien v Moriarty* [2005] IESC 32, [2006] 2 IR 221; *G v DPP* [1994] 1 IR 374; *McNamara v An Bord Pleanala (No 1)* [1995] 2 ILRM 125; *Potts v Minister for Defence* [2005] IEHC 72, [2005] 2 ILRM 517; *Gorman v Minister for Environment* [2001] 1 IR 306; *Irish Haemophilia Society v Lindsay* (Unrep, HC, Kelly J, 16/5/2001); *Solan v DPP* [1989] ILRM 491; *De Róiste v Minister for Defence* [2001] 1 IR 190; *Dekra Éireann Teo v Minister for the Environment* [2003] 2 IR 270; *O'Callaghan v Disciplinary Tribunal* [2002] 1 IR 1; *Ó Ceallaigh v An Bord Altranais* [2000] 4 IR 54; *Webb v Ireland* [1988] IR 353; *Glencar Exploration v Mayo County Council (No 2)* [2002] 1 IR 84; *Re "La Lavia"* [1996] 1 ILRM 194 considered – *C(D) v DPP* [2005] IESC 77, [2005] 4 IR 281 followed – Rules of the Superior Courts 1986 (SI 15/1986) O 84, r 21(1) – Leave refused (2011/330JR – Irvine J – 13/5/2011) [2011] IEHC 205
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Article

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Article

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Causation

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Keane (an infant) v Health Service Executive and Ors

Duty of care

Legitimate expectation – Negligent misstatement – Duty of care owed by public authority – Whether expectation legitimate or reasonable – Whether public authority liable for damages for negligent misstatement – Whether public authority owes same duty as private body for statement made – *Wiley v Revenue Commissioners* [1994] 2 IR 16, *Wildgust v Bank of Ireland* [2006] IESC 19, [2006] 1 IR 570 and *Glencar Explorations v Mayo County Council (No 2)* [2002] IR 84 applied; *W v Ireland (No 2)* [1997] 2 IR 141, *Ward v McMaster* [1988] IR 337 and *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465 followed; *Emerald Meats Ltd v Minister for Agriculture (No 2)* [1997] 1 IR 1 distinguished – Damages of €49,600 awarded (2009/3969P – 15/11/2011) [2011] IEHC 429
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Article

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2012 (June) Law Society Gazette 42

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Planning

Request for further information – Function of planning authority – Response to request – Standard of response required – Time periods for complying with request – Whether failure to comply with request – Consequence of failing to comply with request – Application deemed withdrawn – Entitlement to make further planning application –Whether determination made as planning expert or ministerial function – Whether requests unreasonable – Whether device to avoid giving decision on application – Whether decisions unreasonable – *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 and *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701 applied; *O'Connor v Dublin Corporation* (Unrep, O'Neill J, 3/10/2000); *Illium Properties Ltd v Dublin City Council* [2004] IEHC 327 (Unrep, O'Leary J, 15/10/2004); *Kinsella v Dundalk Town Council* [2004] IEHC 373, (Unrep, Kelly J, 3/12/2004) considered – Planning and Development Regulations 2006 (SI 685/2006), r 33 – Local Government (Planning and Development) Act 1963 (No 28) – Planning and Development Act 2000 (No 30), ss 34 and 261 – Relief refused (2008/1341JR – Hedigan J – 14/4/2011) [2011] IEHC 143
Scanlon v Sligo County Council

Retail planning guidelines

Development – Proposed use – Planning considerations – Parent permission – Respondent's jurisdiction – Retail warehouse park – Substantial grounds – Substantial interest – *Locus standi* – Failure to previously raise framework point – Estoppel – Whether development or exempted development – Whether change of user – Whether changes were "matters of detail" – Whether changes flowed from parent permission – Whether error of law going to jurisdiction – Whether substantial grounds for contending decision invalid – Whether applicant had substantial interest – Whether *locus standi* – *McNamara v*

An Bord Pleanála [1995] 2 ILRM 25; *Lancefort v An Bord Pleanála (No 2)* [1999] 2 IR 270; *Ryanair v An Bord Pleanála* [2004] IEHC 52, [2004] 2 IR 334; *Quinlan v An Bord Pleanála* [2009] IEHC 1, (Unrep, Dunne J, 13/5/2009); *Harrington v An Bord Pleanála* [2005] IEHC 344, [2006] 1 IR 388; *Cicol v An Bord Pleanála* [2008] IEHC 146, (Unrep, Irvine J, 8/5/2008); *Harding v Cork County Council* [2006] IEHC 295, (Unrep, Clarke J, 12/10/2006); *Grianán An Aileach Centre v Donegal County Council (No 2)* [2004] IESC 43, [2004] 2 IR 625; *Palmerlane v An Bord Pleanála* [1999] 2 ILRM 514; *Tormey v Ireland* [1985] IR 289; *Criminal Assets Bureau v Hunt* [2003] 2 IR 168; *Kenny v Dublin City Council* [2009] IESC 19, (Unrep, SC, 5/3/2009); *O'Connor v Dublin Corporation* (Unrep, Ó Néill J, 3/10/2000); *Ashbourne Holdings v An Bord Pleanála* [2002] ILRM 321; *Boland v An Bord Pleanála* [1996] 3 IR 435 and *White v Dublin Corporation* [2004] IESC 35, [2004] 1 IR 545 considered – Planning and Development Act 2000 (No 30), ss 5, 34(5), 39(2) and 50 – Planning and Development (Strategic Infrastructure) Act 2006 (No), s 13 – Application declined (2009/405 & 406JR – MacMenamin J – 22/1/2010) [2010] IEHC 13
Treacy v An Bord Pleanála

PRACTICE AND PROCEDURE

Costs

Security for costs – Full defence to proceedings – Insolvent plaintiff – Initial onus on party seeking security – Special circumstances – Delay – Context of complex and difficult proceedings – Prejudice – Whether plaintiff in position to pay costs in event of successful defence – Whether *prima facie* defence – Whether special circumstances established – Whether inordinate and calculated delay – Whether significant prejudice – *Inter Finance Ltd v KPMG Peat Marwick* [1998] IEHC 217 and *Hidden Ireland Heritage Holidays Ltd v Indigo Services Ltd* [2005] IESC 38, [2005] 2 IR 115 followed – Application refused (2005/793S – Clarke J – 5/2/2010) [2010] IEHC 30
Moorview Developments Ltd v Cunningham

Delay

Proceedings seeking indemnity and contribution – Application to strike out – Inordinate, inexcusable and unreasonable delay in prosecuting proceedings – Failure to join defendant as third party in original proceedings – Settlement of original proceedings without defendant's involvement – As soon as reasonably possible – Prejudice – Court's discretion – Justice of case– Whether inordinate, inexcusable and unreasonable delay – Whether plaintiff proceeded as soon as was reasonably possible – Whether plaintiff in position to know claim was possible to pursue – Whether court should exercise discretion to reject proceedings – *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *Tuohy v North Tipperary County Council* [2008] IEHC 63, (Unrep, Peart J, 10/3/2008); *Robins v Coleman* [2009] IEHC 486, [2010] 2 IR 180; *Molloy v Dublin Corporation* [2001] 4 IR 52 and *Cedardale Property Co Ltd v Deansgrange Development Ltd* (Unrep, Irvine J, 13/11/2008) considered – *ECI Ltd v MC Bauchemie Müller GmbH* [2006] IESC 16, [2007] 1 IR 156 followed – Civil Liability Act 1961 (No 41), s 27 – Motion allowed (2006/4349P – Hedigan J – 13/7/2010) [2010] IEHC 276
Andrews Construction Ltd v Lowry Piling Ltd

Discovery

Relevance and necessity of documents – Court's jurisdiction – Subordinated liabilities order – Opinion of Minister – Control of court over measure in issue – Relevance of process by which proposal reached – Court's application of statutory criteria based on information considered by Minister – AIB capital requirements – Details of stress test examination neither relevant nor necessary – Whether documents retained by AIB and not procurable by Minister discoverable – Credit Institutions (Stabilisation) Act 2010 (No 36), ss 28,29 and 31 – Limited discovery ordered (2011/114MCA – Cooke J – 18/5/2011) [2011] IEHC 219
Abadi & Co Security Ltd and Ors v Minister for Finance

Discovery

Relevant and necessary – Training documentation – Injuries disputed – Foreseeability conceded – Employer's liability – Occupational injury – Whether documents relevant to liability relevant –Whether documentation concerning plaintiff relevant – Whether documentation relating to injuries and/or accidents of fellow workers relevant – Whether documentation relating to defendant's awareness of need to prevent type of injury alleged relevant and necessary – Whether documentation relating to identity, working times and productivity rate of fellow workers relevant – Delay – Whether delay consistent with effective administration of justice – Jurisdiction of court to ensure right to hearing within reasonable time vouchsafed – *PJ Carroll & Co Ltd v Minister for Health and Children (No 3)* [2006] IESC 36, [2006] 3 IR 431 and *Bradley v Córas Iompair Éireann* [1976] IR 217 applied; *Donnellan v Westport Textiles Ltd* [2011] IEHC 11, (Unrep, Hogan J, 18/1/2011) approved –European Convention on Human Rights 1950, art 6 – Constitution of Ireland 1937, art 34 – Appeal allowed, limited discovery granted (2001/18234P – Hogan J – 11/4/2011) [2011] IEHC 152
Jones v Grove Turkeys Ltd

Dismissal of proceedings

Enforcement proceedings – Issues already determined – Overlap of issues – Failure to identify issues still in dispute – Court's inherent jurisdiction to dismiss – Constitutional right to commence and prosecute claim – Right of access to courts – Interests of defendant – Integrity of judicial system – Abuse of process – Issues not previously raised – Whether proceedings moot, *res judicata* or bound to fail – Whether frivolous, vexatious and abuse of process – Whether claim had no rational basis or reasonable cause of action – Whether claim could not possibly succeed – Whether ulterior or improper purpose – Whether plaintiff seeking to re-open litigation – Whether matters already decided – Whether planning breach trivial or minor – *Mahon v Butler* [1997] 3 IR 369; *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425; *Aer Rianta cpt v Ryanair Ltd* [2004] IESC 23, [2004] 1 IR 506; *Barry v Buckley* [1981] IR 306; *Supermacs Ireland Ltd v Katesan (Naas) Ltd* [2000] 4 IR 273; *Fay v Tegral Pipes Ltd* [2005] IESC 34, [2005] 2 IR 261; *Carroll v Ryan* [2003] 1 IR 309; *Woodhouse v Consigna* [2002] 1 WLR 2558; *Bula Ltd (In receivership) v Crowley* [2009] IESC 35, (Unrep, SC, 3/4/2009); *Henderson v Henderson* (1843) 3 Hare 100; *Kenny v Dublin City Council* [2009] IESC 19, (Unrep, SC, 5/3/2009); *Cork County Council v Cliftonhall Ltd* (Unrep, Finnegan J, 6/4/2001); *O'Connell v Dungarvan Energy Ltd* (Unrep, Finnegan J, 27/2/2001); *Lever (Finance) Ltd v Westminster Corporation* [1973] All ER 496; *Kenny v An Bord Pleanála (No 1)* [2001] 1 IR 565 and *Case C – 215/06 Commission v Ireland* considered – Planning and Development Act 2000 (No 30), s 160 – Rules of the Superior Courts 1986 (SI 15/1986) O 19, r 28 – Proceedings struck out (2002/72MCA – Feeney J – 15/4/2011) [2011] IEHC 202
Kenny v Trinity College Dublin

Dismissal of proceedings

Long running litigation – Fraudulent misrepresentation – Plaintiff's counsel admitting that claim unsustainable – Plaintiff seeking to amend proceedings – *Res judicata* – Rule in *Henderson v Henderson* – Whether plaintiff entitled to amend proceedings – Whether plaintiff having reasonable cause of action – Claim dismissed, costs awarded to defendants (2008/6720P – Kearns P – 17/5/2011) [2011] IEHC 243
Moffitt v ACC Bank

Dismissal of proceedings

Prisoner – Dental care – No evidence submitted by applicant as to facts or circumstances – Whether evidence to allow application to be considered – Application dismissed (2011/243JR – Ryan J – 7/4/2011) [2011] IEHC 246
Maher v Governor of Castlereagh Prison

Limitation of actions

Dismissal of proceedings – Delay – Want of prosecution – Allegations of sexual

abuse, assault and battery – Failure to prosecute claim – Entitlement to hearing within reasonable time – Prejudice – Need to achieve finality – Balance of justice – Plaintiff's medical difficulties – Arnold-Chiari malformation – Whether claim statute barred – Whether inordinate and inexcusable delay – Whether defendant prejudiced by delay – Whether unfair to defendant to allow action to proceed – Whether plaintiff suffered from psychological injury – Whether defendant acquiesced in delay – *Rainsford v Mayor, Aldermen and Burgesses of the City of Limerick* [1995] 2 ILRM 561; *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *Gilroy v Flynn* [2004] IESC 98, (Unrep, SC, 3/12/2004); *Desmond v MGN Ltd* [2008] IESC 56, [2009] 1 IR 737 and *McFarlane v DPP* [2010] ECHR 1272 considered – Statute of Limitations Act 1957 (No 6), s 48A(1) – Statute of Limitations (Amendment) Act 2000 (No 13), s 2 – European Convention on Human Rights Act 2003 (No 20), s 4 – European Convention on Human Rights, art 6(1) – Claim dismissed (2006/5753P – Kearns P – 6/5/2011) [2011] IEHC 201
W(M) v W(S)

Non-suit

Definition – Historical meaning – *Res judicata* – Compulsory non-suit – Whether entitled to raise matters already the subject of judgment – Whether distinction between non-suit and direction or dismissal of claim – Whether non-suit described nineteenth century procedure – Whether plaintiff's right to choose to be non-suited abolished – Whether compulsory non-suit remained – Whether *res judicata* – *Outhwaite v Hudson* (1852) 7 Ex 380; *Poyser v Minors* (1881) 7 QBD 329; *R v Machen* [1849] 14 QB 74; *Clack v Arthur's Engineering* [1959] 2 QB 211; *Re May* [1885] 28 Ch D 516; *Ernst and Young v Burte Mining plc* [1996] 1 All 623; *Smyth v Tunney* [2009] IESC 5; *White v Spendlove* [1942] IR 224; *Fox v Star Newspaper Co* [1898] 1 QB 636; *Fletcher v London and North Western Rail Company* [1892] 1 QB 122; *Moorview Developments v First Active plc* [2008] IEHC 211, (Unrep, Clarke J, 20/5/2008); *Barry v Buckley* [1989] IR 306; *Hetherinton v Ultra Tyre Services Ltd* [1993] 2 IR 535; *Hanafin v Minister for Environment* [1996] 2 IR 544 and *O'Toole v Heavy* [1993] 2 IR 544 considered – Supreme Court of Judicature Act 1873 (36 & 37 Vict c 77) – Rules of the Supreme Court (Ireland) 1905, O 26 r 1 – Rules of the Superior Courts 1877, O 40 r 6 – Held that matters the subject of non-suit were binding and *res judicata* applied (2003/9018P – Clarke J – 5/2/2010) [2010] IEHC 34
Moorview Developments Ltd v First Active plc

Particulars

Commercial court – Adequacy of replies to particulars – Clarity of pleadings – Parameters of discovery – Possibility of injustice – Requirement of witness statements – Whether defendant required to specify case to extent reasonably possible – Whether witness statements reduce the need for clarity – Whether particulars required before discovery – Whether necessary for defendant to amend pleadings or particulars to explain case – *Ryanair plc v Aer Rianta CPT* (Unrep, SC, 2/12/2003); *Independent Newspapers v Murphy* [2006] IEHC 276, [2006] 3 IR 566; *Yap v Children's University Hospital (Temple St Ltd)* [2006] IEHC 308, [2006] 4 IR 298; *Hartside Ltd v Heineken Ireland Ltd* [2010] IEHC 3, (Unrep, Clarke J, 15/1/2010); *National Education Welfare Board v Ryan* [2007] IEHC 428, [2008] 2 IR 816 and *Ryanair v Bravofly* [2009] IEHC 41, (Unrep, De Valera J, 26/1/2007) considered – Application granted (2008/19083P – Clarke J – 26/1/2010) [2010] IEHC 19
Thema International Fund plc v HSBC Institutional Trust Services (Ireland)

Security for costs

Special circumstances – Related proceedings – Entitlement to make security in one proceedings available in related proceedings – Method of making security provided in second proceedings available in first proceedings – Claim by plaintiff for liquidated sum – Security for costs already provided by plaintiff in second proceedings –Whether plaintiff in position to pay costs – Whether *prima facie* defence established –Whether special circumstances to warrant declining to order security for costs – *West Donegal v Údarás* [2006] IESC 29, [2007] 1 ILRM 1 applied; *Inter Finance Group Ltd v KPMG Peat Marwick t/a KPMG Management Consulting* (Unrep, Morris P, 29/6/1998approved – *Moorview Developments Ltd v First Active plc* [2009] IEHC 214 (Unrep, Clarke J, 6/3/2009) considered – Order refused; undertaking to make security for costs from other proceedings available accepted (2007/2283S – Clarke J – 8/3/2011) [2011] IEHC 173
Valebrook Developments Ltd (in Receivership) v Keelgrove Properties Ltd

Summary judgment

Foreign judgment – Enforcement and recognition – Common law rules – Judgment granted pursuant to mediated settlement against all defendants jointly and severally – Application for enforcement – Remittal to plenary hearing – Test to be applied – Whether arguable defence – Judgment *in personam* for definite sum – Whether plaintiff obtained Floridian judgment – Whether Foridian judgment final and conclusive – No further challenge to judgment – Commencement of fresh proceedings – Whether enforcement of judgment contrary to public policy – Whether credible factual basis for claim payment expose defendants to US revenue sanction – Whether settlement upon which judgment entered obtained by fraud – Whether defendant estopped from raising argument from unsuccessful challenge in Floridian court – Whether abuse of process – *Aer Rianta v Ryanair* [2001] IESC 6, [2001] 4 IR 607, *Danske Bank A/S t/a National Irish Bank v Durkan New Homes* [2010] IESC 22 (Unrep, SC, 22/4/2010), *Harrisrange Limited v Duncan* [2002] IEHC 14, [2003] 4 IR 1 applied; *Nouvion v Freeman* [1889] 15 App Cas 1, *Buchanan v McVey* [1954] IR 89, *Bank of Ireland v Meeneghan* [1994] 3 IR 111, *Abuoloff v Oppenheimer & Co* [1882] 10 QBD 295, *Vadala v Lawes* [1890] 25 QBD 310, *Jet Holdings Inc v Patel*[1990] 1 QB 335 considered; *Spring Gardens Ltd v Waite* [1991] 1 QB 241distinguished – Limited leave to defend granted (2009/2065S – Finlay Geoghegan J – 31/5/2011) [2011] IEHC 220
Bussoleno Ltd v Kelly and Ors

Statutory Instrument

Rules of the Superior Courts (arbitration) 2012
SI 150/2012

PROFESSIONS

Solicitors

Fees – Taxation of costs – "No foal, no fee" basis – Complaints by defendant – Work done and services rendered – Termination of representation before case concluded – Whether defendant agreed to adjourn proceedings – Whether agreement frustrated – Whether defendant discharged plaintiff "without proper grounds" – Whether liability for costs – Whether discharge entitled plaintiff to recover costs – Whether failure to send s 68 letter rendered contract unenforceable – Whether entitled to costs on solicitor and own client or party and party basis – *McHugh v Keane* (Unrep, Barron J, 16/12/1994) followed; *Boyne v Bus Átha Cliath (No 2)* [2006] IEHC 209, [2008] 1 IR 92; *State (Gallagher Shatter & Co) v De Valera* [1986] ILRM 3 and *Treacy v Roche* [2009] IEHC 103, (Unrep, Laffoy J, 27/2/2009) considered – Attorneys and Solicitors (Ireland) Act 1849 (c 53), s 2 – Solicitors (Amendment) Act 1994 (No 27), s 68 – No orders made (2009/671SP – Laffoy J – 29/1/2010) [2010] IEHC 26
Synnott v Adekoya

Solicitors

Solicitors Disciplinary Tribunal – Appeal – Misconduct – Allegations against respondent found to be untrue – Finding by Tribunal of no *prima facie* case of misconduct – Whether respondent came off record on behalf of applicant – Whether misconduct by respondent – Whether findings of Tribunal upheld – Appeal dismissed (2010/71SA – Kearns P – 11/4/2011) [2011] IEHC 157
Keane v Foy

Solicitors

Solicitors Disciplinary Tribunal – Appeal – Misconduct – Finding by Tribunal of no

prima facie case of misconduct – Allegations of misconduct made against respondent including corruption, theft and fraud of property and perjury on affidavit – Whether misconduct – Appeal dismissed (2011/12SA – Kearns P – 11/4/2011) [2011] IEHC 158
Garvey v Nangle

Solicitors

Undertaking – Enforcement of undertaking – Loan to borrowers by plaintiff – Breach of undertaking to ensure charge over property executed prior to negotiating loan cheque – Funds drawn down but no mortgage furnished – Subsequent loan to borrowers from plaintiff – Entire property sold – No proceeds discharged to plaintiff – Borrowers claim unaware proceeds of sale to be used to repay plaintiff – Whether full and *bona fide* defence – Whether plaintiff suffered any loss – Whether matter should go to plenary hearing – *Bank of Ireland Mortgage Bank v Coleman* [2009] IESC 38, [2009] 3 IR 699 applied – Directions as to exchange of pleadings issued (2010/449SP – Laffoy J – 23/5/2011) [2011] IEHC 216
Danske Bank A/S t/a National Irish Bank v O'Ceallaigh & Anor p/a Sean O' Ceallaigh & Co Solicitors

Solicitors

Undertaking – Failure to comply – Remedy – Discharge mortgage loan and charge – Monies received on foot of undertaking –Loan not discharged – Purchase of second property – Document transferring title to plaintiff executed but plaintiff not registered as owner – Damages sought for monies not paid – Declaratory relief sought plaintiff owner of second property –Whether relationship between parties normal client/solicitor relationship – Whether damages appropriate for failure to discharge undertaking – Whether plaintiff directed defendant not to breach undertaking – Whether partnership agreement between parties material to ownership of respect of second property – Whether plaintiff full beneficial owner of second property – *ACC Bank plc v Brian Johnston & Co* [2010] IEHC 236, [2010] 4 IR 605 approved – Declaration granted; damages refused (2008/546P – Clarke J – 13/4/2011) [2011] IEHC 174
Kelly v Byrne (t/a Thomas Byrne & Company Solicitors)

PROPERTY

Statutory Instruments

Property service (regulation) act 2011 (qualifications) regulations 2012
SI 181/2012

Property services (regulation) act 2011 (client moneys) regulations 2012
SI 199/2012

Property services (regulation) act 2011 (commencement) (No.2) order 2012
SI 198/2012

Property services (regulation) act 2011 (compensation fund) regulations 2012
SI 183/2012

Property services (regulation) act 2011 (licensing) regulations 2012
SI 180/2012

Property services (regulation) act 2011 (professional indemnity insurance) regulations 2012
SI 182/2012

SHIPPING

Statutory Instruments

Signals of distress (ships) rules 2012
SI 170/2012

SOCIAL SERVICES

Library Acquisition

Hamilton, Claire
Irish social work and social care law
Dublin : Gill & Macmillan, 2011
N181.C5

SOCIAL WELFARE

Statutory Instruments

Social welfare and pensions act 2010 (section 4) (commencement) order 2012
SI 197/2012

Social welfare and pensions act 2012 (sections 14, 15 and 17) (commencement) order 2012
SI 195/2012

Social welfare (consolidated claims, payments and control) (amendment) (no. 4) (one-parent family payment) regulations 2012
SI 141/2012

Social welfare (consolidated claims, payments and control) (amendment) (no.5) (prescribed time) regulations 2012
SI 196/2012

TAXATION

Library Acquisitions

Buckley, Michael
Capital tax acts 2012 : stamp duties and capital acquisitions tax
Dublin : Bloomsbury Professional, 2012
M335.C5.Z14

Keogan, Aileen
Law of capital acquisitions tax, finance (no. 3) act 2011
14th ed
Dublin : Irish Taxation Institute, 2011
M337.16.C5

Brennan, Philip
Tax acts 2012
23rd ed
Dublin : Bloomsbury Professional, 2012
M335.C5.Z14

Comyn, Amanda-Jayne
Taxation in the Republic of Ireland 2012
Haywards Heath : Bloomsbury Professional, 2012
M335.C5

Kennedy, Pat
VAT acts 2012
2012 ed
Dublin : Bloomsbury Professional, 2012
M337.45.C5.Z14

Statutory Instrument

Value-added tax (refund of tax) (flat-rate farmers) order 2012
SI 201/2012

TORT

Articles

Schuster, Alex
Tortious liability for defective pharmaceutical and medical products
2011/12 4 (3) Quarterly review of tort law 10

Connelly, Jerome
Torts, costs and socio-economic rights in the Constitution
2011/12 4 (3) Quarterly review of tort law 1

TRADE UNIONS

Industrial action

Picketing – Interlocutory injunction – Restrain – Maintenance and repair of lifts in apartment blocks – Construction of s 11 – Serious issue to be tried – Whether premises place where picketers' employer worked or carried on business – Whether fair case established – Whether picketing unlawful – Whether acting in contemplation or furtherance of trade dispute – Whether pre-conditions to engaging in trade dispute fulfilled – Whether court precluded from granting injunction – *Malincross v Building and Allied Trades Union* [2002] 3 IR 607; *G & T Crampton Ltd v BATU* [1998] 1 ILRM 430 and *Campus Oil v Minister for Industry (No 2)* [1983] IR 88; considered – *P Elliot & Co Ltd v Building & Allied Trades Union* [2006] IEHC 320, (Unrep, HC, Clarke J, 20/10/2006) followed – Industrial Relations Act 1990 (No 19), ss 8, 11and 19 – Relief refused (2010/3695P – Laffoy J – 27/4/2010) [2010] IEHC 288
Dublin City Council v Technical Engineering & Electrical Union

TRUSTS

Resulting trust

Cohabitees – Beneficial owner – Company holding lands in trust –Presumption – Intention – Whether respondent holding issued share capital in trust for appellant – Respondent in attendance but no participation – No involvement by company – Claim dismissed in High Court – Whether trial judge entitled to make inferences against appellant where evidence not challenged – No cross-examination – Whether evidence insufficient to rebut presumption of resulting trust – Whether absence of intent to pass beneficial interest – Onus of rebutting presumption on party asserting it did not apply – No doubt expressed as to credibility of appellant – Whether trial judge erred in setting aside evidence of appellant without stating that it was not credible by inferences which do not carry any or any significant weight – *Twinsectra Ltd v Yardley* [2002] 2 AC 164 followed – *Stanley v Kieran* [2007] IEHC 272 (Unrep – Laffoy J – 19/7/2007) and *Antoni v Antoni* [2007] UKPC 10 (Unrep – 26/2/2007) considered – Appeal allowed (262/2007 – SC – 7/6/2011) [2011] IESC 19
Stanley v Kieran and Anor

Article

Keogan, Aileen
Using your discretion
2012 (June) Law Society Gazette 34

AT A GLANCE

European Directives implemented into Irish Law up to 19th June 2012

European communities (aerial fertilisation)(forestry) regulations 2012
SI 125/2012
EA European communities act, 1972 s3 (DIR2006-11)

European communities (conservation of wild birds (Magharee Islands special protection area 004125)) regulations 2012
SI 139/2012
EA European communities act, 1972 s3 (DIR/2009-147)(DIR/1992-43)

European Communities (conservation of wild birds (River Nanny Estuary and Shore SPA 004158))
SI 140/2012
EA European Communities act, 1972 s3 (DIR/2009-147, DIR/92-43 [DIR/1992-43])

European communities environmental objectives (groundwater) (amendment) regulations 2012
SI 149/2012
EA European communities acct, 1972 s3 (DIR/2000-60)

European communities (Ionising radiation) (amendment) regulations 2012
SI 152/2012
EA European communities act, 1972 s3 (DIR/1996-29)

European Communities (medals and tokens) regulations 2012
SI 205/2012
EA European Communities act, 1972 s3 (REG/2182-2004, REG/46-2009)

European communities (sustainable use of pesticides) regulations 2012
SI 155/2012
EA European communities act, 1972 s3 (DIR/2009-128)

European union (Afghanistan) (financial sanctions) regulations 2012
SI 129/2012
EA European communities act, 1972 s3 (REG/753-2011)

European union (Belarus) (financial sanctions) (No.2) regulations 2012
SI 130/2012
EA European communities act, 1972 s3 (REG/765-2006)

European Union (foodstuffs intended for particular nutritional uses) regulations 2012
SI 169/2012
EA European communities act, 1972 s3 (DIR/2009-39)

European Union (reporting formalities for ships) regulations 2012
SI 166/2012
EA European union communities act, 1972 s3 (DIR 2010-65) (REG-725-2004)

European Union (textile fibre names and related labelling and marketing of the fibre consumption of textile products) regulations 2012
SI 142/2012

EA European Communities act, 1972 s3 (REG/1007-2011, REG/286-2012)

Financial transfers (Afghanistan) (prohibition) order 2012
SI 132/2012
EA Financial transfers act, 1992 s4 (REG/753-2011)

Financial transfers (Belarus) (prohibition) (No.2) order 2012
SI 131/2012
EA Financial transfers act, 1972 s4 (REG/756-2006)

ACTS OF THE OIREACHTAS AS AT 22ND JUNE 2012

31st Dáil & 24th Seanad

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

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

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

4/2012 Health (Provision of General Practitioner Services) Act 2012
Signed 28/02/2012

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

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

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

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

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

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

11/2012 Criminal Justice (Female Genital Mutilation) Act 2012
Signed 02/04/2012

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

13/2012 Protection of Employees (Temporary Agency Work) Act 2012

Signed 16/05/2012 **(Only available electronically)**

14/2012 Education (Amendment) Act 2012
Signed 23/05/2012 **(Only available electronically)**

15/2012 Electricity Regulation (Carbon Revenue Levy) (Amendment) Act 2012
Signed 25/05/2012 **(Only available electronically)**

16/2012 Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012
Signed 30/05/2012 **(Only available electronically)**

17/2012 Local Government (Miscellaneous Provisions) Act 2012
Signed 08/06/2012 **(Only available electronically)**

18/2012 Competition (Amendment) Act 2012
Signed 20/06/2012 **(Only available electronically)**

BILLS OF THE OIREACHTAS AS AT 22ND JUNE 2012

31st Dáil & 24th Seanad

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

Advance Healthcare Decisions Bill 2012
Bill 2/2012
2nd Stage – Dáil **[pmb]** *Deputy Liam Twomey*

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

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

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

Business Undertakings (Disclosure of Overpayments) Bill 2012
Bill 48/2012
Order for 2nd Stage – Seanad **[pmb]** *Senator Rónán Mullen*

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

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

Civil Registration (Amendment) Bill 2011
Bill 65/2011
Committee Stage – Dáil **[pmb]** *Senator Ivana Bacik (Initiated in Seanad)*

Companies (Amendment) Bill 2012
Bill 29/2012
Dáil Stage – Seanad *(Initiated in Seanad)*

Competition (Amendment) Bill 2012
Bill 54/2012
1st Stage – Dáil **[pmb]** *Deputy Emmet Stagg*

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

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

Coroners Bill 2007
Bill 33/2007
Committee Stage – Seanad

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

Credit Guarantee Bill 2012
Bill 27/2012
Report Stage – Dáil

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

Criminal Justice (Search Warrants) Bill 2012
Bill 47/2012
Order for 2nd Stage – Seanad

Criminal Justice (Spent Convictions) Bill 2012
Bill 34/2012
Committee Stage – Seanad *(Initiated in Seanad)*

Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Bill 2012
Bill 32/2012
Passed by Seanad

Criminal Law (Incest) (Amendment) Bill 2012
Bill 43/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Denis Naughten*

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

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

Education (Welfare) (Amendment) Bill 2012
Bill 44/2012
1st Stage – Dáil **[pmb]** *Deputy Aodhán Ó Ríordáin*

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

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

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

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

Energy Security and Climate Change Bill 2012
Bill 45/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Catherine Murphy*

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

European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Bill 2011
Bill 45/2011
Committee Stage – Dáil

European Communities (Amendment) Bill 2012
Bill 36/2012
Committee Stage – Dáil

European Stability Mechanism Bill 2012
Bill 37/2012
Passed by Dáil Éireann

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

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

Financial Emergency Measures in the Public Interest (Amendment) Bill 2012
Bill 49/2012
1st Stage – Dáil **[pmb]** *Deputy Mary Lou McDonald*

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

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

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

Freedom of Information (Amendment) (No. 2) Bill 2012
Bill 51/2012
1st Stage – Dáil **[pmb]** *Deputy Sean Fleming*

Gaeltacht Bill 2012
Bill 53/2012
Order for 2nd Stage – Seanad

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

Housing Bill 2012
Bill 35/2012
1st Stage – Dáil **[pmb]** *Deputy Niall Collins*

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

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

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

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

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

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

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

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

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

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

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

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

Microenterprise Loan Fund Bill 2012
Bill 55/2012
1st Stage – Dáil

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

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

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

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

Ombudsman (Amendment) Bill 2008
Bill 40/2008
2nd Stage – Seanad *(Initiated in Dáil)*

Planning and Development (Taking in Charge of Estates) Bill 2012
Bill 41/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Dominic Hannigan*

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

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

Prohibition on use by Children of Sunbeds and Tanning Devices Bill 2012
Bill 52/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Billy Kelleher*

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

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

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

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

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

Registration of Wills Bill 2011
Bill 22/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator Terry Leyden (Initiated in Seanad)*

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

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

Residential Institutions Statutory Fund Bill 2012
Bill 28/2012
Committee Stage – Dáil

Residential Tenancies (Amendment) Bill 2012
Bill 46/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy Patrick Nulty*

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

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

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

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

Statute Law Revision Bill 2012
Bill 39/2012
2nd Stage – Dáil *(Initiated in Seanad)*

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

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

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

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

Valuation (Amendment) Bill 2012
Bill 50/2012
Order for 2nd Stage – Dáil **[pmb]** *Deputy John McGuinness*

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

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

Wind Turbines Bill 2012
Bill 9/2012
Order for 2nd Stage – Seanad **[pmb]** *Senator John Kelly*

ABBREVIATIONS

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

The Impact of the Irish Economic Downturn on Litigation in Ireland and the UK

THE HONOURABLE MR JUSTICE FRANK CLARKE
TOMÁS KEYS BL*

Introduction[1]

The purpose of this paper is to reflect on the impact of the economic 'boom and bust' on litigation in Ireland and, insofar as there may be an Irish influence, on the UK. This paper will first focus on the establishment of the Commercial List of the High Court in Ireland which is commonly referred to as the Commercial Court by practitioners and members of the Judiciary alike. This paper will also explore the manner in which litigation in the Commercial Court has changed since its establishment and how those changes reflect the prevailing economic conditions in Ireland. Finally, the paper will explore the impact of the establishment of the National Asset Management Agency (NAMA) and other emergency fiscal measures on commercial litigation in Ireland and the UK together with the prominence of insolvency tourism.

Establishment of the Commercial List of the High Court in Ireland

Section 67 of the Company Law Enforcement Act, 2001 established the Company Law Reform Group. The role of the statutory review group is to advise the Minister for Enterprise Trade & Employment on matters relating, *inter alia*, to the Companies Acts, international developments in company law and how it might be possible to improve State Practice and the Rules of the Superior Courts in the company law area.

In its first report published in 2001, the Company Law Reform Group stated that:

> "…there is a convincing case for the dedicated treatment of commercial/company law cases in order to achieve efficient and effective dispute resolution."[2]

In his article on the establishment of The Commercial Court[3], Mr Justice Peter Kelly (who has, since its establishment, been in charge of the list) set out the background to the establishment of the Commercial List of the High Court.

> "The twenty seventh interim report of the Committee on Court Practice and Procedure saw merit in establishing what it described as a "more specialised approach to commercial cases." It recommended that a pilot project Commercial Court be developed in Dublin as a matter of urgency."

In light of the recommendations of the Company Law Reform Group and the Committee on Court Practice and Procedure, the Commercial List of the High Court was established in January 2004. The establishment of the Commercial Court was brought about through a change to the Rules of the Superior Courts[4]. The basic procedure is that litigation is commenced in the ordinary way but an early application is made for entry into the Commercial List. Order 63A sets out the criteria for entry into that list. In the main, claims of a Commercial character with a value of over €1,000,000 including arbitration proceedings are ordinarily admitted. However, the Court is given a broad discretion to admit any proceedings of a Commercial character (there is an express exclusion in respect of Personal Injuries cases) and there is an express jurisdiction to admit intellectual property cases without necessarily reaching any particular financial limit. Any delays by the party wishing to have a case admitted to the Commercial List may result in the refusal of admission to the list.

Since its creation 1,585 cases have been admitted to the Commercial List up to the end of 2011. Of these, 1,460 have been disposed of. The average time from entry to the list to the conclusion of the action is 22 weeks. This compares very favourably with the passage of non-commercial High Court matters. Some more detailed statistics are to be found in Appendix A.

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* The authors would like to thank Marcus F Daly SC and David Casement QC who organised the first annual Anglo Irish Commercial Law Seminar in Manchester. The authors would also like to thank Jacqueline O'Brien SC for her insightful comments and her helpful input with the paper. Finally, the authors would like to thank the members of Judiciary of the Northern Circuit of England & Wales and the members of the Northern Circuit Commercial Bar Association for their generosity in hosting the first annual Anglo Irish Commercial Law Seminar.

1 This paper was delivered by the Honourable Mr Justice Frank Clarke at the first annual Anglo Irish Commercial Law Seminar on 12 April 2012 in Manchester. Some explanatory portions of the paper have been modified as the original paper was directed primarily towards an English audience.

2 *First Report of the Company Law Review Group*, 31 December 2001, Paragraph 12.9.1

3 (2004) 9 (1) BR 4

4 Order 63A

The Commercial List has 4 dedicated Judges of the High Court assigned to it. When necessary, judges who are not normally assigned to the list but who have extensive experience in Commercial Litigation have been assigned on a temporary basis to hear cases. One of the key contributing factors to the speed with which commercial litigation has come to be disposed of in Ireland has been the willingness of Presidents of the High Court to make additional judges available when required. One of the general problems which the Dublin High Court suffers from is a significant tendency for some of the cases listed for hearing not to be reached because of the unavailability of a judge. That problem is, in turn, created by the need to list significantly more cases than are likely to be capable of being heard. However, there have only been two cases in the over eight year history of the Commercial List which had to be adjourned because of the unavailability of a judge. From the beginning, parties have, therefore, been aware that a case is almost certain to be heard on the date allocated. Not surprisingly this has concentrated the minds of parties from an early stage in litigation such that either complete settlements or genuine narrowing of the issues are explored at the earliest possible date.

Purpose of the Commercial List and its impact on litigation once established (2004 – 2007)

The Commercial List was established during a period of strong economic growth in Ireland. From 2004 to 2007, the Irish economy, as measured in terms of an increase in Gross Domestic Product (GDP), grew by an average rate of 5.7% annually.[5]

As pointed out earlier, it was perceived that an efficient system for handling significant commercial litigation forms an important part of the business infrastructure of any country. Ireland, as a small open economy, is highly dependant on external investment. While, doubtless, no external investor hopes to become involved in litigation, the risk of disputes which require to go to court is an inevitable part of the assessment of any commercial enterprise. An efficient Commercial Court system was perceived to be an important part of the attraction of Ireland as a place to do business. That aim was not, of course, in itself particularly a product of the boom. However, the Commercial List came into being just as the Irish property bubble was beginning to reach its peak.

Against that background, there was a massive boom in construction in the residential and commercial property markets in Ireland and consequently a significant growth in property related litigation. Although the subject matter of the cases which were admitted to the Commercial List between 2004 and 2007 range from banking to landlord and tenant disputes, the broad discretion afforded to the listing Judge of the Commercial List also allowed for judicial review proceedings to be considered. Obviously, only judicial review proceedings with a commercial character have been admitted. Many such cases involve judicial review arising out of the actions of regulators in the commercial field such as those involved in aviation (it is unlikely to surprise many that Ryanair is a frequent party to such proceedings). However, given the scale of the construction boom it is hardly surprising that an attempt was made to have the fast track approach of the Commercial Court applied to judicial review challenges in the planning field.

In *Mulholland v An Bord Pleanála*[6], the applicant sought an order of *certiorari* by way of judicial review under Section 50 of the Planning and Development Act 2000 to quash a decision of the Respondent to grant planning permission for a retail development. The first notice party in the action owned the lands and had sought to complete the sale of the property, the subject matter of the proceedings, to a developer. The first notice party sought to have the judicial review proceedings admitted to the Commercial List. However, the applicants objected to such an admission.

Kelly J. admitted the proceedings to the Commercial List notwithstanding the objections of the applicants. In doing so he invoked the broad discretion which the Rules give as to which cases should be admitted to the list. At page 6 of his Judgment, Kelly J. set out the discretion afforded to the listing Judge:

> "By defining "commercial proceedings" as it did, the Superior Court Rules Committee appeared to wish to give a wide measure of discretion to the judge in charge so as to enable the speedy resolution of commercial disputes using that term in a broad way. The committee did not attempt to tie the judge down to a technical or narrow view of what might be appropriate to be admitted to the list."

Further on at page 8 in his Judgment, Kelly J. said:

> "It would seem, however, that any case involving a statutory appeal or judicial review of the type described in O. 63A, r. 1(g) should be capable of admission to the list if it can be demonstrated that a commercial development or process or substantial sums of money, whether by way of profit, investment, loan or interest are likely to be jeopardised if the case is not given a speedy hearing or is denied the case management procedures which are available in the commercial court. This is so where one or more of the parties to the suit are involved in commerce, giving a broad meaning to that term. Such parties would include entities involved in commercial activities whether they be individuals, corporate bodies, semi-state bodies, state bodies or, indeed, the State itself in an appropriate case."

In that case, leave to bring judicial review proceedings was granted on 19 April 2005. The application to transfer the proceedings to the Commercial List was heard on 27 May 2005. The case was listed for hearing on 28 June 2005, a mere ten weeks after the proceedings were initiated. Kelly J, in the concluding paragraph of his Judgment on the substantive issue, stated:

> "Such a speedy hearing could not have been given in the ordinary judicial review list. Given that

5 Department of Finance

6 [2005] 3 IR 1

> everybody in the case accepted that a speedy hearing would be desirable, it is difficult to see why the applicants objected to the transfer of the case into the commercial list."

Kelly J, in the course of his judgment, stated that the type of case which could come under Order 63A Rule 1(a) of the Rules of the Superior Courts would be the type of case that would normally be heard in the Commercial Court in London, Edinburgh and Belfast. Such cases would normally constitute private law disputes of a commercial nature.

However, Order 63A Rule 1(g) of the Rules of the Superior Courts states that:

> "any appeal from, or application for judicial review of, a decision or determination made or a direction given by a person or body authorised by statute to make such decision or determination or give such direction, where the Judge of the Commercial List considers that the appeal or application is, having regard to the commercial or any other aspect thereof, appropriate for entry in the Commercial List"

Before leaving the question of property related cases it is, perhaps, the case that one of the clearest indicators of the recent state of the Irish economy has been the nature of the type of property related case which has come before the Commercial Court. In the early years of the boom the claims brought were predominantly cases in which purchasers sought specific performance (or analogous relief). As the economy turned there was a very rapid change from purchaser specific performance to vendor specific performance. Some of the most difficult cases were those which straddled the two periods involving contracts entered into, and initially sought to be enforced, by purchasers who frequently began to have different feelings about their desire to complete as the pre-trial process continued, matched, almost equally, by a growing desire on the part of the vendor to ensure completion. Now we appear to have reached a third stage where, as a result of the fact that there is virtually no commercial activity in the property sector, there are no specific performance actions at all.

What distinguishes proceedings in the commercial list and what facilitates their timely disposal is the availability of case management, entailing short deadlines, the identification of the real issues in dispute and the use of focused interlocutory procedures. In the early days of the operation of the list, strict cost penalties were applied to the failure of parties to meet deadlines for the filing of pleadings etc. However, it is fair to say that in a fairly short period of time practitioners became used to the new rigour with which time limits were to be enforced. In most cases, the parties themselves now set out their own timetable, subject to the approval of the judge.

While not representing a formal division, it is, in practice, possible to identify two phases to the pre-trial process. The first, frequently referred to as the interlocutory phase, involves traditional pleadings and particulars together with any requirement for discovery, interrogatories and the like. Obviously, if there are applications for interlocutory injunctions, security for costs or such, same are dealt with at this stage. The normal practice is for a timetable to be set out under the guise of the directions motion which any party whose case is admitted into the Commercial List is required to bring. In the absence of any area of contention, the interlocutory phase should proceed as per the directions originally given. It is normal practice to fix a date on which any disputes arising during that phase can be dealt with. Parties are normally given leave to bring motions returnable for such a date for the purposes of resolving any questions that might arise as to particulars, discovery or similar issues. In a way, there has not been much change brought about by the Commercial List to this aspect of the procedure save that it happens under an enforced timescale with regular review by the court to ensure compliance.

However, it is in the second phase (which is sometimes referred to as the trial preparation phase), that the greatest differences occur. Parties are required to exchange witness statements both from witnesses as to fact and expert witnesses. Parties are required to agree books of documents and to exchange written legal submissions. Witness statements are not, as a matter of course, taken as evidence in chief and the rules simply require that the witness statement contains a broad outline of the evidence intended to be given. However, in the case of uncontroversial witnesses, or indeed witnesses whose evidence may consist in part at least of non-controversial material, it is often taken that the relevant witness statement will be used as evidence in chief. Indeed, in some cases the statement is admitted as evidence without the need to call the witness at all.

However, it is normally the case that there will be some examination in chief most especially in respect of witnesses called by the Plaintiff who may be asked to comment on evidence which it can then be anticipated will be led by the Defendant in the light of the witness statements filed by that Defendant. Where the witness is to give controversial evidence, examination in chief is normal at least so far as the areas of controversy are concerned.

It remains the procedural law in Ireland that discovered documents are not, simply by that fact, evidence in the case. However, it is normal practice that the parties agree that each other's documents can be admitted without formal proof. It will invariably be the case that the existence of documents will be so admitted. In addition, and in accordance with what is sometimes called the *Bula/Fyffe's* rule, parties are often prepared to admit their own documents as *prima facie* proof of the contents thereof subject to their right to seek to explain or qualify the contents.

A further feature of the procedure as it has been developed, which facilitates the efficient operation of the list, is the recent jurisprudence in relation to issue based cost orders. In the case of *Veolia Water UK plc v Fingal County Council (No 2)*[7] Clarke J. delivered a judgment in relation to the issue of costs on a preliminary point of law in complex litigation. The substantive proceedings concerned, *inter alia*, a judicial review being sought by the applicants of a decision of the respondent local authority to award a contract relating to water metering. The proceedings were admitted to the Commercial List and the Court directed the trial of a preliminary issue regarding delay. In his judgment in *Veolia*

7 [2007] 2 IR 81

Water UK plc v Fingal County Council (No 1)[8], Clarke J. found that, although the applicants had exceeded the time limitation as set out in Order 84A Rule 4 of the Rules of the Superior Courts, the respondents had failed to answer in a transparent fashion clear and reasonable questions asked about the tender and that this was "*the preponderant reason why the applicants were not in possession of knowledge of the grounds*"[9] until a date later than when the decision had been made.

Clarke J. gave a subsequent decision as to the issue of the costs of the preliminary hearing in *Veolia Water UK plc v Fingal County Council (No 2)*[10] as noted above. The approach which the judge adopted is set out at page 86 of the reported judgement where he stated that:

> However, as indicated above, it seems to me that the starting point of any consideration of costs has to be to identify what the "event" is and, thereby, identify the winning party. In the ordinary way, if the moving party required to bring either the proceedings as a whole (where the costs of the litigation as a whole are under consideration) or a particular interlocutory application (where those costs are involved) in order to secure a substantive or procedural entitlement, which could not be obtained without the hearing concerned, then that party will be regarded as having succeeded even if not successful on every point. The proceedings, or the relevant application as the case may be, will have been justified by the result. Where the winning party has not succeeded on all issues which were argued before the court then it seems to me that, ordinarily, the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by virtue of the successful party having raised additional issues upon which it was not successful.
>
> Where the court is so satisfied, then the court should attempt, as best it can, to reflect that fact in its order for costs. Where the matter before the court involved oral evidence and where the evidence of certain witnesses was directed solely towards an issue upon which the party who was, in the overall sense, successful, failed, then it seems to me that, ordinarily, the court should disallow any costs attributable to such witnesses and, indeed, should provide, by way of set off, for the recovery by the unsuccessful party of the costs attributable to any witnesses which it was forced to call in respect of the same issue. A similar approach should apply to any discrete item of expenditure incurred solely in respect of an issue upon which the otherwise successful party failed."

This approach has been followed in a number of subsequent cases.

While the Woolf reforms have not occurred in Ireland – our most recent Rules of the Superior Courts having been introduced in 1986 – the creation of the Commercial List has had a significant impact not only on Commercial Litigation but also on other civil proceedings whether they be Chancery, judicial review or Non-Jury in nature. It is not uncommon for non-Commercial Court cases to be the subject of active case management by the presiding Judge on an *ad hoc* basis. Parties are more commonly amenable to agree timelines in advance of proceedings in non-Commercial Court cases even though such timetables may not be required by the Rules of the Superior Courts.

A very recent example of a case which was not initially transferred to the Commercial List, but which had all the hallmarks of Commercial Court proceedings due to the speed at which the case was ready for hearing, was *Treasury Holdings v National Asset Management Agency*[11]. The case involved a judicial review sought by a major property company, of enforcement action (the appointment of receivers) sought to be taken against it by NAMA.

The case was first listed before the President of the High Court on 26 January 2012 and at that stage all parties had agreed to a very tight deadline for the exchange of pleadings, affidavits and legal submissions. The 'leave portion' of the case was heard over 6 days commencing on 22 February 2012 and a written decision was delivered by Finlay Geoghegan J. on 22 March 2012. The issues raised in this case will be addressed in more detail below, however, it is submitted that such a tight turnaround would not have been possible had it not been for the adoption of Commercial Court practices by all parties.

Changing Economic Times and the Prevalence of Debt Recovery (2008 – 2012)

With the very near collapse of credit markets globally in 2008 and the very definite collapse of the construction and banking markets in Ireland, the Courts in Ireland and the Commercial Court in particular have had to deal with an increasing amount of debt and insolvency cases.

Some of the largest summary Judgments granted in the history of the Irish courts have occurred in the Commercial Court in 2011. In October 2011, an Order for Final Judgment of approximately €74m was entered against Jim Mansfield in favour of the National Asset Management Agency and a further Order for Final Judgment of approximately €206m was entered against Mr Mansfield in favour of Bank of Scotland PLC on 21 December 2011. The Judgments were sought on foot of personal guarantees provided by Mr Mansfield in favour of Irish Nationwide Building Society and Bank of Scotland PLC.

More recently, those judgments paled into comparative insignificance when, in December 2011, orders for Final Judgment of approximately €1,426m, $808m and 13,819m Japanese Yen combined were granted against Seán Quinn in favour of the former Anglo Irish Bank which had been nationalised by the Irish Government in 2008. It should be noted that there is pending litigation pending between Mr Quinn and his family and the former Anglo Irish Bank across a range of different jurisdictions.

Indeed it is striking to note that the Irish Times reported in April that, for the first quarter of 2012, total judgments

8 [2007] 1 IR 690
9 Ibid at page 716
10 [2007] 2 IR 81
11 [2012] IEHC 66

of just short of €500m were entered in debt cases in Ireland. Of that sum €357m arose in cases taken by NAMA.[12] While the value of judgments had risen by almost half, the total number of individual judgments fell by 8%, thus reflecting a very significant increase in the monetary value of the average judgment.

For the period of 2004 to 2008, in the High Court in Ireland, 34 individuals were adjudicated bankrupt.[13] In 2009, the number of individuals adjudicated bankrupt was 17[14] and in 2010 the number was 29.[15] The differences with regard to bankruptcy between Ireland and the UK will be addressed in greater detail in the final section of this paper.

During the period 2004 – 2007, 43 companies sought Examinership protection from the court.[16] In 2008 a total of 41[17] companies sought such protection from the court, in 2009 the total was 40[18] and in 2010 the total was 22[19]. Examinership is a specifically Irish corporate recovery model. It differs from administration in the United Kingdom in that it is only possible for a company to obtain Examinership protection as a result of a court application and the Examinership process is subject to continuous court review. On the other hand, Examinership differs from Chapter 11 in the United States in that the process outside court is conducted by a court appointed insolvency practitioner who operates in a fiduciary capacity (in much the same way as administrators act in the United Kingdom) so that the company itself has no direct role in the Examinership process. The day to day management of the company remains with its directors (unless the court makes an order giving power to the Examiner) until the process comes to an end.

Clarke J. presided over the longest running Examinership in the history of the State during 2010 and 2011 in relation to McInerney Homes, in the course of which he delivered 4 written judgments and an *ex tempore* Judgment which went to 14 pages. Happily, the Supreme Court upheld all five judgments, admittedly by a 3 to 2 majority.

It is also not surprising that there has been a significant increase in the amount of mortgage enforcement litigation. This applies both at the commercial level (including many cases which have come before the Commercial Court) and also at the domestic level where the Chancery Special Summons List in the High Court and the Circuit Courts throughout the jurisdiction have had to handle a great number of straightforward repossession claims.

It should be noted that due to a recently published Code of Conduct for Mortgage Arrears published by the Central Bank[20] and a recent decision by Dunne J. in *Start v Gunn*[21] , there has been a decrease in the amount of new proceedings being issued where a mortgagee seeks an order for possession on foot of a legal mortgage. The Code of Conduct for Mortgage Arrears 2010 compels lending institutions to engage in a rigorous Mortgage Arrears Resolution Process of reviewing the mortgagors' financial circumstances before instituting proceedings seeking possession of the property where the mortgaged property is a family home and the mortgagor engages in the process.

In *Start v Gunn*, Dunne J. held that, due to the repeal of Section 62(7) of the Registration of Title Act, 1967 by the enactment of the Land and Conveyancing Law Reform Act 2009, the ability of a mortgagee to seek the remedy of an order for possession of registered land under the repealed legislation was limited only to instances where the Indenture of Mortgage was created prior to December 2009 and the sums under the mortgage became due and owing prior to that date. If the sums became due and owing after that date but the legal charge was created prior to that date, then the remedy of an order for possession would not be available to a mortgagee under the repealed or the new legislation. In Dunne J.'s concluding paragraph of the Judgment, she states:

> "It appears that there is a lacuna created by the repeal of s. 62(7) in that, as I have found, those lenders who did not have an entitlement to apply for an order pursuant to s. 62(7) by the 1st December, 2009, are not in a position of avail of the provisions of the 2009 Act, to apply for an order of possession as their right to apply for such an order is not saved by the provisions of the [Interpretation Act 2005]. It is not for the court to supply that which is not contained in the 2009 Act."

An appeal was lodged with the Supreme Court Office in *Start v Gunn* on 7 November 2011. As of 5 June 2012, the Government has not published any legislation to amend the lacuna.

With the significant increase in the amount of debt recovery cases initiated in Ireland since the credit crisis and property bust of 2007 – 2008, an unfortunate situation has arisen where many Defendants can no longer afford to pay for legal representation.

An example of the difficulties that can arise when litigants represent themselves in person was highlighted in the Judgment of O'Donnell J. in the recent Supreme Court case of *Glynn v Owen*[22]. In that case, the Plaintiffs appealed against a decision of Finlay Geoghegan J. in the High Court to the effect that claims by them against the first and second named Defendants could not be pursued as being derivative claims, which could only be brought by the company in which they have a minority interest, and that the rule in *Foss v Harbottle*[23] applied. At paragraph 17, O'Donnell J. stated:

> "…both the plaintiffs and the defendants represented themselves on this appeal. Mr. Leyland who was legally represented was no longer a party to the appeal. The intricacy of the rule in *Foss v Harbottle* has caused considerable confusion even amongst experienced lawyers, and is difficult territory to navigate at the best of times. However, to attempt that journey without

12 "Value of Court Debts up to €500m" Irish Times 5 April 2012
13 Courts Service Annual Reports 2004 – 2008
14 Courts Service Annual Report 2009
15 Courts Service Annual Report 2010
16 Courts Service Annual Reports 2004 – 2007
17 Courts Service Annual Report 2008
18 Courts Service Annual Report 2009
19 Courts Service Annual Report 2010
20 http://www.centralbank.ie
21 Unreported HC Dunne J, 25 July 2011 [2011] IEHC 275
22 Unreported SC O'Donnell J, 23 February 2012 [2012] IESC 49
23 (1843) 2 Hare 461

any legal training and experience, is a very difficult task indeed. In this case it must be said that both the plaintiffs (for whom Mr. McCabe spoke) and the defendants (for whom Jonathan Owen spoke) were articulate and forceful in their presentation. However no authorities were submitted to the court, and while legal submissions were delivered, they transpired to be imperfectly edited versions of the submissions of the High Court, and thus of little assistance on this appeal. Very little attention was addressed to any issue of law."

There has also been a significant increase in the amount of consultations and queries to Free Legal Aid Centres (FLAC) across the country. According to the most recent annual report for FLAC,[24] 12,923 clients contacted FLAC by telephone which was an increase of 38.9% from the previous year.

According to the 2011 Annual report, there were a total of 13,362 legal queries in FLAC centres which is an increase of 21.7% on the previous year. There was an increase of 47% in the number of debt related consultations compared to 2010. The trend continued as there was a 45% increase in debt related calls in 2010 compared to 2009. At page 8 of the Annual FLAC Report 2011 the impact of the economic downturn is quite clear:

"In 2007, the year before Ireland entered into a recession, 2.9% of all queries in FLAC centres were debt-related; by 2011 they accounted for 9.1% of queries."[25]

Another development of concern is the increased tendency of litigants in person who seek to rely on what can only be described as spurious arguments in an effort to defend claims for summary judgment or orders for repossession (although it must be emphasised that many litigants in person now are unrepresented due to lacking funds and do their best to articulate a case to defend within known legal rules). A recent example of such problems and the approach that the Courts of the immediate neighbouring jurisdiction have taken to them can be found in the *ex tempore* Judgment of Deeny J. in *Santander (UK) PLC v Anthony Parker,*[26] which was heard in the Chancery Division of the High Court of Justice of Northern Ireland. This case was an appeal of the decision of a Master of the High Court of Northern Ireland granting an order for possession against the Defendant, who was the occupant and owner of a premises, on foot of a legal charge in favour of the Plaintiff. At paragraphs 6 and 7 of his Judgment, Deeny J. gives an example of one of the arguments sought to advanced by the Defendant:

"[The Defendant] then sets out a whole range of points which I have considered and which he has touched upon in his oral submissions. I will just mention a couple of them expressly. He takes the point that this matter should be adjudicated on by Sir Christopher Geidt, Private Secretary to Her Majesty The Queen. He says that on foot of Clause 45 of the Magna Carta of 1215, which in the version advanced by him reads: 'We will appoint as justices, constables, sheriffs or other officials only men that know the law of the realm and are minded to keep it well.' Of course I have the privilege to serve as one of Her Majesty's justices and sit here to do justice as envisaged by Magna Carta rather than Sir Christopher whom, while I am sure a person of distinction, is not so far as I am aware a judge or lawyer.

[7] Another point raised by him at point 10 reads as follows:

'Since I am a living man, I operate under a foreign jurisdiction to the legal system. I already tried this case in my private foreign jurisdiction court, and find Santander in default judgment. Since Santander was found in default judgment in my private foreign jurisdiction court, Master Ellison, under the rules of the Hague Convention on foreign judgments and civil and commercial matters, should have respected that judgment.'

That is a wholly misplaced submission without foundation. The Master's court and on appeal this court is the appropriate court for dealing with a matter of this kind. Further points were raised and were dealt with by Mr Keith Gibson in his helpful skeleton argument. They include the submission that the respondent, that is the bank, cannot execute a contract as it is not a living thing and of course that is complete, I think the appropriate word is, nonsense, as in law a corporate body is indeed a person entitled to pursue its contractual rights. Mr Parker complains that there is an absence of two "wet signatures". Whatever that means that is not right in law either. He objected to the solicitors acting and to counsel acting because counsel had not produced his "power of authority" or his law licence to practice in Northern Ireland. I reject those submissions."

On occasion, judges of the Superior Courts in Ireland have also had company directors appear before them seeking to conduct litigation on behalf of the relevant company as a "litigant in person" notwithstanding the long held legal principle that a company can only be represented by an attorney. The decision of Bray J. in this regard in *Scriven v Jescott Leed Ltd*[27] was approved by the Ó'Dálaigh CJ in the Supreme Court in Ireland in *Battle v Irish Art Promotion Centre Ltd.*[28] It seems that the possible entitlement of a director to represent a company may come to be considered again by the Supreme Court in the near future.

Examination of the Exceptional Powers of NAMA

It is now proposed to explore how the creation of the

24 FLAC Annual Statistic Report 2011, Published June 2012

25 Ibid

26 Unreported HC Chancery Deeny J, 20 January 2012, [2012] NICh 6

27 (1) 53 Sol. Jo. 101

28 [1968] IR 252

National Asset Management Agency has impacted upon litigation in Ireland and the UK.

In *Dellway Investment & Ors v National Asset Management Agency (NAMA) & Ors.*[29] Kearns P, Kelly and Clarke JJ, delivering their Judgment as a Divisional High Court, stated that:

> "It is hardly surprising that the economic crisis which has affected the country over the last two to three years has generated much debate and controversy, both as to its causes and cures. Likewise, it is hardly surprising that the policy measures put in place to attempt to solve the problem have themselves generated significant controversy."

In response to the banking crisis, the Irish Legislature enacted a very significant piece of legislation The National Asset Management Agency Act, 2009 which established the National Asset Management Agency (NAMA).

The purpose of the Act is set out at Section 2 of the Act and it reads as follows:

> "(a) to address the serious threat to the economy and the stability of credit institutions in the State generally and the need for the maintenance and stabilisation of the financial system in the State, and
>
> (b) to address the compelling need—
>
> (i) to facilitate the availability of credit in the economy of the State,
>
> (ii) to resolve the problems created by the financial crisis in an expeditious and efficient manner and achieve a recovery in the economy,
>
> (iii) to protect the State's interest in respect of the guarantees issued by the State pursuant to the Credit Institutions (Financial Support) Act 2008 and to underpin the steps taken by the Government in that regard,
>
> (iv) to protect the interests of taxpayers,
>
> (v) to facilitate restructuring of credit institutions of systemic importance to the economy,
>
> (vi) to remove uncertainty about the valuation and location of certain assets of credit institutions of systemic importance to the economy,
>
> (vii) to restore confidence in the banking sector and to underpin the effect of Government support measures in relation to that sector, and
>
> (viii) to contribute to the social and economic development of the State."

By the end of 2010, NAMA had acquired €71.2 billion in nominal loan balances (consisting of 11,500 loans of 850 debtors) from the participating institutions (commercial banks) for a consideration of €30.2 billion which represents a discount of 58%.[30]

With the enactment of The National Asset Management Agency Act, 2009 and the transfer of assets to NAMA, that state body became a major stakeholder in property in Ireland, the UK and beyond. Developers who had previously worked with Relationship Managers in the various commercial banks in Ireland had to now deal with NAMA. By the end of 2010, 30 debtor business plans representing €31 billion nominal or 44% of the portfolio were reviewed by the Credit Committee and/or Board.[31]

While NAMA does not publish the list of properties or debtors that are "in NAMA", the 2010 report gives a breakdown of its property portfolio by jurisdiction. The Current Market Value of Property in NAMA as of 30 November 2009 was €21.5 billion with €11.5 billion in Ireland (54% of the portfolio) and €8.2 billion in the UK (38% of the portfolio).[32]

As NAMA was a body set up by the Government and funded by the State, the possibility of public law remedies or equitable relief being sought against NAMA through judicial review or Injunctive relief, respectively, in the High Court would no doubt have been to the forefront of the thoughts of the members of the legislature. To that end, a number of restrictions were put in place limiting the circumstances in which such reliefs can be sought.

Chapter 3 of the Act contains limitations in relation to Injunctive Relief at Section 192 and in relation to judicial review at Section 193. It is proposed that each limitation is addressed briefly.

Section 192 of the Act states:

> "(1) Where injunctive relief is sought on an interim or interlocutory basis in proceedings to which this Chapter applies—
>
> (a) to compel NAMA or a NAMA group entity to take or refrain from taking any action, or
>
> (b) to compel any other person to take or refrain from taking any action where the relief if granted would adversely affect NAMA or a NAMA group entity,
>
> the Court shall have regard, in determining whether to grant such relief, to the public interest.
>
> (2) In considering the public interest, the Court shall have regard to—
>
> (a) the purposes of this Act, and
>
> (b) the importance of permitting NAMA to discharge its functions in an expeditious and efficient manner.
>
> (3) Unless the Court is satisfied that not granting injunctive relief would give rise to an injustice, the Court shall not grant such relief where a remedy in damages would be available to the person who seeks that relief.
>
> (4) For the purposes of subsection (3), the possibility that the action against which injunctive relief is sought would or might result in a person being declared bankrupt or ordered to be wound up or otherwise adversely affected is not, of itself, sufficient to establish that not granting such relief would give rise to an injustice."

29 Unreported HC Kearns P, Kelly, Clarke JJ, 1 November 2010, [2010] IEHC 364

30 NAMA Annual Report 2010

31 Ibid

32 Ibid

In *Dellway Investments Ltd & Ors v National Asset Management Agency (NAMA) & Ors*[33] Patrick McKillen and various linked companies which were affected by a decision to transfer their combined bank loans to NAMA sought *inter alia*, injunctive relief against such a transfer, an order of *certiorari* to quash the decision and also challenged the constitutionality of the 2009 Act.

The proceedings were admitted to the Commercial List, and a divisional High Court consisting of Kearns P, Kelly and Clarke JJ dismissed the claims. On appeal to the Supreme Court, a seven Judge Court determined that Mr McKillen had a right to be heard prior to the acquisition of the loans by NAMA.

Hardiman J. referred to Section 192 of the Act in question in the course of his Judgment in *Dellway Investments Ltd & Ors v National Asset Management Agency (NAMA) & Ors*[34] when he said, at page 58 of the Judgment, that

> "The ordinary rules governing the right to seek interim or injunctive relief have been fortified in favour of NAMA."

He continued

> "The Court is not currently concerned with the legality or the constitutionality of these measures, but solely with the question of whether their affect on a bank customer whose assets are being concerned for acquisition is such as to require that such customer be given a hearing before his assets are taken."

Section 193 of the Act deals with judicial review proceedings. It reads as follows:

> 2 "(1) Leave shall not be granted for judicial review of a decision under this Act unless -
> - (a) either -
>   - (i) the application for leave to seek judicial review is made to the Court within one month after the decision is notified to the person concerned, or
>   - (ii) the Court is satisfied that -
>   - (I) there are substantial reasons why the application was not made within that period, and
>   - (II) it is just, in all the circumstances, to grant leave, having regard to the interests of other affected persons and the public interest,
>
>   and
> - (b) the Court is satisfied that the application raises a substantial issue for the Court's determination."

In the course of the Judgment in *Dellway*, Kearns P, Kelly and Clarke JJ explored the standard of proof required under the Act:

> "It is to be noted that this section does not purport to alter the usual procedure for obtaining leave to apply for judicial review by means of an ex parte application as prescribed by Order 84, rule 20(2) of the Rules of the Superior Courts. The section does, however, alter the standard of proof which has to be achieved in order to obtain leave to apply for such judicial review.
>
> In a normal case, the standard which has to be met is that prescribed by the Supreme Court in G. v Director of Public Prosecutions.[35] An applicant has to demonstrate an arguable case in law to the effect that he is entitled to the relief which he seeks.
>
> Here a higher test is prescribed. The Court must be satisfied that the application raises a substantial issue for its determination. The statutory language used here is similar to that which is contained in the Planning and Development Act 2000, and the Illegal Immigrants (Trafficking) Act 2000 , where substantial grounds have to be demonstrated before leave to apply for judicial review can be granted.
>
> The phrase "substantial grounds" has been considered judicially on many occasions. All of the decisions return to and approve of the approach of Carroll J. in McNamara v. An Bord Pleanála[36] where she said:-
>
> > "In order for a ground to be substantial it must be reasonable, it must be arguable, it must weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result will be. I believe I should go no further than satisfy myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial."

However, Mr McKillen's challenge to NAMA is not confined to Ireland. Mr McKillen is currently challenging the transfer of loans from NAMA to Sir David and Frederick Barclay. While the hearing is ongoing, it is proposed that this paper focus on the decision of Richards J. on two preliminary points (which he delivered on 2 February 2012). *Re Coroin Limited*[37] concerns a petition by Mr McKillen under Section 994 of the Companies Act 2006 (UK). Mr McKillen has a 36% interest in a company called Coroin Limited which company indirectly retains control of three prominent hotels in London, namely the Connaught, the Berkley and Claridge's. Sir David and Sir Frederick Barclay are attempting to obtain control of the company and hence the hotels. Mr McKillen claims that the actions of the Barclays "are unlawful and involve unfairly prejudicial conduct of the affairs of the

33 Unreported HC Kearns P, Kelly, Clarke JJ, 1 November 2010 [2010] IEHC 364, and Unreported SC Murray CJ, Denham, Hardiman, Fennelly, Macken, Finnegan, McKechnie JJ [2011] IESC 13

34 Unreported SC Murray CJ, Denham, Hardiman, Fennelly, Macken, Finnegan, McKechnie JJ [2011] IESC 13

35 [1994] 1 IR 374

36 [1995] 2 ILRM 125

37 Unreported HC Chancery Richards J. 2 February 2012, [2012] EWHC 129 (Ch)

company". He further alleges that there is a conspiracy to injure by unlawful means.

In the case Mr McKillen challenged the sale by NAMA of secured bank loan facilities to Maybourne Finance Limited (which is a company of Barclay interests) for a sum of £662.5m.

At paragraph 13 of the judgement, Richards J., noted the position in relation to jurisdiction:

> "The uncertainty as to the validity of the transfer would not however be resolved unless NAMA was a party to the proceedings and was bound by the result. On MFL's application, I directed that NAMA be joined as a party, subject of course to its right to apply to discharge the order. NAMA would have been entitled to a discharge of the order because the Facilities Agreement provides for the Irish courts to have exclusive jurisdiction, a provision expressly included for the benefit of the lenders. NAMA has, however, agreed to accept the jurisdiction of the English courts for the determination of the validity of the transfer and has appeared by solicitors and counsel at the trial of the preliminary issue. NAMA has served a defence limited to the issue of the validity of the transfer."

He also noted at paragraph 31

> "The Facilities Agreement is governed by Irish law but the parties are agreed that there is no difference between English and Irish law as regards the principles of construction applicable to the agreement. Equally it was accepted, if relevant, that the principles of statutory construction are the same. No evidence of Irish law was put before the court."

The substantive case is currently being heard but it is clear from the observations of Richards J. and the manner in which NAMA have engaged with the Court that, notwithstanding that the facilities agreements state that they be governed by Irish Law, litigation involving NAMA may well be conducted in the Courts of other jurisdictions most especially the UK.

In *Treasury Holdings v National Asset Management Agency*[38], to which reference has already been made, a number of companies which form part of the Treasury Holdings Group *inter alia,* sought leave

> "pursuant to ss. 182 and 193 of the National Asset Management Agency Act 2009 ("the Act") to issue judicial review proceedings seeking, primarily, an order of certiorari quashing a decision of the first named respondent, the National Asset Management Agency ("NAMA") […]to enforce the securities held for multiple loans to the applicants..."[39]

Finlay Geoghegan J., in the course of her judgment determined that the companies had established their entitlement pursuant to the sections 182 and 193 of the Act and Order 84 of the Rules of the Superior Courts to an order granting leave to issue judicial review proceedings seeking orders of certiorari quashing the decision of NAMA to enforce its security and to appoint receivers.

In light of Finlay Geoghegan J.'s decision, all parties agreed to seek to have the substantive hearing transferred to the Commercial List.

Emergency Financial Legislation

One of the measures adopted by the Irish Government to meet the crisis in the banking and public financial sectors was the introduction of emergency legislation. As many may know, all bar one of the main Irish financial institutions are now in public ownership and the one which is not (Bank of Ireland) has the government as a significant minority shareholder. One of the obligations which has been placed on those banks is to engage in significant restructuring so as to downsize their liabilities. It is clear that restructuring would have been either impossible or extremely complex and difficult under existing Company Law legislation. Against that background, the relevant legislation was introduced which permits the Court to make orders in a wide range of circumstances which would not ordinarily be available under traditional Company law. The background to such applications is, of course, the fact that, had it not been for government intervention, the banks concerned would almost certainly have gone into liquidation with significant consequences for all concerned. Obviously shareholder value has already been wiped out save in the case of Bank of Ireland. However, the emergency measures have to be seen in the context of the fact of many others who might claim against any of the relevant banks have had their position improved by the return of the banks concerned to solvency with the benefit of State intervention. The Court must, of course, balance whether, in any particular case, the measure proposed is a justified and proportionate response to that factor.

Insolvency Tourism

Litigation involving Irish parties in Northern Ireland and England & Wales is not confined solely to *inter partes* claims. There have been a number of high profile bankruptcy petitions lodged with the bankruptcy division of the High Court in both Belfast and London on behalf of Irish citizens.

The major benefit of being declared bankrupt in the UK as opposed to Ireland is quite clear when one compares the bankruptcy regimes in both jurisdictions. In the UK, it is possible to emerge from bankruptcy after only 12 months. In Ireland, it takes 12 years. It is somewhat telling that when you do a search in Google for the phrase "bankruptcy UK", the first two sponsored links are aimed at Irish people seeking to be made bankrupt in the UK.

An Irish citizen who recently was unsuccessful in his attempts to be made bankrupt in Northern Ireland was Seán Quinn. On Friday, 11 November 2011, the Master in Bankruptcy in the High Court of Justice in Northern Ireland made a bankruptcy order which had been sought by Mr Quinn. The Master was satisfied that, based on the Affidavit and submission of Mr Quinn's solicitor, Mr Quinn's centre of

38 [2012] IEHC 66
39 Ibid at page 2

main interest (COMI), pursuant to EC Regulation 1346/2000, was Northern Ireland.

Summary proceedings against Mr Quinn, brought by the Irish Bank Resolution Corporation (IBRC) formerly known as Anglo Irish Bank, which also included an application for entry into the Commercial List and a motion for Final Judgment, were due to be heard on Monday, 14 November 2011 in Dublin.

Kelly J. adjourned the summary proceedings in Dublin for a week to allow the Official Receiver in Northern Ireland to make submissions as Mr Quinn's counsel in Dublin was no longer in a position to represent his client in the proceedings. On hearing submissions from counsel for the Official Receiver, who sought an adjournment of the Summary proceedings until after the challenge to the bankruptcy petition was to be heard in Northern Ireland, Kelly J. determined that any decision he would make would not in any way interfere with the jurisdiction of the High Court in Northern Ireland.

At paragraph 46 and 47 of his Judgment in *Irish Bank Resolution Corporation Ltd v Quinn*[40], Kelly J. set out his reasons for not granting an adjournment:

> "At the outset I wish to state that I am quite satisfied that no decision which I make on this application whether in favour of the plaintiff or the Official Receiver has or could have the effect of "seeking to cut across the jurisdiction of the High Court of Justice in a manner which is not permissible" (see Official Receivers solicitors letter of 18th November, 2011). If I thought for a moment that any order that I might make could have such an effect, I would not make it. Comity of Courts requires that this Court respect the jurisdiction and entitlement of the courts of Northern Ireland to deal with all questions properly falling within their jurisdiction without any hint of interference by the courts of this State. I have no doubt but that a similar respect would be demonstrated by the Northern Irish courts to the courts of this State.
>
> This application for summary judgment does not in the slightest way interfere with the Northern Irish court in adjudicating upon all matters pertaining to the defendant's bankruptcy. If the bankruptcy is annulled that is an end of the matter as far as the courts in Northern Ireland are concerned. If on the other hand it stands, then the plaintiff will have to follow the prescribed procedures for proving its debt in accordance with the law and practice of Northern Ireland. That, I am told, will involve a proof of debt sitting and whatever standard of proof that has to be achieved in that regard is that prescribed by the law of Northern Ireland. The plaintiff accepts this to be the case."

The challenge to the bankruptcy came on for hearing before Deeny J. in Belfast on 19 and 20 December 2012. The issue that the court had to determine was whether, in fact, Mr Quinn's COMI was in Northern Ireland or the Republic of Ireland. At paragraph 26 of his judgment in *Irish Bank Resolution Corporation Limited v Quinn*[41] Deeny J. identified two questions which need to be answered in order to determine COMI:

> "Firstly: where was the debtor's centre of main interests where he conducted the administration of his interests on a regular basis before the presentation of the petition for bankruptcy (but bearing in mind the factual matrix or historical facts, per Chadwick LJ at [55](2) in *Shierson v Vileland-Boddy*[42])? Secondly: was that centre of administration ascertainable by third parties, in particular his creditors?"

At paragraph 51 of his Judgment Deeny J. found that Mr Quinn's COMI was in fact the Republic of Ireland:

> "I find that Mr Quinn's main interests in recent months were the litigation which he and his family are embroiled and the salvaging of what he can from the situation in which he finds himself. I find the centre of Mr Quinn's main interests is in the Republic of Ireland. I find that prior to 10 November 2011 he was not conducting the administration of his interests on a regular basis in Northern Ireland. I find that the probability is that the administration of his interests was shared between his home, Belturbet and Dublin where he continues to have professional advisors."

Deeny J. also addressed the second question at paragraph 53:

> "If Mr Quinn, contrary to my finding, did operate the office at Unit 1, Derrylin Enterprise Park in the period leading up to the presentation of the petition I find that it was not sufficiently or reasonably ascertainable by third parties. He admits himself that initially he kept his profile at the office quite low and would have parked his car behind the office building and out of sight. He says he did so to maintain some privacy from the media or indeed the Bank "to avoid snooping into my family's affairs and also to provide a level of protection". He is perfectly entitled to take that approach but he cannot then claim that he has established an office at a centre of main interest which is ascertainable by third parties. The two positions are completely inconsistent. He goes on to say that he believes that "quite a number of people now know where I have been working". That fact is of no assistance to the Bank or other potential creditors."

Once the bankruptcy order had been successfully challenged in Northern Ireland, IBRC sought to make Mr Quinn bankrupt in Ireland and the High Court in Dublin made that order on 16 January 2012.

In light of the difficulties that many are facing regarding debt in Ireland, the Irish Government has introduced the

40 Unreported HC Kelly J, 23 November 2011, [2011] IEHC 428

41 Unreported HC Chancery Deeny J, 10 January 2012, [2012] NICh 1

42 [2005] 1 WLR 396, C.A

Personal Insolvency Bill 2012. Some of the proposals include

> "the establishment of a State-run Insolvency Service to operate the new non-judicial insolvency arrangements, it allowing for three voluntary debt-settlement systems and reducing the period of bankruptcy from 12 years."[43]

In the Bill's current format, it appears that the non-judicial arrangements will involve the debtor and creditor coming to an arrangement to settle the debt which will be voluntary in nature. While this proposal is to be welcomed it is difficult at this juncture to predict to what extent banks will engage in the process.

The proposed reduction in the bankruptcy period from 12 years is to be welcomed.

Conclusion

It is clear from the above that, hardly surprisingly, the Irish Economic downturn has had a significant impact on commercial litigation in Ireland and the UK and it is quite likely that it will have a large impact for some time to come. The Comity of Courts in the neighbouring jurisdictions, of which the approach of the High Court in Belfast and Dublin in the Quinn proceedings are just one example, is a welcome feature in the Jurisprudence of the jurisdictions. ■

Commercial Court Statistics

January 2004 - 31 December 2011

Cases entered into the list	1,585
Cases disposed of	1,460
Cases outstanding	125

Average Waiting period from entry to the list to conclusion - 22 weeks

Outstanding cases

From 2004	-
From 2005	-
From 2006	-
From 2007	3
From 2008	2
From 2009	3
From 2010	7
From 2011	110

25% of cases concluded in less than 4 weeks
50% of cases concluded in less than 12 weeks
75% of cases concluded in less than 33 weeks
90% of cases concluded in less than 49 weeks

Time Periods for Case Conclusion

Less than 2 weeks	23%
2-5 weeks	13%
5-10 weeks	12%
10-15 weeks	6%
15-20 weeks	7%
20-26 weeks	8%
26-52 weeks	23%
More than 52 weeks	8%

Manner in which cases disposed of

Motion to dismiss	4%
Settled After entry	5%
Settled after directions hearing	24%
Settled after hearing date fixed	13%
Settled after pre-trial conference	<1%
Settled at hearing	19%
Full hearing	35%

Causes of Action in the Commercial Court (Order 63A Rule 1 RSC)	TOTAL
Rule a(i) Claim> €1m	1,092
Rule a(ii) Transaction>€1m	13
Rule a(iii) Commodities > €1m	1
Rule a(iv) Export/import > €1m	1
Rule a(v) carriage of goods> €1m	0
Rule a(vi) natural resources> €1m	0
Rule a(vii) Insurance > €1m	21
Rule a(viii) Service claim > €1m	22
Rule a(xi) Business agency claim > €1m	1
Total Rule 1 (a)	1,151
Rule (b) Other claim	224
Rule (c) Arbitration	18
Rule (d) Patents	19
Rule (e) Trademark/Copyright	56
Rule (f) Passing Off	7
Rule (g) judicial review	110

	2004	2005	2006	2007
Claims over €1 million	24	80	69	121
Claims General category	13	9	21	28
Intellectual Property	3	9	9	20
Judicial Review	3	10	15	23

	2008	2009	2010	2011
Claims over €1 million	176	300	215	180
Claims General category	27	48	55	29
Intellectual Property	14	11	4	10
Judicial Review	22	14	9	14

43 Phillip O'Leary, *Personal Insolvency Bill 2012*, www.insolvencyjournal.ie

SUMMER SAVINGS!

CRIMINAL PROCEDURE IN THE DISTRICT COURT

GENEVIEVE COONAN AND KATE O'TOOLE

This title is an essential brief-case companion providing detailed analysis in an accessible, user-friendly style.

- Provides a thorough examination of the jurisdiction of the District Court, including the limits of same, the categories of offence triable summarily and the procedure where offences are to be returned for trial on indictment
- Gives a detailed treatment of a whole range of procedural issues that arise in the context of a criminal prosecution, including bail, disclosure, amendment of proceedings, hearings etc.
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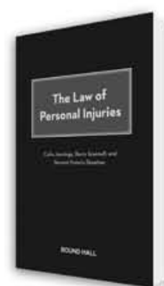

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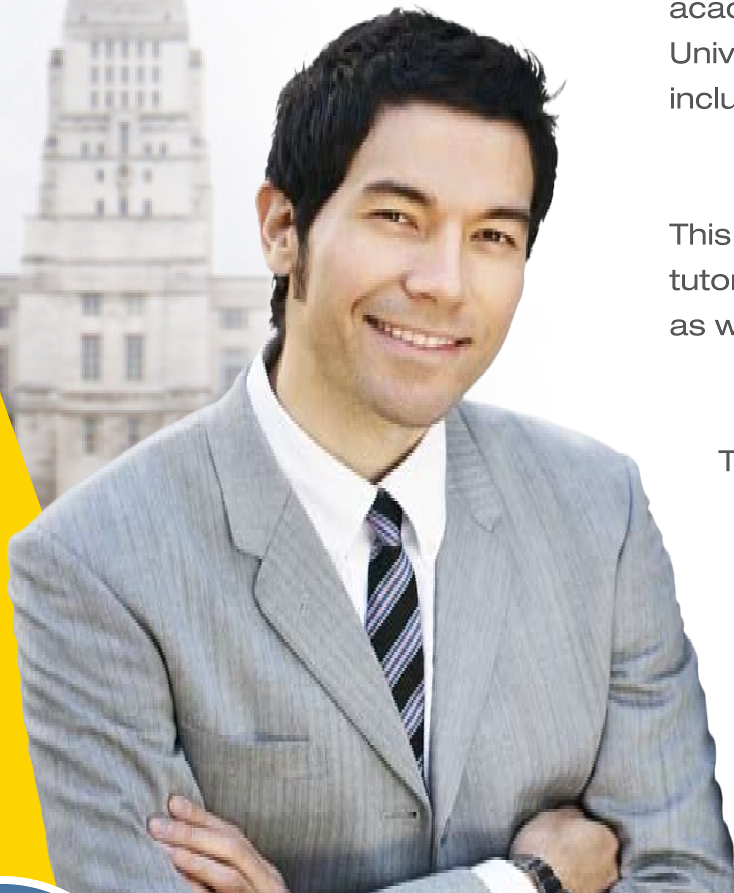

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