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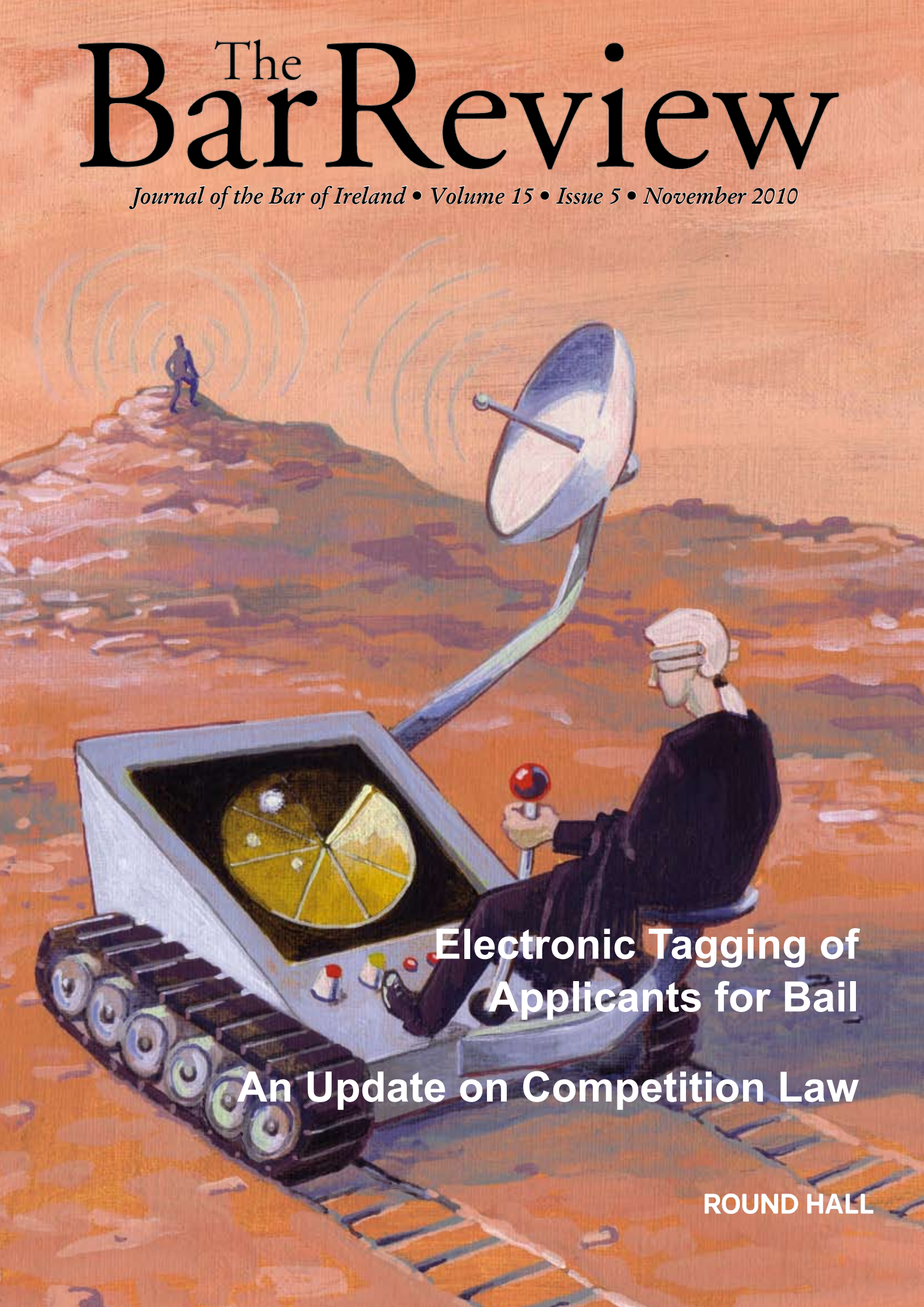
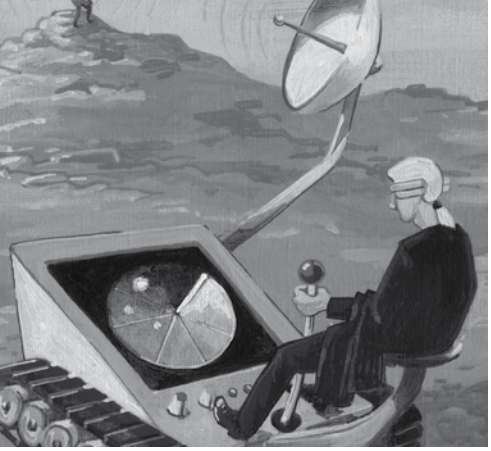


Electronic Tagging of Applicants for Bail

An Update on Competition Law

ROUND HALL



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Electronic Tagging of Applicants for Bail

James David Charity BL*

A. Introduction

In the context of bail, many would argue that the presumption of innocence has been consistently compromised since the introduction of the Bail Act of 1997. Frequently, media criticism of the judiciary, and the legal system in general, with respect to the administration of our bail laws and the number of accused persons admitted to bail while awaiting trial has created a perception that there is an indifference to the welfare of the general public which is endemic in our Courts.[1] There is frequently an equally venomous outcry from the media with regard to a perceived leniency in sentencing on the part of the judiciary.[2].

Setting aside the legal considerations which are fundamental to any debate on bail and sentencing, such as the presumption of innocence in bail applications and the aim of rehabilitation in sentencing, another practical consideration which influences a debate in this area is the availability of prison space which stricter sentencing and tightening of our bail laws would inevitability require. With the Thornton Hall project some way from completion, the simple fact is that a significant increase in the number of prisoners remanded in custody pending trial, or indeed a policy of imposing longer custodial sentences, is not realistic at present given the availability of prison spaces in the State. In 2008, there was capacity for 3581 prisoners in our Prisons and an average number of 3544 in custody at any one time, representing an occupancy rate of 99%.[3] Furthermore, available published figures show that the average yearly amount of accommodating a single prisoner in 2007 was €97,700.[4] Clearly, this represents a significant financial strain on the State in accommodating those remanded in custody or sentenced to terms of imprisonment.

It is clear that a balance must be achieved between the right of the public to be protected, and the right of both accused persons and convicted offenders to due process in order to restore the public confidence in the administration of justice, promote the safety of the public and protect the right to liberty. One such attempt is the forthcoming introduction of electronic monitoring orders which were provided for under the Criminals Justice Acts of 2006 (with respect to sentencing) and 2007 (with respect to bail) respectively. While these provisions have yet to be commenced, it is clear that the recent introduction of the Criminal Justice Act 2006 (Electronic Monitoring Devices) Regulations 2010 (SI 209 of 2010) signals a clear intention to introduce electronic monitoring as a viable alternative to remands in custody and custodial incarceration. This article aims to examine these provisions in detail and highlight the experiences of the English and Welsh jurisdiction with respect to electronic monitoring.

B. Electronic Monitoring under the Criminal Justice Act 2006

The first move toward electronic monitoring in Ireland came in the form of Criminal Justice Act of 2006 and in the context of the sentencing provisions provided by Part 10 of that legislation. However, it is worth noting at the outset that although the provisions of Part 10 of the Act of 2006 came into effect on the 2nd of October 2006, those sections related to electronic monitoring were excluded.[5]

(i) Restriction of Movement Orders

The Act provides that where the Court considers a sentence of imprisonment for a term greater than three months appropriate with respect to certain offences listed in Schedule 3 of the Act[6], a "Restriction of Movement" Order may be imposed as an alternative under Section 100.[7] A Restriction on Movement Order may restrict the movements of the offender as the Court sees fit and may require the offender to be in such place or places for any period as may be specified for a period not exceeding 12 hours in any given day, or not to be in such a place as the case may be.[8] The Order may be made

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1 The conviction of Gerard Barry for the murder of the Swiss student Manuela Riedo while on bail for other offences is one example of this where the Irish Independent edition of the July 29th 2009, in response to an apology by White J on behalf of the people of Ireland to the late Ms. Reido's parents commented: "May I respectfully suggest to Mr. Justice White that it is not the 'Irish nation' that needs forgiving but the Irish judicial system and Irish judiciary...Most of us can only look on in helpless bewilderment and confused frustration at the inadequate sentencing policies and bizarre bail laws which result in violent serial criminals remaining at liberty to terrorise society"

2 The recent release of Larry Murphy, after serving 10 years of a 15 year sentence following a conviction for rape in 2000, led to much media criticism that a harsher and lengthier sentence had not been imposed and thus, the community exposed to increased risk.

3 Irish Prison Service, *Annual Report 2008* (Dublin, 2009) at 16

4 Irish Prison Service, *Annual Report 2007* (Dublin, 2008) at 31

5 Criminal Justice Act 2006 (Commencement) Order 2006- The specific provisions of the 2006 Act relating to electronic monitoring are Sections 101(10), 101(12)(c), 102, 103(1)(d), 103(4)(d), 107, 108(4), 109, 111 and 112.

6 Schedule 3 of the Act lists certain offences contrary to the Criminal Justice (Public Order) Act 1994 and the Non-Fatal Offences Against the Person Act 1997 such as affray, the use of threatening or insulting behaviour in a public place, assault and assault causing harm.

7 Section 101(1) Criminal Justice Act 2006

8 Section 101(2) Criminal Justice Act 2006

"for any period not exceeding six months" and requires the offender to be of good behaviour and to keep the peace.[9] Clearly, the extent of the power was intended to be unchecked and effectively provides the Court with unlimited jurisdiction in restricting the movements of a convicted person who comes within the scope of its provisions. It is arguable that the wording of Section 100(3) of the Act[10], and in particular the words "for any period", allow the Court scope to impose a Restriction of Movement Order at a specified date in the future, providing same does not exceed six months when it does come into effect. It is not clear if this was the intention of the legislature but certainly, if such is the case, there is no provision in the Act which limits the period in which the Order may come into effect. Section 101(8) also requires the Court to come to the conclusion that the particular offender is a "suitable person" in respect of which the restriction Order may be made and the report of a probation and welfare officer may be sought in this regard.[11] Undoubtedly, the provisions of the Act were intended to reduce the pressure on prisons in terms of the number of prisoners being incarcerated and to encourage treatment, education and employment courses as an alternative to custody.[12]

(ii) Electronic Monitoring Orders

When commenced, perhaps the most interesting provision of Section 101 is that contained in Section 101(10) which states:

> "A court making a restriction on movement order may include in the order a requirement that the restrictions on the offender's movements be monitored electronically in accordance with section 102 but it shall not include such a requirement unless it considers, having regard to the offender and his or her circumstances, that he or she is a suitable person in respect of whom such a requirement may be made and, for that purpose, the court may request an authorised person to prepare a report in writing in relation to the offender."[13]

It is worth noting that the Act is unclear on what amounts to an "authorised person."[14] While Section 100(8)[15] makes specific reference to a probation officer, the provisions of Section 101(10) are silent in this regard and presumably, this may ultimately intend to refer to a probation officer or an independent operator. The issue becomes more complicated when one considers the provisions of Section 102 which states that an authorised person shall be responsible for monitoring the compliance of the offender with the electronic monitoring order.[16] It is unclear whether some technical expertise in the operation of the devices is necessary or whether it is envisaged that such monitoring is to be an exercise of the probation service. This is an obvious flaw in the legislation and indicative of the rushed nature of the Act. However, it is apparent however that the Minister[17] must prescribe such persons without any guidelines on the criteria for selection or the factors to be considered.[18]

Furthermore, Section 102(b) of the Act, which states that the order shall include a requirement that the offer ender shall either continuously or for such period as may be specified have an electronic monitoring device fitted to his person in order to monitor his compliance with the order, fails to expressly provide the maximum period for which an electronic monitoring device may be ordered. However, it would seem that the wording of the provision indicates that the purpose of the device is merely to ensure compliance with a Restriction of Movement Order and as such, in having regard to the provisions of Section 101(3), it may not be attached for a period in excess of six months from the date on which the restriction order comes into effect. As discussed above, it is conceivable that the wording of Section 101(3) permits the Court to make an Order to the effect that a restriction of movement should come into operation sometime into the future, rather than on the day on which sentence is delivered. In light of this, the wording of Section 102(b) and particularly the words "...to be carried out" indicates that the Court may well be empowered to impose the attachment of an electronic monitoring device from the day of sentence, notwithstanding that that Restriction of Movement Order does not come into effect until sometime thereafter. This would clearly result in a situation where the offender would be required to wear an electronic device for a period in excess of six months and it is certainly doubtful whether this was indeed the intention of the legislature.

(iii) Non-Compliance with a Restriction of Movement & Electronic Monitoring Order

The Act provides that evidence of non-compliance with an Order may be given to the Court by the production of a document, which may include an automatically produced statement from an electronic device in accordance with regulations laid out in section 111 of the Act, and a certificate signed by an authorised person pursuant to section 102.[19] Section 107(2) provides that such a statement and certificate shall, until the contrary is shown, be evidence of the facts set out therein.[20] Interestingly, the word "and" is used in this regard and this may inadvertently mean that both the certificate and statement must be introduced together before this presumption comes into play. This is certainly contrary to the intention of Section 107(1) which makes specific

9 Section 101(3) Criminal Justice Act 2006
10 Section 100(3) permits a variation of the Restriction of Movement Order on the application of the offender, the owner or adult habitually residing at the place or places specified in the Order, a member of the Garda Síochána or an authorised person under Section 102 of the Act.
11 Section 101(8) Criminal Justice Act 2006
12 See Section 100(6) of the Criminal Justice Act 2006
13 Section 100(10) Criminal Justice Act 2006
14 Section 98 of the Criminal Justice Act 2006 refers to an "authorised person" as "a person who is appointed in writing by the Minister, or a person who is one of a class of persons which is prescribed, to be an authorised person for the purposes of this Part."
15 Section 108 concerns the temporary release of prisoners who may be subject to restriction of movement and electronic monitoring orders.
16 Section 102(1) Criminal Justice Act 2006
17 "Minister" is defined under Section 2 of the Act as the Minister for Justice, Equality & Law Reform
18 Section 98 Criminal Justice Act 2006
19 Section 107(1) Criminal Justice Act 2006
20 Section 107(2) Criminal Justice Act 2006

reference to a "document" or "documents" and it is probable that the intended word to be used in Section 107(2) was "or" rather than "and". It is also a requirement that copies of the statement or certificate be served on the offender before prior to any hearing.[21]

(iv) Temporary Release of Prisoners subject to Electronic Monitoring

Section 108 of the Act provides that where a temporary release direction is made with respect to a prisoner, it may be subject to a condition restricting such person's movement to such extent as the Minister thinks fit and the restriction may be monitored electronically.[22] The concerns with this section obviously arise out of the apparent vesting in the Minister for Justice of quasi-judicial powers. However, it should be noted that Section 108(5) requires the consent of the person in respect of whom the condition is to be imposed.[23] That provision continues to state that the absence of any such agreement or consent shall not confer on that person an entitlement to be released pursuant to a direction. In effect, this creates a situation where the offender can choose to comply with the directions of the Minister or remain imprisoned. Section 108(4), in similar sentiments to Section 102 of the Act, states that a condition that a person's movements be electronically monitored shall include a provision which makes an "authorised person" responsible for monitoring the compliance of the person with the provision and that the person shall continuously, or for a period not in excess of six months, have an electronic monitoring device fitted for the purpose of monitoring his or her compliance with the condition restricting their movement.[24]

(v) Regulations for Electronic Monitoring

Section 111 of the Act provides that the Minister may make regulations prescribing the types of electronic monitoring device that may be used for the purpose of monitoring the compliance of an offender with a requirement under Section 102 or Section 108(4).[25] Section 112 further permits the Minister to make, with the consent of the Minister for Finance, such arrangements as necessary, including contractual arrangement, for the monitoring of the compliance of offenders with a restriction of movement order or a condition imposed under Section 108(4).[26] While no regulations have been issued with respect to the latter section, regulations pursuant to Section 111(b) have been recently introduced in the shape of the Criminal Justice Act 2006 (Electronic Monitoring Devices) Regulations 2010 (SI No. 209 of 2010). However, these regulations, rather than providing clarity in the precise types and specifications of device to be used, are somewhat vague and unhelpful. Regulation 3 states that the types of electronic monitoring device prescribed for the purposes of the Act include a device which is attached to a person,[27] either directly or through a portable tracking device or site monitoring device, linked to a receiving centre by means of a fixed line, radio frequency, satellite or other technology[28] and either directly or through the aforementioned devices capable of transmitting to the receiving centre information relating to the place at which the device is located at a particular time[29], the functioning of the device[30] and capable of detecting and transmitting information of any tampering with the device.[31] Regulations 3(b) and 3(c) make identical provisions with respect to portable tracking devices and site monitoring devices respectively.

C. Electronic Monitoring under the Criminal Justice Act 2007

(i) Electronic Monitoring Orders

The introduction of the Criminal Justice Act of 2007 led to further provisions in relation to electronic monitoring with respect to bail applications and when enacted, will insert a new Section 6B in the Bail Act of 1997 allowing for a person charged with a serious offence or a person appealing a sentence imposed by the District Court to have their movements electronically monitored.[32] As noted, these provisions have yet to be commenced[33] and it should be borne in mind that when they becomes part of our bail laws, they will not apply to those below 18 years of age.[34] Section 6B(1) states:

> "(1) Subject to subsection (2), where a person (in this section referred to as 'the person') who—
>
> (*a*) is charged with a serious offence or is appealing against a sentence of imprisonment imposed by the District Court, and
>
> (*b*) is admitted to bail on entering into a recognisance which is subject to any of the conditions mentioned in subparagraphs (i) and (iv) of section 6(1)(*b*),
>
> the court may make the recognisance subject to the following further conditions:
>
> (i) that the person's movements while on bail are monitored electronically so that his or her compliance or non-compliance with a condition mentioned in any of the said subparagraphs can be established;
>
> (ii) that for that purpose the person has an electronic monitoring device attached to his or her person, either continuously or for such periods as may be specified; and
>
> (iii) that an authorised person is responsible for monitoring the person's compliance or non-compliance with any condition

21 Section 107(3) Criminal Justice Act 2006
22 Section 108(1) Criminal Justice Act 2006
23 Section 108(5) Criminal Justice Act 2006
24 Section 108(4) Criminal Justice Act 2006
25 Section 111 Criminal Justice Act 2006
26 Section 112 Criminal Justice Act 2006
27 Regulation 3(a)(i)
28 Regulation 3(a)(ii)
29 Regulation 3(a)(iii)(I)
30 Regulation 3(a)(iii)(II)
31 Regulation 3(a)(iii)(III)
32 Section 11 Criminal Justice Act 2007
33 Criminal Justice (Commencement) Order 2007
34 Section 6B(9) Bail Act 1997 (as inserted by Section 11 of the Criminal Justice Act 2007)

mentioned in the said subparagraphs or in paragraph (ii) of this subsection."[35]

It is clear that the Act envisages an electronic monitoring order being made only in circumstances where conditions are imposed in accordance with section 6(1)(b) of the 1997 Act. The conditions referred to in Section 6(1)(b) are, however, discretionary and the Court may admit an Applicant to bail without any order thereunder, as can be seen when contrasting that section with 6(1)(a) where the word "shall" is used. It is clear that where conditions are not made pursuant to Section 6(1)(b), there is no authority to make an order for electronic monitoring under the Act. However, the practical reality of bail applications mean that an order in terms of Section 6(1)(b) is usually made in some form. It is also necessary that the Applicant be charged with a serious offence or is appealing a sentence imposed in the District Court.[36]

Section 6B(1)(b)(ii) also allows the Court discretion in deciding the periods and duration for which the electronic monitoring device is to be attached while section 6(B)(1)(b)(iii) provides that an "authorised person" may be made responsible for monitoring compliance with the conditions in Section 6(1)(b) or Section 6B(1)(b)(ii). In similar fashion to the Criminal Justice Act of 2006, the 2007 Act makes the Minister for Justice responsible for setting out the regulations and criteria on what amounts to an "authorised person"[37] The Act again offers no guidance on what qualifications, background or experience an "authorised person" should have and it is unclear whether this will ultimately refer to a probation officer or a person with technical qualifications necessary for the operation and monitoring of the device.

The provisions inserted by the 2007 Act also specify that a recognisance shall not be made subject to the electronic monitoring provisions referred to in Section 6B(1) in circumstances where the owner or person in charge of the place in which the Applicant is to reside or remain refuses their consent, or where the Applicant refuses to comply with such orders.[38] In effect, this means that an Applicant for bail must agree to abide with an electronic monitoring order. However, where the Court is minded to make such an Order, it is difficult to see how an Applicant can validly make such a refusal without running the risk of being remanded in custody. Most probably, the concern of the legislature was the compliance of the electronic monitoring provisions with the constitutional and human rights of an Applicant and it may seem that the fact an Applicant may either consent or refuse to an Order being made in such terms is an effort to avoid these concerns. The provision is therefore potentially open to criticisms of legislative coercion.

The 2007 Act further provides that an Applicant may apply to the Court to vary any of the conditions in Section 6B(1) by revoking or adding conditions thereto.[39] All such applications to the Court must be on notice to the prosecutor.[40] It is interesting to note that such an application for a variation of conditions may only be brought by the Applicant and not by the prosecution.

(ii) Breach of an Electronic Monitoring Order

Section 6B(7) states that the Court may receive evidence from an authorised person, a surety or a member of An Garda Síochána in writing and on oath that the accused is about to contravene the provisions of either sections (i) or (ii) of subsection 1 of Section 6B of the Act.[41] Unfortunately, this is another example of the rather rushed nature in which the 2007 Act was drafted as one will note that there is in fact no section known as 6B(1)(i) or 6B(1)(ii). It is presumed the provisions intended to be referred to are 6B(1)(b)(i) and (ii). This effectively creates a situation whereby any application to the Court under Section 6B(7) that the accused is contravening the electronic monitoring provisions of the Act would fail as the paragraphs referred to in that section do not exist and the accused surely cannot be in breach of a non-existing provision.

This situation is compounded by the new Section 6C introduced by the 2007 Act.[42] Subsection 1 of that provision states that where a person's movements are subject to an electronic monitoring order, evidence of their presence or absence from a particular place or their compliance with a condition imposed under Section 6B(1)(ii) of the Act may be given by production of an automatically generated statement or otherwise by a prescribed device and a certificate that the statement relates to the whereabouts of the person at the dates and times shown and is signed by an authorised person responsible for such electronic monitoring.[43] However, it should be once more noted that there is no provision in the Act known as Section 6B(1)(ii) and it is again presumed that the legislature intended to refer to Section 6B(1)(b)(ii). It seems from the wording of the Act that it is arguable that both the statement and certificate are necessary where such evidence is being produced and one will not suffice without the other. Furthermore, neither is admissible unless they are served on the accused prior to the hearing.[44] The onus of proof in such applications is shifted insofar as the statement and certificate are admissible as evidence of the facts contained therein, unless the contrary is shown.[45] This places a particularly onerous burden on an accused where such an application is made as presumably, any rebuttal of the evidence will require some technical expertise or analysis of the device or alibi evidence to the effect that the accused

35 Section 6B Bail Act 1997

36 A "serious offence", as seen earlier, includes all offences listed in the Schedule to the Bail Act of 1997 and punishable by a term of imprisonment of five years or more.

37 Section 1(2) Bail Act 1997 (as inserted by Section 5 of the Criminal Justice Act 2007)

38 Section 6B2(a) and (b) Bail Act 1997 (as inserted by Section 11 of the Criminal Justice Act 2007)

39 Section 6B(4) Bail Act 1997 (as inserted by Section 11 of the Criminal Justice Act 2007)

40 Section 6B(6) Bail Act 1997 (as inserted by Section 11 of the Criminal Justice Act 2007)

41 Section 6B(7) Bail Act 1997 (as inserted by Section 11 of the Criminal Justice Act 2007)

42 Section 12 Criminal Justice Act 2007

43 Section 6(C) (1) Bail Act 1997 (as inserted by Section 12 of the Criminal Justice Act 2007)

44 Section 6C(3) Bail Act 1997 (as inserted by Section 12 of the Criminal Justice Act 2007)

45 Section 6C(2) Bail Act 1997 (as inserted by Section 12 of the Criminal Justice Act 2007)

was not in the location referred to in the statement during the relevant periods or times. It does appear from Section 6C(2) however that the Court would be required to give more weight to a statement as opposed to such alibi evidence.

(iii) Regulations for Electronic Monitoring

Section 13 of the 2007 Act also inserts a new Section 6D in the 1997 legislation which provides that the Minister may, with the consent of the Minister for Finance, make such arrangements as are necessary with such persons as he sees fit for the purposes of electronic monitoring.[46] However, it should be noted that Section 6D once again refers to the non-existent Section 6B(1)(ii) of the 1997 Act.

In relation to the various types of electronic monitoring device or tag that may be introduced, it is noteworthy that the Act is silent with respect to same and unlike the 2006 Act, where regulations have been introduced pursuant to SI 409 of 2010, no equivalent has been introduced to date under the 2007 Act. In any case, we have already seen that SI 409 of 2010 is largely unhelpful in this regard and one can only expect similar vagueness when regulations are introduced under the 2007 Act. Moeller points out that there is more than one system which may be utilised and provides an example of those in operation in England:

> "There are three main types. The home-based scheme is by far the most commonly used in England. A tag is fixed on the body and it sends a signal to a receiver that is installed in the home. As a result, the tagged person must remain within the family home, inside the signal radius of the receiver unit. By contrast, satellite monitoring has the person carry both tag and receiver, which calculates its location by means of global positioning system (GPS) and relays this information to a monitoring centre. In real-time surveillance, any movements would appear as location trails on a computer screen map, detailing which street and in what direction the person is moving. Satellite surveillance is not fully operable yet, but may be so in the future. Finally, voice recognition depends on the storage of voiceprints in a central computer. The presence of the person in a particular place can then be checked by scheduled telephone calls. The former Minister for Justice indicated that the home-based system would allow for implementation of the relevant legislation in part, once a feasibility test is carried out. Like in England, this type of electronic monitoring is likely to be most prevalent here."[47]

D. Electronic Monitoring in England & Wales

(i) Legislation

Electronic monitoring in the English and Welsh jurisdiction was first provided for by virtue of Section 13 of the Criminal Justice Act of 1991 in relation to the monitoring of curfew orders following the conviction of an accused person.[48] Subsequently, the Criminal Justice and Police Act of 2001 inserted a new Section 6ZAA in the Bail Act of 1976 which provides that an electronic monitoring order may be made in respect of a child or young person to ensure compliance with any conditions of bail imposed by the Court.[49] Section 3A was also inserted by the 2001 Act[50] and stipulates a number of conditions which must be satisfied before the Court can make an electronic monitoring order in respect of such a person.[51] Further provision for electronic monitoring of bail has also been introduced by virtue of the Asylum and Immigration (Treatment of Claimants) Act 2004.[52]

(ii) Pilot Schemes and Equipment

Prior to the limited introduction of electronic monitoring as outlined above, a pilot scheme was conducted and introduced in August 1989 in Nottingham, North Tyneside and Tower Bridge in London.[53] Mair and Nee explain that two types of electronic monitoring system were available, continuously signalling or "active" systems and programmed "passive" systems. They explain:

> "Programmed contact systems only verify a person's presence in a particular location at random times; usually, a computer generates random telephone calls to a residence during any curfew period and the person being monitored is required to answer and confirm his/her identity...The 'active' system, conversely, monitors an individual for the whole of any curfew period and a telephone call is only made

46 Section 6D Bail Act 1997 (as inserted by Section 13 of the Criminal Justice Act 2007)

47 Moeller Tanya "Game of Tag" (2008) 102(2) *Law Society Gazette* 34 at 34-35

48 Section 12 of the 1991 Act made provision for curfew orders in respect of persons over the age of 16 who had been convicted of a criminal offence. In a similar fashion to the Irish legislation, Section 13(2) provides that such orders may be made for a period not exceeding six months but also provides that it shall avoid interference with the time such person spends at school or other educational establishment. Section 12(4) also provides that a curfew order shall include a provision making a person responsible for monitoring the person's whereabouts during the periods of the curfew.

49 Section 131 Criminal Justice and Police Act 2001

50 Section 131(2) Criminal Justice and Police Act 2001

51 Section 3A(3), 3A(4) and 3A(5) Bail Act 1976 (as inserted by the Criminal Justice and Police Act 2001). In particular, the Court may not make such an order unless the child is at least 12 years old and the child or young person has been charged or convicted or a violent or sexual offence or an offence punishable in the case of an adult with a term of imprisonment of fourteen years or more. Furthermore, the young person must be charged or convicted of an offence which would amount to a recent history of repeatedly committing imprisonable offences while remanded on bail or to local authority accommodation. The Secretary of State must have provided notification that electronic monitoring arrangements have been made available in the relevant area and a youth offending team must have informed the Court that the imposition of an electronic monitoring order is suitable in any particular case.

52 Section 36 Asylum and Immigration (Treatment of Claimants) Act of 2004. An electronic monitoring order may be made where a residence restriction is imposed under Section 36(2) or where a reporting restriction could be imposed under Section 36(3) while immigration bail may also be provided to an adult subject to a condition that he comply with electronic monitoring under Section 36(4).

53 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 9

> where an infraction is suspected. It was decided from the beginning that for the trials, it was the 'active' system that would be used. This system consists of three pieces of equipment: (1) a transmitted bracelet which is worn on the leg and which sends out signals when it is in range of (2) a receiver-dialler attached to the telephone line which relays the signals to (3) a central computer which stores the data and warns any operator if a person is absent during any curfew period."[54]

During the course of the trials, the consent of the defendant was required and an 'Electronic Monitoring Agreement' was signed.[55] Where the accused person did not have a telephone line installed in their residence or proposed place of curfew, an agreement was made with British Telecom that a line would be installed within 24 hours of an order being made and would only be used for the purpose of electronic monitoring. The crucial aspect of this was that the accused person would not know the number of the telephone line and could not keep the line busy by dialling the number and defeating any prospect of monitoring the accused.[56] From a modern perspective, this approach would certainly have some benefits, especially if one considers the ease with which a call can now be forwarded to a mobile telephone and potentially defeat the purpose of spot check calls.

However, a number of problems arose during the trials and indeed, one offender in Nottingham who was made subject to a 24 hour monitoring order absconded from his place of curfew, a hostel which had agreed to take part in the pilot. Hostel staff felt the length of the curfew was a contributory factor in this Defendants course of action.[57] Furthermore, during the 24 weeks of the trials conducted in Nottingham, 22 equipment failures were recorded including line failures, possible "dead spots" and the loss of transmission.[58] 53 equipment failures occurred in North Tyneside over a 28 week period,[59] while 84 were noted in Tower Bridge over a 37 week period.[60] There also appeared to be some disquiet among the Magistrates involved in the scheme in North Tyneside and it was noted that one third were opposed to electronic monitoring, one third were neutral and the remainder supported its use.[61]

In Tower Bridge, the first two defendants made subject to electronic monitoring in that area gave television interviews for which they received payment before removing the bracelets and absconding. It also later transpired that one of these two defendants had not been monitored at all during the first three weeks of the trials as a result of the misunderstanding of computer generated coded print outs by an operator.[62]

During the pilot scheme, over half the 50 people ultimately monitored violated their curfew or were charged with a new offence.[63] Following the pilot scheme, twenty of the accused persons who participated were interviewed and it was noted that:

> "Electronic monitoring was seen as restrictive and closer to a remand in custody than to bail with conditions; but the advantages of being at home with one's family outweighed restrictive freedom. Long curfews were considered to be particularly oppressive and the importance of having a job was noted by several respondents. Domestic problems could also arise."[64]

It must also be noted that £700,000 was expended during the course of trials for which only 50 defendants took part.[65] The benefits therefore seemed to be somewhat questionable, especially when one considers the number of violations and the cost of the system. In addition, two defendants who absconded during the trials had not been re-arrested by the time the pilot scheme finished.[66] Some criticism of the pilot has been voiced by various commentators with one stating "...as seems to be the case, electronic monitoring ensures that breaches of curfew will invariably be detected, the resulting deterrent effect would guarantee breach prevention. On that basis, it might well be worth the cost involved, although even then...it is doubtful whether this is a scheme which is not simply too expensive for the benefits. However, it clearly failed to prevent breaches in a very significant number of the cases involved in the field study."[67]

A further second study was later conducted between April 1998 and August 1999 in Manchester and Norwich[68] where cost considerations limited the scheme to 200 cases, although in fact, take up was lower than expected and only 198 orders were actually made.[69] Of the 198 persons captured in the scheme, 184 were male and 14 were female.[70] In preparing for the scheme, it was noted that remand prisoners

54 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 9-10
55 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 12
56 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 11
57 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 20
58 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 26
59 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 34
60 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 43
61 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 33
62 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 38
63 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 44-45. 18 violations occurred while in 11 cases, accused persons were charged with new offences
64 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 60
65 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 67
66 Mair George & Nee Claire, *Electronic Monitoring: The Trials and Their Results* (Home Office, London, 1990) at 44
67 Corre, Neil & Wolchover, David, *Bail in Criminal Proceedings* (Oxford, 2004) at 189
68 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at v
69 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 4
70 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored*

accounted for approximately a fifth of the prison population in England and Wales, but also formed three-fifths of the numbers received into prison owing to the short time usually spent in custody.[71]

During the course of the second pilot scheme, 86% of 198 electronic monitoring orders made were for periods of 12 hours or less. In Norwich, six defendants were curfewed for a 24 hour period and two for 22 hours per day.[72] Eleven of those in the scheme absconded, amounting to approximately 5% of those curfewed. Although this may seem high, the Report points out that in 1998, 12% of those bailed from the Magistrates Court and 9% from the Crown Court absconded.[73] In effect, this means that electronic monitoring may well have provided an additional deterrent in preventing an accused from absconding. One must acknowledge that the numbers included in the scheme were quite limited however. It was also noted that the time in which curfew orders were imposed and the period of electronic monitoring was of significant importance. One of the participants, a 16 year old girl accused of shoplifting, "found the bail curfew easy because she was able to continue shoplifting during the day and said it was 'stupid' that she was not curfewed during shop opening hours."[74]

Furthermore, some defendants, while initially supportive of electronic monitoring orders, became frustrated after subsequently receiving a custodial sentence in circumstances where they would have received a discount for time remanded in custody which was not available by virtue of a curfew monitored by electronic monitoring.[75]

Ninety five defendants had not breached the conditions of their bail during the trial but had some less serious violations recorded, on average about 4.5 violations each.[76] Additional problems were noted in the operation of the devices insofar as one accused set the tamper alarm off outside his curfew hours while having a "kickabout" with friends, another was arrested and brought before the Court when he went to a neighbour's house to borrow tea bags during the hours of his curfew and one defendant had to call out a contractor during the night after his device became damaged while in bed. Furthermore, the girlfriend of another offender also went into labour during his curfew period and after attempting to reach a 24 hour hotline in order to get permission to attend the hospital with her, his call was eventually answered after two hours and he was told to obtain a letter from the hospital confirming why he had been there. Despite this, no record of the call being answered was recorded.[77] However, in contrast to the earlier trial, there had been only several faults noticed in the equipment and problems were not as persistent.[78] Furthermore, unlike many of the sentiments raised in the earlier report, it was noted that: "The bail curfew was generally popular with defendants and their families (until they found themselves in prison and regretted losing the remission that custodial remand would have attracted)."[79]

The report also considered the cost benefits of a national roll out of electronically monitored bail curfew and concluded that, in assuming half of those granted bail curfew would otherwise be remanded in custody (approximately 2500 at the Magistrates Courts and about 100 at the Crown Court) and the remainder would otherwise be bailed, the cost of a national rollout would be £1.53 million. The Report went on to state that assuming that three quarters of those granted bail curfews would otherwise be remanded in custody (approximately 3750 at the Magistrates Courts and about 150 at the Crown Court), there would be savings from a national rollout amounting to £1.25 million. However, if only those who would alternatively be remanded in custody received bail curfew, such orders would lead to greater expense than having a lower unsentenced prison population.[80]

E. Conclusion

In conclusion, it is certainly evident that the legislature has envisaged a move towards electronic monitoring, principally facilitated by the introduction of the Criminal Justice Acts of 2006 and 2007 and the recent introduction of SI 209 of 2010. Unfortunately, in the context of bail, most of these provisions serve to undermine the concept of an accused's presumption of innocence and right to liberty and continue to erode the principles laid down in such decisions as *O'Callaghan*.[81] As noted in one commentary on the new bail provisions contained in the Criminal Justice Acts of 2007, it would appear that the increasing concern of the Oireachtas, in reforming the bail system, "is crime control and not the preservation of liberty."[82]

In addition, the Convention for the Protection of Human Rights and Fundamental Freedoms, which was incorporated into Irish law by virtue of the European Convention on

Curfew as a Condition of Bail-Report of the Pilot (Home Office, London, 2009) at 31

71 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 3

72 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 32

73 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 60

74 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 33

75 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 37

76 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 47. Forty four had no violations recorded in any form. Of those who absconded, they had committed an average of 4.1 less serious violations

77 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 48

78 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 50

79 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 54

80 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 57

81 [1966] IR 501

82 Grolimund, Marc Thompson & Durac, Leonard, *Counting the Cost: Stiffer Irish Bail Laws and the Sacrificing of the Principle of Liberty* (Dublin, 2009) 19(2) at 55

Human Rights Act 2003, is relevant to the forthcoming introduction of electronic monitoring, particularly in respect of Articles 5 and 8. In the case of *Secretary of State for the Home Department v. JJ & Ors*[83], six Iraqi and Iranian nationals suspected of terrorism offences were made subject to control orders requiring them to wear electronic tags and remain at a specified residence at all times, except between the hours of 10am and 4pm. The Order was held to amount to a wrongful deprivation of liberty in breach of Article 5 of the Convention and this decision was upheld by both the Court of Criminal Appeal and the House of Lords. In the Judgment of the House of Lords, it was noted that the provisions were also potentially in breach of Article 8 of the Convention or Article 2 of Protocol 4 but no complaint had been made in that regard to the Court.[84] Privacy is a central concern in this regard, particularly with respect to Article 8, and Moeller highlights this in stating:-

> "The tag cannot record communication or images of the person, but it can monitor his whereabouts at any requisite time in any area, constrained only by the limitations inherent in the type of technology employed. Furthermore, electronic monitoring can interfere with the private life in the family home, which is entwined with the inviolability of the private dwelling (article 40.5) and the right to private property (article 43)."[85]

A further concern is that minimal, if any, research has been conducted with regard to the benefits of introducing a system of electronic monitoring in this jurisdiction. Indeed, one of the few reports that did consider electronic monitoring in Ireland devoted no more than four sentences to the topic, concluding that the Home Office research conducted in England "reported that this measure was both costly and unpopular with magistrates and judges, and that only fifty defendants had been made subject to it over the period, of whom eleven had offended and eighteen had violated bail conditions in other ways."[86]

However, it does appear that electronic monitoring has since been introduced to good effect in relation to convicted prisoners released subject to curfew orders in that jurisdiction. Indeed, in one study, it was noted that in relation to orders made under the Criminal Justice legislation in England and Wales, more than 20,000 people had been made subject to electronic monitoring conditions and there had been little problems reported.[87] However, it certainly seems that the cost benefits and potential success of introducing electronic monitoring devices are open to debate following the second pilot scheme of electronic monitoring in Norwich and Manchester.[88]

It remains to be seen when the legislation dealing with electronic monitoring will be commenced and how it will be enforced. ■

83 *Secretary of State for the Home Department v. JJ & Ors* [2008] 1 AC 385

84 The dissenting judgment of Lord Hoffman at [2008] 1 AC 385 at 417 noted "They are plainly a substantial interference with his privacy and freedom of movement. They engage Article 8 of the Convention ("Everyone has the right to respect for his private and family life, his home and his correspondence") and would engage Article 2 of Protocol 4 ") if the United Kingdom had ratified that Protocol."

85 Moeller Tanya "Game of Tag" (2008) 102(2) *Law Society Gazette* 34 at 36

86 Law Reform Commission, *Report on an Examination of the Law of Bail* (Law Reform Commission, Dublin, 1995) at 140

87 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009) at 5

88 Aris Jennifer, Elliot Robin & Conrad Esther, *Electronically Monitored Curfew as a Condition of Bail-Report of the Pilot* (Home Office, London, 2009)

Update: Assigning a Tenancy and Unreasonable Refusal by the Landlord

John O'Regan BL

In an article published in the July 2010 edition of the Bar Review,[1] it was sought to provide an analysis on what constitutes an unreasonable refusal of consent to assignment by a landlord. There was also a brief examination of the remedies available to aggrieved tenants who have lost a potential assignee and suffered financial loss because of the landlord's unreasonable withholding of consent or delay in making a decision. However, the latter area has been clarified by the Supreme Court's decision of 16th June 2010 in *Meagher & Anor v. Luke J. Healy Pharmacy Limited*.[2] That case was not considered in the article, and accordingly it is now proposed to update and correct the article in light of that decision.

Page 83 of the article stated as follows:

> "Situations have arisen where a tenant has applied to the landlord to assign, but the proposed assignee backs out as a result of delay by the landlord in making a decision, with consequent financial loss to the tenant. In England and Wales, tenants have successfully sued the landlord for damages in these circumstances. It must be pointed out that there is a statutory obligation on landlords in England and Wales under s.1(3) of the Landlord and Tenant Act 1988 to make a decision on consent within a reasonable time, however it is submitted that such a duty also implicitly exists in this jurisdiction."

At Page 84, under the heading "Remedies", it was stated that:

> "Where a landlord has refused consent to assign, or delayed unreasonably with the resultant loss of a potential assignee, a tenant can sue for a declaration that consent has been unreasonably withheld and damages, if appropriate. The cases in England and Wales demonstrate that the measure of damages will be the tenant's reasonably foreseeable losses as a result of the landlord's breach of duty."

This would appear to have been the position in Ireland until the Supreme Court's recent decision in *Meagher & Anor v. Luke J. Healy Pharmacy Limited*.[3] The facts of that case can be summarised as follows.

The plaintiffs were the successors in title of the landlord's interest in the property, and on 1st June 1971 the landlord entered into a lease with the defendant lessee for 35 years. The lease contained *inter alia*, a covenant to repair on the part of the lessee, a covenant restricting user to a pharmaceutical chemist business, and also a covenant not to assign the premises without the previous consent in writing of the lessor. At all material times the defendant was in breach of the repairing covenant. Three schedules of dilapidations were served, the first in 1993, the second in 1995, and the third in 1998. The repairs were not carried out and the proceedings were instituted by the lessor in October 1997, the relief sought being an injunction requiring the lessee to comply with the repairing covenant. However, between December 1997, and June 1998, the lessee sought the lessor's consent to three different assignments to three different proposed assignees. The first assignment was refused on the grounds that the schedule of dilapidations had not been completed, the second proposed assignment was not replied to, and the third proposed assignment (to Cellular World Limited) was the subject of protracted correspondence but the lessors neither granted nor refused consent to assign.

Accordingly, the defendant delivered a counterclaim on 23rd October 1998 seeking a declaration that the lessee was entitled to assign the lease to Cellular World Limited without the consent of the lessors, and seeking damages for breach of contract, breach of covenant, and breach of statute. The case was heard in the High Court (Murphy J.)[4] in April 2005. However in the interim (in September 1999), the lessees carried out the works required by the schedule of dilapidations and the lessors consented to an assignment to Esat Digifone Limited in July 2000.

Murphy J. held that the lessors had acted unreasonably in refusing consent to assign the lease to Cellular World Limited and made a declaration to that effect. In addition, he awarded the lessee damages from the 20th October 1998, the date of expiration of a completion notice served on the lessee by Cellular World Limited, stating that Cellular World Limited were ready, willing and able to complete the purchase of the lease on that date. He measured damages at the rent and rates paid by the lessee from 20th October 1998 to the assumption by Esat Digifone Limited of responsibility for same, together with the selling agent's fees in respect of the sale of the lease to Esat Digfone Limited.

The plaintiff lessors appealed that decision to the Supreme Court. The decision of the Court was delivered by Finnegan J., who determined that the deciding issue was

1 Assigning a Tenancy to a Third Party, What is an Unreasonable Refusal by the Landlord? (2010) 15 (4) BR 80.
2 [2010] IESC 40.
3 [2010] IESC 40.
4 *Meagher v. Luke J. Healy Pharmacy Limited* [2005] IEHC 120.

whether, as a matter of law, damages could be recovered by a tenant for the unreasonable withholding of consent to an assignment.

Supreme Court Decision

Finnegan J. engaged in a detailed review of the law in Ireland, setting out the relevant statutory provisions and in particular s.66 of the Landlord and Tenant (Amendment) Act, 1980.[5] He noted that the entitlement of a lessee to damages if consent was withheld unreasonably was not dealt with in Wylie's book on landlord and tenant law,[6] but that a very brief reference was made in Deale's book[7] (at p 184) as follows:

> "An unreasonable refusal of consent may entitle the lessee to damages: *Kelly v. Cussen* 88 I.L.T.R. 97: but see *Rendell v Roberts and Stacey Limited* 175 E.G., [1960] E.G.D. 161, to the contrary."

Reliance was placed by the appellant lessors on the latter case, and Finnegan J examined a line of English authority both prior and subsequent to that decision. In *Rendell v Roberts and Stacey Limited*,[8] the lease contained a covenant on the part of the lessee which stated that the lessee could not assign the property without the consent in writing of the lessors and that such consent could not be unreasonably withheld. The defendant lessor refused consent to assignment and it was accepted at the hearing that the refusal of consent was unreasonable. The plaintiff lessee contended that the covenant was a covenant by the lessee not to assign without consent, but that it amounted also to a *positive* covenant by the lessor that he would not withhold consent unreasonably: the lessor being in breach of that covenant the lessee claimed an entitlement to damages.

The lessor contended that the covenant was a covenant by the lessee not to assign without consent with the mere qualification that the consent should not be unreasonably withheld: the effect of the covenant, it was submitted, was that if the consent should be withheld unreasonably, the lessee would be entitled to assign without consent but that the covenant did not entitle the lessee to damages.

In giving judgment in *Rendell v Roberts and Stacey*, Salmon J. reviewed the English authorities up to that date,[9] and came to the conclusion that the law was clear since the 1874 decision in *Treloar v Bigge*.[10] There, the covenant in issue was as follows:

> "And the said Thomas Treloar doth covenant with the said T.E. Bigge that he shall not nor will assign this present Lease, or let etc, or otherwise part with the premises hereby demised, or any part thereof, without the consent in writing of the said T.E. Bigge, such consent not being arbitrarily withheld."

Kelly C.B. gave judgment as follows:

> "Two questions arise in this case, the first being whether certain words introduced in the clause prohibiting assignment, and whether the plaintiff covenants not to assign without licence in writing, *amount to an absolute covenant on the part of the Lessor not to withhold his consent arbitrarily. I am of the opinion that they do not constitute a covenant on which the Lessee can sue but are words the only effect of which is to qualify the generality of the phrase into which they are introduced.* The plaintiff covenants that he will not assign the Lease or the premises demised 'without the consent in writing of the said T.E. Bigge first had and obtained', and if the words stopped the tenant's covenant would be absolute, but they are qualified by the words 'such consent not being arbitrarily withheld'. Now the rule of law, no doubt, is that any words in a deed which impose an obligation upon another amount to a covenant by him; but the words must be so used as to show an intention that there should be an agreement between the covenantor and the covenantee to do or not to do a particular thing. I cannot find any such intention here. The words taken grammatically, do not seem to me to amount to an undertaking by the Lessor, but are part of the same sentence as that containing the Lessee's covenant, and qualify its generality. They prevent that covenant operating in any case of arbitrary refusal on the part of the Lessor, that is in any case where, without fair, solid and substantial cause, and without reason given the Lessor refuses his assent." [Emphasis Added]

Finnegan J. noted that between 1874 and the passing of the Landlord and Tenant Act 1988[11] in England and Wales, *Treloar v. Bigge* was cited with approval and followed in many cases. Indeed, the sole dissenting voice that he could find was an *obiter* comment of Denning J. in *Rose & Another v Gossman*.[12] Accordingly, he was satisfied that *Treloar v. Bigge* represented the law in Ireland, and that the position had not been altered by s.66 of the Landlord and Tenant (Amendment) Act 1980. He concluded as follows:[13]

5 Which provides *inter alia* as follows: 66.—(1) A covenant in a lease (whether made before or after the commencement of this Act) of a tenement absolutely prohibiting or restricting the alienation of the tenement, either generally or in any particular manner, shall have effect as if it were a covenant prohibiting or restricting such alienation without the licence or consent of the lessor;

66 (2) In every lease...in which there is contained... a covenant prohibiting or restricting the alienation, either generally or in any particular manner, of the tenement without the licence or consent of the lessor, the covenant shall, notwithstanding any express provision to the contrary, be subject—(a) to a proviso that the licence or consent shall not be unreasonably withheld...

6 Wylie, *Landlord and Tenant Law*, (2nd ed., Butterworths, 1998).

7 Deale, *The Law of Landlord and Tenant in Ireland,* (1st ed.,1968)

8 175 E.G., [1960] E.G.D. 161.

9 *Ideal Film Renting Company Limited v Nielsen* [1921] 1 Ch. 575; *Treloar v Bigge* L.R. 9 Exch. 151.

10 L.R. 9 Exch. 151.

11 Section 1(3) of which imposes a positive obligation on the landlord as follows: "(3) Where there is served on the person who may consent to a proposed transaction a written application by the tenant for consent to the transaction, he owes a duty to the tenant within a reasonable time—

(a) to give consent, except in a case where it is reasonable not to give consent,"

12 201 E.G. 767, [1966] E.G.D. 103

13 [2010] IESC 40 at pp 19-20.

> "Had the Oireachas intended to alter the law as it has been understood for over one hundred and thirty years it is to be expected that clear wording would have been used. No such words were used and I am satisfied that the Act of 1980 did not alter the common law by providing an action for damages where none previously existed. In so holding, I am mindful that the Landlord and Tenant Act 1931 and statutes relating to the law of landlord and tenant thereafter are statutes ameliorating the tenant's position and this is relevant in construing their provisions ... For the foregoing reasons I am satisfied that in Irish law having regard to the terms of the covenant against assignment in the Lease and the provisions of section 66 of the Landlord and Tenant (Amendment) Act 1980, the Lessee has no right of action for damages by reason of the Lessors having unreasonably withheld consent to assign. It is, of course, open to the parties to a lease to include a covenant by the lessor not to unreasonably withhold consent the breach of which covenant would give to the lessee a right of action for damages. Absent such a covenant no such right arises."

Conclusion

Accordingly, contrary to what was stated in the previous article, it appears that unless there is an express covenant on the part of the lessor not to withhold its consent to assign unreasonably, then the tenant will have no action in damages against the landlord for withholding consent unreasonably. In giving judgment, Finnegan J himself set out the remaining options open to a tenant and assignee where a landlord unreasonably refuses consent to assign, and there is no express covenant affecting the lessor:

- An application can be made to the court for a declaration that consent has been unreasonably withheld, in which case the lessee will be entitled to assign without consent.
- The lessee can assign without consent and the lessee (and assignee) can raise as a defence to any proceedings taken by the lessor for breach of covenant against alienation the unreasonable refusal of consent.
- Finally, an assignee of a lease without consent, consent having been refused, may seek a declaration that consent was unreasonably refused and in proceedings taken by the lessor can raise the unreasonable withholding of consent by way of defence.

As Finnegan J. acknowledges, "In assigning without consent there is the risk that ultimately the withholding of consent may be held not to have been unreasonable: however in such an event, since the repeal of Deasy's Act section 10 and the amendment of the Conveyancing Act 1881 section 14 by the Landlord and Tenant (Ground Rents) Act 1967 section 35(1), relief against forfeiture may be obtained". ■

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 15, Issue 5, November 2010

A directory of legislation, articles and acquisitions received in the Law Library from the 19th June 2010 up to 13th October 2010
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

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SI 198/2010

Appointment of special adviser (Minister for Defence) (no. 2) order 2010
SI 256/2010

Appointment of special adviser (Minister for Defence) order 2010
SI 255/2010

Appointment of special adviser (Minister of State at the Department of the Taoiseach) order 2010
SI 193/2010

Community, rural and Gaeltacht affairs (alteration of name of department and title of minister) order 2010
SI 215/2010

Equality, integration, disability and human rights (transfers of departmental administration and ministerial functions) order 2010
SI 217/2010

Justice, equality and law reform (alteration of name of department and title of minister) order 2010
SI 216/2010

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Library Acquisition

Watts, Peter
Bowstead and Reynolds on agency
19th edition
London: Sweet & Maxwell, 2010
N25

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Clarke Quarries Limited v PT McWilliams Limited

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McIlwrath, Michael
International arbitration and mediation: a practical guide
London: Kluwer Law International, 2010
N398.8

Mistelis, Loukas A
Concise international arbitration
The Netherlands: Kluwer Law International, 2009
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Square Capital Ltd v Financial Services Ombudsman

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Trying times
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Dolan, Pat
Children's rights in Ireland: legacy issues and future prospects
2010 IHRLR 177

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Asylum

Judicial review – Leave – Appeal to tribunal outstanding – Rare and exceptional circumstances where court will intervene in advance of determination of asylum process – Discretion – Substantial grounds – Whether appeal hearing unsuitable or incapable of remedying grievances of applicant – Credibility – Country of origin information – Two stage procedure of asylum process – *Stephan v Minister for Justice* [2001] 4 IR 203 distinguished; *Kayode v Refugee Application Commissioner* [2005] IEHC 172, (Unrep, O'Leary J, 25/4/2005) and *FO v Minister for Justice* [2009] IEHC 300, (Unrep, Cooke J, 26/6/2006) applied – Refugee Act 1996 (No 17), ss 13 and 17 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2)(b) – European Community (Eligibility for Protection Regulations 2006, (SI 518/2008), reg 2, 4(4), 5 and 5(1)a – Leave refused (2008/431JR – Cooke J – 7/10/2009) [2009] IEHC 602
A (A) (A Minor) v Minister for Justice

Asylum

Judicial review – Leave – Assessment of credibility – Flawed treatment of credibility – Duty of decision maker – Whether tribunal engaged in speculation or conjecture – Whether expression of opinion or rejection of parts of evidence conjecture – Treatment of notice of appeal – Failure to refer to previous tribunal decisions – Prejudice – Substantial grounds – *Memeshi v Refugee Appeals Tribunal* (Unrep, Peart J, 25/6/2003), *Camara v Minister for Justice* (Unrep, Kelly J, 26/6/2000), *Da Silveira v Refugee Appeals Tribunal* [2004] IEHC 436, (Unrep, Peart J, 9/7/2004), *R v Home Secretary, Ex P Robinson* [1998] QB 929, *Muanza v Refugee Appeals Tribunal* (*Ex Temp*, Birmingham J, 8/2/2008) and *IK v Refugee Appeals Tribunal* [2008] IEHC 173, (Unrep, Birmingham J, 12/6/2008) considered; *Okeke v Refugee Appeals Tribunal* [2006] IEHC 46, (Unrep, Peart J, 17/2/2006) approved – Refugee Act 1996 (No 17), ss 11 and 13 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2) – Leave refused (2007/1288JR – Clark J – 8/10/2009) [2009] IEHC 445
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Asylum

Judicial review – Leave – Conduct and content of appeal hearing – Decision – Fair procedures – Natural and constitutional justice – Credibility – Applicant denying that certain questions referred to in decision put to him – Translation – Alleged translation error – Attendance note – Discrepancy in evidence – Failure to reflect evidence and information of the applicant – Whether any clear and significant error of fact – Determination of credibility – Whether any error of law or lack of procedural fairness – Decision as whole – Minor discrepancies – *Carciu v Minister for Justice*, (Unrep, Finlay Geoghegan J, 4/7/2003), *Traore v Refugee Appeals Tribunal* [2004] IEHC 606, [2004] 2 IR 607, *Olatunji v Refugee Appeals Tribunal* [2006] IEHC 113, (Unrep, Finlay Geoghegan J, 7/4/2006), *JBR v Refugee Appeals Tribunal* [2007] IEHC 288, (Unrep, Peart J, 31/7/2007), *DH v Refugee Applications Commissioner* [2004] IEHC 95, (Unrep, Herbert J, 27/5/2004), *FOS v Refugee Applications Commissioner* [2008] IEHC 238, (Unrep, McMahon J, 11/7/2008), *Ndinda v Refugee Appeals Tribunal* [2006] IEHC 368, (Unrep, Herbert J, 16/11/2006) and *OO v Minister for Justice* [2008] IEHC 307, (Unrep, Hedigan J, 9/10/2008) considered; *FP v Minister for Justice* [2001] 1 IR 164 and *Pok Sun Shum_v Ireland* [1986] ILRM 593 applied; *Kikumbi v Refugee Applications Commission* [2007] IEHC 11, (Unrep, Herbert J, 7/2/2007) approved – Refugee Act (Appeals) Regulations 2003 (SI 424/2003) – Refugee Act 1996 (No 17) ss 13 – Relief refused (2006/1231JR – Clark J – 7/10/2009) [2009] IEHC 432
N (A Z) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave – Credibility – Documentation – Authenticity of documents – Whether documents put in evidence by applicant lacked authenticity – Alleged failure to consider documents – Alleged failure to put doubts about authenticity of documents to applicant – Alleged failure to give reasons for determination that documents lacked authenticity – Extent of duty and obligation to state reasons on which decision based – Whether any doubt as to why tribunal had doubts about authenticity of documents- Whether any obligation on decision maker to refer to each and every piece of information furnished – *N v Refugee Appeals Tribunal* [2009] IEHC 56, (Unrep, Clark J, 5/2/2009) considered; *Pamba v Refugee Appeals Tribunal* (*Ex Temp*, Cooke J, 19/5/2009) followed; *Banzuzi v Refugee Appeals Tribunal* [2007] IEHC 2, (Unrep, Feeney J, 18/1/2007), *Fasakin v Minister for Justice* [2005] IEHC 423, (Unrep, O'Leary J, 21/12/2005) and *COI v Minister for Justice* [2007]

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Deportation

Judicial review – Leave – *Certiorari* – Whether substantial grounds for review – Whether deportation order made by minister with respect to failed asylum seeker subject to review – Factors to be taken in to account when making deportation order – Irish born children – Family life – Whether weight attached by minister to criminal convictions proportionate – Whether breach of Convention rights – Whether deportation of father breached rights of family – Whether decision to deport reasonable and proportionate – *Y (HL) v Minister for Justice* [2009] IEHC 96 (Unrep, Charleton J, 13/2/2009) distinguished; *Dimbo v Minister for Justice* [2008] IESC 26 (Unrep, Finlay Geoghegan J, 14/11/2006*); Oguekwe v Ministerr for Justice* [2008] IESC 25, [2008] 3 IR 796*; Kouyape v Minister for* Justice [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005); *Kozhukarov v Minister for Justice, Equality and Law Reform* [2005] IEHC 424 (Unrep, Clarke J, 14/12/2005*); Grant v UK* (Case 10606/07) (Unrep, ECHR, 8/1/2009); *O v Minister for Justice* [2009] IEHC 448 (Unrep, Cooke J, 14/10/2009); *O v Minister for Justic*e [2009] IEHC 148 (Unrep, Charleton J, 11/3/2009); *Agbonlahor v Minister for Justic*e [2009] IEHC 166, [2007] 4 IR 309 considered – Immigration Act 1999 (No 22), s 3 – Leave refused (2009/376JR – Dunne J – 4/12/2009) [2009] IEHC 528
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Deportation

Judicial review – Leave – Claims for asylum refused – No proceedings brought challenging decision – Application made by parent on behalf of all family members under one asylum application – Deportation order made – Application for leave to remain in state – Application for extension of time – Four months outside of fourteen day period allowed – Explanation for delay – Whether good or sufficient reason for court to grant extension of time – Substantial grounds – Whether asylum applications properly considered – Relevant factors in determining whether to grant an extension of time – Merits of application – Reasons for delay – Whether good and sufficient reasons to grant extension of time – *Brennan v Governor of Portlaoise Prison* [2007] IEHC 384, [2008] 3 IR 364 mentioned; *AN v Minister for Justice* [2007] IESC 44, [2008] 2 IR 48 distinguished; *MQ v Judge of the Northern Circuit* (Unrep, McKecknie J, 14/11/2003) and *CC v Judge Early* [2007] IEHC 147, (Unrep, MacMenamin J, 28/4/2006) applied – Immigration Act 1999 (No 22), s 3(2)(f) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2) – Application refused (2004/224JR – Clark J – 9/10/2009) [2009] IEHC 437
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Discretion – Rule that costs follow event – Conduct of parties – Whether reprehensible behaviour could deprive successful party of order for costs – Whether successful party to pay costs of unsuccessful party – *Dunne v Minister for Environment* [2007] IESC 60, [2008] 2 IR 775 applied – Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 1 – Costs awarded to unsuccessful plaintiff (354/2007 – SC – 26/11/2009) [2009] IESC 78
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Parties

Correction of names of parties – Clerical error – Correction of clerical error – Whether error in name of plaintiff amounted to clerical error – Whether error arose from lack of knowledge – Whether error arose from mistaken belief – Whether application brought pursuant to appropriate rule – *R v Commissioner of Patents, ex p* Martin (1953) 89 CLR 381 and *Re Maere's Application* [1962] RPC 182 followed – Rules of Superior Courts 1986 (SI 15/1986) O 63 , r 1 – Defendants' appeal allowed (420/2005 – SC – 16/11/2009) [2009] IESC 75
Sandy Lane Hotel Ltd v Times Newspapers Ltd

Parties

Judicial review – *Locus standi* – "Affected" person – Whether party should be allowed to participate in proceedings – *In re Greendale Developments Ltd (No 3)* [2000] 2 IR 514 approved; *Henderson v Henderson* (1843) 3 Hare 100*, Becker v Finanzamt Münster-Innenstadt (Case 8/81)* [1982] ECR 53, *Marshall v Southampton and South-West Hampshire Area Health Authority (Case 152/84)* [1986] ECR 723 and *R v Durham County Council and Others, Ex p Huddleston* [2000] 1 WLR 1484 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 84, rr 22 & 26 – Application allowed, matter remitted to High Court for rehearing (91/2008 – SC – 18/2/2010) [2010] IESC 8
Abbeydrive Development Ltd v Kildare County Council

Personal injuries

Offers – Terms of settlement – Period in which offers must be served – Who should make offer first – Whether service of offers permitted up to and during trial – Whether plaintiff obliged to make offer first – Whether simultaneous service of offers required – Civil Liability and Courts Act 2004 (No 31), s 17 – Civil Liability and Courts Act 2004 (Section 17) Order 2005 (SI 169/2005) – Plaintiff ordered to furnish offer (2007/3158P – Kearns P – 18/12/2009) [2009] IEHC 563
O'Donnell v McEntee

Pleadings

Amendment – Further particulars of negligence – Application to amend pleadings to include further particulars of negligence – Whether amendment represents new and distinct cause of action – Whether defendant prejudiced by proposed amendment – *Krops v Irish Forestry Board Ltd* [1995] 2 IR 113; *Bell v Pederson* [1995] 3 IR 511; *Rubotham (an infant) v M & B Bakeries Ltd* [1993] ILRM 219; *Woori Bank v Hanvit LSP Finance Ltd* [2006] IEHC 156 (Unrep, Clarke J, 17/5/2006) and *Croke v Waterford Crystal Ltd* [2004] IESC 97, [2005] 2 IR 383 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 28 – Application granted (2007/4343JR – Herbert J – 3/2/2009) [2009] IEHC 534
Webb v Minister for Finance

Pleadings

Amendment – Statement of claim – Statute of limitations – Whether amendments amounted to reconstitution of personal injury claim into fatal injury claim – Whether fatal injuries claim amounted to entirely new claim – Whether defendant prejudiced by amendment – Whether statute barred –*Weldon v Neal* (1887) 19 QBD 394; *Bell v Pederson* [1995] 3 IR 511; *Croke v Waterford Crystal* [2005] 2 IR 383; *Bank of Ireland v O'Connell* [1942] IR 1; *B(L) v Minister for Health* [2004] IEHC 61, (Unrep, O'Neill J, 26/3/2004) and *Mahon v Burke* [1991] 2 IR 495 considered; *Krops v Irish Forestry Board Ltd* [1995] 2 IR 113 distinguished – Civil Liability Act 1961 (No. 41), s. 48 – Amendments refused (2004/1747P – Dunne J – 4/12/2009) [2009] IEHC 537
Farrell v Coffey

Summary summons

Account – Preliminary question to be tried – Whether plaintiff entitled to account as of right – Whether fund or investor entitled to account on foot of fiduciary duty – Whether defendant can establish preliminary question to be tried – Whether custodian has obligation to account beyond obligations set out in UCITS directive – Whether custodian of fund is trustee – *Moore v McGlynn* [1894] 1 IR 74 followed – Rules of the Superior Courts, 1986 (SI 15/1986), O 2, r 1 & O 37, rr 13-15 – European Communities (Undertakings for Collective Investments in Transferable Securities) Regulations 2003 (SI 211/2003) – Preliminary issue directed (2009/2938, 3097 & 3098SS – Clarke j – 21/12/2009) [2009] IEHC 565
Aforge Finance SAS v HSBC Institutional Trust Services

Third party procedure

Service of third party notices – Application to set aside – Delay – Whether third party notice served as soon as reasonably possible – Relevance of prejudice – Multiplicity of actions – Whether application to set aside brought as soon as reasonably possible – *Greene v Triangle Developments Ltd* [2008] IEHC 52; *A. & P. (Ireland) Ltd v Golden Vale Products Ltd* (Unrep, McMahon J, 7/12/1978); *Molloy v Dublin Corporation* [2001] 4 IR 52; *Connolly v Casey* [2000] 1 IR 345; *Boland v Dublin City Council* [2002] 4 IR 409; *Carroll v Fulflex International Co Ltd* (Unrep, Morris J, 18/10/1995); *Tierney v Sweeney Ltd* (Unrep, Morris J, 18/10/1995); *Grogan v Ferrum Trading Company Ltd* [1996] 2 ILRM 216 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 16, r 1(3) – Applications dismissed (2004/19709P – Laffoy J – 2/12/2009) [2009] IEHC 581
S. Doyle & Sons v Flemco Supermarket Ltd

Statutory Instruments

Rules of the Superior courts (order 75) 2010
SI 208/2010

Rules of the Superior Courts (trial) 2010
SI 209/2010

PRIVACY

Article

Robinson, Dara
I spy with my little eye
2010 (June) GLSI 22

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Mulally, Suzanne
Land and conveyancing law reform act 2009: implications for family lawyers
2010 (Spring) FLJ 3

Twomey, Majella
The multi-unit developments bill 2009: adequate protection for property owners?
2010 ILT 123

Statutory Instruments

National Treasury Management Agency act 1990 (delegation of NAMA banking transactions) order 2010
SI 203/2010

Valuation act 2001 (global valuation) (apportionment) (Bord Gáis Éireann) order 2010
SI 230/2010

Valuation act 2001 (global valuation) (apportionment) (Eircom) order 2010
SI 229/2010

ROAD TRAFFIC

Statutory Instruments

Road traffic (construction, equipment and use of vehicles) (revocation) regulations 2010
SI 259/2010

Road traffic (licensing of drivers) (amendment) regulations 2010
SI 403/2010

Road traffic (recognition of foreign driving licenses-New Zealand and Taiwan) order 2010
SI 402/2010

SOCIAL WELFARE

Statutory Instrument

Social welfare and pensions act 2008 (section 16(c)) (commencement) order 2010
SI 246/2010

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Mullins, Patrick
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STATUTE

Interpretation

Legislative regime – Bye-law – Power to make bye-laws – Fisheries – Jurisdiction – Usurpation of powers – Rules of statutory interpretation – Literal approach – Whether procedure adopted in passing bye-law contrary to natural and constitutional justice – Whether requirements of fair procedures applied – Circumstances of case – Subjective assessment of fairness of administrative action – Consultation process – Whether adequate discharge of obligations – Alleged inequality of treatment – Whether disparity of treatment justified by exigencies of situation – *Keane v An Bord Pleanála* [1997] 1 IR 184 followed; *International Fishing Vessels Ltd v Minister for Marine (No 2)* [1991] 2 IR 93 and *Russell v Duke of Norfolk* [1949] 1 All ER 109 applied; *East Donegal Co-Operative Livestock Mart Ltd v AG* [1970] IR 317 considered – Constitution of Ireland 1937, Article 40.1 – Fisheries (Consolidation) Act 1959 (No 14), ss 9, 11(1)(d) and 67 – Fisheries (Amendment) Act 1962 (No 31), s 3 – Fisheries Act 1980 (No 1) – Kerry District Conservation of Salmon and Sea Trout Bye-Law (No 844/2008) – Interpretation Act 2005 (No 23), s 5 – European Council Directive 92/43/EEC – European Communities (Natural Habitats) Regulations 1997 (SI 94/1997), reg 7, 24 and 24(2) – Relief refused (2008/1172JR – Hedigan J – 18/8/2009) [2009] IEHC 399
Teahan v Minister for Communications

TAXATION

Practice and procedure

Assessment – Due and payable – No payment – No appeal raised in respect of assessments within statutory time limits – Summary judgment granted by Master – Appeal to High Court – Whether any *bona fide* defence at law or on merits – Legal status of assessments – Final and conclusive nature of assessments – Authorisation – Manner in which authorisation can be proved – Whether defendant could put in issue matter previously admitted – Specific statutory mechanism for proving that proceedings instituted in accordance with law – Certificate – Whether certificate exhibited defective on its face – Whether assessments deemed to be final and conclusive – Whether payment of sums stated in assessments duly demanded – Whether affidavits before court prove that sums remain due and payable – Absence of effective and proved certificate – *Criminal Assets Bureau v PS* [2004] IEHC 351, [2009] 3 IR 9 and *Criminal Assets Bureau v P McS* (Unrep, HC, Kearns J, 16/11/2001) considered – Criminal Assets Bureau Act 1996 (No 31), s 8 – Taxes Consolidation Act 1997 (No 39), ss 933, 958, 966(1) (3), (4), (5) and (6) and 1080(4) – Finance Act 2001 (No 7), s 236 – Finance Act 2005 (No 5), s 145 – Appeal dismissed (2007/619R – Feeney J – 14/9/2009) [2009] IEHC 414
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Statutory Instrument

Finance act 2010 (commencement of section 44) order 2010
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Statutory Instruments

Taxi regulation act 2003 (grant of taxi licences) (amendment) regulations 2010
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European communities (audiovisual media

services) regulations 2010
DIR/1989-552
SI 258/2010

European Communities (authorization, placing on the market, use and control of plant protection products) (amendment) (no. 2) regulations 2010
Please see S.I
SI 278/2010

European Communities (certain contaminants in foodstuffs) regulations 2010
Please see S.I
SI 218/2010

European communities (Classical swine fever) (restriction on imports from Germany) regulations 2010
DIR/2008-855
SI 210/2010

European communities (conservation of wild birds (North Bull Island special protection area 004006)) regulations 2010
DIR/2009-147
SI 211/2010

European communities (conservation of wild birds (South Dublin bay and river Tolka estuary special protection area 004024)) regulations 2010
DIR/2009-147
SI 212/2010

European Communities (consumer credit agreements) regulations 2010
DIR/2008-48
SI 281/2010

European Communities (credit rating agencies) regulations 2010
REG/1016-2009
SI 247/2010

European Communities (cross border payments) regulations 2010
REG/924-2009
SI 183/2010

European Communities (greenhouse gas emissions trading) (aviation) regulations 2010
DIR/2003-87
SI 261/2010

European Communities (public pan-European cellular digital land-based mobile communications) regulations 2010
DIR/1987-372
SI 195/2010

European Communities (Republic of Guinea) (financial sanctions) regulations 2010
REG/1284-2009
SI 221/2010

European Communities (restrictive measures) (Republic of Guinea) regulations 2010
REG/1284-2009)
SI 219/2010

European communities (restrictive measures) (Uzbekistan) (revocation) regulations 2010
REG 1267/94
SI 226/2010

European Communities (road transport) (amendment) regulations 2010
DIR/1996-26
SI 182/2010

European Communities (statutory audits) (directive 2006/43/EC) regulations 2010
DIR/2006-43
SI 220/2010

European Communities (transitional period measures in respect of third country auditors) (fees) regulations 2010
DIR/2006-43
SI 251/2010

Persistent organic pollutants regulations 2010
REG/850-2004
SI 235/2010

Statistics (census of agriculture) order 2010
REG/1166-2008
SI 181/2010

Statistics (census of population) order 2010
REG/763-2008
SI 207/2010

Waste water discharge (authorisation)(amend ment) regulations 2010
DIR/2006-11
SI 231/2010

Rules of Court

Rules of the Superior courts (order 75) 2010
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Rules of the Superior Courts (trial) 2010
SI 209/2010

ACTS OF THE OIREACHTAS 2010 AS AT 13TH OCTOBER 2010 30TH DÁIL & 23RD SEANAD

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

1/2010 Arbitration Act 2010
Signed 08/03/2010

2/2010 Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010
Signed 16/03/2010

3/2010 George Mitchell Scholarship Fund (Amendment) Act 2010
Signed 30/03/2010

4/2010 Petroleum (Exploration and Extraction) Safety Act 2010
Signed 03/04/2010

5/2010 Finance Act 2010
Signed 03/04/2010

6/2010 Criminal Justice (Money Laundering and Terrorist Financing) Act 2010
Signed 05/05/2010

7/2010 Euro Area Loan Facility Act 2010
Signed 20/05/2010
(Not yet available on Oireachtas website)

8/2010 Fines Act 2010
Signed 31/05/2010

9/2010 Intoxicating Liquor (National Conference Centre) Act 2010
Signed 31/05/2010

10/2010 Inland Fisheries Act 2010
Signed 01/06/2010

11/2010 Energy (Biofuel Obligation and Miscellaneous Provisions) Act 2010
Signed 09/06/2010

12/2010 Competition (Amendment) Act 2010
Signed 19/06/2010

13/2010 Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010
Signed 30/06/2010

14/2010 Merchant Shipping Act 2010
Signed 03/07/2010
(Not yet available on Oireachtas website)

15/2010 Health (Amendment) Act 2010
Signed 03/07/2010

16/2010 European Financial Stability Facility Act 2010
Signed 03/07/2010
(Not yet available on Oireachtas website)

17/2010 Compulsory Purchase Orders (Extension of Time Limits) Act 2010
Signed 07/07/2010

18/2010 Health (Miscellaneous Provisions) Act 2010
Signed 09/07/2010

19/2010 Wildlife (Amendment) Act 2010
Signed 10/07/2010

20/2010 Health (Amendment) (No. 2) Act 2010
Signed 13/07/2010

21/2010 Adoption Act 2010
Signed 14/07/2010

22/2010 Criminal Justice (Psychoactive Substances) Act 2010
Signed 14/07/2010

23/2010 Central Bank Reform Act 2010

Signed 17/07/2010

24/2010 Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010
Signed 19/07/2010
(Not yet available on Oireachtas website)

25/2010 Road Traffic Act 2010
Signed 20/07/2010

26/2010 Údarás na Gaeltachta (Amendment) Act 2010
Signed 20/07/2010

27/2010 Criminal Procedure Act 2010
Signed 20/07/2010
(Not yet available on Oireachtas website)

28/2010 Social Welfare (Miscellaneous Provisions) Act 2010
Signed 21/07/2010

29/2010 Dog Breeding Establishments Act 2010
Signed 21/07/2010
(Not yet available on Oireachtas website)

30/2010 Planning and Development (Amendment) Act 2010
Signed 26/07/2010
(Not yet available on Oireachtas website)

BILLS OF THE OIREACHTAS AS AT 13TH OCTOBER 2010 30TH DÁIL & 23RD 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 2010
Bill 26/2010
Order for 2nd Stage – Seanad **[pmb]** *Senator Liam Twomey*

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

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

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

Biological Weapons Bill 2010
Bill 43/2010
Order for 2nd Stage – Dáil

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

Chemicals (Amendment) Bill 2010
Bill 47/2010
Order for 2nd Stage – Dáil

Child Care (Amendment) Bill 2009
Bill 61/2009
2nd Stage – Dáil *(Initiated in Seanad)*

Civil Law (Miscellaneous Provisions) Bill 2010
Bill 44/2010
Order for 2nd Stage – Dáil

Civil Liability (Amendment) Bill 2008
Bill 46/2008
Order for 2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

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

Civil Liability (Good Samaritans and Volunteers) Bill 2009
Bill 38/2009
2nd Stage – Dáil **[pmb]** *Deputies Billy Timmins and Charles Flanagan*

Civil Unions Bill 2006
Bill 68/2006
Committee Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Climate Change Bill 2009
Bill 4/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Eamon Gilmore*

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad **[pmb]** *Senators Ivana Bacik*

Committees of the Houses of the Oireachtas (Powers of Inquiry) Bill 2010
Bill 1/2010
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Communications (Retention of Data) Bill 2009
Bill 52/2009
Committee Stage – Seanad

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

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

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

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

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

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

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

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

Criminal Justice (Public Order) Bill 2010
Bill 7/2010
Committee Stage – Dáil

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

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

Criminal Law (Defence and Dwellings) Bill 2010
Bill 42/2010
Order for 2nd Stage – Dáil

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

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

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

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

Education (Amendment) Bill 2010
Bill 45/2010
Order for 2nd Stage – Dáil

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

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

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

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

Employment Agency Regulation Bill 2009
Bill 54/2009
Order for Report Stage – Dáil

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Immigration, Residence and Protection Bill 2010
Bill 38/2010
Order for 2nd Stage – Dáil

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Offences Against the State Acts Repeal Bill 2008
Bill 37/2008

2nd Stage – Dáil **[pmb]** *Deputies Aengus Ó Snodaigh, Martin Ferris, Caomhghin Ó Caoláin and Arthur Morgan*

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

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

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

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

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

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

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

Prevention of Corruption (Amendment) Bill 2008
Bill 34/2008
Order for Report Stage – Dáil

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

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

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

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

Property Services (Regulation) Bill 2009
Bill 28/2009
2nd Stage – Dáil *(Initiated in Seanad)*

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

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

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

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

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

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

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

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

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

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

Sunbeds Regulation (No. 2) Bill 2010
Bill 33/2010
1st Stage – Dáil **[pmb]** *Deputy Jan O'Sullivan*

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

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

Twenty-ninth Amendment of the Constitution Bill 2009
Bill 71/2009
Order for 2nd Stage – Dáil **[pmb]** *Deputy Alan Shatter*

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

Vehicle Immobilisation Regulation Bill 2010
Bill 46/2010
1st Stage – Dáil **[pmb]** *Deputy Simon Coveney*

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

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

Whistleblowers Protection (No. 2) Bill 2010 Bill
1st Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Brendan Ryan, Alex White, Michael McCarthy, Phil Prendergast and Ivana Bacik*

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

ABBREVIATIONS

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

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Post Modernisation Judgments of Ireland's Competition Court: A Review

Philip Andrews*

Introduction

Since modernisation of EU and Irish competition rules in the early 2000's, four major competition law judgments have been handed down by Ireland's Competition Court: *ILCU*, *Hemat*, *BIDS* and, most recently, *Panda Waste*. Each has been controversial. *ILCU* and *BIDS* were appealed, resulting in reversals of the Competition Court's approach on fundamental substantive issues in each case. *Hemat*, while upheld on appeal, was openly criticised by senior officials from the Irish Competition Authority.[1] No less controversial is *Panda Waste*, in which the Competition Court found local government policy on collection of municipal waste to be in violation of Irish competition rules (and, in so holding, ignored a Competition Authority decision on the pro-competitive benefits of the impugned practices). It too is to be appealed.

The foregoing has occurred notwithstanding two important modernisation-driven innovations: the practice, since 2004, of a single specialist judge hearing all substantive competition law cases, as well as the now near-standard inclusion of economics, particularly expert economic testimony and micro-economic analytical tools, into Competition Court assessments (with the Court in *ILCU* and *BIDS* going so far as to appoint its own expert economic assessor).[2] Why have these changes not improved predictability in judicial outcomes?

From a quick-look review of the four judgments, with particular focus on *Panda Waste*, two possible explanations are proposed.

First, key concepts that define the law's scope – in particular, related concepts of "undertaking" and "economic activity" – have been interpreted in a somewhat *ad hoc* manner, leading to major differences in outcomes. In *Hemat*, regulation with "economic consequences" is not an economic activity, so competition rules do not apply. But in *Panda Waste*, regulation "aimed at directly affecting the market" is such an activity, so competition rules do apply. As a direct result, in one case (*Hemat*) competition law has a relatively rare application to regulation, while in another (*Panda Waste*) competition law attains almost constitutional stature.

Second, while expert economic testimony and micro-economic analytical tools are now an established part of Competition Court judgments, there appears still to be some variance in the economic doctrine underlying the major cases. Does this matter? A quick review of *ILCU, Hemat*, *BIDS*, and *Panda Waste* suggests it may: in each case, there appears to be a nexus between the economic underpinnings preferred by the Competition Court and the substantive liability standard applied. In *Panda Waste*, the Competition Court's strong affirmation of atomistic competition as the superior mechanism for governing the sector fairly jumps from the page. As a result, an expansive view of wrongful behaviour is applied. In contrast, in *Hemat* and *BIDS*, the Court seems to have less faith in free market competition, going so far in *BIDS* as to endorse a sector-wide private re-ordering of the market.

Background to *Panda Waste*

On 3 March 2008, Dublin's four local authorities agreed an important change to their joint approach to waste management. The change, which involved a formal variation to the Waste Management Plan for the Dublin Region 2005 - 2010 (referred to both in the *Panda Waste* judgment and in this note as "the Variation"), sought to significantly alter the way in which household waste was collected across Dublin. Henceforth, collection of household waste would be carried out by a single waste operator, to be either a Dublin local authority or a private operator selected via competitive tender.

The implications for private waste collection firms operating in Dublin were obvious: once implemented, the Variation would prevent multiple waste collectors operating within the same area in Dublin. In the words of the opening paragraph of the *Panda Waste* judgment, "[*t*]*he Variation would have the effect of excluding private operators from the domestic waste collection market … and would vest all rights to collect waste in a single operator*."[3]

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1 Gorecki, K. P. & Mackey, M. *Hemat v Medical Council: Its Implications for Irish and EU Competition Law*, [2007] ECLR, Volume 28, Issue 5, pages 285 – 293, in which the Competition Court's reasoning is described as "inconsistent" and "incorrect" (at page 293). At the time, Paul Gorecki was a Member of the Competition Authority. Noreen Mackey is Legal Advisor to the Competition Authority.

2 Order 63B of the Rules of the Superior Courts provides for a designated judge, selected from the current 36 Judges of the High Court, to sit in a specialist court for competition law matters. Pursuant to Order 63B, "[c]ompetition proceedings, and any motions or other applications in the competition proceedings, shall be heard in the Competition List by the Judge."

3 *Nurendale Limited trading as Panda Waste Services v Dublin City Council, Dun Laoghaire/Rathdown County Council, Fingal County Council, and*

Two of Ireland's leading private waste operators – Nurendale Limited, trading as Panda Waste Services, and Greenstar Limited – challenged the Variation on both competition and administrative law grounds. This article discusses only the Court's competition law analysis of their challenge although, ultimately, the legal challenge succeeded on both fronts.

The Scope of Competition Law – What is An Undertaking?

Panda Waste

The most controversial aspect of the *Panda Waste* judgment is doubtless its finding that adoption of the Variation by the four local authorities can be construed as an economic activity, and therefore susceptible to review and prohibition under Irish competition law.

Following review of ECJ jurisprudence on the concept of an undertaking (and citing, in particular, Case C-49/07 *MOTOE*, Case T-196/04 *Ryanair*, and Case C-309/99 *Wouters*), the Court in *Panda Waste* adopted a "unified approach" test to determining when a public body or authority exercising regulatory powers constitutes an "undertaking."[4]

Applying this unified approach test to the action of the local authorities in adopting the Variation, the Court held that the local authorities' involvement in economic activities in downstream local waste markets meant that a policy decision on the future organization of such markets was also an economic activity.

Specifically, the Court held that " … where the regulatory acts impact on private operators on the same market where also the [local authorities] commercially engage, the regulatory role performed will not preclude them from being found to be undertakings." The Court went on to determine that, because the Variation was " … aimed at directly affecting the market for domestic waste collection," it followed that " … the Variation is of an economic, rather than an administrative, nature."

ILCU

Like in *Panda Waste*, one of the most controversial aspects of *ILCU* related to the Competition Court's approach to the concept of an undertaking. In *ILCU*, a voluntary association of credit unions (the Irish League of Credit Unions) was found to be engaged in an economic activity via the provision to its members of an ill-defined, but "complex bundle" of "representation services" (including certain self-regulation activities carried out by the ILCU vis-à-vis its members).[5] Accordingly, the ILCU was found to be an undertaking for purposes of EU and Irish competition law. On foot of that finding, the Competition Court held that the ILCU was (a) dominant in the provision of such representation services to credit unions (including to its own members), and (b) abusing that dominant position by refusing to provide non members access to the facilities of its own members.[6]

The Competition Court's decision that the ILCU constituted an undertaking was based primarily on the court's findings that the lobbying and representational services provided by ILCU were "tradable services" (by which the Court appeared to mean provided in return for payment). Hence, the judgment takes some care to reject defence arguments that the advocacy and other representation services provided by ILCU to its members were not traded. The Competition Court found that "[w]hile it may not be the case in Ireland, representational and lobbying services are both well established and well rewarded in other jurisdictions, notably the US."[7]

Thus, the test as to whether a particular service is an economic activity as per *ILCU* is whether the services at issue are "traded" (in other words, provided for reward) in Ireland or elsewhere.

Hemat

The foregoing may be contrasted with the approach in *Hemat*. In that case, adoption by the Medical Council of advertising restrictions on medical practitioners was found not to be an economic activity notwithstanding explicit Court acceptance that the advertising restrictions at issue had "economic consequences."[8] Accordingly, the Medical Council was found to be neither an undertaking nor an association of undertakings for purposes of EU and Irish competition rules.

In so deciding, the Competition Court declined to follow a "unified approach," stating that " … considerable caution

South Dublin county Council [2009] IEHC 588 and *Greenstar Limited v Dublin City Council, Dun Laoghaire/Rathdown County Council, Fingal County Council, and South Dublin county Council* [2009] IEHC 589.

4 *Panda Waste* Judgment, at para. 57. Ultimately, the Competition Court's adoption of a "unified approach" test in assessing whether the local authorities' constituted undertakings is almost entirely rationalised by reference to *MOTOE*. The Competition Court states that "[*b*]*oth the Advocate General and the Court considered both the consent required from ELPA [the regulatory act] and its actions [the economic activities] on markets together, finding that its activities must be economic to and therefore it must be an undertaking*." The Competition Court goes on to state that "[*s*]*uch a unified approach can be seen in the way in which they phrased the questions for reference*."

5 What was meant by representation services was not clearly defined during the court proceedings. The Court indicated that the services provided by ILCU " … *may be broken down in the following way: (a) pure representation services, i.e. advocacy, (b) LP/LS insurance, compulsorily obtained through ECCU, (c) SPS, compulsorily confined to ILCU members, (d) self regulation*." However, finding that it was unnecessary for the purposes of its judgment to do so, the Court did not identify precisely what constituted credit union representation services. It would follow that the ILCU's "self regulation" activities were considered economic activities by the Court.

6 ILCU Judgment, at page 109. On appeal, the Supreme Court overturned the Competition Court's verdict on the basis that the market definition was flawed and the Supreme Court did not review or otherwise discuss the lower court's approach on the definition of an undertaking. Fennelly J, who drafted the unanimous Supreme Court verdict , does note in the judgment "I confess to finding it troubling that any and every association of business undertakings should be held, for purposes of competition law, automatically to be engaged in a business consisting of the provision of services for reward" (at para. 140).

7 ILCU Judgment, at page 108.

8 According to the Court "[t]hat conclusion [i.e., that the restriction on advertising at issue has economic consequences] is one which I clearly accept as any measure which impacts upon the participation of an economic operator on a relevant market would most likely have such consequences" (at para. 15).

must be used in assimilating different functions as in principle each separate activity must be individually considered. It is only in the rarest of occasions that a composite view will be appropriate." Rather, the test applied in *Hemat* was whether the Medical Council was " … driven by public interest considerations, and the extent of these public interest considerations."[9]

Two key factual conclusions caused the Competition Court to find this "public interest" test met. First, the Competition Court noted that the " … general underlying intention of the legislation was to protect the public interest."[10] Second, the Competition Court noted that the level of input, influence, supervision and ultimate control which the governing legislation vested in the Minister for Health and Children, was "very significant." It followed in the Competition Court's view that the Medical Council was not engaged in an economic activity when enforcing restrictions on advertising.

BIDS

In *BIDS*, the High Court found it "uncontroversial" that each of the private firm beef processors involved in BIDS constituted an undertaking for purpose of Article 101 TFEU.[11] Accordingly, it was not disputed that BIDS constituted an "association of undertakings."

Undoubtedly, the *BIDS* approach to the concept of undertaking and association of undertakings is the least controversial among the four major cases. More notable is the *BIDS* verdict.[12] Notwithstanding that BIDS was found to be an association of undertakings, the Competition Court found the arrangement at issue – a sector-wide re-organisation via collaboration between competitors – to be outside the scope of EU and Irish competition rules.

9 At para 47.

10 *Ibid* at para 51. In reaching this conclusion, the Competition Court noted that the legislation conferred on the Medical Council responsibility for registration, education and training, and fitness to practice and that " … the structure and provisions of the Medical Council were focused almost exclusively on those who receive service from the medical profession and not on the profession itself."

11 *BIDS* concerned a State sponsored rationalisation programme for the beef industry, involving collaboration between 10 leading Irish beef processors (representing around 93% of total beef processing in Ireland) to coordinate the removal of 25% of total processing capacity from the Irish market. That collaboration was considered by the High Court not to prevent, restrict, or distort competition in any way (and as a result to fall outside the scope of Article 101 TFEU and its equivalent provision in Irish competition law, section 4 of the Competition Act 2002).

12 On appeal, the Supreme Court referred a question to the ECJ on 8 March 2008 (as to whether an agreement between competitors of the type at issue to remove capacity from the market was to be regarded as a restriction by object under Article 101 TFEU). By judgement delivered on 20 November 2008, the ECJ ruled that the agreement "has as its object the prevention, restriction or distortion of competition within the meaning of Article 101 TFEU." By judgment delivered on 3 November 2009, the Supreme Court remitted the matter back to the Competition Court to assess application of the criteria in Article 101(3) to the agreement. As of writing, the case was listed for mention before the Competition Court on 7 October 2010.

Comment

As per the Competition Court, "[t]he definition of the term 'undertaking' is critically important … as it directly determines the scope of competition rules."[13] But the test applied by the Competition Court on this important point seems to vary.

In *Panda Waste*, regulation by a public body was considered an economic activity because it "directly affects" a market, with little or no reference to the public interest goal pursued. In *Hamat*, regulation by a professional association is found not to be an economic activity because a public interest goal was pursued, with the effect on the market considered largely irrelevant. In further contrast, in *ILCU*, "self regulation" via a trade association was found to be an economic activity, but because certain of the services provided by the ILCU were "traded services."

Economic Theory and the Liability Standard

According to the Supreme Court judgment in *ILCU*, "[Irish] courts are required to integrate economic principles into law." As the Supreme Court also acknowledged, this "is not an easy task" because economic principles are "in a state of constant development."[14]

Perhaps the most important legal consequence of a shift in the underlying economic theory in competition law cases is the impact that change may have on the liability standard applied.

To illustrate, when prevailing U.S. economic doctrine held that business-government collaboration was the best way to organise the economy (from circa 1915 – 1933), the U.S. courts adopted a tolerant attitude towards cooperation between firms, often treating suspect behaviour permissively. Similarly, during this period, "[w]hen the Supreme Court confronted cases involving market power measurement, it tended to accept broad market definitions that made a finding of dominance less likely."[15]

When the prevailing economic doctrine changed, and the statist assumptions of New Deal planning were assailed by economists, U.S. courts adopted a significantly more expansive view of wrongful behaviour, becoming in the process much more willing to find that firms acted improperly.[16] As a result, the legal hurdles plaintiffs and particularly the U.S. federal

13 *Hemat v Medical Council*, at para. 19.

14 Supreme Court Judgment, at para. 105.

15 Kovacic & Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Persp. 43 (2000), page 48. The defining U.S. Supreme Court judgment of this era is *Appalachian Coals, Inc v. U.S.* (288 U.S. 344 [1933]), in which the Court refused to condemn an output restriction scheme embodied in a joint marketing agreement proposed by coal producers in the eastern United States. Commenting on the case, Kovacic & Shapiro state that " … *the Court appeared to have lost faith in free market competition and welcomed experiments with sector-wide private ordering.*" The case is now seen as "a Depression-era aberration."

16 By way of example, in *U.S. v. Socony Vacuum Oil Co.* (310 U.S. 150 [1940]), in a case bearing some resemblance to *BIDS*, the U.S. Supreme Court condemned collective efforts by refiners to buy "distress" gasoline produced by independents, warning that business managers who tried privately to recreate the planning schemes that government officials previously had approved acted at their peril. *Socony's* ban on all arrangements that affect price is generally regarded now as extreme.

enforcement agencies faced in prosecuting competition law cases were significantly reduced.[17]

Later, the "unmistakably profound" Chicago School influence was to inspire the U.S. courts to raise the standards that plaintiffs must satisfy to prevail in competition law cases.[18] Or, as one commentator has put it, the Chicago School " … *catalyzed the retrenchment of liability standards*" in antitrust law.[19]

As an inheritance from U.S. anti-trust rules, there appears little reason to suppose that Irish competition law should not similarly be influenced by prevailing economic theory.[20] Just as in the U.S. system, the underlying economic doctrine preferred by the Competition Court has substantial practical and legal significance for Irish competition law enforcement. The ideological subtext is important.

Panda Waste

The *Panda Waste* judgment goes to admirable lengths to identify a coherent theory of economic harm resulting from the impugned practices. According to the judgment, " … competition in the market can only provide a reduction in costs to consumers, above and beyond that which is obtainable from either a local authority monopoly or by way of competitive tender."[21]

In addition, the judgment concludes that " … where there is a public or tendered monopolist, any increase in price will merely be borne by the public, and there will be no constraining force preventing such situation. Further it will create a situation involving incumbent providers who will be at a significant advantage upon renewal of any contract. There is also the question of what the other competitors are to do in the meantime, while they do not have the contract."[22]

A central assumption in this analysis is that commercial markets are more efficient than markets subject to government regulation. Fully de-regulated, atomistic competition is to be preferred over any form of competitive tendering or other regulated approach to competition. Hence, the local authorities' decision to provide for a "public or tendered monopolist" is deemed generally harmful for effective competition. Indeed, overall, the capacity of government institutions (such as local authorities) to make wise choices about when and how to intervene in the economy is doubted.

Consistent with that ideological approach, the Competition Court appears to have applied a relatively low liability standard in reaching a verdict that the market intervention at issue (*i.e.*, the Variation) was unlawful and attributing competition law liability to the local authorities. The court's approach on market definition, dominance and on the anti-competitive object of the arrangement illustrates this.

Panda Waste on Market Definition

According to the Court, the relevant market for purposes of assessing the market power of the local authorities was the market for provision of household waste collection services in "the greater Dublin area."[23] In reaching this conclusion on the relevant geographic market, the Competition Court asked "… *within what area are the terms of competition sufficiently homogenous with regards to household waste collection services?"* The Competition Court found that this question was "easily answered." According to the Court, because the Waste Management Plan applied to all four local authorities, '*[t]he conditions of competition in these areas are therefore homogenous*." On that basis, the Court concluded that the relevant geographic market was the greater Dublin area.

This approach is notable on a number of fronts. First, it relies upon a relatively low test for defining the relevant market definition; namely, that the relevant market constitutes the area within which terms of competition are "sufficiently homogenous." Second, the evidence relied upon to demonstrate that this test is met is somewhat scant. Indeed, the fact that the Waste Management Plan applied to all four local authority areas was found, in itself, sufficient to prove a single relevant geographic market (notwithstanding that, as a matter of fact, the conditions of competition across the four local authority areas differ fundamentally).[24] Third, it is noteworthy that the geographic market definition is the output entirely of the Competition Court's own economic assessment, and was not supported by the expert economic evidence either of the prosecution or the defence.

17 Thus, in a famous dissent in *Von's Grocery* (384 U.S. at 301), Justice Potter Stewart captured the spirit of the time by lamenting that the sole consistency he could perceive in Supreme Court antitrust decisions was that "the Government always wins."

18 Kovacic *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix,* Columbia Business Law Review, Vol 2007. pages 1 – 78, at page 5. The most dramatic example of the influence of the Chicago School on judicial thinking is often cited as *Continental T.V. Inc. v. GTE Sylvania Inc.* (433 U.S. 36 [1977]), which held that all nonprice vertical restrictions warrant rule of reason analysis, and in which the U.S. Supreme Court prominently cited Chicago School commentary.

19 Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration.* Iowa Law Review, 74 pages 1105 – 50. U.S. antitrust and government enforcement policy since the mid-1990s have generally preferred a more expansive antitrust intervention that builds upon the theoretical and empirical propositions advanced by Chicago School proponents, while qualifying Chicago views. This is in line with post-Chicago School literature, which generally defines a broader zone of antitrust intervention (see, *e.g., Post-Chicago Analysis After Kodak: Interview with Professor Steve C Salop* 7 Antitrust 20, 20 (1992)).

20 In *ILCU*, the Supreme Court explicitly recognises that EU and thereby Irish competition rules " … *constitute a European inheritance from the anti-trust law of the United States, in particular ss. 1 and 2 of the Sherman Anti-trust Act (1890)*" (at para. 104). For support for this position, see O'Donoghue & Padilla, *The Law and Economics of Article 82 EC*, footnote 31 at page 11, where the influence of US antitrust thinking and US antitrust lawyers on the drafting of the competition provisions in the EU Treaties is discussed. See also Legal, H. *Standards of Proof and Standards of Judicial Review in EU Competition law*, where Legal states that " … the vast experience of competition law accumulated in the U.S. yields considerable influence over the EU."

21 Panda Waste Judgment, at para. 118.

22 *Ibid.*

23 Panda Waste Judgment, at para. 76.

24 According to O'Donoghue and Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing 2006, market definition " … constitutes a critical step in the assessment of dominance: the Community Courts have consistently held that the definition of a relevant market is an essential prerequisite for the assessment of dominance" (citing Case 6/72, Europemballage Corporation and Continental Can v Commission [1973] ECR 215 para. 32 ("the definition of the relevant market is of essential significance").

Panda Waste on Dominance

The Competition Court considers it "patently clear" that the local authorities are individually ***and*** collectively dominant on the same relevant antitrust market (the collection of household waste in the Dublin region).[25] The co-existence of individual and collective dominance on the same market and at the same time is novel in competition law theory and conceptually difficult (particularly given that the Competition Court expressly defines dominance by reference to the ability to act independently of competitors).

Even ignoring that question, however, the Court's approach appears conducive towards a finding of dominance. For one thing, the Court facilitates the outcome on individual dominance by assessing the market power of each local authority not by reference to the relevant market, but by reference to a much narrower hypothetical market limited to the area within which each operates.[26] In other words, for purposes of finding single firm dominance, the Court does not appear to follow its own market definition. Rather, a much narrower hypothetical market is used by reference to which the "market shares" of each of the local authorities are greatly exaggerated.[27]

This approach is then reversed for purposes of assessing collective dominance, with the Court relying on the market for the greater Dublin area to find each of the local authorities collectively dominant.[28]

Panda Waste on Anti-Competitive Object

According to the Competition Court, that the Variation " … prevents, restricts or distorts competition is patent."[29] This conclusion is reached because "[t]he Variation seeks to remove private operators from a market in which there is currently competition, and instead replace it with a system whereby either the local authority or a successful tenderer (as the former decides), will be the sole collector within the entire region or within any single or multiple sections that the respondents so designate." This view is, in itself, sufficient to demonstrate that the Variation is an anti-competitive agreement by object (an issue that required a reference to the ECJ by the Supreme Court in *BIDS*). According to the Competition Court "[i]ts object is thus the removal of operators from the market and its effect will be likewise … [i]t would cause the market to move from many multiple competing undertakings to only a few, or even perhaps one."

In so proceeding, the Court seems to endorse a highly structural (and from an economic theory perspective, somewhat outdated) approach to competition – that which promotes competition is legal, that which suppresses competition is illegal, end of story. Even if the result of the reduction of competition is unambiguously more efficient, the Competition Court's approach in *Panda Waste* suggests it is illegal.

According to the Competition Authority, the pro-competitive benefits of competitive tendering for local municipal waste collection services far outweigh any associated anti-competitive harm. Thus, in 2005, following extensive comparative analysis of various methods of municipal waste across a number of different countries, the Competition Authority concluded that " … competitive tendering is the best method of ensuring that household waste collection providers deliver consumers good service at competitive prices."[30]

BIDS

In contrast to *Panda Waste*, in *BIDS*, the Competition Court is highly supportive of State intervention (and, indeed, private firm collaboration) aimed at achieving efficiencies. That approach is manifest from the verdict: a State sponsored rationalisation programme for the beef industry, involving collaboration between 10 leading Irish beef processors (representing around 93% of total beef processing in Ireland) to remove 25% of total processing capacity from the market, was found not to raise competition issues.[31]

The Court's positive attitude towards the arrangement is also evident from the first paragraphs of its decision.[32] At the outset, the Court states that BIDS (referred to in the judgment as the Society) " … acted in a manner which was totally the antithesis of how cartels usually operate … [t]here were no secret meetings, no coded messages, no failure to record and keep minutes, and no obfuscation in requesting compliance." Further, the Court found that in its approach to

25 Panda Waste Judgment, at para 123.

26 Panda Waste Judgment, at para. 132, where the Court concludes that each of the local authorities is dominant "*in each of their individual areas*" (which presumably is a reference to each of the separate and distinct functional areas within Dublin region in which the local authorities operate).

27 This is important because on the narrower hypothetical markets used by the Court each local authority (other than Dun-Laoghaire County Council) was found to have a market share of above 95%, which shares were relied upon to support a presumption of dominance. In contrast, on the relevant market defined by the Court, each of the local authorities' market shares would be significantly reduced such that, from the economic testimony produced by Panda Waste's economic expert, Dublin City Council would have a share of 38.8%, South Dublin Council a 21/3% share, Final Council 20.2%, and Dun Laoghaire/Rathdown 8.2%. Clearly, those shares are not of the order to support a presumption of dominance (which normally would only arise on a share of above 40%).

28 Panda Waste Judgment, at para. 134, where the Court concludes that the local authorities " … are also collectively dominant in the greater Dublin area, in addition to being dominance individually within each of their respective geographical areas."

29 Panda Waste Judgment, at para. 81.

30 Enforcement Decision (Decision No. E/05/002), *Alleged excessive pricing by Greenstar Recycling Holdings Limited in the provision of household waste collection services in northeast Wicklow,* available at *http://www.tca.ie/images/uploaded/documents/e_05_002%20Greenstar.pdf.*

31 Planning for the rationalisation process was largely funded by Enterprise Ireland (a State agency responsible for supporting Irish businesses in the manufacturing and internationally traded service sectors), and representatives from a number of government agencies (including An Bord Bia and the Department of Agriculture and Food) were on a steering group that assisted in preparing the restructuring plan. The restructuring plan was also support by a report commission by the Minister for Agriculture and Food following establishment by the Minister of a Beef Task Force (chaired by the Secretary General of the Department of Agriculture and Food with members from various State agencies).

32 *BIDS*, para.'s 84 – 87. The decision section of the judgment commences at para. 84.

processing the rationalisation plan " … one could not under any circumstances levy criticism against the Society."[33]

As regards the resulting liability standard applied, perhaps the starkest contrast between *BIDS* and *Panda Waste* is the Court's consideration of whether the BIDS collaboration constituted an agreement to restrict competition by object (rather than effect). Again, the stated intention of BIDS – a collaboration of the leading Irish beef processors – was to remove 25% of total capacity from the market.

In considering this matter, the Court took the position that only agreements to fix prices, limit output and share markets or customers are restrictive by object. Having concluded that the BIDS arrangement did not involve any of those aspects, the Competition Court concluded "I therefore do not believe that one can say, on the balance of probability that the arrangements under discussion are so objectionable as to restrict competition by object."[34]

As confirmed in a terse ECJ response to the Supreme Court's preliminary reference on appeal of the Competition Court's judgment, the proper question in determining whether an "infringement by object" arises is whether the arrangement in question "… can be regarded, by its very nature, as being injurious to the proper functioning of normal competition."[35] According to the ECJ, the BIDS arrangement "conflicts patently with the concept inherent in the EC Treaty provisions relating to competition."[36]

ILCU

As recognised by the Supreme Court on appeal, ILCU represented an ultra interventionist approach to competition law enforcement. So far did it expand the concepts of "undertaking" and "dominance" that it brought competition law into direct conflict with fundamental principles of freedom of association.[37] Thus, the underlying economic theory in *ILCU* appears similar to that motivating the court in *Panda Waste*.

In determining that an ILCU savings protection scheme (or SPS) – essentially a pool of money made up of contributions by members of the ILCU over a number of years – constituted a separate product market, the Competition Court adopted a ""intuitive' or 'innate characteristics' test. The Court preferred this test to the SSNIP and other economic evidence on market definition presented by the defence. Further, notwithstanding that the expert economist of the prosecution "lacked quantitative data for his own application of the SSNIP test," the Court preferred the approach of that witness.[38]

The Court continued, "[h]aving concluded, as I do, that there is a separate product market for SPS services, the requirement to identify precisely what constitutes the ILCU bundle assumes a lesser significance. For present purposes, it is sufficient to state that there is a market for credit union representation services which includes advocacy, provision of insurance and financial services, and self regulation."

The relatively low standard to which the prosecution was held in proving this narrow market definition was implicitly criticised on appeal by the Supreme Court. According to the Supreme Court, the prosecution failed to produce "cogent factual evidence of the existence of a product market in representation services," and the matter was "not debated with the intensity of the SPS issue."[39]

Thus, in a manner similar to *Panda Waste*, the economic theory preferred by the Competition Court in *ILCU* seemed to result in a lowering of the legal hurdles that the prosecution faced, in particular (but not solely) in respect of the critical market definition issue.

Hemat

Given the verdict in *Hemat* – namely, that the defendant was not an undertaking or association of undertakings and therefore that neither EU nor Irish competition law were applicable to the dispute at issue – the case provides less basis for illustration of a link between the underlying economic theory and the liability standard.

Comment

In determining the appropriate economic doctrine for the Competition Court to apply, the Supreme Court's unanimous judgment in *ILCU* is important and helpful.

First, as mentioned above, *ILCU* clearly and unequivocally affirms the Competition Court's obligation to integrate economic principles into its legal analysis. In addition, *ILCU* gives strong indication of the appropriate economic thinking and doctrine that should inform Competition Court judgments. This follows from two notable aspects of the Supreme Court judgment. First, the Supreme Court explicitly recognises that Irish competition rules " … *constitute a European inheritance from the anti-trust law of the United States, in particular ss. 1 and 2 of the Sherman Anti-trust Act (1890).*"[40] Second, the Supreme Court accepts much of the modern economic thinking on tying arrangements that underpin U.S. antitrust law.

The Supreme Court's judgment also contains a number of important outward signs of modern economic thinking and influence. The judgment resonates with themes familiar to readers of modern economic literature – in particular, the

33 The Court does state that the above endorsement of BIDS's comportment did not have "a direct bearing on the case" (para. 84).

34 *BIDS* judgment, at para. 98.

35 At para. 17.

36 At para. 35.

37 According to the Supreme Court, "[*o*]*ne of the most readily foreseeable implications of the Authority's analysis is that any trade association representing a significant percentage (which need not even amount to 50%) of a particular trade or profession might be held to enjoy a dominant position in the market for representation services for the trade or profession in question. A person denied admission to membership of the association, for whatever reason, might plausibly mount a case of abuse of a dominant position based on refusal to supply the association's services … it seems at least conceivable that competition law could be deployed in pursuit of complaints of disappointed applicants for membership*."

38 ILCU Judgment, at page 130.

39 Supreme Court Judgment, at para. 144.

40 Supreme Court Judgment, at para. 104. For support for this position, see O'Donoghue & Padilla, *The Law and Economics of Article 82 EC*, footnote 31 at page 11, where the influence of US antitrust thinking and US antitrust lawyers on the drafting of the competition provisions in the EU Treaties is discussed.

pronouncement that " … *the entire aim and object of competition law is consumer welfare*."[41]

Finally, the unanimous opinion also manifests a basic scepticism towards intervention to control the conduct of dominant firms and includes a memorable passage about the benefits of monopoly.[42] More explicitly, the unanimous opinion goes so far as to cite a passage from leading Harvard School economists Professors Areeda, Elhauge and Hovenkamp.

Conclusion

The Competition Court's consideration of the Variation as an economic activity, together with the court's affirmation of competition as the superior mechanism for governing the sector, results in Irish competition law attaining almost constitutional stature: effectively, national competition law is used as a means to check quasi-political decisions on the regulation of and state involvement in markets. As a result, a fundamental aspect of Irish environmental and waste law – the regional Waste Management Plan – is rendered, as an anti-competitive agreement by object, presumptively unlawful.[43]

As mentioned, an appeal of the judgment has been lodged. An important question in any such appeal is likely to be whether competition law is properly applicable to adoption of regulatory or policy decisions of the type impugned by the Competition Court (or, put another way, whether adoption of the Variation properly constitutes an economic activity).

More generally, given that four out of four cases to come before the Competition Court so far have resulted in appeals, with two out of three appeals heard to date successful, the question arises as to how predictability and certainty might be enhanced.

One possibility might be to seek to bolster the influence of the Competition Authority in the system. A key change brought about by the 2002 modernisation of Irish competition law was abolition of the notification regime to the Competition Authority. That regime permitted the Competition Authority to review and clear notified arrangements as compatible with competition law, thereby affording the agency an important decision-making and policy formulation role in the system. One possible suggestion would be to re-inaugurate such a notification regime. Such a course would, however, run against the general trend for "best practice" competition law enforcement (according to which agencies should be primarily focused on investigating cartels).

It is also the case that the judicial outcome in the four major cases so far (*ILCU*, *BIDS*, *Hemat* and, pending appeal at least, *Panda Waste*) has been, in each case, forcefully and openly opposed by the Competition Authority. In other words, in 100% of the cases adopted since modernisation, Ireland's expert competition law agency – staffed with a number of highly qualified economists with long experience – has opposed the verdict; whether directly in court (à la *BIDS* and *ILCU*) or indirectly via published decisions or statements (à la *Hemat* and *Panda Waste*). So, given the evident tension between judicial and agency thinking on competition law (and the resulting incentives to appeal any agency decision), re-involving the Competition Authority in the decision-making process may not necessarily enhance legal certainty or improve result timeframes.

Undoubtedly, however, the existing system is concerning. In *Panda Waste*, the trial took 15 days and, as mentioned, the resulting judgment is now under appeal to the Supreme Court. *BIDS*, which commenced by way of plenary summons on 30 June 2003, and involved an 11 day trial, a Supreme Court appeal and a preliminary reference to the ECJ, is on-going and remains unresolved, with a date listed for mention before the Competition Court in October 2010 (*i.e.,* over seven years from initiation). Final resolution of *ILCU*, which commenced on 22 July 2003, involved an 11 day trial and a Supreme Court appeal, took nearly four years with the Supreme Court verdict delivered on 8 May 2007. *Hemat*, which involved a two-day trial, commenced on 24 November 2003, with the Competition Court judgment delivered on 7 April 2006 and, following appeal, the Supreme Court judgment delivered on 29 April 2010 took just under six and a half years.

Not only is significant delay and uncertainty now a feature of the system. The legal costs associated with litigating in that environment are, it is fair to say, truly enormous. The Competition Authority's costs in *ILCU* alone – reportedly representing two-thirds of the total costs in the case – were reported to be €1.7 million.[44]

The implications for competition law enforcement, and particularly private enforcement (generally considered an important plank in assuring effective enforcement of competition law), are obvious. At a time when the London Bar is actively – and with some success – promoting England as the best jurisdiction for private action litigation in EU competition law cases, it may also undermine Ireland's attractiveness as a litigation centre in a growth area. Perhaps some greater coherence in the economic theory underpinning Competition Court judgments might go some way to addressing the controversy surrounding verdicts. ■

41 Supreme Court Judgment, at para. 109.

42 Supreme Court Judgment, at para. 109 ("Competition law does not outlaw economic power, only its abuse. Economic power may, indeed should, be the reward of effective satisfaction of consumer needs. It would be inconsistent with the objectives of free competition that successful competitors should be punished.").

43 The Waste Management Plans provided for in the 1996 Act, via which the State effectively sought to implement EU obligations in respect of non-hazardous waste, have been recognised as a "*crucial component*" of that statute (and, thereby, the Irish regulatory framework for waste). *See* Boyle, M. (2002) Clearing up after the Celtic Tiger: the politics of waste management in the Irish Republic, *Journal of the Scottish Association of Geography Teachers, 30*.

44 Competition Press, Volume No. 16, Edition 8 (2009), at page 183.

Homosexuality, Defamation and the Law

Pat J. Barrett BL

Introduction

Given the near-unanimous passage of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, an Act intended to give legal recognition to same-sex relationships for the first time in Ireland, through the Oireachtas[1], it is submitted that the time has come to revisit the anachronistic situation in Irish law whereby unfounded allegations of homosexuality *per se* are deemed to be defamatory, particularly the precedent of *Reynolds v. Malocco*[2], with regard to the development of the law in other common law jurisdictions.

Homosexuality and the Criminal Law in Ireland

In England and Wales, the first statute prohibiting homosexual activity under criminal, rather than ecclesiastical law, was the Buggery Act 1533. Enacted when English society was on the cusp of the Dissolution of the Monasteries, the Act prescribed hanging as punishment for "the detestable and abominable Vice of Buggery committed with mankind or beast" and specified buggery to be a felony, meaning that the chattels of anyone convicted of such an offence would be forfeit to the Crown upon their execution. Benefit of clergy (which exempted religious from the laws of the land) was also denied to anyone convicted under the Act. As a consequence, priests and nuns, who could not be executed for crimes such as murder, could be put to death for breach of the Buggery Act. The Irish Parliament enacted legislation in similar terms in 1634.

Although the 1634 Act was repealed by the Offences Against the Person (Ireland) Act 1829, the penalty for its breach remained unchanged until the Offences Against the Person Act 1861, s. 61 of which reconstituted "the abominable crime of buggery" and specified a mandatory minimum sentence of ten years' penal servitude, and a maximum penalty of life imprisonment. (The mandatory minimum punishment was removed by the Statute Law Revision Act 1892). Section 11 of the Criminal Law Amendment Act 1885 further criminalised the commission or attempt to do so of "gross indecency" between males, where actual intercourse could not be proven. Oscar Wilde was convicted under this provision in 1895 and sentenced to the maximum two years' hard labour.

In Ireland following independence, the validity of the 1861 Act was not challenged until *Norris v. Attorney General*[3], where the plaintiff sought a declaration that s. 61 of the 1861 Act and s. 11 of the 1885 Act were inconsistent with the 1937 Constitution by virtue of the fact that they, *inter alia*, contravened his personal right to privacy. McWilliam J. in the High Court refused the relief sought.

McWilliam J's judgment was upheld in the Supreme Court by a 3-2 margin. O'Higgins CJ, speaking for the majority, justified the prohibition on consensual same-sex activity by reference to the "depressive reactions which frequently occur when a relationship ends"[4] which would be faced by homosexuals upon legalisation of same-sex activity; to the "depression, despair and suicide"[5] inevitably faced by that community; to the "habitual" nature of "the homosexual lifestyle"[6]; to the spread of venereal disease caused by homosexual activity; and to the harm caused the institution of marriage by legalised homosexuality. The fact that none of these considerations were relevant to the plaintiff was not acknowledged by the court.

Although Henchy J. delivered a strong dissenting judgment, he did not ignore the sociological reality of homosexuals in Ireland of the early 1980s, citing a theological witness' view that "[H]omosexual acts between males would be deemed morally wrong by most of the citizens of this State"[7].

In line with its decision in the earlier *Dudgeon* case[8], the ECHR subsequently upheld Norris' claim of victimisation under the European Convention on Human Rights and awarded him £14,000 damages.[9] Accordingly, the Criminal Law (Sexual Offences) Act 1993 repealed both s. 61 of the 1861 Act and s. 11 of the 1885 Act, prescribing seventeen as a universal age of consent for homosexual and heterosexual sexual activity. Curiously, the Prohibition of Incitement to Hatred Act 1989, enacted while homosexual activity was still a criminal offence under Irish law, criminalised incitement to hatred on the grounds *inter alia* of sexual orientation, punishable by up to two years in prison and/or a fine of £10,000.

Consequent to this gradual shift in the law and social attitudes, s. 5 of the Unfair Dismissals (Amendment) Act 1993 stated that the dismissal of an employee on the ground of sexual orientation would be deemed unfair. Section 6 (2) of the Employment Equality Act 1998 prohibits discrimination between employees on the ground of sexual orientation and, in the most far-reaching provision to date, s. 3 (2) of

1 The Bill passed all stages in the Dáil without a vote and was approved in the Seanad by 48 votes to 4 (*Irish Times*, 9th July, 2010).
2 [1999] 2 I.R. 203
3 [1984] I.R. 35
4 at 62
5 at 63
6 *Ibid.*
7 at 74
8 *Dudgeon v. UK* (1981) 4 EHRR 149
9 *Norris v. Ireland* (1989) 13 EHRR 186

the Equal Status Act 2000 prohibited discrimination in the provision of goods and services on the grounds of sexual orientation in the sphere of private activity between suppliers and consumers.

The latest step in this legal evolution is now the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, which includes rights of succession, maintenance, shared home protection between civil partners and remedies for same-sex domestic violence: in effect, recognition of same-sex unions in Irish law.

Therefore, in Ireland, in this twenty-first century, would the reasonable member of society think unfavourably of a homosexual, and is it therefore defamatory to be wrongly tagged as one?

Homosexuality as Defamation

Section 2 of the Defamation Act 2009 defines a "defamatory statement" as: "a statement that tends to injure a person's reputation in the eyes of reasonable members of society". In *Quigley v Creation Ltd.*[10], Walsh J., in the Supreme Court (Budd and McLoughlin JJ. concurring *nem. diss.*) stated:

> "[I]f words only tend to lower a person in the minds of a particular class or section of society, particularly if the standard of that particular section of society is one which the Court cannot recognise or approve, the words will not be held to be defamatory. On the other hand, words are defamatory if they impute conduct which would tend to lower that person in the eyes of a considerable and respectable class of the community, though not in the eyes of the community as a whole. The test is whether it will lower him in the eyes of the average right-thinking man."

Therefore, the question is whether that section of society, and specifically that section of Irish society in the 21st century, which thinks less of a person by virtue of his or her homosexual orientation is "considerable and respectable", comprised of "average" and "right-thinking" (or "reasonable") people; or are they the section of society which continues to adhere to a standard "which the Court cannot recognise or approve"?

The Ireland of 2010 is clearly a world apart from the country in which the Criminal Justice (Sexual Offences) Act 1993 was deemed necessary, after an interval of four years, to enforce a judgment of the ECtHR. Although lagging some way behind most of Europe, Ireland has now reached a point where "out" homosexuals have reached positions of prominence and success in almost all sectors of society. An Irish Times/Behaviour Attitudes opinion poll published on the 15th September, 2010, found that the section of the adult population that would think less of a homosexual person stood at just 5% (with a 3% margin of error).

Even on the most pessimistic view, therefore, it appears that the segment of the Irish population inclined to think worse of a person on account of homosexual activity is sufficiently in the minority such as to exclude them from being considered a "considerable and respectable" proportion of society, under the *Quigley* formulation. Were one to ignore these figures, and the evidence of the increasingly public role played by homosexuals in Irish public and professional life since 1993, however, is it just of the law to continue to assume that an imputation of homosexual activity or orientation is automatically, without plea of special innuendo, defamatory? What of those who do not disapprove of homosexual behaviour; or, indeed, those who are themselves homosexual? Are they deserving of the titles "reasonable", "respectable" or "right-thinking"?

In *Harrison v. Thornborough*[11], it was held that "[W]ords which an [sic] hundred years ago did not import a slanderous sense may now, and so vice versa". Thus, adaptability has always been the benchmark of defamation law, more so, it seems, than any other realm of the common law, in order to keep pace with changing slang, *entendres*, codes and patois.

One of the earliest reported cases where a plaintiff sued for homosexual defamation was *Leicester v. Walter*[12], where the plaintiff was awarded £1,000 in respect of allegations that his wife had accused him of "the same offence for which Lord Audley had been executed in the reign of Charles I". Since the law at the time was still governed by the 1533 Act, the considerable amount of damages awarded is perhaps no surprise.

Similarly, in *AB v. XY*[13] - where the statement at issue was that the plaintiffs had engaged in unspecified behaviour which had left them "without a shred of character; they are not men, they are beasts"[14] - it was accepted by the court at trial that the plaintiffs had been accused of homosexual behaviour. Not surprisingly, given the legal status of homosexuality at the time (a mere 22 years after Oscar Wilde's conviction), the capacity of homosexual imputations to be defamatory *per se* was not even in issue.

The question as to whether an imputation of lesbianism was defamatory was not raised until *Kerr v. Kennedy*[15], where the plaintiff sued on foot of a spoken allegation that she was so oriented. Again, although the plaintiff put the defendant on proof of the issue, and even though lesbianism was not covered by the Offences Against the Person Act 1861, no serious argument seems to have been pursued as to whether this statement was defamatory *per se*; the legal argument instead centred around whether the allegation was one of "unchastity" within the Slander of Women Act 1891, under which no special damage would have to be proven for damages to be recovered. Asquith J., finding for the plaintiff, stated at p. 413:

> "In the absence of any judicial guidance or authority as to the meaning of "unchaste" or "chaste" in this connection, dictionaries can be consulted and their definitions have been cited in this case. Almost all, under the term "unchastity", include "impurity," "lasciviousness," and the like. Can anyone doubt that lesbianism is covered by such terms?"

10 [1971] 1 I.R. 269

11 (1714) 88 ER 691 at 691
12 (1809) 2 Camp. 251
13 [1917] SC 15
14 *Ibid.*, p. 16
15 [1942] 1 KB 409

In *Thaarup v. Hulton Press*[16], the Court of Appeal decided that a cartoon printed by the defendant stating that the plaintiff, a milliner, "wanted a few pansies" was capable of defamation. The outcome of the case is uncertain: presumably it settled before full hearing.

After *Kerr*, and not surprisingly give the settled state of statute and common law, the question of homosexual allegations as defamation rested for some time, recurring only as media fodder in isolated cases such as the notorious *Liberace v. Daily Mirror Newspapers Ltd.*[17] where the sequinned entertainer sued successfully for libel on foot of a description of him as a "deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, luminous, quivering, giggling, fruit-flavoured, mincing, ice-covered heap of mother-love". He was awarded £8,000 damages, largely due to the innuendo contained in the term "fruit-flavoured".

The next potential judicial consideration of the question did not come until *R. v. Selvey*[18], where the defendant was charged with (non-consensual) buggery under the Sexual Offences Act 1956. In the course of his testimony, the defendant alleged that the adult complainant offered him sex in return for a £1 loan, and that the complainant had told the defendant that he had had homosexual sex for money already that day. The question to be considered by the Court of Appeal (Lord Denning M.R., Widgery and MacKenna JJ) was whether this evidence constituted an attack on the complainant's good name sufficient for the defendant to lose the shield of privilege against being cross-examined on his previous convictions under s. 1 (f) (ii) of the Criminal Evidence Act 1898 (the UK equivalent of s. 1 (f) (ii) of the Criminal Justice (Evidence) Act 1924). Notably, in dismissing the defendant's appeal against his conviction, the Court classed the objectionable imputation against the complainant not simply as being that he was engaged in prostitution but also that he "was a homosexual who carried indecent photographs about with him"[19]. Although not explicitly stated, it is surely not stretching credulity to infer that the nature of Selvey's defence would have led to the dropping of his shield even on the insinuation that the complainant was a homosexual alone, without the accompanying implication of prostitution.

This view of the law was confirmed in Britain by *R. v. Bishop* [1975] 1 Q.B. 274, where the defendant, charged with theft from a hotel bedroom, explained under oath that his fingerprints were present in the room because he had had a homosexual relationship with a prosecution witness. The trial judge accordingly permitted cross-examination of the defendant on his previous convictions and he was convicted. On appeal, the defendant claimed that s. 1 of the Sexual Offences Act 1967, which legitimised homosexual activities between consenting males aged twenty-one years or older, removed the legal stigma from homosexuality and that the trial judge erred in finding that his defence accordingly cast imputations on the character of the witness. The Court of Appeal (Stephenson L.J. MacKenna and O'Connor JJ.), rejecting the appeal, relied on the opinion of Lord Reid in *R. v. Knuller (Publishing, Printing and Promotions) Ltd.*[20], where the defendant publisher was charged with conspiracy to corrupt public morals and conspiracy to outrage public decency for running classified advertisements relating to sexual practices taking place between male persons[21].

Lord Reid, in upholding the conviction on the charge of conspiracy to corrupt public morals, opined at p. 457 that: "[T]here is a material difference between merely exempting certain conduct from criminal penalties and making it lawful in the full sense. Prostitution and gaming afford examples of this difference ..."[22]

In *Bishop*, the Court of Appeal relied upon this section of the judgment as sanction for the proposition that:

> "[T]he gap between what is declared by Parliament to be illegal and punishable and what the common man or woman still regards as immoral or wrong is not wide enough to support [the defendant's argument]"[23].

The Court followed this with the observation that:

> "If Mr. Price [the prosecution witness in respect of whom the allegation was made] were to sue the defendant in respect of his allegation if repeated outside a court of law, we venture to think that a submission that the words were incapable of a defamatory meaning would be bound to fail and a jury would generally be likely to find them defamatory ... If this is still true, we are not behind the times in holding that Mr. Price's character was clearly impugned by the allegation of homosexual conduct made against him by the defendant"[24].

Having found, therefore, that reasonable right-thinking members of society would still think less of a person engaged in homosexual behaviour, the Court, remarkably, asserted:

> "[W]e do not accept the submission that an imputation of homosexual immorality against a witness may not reflect upon his reliability - generally or in the witness box"[25].

In Ireland, the question of homosexuality as defamation seems to have rarely troubled the courts[26]. Considering both the legal position of homosexuality in Ireland for most of the twentieth century and the rigidly Catholic religious norms previously dominant in Irish society, this is not perhaps surprising: it is not generally disputed that an allegation that someone is engaged in criminal behaviour is defamatory.

16 (1943) 169 LT 309
17 (High Court of Justice, reported in *The Times*, 18th June, 1959)
18 [1968] 1 QB 706
19 *Ibid.*, p. 714
20 [1973] A.C. 435
21 *Ibid.*, pp. 454-455
22 S. 4 (1) of the 1967 Act states: "*A man who procures another man to commit with a third man an act of buggery which by reason of section 1 of this Act is not an offence shall be liable on conviction on indictment to imprisonment for a term not exceeding two years*".
23 [1975] 1 Q.B. 274 at 281
24 *Ibid.*
25 *Op. cit.* at p. 282
26 The euphemistic judgment in *Bolton v. O'Brien* (1885) 16 LR Ir. 97, where the plaintiff was accused of an "indictable offence of an unnatural kind" seems an exception.

Considering, the paucity of reports on this matter, the treatment of the matter in *Reynolds v. Malocco*[27] is somewhat disappointing. The plaintiff was a successful nightclub owner against whom the defendant made allegations that he permitted the sale of drugs on his premises. The draft article also referred to the unmarried plaintiff as a "gay bachelor" while referring to his "latest model girlfriends" and printing a photograph of him with a woman whose face had been obscured from the picture. The plaintiff sought an injunction against publication of the article on the basis that the damage to his reputation would be so great, and the defendants so impecunious, that damages would not be available as a remedy.

In the course of argument, the first defendant argued in mitigation that "[H]omosexuality is an accepted part of Irish life and the days are long gone when homosexuals were simply tolerated; they are now accepted and integrated into the fabric of Irish life like other minorities"[28]. Opposing this argument, the plaintiff argued that "[A]n allegation of being gay is an allegation of deviant sexual practice which many people in Irish society find repellent"[29]. Kelly J., considering the judgment in *R. v. Bishop*, stated that the court's finding on the likely defamatory nature of an allegation of homosexuality appeared "to represent the legal position in England and in my view it also represents the legal position in Ireland"[30]. The learned judge, rejecting the defendants' arguments in this regard, continued:

> "Quite apart from the decision which I have just cited, it does not appear to me to be sound to suggest that merely because an activity is no longer prohibited by the criminal law, an allegation of engaging in such activity cannot be defamatory. The commission of adultery is not a criminal offence but nobody could seriously suggest that an allegation of adultery could not be defamatory. Similarly, to lie is not a criminal offence, but again can it be seriously suggested that to call a person a liar is not defamatory?"[31]

The *ratio* employed by the learned trial judge in this contention is to be regretted. Unlike accusations of adultery or dishonesty, imputations of homosexuality *per se* do not imply deceit or untrustworthiness in personal or business dealings, and any statement to the contrary (such as that of the Court of Appeal in *R. v. Bishop*[32]) should ideally be disapproved, rather than given judicial sanction in a modern-day Western republic. Where an allegation of homosexuality carries an innuendo of dishonesty or adultery - where the plaintiff is married, for instance, or has gone on record denying such an orientation - relief will, however, still be available. Clearly, reform - preferably in the form of an unambiguous decision on the point by the High or Supreme Court - is desirable, even necessary, to reflect the reality of present-day Ireland.

27 *Op. cit.*, fn. 1
28 *Ibid.*, p. 216
29 *Ibid.*
30 *Ibid.*, p. 217
31 *Ibid.*, pp. 217-218
32 *Op. cit.*, n. 27

Injurious Falsehood

Walsh J., in the course of his judgment in *Quigley v. Creation Ltd.*, pointed to a problem as he perceived the law of defamation, particularly in the context of smaller communities:

> "In a community which places a high value on female chastity, to say untruthfully of a woman that she was the victim of a rape may well lower her in the eyes of the community by creating an undesirable interest in her or by leaving her exposed to the risk of being shunned or avoided — however irrational it may appear that a person who has been the victim of a criminal assault should as a result, through no fault of her own, be lowered in the eyes of ordinary reasonable persons in the community[33]".

Although it is thoroughly undesirable and surely inaccurate to view rape victims as being lowered in the estimation of reasonable members of society, it is unavoidable that certain imputations, which ought not to damage the victim's reputation, may nevertheless cause harm to that person, particularly by way of being shunned by members of the community. In this instance, the position of a person wrongly accused of homosexuality (where no innuendo of infidelity or deceit arises) may be compared to that of a person wrongly claimed to have suffered rape: they may suffer the backlash of community intolerance, and may even have economic and romantic prospects damaged. In such cases, injurious falsehood may be a desirable remedy. Section 42 of the Defamation Act 2009 provides that this tort may be availed of where malicious publication of untrue material causes special damage to a plaintiff. "Special damage" in such instances may encompass loss of marriage chances, as was held in *Sheperd v. Wakeman*[34]. Therefore, a finding by the judiciary that homosexuality *per se* is not defamatory need not leave an injured plaintiff without recourse where the accusation was malicious and led to demonstrable special damage.

Other Common Law Jurisdictions

In recent decades, numerous forums across the common law world have found that imputations of homosexuality, without innuendo, are not actionable as defamation. The Scottish Court of Session so held in *Quilty v. Windsor*[35], placing emphasis on the fact that gay partners had quasi-marital protection for each other's debts, and that unmarried homosexuals could adopt children.

The New South Wales Supreme Court, in *Rivkin v. Amalgamated Television Services Pty Limited*[36], likewise held that homosexuality *per se* was not defamatory. Bell J. emphasised the legal protections available to homosexuals in Australia in support of this, among them the right to protection against discrimination, the outlawing of incitement to hatred of homosexuals and the recognition of homosexual relationships as "*de facto* relationships" for the purposes of maintenance and property orders. Bell J. stated that a disparagement of

33 *Op. cit.*, p. 272
34 (1661) 1 Sid. 79
35 [1999] SLT 346
36 [201] NSWSC 432

the plaintiff's reputation among a certain section of society would not amount to defamation "unless the views of that group happened to correspond with those of right thinking members of society generally". This decision has been both approved *obiter*[37] and disapproved[38] in other judgments of the New South Wales Supreme Court. Kirby J. in the High Court of Australia, however, has stated *obiter* that "[I]t ought not to be the case in Australia that to publish a statement that one adult was involved in consenting, private homosexual activity with another adult involves a defamatory imputation" but recognised that the scope for defamation by innuendo still existed.[39]

In the United States, the divide in opinion not surprisingly mirrors the cultural divide. Federal district courts in Massachusetts[40], New York[41], Colorado[42] and New Jersey[43] (where same-sex unions are permitted or recognised to varying degrees)[44] have held that *per se* imputations of homosexuality are not actionable as defamation, whereas courts in Texas[45] and Missouri[46] (where same-sex marriage has been outlawed by amendment to the state Constitution), have refused to find that homosexuality *per se* might not be capable of defaming a person.

Conclusion

The jurisprudence of the question of homosexuality as defamation *per se* is littered with prejudice and ignorance, whether that ignorance is regarding "impure", "lascivious" lesbians, as in *Kerr v. Kennedy*, or the "*reliability - generally or in the witness box*" of homosexuals, as in *R. v. Bishop*. Given the enactment of the Civil Partnerships and Certain Rights and Obligations of Cohabitants Act 2010, which will extend quasi-marital rights to homosexuals, this jurisprudence, and the cited portions of the judgment in *Reynolds v. Malocco*, appear increasingly anachronistic, comparable to those old judgments of the American Deep South that held falsely labelling a white person as black to be actionable[47].

If the courts decide to recognise the changing landscape of Irish society in such a way, of course, it will not preclude those who suffer damage from unfounded allegations of homosexuality from seeking recourse, whether they sue for defamation pleading innuendo of deceit or infidelity (as was done by the musicians Jason Donovan[48] and Robbie Williams[49]), or whether they sue for injurious falsehood due to special damage, be it loss of economic or even marital opportunity, where malice can be shown. Such a reform will endorse the fact that those who think less of a homosexual person by virtue of their sexual orientation no longer comprise a "considerable and respectable class of the community": rather, they have now become merely "a particular class or section of society", adhering to a standard "which the Court cannot recognise or approve", in the *dicta* of Walsh J. Such a reform would finally drive the final Irish nail into the coffin of Henry VIII's Buggery Act of 1533. ■

37 *Obermann v. ACP Publishing Pty Ltd.* [2001] NSWSC 1022
38 *Kelly v. Fairfax Publications Ltd.* [2003] NSWSC 586
39 *John Fairfax Publications Pty Ltd. v. Rivkin* (2003) 201 ALR 77 at 109
40 *Albright v. Morton* (2004) 321 F. Supp. 2d 130
41 *Stern v. Cosby* (2009) Case 1:07-cv-08536-DC
42 *Hayes v. Smith* (1991) 832 P. 2d 1022
43 *Murphy v. Millennium Radio Group LLC* (2010) Case 3:08-cv-01743-JAP-TJB
44 Although Colorado recognises civil partnerships, same-sex marriage is prohibited by the state Constitution.
45 *Robinson v. Radio One* (2010) Case 03:09-cv-01203-O
46 *Nazeri v. Mo. Valley Coll.* (1993) 860 S.W. 2d 303
47 See, *e.g.*, the judgment of the Supreme Court of South Carolina in *Bowen v. Independent Publishing* (1957) 96 SE 2d 564
48 Jason Donovan was awarded damages of £200,000: *The Times*, 5th April, 1992.
49 *The Independent*, 6th December, 2005.