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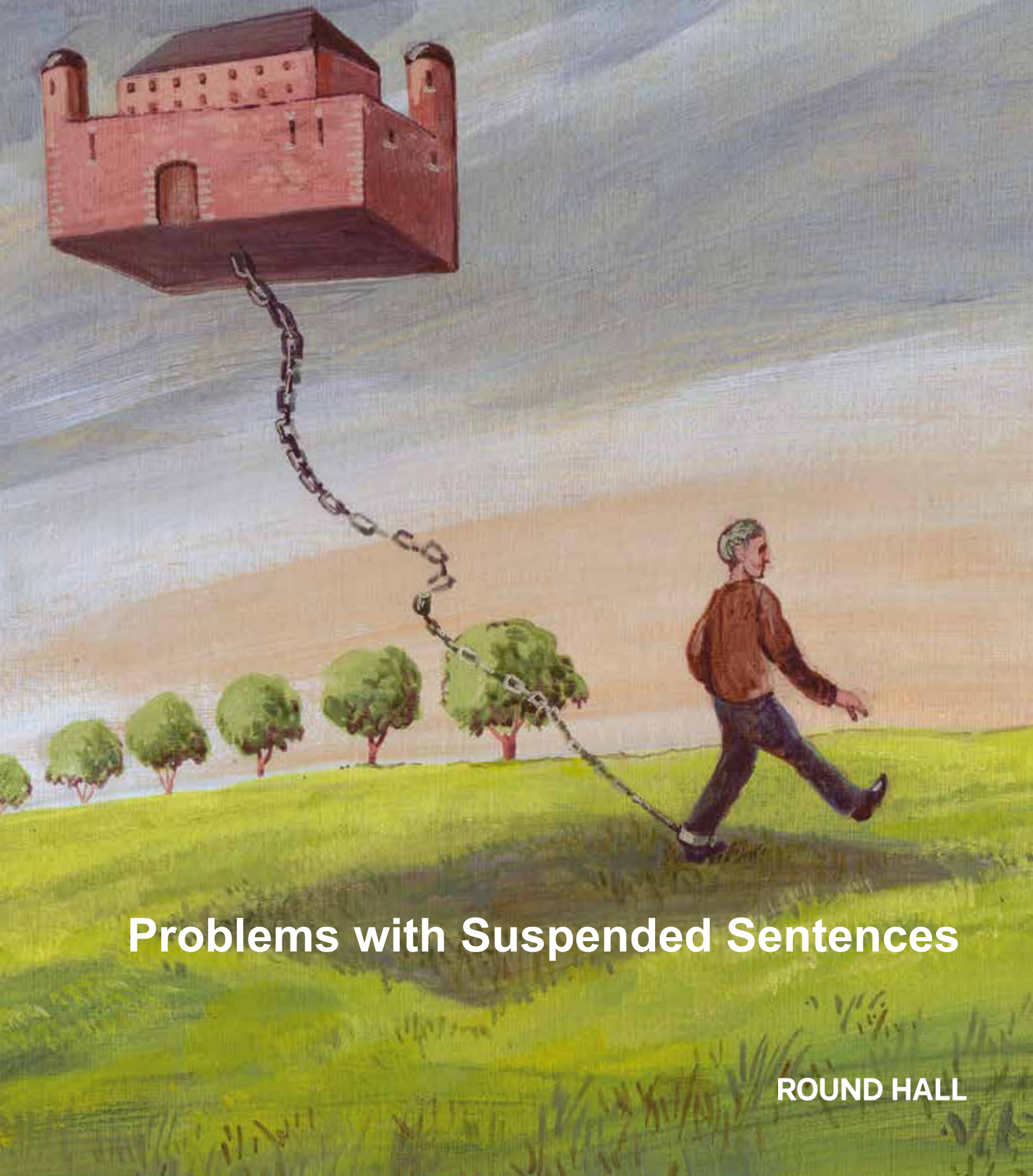

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Professor J C W Wylie holds the degrees of LLB and LLD from Queen's University Belfast and LLM from Harvard University. He was Frank Knox Fellow at Harvard Law School and held a Fulbright Scholarship to the USA during 1966-67. After various teaching posts at Belfast and Cardiff, Professor Wylie held a chair of law at Cardiff from 1979 to 2009, and he has been an Emeritus Professor since then.

He is the leading authority on Irish property law and, apart from his work on law reform, has written the standard texts on land law, conveyancing and landlord and tenant law and practice, all available from Bloomsbury Professional. He has been a consultant to A&L Goodbody Solicitors for over 20 years.

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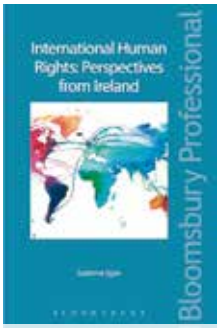
Suzanne is a graduate of UCD, Osgoode Hall Law School (Canada) and the Kings' Inns. She was formerly a Member of the Irish Human Rights Commission (2001-2011).



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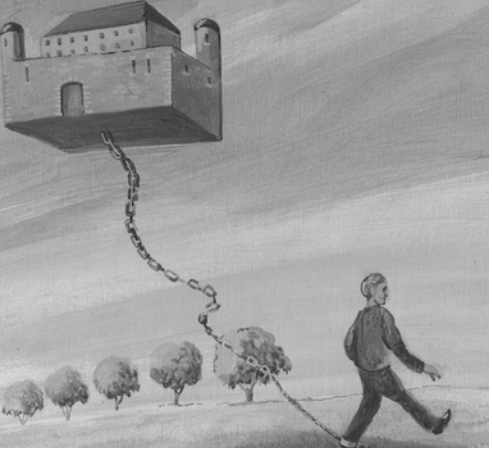

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Appeals to the Supreme Court and the new Appellate Regime

Ben Clarke BL

Introduction

The introduction of the Court of Appeal has led to major changes in the work of the Supreme Court and the introduction of a new practice direction. This article will examine recent determinations and judgments from the Supreme Court which give an indication of how it now deals with efforts to avail of a second '*last chance*' appeal.

Determinations are concise and unanimous written judgments that are now delivered by the Supreme Court following its consideration of an application for leave to appeal. Such applications are made in writing. In the new *Judgments & Determinations* section of *courts.ie,* these written Determinations and supporting documentation are available. The 32 Determinations delivered over the past legal year provide a clear indication of the approach that the '*new*' Supreme Court is taking in developing a new appellate jurisprudence.

This article considers a number of particular Determinations, each addressing distinct issues relevant in respect of both appeals that were in being prior to the introduction of the Court of Appeal and also new or upcoming appeals.

Fox v Mahon & ors – 22nd January 2015

An application for a determination cancelling the inclusion of a specific appeal within a class of appeal specified within the direction made by the Chief Justice pursuant to Article 64.3.1°, transferring such appeals to the Court of Appeal

On 29th October 2014 the Chief Justice gave a direction transferring cases falling within a certain class of appeal from the Supreme Court list to the Court of Appeal. This once-off direction could only be made in circumstances where the Court was satisfied that it [was] in the interest of the administration of justice and the efficient determination of appeals that such a Direction should be made. The Applicant sought an Order pursuant to Article 64.3.3° cancelling the effect of that direction in so far as it related to that appeal.

The grounds for the application were that:

a) The appeal involved a point of law of exceptional public importance and / or the interests of justice suggested that the appeal be heard by the Supreme Court, and;
b) Were the appeal to be determined by the Court of Appeal, it was anticipated that the losing party would seek leave to appeal to the Supreme Court and therefore it would save in both time and costs were the Supreme Court to retain the appeal.

At the outset, the Court set out the mechanics of the applicable process for such applications. The Court acknowledged that the mechanism provided for by Article 64.3.3° was in recognition of the fact that the Direction *was*… made without consultation with the parties to the appeals… and that the Court was entitled to allow that application 'if it is just to do so'.

The Court set out the following presumptions, which it held were applicable under the new constitutional regime:

> 11. The new constitutional regime, therefore, presumes:-
> (i) that the ordinary entitlement to have an appeal from a determination of the High Court continues but is now to be fulfilled by an appeal to the Court of Appeal; and
> (ii) that, [absent] exceptional circumstances, even where an appeal to this Court might be… warranted by reason of it raising an issue of general public importance or it being otherwise in the interests of justice that such an appeal be brought, it is presumed that such an appeal is better taken when the issues have been refined by the hearing of an appeal in the Court of Appeal… it does… have to be acknowledged that the Constitution itself recognise[s] that there may be exceptional circumstances where the latter imperative does not apply. That leap-frog jurisdiction is, however, expressly stated in the Constitution to be an exceptional one.

In light of these presumptions, the Court stated that the purpose of such an application is to enable a party to an appeal *to bring to the attention of the Court any special factors… which might persuade the court that… the appeal should be retained in this Court…*

The Court then turned to deal with the basis for the application before it:

> "[T]he reasons advanced… are concerned… with the suggestion that the appeal raises issues of general public importance. In substance, it is suggested that this… case… might well come back to this Court…

even if an initial appeal was… determined in the Court of Appeal."

Refusing the application the Court restated that there was a constitutional presumption that the right of appeal from the High Court is best met by an appeal to the Court of Appeal and, consequently, that there is also a presumption that appeals to the Supreme Court should ordinarily, in the absence of such exceptional circumstances warranting a leapfrog appeal, come from the Court of Appeal. The Court explained that the basis for this presumption was that a case involving an important issue of general public importance would benefit from the filtering process of an appeal to the Court of Appeal.

The Court reached the following conclusions, which provide useful guidance for future applications:

a) The fact that a decision of the High Court might give rise to an issue of public importance or otherwise involve questions where it might be in the interests of justice that an appeal be brought to the Supreme Court, does not, of itself, mean that it is appropriate for the Court to retain an appeal notwithstanding the initial direction that the appeal concerned be transferred to the Court of Appeal.
b) The Court will only cancel such a direction where the applicant brings to the attention of the court a significant countervailing factor which would justify the court in departing from its initial view.
c) Where the issue relied upon is the importance of the issues raised in the appeal, the Court will have regard to the fact that these issues may not arise following an appeal to the Court of Appeal or may have been refined and refocused to the ultimate benefit of a potential Supreme Court hearing.
d) Therefore, in an application pursuant to 64.3.3° (or a *leapfrog* application pursuant to Article 34.5.4°) where it is submitted that it is *clear and probable* that the case will return to the Supreme Court in any event due to the importance of the issues raised, practitioners must specify not just what those issues are, but:
    I. The basis upon which it is claimed that those issues will not fall away in the course of an appeal to the Court of Appeal, and;
    II. Why it is claimed that those issues might not be better clarified or focused by an intermediate appeal.
e) Alternatively, there may be cases where other compelling issues, such as urgency or the course of the proceedings to date, might warrant the Supreme Court determining that it was in the interests of the efficient administration of justice that the important point potentially arising be kept for determination without the benefit of an intermediate appeal.

Abama & ors v Gama Construction Limited & anor – 26th February 2015

An application for an Order under Article 64.4.1° that an appeal, which had not been included within a class of appeal to be transferred, be transferred to the Court of Appeal on the basis that it was logistically prudent in circumstances whereby related proceedings were before the Court of Appeal

The Appellants had filed a Notice of Expedited Appeal in the Court of Appeal in respect of a linked High Court decision granting the reliefs sought by the Plaintiffs in respect of an interim motion. The Appellants submitted that *the* issues raised in relation to the Respondents' application… were… at the heart of the Appellants' Supreme Court Appeals. Therefore… it was argued… that it would be in the interests of justice for the appeals to be heard together, as it would allow for the most expedient determination of the issues before the Court.

The Court stated that the fact that there are two appeals involving the same or similar parties, facts or issues does not necessarily mean that it is in the interests of the administration of justice that both appeals be heard together, either in the Court of Appeal or the Supreme Court. The Court held that the critical factor is the consideration of whether the interests of the administration of justice would require that the two appeals be heard, insofar as possible, by the same judges. Even if both Appeals were before the same court, in the absence of such a compelling reason the Court stated that it would be difficult to see why both appeals ought to be heard by the same court.

The Court stressed that the interests of the administration of justice involve a saving of court time or minimizing the risk of inconsistent decisions every bit as much as they involve the interests of the parties. Where there is a significant benefit to be gained by reducing the risk of a different approach being perceived to have been adopted, this would require much more than an overlap in the parties, issues or factual background to the proceedings. The connection must be sufficiently close that the judges hearing a second appeal would obtain a significant benefit from having heard the first.

This determination provides a focused indication of what must be established by applicants seeking to obtain directions to have related matters travel together within the new appellate structure

Barlow & ors v Minister for Agriculture Food and Marine & ors – 26th February 2015 (see also *Child Family Agency v JD*, 19th May 2015)

An application for leave to appeal directly to the Supreme Court under Article 34.5.4° (a Leapfrog Appeal)

This was the first application for *leapfrog leave* to come before the Court. The Court stated that any consideration of the broad principles outlined at that early stage must be taken as being tentative.

The First *Barlow* Principle

The first broad principle established was that it is a pre-condition of Article 34.5.4° that the criteria applicable in

an ordinary leave application must be satisfied in a leapfrog application. Therefore, before any additional factors are considered, the court must be satisfied that the case involves a matter of general public importance or that there is some other reason requiring that the interests of justice be met by such an appeal.

The Second *Barlow* Principle

If the basic constitutional threshold of public importance or public interest is satisfied the Court must then consider the additional requirement that, in the words of Article 34.5.4°, there are exceptional circumstances warranting a direct appeal to the Supreme Court.

Before considering what might constitute such exceptional circumstances, the Court noted that some assistance might be found in its earlier determinations, which held that appeals should ordinarily go to the Court of Appeal:

> "Put colloquially, Fox asks the question as to whether it truly is the case that an appeal to this Court is likely to arise anyway and further whether, even if it is, the appeal is likely to "look the same" when it gets to this Court."

When answering this question, the Court held that regard must be had to cases on opposite ends of the spectrum. On one end, there is a single-issue case involving a legal issue clearly meeting the constitutional threshold. The case at that end of the spectrum might be described as a single issue case with clearly identified arguments where a second appeal to… the Supreme Court… would be likely to involve only a rehash of the arguments which would be made to the Court of Appeal. However, on the other end of the spectrum are cases in which the issues [that] might arise on appeal would have been many and varied, including questions of the sustainability of the facts found by the trial judge or routine questions concerning whether the trial judge had properly applied well settled law to the circumstances of the case. In such a case, the Court held that:

> "Even if… there might be a point, or points, which might ultimately be considered as possibilities for meeting the constitutional threshold for an appeal to this Court, it would be difficult to see how the process of bringing such a case to final determination would not be significantly improved by an appeal to the Court of Appeal."

The Court noted that the further one gets… from the 'single important issue of law' case, the more weight has to be attached to the risk that the overall appellate process might be impaired by departing from the default position of an appeal to the Court of Appeal. It is this balancing of factors that will likely fill the central role in the test to be applied by the Supreme Court in all leapfrog applications.

Exceptional Circumstances

The Court stated that it would be both *wrong and dangerous* to attempt at that early stage to identify an exhaustive list of potentially exceptional circumstances, but proffered two obvious circumstances which it felt could be held to be exceptional.

Firstly, the Court indicated that it was prepared to accept, at the level of principle, that there may be cases which solely due to the issues or questions involved would be rendered exceptional. However the Court was careful to point out that this was very much subject to the factors referred to in *Fox*, regarding the refining and focussing of issues. Therefore, it is absolutely clear that not every case meeting the basic constitutional threshold for leave to appeal to the Supreme Court can be regarded as exceptional.

The second criteria, which the Court anticipated may arise, is urgency. The Court stated that:

> "There clearly will be cases where… a clock in the real world is ticking. In such cases, even if there may be perceived to be some… advantage to… an intermediate appeal, the balance may favour a direct appeal to this Court, precisely because the downside of any delay… would be disproportionate in the circumstances of the case."

It is clear then that circumstances could arise whereby the Supreme Court would find that, notwithstanding the fact that the Court takes the view that the issues may benefit from the filtering process of an initial appeal to the Court of Appeal, the element of temporal urgency renders the matter one appropriate for a *leapfrog* appeal.

The Balancing Act and Applicable Test for *Leapfrog Leave*

The Court set out the applicable test, which can be summarised as follows:

a) Has the constitutional threshold for an appeal to the Supreme Court been met;
b) If so, can it be said that there are exceptional circumstances, either deriving from the nature of the appeal itself or factors such as urgency, that justify a leapfrog appeal, and;
c) If such circumstances do exist, the Court must then conduct the balancing exercise between the extent to which, on the one hand, there may be a perceived disadvantage in not going through the default route of an appeal to the Court of Appeal and, on the other hand, any disadvantage to the Courts or to the parties in respect of trouble and expense, or in respect of the resolution of urgent proceedings, by running the risk that two appeals will ultimately be necessary in any event.

Importantly, the Court stated that there could only truly be a saving of time and expense for both the courts and the parties, if it is likely that there will be a second appeal irrespective of the decision of the Court of Appeal. Clearly, this of itself will not be a ground sufficient for the granting of a leapfrog appeal.

Other Considerations – Tactical implications

The Court also addressed a number of issues which should

be considered by a party who contemplates bringing an application for *leapfrog leave*.

Limitation of grounds of appeal

The Court noted that while ordinarily a party would be entitled to raise any arguable ground of appeal at the Court of Appeal, there may be grounds of appeal… which would not meet the constitutional threshold and which, could not, therefore, be pursued… at the Supreme Court.

The Court did however acknowledge that there may be cases whereby the interests of justice would require that a particular point be permitted to be canvassed… even where that point might not, of itself, meet the constitutional criteria of importance. The Court further noted that the precise application of the "interests of justice" criteria had not yet been the subject of a detailed consideration by the Court.

'Doubling up' – A stay at COA to facilitate a *Leapfrog* application

The Court noted that by virtue of section 9 of the Court of Appeal Act 2014, there is no reason in principle why a party cannot file a broad notice of appeal before the Court of Appeal, seek to have that application stayed pending an application to… the Supreme Court… for a leapfrog leave, and, thus retain its entitlement to run its case before the Court of Appeal should it fail in its application for leave to… the Supreme Court.

Respondents who wish to affirm judgment on further grounds

The Court highlighted the difference between the rules set out at Order 58, rule 18(1)(d) and 18(3), which provide for situations whereby a respondent wishes, on the one hand, to contend that the judgment or order appealed from should be affirmed on grounds other than those set out in the judgment or order of the court below, **or**, on the other hand, seeks to vary the decision or order of the court below (i.e. to cross-appeal).

The Court felt that it was:

> "[I]mportant to emphasise that a party who is content with the result of either the High Court (in the case of a leapfrog appeal) or the Court of Appeal (in the case of an ordinary appeal) can raise any further or different grounds justifying the ultimate decision which it wishes to stand over simply by including the relevant statement in the respondent's notice. On the other hand, a party who wishes to urge that the ultimate result of the case should be different must itself seek leave to appeal in the ordinary way. "

The Court further stated that:

> "One of the issues which… may well have to… [be]… addressed… [are] the circumstances in which the interests of justice might require allowing leave to cross appeal on a ground or in relation to a matter in circumstances where the issues sought thereby to be raised would not, on a standalone basis, justify granting leave to appeal to that party were it the appellant."

The Court ultimately took the view that at least some of the issues satisfied the basic constitutional threshold, or were 'significantly important'. The Court was further satisfied that the lesser ancillary issues identified were 'sufficiently linked' to the core issues to render it in the interests of justice that such issues should also be dealt with by the Supreme Court.

The Court was willing to accept that there was 'some reasonable degree of urgency'. In those circumstances the Court was required:

> "T]o balance the potential advantage (which the court was satisfied was relatively limited…) of a first appeal to the Court of Appeal with the disadvantage of putting the parties to the potential expense and effort of two appeals in circumstances where there might be only a limited advantage to that course of action."

Ultimately the Court held… that, for present purposes, it should on balance regard… the… case as exceptional and grant leave to bring a leapfrog appeal on the grounds sought.

In a later determination, also in *Barlow*, the Court gave leave to bring a cross-appeal on costs while pointing out that that issue would not have justified leave on a standalone basis.

'Standard leave applications' – *Dowling*, *O'Donnell* & *Reddington*

Dowling & ors v Minister for Finance (20th April 2015), *Governor and Company of the Bank of Ireland & anor v O'Donnell* (28th April 2015) and *Director of Public Prosecutions v Reddington* (19th May 2015) were all applications for leave to appeal from the Court of Appeal. Again, in each Determination, the Court noted that as both appellate courts were in a transitional stage, consideration of the principles set out must at this point be tentative, and that the starting point must be a consideration of the relevant provisions of the Constitution.

In each Determination, the Court refused leave. While there is less to be gleaned from these standard leave applications by way of general principles, there are a number of discreet points which can be identified.

Reluctance to interfere with Case Management decisions

In *Dowling,* the Appellants sought to appeal a decision refusing *'an emergency priority hearing*'. Refusing the application, the Court stated that it would be extremely slow to interfere with the important discretion of the Court of Appeal in its case management under the new rules. The same point was made in *O'Donnell*, in relation to a proposed appeal against the refusal of the High Court to adjourn the proceedings.

Limited leniency regarding inefficient or insufficient paper work

Since the first Practice Direction was published, the new appellate courts have made it clear that the efficiency of the new structure will be entirely dependent on the strict implementation of the rules governing the efficient filing of

paperwork. In *Reddington,* the Court restated how important these rules are:

> "It is the responsibility of an applicant to file the appropriate papers… As this is a time of transition… the Court was lenient… However, it must be stressed that papers filed on an application should be in order, and that the Court will consider the application on the papers filed."

It is clear that parties will be limited to the documentation that has been put before the Court, as provided for by Order 58.

In *McKeogh v Doe,* the Court specially listed the matter for mention in advance of the hearing of the appeal, due to prior inadequacies in respect of the papers and, in particular, the books of authorities, which did not comply with practice direction SC16 and also the Statement in respect of matters arising from the implementation of the new Supreme Court rules and statutory practice direction. Upon finding that the papers were still not in compliance, the Court removed the case from its list and made an order for costs thrown away against the Solicitors for the relevant Defendant, which the Court valued at €15,000 plus VAT.

Recently the Court was critical of the papers filed by the DPP in *DPP v Maher* and also made a costs Order.

Grounds of Appeal must have been substantially addressed at hearing

In *Reddington,* the Court stated that it would not generally be permissible to seek to appeal a decision on a ground arising out of an issue which was not materially addressed at the hearing in the lower court. It is clear that the Supreme Court is alert to scenarios in which it considers practitioners to be scouring written submissions and transcripts for issues which, although strictly speaking raised, were not matters which were robustly addressed at the High Court or the Court of Appeal.

Costs of the leave application

The issue of costs was addressed in a subsequent Determination in *Dowling*. The appellants had been refused leave to appeal from the Court of Appeal and an application for costs was made by both the respondent/defendant and the notice parties to the appeal. The costs application was made pursuant to paragraph 15(a) of Practice Direction SC16.

Despite making no order for costs – as it was the first such application in the new structure, the Court held that generally, the reasonable costs of resisting an unsuccessful application would be awarded to the respondent.

More Recent updates, *Walshe* and *Lyons*

While it may appear self evident, the recent Determinations in *Lyons v. Ireland, The Attorney General and Ríona Ní Fhlanghaile, Referendum Returning Officer* and *Walshe v. Ireland, The Attorney General, The Referendum Returning Officer and The Referendum Commission* (16th September 2015) illustrate that it is not enough that a potential appeal to the Supreme Court involves a subject matter that is in itself constitutionally important, but rather there must be some merit in the grounds of appeal themselves in order for a case to meet the threshold. In both *Lyons* and *Walshe,* clearly the issue itself was of public importance (the result of the marriage equality referendum). However, the Court held that there was no substance to the points raised by either applicant.

The Determinations in both *Lyons* and *Walshe* also clarify that the filing of a Notice seeking Leave to Appeal to the Supreme Court does not in itself constitute or act as a Stay on the judgement from which leave is sought to appeal. A stay must be sought at the Court of Appeal, as it would be in any other court.

Conclusion

It is clear that practitioners will have to inform themselves of the requirements of the new appellate structure. It is also evident that of paramount importance are the new requirements regarding the form of the required papers.

The Determinations discussed above provide only a broad overview of the factors that will likely be addressed in the jurisprudence which will quickly develop in the reformed Supreme Court. ■

A Tale of Two Houses

Sharon Hughes BL

Introduction

On 18th May 2015, the Court of Appeal handed down its judgment in *Teresa Ennis v. The Child and Family Agency and Jarlath Egan*. Mr Justice Kelly gave the lead judgment, reversing the decision of Mr Justice Hogan at (2014) IEHC 440, and allowing the appeal of the Child and Family Agency, who were held to be not liable in negligence for the criminal damage to a property by individuals who were neither its servants, agents or under its control.

On the facts as found by the High Court, the Court of Appeal held that there was no breach by the CFA of a duty of care extending to third parties and further there was no breach of any such alleged duty.

Findings of Fact

Ms A was placed into care at the age of two years old and was committed to the care of the Health Service Executive (HSE) by a District Court order in August 1998.

During August of 2004, Ms A, then aged 17, began living in a HSE residence, known as Shannon Cottage. With her 18th birthday approaching, Ms A was anxious to live independently and the HSE gave consideration to the idea of assisting her with this move. Reports were compiled in 2004 and 2005 by Miss A's *guardian* a*d litem*; the 2004 Report expressed concern over Miss A's suitability for independent living, yet these concerns were absent in the 2005 Report.

The statutory power to assist Miss A, once she reached the age of 18, is contained within section 45(1) of the Child Care Act 1991 which provides that

> "where a child leaves the care of (the HSE, it) may, in accordance with subsection (2), assist him for so long as the (HSE) is satisfied as to his need for assistance and that he has not attained the age of 21";

Subsection (2) limited the HSE in how it could help Miss A.

The Court of Appeal held that the trial judge did not take sufficient consideration of the un-contradicted testimony that section 45 (2) (e) was the only available option, namely to co-operate with housing authorities in planning accommodation for Miss A on reaching the age of 18 years.

What is important in this case is that the HSE exercised its statutory discretion to assist Miss A and by 2nd September 2005 she had moved into accommodation known as No. 10 Percy Cottages. By the middle of September 2005, there was a mutual agreement between the landlord, Miss A and the HSE that the lease should be terminated due to a series of noise complaints by neighbours and damage done to the property following an alleged break in on 24th September.

Both courts agreed that the lease had been terminated on Friday 30th September 2005 as No. 10 was vacated and the keys were returned to the Landlord.

Night in question

Following the exit from No. 10 Percy Cottages, HSE staff returned with Miss A to a HSE residence known as Retreat Lodge. At some point, she left with her sister and at 11.15pm, HSE staff contacted Miss A, who informed them that she would not be returning to the Lodge. At 12.50am, Miss A phoned the staff to ask if her sister could be collected but made it clear that she would not be returning. The HSE staff, in the company of the Gardaí, went to meet her but she refused to return with them.

Athlone Fire Service received a call at 5.01am informing them that No. 10 was on fire; Retreat Lodge were informed of the fire at 5.50am by the Gardaí and that Miss A was detained at their Station.

At some time between the HSE staff visiting Miss A, and the Fire Service's call at 5.01am, Mr D and Mr C broke into No. 10 Percy Cottages with Miss A as company and set fire to a mattress upstairs in the property. Miss A was downstairs at all material times. The fire spread to the rest of the house, and to the adjoining property, No 11. Both Mr D and Mr C admitted to causing the fire in a statement to the Gardai and this has been accepted by both courts as being the most likely explanation for the fire.

The owner of No. 11 brought proceedings against the HSE and the landlord, a Mr Egan. The trial judge found no basis for bringing a claim against the landlord and this appeal solely concerns the finding against the HSE and the award of damages in the sum of €75,414.00.

The High Court's Decision

The High Court found that a special relationship existed between the HSE and Miss A at the time of the fire and that this necessarily entailed a duty of care. In order to reach this assessment, Justice Hogan relied upon several notable authorities on third party liability

As the HSE were acting pursuant to the statutory duty contained within s.45 of the Childcare Act, this created a special relationship between Miss A and the HSE. Furthermore, as the HSE assisted Miss A into No. 10 and had monitored her within, a duty of care was indeed owed to her.

Mr Justice Hogan likened the special relationship to that shared between prison officers and detainees. He relied upon the seminal House of Lord's decision in *Dorset Yacht Co. Limited v. Home Office (*1970) AC 100. The Home Office were held vicariously liable in negligence for certain prison officers who held in custody three young offenders on an island near Poole harbour in Dorset. The three young offenders escaped one night, boarded a yacht and caused it to collide with another yacht nearby.

The trial judge also relied upon the case of *Vicar of Writtle v. Essex County Council* 77 LGR 656 which held a local authority liable for a fire to a church by a 12 year old boy

who was placed into a community home by them. Section 24(2) of the Children and Young Person's Act 1969 created a parental responsibility between the Local Authority and the young boy; their duty was that of a reasonable parent to control their child. The Local Authority's failure to inform the community home of the boy's fire raising propensities meant that they had acted unreasonably as by informing them, closer supervision over the boy could have been organised. Mr Justice Hogan considered the operation of s.24(2) of the 1969 Act to be similar to that under which the HSE were acting.

In the *Dorset Yacht* case, as all of the escaping detainees had criminal records and a history of absconding, the 'three officers knew or ought to have known that these trainees would probably try to escape during the night, would take some vessel to make good their escape and would propably cause damage to it or some other vessel'[1]. Lord Reid held that it was 'a likely consequence of their neglect of duty' that damage would occur to other yachts nearby. Similarly, the 12 year old boy in the *Vicar of Writtle* case had fire starting propensities and so it was the "very kind of thing" that could happen once he was left to his own devices. Mr Justice Hogan considered that Miss A's history of absconding and irresponsible behaviour during the tenancy should have put the HSE on notice that she could return to No.10 once vacated and cause damage within. He considered that the fire therefore ought to have been reasonably foreseeable to the HSE by relying upon the *Dorset Yacht* case as well as the *Vicar of Writtle* case.

The High Court held that the termination of the lease prior to the fire did not break the chain of causation as by facilitating Miss A to move into No.10, the CFA should have been aware that she could return.

Mr Justice Hogan concluded with an analysis of whether policy considerations warranted a finding that the HSE owed Miss A a duty of care. He relied upon *Glencar Exploration plc v. Mayo County Council (No2.)* (2001) 1 I.R. 84 which concerned an appeal from a decision to dismiss a claim for damages which was brought against Mayo County Council arising out of the imposition of a ban by it on gold mining on Croagh Patrick. This ban was held to be *ultra vires* the Council. The Supreme Court was required to decide whether the County Council owed the Plaintiff a duty of care in the way in which it had imposed the ban; The Supreme Court held that it did not owe a duty a care.

Furthermore, the just and reasonable test as set down by O'Donnell J. in *Whelan v. Allied Irish Banks* (2014) IESC 3 called for the HSE to owe a duty as "it would expose innocent and absolutely blameless citizens such as Ms. Ennis... to the risk of serious damage to (her) property"[2]. Mr Justice Hogan disagreed with Counsel's argument that the case of *X (minors) v. Bedfordshire County Council (*1995) 2 A.C. 633 merited consideration in determining whether the HSE ought to owe a duty of care. The House of Lords in this case declined to impose a duty of care on similar local authorities who take children into their care as there was a real risk that the local authorities would be dissuaded from exercising their statutory discretionary powers.

The Court of Appeal Ruling

Mr Justice Kelly did not consider that the HSE owed Miss A any duty of care as there was no special relationship between them at the material times. Both the *Dorset Yacht* and *Vicar of Writtle* cases were so far factually removed from the case at hand that they could be of no relevance whatsoever. In fact, they could only lead to a finding that the HSE did not owe any duty of care to Miss A.

The prison officer analogy was considered to be inappropriate as at all material times, Miss A was neither in the custody of the HSE nor had they any powers of detention over her. Furthermore, s.45 of the Childcare Act 1991 was not comparable to s.24(2) of the 1969 Act, as the HSE's abilitiy to assist Miss A was limited to 'co-operating with housing authorities in planning accomodation for children leaving care'. Once Miss A reached the age of 18, the HSE ceased to have any powers of detention over her and all they could do to assist her was to co-operate in organising accomodation. The HSE had indeed done this but once the tenancy was terminated, so was their power. Neither the HSE nor the gardai could compel Miss A to return to Retreat Lodge on the night in question.

The Court of Appeal found little logic in the High Court's finding that the HSE staff 'used their very best endeauvours well beyond the call of duty to assist Miss A'[3] yet were in breach of their duty to her.

The Court of Appeal also disagreed that Miss A returning to No. 10 on the night in question and setting fire to the property, causing damage to No. 11, was the "very kind of thing" likely to happen. Miss A was a troubled individual but had displayed no fire starting tendencies. The damage to No. 11 could not have been reasonably foreseeable. Mr Justice Kelly also pointed to the termination of the lease and the fact that Miss A did not even cause the fire.

The Court of Appeal reiterated that *Glencar* is the governing authority in establishing legal liability and that the four requirements to establish liability are reasonable foreseeability; proximity of relationship; countervailing public policy considerations and the justice and reasonableness of imposing a duty of care.

Kelly J. was also mindful of the concerns expressed in *X (minors) v. Bedfordshire County Council* (1995) 2 A.C. 633 and he warned that "a too ready imposition of a duty of care on the (Child and Family Agency) could have a stultifying effect on it in the discharge of its functions"[4].

Conclusion

The Court of Appeal allowed the appeal as there was no basis in law for the imposition of a duty of care on the CFA since the individuals who caused the fire to No.11 were neither its servants or agents or persons to whom they owed a duty of care, by virtue of a special relationship. It appears that Mr Justice Kelly has restated the law in relation to liability for third parties by taking a commonsense and practical approach to issues regarding the duty of care, foreseeability and policy considerations. ■

1 (1970) A.C. 1004, 1026

2 *Teresa Ennis v. Health Service Executive and Jarlath Egan* (2014) IEHC 440, p108.

3 Ibid, p101.

4 *Teresa Ennis v. The Child and Family Agency*, No. 15COA/2014

99|9: Nine Issues with Section Ninety-Nine

James Dwyer BL*

Introduction

Section 99 of the Criminal Justice Act 2006 was commenced nine years ago.[1] It provided for the codification of the suspended sentence which was a creature of the Irish common law.[2] The Court of Criminal Appeal remarked that the section "*…can be read as no more than a restatement in statutory form of the position at common law rather than as the creation of a statutory jurisdiction*".[3] However the section introduced some innovations, in particular the discretion to partially revoke a suspended sentence.

The section was amended in 2007 to change the process of revocation.[4] In the section as promulgated, where an accused was convicted and sentenced for an offence in breach of a bond, he was then remanded to the court that suspended the sentence for revocation. The 2007 Act reversed this providing that revocation occurs between the conviction and the sentence for the triggering offence so that the sentences are imposed in chronological order.

The section was further amended in 2009 to provide that only an offence committed within the currency of the bond would trigger a revocation.[5] Previously there was an anomalous situation where the section required a revocation hearing where an accused was convicted of an offence during the currency of a bond even if the offence committed pre-dated the bond.

Section 99 and remanding to the next sitting for revocation

Where a defendant is convicted of an offence during the currency of a bond, s. 99(9) mandates remanding him to the "*next sitting*" of the court which imposed the suspended sentence. In *DPP v Carter*,[6] the defendant was before the Dublin Circuit Criminal Court listed for sentence. He had been convicted during the currency of a suspended sentence imposed by Dublin Metropolitan District Court. Accordingly the defendant was remanded under s. 99(9) to the District Court for revocation of sentence. The District Court stated a case in relation to whether the revocation hearing could proceed where the defendant had not been remanded to the sitting of the court immediately following that of the Circuit Court, notwithstanding the section providing that the court was required to remand to the 'next sitting' of the court which imposed the suspended sentence.

The DPP argued that the provision was directory rather than mandatory and that in any event a failure to remand the defendant to the next sitting had no effect on the validity of the procedure before the District Court. O'Malley J. disagreed and held that the failure to remand to the next sitting was fatal to the statutory revocation process:

> "The question here is ultimately one of jurisdiction. The issue is not whether the defendant was properly brought before the District Court, but whether a lawful foundation had been laid for the exercise by the District Court of its powers under subs.(10) of the Act. It seems to me that this issue must be approached on the basis that the powers in relation to suspended sentences are now entirely governed by statute, and that the statutory power to revoke such a sentence under subs.(10) of the Act depends on a valid order having been made under subs. (9). I propose therefore to follow *Devine*[7] and hold that in this case the District Court had no jurisdiction to deal with the applicant. I do so on the basis that *Devine* is a decision of the Court of Criminal Appeal directly concerned with the proper interpretation of the statutory provisions in issue in this case."[8]

A five-judge Supreme Court unanimously upheld the High Court decision.[9] The appeal in *Carter* was heard together with a consultative case stated from Dublin Circuit Criminal Court called *DPP v Kenny* in which an accused had been remanded to that Court under s. 99(9). At the time of the remand order,

* This article was originally a paper delivered to the Irish Criminal Bar Association Conference in Tullamore on July 11th 2015 but has been updated to take into account developments since then.

1 It was commenced on October 2, 2006 by S.I. No. 390 of 2006–Criminal Justice Act 2006 (Commencement) Order 2006.

2 See Osborough, 'A Damocles Sword Guaranteed Irish' (1982) 17 *Irish Jurist* 221.

3 *per* Finnegan J. in *People (DPP) v Gordon Ryan* [2009] IECCA 21; unreported Court of Criminal Appeal, March 20, 2009, at p. 13 of the judgment.

4 by s. 60 of the Criminal Justice Act 2007 commenced on May 18, 2007 by S.I. No. 236 of 2007–Criminal Justice Act 2007 (Commencement) Order 2007.

5 by s. 51 of the Criminal Justice (Miscellaneous Provisions) Act 2009 commenced on August 25, 2009 by S.I. No. 330 of 2009–Criminal Justice (Miscellaneous Provisions) Act 2009 (Commencement) (No. 3) Order 2009.

6 [2014] IEHC 179; unreported High Court, O'Malley J. March 21, 2014.

7 *People (DPP) v Devine* [2011] IECCA 67, unreported, Court of Criminal Appeal, October 19, 2011

8 [2014] IEHC 179; unreported High Court, O'Malley J. March 21, 2014, at para. 39.

9 *DPP v Carter, DPP v Kenny* [2015] IESC 20; unreported Supreme Court, March 5, 2015.

the date to which the remand was made was the next sitting. However in the interim, unscheduled sittings were convened thus rendering the sitting remanded to not be the 'next sitting'. The Supreme Court held that the scheduling of the interim dates did not retrospectively invalidate the order:

> "In *Kenny* it appears to the Court that there has been compliance with the provisions of section 99(9). The validity of the order must be judged by the circumstances as of the date of the order. Section 99(9) does not require that a person be returned to a sitting of the court which has not yet been fixed or scheduled in accordance with the Circuit Court rules.…The fact that in the intervening time it so happened that the Circuit Court sat on a number of occasions had no effect on the validity of the District Court Order, and therefore did not affect the jurisdiction of the Circuit Court to proceed."[10]

In his judgment, Hardiman J. remarked that it is the duty of the prosecutor to ascertain when the next sitting of the court that imposed the suspended sentence is.[11] This will not always be clear. With the District Court where the offence is summary the defendant would need to be remanded to the next sitting of the appropriate District Court area. However, where the offence is indictable or the defendant is in custody, any area within the District Court district would have jurisdiction and there may be an earlier sitting which has jurisdiction to deal with the case. This is further complicated where there are a number of offences.[12]

Section 99 and remanding to the next sitting for sentence

When a revocation hearing occurs, there is a requirement under s.99(10A) to remand a defendant back to the original court for a consecutive sentence to be imposed in relation to the breach offence. Whereas the jurisdiction to revoke a sentence derives from the section, the jurisdiction to sentence a person who has been convicted of an offence does not. In *Carter*, O'Donnell J. made the following *obiter* observations on the issue:

> "However, it should be noted that this reasoning would not necessarily apply in the same way to a remand from a reactivating court under section 99(10) to the convicting court under section 99(10A). That court is exercising its power to impose sentence in respect of a matter properly before it. The jurisdiction to do so comes from the court's jurisdiction to try the offence. Trial, adjudication and sentence are normally indivisible parts of the administration of justice. Accordingly, the power to impose a sentence does not appear to be created or conferred by section 99(10A), or to be dependent upon it That section at best merely provides a mechanism to secure the individual's attendance before the court."[13]

Therefore where there has been a failure to properly invoke the revocation jurisdiction, there remains a jurisdiction and a requirement that a defendant be sentenced for the offence of which he has been convicted.

Section 99 and revisiting the original sentence on a revocation hearing

In *DPP v Vajeuskis*,[14] the defendant was sentenced in the District Court to four months imprisonment which was suspended for two years under s. 99(1) for various road traffic offences. He was subsequently convicted of other offences and remanded back to the court for revocation under s. 99(10). At the revocation hearing, the defendant argued that the original sentence was invalid as the period of suspension could not exceed the length of the sentence and in particular could not exceed the maximum sentence which could be imposed for that offence.

On a case stated to the High Court, the DPP argued that the original sentence could not be revisited on a revocation application and it was therefore not a matter before the District Court. Peart J. agreed:

> "I agree with [counsel for the DPP's] submission that on the revocation application it is not open to the District Judge who imposed the suspended sentence to enter then upon the question of whether the sentence imposed is a lawful one. That question must be dealt with by way of an appeal or else by way of judicial review. As far as the sentence itself is concerned, there could be no question of the judge reconsidering the sentence. To that extent he is functus officio as far as any reconsideration of the sentence is concerned. In my view it would follow that when he is considering whether it would be unjust to revoke the suspension because another offence has been committed during the period of suspension, he must disregard for that purpose any question of whether the suspended sentence was lawfully or appropriately imposed. He must look to other facts and circumstances when deciding whether it would be unjust to revoke the suspension, and it would not be appropriate to set forth in any manner whatever the variety of facts and circumstances which might render it unjust to revoke, as each case will be individual as is each convicted person."[15]

Therefore it appears not to be open to a judge in a revocation hearing to alter the original sentence by for example lengthening and suspending it further or placing the defendant on a new bond.[16]

In *Kiely v DPP*,[17] the applicant was the subject of various sentences amounting to a six year suspended sentence imposed by the Circuit Court. He was subsequently convicted of public order offences in the District Court and remanded

10 *ibid.*, *per* O'Donnell J, at para. 37 of his judgment.
11 at para. 23 of his judgment.
12 See Order 13, District Court Rules.
13 *ibid.*, at para. 39 of his judgment.
14 [2014] IEHC 265; unreported High Court, Peart J., May 23, 2014.
15 *ibid.*, at p. 15 of the judgment.
16 There is however a jurisdiction derived from s. 99(6) for a probation officer to apply at any time before the suspended sentence expires for further conditions to be added to the suspended sentence.
17 [2008] unreported Court of Criminal Appeal, February 19, 2008.

to the Circuit Court for revocation. The Circuit Court reactivated four of the six years and suspended the final two year sentence. The applicant appealed against the decision to reactivate four years of the sentence. The appeal was dismissed but Denham J. remarked that in the revocation hearing, the judge had a "*right to vary the original sentences*".[18]

The remarks are *obiter* as the issue of varying the original sentence appears not to have been litigated in that appeal. *Kiely* was not opened to the High Court in *Vajeuskis*. It is submitted that the strong dictum in *Vajeuskis* is unaffected by the *obiter* remarks in *Kiely* and a court in a s. 99(10) hearing cannot revisit the merits of the original sentence and can only consider whether or not to revoke the original sentence imposed.

Section 99 and suspension for a period longer than the sentence imposed

In *People (DPP) v Hogan*,[19] Keane C.J. made the following remarks in relation to suspending a sentence beyond the length of the sentence itself:

> "The court does not want to lay down any hard and fast rule in relation to this. It may be possible to envisage circumstances in which that is an appropriate course, namely, to suspend the sentence for a longer period than the sentence actually imposed. But it would need special circumstances because after all, a person who is the subject of a suspended sentence and then spends three years or whatever period it is without getting into any trouble of any sort with the law and takes the chance that he is being offered by the court and honours, as it were, that chance that he is being given, is entitled, in general terms, to have a line drawn under the matter at that stage. The court is not satisfied that, in general, it is a desirable practice to do what was done in this case and suspend it for a longer period than the actual term imposed."[20]

In *DPP v Vajeuskis*,[21] the DPP argued this approach had been superseded by the introduction of section 99 by the Oireachtas. Peart J. agreed:

> "It follows also in my view, in so far as it is relevant at all (but it may be helpful generally to say this), that Judge Hughes was not restricted as to the length of time for which he could suspend the sentence of four months which he imposed, and that it is not the law of this State that a sentence may not be suspended for any period longer than the sentence itself. The Act is silent in that regard and as to the maximum length of any such suspension. That is what the Oireachtas has decided the law should be."[22]

These comments are *obiter* but seem to follow from the wording of s. 99(2) which refers to a "*period of suspension*" without linking that phrase to the length of the sentence so suspended.

Section 99 and appealing against the triggering conviction

In *Muntean v Hamill & DPP*,[23] the accused was convicted of an offence before the District Court. The offence was committed within the currency of a suspended sentence imposed in another court. The accused was remanded under s. 99(9) to that other court for sentence.

Meanwhile the accused sought to prosecute an appeal to the High Court by way of case stated against his conviction. The respondent judge refused to state a case on the basis that he had not yet sentenced the accused (as the s. 99(9)-99(10A) process was not complete), The matter had not therefore been "*determined*" by him as provided by s. 2 of the Summary Jurisdiction Act 1857 thus the case was not yet ripe for appeal. McCarthy J. refused *certiorari* to quash the refusal of the respondent judge. He held that the matter had not been finally determined and thus an appeal could not yet be prosecuted: "*Thus learned District Court Judge had jurisdiction to remand the applicant pursuant to s. 99 of the 2006 Act and indeed, a duty to do so.*"[24]

McCarthy J. based his decision largely on the earlier Supreme Court decision in *State (Aherne) v Cotter*.[25] There the Supreme Court underlined that an accused cannot prosecute an appeal *de novo* to the Circuit Court under s. 18 of the Courts of Justice Act 1928 against conviction alone: "*Section 18 of the Act of 1928 extended the right of appeal to all cases where any fine or any imprisonment was imposed, but it made no provision for appealing against conviction alone or penalty alone.*"[26]

The issue arose in the context of appeals *de novo* from the District Court to the Circuit Court under s. 18 of the Courts of Justice Act 1928 in *Sharlott v Collins*.[27] There the applicant was convicted in the District Court of an offence before the respondent. He had been the subject of a five-year suspended imposed previously in the Circuit Court. Both the offence and the conviction took place within the currency of the five-year bond. The applicant was remanded to the Circuit Court under s. 99(9). He also simultaneously sought to prosecute an appeal against the conviction alone. He sought prohibition to stop his revocation hearing before the Circuit Court pending his appeal.

Hanna J. refused the relief, holding that the District Court was obliged to remand the applicant under s. 99(9) to the Circuit Court and that an appeal to the Circuit Court could not lie against conviction alone. He held that the application was *quia timet* as the court could rectify any perceived injustice:

> "The applicant is apprehensive that the suspended sentence may be activated before he has the opportunity to pursue his appeal. Were he ultimately

18 *ibid.*, at p. 4, para. 6.
19 unreported Court of Criminal Appeal, March 4, 2002.
20 See also *McCarthy v Brady* [2007] IEHC 261; unreported High Court, de Valera J., July 30, 2007.
21 [2014] IEHC 265; unreported High Court, Peart J., May 23, 2014.
22 *ibid.*, at para. 18.
23 [2010] IEHC 391; unreported High Court, McCarthy J., May 11, 2010.
24 *ibid.*, at p. 12, para. 24.
25 [1982] I.R. 188.
26 *ibid.*, at pp. 196-197, *per* Walsh J.
27 [2010] IEHC 482; unreported High Court, Hanna J., December 21, 2010.

to succeed and to stand innocent of the District Court charge, he would undoubtedly suffer a grave injustice were the Circuit Court sentence in the meantime activated."[28]

In *DPP v Phyllis O'Callaghan*,[29] the issue arose in the context where both the triggering conviction and the suspended sentence had been imposed in Dublin District Court. The court referred to the right of appeal against a revocation under s. 99(12) and the mandatory terms of ss. 99(9)-(10A) and held that the issue could be dealt with by the Circuit Court in a manner which protected the defendant's right to a fair trial.

Section 99 and suspended sentences imposed by the Circuit Court on appeal

In *McCabe v Attorney General and another*,[30] the applicant argued that the section was unconstitutional. A suspended sentence was imposed on the applicant by the Circuit Court on appeal from the District Court. It was argued that the absence of an appeal against an order of the Circuit Court in a District Court appeal revoking a suspended sentence rendered the appeal protection provided for in s. 99(12) a nullity. Hogan J. held that the section was not unconstitutional but to seek to execute the revocation of a sentence imposed by the Circuit Court on appeal would be unconstitutional.

The Court of Appeal allowed the appeal holding that the Oireachtas in promulgating s. 99(12) had in fact given a right of appeal from a decision to revoke a suspended sentence in a District Court appeal under s. 99(10).[31] Section 18(3) of the 1928 Act precludes an appeal against any order made by the Circuit Court on appeal from the District Court under the section. Finlay Geoghegan J. pointed out that the s. 99(10) revocation is not an order appealed from the District Court and is distinct from the appeal itself. Accordingly there is a right of appeal to the Court of Appeal. The right of appeal is restricted to revocations under s. 99(10) but presumably applies equally to revocations under s. 99(17).

Section 99 and multiple revocations

One of the innovations of section 99 was to give a discretion to only partly re-impose a suspended sentence. Under the common law, a suspended sentence had to be re-imposed in its entirety in the event of a breach unless the breach was *de minimus*.[32] Where a sentence is partially re-imposed, it would appear reasonable that the remaining part which has not been re-imposed continues to be suspended. However the wording of the section suggests otherwise.

Section 99(10) provides that the court shall revoke the order unless it would be unjust to do so, "…*and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just*…". Therefore no subsequent revocation could take place as the sentence has already been revoked.[33] The *obiter* remarks of Denham J. in *Kiely v DPP*[34] seem to allow for the court to suspend the balance of a sentence partially revoked but such a jurisdiction is doubtful having regard to the dictum of Peart J. in *DPP v Vajeuskis*.[35]

Section 99 and the Court of Criminal Appeal

In *People (DPP) v Foley*,[36] the appellant was the subject of a suspended sentence imposed by the Circuit Court but modified on appeal. He subsequently offended in breach of the suspended sentence and the question arose as to which court he should be remanded under s. 99(9) to the Circuit Court or the Court of Criminal Appeal. The appellant argued it should be the Circuit Court largely because this would allow for the applicant to have an appeal against the revocation as envisaged by s. 99(12). On a s. 29 reference, the Supreme Court disagreed citing the plain meaning of the words of the section:

> "The words of s. 99, subsections (1), (9) and (10) of the Act of 2006, as amended, are clear and plainly establish a system by which a sentence may be suspended and this suspension subsequently revoked. The limited appeal from the CCA in such circumstances is not such a factor as to alter the clear wording of section 99(1)."[37]

The Court of Criminal Appeal has not been abolished. Section 3(2) of the Criminal Procedure Act 1993 continues to empower the court determine appeals against severity of sentence. Section 7A(3) of the Courts (Supplemental Provisions) Act 1961 (as inserted by s. 8 of the Court of Appeal Act 2014) provides as follows:

> "(3) Subject to section 78 (1) of the Act of 2014, there shall be vested in the Court of Appeal all jurisdiction which was, immediately before the establishment day, vested in or capable of being exercised by the Court of Criminal Appeal."

Section 78(1) of the Court of Appeal Act 2014 provides as follows:

> "78. (1) The Court of Criminal Appeal shall, as regards any proceedings before it that have been —
> (a) initiated before the establishment day, and
> (b) heard in full or in part by that Court before that day, continue to have jurisdiction in respect of the proceedings and accordingly the Court of Criminal Appeal may determine and pronounce judgment in respect of those proceedings."

28 *ibid.*, at p. 6, para. 19.
29 [2015] IEHC 165; unreported High Court, Faherty J., March 20, 2015.
30 [2014] IEHC 435; unreported High Court, Hogan J., September 29, 2014.
31 *McCabe v Governor of Mountjoy Prison* [2015] IECA 456, unreported Court of Appeal, July 22, 2015.
32 *People (DPP) v Stewart* unreported, Court of Criminal Appeal, January 12, 2004.
33 The issue has yet to be determined by the Superior Courts but this view has been taken by His Honour Judge Martin Nolan in the Dublin Circuit Criminal Court.
34 [2008] unreported Court of Criminal Appeal, February 19, 2008.
35 [2014] IEHC 265; unreported High Court, Peart J., May 23, 2014.
36 [2014] IESC 2; unreported Supreme Court, January 23, 2014.
37 *ibid.*, at paras. 52-53, *per* Denham C.J. (*nem diss.*).

Subsection (4) goes onto provide as follows:

> "(4) (a) For the purposes of subsection (1), proceedings shall not be taken to have been heard in part by reason only of the Court of Criminal Appeal…having heard an interlocutory application relating to the proceedings or unless the proceedings are confined to a procedural matter, the Court of Criminal Appeal… having heard any procedural application or motion relating to the proceedings.
>
> (b) Where, however, an order has been made by the Court of Criminal Appeal …in relation to an interlocutory application, procedural application or motion concerning proceedings which are subsequently determinable by the Court of Appeal, the order shall be binding on the Court of Appeal in respect of the issue which is the subject of the proceedings.
>
> (c) Paragraph (b) is without prejudice to any change of circumstance which may warrant a variation in the terms of the order referred to in that paragraph."

The determination of the appeal against severity of sentence cannot be described as an interlocutory application as the appeal was determined. Therefore it is arguable that in accordance with s. 78(1)(b), the jurisdiction of the Court of Criminal Appeal subsists. The issue has yet to be determined by a decision of either appellate court.

Section 99 and the non-severability of conviction and sentence

In *Harvey v Leonard and DPP*,[38] the applicant brought judicial review proceedings seeking *certiorari* to quash the order of the District Judge who had remanded the applicant pursuant to s.99(9). It was argued that there was no jurisdiction to remand him for revocation of a suspended sentence absent an order sentencing him as the conviction could not stand alone. The applicant had pleaded guilty to a summary offence in the District Court. It was disclosed that the applicant had committed the offence during the period of a suspended sentence and he was therefore remanded back before the original court that imposed the suspended sentence under s.99(9) (as amended).

The applicant argued that this was in excess of the court's jurisdiction as, in summary procedure, a conviction could not stand alone as a valid order divorced from penalty because of the principle of non-severability.[39] In refusing the application, Hedigan J. found that conviction and sentence occurred independently and the section did not offend the principle of non-severability:

> "The challenge is based on what I consider the mistaken view that conviction and sentence are so inextricably linked that nothing of substance can occur between them. That proposition cannot be correct. Experience over many years shows practitioners that District Judges regularly convict and put back for sentence. There may be sought probation or other reports or all manner of further evidence before sentence is imposed. The procedure contemplated by s. 99 is obviously different but nonetheless clearly occurring within the same hiatus between conviction and sentence. The reality in all such cases is that the accused has been convicted and awaits sentence. The wording of the Act could not be clearer and its meaning is also clear. The requirement on the District Judge is mandatory and the District Judge's actions were exactly in accordance therewith."[40]

In *McCabe v Governor of Mountjoy Prison*,[41] the applicant had received a suspended sentence in the Circuit Court (on appeal) for driving with no insurance. He was subsequently convicted of a public order offence in breach of the bond. He was remanded in custody under s. 99(9) to the Circuit Court for revocation. He brought an application for an enquiry under Article 40 of the Constitution. He argued that the section was unworkable as he could not be described as being a convicted person having regard to the non-severability of conviction and sentence.

Hogan J. held that the meaning of a person who was 'convicted of an offence' as provided for in the section was not the precise equivalent of a person who has been convicted and sentenced:

> "But, if, in general, the law (and specifically the statutory law) treats conviction and sentence as inseparable, this does not mean that this is so for all purposes or, more particularly, that the Oireachtas is not free to depart from these concepts. It follows that the meaning of the word 'conviction' has not been fixed unalterably by some sacred legal tablet of stone which has permanently abridged the capacity of the Oireachtas to give this word any different meaning, even in the plainly different legal context of the 2006 Act."[42]

The decision of Hogan J. (at least in relation to the issue of severance) was upheld by the Court of Appeal.[43]

Conclusion

The section has come to rival s. 49 of the Road Traffic Act 1961 in the amount of litigation it has triggered. As O'Donnell J. recently observed "*Only one thing is clear and beyond dispute: s. 99 is in need of urgent and comprehensive review.*"[44] ■

38 [2008] IEHC 209; unreported High Court (Hedigan J.), July 3, 2008.

39 *State (Sugg) v O'Sullivan*, Unreported, High Court (Finlay P), June 23, 1980, *State (O'Reilly) v Delap*, unreported High Court (Gannon J), December 20, 1985, *State (de Búrca) v Ó hÚadhaigh* [1976] 1 I.R. 85.

40 *per* Hedigan J., at p. 8 of his judgment.

41 [2014] IEHC 309; unreported High Court, Hogan J., June 3, 2014.

42 *ibid.*, at para. 15.See also *Murphy v Watkin*; unreported High Court, Moriarty J., July 11, 2014.

43 *McCabe v Governor of Mountjoy Prison* [2015] IECA 456, unreported Court of Appeal, July 22, 2015, in particular the judgment of Mahon J.

44 *DPP v Carter, DPP v Kenny* [2015] IESC 20; unreported Supreme Court, March 5, 2015, *per* O'Donnell J., at para. 1. of his judgment.

The Bar of Ireland Retirement Trust Scheme – The Benefits

Whilst most members are aware of the considerable tax relief's available under the Bar of Ireland pension scheme, it is important to point out that the scheme also gives excellent value for money to members due to the low charging structure it provides when compared to personal arrangements such as Personal Retirement Savings Accounts (PRSA) or self directed personal pension plans.

The Trustees of the Bar of Ireland pension scheme, through their advisors, JLT Financial Services, have put in place an extremely competitive annual fund management charging structure of between 0.12% and 0.7% p.a. of fund value–depending on the investment fund/s selected. Allowing for the trusteeship and administration charge of 0.3% p.a. gives a total scheme charge of between 0.42% and 1% per annum. For those in the scheme default investment strategy, the total scheme charge is approximately 0.87% per annum. There are no commissions, entry, exit or hidden charges payable.

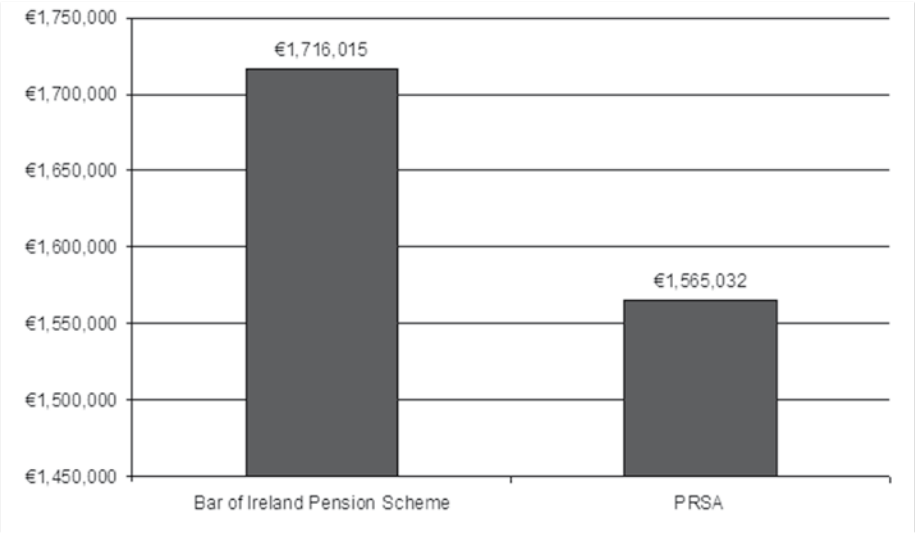
The Bar of Ireland pension cost structure compares very favourably with the typical charging structure of a stand alone personal pension policy such as PRSA which has a combination of two charges.

The first can be up to 5% of each contribution payment taken as an entry charge by the product provider plus a second charge typically amounting to at least 1% p.a. of fund value. Other products may carry additional monthly policy fees.

The charging structure secured by JLT Financial Services for the Bar of Ireland pension scheme demonstrates the economies of scale delivered to members by being part of a scheme with nearly 500 active members and assets under management of just under €130 million.

The impact of paying higher charges is both real and significant and will ultimately result in a lower fund being available to people when they retire, as demonstrated by the table overleaf;

Projected values at age 65



Assumptions;
Member aged 40, annual income €100,000, contribution of 25% x income, retirement age 65, contribution increases of 3% p.a., investment return of 6% p.a. to age 65.

NOTE: Returns and projected values are not guaranteed. Values can fall as well as rise.

In this example, the lower charging structure within the Bar of Ireland pension scheme has the potential to deliver an additional fund to the member at retirement in excess of €150,000 or 9.6% more than that delivered within a higher charging structure such as a PRSA[1].

Therefore it is clear that an individual can gain significantly by saving for their retirement through the Bar of Ireland Pension scheme and receiving the direct benefit of the lower charging structure.

Additional Benefits

Another significant benefit to members of the Bar of Ireland pension scheme is the governance framework that has been put in place whereby the Trustees meet with the Investment Fund Managers at least twice yearly to review the operation and investment performance of each investment fund and investment fund manager.

The schemes governance framework is vitally important as it ensures the ongoing review and monitoring of the investment fund choices and strategies to the ultimate benefit of members of the scheme. The Bar of Ireland Pension scheme also gives members a wide investment choice by providing a suite of twelve separate investment funds managed by four different fund managers.

1 *NOTE: Based on standard PRSA charging structure.*

The scheme also provides a full online member access facility together with a dedicated JLT Financial Services consultancy and administration team who are available to assist members daily on a broad range of sometimes complex issues including;

- ✓ Maximum Contribution Levels
- ✓ Tax Year End Deadlines
- ✓ Tax Year End Pension Clinics
- ✓ Investment Fund Options
- ✓ Retirement Options
- ✓ Review of Other Pension Funds
- ✓ Pensions Legislation
- ✓ Application for Personal Fund Threshold
- ✓ State Pensions
- ✓ Provision for Dependants
- ✓ Provision to Access Funds from Age 60 and Subsequently Rejoin the Scheme

Changing Pension Landscape

Recent Finance Acts introduced some changes to the tax treatment of pension contributions and the retirement benefits emerging. However it is important to keep in mind that there are still significant advantages accruing to members of the Bar of Ireland Pension scheme.

Tax Relief on Contributions

Member's contributions to the scheme continue to receive tax relief at the individual's highest marginal rate of tax. Therefore every €1.00 paid into the plan has a net cost of €0.60 cent after tax relief at the rate of 40%.

Once in the fund, the contribution is allowed to accumulate investment growth tax free, and, at retirement the member has the option of taking up to 25% of the total fund as a lump sum–the initial €200,000 of which is tax free with the next €300,000 tranche taxable at the lower 20% rate, subject to conditions.

The maximum annual pension contribution which can be paid, and on which tax relief can be claimed, is age related as follows;

Age	% of Salary	Maximum Contribution
Under age 30	15%	€17,250
30 – 39	20%	€23,000
40 – 49	25%	€28,750
50 – 54	30%	€34,500
55 – 59	35%	€40,250
60 & over	40%	€46,000

Subject to an earnings cap of €115,000

Retirement Lump Sums

On retirement, members are allowed to withdraw a lump sum of up to 25% of the value of their funds. With effect from 1st January 2011, retirement lump sums up to €200,000 can continue to be paid tax free.

However, if 25% of the fund value results in a lump sum entitlement in excess of €200,000 but below €500,000 – the sum in excess of €200,000 is subject to 20% taxation. Any lump sums in excess of €500,000 will be fully taxed at the marginal rate.

	Previous Position	New Position
Total Fund	€1,000,000	€1,000,000
Tax Free Lump Sum	€250,000	€200,000
Balance of Lump Sum (after tax 20%)	N/A	€40,000 (after €10,000 tax)
Balance to ARF/AMRF or annuity	€750,000	€750,000

Conclusion

It is true that recent Finance Acts targeted the tax reliefs available to pension funding. However, making provision for your retirement through the Bar of Ireland Pension scheme still remains the most tax efficient method available to you to protect your standard of living in retirement.

If you would like to join the scheme or, have any queries in relation to this article, or the Bar of Ireland Retirement Trust Scheme in general – please contact Donal Coyne in JLT at 01 636 2746 or dcoyne@jlt.ie. ■

This article was prepared by Donal Coyne, Pensions Director at JLT (at the request of the Bar of Ireland Pension Committee)

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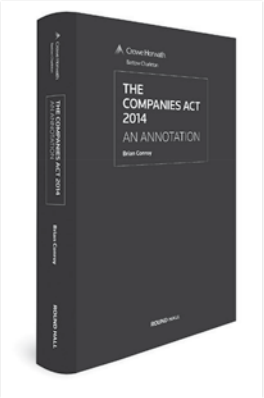
THE COMPANIES ACT 2014
AN ANNOTATION

1ST Edition • Brian Conroy

KEY FEATURES

- **Table of Origins and Destinations** for ready reference to equivalent provisions in the prior legislation
- **Table of Optional Provisions** in the Act, identifying the provisions which a company may contract out of through its constitution
- A narrative introduction to each Part of the Act explaining the key changes introduced in that Part
- Annotations to each section referring to the equivalent provision in prior legislation, explaining the section's application and referring, where necessary, to relevant case law
- Annotations directing the reader to the equivalent provisions in UK legislation



July 2015

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Application to strike out proceedings as constituting abuse of process – *Res judicata* – Right of access to court – Public policy interest in ensuring finality of litigation – Public policy

interest in preventing vexatious litigants from subjecting parties to multiple law suits on same issue – *Henderson v Henderson* abuse of process – Issues that could have been raised in previous proceedings – Special circumstances – Whether issue raised had been decided previous proceedings – Whether issues raised could properly have been raised in previous proceedings – Whether special circumstances justifying raising of such issues in present proceedings – Whether issues raised had yet to be decided in previous proceedings – *Re Vantive Holdings* [2009] IESC 69, [2010] 2 IR 118 applied – *Johnson v Gore Wood & Co* [2002] 2 AC 1; *Henderson v Henderson (1843) 3 Hare 100; Carroll v Ryan [2003] 1 IR 309; AA v Medical Council [2003] 4 IR 302; Barrow v Bankside Ltd* [1996] 1 WLR 257; *Woodhouse v. Consignia Plc [2002] 1 WLR 2558 and Cox v Dublin City Distillery (No 2) [1915] 1 IR 345 considered – Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425 and *Aer Rianta cpt v Ryanair Ltd* [2004] 1 IR 506 distinguished – Proceedings struck out (2014/9156P – Costello J – 11/3/2015) [2015] IEHC 200
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Appeal

Mootness – Court of Appeal – *Habeas corpus* proceedings – Circumstances in which court would hear proceedings which would otherwise be moot – Whether proceedings affecting many other cases before courts – Whether short duration of sentence in issue would escape review if mootness preventing hearing of appeal – Whether validity of detention of sufficient importance to overcome practice of refusing to hear moot appeals – Whether proceedings having systemic relevance to operation of criminal justice system – *Malone v Minister for Social Protection* [2014] IECA 4, (Unrep, CA, 10/12/2014); *Salaja (a minor) v Minister for Justice* [2011] IEHC 151, (Unrep, Hogan J, 10/2/2011); *Goold v Collins* [2004] IESC 38, [2005] 1 ILRM 1; *Cahill v Sutton* [1980] IR 269; *Clarke v Member in Charge of Terenure Garda Station* [2001] 4 IR 171; *Dunne v Governor of Cloverhill Prison* [2009] IESC 43, (Unrep, SC, 21/5/2009); *Farrell v Governor of St. Patrick's Institution* [2014] IESC 30, [2014] 2 ILRM 341 and *The State (Woods) v Governor of Portlaoise Prison* (1973) 108 ILTR 54 considered – Criminal Law Act 1999 (No 14), s 11 – Finance Act 1999 (No 2), s 102 – Application refused (43/2014 – Court of Appeal – 20/3/2015) [2015] IECA 71
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Costs

Application for costs – Judicial review – Asylum and immigration – Legal point raised in course of proceedings – Set off to satisfy wasted costs order in previous proceedings – Whether costs should follow event – Whether reduction of costs in respect of pre-trial work warranted – *EPA v Refugee Appeals Tribunal [2013] IEHC 85, (Unrep, Mac Eochaidh J, 27/2/2013) and X,Y,Z v Minister Voor Immigratie en Asiel (C-199/12, C-200/12 & C-201/12)* considered – Costs, with some reductions, awarded to successful applicant (2010/1424JR – Mac Eochaidh J – 12/3/2015) [2015] IEHC 162
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Delay

Appeal against judgment dismissing claim for inordinate and inexcusable delay – Inordinate delay – Inexcusable delay – Balance of justice – Culpable delay of defendant – Acquiescence – Moderate prejudice – Appellate jurisdiction of Court of Appeal – Time limit for appeal – Whether inordinate delay – Whether inexcusable delay – Whether balance of justice favoured allowing claim to proceed – *Rainsford v Limerick Corporation* [1995] 2 ILRM 561; *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 and *Stephens v Flynn Ltd* [2008] IESC 4, (Unrep, Supreme Court, 25/2/2008) applied – *Gilroy v Flynn* [2004] IESC 98, [2005] 1 ILRM 290; *Stephens v Paul Flynn Ltd* [2005] IEHC 148, (Unrep, Clarke J, 28/4/2005); *Rodenhuis & Verloop BV v HDS Energy Ltd* [2011] 1 IR 611 and *John Donnellan v Westport Textiles Ltd* [2011] IEHC 11, (Unrep, Hogan J, 18/1/2011) considered – *Collins v Minister for Justice, Equality and Law Reform & ors* [2015] IECA 27, (Unrep, Court of Appeal, 19/2/2015) and *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510 followed – European Convention on Human Rights 1950, art 6 – Appeal allowed (2014/80 – CA – 12/3/2015) [2015] IECA 58
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Discovery

Judicial review – An Garda Síochána – Complaints – Decision to find complaint admissible – Documents relating to complaint – Public interest privilege – Confidential information – Whether discovery relevant – Whether discovery necessary – Whether discovery permissible in judicial review proceedings – Whether respondent's assertion of privilege premature – *Ryanair plc v Aer Rianta cpt* [2003] 4 IR 464; *Framus Ltd v CRH plc* [2004] 2 IR 20; *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* [1882] 11 QBD 55; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 36; *Carlow Kilkenny Radio Ltd v Broadcasting Commission* [2003] 3 IR 528; *Kilkenny Communications v Broadcasting Commission* [2004] 1 ILRM 17; *Mac Aodháin v Éire* [2010] IEHC 40, [2012] 1 IR 430; *Fitzwilton v Judge Mahon* [2006] IEHC 48, (Unrep, Laffoy J, 16/2/2006); *Leech v Independent Newspapers (Ireland) Ltd* [2009] IEHC 259, [2009] 3 IR 766 and *Director of Consumer Affairs and Fair Trade v Sugar Distributors Ltd* [1991] 1 IR 225 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 31 – Garda Síochána (Discipline) Regulations 2007 (SI 214/2007), regs 10 and 45 – Garda Síochána Act 2005 (No 20), ss 81, 84, 87, 88, 93, 94, 97 and 98 – Discovery ordered (2014/120JR – McDermott J – 16/3/2015) [2015] IEHC 203
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Discovery

Miscarriage of justice – Director of Public Prosecutions – Disclosure obligations – Witnesses – Whether application for discovery erroneously naming non-party as notice party – Whether discovery would be allowable if non-party were defendant – Whether discovery sought as against non-party relating to serious allegations against non-party – *Ryanair plc v Aer Rianta cpt* [2003] 4 IR 464 considered – Rules of the Superior Courts 1986 (SI 15/1986), O31, rr 12 and 29 – Criminal Procedure Act 1993 (No 40), s 9 – Application refused (2010/7923P – White J – 20/3/2014) [2014] IEHC 679
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Leave to appeal

Planning and environmental law – Judicial review – Point of law of exceptional public importance – Decision of An Bord Pleanála where errors made by planning inspector – Whether uncertainty in law – Whether differing approaches of courts regarding extent to which An Bord Pleanála must expressly distinguish errors by planning inspectors – Whether point of law of exceptional public importance – Whether public interest in appeal – *Glancré Teo v An Bord Pleanála* [2006] IEHC 250, (Unrep, MacMenamin J, 13/7/2006); *Michael Cronin (Readymix) Ltd v An Bord Pleanála* [2009] IEHC 553, [2009] 4 IR 736; *Cork City Council v An Bord Pleanála* [2006] IEHC 192, [2007] 1 IR 761; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *McF Quirke & Sons v An Bord Pleanála* [2009] IEHC 426, [2010] 2 ILRM 93; *Craig v An Bord Pleanála* [2013] IEHC 402, (Unrep, Hedigan J, 26/8/2013) and *Maxol Ltd v An Bord Pleanála* [2011] IEHC 537, (Unrep, Clarke J, 21/12/2011) considered – Planning and Development Act 2000 (No 30), ss 4, 5 and 50A – Court of Appeal Act 2014 (No 18), s 75 – Application refused (2013/505JR – Baker J – 20/3/2015) [2015] IEHC 205
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Motion

Application for leave to cross-examine deponent on affidavit – Interlocutory injunction – Discretion of court – Material conflict of fact in affidavits – Necessary to dispose of issues – Plenary hearing – Whether cross-examination necessary to dispose of issues – Whether cross-examination necessary at interlocutory stage – *Director of Corporate Enforcement v Seymour* [2006] IEHC 369, (Unrep, O'Donovan J, 16/11/2006) followed – *Bula v Crowley (No 4)* [2003] 2 IR 430 and *Campus Oil v Minister for Industry and Energy & Ors (No 2)* [1983] IR 88, [1984] ILRM 45 applied – Application refused (2015/1736P – McGovern J – 12/3/2015) [2015] IEHC 149
Bank of Ireland v O'Donnell

Stay

Application for stay on execution – Final judgment and order – Statutory powers – Inherent jurisdiction of court – Requirement to apply at time of giving judgment – Correction of slip or error – Fraud – Facts arising too late to be pleaded – Failure of order to correctly state what court actually decided and intended – Certainty of administrative law – Whether court had jurisdiction to amend order by granting stay on execution – *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *McGrory v ESB* [2003] 3 IR 407; *Earl of Desart v Townsend* (1887) 22 ILTR 389; *Prendergast v Biddle*, (Unrep, SC, 31/7/1950); *Moohan v S & R Motors (Donegal) ltd* [2007] IEHC 435, [2008] 3 IR 650; *Danske Bank v McFadden* [2010] IEHC 119, (Unrep, Clarke J, 27/4/2010); *Stapleford Finance Ltd v Courtney* [2014] IEHC 668, (Unrep, Barton J, 14/10/2014); *ACC Bank Plc v Stephens* [2013] IEHC 264, (Unrep, Laffoy J, 5/6/2013); *Kelly v National University of Ireland & ors* [2009] IEHC 484, [2009] 4 IR163 and *Belville Holdings v Revenue Commissioners* [1994] 1 ILRM 29 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 28, r 11 and O 42, r 28 – Land and Conveyancing Law Reform Act 2009 (No 27), s 116(3) – Enforcement of Court Orders Act 1926 (No 18), s 21(1) – Application refused (2009/11432P – Barton J – 13/3/2015) [2015] IEHC 192
McDonald v O'Driscoll

Strike out

Failure to disclose reasonable cause of action – Public procurement – Tender – Food standards accreditation – Collateral attack – *Locus standi* – Economic operator – Authorised representative – Whether plaintiff having standing to bring proceedings – Whether plaintiff producer, supplier or manufacturer of goods – Whether plaintiff seeking to challenge statutory system

of food standards accreditation – Whether proceedings bound to fail – Whether matters raised justiciable – *Barry v Buckley* [1981] IR 306 and *McCourt v Tiernan* [2005] IEHC 268, (Unrep, Clarke J, 29/7/2005) applied – Rules of the Superior Courts 1986 (SI 15/1986), O 84A – An Bord Bia Act 1994 (No 22), s 8 – National Standards Authority of Ireland Act 1996 (No 28) – Industrial Development (Forfás Dissolution) Act 2014 (No 13) – Regulation 765/2008/EC – Proceedings struck out (2014/5495P – Baker J – 20/3/2015) [2015] IEHC 206
Long v An Bord Bia

Summary judgment

Appeal against summary judgment – Family home – Independent legal advice – Terms of loan facility – Whether trial judge incorrect in finding no *bona fide* defence to warrant full plenary hearing – Whether very clear no defence – Whether evidence of facts gave rise to arguable defence – *Aer Rianta v Ryanair* [2001] 4 IR 607 and *Irish Bank Resolution Corporation v Gerard McCaughey* [2014] IESC 44, (Unrep, SC, 11/7/2014) followed – Appeal dismissed (147/2013 – CA – 13/3/2015) [2015] IECA 49
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Summary judgment

Defence – Current account – Overdraft – Whether defendant having signed overdraft facility – Whether defendant liable as to repay overdraft facility availed of – Whether *bona fide* or *prima facie* defence established – *Aer Rianta v Ryanair* [2001] 4 IR 607 and *First National Bank v Anglin* [1996] 1 IR 75 applied – *National Westminster Bank v Daniel* [1993] 1 WLR 153 and *Lloyds Bank plc v Voller* [2000] 2 All ER (Comm) 978 approved – Appeal dismissed (271/2014 – Court of Appeal – 19/3/2015) [2015] IECA 55
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Summary judgment

Defence – Loan agreement – Conditions of loan – Whether loan conditional on existence of deed of covenant for intoxicating liquor licence – Whether continuation of negotiation of terms following signing of loan agreement invalidating agreement – Whether loan unenforceable due to funds never having been drawn down – Whether misrepresentation of loans by bank – Whether limited recourse loan – Whether formal event of default – Whether *bona fide* or *prima facie* defence established – *Aer Rianta v Ryanair* [2001] 4 IR 607 applied – *Freeman v Bank of Scotland plc* [2014] IEHC 284, (Unrep, McGovern J, 29/5/2014) approved – *Bauer v Bank of Montreal* [1980] 2 SCR 102 distinguished – Appeal dismissed (478/2014 – Court of Appeal – 19/3/2015) [2015] IECA 56
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Third party procedure

Application to set aside third party proceedings – Medical negligence – Time limits to service of third party notice – Reasonable time – Prejudice – Requirement to obtain expert evidence – Whether third party notices served as soon as reasonably possible – Whether prejudice to third party to warrant setting aside of third party notices – Whether failure to obtain expert evidence prior to issue warranted setting aside of third party notices – *Buchanan v BHK Credit Union Ltd & ors* [2013] IEHC 439, (Unrep, Hogan J, 24/9/2013); *Connolly v Casey* [2000] 1 IR 345; *Freisburg v Farham Resort Ltd & ors* [2012] IEHC 219, (Unrep, Hogan J, 24/5/2012); *Gilmore v Windle* [1967] IR 323; *Greene v Triangle & anor* [2008] IEHC 52, (Unrep, Clarke J, 4/3/2008); *Molloy v Dublin Corporation* [2001] 4 IR 52; *Murnaghan v Markland Holdings Ltd* [2007] IEHC 255, (Unrep, Laffoy J, 10/8/2007); *Robins v Coleman* [2009] IEHC 486, [2010] 2 IR 180; *Stephens v Paul Flynn Ltd* [2008] IESC 4, [2008] 4 IR 31 and *Woori Bank v KDB Ireland Ltd* [2006] IEHC 156, (Unrep, Clarke J, 17/5/2006) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 16, rr 1(3) and 8(3) – Civil Liability Act 1961 (No 41), s 27(1)(b) – Third party proceedings set aside (2012/9273P – Kearns P – 13/3/2015) [2015] IEHC 150
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SI 273/2015

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BILLS INITIATED IN DÁIL ÉIREANN DURING THE PERIOD 24TH JUNE 2015 TO THE 14TH OCTOBER 2015

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

Banded Hours Contract Bill 2015
Bill 73/2015 [pmb] Deputy Peadar Tóibín

Child Care (Guardian Ad Litem) Bill 2015
Bill 72/2015 [pmb] Deputy Robert Troy

Civil Debt (Procedures) Bill 2015
Bill 65/2015

Coroners (Amendment) Bill 2015
Bill 74/2015 [pmb] Deputy Pádraig Mac Lochlainn

Coroners Bill 2015
Bill 67/2015 [pmb] Deputy Clare Daly

Credit Guarantee (Amendment) Bill 2015
Bill 77/2015

Criminal Justice (Burglary of Dwellings) Bill 2015
Bill 76/2015

Electoral (Amendment) (No.2) Bill 2015
Bill 87/2015

Finance (Miscellaneous Provisions) Bill 2015
Bill 89/2015

Finance (Tax Appeals) Bill 2015
Bill 71/2015

Financial Emergency Measures in the Public Interest Bill 2015
Bill 91/2015

Garda Síochána (Amendment) (No. 2) Bill 2015
Bill 70/2015 [pmb] Deputy Pádraig Mac Lochlainn

Harbours Bill 2015
Bill 66/2015

Marriage Bill 2015
Bill 78/2015
1916 Quarter Development Bill 2015
Bill 85/2015 [pmb] Deputy Éamon Ó Cuív

Planning and Develeoment (Taking in Charge of Estates) Bill 2015
Bill 88/2015 [pmb] Deputy Michael McNamara

Ramming of Garda Vehicles Bill 2015
Bill 86/2015 [pmb] Deputy Brendan Griffin

Referendum (Amendment) Bill 2015
Bill 75/2015 [pmb] Deputies Pádraig Mac Lochlainn and Gerry Adams

Sentencing Council Bill 2015
Bill 90/2015 [pmb] Deputy Padraig Mac Lochlainn

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 24TH JUNE 2015 TO THE 14TH OCTOBER 2015

Choice of Court (Hague Convention) Bill 2015
Bill 64/2015

Criminal Justice (Knife Possession) Bill 2015
Bill 80/2015 [pmb] Deputy Niall Collins

Criminal Law (Sexual Offences) Bill 2015
Bill 79/2015

Defence (Amendment) Bill 2015
Bill 68/2015

Education (Welfare) (Amendment) Bill 2015
Bill 63/2015 [pmb] Senators Mary Moran, Susan O'Keeffe and Aideen Hayden

Longer Healthy Living Bill 2015
Bill 81/2015 [pmb] Senators John Crown, Sean D. Barrett and Averil Power

Minerals Development Bill 2015
Bill 69/2015

PROGRESS OF BILL AND BILLS AMENDED DURING THE PERIOD 24TH JUNE 2015 TO THE 14TH OCTOBER 2015

Children (Amendment) Bill 2015
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Report Stage
Passed by Dáil Éireann

Children First Bill 2014
Bill 30/2014
Report Stage
Passed by Dáil Éireann

Choice of Court (Hague Convention) Bill 2015
Bill 64/2015
Passed by Seanad Éireann

Civil Debt (Procedures) Bill 2015
Bill 65/2015
Committee Stage
Report Stage

Climate Action and Low Carbon Development Bill 2015
Bill 2/2015
Report Stage
Passed by Dáil Éireann

Defence (Amendment) Bill 2015
Bill 68/2015
Committee Stage

Equality (Miscellaneous Provisions) Bill 2013 (changed from Employment Equality (Amendment)
(No. 2) Bill 2013
Bill 23/2013
Report Stage

Environment (Miscellaneous Provisions) Bill 2014
Bill 86/2014
Report Stage
Passed by Dáil Éireann

Finance (Tax Appeals) Bill 2015
Bill 71/2015
Committee Stage

Garda Síochána (Policing Authority and Miscellaneous Provisions) Bill 2015
Bill 47/2015
Committee Stage

Gender Recognition Bill 2014 Bill 116/2014
Report Stage
Passed by Dáil Éireann

Houses of the Oireachtas (Appointments to Certain Offices) Bill 2014
Bill 75/2014
Committee Stage
Report Stage

Industrial Relations (Amendment) Bill 2015
Bill 44/2015
Report Stage
Passed by Dáil Éireann

Marriage Bill 2015
Bill 78/2015
Report Stage
Passed by Dáil Éireann

National Cultural Institutions (National Concert Hall) Bill 2015
Bill 52/2015
Committee Stage
Report Stage

National Minimum Wage (Low Pay Commission) Bill 2015
Bill 42/2015
Committee Stage

Personal Insolvency (Amendment) Bill 2014
Bill 96/2014
Report Stage
Passed by Dáil Éireann

Petroleum (Exploration and Extraction) Safety Bill 2015
Bill 59/2015
Committee Stage

Urban Regeneration and Housing Bill 2015
Bill 51/2015
Committee Stage

Children First Bill 2014
Bill 30/2014
Committee Stage – Seanad

Choice of Court (Hague Convention) Bill 2015
Bill 64/2015
Committee Stage – Seanad
Passed by Seanad Éireann

Civil Debt (Procedures) Bill 2015
Bill 65/2015
Committee Stage

Communications Regulation (Postal Services) (Amendment) Bill 2015
Bill 46/2015
Committee Stage

Consumer Protection (Regulation of Credit Servicing Firms) Bill 2015
Bill 1/2015
Committee Stage

Equality (Miscellaneous Provisions) Bill 2013 (changed from Employment Equality (Amendment)
(No. 2) Bill 2013
Passed by Seanad Éireann

Environment (Miscellaneous Provisions) Bill 2014
Bill 86/2014
Committee Stage

Garda Síochána (Policing Authority and Miscellaneous Provisions) Bill 2015
Bill 47/2015
Passed by Seanad Éireann

Houses of the Oireachtas (Appointments to Certain Offices) Bill 2014
Bill 75/2014
Committee Stage

Industrial Relations (Amendment) Bill 2015
Bill 44/2015
Committee Stage
Report Stage

Minerals Development Bill 2015
Bill 69/2015
Report Stage

National Minimum Wage (Low Pay Commission) Bill 2015
Bill 42/2015
Report Stage
Passed by Dáil Éireann

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Don't name names! A New SI on Naming Judges in Judicial Review Cases

Matthew Holmes BL

Introduction

A statutory instrument came into force on the 17th of August 2015 without much fanfare, SI no 345 of 2015 Rules of the Superior Courts (Judicial Review). This SI amends the way in which judicial reviews are taken, in particular in relation to the Judge who is being reviewed. Judges who are being judicially reviewed should no longer be named in the title of the proceedings. This SI has the potential to result in a seismic shift in the number of judicial reviews that are taken. Order 84 Rule 22 (2A) now requires that:

> "(a) the judge of the court concerned shall not be named in the title of the proceedings by way of judicial review, either as a respondent or as a notice party, or served, unless the relief sought in those proceedings is grounded on an allegation of mala fides or other form of personal misconduct by that judge in the conduct of the proceedings the subject of the application for judicial review such as would deprive that judge of immunity from suit,
> (b) the other party or parties to the proceedings in the court concerned shall be named as the respondent or respondents, and
> (c) a copy of the notice of motion or summons must also be sent to the Clerk or Registrar of the court concerned."

A practice has developed that judges, of both the District Court and Circuit Court, even though named, do not appear, are not represented and otherwise do not participate in judicial review proceedings which touch upon the validity of their orders.[1] This SI takes this a step further in practice.

Judicial immunity

Judges can now only be named in a judicial review where it is alleged that their conduct would deprive them of immunity from suit. Judicial immunity from suit is an old and somewhat unclear rule. In *O'Connor v Carroll,* the Supreme Court unanimously held that where a judge has not opposed the judicial review proceedings, an order for costs may not be made against him or her in the absence of mala fides or impropriety. [2] The Court also found that that unless mala fides or impropriety is alleged, the judge should not be joined. Where such an allegation was made it was necessary to join the judge as a respondent but only to afford the judge the opportunity to appear to defend his or her own constitutional rights. This case law is worth examining in order to see what behaviour should result in a judge being named in the title of the proceedings

The rule that judges are immune from paying the costs of a judicial review is an old one. Palles C.B. in *Rex (John Conn King) v. Justices of Londonderry ,* stated;

> "According to the principles that the Courts have been acting upon for years, as a rule magistrates ought not to be obliged to pay costs unless they were acting in some way that was not bona fide , or unless they took it upon themselves to put forward and support a case that was wrong in point of law."[3]

O'Neill J. in *OF v O'Donnell* explains the rationale behind this rule- if there is a risk to personal fortune whenever a judge makes a mistake, it would be impossible to retain judges.[4] This is why they have judicial immunity. He also points out

> "It would seem unnecessary for that purpose to have recourse to procedures in which the judge must be joined as a party. Indeed such a procedure has little merit in practice as the judge whose decision is being impugned has no interest or function in supporting it. Furthermore, as has been pointed out by this Court, it would be inappropriate for any judge to swear an affidavit in any such proceedings as that would leave him open to cross-examination in relation to the judicial process. That would be contrary to the public interest. These problems might properly be the subject matter of law reform or, alternatively, review by the full court in an appropriate case."

The reason for this is because if judges were to intervene in a judicial review taken against them, it would be seen to breach the principle of judicial independence. He also found that the inability to recover costs against a judge is not a breach the right of access to Courts under Article 6 of the European Convention on Human Rights, or of the right to an effective remedy under Article 13.

1 See *Feeney v. District Judge Clifford* [1989] I.R. 668 *McIlwraith v Fawsitt* 1990 1 IR 343.
2 [1999] 2 I.R. 160
3 (1912) 46 I.L.T.R. 105
4 2013 3 IR 484

The rule of judicial immunity has consistently been upheld by the Supreme Court.[5] This principle has also been recognised by the United Nations.[6]

What is Judicial misconduct?

There is a real dearth of case law as to what behaviour would render a judge liable for suit. There are some ancient examples of egregious judicial behaviour, but little in the way of modern jurisprudence. In the *King* decision, Palles C.B. indicated that wilful error would be sufficient to result in costs being awarded against the justices. He gave the example of a case of *Rex (Hynes) v. J. of Clare*, where costs were awarded against magistrates who had refused to follow a decision which was binding on them.[7] An older example is the 16th century case of *Windham v Clere*, where a justice of the peace was held liable for issuing a warrant for the arrest of the plaintiff.[8] No accusation had ever been made against the plaintiff and the defendant knew him to be innocent.

McCoppin v Kennedy involved a judicial review of a decision of the Circuit Court to abandon a hearing and award costs against the applicant.[9] While evidence was being heard in the Circuit Court, the plaintiff was removed from the court when his mobile phone rang, and when the mobile phone of the plaintiff's counsel then rang, the judge rose from the bench and, on his return, pronounced that the hearing was "aborted" due to the plaintiff's contempt and also due to the ringing of his counsel's phone, and he awarded costs against the plaintiff in favour of the defendant on a "thrown away" basis. It was alleged that the applicants article 6 and 13 ECHR Rights had been breached by the judges behaviour. The judge's order was subsequently quashed by the High Court but an order for costs against him was refused.

In *Kemmy v Ireland,* it was held that a man whose rape conviction and three-year sentence was overturned on appeal was not entitled to damages from the State arising from unfairness due to an error by the judge presiding at his trial.[10] McMahon J ruled that that this would amount to an "indirect and collateral assault" on judicial immunity. The trial judge had read his own note of the complainant's evidence to the jury, without also reading Mr Kemmy's.

In *Curtis v Kenny*, Kelly J held that "Parties cannot be asked to tolerate bias, prejudice, ill will or mala fides in any form on the part of the Judiciary".[11]

Stephens v. Connellan arose out an unusual firearms case, involving a retired police doctor in Galway.[12] It was alleged that the trial judge said "I think that you would have been better off accepting what was on offer from Mr. MacHale than coming before this court"- referring to an offer being made in the event of a guilty plea. This offer had not been mentioned in open court. The High Court felt it was a most serious charge against a judge that he would be informed of such discussions by the state solicitor in the absence of the accused or his legal representatives, however, on the facts, it found that this had not happened.

Other Jurisdictions

Unfortunately looking at the jurisprudence from other jurisdictions provides little guidance as to when a judge might lose their immunity from suit. In the United Kingdom, it appears there is much wider judicial immunity from suit than in this jurisdiction. According to *De Smith's Judicial Review* "At common law, immunity extends to all decisions taken within the judge's very wide jurisdiction… even if actuated by malice or corruption. Only if a judge of a superior court acts deliberately or recklessly without any colour of right can an action in tort lie."[13]

In the United States of America, judicial immunity does not apply where a judge is acting outside his normal duties. However, misbehaviour in the course of performing judicial acts is immune.[14] In the case of *Mireles v. Waco*, a defence lawyer failed to appear for a scheduled hearing.[15] The judge not only issued a bench warrant for his arrest, but instructed the police sent to arrest him to "rough him up a little" to teach him not to skip court dates. This was held to attract judicial immunity because it was entirely within his activities as a judge presiding over a court.

It is therefore somewhat unclear, due to the paucity of case law, what exactly constitutes "Other form of personal misconduct by that judge in the conduct of the proceedings … such as would deprive that judge of immunity from suit". Some examples have arisen; bias, prejudice, discussing cases outside of court or refusing to follow orders which are binding. Reviewing the case law it appears that in order for a judge to be deprived of immunity from suit, the misconduct would have to be of an exceptionally serious nature and would constitute some fundamental breach of fair procedures that was not actively malicious. The paucity of case law is perhaps caused by an understandable reluctance by practitioners to make such an allegation against judges they appear before.

Other Changes

Rule 27 has the following sub-rule inserted "(2A) Without prejudice to the generality of sub-rule (2), the Court may, at any time, where it deems fit, in any case where the relief sought relates to any proceedings in or before a court: (a) direct the applicant to procure and lodge in Court or exhibit a transcript of the record of the proceedings before that court, or (b) direct the production to it by the Registrar or Clerk of that court of the record of the proceedings before that court."

This presumably is to make up for the situation where a judge might spot an error in what is claimed to have happened that one of the parties might not. It will help resolve any

5 See *The State (Prendergast) v. Rochford, District Justice, Claremorris and Durkin, Circuit Court Judge* Unrep. Supreme Court, 1st July 1952 and *OF v O'Donnell* 2013 3 IR 484

6 Principle 16 of the UN basic principles on the independence of the judiciary states that judges should enjoy "personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions".

7 (1911) 45 I.L.T.R. 76

8 (1589) 78 E.R. 387

9 [2005] 4 IR 66

10 [2009] IEHC 178

11 2012 IEHC 556

12 [2002] 4 I.R. 321

13 *De Smith's Judicial Review* 7th ed, Woolf Sweet and Maxwell 2013 London pg 997

14 *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979) Misbehavior

15 (1991) 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9

difficulties around exactly what was and wasn't done by the judge in the lower court.

Comment

At first glance this change to the rules appears strange. It could result in an order that a judge not rehear a case, this would be an order that is binding on someone who is statutorily prohibited from being part of the proceedings.

Even if it is the case that an applicant is of the view that a judge has committed some form of misconduct in the course of proceedings that would deprive him of immunity from suit, this may not necessarily result in him being named in the proceedings. There may be little advantage to be gained from doing so and a number of disadvantages. The most obvious of which are another party opposing your case and risking the judge's future ire.

There is anecdotal evidence that a number of practitioners, particularly outside of Dublin, are reluctant to judicially review their local Judge. This is particularly the case in District Courts where they may feel that they might risk losing legal aid assignments and an appeal to the Circuit Court is a safer option than judicial review. It is hoped that this SI will go some way towards assuaging these fears. Whilst judges are still likely to find out that their orders are being reviewed, this SI will hopefully make the process less embarrassing as they will not be named and shamed. ■

Passing Off: An Uncertain Remedy: Part 2

Peter Charleton and Sinéad Reilly*

This is Part 2 of a three part article dealing with the topic of passing off. Part 1 appeared in the July edition of the Bar review and Part 3 will appear in the December edition. This part will focus in more detail on some of the case law dealing with the tort of passing off.

The *McCambridge* Case

Such is the basic theory of the tort of passing off; practice demonstrates that predictability of outcome is elusive. These cases tend to come down to perception and one wonders how such cases have much, if any, precedential value. In illustration is a case which recently came before the Irish High Court and the Supreme Court on appeal: *McCambridge Ltd v Joseph Brennan Bakeries*.[1] Wholewheat bread was in issue. And it was one of the relatively rare cases where a claim for passing off based on get-up alone was successful.[2] Such cases are hard to bring home without evidence of an intent to mislead, it being difficult to establish both distinctiveness and the likelihood of a misrepresentation.[3] The plaintiff, McCambridge Ltd, is the market leader in Ireland for wholewheat bread, having a 30% market share at the relevant time. It sells its bread in a plastic re-sealable bag. On the front of the bag, there is a dark green panel, which includes an image of a sheaf of wheat, the words 'Irish Stoneground Wholewheat Bread', and the McCambridge name printed in an arc shape, underneath which there is the signature of 'John McCambridge'. The bag, apart from the green label, is see-through. Brennan is one of Ireland's largest and well-known manufacturers of breads, "today's bread today!", though until 2010 it had not entered the market for wholewheat bread. At the relevant time, it had a 6% market share, which it wanted to increase, under new packaging. Brennan adopted the same re-sealable type of plastic bag as that used by McCambridge, a green panel also appeared on the front, though a slightly different shade. The script was also similar, and a signature was also used, that of 'Joe Brennan'. McCambridge complained of passing off. It did not claim any proprietary right in the type of resealable bag, its shape or the shape of the bread inside; taken individually, these elements were generic or common to the trade.[4] But what it complained about was Brennan's use of a combination of these elements.[5] Brennan said it had done enough to distinguish its product: the red and yellow colours which feature on all its bread appeared prominently on the front, as did its name and logo.

The High Court judge framed the question thus: whether, objectively speaking, a reasonable member of the public wishing to purchase a loaf of McCambridge wholewheat bread was likely to be confused into buying the Brennan's wholewheat loaf in error, believing it to be McCambridge bread because it so closely resembled it in its general get-up. Goodwill was conceded. Damage was assumed. The issue then was whether there was a misrepresentation on the part of Brennan. McCambridge said that Brennan deliberately tried to copy its packaging in order to improve its own market share. Reference was made to correspondence between Brennan and the design agency, obtained on discovery, which suggested that a particular alteration, ultimately adopted, would bring "*it closer to McCambridges'*. Could they have had the McCambridge packaging in mind? The judge was not swayed by the allegations; he was satisfied that Brennan had not set out to mislead consumers, but in any event it mattered not: innocence is no defence.

The judge had to put himself into the shoes of the average shopper for McCambridge wholewheat bread: a person who is "*not in any particular hurry*", is "*neither overly scrupulous [or] dilatory*" and who enters a shop with a wish to purchase a loaf of McCambridge wholewheat bread.[6] The judge would not concern himself with the careless or indifferent shopper. Wearing his 'average consumer' hat, the judge would make his assessment based on a "*first overall impression*". To aid the

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1 [2011] IEHC 433, (Unreported, High Court, Peart J, 25 November 2011); and [2012] IESC 46, (Unreported, Supreme Court, 31 July 2012).

2 See *Adidas v O'Neill* [1983] ILRM 112 where O'Higgins CJ observed that a claim for passing off based exclusively on the alleged imitation of the general appearance of "get up" is rare.

3 See Wadlow, fn 35 above, at para 8-133: "*To make out a case based solely on similarities of get-up the claimant must show that deception is likely notwithstanding the absence of his own brand name on the defendant's goods and the likely presence there of the defendant's brand name and perhaps other distinguishing matter. Not surprisingly, the cases in which passing-off has been found have predominantly been ones of deliberate deception."* See *Fisons v Godwin* [1976] RPC 653; *Burford v Mowling* (1908) 8 CLR 212; *Parkdale Pty Ltd v Buxu Pty Ltd* (1982) 149 CLR 191; and *Red Bull GmbH v Mean Fiddler* [2004] EWHC 991.

4 As to generic feature cases, see *Williams JB Company v Bronnley & Co Ltd* (1909) 26 R.P.C. 765; *Hennessy & Co Limited v Keating* [1908] 1 IR 43; *Mars Australia Pty Limited v Sweet Rewards Pty Limited* [2009] FCAFC 174; *Imperial Group v Philip Morris* [1984] RPC 293; and *Rizla v Bryant & May Limited* [1986] RPC 389.

5 *Polycell Products Ltd v O'Carroll & Ors t/a Dillon O'Carroll* [1959] 1 Ir Jur Rep 34: though features may in themselves be "individually generic", a particular combination of such characteristics may, nonetheless, be sufficiently distinct and identifiable such that it constitutes a reputation which will be protected.

6 As to the 'reasonably prudent shopper' test, see *Jacob Fruitfield Food Group Ltd & Anor v United Biscuits (UK) Ltd* [2007] IEHC 368, (Unreported, High Court, Clarke J, 12 October 2007).

judge, a mock supermarket stand was installed in the court room. The stand was stocked with a variety of wholewheat breads, including that of Brennan and McCambridge and other brands. Consumer witnesses and expert witnesses were called. One of the consumer witnesses said she went into her local supermarket, picked up the bread as part of her general shop thinking it was McCambridge bread; a price sticker had partially obscured the Brennan logo. Another, a long-term purchaser of McCambridge bread, said that when he picked up the bread, the supermarket shelf was messy and it was only the next morning, while eating a slice of toast, that he realised his mistake. A shopkeeper told of how customers returned Brennan's bread to his shop, complaining that the packaging was confusingly similar. Evidence given by the experts supported the case made on behalf of the respective parties: an expert called on behalf of McCambridge said the opportunity for customers to make a mistake was high; whereas an expert called on behalf of Brennan said the packages were "*chalk and cheese*".

As to the factors to take into account, the trial judge approved the comments of his colleague, Clarke J in *Jacob Fruitfield Food Group Ltd v United Biscuits (UK) Ltd*:

> "Firstly I should have regard to the circumstances in which the products are likely to be purchased, the sort of customers who are likely to purchase them, and the amount of attention which, at least the less careful of those purchasers, are likely to apply to their considerations. The competing get ups should be judged as a matter of first impression but also by reference to the type of features which, in all the circumstances of the case, are likely to attract the attention of a purchaser in those circumstances. While it is true to state that distinguishing brand or trade names need to be carefully considered, that aspect of the case also needs to be seen in context by reference to the extent which those features are likely, in all the circumstances, to have an effect on actual purchasers. I do not consider that either Fisons or Adidas establish any special rule to be applied in cases where brand or trade names are present. Those cases merely state the obvious. That in many, perhaps most, cases where there is a clear presence of a brand or trade name it is likely that purchasers will identify the differences in the product by reference to it. There may, however, be cases where, in all the circumstances of the case, and notwithstanding such a distinguishing feature, a risk of confusion nonetheless continues."[7]

Context is relevant. The trial judge considered how the competing loaves would be presented in the supermarket: generally on open shelves at or near eye level; some of the shelves would be flat, while others would be sloped upwards. At the start of the day, the loaves would generally be stocked upright on the shelves, but as the day progressed, they may get tossed around, thus obscuring any distinguishing features, such as a competing brand name or logo, on the front of the packaging. A further consideration was that the purchase of bread is not something to which the average consumer will typically devote much time: he or she will pick the bread off the shelf quite quickly and place it in his or her shopping basket without too much, if any careful scrutiny.[8] All of this was relevant when considering the "get up" of the two competing products.

The judge accepted that the packaging had differences, he concluded that "*it would take more care and attention than… it is reasonable to attribute to the average shopper for him or her not to avoid confusion between the two packages when observed on the shelf, especially when these are placed adjacently or even proximately so."* The positioning of the identifiable Brennan colours and logo, and the other distinguishing features, could not overcome the risk of confusion. Passing off was established: the remedy, an injunction and an account of profits. An appeal to the Supreme Court was dismissed, though one judge saw the case as one of mere confusion.[9]

The *Morrocanoil v Aldi* case

Contrast this with the recent decision of the English High Court in *Morrocanoil Israel Ltd v Aldi Stores Ltd.*[10] Here the plaintiff, MIL, a manufacturer of hair oil, was unable to establish a misrepresentation on the part of Aldi, a well-known discount supermarket. The competing products were MIL's leading product, 'Moroccanoil', sold in a brown bottle with a turquoise label and packaged in a turquoise box, with orange graphics, and Aldi's 'Miracle Oil', sold in a similar type bottle, but bearing Aldi's CARINO' brand and a leaf motif. While the trial judge accepted that the word 'Moroccanoil' was distinctive of MIL, he was less inclined to find that the get-up was by itself distinctive. The product had never been marketed without the name so it could never have become distinctive. The two must be viewed together.

The name, he thought, played the greater role and so he approached the case on the basis that the goodwill in MIL's business attached primarily to its name. This even though he accepted that at the relevant time the particular shade of bright turquoise used by MIL was not to be found as a significant feature in the packaging of other hair care products marketed in the UK. This, it would seem, put MIL on the back foot from the outset: similarity, as opposed to distinctiveness

7 Ibid.

8 On appeal, it was submitted on behalf of Brennan that customers who do not look at the packaging of a product to see if it is the brand they wish to buy should properly fall into the category of "the careless consumer" and in such circumstances there can be no misrepresentation. However, MacMenamin J who delivered the majority judgment, stated that this submission missed a critical part of the trial judge's rationale: he was addressing evidence as to the phenomenon of fast moving consumer goods displayed on a supermarket shelf. What was in issue, and what was clearly in the trial judge's mind, was that even ordinary reasonable prudent customers do not, in fact, frequently carry out a detailed examination of the product at the time when they take the bread from the supermarket shelf and place it in the supermarket trolley.

9 *McCambridge v Joseph Brennan Bakeries* [2012] IESC 46. The dissenting judge, Fennelly J, stated at para 19 of his judgment that the trial judge set the bar too low: "*it is only where one trader is shown to have so behaved as to lead those consumers to believe that the goods he is selling are those of the competitor that the tort of passing-off is committed. In my view, the analysis deployed by the learned trial judge would permit a finding of passing off to be made merely on a sufficient showing of confusion without the essential element of imitation of the specific quasi-proprietary interest of the plaintiff in the get-up of his own goods."*

10 [2014] EWHC 1686 (IPEC).

in get-up, will rarely give a cause of action if the names of the traders concerned are given reasonable prominence on the goods.[11] What's more, any trader is free to copy a rival's goods in respects in which they are not distinctive. A further challenge facing MIL was that there was no evidence that any consumers had actually assumed, because of Miracle Oil's name and get-up, that it had a trade connection with MIL. Indeed blog evidence tended to suggest the opposite. Bloggers referred to the fact that they had to do "*a double take*" and that Aldi's packaging was "*cheeky*", but none were misled.

MIL then sought to argue ill-intent on Aldi's part: it said Aldi designed the packaging with Moroccanoil firmly in mind. The Court was shown documents produced by Aldi in the design phase, one of which included a comment that the design needed to match the Moroccanoil colours. MIL accepted that no misrepresentation would be established if it were shown that the similarities did no more than cause Aldi's Miracle Oil to bring MIL's Moroccanoil to mind. But, it was said that Aldi was "*living dangerously*". The Court accepted that Aldi had made a conscious decision to package Miracle Oil in a way reminiscent of Moroccanoil to some real extent. But, be that as it may, it could not, without more, amount to passing off. A trader who lives dangerously appreciates the risk of confusion, but endeavours to maintain a safe distance.[12] Hacon J stated that "*if the defendant's intent is that the name and/or get-up of its product will bring to mind the claimant's product but not lead to any false assumption on the part of the public as to any sort of trade connection (including common manufacturer or a licence), then at best from the claimant's point of view this is neutral.*" Aldi's subjective intent was only one element in the global assessment. Other factors were also relied on: (i) Moroccanoil was typically sold in high-end salons, and was not a product one would expect to find in Aldi; (ii) Moroccanoil costs about £30, Miracle Oil a mere £4; and (iii) the Moroccanoil box, and the label on the bottle, used a striking 'M' logo, and the CARINO brand and leaf motif appeared on the Aldi equivalent. Hacon J concluded at pp.1107-1108:

> "… the evidence does not lead to the conclusion that members of the public are likely to assume either that Miracle Oil and Moroccanoil are the same thing or that they come from the same manufacturer or are otherwise linked in trade, such as by a licence. Even if there were any such members of the public, they would be too few in number to cause damage to MIL's goodwill.
>
> I think that Aldi intended to make the public think of Moroccanoil when they saw Miracle Oil in its packaging and I think Aldi succeeded. But purchases of Miracle Oil have not been and are not likely to be made with any relevant false assumption in the mind of the purchasers. There is not even likely to be any initial interest confusion. There is no likelihood of an actionable misrepresentation."[13]

Some might wonder whether this case brings back the old requirement to prove an intention to deceive? Though the test is supposedly an objective one, and the subjective intent of the defendant is an element to be weighed in the balance, one is driven to the conclusion that only evidence of some ill-intent on Aldi's part would have led the Court to reach a different decision. How in reality is one to prove this? It will be impossible in all but the most blatant of cases. While Aldi admitted that it made a conscious decision to live dangerously, the Court was satisfied on the evidence before it, or the lack of evidence, that it had not crossed the line. But where is the line? Aldi admitted to borrowing aspects of MIL's get-up, particularly its turquoise colour, though this get-up was not found to be distinctive of MIL. In some senses it is difficult to rationalise this finding: why, in trying to make its product reminiscent of MIL's, would Aldi copy its get-up if the get-up was not thought to be distinctive of MIL? But to paraphrase the comments of the Federal Court of Australia in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd*, is it not a reasonable inference that Aldi, with knowledge of the market, considered that such borrowing was "*fitted for the purpose and therefore likely to deceive or confuse…?*".[14] If the tort exists to protect the trader, and not to champion the consumer, should the remedy not be more readily available in such cases? Passing off has shown itself in the past to be flexible enough to adapt to changing business practices and indeed this has been part of its charm. Lookalike goods are increasingly sophisticated and many escape legal censure, at least under the law of passing off, by making sure their own brand name is prominently displayed.[15] This, it is said, neutralises any misrepresentation so confusion is avoided and there can be no deception.[16] But one wonders whether this can really be asserted so definitively as if it were a rule of law, when in reality it is no more than just an assumption or a probability. Perhaps we afford too much respect to the brand name? Wadlow suggests that in today's world, get-up should be taken more seriously as an indication of origin and perhaps sometimes should be of comparable importance to the brand.[17] He states:

> "It is probably still true to say that very few traders deliberately use get-up as the sole or primary means of identification of their goods. That is given to verbal marks, and especially brand names. However, what matters is how customers distinguish competing goods in fact. It is quite normal for customers selecting goods from supermarket shelves to go by some aspect of the overall appearance as much as by the name. What is more difficult is to identify the precise visual cues on which the customer relies. Despite the fact that many of the brands of any particular commodity often bear an overall resemblance to one another, the eye seems to be able to distinguish them and select one without any conscious reference to the

11 Clerk & Lindsell, fn 32 above, at para 26-13, citing *CMG Radio Holdings Ltd v Tokyo Project Ltd* [2005] EWHC 2188 (Ch); [2006] FSR 15.

12 *Specsavers International Healthcare Ltd & Ors v Asda Stores Ltd* [2012] EWCA Civ 24 at para 115.

13 [2014] EWHC 1686 (IPEC) at paras 60 to 61.

14 [2002] FCAFC 157.

15 Cornish and Llewelyn, Intellectual Property, (London, 5th ed) (2003) at para 16-40.

16 Middlemiss and Warner, "Is there still a hole in this bucket? Confusion and misrepresentation in passing off", (2006) 1(2) JIPLP 131.

17 Wadlow, fn 35 above, at para 8-136.

> brand names as such. Unfortunately, there has been little objective analysis of this effect in the reported cases, and self-serving assertions of what is or is not distinctive do not always help."[18]

Others might argue that this only reaffirms the central importance of misrepresentation. One might say the totality of the evidence simply could not support a case of passing off and that courts should be on their guard against finding fraud merely because there has been an imitation of another's get-up.[19]

This was simply a case of competition in action: there is no tort of copying, passing off does not confer monopolies and the courts can only intervene where there is a legal, as distinct from a moral, wrong. Copying, without a misrepresentation, is prohibited in continental Europe as a form of unfair competition, but no such cause of action exists in Ireland or in the UK, though many have argued in its favour.[20] There is a statutory regime, derived from an EU Directive, which prohibits unfair commercial practices in a business to consumer context, of which copying might arguably be one.[21] In the UK, the Government is considering making a civil injunctive power available to businesses to prevent rivals copying the designs of their product packaging.[22] But where passing off is pleaded, the three elements of the trilogy must each be established. Not all misrepresentations will be actionable: a misrepresentation which a trader regards as damaging will not necessarily cause damage.

Unimagined worlds

The American courts have, since 1953, recognised a "right of publicity" as a property right, conferring an exclusive right to exploit the publicity value of one's name, likeness or other personality attributes.[23] Thus even in the absence of any suggestion of sponsorship or the like, the unconsented use of the plaintiff's name or image is actionable, provided it is not merely incidental, but designed specifically to promote the defendant's commercial interest.[24] Judge Jerome Frank in *Haelan Laboratories v Topps Chewing Gum* considered that a man has a right in the publicity value of his photograph. He explained: "*it is common knowledge that many prominent persons, far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorising advertisements, popularising their countenances, displayed in newspapers, buses, trains and subways*." In 1977 the right was recognised by the US Supreme Court.[25] It is now recognised as a distinct right in more than half the US states, either by statute or at common law or both.[26] In other states, it is protected through the law of unfair competition. A similar right has been developed in Canada[27] and in the Caribbean.[28]

In 1960, Professor William Prosser put forward the "*name or likeness*" formulation: the right of publicity cases involved either name appropriation or picture or other likeness appropriation.[29] Prosser considered, however, that it was not impossible that there might be appropriation of a person's identity, as by impersonation, without the use of either his name or his likeness. The case law soon bore out this prediction. The courts restrained the use of a famous catchphrase,[30] an impersonator,[31]and a celebrity lookalike.[32]In *Midler v Ford Motor Co,* the defendant was prevented from using in an advertisement a sound-alike of the "*celebrated chanteuse*", Bette Midler.[33] Noonan J, delivering the judgment of the Court of Appeals for the Ninth Circuit, stated that Midler's voice was obviously of benefit to the defendant: why else would it have studiously acquired the services of a sound-alike and instructed her to imitate the chanteuse. He reasoned that one's voice is as distinctive and personal as one's face and to impersonate Ms Midler's voice was to pirate her identity and commit a tort.

The *Vanna White* case, it is suggested, was a step too far.[34] Here the Ninth Circuit found that the evocation of a

18 Wadlow, fn 35 above, at para 8-147.

19 See *Cadbury-Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] 1 WLR 193.

20 The nearest one comes is copyright, but that carries its own problems.

21 Section 71 of the (Irish) Consumer Protection Act 2007; see generally, Nathan Reilly, 'A New Unfair Competition Law for Ireland', (2009) 31 DULJ 1 at 100.

22 See Department for Business, Innovation, Skills and Intellectual Property consultation on consumer protection: copycat packaging. The consultation closed in May 2014 and, as at the time of writing, the Department is analysing the feedback received.

23 The right was recognised by Jerome Frank J in *Haelan Laboratories v Topps Chewing Gum* 202 F. 2d 866 (2d Cir). Here the plaintiffs were chewing gum manufacturers who had contracted with baseball players for the exclusive right to use their names and likenesses in connection with their gum. They successfully prevented the defendants from using these same sportsmen in their advertising

24 Fleming, The Law of Torts, (Sydney, 1992) (8th ed) at p 719.

25 *Zacchini v Scripps-Howard Broadcasting* 433 U.S. 562 (1977).

26 There is no federal right to a right to publicity. Under the Restatement (Second) Of Torts §§ 652A–652I the invasion of the right to publicity is most similar to the unauthorised appropriation of one's name or likeness.

27 *Krouse v Chrysler* (1973) 40 DLR (3d) 15 (Ont. CA).

28 *The Robert Marley Foundation v Dino Michelle Ltd* JM 1994 SC 032, where the Supreme Court of Jamaica held that the commercial use of Bob Marley's name and likeness on t-shirts without the plaintiff's consent constituted an impairment of the plaintiff's exclusive right to use Marley's image. The Court stated that *"[Jamaican] law recognises a civil wrong, known in Canada as "appropriation of personality" and in several States of the United States as "breach of the right of publicity". It is not so much that the cases have "uncovered a piece of the common law and equity that had [hitherto] escaped notice… but rather, the declaration of the tort results from the application of recognised principles of law seven if hitherto diffuse) to particular fact situations arising under "new conditions of society". The tort consists of the appropriation of a celebrity's personality (usually in terms of his or her name and likeness etc) for the financial gain or commercial advantage of the appropriator, oto the detriment of the celebrity or those claiming through him or her."* The authors are grateful to Natalie GS Corthésy for drawing their attention to this case. See further Eddy D Ventose and Nathalie GS Corthésy, "Protecting personality rights in the Commonwealth Caribbean", (2009) 4(12) JIPLP 904.

29 Prosser, "Privacy", (1960) 48 Cal. L. Rev. 383, 401-07 (1960), referred to by the California Court of Appeal in *Eastwood v. Superior Court*, 149 Cal App 3d 409, 198 Cal Rptr 342 (1983).

30 *Carson v Here's Johnny Portable Toilets Inc* 698 F 2d 831 (6th Cir. 1983).

31 In *Estate of Presley v Russen* 513 F Supp 1339 (DNJ, 1981) the right was applied to prohibit impersonators of the late Elvis Presley, while in *Price v Worldvision Enterprises Inc* (SD NY) 455 F Supp. 252 the plaintiffs, heirs of the actors who had created the comedy characters, Laurel and Hardy, were able to prevent a television series portraying the comedy duo.

32 *Onassis v Christian Dior* 472 NYS (2d) 254 (SC 1984)

33 *Midler v Ford Motor Co* 849 F 2d 460 (1988).

34 *White v Samsung Electronics America Inc* 971 F 2d (1395) (1992) (9th Cir (US).

celebrity's identity was enough to find a misappropriation of personality. Samsung ran an advertisement for its VCRs which featured a robot dressed in a blonde wig, an evening gown and jewellery standing next to a board of large letters. The board was intended to depict the popular television game show, The Wheel of Fortune, and the robot, the show's hostess, Vanna White. The advertisement was set in the future. The message was that the Samsung VCR would still be in use in the 21st century, but a robot would have replaced the celebrity game show hostess. Perhaps not seeing the fun in it, White sued. The Court found that the advertisement had wrongfully misappropriated Ms White's identity by evoking her image. The majority of the Court thought that the right to publicity could not possibly be limited to names and likeness. If it were, a "*clever advertising strategist*" could avoid using White's name or likeness, but nevertheless remind people of her with impunity, effectively eviscerating her rights. The right of publicity must therefore extend beyond name and likeness to any appropriation of White's identity, that is to anything that evokes her personality. Judge Alarcon dissented. He thought the majority decision confused Vanna White, the person, with the role she had assumed on the game show. He stated:

> "The majority appears to argue that because Samsung created a robot with the physical proportions of an attractive woman, posed it gracefully, dressed it in a blond wig, an evening gown, and jewelry, and placed it on a set that resembles the Wheel of Fortune layout, it thereby appropriated Vanna White's identity. But an attractive appearance, a graceful pose, blond hair, an evening gown, and jewelry are attributes shared by many women, especially in Southern California. These common attributes are particularly evident among game-show hostesses, models, actresses, singers, and other women in the entertainment field. They are not unique attributes of Vanna White's identity. Accordingly, I cannot join in the majority's conclusion that, even if viewed together, these attributes identify Vanna White and, therefore, raise a triable issue as to the appropriation of her identity.
>
> The only characteristic in the television commercial that is not common to many female performers or celebrities is the imitation of the "Wheel of Fortune" set. This set is the only thing which might possibly lead a viewer to think of Vanna White. The Wheel of Fortune set, however, is not an attribute of Vanna White's identity. It is an identifying characteristic of a television game show, a prop with which Vanna White interacts in her role as the current hostess. To say that Vanna White may bring an action when another blond female performer or robot appears on such a set as a hostess will, I am sure, be a surprise to the owners of the show."

In a dissenting opinion delivered after a petition for a rehearing was denied, Judge Kozinski considered how the sweeping nature of this new right, a right which would give every famous person an exclusive right to anything that would remind the public of her:

> "What is it about the ad that makes people think of White? It's not the robot's wig, clothes or jewelry; there must be ten million blond women (many of them quasi-famous) who wear dresses and jewelry like White's. It's that the robot is posed near the "Wheel of Fortune" game board. Remove the game board from the ad, and no one would think of Vanna White... But once you include the game board, anybody standing beside it–a brunette woman, a man wearing women's clothes, a monkey in a wig and gown -would evoke White's image, precisely the way the robot did. It's the "Wheel of Fortune" set, not the robot's face or dress or jewelry that evokes White's image. The panel is giving White an exclusive right not in what she looks like or who she is, but in what she does for a living."[35]

The decision has been much criticised; and we think justifiably so, with many pointing to the fact that the "use" of Vanna White was not deceptive and nor did it free-ride on her associative value.[36] The evocation of Ms White's role was not intended to encourage her fans to buy a Samsung VCR. It has been said that the decision "*dangerously expanded the aura of protection for celebrities*" and that it failed to make a distinction between a commercial use and a use of the commercial value of a celebrity's identity; only the latter should be questioned.[37]

The Attitude in Ireland and the UK to the Right of Publicity

Compare the US position with that in Ireland and the United Kingdom, where the law does not recognise any independent right of publicity.[38] At least as regards the United Kingdom, this was confirmed as recently as July 2013 by Birss J:

> "Whatever may be the position elsewhere in the world, and how ever much various celebrities may wish there were, there is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image."[39]

Thus, those seeking to restrain the use of their image in Ireland and the U.K. must resort to other causes of action, such as breach of confidence, breach of contract, infringement of copyright, defamation or, where the circumstances allow, passing off. Passing off, however, will only offer protection in the false endorsement type case (where a celebrity supposedly encourages the public to buy a product); it will not enjoin mere merchandising (where a celebrity's image is used to enhance the attractiveness

35 *White v Samsung Electronics America* 989 F.2d 1512 (9th Cir. 1993)

36 Aldo De Landa Barajas, "Personality rights in the United States and the United Kingdom – Is Vanna too much? Is Irvine not enough?" Ent LR 2009, 20(7), 253, citing also Welkowitz, "Catching Smoke, Nailing Jell-O to a Wall: The Vanna White Case and the Limits of Celebrity Rights" (1995) 3 J Intell Prop L 67.

37 Aldo De Landa Barajas, see above.

38 Compare also with the more generous approach of the Australian courts. See *Henderson v Radio Corporation* [1969] RPC 218; *Hogan v Koala Dundee* (1988) 12 IPR 508; *Hogan v Pacific Dunlop* (1989) 12 IPR 225.

39 *Fenty & Ors v Arcadia Group Brands Ltd (t/a Topshop) & Anor* [2013] EWHC 2310 (Ch).

of a product to the public).[40] Celebrities are afforded no special treatment here: the classical trinity of goodwill, misrepresentation and damage must still be established. The heart of the tort remains misrepresentation. The issue will always depend on the nature of the relevant market and on the perception of the relevant customers. The reasons why a person might be moved to buy the product in question need to be considered. If they simply wish to buy an image of the pop star, there can be no misrepresentation.

In *Lyngstad v Annabas Products Ltd*, where the pop group Abba objected to the defendants producing t-shirts and pillow slips bearing their images, the Court found there could be no liability, there being no misrepresentation. Oliver J did not think consumers would believe that the group had given their approval to the merchandise, but rather that they would assume "*that the defendants were … catering for a popular demand among teenagers for effigies of their idols*".[41] In *Harrison & Anor v Polydor Ltd* an objection by two of The Beatles to the use of their photos on a record of interviews they gave to a journalist was dismissed on the ground that no one would suppose that the record had been put out by or on behalf of The Beatles themselves.[42] In the *Elvis Presley* case, Laddie J said that the public would not assume that the use of the words ELVIS, ELVIS PRESLEY, or ELVISLY YOURS on toiletries and perfumes indicated any connection with Elvis's estate. When it comes to mementoes, customers are generally indifferent as to source: "*when a fan buys a poster or cup bearing an image of his star, he is buying a likeness, not a product from a particular source*".[43] Similarly no passing off was found to occur where a trader sold stickers of the Spice Girls.The people who bought the stickers were unlikely to believe the stickers were published by the band or were authorised by them.[44] These can all be said to fall within the category of the merchandising type case.

Eddie Irvine v Talksport

The first judicial pronouncement in the UK that the tort of passing off rendered unlawful "false endorsement" involving a celebrity came in *Irvine v Talksport*.[45] Here the Formula 1 racing car driver, Eddie Irvine, brought a claim against the UK-based radio station Talksport for using an image of him holding a portable radio on a promotional brochure. The image had been created by manipulating a photograph in which Irvine was holding a mobile phone. Irvine claimed that the brochure falsely gave the impression that he was endorsing Talksport and that consequently the distribution of the brochure constituted a passing off. Laddie J, upheld on appeal, thought there was no reason why the law of passing off in its modern form and in modern trade circumstances should not apply to cases of false endorsement (as distinct from merchandising cases): "*manufacturers and retailers recognise the realities of the market place when they pay for well known personalities to endorse their goods. The law of passing off should do likewise.*" As to the question of goodwill, Laddie J was satisfied that at the relevant time, 1999, Irvine was extremely "*hot property*" in the field of motor racing and was well known by name and appearance to a significant part of the public in the UK. Was there a misrepresentation? Yes, although the defendants had not set out to mislead the public, they intended to convey the message that Talk Radio was so good that it was endorsed and listened to by Mr Irvine. This was false. The damage was dilution/loss of licensing opportunity. This was so notwithstanding that the parties were not in competition with each other, the common field of activity doctrine having been discredited.[46] Damages of £2,000 were awarded, but increased on appeal to £25,000, being the amount which Mr Irvine would have charged for the endorsement.

At face value, it might seem that Laddie J simply applied the orthodox ingredients of the tort. However, Carty suggests that the judge applied an extended meaning to all three ingredients, with the result that the decision can be interpreted as protection against misappropriation of fame. She explains:

"Thus in order to prove false endorsement the claimant had only to raise a rather tenuous "association" misrepresentation. The need to show "goodwill" (customer base) appeared to have been refashioned as the need to protect the value of the claimant's "reputation" or "fame"—in other words the "grab value" of the claimant. Goodwill was thus extended to include "promotional goodwill"—"the attractive force which is the reputation" of Irvine. And the type of harm to be shown as likely became the vague concept of dilution. The judge accepted that there was no damage in the direct sense but rather "the law will vindicate the claimant's exclusive right to the reputation or goodwill". In essence the defendants had acted unfairly and were to pay for taking advantage of a reputation without paying for it."[47]

Rihanna and Topshop

The issue came to the fore again in a case involving Rihanna, the world famous pop star and style icon with a "*cool, edgy*" image, and fashion retailer, Topshop.[48] In March 2012, Topshop offered for sale, in its stores and online, a t-shirt bearing an image of Rihanna. About 12,000 units were sold in

40 As to the distinction between endorsement and merchandising, see the decision of Laddie J in *Irvine v Talksport Ltd* [2002] FSR 60 at para 9 where he explains: "*When someone endorses a product or service he tells the relevant public that he approves of the product or service or is happy to be associated with it. In effect he adds his name as an encouragement to members of the relevant public to buy or use the service or product. Merchandising is rather different. It involves exploiting images, themes or articles which have become famous.*" See also the comments of Birss J at para 33 of *Fenty*, fn 93 above.

41 [1977] FSR 62 Ch D.

42 [1977] FSR 1 Ch D.

43 *Elvis Presley Trade Marks; Elvis Presley Enterprises Inc* [1999] RPC 567.

44 *Halliwell v Paninin SpA* (6 June 1997) (Lightman J). See also *Travener Rutledge v Trexapalm* [1977] RPC 275, the Kojak Lollipops case, where the "unauthorised" local lollipop retailer succeeded against the makers of the television program); and *Wombles v Womble Skip Hire* [1975] FSR 488 where the creator of the characters called "Wombles" could not restrict the unauthorised use of that name for rubbish skips.

45 [2002] FSR 60.

46 The decision in *McCulloch v May* (1948) 65 RPC 58, where a well-known BBC children's broadcaster could not restrain the defendant company from using his popular pseudonym "Uncle Mac" on breakfast cereals, had been discredited. See generally Phillips and Coleman, fn 38 above.

47 Carty, "Advertising, Publicity Rights and English Law", (2004) 3 IPQ 209.

48 *Fenty & Ors v Arcadia Group Brands Ltd (t/a Topshop) & Anor* [2013] EWHC 2310 (Ch).

total. The image was derived from a photograph of Rihanna which was taken by an independent photographer when she was shooting her video for a single from her "Talk That Talk" album. The trial judge, Birss J, thought the image was "striking": Rihanna was looking directly at the camera with her hair tied above her head in a headscarf. Topshop had a licence from the photographer to use the image; but it did not have the permission of the star herself. Rihanna claimed passing off: she said a substantial number of customers would be deceived into thinking it was an authorised image and that they would buy the t-shirt in this mistaken belief. The judge found that Rihanna had "*ample goodwill*" to succeed in a passing off action of this kind.

The scope of her goodwill was not only as a music artist but also in the world of fashion, as a style leader. Her trading activities include a substantial merchandising operation, carried out through separate corporate vehicles, also claimants in the proceedings. The Court heard evidence that Rihanna was working hard to identify herself as a serious fashion designer and had worked with the likes of H&M, Gucci and Armani. Notably Bravado, the company that manages her merchandising business, had not been given merchandising rights in relation to high-end fashion; these were retained by the star herself. She had also entered into an agreement to design clothing for the established high-street fashion store, River Island, which showed that her identity and endorsement in the world of high street fashion was perceived to have a tangible value. Young females aged between 13 and 30 were interested in her views about style and fashion; if Rihanna was seen to wear or approve of an item of clothing, this was taken to be an endorsement of that item in their minds.

Topshop said there was no misrepresentation. There was nothing on the t-shirt or on the swing tag or other labelling which represented that it was official Rihanna merchandise and customers did not think that it was. It was different to standard pop star merchandise: it was plainly an item of fashion wear. Customers would buy it because they liked the product and the image for their own qualities and there was a definite trend in fashion for image t-shirts. There was no evidence of actual confusion. On Rihanna's part, it was said that in the particular circumstances of the case, there was a likelihood that customers would be misled. These circumstances included Rihanna's past association with Topshop and the particular features of the image itself.[49]

Birss J thought that Topshop's past collaborations with celebrities, including Kate Moss, meant that customers would not be surprised to find goods on sale in Topshop which had been endorsed or approved by celebrities. Customers would not necessarily assume that such goods were authorised, but equally they would not assume they were not. Topshop had also sought to capitalise on its connections with very famous stylish people, including Rihanna. In 2010, it ran a competition for a personal shopping appointment with Rihanna at its flagship Oxford Circus store. In February 2012, Rihanna visited the same store, this time on a shopping trip of her own. On Twitter, employees of the store wondered what she might buy. This, the judge thought, showed that Topshop recognised and sought to take advantage of Rihanna's public position as a style icon.

He also had regard to the image itself. It was taken during the video shoot for "We Found Love", a track on Rihanna's "Talk that Talk" album and was similar to the official images used to promote the album. The particular video shoot, which took place close to Bangor in Northern Ireland, had attracted much media attention at the time after the owner of the land on which the shoot took place complained about Rihanna's risqué wardrobe. Birss J thought that the relationship between the t-shirt image and the official images for the album and the video shoot would be noticed by her fans. This was important: the t-shirt image was not just recognisably Rihanna, it looked like a publicity shoot for her recent musical release and her fans might well think it was part of the marketing campaign for that project. Putting all this together, Birss J said:

> "The prospective purchasers will look at this garment on sale in Topshop (or on Topshop's website). The nature of the image itself seems to me to be a fairly strong indication that this may be an authorised product, an item approved by Rihanna herself. The fact it is fashion garment and not a cheap simple merchandising blank does not act as a sign pointing against authorisation but nor is it a pointer in that direction. The fact it is on sale in a high street retailer is neutral. The fact the high street retailer is Topshop is not neutral. The public links between Topshop and famous stars in general, and more importantly the links to Rihanna in particular, will enhance the likelihood in the purchaser's mind that this garment has been authorised by her.
>
> The fact there is no indication of artist authorisation on the swing tag or neck label points firmly against authorisation but in my judgment that is not strong enough to negate the impression the garment is authorised. Although I accept that a good number of purchasers will buy the t-shirt without giving the question of authorisation any thought at all, in my judgment a substantial portion of those considering the product will be induced to think it is a garment authorised by the artist. The persons who do this will be the Rihanna fans. They will recognise or think they recognise the particular image of Rihanna, not simply as a picture of the artist, but as a particular picture of her associated with a particular context, the recent Talk That Talk album. For those persons the idea that it is authorised will be part of what motivates them to buy the product. I am quite satisfied that many fans of Rihanna regard her endorsement as important. She is their style icon. Many will buy a product because they think she has approved of it. Others will wish to buy it because of the value of the perceived authorisation itself. In both cases they will have been deceived."

This was found to be "*obviously*" damaging to Rihanna's goodwill, the damage being the sales lost to her merchandising business and the loss of control over her reputation in the fashion sphere. Birss J commented that the fact that the t-shirt

49 Underhill LJ in the Court of Appeal, [2015] EWCA Civ 3, did not believe that either factor by itself would have sufficed to ground the case in passing off, and he thought that Rihanna's association with Topshop had not weighed very heavily in the balance.

was a high quality product could not negate that aspect of the damage: "*It is a matter for [Rihanna] and not Topshop to choose what garments the public think are endorsed by her."* While Birrs J accepted that the mere sale by a trader of an article bearing the image of a famous person is not, without more, an act of passing off, he held that "*the sale of this image of this person on this garment by this shop in these circumstances"* was a different matter. The remedy was an injunction, upheld on appeal, prohibiting Topshop from dealing in the t-shirt any further without clearly informing prospective purchasers that it had not been approved or authorised. The form of the injunction was recognition that the vice in the impugned activities lay not in the use of Rihanna's image, but in using it in such a way as to cause a misrepresentation.[50]

So where do these cases leave us in Ireland and in Britain? Are we closer to the US position? Do we want to be? Carty suggests that *Irvine* shows the scope for manipulation of the tort away from misrepresentation and the public interest to misappropriation and the protection of fame *per se*. If the tort is to apply to false endorsement claims, there must be an endorsement in a real sense. Otherwise there can be no material reliance and no harm to promotional goodwill. The facts must demonstrate that the product is being endorsed, and not simply that the celebrity is being used. Carty wonders was this really the case in *Irvine*, and indeed, we wonder whether it was in the Rihanna case. She refers to the "*misappropriation feel*" of the case, with the judge castigating "*squatting*" by the defendants who "*exploited*" Irvine's fame, and his focus on dilution. She wisely cautions: "*if this central requirement is applied in a vague way to mean a false implication that there is "some association" or financial link between the celebrity and the advertised product or service or indeed if the requirement for a misrepresentation is dropped in favour of protecting against unpaid use of the celebrity for attention-grabbing then true passing off is not involved."* Such cases are closer to merchandising than endorsement and there can be no liability in passing off for mere merchandising. Indeed it seems to us that the Rihanna case is more properly to be considered a merchandising or icon case: Rihanna was the product; her image on the t-shirt was the point of the product and the reason for its purchase. Carty concludes:

> "… where celebrity persona use is involved only "informational advertising use" merits legal protection. There is an acceptable use of the tort of passing off where real endorsement is being misrepresented in the advertising. Liability is justified because the defendant's apparently useful consumer information is likely to be relied upon, harming both celebrity and public alike. Merely taking something of value without paying is not a good reason to interfere with an unauthorised use of a celebrity persona. Harm (based on established torts, though primarily passing off) not unjust enrichment should be the key to liability. The regrettable acceptance of the commercial magnetism of trade marks in registered trade mark law—protecting the stronger marks most rigorously—is no reason to extend the common law in a similar fashion to protect the commercial magnetism of celebrity."[51] ■

Part 3 (the concluding part of this article) will appear in the December edition of the Bar Review and will focus on remedies for the tort of passing off.

50 [2015] EWCA Civ 3, per Kitchin LJ at para 48.

51 Carty, fn 101 above.

Snapshots

Michael O' Higgins SC, speaking at the recent launch of his novel "Snapshots" in the Atrium of the Distillery Building. Snapshots is a gritty crime thriller set in 1980s Dublin. The book is published by New Island Books

"*They can live in the desert but nowhere else*": Human Rights, freedom of religion and the demand for State control over access to faith schools

Sunniva McDonagh SC*

On the 5th of December this year, the traditional Armenian stone cross, the Khachkar, will be placed as a genocide memorial in the grounds of Christ Church Cathedral in Dublin to commemorate 100 years since the Armenian Genocide of 1915. This is a fitting gesture by the Church of Ireland and is a continuation of the hospitality offered to the Armenian community of Ireland by Taney Church of Ireland Parish in Dundrum over a number of years. It is also fitting that the Irish memorial to the Armenian Genocide will be placed on the grounds of a Christian church as the Christian churches are among those who have recognised the events of 1915 as a Genocide in a way that most governments have failed to do[1].

During the Armenian Genocide, up to a million Armenian Christians were killed or deported from Eastern Anatolia by the Ottoman Turks to the far deserts of Syria where tens of thousands of them were murdered while many times that number died of thirst, hunger, cold and sickness. The title of this article is a diktat issued concerning the Armenians by one of the Turkish architects of the Genocide.

Almost twenty-five years later, the Nazis recalled the events of 1915. In giving the order to invade Poland in order to gain Lebensraum, Adolf Hitler asserted *"who still talks nowadays of the extermination of the Armenians?"*[2] Thus historians have argued that Hitler reckoned he could act without retaliation in imposing his Final Solution as the world had turned a blind eye to the Armenian Genocide and would do so in relation to the Holocaust.

These dreadful events remind us that human rights are not just the concern of specialised agencies but that we are all called upon to be vigilant to ensure these rights are respected in all societies and at every level of society.

The focus of this paper is the right to freedom of religion. In particular it looks at an important component of this right which is the right of religious traditions to associate together and found schools reflecting their particular denominational ethos and for such schools to hand on their particular faith tradition to students of that faith whose parents choose such schools. This is essentially the right in favour of the freedom of religion. This article acknowledges the corollary of this right which is freedom from religion. This is the right not to be subjected to religious coercion. However certain human rights NGOs and bodies concentrate almost exclusively on the right to freedom from religion and fail to respect appropriately the right to freedom for religious liberty and association. Thus the position adopted by those bodies is that no child should be given preferential access to a denominational school regardless of the religious affiliation of the child (unless perhaps where such a school is not in receipt of State funding.) Once children of other faiths and none are admitted on an equal basis with children of the faith denomination of the school, the right not to be proselytised is relied on to argue that denominational schools should not teach religious instruction as part of an integrated school curriculum in accordance with the characteristic ethos of the school but should do so discretely such as outside school hours. Thus religion is tolerated so long as it remains on the margins of the school curriculum.

Examples of this view can be found in various UN Committees. For example, the Committee on the Elimination of Racial (sic) Discrimination in its Concluding Observations on the 10th of March 2005 in relation to Ireland stated that Ireland should:

> "Amend the existing legislative framework so that no discrimination may take place as far as the admission of pupils (of all religions) in schools is concerned."[3]

More recently in 2015, the UN Human Rights Committee in

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1 On the 12th of April 2015, Pope Francis described the massacre of the Armenian people by the Turks as the first genocide of the 20th century.

2 This was a quote from a statement which was read at a hearing of the Nuremberg trials and is said to have been part of Hitler's address to his commanders in chief on August 22nd 1939. It is noted that some historians doubt its authenticity. Some historians suggest that Hitler's *"Final Solution"* was inspired by the Turkish massacre of its Armenian population in 1915 while others have downplayed the genocide as a precedent for the final solution as part of a larger effort to deny or downplay the Armenian genocide. It is not the task of this paper to determine this precise historical question.

3 This is justified on the basis of the *"intersectionality"* of racial and religious discrimination.

its concluding observations on the Fourth Periodic Report of Ireland stated at paragraph 21:

> "It is concerned about the slow progress in relation to ... the phasing out of integrated religious curricula in schools accommodating minority faith or non-faith children."

Its recommendation was that Ireland:

> "Should also introduce legislation to prohibit discrimination in access to schools on the grounds of religion, belief or other status."

Having regard to the origins of human rights from which these views have sprung, their sentiments are a somewhat surprising. The Universal Declaration of Human Rights 1948 and the European Convention on Human Rights 1950 were fashioned after the Second World War in response to the Holocaust when the Nuremberg *"laws"* were used as an instrument of discrimination and oppression of Jewish German citizens. Great crimes had been committed by the Nazis under the cover of these laws. The objection to punishing the criminals (based on the impermissibility of retroactive penal justice) could be overcome only if one simply said that the post war decrees invaliding Nazi laws did not qualify as retroactive penal sanctions because in the words of the respected German jurist Gustav Radbruch:-

> "Even though (those decrees) themselves were not in force, their content was already binding before those deeds were committed; and in their content such rules correspond to a law which is above statute, however one may like to describe it: the law of God, the law of nature, the law of reason."[4]

Thus the principle by which evil positive laws could be condemned as a legal injustice was an attempt to express the proposition that human beings have inalienable and inherent rights regardless of whether they are recognised or restricted by the State. The Declaration and the ECHR represent expressions of universal rights to which all human beings are entitled by virtue of their humanity and dignity as human beings. The freedoms protected by the Declaration and the ECHR (and its Protocols) are seen as rights which can be relied upon by individuals against interference from the State. Thus human rights law is premised on the idea that there have to be fundamental limits imposed on the exercise of State power. It is about limitations being imposed upon the State to stop it from interfering in how individuals may choose to structure their lives and about carving out areas of freedom for individuals. It is a freedom from the State born out of the historical totalitarianism of the State.

However, the UN pledge to the Jewish victims of persecution that the State would not unduly interfere with their traditions and practices is not always fully respected by some in the human rights community when applied to a modern analogy.

In considering the question of access to faith schools and what their permitted religious curriculum should be, it is of the utmost importance to emphasise the positive contribution children of different and no faith traditions make to a faith school. Inclusion and tolerance should be core values of any such school. The faith schools founded by Irish Christian missionaries abroad which welcomed and educated children of many different faiths and where proselytism was never an objective may be considered as an appropriate model for a truly inclusive faith school. However, what is at issue is the right of faith schools to give priority to children who share the faith tradition of the school and whose parents have chosen the particular ethos of the school and to guarantee to such parents that the school will provide a faith based education through an integrated religious curriculum. The further question is whether faith schools, when they welcome children of other faiths and none, should thereby be precluded from teaching an integrated religious curriculum. (Despite the fact that parents have the right to withdraw their children from religion class).

If religious liberty and the free right of association permit religious bodies to organise their lives free from State interference, what justifications might be relied upon for State interference in the exercise of such freedoms?

Firstly, there is an inherent tension between human rights law and equality law which should be acknowledged. Equality law is not premised on non-interference by the State but quite the opposite: the duty of the State to interfere with private behaviour in order to ensure compliance with equality principles.

Equality law had its genesis in the 1960s in the US civil rights legislation passed to prohibit discrimination on grounds of race. The American legislation sought to a remedy not the oppressive use of State power against individuals, but the failure by the State to do enough to protect the black minority from the tyranny of the white majority. The grounds of equality have been extended over the last half century to protect other groups under the equality principles, including grounds of disability, gender, sexual orientation,„marital status and religion. Thus equality law arises from the State not doing enough to protect those in its care whereas human rights law arises from the perception that the State is overly interfering with the freedom of those subject to its jurisdiction.

Any expression of human rights law must take care to respect the principles of equality protected by the State. The State is rightly mandated to intervene in society when equality principles are not being respected. Thus in many areas of life a careful balance between human rights (non-interference) and equality principles (appropriate interference) is called for. The rights on both sides should be acknowledged and balanced in a fashion which respects both rights as far as possible. This is no easy task. However in seeking to achieve such a balance in the context of education it would seem more appropriate to concentrate on establishing a sufficient plurality of school types rather than restricting the rights of faith schools.

Secondly, there is little consensus about what constitutes a human right or indeed how we should seek to determine what a *"human right"* is. Who is to decide what rights reside in people because of their inherent dignity? Or indeed, are there rights which are not founded in the inherent dignity of individuals?

4 Cited in A Short History of Western Legal Theory by J.M. Kelly (Clarendon Press 1992) p. 379-380.

Thus, some framework for identifying the underlying principles would seem appropriate. These principles include philosophical, ethical and jurisprudential considerations which are outside the scope of this article. However, it would be wise to exercise caution in declaring human rights on the basis of a majority view or an opinion poll. The basis of human rights lies deeper than that. History is replete with examples of actions which have enjoyed the sanction of the majority but may be seen today as morally dubious. Perhaps the dropping of the atom bomb on Hiroshima and the toleration of slavery in the United States might be examples of this. A Red C opinion poll taken in Ireland in the 1930s might not have found a majority of people agreeing with the proposition that the women banished to the Magdalene Laundries were suffering inhuman and degrading treatment. Thus, it would be altogether too simplistic to suggest that human rights arise from the majority opinion.

It is often said that there are *"emerging human rights"* but it is less often discussed wherefrom and on what principled basis such rights might emerge. For example, there is no recognised international right to abortion. However, some influential UN Committees have suggested that such a right should be a component of a woman's reproductive right or right to bodily autonomy. Some in the human rights community are endeavouring to establish the recognition or creation of such a right. A majority of Commissioners of the Irish Human Rights and Equality Commission have recently voted to espouse the position that the Eighth Amendment to the Constitution should be repealed despite IHREC having an express statutory duty under its parent Act to protect constitutional rights[5]. To urge repeal of the Constitution is to acknowledge that constitutionally protected rights are at stake which require the People of Ireland to determine whether such rights should be restricted or repealed. It does not seem appropriate to this writer, a Commissioner of IHREC who was of the minority position, for IHREC to seek to restrict a guaranteed constitutional right however sincerely held is the aspiration that a competing right might emerge to trump this right.

Thirdly, there is often a confusion of terms used in debates on matter of public policy. Most people acknowledge that pluralism is vital to the survival of liberal democracy and government policies relating to education should protect and foster a number of different school models and that the State should be neutral. It is entirely appropriate that the State should be neutral. However such neutrality is often interpreted to mean that the State as a matter of neutrality should promote a secular model of public life and political life and any matter of religious practice or belief is a private matter with no place for open expression in the public square. Such a view might argue that while denominational schools should not be prohibited, they should not be in receipt of any State funds. Such a view often sees faith schools as organs of the State over which the State should exercise maximum control rather that truly voluntary associations or bodies whose autonomy the State should respect as far as possible. However the promotion of a secular vision of the public square is not a truly neutral view. A secular view is not a neutral view but one particular philosophical standpoint. Moreover, education by its very definition is not *"neutral"*. Nor should it be. Every type of education seeks to transmit certain values. A secular model of education has a different philosophical basis to a religious one. This makes it different from a religious basis but it does not make it neutral. TS Elliot wrote:

> "Education is a subject which cannot be discussed in a void: our questions raise other questions, social, economic, financial, political. And the bearings are on more ultimate problems than these: to know what we want in education we must know what we want in general, we must derive our theory of education from our philosophy of life."

A neutral State should encourage a plurality of school types. If there are not enough patrons to represent fully the school types parents wish for their children it is essential to advocate for more diversity in school types. This approach best holds the balance between competing rights. To marginalise the teaching of religion in religious schools and argue that no priority be given to children of the particular faith in question undermines the right to religious liberty and fails to adequately protect human rights.

The words of Aidan O'Neill QC of Matrix Chambers in London are apt even though they were addressed to a different context:

> "This is to condemn the religious to the very closet which equality law has done so much to liberate others from."[6]

To illustrate his point, he refers to the impact of equality principles on sexual orientation. He compares a speech of Lord Rodger of Earlsferry in *HJ (Iran)*[7] and the opinion of Advocate General Bot in *Y and Z v. Germany*[8]. Both cases deal with gay rights and their expression in the public square.

The German case dealt with the test for persecution on grounds of sexual orientation. AG Bott limited the notion of persecution in relation to gay people to "the real risk of being executed or subjected to torture, or inhuman or degrading treatment, of being reduced to slavery or servitude or of being prosecuted or imprisoned arbitrarily." In the *HJ (Iran)* case, the late Lord Roger of Earlsferry stated that the right to live freely and openly as a gay man involved a wide spectrum of conduct "just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates."

In the first case, there was no persecution if a gay person could live a quiet life without drawing attention to himself or herself. While the writer wishes to disassociate herself

5 SS 2(1) and 10(1)(a) of the Irish Human Rights and Equality Commission Act, 2014

6 (synopsis of Chamber debate published online by Oxford Human Rights Hub

7 HJ (Iran) v. Secretary of State for the Home Department (2011) 1 AC 596.

8 Joined cases C-71/11 and C-99/11 Y and Z v. Germany 5th September (2012) ECR 1-NYR.

from the stereotypical example of the learned judge in the second case, the sentiment that all rights are entitled to find expression and protection in the public square is a laudable one. The task of balancing such rights will always prove challenging and the right to religious liberty should not enjoy any special privilege. However, it should not become the right that dare not speak its name. ■

Eileen Finn raises over €80,000 for Motor Neuron Association

Eileen Finn BL was diagnosed with Motor Neurone Disease in 2012. With a team of walkers, she participated in the Dublin Ladies Mini Marathon on 1 June 2015. Her aim was to raise €30,000 for the Irish Motor Neurone Disease Association (IMNDA), who provide Eileen and others with so much practical support.

As part of the funding effort, a wine & cheese evening was held on 21 May 2015 in the Distillery Building. The event was attended by many members of the Bar, judiciary, solicitors, friends and family and was an enormous success, with a total of €16,082 raised on the night. Funds were also raised through cake sales held in the Distillery Building and the Criminal Courts of Justice.

The overall "Walk With Eileen" campaign raised in excess of €82,000- over €50,000 more than the original funding target. This included a donation of €10,000 from William Fry Solicitors.

A formal presentation of the funds took place at The Merrion Hotel on 24 July 2015 and was attended by the Minister for Justice and Equality, Frances Fitzgerald TD, who very kindly spoke at the event.

Eileen would like to acknowledge the help and support of the Bar Council, the Courts Service, the judiciary and many of her colleagues who have helped her to continue to work for as long as possible. She is very much aware that this is only possible with the cooperation and assistance of so many. ■

Pictured at Wine & Cheese at The Distillery Building: From left- Lucy O'Connell BL, Eileen Finn BL and Siobhan Gaffney BL.

Pictured at Wine & Cheese at The Distillery Building: From left- Mr. Justice Adrian Hardiman, Judge Yvonne Murphy, Eileen Finn BL and Mr. Justice Peter Kelly.

Pictured at the presentation of the cheque to IMDNA at the Merrion Hotel: Eileen Finn BL with the Minister for Justice and Equality, Frances Fitzgerald and friends and family.

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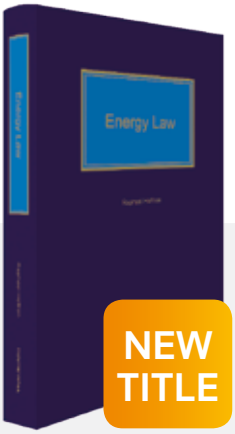
ABOUT THE AUTHOR

Raphael Heffron is a Lecturer in Law at the University of Leeds. He has acted as a consultant for the World Bank and various thinktanks in London. Raphael is a trained Barrister-at-Law and was called to the Bar in July 2007 in Ireland. He is also the author of *Energy Law: An Introduction* (Springer, 2015) and *Deconstructing Energy Law and Policy* (Edinburgh University Press, 2015).



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