The Bar Review

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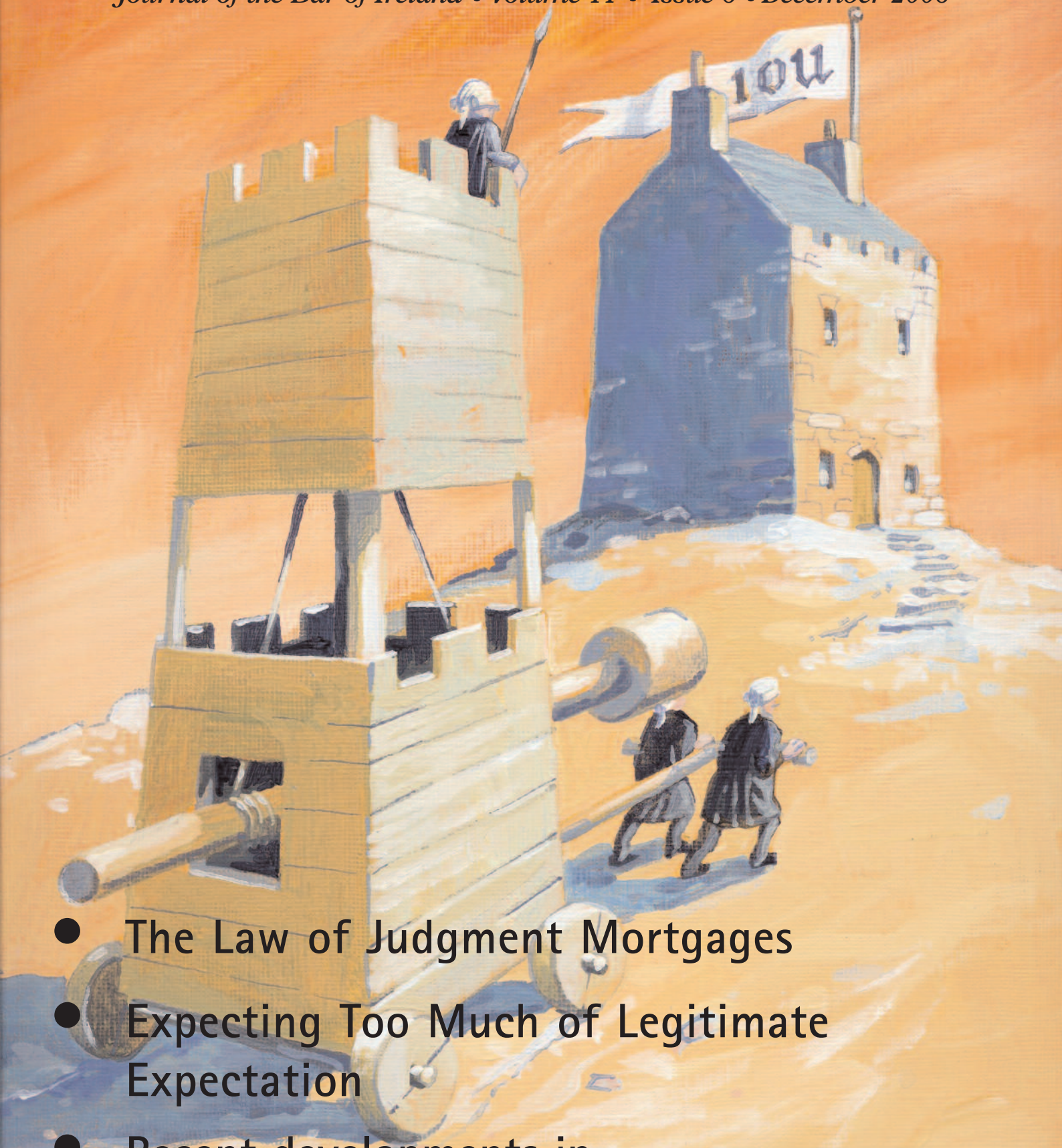

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The Bar Review

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Pension Lawyers Essay Competition

The Association of Pension Lawyers in Ireland is holding its 3rd annual essay competition. The essay title is "Trust Law and Pensions - Is it time for a change?" First prize is €3,000 with a second prize of €1,000. The competition is open to all students of law, and to solicitors and barristers up to 2 years qualified. The closing date for entry is 28th February, 2007. Entries should be sent to Peter Fahy, Association of Pension Lawyers in Ireland, c/o O'Donnell Sweeney Solicitors, One Earlsfort Centre, Earlsfort Terrace, Dublin 2. The rules of the competition and guidance on the possible direction an essay might take are available from the same address.

Thomson Round Hall Criminal Law Conference 2006

L-R: Pictured at the Thomson Round Hall Criminal Law Conference 2006 were Catherine Dolan, Commercial Manager at Thomson Round Hall; Mr James Hamilton, the DPP; An Tanaiste and Minister for Justice, Equality and Law Reform Michael McDowell TD; and The Hon. Mr Justice Nicholas Kearns of The Supreme Court.

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Bar Council Legislation Committee

Paul O'Higgins SC

When I was called to the Bar in 1977, it was a very different place to the Bar we know today. It was exclusively located in the Law Library. The library in question encompassed only the main ground floor of the Law Library and the balcony immediately above it. There were 300 barristers approximately and it was clear that the profession was in danger of an overwhelming invasion because an unprecedented 25 barristers or so had decided to begin practice that October. The legal diary occupied approximately half of one side of the page. Much of that was related to future cases.

The High Court was bulging and a slightly controversial ten member strong. This was two up on 1976, appointments having been made to statutory extra places in the dying days of the 1973 to 1977 coalition Government.

Immensely learned and helpful as he was, my master had three devils so that continuous occupation with his business was not likely and there was a grave danger that in my first few years, the time honoured process of learning by observation would teach me more about the etiquette of drinking of coffee than about winning cases. The coffee itself was more likely to be bought for, than by me, and the degree of its general congealment raised the question whether it should be properly sold by the slice or the cup. Shortage of money for nicotine could in part be met by spending ten minutes in the upstairs or downstairs coffee room where the permanent cloud of thick smoke enforced something closer to active than passive smoking on the average customer. (The Law Library itself was, of course, despite its high ceiling, filled with a significant haze at almost all times)

After a hard day hoping for work and sitting in court watching and hopefully learning from those who had it, the 35p price of a pint still represented a formidable barrier to temptation. While both useful and satisfying, the staple diet of FLAC cases, in the absence of a civil legal aid system, while it might have enriched the sprit, did nothing to enrich the pocket.

At that time I would have certainly welcomed the opportunity to use my time, increase my skills, make my presence in the library known and make some money as well, all opportunities which are presented by the Bar Council Legislation Committee.

Every week, the e-Dáil Digest is produced, giving a comprehensive listing of what will be dealt with by the Dáil in the coming week. The Houses of the Oireachtas website also gives extensive future notice of what is projected on the legislative agenda.

Last year, the Bar Council instituted a scheme whereby for the benefit for the press, the public and other persons who might be interested, selected legislative provisions, be they bills, recent acts or statutory instruments, would be the subject of legal commentary by barristers for posting on the Bar Council website.

Barristers who would like to contribute are welcome to focus on topics of particular interest to themselves and are encouraged to adopt approaches to the analysis of legislation which appear to suit the particular legislation in question. Some pieces of legislation are dramatic or important for their overall conception. Others are a mix of provisions, some of which may be of little interest and others of great importance. In general, statutory provisions are liable to have a significant affect on the development of case law and may reflect significant legal controversy leading to their enactment. Very often, legislation will reflect trends which have been perceived as important long before the legislation itself. Frequently, the area in which legislation takes place will have been considered in reports by the Law Reform Commission or other bodies (though not necessarily reflecting their views).

What is sought is not a substitute explanatory memorandum, since this is available officially in any event. The commentary can focus on a section or subsection of legislation as validly as on an act as a whole. What is aimed for is an insight that is interesting to the layman, but makes a contribution to the analysis or consideration of the legislation in question, which represents added value by virtue of the legal expertise which the author can bring to it.

The project has been slow to get off the ground, having taken its first tentative steps last legal year. This year, it will be put on a more systematic basis. While it is hoped that the contributions sought will not be bland, it is not intended that they should reflect a party political bias one way or another. They are designed primarily to consider the legal merits, or difficulties associated with the legislation concerned.

Upsides

For the member interested in participating, the benefits are significant. In the first place, although the commentaries on the website are not attributed to particular members, they obviously achieve significant recognition from professional colleagues who have free access to details of authorship. In addition, the sum of €500.00 and in exceptional circumstances, more than that is paid for the commentary. Carrying out the exercise also attracts CPD points. It is also envisaged that at the end of the year, a lunch/dinner will be held to bore or entertain those who have contributed, depending on the contributors' attitude to such functions. Contributions, with or without adaption have subsequently made their way to the Bar Review.

Downsides?

The only obvious downside is that in rare circumstances, a particular intended contribution may never be fit for publication. Every effort is made to avoid this. It is not expected to be a regular occurrence. To minimise any risk that this may happen, advice and assistance will be available from those on the Legislation Committee who can be approached both to discuss potentially appropriate subjects, give prospects the go-ahead and to give ongoing advice.

The Legislation Committee is eager to discuss any project with members wishing to do one and will give every assistance on scheduling to indicate a date by which the contribution from any individual member is expected. Having regard to the fact that one of the objectives of the commentary process is to comment at a time when the relevant matters are particularly topical, it is important that deadlines for publication are reasonably strictly observed.

Those who wish to enquire about contributing should talk to myself, Paul O'Higgins, Vincent Nolan BL, Alan Keating BL, Tara Connell BL, Joe Jeffers BL or Tony McGillicuddy BL. Further notification of expansions on those on the Legislation Committee will be given and contact with any of us will ensure that the ball starts rolling. We look forward to learning everything you can teach us in the process of making your contributions and hope that those who participate will find the exercise a small springboard in your careers ●

Expecting Too Much of Legitimate Expectation?

Niall F Buckley BL and James McDermott BL

Introduction

A Schoolteacher, a Mature Student and a Council Tenant walk into a courtroom Sounds like the first line of a joke, but it is in fact the rich backdrop to a trilogy of recent cases in which our courts have been once again forced to grapple with the maturing principles of the doctrine of legitimate expectation and its relationship to the concept of promissory estoppel. This article considers these trends in the context of these cases and identifies several concerns with the conflation of the legitimate expectation and promissory doctrinal streams.

In addition we contrast these cases with the approach in England since *R v North and East Devon Health Authority, Ex p Coughlan*,[1] where the courts have pursued a policy of distinguishing between the different categories of expectations which will arise and projecting what outcomes will flow. As will be seen, the Irish courts have generally eschewed such a prescriptive approach. Instead they have preferred a more flexible model which fastens upon what conduct of a public body would be conscionable in given circumstances.

The Schoolteacher

In *Hennessy v St. Gerard's School Trust*[2], the plaintiff was a schoolteacher who contended that she was entitled to a permanent teaching post**.** The defendant argued that she was employed initially under a probationary contract for one year which, if performed satisfactorily, would lead to a permanent position if such a post were available. The plaintiff contended that she was exempt from any probationary period as she was a member of the 'Supplementary Panel' which signified that she had given satisfactory teaching service in other schools. On this point, Haugh J. found for the defendant describing the plaintiffs submission as being "somewhat unlikely" given that the purpose of having a probationary period was to reassure an employer that their prospective employee had given a period of satisfactory service to them before being made permanent. It would be illogical for them to dispense with the need for probation simply because the employee had given satisfactory service elsewhere. Reaching this conclusion, Haugh J. noted the evidence of several witnesses that a period of probation was included in virtually every contract offered by schools to new teachers and also the fact that in various written communications sent by the defendants to the plaintiff they had referred to her being on a probationary contract. The plaintiff had not sought to challenge this description until after she had been informed that she was not to be offered a permanent contract.

Haugh J. then considered whether the plaintiff was entitled to a hearing with the Board of Governors of the school before a final decision about her future was made. The headmaster of the defendant school had initially offered the plaintiff such a meeting but the Board later indicated that they would not meet with her. The entitlement to such a hearing appeared to be supported by the *'J.M.B. Manual for Boards of Management of Voluntary Secondary Schools'* which arose from agreements between the J.M.B (the school management organisation of which the defendant was a member) and the A.S.T.I (the trade union of which the plaintiff was a member). The defendant argued that this agreement was not binding on them as it was not registered with the Labour Court and, in any event, the board of their school was a Board of Governors rather than a Board of Management. Haugh J. noted that in deciding whether an individual's period of probation had been satisfactory, the Board of Governors was not engaged in disciplinary proceedings but simply assessing performance. He then concluded that "I am satisfied as a matter of probability that certain agreements or understandings had indeed been concluded between the J.M.B. and the A.S.T.I. which would have afforded a probationer in that situation the right to address the relevant board…" He added that it did not matter whether such a board was described as being a 'Board of Management' or a 'Board of Governors.' In reality, both performed the same function. He also indicated that the plaintiff had the right to such a meeting based on the express promise made to her by the headmaster of the defendant school.

On the issue of performance, Haugh J. accepted that in concluding that the plaintiff's year of probation had not been satisfactory, the headmaster had held genuine concerns about the performance of the plaintiff in areas such as control of the classroom, poor relationships with students and an inability to deal with class questions. The final decision on this issue rested with the Board of Governors who would ordinarily be expected to act on the recommendation of their headmaster. Haugh J. noted that when they agreed not to offer a permanent contract to the plaintiff, the Board of Governors were aware in general terms of her shortcomings but held that they had wrongly denied her the right to meet with and address them before coming to their final decision. However despite this failure, Haugh J. was satisfied that even had the plaintiff been given a hearing, it was very unlikely that the eventual outcome would have been any different. He awarded her €15,000 in compensation.

Of most legal significance in this judgment is the analysis by Haugh J. of the demarcation between legitimate expectation and promissory estoppel. In deciding that the plaintiff had a right to be heard, Haugh J. concluded :

> "Whilst there is a formidable body of legal opinion suggesting that entitlements arising under the doctrine of legal expectancy apply only

1 [2001] QB 213

2 (Unrep, HC, Haugh J, 17 Feb 2006)

> in relation to dealings with public bodies rather than private ones, it is clear from the judgment of Finlay C.J in *Webb v Ireland* that the said concept is but an aspect of the well recognised equitable concept of promissory estoppel whereby a promise or representation as to intention may in certain circumstances be held binding on the representor or promisor. If it is a doctrine deriving from the principles of equity, it seems hard to find a rational explanation as to why it should only bind public bodies or bind them in a different way from the obligations which will be placed on other bodies…Since I am satisfied that the plaintiff had a right to a hearing before any decision was made both under her contract and by way of the doctrine of legal expectation or promissory estoppel, it is not strictly necessary for me to determine whether she may also have enjoyed such a right as a right under constitutional or natural justice."

In regarding legitimate expectation as simply an aspect of promissory estoppel, Haugh J. appears to be endorsing a number of previous decisions such as *Webb*[3], *Kenny*[4] and the *Garda Representative Association*[5]. This conflation has some unfortunate consequences and certainly, the wisdom of extending a public law doctrine into matters of private law has to be questionable. For example Hogan and Morgan write that:

> "… it seems clear that the legitimate expectations doctrine is one which is exclusively public law in character. While the doctrine has obvious affinities with promissory estoppel, it may be doubted whether the element of detrimental reliance is necessary. In other words, legitimate expectations are protected in the interests of safeguarding the citizen against haphazard and unfair changes in administrative policy and practice. If this is the true rationale for the doctrine, then, clearly, there would be no basis for extending the ambit of legitimate expectations to private law."[6]

Leaving aside the public law character of legitimate expectation and the apparent lack of a detrimental reliance requirement to invoke it, Hogan and Morgan go on to analyse three further distinctions between it and promissory estoppel[7] which throw further doubt on attempts to equate the two doctrines.

The Mature Student

In *Power v The Minister for Social and Family Affairs*[8], the applicant was a full time student who enrolled in college with the assistance of the 'Back to Education Allowance' provided by the Department of Social and Family Affairs. The scheme was designed to provide learning opportunities for people who had not previously received a third level education by enabling them to attend a full time course without losing their entitlement to social welfare payments. Details of this scheme were included in a booklet entitled 'Back to Education Programme SW70' which was published in June 2002 and provided that:

> "The allowance is payable for the duration of the course, including all holiday periods. It is not means tested so you may also work without affecting your payment…"

The applicant applied for inclusion in the scheme and was accepted into it in September 2002. He claimed this made it possible for him to attend university by providing financial support even during the Summer months. Everything ran smoothly until the applicant was sent a letter in March 2003 which informed him that:

> "Following a review of the Back to Education Allowance (BTEA) Scheme, it has been decided that, with effect from Summer 2003, the allowance will not be payable for the summer holiday period between the academic years."

The applicant then got involved in a campaign to reverse this amendment to the scheme, which included letter writing, demonstrations and lobbying. These were not successful, and so in February 2004, he commenced judicial review proceedings claiming that he (and 173 other applicants) had a legitimate expectation that the scheme as constituted when they were admitted to college would continue for the duration of their studies. In particular, they contended that in the booklet issued, the respondent made a statement amounting to a promise or representation that vacation payments would be made for the duration of the course of education of the applicants and that such a promise was binding as regards those students who entered the scheme on foot of such a promise.

In considering the constituent elements of a successful legitimate expectation claim, Mac Menamin J. quoted with approval Fennelly J. in *Glencar Exploration v Mayo County Council*[9] who observed that:

> "In order to succeed in a claim based on a failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation, reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally there are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory bar is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."

MacMenamin J. accepted that the scheme under consideration was not a statutory one but was in effect an administrative non-statutory scheme, approved by government decision only. It was therefore more easily amended to meet changing circumstances. He concluded, however, that the wording used in the booklet was clear and unequivocal and did not indicate that the terms and conditions of the scheme might be liable to change without notice "..especially to those persons who had already embarked, at significant sacrifice, on the scheme and were thereby pursuing an undergraduate course ***in*** third level education." He then decided that the booklet read in conjunction with the application form creates a relationship between the parties "more akin to an individualised promise and representation rather than mere enunciation of a general policy". He noted that in the ***Coughlan*** case, Lord Woolf MR described three categories of expectation, the third of which was substantive rather than procedural in nature. MacMenamin J remarked:

3 *Webb v Ireland* [1988] I.R. 353
4 *Kenny v Kelly* [1988] I.R. 457
5 *Garda Representative Association v Ireland* [1989] I.R. 193
6 Hogan and Morgan, *Administrative Law in Ireland* (Roundhall, 3rd ed. 1998) at 860
7 see Hogan and Morgan, *Administrative Law in Ireland* (Roundhall, 3rd ed. 1998) at 896-900
8 *Power & others v Minister for Social and Family Affairs* [2006] IEHC 170
9 *Glencar Exploration plc v Mayo County Council* [2002] 1 IR 84

> "Where the promise is induced in expectation of a substantive benefit, the Court of Appeal found that its task was to 'determine whether there is a sufficient overriding interest to justify departure from what has been previously promised'".

Applying this principle to the facts of the instant case, MacMenamin J. was satisfied that there was no evidence of any over-riding public interest which would justify the removal of the benefit from the applicant who had enrolled in third level education based on specific representations that had been made. He was satisfied that the respondent had issued a statement or adopted a position amounting to a specific promise or representation as to how it would act in respect of an identifiable area of its activity and this promise had been made to an identifiable group of people and commented that:

> "The representation formed part of the transaction definitively entered into by persons who commenced third level education on the basis of representations contained in the booklet. It was reasonable for the first named applicant to conclude that the respondent would abide by the representation to the extent that it would be unjust to permit the respondent to resile there from."

Having decided that it would be unjust to permit the respondent to alter the applicants' circumstances once he had committed himself to following a course of third level education on foot of their representations, MacMenamin J. concluded that the applicant had suffered a detriment as a consequence of the breach of the respondent's commitment. He was satisfied that, having refrained from seeking a judicial review remedy in 2003, the applicant was therefore debarred by his own conduct from obtaining judicial review by way of ***certiorari***, prohibition or injunction but was entitled to a declaration that the decision of the respondent to implement the changes was contrary to his legitimate expectation and was therefore entitled to restitution which would place him in the same financial position as he would have been in had the decision not been made.

The Council Tenants

Dunleavy v Dun Laoghaire Rathdown County Council[10] arose out of protracted arrangements in relation to the purchase of local authority housing by the long-term tenants. The plaintiffs were residents of local authority maisonettes in Dun Laoghaire, and tenants of the defendant. They claimed that as a result of representations made by the defendant on various occasions down the years – in some cases as early as 1979 - they had a legitimate expectation that their maisonettes would be sold to them at the then prevailing prices. On certain dates from 1979 to 1999, the defendants sent out standard-form letters to the tenants inviting expressions of interest as to the purchase of the maisonettes. The letters did not commit to selling the properties and the first letter in 1979 referred to potential legal difficulties that might frustrate the sale. No clear reference appears to have been made to these difficulties in later correspondence. Each of the plaintiffs had, at various dates, expressed an interest in purchasing their maisonettes. Evidence was given that they had relied to their detriment, having foregone the opportunity to transfer from their maisonettes to houses, on the understanding that the maisonettes would be sold to them. Had they taken up this option to transfer, they would have been already entitled to purchase those houses. The tenants had also expended considerable sums in repairing and renovating the properties. One plaintiff had spent sums on maintenance after the local authority had refused to do so, in light of the fact that he was to purchase the home. These dealings were against the backdrop of a clear statutory discretion conferred on the local authority in relation to the sale of public housing, juxtaposed with a stated government policy of selling local authority housing to long term tenants.

Macken J was satisfied that up until 1995, in the eyes of the defendant, there was a reasonably held view that serious legal uncertainties existed in relation to the sale of maisonettes, their having shared spaces and services. Thus it was not acting unreasonably or arbitrarily in excluding maisonettes from tenant purchase schemes until those issues were resolved in 1995. The judge framed the plaintiff's claim thus:

> "The Plaintiff's claim under the principle of legitimate expectation arises from their respective expressions of interest in the purchase of their dwellings, repeated over a period of years, originally and generally in response to the ... periodic invitation of the defendants to the plaintiffs as well as the publication at least in 1988, 1989 and 1995 and even earlier, of tenant purchase schemes adopted by the defendant and sometimes incorporated into sales schemes for dwellings, including maisonettes and always by references to prices or to formulae for calculating such prices"

She then proceeded to apply Fennelly J's criteria from ***Glencar.*** The judge was satisfied that the initial letter of 1979 could not be construed as a representation that they would sell the maisonettes, but simply an attempt to gauge interest levels. That was "not the end of the story" though, she remarked. A series of letters were exchanged. Tenant purchase schemes and the local authority sales schemes were notified or explained to the plaintiffs, and meetings had been held at the local authority's premises in relation to the matter. Forms were requested to be signed and returned. From 1980, right through the 1990s, representations and inquiries were made by the plaintiffs and councillors on their behalf. The judge recognised that whilst at no time was a formal offer to sell made, the defendants at no stage communicated to the plaintiffs that they had misunderstood the position. Macken J noted that "[w]hat happened was the opposite." She concluded that a clear impression was conveyed through letters sent in March and November 1983, that the sales would proceed.

The judge was satisfied that the second element was met: representations were made directly to a specific and identifiable class of persons – the tenants of the maisonettes. The plaintiffs had acted on the faith of the representations in expending money on maintenance, repair and improvement of their homes. Those aspects established, she considered whether it would be unjust to permit the public authority to resile from those representations. This was complicated by the fact, that in the context of the particular case, this was effectively concerned with the appropriate pricing levels at which the houses should be sold. As various sales schemes had been proposed over the years, Macken J was satisfied that by continuing to express an interest in purchasing pursuant to the subsequent schemes with increasing prices, the plaintiffs had waived any right to purchase pursuant to prices prevailing under any of the earlier schemes. The qualifying periods had expired and they had been supplanted by subsequent schemes. In 1995, statutory regulations had been passed resolving the difficulties associated with the sale of maisonettes. Macken J concluded that as of a reasonable period of time – such as to provide time for legal advice and drafting - after the coming into effect of the Housing (Sale of Houses) Regulations 1995 and the adoption of a model scheme by the defendant, the plaintiffs had a legitimate expectation that

10 *Dunleavy & others v Dun-Laoghaire-Rathdown County Council* [2005] IEHC 381

the maisonettes would be sold to them at prices appropriate to that period. Significantly she added that: "The plaintiffs would therefore have been entitled also to have invoked an entitlement to have the maisonettes offered to them under the doctrine of promissory estoppel."

In concluding in *Dunleavy* that the facts supported claims in both legitimate expectation and promissory estoppel, Macken J's findings are consistent with the co-existence of two distinct doctrines, in contrast to the approach of Haugh J in *Hennessy,* and the *dicta* of Finlay CJ in *Webb*. Interestingly, Macken J analysed the reasonableness of the council's belief that legal problems prevented the completion of the sales up until 1995, an approach which lends itself to parallels with the Court of Appeal's analysis in *Coughlan*. In *Dunleavy*, the rationality inquiry is not on the overarching justifiability of the authority's ongoing failure to sell, but the sub-aspect of when alleged legal obstacles ceased to excuse their delay. Rationality is a golden thread of review in public law. The inquiry focuses on the reasonable exercise of an authority's discretion, constraining potential abuses, whilst recognising the dangers of overly fettering policy choices. The presence of rationality review reflects the distinctive public law nature of legitimate expectation. It is surely unsuitable to impose quite so exacting standards on private individuals.

The English Approach

Despite occasional parallels, there has been little reference to the English case law in most of the Irish judgments, despite a series of important decisions there and a corresponding profusion of academic commentary. Prior to the landmark Court of Appeal decision in ***R v North and East Devon Health Authority, ex p. Coughlan***,[11] considerable uncertainty had existed in relation to whether there was a free-standing principle of substantive legitimate expectation, in what circumstances a legitimate expectation could be said to arise, and what standard of review ought to apply to expectation claims.[12]

The long-term patients of Newport Hospital, including Ms Coughlan, were promised 'a home for life' when transferred in 1993 to Mardon House facility for the chronically injured and disabled. In October 1998, the Health Authority decided to close Mardon House on foot of consultation paper recommendations that it represented a drain on resources. Some consideration was given to the promise previously made, but a decision was taken, nonetheless, to move the patients elsewhere. The Court of Appeal reviewed the circumstances in which an expectation might arise from a promise made by a public body as to how it would exercise its statutory function in the future, and posited three possible outcomes:

> "The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course...
>
> On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken...
>
> Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too, the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power."[13]

The Court unambiguously recognised that a legitimate expectation as to a substantive outcome could be upheld. They proceeded to postulate appropriate review standards, according to the circumstances. Where the expectation was no more than a factor to be considered, in situation (a), the Court deemed that only *Wednesbury* review was appropriate. In situation (b), the court would engage in full review. Consultation is mandated and the court would adjudge the adequacy of the reason underpinning the change of policy. The protection is primarily as to procedural integrity. In situation (c), "the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised."[14]

The court conceived of its role in legitimate expectations as a guardian against abuse of power. An intrinsic irrationality standard would not suffice:

> "a bare rationality test would constitute the public authority judge in its own cause, for a decision to prioritise a policy change over legitimate expectations will almost always be rational from where the authority stands, even if objectively it is arbitrary or unfair."[15]

So modelled, the Court's task is: "not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an extant promise."[16] If fairness is to mean anything, the court remarked, it must include "fairness of outcome" and thus substantive expectation must yield substantive outcomes. The Court considered that Ms Coughlan's expectation had been unfairly thwarted and that there was no overriding public interest to warrant it.

In England, *Coughlan* marked the beginning of a march away from bare rationality review. Having characterised the court's focus as abuse of power rather than reviewing discretionary decision-making, a distinct test was appropriate, though the precise degree of scrutiny inherent to it remained to be refined. In *R v Department of Education and Employment, ex p.Begbie*[17] Laws LJ questioned the neat distinctions in *Coughlan*:

> "As it seems to me, the first and third categories explained in the Coughlan case ... are not hermetically sealed. The facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review"

Accordingly, Laws LJ advocated a sliding scale of review:

> "Fairness and reasonableness (and their contraries) are objective concepts; otherwise there would be no public law, or if there were, it would be palm tree justice. But each is a spectrum, not a single point, and they shade into one another. It is now well established that the Wednesbury principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake...
>
> The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy."

11 [2001] QB 213

12 Craig & Schonberg, "Substantive Legitimate Expectation after Coughlan" [2000] P.L. 684

13 [2001] QB 213 at 241-2

14 *ibid* at 242

15 *ibid* at 245

16 *ibid* at 244

17 [2000] 1 WLR 1115

The sliding scale approach has not yet yielded distinct review standards, but these judgments have been the subject of a significant body of academic commentary.[18] Schonberg observes that European community law applies a "significant imbalance" test as between the private and public interests.[19] Proportionality, the current darling of English public lawyers, has also been canvassed as the appropriate review mechanism by which to gauge legitimate expectations.[20]

Additionally, it should be remembered that, as with promissory estoppel, the establishment of a legitimate expectation does not dictate a particular relief. Sales & Steyn highlight that the very fact that discretion is conferred upon the public authority, reflects that the legislature does not deem it appropriate to pre-determine how the authority should act.[21] The doctrine should ensure public bodies have had a good opportunity at the point of promulgating a policy/assurance to assess the practical consequences of decisions in individual cases.

Some authorities assume that when the test is satisfied, the protection must consist in the fulfilment of the promise but there is no necessary equivalence between the promise made and the relief.

The resolution required and the existence of an expectation should be assessed separately. If there is no abuse of power, sufficient respect may be had for an expectation without requiring a substantive outcome, providing the public authority has regard to the assurance, has a good reason for departing from it and put the individual on notice that the assurance may be departed from and why. An opportunity to make representations should be afforded and reasons should be given why the departure from the assurance was necessitated.

Sales & Steyn advocate that, prior to conferring a substantive benefit, the following conditions be satisfied: (a) at the time of the assurance, the decision-maker has specific information relevant to the transaction in question and could accurately assess its implications; (b) significant detrimental reliance is present; (c) no-overriding public interest justifies the departure from the assurance.[22] This approach, they canvass, results in a minimum infringement of the public interest in flexibility.

Role of the Academic Commentary

Irish academic writing has not been much referred to in the case law. Ironically, however, there is judicial cognisance of it in the recent English jurisprudence on the extent to which legitimate expectations can arise from *ultra vires* representations. The appropriate interplay between these two public law principles is a vexed question indeed, and does not play a significant role in the trio of cases examined above. Only the briefest of references is possible therefore, solely for the purpose of illustrating the academic influence. Traditionally, *ultra vires* representations by public authorities were regarded as incapable of generating the basis for a legitimate expectation. In *R v Ministry of Agriculture, Fisheries and Food, ex p. Hamble (Offshore) Fisheries Ltd*[23], Sedley J. (as he then was) opined that to hold a public authority to an unlawful representation by that body would have "the dual effect of unlawfully extending the statutory power and destroying the ultra vires doctrine by permitting public bodies arbitrarily to extend their powers."[24] The principle ostensibly reflects a neat logic. Sometimes, however, the *ultra vires* act which limits the authority's discretion is precisely the making of an unequivocal representation. Hogan and Morgan remark that if it "is strictly applied, it is capable of causing considerable injustice and, incidentally, largely stifling the legitimate expectation-estoppel doctrine at birth in the public law field."[25]

Recently, influenced by a sustained critique of the rule by Craig in *Administrative Law*,[26] and the comments of Hogan and Morgan, the Court of Appeal in *Rowland v Environment Agency*[27] intimated a retreat from the orthodoxy. In *Rowland*, the Court of Appeal acknowledged the High Court judge's views in relation to criticisms addressed against the doctrine:

> "This rule of law has been the subject of sustained academic criticism as conducive to injustice: see e g *Craig, Administrative Law* , 4th ed (1999), p 642 and *Morgan & Hogan, Administrative Law in Ireland*, 2nd ed (1991), p 863. But it remains the law"

Whilst regretting the limitations which prevented it from implementing Craig's proposed balancing test, the Court relied on *Pine Valley Developments v Ireland*[28] and *Stretch v UK*[29] and recognised that an *ultra vires* promise could give rise to a legitimate expectation, albeit that the substantive relief available might be limited by the scope of the authority's lawful power.

Conclusions

Whilst both promissory estoppel and legitimate expectation are founded upon the creation of expectations, and reliance upon them, the latter doctrine has developed distinctly in relation to public bodies. This rests upon the basis that good governance demands that administrative bodies ought not conduct themselves so as to generate expectations on the part of citizens, which they can subsequently disregard. Rationality and other public law review standards may feature in legitimate expectation but have no necessary application to promissory estoppel.

This limited reference to the English cases is somewhat regrettable. Some of the Irish academic writing on the topic is very fine,[30] but the development of the principles in our courts has not quite matched the rigour of their English counterparts. These authors would counsel against wholesale adoption of the English approach, but do believe some fruits might come from greater consideration of the cases in future judgments. Whilst a rigid categorisation and application of corresponding review standards' approach is not appropriate to a doctrine founded upon conscionable conduct, the distinctions between the substantive and procedural expectations, and other classifications do lend useful structure to attempts to define the parameters of the doctrine.

At time of going to press, a significant High Court judgment from Clarke J. on the issue of legitimate expectation is awaited in *P Lett & Co Ltd V Wexford Borough Council & Ors*. It is hoped the Courts may take this opportunity to invest the Irish doctrine with renewed clarity and rigour. Oscar Wilde once suggested that the only duty we owed history was to rewrite it. It is hard not to conclude that perhaps a similar duty is now owed to the doctrine of legitimate expectation ●

18 E.g. Craig & Schonberg, "Substantive Legitimate Expectation after Coughlan" [2000] PL 684; Sales & Steyn, "Legitimate Expectations in English Public Law: An Analysis" [2004] P.L. 564; Steele, "Substantive Legitimate Expectations: Striking the Balance" [2005] 121 LQR 300; Hannett & Busch, "Ultra Vires Representations and Illegitimate Expectation" [2005] P.L. 729 and others

19 Schonberg, *Legitimate Expectations in Administrative Law* (2000) at 149-150

20 Steele supra at n.18

21 Sales & Steyn, [2004] P.L. 564

22 Sales and Steyn n.21 at 580

23 [1995] 2 All ER 714

24 *ibid* at 731

25 Hogan and Morgan, *Administrative Law in Ireland* (Roundhall, 3rd ed. 1998) at 863

26 Craig, *Administrative Law* (Sweet & Maxwell, 4th ed. 1999)

27 [2005] Ch 1, [2004] 3 WLR 249

28 (1991) 14 EHRR 319

29 (2004) 38 EHRR 12

30 see especially Hogan & Morgan, *Administrative Law in Ireland* (Roundhall, 3rd ed. 1998) at 858 *et seq*; Brady, "Aspiring Students, Retiring Professors and the Doctrine of Legitimate Expectation" (1996) 31 Ir Jur 133; Delany, "The Future Of The Doctrine Of Legitimate Expectations In Irish Administrative Law" (1997) 32 Ir Jur 217: Barrett, "Grating Expectations", in Breen, Casey, Kerr (ed)(Roundhall, 2000)

The Law and Practice of Judgment Mortgages

Neil Maddox BL

Introduction

Judgment mortgages are one means of enforcing a debt due on foot of a judgment. It enables a judgment creditor to register a mortgage against the judgment debtor's land. As land is invariably a valuable asset, judgment mortgages are widely utilised to enforce this type of debt. The Judgment Mortgages (Ireland) Acts 1850 and 1858 set down the procedure by which a judgment mortgage can be registered against the defendant's land. In particular, section 6 of the 1850 Act governs the procedure for the creation of such mortgages.

If the defendant does not pay the judgment debt, the judgment creditor may file an affidavit containing details of the judgment in the court where it was entered. If the land is unregistered, a copy of the affidavit must be registered in the Registry of Deeds. If it is registered land, the copy affidavit must be registered in the Land Registry. Judgment mortgagees should take note that the judgment mortgage is generally considered as a voluntary conveyance by the courts. As such, it will often lose priority to other encumbrances on the land.

Furthermore, the validity of judgment mortgages has, in the past, provided a fertile area for successful challenges based on technical points of law. The Supreme Court has partially rejected the old view that the validity of a judgment mortgage is dependent on adherence to the strict statutory requirements for their creation. However, great care should still be taken when drafting proceedings to ensure that the formalities laid down in section 6 have been complied with.

The Land and Conveyancing Law Reform Bill 2006

Anyone publishing material in the law of real property over the next months and years will be acutely conscious of the provisions of The Land and Conveyancing Law Reform Bill 2006. The fear of any author is that the passage of the bill will instantly render any current publications instantly obsolete. This is not necessarily the case as practitioners will now have to equip themselves with a knowledge of the old law and the new in many cases. In relation to the creation and enforcement of judgment mortgages, the Damocles sword hanging over the Acts of 1850 and 1858 may be stayed temporarily by the fact that the bill contemplates reform of this area by Ministerial Regulation. The technical requirements of the affidavit are almost certainly to be abolished and, in the future, it will only be necessary to identify the parties with certainty. However, if the validity of a judgment mortgage created prior to the commencement of the new act is challenged, it would seem that this would have to be done on the basis that the old statutory formalities were not followed and a knowledge of the old technical defences will still be needed.

The remaining provisions mostly codify the existing law. A judgment mortgage is still to be treated as a voluntary conveyance when looking to priority, but a judgment mortgagee will have the same priority when the debtor becomes insolvent as an ordinary mortgagee

Creation

1. Obtain Judgment for a definite sum.
2. Defendant defaults on payment.
3. Swear an affidavit in terms of the judgment stating the judgment debtor is the owner of the land.
4. File the affidavit in the office of the court where judgment was obtained.
5. Register a copy affidavit in the Registry of Deeds or the Land 6. Registry as appropriate.
7. The Registrar of Deeds or Registrar of Title will then send a note to both parties confirming registration.

Section 6 of the 1850 Act is a lengthy, detailed and poorly drafted statutory provision which can provide guidance and cause confusion as to the procedure for registration in equal measure. It applies to judgments, decrees, orders or rules, of the Superior Courts which require the payment of money to the judgment creditor of a definite sum.[1] This need not be a liquidated sum as long as the judgment or order is for a specific amount of money. The application of section 6 has been extended to the Circuit Court by virtue of the Circuit Court (Registration of Judgments) Act 1937 and to the District Court by sections 24 and 25 of the Courts Act 1981. It should be noted that there is no provision for the enforcement of judgment mortgages in the District Court and a judgment creditor should apply to the Circuit Court in this regard.[2]

The deponent must be a creditor as defined by section 6 of the 1850 Act, or a person authorised to swear the affidavit under section 3 of the 1858 Act. Section 3 is of particular relevance as it contains a broader definition of an authorised deponent.

Where more than one creditor obtains judgment, one, or more than one of them may make the affidavit.[3] Under the Age of Majority Act 1985, a minor may make a judgment affidavit. If the creditor is a company, the affidavit should be made by the secretary, deputy secretary, or law agent.[4] The court may also authorise a particular individual to swear the affidavit where the judgment creditor is unable to do so. The courts have given leave, for example, to persons acting under a power of attorney on behalf of the plaintiffs who were then resident in Europe,[5] to the partner of a

1 Wylie, *Irish Land Law* (3rd. ed., London, 1997), p. 792. Christopher Doyle, *Judgment Mortgages The Bar Council Continuing Legal Education Programme* (Dublin, 1994), p. 1.
2 Law Reform Commission, *Consultation Paper on Judgment Mortgages* (Dublin, 2004), p. 9.
3 *In Re. Kane* [1901] 1 I.R. 520; *In Re. Gray* I.R. 1 E.q. 265.
4 Brendan Fitzgerald, *Land Registry Practice* (2nd ed., Dublin, 1995), pp. 128-129.
5 *O'Brien v. Roberts* (unreported, 12 December, 1892); *Cullinane v. Cullinane* (unreported, 21 September, 1894) referred to in Madden, *A Practical Treatise on the Registration of Deeds, Conveyances and Judgment Mortgages* (Dublin, 1901), p. 140.

plaintiff who was detained in Scotland where immediate registration was necessary, and to the next friend of a plaintiff who was of unsound mind.[6] In *Lawless v. Doake*,[7] the judgment creditor was deceased. The court directed that an entry be made in the margin of the summary of the judgment stating that the applicant was the executor of the plaintiff's estate, and, as such, was entitled to issue proceedings for the full amount.

Contents of Affidavit

From a reading of section 6, the affidavit should contain the following averments:[8]

a. A clause indicating the Deponent is duly authorised to make the affidavit.
b The full name, title and record number of the cause of action upon which judgment was entered.
c. The court where judgment has been entered.
d. The date of the judgment.
e. The name and the usual and last place of abode of the plaintiff and defendant: both at the time the judgment was entered and also at the time the affidavit is sworn. A company should list its registered office as the place of abode.
f. The "title trade or profession" of the plaintiff and defendant: again, both at the time judgment was entered and the date the affidavit was sworn.
f. The amount of the judgment debt, costs owing and interest pursuant to the Courts Acts.
g. The defendant must state that to the best of his/her knowledge and belief that the defendant is 'seised or possessed or has disposing power over the lands'.
h. The land must be described. For registered land, under section 71(2) of the Registration of Title Act 1964 the County and Folio number will suffice. For unregistered land the 'County and Barony, or Town or County of a City or Parish, or Town and Parish'.

The affidavit does not have to contain a means of knowledge clause.[9]

i. Jurat.

Position of Judgment Creditor

Section 7 of the 1850 Act provides that registration of the judgment mortgage transfers 'all the lands, tenements and hereditaments mentioned [in the affidavit] for all the estate and interest of which the debtor mentioned in such affidavit shall, at the time of registration, be seised or possessed or have disposing power in law or equity'.[10] The mortgage may, however, be redeemed on payment of the judgment debt. Essentially, the registration creates a mortgage of the interest in the land held by the judgment debtor in favour of the judgment creditor. The 1850 Act puts the judgment creditor in a similar position to a legal mortgagee, but the registration of the mortgage is not a conveyance and is not execution against the lands.[11] If the debtor fails to discharge the debt, the judgment creditor has almost the same remedies available to a mortgagee on default.

For registered land, s. 71(4) of the Registration of Title Act 1964 provides that the registration of the affidavit operates as a charge over the interest of the judgment debtor. The judgment creditor has such powers to enforce the charge as may be conferred upon him by the court. The position of a judgment creditor of registered land is, therefore, akin to that of a chargee, while that of a creditor over unregistered land is akin to a mortgagee.[12] There is nothing to prevent a judgment mortgagee conveying his interest under the judgment to a third party who will then be a sub-mortgagee. Indeed, a judgment against a judgment mortgagee may be registered as a mortgage against the estate and interest acquired by the judgment creditor in the lands of the original judgment creditor. This takes effect as between the two judgment mortgages, and cannot add to the burden of the original judgment debtor or interfere with his equity of redemption.[13]

Co-Ownership

If all the co-owners are joint tenants and are jointly liable on the judgment debt, registration of a judgment mortgage against the property will not sever the joint tenancy. If the judgment mortgage affects the interest of every co-owner, any one of them may bring an action for partition and sale of the property under of The Partition Acts.[14]

If only one of the co-owners of unregistered land is liable on the judgment debt, registration of the mortgage will effect a severance of a joint tenancy.[15] The position is different with respect to registered land and, somewhat anomalously, registration of the judgment mortgage does not sever a joint tenancy of the co-owners.[16] This disparate treatment of registered and unregistered land has significant consequences when a judgment creditor seeks to enforce their security.

For unregistered land, the judgment creditor may not exercise the normal remedy of sale in the event of the creditor failing to redeem the mortgage. The court has no jurisdiction to make an order for possession as against the co-owner whose interest is unaffected by the registration.[17] As the filing of the affidavit in the Registry of Deeds effects a transfer of the debtors interest to the judgment creditor, the latter will have *locus standi* to apply to the court for an order of sale in lieu of partition under the Partition Act 1868.

For registered land, the position of the judgment creditors is akin to that of a chargee and they have no legal or equitable interest in the land on registration of the judgment mortgage. Consequently, the creditor does not possess any *locus standi* to apply to the court for an order of sale under the Partition Acts. It would appear that a judgment creditor in this circumstance has no right of sale over the home. They would be confined to seeking a sale of the share of the property which is the subject matter of the judgment debt. This is clearly an unsatisfactory means of enforcing the security.[18]

6 *Cullen v. Stewart* (unreported, 1 June, 1897), *Wrightson v. McMahon* (unreported, 22 November 1899) referred to by Madden, *A Practical Treatise*, p. 140.
7. 12 L.R. Ir. 68.
8. As summarised by Doyle, *Judgment Mortgages, pp. 2-5.*
9. *O'Connor v. Whelan* [1993] 1 I.R. 560.
10 Stephen Glanville, *The Enforcement of Judgments* (Dublin, 1999), pp. 154-155.
11 *Barnett v. Bradley* (1890) I.L.T.R. 39; *First National Building Society v. Ring* [1992] 1 I.R. 375; *In Re Floods Estate* (1867) 17 1 Ir.Ch.R. 127.
12 Heather Conway, *Co-Ownership of Land: Partition Actions and Remedies* (Dublin, 2000), p. 196.
13 *Rossborough v. McNeill* (1889) 23 L.R. Ir. 409 at 413.
14 Conway, *Co-Ownership of Land*, p. 173.
15 *Irwin v. Deasy* [2004] IEHC 104 (1 March 2004).
16 *Irwin v. Deasy* [2006] IEHC 25.
17 *Tubman v. Johnston* [1981] NI 53, Conway, *Co-Ownership of Land*, pp. 173-177.
18 John Mee, 'Judgment Mortgages, Co-Ownership and Registered Land' (1999) 4 *Conveyancing and Property Law Journal* 28 at 30; *Northern Bank v. Haggerty* [1995] N.I. 211; In *First National v. Ring* [1992] 1 IR 375. Denham J. failed to consider this problem as her judgment was premised on the erroneous view that judgment mortgages over registered and unregistered land operate in an identical manner.

Family Home Protection Act

It is often the case that a creditor wishes to register a judgment mortgage against the interest of one spouse in their family home. Section 3 of the Family Home Protection Act 1976 requires the consent in writing of the non-owning spouse to any conveyance of an interest in the family home The significance of this case for judgment mortgages registered against the interest of one spouse was considered in ***Containcare v. Wycherley.***[19]

In this case, the defendants' were husband and wife and lived in a house which had been demised to them jointly. The house was a family home within the meaning of the 1976 Act. The plaintiff recovered judgment for a liquidated sum against the first defendant and subsequently registered an affidavit in the Registry of Deeds in order to convert the judgment into a judgment mortgage. When the plaintiff issued a summons in the High Court seeking a well-charging order, the second defendant argued that no estate in the house had vested in the plaintiff, as she had not consented to the disposition.

However, Carroll J. stated that the Act had no application.[20] The judge reiterated the view that rights under section 3 of the 1976 Act did not constitute any estate or interest in the land,[21] and, as the land was unregistered, the registration of the judgment mortgage operated to sever the joint tenancy. Section 7 of the 1976 Act, which makes provision for the other spouse to pay off the mortgage, was held inapplicable as it referred only to mortgages repayable by installments and a judgment mortgage was not so repayable. She further held that, by virtue of mortgage repayments made after the severing of the joint tenancy, the second defendant was entitled to claim an increase in her share of the tenancy in common commensurate with the increase in the value of the equity of redemption resulting from those mortgage payments.

This does not necessarily mean that a judgment creditor may then exercise a power of sale under the mortgage.[22] As a judgment mortgage is treated as a voluntary transaction, it is subject to all equities existing at the time of registration.[23] The normal remedies for enforcement of the mortgage may not be enforceable against any equity which the spouse possesses at this time.[24] The court has a discretion as to how such an equity should be discharged, and an order of sale may not be appropriate in all cases. The courts have taken the view that a spouse's equity is not purely financial, as it also involves an entitlement to possession of the home and enforcement of the judgment mortgage would interfere with this right.[25]

Licensing

In *Re Brendan Sherry-Brennan*[26] it was held that a judgment mortgage against the licensed premises of a judgment debtor does not assign the licence to the judgment debtor. Furthermore, it does not compel the debtor to endorse or hand over the licence on a sale by the court. However, an application can be made to revive the licence in the District Court, or before the County Register, if it can be proved that the premises were licensed in the preceding four years. If the judgment mortgagee is a limited company, the objects clause should be amended to permit the company to carry on licensed trade.[27]

Enforcement

An application for a well charging order is brought by Special Summons in the High Court or by Equity Civil Bill in the Circuit Court.

If proceeding in the Circuit Court, the Civil Bill must be served on the defendant. If no appearance is then entered, the claim may be heard as a motion for judgment in default of appearance.

If proceeding in the High Court, the Special Summons and grounding affidavit should be served, returnable to the Masters Court. The defendant may enter an appearance at any time until the hearing of the action. On the return date, the Master will transfer the matter to the Judges list if all of the documentation is in order and there is sufficient proof of service.

The necessary proofs are the judgment itself and an attested copy of the judgment mortgage affidavit. For registered land, an attested copy of the folio showing the entry of the mortgage as a burden should be obtained. For unregistered land, a note from the Registry of Deeds indicating the mortgage has been registered should be produced. It is normal to exhibit a letter of demand.

A defence may be filed in the Circuit Court. If this is done, the matter will be heard as a trial.

In the High Court, a replying affidavit may be filed. A defence may only be filed if the judge believes there is an issue requiring oral evidence.

If everything is in order, the court will issue a declaration that the money is well charged on the property. Normally, it will also allow one month to pay the money and three months to dispute the amount of the debt. If this is defaulted upon, the consequential Order allows lands to be sold with the approval of the court and also with the usual accounts and enquiries to be taken.

Further proceedings are then heard in the County Registrar's Office (for the Circuit Court) or the Examiner's Office (for the High Court). The relevant Court Officer will advertise in a relevant newspaper/magazine for other claims on the property and set a time limit for such claims to be made.

When the amount of each claim and its priority is determined, a certificate is issued. If there is significant delay at this stage, as is often the case, the matter may be referred to court and the plaintiff faces the possibility of being denied further relief.

If the matter proceeds to sale, the Court must approve this. It must be shown that the price obtained was the best possible in the circumstances. Both the judgment debtor and other mortgagee(s)'s have the right to be heard at this stage.

19 [1982] I.R. 143.
20 p. 150.
21 *Nestor v. Murphy* [1979] I.R. 326; *Gluckian v. Brennan* [1981] I.R. 478.
22 Lyall, *Land Law in Ireland*, pp. 486-489.
23 *Tempany v. Hynes* [1976] I.R. 101.
24 *C v. C.* [1981] I.L.R.M. 254 establishes that payments made by a wife towards the purchase value of the house or the repayment of mortgage installments creates a trust by the husband for the wife of a share in the house proportionate to the amount of such payments.
25 See *Curran v. Curran* (Unreported, High Court, McWilliam J., 10 March 1981); *O'D v. O'D* (Unreported, High Court, 1983) where Murphy J. refused sale in lieu of partition on the basis that the property was a family home; *Re Whitehalls Estate* (1887) 19 LR. Ir. 45 where Monroe J. stated it would be inappropriate to order sale if it would prove abortive or involve the parties accepting a significant sacrifice; Lyall, *Land Law in Ireland*, p. 488.
26 [1979] I.L.R.M. 113 at 117.
27 Constance Cassidy, *The Licensing Acts* (Dublin, 2001), para. 2-15.

Failure to Comply with Section 6 of the 1850 Act[28]

'Title, Trade or Profession' of Defendant/ Description of Lands

Traditionally, technical defences alleging failure to comply with the strict requirements of section 6 have enjoyed great success. Even in the absence of prejudice to a defendant, the courts were willing to hold that the judgment mortgage was void on highly technical grounds. The most common challenges were based on the fact the description of the parties, the lands or the amount of costs were inaccurate.

As Compton J. observed in ***Crosbie v. Murphy***[29], 'the designation of the party against whom the judgment mortgage is to be obtained should be stated with precision and accuracy'.[30] In ***Allied Irish Banks v. Griffin***[31] a reference to the judgment debtor as widow (and a married women when the judgment was entered), when in fact she was a farmer, failed to comply with the requirements of section 6.

If the land is registered, it may be described by reference to its county and folio number.[32] For unregistered land, the traditional view was that a failure to refer to the correct parish (as listed in the census) or barony invalidates the affidavit.[33] If the land is not located in a town, the county and barony should be referred to. However, in ***Irish Bank of Commerce v. O'Hara***[34] a more flexible approach to the interpretation of section 6 was taken. In the High Court, Costello J. stated that non-compliance will only make the mortgage void if it defeats the purpose of the Act. So long as the description was adequate to achieve this purpose, failure to comply with a statutory requirement would not render the affidavit void. The court endorsed the view that the relevant parish need only be referred to if the lands are located in a town. The Supreme Court approved of the judgment of Kenny J. in ***Credit Finance v. Grace***[35] where it was held that an error in a judgment mortgage affidavit is not fatal unless likely to mislead.[36]

However, ***O'Hara*** has been described as a 'false dawn' by one commentator in light of the decision in ***Allied Irish Bank v. Griffin***.[37] Here the 'title, trade or profession' of the defendant was misstated. Denham J. rejected the plaintiff's argument that the purposive approach adopted in ***O'Hara*** should be followed. Thus, it appears that the failure to accurately describe the defendant in accordance with section 6 will still render the judgment mortgage void, irrespective of whether such a failure to comply with the statute is likely to mislead or not. As such, a technical defence on this basis would still seem to have a good chance of success.

Judgment debt

The amount of the money owing on the judgment together with the amount of costs must be stated accurately on the affidavit. For a judgment obtained in the District Court, the amount of costs must not be greater than the amount in judgment.[38] Failure to state the amount of costs accurately will invalidate the judgment mortgage.[39]

Registered Land

Section 71 of the Registration of Title Act 1964 governs priority for judgment mortgages over registered Land. Section 71(4) states that:

> "Registration of an affidavit [for the purpose of registering a judgment mortgage] shall operate to charge the interest of the judgment debtor subject to:
>
> (a) the burdens, if any, registered as affecting that interest.
> (b) the burdens to which, though not so registered, that interest is subject by virtue of section 72, and
> (c) all unregistered rights to which a judgment debtor held that interest at the time of registration."

Thus, the judgment mortgage is subject to all registered rights and unregistered burdens existing at the time of registration. Section 69 of the Act states that the judgment mortgage is a registrable burden and the Land Registry Rules 118-120 prescribe the appropriate procedure for registration.[40]

Rule 118 states that the registration of the judgment mortgage as a burden on the registered land occurs when the copy affidavit, as prescribed by section 6 of the 1850 Act, is lodged in the registry and an entry or notice of the deposit is made in the register in the form prescribed by the rule. ***In Re. Phelan***[41] establishes that the role of the registrar is ministerial only. If the affidavit fulfills the requirements of rule 119, the registrar cannot refuse to register the affidavit.

Rule 119 states:

1) The registered property of the judgment debtor which the judgment creditor seeks to charge shall be identified by a statement in the affidavit to the effect that the property described in it that the judgment debtor is seized or possessed of or has disposing power over is the property, or a defined part of the property, in a specified folio of the register, or by a certificate of the judgment creditor or his solicitor to the like effect endorsed on the copy affidavit deposited.

2) No entry of notice of the deposit of an affidavit as a burden shall be made unless the affidavit: (a) purports to be made by the creditor specified in section 6 of the said Act of 1850 or by a person authorised to make by section 3 of the Judgment Mortgage (Ireland) Act, 1858 and (b) specifies (i) the folio of the register and the county of a city, and parish, or the town and parish, in which the property to which it relates is situated.

The mortgage is registered on the folio and notice is then served on the judgment debtor/ registered owner.[42] If the registrar suspects that the deponent of the affidavit is not statutorily entitled to swear it, or if a defect other than failure to comply with rule 119 appears, these doubts will be communicated to the applicant's solicitor. The affidavit may be returned to the solicitor if he requests this. However, the affidavit may still be registered if requested. It should also be noted that, for an affidavit which is returned to the applicant's solicitor and re-lodged, the date of re-lodgement is the crucial date as regards priority.

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28 Christopher Doyle, 'Judgment Mortgages-A False Dawn', [1993] 18 *Gazette* 297; Doyle, 'Merits v. Technicalities: The Judgment Mortgage (Ireland) Acts', [1993] 11 *Irish Law Times* 52; Law Reform Commission, *Consultation paper on Judgment Mortgages* (Dublin, 2004), pp. 12-17.
29 (1858) 8 I.C.L.R. 301.
30 at p. 311.
31 [1992] 2 I.R. 70.
32 Section 71(2) of the Registration of Title Act.
33 *Re Flannery* [1971] I.R. 10; *Re Murphy and McCormack's Contract* [1930] I.R. 322; *Re Earl of Limerick's Estate* (1867) 7 Ir. Jur. Rep. 85.
34 Unreported, High Court, 10 May 1989.
35 (Unreported, Supreme Court, 29 May 1972).
36 *Irish Bank of Commerce v. O' Hara*, p. 2.
37 [1992] 2 I.R. 70; (1992) I.L.R.M. 590; Doyle, 'Judgment Mortgages-A False Dawn';.
38 S. 24, S.25 Courts Act 1981.
39 *Phillips v. Kilkelly* (Unreported, High Court, 11 July, 1966).
40 Fitzgerald, *Land Registry Practice*, pp. 124-137
41. [1912] 1 I.R. 91.
42 p. 125.

Legal Update

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ADMINISTRATIVE LAW

Article

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Appointment of special adviser (minister for finance) order, 2006
SI 484/2006

Marine (delegation of ministerial functions) (no. 4) order 2006
SI 543/2006

Marine and natural resources (transfer of departmental administration and ministerial functions) order 2006
SI 530/2006

Oireachtas (ministerial and parliamentary offices) (secretarial facilities) regulations 2006
SI 535/2006

ADOPTION

Library Acquisitions

Bridge, Caroline
Adoption: the modern law
Bristol: Jordan Publishing Limited, 2003
N176.1

Swindells, Heather
Adoption: the modern procedure
Bristol: Jordan Publishing Limited, 2006
N176.1

AGENCY

Article

Gardiner, Caterina
Compensating commercial agents under the Commercial Agents Directive - uncertainty continues
2006 CLP 195

ARBITRATION

Contract
Arbitration clause - Power of arbitrator – Issues to be referred to arbitrator – Arbitration clause – Meaning of phrase "any dispute" – Whether arbitration clause intended that all disputes arising out of particular transaction be referred to arbitrator – Whether arbitrator had jurisdiction to select and determine new site or whether arbitrator could only determine acceptability of proposed new site in contest between parties – Application to refer to arbitration granted – (2002/1304P – O'Sullivan J - 4/5/2006) [2006] IEHC 129
Templeville Developments Ltd v The Leopardstown Club Ltd

Article

Geraghty, Cliodhna
Provisional measures in international commercial arbitration – the effectiveness of the ICC Rules for a pre-arbitral referee procedure
2006 CLP 202

AVIATION

Statutory Instruments

Aer Lingus act 2004 (commencement of certain provisions) (no. 2) order 2006
SI 475/2006

Aer Lingus act 2004 (commencement of certain provisions) order 2006
SI 474/2006

Aer Lingus act 2004 (commencement of section 6(2)) order 2006
SI 476/2006

Aer Lingus act 2004 (commencement of section 6) order 2006
SI 455/2006

Aer Lingus act 2004 (section 6(4)) order 2006
SI 456/2006

BANKING

Statutory Instrument

Central bank act 1942 (sections 33j and 33k) (amendment) regulations 2006
SI 528/2006

BROADCASTING

Statutory Instruments

Television licenses regulations 2006
SI 404/2006

Wireless telegraphy (ship station radio license) regulations, 2006
SI 414/2006

BUILDING & CONSTRUCTION

Building contract
Specific performance – Delay - Agreement not executed - Party seeking to rely agreement estopped from denying its validity – Whether party not guilty of delay who wishes to seek specific performance against delaying party can apply as soon as delays occurs – Relief granted – (2005/469P – Clarke J – 12/5/2006) [2006] IEHC 144
Fitzsimons v Value Homes Ltd

Library Acquisition

Ramsey, Vivian
Keating on construction contracts
8th ed
London: Sweet & Maxwell, 2006
N83.8

Statutory Instrument

Building advisory body order, 2002 (amendment) order, 2006
SI 503/2006

CHILDREN

Article

Buckley, Helen
Duty to care: reducing risk in childcare settings
2006 (3) IJFL 3

Library Acquisition

Hershman, David
Hershman and McFarlane children act handbook 2006/2007
Bristol: Jordan Publishing Limited, 2006
N176

Statutory Instruments

Child Care (pre-school services) regulations 2006
SI 505/2006

Youth work act 2001 (prescribed national representative youth work organisation) regulations 2005
SI 926/2005

CIVIL RIGHTS

Article

Foley, Brian
Time to think about the 'nuclear option'?
2006 (July) GLSI 12

CLUBS

Statutory Instruments

Private security (license fees) regulations 2006
SI 470/2006

Private security (licensing and qualifications) regulations 2006
SI 468/2006

Private security (licensing applications) regulations 2006
SI 469/2006

Private security (licensing and standards) (amendment) regulations 2006
SI 435/2006

Private security services act 2004 (section 37 (part)) (commencement) (no.2) order 2006
SI 436/2006

COMMERCIAL LAW

Library Acquisition

McHugh, Damian

Public relations and corporate communications law in Ireland
Dublin: First Law Limited, 2006
N250.C5

COMPANY LAW

Directors
Restriction - Costs follow event – Discretion of court - Unsuccessful application to restrict directors – Whether court had discretion to award costs in unsuccessful application to restrict directors – Whether general rule that costs follow event was applicable in cases where director satisfies court that he should not be restricted – No order as to costs – (2003/459Cos – O'Leary J – 14/7/2006) [2006] IEHC 88
Re Doherty Advertising Ltd; Stafford v Beggs

Directors
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Re Kelly Technical Services (Ireland) Ltd; Kavanagh v Kelly

Directors
Restriction – Application for restriction on basis of non-availability of audited accounts and non-filing of annual returns – Whether directors acting honestly and responsibly – Whether directors should be restricted – Companies Act 1990 (No 33), s 150 – Order granted (2005/103COS - Peart J - 21/12/2005) [2005] IEHC 458
Re Dublin Sports Café Ltd; Farrell v Long

Register
Restoration – Petitioner applying to have company restored to register to enable prosecution of s 205 application – Company struck off register for failure to file returns – Whether just to restore company to register – *Goode v Philips Electrical (Ireland) Ltd* [2002] 2 IR 613 distinguished – Companies (Amendment) Act 1982 (No 10), s 12B(3) - Leave to restore granted (2005/277COS - Laffoy J – 14/11/2005) [2006] IEHC 19
Re New Ad Advertising Co Ltd

Articles

Brady, Alan
Corporate killing - the law reform commission's proposals
2006 ILTR 235

Callanan, Grainne
The costs of restriction
2006 CLP 175

Grier, Elaine
Eurofood IFSC Ltd - an end to forum shopping?
2006 CLP 161

O'Reilly, Aillil
Subsidiaries and "letter box" companies
2006 (Summer) IBLQ 27

Statutory Instrument

Companies (fees) order 2006
SI 502/2006

COMPETITION LAW

Article

Dodd, David
Competition and regulation update
2006 (Summer) IBLQ 12

O'Loughlin, Rosemary
All together now
2006 (July) GLSI 26

Library Acquisition

Korah, Valentine
Cases and materials on EC competition law
3rd ed
Oxford: Hart Publishing Limited, 2006
W110

CONFLICT OF LAWS

Library Acquisition

Collins, Lawrence
Dicey, Morris and Collins on the conflict of laws
14th ed
London: Sweet & Maxwell, 2006
C2000

CONSTITUTIONAL LAW

Habeas corpus
Natural justice – Failure to rule on arguments – Warrant – Evidence – Whether evidence before District Judge to support findings – Appropriateness of *habeas corpus* procedure – Whether failure to disclose information to applicant – Whether reasonable efforts made to establish identity – Whether identity cards destroyed – *In re Haughey* [1971] IR 217; *Byrne v Grey* [1988] IR 31; *O'Mahony v Ballagh* [2002] 2 IR 410; *McDonagh v Governor of Cloverhill Prison* [2005] 1 ILRM 340 and *Arra v Governor of Cloverhill Prison* (Unrep, Ryan J, 26/1/2005) followed – Refugee Act 1996 (No 17), ss 9(8) and 9(10); Immigration Act 2003 (No 26), s 7 – Declaration that detention unlawful granted (2005/305SS – MacMenamin J – 14/4/2005) [2005] IEHC 471
Nasiri v Governor of Cloverhill Prison

Articles

Eardly, John
The Constitution and marriage; the scope of protection
12 (4) 2006 BR 137

Foley, Brian
Time to think about the 'nuclear option'?
2006 (July) GLSI 12

Library Acquisition

Binchy, William
Human rights, constitutionalism and the judiciary: Tanzanian and Irish perspectives
Dublin: Clarus Press, 2006
M31.C5

CONTRACT LAW

Building contract
Specific performance – Delay - Agreement not executed - Party seeking to rely agreement estopped from denying its validity – Whether party not guilty of delay who wishes to seek specific performance against delaying party can apply as soon as delays occurs – Relief granted – (2005/469P – Clarke J – 12/5/2006) [2006] IEHC 144
Fitzsimons v Value Homes Ltd

Specific performance
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Quinn v Greally

Specific performance
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Slaney Foods International Ltd v Bradshaw Foods Ltd

Library Acquisition

Cheshire, Fifoot and Furmston's law of contract
15th ed
Oxford: Oxford University Press, 2006
N10

CONVEYANCING

Articles

Linehan, Denis
Good deed for the day
2006 (July) GLSI 34

Mee, John
The Land and Conveyancing Law Reform Bill 2006: observations on the law reform process and a critique of selected provisions
2006 C & PLJ 67 - part 1

COSTS

Article

O'Dwyer, Colm
The Haran report on legal costs
12 (4) 2006 BR 107

CREDIT UNIONS

Statutory Instrument

Credit union act 1997 (alteration of financial limits) regulations 2006
SI 546/2006

CRIMINAL LAW

Delay
Right to expeditious trial – Complainant delay - Prosecutorial delay – Right to fair trial - Sexual abuse –Whether delay on part of complainants in reporting alleged abuse was reasonable and understandable – Whether delay inordinate and inexcusable - Whether applicant's ability to defend himself had been compromised as result of delay – Whether applicant was prejudiced by delay – Whether applicant must establish that there was real and serious risk that fair trial can not be guaranteed – Whether inordinate lapse of time automatically equates to presumed prejudice - Prohibition refused (2003/128JR – Macken J – 15/6/2005) [2005] IEHC 204
M (M) v DPP

Delay
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F (S) v DPP

Delay
Right to expeditious trial – Complainant delay – Right to fair trial - Sexual assault – Minors – Multiple complainants – Whether applicant exercised dominion over complainants – Whether reasons justifying delay in complaining – Dominion – Prejudice – Death of witnesses – Whether return for trial defective – *B v DPP* [1997] 3 IR 203; *PP v DPP* [2000] 1 IR 403; *PC v DPP* [1999] 2 IR 25; *S v DPP* (Unrep, SC, 19/12/2000); *Zambra v McNulty* [2002] 2 IR 351 and *JM v DPP* (Unrep, SC, 28/7/2004) followed – Return for trial quashed on *Zambra* grounds; further prosecution in relation to one complainant only prohibited; balance of application dismissed (2002/374JR – MacMenamin J – 11/2/2005) [2005] IEHC 445
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Delay
Right to expeditious trial - Complainant delay – Prosecutorial delay – Right to fair trial –- Sexual assault – Minors – Whether applicant exercised dominion over complainant – Whether reasons justifying delay in complaining – Death of witnesses – Whether applicant prejudiced – Whether return for trial defective – *DPP v Byrne* [1994] 2 IR 236; *B v DPP* [1997] 3 IR 203; *PC v DPP* [1999] 2 IR 25; *PP v DPP* [2000] 1 IR 403; *PO'C v DPP* [2000] 3 IR 87; *Zambra v McNulty* [2002] 2 IR 351; *PL v Buttimer* [2004] 4 IR 494 and *DD v DPP* [2004] 3 IR 172 followed – Constitution of Ireland 1937, Article 38 – Return for trial quashed on *Zambra* grounds; application for prohibition on grounds of delay dismissed (2002/339JR – MacMenamin J – 11/2/2005) [2005] IEHC 446
C (B) v Kirby

Delay
Right to expeditious trial - Complainant delay – Prosecutorial delay – Right to fair trial– Prejudice – Death of witnesses – Stress and anxiety – Complaints made in 1987 – Decision of DPP not to prosecute in 1989 – Whether dominion exercised – Whether reasons explaining delay – Whether return for trial defective – *O'Flynn v Clifford* [1988] IR 740; *PC v DPP* [1999] 2 IR 67; *PO'C v DPP* [2000] 3 IR 87; *BF v DPP* [2001] 1 IR 656; *PP v DPP* [2001] 1 IR 403; *PM v Malone* [2002] 2 IR 560; *Zambra v McNulty* [2002] 2 IR 351; *JC v DPP* (Unrep, SC, 19/12/2003) and *JM v DPP* (Unrep, SC, 28/7/2004) followed – European Convention on Human Rights, article 6 – Return for trial quashed on *Zambra* grounds; prohibition granted in respect of certain charges on grounds of prosecutorial delay, balance of application dismissed (2002/189JR – MacMenamin J – 11/2/2005) [2005] IEHC 447
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Delay
Right to expeditious trial - Complainant delay – Right to fair trial – Sexual offences – Dominion – Constitution –Application to restrain further prosecution of sexual abuse offences – Whether delay prejudicial – Whether right to fair trial prejudiced by refusal of relief – *O'C (J) v DPP* [2000] 3 I.R. 478 considered – Application refused (2004/640JR – Murphy J – 17/01/2006) [2006] IEHC 7
O'B (T) v DPP

Delay
Right to expeditious trial – Complainant delay – Right to fair trial - Sexual offence - Dominion – No specific prejudice alleged – Whether presumptive prejudice such as to warrant restraint of trial – Whether delay explicable – Whether applicant exercised dominion over complainant – Whether exercise of dominion causing delay in making of complaint – *PM v Malone* [2002] 2 IR 560 considered – Prohibition refused (2003/740JR – Clarke J – 16/02/2006) [2006] IEHC 44
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Drunk driving
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Gordon v DPP

Evidence
Procurement and preservation of evidence –Prosecution arising out of road traffic accident **–** Applicant charged with driving mechanically propelled vehicle which was seriously defective - Delay in seeking inspection – Vehicle destroyed – Whether vehicle relevant evidence – Whether real risk that applicant will not receive fair trial – *Murphy v DPP* [1989] ILRM 71, *Braddish v DPP* [2001] 3 IR 127; *Dunne v DPP* [2002] 2 IR 305; *McKeown v Judges of Dublin Circuit* (Unrep, SC, 9/4/2003) and *Scully v DPP* [2002] 2 ILRM 396 considered - Prohibition refused (2002/616JR – Quirke J – 8/3/2005) [2005] IEHC 69
Savage v DPP

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Ludlow v DPP

Evidence
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Fagan v Judges of Circuit Criminal Court

Evidence
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O'Donnell v Judge Coughlan

Extradition
European arrest warrant – Correspondence of offences – Whether offences charged in warrant correspond to offences in State – Constitutional rights – Delay – Whether such delay on part of authorities seeking surrender of applicant that he ought not be surrendered – Whether applicant's constitutional rights would be infringed on account of delay if applicant were to be surrendered – European Arrest Warrant Act 2003 (No 45), s 16 – Order for surrender of respondent (2006/1EXT – Peart J – 14/3/2006) [2006] IEHC 95
Minister for Justice, Equality and Law Reform v Anderson

Offences
Indictable offence - Delegated legislation – Principles and policies – Legislative source of statutory instrument – Intention of legislature – Statutory instrument made for purpose of giving effect to Council Directive – Whether minister precluded from creating indictable offence by statutory instrument made to give effect to Council Directive – Application for judicial review to prevent further prosecution of offences – Whether delegated legislation *ultra vires* – Animal Remedies Regulations 1996 (SI 179/1996) – *Browne v Ireland* [2003] 3 IR 203 considered – *Leontjava v DPP* [2004] 1 IR 591 distinguished – European Communities Act 1972 (No 27), s 3(3) – Animal Remedies Act 1993 (No 23), ss 8, 20 and 23 –Relief refused (2005/399JR – Abbott J – 24/8/2005) [2005] IEHC 475
Quinn v Ireland

Proceeds of crime
Restraint order - Bank – Account – Applicant restrained from disposing or dealing with assets in bank account – Application to vacate order – Criminal Justice Act 1994 (No 15), s 24 - Order varying previous restraint order to allow limited payment out of funds (2005/2898P – Smyth J – 13/12/2005) [2005] IEHC 459
Burns v Bank of Ireland

Sentence
Probation order - Breaches of conditions of recognisance - Whether conviction and sentencing only possible within period of probation order – Whether original probation order extended by District Judge in circumstances where conviction and sentencing adjourned to give accused one further chance – Probation of Offenders Act 1907 (7 Edw 7, c 17), s 1(1) and 5 – (2005/609SS – Murphy J – 27/7/2005) [2005] IEHC 295
DPP (Comiskey) v Traynor (A Minor)

Road traffic offences
Statute – Interpretation – Intoxilyzer – Failure of accused to provide sufficient specimen of breath to allow intoxilyzer determine quantity of alcohol – Whether statute creating absolute offence – *People (DPP) v Moorehouse* [2005] IESC 52, (Unrep, SC, 28/7/2005) and *People* (*DPP) v Doyle* [1996] 3 IR 579 considered - Road Traffic Act 1994 (No 7), s 13(2) –- *Certiorari* refused (2005/495JR – Murphy J – 20/3/2006) [2006] IEHC 84
Davitt v Judge Deery

Warrant
Committal warrant – Reissuing of warrant – Delay - Evidence to be adduced in application to reissue committal warrant – Time limit within which committal warrant should be returned for reissue – Whether the reissuing of committal warrant was invalid where no evidence adduced as to existence of certificate before District Court – Whether onus of proof shifted to respondent to show lawfulness of impugned acts – Whether the committal warrant should show on its face that requisite inquiry into application to reissue warrant was carried out – *Certiorai* granted (2005/838JR – MacMenamin J – 10/3/2006) [2006] IEHC 126
Daly v Judge Coughlan

Warrant
Search and seizure – Validity – Damages – Breach of constitutional rights – Tort – Personal rights – Invalid search warrant – Whether damages would be awarded for breach of rights – Whether breach deliberate and conscious violation of rights - Whether warrant can be issued to search potential escape route – Whether appearance of words "District Judge" on warrant issued by peace commissioner affects validity – Larceny Act 1916 (6 & 7 Geo 5, c 50), s.42 – Claim dismissed (1997/2363P - Clarke J – 13/4/2006) [2006] IEHC 117
Osbourne v Minister for Justice

Articles

Guiry, Roberta
Who is the victim? - The use of Victim Impact Statements in murder and manslaughter cases
2006 (3) ICLJ 2

Kennedy, Edel
The hand that robs the cradle
2006 (July) GLSI 18

Rogan, Mary
The role of victims in sentencing - the case of compensation orders
2006 ILTR 202

Library Acquisitions

Chalmers, James
Criminal defences and pleas in bar of trial
London: Thomson W. Green, 2006
M584

National Crime Council
An examination of time intervals in the investigation and prosecution of murder and rape cases in Ireland from 2002-2004
Dublin: Government Publications, 2006
M544.4.C5

Statutory Instruments

Criminal justice act 2006 (commencement) (no.2) order 2006
SI 529/2006

Criminal justice (illicit traffic by sea) act 2003 (commencement) order
2006
SI 539/2006

Criminal justice (terrorist offences) act 2005 (section 42(6)) (counter terrorism) (financial sanctions) regulations (no. 2) 2006
REG/2580-2001
SI 434/2006

District court (probation of offenders) rules 2006
SI 544/2006

District court (public order) rules 2006
SI 545/2006

Firearms act 1925 (surrender of firearms and offensive weapons) order 2006
SI 451/2006

Mental health (criminal law) review board (establishment day) order 2006
SI 499/2006

DAMAGES

Award
Physical and sexual abuse – Statute of limitations - Whether elements of claim not particularised until trial were statute barred – Whether plaintiff need identify every incident of abuse in advance of his action before he was entitled to rely on it in support of his claim – Where damages are claimed under headings of negligence, breach of duty, assault and breach of and failure to vindicate constitutional rights award of damages has to comprehend each of those headings – Whether aggravated damages should be awarded – General and aggravated damages awarded (1997/13984P – O'Donovan J – 21/3/2006) [2006] IEHC 119
Connellan v Saint Joseph's Kilkenny

DISCRIMINATION

Library Acquisition

Connolly, Michael
Discrimination law
London: Sweet & Maxwell, 2006
M208

EASEMENTS

Profit à prendre
Fishing rights – Several fishery – Ownership of river bed – Abandonment – Prescription – Whether permission granted for fishing – Whether unsolicited permission – Whether removal of gravel wrongful – *Little v Wingfield* (1858) 81 CLR 279; *Earl de la Warr v Myles* (1881) 17 ChD 535; *Neill v Duke of Devonshire* (1882) 8 App Cas 135; *Carroll v Sheridan* [1984] ILRM 451; *BP Properties v Buckler* (1985) 55 P & CR 337; *Tennant v Clancy* [1987] IR 15 and *Gannon v Walsh* [1998] 3 IR 245 considered – Prescription Act 1832 (2 & 3 Will 4, c 71), s 4; Conveyancing Act 1881 (44 & 45 Vic, c 41), s 6 – Declaration of ownership of several fishery rights made in favour of plaintiff Injunction granted (1999/11606P – Macken J – 29/11/2005) [2005] IEHC 414
Agnew v Barry

EDUCATION

Library Acquisition

School of Law, Trinity College
Primary schools and the law: a 2006 update
Dublin: School of Law Trinity College, 2006
N184.2.C5

Statutory Instruments

Child Care (pre-school services) regulations 2006
SI 505/2006

Education and science (delegation of ministerial functions) order 2006
SI 533/2006

ELECTIONS

Article

Dockery, Liam
Dail elections - recent changes to the petition procedure
2006 2 (2) JCP & P 12

EMPLOYMENT LAW

Contract
Fixed term contract – Contract terminated before expiration of fixed term – Legitimate expectation – Exemplary damages - Whether change in policy which resulted in plaintiff being medically reclassified and thereafter dismissed was breach of contract – Whether plaintiff had legitimate expectation that he would be maintained at same medical grade which he was on when he entered into fixed term contract – Whether defendants' behaviour in dismissing plaintiff gave rise to claim for exemplary damages – Damages of €36,395.77 plus court interest awarded – (1998/11905P – Laffoy J – 7/4/2006) [2006] IEHC 114
McGrath v Minister for Defence and others

Contract
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Electricity Supply Board v Minister for Social, Community and Family Affairs

Contract
Wages properly payable – Deduction – Unauthorised – Industrial relations – Appeal on point of law – Whether EAT erred in law – Employer substituting long service increment for service pay – Whether deduction unauthorised – Industrial Relations Act 1990 (No 19), s 26(1) – Payment of Wages Act 1991 (No 25), ss 5, 6 and 7(4)(b) – Appeal allowed (2004/362Sp – Finnegan P – 9/12/2005) [2005] IEHC 417
Dunnes Stores (Cornelscourt) Ltd v Lacey

"Contract of service"
"Contract for services" – "Employee" – "Independent contractor" – *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34 and *Castleisland Cattle Breeding v Minister for Social Welfare* [2004] IESC 40; [2004] 4 IR 150 followed – Social Welfare (Consolidation) Act 1993 (No 27), ss 263 and 271 – Appeal dismissed: employees retained under contracts of service (2002/113 & 187Sp – Gilligan J – 21/2/2006) [2006] IEHC 59
Electricity Supply Board v Minister for Social, Community and Family Affairs

Disciplinary procedures
Allegations of serious misconduct – Investigation – Suspension – Investigation report - Disciplinary procedure invoked – Injunction seeking to prevent disciplinary proceedings arising out of report – Allegations of breach of fair procedures during investigation - Whether party under investigation entitled to fair procedures during investigation where investigation preliminary to full disciplinary hearing - Injunction to remove suspension - Whether suspension of managing director appropriate in circumstances – *Morgan v Trinity College* [2003] 3 IR 157 followed – Relief refused (2004/19385P – Clarke J – 14/1/2004) [2005] IEHC 3
O'Brien v AON Insurance Managers (Dublin) Ltd

Articles

Doran, Kieran
Drug and alcohol testing under the Safety, Health and Welfare at Work Act
2005
(2006) 2 IELJ 36

Kimber, Cliona
Restrictive covenants in employment law
(2006) 3 IELJ 85

McCrann, Terence
Investigations in the workplace
(2006) 3 IELJ 68

Meenan, Frances
Protection of Employees (Fixed-Term Work) Act 2003 - recent case law
(2006) 2 IELJ 39

O'Sullivan, Stephen
Employment law analysis
2006 (Summer) IBLQ 24

Twomey, Adrian F
Castles in the air: collective agreements, compulsory redundancies and
Kaur v MG Rover
(2006) 3 IELJ 77

Library Acquisitions

Honeyball, Simon
Honeyball and Bowers' textbook on labour law
9th ed
Oxford: Oxford University Press, 2006
N190

Purdy, Alastair
Termination of employment: a practical guide for employers
Dublin: First Law Limited, 2006

N192.2.C5

Upex, Robert
The law of termination of employment
7th ed
Bristol: Jordan Publishing Limited, 2006
N192.2

Statutory Instruments

Employment regulation order (contract cleaning (City and County of Dublin) joint labour committee) (no. 2), 2006
SI 458/2006

Employment regulation order (contract cleaning (excluding the City and
County of Dublin) joint labour committee) (no. 2), 2006
SI 459/2006

Employment regulation order (handkerchief and household piece goods joint labour committee), 2006
SI 513/2006

Employment regulation order (security industry joint labour committee),
2006
SI 500/2006

Employment regulation order (shirtmaking joint labour committee), 2006
SI 514/2006

Employment regulation order (tailoring joint labour committee), 2006
SI 515/2006

Employment regulation order (women's clothing and millinery joint labour committee), 2006
SI 516/2006

Safety, health and welfare at work (construction) regulations 2006
SI 504/2006

Safety, health and welfare at work (exposure to asbestos) regulations 2006
DIR/83-477, DIR/91-382, DIR/2003-18, DIR/87-217
SI 386/2006

EUROPEAN LAW

Articles

Garcia-Bragado Manen, Sofia
The environmental liability directive
2006 ILTR 220

Gibson, Emily
Recent developments in public procurement
2006 (Summer) IBLQ 5

Grier, Elaine
Eurofood IFSC Ltd - an end to forum shopping?
2006 CLP 161

McNamara, Richard
Brussels calling: The unstoppable Europeanisation of Irish family law
Martin, Frank
2006 (3) IJFL 8

Library Acquisitions

Arnull, Anthony
Wyatt & Dashwood's: European Union Law
5th ed
London: Sweet & Maxwell, 2006
W71

Henning-Bodewig, Frauke
Unfair competition law - European Union and member states
The Hague: Kluwer Law International, 2006
W110

Korah, Valentine
Cases and materials on EC competition law
3rd ed
Oxford: Hart Publishing Limited, 2006
W110

FAMILY LAW

Judicial separation

Proper provision – Lump sum payments – Family home – Costs – Family company – Extraction of funds –Whether cost of extracting funds relevant – Whether tax consequences relevant – Assessing value of company – *BD v JD (No 1)* [2004] IESC 101 (Unrep, SC, 8/12/2004) and *BD v JD (No 2)* [2005] IEHC 154 (Unrep, McKechnie J, 4/5/2005) followed – Family Law Act 1995 (No 26), ss 6, 8(1)(c)(i), 9, 14, 15(a), 15A(10), 16, 18 and 36 – Various ancillary reliefs ordered in favour of applicant (2002/83M – McKechnie J – 2/12/2005) [2005] IEHC 407
D (B) v D (J) (No 3)

Nullity

Full, free and informed consent - Appeal against refusal of decree of nullity –Whether respondent by virtue of sexual orientation was capable of sustaining normal marital relationship – Whether petitioner was capable of sustaining marital relationship by reason of his mental condition – Whether failure to disclose circumstance of substance which would have influenced petitioner into entering marriage was ground for nullity – Decree of nullity refused; order of Circuit Court affirmed - (158/CA/05 – O'Higgins J – 16/2/2006) [2006] IEHC 127
B (A) v C (N)

Articles

Eardly, John
The Constitution and marriage; the scope of protection
12 (4) 2006 BR 137

McNamara, Richard
Brussels calling: The unstoppable Europeanisation of Irish family law
Martin, Frank
2006 (3) IJFL 8

Mullins, Patrick
To have and to hold
2006 (July) GLSI 22

Library Acquisition

Lowe, Nigel
Bromley's family law
10th ed
Oxford: Oxford University Press, 2006
N170

FINANCIAL SERVICES

Article

Walker, Peter
Observations on the MiFID
2006 (Summer) IBLQ 9

Library Acquisitions

Financial Regulator
Protecting consumers through effective regulation: annual report of the
Financial Regulator 2005
Dublin: Financial Regulator, 2005
N308.3.C5

Hudson, Alastair
The law on financial derivatives
4th ed
London: Sweet & Maxwell, 2006
N300

FISHERIES

Statutory Instrument

Marine (delegation of ministerial functions) (no. 4) order 2006
SI 543/2006

Marine and natural resources (transfer of departmental administration and ministerial functions) order 2006
SI 530/2006

Monkfish (control of landings) regulations 2006
SI 496/2006

Mussel seed (conservation) (no.5) regulations 2006
SI 403/2006

Mussel seed (conservation) (no. 6) regulations 2006
SI 415/2006

Mussel seed (conservation) (no. 7) regulations 2006
SI 416/2006

Mussel seed (conservation) (no. 8) regulations 2006
SI 465/2006

Mussel seed (conservation) (no. 9) regulations 2006
SI 466/2006

Mussel seed (conservation) (no. 10) regulations 2006
SI 495/2006

National salmon commission and standing scientific committee (terms of reference and procedure) order 2006
SI 483/2006

FREEDOM OF INFORMATION

Article

Dee, Eoin
Tell me more
2006 (July) GLSI 38

GARDA SIOCHANA

Library Acquisition

Morris, The Honourable Mr Justice, Frederick
Report of the tribunal of inquiry set up pursuant to the tribunal of inquiry (evidence) acts 1921-2002 into certain gardai in the Donegal division
Dublin: Government of Ireland, 2006
N398.1.C5

Statutory Instruments

Garda Siochana (admissions and appointments) (amendment) regulations 2006
SI 509/2006

Garda Siochana (promotion) regulations 2006
SI 485/2006

Garda Siochana (reserve members) regulations 2006
SI 413/2006

HEALTH

Statutory Instruments

Health act 2004 (national health consultative forum appointment of members) order 2006
SI 479/2006

Health (interest payable on recoverable health charges) regulations 2006
SI 445/2006

Mental health (criminal law) review board (establishment day) order 2006
SI 499/2006

HOUSING

Library Acquisitions

National Consumer Agency
Property management companies and you
Dublin National Consumer Agency, [2006]
N54.6.C5

National Consumer Agency
Management fees and service charges levied on owners of property in multi-unit dwellings: report by the National Consumer Agency
Dublin: National Consumer Agency, [2006]
N54.6.C5

HUMAN RIGHTS

Library Acquisitions

Amnesty International Irish Section
Our rights, our future - human rights based approaches in Ireland: principles, policies and practice
Dublin: Amnesty International Irish Section, 2006
C200.C5

Amos, Merris
Human rights law
Oxford: Hart Publishing Limited, 2006
C200

Binchy, William
Human rights, constitutionalism and the judiciary: Tanzanian and Irish perspectives
Dublin: Clarus Press, 2006
M31.C5

IMMIGRATION

Asylum
Natural justice – Reasons – Credibility – Failure to give reasons – Failure to disclose country of origin information – Whether no basis for findings – Whether failure to allow applicant to clarify contradictions – *Horvath v Secretary of State for Home Department* [1999] INLR 7; *Kramarenko v Refugee Appeals Tribunal* [2004] 2 ILRM 55; *Camara v Minister for Justice, Equality and Law Reform* (Unrep, Kelly J, 26/7/2000) followed – Application refused (2004/326JR – MacMenamin J – 3/6/2005) [2005] IEHC 469
A (EO) v Refugee Appeals Tribunal

Deportation order
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H (I) v Minister for Justice, Equality and Law Reform

Deportation order
Revocation - Fair procedures – Application for revocation of deportation order – Whether properly considered – *Mandamus* – Whether arguable grounds for contending that consideration should have been given to representations in respect of revocation of deportation order – Immigration Act 1999 (No 22), s 3(11) – Leave granted (2005/280JR - Finlay Geoghegan J – 24/01/2006) [2006] IEHC 5
A (D) v Minister for Justice, Equality and Law Reform

Judicial review
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M (V) v RAT

Judicial review
Application for leave – Asylum - Fair procedures – Internal relocation – Whether obligation on decision maker to notify applicant of issue relevant to decision prior to hearing – Whether substantial grounds advanced by applicant for challenging decision of respondent – Whether respondent failed to take into account relevant considerations when deciding that applicant could relocate internally – *B.P v. Minister for Justice* [2003] 4 I.R. 201 distinguished – Application dismissed (2005/351JR – Peart J – 17/02/2006) [2006] IEHC 46
O (J) v RAT

Judicial review
Application for leave – Asylum - Substantial grounds – Unreasonableness – Credibility – Whether failure to disclose relevant information – Whether decision irrational – Standard of review – *McNamara v An Bord Pleanála (No 1)* [1995] 2 ILRM 125; *Camara v Minister for Justice* (Unrep, HC, Kelly J, 26/7/2000); *Macharia v Immigration Appeals Tribunal* [2000] INLR 267; *Osayande v Minister for Justice* [2003] IR 1; *VU v Refugee Applications Commissioner* [2005] IEHC 146, [2005] 2 IR 537 and *Muresan v Minister for Justice* [2004] 2 ILRM 364 considered – Refugee Act 1996 (No 17), ss 2, 11(b), 13, 16; Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2)(b) – Leave refused (2004/531JR – MacMenamin J – 26/7/2005) [2005] IEHC 470
O (IL) v Refugee Appeals Tribunal

INJUNCTIONS

Interlocutory
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Sheridan v Louis Fitzgerald Group

Interlocutory
Employment– Dismissal – Disciplinary proceedings – Fair procedures – Appeal from initial determination under disciplinary process – Whether breach of fair procedures in conduct of disciplinary process – Whether fair issue to be tried – Whether interlocutory injunction should be granted restraining continuation of disciplinary process, including appeal thereunder – Application refused (2005/3997P – Laffoy J – 26/1/2006) [2006] IEHC 3
McEvoy v Bank of Ireland

Interlocutory
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Contech Building Products Ltd v Walsh

INSURANCE LAW

Contract
Construction – *Contra proferentem* – Disability – Objective test for state of health – Reasonable expectations of parties – Estoppel by representation – Definition of disablement and sickness – Whether unfit for work – Salary protection insurance – Whether entitled to benefit of scheme – Rheumatoid arthritis – Chronic pain syndrome – Whether totally or partially prevented from working – *Haghiran v Allied Dunbar* [2001] 1 All ER (Comm) 97 distinguished; *Cook v Financial Ins Co* [1998] 1 WLR 1795; *Robertson v French* (1803) 4 East 130 and *Sheridan v Phoenix Life Ass Co* (1858) B & EL 156 considered – Defendant liable on policy for periods of total and partial disability (2001/17745P – MacMenamin J – 1/11/2005) [2005] IEHC 449
O'Reilly v Irish Life Assurance plc

Library Acquisitions

Buckley, Austin J
Insurance law
2nd ed
Dublin: Thomson Round Hall, 2006
N290.C5

Colinvaux's law of insurance
8th ed
London: Sweet & Maxwell, 2006
N290

INTELLECTUAL PROPERTY

Patents
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Norton Healthcare Ltd v Akzo Nobel NV

INTERNATIONAL LAW

Article

Walsh, Padraig
To get rich is glorious: legal issues for Irish investment in China
Part 1 - 2006 ILTR 215
Part 2 - 2006 ILTR 230

JUDICIAL REVIEW

Delay
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(2005/593JR – Dunne J – 28/4/2006) [2006] IEHC 151
Fagan v Judges of the Circuit Criminal Court

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Rutledge v Judge Clyne

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Grimes v Cork Co Co

LANDLORD & TENANT

Article

Ryall, Aine
Landlords, tenants and rental deposits - is there a better way to deal with disputes?
2006 C & PLJ 57

LEGAL AID

Statutory Instrument

Civil legal aid regulations 2006
SI 460/2006

LEGAL HISTORY

Library Acquisition

Dawson, Norma M
Reflections on law and history: Irish legal history society discourses and other papers, 2000-2005
Dublin: Four Courts Press, 2006
L403

LEGAL PROFESSION

Article

O'Dwyer, Colm
The Haran report on legal costs
12 (4) 2006 BR 107

LEGAL SYSTEM

Library Acquisition

Smith, A T H
Glanville Williams: learning the law
13th ed
London: Sweet & Maxwell, 2006
L155

LICENSING

Library Acquisition

Cassidy, Constance
The practitioners' concise guide to liquor licensing
Dublin: First Law, 2006
N186.4.C5

MENTAL HEALTH

Statutory Instruments

Mental health act 2001 (commencement) order 2006
SI 411/2006

Mental health (criminal law) review board (establishment day) order 2006
SI 499/2006

NEGLIGENCE

Medical negligence
Standard of care – General and approved practice – Injuries suffered at childbirth – Oxygen deprivation – Late delivery – Whether obstetrician negligent – Whether members of theatre staff negligent – *Dunne (a minor) v National Maternity Hospital* [1989] IR 91 applied – Hospital 100% liable; Obstetrician not negligent (1999/9796P – De Valera J – 15/4/2005) [2005] IEHC 415
Pyne v Western Health Board

Article

Buckley, Helen
Duty to care: reducing risk in childcare settings
2006 (3) IJFL 3

Library Acquisitions

School of Law, Trinity College
Primary schools and the law: a 2006 update
Dublin: School of Law Trinity College, 2006
N184.2.C5

Walton, His Honour Judge, Christopher
Charlesworth & Percy on negligence
11th ed
London: Sweet & Maxwell, 2006
N33.3

PENSIONS

Article

Enright, Mairead
Pension fund trustees and mandatory terms of office - a law and economics analysis
2006 ILTR 182

PERSONAL INJURIES

Article

Canny, Martin
The disclosure rules for personal injuries cases - keep your cards where we can see them!
2006 2 (2) JCP & P 7

Library Acquisition

PIAB compilation
Dublin: Law Library, 2006
Personal Injuries: Compensation: Ireland
N38.Z9.C5

PLANNING & ENVIRONMENTAL LAW

Exempted development
Injunction– Aerodrome – Whether planning permission necessary for development – Whether works only affecting interior of building – Whether exempted by regulation – Onus of proof – *Dublin Co Co v Tallaght Block Company Limited* [1982] ILRM 534; *Dublin Corp v Sullivan* (Unrep, Finlay P, 21/12/1984); *Lennon v Kingdom Plant Hire Ltd* (Unrep, Morris J, 13/12/1991); *Keane v An Bord Pleanála* [1997] 1 IR 184; *Carthy v Fingal Co Co* [1999] 3 IR 577 and *Westport UDC v Golden* [2002] 1 ILRM 439 – Irish Aviation Authority Act 1993 (No 29) - Planning and Development Act 2000 (No 30), ss 3, 4(1)(h), 4(2), 157, 160 and 162 – Planning and Development Regulations 2001 (SI 600/2001), arts 5, 6, 7 and 9, sch 2, – Declarations granted that development required planning permission (2002/90/MCA – McKechnie J – 28/4/2005) [2005] IEHC 408
South Dublin County Council v Fallowvale Ltd

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Moriarty v South Dublin County Council

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Duffy v Dublin City Council and Shanahan

Article

Garcia-Bragado Manen, Sofia
The environmental liability directive
2006 ILTR 220

Library Acquisition

Department of the Environment, Heritage and Local Government
Wind energy development guidelines: guidelines for planning authorities June 2006
Dublin: Department of the Environment, Heritage and Local Government,
2006
N96.C5

Statutory Instruments

Planning and development act 2000 (designation of strategic development zone: Balgaddy-Clonburris, South Dublin County) order 2006
SI 442/2006

Planning and development (strategic infrastructure) act 2006 (commencement) order 2006
SI 525/2006

Waste management (landfill levy) (amendment) regulations 2006
SI 402/2006

PRACTICE AND PROCEDURE

Appeal
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Electricity Supply Board v Minister for Social, Community and Family Affairs

Appeal
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Cullinane v Eustace and Cowley

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Eircom plc v Commission for Communications Regulation

Discovery
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Central Parking System (Ireland) Ltd v Dublin City Council

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Fitzwilton Ltd v Mahon Tribunal

Discovery
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VLM Ltd v Xerox (Ireland) Ltd

Dismissal of proceedings
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Irish Municipal Public and Civil Trade Union v Ryanair

Pleadings
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Shell Ltd v McGrath

Summary judgment
Bill of exchange – Dishonoured – Set-off – Cross-claim – Whether claim for liquidated sum – *Walek and Co v Seafield Gentex* [1978] IR 167; *Nova (Jersey) Knit v Kammgarn* [1977] 2 All ER 463 and *Cebora v SIP* [1976] 1 Lloyds Rep 271 followed – Rules of the Superior Courts 1986 (SI 15/1986), O 63A, r 6(1)(xiii) – Judgment entered in full; cross-claim adjourned for plenary hearing (2005/807S – Kelly J – 2/12/2005) [2005] IEHC 418
Kay-El (Hong Kong) Ltd v Musgrave Ltd

Summary judgment
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Anglo Irish Bank Corporation plc v McGrath

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Powderly v McDonagh

Articles

Abrahamson, William
Developments in delay - no more comfortable assumptions
2006 2 (2) JCP & P 2

Canny, Martin
The disclosure rules for personal injuries cases - keep your cards where we can see them!
2006 2 (2) JCP & P 7

PRIVACY

Library Acquisition

Kelleher, Denis
Privacy and data protection law in Ireland
Haywards Heath: Tottel Publishing, 2006
M209.D5.C5

PROBATE

Administration of estates
Costs- Whether general rule that costs to be paid out of estate has application to administration suit even where conducted *bona fide* and with reasonable basis – Whether reasonable basis for litigation – Whether costs to be paid out of personal estate – *In Bonis Morelli; Vella v. Morelli* [1968] IR 11 distinguished – Claim dismissed, no order as to costs (2004/277SP - Laffoy J – 13/2/2006) [2006] IEHC 49
In Bonis Young; Young v Cadell

PROFESSIONS

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Conroy v McArdle

PROPERTY

Articles

Buckley, Niall
Adverse possession at the crossroads
2006 C & PLJ 59

Linehan, Denis
Good deed for the day
2006 (July) GLSI 34

McCarthy, Aoife
Law Reform Commission Land Law update
2006 C & PLJ 54

Mee, John
The Land and Conveyancing Law Reform Bill 2006: observations on the law reform process and a critique of selected provisions
2006 C & PLJ 67 - part 1

Mullins, Patrick
To have and to hold
2006 (July) GLSI 22

Library Acquisitions

Burn, Edward H
Cheshire and Burn's modern law of real property
17th ed
Oxford: Oxford University Press, 2006
N60

National Consumer Agency
Property management companies and you

Dublin National Consumer Agency, [2006]
N54.6.C5

National Consumer Agency
Management fees and service charges levied on owners of property in multi-unit dwellings: report by the National Consumer Agency
Dublin: National Consumer Agency, [2006]
N54.6.C5

Statutory Instruments

Land purchase annuities redemption scheme (amendment) regulations 2006
SI 352/2006

Registration of deeds and title act 2006 (commencement) (no.2) order 2006
SI 511/2006

Registration of deeds and title act 2006 (establishment day) order 2006
SI 512/2006

ROAD TRAFFIC

Statutory Instruments

European Communities (driving theoretical tests) (amendment) regulations
2006
DIR/91-439, DIR/2000-56
SI 538/2006

Road safety authority act 2006 (conferral of functions) order 2006
SI 477/2006

Road safety authority act 2006 (establishment day) order 2006
SI 462/2006

Road safety authority act 2006 (section 18) (appointed day) order 2006
SI 463/2006

Road traffic act 2002 (commencement of certain provisions relating to driving while holding mobile phone) order 2006
SI 443/2006

Road traffic acts 1961 to 2006 (fixed charge offence) (holding mobile phone while driving) regulations 2006
SI 444/2006

Road traffic (licensing of drivers) regulations 2006
DIR/91-439, DIR/94-72, DIR/96-47, DIR/97-26,
SI 537/2006

SALE OF GOODS

Library Acquisition

Guest, Anthony Gordon
Benjamin's sale of goods
7th ed
London: Sweet & Maxwell, 2006
N280

SEA & SEAHORE

Statutory Instrument

Harbours act 1996 (sections 86 and 87) (commencement) order 2006
SI 446/2006

SECURITIES

Article

McGrath, Noel
Chopping down Dante's wood? - Article 9 of the Uniform Commercial Code and
Personal Property Security Law in Ireland
2006 CLP 179

SECURITY

Statutory Instruments

Private security (license fees) regulations 2006
SI 470/2006

Private security (licensing and qualifications) regulations 2006
SI 468/2006

Private security (licensing applications) regulations 2006
SI 469/2006

Private security (licensing and standards) (amendment) regulations 2006
SI 435/2006

Private security services act 2004 (section 37 (part)) (commencement) (no.2) order 2006
SI 436/2006

SENTENCING

Article

Rogan, Mary
The role of victims in sentencing - the case of compensation orders
2006 ILTR 202

SET OFF

Article

Heslin, Mark
Update on the law relating to set-off
2006 (Summer) IBLQ 1

SHIPPING

Statutory Instruments

Merchant shipping (weighing of goods vehicles) regulations 2006
SI 510/2006

Wireless telegraphy (ship station radio license) regulations, 2006
SI 414/2006

SOCIAL WELFARE

Statutory Instruments

Social welfare (consolidated payments provisions) (amendment) (no. 4)(family income supplement) regulations 2005
SI 350/2005

Social welfare (consolidated payments provisions) (amendment) (no.5)(island allowance) regulations
SI 351/2005

Social welfare (consolidated payments provisions) (amendment) (no. 9)(one-parent family payment) (assessment of earnings) regulations 2006
SI 486/2006

Social welfare (consolidated payments provisions) (amendment) (no. 10) (treatment) regulations 2006
SI 487/2006

Social welfare (consolidated payments provisions) (amendment) (no.11) (compensation payments) regulations 2006
SI 497/2006

Social welfare (consolidated payments provisions) (amendment) (no.12) (state and widow(er)'s pension (non-contributory) earnings disregard) regulations 2006
SI 519/2006

Social welfare law reform and pensions act 2006 (item 6 of schedule 8)(commencement) order, 2006
SI 357/2006

Social welfare law reform and pensions act 2006 (section 40)(commencement) order 2006
SI 437/2006

Social welfare (recovery of overpayments) regulations 2005
SI 349/2005

Social welfare (rent allowance) (amendment) regulations 2005
SI 352/2005

STATUTORY INTERPRETATION

Library Acquisition

Manchester, Colin
Exploring the law: the dynamics of precedent and statutory interpretation
3rd ed
London: Thomson Sweet & Maxwell, 2006
L35

TAXATION

Library Acquisitions

Antczak, Gina
Tolley's corporation tax 2006-07
2006-07 ed
London: LexisNexis Tolley, 2006
M337.2

Appleby, Tony
The taxation of capital gains: finance act 2006
18th ed
Dublin: Irish Taxation Institute, 2006
O'Hanlon, Finola
M335.15.C5

Bradley, John A.
PRSI and levy contributions: social welfare act 2006
11th ed
Dublin: Irish Taxation Institute, 2006
M336.93.C5

Collison, David
Tiley & Collison: UK tax guide 2006-07
24th ed
London: LexisNexis Butterworths, 2006
M335

Condon, John F
Capital acquisitions tax 2006: finance act 2006
18th ed
Dublin: Irish Taxation Institute, 2006

M337.16.C5

Donegan, David
Irish stamp duty law
4th ed
Dublin: Tottel Publishing, 2006
M337.5.C5

Golding, Jon
Tolley's inheritance tax 2006-07
2006-07 ed
London: LexisNexis Tolley, 2006
M337.33

Homer, Arnold
Tolley's tax guide 2006-07
London: LexisNexis, 2006
Taxation
M335

Kennedy, Pat
Irish taxation - law and practice 2006/2007
4th ed
Dublin: Irish Taxation Institute, 2006
M335.C5

Lenehan, Orla
Taxation in the Republic of Ireland 2006
Haywards Heath: Tottel Publishing: 2006
M335.C5

McAteer, William A
Income tax 2006: finance act 2006
19th ed
Dublin: Irish Taxation Institute, 2006
M337.11.C5

O'Mara, John
Tax guide 2006
Haywards Heath: Tottel Publishing, 2006
M335.C5

Scully, Emmet
The law and practice of Irish stamp duty: finance act 2006
2nd ed
Dublin: Irish Taxation Institute, 2006
M337.5.C5

Smailes, David
Tolley's income tax 2006-07
91st ed
London: LexisNexis Tolley, 2006
M337.11

Walton, Kevin
Tolley's capital gains tax 2006-07
2006-07 ed
London: LexisNexis Tolley, 2006
M337.15

Ward, John
Judge Irish income tax 2006
2006 ed
Haywards Heath: Tottel Publishing Ltd, 2006
M337.11.C5

Wareham, Robert
Tolley's value added tax 2006
2nd ed
London: LexisNexis Tolley, 2006
M337.45

Statutory Instruments

Appointment of special adviser (minister for finance) order, 2006
SI 484/2006

Finance act 2006 (commencement of section 122(1) order 2006
SI 520/2006

Finance act 2006 (section 122(2)) (designation of company) order 2006
SI 521/2006

Finance act 2006 (commencement of sections 93(1), 97(1)(b) and 99(1)(a)) order 2006
SI 549/2006

TORT

Personal injuries
Negligence - Onus of proof - Credibility of plaintiff – Judgment in default against first defendant - Claim dismissed as against second defendant - Damages assessed as against first defendant only (1999/9631P – Peart J – 10/2/2005) [2005] IEHC 27
Twomey v Crean and O'Donoghue

Personal injuries
Negligence - Road traffic accident – Onus of proof – Whether facts established sufficiently clear on which to base inference of negligence – Whether technical evidence supports inference contended for - *Gahan v Engineering Products Ltd* [1971] IR 30 distinguished – Case dismissed (2000/13628P – Peart J – 17/2/2005) [2005] IEHC 38
O'Gorman v MIBI

Article

Canny, Martin
The disclosure rules for personal injuries cases - keep your cards where we can see them!
2006 2 (2) JCP & P 7

Library Acquisitions

Healy, John
Principles of Irish torts law
Dublin: Clarus Press, 2006
N30.C5

PIAB compilation
Dublin: Law Library, 2006
Personal Injuries: Compensation: Ireland
N38.Z9.C5

Rogers, William Vaughan Horton
Winfield & Jolowicz on tort
17th ed
London: Sweet & Maxwell, 2006
N30

School of Law, Trinity College
Primary schools and the law: a 2006 update
Dublin: School of Law Trinity College, 2006
N184.2.C5

TRANSPORT

Statutory Instruments

Carriage of dangerous goods by road act 1998 (appointment of competent authorities) order 2006
SI 407/2006

Carriage of dangerous goods by road (fees) regulations 2006
SI 408/2006

Carriage of dangerous goods by road regulations 2006
SI 405/2006

Railway (Dublin light rail line B1 - Sandyford Industrial Estate to Cherrywood) order 2006
SI 441/2006

Taxi regulation act 2003 (fixed charges offences) regulations 2006
SI 494/2006

Taxi regulation act 2003 (one vehicle; one licence) regulations 2006
SI 439/2006

Taxi regulation act 2003 (small public service vehicles) (amendment) (no.2) regulations 2006
SI 493/2006

Taxi regulation act 2003 (small public service vehicles) (licensing) (no.2) regulations 2006
SI 467/2006

Taxi regulation act 2003 (small public service vehicles) (licensing) (no.2) (amendment) regulations 2006
SI 501/2006

Taxi regulation act 2003 (small public service vehicles) (tamper-proof licence disc) (amendment) regulations 2006
SI 482/2006

Taxi regulation act (maximum fares) order 2006
SI 438/2006

TRAVEL

Statutory Instruments

Tour operators (licensing) (amendment) regulations, 2006
SI 526/2006

Travel agents (licensing) (amendment) regulations, 2006
SI 527/2006

TRIBUNALS

Library Acquisitions

Birmingham, George
Report of the commission of investigation (Dean Lyons case): set up pursuant to the commissions of investigation act 2004
Dublin: Stationery Office, 2006
N398.1.C5

Morris, The Honourable Mr Justice, Frederick
Report of the tribunal of inquiry set up pursuant to the tribunal of inquiry (evidence) acts 1921-2002 into certain gardai in the Donegal division
Dublin: Government of Ireland, 2006
N398.1.C5

AT A GLANCE

COURT RULES

Circuit Court rules (national minimum wage act) 2006
SI 531/2006

Circuit Court rules (protection of employees (fixed-term work)) 2006
SI 532/2006

District Court districts and areas (amendment) (Oldcastle and Kells) order, 2006
SI 536/2006

District court (probation of offenders) rules 2006
SI 544/2006

District court (public order) rules 2006
SI 545/2006

European directives implemented into Irish Law up to 15/11/2006

Information compiled by Robert Carey, Law Library, Four Courts.

Criminal justice (terrorist offences) act 2005 (section 42(6)) (counter terrorism) (financial sanctions) regulations (no. 2) 2006
REG/2580-2001
SI 434/2006

European Communities (authorization, placing on the market, use and control of plant protection products) (amendment) (no. 4) regulations 2006
DIR/91-414, DIR/1993-71
SI 381/2006

European Communities (avian influenza) (amendment of regulations) regulations (no.2) 2006
DEC/2006-405
SI 356/2006

European Communities (avian influenza) (control on imports of avian products from Romania) (amendment) regulations (no. 2) 2006
DEC/2006-435
SI 379/2006

European Communities (carriage of dangerous goods by road) (ADR miscellaneous provisions) regulations 2006
Please see S.I as it implements a number of directives
SI 406/2006

European Communities (clinical trials on medicinal products for human use)(amendment no 2) regulations 2006
DIR/2001-20, DIR/2005-28
SI 374/2006

European Communities (control of organisms harmful to plants and plant products) (amendment) (no.3) regulations 2006
Please see S.I as it implements a number of directives
SI 490/2006

European Communities (cosmetic products)(amendment no. 3) regulations
2006
DIR/2005-80
SI 373/2006

European Communities (cosmetic products)(amendment no. 4) regulations
2006
DIR/2006-65
SI 506/2006

European Communities (driving theoretical tests) (amendment) regulations
2006
DIR/91-439, DIR/2000-56
SI 538/2006

European Communities (eligibility for protection) regulations 2006
DIR/2004-83
SI 518/2006

European Communities (food and feed hygiene) (amendment) regulations 2006
Please see S.I. as it refers to a lot of regulations
SI 387/2006

European Communities (good agricultural practice for protection of waters) regulations 2006
Please see S.I as it implements a number of directives
SI 378/2006

European Communities (hygiene of foodstuffs) regulations 2006
REG/852-2004
SI 369/2006

European Communities (milk quota) (amendment) (no.3) regulations 2006
REG/1788-2003, REG/595-2004
SI 508/2006

European Communities (Newcastle disease) (control of imports of avian products from certain districts of Bulgaria) (amendment) (no.3) regulations 2006
DEC/2006-571
SI 488/2006

European Communities (organisation of working time) (mobile staff in civil aviation) regulations 2006
DIR/2000-79
SI 507/2006

European Communities (pesticide residues) (products of plant origin including fruit and vegetables) (amendment) (no. 3) regulations 2006
DIR/2006-60, DIR/2006-61
SI 464/2006

European Communities (pesticide residues) (cereals) (amendment) (no.3) regulations 2006
DIR/2006-61, DIR/2006-62
SI 492/2006

European Communities (pesticide residues) (foodstuffs of animal origin)(amendment) (no. 3) regulations 2006
DIR/2006-62
SI 489/2006

European Communities (protection measures in relation to avian influenza in poultry and other captive birds) regulations 2006
DIR/2005-94
SI 478/2006

European Communities (protection measures in relation to highly pathogenic avian influenza of subtype H5N1 in wild birds) (no.2) regulations 2006
DEC/2006-563
SI 480/2006

European Communities (protection measures in relation to highly pathogenic avian influenza of the subtype in poultry) (no.2) regulations 2006
DEC/2006-415
SI 491/2006

European Communities (restrictive measures) (Burma/Myanmar) regulations
2006
REG/817-2006
SI 473/2006

European Communities (sampling methods and methods of analysis for the official control of the levels of certain contaminants in foodstuffs) (no.2) regulations 2006
Please see S.I as it implements a number of directives
SI 412/2006

European Communities (statistics) (labour costs surveys) regulations 2006
Please see S.I as it implements a number of directives
SI 354/2006

Road traffic (licensing of drivers) regulations 2006
DIR/91-439, DIR/94-72, DIR/96-47, DIR/97-26,
SI 537/2006

Safety, health and welfare at work (exposure to asbestos) regulations 2006
DIR/83-477, DIR/91-382, DIR/2003-18, DIR/87-217
SI 386/2006

Acts of the Oireachtas 2006 up to 15/11/2006

Information compiled by Damien Grenham, Law Library, Four Courts.

1/2006 University College Galway (Amendment) Act 2006
Signed 22/02/2006

2/2006 Teaching Council (Amendment) Act 2006
Signed 04/03/2006

3/2006 Irish Medicines Board (Miscellaneous Provisions) Act 2006
Signed 04/03/2006

4/2006 Competition (Amendment) Act 2006
Signed 11/03/2006

5/2006 Social Welfare Law Reform and Pensions Act 2006
Signed 24/03/2006

6/2006 Finance Act 2006
Signed 31/03/2006

7/2006 Aviation Act 2006
Signed 04/0/2006

8/2006 Sea-Fisheries and Maritime Jurisdiction Act 2006
Signed 04/04/2006

9/2006 Employees (Provision of Information and Consultation) Act 2006
Signed 09/04/2006

10/2006 Diplomatic Relations and Immunities (Amendment) Act 2006
Signed 12/04/2006

11/2006 Criminal Law (Insanity) Act 2006
Signed 12/04/2006

12/2006 Registration of Deeds and Title Act 2006
Signed 07/05/2006

13/2006 Parental Leave (Amendment) Act 2006
Signed 18/05/2006

14/2006 Road Safety Authority Act 2006
Signed 31/05/2006

15/2006 Criminal Law (Sexual Offences) Act 2006
Signed 02/06/2006

16/2006 Employment Permits Act 2006
Signed 23/06/2006

17/2006 Health (Repayment Scheme) Act 2006
Signed 23/06/2006

18/2006 European Communities (Amendment) Act 2006
Signed 28/06/2006

19/2006 National Sports Campus Development Authority Act 2006
Signed 5/7/2006

20/2006 Defence (Amendment) Act 2006
Signed 12/07/2006

21/2006 National Economic and Social Development Office Act 2006
Signed 12/07/2006

22/2006 Hepatitis C Compensation Tribunal (Amendment) Act 2006
Signed 16/07/2006

23/2006 Road Traffic Act 2006
Signed 16/07/2006

24/2006 Building Societies (Amendment) Act 2006
Signed 16/07/2006

25/2006 Institutes of Technology Act 2006
Signed 16/07/2006

26/2006 Criminal Justice Act 2006
Signed 16/07/2006

27/2006 Planning and Development (Strategic Infrastructure) Act 2006
Signed 16/07/2006

28/2006 Road Traffic and Transport Act 2006
Signed 04/10/2006

Bills of the Oireachtas up to 15/11/2006

Information compiled by Damien Grenham, Law Library, Four Courts.

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

Air navigation and transport (indemnities) bill 2005
1st stage- Seanad

Broadcasting (amendment) bill 2003
1st stage –Dail

Building control bill 2005
Committee – Dail

Child Care (amendment) bill 2006
2nd stage- *(Initiated in Seanad)*

Child trafficking and pornography (amendment) (no.2) bill 2004
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Citizens information bill 2006
2nd stage - Dail

Civil law (miscellaneous provisions) bill 2006
1st stage – Dail

Civil partnership bill 2004
2nd stage- Seanad

Climate change targets bill 2005
2nd stage – Dail **[pmb]** *Eamon Ryan and Ciaran Cuffe*

Comhairle (amendment) bill 2004
2nd stage – Dail

Competition (trade union membership) bill 2006
2nd stage – Dail **[pmb]** *Michael D. Higgins*

Consumer rights enforcer bill 2004
1st stage –Dail

Courts (register of sentences) bill 2006
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Criminal justice (mutual assistance) bill 2005

Report stage – Seanad

Criminal Law (amendment) bill 2006
1st stage- Dail **[pmb]** *Jim O'Keeffe*

Criminal law (home defence) bill 2006
1ST stage- Dail

Defamation bill 2006
2nd stage – Seanad

Defence (amendment) bill 2005
1st stage – Dail **[pmb]** *Billy Timmins*

Defence of life and property bill 2006
2nd stage- Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Electricity regulation (amendment) bill 2003
2nd stage – Seanad

Electoral (amendment) bill 2006
1st stage- Dail

Electoral (amendment) (prisoners' franchise) bill 2005
2nd stage – Dail *(Initiated in Seanad)* **[pmb]** *Gay Mitchell*

Electoral (preparation of register of electors) (temporary provisions) bill 2006
1st stage- Dail **[pmb]** *Eamon Gilmore*

Electoral registration commissioner bill 2005
2nd stage- Dail **[pmb]** *Eamon Gilmore*

Energy (miscellaneous provisions) bill 2006

Report – Dail

Enforcement of court orders bill 2004
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Enforcement of court orders (no.2) bill 2004
1st stage- Seanad **[pmb]** *Senator Brian Hayes*

Europol (amendment) bill 2006
2nd stage- Dail *(Initiated in Seanad)*

Fines bill 2004
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Fluoride (repeal of enactments) bill 2005
2nd stage – Dail **[pmb]** *John Gormley*

Freedom of information (amendment) (no.2) bill 2003
1st stage – Seanad **[pmb]** *Brendan Ryan*

Freedom of information (amendment) (no.3) bill 2003
2nd stage – Dail **[pmb]** *Pat Rabbitte*

Freedom of information (amendment) bill 2006
1st stage-Dail **[pmb]** *Joan Burton*

Fur farming (prohibition) bill 2004
2nd stage- Dail **[pmb]** *Dan Boyle*

Genealogy and heraldry bill 2006
1st stage- Seanad **[pmb]** *Senator Brian Hayes*

Good Samaritan bill 2005
2nd stage – Dail **[pmb]** *Billy Timmins*

Greyhound industry (doping regulation) bill 2006
2nd stage – Dail **[pmb]** *Jimmy Deenihan*

Health (amendment) (no.2) bill 2004

Committee stage- Dail

Health (hospitals inspectorate) bill 2006
2nd stage – Dail **[pmb]** *Liz McManus*

Health (nursing homes) (amendment) bill 2006

Report stage- Dail

Housing (stage payments) bill 2004
2nd stage- Seanad **[pmb]** *Senators Paul Coughlan, Joe O'Toole and Brendan Ryan*

Housing (stage payments) bill 2006
1st stage- Seanad **[pmb]** *Senator Paul Coughlan*

Human reproduction bill 2003
2nd stage – Dail **[pmb]** *Mary Upton*

Industrial development bill 2006
1st stage- Dail

Independent monitoring commission (repeal) bill 2006
2nd stage – Dail **[pmb]** *Martin Ferris, Arthur Morgan, Caoimhghín ó Caoláin,*

Aengus ó Snodaigh and Seán Crowe.

International criminal court bill 2003

Report stage– Seanad *(Initiated in Dail)*

International peace missions bill 2003
2nd stage – Dail **[pmb]** *Gay Mitchell & Dinny McGinley*

Investment funds, companies and miscellaneous provisions bill 2006
1st stage – Seanad **[pmb]** *Senator Mary O'Rourke*

Irish nationality and citizenship (amendment) (an Garda Siochana) bill 2006
1st stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke.*

Irish nationality and citizenship and ministers and secretaries (amendment) bill 2003

Report – Seanad **[pmb]** *Feargal Quinn*

Land and conveyancing law reform bill 2006

Committee stage- Seanad

Law of the sea (repression of piracy) bill 2001
2nd stage – Dail **[pmb]** *(Initiated in Seanad)*

Local elections bill 2003
2nd stage –Dail **[pmb]** *Eamon Gilmore*

Local government (business improvement districts) bill 2006
1st stage – Seanad **[pmb]** *Senator Mary O'Rourke*

Mercantile marine (avoidance of flags of convenience) bill 2005
2nd stage- Dail **[pmb]** *Thomas P. Broughan*

Money advice and budgeting service bill 2002
1st stage – Dail

National oil reserves agency bill 2006

Report stage- Dail

National oil reserves agency bill 2006
1st stage - Dail

National pensions reserve fund (ethical investment) (amendment) bill 2006
1st stage- Seanad

National transport authority bill 2003
2nd stage – Dail **[pmb]** Ciaran Cuffe and Eamon Ryan

Nuclear test ban bill 2006
1st stage - Dail

Offences against the state acts (1939 to 1998) repeal bill 2004
1st stage-Dail **[pmb]** Aengus Ó Snodaigh

Offences against the state (amendment) bill 2006
1st stage- Seanad **[pmb]** *Senators Joe o'Toole, David Norris, Mary Henry and Feargal Quinn.*

Official languages (amendment) bill 2005
2nd stage –Seanad **[pmb]** Senators *Joe O'Toole, Michael Brennan and John Minihan.*

Patents (amendment) bill 1999
2nd stage _Seanad *(Initiated in Dail)*

Planning and development (amendment) bill 2004
1st stage – Dail **[pmb]** Michael Noonan

Planning and development (amendment) bill 2005

Committee – Dail **[pmb]** Eamon Gilmore

Planning and development (amendment) bill 2006
1st stage – Dail **[pmb]** *Damien Grenham*

Planning and development (amendment) (no.3) bill 2004
2nd stage- Dail **[pmb]** *Eamon Gilmore*

Postal (miscellaneous provisions) bill 2001
1st stage –Dail *(order for second stage)*

Prisons bill 2005

Committee – Seanad

Privacy bill 2006
1st stage- Seanad

Proceeds of crime (amendment) bill 2003
2nd stage – Dail

Prohibition of ticket touts bill 2005
2nd stage – Dail **[pmb]** *Jimmy Deenihan*

Public service management (recruitment and appointments) bill 2003
1st stage – Dail

Pyramid schemes bill 2006
2nd stage- Dail **[pmb]** *Kathleen Lynch*

Registration of wills bill 2005

Committee – Seanad **[pmb]**

Registration of lobbyists bill 2003
2nd stage- Dail **[pmb]** *Pat Rabbitte*

Residential tenancies (amendment) bill 2006
1st stage – Dail **[pmb]**

Road traffic (mobile telephony) bill 2006

Committee- Dail **[pmb]**

Sea pollution (miscellaneous provisions) bill 2003

Committee – Dail *(Initiated in Seanad)*

Sexual offences (age of consent) (temporary provisions) bill 2006
2nd stage – Dail **[p.m.b.]** *Brendan Howlin*

Sustainable communities bill 2004
1st stage – Dail **[pmb]** *Trevor Sargent*

Totalisator (amendment) bill 2005
1st stage – Seanad **[pmb]**

Tribunals of inquiry bill 2005
1st stage- Dail

Twenty-fourth amendment of the Constitution bill 2002
1st stage- Dail **[pmb]** *Ruairí Quinn*

Twenty-seventh amendment of the constitution bill 2003
2nd stage – Dail **[pmb]** *Caoimhghín Ócaoláin*

Twenty-seventh amendment of the constitution (No.2) bill 2003
1st stage – Dail **[pmb]** *Arthur Morgan, Deputy Caoimhghín Ó Caoláin, Deputy Seán Crowe, Deputy Martin Ferris, Deputy AengusÓ Snodaigh*

Twenty-eighth amendment of the constitution bill 2005
1st stage- Dail

Twenty-eighth amendment of the constitution bill 2006
2nd stage- Dail **[pmb]** *Michael D. Higgins*

Twenty-eighth amendment of the constitution (No.2) bill 2006
2nd stage- Dail **[pmb]** *Dan Boyle*

Twenty-eighth amendment of the constitution (No.3) bill 2006
2nd stage- Dail **[pmb]** *Dan Boyle*

Waste management (amendment) bill 2003
2nd stage – Dail **[pmb]** *Arthur Morgan*
Water services bill 2003
Report - Dail *(Initiated in Seanad)*
Whistleblowers protection bill 1999

Committee - Dail **[pmb]**

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

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Cancellation from Land Register

When dealing with unregistered land, a document showing the debt has been paid (called a satisfaction piece) must be brought to the judgments office of the High Court or Circuit Court as appropriate, where it is recorded on the judgment. A certificate of satisfaction will then be issued. When this certificate is lodged in the Registry of Deeds, a memo will be entered on the affidavit which serves to reconvey the land to the judgment debtor.[43]

For registered land, a judgment mortgage may be canceled as a burden on the register in accordance with Rule 122 of the Land Registry rules.

This involves the production of a satisfaction piece, as specified in section 9 of the 1850 Act, to the registrar, duly signed by the court officer in the court where the judgment was entered.[44]

If the registrar is satisfied that the judgment mortgage is invalid, it may be canceled under Rule 121. Alternatively, under Rule 111 (b) it may be canceled on the basis that it no longer burdens the land. This may be utilised where, for example, the judgment mortgage has become statute barred after 12 years. In such a case, notice (Form 71B) is normally served by the Land Registry on the judgment creditor and in the absence of valid objections, the judgment mortgage will be canceled.

Application may be made to cancel the mortgage on the basis that it was not valid. Normally, it is argued that the formalities in the Judgment Mortgage Acts have not been complied with or that the judgment debtor has no estate or interest in the land.

If the judgment mortgaged is registered as against the land of a judgment debtor in error (e.g. if there is a mix up as regards names), either the judgment creditor or debtor may apply to cancel the mortgage. There will, however, still be a record of the entry on the folio. Under Rule 6, all canceled entries can be removed from the folio. An application should not be made to the Land Registry to enter a note on the folio indicating that the mortgage was entered in error as the registrar has no power to do so.[45]

Such applications should be made on affidavit. If any question of law or fact arises, it may be referred by the registrar to court.[46]

Enforceability Against Third Parties

A purchaser for value of registered land is entitled to have canceled from the register a judgment mortgage which has been registered against the vendors interest, provided that the entire transaction has been completed, and the full purchase money paid, prior to the registration of the judgment mortgage itself. In *In the matter of Strong*,[47] the owner of registered land had executed a deed of transfer of his interest in favour of a purchaser for full value. However, just a few minutes before the deed was lodged for registration, a judgment mortgage was registered against the vendor's interest. The court found that the interest of a person who has entered into a contract for the purchase of registered land and who has paid the purchase money has a right which does not appear upon the register, and would take priority over any judgment mortgage subsequently registered.[48]

The question of a purchaser who has signed a contract, but not paid the full purchase money by the time the judgment mortgage was registered, came before the Supreme Court in *Tempany v. Hynes*[49] Kenny J., giving the majority judgment, rejected this reasoning stating that, until the whole of the purchase money was paid, the Vendor has a beneficial interest equivalent to the amount of the unpaid purchase money.[50] He concluded that the judgment mortgage was capable of affecting the remaining beneficial interest which the company had in the lands.[51] The Land and Conveyancing Bill 2006 is set to overturn the rule in this case. Instead, the entire beneficial will pass once an enforceable contract has been entered into.

Unregistered Land

As a judgment mortgage is treated as a voluntary conveyance, it will frequently be in danger of losing priority to other interests affecting the land. As Kennedy C.J. observed in *Murphy v. McCormack*[52], a judgment mortgage is a process of execution and the judgment debt is not in the nature of valuable consideration. Normally, for unregistered land, and in contrast to ordinary mortgages, the judgment mortgage will lose priority to all other equitable interests affecting the property at the date of its registration in the Registry of Deeds. This includes prior unregistered deeds. However, if the judgment creditor can obtain a conveyance of the land from the landowner, and can claim to be a purchaser without notice, he can claim priority for the judgment mortgage over prior unregistered deeds. This is only where an issue of priority arises as between the prior unregistered deeds and the subsequent registered one.

Companies/Bankrupts

Obtaining a judgment mortgage is a process of execution. Section 291 of Companies Act 1963 states that:

> ...where a creditor has issued execution against...the lands of a company ... and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution ... against the liquidator unless he has completed the execution...before the commencement of the winding up.[53]

Sub.s. (5) deems the process of execution to be completed by 'seizure and, in the case of an equitable interest, by the appointment of a receiver'. This means that a judgment creditor is an unsecured creditor until the execution process is completed in accordance with section 291. This requirement makes it extremely difficult for a judgment creditor to secure priority in a winding up. Unless the land generates income, there will be no reason to appoint a receiver other than to comply with the provisions of this section and it imposes an onerous requirement on the judgment creditor for no obvious reason.[54]

Section 284 (2) of the 1963 Act and section 51 of the Bankruptcy Act 1988 indicate that a judgment mortgage registered within three months of a company being wound up, or an individual being adjudicated bankrupt, will enjoy no priority as against other creditors ●

43 Julian Deale, *Circuit Court Practice and Procedure* (2nd ed., Dublin, 1994), p.172.
44 McAllister, *Registration of Title in Ireland*, pp. 212-213
45 *Mercantile Credit Company of Ireland v. John Buckley*
46 Fitzgerald, *Land Registry Practice*, pp. 134-135.
47 [1940] I.R. 382. See also *Devoy v. Hanlon* [1929] I.R. 246.
48 Per O'Byrne J. pp. 400-408.
49 [1976] I.R. 101.
50 *Rose v. Watson* (1864) 10 H.L.C. 672 at 683-84; *Re. Kelly's Carpetdrome* (unreported, High Court, 29 November 1983).
51 Wylie & Woods, p. 340.
52 [1930] I.R. 322 at 327.
53 In *Re. Overseas Aviation Engineering (GB) ltd.* [1963] 1 Ch. 24, a case concerning the equivalent provision in English law, it was held that, as the judgment creditor had not completed execution by seizing the land and appointing a receiver over the equitable interest, the judgment creditor had no rights in the liquidation.
54 Law Reform Commission, *Consultation Paper on Judgment Mortgages*

Ignorantia Juris Neminem Excusat – Time for the State to Get its Act[s] Together?

Dr Brian Hunt BL[1]

"There are fundamental problems in requiring people to be bound by laws which they cannot reasonably be expected to find, interpret or understand."[2]

Those are the words of Tom Kitt, Minister of State at the Department of the Taoiseach, speaking on the Second Stage of the Statute Law Revision (Pre-1922) Bill 2004. While they were uttered in the context of pre-1922 legislation, the words are equally applicable to post-1922 legislation.

His words amount to quite a significant admission on the part of the State, to the effect that the principle of *Ignorantia Juris Neminem Excusat* is not tenable in circumstances where the statute book is in the grave state of disorder that it is presently in.

The Great Presumption

All the people of Ireland are presumed to know all of the law of the State, stretching from the 13th Century to the present day. This is what can be termed "the great presumption". It is a presumption upon which our legal system, and even our State, is built. The State presumes that its citizens have read the thousands of statutes and the several thousand statutory instruments which govern the land. However, the reality is considerably different.

Austin was of the view that no law can exist unless it is expressed. If a law has not been expressed, then it is known only to its maker. If a law is known only to its maker, then it is clearly unreasonable to make people culpable for a failure to adhere to that law. Perhaps then, it may be said that the legislation comprising the Irish Statute Book is known only to its maker.

It is probable that a sizeable majority of the citizens of the State have not seen a statute, let alone read one. Looked at more closely, it is possible to argue that the principle of *ignorantia* is not merely a duty imposed on the people; it also amounts to an obligation imposed on the State. This is not only the obligation to publish laws, but to take steps to ensure that the meaning and effect of those laws are conveyed and communicated. So, it may be said that the act of publication on the part of the State is not in itself always sufficient.

Is it acceptable or even fair that the very act of publication means that all people are fixed with knowledge of that law and are in fact bound by it? As succinctly put by Lord Simon of Glaisdale:

> "Legislation which is unnecessarily difficult to understand is a derogation from the democratic right of the citizen to know by what law he is governed."[3]

Statutes and all other forms of legislation are public documents. But just what does this mean? In Ireland it means that legislation is published in an unrestrictive manner, such that the public are not expressly prohibited from seeing it. Theoretically, the fact that statutes are public documents means that the public have access to them, but the reality is quite different.

The publicity surrounding new legislation has increased in recent years. Acts which are regarded as having a broad appeal or are of newsworthy interest to the public will usually be reported on in the newspapers with a very brief reference to some of its key provisions. Such publicity serves a purpose, at the very least it makes the public aware of the existence of that piece of legislation. However, it invariably plays no role in informing them of the detail of the legislation.

Utterances of the Courts

Such is the depth to which the principle of *ignorantia* is embedded in the Irish justice system, that the courts have not delivered a comprehensive or explorative judgment on the matter. Neither, it must be said, has the legislature debated or articulated to any great degree the true import of this principle.

The furthest that the Irish courts have ventured into the principle of *ignorantia* is to confirm the applicability and effect of the principle. In *Jackson v Stopford*[4], the High Court of Appeal was asked to rectify or cancel a deed in circumstances where its terms operated differently from what the parties had intended. The initial trial judge, Gordon J., felt that to rectify the lease "would, in my opinion be contrary to the ordinary principle *ignorantia juris non excusat*, and none of the cases which [counsel for the plaintiff] has cited goes the length that he has contended for."[5] On appeal, O'Connor M.R. emphasized the importance of the principle of *ignorantia*:

1 Consultant, Mason Hayes and Curran.
2 608 *Dáil Debates* Col. 398 (20 October 2005).
3 Hansard Vol. 336, p. 954.
4 [1923] 2 IR 1.
5 *ibid.*, at 5.

> "The ignorance in the present case was not the ignorance of a mere private right. It was the ignorance of the statute law governing every member of the community ... To countenance the proposition that instruments *inter partes* should be cancelled because they did not know the general law of the land would lead to insecurity in the ordinary transactions of every-day life."[6]

In *O'Neill v Carthy*[7], Hanna J. intimated that there may be circumstances in which a person could successfully rely on the principle of *ignorantia*. In this case, the applicant, in seeking an extension of time, claimed that he was not aware of the time limit within which a notice of intention to claim relief must be served, as stipulated by section 24 of the Landlord and Tenant Act 1931. In affirming the decision of the Circuit Court to decline to grant an extension of time[8], Hanna J. stated:

> "The most that can be said for the tenant here is that he made a slip: in other words he pleads ignorance, if not of the existence of the Act itself, of the fact that the Act laid down certain times within which he must serve certain notices before he could benefit thereunder.
>
> I am not to be taken as laying down a rule that mere ignorance of the Act itself or of the times prescribed thereby is in itself a sufficient or insufficient ground upon which a Judge might extend the times under sect. 45. I can conceive cases of absence beyond the seas or even of illness on the part of the tenant in which he might successfully plead ignorance of the Act or of its provisions. But in this case, without in any way binding myself to a view of the effect of ignorance in all possible cases, I am of opinion that ignorance of the provisions of this well-known Act cannot be pleaded three years after its passing by a tenant who was living in Dublin and has read the newspapers, presumably, in which the Act has been discussed, and who is, on his own showing, well aware of the existence of the Act and of the fact that he has rights thereunder."[9]

It is particularly significant that Hanna J. was able to "conceive cases of absence beyond the seas or even of illness" where a person might successfully plead ignorance of the law. While his comments in this regard appear to be restricted to the circumstances of the instant case, his comments nevertheless represent a possible chink in the armour of *ignorantia,* which has yet to be exploited.

Other judicial decisions have thrown a little further light on the scope of the applicability of the principle of *ignorantia*. The comments of Ó'Dálaigh C.J. in *The State (Quinn) v Ryan*[10] serve to confirm that the principle of *ignorantia* is referable not only to statute law, but also to common law, as well as the provisions of the Constitution:

> "A belief, or hope, on the part of the officers concerned that their acts would not bring them into conflict with the Courts is no answer, nor is an inadequate appreciation of the reality of the right of personal liberty guaranteed by the Constitution."

A similar point was at issue in *The People v Shaw*[11] where the admissibility of evidence was at issue. With reference to that dicta of Ó'Dálaigh C.J. in *The State (Quinn) v Ryan,* Walsh J. stated that:

> "To hold otherwise would be to hold what to many people would be an absurd position, namely, that the less a police officer knew about the Constitution and, indeed, of the law itself, the more likely he would be to have the evidence which he obtained in breach of the law (and/or the Constitution) admitted in court. If such indeed were the position, it could well lead to a demand that the interests of equality of treatment should permit an accused person to be allowed to be heard to the effect that he did not know that the activity of which he was charged, and which has been proved against him, amounted to a breach of the criminal law."

In *Hanahoe v Hussey*[12], Kinlen J. appeared to assert that the principle of *ignorantia* is equally applicable to members of the judiciary:

> "There is no evidence that the learned District Judge had no experience of such warrants or that she was unfamiliar with the Act. The onus to prove such matters lies firmly with the applicants. The maxim *'ignorantia juris quod quisque scire tenetur non excusat'* - (ignorance of the law, which everyone is presumed to know, excuses no one) is applicable. Here a court of record has issued warrants and there is a presumption in favour of their legality."

Kinlen J. again touched upon the principle of *ignorantia* in *O.B. v R*[13], a nullity case, where, with reference to the petitioner's claim that "she did not know or understand the law", Kinlen J. stated that "that, in itself, is not an explanation or excuse for the failure to assert one's rights. The old maxim is *'ignorantia juris, quod quisque scire tenator neminem excusat'* ignorance of the law, which everyone is presumed to know, excuses no one)."

The Dáil and Seanad

The principle was also applied by Murphy J. in *Vehicle Imports Limited (in liquidation)*[14], where in finding a person involved in the accounting affairs of a company to be a shadow director, he stated that "If the maxim, *ignorantia juris haud excusat*, ignorance of the law is no defence, is to have any application, it must have particular application to a person recognised by the Companies Acts as qualified to audit books of account."

The utterances of our parliamentarians on the principle of *ignorantia* have been relatively rare, and where they do occur, they tend to be quite brief and directed towards the applicability of the principle in the context of a particular section or Act.

During the course of the Report Stage debate on the Status of Children Bill 1986, in the Dáil, Deputy Taylor[15] sought to alleviate concerns that his proposed amendment would create problems for people who would be unaware of its terms:

6 *ibid.,* at 11.

7 [1937] IR 580.

8 A request to grant an extension of time based on a plea of ignorance of the law was also declined by the Employment Appeals Tribunal in *Conly v Keatings Transport* 18/01/2000 UD653/99.

9 *ibid.,* at 583.

10 [1965] IR 70, 134.

11 [1982] IR 1.

12 [1998] 3 IR 69.

13 [1999] 4 IR 168, 177 – 178.

14 High Court, Unreported, 23 November 2000 at para. 53.

15 In advancing the merits of his amendment which proposed that the non-marital of a testator would benefit from a will in the same manner as marital-children.

> "We all know that ignorance of the law is no excuse. People are presumed to know the law and if this Bill becomes law in its present form, no doubt there will be a fair amount of publicity concerning the date on which a will is made. It is up to any person to amend a will if he is of a mind to do so. People are imputed with knowledge of the law and the law is given publicity by the media when measures are passed. Laws and promises are constantly changed and people have to cope with that situation."[16]

In discussing section 4 of the Prohibition of Forcible Entry and Occupation Bill 1970, Senator Mary Robinson touched on the assertion that the principle of *ignorantia* not only obliges people to know what the law is, but that it equally obliges the State to make those laws accessible to the people:

> "It is, and has always been, one of the fundamental precepts of our criminal law that a person ought to know, or ought to be able to know, what the law is and particularly whether he is committing a criminal offence. It is one of the maxims of the law that *ignorantia juris nemini excusat*—ignorance of the law is no excuse—and the obvious and logical corollary to this is that a person must be able to ascertain in good faith whether he would be committing a criminal offence or not. It is on this basis that I would have some doubts about the constitutionality of this provision and also I would find it, even if marginally constitutional, highly undesirable to have a situation where a person would not know whether as a member of that group he would be committing a criminal offence ..."[17]

The words of Deputy M.J. O'Higgins during the course of the debate on the Succession Bill 1965, serve as an honest admission by a member of the legislature that the principle of *ignorantia* is largely theoretical:

> "It is all very well for the courts to say *ignorantia juris non excusat*—ignorance of the law is no excuse. As the Minister in his professional capacity knows as well as I do, while the general outlines of the law may be known to people, the technical details, such as those being established in this Bill, are not known to the vast majority of people."[18]

During the Committee Stage of the Seanad debate on the Companies (No. 2) Bill 1987, Minister Brennan sought to amend section 51 on the basis that it was running counter to the operation of the principle of *ignorantia*. He explained the amendment:

> "This subsection is saying at present that, if you acquire an interest and you know that the acquisition gives rise to a legal obligation to notify the company, you must notify within five days. The second clause in the subsection is saying that, if you do not know you have acquired an interest at the time you have acquired it, you must make the notification within five days of the date on which you first knew you had a legal obligation to do so. The problem with this is that it would make the provision very difficult to operate as it falls into the trap of creating a legal obligation on a person only if he or she knows that he or she has such an obligation, in other words, a contradiction of the principle that ignorance of the law is no excuse, as it were. The two related amendments here rectify this by aligning the drafting of subsection (2) with that of subsection (1). In other words, the time period for notification of the occurrence of a notifiable event under subsection (2) should run from the time the person becomes aware that the event itself has occurred and not when he becomes aware that the occurrence of the event gives rise to a legal obligation."[19]

This, inter alia, shows a determination on the part of the legislature that legislative provisions should not be permitted to contradict or in some way undermine the principle of *ignorantia*. It also demonstrates, as indicated by the Minister, that where the operation of a provision is contingent on a person's awareness, it effectively becomes inoperable and ultimately, unenforceable.

The State's Obligation

A law can only function if the people who are affected by it have knowledge of its content, either actual knowledge, or at the very least - having declined the opportunity to acquire at least some actual knowledge - constructive knowledge. Citizens cannot be required to comply with a "law" which is drawn up in secret and remains in secret. In fact, it would be incorrect to recognise such a document as a law, because of its inherent secrecy. In order to have the capacity to impose legal obligations, legislation must be promulgated and made known, in the widest way possible.

For practical reasons, it must be accepted that the assumption made in *ignorantia juris neminem excusat* is in itself a fair one. Our legal system could not operate to any degree of effectiveness if ignorance of the law was to constitute a defence. However, some degree of proportionality must be brought to bear on the application of the principle. If one were to examine the operation and effect of the principle of *ignorantia* in the context of the Irish statute book, and ask is it reasonable to impose such a burdensome principle in the current environment of an inaccessible body of legislation, fairness would compel an objective observer to conclude that the mere publication of legislation is not in itself a sufficient act on the part of the State to discharge its duties which exist under the principle of *ignorantia*.

It may be said that the simple act of publication of legislation would be sufficient if the legislation was linguistically accessible - in reasonably accessible language - and in a physically accessible form – that the meaning of the law on a particular point could be ascertained from reading one stand-alone piece of legislation. However, this is not presently the case. Accordingly, if the principle of *ignorantia* is to be sustained, the State must do more to communicate the meaning of legislation produced by the legislature.

Because of its turgid and convoluted language and because of the dependence of one statute upon another for its meaning, the statute book is largely inaccessible to a great many people. In fact, such is the extent of the inaccessibility of our statute book that one could go so far as to suggest that the principle of *ignorantia juris neminem excusat* is not sustainable in the long term ●

16 375 *Dáil Debates* Col. 1139 (18 November 1987).

17 71 *Seanad Debates* Col. 147 – 148 (11 August 1971).

18 217 *Dáil Debates* Col. 100 (29 June 1965).

19 118 *Seanad Debates* Col. 1697-1698 (24 February 1988)

Defrenne to *Cadman*. Female Employees and Length of Service

Brian Byrne BL

Judgment Published And Media Response

On 3rd October 2006, the European Court of Justice (Grand Chamber) delivered their judgement in the case of *B.F. Cadman v. Health and Safety Executive*[1] which was a response to a request for a Preliminary Ruling from the Court of Appeal (England and Wales). The case dealt with the issue of equal pay for female employees in circumstances where length of service increments seemed to favour male employees. The press took an interesting approach to the judgment with a front page head-line claiming that "Pay Ruling will undo 50 years of women's struggle."[2]

Facts And Domestic Proceedings

Mrs Cadman was employed by the HSE in the U.K., who have altered their payment system many times. Before 1992, the system was incremental whereby each employee received an annual increase until they reached the top of the pay scale for their grade. In 1992, the HSE introduced a performance related element so that the amount of the annual increment was adjusted to reflect the employees individual performance. Under this system, high performing employees could reach the top of the scale more quickly. In 1995, a 'Long Term Pay Agreement' was introduced, and annual pay increases was set in accordance with the award of points called 'equity shares' linked to the employee performance. That change had the effect of decreasing the rate at which pay differentials narrowed between longer serving and shorter serving employees on the same grade. Finally in 2000, the system was altered again to enable employees lower in the pay bands to be paid larger annual increases, and accordingly to progress more quickly through the pay band.

In June 2001, Mrs Cadman lodged an application before the Employment Tribunal based on the (UK) Equal Pay Act 1970. At the date of her claim, she was engaged as a band 2 Inspector, a managerial post, for nearly five years. She took as comparators four male colleagues who were also band 2 Inspectors.

Although they were in the same band as Mrs Cadman, those four persons were paid substantially more than her. In the financial year 2000/2001, Mrs Cadman's Annual salary was £35,129, whilst her comparators were paid £39,125, £43,345, £43,119, and £44,183. It was common ground that at the date of the claim lodged at the Employment Tribunal, the four male comparators had longer service than Mrs Cadman, acquired in part in more junior posts. The Employment Tribunal held that under Section 1 of the Equal Pay Act 1970, the term in Mrs Cadman's employment contract relating to pay should be modified so as not to be less favourable than that in the employment contracts of her four comparators.

The HSE appealed to the Employment Appeals Tribunal against that decision. That Tribunal held, first, that in the light of the judgement in the *Danfoss* case[3] where unequal pay arose because of the use of length of service as a criterion, no special justification was required. It held, secondly, that even if such justification were required, the Employment Tribunal had erred in law when considering justification.

By notice of appeal of 4th November 2003, Mrs Cadman appealed against the decision of the Employment Appeal Tribunal to the Court of Appeal. The Court of Appeal stated that the differentials in pay relied upon by Mrs Cadman in support of her action are explained by the structure of the pay system, as the HSE applies a system of pay increases which in one way or another, reflects and rewards length of service. Since women in pay band 2 and generally in the relevant part of the HSE's workforce have on average shorter service than men, the use of length of service as a determinant of pay has a disproportionate impact on women.

The Court of Appeal stated that evidence submitted by the Equal Opportunities Commission, and accepted by all parties to the dispute, shows that in the UK and throughout the EU, the length of service of female workers, taken as a whole, is less than that of male workers. The use of length of service as a determinant of pay plays an important part in the continuing, albeit slowly narrowing, gap between female and male workers. In that regard , the Court of Appeal was uncertain whether the case law of the Court has departed from the finding in *Danfoss*[4] that 'the employer does not have to provide special justification for recourse to the criterion of length of service'. Recent cases, inter alia, *Nimz*[5] *Gerster*[6], and *Hill & Stapleton*[7] , arguably represent second thoughts on the part of the Court of Justice.

The Court of Appeal noted, in that regard, that it was not convinced by the HSE's argument that the scope of the judgement in *Danfoss* has been modified by the subsequent case law of the Court only in relation to part-time workers and that therefore the criterion of length of service never needs objective justification, except in relation to those workers. Furthermore the Court of Appeal agreed with the Employment Appeal tribunal that if the issue relating to the scope of the judgement in *Danfoss* were to be resolved in a manner favourable to Mrs Cadman, the case would have to be referred back to a differently constituted Employment Tribunal, so that the issue of justification could be re-examined.

1 Case C-17/05

2 Irish Independent, 4th November 2006

3 Case 109 / 88 (1989) ECR 3199, paragraph 25.

4 Case 109 / 88 (1989)ECR 3199.

5 Case C-184/89 (1991) ECR I- 297.

6 Case C-1 / 95 (1997) ECR I-5253

7 Case C- 243 / 95 (1998) ECR I-3739

Preliminary Ruling

In those circumstances, the Court of Appeal decided to stay its proceedings and to refer the following questions to the Court of Justice for a Preliminary Ruling:-

(1) Where the use by an employer of the criterion of length of service as a determinant of pay has a disparate impact as between relevant male and female employees, does Article 141 EC require the employer to provide special justification for recourse to that criterion? If the answer depends on the circumstances, what are those circumstances?

(2) Would the answer to the preceding question be different if the employer applies the criterion of length of service on an individual basis to employees so that an assessment is made as to the extent to which greater length of service justifies a greater level of pay?

(3) Is there any relevant distinction to be drawn between the use of the criterion of length of service in the case of part-time workers and the use of that criterion in the case of full-time workers?

The General Scheme Arising From Article 141 (1) EC

Article 141 (1) EC lays down the principle that equal work or work of equal value must be remunerated in the same way, whether it is performed by man or woman – *Lawrence and Others.*[8] As the court held in *Defrenne*[9], that principle, which is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified, forms part of the foundations of the community – see also *Brunhoffer*[10] and *Lawrence and Others.*[11] Furthermore, it must be recalled that the general rule laid down in the first paragraph of Article 1 of Directive 75/117 which is principally designed to facilitate the practical application of the principle of equal pay outlined in Article 141, 1 EC, in no way alters the content or scope of that principle – see *Jenkins.*[12] That rule provides for the elimination of all discrimination on grounds of sex with regards to all aspects and conditions of remuneration for the same work or for work to which equal value is attributed – see *Rummler.*[13]

The scope of Article 141, 1 EC covers not only direct but also in-direct discrimination - see *Jenkins*[14] and *Elsner-Lakeberg*[15]. It is apparent from settled case law that Article 141 EC, like its predecessor Article 119 EEC, must be interpreted as meaning that whenever there is evidence of discrimination, it is for the employer to prove that the practice at issue is justified by objective factors unrelated to any discrimination based on sex – see *Danfoss,*[16] *Kowalska,*[17] *Hill & Stapleton,*[18] and joined cases *Schonheit and Becker.*[19]

The justification given must be based on a legitimate objective, the means to achieve that objective must be appropriate and necessary for that purpose – see *Bilka.*[20]

Length Of Service As A Criterion

In paragraph 24 and 25 of the judgement in *Danfoss*, the Court after stating that recourse to the criterion of length of service may involve less advantageous treatment of women than of men, held that the employer does not have to provide special justification for recourse to that criterion. By adopting that position, the Court acknowledged that rewarding, in particular, experience acquired which enables the worker to perform their duties better constitutes a legitimate objective of pay policy. As a general rule, recourse to the criterion of length of service is appropriate to attain that objective. Length of service goes hand in hand with experience, and experience generally enables the worker to perform their duties better.

The employer is therefore free to reward length of service without having to establish the importance it has in the performance of specific tasks entrusted to the employee. In the same judgement, the Court did not, however, exclude the possibility that there may be situations in which recourse to the criterion of length of service must be justified by the employer in detail. That is so in particular, where the worker provides evidence capable of giving rise to serious doubts as to whether recourse to the criterion of length of service is, in the circumstances , appropriate to attain the above mentioned objective. It is in such circumstances for the employer to prove that that which is true as a general rule, namely that length of service goes hand in hand with experience and that experience enables the worker to perform his duties better, is also true as regards the job in question.

It should be added that where a job classification system based on an evaluation of the work to be carried out is used in determining pay, it is not necessary for the justification for recourse to a certain criterion to relate on an individual basis to the situation of the workers concerned. Therefore, if the objective pursued by recourse to the criterion of length of service is to recognise experience acquired, there is no need to show in the context of such a system that an individual worker has acquired experience during the relevant period which has enabled him to perform his duties better. By contrast, the nature of the work to be carried out must be considered objectively – see *Rummler.*[21]

Ruling Of Court Of Justice

In *Cadman*, the Court stated that following from all of the foregoing considerations the first and second questions referred to it must be determined as follows;

- Since as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard.

8 Case C-320/00 (2002) ECR I – 7325 paragraph 11

9 Case 43 / 75 (1976) ECR 455 paragraph 12

10 Case C – 381 / 99 (2001) ECR I – 4961 paragraph 28

11 Case C - 320/ 00 (2002) ECR I – 7325 paragraph 12

12 Case 96 / 80 (1981) ECR 911, paragraph 22.

13 Case 237 / 85 (1986) ECR 2101 paragraph 11

14 Case 96 / 80 (1981) ECR 911 paragraph 14 & 15

15 Case C – 285 / 02 (2004) ECR I – 5861 paragraph 12

16 Case 109 / 88 (1989) ECR 3199, paragraphs 22 & 23

17 Case C – 33 / 89 (1990) ECR I – 2591 paragraph 16

18 Case C – 243 / 95 (1998) ECR I – 3739, paragraph 43

19 Cases C-4/02 and C- 5/02 (2003) ECR I – 12575 paragraph 71

20 Case 170 / 84 (1986) ECR 1607, paragraph 37

21 Case 237/85 (1986)ECR 2101, paragraph 13.

- Where a job classification system based on an evaluation of the work to be carried out is used in determining pay, there is no need to show that an individual worker has acquired experience during the relevant period, which has enabled him to perform his duties better.

With respect to the third question referred for a Preliminary Ruling, the Court stated that in the light of the answer given to the first and second questions, there was no need to answer the third. The United Kingdom Government and Ireland take the view that, if the Court were contemplating departing from the principles that it laid down in *Danfoss*, considerations of legal certainty would require a limit on the temporal effects of the judgement to be given. Since this judgement contains only a clarification of the case law in this field, there is no need to limit its temporal effects.

The Further Effects Of The Judgment In *Cadman*

It will be recalled that certain sections of the press (see paragraph 1 above) believed that the decision of the Court of Justice in *Cadman* was a retrograde step and that it would have adverse effects upon the principle of equal pay between men and women. In reality, the Court, has provided a Preliminary Ruling in answer to issues which have already been decided in previous cases including parallel issues such as *Danfoss*, and *Jenkins* (part-time working) and *Nimz* (job- sharing). The common thread is that because of family commitments, women are statistically more likely to be engaged in part-time work and job-sharing.

Further, the Court has taken the opportunity to re-state their finding in *Danfoss*. The Court has set down a General Rule that the criterion of length of service is appropriate, but allows a caveat that the worker may provide evidence capable of raising serious doubts in that regard, whereby said general rule may be dislodged. The forum and procedure for such matters has already been referred to by the Court of Justice in *Danfoss* where a discriminatory effect was shown to emerge from a system that totally lacked transparency – the employer bears a burden of proof to explain how the wages are determined. Also, in *Bilka*[22], it was held that a national court should apply a three-fold test in assessing objective justification:

(a) measures must correspond to a real need on the part of the undertaking
(b) they must be appropriate as a means of achieving the end in view, and
(c) they must be necessary to achieve that end.

Conclusion

Far from undoing 50 years of womens struggle, the judgement of the Court of Justice in *Cadman*, has in fact reinforced a previous judgement of the Court reported in 1989[23] and in so doing has also taken the opportunity to clarify and illuminate case law handed down by the Court of Justice prior to, and since 1989 ●

[22] Case 170/84 (1986) ECR 1607.

[23] *Danfoss* Case 109/88 (1989) ECR 3199.

Asylum procedures: recent developments in EU law

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Within the EU, the harmonization of asylum law and policy has brought with it increasing emphasis on speed in the determination of asylum claims. The recently adopted European Council Directive on Minimum Standards on Procedures in Member States for granting and withdrawing refugee status (the Procedures Directive) includes extensive provisions for the use of accelerated procedures,[1] raising concerns that access to regular asylum determination procedures may become the exception rather than the norm.[2] The Directive sets out basic principles and guarantees to be applied in national asylum determination systems, with the stated aim of ensuring a common minimum standard of protection throughout the EU. However, the possible exceptions and derogations that qualify these safeguards are so broad that, in practice, they will not apply to a significant number of asylum seekers.[3] From a protection perspective, such exceptions cannot be justified. They represent, within the European asylum agenda, ongoing tensions between immigration control and the protection of the institution of asylum. These tensions have been played out in the negotiations on the Directive. Its adoption in December 2005 has failed to resolve these tensions, with the European Parliament continuing to reserve its right to challenge the legality of the Directive and its compatibility with fundamental rights.[4]

If incorporated into national laws in its current form, many provisions of the Directive risk violating international law, exposing asylum seekers to ever increasing risks of *refoulement*. Recognizing these risks, an NGO alliance called, in March 2004, for the withdrawal of the Directive, noting that 'the most contentious provisions are all intended to deny asylum seekers access to asylum procedures and to facilitate their transfer to countries outside the EU'.[5] Particular concerns have been expressed in relation to the expansion of safe country practices and the introduction of common European lists of safe countries. In relation to the latter proposal, questions have arisen as to whether the Procedures Directive exceeds the competence of the EC under Title IV EC, *viz* to set minimum standards only.[6] More favourable standards may be applied at national level, but only insofar as they are compatible with the Directive. This requirement of compatibility sets constraints on the standards of protection applied by Member States, suggesting a common ceiling for protection standards rather than a common minimum floor.[7] Against this background, the potential for a considerable lowering of protection standards within Member States is significant. So, also, is the possibility of a challenge to the legality of the Directive and further delays in the harmonization process.

In Ireland, legislative changes introduced in the Immigration Act 2003 anticipated the expanded use of accelerated procedures envisaged by the Directive. The transposition of the Procedures Directive could lead to further changes in the asylum determination process in Ireland. The recently published Scheme for an *Immigration, Residence and Protection Bill, 2006,* retains much of the changes introduced by the 2003 Act, with increased discretion granted to the Minister for Justice, Equality and Law Reform, to withhold documents or information on grounds of public security or public policy, including during determination at first instance and on appeal.[8] Further diminution of procedural standards could be possible, given the lowering of standards heralded by the Procedures Directive.

Procedural guarantees: minimum standards, minimal protection

The Directive sets out minimum procedural guarantees applicable within asylum determination systems. These minimum procedural guarantees are subject, however, to a range of exceptions and derogations. Member States are permitted, for example, to place extensive limits on personal interviews with asylum applicants, dispensing with interviews where the competent authority has already had a meeting with the applicant in accordance with the Qualification Directive;[9] where it is not 'reasonably practicable' to hold an interview;[10] or where the competent authority considers the application unfounded on one of the many grounds listed in article 23(4).

The right to free legal aid and representation is also limited by the Directive and may be restricted by Member States to appeals against negative decisions or to cases where the appeal or review is 'likely to succeed'.[11] As with the restrictions on personal interviews, this restriction reflects a failure to acknowledge the specific needs of asylum applicants faced with linguistic, cultural and legal barriers to presenting their claims. It also raises questions as to who is to determine whether an appeal or review is 'likely to succeed' and potentially adds yet another layer of bureaucratic decision-making. Providing legal assistance and representation at an early stage ensures that protection needs are quickly identified. As experience within national determination procedures shows, removing this right is likely only to divert resources into expensive, time consuming appeals and judicial review proceedings.

Further measures to streamline asylum determination proceedings are introduced in Article 6(3), which allows an applicant to make an application on behalf of his/ her dependents. In such cases, Member States 'may' provide for a personal interview with dependents, but this does not appear to be obligatory. The consent of the dependent is required for such an application to be made but may only be requested at the time of the interview. This requirement ignores the fact that many applicants may not

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1 Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status 2005/85/EC of 1 December 2005 OJ L 326/13

2 See: JUSTICE Proposed Directive on Minimum Standards in Asylum Procedures, evidence submitted to the House of Lords, European Union Committee, Sub-Committee E inquiry, January 2001. See generally: Mullally S, "Manifestly Unfounded Asylum Claims in Ireland", in 8(4) *European Public Law* December 2002, pp.525-543.

3 UNHCR Comments on the Proposal for a Council Directive on Minimum Standards in Member States for Granting and Withdrawing Refugee Status, 10 February 2005

4 European Parliament legislative resolution on the amended proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, adopted 27 September 2005, A6-0222/2005. See also Letter from the Meijers Committee (Committee of experts on international immigration, refugee and criminal law), 9 December 2005, calling on members of the EP Committee on Civil Liberties, Justice and Home Affairs to consider a legal challenge under article 230 EC to the Directive (CM05-05).

5 ECRE, ILGA Europe, Amnesty International, Pax Christi International, Quaker Council for European Affairs, Human Rights Watch, CARITAS-Europe, Médecins Sans Frontières, Churches' Commission for Migrants, Save the Children in Europe *Call for withdrawal of the Asylum Procedures Directive* (22 March 2004). Concerns were reiterated by ECRE, Amnesty International and Human Rights Watch Press Release, *Refugee and Human Rights Organisations across Europe Express their Concern at the Expected Agreement on Asylum Measures on breach of International Law* (28 April 2004).

6 Under article 5 of the Directive, Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, 'insofar as those standards are compatible with this Directive.' The suggestion here is that the Directive sets a ceiling for applicable standards, rather than a common minimum. As such it goes beyond the competence of the EC under Title IV EC. This potential for illegality is evident, in particular, in the commitment to a common European list of safe countries of origin. See letter from the Standing Committee of Experts on international immigration, refugee and criminal law (Meijers Committee) 9 December 2005, *supra* n.4 and; Costello C European Journal of Migration Law 7 (1) 2005 35-69, pp.53-54

7 See: Peers S 'EU Asylum Procedures: an assault on human rights?' *Statewatch News Online, November 2003,* available at: http://www.statewatch.org/news/2003/nov/04asylum.htm

8 Scheme for an Immigration, Residence and Protection Bill, September 2006, available at http://www.justice.ie (See, for example, Head 52(2)(d) '*Notification of determination application at first instance*'

9 Article 12(2)(b)

10 Article 12(3)

11 Article 15(2) and 15(3)(d)

be aware of the persecution experienced by their dependants, for example, where a woman has suffered sexual violence but has not disclosed this to the male members of her family.[12] Given the many exceptions to the requirement to hold a personal interview, such information may never come to light. At a time when many states have moved towards the adoption of gender guidelines and the Qualification Directive specifically recognizes gender based persecution,[13] the absence of a right to a personal interview for each family member is a regrettable omission.

One of the most worrying aspects of the Directive is the failure to guarantee a right of appeal with suspensive effect. The right to remain within the territory of the State is guaranteed only while waiting for a determination at first instance.[14] In effect, this means that the right to appeal may be illusory, in that the asylum seeker is liable to deportation before the process is fully concluded. The right to remain in the territory of the State while awaiting a decision at first instance may be fulfilled by allowing applicants to remain at borders or transit zones, facilitating detention and fast-tracking reception centres at the borders of Member States and exacerbating the difficulties faced in accessing practical services and legal aid. The UNHCR has pointed out that the absence of a suspensive right of appeal will mean that the vast majority of rejected asylum seekers who lodge an appeal will not be permitted to remain in the EU until their appeals are decided, "despite the fact that in several European countries 30-60 percent of initial negative decisions are subsequently overturned on appeal."[15] The failure to guarantee an in-country right of appeal removes one of the most critical safeguards against ***refoulement***. In determining whether a remedy is to have suspensive effect, Member States are required to exercise their discretion in accordance with their international obligations. The discretion granted to Member States, however, serves only to increase the possibility of non-compliance and allows for continuing divergence in the levels of protection provided at national level.

Accelerating asylum determination processes

The Directive includes extensive provisions for accelerating asylum claims deemed to be 'inadmissible' or 'unfounded'. Special procedures are also permitted when processing claims at borders or in transit zones or when processing claims involving 'safe countries'. And, in what has proven to be one of the most controversial elements of the Directive, the use of safe country practices is greatly expanded, with the introduction of so-called 'super-safe' third countries and common minimum lists to be applied by all Member States.

With the expansion of the use of accelerated procedures, access to regular asylum determination procedures will increasingly become the exception rather than the norm. While accelerated procedures are required to comply with the general guarantees set out in Chapter II of the Directive, the consequences of accelerating or prioritizing a claim are left largely to Member States, with the possibility of a considerable lowering of procedural safeguards. As already noted, Member States may, for example, dispense with the requirement of a personal interview in such cases thereby removing one of the core requirements of a fair asylum determination procedure. It is this erosion of minimum standards that prompted an unusually critical response from Ruud Lubbers, then High Commissioner for Refugees, to the Directive. Several provisions of the Directive, he warned, fell short of accepted international legal standards, expanding the use of restrictive and highly controversial practices and jeopardizing the lives of future refugees.[16]

The conflation of merits and admissibility determinations and further deterioration of procedural standards can be seen in the provisions on admissibility in the Directive.[17] Under the Directive, asylum applicants may have their claims deemed inadmissible on a number of grounds including where safe third country or first country of asylum concepts apply or in the case of transfers under the Dublin II regime.[18] In a move that potentially undermines the progress made in the Qualification Directive, provision is made for claims to be determined as inadmissible if the applicant is benefiting from some other form of protection guarding against ***refoulement.***[19] This provision opens up the possibility of subsidiary/complementary protection mechanisms being used to undermine the 1951 Convention and to further limit access to refugee status. The adoption of the Qualification Directive and, in particular, the requirement that Member States establish a legal framework for subsidiary protection, were important steps forward in ensuring compliance with international human rights standards. Subsidiary forms of protection, however, should remain subsidiary, that is, they should only come into play once a substantive examination of an asylum claim, in accordance with the 1951 Convention, has been completed.[20] Otherwise, Member States may resort all too easily to forms of protection that fail to meet the standards of international refugee law.

In addition to expanding the concept of an inadmissible claim, the Directive significantly expands the concept of an 'unfounded' claim. Article 23 sets out an indicative list of fifteen separate grounds on the basis of which an asylum application may be determined as unfounded and subsequently prioritized or accelerated. These include grounds as diverse as: posing a risk to national security; failing to make a prompt application; or failing to produce sufficient evidence of identity. Claims may also be determined as unfounded where the safe third country or safe country of origin concepts, apply.

In addition to the extended provisions on accelerated procedures, the Directive also allows for the application of a range of 'specific procedures' that need not comply with the general guarantees set out in Chapter II.[21] These procedures may apply when processing applications submitted at borders or transit zones or when processing applications to which the safe third country concept applies. In relation to such applications, no examination, or no full examination of an asylum application, need take place prior to removal of an applicant from the territory of the State.

The expansion of concepts such as 'inadmissible' and 'unfounded claims', together with the introduction of a range of 'specific procedures', may raise problems of compliance with the ECHR, in particular, the judgment of the European Court of Human Rights in ***TI v UK,*** in which the Court stated that an individual assessment of an asylum claim must be carried out before any transfer is made.[22] The failure to assess the merits of individual claims is likely to be raised in any challenge to the legality of the Directive.

(i) Safe third countries

International refugee law stipulates that the primary responsibility for international protection lies with the state where the asylum claim is lodged. A transfer of responsibility is only permissible where the third country is deemed safe in the individual circumstances of the applicant and where a meaningful link exists between the applicant and the third country. In addition, the presumption of safety must be rebuttable and any transfer of responsibility should only take place where the third country has consented to grant the applicant full access to an asylum determination procedure that complies with the 1951 Convention.[23] With the expansion of the use of accelerated procedures under the Directive,

12 This issue was highlighted by the Meijers Committee (Committee of Experts on international immigration, refugee and criminal law), in its letter to the Irish Presidency of the Council of the European Union, 18 March 2004.

13 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, article 6(c) and 9(2)(f) OJ L 304, 30.9.2004., p.12

14 Article 7(1)

15 UNCHR Press Release *Lubbers calls for EU asylum laws not to contravene international law* (29 March 2004), cited in Immigration Law Practitioners' Association, *Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting or withdrawing refugee status 30 April 2004,* July 2004, p.20

16 UNHCR *supra* n.15

17 Costello C *supra* n.6, p. 49

18 Article 25

19 Article 25(2)(d)

20 UNHCR Comments *supra* n.3

21 Article 24

22 Application No. 43844/98 (7 March 2000)

23 UNHCR ExCom Conclusions 15 and 58.

however, applicants are not provided with an effective opportunity to rebut the presumption that a third country is safe in their particular case and, given the absence of an in-country right of appeal, applicants may also be denied an effective remedy against a decision to apply the safe third country procedures. Both the original and amended proposals for a Procedures Directive had been widely criticized for placing the burden of rebutting the presumption of safety entirely on the applicant. The Directive, as finally adopted, fails to adequately address these criticisms, providing only that Member States set out 'rules on methodology' to determine whether the safe third country concept applies to a particular country or a particular applicant.[24] The 'rules on methodology' are expected to provide for 'case by case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe'. Member States may, therefore, prioritise the general designation of a country as safe.[25] As a minimum safeguard, the Directive requires that Member States examine whether applicants could face a risk of torture, inhuman, cruel or degrading treatment, prior to removal to a third country.[26] However, there is no requirement of any examination of individual risks extending beyond this minimum.

Article 36 of the Directive expands the safe third country concept to include 'the European safe third countries concept', presently understood as countries within the European region. No minimum standards appear to be applicable to article 36 procedures and access to the asylum procedure (and the territory of the State) may be denied without any substantive examination of the asylum claim. Denials of access may be made by border police, raising fears that such asylum applications will be assessed by personnel who are inadequately qualified to fully assess protection needs. Such denials risk being at variance with international refugee law and with the ECHR, in particular, with requirements for individual assessments of asylum claims.[27]

Difficulties also arise with the criteria to be used in designating third countries as safe. Set out in article 36(2), these include the existence of an asylum procedure prescribed by law and ratification and observation of the ECHR. However, the mere existence of an asylum procedure is insufficient to provide adequate safeguards against ***refoulement.***[28] Many states, just outside the external borders of the EU, have neither the resources nor the systems in place to process significant numbers of asylum applications. Denying applicants access to regular asylum determination procedures because they have traveled through such states risks significantly undermining the right to seek asylum. The reference to observation of the ECHR is welcome as it recognizes that ratification, in itself, is insufficient to ensure compliance with Convention standards. However, the broader human rights obligations imposed by UN human rights treaties are not referred to. This failure again allows for discrepancies between Member States in the protection standards applied. Under Article 36(4), Member States must allow for exceptions from the application of the safe third country concept for 'humanitarian or political purposes' or for 'reasons of public international law.' This minimum requirement is necessary to guard against ***refoulement.*** However, it brings into question the utility or fairness of safe country concepts in the first place.

Member States' discretion to determine the safety of a third country is further limited by 36(3), which provides for the adoption, by a qualified majority, of a common list of third countries that 'shall' be regarded as safe. This restriction on Member States' discretion has led to criticisms that the Directive extends beyond the limits of competence of EU law, ***viz,*** to set minimum standards only.[29] Similar criticisms have been raised with regard to provisions for a common European list of safe countries of origin.

(ii) Safe countries of origin

Attempts to agree on a common European list of safe countries of origin and the question of whether Member States would be permitted to retain individual safe country of origin lists led to considerable delays in the negotiation process, reflecting the extent to which asylum processes continue to reflect the foreign policy interests of states. Ultimately, the Directive permits Member States to introduce or retain national lists, while also providing for a common European list and general criteria to be applied in the designation of a country as a safe country of origin.[30] The general criteria include tests such as whether the non-derogable rights set out in international human rights law are 'consistently observed' and whether 'generally effective remedies against violations of civil and political rights' are available.[31] The possibility of designating part of a country as safe is also provided for, extending further the concept of an internal protection alternative.[32] Although the Directive provides that the particular circumstances of the applicant must be taken into account,[33] in practice, an opportunity to rebut the presumption of safe country of origin will arise only after a decision has been made at first instance. At this point, an applicant may not have enough time to provide the evidence required and may not even be permitted to remain in the State, given the absence of guarantees for an in-country right of appeal.[34]

As with safe third countries, the criteria for designating safe countries of origin provide only minimal safeguards for an asylum applicant. Even these minimal safeguards, however, are undermined by the possibility of Member States retaining national lists that include countries not complying with the generally agreed criteria.[35] The only restriction on Member States' discretion in such instances is that persons in the third country concerned are 'generally' neither subject to persecution as defined by article 9 of the Qualification Directive, nor to torture or inhuman or degrading treatment. In making this assessment, Member States are required to have regard to the legal situation, the application of law and the 'general political circumstances' pertaining in the third country concerned. Allowing Member States to derogate in this way from the already low standards set by the Directive significantly undermines the protection afforded to asylum applicants and Directive's stated objective to harmonise asylum procedures.

The potential for significant discrepancies in the application of the safe country of origin concept can be seen in the difficulties encountered in agreeing a common European list of safe countries of origin.[36] The original ten countries proposed for inclusion in a common list included countries such as Mali and Ghana, where female genital mutilation (FGM), child trafficking, child labour, restrictions on freedom of peaceful assembly and association, and police brutality, have been well documented by human rights organizations. Rejecting the inclusion of Mali in the safe country list, Germany noted that the widespread practice of FGM was the 'key factor'. France, on the other hand, assessed Mali as a 'safe country of origin' noting that the Penal Code, under which deliberate injury and ill treatment are criminal offences, provided a basis for prosecution of FGM. Denmark also concluded in favour of including Mali on the safe country list despite acknowledging 'severe beatings of suspects in police custody', 'life threatening prison conditions', forced labour and the widespread practice of FGM. Ireland concluded in favour of designating all ten countries listed as safe, with little or no commentary on the individual proposals and references to only very limited country of origin information.

24 Article 27(2)(b)
25 See Costello C *supra* n.6, p.60. See also Gilbert G 'Is Europe Living Up to Its Obligations to Refugees?' *EJIL* (2004) p.963
26 Article 27(2)(d)
27 TI v UK *supra* n.22
28 UNHCR *supra* n.3
29 *Supra* n.4
30 Supra n. 1, Articles 29, 30, 31 and Annex II.
31 *Ibid.* Annex II
32 Article 30(3). Member States may also designate a country as safe for specific groups of persons.
33 Article 31(1)
34 *Ibid.* Article 40.
35 Article 30(2)
36 The following discussion draws on the report compiled by Statewatch on the safe country of origin negotiations. See generally: Statewatch 'EU divided over list of safe countries of origin – Statewatch calls for list to be scrapped'. 'September 2004, http://www.statewatch.org/news/sep/2004/sep/safe-countries-links.htm

Recognising the difficulties of securing agreement on a common list, the Directive provides that the list shall be adopted by Council, acting on a qualified majority basis.[37] A Member State's obligation to apply the safe country principle to a third country may be suspended but cannot be avoided altogether unless the Council approves a proposal to remove the third country in question from the common list. It is this lack of flexibility that has prompted criticisms that the Directive goes beyond its mandate to set minimum standards only.[38] Requiring Member States to adhere to a common list limits their discretion to apply higher standards. In doing so, the Directive potentially exceeds the limits of competence of EU law, in the words of Steve Peers, it 'crosses the Rubicon':[39]

The Council is no longer setting minimum standards for protection, which already runs the risk of a competitive 'race to the bottom' by Member States [...] Now it is at least partly in the business of forcing them to lower standards, setting a low ceiling for protection rather than a low floor'.

This 'low ceiling' is further reinforced by the shifting of the burden of proof that comes with a presumption of safety. The burden of rebutting the presumption rests entirely on the applicant, undermining the notion of a shared duty to ascertain and evaluate all relevant evidence. With the presumption of safety, it falls to the applicant to submit 'serious grounds for considering' a country not to be safe in his or her particular circumstances. Where accelerated procedures are triggered by the application of the safe country of origin concept, the likelihood of an applicant being able to rebut this presumption is seriously diminished. Placing the burden of rebuttal entirely on the applicant changes the nature of the asylum determination process, from an inquisitorial one with shared duties as between the applicant and deciding authority, to an increasingly adversarial process in which the asylum applicant is engaged in a continuous struggle to present her claim.

Other difficulties arise with the safe country of origin concept. Designating a country as safe may amount to a ***de facto*** geographical reservation to the Geneva Convention. This is clearly incompatible with the intent of the 1967 Protocol to the Convention and runs counter to broadly-based international opinion in favour of applying the Convention without geographic restrictions.[40] It also works against an individual assessment of the merits of an asylum claim, preferring instead the sledgehammer approach to crack, what Goodwin-Gill refers to as, 'the very small nut of the occasional abuse of claim'.[41] The UNHCR initially accepted the safe country of origin concept as having a role to play in preventing or reducing backlogs and helping to identify cases for expedited treatment.[42] In its ***Global Consultations on International Protection,*** the UNHCR again commented that the safe country of origin concept might operate as an effective decision-making tool. However, the High Commissioner has also pointed to the need for individual assessments of each claim and for an effective opportunity to rebut any general presumption of safety.[43] Within the context of accelerated procedures, with limited rights of appeal, it is unlikely that such an opportunity will exist. If a full individual assessment does take place, it is unclear how the safe country of origin concept can contribute to greater speed in the determination process. As the British-based NGO, ***Justice,*** commented on the use of the safe country of origin concept in UK asylum law:[44]

> "Either the designation will be applied broadly, [...] without proper consideration of the individual case; or, [...], states will in any event have to consider the detailed circumstances of the individual claim [...] The first is unsafe; the second is unlikely to accelerate procedures and, if it leads to satellite litigation, may indeed lengthen them."

The proposal to establish a common EU list of safe countries of origin was promoted, in particular, by the UK, drawing on its own practice of using 'white lists' to exclude potential applicants from regular asylum processes. In March 2004, the British Refugee Council accused the British Government of playing 'a central role in driving down standards across Europe [...]'. The history of 'white lists' in the UK has been particularly controversial. The Nationality, Immigration and Asylum Act, 2002, reintroduced the concept of white lists of 'safe countries of origin'. Applicants from these countries may have their cases certified as 'clearly unfounded', and as a result, lose their right to an in-country appeal.[45] Additional countries may be added to the list by the Home Secretary, if he is satisfied that there is 'in general' no serious risk of persecution or contravention of the UK's obligations under the ECHR.[46] At the time of drafting the 2002 Nationality, Immigration and Asylum Act, the Joint Parliamentary Committee on Human Rights,[47] expressed serious concerns about the use of the 'safe country of origin' concept.[48] On the designation of the ten new EU Member States as 'safe', the Committee had this to say:[49]

> "...In view of the well-authenticated threats to human rights which remain [...] a presumption of safety, even if rebuttable, presents a serious risk that human rights would be inadequately protected. We consider that the presumption of safety is unacceptable on human rights grounds."

As to the absence of a suspensive right of appeal for claims that are certified as 'clearly unfounded', the Committee concluded that this would lead to inadequate protection against ***refoulement,*** and would, in some circumstances, deny an applicant the right to an effective remedy.[50] These concerns have fallen on deaf ears, however, with the United Kingdom leading the battle to entrench the safe country of origin concept and to limit rights of appeal in the minimum standards set by the EU.

The Procedures Directive: implications for Irish asylum law

In Ireland, the increasing use of accelerated procedures and reduced rights of appeal heralded by the Procedures Directive were already anticipated in the changes introduced by the 2003 Immigration Act. The 2003 Act amends the 1996 Refugee Act, replacing the manifestly unfounded procedures with a complex set of procedures to be applied to designated categories of asylum claims. As amended, sections 12 and 13 of the 1996 Refugee Act include lists of asylum claims, which may be "prioritised" or channeled through accelerated procedures, subject to a direction in writing from the Minister to this effect. As with the previous manifestly unfounded process, where the provisions on accelerated procedures apply, appeals take place without an oral hearing and are subject to reduced time limits.

Section 13(6) of the Refugee Act (as amended), echoing the most frequently used provisions of the manifestly unfounded process,[51] provides that accelerated procedures may be applied where there is, "either no basis or a minimal basis for the contention that the applicant is a refugee." In its submissions on the 2003 Act, the UNHCR argued that for the sake of consistency, the terminology used in its Executive Committee (EXCOM) Conclusion No.30 on Manifestly Unfounded claims should be adopted, *viz*: "that the application is not related to the criteria for the granting of refugee status laid down in the 1951 UN Convention [...] nor any other criteria justifying the granting of asylum." This recommendation, suggesting the need to take into account the broader protection needs of the asylum applicant was ignored. The terminology used in s.13 (6)(a) is consistent, however, with the Procedures Directive, which allows for the use of accelerated procedures in cases where the issues raised in an application are deemed to be either 'not relevant or of minimal relevance' to the claim.[52]

37 Article 29
38 See Costello C *supra* n.6, p. 54
39 Peers S 'EU Asylum Procedures: an assault on human rights?' *Statewatch News Online, November 2003,* available at: http://www.statewatch.org/news/2003/nov/04asylum.htm
40 See: UNHCR Executive Committee, Background Note on the Safe Country Concept and Refugee Status 26th July 1991 (EC/SCP/68)
41 Goodwin-Gill (April 2001) cited in: House of Lords Select Committee on the European Union, Eleventh Report on Minimum Standards in Asylum Procedures London: HMSO.
42 UNHCR Executive Committee, Background Note on the Safe Country Concept and Refugee Status 26th July 1991 (EC/SCP/68)
43 UNCHR Asylum Processes (Fair and Efficient Procedures) Global Consultations on International Protection, 2nd meeting. EC/GC/01/12 31 May 2001 para. 24-26.p.9 para. 39
44 Justice supra n.2, p. 13 para. 59
45 *Ibid.* s. 94 (3)
46 Nationality Immigration and Asylum Act, s.94(5).
47 Joint Committee On Human Rights - Twenty-Third Report, 22nd October 2002, available at: http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/176/125502.htm, accessed on May 10th 2003.
48 This view was shared by the House of Lords Select Committee on the European Union, supra n.41.
49 Supra n.47, para.35.
50 *Ibid.* paras.32-33.
51 See sections 12(4)(a)-(c) of the Refugee Act, 1996.
52 Article 23(4)(a)

The 2003 Act also includes extensive provisions on credibility, drawing on some of the most objectionable elements of the previous manifestly unfounded process. According to the explanatory memorandum attached to the 2003 Immigration Act, where credibility is in question, the appeals process may be accelerated following a negative decision by the Commissioner. These provisions find echoes in the Procedures Directive, specifically in the grounds listed for determining a claim to be 'unfounded'.[53]

Anticipating the Procedures Directive, the changes introduced by the 2003 Act firmly entrenched safe third country and safe country of origin practices in Irish asylum law. In the Refugee Act (as amended), the concept of a 'safe third country' is referred to in the admissibility provisions and in provisions for 'prioritising' and accelerating asylum claims. The transposition of the Procedures Directive into Irish law may lead to some clarification of current practice in relation to safe third country practices. As presently drafted, there is considerable scope for inconsistencies between the safe third country concept as used in admissibility procedures and in accelerated or prioritized procedures.

The reduction of rights of appeal in safe third country and Dublin II cases, provided for in the Procedures Directive is also anticipated in the 2003 Act. Appeals in such cases do not have suspensive effect and in the application of Dublin II provisions, reduced time limits apply. Further reductions in rights of appeal and time limits are provided for in the provisions on special accelerated procedures,[54] which allow only a four-day time limit on appeals. These provisions allow for the application of specific 'border procedures' and the so-called 'super-safe' third country concept employed in the Procedures Directive.

The amendments introduced by the 2003 Act also make provision for the use of accelerated procedures where an applicant is a national of or has a right of residence in a designated safe country of origin. As with the safe third country concept, the criteria to be used in designating safe countries of origin include whether or not the country is a party to and "generally complies" with obligations under the UN Convention Against Torture, the International Covenant on Civil and Political Rights and, where appropriate the ECHR. A list of safe countries of origin has now been adopted and includes not only new EU Member States but also countries within the broader European region, namely, Croatia, Bulgaria and Romania. To date, South Africa is the only non-European country listed as safe.[55] This will change, however, with the adoption of the common European list.

The erosion of procedural safeguards witnessed in the 2003 Act will not be checked by the adoption of the Procedures Directive. Indeed, transposition of the Directive could bring further erosion of procedural safeguards and a continuing diminution of due process in Irish asylum law. The recently published *Scheme for an Immigration, Residence and Protection Bill* retains the use of accelerated procedures, reduced rights of appeal and stringent time limits introduced by the 2003 Act. Given the increased barriers to access to the asylum process, accelerated procedures will become the norm rather than the exception, with the attendant risk of *refoulement* that such change brings. Introducing the Scheme for the Bill, the Minister commented that this Bill would lead to a 'radical overhaul' of the immigration process.

The Scheme proposes many significant changes, particularly for long-term residents and beneficiaries of subsidiary protection. Notably in terms of asylum procedures, the Refugee Appeals Tribunal is to be replaced by a Protection Review Tribunal.[56] However, despite the change in name, much remains the same. The Tribunal will continue to publish selected decisions only and hearings will be conducted in private. A worrying development in the Bill is the considerable discretion granted to the Minister for Justice Equality and Law Reform, and in some instances the Minister for Foreign Affairs, to withhold information relating to the asylum /protection application, for reasons of 'public policy' or 'public security'.[57] Such information may be withheld at first instance or on appeal, raising serious questions as to inequality of 'arms' in the asylum process. Such discretionary powers are exacerbated by the ongoing failure to establish an independent body to determine asylum applications at first instance and the heavy burden placed on the applicant, particularly where accelerated procedures come into play. Already faced with the burden of rebutting a presumption of safety or *non-refoulement,*[58] an applicant may now also be denied access to the information that led to a negative decision on his or her application.

Conclusion

Procedures for granting or withdrawing refugee status in EU Member States have been established and elaborated on the basis of different constitutional and administrative traditions. The Procedures Directive is intended to align the asylum determination systems of Member States on the basis of agreed minimum standards. The discretion left to Member States, however, reflects a failure to harmonise. What we are left with is the possibility of multiple determination procedures and considerable room for differences between Member States in the standards of protection provided. The fragmentation of asylum procedures in the Directive is further exacerbated by the possibility of multiple asylum determination bodies exempted from Chapter II's minimum standards.[59] Such exceptions lead to further fragmentation and obfuscation within asylum determination processes. Far from simplifying procedures, the Directive adds further layers and inevitable confusion to asylum processes. This confusion will persist in asylum determinations in Ireland, already provided for under the range of accelerated procedures introduced by the 2003 Act. The proposed *Immigration, Residence and Protection Bill* is indeed an opportunity for a 'radical overhaul'. It is an opportunity to develop a strong system of protection and a rights-based immigration process. That opportunity, however, has not been seized. For the moment, it appears that accelerated procedures, stringent time limits and ineffective remedies will persist, with increasing numbers of asylum applicants denied access to fair procedures ●

53 Article 23(4).
54 s.13(8) of the Refugee Act (as amended).
55 See: Refugee Act 1996 (Safe Countries of Origin) Order 2003 (S.I. 422 of 2003) and Refugee Act 1996 (Safe Countries of Origin) Order 2004 (S.I. 714 of 2004) (adding Croatia and South Africa to the list).
56 Head 54.
57 Supra n.8.
58 See, for example, Head 61.
58 See Article 4.