# The Bar Review

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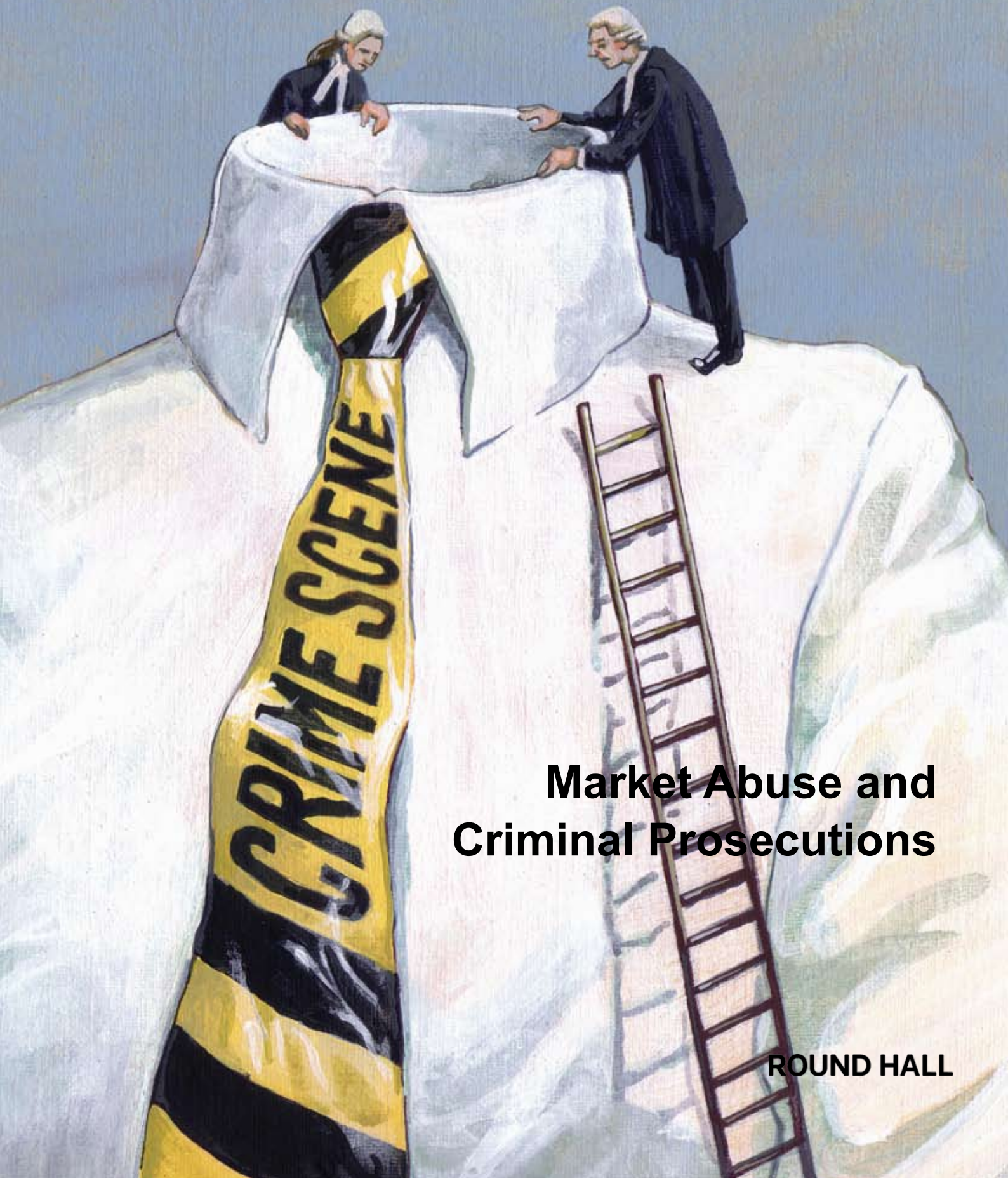


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# The Bar Review

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# Irish lawyers deliver professional course in Kosovo

Daragh O'Shea and Angela Ruttledge

During the second week of September, a faculty of 12 Irish lawyers travelled to Prishtina to deliver intensive training to members of the legal profession. The objective of the course was to bridge the gap between legal teaching at university level and those practical skills required to deal with difficulties and issues faced in legal practice in Kosovo.

The training project was created following a request for assistance in the development of a professional practice course from the Kosovo Chamber of Advocates (the regulatory/representative body for lawyers in Kosovo) ("KCA"). The project was undertaken by a committee of solicitors and barristers from the collaborative Law Society/ Bar Council Rule of Law Development Initiative.

Between 1989 and 1999 Albanians were restricted from practising law in Kosovo and many Kosovar Albanian lawyers dropped out of the profession altogether. When NATO and the UN moved in to administer Kosovo in 1999, Kosovar Albanians were again entitled to practice and, in 2002, the KCA was reconvened. In February 2008, Kosovo declared independence and Ireland is one of the many European countries, along with the United States, Australia and Canada, to have recognised its declaration. As a potential candidate for EU accession, the little nation has its work cut out for it.

Kosovo's lawyers face a skills gap a decade wide and a new market structure. While trainee "advokats" must undergo a period of work experience, the absence of a professional training programme compounds the challenges facing the legal community there.

Funded primarily by Irish Aid, the week long pilot course was designed bearing in mind particular aspects of the legal system in Kosovo but delivered in much the same way as the Law Society and Kings' Inns professional practice courses: a mixture of lectures and small group tutorials. The project was designed and coordinated by barristers Leesha O'Driscoll and Kieran Falvey, solicitors Daragh O'Shea, Angela Ruttledge, Betsy Keys Farrell and the Law Society's Eva Massa.

A number of shadow trainers were identified amongst the participants and it is hoped that these young lawyers will take over the development and facilitation of the professional practice course in the coming years. Many thanks for the support from Turlough O'Donnell, SC former Chairman of the Bar Council, Aine Shannon and Tom MacDonald, Kings' Inns, TP Kennedy and Cillian MacDomhnaill of the Law Society ■

# Promoting the Rule of Law – Pamodzi

Rachel Power

Originally founded in 2007, the joint Law Society and Bar Council Rule of Law initiative has collaborated with academics, judges, legal practitioners, policymakers and civil society around the world to advance collective knowledge of the relationship between Rule of Law, democracy, sustained economic development and human rights. The project originated in recognition of the increased emphasis placed on Rule of Law in development aid, and in response to the number of requests for assistance received by Ireland involving the Rule of Law.

In the hope of driving the Irish legal profession's interest in overseas work, the project has recently gained formal footing in the shape of a newly incorporated charitable company. The charity is now called Pamodzi - Promoting Rule of Law. The word Pamodzi means 'unity' or 'together' in Nyanja, a language of southern Africa. The name was proposed by the High Court Judge, the Honorable Mr. Justice Garrett Sheehan. Judge Sheehan has had particular involvement in Zambia and is an ardent advocate of the ideals upheld by this project.

In recent years, projects have addressed the broad spectrum of Rule of Law from capacity development of national judiciary to legal aid and legal information at a community level; and has spanned the globe from Kosovo to Malawi, South Africa to Bosnia. Pamodzi is now looking to expand on these projects.

Pamodzi is seeking enthusiastic and committed individuals to get involved, identify new projects and assist with research and fundraising. We are interested in hearing from all sectors of the legal community be it experienced judges, barristers, solicitors, academics or students. We truly believe that members of the Irish legal profession have a significant role to play in enhancing the Rule of Law and shaping the progress of fragile societies.

Pamodzi - Promoting Rule of Law will officially be launched at our next quarterly meeting on Thursday the 27th of January 2011 at The Distillery Building, Church Street. It will be a chance to hear more about our work, meet with those involved and see how you can contribute. ***For further information please visit our website www.pamodzi.ie. Alternatively you can email r.power@pamodzi.ie to register an interest or sign up for our Newsletter.*** ■

# The *Cityview Press v AnCo* Principles and Administrative Discretion. Form or Substance?

Brian Foley BL*

> The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.
>
> - Article 15.2.1º

## The *Cityview Press v AnCo* Principles

Article 15.2.1º of the Constitution is quite specific. It says that the only ("the sole and exclusive") law-maker for the State is the Oireachtas. Obviously, this creates something of a problem for statutory instruments and other forms of secondary legislation. From a layman's perspective, surely the Planning and Development Regulations, 2001 are as much "law" as the Planning and Development Acts, 2000-2006. After all, they both have something to say about what he can and cannot legally do. From such a perspective one could see how secondary legislation as "law" would be constitutionally suspicious. On the other hand, it is probably beyond debate that our Constitution simply must recognise the legitimacy of secondary legislation because it is absolutely essential for efficient governance.[1] Our constitutional solution, of course, is to refuse to deem secondary legislation to be "law" within the meaning of Article 15.2.1º if that secondary legislation does no more than flesh out the "principles and policies" contained in its parent (or "delegating") legislation. O'Higgins C.J. put it as follows in *Cityview v An Chomhairle Oiliúna*[2]:-

> "In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits — if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body — there is no unauthorised delegation of legislative power."[3]

## General Efficacy of Article 15.2.1

Article 15.2.1º has not always proven to be an incredibly effective constraint on the *legislature* in respect of controlling its delegations of power. Indeed, as regards *Cityview Press* itself, one struggles to see precisely where the relevant principles and policies were contained in the Industrial Training Act, 1967 which apparently legitimated the delegation of power to *An Chomhairle Oiliúna* to raise particular levies to fund its activities.[4] One can also point to cases such as *McDaid v Sheehy*[5] where, one could argue, a perhaps-too-cautious application of the doctrine of mootness has left an otherwise grossly unconstitutional delegation of power in the form of s.1 of the Imposition of Duties Act, 1957 on the statute book. Perhaps, however, it is the operation of the presumption of constitutionality in tandem with the *Cityview Press* principles that has created most difficulty. We have seen that the legislature is not constitutionally permitted to delegate law-making power. Thus, if legislation gives a power to make secondary legislation without accompanying principles and policies the legislation is unconstitutional and it should fall. However, it is also trite to point out that the secondary law maker can only act *intra vires*. The difficulty here is that the presumption of constitutionality requires one to assume that secondary law-makers are aware of constitutional limitations and, in particular, that they cannot do more than flesh out principles and policies. So, it can come to pass that a secondary-law maker operates within the literal and semantic embrace of his grant, but, in truth, is exceeding that which he is permitted to do.

*Cook v Walsh*[6] demonstrates this quite well. The Plaintiff had been injured in a road traffic accident and per s.45 of the Health Act, 1970 would otherwise have been a "fully eligible person" and entitled to free health care. However, the Minister for Health had made regulations which provided that such fully eligible persons injured in such accidents were not so entitled to free health care unless it was shown they could not recover compensation. In so doing, the power which the Minister relied on was s.72(2) of the Health Act, 1970 which provided that:

> "Regulations made under this section may provide

* LL.B (Dub), Ph.D (Dub).

1 See e.g. *Pigs Marketing Board v Donnelly* [1939] IR 413, at 421.
2 [1980] IR 381.
3 [1980] IR 381, at 399.
4 See Kelly, *The Irish Constitution* (Hogan & Whyte eds., 4th ed., Dublin, Butterworths, 2003, at 241; Morgan, *The Separation of Powers in the Irish Constitution* (Dublin, Round Hall, 1997) at 239.
5 [1991] 1 IR 1.
6 [1984] IR 710.

> for any service under this Act being made available only to a particular class of that persons who have eligibility for that service."

One could fairly understand a sincerely held belief that such a provision would permit the regulations as passed. The Supreme Court held that it must, where possible, interpret the provision in a manner which would avoid leading to a finding of unconstitutionality. If it was interpreted allow the Minister to do as he did – i.e. effectively amend primary legislation – then it would have to fall:-

> "It must therefore be presumed that in relation to the provisions of s. 72, sub-s. 1, the Oireachtas intended only a constitutional construction thereof and that the powers conferred on the Minister were merely for the purpose of giving effect to principles and policies which are contained in the Act itself."[7]

And thus, the section was upheld, but the regulations condemned as *ultra vires*. With such cases in mind, it could be argued that Article 15.2.1º can prove to offer very little incentive to the legislature to ensure that delegations of power are within constitutional limits. The ambit of the delegation in s.72(2) was truly broad and it is fairly difficult to see what in the Health Act, 1970 was there to guide its application. One could query whether the presumption of constitutionality was truly intended to save what appears to be a classic example of legislative neglect of Article 15.2.1º from challenge.[8]

## Administrative Controls

### *The Cases: Casey, Salafia and Dunne*

In recent years, something of a new challenge to the efficacy of Article 15.2.1º has emerged. This can be illustrated best with *Casey v Minister for Arts, Heritage, Gaeltacht and the Islands.*[9] Timothy Casey was a boat operator who was involved in the transport of persons to Skellig Micheal (a national monument). Unforunately, increasing number of visitors to the site had caused damage and deterioration to the area and particular safety issues had been identified. As a result, the Minister decided that landing on Skellig Micheal would require a permit and Mr. Casey was refused such a permit. The Minister's decision to impose the permit requirements were based on provisions of the National Monuments Act, 1930 which empowered the Minister to "admit the public to enter on and view such monument … subject to such conditions and limitations as the [respondent] … shall prescribe." Similarly, reference was made the obligations on the Minister to ensure the maintenance of such monuments. After holding that the imposition of the permit system was *intra vires*, Murray J., for the Supreme Court, [10]turned to consider the constitutionality of the delegation. In respect of the constitutionality of such, it was said that:-

> "We are not concerned here with the making or the enforcement of a legislative instrument. The preservation and protection of national monuments is quintessentially an administrative matter to be achieved by implementing policy decisions."[11]

The significance of this ought not be understated. The Court appears to make a distinction (which is entirely valid in theory) between the delegation of formal law-making power (i.e. a power to pass or make secondary legislation) and the delegation or granting of decision-making power in what are described as "quintessentially" administrative matters. The latter, it would appear, are not required to comply with the *Cityview Press* principles.

Similar conclusions were reached in *Salafia v Minister for Environment*[12] and *Dunne v. The Minister for the Environment.*[13] In *Salafia* it was argued that s.14A of the National Monuments Act, 1930[14] was unconstitutional for breach of the non-delegation doctrine. The argument failed. Smyth J held as follows:-

> "In my judgment the authorities clearly establish that Article 15.2 is not engaged by a statutory provision conferring a power of discretionary decision making….Section 14A does not involve a delegated power to legislate, it involves the exercise of an administrative discretion by the Minister and that discretion is not unqualified but is drawn in necessarily broad terms having regard to the variety of circumstances in which the discretion may fall to be exercised."

In *Dunne*, the High and Supreme Court were concerned with s.8 of the National Monuments (Amendment) Act, 2004 which permitted the operation of a special permission system in relation to works affecting a national monument where same could be carried out under directions given by the relevant Minister. Of the section, the Supreme Court noted:-

> "[T]he section is concerned with the making of an administrative decision which consists of the giving of directions. This is an entirely different legal concept as the exercise of a statutorily conferred discretion is not governed by the provisions of Article 15 of the Constitution, but is instead subject to the requirements of administrative law."[15]

7 [1984] IR 710, at 722.

8 In that regard, it is interesting to note in *Dunne*, that the Supreme Court held "It goes without saying that if powers had been delegated to the first defendant to make regulations or orders which went outside the principles and policies of the Act of 2004, any such measure would be unconstitutional." This does not seem to be part of the ratio and it does not appear as if the relevance of the presumption of constitutionality had been considered.

9 [2004] 1 IR 402.

10 McGuinness and McCracken JJ concurred.

11 [2004] 1 IR 402, at 422.

12 [2006] IEHC 61.

13 [2004] IEHC 304 (HC); [2007] 1 IR 194 (SC).

14 Section 5 of the National Monuments (Amendment) Act 2004.

15 [2007] 1 IR 194, at 209. Laffoy J had reached a similar conclusion in the High Court.

### *Analysis*

It would seem then, that Article 15.2.1º bites against a delegation to legislate and a power to legislate only. If such a power is apparently given, the actual "legislating" which can be done can only be such as to flesh out the principles and policies of parent legislation. On the other hand, Article 15.2.1º does not bite against the delegation of discretionary decision making or the delegation of purely administrative powers. In principle, this makes a good deal of sense. It is certainly clear that Article 15.2.1º cannot mean that every single piece of decision making carried out by the executive must be buttressed by principles and policies in parent legislation. Indeed, in many other jurisdiction very little attention is paid to controlling the scope of delegated legislative powers and to such audiences, it may make eminent sense to permit wide ranging delegation.[16] On the other hand, whatever functional advantages there may be to a generous approach to delegation, Article 15.2.1º is clear in its terms and ought to be taken seriously. Thus, it stands to reason that the distinction between law-making power and purely administrative functions should not be taken too far lest Article 15.2.1º itself become endangered.

### *Possible Difficulties: Form over Substance?*

The decisions in *Casey, Salafia* and *Dunne*, however, do prompt the unsettling suggestion that the difference between the engagement and non-engagement of Article 15.2.1º may be the form in which the relevant power is delegated or granted. Suppose the (fictional) Fishing Act, 2010 provided that the "Minister may by Regulation limit the types of fish which may be fished in Irish waters". That grants the Minister a power to make regulations to do just that and would have to survive Article 15.2.1º scrutiny. On the other hand, suppose the Act provided instead that the "Minister may limit the types of fish which may be fished in Irish waters". It is not clear, on the basis of the above, that this would be caught by Article 15.2.1º.

The examples could be multiplied, but it seems reasonable to suggest that the form of the grant is not, of itself, an appropriate decider as to the application or non-application of an important constitutional safeguard. Indeed, one could make the point that the non-delegation doctrine itself appears to favor substance over form. This is because in many situations it is very difficult to view the making of secondary legislation as anything other than the making of law. The *Cityview Press* approach is to eschew formalism and to look at the substance of the secondary legislation. If it does no more than repeat the words and intention of the legislature, then it's not really "law" and it doesn't trespass into the legislative domain marked out by Article 15.2.1º. In a formal sense, secondary legislation is "law" just as much as primary legislation is. In the substantive sense just described, however, secondary legislation becomes capable of being viewed as something other than "law". That is an inherently substantive enquiry and it always has been. Thus, it would seem that there simply must be something more to be looked at than simply the form in which the power is granted or delegated.

This, however, leads to a somewhat tricky realisation. On the assumption that courts will not find the form of delegated power alone to be determinative, it would then follow that courts must engage with the difficult task of deciding just which delegated powers are purely administrative (and which do not need guidance in the form of principles and policies) and which are not. Clearly, the determining principle here ought not be the form in which the power is granted but aside from that it is quite difficult to see precisely what criteria would inform an entirely objective conclusion on such a point. So what can inform the distinction?

### *Distinguishing Criteria?*

Maddox makes the interesting point that if the *Cityview* test is satisfied the conclusion one must reach is that the Minister is simply engaged in pure administration as satisfaction of the test proves that the ministerial act has none of the essential characters of law-making.[17] This might suggest that the essence of pure administration is the removal or absence of policy-making choice. It is, however, somewhat difficult to accept that in cases like *Casey*, what was involved was anything other than policy-making. A policy was decided upon in respect of the acceptability of free access to Skellig Michael and that policy was implemented via the application of choice and discretion. Usually, one could retort that such policy-making is acceptable as long it is hemmed by principles and policies.

Indeed, in *Maher v Minister for Agriculture*[18] it certainly appeared as if Denham J. was willing to accept that an exercise of choice was *not* a determination of policy *so long* as the exercise of choice was governed by a structure of principles and policies. Of course, this won't be very helpful. The very essence of the *Casey, Salafia* and *Dunne* decisions are that purely administrative grants do not need to be governed by such a structure. Thus, it cannot follow that categorisation as a purely administrative power depends on the presence of such a structure. That would be circular. It would seem, therefore, that the Courts will have to become engaged in a qualitative assessment of the type of choice and discretion vested – i.e. as to whether it is "purely administrative" or not.

In that regard, there then seems to be no more obvious a test as to consider the nature of the power and examine whether it appears to be intended to govern matters traditionally or historically regulated by secondary legislation in the sense that some kinds of powers are traditionally those which have been exercised by the public administration and some kinds of powers are traditionally those that have been exercised by the promulgation of secondary legislation. That, however, is necessarily a very subjective enquiry and one which may not provide helpful in all cases and the matter is likely to be largely one of judicial impression, exercised against the best analysis of the relevant power that the court is permitted to engage in by the arguments provided by both sides. Of course, there will have to be a good deal of common

16 For an overview, see Fahey, "Reconsidering the Merits of the 'Principles and Policies Test – A Step Towards the Reform of Article 29.4.10º of the Constitution" (2006) 24 IL/T 70.

17 Maddox, "Legislation by Delegation – The Principles and Policies Test in Irish Law" (2004) 22 ILT 293.

18 [2001] 2 IR 139, at 223-223.

sense exercised as to what properly falls under the heading of purely administrative.

For example, in *Casey,* Murray J paid specific attention to the nature of the statutory functions at issue in case noting that they "involve such matters as cleaning, repairing, railing off, fencing and covering up monuments as well as acts generally for their preservation and protection",[19] leading to the conclusion that such were purely administrative. Just as much as historical categorization would appear relevant, it would also seem important that a Court be able to consider how *should* the relevant power be classified. Perhaps a Court could consider the extent to which the power (on the assumption it is not enveloped by Article 15.2.1º) is subject to the control and regulation of the principles of administrative law thus offering a degree of oversight which may be viewed as sufficient.[20] Equally, a Court may be persuaded by whether or not the particular power has the potential to directly interfere with constitutional rights.[21] Indeed, given that the essence of Article 15.2.1º is to enshrine the value that law-making is done through the full processes of the Oireachtas, a Court might also consider the general significance and importance of the particular power at hand and the extent to which its regulatory reach could be regarded as truly "legislative".

19 [2004] 1 IR 402, at 421.

20 See *Dunne v Minister for the Environment* [2007] 1 IR 194, 209.

21 See *Dunne v Minister for the Environment* [2007] 1 IR 194, 210. "It can hardly be disputed that it is within the competence of the Oireachtas under Article 15.2 of the Constitution to make a law giving the first defendant a wide discretion both in terms of the scope of the direction under s. 8 and the criteria to which he may have regard, provided of course that no other provision of the Constitution is thereby infringed."

## Conclusion

In truth, many of the criteria one may suggest would not satisfy pure logic as to whether a power is administrative or legislative. Indeed, on the assumption that one rejects the formal description of the power as determinative, one could query whether, in fact, it is workable to distinguish between those powers to which Article 15.2.1º applies and those to which they do not. That said, the Courts have proved quite able to identify other abstract concepts such as the "administration of justice" within the meaning of Article 34 and perhaps Irish constitutional law is about to see a rich new line of authority on what it truly means to be a law maker within the meaning of Article 15.2.1º. It ought be remembered that there is inherent democratic value in important civic regulation being traceable in a real and substantive form to decisions of the legislature rather than the executive (or members thereof). It would certainly be a shame if the *Casey, Salafia* and *Dunne* line of authority were ultimately to contribute to a further dilution of such values and of the general efficacy of Article 15.2.1º as a restraint on the legislatures ability to delegate important functions. ■

# President Addresses Medico Legal Society

At the recent Medico Legal Society of Ireland meeting held at the Kildare Street and University Club, the speaker for the night was President McAleese, who attended with Martin McAleese. The President and her husband were presented with citations of Honorary Life Membership of the Society. Pictured from left to right are: Dolores Keane BL, Honorary Treasurer, Dr. Mary Davin Power, Honorary Secretary, President McAleese, Martin McAleese, Dr. Antonia Lehane, Immediate Past President and Dermot Manning BL, President.

# Appointing a receiver by way of equitable execution in relation to future debts

Sam Collins BL*

## Introduction

In recent years a number of high profile actions have been heard regarding execution of substantial judgments against impecunious judgment debtors. A significant weapon in a judgment creditor's arsenal is to apply to appoint a receiver by way of equitable execution.[1]

The purpose of this article is to consider this jurisdiction and, in particular, examine whether a receiver may be appointed in relation to future debts, in light of three important cases: *Soinco SACA v Novokuznetsk Aluminium Plant and ors*[2], *O'Connell v An Bord Pleanála*[3], and *Masri v Consolidated Contractors Int (UK) Ltd (No 2)*[4].

## Background and procedure

The jurisdiction to appoint a receiver by way of equitable execution was developed by the Courts of Chancery in the 19th century[5]. The power was provided for in section 28(8) of the Supreme Court of Judicature (Ireland) Act 1877 as follows:

> "A…receiver [may be] appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order shall be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just"[6]

Applications to appoint a receiver under the Rules of the Superior Courts (RSC) are governed by O.50 r.6 RSC.[7] The jurisdiction is discretionary. Applications may be made *ex parte* or on notice.[8]

O.45 r.9 RSC provides that, in determining whether it is *"just and convenient"* to appoint a receiver by way of equitable execution, the Court should have regard to the quantum of the judgment debt, the probable costs of appointment and the probable sum to be obtained. The Court may direct inquiries and the order *"shall be made upon such terms as the Court may direct."*

The receiver may be required to provide security (*Fahey v Tobin*[9]) in particular where the value of the property in relation to which appointment is made exceeds the value of the judgment debt (*Condon v Quilter*[10]).

## Accessing those hard-to-reach assets

A receiver will not be appointed where legal execution is possible (*Re Shepherd*[11]; *O'Connell*[12]). Space exists for the jurisdiction's operation, however, at the boundaries of these alternative mechanisms. A *fi. fa.* may only be executed against physical assets. A Mareva-type injunction requires evidence of an intention to defeat judgment[13], and has a freezing rather than executive effect. A third party debt or garnishee order may require information beyond a judgment creditor's knowledge[14].

## Conditions under which the Court may order appointment

Courtney sets out the test for appointment thus:[15]

* The author wishes to thank Declan McGrath BL for his help with this article.

1 See generally Courtney, *Mareva Injunctions and Related Interlocutory Orders*, (1998) Butterworths, [10.77] – [10.82]; Glanville, *The Enforcement of Judgments*, (1999) Round Hall Sweet & Maxwell, [2-06], [2-21], [4-01], [5-41], [15-15]; Keane, *Equity and the Law of Trusts in Ireland* ,(1998) Butterworths, [22.05]; Frisby and Davis-White, *Kerr and Hunter on Receivers and Administrators*, (19th ed, 2010) Sweet & Maxwell, pp.108-110.

2 [1998] 2 WLR 335, [1998] QB 406.

3 Peart J., High Court, 19 February 2007; [2007] IEHC 79.

4 [2009] 2 WLR 621, [2008] EWCA Civ 303.

5 See generally, Courtney, *op. cit.*, [10.69] – [10.70]; McGhee, *Snell's Equity* (31st ed, 2005) Sweet & Maxwell, [17-25].

6 See Wylie, *Judicature Acts*, (1900) Dublin, pp.73-81. The comparable English provision is section 25(8) of the Judicature Act 1873.

7 In England, procedures to appoint a receiver are detailed in CPR 69, supplemented by Practice Direction 69 (published April 2010). Section 5 of the latter deals specifically with the appointment of a receiver to enforce a judgment. See generally Zuckermann, *Civil Procedure*, (2003) LexisNexis, [20.120]-[20.122].

8 O.50 r.7 RSC; *Flannery v Ryan* [1919] 2 IR 338. Two notable exceptions, where applications must be made on notice, arise in respect of pension benefits (*Campbell v Usher* 47 ILTR 165; *Moran v Heaslip* 67 ILTR 212) and salary (*Clery v O'Donnell* 78 ILTR 190).

9 [1901] 1 IR 511.

10 32 ILTR 44.

11 (1889) 43 Ch D 131.

12 p.15.

13 Courtney, *op. cit.*, [10.80].

14 cf. *O'Connell*, p.14, where Peart J. said, regarding an application to appoint a receiver over prospective damages in a personal injury action, that the judgment creditor would be unaware of settlement discussions and so could not *"make any timely application for an order of garnishee over any settlement monies*".

15 Courtney, *op. cit.*, [10.80]; See also Keane, *op. cit.*, [22.05].

"The prerequisites for an order appointing a receiver by way of equitable execution are:

(a) that a plaintiff had obtained judgment against the defendant;

(b) that a plaintiff has been unable at law to execute his judgment against the defendant; and

(c) that the defendant is entitled to *an equitable interest* in property which could have been seized if he held the legal interest in the property."

Criterion (b) was fatal to the judgment creditor's application in *National Irish Bank v Graham*[16] where the bank, having appointed a receiver in relation to the judgment debtors' herd of non-milking cattle, sought an order appointing the receiver in relation to remaining cattle on the farm (ie the milking cattle). Keane J. (as he then was) declined to grant the order sought since the judgment debtors were both legal and equitable owners of the milking cattle, so there was no impediment to execution of a *fi. fa.*.[17] A similar result was reached in *Morris v Taylor*[18], where the Court declined to appoint a receiver where money was in a bailee's hands and could be reached through a *fi. fa.*.

Regarding criterion (c), in *Maclaine Watson & Co Ltd v International Tin Council*[19] Millett J. rejected the proposition that the relevant interest had to be equitable, instead citing authority to the effect that the relief removed a hindrance to execution at common law.[20] Courtney[21] notes that *"[i]t still appears to be the case in Ireland that the subject of the assets sought to be affected must be equitable"*, citing Keane J.'s judgment in *Graham*. This comment predates *O'Connell* and accordingly needs revision since, in that case, Peart J. appointed a receiver over proceeds of litigation and cited *Maclaine* in his judgment.

## Which classes of assets are covered?

The classic case arises where there is an actual debt at the time of appointment, though it need not be immediately payable.[22] Examples include[23]: *In re Pope*[24] (land subject to an equitable mortgage[25]); *O'Donovan v Goggin*[26] (deposit receipt held jointly between judgment debtor and another, with judgment debtor holding entire beneficial interest); *In re Peace and Waller*[27] (payment of a taxed bill of costs under the Solicitors Acts).

The most notable asset which is immune from the appointment of a receiver is future earnings (*Homes v Millage*[28]), though receivers have been appointed in relation to earnings which have already accrued but not yet been paid (*Picton v Cullen*[29]). A significant question arises as to whether this rule applies only to future earnings or to future debts, which will be discussed in more detail below.

## Can a receiver be appointed in respect of future debts?

Future debts are debts not yet owed but which may subsequently be owed. Several considerations arise in respect of such assets.

First, they may be indeterminate (as to both amount and due date). This raises a question as to whether the Court's order could ultimately be futile to effect even a *pro tanto* reduction in the judgment debt (for instance, if no monies are ultimately received).[30]

Second, in particular where future earnings (either salary or pension benefits) are concerned, a hardship argument arises, since denying a judgment debtor his future income could render him destitute. As Lindley L.J. noted in *Holmes v Millage*[31], such applications raise a *"question… of great importance, not only to the parties immediately concerned, but to every wage-earning person in the country."*

In O'Floinn, *Practice and Procedure in the Superior Courts*[32], the learned author states that *"[a] receiver will not generally be appointed over payments to be made in futuro but only over payments which have already accrued but have yet to be paid over to a defendant*", citing *Re Johnson*[33] and *Ahern v O'Brien*[34], and noting *Clery v O'Donnell*[35], *Garrahan v Garrahan*[36] and *O'Connell v An Bord Pleanála*.

Regarding these authorities, it is notable that, while the Court reiterated the general rule in *Ahern*, it did in fact make the order sought, appointing a receiver over ground rents payable to the defendant (this order was made on a conditional basis, but was not challenged and subsequently was made absolute). In *Garrahan*, a receiver was appointed over a Garda pension. Also in *O'Connell*, the Court appointed a receiver over future damages arising from personal injury litigation.

It is respectfully suggested that, especially in light of the

16 [1994] 1 IR 215.

17 See also *In re Shephard* (1889) 43 Ch D 131 at 138 (per Fry L.J.):"A receiver was appointed by the Court of Chancery in aid of a judgment at law when the plaintiff showed that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for a legal debt."

18 [1892] 32 LR Ir 14.

19 [1987] 3 WLR 508.

20 The Court declined to appoint a receiver on different grounds; however, it found no technical reason why a receiver could not be appointed over the putative asset class, namely prospective litigation involving ITC members.

21 *op. cit.*, [10.80].

22 A comparable meaning has been given to the expression *"debt owing or accruing"* in section 61 of the Common Law Procedure Act, 1854, with *"accruing"* held by Wightman and Crompton JJ. in *Jones v Thompson* EL. BL. & EL. 63 at [64] as referring to *debitum in presenti, solvendum in futuro*.

23 See generally: Courtney, *op. cit.*, [10.80]; Wylie, *op. cit.*, pp.79-81; Frisby and Davis-White, *Kerr and Hunter on Receivers and Administrators* (19th ed, 2010) Sweet & Maxwell, pp.108-110.

24 17 QBD 743.

25 While the order appointing the receiver was discharged, this was on different grounds, namely a failure to register.

26 [1892] 30 LR Ir 579.

27 24 Ch.D 495.

28 [1893] 1 QB 551. See discussion in *Soinco*, pp. 339-341, and *Masri*, [152]-[154], [162].

29 34 ILTR 139.

30 A similar point concern was raised by Lord Bingham in the context of a decision on third party debt orders, *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2004] 1 AC 260, [26].

31 [1893] 1 QB 551 at 554.

32 (2nd ed, 2008) Tottel Publishing, p.430.

33 [1898] 2 IR 551.

34 [1991] 1 IR 421.

35 78 ILTR 190.

36 [1959] IR 168.

recent *Masri* decision, the better view is that future debts can be the subject of an order appointing a receiver by way of equitable execution, subject to an important exception in respect of future earnings. This is based on an English decision at first instance as recently endorsed by the Irish High Court and developed in the Court of Appeal, which decisions are discussed below.

### *Soinco SACA v Novokuznetsk Aluminium Plant and ors*

The plaintiff applied to appoint a receiver by way of equitable execution in respect of monies which might become due to a judgment debtor pursuant to a supply contract.

Colman J., in granting the relief sought, took a progressive view of the jurisdiction to appoint receivers by way of equitable execution. He noted that *"English law has traditionally developed by means of identifying broad but established juridical principles which have been extended incrementally to new factual situations when the interests of justice required such extension"*[37], drawing an analogy with the development of Mareva-type injunctions and summarising:

> "I can see no reason whatever why, 124 years after the Judicature Acts, the court should deny to itself a jurisdiction which is self-evidently likely to be extremely useful as an ancillary form of execution. I would therefore hold that there is jurisdiction to appoint a receiver by way of equitable execution to receive future debts as well as debts due or accruing due at the date of the order."[38]

It is notable that, as distinct from personal hardship, the argument that the order would have the effect of "bringing the business of the judgment debtor to a standstill by cutting off payment otherwise available to it" was held to be irrelevant by Colman J.:

> "Impact on the judgment debtor's business is not a consideration material to the availability of legal process of execution and there is no reason in principle why it should be introduced as material to the availability of equitable execution."[39]

### *O'Connell v An Bord Pleanála*

The second named notice party, Lavine Ltd, sought appointment of a receiver by way of equitable execution over any monies which the applicant (a judgment debtor of Lavine Ltd) might recover in an action she commenced in the High Court arising out of an assault.

The Court was cognisant of personal hardship in exercising its discretion. Peart J. noted at page 14 of his judgment:

> "The sum of damages is not to be in any way equated with earnings or wages necessary for the applicant to live. It is a fund entirely removed from such a category. It is in the nature of a debt due for payment in the future in the event of an award of damages being made in her favour."

Peart J. cited *Soinco* with approval, noting in passing that Courtney had endorsed the decision in his book, and quoted extensively from that judgment. He noted that *"I am satisfied that the reasoning of Colman J. in Soinco is equally persuasive in this jurisdiction, and I see no reason why this Court should conclude that the law here should be different"*[40]. Peart J. was satisfied that making the order was both just (since it was limited to the amount of the judgment debt, plus interest) and convenient (noting in particular that, since Lavine Ltd was at an informational disadvantage in respect of the applicant's proceedings, it would be unable to move a garnishee application in respect of any damages or settlement monies obtained), though importantly he noted:

> "I should add of course that simply because it would be "convenient" in the broad sense of that word [that] a judgment creditor would have a receiver appointed, would not justify the Court in appointing a receiver. Any judgment creditor must be expected to exhaust any reasonable method of legal execution before equity could be expected to provide assistance. That is clear from the authorities."[41]

This latter comment reiterates what has been clear throughout the cases (for instance, *Re Shepherd*), that a judgment debtor cannot elect to appoint a receiver by way of equitable execution where execution at law is available.

### *Masri v Consolidated Contractors Int (UK) Ltd (No 2)*

Mr. Masri brought an action in the English Courts for breach of contract in respect of an interest in an oil concession in the Yemen against, *inter alios*, Consolidated Contracts (Oil & Gas) Co SAL ("CCOG"). By two decisions Gloster J. found for Mr. Masri as to liability[42]and quantum[43]and, by a further decision in December 2007, she made several orders, including the appointment of a receiver by way of equitable execution in relation to CCOG's interest in revenues from the oil concession. By permission from the Court of Appeal (Rix and Jacob LL.J.), CCOG appealed against the receivership order on several grounds.

First, it said that an English Court had no jurisdiction to make a receivership order by way of equitable execution in relation to foreign debts. Lawrence Collins L.J. rejected this argument after extensive consideration which will not be discussed here.[44]

As regards the appointment of a receiver by way of

37 p.420.
38 p.421.
39 p.421.
40 p.14.
41 p.15.
42 [2006] EWHC 1931 (Comm).
43 [2007] EWHC 468 (Comm).
44 Note that, in *Masri v Consolidated Contractors Int (UK) Ltd (No 4)* [2010] 1 AC 90 (dealing with a different issue), Lawrence Collins L.J., now in the House of Lords, noted that he agreed with Sir Anthony Clarke M.R.'s '*observation that in* Masri (No 2) [2009] QB 450, para 31*, I may have understated the current relevance of the presumption against extraterritoriality".*

equitable execution in relation to future debts, Lawrence Collins L.J. (with whom Lord Neuberger and Ward L.J. agreed) extensively reviewed the authorities in this area.[45] This review is discussed below.

### *(i) The older authorities*

The Court was referred to *"a series of authorities from 1883 to 1914, most of which, says CCOG, support the proposition that a receiver may not be appointed over future debts"*[46].

Two of these were *"of no direct assistance"*, namely *Cadogan v Lyric Theatre*[47] (which was decided on the basis that profits at a theatre were not "rent" and so not subject to an order which had been made appointing a receiver) and *Morgan v Hart*[48] (where an order appointing a receiver to *"recover the rents, profits and moneys receivable in respect of the defendant's interest in…furniture and effects"* was equivalent to an injunction restraining the defendant from dealing with his furniture, and was irregular as its purpose was to maintain the status quo in advance of discovery).

In *Edwards & Co v Picard*[49], where a receiver was appointed in respect of the judgment debtor's interest in three patents, there was held to be no property to receive. The case contained differing *obiter* views on appointing a receiver over future debts.[50]

Lawrence Collins L.J. summarised the effect of the relevant authorities into four propositions:

> "The position, then, was, first, that there was consistent Court of Appeal authority (based on what I have suggested was a misunderstanding of the decision in *North London Railway Co v Great Northern Railway Co* 11 QBD 30) that the power to appoint a receiver by way of equitable execution was limited to the pre-1873 practice. Second, in *Webb v Stenton* 11 QBD 518 two members of this court had expressed a view, obiter, which is only consistent with a view that the court had power to appoint a receiver over future trust income. Third, in *Holmes v Millage* [1893] 1 QB 551 it had been held that a receiver could not be appointed by way of equitable execution over a man's future earnings. Fourth, there was no decision among the older authorities that the court had no power to appoint a receiver by way of equitable execution over debts which had not accrued, but which would accrue in the future."[51]

### *(ii) The indemnity cases*

Following examination of the 1883-1914 authorities, Lawrence Collins L.J. concluded that *"until recently there was no authority bearing on the question whether there was a power to appoint a receiver by way of equitable execution over future debts, but the question arose whether there was such a power in relation to a right of indemnity"*[52]. Two cases were considered; *Bourne v Coldense Ltd*[53] and *Maclaine Watson & Co Ltd v International Tin Council*[54]. CCOG had argued[55] that these cases did not bear on the question of future debts but this was rejected *"because the same objection could be made to such an order as to an order in relation to future debts, namely that a right of indemnity is not subject to a process of execution at law."*[56]

In both cases a receiver had been appointed: in the former, in relation to a union indemnity for legal costs; in the latter, in relation to the right of the judgment debtor to be indemnified against liabilities to, and make demands for payment of, member states of the International Tin Council.

### *(iii) Recent authorities*

Lawrence Collins L.J. further discussed *Soinco*[57] and noted that it had been applied by the Irish High Court in *O'Connell*[58]. He concluded:

> "In my judgment there is no reason why in 2008 the court should not exercise a power to appoint a receiver by way of equitable execution over future receipts from a defined asset. There is no longer a rule, if there ever was one, that an order can only be made in relation to property which is presently amenable to legal execution. There is no firm foundation in authority for a rule that the remedy is not available in relation to future debts. There is no principle which prevents the development of existing authority to extend the remedy to the property which was the subject of the receivership order in this case."[59]

The judgment of the Court of Appeal in *Masri* is, with respect, a logical development of the principles outlined in *Soinco* and endorsed in *O'Connell*. The historic belief that future debts cannot be the subject of an appointment of a receiver by way of equitable execution appears to be increasingly infirm.

## Conclusion

The incremental expansion in the jurisdiction to appoint a receiver by way of equitable execution now appears to have embraced future debts (subject to the important exception of future earnings). This has potentially wide-ranging effects for an already useful tool for judgment creditors. It is hoped that the Irish Courts, having already endorsed *Soinco*, soon have the opportunity to consider *Masri*. ■

45 [136]-[184].
46 [150].
47 [1894] 3 Ch 338.
48 [1914] 2 KB 183.
49 [1909] 2 KB 903
50 Moulton L.J., 908-909.; Buckley L.J., 910.
51 [162].
52 [163].
53 [1985] ICR 291.
54 [1988] Ch 1. Affirmed [1989] Ch 253.
55 [139].
56 [163].
57 [169] – [170]. CCOG had argued that *Soinco* had been wrongly decided, but did not succeed on this point: [139].
58 [171].
59 [184].

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## FAMILY LAW

### Child abduction

Hague Convention – Grave risk – Wrongful removal – Habitual residence – Assessment of children by psychologist – View expressed by children that they did not want to return with applicant – Welfare of children – Relevant principles to be applied – Test to be applied – Meaning of intolerable situation – Degree of harm – Meaning grave risk – Whether risk of physical or psychological harm – Whether children at grave risk – Whether allegation of physical abuse proven – Whether children's views determining factor – *N v D* [2008] IEHC 51, (Unrep, HC, Edwards J, 4/3/2008); *In re A (A Minor) (Abduction)* [1988] 1 FLR 365; *CK v CK* [1994] 1 IR 250; *RK v JK* [2000] 2 IR 416; *MSH v LH* [2000] 3 IR 390, [2001] I ILRM 448; *Friedrick v Friedrick* (1996) 78F 3d 1060 and *MN v RN* [2009] IEHC 213, (Unrep, HC, Sheehan J, 1/5/2009) considered – Charter of Fundamental Rights of the European Union, art 24(3) – Hague Convention on the Civil Aspects of International Child Abduction 1980, article 12 – Council Regulation (EC) No 2201/2003, articles (11)2 and 13(b) – Order for return of children granted (2009/27HLC – Edwards J – 18/12/2009) [2009] IEHC 585
*LI (P) v LA (E)*

### Children

Care order – Fair procedures – Refusal by applicant (mother) to co-operate with Health Service Executive – Refusal to have psychological assessment carried out – Court's concerns for safety and welfare of child – Whether placing of by child by Health Service Executive in care of father justified – Whether appeal more appropriate way to proceed – Childcare Act 1991 (No 17), ss 12, 17(1), 19(1) and 20 – Leave refused (2009/1197JR – Hedigan J – 7/12/2009) [2009] IEHC 591
*K (L) v Health Service Executive & Judge Devins*

### Children

Care order – Inherent jurisdiction of court – Length of detention – Benefit to child – Safeguards – Power to make determinate order – Necessity for inbuilt review mechanism – Role of guardian *ad litem* – Progress of child – Application to terminate detention – *S(S) (a minor) v Health Service Executive* [2007] IEHC 189, [2008] 1 IR 594 considered – Order terminating detention (2009/1054P – Sheehan J – 16/7/2009) [2009] IEHC 406
*Health Service Executive v H (M)*

### Guardianship

Access – Meaning of family – Same sex couple conceived child by artificial insemination – Enforceability of written "sperm donor agreement" governing status, rights and duties of each party regarding infant – Rights of unmarried biological father – Rights of natural mother – Welfare of infant paramount – Weight to be attached to report of court appointed assessor – Status of European Convention on Human Rights – Duty of Irish courts – *De facto* family – Whether same sex *de facto* family protected by article 8 – *JK v VW* [1990] 2 IR 437 and *WO'R v EH* [1996] 2 IR 248 and *Mata Estevez v Spain* (App 56502/00, ECHR, 10/5/2001) considered – Guardianship of Infants Act 1964 (No 7), s 6A – Family Law Act 1995 (No 26), s 47 – European Convention on Human Rights Act 2003 (No 20), ss 2, 3, 4 and 5 – European Convention on Human Rights and Fundamental Freedoms, articles 1, 8, 13 and 35 – Applicant's appeal in relation to guardianship dismissed; access remitted (186/2008 – SC – 10/12/2009) [2009] IESC 81
*McD (J) v L (P)*

### Practice and procedure

Maintenance – Reciprocating jurisdiction – Enforcement order granted by Master of High Court – Notice of appeal in respect of enforcement order – Allegation that defendant unaware of proceedings or decree – Service of documents leading to original maintenance order – Whether service adequate – Whether decree could be enforced – Maintenance Order s Act 1974 (No 16 ), s 9 – Direction that appeal of defendant admitted for hearing before court on affidavit (2007/77EMO – Abbott J – 11/6/2010) [2009] IEHC 608
*McC (K) v O'D (A)*

### Proper provision

Judicial separation – Assets – Property portfolio built up primarily by husband over period of 40 years – Significant portion of property portfolio acquired prior to marriage – Beneficial interest claimed by husband's sister – Whether reduction and/or removal of debt had to be balanced against need for accommodation and money to live on – Need for accommodation and living expenses – Interest of justice – Family Law Act 1995 (No 26), s 16(2)(a) – (1) inclusive – Order that all properties be sold and net proceeds divided equally between parties (2008/52M – Sheehan J – 17/11/2009) [2009] IEHC 517
*H (D) v H (G)*

### Judicial Separation

Preliminary issue -Jurisdiction – Forum *conveniens* – Habitual residence – Meaning of ordinary residence -Principles to be applied – Intention to return to residence – Tenure of physical residence – Possibility of being ordinarily resident in more than one place – Entitlement of applicant to judicial separation – Normal marital relationship – Provision for spouse – Equality in provision for spouse – Adultery – Whether couple ordinarily resident in Ireland – Whether applicant entitled to judicial separation – Whether normal marital relationship existed – *Van den Boogaard v Loumen* [1997] ECR 1147, *O'K v A* [2008] IEHC 243 [2008] 4 IR 801, *Charman v Charman* [2005] EWCA Civ 1606 [2006] WLR 1053 considered; *N v O'D* [2006] IEHC 452 (Unrep, Abbott J, 29/11/2006) considered; *Marinos v Marinos* [2007] EWHC 2047 [2007] 2 FLR 1018 and *White v White* [2001] 1 AC 596 followed ; *C.M. v. Delegacion Provincial de Malaga* [1999] 2 I.R. 363 and *T.F. v. Ireland* [1995] 1 I.R. 321 applied – Judicial Separation and Family Law Reform Act 1989 (No 6) ss 2, 3 & 4 – Council Regulation (EC) No. 2201/2003 arts 3, 4, 5, 6, 7 & 31 – Council Regulation (EC) No 44/2001 art 5 – Jurisdiction and entitlement to judicial separation affirmed (2008/41M – Abbott J – 27/7/2009) [2009] IEHC 579
*S (R) v S (P)*

### Statutory Instrument

District Court (enforcement of maintenance orders) rules 2010
SI 325/2010

## FISHERIES

### Statutory Instruments

Inland fisheries act (establishment day) order 2010
SI 262/2010

Inland fisheries (fixed charge notice) regulations 2010
SI 324/2010

Inland fisheries act 2010 (form of instrument of appointment) regulations 2010
SI 316/2010

Sea-fisheries (control on fishing for razor clams in Rosslare Harbour) regulations 2010
SI 310/2010

Sea-fisheries (prohibition on fishing for clams in Waterford estuary) regulations 2010
SI 378/2010

Wild salmon and sea trout tagging scheme regulations 2010
SI 323/2010

## FREEDOM OF INFORMATION

### Appeal

Point of law – Limited nature of appeal – Request for records in context of extradition proceedings – Material refused – Issue of s 25 certificate – Application seeking order setting aside certificate – Whether records sought exempt – Purpose of request – Grounds upon which exemption asserted – Purpose and scope of certificate – Whether Minister entitled to withhold material and information – Scope of appeal – Adequacy if reasons given – Discretion – Whether waiving of confidentiality by providing records to a third party factor to consider – Constitutional rights – Whether court could call for production of the material/documentation – Onus on Minister to justify exemption – *Deely v Information Commissioner* [2001] 3 IR 439; Sheedy v Information Commissioner [2005] IESC 35, [2005] 2 IR 272 ; *Murphy v Corporation of Dublin* [1972] IR 215 ; *Minister for Agriculture v Information Commissioner* [2000] 1 IR 309 ; *Duff v Minister for Agriculture* [1997] 2 IR 22 considered – *McCormack v Garda Siochána Complaints Board* [1997] 2 IR 489 distinguished – Freedom of Information Act 1997 (No 13), ss 7, 23(1)(a)(i) to (iii), 24(1)(a) 25 and 42 – Postal and Telecommunications Service Act 1983 (No 24) – Interception of Postal Packages and Telecommunications Messages (Regulations) Act 1993 (No 10) – Criminal Justice (Terrorist Offence) Act 2005 (No 2)- European Arrest Warrant Act 2003 (No 45), s 37 – Application to set aside certificates refused in both cases (2009/186MCA & 2009/192MCA – Peart J – 14/1/2010) [2010] IEHC 197
*Campbell & McGuigan v Minister for Justice*

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### Statutory Instruments

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SI 415/2010

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SI 263/2010

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SI 340/2010

Health (miscellaneous provisions) act 2010 (commencement) order 2010
SI 392/2010

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SI 362/2010

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SI 357/2010

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## IMMIGRATION

### Asylum

Appeal – Certificate for leave to appeal to Supreme Court – Point of law of exceptional public importance – Criteria to be applied by court – Whether point of law of exceptional importance raised – Whether jurisdiction to grant certificate must be exercised sparingly – Whether area of law involved uncertain – Requirements of exceptional public importance – Legal test for assessment of credibility – Decision of tribunal quashed for failing to consider all relevant evidence going to credibility as no mention was made in decision to documentary evidence produced which was directly pertinent to credibility – Whether any novelty or controversy in proposition that tribunal obliged to consider all relevant evidence available to it – *Raiu v Refugee Appeals Tribunal* (Unrep, HC, Finlay Geoghegan J, 26/2/2003); *Glancré Teoranta v An Bord Pleanála* [2006] IEHC 250, (Unrep, HC, MacMenamin J, 13/7/2006); *Arklow Holidays Ltd v An Bord Pleanála* [2008] IEHC 2, (Unrep, HC, Clarke J, 11/2/2008) and *DVTS v Minister for Justice* [2007] IEHC 451, (Unrep, HC, 30/11/2007) applied – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(3)(a) – Application for certificate refused (2007/648JR – Cooke J – 26/11/2009) [2009] IEHC 510
*R (I) v Minister for Justice*

### Asylum

Availability of state protection – Country of origin information – Finding of availability of State protection – Fear of persecution – Section 13 report made negative recommendation based on lack of credibility – No specific finding on issue of credibility by tribunal – Whether account of persecution accepted or rejected – Whether decision of tribunal wrong in law – Whether inadequate and flawed consideration of evidence – Whether partial and selective appraisal of country of origin information – Whether applicant afforded adequate opportunity to comment or rebut on country of origin information – Whether process by which finding as to availability of State protection flawed – Onus of proof as to unavailability of internal relocation – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 2 and 7 – Refugee Act 1996 (No 17), ss 13, 16 and 17 – Certiorari granted (2007/493JR – Cooke J – 9/12/2009) [2009] IEHC 607
*O (A S) v Refugee Appeals Tribunal*

## Asylum

Credibility – Assessment of credibility – Relevant considerations – Fair procedures – Whether manner in which credibility impugned complied with requirements of natural and constitutional justice or fair procedures – Requirement on member of tribunal to put matters of concern and/or perceived discrepancy to applicant and give them opportunity of dealing with same – Whether matter should have been put to applicant – *DVTS v Minister for Justice* [2007] IEHC 305, [2008] 3 IR 476 and *SSS v Minister for Justice* [2009] IEHC 329, (Unrep, Cooke J, 14/7/2009) applied – *Idiakheuea v Minister for Justice* [2005] IEHC 150, (Unrep, Clarke J, 10/5/2005); *Moyosola v Refugee Applications Commissioner* [2005] IEHC 218, (Unrep, Clarke J, 23/6/2005) and *Olatunji v Refugee Appeals Tribunal* [2006] IEHC 113, (Unrep, Finlay-Geoghegan J, 7/4/2006) followed – *LN v Minister for Justice* [2005] IEHC 345, (Unrep, O'Neill J, 7/10/2005) and *AC v Minister for Justice* [2007] IEHC 359, (Unrep, Dunne J, 19/10/2007) distinguished – Refugee Act 1996 (No 17), ss 2, 11 and 13 – Application granted; decision quashed and remitted for rehearing (2007/102JR – Dunne J – 18/12/2009) [2009] IEHC 605
*A (A H) v Refugee Appeals Tribunal*

## Asylum

Credibility – Country of origin information – Membership of political party – Discrepancies – Lack of knowledge regarding political party – Weight given to evidence in different forms – Whether duty to consider probative value of documentary and secondary evidence supportive of impugned oral evidence –Fair procedures – Whether obligation to state reasons for discounting secondary evidence – Relevant principles to be applied – Whether failure to consider contemporaneous documentation submitted by applicant – Jurisdiction of the court in judicial review – *Memishi v Refugee Appeals Tribunal* (Unrep, Peart J, 25/06/2003) , *Kramarenko v. Refugee Appeals Tribunal* [2004] IEHC 101 [2005] 4 IR 321, *Traore v. Refugee Appeals Tribunal* [2004] IEHC 606 (Unrep, Finlay Geoghegan J, 14/5/2004), *Da Silviera v. Refugee Appeals Tribunal* (Unreported, Peart J, 9/7/04), *S v Minister for Justice* [2005] IEHC 395 (Unrep, Peart J, 4/11/2005), *Imafu v. Refugee Appeals Tribunal* [2005] IEHC 182 (Unrep, Clarke J, 27/5/2005), *Imafu v. MJELR* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005), *Imoh v. Refugee Appeals Tribunal* [2007] IEHC 220 (Unrep, Clarke J, 24/06/2005) , *Banzuzi v. Refugee Appeals Tribunal* [2007] IEHC 2 (Unrep, Feeney J, 18/1/2007), *Kikumbi v. Minister for Justice* [2007] IEHC 11 (Unrep, Herbert J. 2/7/2007), *W(E)A v Refugee Appeals Tribunal* [2008] IEHC 339 (Unrep, Hedigan J, 4/11/2008), *NK v Refugee Appeals Tribunal* [2004] IEHC 240 (Unrep, Finlay Geoghegan J, 2/4/2004), *VZ v MJELR* [2002] 2 IR 135, *Simo v. Refugee Appeals Tribunal* [2007] (Unrep, Edwards J., 4/7/2007), *Zarandy v. SSHD* [2002] EWCA 153 and *R. v. Immigration Appeals Tribunal ex parte Sardar Ahmed* [1999] INLR 7 – Refugee Act 1996 (No 17), ss 11(b) and 16(5)– EC (Eligibility for Protection ) Regulations 2006 (SI 518/2006) – Certiorari granted – (2007/648JR – Cooke J – 24/7/2009) [2009] IEHC 353
*R (I) v Minister for Justice, Equality and Law Reform*

## Asylum

Credibility – Lack of credibility – Applicable principles – Whether tribunal member made fundamental errors in assessing and understanding evidence – Whether irrational and unsubstantiated findings based upon misconstruing evidence – Whether credibility matter for assessment of administrative decision maker –Whether notwithstanding possible discrepancies of detail finding as to lack of credibility sufficiently well grounded in material – *IR v Minister for Justice* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) applied – Refugee Act 1996 (No 17), s 11(B) and 13 – Application dismissed – (2007/835JR – Cooke J – 9/12/2009)[2009] IEHC 606
*A (T M) v Minister for Justice*

## Asylum

Credibility – Unaccompanied minor – Age of majority reached by time appeal heard -Factors to which regard should be had in assessing applicant – Whether tribunal member in assessing credibility of applicant should have regard to age and psychological state of applicant – Whether weight to be given to evidence exclusively matter for decider of fact – Role of decider of fact – *E v Refugee Appeals Tribunal (O'Gorman)* [2004] IEHC 338, (Unrep, Peart J, 21/10/2004); *Da Silveira v Refugee Appeals Tribunal* [2004] IEHC 436, (Unrep, Peart J, 9/7/2004); *Kikumbi* v *Refugee Applications Commissioner* [2007] IEHC 11, (Unrep, Herbert J, 7/2/2007), *FP v Minister for Justice* [2002] 1 IR 164 and *Imafu v Minister for Justice* [2005] IEHC 416, (Unrep, Peart J, 9/12/2005) considered – *SSS v Minister for Justice* [2009] IEHC 329, (Unrep, Cooke J, 14/7/2009) applied – *Nguedjo v Refugee Appeals Tribunal* (Unrep, White J, 22/7/2003) distinguished – Application for leave refused – (2008/887JR – Dunne J – 9/12/2009) [2009] IEHC 604
*S (H A) v Refugee Appeals Tribunal & Min for Justice*

## Asylum

Delay – Arrival in State – Failure to make application for asylum as soon as reasonably practicable after arrival in State – Alleged failure to consider applicant's explanations for not seeking asylum – Direct flight rule – Alleged failure to consider evidence of applicant – Whether delay in applying for asylum inconsistent with fear of persecution – Whether any reasonable explanation given – *Memishi v Refugee Appeals Tribunal* (Unrep, HC, Peart J, 25/6/2003) considered – Refugee Act 1996 (No 17), ss 11 and 13(6)(c)- Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2) – European Community (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Dublin II Regulation (Council Regulation 343/2003) – Leave refused (2007/1375JR – Clark J -12/11/2009) [2009] IEHC 491
*C (B) v Refugee Appeals Tribunal*

## Asylum

Delay – Extension of time – Good and sufficient reason – Explanation for delay – Applicants legally represented at all material times – Minor applicant –– Whether good and sufficient reason for delay – Whether principles to be applied in considering application for extension of time affected by applicant being a minor – *A (J) v Refugee Appeals Tribunal* [2008] IEHC 440 (Unrep, Irvine J, 3/12/2008) applied -Deportation – Judicial review – Deportation order – Claim that minor applicant not included in failed application for asylum – No investigation of applicant's claim to asylum carried out – No report and recommendation made in respect of applicant's claim – Claim that Minister acted *ultra vires* in making deportation order – Refugee Act 1996 (No 17) ss 11 & 13 – Illegal Immigrants (Trafficking) Act 2000 (No 29) s 5- Immigration Act 1999 (No 22) ss 3 and 5- Extension of time to challenge RAT refused; Leave to challenge deportation order granted on specified basis (2009/402JR – Cooke J – 31/7/2009) [2009] IEHC 394
*I (P) v Refugee Appeals Tribunal*

## Asylum

Fear of persecution – Availability of state protection – Internal relocation – Absence of investigation into conditions prevailing in part of country of origin to which relocation proposed – Infringement of right to fair procedures – Failure to identify specific relocation site – Whether conclusion on availability of internal relocation sustainable – Validity of conclusion on state protection – Whether claimed risk of persecution could be avoided by internal relocation – Whether tribunal erred in law and applied wrong legal test – Country of origin information – European Communities (Eligibility for Protection) Regulations 2006 (SI /2006), reg 7(2) – Convention on the Status of Refugees

1951 – Leave granted (2009/96JR – Cooke J – 11/11/2009) [2009] IEHC 492
*MM (W) v Refugee Appeals Tribunal*

## Asylum

Fear of persecution – Convention nexus – Definition of refugee – Limits of scope of Refugee Convention – Whether persecution arose independently of political beliefs or ethnic group membership – Whether tribunal member erred in law in determining that applicant did not have Convention nexus for accepted fear of persecution – Applicable principles to question of establishing Convention nexus – *R v Immigration Appeal Tribunal ex parte Shah* [1998] WLR 270*; Lelimo v Minister for Justice,* [2004] 27 R 178; *A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Horvath v Secretary of State* [1999] INLR 17; *Tabbi v Refugee Appeals Tribunal* (Unrep, Peart J, 27/7/2007) *Imafu v Refugee Appeals Tribunal* [2005] IEHC 416, (Unrep, Peart J, 9/12/2005) – Refugee Act 1996 (No 17), s 2 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave refused (2007/1697JR – McCarthy J – 21/12/2009) [2009] IEHC 603
*E (P) v Minister for Justice*

## Asylum

Fear of persecution – Well founded fear of persecution – Blood fued – Credibility – State protection – Whether error of fact vitiated entire credibility assessment performed by tribunal – Country of origin information – Individual circumstances of applicant – Whether tribunal failed to have proper regard to all country of origin information – Absence of effective State protection – Failure to have regard to previous decisions – *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, [2000] WLR 379, [2000] 3 All ER 577; *Zgnatev v Minister for Justice* (Unrep, HC, Finnegan J, 29/3/2001); *B(GO) v Minister for Justice* [2008] IEHC 229, (Unrep, HC, Birmingham J, 3/6/2008); *Canada (AG) v Ward* [1993] 2 SCR 689; *O (H) v Refugee Appeals Tribunal* [2007] IEHC 299, (Unrep, HC, Hedigan J, 19/7/2007) ; *OAA v Minister for Justice* [2007] IEHC 169, (Unrep, HC, Feeney J, 9/2/2007); *Fasakin v Refugee Appeals Tribunal* [2005] IEHC 423, (Unrep, HC, O'Leary J, 21/12/2005); *Atanasov v Refugee Appeals Tribunal* [2006] IESC 53, [2007] 1 ILRM 288; *Minister for Justice* [2009] IEHC 353, (Unrep, HC, Cooke J, 24/7/2009); *Keagnene v Minister for Justice* [2007] IEHC 17, (Unrep, HC, Herbert J, 31/7/2007); *Bisong v Refugee Appeals Tribunal* [2005] IEHC 157, (Unrep, HC, O'Leary J, 25/4/2005) ; *KOCI v Home Secretary* [2003] EWCA Civ 1507 considered – *Carciu v Refugee Appeals Tribunal* (Unrep, HC, Finlay Geoghegan J, 4/7/2003) and *GK v Minister for Justice* [2002] 2 IR 418, [2002] 1 ILRM 401 applied – Refugee Act 1996 (No 17), ss 13, 16 and 17 – Partial leave to apply for judicial review granted (2009/426JR – Edwards J – 20/10/2009) [2009] IEHC 483
*L (M) v Refugee Appeals Tribunal*

## Asylum

Family life – Family members dependant on applicant – Right to respect for family life – Breach of fundamental rights – Whether interference with family life – Whether requirement to consider effect of deportation on family members – Weight to be attached to effect on family members – Whether deportation in breach of respect to family life – Rights of community – Balancing of rights of individual with rights of state and community – Whether effect of separation after deportation order on applicant's siblings considered – Definition of family life – Whether reasonable to expect family members to follow – Lack of any parental involvement – Whether special consideration given to family circumstances – *Marckx v Belgium* 1979 ECHR 2, *Olsson v Sweden* [1989] 11 EHRR 259, *EM (Lebanon) v Secretary of State for the Home Department* [2008] 3 WLR 931, *Berrehab v Netherlands* (1988) 11 EHRR 328, *Moustaquim v Belgium* (1991) EHRR 802, *Boughanemi v France* (1996) 22 EHRR 228, *Radovanovic v Austria* (App no 42703/98, 22/04/2004), *Advic v United Kingdom* 20 EHRR CD125, *R(Mahmood) v Secretary of State for the Home Department* [2001] WLR 840, *Oguekwe v Minister for Justice* [2008] IESC 25 [2008] 3 IR 795, *S(BI) v Minister for Justice* [2007] IEHC 398 (Unrep, Dunne J, 30/11/2007), *Pok Sum Shum v Minister for Justice* [1986] ILRM 595, *PF v Minister for Justice* (Unrep, Ryan J, 26/01/2005), *YO v Minister for Justice* [2009] IEHC 148 (Unrep, Charleton J, 11/3/2009) considered; *Bekko-Betts v Secretary for the Home Department* [2008] 3 WLR 166 distinguished – Immigration Act 1999 (No 22), s 3 (6) – Criminal Justice (UN Convention Against Torture) Act 2000, s 4 – Refugee Act 1996 (No 17), s 5 – European Convention on Human Rights Act 2003 (No 20), s 5 – European Convention on Human Rights and Fundamental Freedoms 1950, art 8 – *Certiorari* granted (2008/1145JR – Clark J – 26/05/2009) [2009] IEHC 245
*A (M) v Minister for Justice*

## Asylum

Further application on basis of fresh evidence – Refusal- Discretion – Whether Minister unlawfully fettered his discretion in refusing to allow re-application for refugee status – Test – Criteria for re-admission of claim – Status as HIV positive – Medical reports – Whether applicant's HIV condition previously considered as basis and reason for fear of persecution – Whether correct test applied in refusing application – Matters to be considered – New information not previously fully considered – Whether discretion exercised in accordance with natural and constitutional justice – Prohibition against *refoulement* – *R v Secretary of State for the Home Department, ex parte Onibiyo* [1996] 2 WLR 490, [1996] 2 All ER 901; *COI v Minister for Justice* [2007] IEHC 180, [2008] 1 IR 208 ; *KCC v Minister for Justice* [2007] IEHC 176, [2008] 1 IR 219; *Ladd v Marshall* [1954] 1 WLR 1489, [1954] 3 All ER 745; *Singh v Secretary of State for the Home Department*(Unrep, HL, 8/12/2005); *N v United Kingdom* (2008) 47 EHRR 39 and *Muresan v Minister for Justice* [2004] 2 ILRM 364 considered – *EMS v Minister for Justice* [2004] IEHC 398, (Unrep, HC, Clarke J, 21/12/2004) followed – Refugee Act 1996 (No 17), ss 5, 11 and 17(7) – Immigration Act 1999 (No 22), s 3(11) – Convention on the Status of Refugees 1951, art 33 – Relief granted but no order as to costs made (2006/344JR – Clark J – 14/10/2009) [2009] IEHC 436
*A (A) v Minister for Justice*

## Asylum

Minor applicant – Credibility of applicant – Details regarding country of origin – Habitual residence – Whether reasonable grounds for conclusion – Obligation to put adverse finding to applicant to allow rebuttal – Reliance on information provided in interview – Whether selective reliance on information provided – Whether liberal approach applied – Refugee Act 1996 (No 17), s 13(1) – *Certiorari* granted (2007/1315 JR – McMahon J – 17/07/2009) [2009] IEHC 325
*H v Minister for Justice and Refugee Appeals Tribunal*

## Asylum

Persecution – Allegation of failure to adopt correct definition of 'act of persecution' -Factors to be considered -Whether cumulative incidents amounted to persecution – Whether one incident amounted to persecution where several cumulatively did not – Whether respondent erred in applying incorrect principles in assessing persecution – *Tabi v Refugee Appeals Tribunal* [2007] IEHC (Unrep, Peart J, 27/7/2007) and *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) applied – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 3,4,5,7, 9 & 15 – Leave refused (2008/1041JR – McCarthy J – 31/7/2009) [2009] IEHC 509
*T (Z) v Minister for Justice Equality and Law Reform*

## Deportation

Delay – Extension of time – Application

for asylum refused on appeal – Deportation order made – 14 day time limit applicable to proceedings expired – Whether good and sufficient reasons for extending time – Possibility of issuing proceedings addressed and investigated well within statutory time limit – Failure to proceed within time limit not caused by impediments, ignorance, disability, lack of resources or lack of access to advice or legal assistance – Discretion – Whether substantial grounds for seeking judicial review – Whether Minister failed to assess correctly potential interference with private life of applicant – Interpretation of concept of family life – *Kugathas v Home Secretary* [2003] EWCA 31, [2003] INLR 170 considered – European Convention on Human Rights and Fundamental Freedoms, art 8 – Refugee Act 1996 (No 17), s 5 - Application for leave refused (2009/1077JR – Cooke J – 10/12/2009) [2009] IEHC 597

*Kanza v Minister for Justice*

## Deportation

Judicial review – Leave – Refusal of revocation of deportation order – Mother and children – Youngest child born in state – Failure to pursue asylum application – Departure from state – Deportation order – Application for residency on re-entry – Application for revocation of deportation order – Affirmation of deportation order – Adjournment of leave application for fresh application for revocation of order – Whether insurmountable obstacles to family life in Nigeria – Whether error in application of insurmountable obstacles test – Whether failure to establish sufficient substantial reason – Whether failure to reach reasonable and proportionate decision – Whether substantial grounds for review – Whether open to minister to identify general reasons of immigration control as substantial reason – Whether obligation to identify applicant-specific reason – Disregard for immigration laws – Lack of candour – Failure to pursue asylum application – Requirement for fact-specific assessment of rights of citizen child and family – *R(Mahmood) v. Home Secretary* [2001] 1 WLR 840; *Oguekwe v Minister for Justice* [2008] IESC 25, [2008] 3 IR 795; *Y(H L) v Minister for Justice* [2009] IEHC 96, (Unrep, Charleton J, 13/2/2009); *Alli v Minister for Justice* [2009] IEHC 595, (Unrep, Feeney J, 11/6/2009); *A(G) v Minister for Justice* [2009] IEHC 235, (Unrep, McMahon J, 22/5/2009)*; Osunde v Minister for Justice* [2009] IEHC 448, (Unrep, Cooke J, 14/10/2009); *R v Home Secretary, ex parte Razgar* [2004] 2 AC 368 and *AO & DL v Minister for Justice* [2003] 1 IR 1 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave refused (2009/621JR – Clark J – 2/12/2009) [2009] IEHC 593

*I (E) v Minister for Justice, Equality and Law Reform*

## Deportation

Judicial review – Leave – *Certiorari* – Deportation order – Parents of citizen child – Children born in state – Whether error in application of insurmountable obstacles test – Whether proper to apply reasonableness test – Whether failure to comply with Supreme Court guidelines – Whether decision to deport proportionate or reasonable – Representations to minister – Ministerial examination of file – Regard for personal circumstances – Humanitarian considerations – Capacity to find employment – Right to respect for private and family life – Proportionality of interference with rights – Constitutional rights of Irish born children – Insurmountable obstacles test – Application of European Convention on Human Rights jurisprudence – Whether reasonableness test involves lower threshold than insurmountable obstacles test – Meaning of 'insurmountable obstacles' – Whether failure to identify sufficient substantial reason – Whether failure to reach reasonable and proportionate decision – Whether substantial grounds for review – Requirement for fact-specific assessment of rights of citizen child and family – Interests of common good – Legitimate aim of state to maintain control of borders – Family circumstances – Age and adaptability of children – Length of time in State – Whether sufficient fact-specific analysis carried out – *A(G) v Minister for Justice* [2009] IEHC 595, (Unrep, Clark J, 2/12/2009)*; Oguekwe v Minister for Justice* [2008] IESC 25, [2008] 3 IR 795; *Dimbo v Minister for Justice* [2008] IESC 26, (Unrep, SC, 1/5/2008); *R(Mahmood) v. Secretary of State for Home Department* [2001] 1 WLR 840 and *AO & DL v Minister for Justice* [2003] 1 IR 1 considered – Immigration Act 1999 (No 22), s 3 – European Convention on Human Rights 1950, art 8 – Leave refused (2009/200JR – Clark J – 2/12/2009) [2009] IEHC 594

*A (OE) v Minister for Justice, Equality and Law Reform*

## Deportation

Judicial review – Leave – Deportation order – Father of citizen child – Children born in state – Whether error in application of insurmountable obstacles test – Whether proper to apply reasonableness test – Whether failure to comply with Supreme Court guidelines – Rights of citizen children –Immigration policy – Balancing of rights of citizen child and right of state to refuse leave to remain – Representations to minister – Ministerial examination of file – Consideration of personal circumstances – Assessment of proportionality of deportation – Insurmountable obstacles test – Application of European Convention on Human Rights jurisprudence – Whether reasonableness test involves lower threshold than insurmountable obstacles test – Meaning of 'insurmountable obstacles' – Whether failure to identify sufficient substantial reason – Whether failure to reach reasonable and proportionate decision – Whether substantial grounds for review – Requirement for fact-specific assessment of rights of citizen child and family – Use of formulaic language by minister – Interests of common good – *Oguekwe v Minister for Justice* [2008] IESC 25, [2008] 3 IR 795; *Fajujonu v Minister for Justice* [1990] 2 IR 151; *Dimbo v Minister for Justice* [2008] IESC 26, (Unrep, SC, 1/5/2008); *Zhu and Chen v Secretary of State* (Unrep, 19/10/2004); *Huang v Secretary of State* [2006] 2 AC 167; *Chikwamba v Secretary of State* [2008] 1 WLR 1240; *EB (Kosovo) v Secretary of State* [2008] 3 WLR 178; *VW (Uganda); AB (Somalia) v Secretary of State* [2009] WLR 7; *R(Mahmood) v. Home Secretary* [2001] 1 WLR 840; *Pok Sun Shum v Ireland* [1986] ILRM 593; *Osheku v Ireland* [1986] 1 IR 733; *AO & DL v Minister for Justice* [2003] 1 IR 1; *Bode v Minister for Justice* [2006] IEHC 341, (Unrep, Finlay Geoghegan J, 14/11/2006); *Gül v Switzerland* (1996) 22 EHRR 93; *Ajayi v United Kingdom* (27663/95, 26/6/1999); *Boultif v Switzerland* (2001) 33 EHRR 50; *Sen v Netherlands* (2003) 36 EHRR 7; *Mokrani v France* (2005) 40 EHRR 5; *Uner v Switzerland* (2007) 45 EHRR 14; *Konstantinov v Netherlands* (16351.03, 26/4/2007); *Omoregie v Norway* (265/07, 31/10/2008); *Haghighi v Netherlands* (2009) 49 EHRR 8; *Da Silva v Netherlands* (2007) 44 EHRR 34; *R v Home Secretary, ex parte Razgar* [2004] 2 AC 368; *HB (Ethiopia) v Home Secretary* [2006] EWCA Civ 1713; [2007] Imm AR 396; LM *(Democratic Republic of Congo) v Secretary of State* [2008] EWCA Civ 325; *AF (Jamaica) v Secretary of State* [2009] EWCA Civ 240; DS (India) [2009] EWCA Civ 544; *ZB (Pakistan) v Secretary of State* [2009] EWCA Civ 834; *Cirpaci v Minister for Justice* [2005] 2 ILRM 547; *McNamara v An Bord Pleanala (No 1)* [1995] 2 ILRM 125 and *The People v O'Shea* [1982] IR 384 considered – Refugee Act 1996 (No 6), ss 5, 9 and 18 – Immigration Act 1999 (No 22), s 3 – Leave refused (2009/193JR – Clark J – 2/12/2009) [2009] IEHC 595

*A (G) v Minister for Justice, Equality and Law Reform*

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Delay – Extension of time – Failure to take proceedings based on legal advice – Whether obtaining second legal advice more favourable to possibility of taking judicial review proceedings constituted good and sufficient reason for extending time – No serious issues raised – No substantial grounds made out – Decision turned predominantly upon credibility – Treatment of credibility issues on application for judicial review – Whether finding on credibility based on written appeal capable of being upset in judicial review application – Illegal Immigrants (Trafficking) Act 2000 (No 29), S 5 – Time not extended; application for leave refused – (2007/1450JR – Cooke J – 11/11/2009) [2009] IEHC 498
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## LAND LAW

### Judgment mortgage

Judgment creditor – Carriage of proceedings – Security provided to two lenders – Priority – Well charging orders and order for sale in relation to both judgments —Prior incumbrancer – Alteration of folio – Priority – Claim of priority – Period of limitation – Whether all incumbrancers benefited from an order for sale – Whether debt must be proven in order to benefit from order for sale – Relevance of delay in proving debt — Whether order for sale enured for all judgment creditors – Statute of limitations –Whether limitation period continued to run – *Re Coloe's Estate 25* LR Ir 86 and *Allied Irish Banks v Dormer* (Unrep, Finlay Geoghegan J, 13/03/2009) [2009] IEHC 586 considered – Rules of the Superior Courts 1986, (SI 2/1996) O 33 r 8, O 55 – (1987/641SP – McMahon J – 8/12/2009) [2009] IEHC 545
*Bank of Ireland v Moffitt and ACC Bank plc*

### Judgment mortgage

Unregistered land – Property jointly owned – Judgment mortgage obtained against interest of one co-owner only – Well-charging order sought – Order for sale in lieu of partition – Hardship to co-owing spouse – Innocent party – Judicial discretion to refuse sale – Whether good reason to refuse order for sale – Factors to be considered – Valuation of property – Relevance of feasibility of sale of property – Net equity available – Necessity for further inquiries – *Irwin v Deasy* [2006] IEHC 25, [2006] 2 ILRM 226 and *First National Building Society v Ring* [1992] 1 IR 375 considered – Partition Act 1868 (31 & 32 Vict. c. 40), s 4 – Well charging order made and proceedings adjourned to facilitate inquiries; Order for partition and sale in lieu of partition refused (2008/1277JR – Dunne J – 9/12/09) 2009 IEHC 546
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### Duty of care

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### Duty of care

Hazard – Trip and fall – Footpath – Indent or depression in drainage channel in footpath – Piece of concrete missing from side of drainage channel as result of excavations in pathway – Whether or not depression or indent was tripping hazard – Whether sufficient depth to be trip hazard – Whether defendants liable – Significant injury – General damages of €60,000 awarded (2008/855P – O'Neill J – 6/11/2009) [2009] IEHC 536
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### Duty of care

Hazard – Trip and fall – Injuries sustained in course of employment – Safe place of work – Whether premises unsafe – Whether safe traffic route provided for staff members – System of work – Whether safe and appropriate system of work – Whether plaintiff herself responsible for system of work in place – Onus of providing safe place of work and safe system of work upon employer – Whether plaintiff guilty of contributory negligence – Failing to keep a proper lookout – Damages of €54,900 awarded (2007/3293P – Quirke J – 27/5/2009) [2009] IEHC 609
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### Permission

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## PRACTICE & PROCEDURE

### Appeal by way of case stated

District Court discretion to state case – Sequential procedure for appeal by way of case stated – Whether recognisance can be fixed before requesting that case be stated – Purpose of recognisance – *Thompson v Curry* [1970] IR 61 and *People (DPP) v O'Connor* (Unrep, Finlay P, 9/5/1983) followed – Summary Jurisdiction Act 1857 (20 & 21 Vict, c 43), ss 2 to 5 – Courts (Supplemental Provisions) Act 1961 (No 39), s 51 – District Court Rules 1997 (SI 93/1997), O 102 – Relief refused (2009/1215JR – Kearns P – 1/12/2009) [2009] IEHC 582
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### Contempt

Attachment and committal – Failure to comply with consent order directing respondent to carry out refurbishment – Motion seeking order for leave to attach and commit respondent for failure to comply with order – Problems concerning funding for completion of remedial works outlined in order – *Bona fides* of respondent – Whether any exceptional circumstances why court should refrain from making order of attachment for contempt in default of compliance – Discretion – Public interest – *Morris v Garvey* [1983] IR 319 and *Laois County Council v Scully* [2007] IEHC 212, (Unrep, HC, Peart J, 23/01/2007) considered – Planning and Development Act 2000 (No 30), s 160 – Committal of respondent to prison for period of six months, suspended for period of twelve months on condition that respondent complete programme of works contained in order (2004/19MCA – Budd J – 24/11/2008) [2008] IEHC 465
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### Costs

Judicial immunity – No steps – Judicial review – *Certiorari* – Relief granted – No participation by respondent in proceedings – Application for costs against respondent and notice party – Whether order should be made against respondent – Whether engaged in quasi judicial function – Relevant factors – *Noonan Services Ltd v Labour Court* (Unrep, SC, 14/5/2004), *O'Connor v Judge Carroll* [1999] 2 IR 160 and *F v O Donnell* [2009] IEHC 142 (Unrep, O'Neill J, 27/3/2009) considered – Private Security Services Act 2004 (No 12) , s. 40 – European Convention on Human Rights, article 6.1 and 13 – Order for costs against appeals board refused (2008/1448 JR – Dunne J – 10/12/2009) [2009] IEHC 547

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Solicitors – Wasted costs order – Threshold – Criterion for making of order – Discretion of court – Whether costs incurred to be paid by applicant's solicitors – Whether costs incurred unnecessarily – Conduct of solicitor – Whether proceedings ought never to have been brought – Whether wasted costs incurred – Jurisdiction to be exercised sparingly – Duty of legal practitioners –Whether any valid reason for pursuing application – Whether misjudgment rather than serious misconduct – *Kennedy v Killeen Corrugated Papers* [2006] IEHC 385, [2007] 2 IR 561 applied- Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 7 – Application refused; but costs awarded against applicant personally (2009/483JR – Cooke J- 10/12/2009) [2009] IEHC 596
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## Delay

Sexual assault – Inordinate and excusable delay – Delay prior to commencement – Whether real or serious risk of unfair trial – Whether fair procedures – Whether high probability of fair result – Relevance of prejudice – Difference between pre commencement and post commencement delay – Relevant date – Death of central witness – Assessment of witness evidence – Relevance of witness evidence – Conduct of the defendant – Whether acquiescence by defendant – *Royal Dublin Society v Yates* (Unrep, Shanley J, 31/7/1997) and *People (DPP) v Hannon* [2009] IECCA 43 [2009] 4 IR 147, SH v DPP [2006] 3 IR 575, *DPP v Quilligan (No. 3)* [1993] 2 IR 305, *McBreary v Northwestern Health Board* [2007] IEHC 431 (Unrep, MacMenamin J, 14/12/2007), *OS v OS* [2009] IEHC 161 (Unrep, Dunne J, 02/04/2009), *O'Domhnaill v Merrick* [1984] IR 151, *Toal v Duignan (No 1)* [1991] ILRM 135, *H v DPP* [2006] 3 IR 575, *OC v DPP* [2000] 3 IR 478 considered – Statute of Limitations Act 1957 (No 6), s 48(a) – Statute of Limitations (Amendment) Act 2000 (No 13), s 3 – Proceedings dismissed (2008/7644P – Charleton J – 18/12/2009) [2009] IEHC 542
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Intellectual property – Computer software – Breach of confidence – Agreement certain documents discoverable – Trade secrets of rival company – Whether disclosure might affect competitive position of parties – Restriction sought that material made available to experts and legal advisor only of plaintiff and not to specified officer of plaintiff – Whether restriction justified – Whether exceptional circumstances – *Warner Lambert Co v. Glaxo Laboratories Limited* [1975] RPC 354, *Mackay Sugar Cooperative Association Limited v CSR Ltd* [1996] ALR 183, *Science Research Council v Nasse* [1980] AC 1028, *Mobil Oil Australia Ltd v McDonnells PTY Ltd v Guina Development PTY Ltd* [1996] 2 VR 34, *Format Communications MFG Ltd v ITT (United Kingdom) Ltd* [1983] FSR 473, *British Markitex Limited v Johnson* [1987] 2 PRNZ 53, *Sport Universal v Prozone Holdings Limited* [2003] EWHC 204 , *Reynolds Leasing Corporation v Carreras Rothmans Limited* (Unreported, 19/07/83), *International Video Disk Corporation v Nimbus Records Limited (No. 1)* (Unrep, 11/04/91) considered– Disclosure to legal advisors and nominated officer of plaintiff subject to conditions (2008/4333P – Kelly J – 31/07/09) [2009] IEHC 385
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## Particulars

Failure to provide – Application to strike out defence – Further and better particulars – Intellectual property – Computer software – Alleged breach of rights – Failure to furnish further and better particulars – Whether replies contradictory – Whether replies adequate – Whether defendant able to furnish particulars – Direction that indication be given as to whether particulars could be furnished – Consequences of inadequate replies – Positive defence raised – Positive assertions not particularised – Portion of defence struck out – (2008/2204P – Clarke J – 31/07/2010) [2009] IEHC 387
*Ryanair v Bravofly Ltd*

## Parties

Joinder – Contract – Damages – Use of website – Screen scraping – Terms of use – Whether breach of contract – Leave to join co-defendant – Separate proceedings between plaintiff and proposed co-defendant outside jurisdiction – Whether related proceedings – Application for stay of Irish proceedings refused in second set of proceedings – Whether proceedings began upon making order joining party – Conflict of laws – Whether obligation to decline jurisdiction – Whether related actions – *Hynes v Western Health Board* [2006] IEHC 55 (Unrep, Clarke J, 8/3/2006) considered – Rules of Superior Courts (SI 20/1996), O 11B, O 15 r 13 – Jurisdiction of Courts and Enforcement of Judgments Act 1998 (No 62) – Lugano Convention on Jurisdiction of Courts and Enforcement of Judgments Act 1988, art 21 and 22 – (2008/2204 P – Kelly J – 30/07/2009) [2009] IEHC 386
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Reasonable cause of action – Inherent jurisdiction of court – Preliminary issue – Whether action should be struck out, stayed or dismissed on basis of being bound to fail – Rules of the Superior Courts 1986 (SI 15/1986) O19, r 28; O 122 r 11 – *Barry v Buckley* [1981] IR 306 and *Goodson v Grierson* [1908] 1 KB 761 applied – Application granted (2006/4225P – Hedigan J – 15/10/2009) [2009] IEHC 601
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Want of prosecution – Delay –Discretion – Chronology of case – Prejudice in terms of defence – Whether delay inordinate and inexcusable – Whether any real risk of unfair trial – Culpable delay – Balance of justice – Constitutional principles of basic fairness of procedures – Conduct of both parties – Acquiescence – *Primor v Stokes Kennedy Crowley* [1996] 2 IR 4 applied – Relief refused (2000/13624P & 2000/9144P – McCarthy J- 15/12/2009) [2009] IEHC 575
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## Summary judgment

Leave to defend – Whether arguable defence disclosed – Test applicable – Frustration of contract – Whether partial frustration applicable – Implied terms – Test applicable – Mistake of law – Test applicable – *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607, *First National Commercial Bank plc v Anglin* [1996] 1 IR 75, *Davis Contractors Ltd v Fareham UDC* [1956] AC 696, *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255 and *Kleinwort Benson Ltd v Lincoln*

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*Ringsend Property Ltd v Donatex Ltd*

### Summons

Renewal – Set aside renewal – Unconditional appearance entered – Grounds – Discretion – Whether good reason to renew summons – Whether required reasonable efforts to serve defendant – Meaning of "other good reason" – Factors to take into account – Whether fact that Statute of Limitations would defeat new proceedings could be good cause to grant renewal – Reciprocal basis of Statute of Limitations – Prejudice to defence – Lapse of time – Whether actual substantial impairment of defence established – *Baulk v Irish National Insurance Co Ltd* [1969] IR 66; Martin v Moy Contractors Ltd (Unrep, SC, 11/2/1999); *Roche v Clayton* [1998] 1 IR 596 and *McCooey v Minister for Finance* [1971] IR 159 considered- Behan v Bank of Ireland, (Unrep, HC, 14/12/1995) and *O'Grady v Southern Health Board* (Unrep, HC, 2/2/2007) applied – *O'Brien v Fahy* (Unrep, SC, 21/3/1997) distinguished – Rules of the Superior Court 1986 (SI 15/1986) O 8, rr 1 and 2 , O 11A, r 6 – Defendant's application refused (2004/9197P – McMahon J – 27/2/2009) [2009] IEHC 612
*Jackman v Getinge AB*

## Trial

Notice of trial – Trial without jury -Set aside notice of trial– Defamation and unlawful interference with quiet enjoyment of premises – Right to jury trial – Right to jury trial in respect of part only of proceedings -Principles to be applied – Factors to be considered – Right to jury trial stipulated by statute – Entitlement to jury trial not absolute – Discretion of court – Interests of justice – Defendant lay litigant – Whether defendant had right to jury trial – Whether two separate trials should be ordered – Whether 'hybrid trial' should be ordered – Whether in interests of justice to order jury trial – *Sheridan v Kelly* [2006] IESC 26 [2006] IR 314, *Cork Plastics (Manufacturing) v Ineos Compound UK Ltd* [2008] IEHC 93 [2008] 1 ILRM 174 considered – Courts of Justice Act 1924 (No 10) s 94 – Courts Act 1988 (No 14) s 1 – Notice of trial not set aside (2008/8357P – Clarke J – 31/7/2009) [2009] IEHC 389
*Malcomson Law v Maher*

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SI 421/2010

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SI 361/2010

# PRISONS

### Conditions

Access to training – Prison rules – Applicant not afforded access to education and literacy training – Positive obligation of encouragement and facilitation of education – Whether prison rules being complied with – Requirement under rules to provide broad and flexible programme of education – Whether control and management of prisoners within prison system matters entrusted to executive – Prison Rules 2007 (SI 252/2007), r 110 – Prisons Act 2007 (No 10), s 35 – Leave to apply for judicial review granted (2009/1183JR – Edwards J – 25/11/2009) [2009] IEHC 513
*McCarthy v Governor of Mountjoy Prison*

# PROBATE

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# PROPERTY

### Judgment mortgage

Well-charging order – Order for sale – Settling of claim prior to advertisement for incumbrancers – Application for discharge of order for well-charging order – Application for order directing sale by notice party – Whether jurisdiction to make order – Whether claim of notice party statute-barred – Rights of incumbrancers other than plaintiff – Whether incumbrancer who had not proved entitled to claim – Obligations of plaintiff – Right of plaintiff to vacate order prior to advertisement – Whether inherent jurisdiction to consider application from incumbrancer who had not proved – Limitation period – Discretion – *Johnson v Lowry* [1900] 1 IR 316; *Harpur v Buchanan* [1919] 1 IR 1; *Archdall v Anderson* (1890) 25 LR Ir 433; *Sterndale v Hankinson* (1827) 1 Sim 393; *Royal Bank of Ireland Ltd v Sproule* (1940) Ir Jur Rep 33; *Re Alpha Co Ltd* [1903] 1 Ch 203; *Re Nixon's Estate* (1875) 9 Ir R Eq 7; *Re Colclough* (1858) 8 Ir Ch R 300; *Re Coloe's Estate* (1890) 25 LR Ir 86; *Munster and Leinster Bank v Mackey* [1917] 1 IR 49 and *Irwin v Deasy* [2006] IEHC 25, [2004] 4 IR 1 considered – Statute of Limitations 1957, ss 32, 33 and 38 – Rules of the Superior Courts 1986 (SI 15/1986), O 33, r 8 – Application refused; order vacating well-charging order and order for sale (1995/233SP – Finlay Geoghegan J – 13/3/2009) [2009] IEHC 586
*Allied Irish Banks plc v Dormer*

### Judgment mortgage

Well-charging order – Order for sale – Settling of claim prior to advertisement for incumbrancers – Application for discharge of order for well-charging order – Application for order directing sale by notice party – Whether jurisdiction to make order – Whether claim of notice party statute-barred – Rights of incumbrancers other than plaintiff – Whether incumbrancer who had not proved entitled to claim – Obligations of plaintiff – Right of plaintiff to vacate order prior to advertisement – Whether inherent jurisdiction to consider application from incumbrancer who had not proved – Limitation period – Discretion – Co-owners of property – Judgment against one owner only – *Allied Irish Banks Plc v Dormer* [2009] IEHC 586, (Unrep, Finlay Geoghegan J, 13/3/2009) and *Irwin v Deasy* [2006] IEHC 25, [2004] 4 IR 1 considered – Statute of Limitations 1957 (No 6), ss 32, 33 and 38 – Rules of the Superior Courts 1986 (SI 15/1986), O 33, r 8 – Application refused; order vacating well-charging order and order for sale (1995/233SP – Finlay Geoghegan J – 13/3/2009) [2009] IEHC 587
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## RESIDENTIAL INSTITUTIONS REDRESS BOARD

### Award

Review of award – Duty to give reasons – Failure to give reasons – Irrationality – Unreasonableness – Whether reasons given inadequate or sufficiently comprehensive – Whether decision irrational or unreasonable in circumstances – *O'Keeffe v An Bord Pleanála* [1993] IR 39, *State (Keegan and Lysaght) v Stardust Victims Compensation Tribunal* [1986] IR 642, *State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] 1 IR 51 and *Mulholland v An Bord Pleanála (No 2)*[2005] IEHC 306 [2006] IR 453 applied; *Foley v Her Honour Judge Murphy* [2007] IEHC 232 [2008] IR 619 distinguished; *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 , *Flanagan v UCD* [1988] IR 724, *O'Donoghue v An Bord Pleanála* [1991] ILRM 750, *Hadjianastassiou v Greece* (1992) 16 EHRR 219, *Faulkner v Minister for Industry and Commerce* (Unrep, Supreme Court, 10/12/1996), *Anheuser Busch INC v Controller of Patents Design and Trademarks* [1987] IR 329, *Mishra v Minister for Justice* [1996] 1 IR 189 and *McCormack v Garda Síochána Complaints Board* [1997] 2 IR 489 considered – Residential Institutions Redress Act 2002 (No 13) ss 13 and 15 – Reliefs refused (2006/139JR – Clark J – 31/7/2009) [2009] IEHC 388
*J(C) v Residential Institutions Review Committee*

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SI 434/2010

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SI 452/2010

## SOLICITORS

### Disciplinary tribunal

Appeal to High Court – Procedure on appeal – Decision of no *prima facie* case for inquiry – Documentary evidence submitted – Whether complaints without substance or justification – Whether Disciplinary Tribunal erred in decision – Whether sufficient evidence before Disciplinary Tribunal to decide on complaint – Contents of affidavit sworn by appellant in context of appeal – Solicitors (Amendment) Act 1960 (No 37) , s 7 – Solicitors (Amendment) Act 1994 (No 27), s 17 – Solicitors (Amendment) Act 2002 (No 19), s 9 – Rules of the Superior Courts (Solicitors (Amendment) Act 2002) 2004 (SI 701/2004) r 12 – Appeal dismissed (2009/92SA – Kearns J – 23/11/2009) [2009] IEHC 514
*Spring v Evans*

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## STATUTE

### Interpretation

Commencement order – Requirement set out in commencement order "*Persons under five years of age*"– Interpretation – – Whether requirement applied at time of commencement of Act or time of application – Whether purposive approach applied – Whether literal approach applied – Whether meaning of statute was clear – Whether words might be implied – Appeal – Determination of disability appeals officer – Assessment of need – Eligibility criteria – Limitation of services – Whether requirement to give reasons for refusal – *State (Creedon) v Criminal Injuries Compensation Tribunal* [1988] IR 51, *O Donohue v An Bord Pleanala* [1991] ILRM 750, *Ní Eilí v Environmental Protection Agency* (Unreported, SC, 30/07/1999), *Howard v Commissioner of Public Works* [1994] 1 I.R. 101, *Direct United States Cable Co v Anglo-American Telegraph Co.* (1877) 2 App Cas 394, *MJT Securities Ltd v Secretary of State for the Environment* [1998] JPL 138, *In re MacManaway* [1951] AC 161, *Tinkham v Perry* [1951] ITLR 91, *R v Wimbledon Justices, ex parte Derwent* [1953] 1 QB 380, *DB v Minister for Health* (Unrep, SC, 26/3/2003), *Mulcahy v Minister for the Marine (*Unrep, Keane J, 4/11/94), *Byrne v Official Censor* [2007] IEHC 464 (Unrep, O Higgins J, 21/11/2007), *Girling v Secretary of State for Home Department* [2007] 2 WLR 782 considered – Disability Act 2005 (No 14), ss 1, 7, 9 and 15 – Disability (Assessment of Needs, Service Statements and Redress) Regulations 2007 (No 263/2007) – Appeal dismissed (2009/148MCA – Hanna J – 8/12/2009) [2009] IEHC 540
*Health Service Executive v Dykes and Gallahue*

### Validity

Licensed premises – Sale of intoxicating to person under age of 18 years – Defence – Failure of section to continue to provide general defence of reasonable care or due diligence – Objective and intention of legislature – Whether age card production sole defence – Construction – Interpretation – Plain, literal and grammatical meaning of words – Whether two mutually exclusive defences available – Whether defence of due diligence retained – Whether competent for legislature to limit type of reasonable care upon which accused could rely to exculpate himself – Whether legislature could lawfully specify degree of care which would suffice as defence – *Attorney General (MacNeill) v Carroll* [1932] IR 1; *Regina v City of Sault Ste Marie* 85 (DLR) (3d) 161; *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267; *Sherras v DeRutzen* [1895] 1 QB 918; *Brady v Environmental Protection Agency* [2007] IEHC 58, [2007] 3 IR 232; *Attorney General (MacNeill) v Carroll* [1932] IR 1; *Duncan v Gleeson* [1969] IR 116; *PG v Ireland* [2006] 4 IR 1; *Proudman v Dayman* 67 CLR 536 and *Sweet v Parsley* [1970] AC 132, [1969] 2 WLR 470, [1969] 1 All ER 347 considered – Intoxicating Liquor Act 1988 (No 16), ss 31, 34 and 34A – Intoxicating Liquor Act 2000 (No 17), s 14(1)(b) – Intoxicating Liquor Act 2003 (No 31), ss 14 and 15 – Intoxicating Liquor Act 1988 (Age Card)

Regulations 1999, (SI 4/99) – Constitution of Ireland 1937, Articles 38.1 and 40.3 – Relief refused (2007/1234JR – Herbert J – 25/11/2009) [2009] IEHC 515
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SI 290/2010

## TORT

### Nuisance

Water – Drainage of water from higher to lower land – Damage caused by flooding – Whether duty of care – Whether damage reasonably foreseeable – Exceptional circumstances – Relevance of actions to remedy drainage issues – Subsequent damage to property caused by flooding – Whether damage reasonably foreseeable – *Fitzpatrick v O Connor* (Unreported, Costello J, 11/03/1988) and *Home Brewery v Davis and Company* [1987] 1 All ER 638 – Decree in favour of plaintiff (1996/922P – Dunne J – 11/12/09) [2009] IEHC 548
*Ambrose v Shevlin*

## TRADE MARKS

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(amendment) (no. 2) regulations, 2010
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SI 286/2010

Waste management (licensing) (amendment) regulations 2010
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SI 350/2010

## ACTS OF THE OIREACHTAS AS AT 15TH NOVEMBER 2010 (30TH DÁIL & 23RD SEANAD)

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

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

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

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

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

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

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

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

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

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

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

11/2010 Energy (Biofuel Obligation and Miscellaneous Provisions) Act 2010
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12/2010 Competition (Amendment) Act 2010
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13/2010 Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010
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14/2010 Merchant Shipping Act 2010
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15/2010 Health (Amendment) Act 2010
*Signed 03/07/2010*

16/2010 European Financial Stability Facility Act 2010
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17/2010 Compulsory Purchase Orders (Extension of Time Limits) Act 2010
*Signed 07/07/2010*

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

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

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

22/2010 Criminal Justice (Psychoactive Substances) Act 2010
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23/2010 Central Bank Reform Act 2010
*Signed 17/07/2010*

24/2010 Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010
*Signed 19/07/2010*

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

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

27/2010 Criminal Procedure Act 2010
*Signed 20/07/2010*

28/2010 Social Welfare (Miscellaneous Provisions) Act 2010
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*(Not yet available on Oireachtas website)*

30/2010 Planning and Development (Amendment) Act 2010
*Signed 26/07/2010*
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## BILLS OF THE OIREACHTAS AS AT 15TH NOVEMBER 2010 (30TH DÁIL & 23RD SEANAD)

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

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

Advance Healthcare Decisions Bill 2010
Bill 26/2010
Order for 2nd Stage – Seanad **[pmb]** *Senator Liam Twomey*

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

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

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

Biological Weapons Bill 2010
Bill 43/2010
Committee Stage – Dáil

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

Building Control (Amendment) Bill 2010
Bill 41/2010
1st Stage – Dáil **[pmb]** *Deputy John O'Donoghue*

Chemicals (Amendment) Bill 2010
Bill 47/2010
Report Stage – Dáil

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

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

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

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

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

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

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

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

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

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

Construction Contracts Bill 2010
Bill 21/2010
Order for Committee Stage – Seanad **[pmb]** *Senator Fergal Quinn*

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

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

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

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

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

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

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

Criminal Justice (Public Order) Bill 2010
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Criminal Justice (Violent Crime Prevention) Bill 2008
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Committee Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Garda Síochána (Powers of Surveillance) Bill 2007
Bill 53/2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

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

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

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

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

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

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

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

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

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

Local Government (Mayor and Regional Authority of Dublin) Bill 2010
Bill 48/2010
2nd Stage – Dáil

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Prevention of Corruption (Amendment)

Bill 2008
Bill 34/2008
Order for Report Stage – Dáil

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Value-Added Tax Consolidation Bill 2010
Bill 49/2010
Committee Stage – Dáil

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

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

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

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

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

## ABBREVIATIONS

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

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# Criminal Prosecutions under the Market Abuse Regulations
# More than one way to skin a cat

Dáithí Mac Cárthaigh BL

## Introduction

It is often recalled that Al Capone was jailed for tax evasion rather than the other more nefarious pursuits with which he occupied himself. As we are inundated with revelations of apparent rife criminality in the Irish banking sector and other related fields, there has been an understandable public outcry for prosecutions.

The prospect of numerous long and expensive fraud trials is not at all attractive for prosecution authorities, not least, given the traditionally perceived difficulties of bringing such prosecutions home. However, other avenues are open.

There has yet to be a single prosecution in Ireland under the Market Abuse Regulations[1] which set out at Regulation 49 a number of offences all of which on summary conviction carry a fine of €5,000 and/or 12 months' imprisonment.

Although, naturally, one's eye is drawn to the 'head-line' offences of Insider Dealing and Market Manipulation (which are also indictable with a maximum penalty of a €10,000,000 fine and/or 10 years' imprisonment[2]) the other 'summary trial only' offences also deserve our attention.

It should be appreciated that for a former pillar of society, a criminal conviction and the loss of one's liberty for a number of months can be a heavy penalty indeed, involving, as it does, the loss of social standing and the stigma attached to having a criminal record, not to mention the difficulties involved in securing entry to the United States.

Summary trials, as well as being cheaper to run, are shorter and more focused and give the opportunity to address widespread systematic abuse in a measured fashion.

Where a person is convicted of a Regulation 49 offence and the contravention continues after the conviction, that person is guilty of a further offence on every day which the contravention continues and is liable on summary conviction to the same penalty for each such further offence. The Central Bank[3] may also bring such summary prosecutions[4]. The offences are as follows:

1. Insider Dealing (Regulation 5),
2. Market Manipulation (Regulation 6),
3. Failure to comply with a requirement to prevent and detect market manipulation practices (Regulation 7),
4. Failure to disclose inside information (Regulations 10 & 11),
5. Failure of managers to disclose information in relation to certain of their transactions (Regulation 12),
6. Failure to notified suspicious transactions (Regulations 13 & 14),
7. Failure to fairly present recommendations on investment strategy (Regulations 17-20),
8. Failure to disclose (conflicts of) interest(s) in recommendations (Regulations 21 & 22),
9. Failure when disseminating recommendations produced by third parties to disclose certain information relating thereto (Regulations 23 & 24),
10. Managing a regulated financial service provider while disqualified (Regulation 47).

Insider Dealing (Regulation 5) and Market Manipulation (Regulation 6) are also triable on indictment and, when so tried, carry a maximum penalty on conviction of a €10,000,000 fine and/or 10 years' imprisonment[5].

The Central Bank also has extrajudicial enforcement powers under Part 5 of the Regulations[6] in relation to all the above offences and may, where it has reason to suspect that a prescribed activity is being, or has been, committed, appoint assessors to investigate and if appropriate recommend sanctions[7]. Sanctions range from cautions and reprimands[8] to monetary penalties[9] and disqualification from

1 Regulations (S.I. No. 342/2005) implementing Market Abuse Directive (2003/6/EC). The Regulations cover actions in Ireland regarding financial instruments admitted to, or seeking admission to, trading on a regulated market in any EU state and to actions taken anywhere in relation to financial instruments admitted to, or seeking admission to, trading on any regulated market in Ireland (Regulation 4(1)(2)).

2 They are also offences to which s.32 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 apply by virtue of Regulation 49(2).

3 Central Bank and Financial Services Authority of Ireland.

4 Regulation 53.

5 They are offences to which s.32 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 apply by virtue of Regulation 49(2).

6 Regulations 34-48.

7 Regulation 35.

8 Either public or private. Regulation 41(a)&(b).

9 Up to €2,500,000 in any case (Regulation 41(c)). See also regulation 46(2).

the management of, or having a qualifying holding[10] in, any regulated financial service provider[11].

## Regulation 49 offences

### *Insider Dealing (Regulation 5)*

Insider Dealing is a person who possesses information not available to the general public using that information to acquire or dispose of financial instruments to which that information relates either on his own account or that of a third party or to attempt to do so directly or indirectly.

Insider dealing is also dealt with in Part V of the Companies Act 1990[12], as amended, a scheme parallel to the Market Abuse Regulations carrying both civil and criminal liabilities.

Inside information is of a precise nature[13] relating to one or more issuers of financial instruments or to one or more financial instruments which has not been made public and which information, if it were made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments.

This includes non-public precise information relating to one or more such derivatives which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets[14].

Inside information also means, in the case of persons charged with the execution of orders concerning financial instruments, precise information conveyed by a client relating to that client's pending orders regarding one or more issuers of financial instruments or one or more financial instruments, and which information, were it made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments[15].

The view of the Supreme Court in *Fyffes plc v DCC plc* [2009] 2 IR 417 is that the test of what constitutes inside information is an objective test. Per Denham J. at p 714:-

> "The test, as set out clearly in s 108(1) [of the Companies Act 1990, which outlaws insider dealing][16], is an objective test. Was there information? Was it generally available? If it was made generally available, would it be likely materially to affect the price of the shares on the market?"

The regulation goes on to state that inside information may not be disclosed except in the normal course of the exercise one's employment, profession or duties, nor may one recommend or induce another, on the basis of inside information, to acquire or dispose of financial instruments to which that inside information relates.[17]

This ban relates to anyone possessing inside information by virtue of his membership of the administrative, management or supervisory bodies of the issuer of the financial instrument in question, his holding in the capital of the issuer, his having access to the information through the exercise of his employment, profession or duties, or as a result of criminal activities. The ban also relates to natural persons who take part in the decision to carry out transactions on behalf of legal persons[18] and any other person who possesses information which he knows or ought to know is inside information[19].

Insider dealing also includes financial instruments not admitted to, or seeking admission to, trading on a regulated market in an EU state but the value of which depends on such instruments[20].

There are a number of statutory defences. The first is an understandable exemption relating to transactions conducted in the discharge of an obligation to acquire or dispose of a financial instrument that has become due and which results from an agreement concluded before the person concerned possessed the inside information[21].

There also an exemption for actions taken in conformity with takeover rules. Having access to inside information relating to another company and using it in the context of a public takeover offer for the purpose of gaining control of that company or proposing a merger with that company in conformity with rules made under s. 8 of the Irish Takeover Panel Act 1997 is not a contravention of Regulation 5[22].

10 A direct or indirect holding of shares or other interest in a regulated financial service provider which represents 10% or more of the capital or the voting rights or a direct or indirect holding of shares or other interest in a regulated financial service provider which represents less than 10% of the capital or voting rights but which, in the opinion of the Bank, makes it possible to control or exercise a significant influence over the management of the regulated financial service provider. (Regulation 34).

11 Regulation 41(d).

12 No. 33 of 1990.

13 'Information of a precise nature' (also 'precise information' in this article) is that which indicates a set of circumstances which exists or may reasonably be expected to come into existence, or an event which has occurred or may reasonably be expected to occur, and is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments (Regulation 2).

14 Regulation 2(1).

15 Regulation 2(1) i.e. Information that a reasonable investor would be likely to use as part of the basis of his investment decisions. The difficulties in profiling the 'reasonable investor' were explored by the Supreme Court in *Fyffes plc v DCC plc* [2009] 2 IR 417.

16 "It shall not be lawful for a person who is, or at any time in the preceding 6 months has been, connected with a company to deal in any securities of that company if by reason of his so being, or having been, connected with that company he is in possession of information that is not generally available, but, if it were, would be likely materially to affect the price of those securities."

17 Regulation 5(1)&(2)

18 Regulation 5(3)(b)

19 Regulation 5(3)(c). This however does not preclude one company dealing in the financial instruments of another if an officer of the first company has information received in the course of his duties consisting only of the fact that the first named company proposes to (attempt to) acquire such financial instruments (Regulation 8(3)).

20 Regulation 5(4).

21 Regulation 5(5).

22 Regulation 8(2). Actions taken in compliance with rules made under s. 8 of the Irish Takeover Panel Act 1997 (in particular rules relating to the timing, dissemination or availability, content and standard of care applicable to a disclosure, announcement, communication or release of information during the course of a public takeover offer) is not a contravention of Regulation 5 provided that the

The final exemption/statutory defence concerns buy-back programmes or stabilisation measures[23]. Regulation 5 does not apply to trading in own shares in buy-back programmes, or to trading to secure the stabilisation of a financial instrument, provided that such trading is carried out in accordance with the EU Market Abuse Regulation[24] or to the purchase of own shares carried out in accordance with Part XI of the Companies Act 1990.

## Market Manipulation (Regulation 6)

Market Manipulation is defined as transactions or orders to trade which give, or are likely to give, false or misleading signals as to the supply of, demand for, or price of, financial instruments, or which secure by a person or persons acting in collaboration the price of one or several financial instruments at an abnormal or artificial level.

There is an exception where the person, who enters into the transactions or issues the orders to trade, establishes that the reasons for so doing are legitimate and that the transactions or orders to trade, as the case may be, conform to accepted market practices on the regulated market concerned[25].

Market Manipulation also covers transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance[26], or dissemination of information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments. This also including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading[27].

There an exemption for actions taken in conformity with takeover rules. Having access to inside information relating to another company and using it in the context of a public takeover offer for the purpose of gaining control of that company or proposing a merger with that company in conformity with rules made under s. 8 of the Irish Takeover Panel Act 1997 is not a contravention of Regulation 6[28].

Another exemption/statutory defence relates to buy-back programmes or stabilisation measures[29]. Regulation 6 does not apply to trading in own shares in buy-back programmes, or to trading to secure the stabilisation of a financial instrument, provided that such trading is carried out in accordance with the EU Market Abuse Regulation[30] or to the purchase of own shares carried out in accordance with Part XI of the Companies Act 1990.

## Requirements to prevent and detect market manipulation practices (Regulation 7)

The Central Bank is obliged to require that market operators[31] structure their operations so that market manipulation practices are prevented and detected, and that market operators report to it on a regular basis in accordance with arrangements drawn up by the Bank[32].

The Central Bank may – but had not done as yet - impose requirements concerning transparency of transactions concluded, total disclosure of price-regularisation agreements, a fair system of order pairing, the introduction of an effective atypical order detection scheme, sufficiently robust financial instrument reference price-fixing schemes and clarity of rules on the suspension of transactions[33] and any person who contravenes any such requirement would be guilty of an offence[34].

## Failure to disclose inside information (Regulations 10 & 11)

Regulation 10 imposes a positive duty on the issuer of financial instruments to disclose publicly and without delay inside information which directly concerns the said issuer. Such disclosure must be done in a way that enables fast access to it and enables the public to assess it correctly and in a timely manner. This duty includes the positive obligation to disclose publicly any significant change concerning such information already disclosed and to do so immediately and through the same channels used for the original disclosure[35].

The fact that an issuer does not disclose such information does not mean that it can be used by an insider. Per Fennelly J. (Supreme Court) in *Fyffes plc v DCC plc* [2009] 2 IR 417 at 742:-

> "Insiders cannot be allowed to use inside information merely because – perhaps especially because – the company does not itself disclose it."

This regulation only applies to financial instruments where the issuer has made a request for its admittance to trading on a regulated market or has approved its admittance to trading on a regulated market[36].

In particular, the issuer is required to post on its internet site(s) for at least six months any inside information which it is required to publicly disclose[37]. Such disclosure may not be combined by the issuer with the marketing of its activities in a manner which is likely to mislead the public[38].

Given the regulations' genesis as an EU directive, the issuer is obliged take reasonable care to ensure that such disclosure is synchronised as closely as possible between all

relevant general principles set out in the Irish Takeover Panel Act 1997 are also complied with. (Regulation 8(4)).

23 Regulation 9(1).

24 Commission Regulation (EC) No 2273/2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments. Text at Schedule 5 of the Regulations.

25 See also Regulation 2(4) & Schedule 2.

26 See also Regulation 2(5) & Schedule 3

27 Regulation 2(1) & (3).

28 Cf. Footnote 21.

29 Regulation 9(1).

30 Commission Regulation (EC) No 2273/2003 (*Supra*).

31 Market operators are persons who manage and/or operate the business of a regulated market, including regulated markets which manage and/or operate their own business as a regulated market (Regulation 2)

32 Regulation 7(1)

33 Regulation 7(2)

34 Regulation 49(1)(c)

35 Regulation 10(1)&(4)&(5)

36 Regulation 10(12).

37 Regulation 10(2).

38 Regulation 10(3).

categories of investors across the regulated markets of the EU states[39].

An exception/statutory defence allowing the issuer to delay public disclosure of inside information is set out at Regulation 10(7). Such disclosure may be delayed to avoid prejudicing the issuer's "legitimate interests" provided that such failure to disclose would not be likely to mislead the public and that the issuer is able to ensure the confidentiality of that non-disclosed inside information.

The issuer's "legitimate interests" may include negotiations in being where such negotiations would be likely to be affected by public disclosure in particular where the issuer is in grave financial difficulties, though still solvent, and said negotiations are designed to ensure the issuer's long-term financial recovery and would be jeopardised by such disclosure. Even in these circumstances public disclosure of information may only be delayed for a limited period[40].

The issuer's "legitimate interests" may also include decisions taken or contracts made by the issuer's management body which need the approval of another body of the issuer in order to become effective. This provided that the organisation of the issuer requires separation between those bodies and that public disclosure of the information before such approval together with the simultaneous announcement that the approval was still pending would jeopardise the correct assessment of the information by the public[41].

To avoid the misuse of this undisclosed inside information by its being leaked, the issuer has several positive obligations:

Firstly, to take effective measures to deny access to the information to persons other than those who require it for the exercise of their functions within the issuer.

Secondly to take the measures necessary to ensure that persons with access to the information acknowledge the legal and regulatory duties entailed and are aware of the sanctions attaching to the misuse or improper circulation of that information.

Thirdly, to have in place measures which allow immediate public disclosure in case the issuer is not able to ensure the confidentiality of the information[42].

Where the issuer, its servants or agents, discloses any inside information to a third party in the normal course of business, the party which made the leak, must make complete and effective public disclosure of the leaked information (except where the third party receiving the inside information is under an obligation of confidentiality).

As regards timing, the party which made the leak must come clean simultaneously in the case of an intentional disclosure and must come clean without delay in the case of a non-intentional disclosure.[43].

Regulation 11 imposes a further obligation on the issuer and anyone acting on his behalf or for his account to draw up a list of all persons working for them, as employees or otherwise, who have access to inside information relating directly or indirectly to the issuer. This duty only arises where the issuer has made a request that the financial instrument concerned be admitted to trading on a regulated market or has approved its admission to a regulated market.

This "list of insiders" must contain the following information[44]: (a) the name of any person having access to inside information; (b) the reason why any such person is on the list, and (c) the date on which the list of insiders was created and updated. The issuer and anyone acting on his behalf or for his account must regularly update this list and give a copy to the Central Bank if the Bank so requests[45].

## Managers' transactions (Regulation 12)

Managers operating within an issuer of financial instruments registered in the State and persons closely associated with them must notify to the Central Bank within five working days of transactions conducted on their own account relating to shares in the issuer, or to derivatives or other financial instruments linked to them[46].

A 'manager' in the context of Regulation 12 or to give him his full title a "person discharging managerial responsibilities" is either a member of one or more of the administrative, management or supervisory bodies of the issuer of the relevant instrument or a senior executive who is not a member of any such body but who has regular access to inside information relating to the issuer and the power to make managerial decisions affecting the future developments and business prospects of the issuer[47].

"Persons closely associated" with managers in the context of Regulation 12 are:-

(a) The manager's spouse;
(b) The manager's dependant children;
(c) Other relatives of the manager who have lived under his roof for at least one year on the date of the transaction concerned;
(d) Any person whose managerial responsibilities are discharged by a manager in the issuer, or whose managerial responsibilities are discharged by such a manager's spouse, dependant child or other of his relatives who has lived under that manager's roof for at least one year on the date of the transaction concerned, or a company controlled by such a person or set up to benefit such a person or a person or company whose economic interests are substantially equivalent to such a person.

If the issuer is not registered in Ireland, but in another EU state, managers and their close associates must notify the making such transactions in accordance with the rules of notification of that EU state as they relate to such instruments[48].

Similarly, where such issuers are not registered in Ireland, but in a non-EU state, managers and their close associates must notify within five working days the making such transactions to the competent authority in the EU state to

39 Regulation 10(6) where the instrument concerned has been admitted to trading or has requested admission.
40 Regulation 10(8)(a)
41 Regulation 10(8)(b)
42 Regulation 10(9)
43 Regulation 10(10) & (11)
44 Schedule 4
45 Regulation 11(3) & (4)
46 Regulation 12(1) & (3).
47 Both definitions are in Regulation 12(8).
48 Regulation 12(2)(a).

which the issuer is required to file its annual information under the Prospectus Directive[49].

The Central Bank must ensure that public access to such information is readily available without delay.[50]

## Failure to notify suspicious transactions (Regulations 13 & 14)

Regulation 13 obliges certain classes of prescribed persons to notify the Central Bank without delay of transactions which they reasonably suspect constitute market abuse[51]. A "prescribed person" is any natural or legal person (including investment firms, credit institutions or market operators) which arranges transactions in financial instruments on a professional basis and is registered in Ireland or is a branch operating in Ireland of any such person or company which is registered in another EU state[52].

The required notification must include (a) a description of the transaction, including the type of order and the type of trading market concerned; (b) the reasons for the suspicion; (c) the identity of the persons on whose behalf the transaction was carried out and the other persons involved; (d) the prescribed person's role in the transaction; and (e) other relevant information[53]. The notification must at least contain the reasons for the suspicion and any gaps in the information at the time of notification must be furnished as soon as such information becomes available[54].

Prescribed persons enjoy immunity for acts done in good faith pursuant to their duty to notify the Central Bank of such transactions but may not inform any other person of this notification, in particular they may not 'tip off' the persons on whose behalf the transaction was carried out or parties related to them unless otherwise legally obliged to so do[55]. Likewise, the Central Bank may not disclose the name of the notifier if such disclosure would harm or be likely to harm the notifier[56].

On receipt of such notification the Central Bank must share this information with the relevant competent authorities of each regulated market on which the instrument concerned is admitted to trading or is the subject of a request to be so admitted[57].

In a Common Law context, where importance is placed on the *mens rea*, Regulation 13(2) which provides that "*[a]ny prescribed person shall decide on a case-by-case basis whether there are reasonable grounds for suspecting that a transaction involves market abuse after taking into account the elements constituting market abuse*" would appear to construct a *de facto* statutory defence. Evidence to ground such a notification would appear to need to be as clear as one's proverbial nose before failure to notify could be deemed a criminal dereliction of a statutory duty.

It is a separate offence to give the Central Bank a Regulation 13 Notification which one knows to be false or misleading in a material particular or which one does not believe to be true, carrying upon summary conviction a fine of €5,000 and/or 12 months' imprisonment[58].

## Failure to present fairly investment strategy recommendations (Regulations 17-20)

Recommendations in this context consist of information, produced by independent analysts, investment firms, credit institutions, or any other person whose main business it is to produce such recommendations, their servants or agents, that express, directly or indirectly, a particular investment recommendation in respect of a financial instrument or an issuer thereof or information produced by other persons which directly recommends a particular investment decision in respect of financial instruments[59] and which is intended for distribution channels[60] or for the public[61].

A person who produces or disseminates such recommendations must take reasonable care to ensure that such recommendations are fairly presented, and must disclose any of its interests in, or conflicts of interest concerning, the financial instruments and issuers to which the recommendation relates[62].

Except in the case of recommendations produced or disseminated in Ireland by journalists who are subject to equivalent appropriate regulation which satisfies the Central Bank[63], anyone who produces a recommendation must ensure that it discloses clearly and prominently the name and job title of the individual who prepared it and the name of the person responsible for its production[64].

Journalists however do not have *carte blanche*. Where a journalist acts in his professional capacity, the dissemination of information will be assessed, for the purposes of the definition of "market manipulation" taking into account the code of conduct governing the journalist's profession. This privilege is set at naught, however, where the journalist derives, either directly or indirectly, an advantage or profit from the dissemination of the information concerned[65].

Where an investment firm or credit institution is responsible for the preparation or production of a recommendation in the conduct of its business, it must ensure that the recommendation indicates clearly and prominently the identity of the relevant competent authority of the investment firm or credit institution[66].

Where neither an investment firm nor a credit institution is responsible for the preparation or the production of a recommendation but rather a person subject to self-

49 Directive on the Prospectus to be Published when Securities are offered to the Public or Admitted to Trading 2003/71/EC. (Regulation 12(2)(b)&(3)).
50 Regulation 12(7)
51 Regulation 13(1). Such notification may be by telephone call to a number specified by the Central Bank provided that notification in writing to the same effect is made as soon as is practicable thereafter.
52 Regulation 13(8).
53 Regulation 13(4).
54 Regulation 13(5).
55 Regulation 13(6) & (7) and 14(1).
56 Regulation 14(2).
57 Regulation 13(3).
58 Regulation 51(a).
59 Including any opinion as to the present or future value or price of such instruments.
60 Channels through which information is, or is likely to become, publicly available (Regulation 16).
61 Regulation 16 Definition.
62 Regulation 17
63 Regulation 26.
64 Regulation 18(1).
65 Regulation 26(2).
66 Regulation 18(2).

regulatory standards or codes of conduct is, such a person must ensure that a reference to those standards or codes, as the case may be, be disclosed clearly and prominently in the recommendations[67].

These recommendations must in all circumstances be fairly presented and, subject to the aforementioned journalistic exemption, the person responsible for their preparation or production in the course of his business or profession must take reasonable care to ensure that:-

(a) facts be distinguished from comment;
(b) sources be reliable and, if not, that doubtful sources be identified;
(c) all projections, forecasts and price targets be clearly labelled as such and that the material assumptions made in producing or using them be indicated[68].
(d) any recommendation can be justified to the Central Bank if it so requests[69].

In addition, where the producer or disseminator of recommendations in the course of his business or profession is an independent analyst, an investment firm, a credit institution, a related company within the meaning of s.140 of the Companies Act 1990, a person whose main business or profession is to produce such recommendations, or a person working for any of the aforesaid, the said producer/disseminator must take reasonable care to ensure[70]:

(a) that all material sources are indicated;
(b) that any basis of valuation or other methodology used to evaluate a financial instrument or an issuer of a financial instrument, or to set a price target for a financial instrument, is adequately summarised (unless this would be disproportionately long in relation to the length of the recommendation[71]);
(c) that the meaning of any recommendation made, such as 'buy', 'sell' or 'hold', which may include the time horizon of the investment to which the recommendation relates, is adequately explained and that any appropriate risk warning[72] is indicated (unless this would be disproportionately long in relation to the length of the recommendation[73]);
(d) that reference is made to the planned frequency of any updates of the recommendation and to any major changes in any coverage policy previously announced;
(e) that the date on which the recommendation was first released for distribution is indicated clearly and prominently, as well as the relevant date and time for any financial instrument price mentioned, and
(f) where a recommendation differs from a recommendation concerning that the same financial instrument or issuer, issued during the previous 12 months, this change and the date of the earlier recommendation must be indicated clearly and prominently.

## Disclosure of (conflicts of) interest(s) in recommendations (Regulations 21 & 22)

Persons who make such recommendations in the course of their business or profession have a obligation to disclose therein any interests or conflict of interest they may have in relation the financial instrument or issuer in question[74].

Their obligation is fleshed out in Regulations 21 & 22: They must disclose all relationships and circumstances that might reasonably be expected to impair the objectivity of their recommendations, in particular where they have a significant financial interest in one or more of the financial instruments which are the subject of the recommendations, or where they have a significant conflict of interest with respect to any issuer to which the recommendations relate[75].

In the case of a company, this obligation extends to any person working for, or providing a service to, the company who was involved in preparing the recommendation[76].

It must also include any and all such interests or conflicts of interest of that company, or of related companies, which would be reasonably expected to be accessible to the persons involved in the preparation of the recommendations and also those interest and conflicts of interest known to persons who, although not involved in the preparation of the recommendations, could reasonably be expected to have access to the recommendations prior to their dissemination to customers or the public[77].

Where the producer of the recommendations is an independent analyst, an investment firm, a credit institution, a related company, or a person whose main business it is to produce recommendations, that producer, in any recommendations it produces, must disclose clearly and prominently the following information on its interests and conflicts of interest[78]:-

(a) any major shareholding[79] that exists between that producer or any related company on the one hand and the issuer on the other;
(b) any other significant financial interest held by that producer or any related company in relation to the issuer;
(c) where applicable, a statement that the producer or any related company is a market maker[80] or

67 The recommendations having been produced or disseminated in the conduct of the person's business or profession. Regulation 18(3).
68 Regulation 19(1).
69 Regulation 19(2).
70 Regulation 20.
71 do.
72 Including a sensitivity analysis of the relevant assumptions.
73 Cf. Footnote 74.
74 Regulation 17(b).
75 Regulation 21(1).
76 Regulation 21(2).
77 Regulation 21(3).
78 Regulation 22(1).
79 This includes (a) a shareholding held by the producer or any related company that exceeds 5% of the total issued share capital in the issuer, and (b) a shareholding held by the issuer exceeding 5% of the total issued share capital in the producer or any related company (Regulation 22(2)).
80 A market maker is a company, or an individual, that quotes both a buy and a sell price in a financial instrument or commodity held in inventory, hoping to make a profit on the bid-offer spread (the

liquidity provider in the financial instruments of the issuer;

(d) where applicable, a statement that the producer or any related company has been lead manager or co-lead manager during the previous 12 months of any publicly disclosed offer of financial instruments of the issuer;

(e) where applicable, a statement that the producer or any related company is party to any other agreement with the issuer relating to the provision of investment banking services[81], and

(f) where applicable, a statement that the producer or any related company is party to an agreement with the issuer relating to the production of the recommendations.

Also, where such a producer of recommendations is an investment firm or credit institution it must disclose clearly and prominently the following information:-

(a) in general terms, its organisational and administrative arrangements for the prevention and avoidance of conflicts of interest with respect to recommendations, including information barriers;

(b) with respect to persons working for them who are involved in preparing recommendations: whether or not their remuneration is tied to the company's investment banking transactions or that of any related company;

(c) where persons referred to above receive or purchase the shares of the issuers prior to a public offering of the shares, the price at which the shares were acquired and the date of their acquisition, and

(d) on a quarterly basis, the proportion of all recommendations that fall within the categories of 'buy', 'hold', 'sell' or equivalent terms, as well as the proportion of issuers corresponding to each of those categories to which it has supplied material investment banking services over the previous 12 months.

Where a full disclosure under these regulations would be disproportionately long given the length of the recommendations, a clear and prominent reference to where the disclosure can be directly and easily accessed by the public is sufficient[82].

## Dissemination of recommendations produced by third parties (Regulations 23 & 24)

Except in the case of news reporting on recommendations produced by a third party where the substance of the recommendations is not altered[83], a person which produces or disseminates recommendations in the course its business or profession (a "relevant person"[84]) disseminating recommendations produced by a third party must ensure that such recommendations indicate clearly and prominently the identity of that relevant person[85].

Subject to this news reporting exception, in the case where such recommendations are substantially altered within the disseminated information, the person disseminating the information must clearly indicate the substantial alteration in detail and where such a substantial alteration consists of a change of the direction of the recommendation[86] the person disseminating the substantial alteration must comply with the above regulations to fairly present recommendations on investment strategy[87] *vis à vis* that substantial alteration[88].

Again, subject to the news reporting exception, a relevant person who disseminates substantially altered recommendations must have a formal written policy so that the persons receiving the information may be directed to where they can access (a) the identity of the producer of the recommendations; (b) the recommendations themselves, and (c) the disclosure of the producer's interests or conflicts of interest in so much as those details are already are publicly available[89].

Where there is dissemination of a summary of recommendations produced by a third party, the relevant persons disseminating the summary must ensure that the summary is clear and not misleading and mentions such of the following that are publicly available: the source document and where disclosures relating to the source document can be directly and easily accessed by the public[90].

Where the relevant person is an investment firm or credit institution (or a person working for such a body) and it disseminates recommendations produced by a third party, the relevant person must ensure that the recommendations include clear and prominent disclosure of the name of the competent authority of that firm or institution[91].

Where such a firm or institution has substantially altered a recommendation it must comply with the above regulations to fairly present recommendations on investment strategy[92] as applicable[93].

Where such a relevant person has not already disseminated the recommendation through a distribution channel, the disseminator of the recommendation must fulfil the requirements of disclosure of the relevant person's interest and conflicts of interest[94].

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difference between the price it quotes for an immediate sale and an immediate purchase) or trade.

81 Provided that this would not entail the disclosure of any confidential commercial information and that the agreement has been in effect during the previous 12 months, or has given rise during the same period to a payment of compensation or to a promise to pay compensation.

82 Regulations 21(4) & 22(4). Such as a direct Internet link to the disclosure on an appropriate Internet site of the relevant person.

83 Regulation 23(5) This is seperate to the journalistic exemption at Regulation 26.

84 Regulation 16.

85 Regulation 23(1).

86 Such as changing a 'buy' recommendation to a 'hold' or 'sell' recommendation or *vice versa*.

87 Regulation 18-21 in particular.

88 Regulation 23(2)&(3).

89 Regulation 23(4).

90 Regulation 23(5).

91 Regulation 24(1).

92 Regulation 18-22 in particular.

93 Regulation 24(3).

94 Regulation 24(2). Such interests and conflicts of interest under Regulation 22.

### Non-written recommendations

The requirements regarding the fair presentation of recommendations on investment strategies and the duty to disclose interests and conflicts of interest in such recommendations[95] may be satisfied in the case of non-written recommendations by reference to a place where the information concerned may be directly and easily accessed by the public[96].

### Managing a regulated financial service provider while disqualified (Regulation 47).

A regulated financial service provider[97] must ensure that any and all persons concerned in the management thereof, or having a qualifying holding[98] therein, are not subject to a disqualification pursuant to Regulation 41(d)[99]. This offence differs from the other created by the Regulations in that it is the only one where the Central Bank must first have applied a sanction under its Part 5 procedures, rather that the option being open to prosecute the offender without such prior action having been taken by the Central Bank.

95 Regulations 18, 19, 20, 21(1) & 22.
96 Such as a direct Internet link to an appropriate Internet site of the relevant person (Regulation 25).
97 As defined in the Central Bank and Financial Services Authority of Ireland Act 2004 s. 2(g). (Regulation 34).
98 Cf. Footnote 9 (*supra*).
99 Regulation 47.

### Conclusion

One will expect both the Central Bank/Financial Regulator and the Director to bring prosecutions both summarily and on indictment. In addition, they will wish to navigate safely the choppy waters which often result where European and domestic principles meet as well being mindful of the Regulations' interaction with the Companies Acts.

From the point of view of justice being seen to be done, it is heartening that the Regulations explicitly provide for a lifting of the corporate veil: Where an offence committed by a body corporate is proved to have been committed with the consent, connivance or approval of any director, manager, secretary or other officer of the body corporate or a person who was purporting to act in any such capacity, or to have been attributable to the wilful neglect on the part thereof, that person as well as the body corporate shall be guilty of an offence and shall be liable to be proceeded against and punished as if that person were guilty of the first-mentioned offence[100].

Individuals may be charged with having committed offences under these Regulations even if the body corporate concerned is not so charged in relation to the same matter[101].

Such prosecutions would be a welcome step toward a more accountable financial sector and would do much to build public confidence in our civic and public institutions. ■

100 Regulation 52(1).
101 Regulation 52(2).

# Confessions and Camera Perspective Bias

PAUL LAMBERT*

### Introduction

The author[1] is researching certain aspects of television courtroom broadcasting effects research for a PhD thesis[2] and in the course of that research,[3] has become aware of substantial studies on the issue of confession camera perspective bias. These studies examine how the camera

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1 The author would like to acknowledge the thoughtful comments of Mr Tom O'Malley on an earlier draft. The views, comments and responsibility for any inaccuracies, remain with the author. Contact: lambertp@tcd.ie
2 Lambert, P., draft PhD thesis; and also Lambert, P., "Effects Research Issues in Television Courtroom Broadcasting: Getting Past Monkey," 10th European Conference on eGovernment, University of Limerick, 17-18 June 2010; Lambert, P., "Monkey Magic: Problems With Effects Research of Television Courtroom Broadcasting," *Irish Law Times* (forthcoming). See also Lambert, P., draft PhD thesis; Lambert, P., "Eye Tracking Technology and Television Courtroom Broadcasting," *Computers and Law*, (forthcoming, 2010); and Society of Computers and Law, SCL News, Articles and Blog, 12/8/10; and at www.scl.org, last accessed on 12/8/10.
3 The issue arises as to whether another camera focus effect can arise with cameras in court and courtroom footage. There is an obvious need for research. The research into false confessions and camera perspective bias shows that more sophisticated research can be applied to legal issues and problems. Not only should eye tracking be applied to television courtroom broadcasting effects research, but the US Supreme Court has called for empirical research. Another example occurred recently when research was published in the *Harvard Law Review* questioning via empirical research, the comments of the US Supreme Court in a particular case. See Kahan, D.M., Hoffman, D.A., and Braman, D., "Whose Eyes Are You Going to Believe? *Scott v Harris* and the Perils of Cognitive Illiberalism," *Harvard Law Review*, (January 2009), pp. 837 – 906, referring to the case of *Scott v Harris*, 127 S Ct 1769 (2007).

angle (and what the camera focuses on) actually affect the viewer's perspective of a recorded interview. This important topic is discussed below, given its applicability to criminal legal practice and the video recording of Garda confession interviews in Ireland. This is important because, far too often, we ignore relevant, and often compelling, social science and empirical research which investigates current legal issues. It has taken a long time for legal practice to recognise important psychological research into the separate issue of eye witness identification.[4]

## False Confessions

False confession research is particularly important. There are many instances where people have been recorded on television and on video recording confessing to crimes that they have not committed. This is additionally significant since the Innocence Project in the US which applies DNA technology and techniques to past conviction cases. This was founded by Barry Scheck, the noted American lawyer and academic. It has proven that many innocent people have been convicted and gaoled. It found that a quarter of the DNA exoneration cases originally relied strongly on false confessions.[5]

## Camera Perspective Bias

There is increasing psychology and eye tracking research into the effects of cameras and camera perspective in recorded police interviews and false confessions.[6] This is partly driven by the knowledge that there are false convictions and confessions – some captured on video recording.

The research has found that different camera angles and focus orientations of the interview recording camera, can alter significantly how viewers of such film footage rate the *genuiness* and *voluntariness* of the recorded "confessions." The manner in which the evidence is filmed, i.e. the confession footage, can influence judgements of guilt.[7] Mock jurors have been found to be influenced by the camera angle from which the interrogation is filmed.[8] This is now known as *camera perspective bias*.

Many criminal investigation interviews that are recorded, adopt a suspect focused angle only, instead of focusing on the police officer or focusing on both of them at the same time. This enhances the perceived voluntariness of any confession.[9] Lassiter and Irvine[10] showed the same interview recorded on different cameras to show: suspect only, police officer only, and both equally focused. The research study subjects then viewed one of the videos, depending on which group they were in. The ones who saw the suspect only video, perceived less coercion.[11] Other research also confirmed that suspect focus only videos, yielded significantly higher ratings for perceived guilt and voluntariness.[12] Ware[13] also examined camera perspective bias and used eye trackers to monitor visual attention. She also refers to studies and the literature which shows that suspect focus only camera perspective, creates a bias for judgements of voluntariness and guilt.[14]

As a result of the Lassiter and Irvine[15] study, police practice in New Zealand changed to ensure that there was no suspect only video recordings, and that both the suspect and questioner were always in frame.[16] Pressure is increasing to change policies elsewhere also.

Andrew Ashworth in his recent 4th edition of *Criminal Process* (page 96) also briefly highlights the empirical social science research on camera perspective bias, including the seminal research by G.D. Lassiter. Ashworth also refers to New Zealand research.[17]

## Irish Video Recording Practice

In Ireland the relevant legislation in relation video recording of police interviews is S.I. 74 of 1997, which is the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 (the "Regulations"). This permits the electronic recording of Garda interviews.

However, there are a number of issues that need to be pointed out. Obviously, from the date of the original Act (in 1984) and the Regulations (in 1997), we can say that the rules date from well before the contemporary research on camera perspective bias. In fact the Regulations refer to "tapes" which predates many modern technology recording media and devices (see, for example, definitions of "electronic recording" and "equipment").

In terms of the specifics of the Regulations, there is actually no explicit reference to video recordings *per se*. Regulation 4(1) provides that "interviews [of persons detained

4 Note the recent article by Davin O'Dwyer, "Have We Come to the End of the Line-Up?" *Irish Times*, Weekend Review, 7th August 2010. Note also a previous article by the author, Lambert, P., "Swearing Blind With Pointed Fingers: The Psychology of Identification Parades and Eyewitness Identification," *Irish Criminal Law Journal*, (2000), p. 11.

5 See http://www.innocenceproject.org, and as referred to in Schmidt, H.C., below, 11.

6 This is also noted by Ware, L.J., Monitoring Visual Attention in Videotaped Interrogations: An Investigation of the Camera Perspective Bias, MSc thesis, Ohio University (2006), p. 35.

7 Schmidt, H.C. Effects of Interrogator Tactics and Camera Perspective Bias on Evaluations of Confession Evidence, MSc thesis, Ohio University (2006).

8 Lassiter, G.D. and Irvine, A.A., "Videotaped Confessions: The Impact of Camera Point of View on Judgements of Coercion," *Journal of Applied Social Psychology*, (1986)(16), pp. 286 – 276. Referred to in Schmidt, H.C., above, pp. 9 – 10.

9 See Schmidt, H.C., above, pp. 25 - 26.

10 Lassiter, G.D. and Irvine, A.A., above, pp. 286 – 276. Referred to in Schmidt, H.C., p. 26.

11 *Ibid.*

12 See, for example, Lassiter, G.D., Munhall, P.J., Ploutz-Snyder R.J. and Breitbecher, D.L., "Illusory Causation: Why It Occurs," *Psychological Science*, (2002)(13), pp. 299 – 305, as referred to in Schmidt, H.C., above, p. 28.

13 Ware, L.J., above.

14 Geller, W.A., *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices,* (A Report to the National Institute of Justice, Washington, DC: US Department of Justice, (1992); Kassin, S.M., "The Psychology of Confession Evidence," *American Psychologist*, (1997(52), pp 221 – 233; and Lassiter, G.D., "Illusory Causation in the Courtroom," *Current Directions in Psychological Science*, (2002)(11), pp. 204 – 208; each as referred to in L.J. Ware, above, p. 10.

15 Lassiter, G.D. and Irvine, A.A., above, pp. 286 – 276. Referred to in Schmidt, H.C., above, p. 26.

16 See Schmidt, H.C., above, p. 31.

17 Namely, Dixon and Travers, *Interrogating Images: Audio-Visually Recording of Police Interviews with Suspects*, (Sydney Institute of Criminology, 2007).

under s4 CJA 1984, s30 OASA 1939, s2 CJ(DT)A 1996] ... shall be electronically recorded." There is no definition of "electronically recorded." Albeit, there is a definition of "electronic recording." This definition does not explicitly refer to videos or film.

The author, however, understands that in Ireland when videos are used to record Garda interviews and confessions, one video camera (feeding to three video recorders) is used.[18] The logic behind the three feeds is understood to be a foil in the event of breakdowns, etcetera. It is also understood that the practice in Ireland is to have the video focus on the interview suspect only.

Therefore, to the extent that the interview suspect only, is visible in the recordings means that camera perspective bias is a real and live concern in Ireland. In terms of the perspective focus of the interview suspect, it is unclear if this is head on, side on, angled, etcetera. There does not appear to be any official documents, reports or regular reviews of practice in Ireland to make the process and practice transparent. In order to be assured that in fact camera perspective bias is not an issue of concern, greater illumination of the actual use and practice surrounding the Garda video recording of interviews is needed. However, it appears from even this admittedly short review, that the Irish practice of Garda video filming of suspect interviews is questionable in light of modern social science empirical evidence.

However, further considerations also arise. Modern IT and intellectual property laws attempt to be technology neutral, so as to avoid becoming out of date in the face of rapidly changing technology. The Irish laws highlighted above in terms of electronically recording Garda interviews are at this stage out of date. While the previous practice appears to be that the defendant would automatically receive a copy of one of the video recordings, it is understood that s/he or his/her solicitor now has to apply for such a copy. Unfortunately, as the law has not been updated, the defence receive a copy video cassette recording. One does not need to be a tech savvy teenager to know that video cassettes are dated and obsolete. It is not practical or indeed possible in most instances to find a video recorder to play the defence video cassette on. How are the defendant's rights to be preserved? A technology neutral law, or amendment, might assist.

While the original legislation dates to approximately 20 years ago, it is understood that actual examples of video recording interviews have only occurred within the last 10 years. Unfortunately, there is no research and ongoing monitoring, so it is not possible to examine any globally accurate statistics or information, whether third party or official.

This is certainly an area which requires and will benefit from further more in depth research in Ireland.

## Photographs and Consent Considered

While the author originally set out to highlight the issue of camera perspective bias, some further issues are worthy of mention. For example, is the Regulation successful in achieving its aim?

Regulation 17 refers to "photographs." The intention appears to be that still photographs may not be printed or produced from video recordings *per se* or for identification purposes, in particular without the written consent of the interview subject. However, are there some unintended results from the drafting of the Regulation?

Consider that the Regulation refers to a "tape." In addition, it refers to "a photograph." Yet there is no definition of a "photograph" at all in the Regulation. A photograph can be hard copy printed (or developed) photograph. It can also be an electronically produced photograph on screen, whether on a video screen, computer screen, mobile device screen, etcetera. The point is that there can be hard copy photograph and electronic copy photograph. In addition, electronic photographs can be single still image photographs and or a series of "moving" image photographs. A video recording when played can be described as a series of moving image photographs.

Technologically speaking also, a video recoding on a tape is the *data* which is recorded on the magnetic tape media. The video [moving] images or photographs are *not* the data so recorded on the electronic media device. The data has to be interpreted and decoded in order to produce or play the images on a screen for the user.

Could it be the case, therefore, that the written consent of the suspect is required to even "play" the video recording of the interview? This would be an unintended consequence of the Regulation. The least that can be said is that the intention behind the Regulation, and whether this is actually achieved, requires further consideration. It is not guaranteed that it has been successful.

## Conclusion

The author briefly has highlighted the issue of camera perspective bias and recent research in the field. Official policy on this issue should reflect and guard against the camera perspective bias and other issues that can arise. Greater transparency and ongoing monitoring research is needed in order to assess the bias issues that may exist, and then to amend policy if this is necessary – which it appears to be. It may be that the Regulation itself is the appropriate place to include explicit reference to at least some of the mechanics of guarding against bias effects. Separately, the Regulation requires to be updated to respect, if not reflect, modern technology. It is significantly out of date. The technology neutral approach might be considered in this regard. More detailed consideration of the Regulation may also confirm if there are unintended effects which need to be corrected, such as the photograph and consent issue. ■

18 Personal correspondence with Garda Press Office, 13 August, 2010. Correspondence with author.

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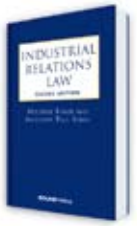

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