The Bar Review

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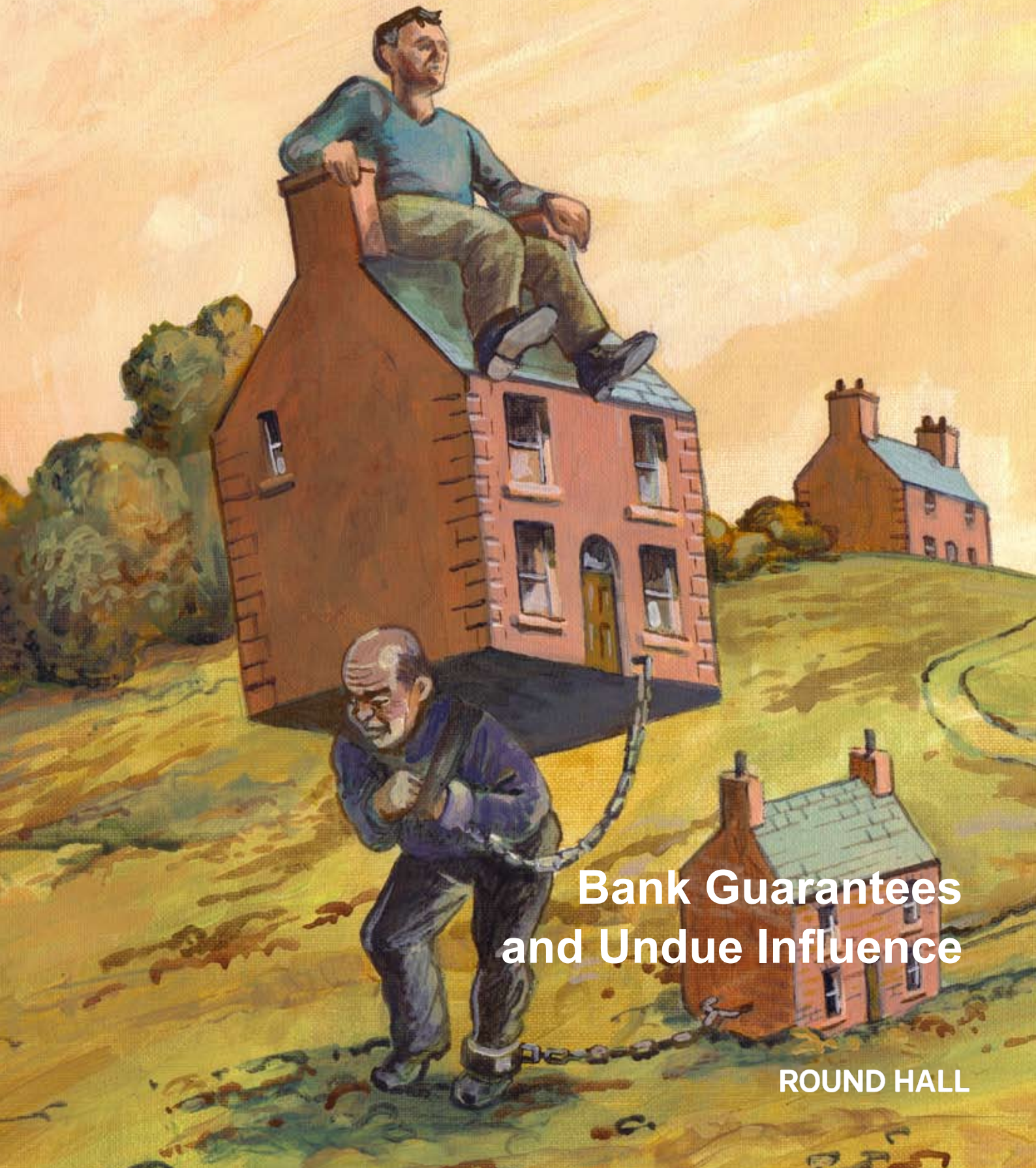

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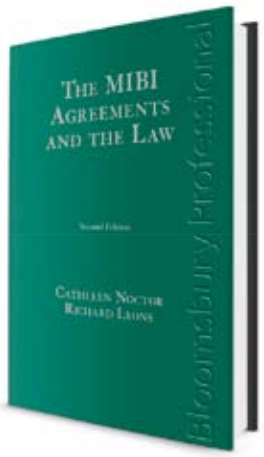

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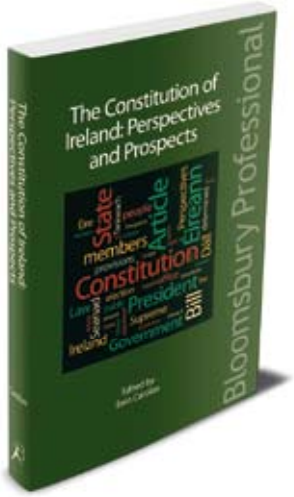

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The Statute of Limitations and PIAB

Michelle Liddy BL

Introduction

In any action seeking damages for personal injuries the first thing that any prudent practitioner will do is verify that the claim is not barred by virtue of the Statute of Limitations, 1957 as amended. That exercise involves looking at the limitation legislation in the light of the Personal Injuries Assessment Board Act 2003 ("the PIAB Act"). The calculation should be simple and, considering the Courts have no jurisdiction to enlarge the time set down in the limitation legislation,[1] one could be forgiven for thinking this is the case. However, in recent times, the issue has become more complex and the enactment of the PIAB Act has added an unwelcome layer of confusion. This article seeks to provide a comprehensive analysis of the meaning and effect of the relevant statutory provisions in light of the applicable case law in order to identify when the limitation period actually expires in practice.

The Operative Legislation

The enactment of the Statute of Limitations (Amendment) Act, 1991 ("the 1991 Act") and its subsequent amendment by section 7 (A) of the Civil Liability and Courts Act, 2004 ("the 2004 Act") reduced the limitation period in respect of actions seeking damages for personal injuries from three years to two years. As such, if injury occurs on the 1st of January, 2012, assuming there is no date of knowledge issue and subject to the following provisions, the limitation period will expire on the 31st of December, 2013.

The PIAB Act requires that an application be made to the Injuries Board in most types of actions seeking damage for personal injuries before any proceedings can issue. There are some exceptions to this but these are of no concern for current purposes. It is the making of the application to the Injuries Board under Section 11 that stops time running in respect of the 2 year limitation period. Section 11 of the PIAB Act provides that an application should be in a certain format and be accompanied by certain documents specified by the Injuries Board[2].

Section 50 of the PIAB Act provides that "the period beginning on the making of an application under section 11 in relation to the claim and ending 6 months from the date of issue of an authorisation …… shall be disregarded." Essentially, the period while the application is being determined by the Injuries Board and a six month period after the issuing of an Authorisation are not taken into account in the 2 year period.

Rule 3 (3) of the Personal Injuries Assessment Board Rules ("S.I 219/2004") supplements both sections 11 and 50 of the PIAB Act. That Rule provides that the operative date for the making of an application for the purposes of section 50 of the PIAB Act "shall be the date on which the application in a form specified in sub rule (1)(a), containing the information specified in sub rule (1)(b) is acknowledged in writing as having been received by the Board."

The vague wording of the legislative provisions, as set out above, and the overlap and conflict between the PIAB Act and S.I 291/2004 has led to significant difficulties in practice. As a result, it has fallen to the Courts to provide some level of certainty in relation to the limitation legislation.

When is the application to the Injuries Board deemed to have been made?

The making of an application under section 11 of the PIAB Act will stop time running for the purposes of the limitation legislation. While this would seem a fairly simple calculation, it has led to significant difficulties. For example, is the application deemed to have been made when the Injuries Board affix a date stamp to it, when they inform the intended Respondent that a claim is likely to be made or when they write to the Claimant and inform them that the application has been received and is complete?

Dunne J addressed this issue in *Figueredo v McKiernan* [2008] IEHC 368. The date of the accident in that case pre-dated the commencement of the 2004 Act and as such, circumstances and legislation dictated that the application to the Injuries Board had to be made on or before the 30th of March 2007. The Plaintiff's Solicitor sent the application in the prescribed form, to the Injuries Board by registered post on the 29th of March, 2007. The Plaintiffs contention was that in the ordinary course of events, the application would be received by the Injuries Board on the 30th of March, 2007. The Injuries Board acknowledged the application as received on the 2nd of April, 2007 and the Defendants submitted that this was the relevant date and as such, the claim was statute barred. Dunne J noted that:

> "I cannot see how a Plaintiff could find themselves statute barred in circumstances where they have made the necessary application to PIAB under s.11 of the Personal Injuries Assessment Board Act 2003, within time, by post, in circumstances where in the ordinary course of post, the application would have been in time…… I do not see how the administrative act of fixing a date stamp on the application by PIAB can oust the statutory provisions in relation to the limitation period"[3]

1 *Poole v O'Sullivan* [1993] ILRM 55,

2 Generally the Injuries Board standard Form A, any correspondence between the Claimant and the intended Respondent, a medical report and any vouching documentation in respect of special damages

3 [2008] IEHC 368 at 377.

As such, the circumstances of each case must be looked at in a global nature. The fact that an application has been made within time cannot simply be cast aside in favour of the procedures and view of the Injuries Board, which are matters entirely outside the Plaintiff's control. Clarke J approved of this view in *Fogarty v McKeogh Brothers (Ballina) Limited* [2010] IEHC 274.

The issue came up again in *O'Callaghan v Hannon* (Unreported, Birmingham J, High Court, 15th June 2010). The Plaintiff's solicitor had submitted correspondence to the Injuries Board, by way of application, but had omitted certain information, namely a medical report, in support of the application. The Injuries Board wrote to the Plaintiff's solicitor stating "we acknowledge receipt of your recent correspondence. However we require additional documentation before the application is accepted as complete". Birmingham J noted that section 11 of the PIAB Act was a two part provision with the first part, under section 11(1), being that application be made and the second part, under section 11(2), being that the application be in a certain format and be accompanied by certain documents.[4] Birmingham J. held that, although the application to the Injuries Board had been made in the absence of certain information, it was still an application for the purpose of the Statute of Limitations because section 11(1) was satisfied.[5] It was also held that the aforementioned letter from the Injuries Board was an acknowledgment in writing of receipt of the application even though it did state that certain information was absent from the application.[6]

More recently in *Kiernan v J.Brunkard Electrical Limited and Quebec Construction Limited* [2011] IEHC 448 (which is currently understood to be under appeal to the Supreme Court), the Plaintiff's Solicitor sent a fax to the Injuries Board containing an application form, a copy medical report and a copy cheque and on the same day, May 27th , 2009, sent the originals by registered post. The Injuries Board acknowledged receipt of the documentation on the day of the fax but stated that additional information was required before the application could be accepted as complete. The Injuries Board wrote again to the Plaintiff's Solicitor stating that the application was complete for the purposes of section 50 of the PIAB Act on May 29th, 2009 (which was the day that the originals of the documents arrived through the post). The issue, for current purposes, was whether time stopped running for the Statute of Limitations on May 27th or May 29th , 2009. White J noted that there was a conflict between section 50 of the PIAB Act and S.I 219/2004 in that all that was required by section 50 was that an application be made but S.I 219/2004 required that the application be made in a certain form, be accompanied by certain documentation and be acknowledged as complete by the Injuries Board before having any effect on the limitation period.[7] Precedent dictated that the Act was to take preference over the S.I. He noted that section 50 referred to "the making of an application" and he held that the on the ordinary meaning of that phrase "the essential components were in place after the fax had been successfully delivered on the 27th May, 2007 (sic)"[8] As such, the application was deemed to have been made on May 27th and that was the date on which time stopped running for the purposes of the limitation period.

The cumulative result of the case law is that the operative date for the purposes of the limitation period is the date on which the application is made to PIAB *simpliciter*. This seems to reduce S.I 219/2004 to no more than a guideline and it appears that failure to comply with S.I 219/2004 will not be fatal to a Plaintiff's case. As long as the application is in the correct form and the Injuries Board acknowledge it, even if that acknowledgment is to inform a claimant that their application is incomplete, time has stopped running for the purposes of the limitation period.[9]

When is the Authorisation deemed to have issued?

Having made an application to the Injuries Board, a Claimant must then wait for the assessment to be made. Assuming that the assessment is not accepted and proceedings are to issue, the Injuries Board will issue an Authorisation to the Claimant. However, time does not begin to run for 6 months after the issuing of same. The relevant provision of the PIAB Act for the issuing of the Authorisation depends on the circumstances in which it is to be issued.

Fogarty v McKeogh Brothers (Ballina) Limited [2010] IEHC 374 was a case in which the Injuries Board issued an Authorisation to the Plaintiff on the 14th of May, 2008. It was not received by the Plaintiff's Solicitor until the 21st of May, 2008 despite having been sent through the document exchange which operates as a one day system. As a finding of fact, Clarke J held that the Authorisation was not put into the document exchange on the day on which it had the seal of the Injuries Board affixed to it.[10] He noted that section 50 of the PIAB Act had to be looked at in the light of the section under which the Authorisation issued.[11] In this instance, the Authorisation issued under section 14 which refers to an Authorisation being issued *to* a claimant rather than just being issued *simpliciter* (as it happens sections 14, 17, 32, 36, 46(3) and 49 all refer to an Authorisation being issued to a claimant). The result of this was that the Court accepted the Plaintiff's argument that there is a distinction between documents which have been issued, for example in the Central Office, and documents which issue to the intended recipient. Clarke J specifically commented that

> "… it is not appropriate for PIAB to describe a document as having been issued for the purposes of s 14 at any date earlier than the date, at a minimum, when that document is directed to the claimant concerned … It seems to me that the date on which the seal of the Board is affixed is not the relevant date.

4 Unreported, Birmingham J, High Court, 15th June 2010 at page 8.
5 Ibid.
6 Ibid at page 9.
7 [2011] IEHC 448 at 453.
8 Ibid at 454.
9 The result of the appeal to the Supreme Court in the *Kiernan* case may alter that position but that appeal has yet to be heard at the time of writing.
10 [2010] IEHC 274 at 376.
11 Ibid at 378.

> The relevant date is the date when the document is sent to the relevant claimant."[12]

While Clarke J accepted that there might be some debate as to whether the document was issued to the Claimant when it was sent or when it was received, his own view on the matter is clear, and it is submitted is the correct one. While the comments of Clarke J in relation to the exact point at which the Authorisation is said to have issued to the claimant are *obiter,* they do provide some clarity in relation to the issue.

The important date is the date when the Authorisation is issued to the Claimant. Essentially the Courts have said yet again that administrative acts of the Injuries Board are not determinative of matters. The date on the Authorisation is not determinative if there is a legitimate reason to look behind it to avoid an injustice.

When is the last date available before the claim becomes statute barred?

Assuming that the claimant has received Authorisation from the Injuries Board and then wishes to issue proceedings, this must be done from the appropriate office. The question then arises what is the position for a claimant who finds that the last day available to him falls on a day when the appropriate office is closed?

Clearly it is not permissible for a claimant to deduct weekends and bank holidays from the limitation period but a concession is made when the last day of the limitation period falls on such a day. That was the conclusion reached by Morris J in *Poole v O'Sullivan* [1993] ILRM 55. In that case, the Central Office had refused to issue a summons due to an error on a Friday evening. The next day, the Saturday, was the day on which the limitation period expired. The Plaintiff's Solicitor then successfully issued the summons on the following Monday morning. Morris J approved the judgments of Karminski LJ and Megarry J in *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336. They held:

> "… a statutory period of time whether general or special, will, in the absence of any contrary provision, normally be construed as ending at the expiration on the last day of the period. That rule remains; but there is a limited but important exception or qualification to it ……If the act to be done by the person concerned is one for which some action by the court is required, such as issuing a writ, and it is impossible to do that act on the last day of the period because the offices of the court are closed for the whole of that day, the period will prima facie be construed as ending not on that day but at the expiration of the next day upon which the offices of the courts are open and it becomes possible to do the act.."[13]

The position in relation to this aspect of the statute is clear. If the last day available falls on a day on which the appropriate office is closed, the statutory period is extended to the next day that the appropriate office is open. If, however, the proceedings are not issued on the very next day that the office is open, it is a near certainty that the proceedings will be statute barred, assuming of course that the Defendant has been savvy enough to plead the statute as a defence.

In all the case law as above, it is submitted that there is a pro-Plaintiff approach. For example, in the *Poole* case, Morris J held that the Courts could not enlarge the time allowed under the Statute, but yet added time to the limitation period. Admittedly, this was a matter of practicality but the question arises whether there is an element of semantics involved. After all, a Plaintiff who finds that the last day of the limitation period falls on a day when the office is closed is in no worse a position than one who finds that the last day is on a day when the office is open. Both have had 2 years to bring their claim and both are, or at least should be, subject to the same rules and constraints.

Conclusion

As Dunne J noted in *Fugueredo,*

> "Whilst one might be critical of a Plaintiff for leaving the issue of proceedings, or, in the case of personal injuries applications the making of an application under s.11 until the last moment, nonetheless the Statute of Limitations 1957 has fixed a specific period within which to commence one's proceedings and it seems somewhat harsh, to say the least, that having taken every step that one can take in order to commence proceedings, that one could become statute barred by the actions of a third party over whom one has no control, in this case the Personal Injuries Assessment Board."[14]

That *dicta* sums up the position in relation to the limitation legislation succinctly. It is never ideal for a Claimant or Plaintiff to allow matters come down to the last day of the limitation period but it happens and so it is of paramount importance that there are definite dates which can be identified as being relevant. In recent times, the Courts have provided some clarity in relation to the relevant dates for the making of the application, the issuing of an authorisation and the issuing of proceedings. While recent decisions have clarified matters, it is to be hoped that the appeal of the *Kiernan* decision does not turn all that on its head. ■

12 Ibid at 379.

13 [1973] QB 336 at 356.

14 Supra n.1 at 372-373.

The Wisconsin Innocence Project 2012

Hilary Lennox BL

The Bar Council selected me to spend three very interesting months this Summer learning about the Innocence Project in Wisconsin, USA. So this is how my summer began. I got off the plane in Chicago, found the bus that would take me to Madison, Wisconsin and headed off into the unknown for three hours. I had no idea what Madison looked like except from google maps street view and I found my lake house with my roommates on craigslist. I hoped it didn't belong to the craigslist serial killer.

I was based in the Law school at the University of Wisconsin on Bascom Hill. There were about 30 Attorneys buzzing around and about 80 students taking part in the different criminal clinical programs, which run throughout the summer. The Innocence Project is one of those clinical programs and the application process for the students is very competitive. The directors of each clinic invited me to lectures, prison visits and courts hearings so I was extremely active for the summer.

I was given the task of screening some of the cases that come in regularly from prisoners protesting their innocence. There is a myriad of reasons why applications to have cases reviewed are summarily refused. Cases will not be considered if the person is already represented by a lawyer, if a person alleges intoxication, self defence or admits to a minor part in the crime. Sexual assault cases will not be considered if the convicted person claims contact was consensual as DNA evidence can be used to prove both parties were at the scene but not whether it was consensual.

The Innocence Project only becomes involved at the appeals stage. They distinguish between trial and appellate lawyers. The trial lawyers are rarely involved in the appeal. One of my tasks was to draft a direct appeal with another Innocence Lawyer and a student and this has the result that my name is now on the pleadings. It was a challenging experience to familiarize myself with Wisconsin legislation and case law, which is in somewhat similar to Irish law, but hugely embellished in some areas.

The appeal I drafted was the case of Curtis Forbes[1], a cold case re-opened in 2007. Mr. Forbes was found guilty of first-degree murder of a woman called Marilyn McIntyre in 1980 in Wisconsin. He was sentenced to life in prison. She was eighteen and married to Mr. Forbes's best friend. She was bludgeoned, strangled and stabbed in her apartment while her 3 month old son was sleeping. The case was reopened in 2007 when the state crime lab matched DNA from the McIntyre apartment to hair samples Mr. Forbes had given to police in 1980. The body was exhumed in March 2008 for the collection of more evidence and Mr. Forbes was arrested in 2009.

A key piece of evidence was a small blood stain on the shirt worn by Mr. Forbes on the night of the murder as witnessed/ reported by his wife, Debra Forbes. She told friends about the blood and she also mentioned it in a recorded phone call from the jail two days after Mr. Forbes was arrested. However, there was a very strong alternative suspect, Marilyn's husband, Lane McIntyre, who violently and repeatedly abused her. The appeal began with an attempt to obtain a new trial and introduce this evidence.

I became very involved in other cases dealing with forensic science and techniques which have led to successful convictions, sometimes without corroborating evidence or without having been scientifically validated, for instance, the science of shaken baby syndrome. The thinking on Shaken Baby Syndrome has been dramatically altered in recent years and Professor Keith Findley, the co-founder of the Wisconsin Innocence Project, is one of the world specialists in the area who introduced me to a number of cases. My article on the issue, "*Shaken Baby Syndrome Science or Myth",* is the cover story of the November issue of the Law Society Gazette.[2]

Life in the US means life. The length of sentences in general is mind blowing and completely at odds with sentencing policy in Ireland. One male was convicted of arson and was sentenced to 158 years; another received 75 years for armed robbery (even though no one died). He hopes to get out in 2056! Another male in Dodge Prison, Wisconsin[3] was serving 35 years for sexual assault of a child. In some states, there are 16 year old boys who have been sentenced to life without parole and will die in prison. One 16 year old said during his trial that he was worried his teacher would be angry as he wasn't turning in his homework on time. One would have to question whether 16 year olds should be tried as adults and receive life sentences without parole.

Sentencing is significantly affected by plea bargaining which plays a major role in the American criminal justice system. 95% of cases enter a plea and save the huge expense of trial. If an accused takes his chances and loses, he will almost certainly face the maximum sentence (the penalty for not entering a plea). One man was offered 3 years but maintained his innocence. He was convicted and sentenced to forty years. Couple that with ineffective assistance of counsel (public defenders who have a very heavy caseload and little time to prepare), the stakes are heavily weighted towards entering a plea, even if an accused is innocent.

Of course, some who seek the assistance of the Innocence Project are not innocent. I worked with one attorney who had been dealing with a case for two years and had several consultations in prison with an inmate who cried on his shoulder protesting his innocence. Finally, due to numerous unsuccessful and then successful DNA motions, the DNA tests indicated that he was the killer. This attorney lamented

1 Curtis Forbes – 2009 CF 000122

2 http://www.lawsociety.ie/Documents/Gazette/Gazette%202012/GazetteNovember2012.pdf

3 http://www.wi-doc.com/dodge.htm

the time wasted on the case and maybe felt a bit foolish having genuinely believed in the offender's innocence.

One facet of the U.S. justice system is a very public, user friendly website setting out the criminal history of each offender. Any member of the public can access this information, including court hearings, sentences and current prison location by simply entering a name and county into the website. There is no wiping the slate clean. This, however, is very helpful for the Innocence Project Lawyer, who does not have to depend on a third party for the background of the case.

Restorative Justice[4] is a project, which runs parallel to the Innocence Project and focuses on the needs of victims and offenders, as well as the involved community. Offenders are encouraged to take responsibility for their actions and to repair the harm they have done, by apologizing or returning stolen money etc. Working with this project obliged me to attend at the prisons, meeting clients once a week. The first prison I visited was Oshkosh Prison, a two hour drive north of Madison.

Prisons in the US are huge with numerous identical buildings dotted around the compound. Each building houses specific types of inmates. The prisons are self-sufficient and inmates work in different areas like the prison hospital, vegetable fields, worm farms, bakeries and the kitchen. The kitchen prepared 7,500 meals per day and had a different menu for each dietary requirement. I counted 38 on the blackboard there. Segregation or solitary confinement "seg" is where the prisoners are sent if they have been misbehaving. It is like a prison within a prison. It is used for the most angry, deranged or disruptive prisoners. It is regularly closed to visitors for safety reasons so we were privileged to be allowed in that day. Generally, each prisoner wears a green suit but in "seg" you have to wear orange.

When we entered, the inmates were all shouting at each other, banging on the doors and wolf whistling. They are not allowed leave the cell for the duration of their time there. The shouting etc is their only daily activity. Certain cells with thick windows as walls are used for suicidal inmates, or those who need to be closely watched. There was a schizophrenic prisoner in one cell who was dancing and chanting "they're coming". The prison warden informed us of a mentally unwell inmate who, when he had been contained in one of those cells, had ripped his own eyeball out and was in the process of doing the same to his other eye, when the wardens intervened. At that point, one of the attorneys passed out and the internal electric doors to the cell corridors were shut while we waited for the medical team to arrive.

Life in prison has its own routine. Inmates are encouraged to have a sense of responsibility and receive a wage if they work. The hourly rate is 33 cents per hour. This is used to pay for a dental or doctor's visit, which costs $7, or new shoes, a tv or anything else in the prison. Some put it towards outside debts and maintenance payments for their children. Judges are very reluctant to halt those payments once a person is incarcerated. In Wisconsin, such payments are not stopped even if a person receives a life sentence. The family law clinic, which runs parallel to the Innocence Project, gives legal advice to inmates and represents them for various maintenance and access applications. Advisers are present at these hearings by way of telephone on the court speakers. One inmate has so many children, he has racked up a maintenance bill of $55,000. The family law clinic are working on his case to have the payments modified. Otherwise, he could get a new sentence on top of what he is already serving, for non payment of debts.

One of the most interesting cases of the Summer was the case of Johnny Hullet, now 65, who was convicted 30 years ago for raping and strangling an elderly woman in South Carolina. He was sentenced to life in prison in 1982. Interestingly, there were three other murders, where the victims were white, elderly, heavy-set women killed within the space of four months. The murder scenes were almost identical in each, all found in a bath of water, with one covered in fruit juice. The first murder remains unsolved. For the second, an African American man was convicted and in the third case, Mr. Hullet was found guilty.

It became clear there was material evidence still untested from the crime scene and materials, which could be retested. With new advances in DNA science, new tests could potentially show new results or indicate the real perpetrator by a match in CODIS (FBI DNA bank), particularly given the age of this case. So, we began drafting the motion for testing for the State of South Carolina (where the murders were committed). As the laws in each state differ, Attorneys can apply by way of *pro hac vice* motion to obtain a right of audience for that one case.

I headed off in a van with the Innocence Project Team to South Carolina. We travelled down Wisconsin, into Illinois, through Kentucky, Tennessee, North Carolina and into South Carolina to make our application before a Southern Judge. Upon arrival, we were greeted by a huge number of press, at least 15 members of the police and prosecution, sheriffs and of course Mr. Hullet, waiting for us in the holding cells in chains. It did strike me as I was sitting beside him that I was either sitting with a serial killer or an innocent man. Both are an equally harrowing prospect as he has been in prison for the last 30 years. I have since heard that our DNA application has been rejected, so plan B will have to be put into action.

All Attorneys and students were obliged to attend certain lectures each week and one included a Victim Panel. They brought in three victims of crime to discuss their victim offender mediation process. Each came to tell their story of how they were affected by their crime and how they rebuilt their lives. One case study featured a woman called Jackie who had been shot in the head by two sixteen year olds who went to her house to commit a theft. They did not realize she was home. When, she walked in on them, they made up a story and left the house but one returned to kill her. He approached her from behind with a pillow and shot her in the head. Her son found her later. She was in intensive care for a long time and the bullet essentially paralysed her right hand side. Her speech was slurred, with limited movement of her right arm and leg. One boy received 80 years, the other 65 years. She visits them both (now 32) in prison regularly and gives them money. There was talk that she had fallen in love with one of them. One could say it was a successful victim offender reconciliation.

The second case study was the mother of a man who was

4 Professor Pete de Wind, Director Restorative Justice Project - http://law.wisc.edu/fjr/rjp/

shot in a bar late at night, 22 years ago. She wanted no part in the victim offender mediation process and discussed her reasons. The third was Mike, the brother of a man who was killed by a drunk driver. The woman offender was 42 and an alcoholic when she smashed into the side of the brother's car, crushing his entire right side. She was sentenced to 10 years. Mike began visiting her in prison over the years and they became friends. She has now been released and he calls her frequently to see how she is.

There is now an increasing focus on victims' rights and victim compensation throughout the US. I attended a meeting with the District Attorneys office at Dane County, where a unit had been set up to assist victims. The unit consisted of a team of psychologists/sociologists to counsel victims before, during and after the trial.

Even if the Innocence Project is successful and a convicted person is exonerated, there is very little compensation or support for such persons once they are freed. Current Wisconsin law awards $5000 for each year an exoneree is falsely incarcerated. It is capped at $25,000. Statistics show the average exoneree spends 13 years in prison with some being incarcerated for over 26 years. Furthermore, there is a difference in benefits between being paroled and exonerated. Offenders who are paroled are usually set up in a half way house, given some type of job and have a parole officer. A person who is exonerated is freed at the gates of a prison, with no support and family or friends may have either died or moved on. The Innocence Project is petitioning to have this legislation changed.

The Innocence Project is without a doubt a great feature of the American justice system and has to date exonerated 300 people who were wrongfully convicted. It has changed the landscape of criminal justice legislation in some States. The summer of 2012 was for me an eye opener and life changing experience and I wish to thank the Bar Council for giving me the opportunity to work with the Innocence Project. I would recommend it to anyone fortunate enough to be given this opportunity. I also want to thank the Wisconsin Innocence Project and all the attorneys and students, who could not have been nicer or more accommodating. ■

Challenging Times in Asylum and Immigration Judicial Review: Is The System Stretched To Breaking Point?

Sunniva McDonagh SC, Sinéad Costello BL and Imelda Kelly BL

Introduction

This article considers the functioning of judicial review in asylum and immigration in the context of the large volume of cases, the delays inherent in the system and the impact of such delays on applicants and respondents. These problems have been the subject of judicial comment by our Superior Courts, most recently by the Supreme Court in *Okunade v. Minister for Justice, Equality and Law Reform*.[1] If the objectives of judicial review are to: determine the "lawfulness of decision making in the public field"[2]; ensure finality and certainty at an early stage; and provide access to the courts and effective remedies, is the current system achieving those objectives? Given the problems highlighted below, it appears not. The current system is failing both applicants and respondents and this article seeks to recommend practical measures that may alleviate these pressures.

Functioning of Judicial Review in Asylum and Immigration

Section 5 of the Illegal Immigrants (Trafficking) Act 2000 provides the statutory framework for most asylum and immigration judicial review procedures. This requires leave to be on notice; imposes a 14-day time limit; and requires applicants to show substantial rather than arguable grounds. Consequently, the list is made up of pre and post-leave cases and currently there are approximately 1,400 cases awaiting a hearing date. A list to fix dates is held once every term and between six and eight cases are listed for hearing each week.[3] A chronological listing system is applied and each case must take its place in the queue unless it is given priority listing. Priority is granted on an *ad hoc* basis. There are cases in the list waiting to be heard for up to four years.

1 [2012] IESC 49.

2 *Rawson v. Minister for Defence* [2012] IESC 26, *per* Clarke J. at para. 6.1.

3 At the LTFD on 16 July 2012 there were 56 cases in the post-leave list. These were allocated a hearing date first. There were 1,350 cases in the non-priority pre-leave list, of which approximately 30 were allocated a hearing date. Therefore, in the current legal term approximately 80 cases only will be heard.

By contrast, in the ordinary judicial review list, once parties are ready to proceed the case will be granted a hearing date and currently the waiting period is approximately four months. Shorter cases are heard on Mondays. There is a judicial review list every day and several judges are listed for non-jury/judicial review business. This gives greater flexibility in allocating cases to judges as they become available. It also enables early listing of cases where other cases settle. Also, the registrar dealing with judicial review sits daily to hear Motions for Directions and is available to actively manage the list as changes occur.

Systemic Problems

A number of systemic problems are identifiable in the current system which undermine the objectives on which the statutory framework for judicial review in asylum and immigration cases is based. These include significant delays in the hearing of cases, multiple applications and pressures on limited court resources.

In upholding the constitutionality of s. 5, the Supreme Court stated, *inter alia*, that it served the legitimate public policy objective of establishing at an early stage legal certainty regarding administrative decisions and facilitated the proper and better administration and functioning of the asylum system. It did not constitute a denial of access to the courts nor restricted the fundamental right to bring proceedings pursuant to Article 40.4.2 challenging detention. The discretion of the High Court to extend time for good and sufficient reason was sufficiently wide to avoid injustice and enable persons who had shown reasonable diligence to have sufficient access to the courts. The requirement on the applicant to show substantial grounds before being granted leave was not so onerous either in itself or in conjunction with the 14-day time limit as to infringe the constitutional right of access to the courts or to fair procedures.[4] Unfortunately, given the extensive problems, it is clear that many of the public policy objectives which informed the Supreme Court's decision are not being achieved.

In *Okunade v. Minister for Justice, Equality and Law Reform*, Clarke J. speaking for a five-judge Supreme Court stated that:

> "…as the hearing of the application involves, in the majority of cases, opposition from the Minister to the grant of leave, it follows that the hearing requires a significant allocation of court time (far beyond that which would be required to deal with *ex parte* application) and thus requires the court to manage its list in such a way that adequate time is given for the filing, on behalf of the parties, of written submissions and in a manner which requires cases to be placed in a queue of those awaiting hearing until such time as court time becomes available. For all of those reasons the regime which derives from s. 5 of the 2000 Act leads inevitably to a reasonably significant wait before a contested leave application, in the cases to which that regime applies, can be heard."[5]

Clarke J. went on to highlight:

> "[p]art of the problems with which the High Court is faced in attempting to deal with the very large volume of judicial review challenges in the immigration field are statutory measures which have, as their inevitable effect, either the delay of applications or the necessity to hear additional applications arising out of the same set of facts. This is highly undesirable."[6]

Furthermore, in relation to the requirement for leave applications to be made on notice, he stated that this has "...a very real impact on the courts using up, as it does, a significant amount of court time… and the amount of court resources that have to be allocated is significantly increased by reason of the anomalies in that statutory structure…".[7]

In speaking of the court's role, he states:

> "It is my view that the system of applications for leave on notice (which was designed to weed out unmeritorious applications at an early stage) has had significant unintended consequences. The High Court list is full of cases awaiting a hearing of the leave application precisely because many of the leave applications are opposed thus requiring time for the filing of materials and submissions and, because of the necessarily longer hearing time required for opposed applications, a significant waiting list exists until a sufficient slot for such hearing can be provided. It seems to me that the concept of leave on notice, while well intended, has turned out to be counter-productive.
>
> 6.4 As part of the measures designed to ensure a speedy resolution of any issues arising out of a decision in the immigration process s. 5 of the 2000 Act requires… that applications for leave be initiated within 14 days of the decision under challenge save where the court considers that there are grounds for extension. However, the reality is that the leave on notice system has created such a backlog that it takes many months for applications for leave to be heard. An extremely short period for commencement and a very long period before even the leave application can be considered, hardly makes sense."[8]

Further problems are created by the need to allocate time to other interlocutory applications such as injunctions and discovery.

Under Practice Direction HC56[9] all matters relating to decisions, proceedings or measures in the areas of asylum, immigration, nationality and citizenship, including EU citizenship were allocated to the asylum and immigration judicial review list.[10] This risks overstretching a system that is already overburdened.

4 *The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360.
5 *Ibid* at para. 2.10.
6 *Ibid* at para. 2.11.
7 *Ibid* at para. 6.1.
8 *Ibid* at paras. 6.3 and 6.4.
9 19 December 2011, which came into operation on 11 January 2012.
10 The matters which are specified arise under the following legislative provisions: The Refugee Act 1996 as amended; The European

Additional burdens are placed on the court system where the court directs applicants to put respondents on notice in cases which are not subject to s. 5 of the 2000 Act, for example, subsidiary protection and citizenship decisions. These cases are not required to be on notice and could and should be dealt with *ex parte*. These cases are then added to the list to fix dates where they must await a pre-leave hearing date adding to the delays in the system and the attendant pressures on limited court resources. This substantially increases the costs of litigation for both applicants and respondents and it is questionable whether there is any benefit to the respondent to participate at this stage.

Various practices have developed on an *ad hoc* basis which may lead to divergences in approaches to the functioning of the list. For example, the practice of putting the respondent on notice in *ex parte* cases; the granting of priority listing; the transfer of certain cases into the ordinary judicial review list; and the designation of test cases. These have developed without any guidelines or Practice Directions to ensure consistency in approach.

Given the number of cases in asylum and immigration judicial review, there may be questions as to the consistency and standards of public administration and decision making. In *M v. Minister for Justice, Equality and Law Reform*[11] Advocate General Bot considered that a procedure for the examination of the applicant's subsidiary protection claim which took 21 months was "manifestly unreasonable".

Another difficulty within asylum and immigration judicial review is that counsel may represent one side only. This is because respondents require counsel acting for them to give an undertaking not to act for applicants. This divides colleagues on the basis of whom they represent and has a systemic polarising effect. It does not accord with the principle of an independent referral bar applying the cab-rank rule and does not foster a spirit of collegiality.[12] Other public bodies and officers such as the Director of Public Prosecutions are represented by independent solicitors and counsel who act for both sides.[13] If the justification for such an undertaking in respect of immigration is based on public policy considerations, similar considerations do not apply to the Refugee Appeals Tribunal or the Refugee Applications Commissioner, whose sole function is to determine refugee status in individual cases, with no wider policy making function.

Impacts

Some of the most important Constitutional, EU, ECHR and judicial review cases dealt with in the Superior Courts arise in asylum and immigration and raise fundamental human rights issues. The systemic problems which have been identified have a significant human cost. Many applicants suffer psychologically and physically from the unreasonable delays produced by the current system. The lack of certainty in their legal status means they cannot plan for their future. Many are in direct provision accommodation and cannot properly integrate into their local community or participate in employment or education. Problems of isolation are common.[14]These problems are particularly acute for those who are victims of persecution or torture, those with mental health difficulties, and other vulnerable applicants such as separated children. Research has shown that the longer the delays in the determination process, the greater the inconsistencies in the evidence of individuals with higher levels of Post-Traumatic Stress Disorder (PTSD) and depression. In essence, the more likely a person is to have suffered serious trauma, the greater the negative impact delays will have on them. In particular, Herlihy, Scragg and Turner have found that: "if discrepancies continue to be used as a criterion for regarding a case as lacking credibility, then asylum seekers who have post-traumatic stress at the time of their interviews are systematically more likely to be rejected the longer their application takes."[15]

The practical and legal situation of children in the

Communities (Eligibility for Protection) Regulations 2006; The Illegal Immigrants (Trafficking) Act 2000; The Immigration Acts 1999, 2003 and 2004; The Irish Nationality and Citizenship Acts 1956 to 2004; and The European Communities (Free Movement of Persons) Regulations 2006 and 2008.

11 Case C-277/11, (26 April 2012)

12 Writing extrajudicially on the culture of the independence of members of the Bar, Lord Steyn commented that the point was an institutional one based on grounds of constitutionalism. It arose in important cases where there are tensions between the liberty of the individual and the interest of the executive. He said that "[f]or my part I regard highly qualified, independent and courageous Bar as of central importance in our system." He further stated that "The independence of the Judiciary and of advocates is perhaps more important now than ever, because one of the great constitutional tasks of the Courts today is to control misuse of powers by Government ministers and departments…. Until now no Government minister has had and no Government has sought power to exercise ultimate control over the profession of advocacy in the courts." Lord Steyn, *The Role of the Bar, the Judge and the Jury: winds of change*, P.L. 1999, Spr, 51-63.

13 Other examples include the Information Commissioner, An Bord Pleanála, the Commission for Communications Regulation, the Commission for Aviation Regulation, the Competition Authority, and the Environmental Protection Agency.

14 In the Dáil debate on the Immigration Residence and Protection Bill 2010, the current Minister for Justice and Equality, Mr Alan Shatter TD, when an opposition Deputy, voiced serious criticism of the public administration of the current systems in relation to asylum and immigration matters, citing the need for fair, consistent, transparent and independent decision-making including an independent appeals system, the cost to the exchequer, the human cost of people being subject to unreasonable delays, while being unable to work or study and remaining in direct provision for this period, the impact on family reunification, and extreme delays in consideration of citizenship and long term residence applications. As regards the Bill itself, he highlighted the need for it to achieve balance between the rights of the executive and the need to ensure the protection of fundamental human rights, including under relevant European and international standards. The current Minister for Communications, Energy and Natural Resources Mr Pat Rabbitte TD, an opposition Deputy at the time, also referred to the human cost of delays and the need for an independent tribunal system (citing the UK as an example), and noted the differential negative impact on women, particularly arising from the direct provision system. See Dáil Debates on the Immigration Residence and Protection Bill 2010: Second Stage, 6 October 2010, available at http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2010100600010?opendocument

15 Herlihy, Scragg and Turner, *Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interviews study*, British Medical Journal, Vol. 324, 9 February 2002; Herlihy, Jobson and Turner, *Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum*, Applied Cognitive Psychology, 26: 661-676 (2012).

asylum and immigration processes requires consideration in their own right. Particular problems arise for children in the context of, for example, direct provision including: nutritional problems; lack of appropriate spaces for play and development; overcrowding; and disruption to their family life.[16] A consistent approach should be taken to the application of the principle of the best interests of the child in decisions affecting them. Article 42A of the Constitution, which specifically recognises the natural and imprescriptible rights of all children, will now have to be considered in relation to these children.

Another obvious consequence of the systemic failures in the asylum and immigration system is the financial cost to the exchequer in terms of long-term direct provision; litigation costs; court resources; and public service costs.

Perhaps less obviously, the cumulative effect of all of the problems identified may be such that they call into question whether judicial review is still an adequate and effective remedy in the context of asylum and immigration. It is clear that the asylum and immigration judicial review processes have not functioned in the manner which was envisaged by the Supreme Court in the Article 26 reference on *The Illegal Immigrants (Trafficking) Bill, 1999*. At the time of that decision, the Court held that s. 5 of the 2000 Act was such as to provide effective access to the courts. Where review is to a standard of reasonableness only, its effectiveness as a remedy under Irish constitutional law, EU law including the EU Charter of Fundamental Rights, and ECHR law remains to be definitively determined.

Suggested recommendations

The following practical measures are suggested to address the current problems:

1. Amalgamate the Asylum and Immigration judicial review list and the ordinary judicial review list into a single common judicial review list operating on the basis of the ordinary judicial review list. This could be run on a pilot or trial basis for a minimum period of one legal year and then assessed for effectiveness and efficiency.
2. Alternatively, have a separate asylum judicial review list dealing with cases against the Refugee Applications Commissioner and Refugee Appeals Tribunal, with immigration and other cases being dealt with in the ordinary judicial review list, both lists applying the ordinary judicial review list model.
3. Abolish the List To Fix Dates. This will enable parties to apply for a hearing date once pleadings are closed and the case is ready for hearing. This is the model used in the ordinary judicial review list.
4. To clear the backlog of cases, use the Personal Injuries case management system to randomly select cases to be listed for hearing. In this list the random selection is done by a registrar.
5. Assign more judges to hear cases and/or allow for flexibility to allocate cases to other judges who become available.
6. List more cases for hearing per week, on a back-up / reserve basis.
7. Designate a particular day for hearing shorter cases which practitioners certify can be disposed of in under 2 hours.
8. Use Order 84 r 24(2) to conduct telescoped hearings. This empowers the court to treat an application for leave as if it were the hearing of the substantive application for judicial review. Judicial guidelines should be developed to establish appropriate procedures for this practice.
9. Only direct the respondent to be put on notice in *ex parte* leave applications in exceptional cases, and, if necessary, develop criteria or guidelines to identify such cases.
10. Develop guidelines on the use and designation of test cases which can be utilised to clarify important points of law. However, it would be important to ensure that the rights of applicants to litigate their individual cases would not be unreasonably restricted. Furthermore, effective rights of appeal to the Supreme Court from designated test cases must be protected.
11. Allow for costs penalties or interest on costs where a respondent concedes or settles the case after it has been set down for hearing, and in the absence of new facts. There is a precedent for costs penalties to be awarded against applicants in the recent Practice Direction HC57.

Conclusion

The system for asylum and immigration judicial review established pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000 is stretched to breaking point. The landscape of asylum and immigration in Ireland has fundamentally changed in the intervening years since the Supreme Court's decision upholding the constitutionality of s. 5. The systemic delays are seriously affecting the rights of applicants and respondents to effective access to the courts, the early resolution of proceedings and in achieving finality and certainty in relation to these decisions. Legislative reform is necessary to address the fundamental structural deficiencies which exist. In the meantime, however, the courts and practitioners must creatively use the mechanisms at our disposal to alleviate the pressures within the current system for the benefit of both applicants and respondents. ■

16 Arnold, *State Sanctioned Child Poverty and Exclusion: The case of children in state accommodation for asylum seekers*, Irish Refugee Council (2012).

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 17, Issue 6, December 2012

A directory of legislation, articles and acquisitions received in the Law Library from the 13th October 2012 up to 16th November 2012
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Deirdre Lambe and Renate Ní Uigín, Law Library, Four Courts.

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Foreign award

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Financial Services Ombudsman

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legal consequences of decision required oral hearing – Whether documentary evidence sufficient to resolve complaint – Whether decision vitiated by serious error – Whether oral assurances of bank official could by legally binding – Whether holding of oral hearing consistent with informal and expeditious process – *Koczan v Financial Services Ombudsman* [2010] IEHC 407 (Unrep, Hogan J, 1/11/2010), *Square Capital Ltd v Financial Services Ombudsman* [2009] IEHC 407, [2010] 2 IR 514, *O'Hara v ACC Bank plc* [2011] IEHC 367 (Unrep, Charleton J, 7/10/2011), *J&E Davy t/a Davy v Financial Services Ombudsman* [2008] IEHC 256 (Unrep, Charleton J, 30/7/2008), *Ryan v Financial Services Ombudsman* (Unrep, MacMenamin J, 23/9/2011), *L'Estrange v Graucob* [1934] 2 KB 394, *Maguire v Ardagh* [2002] IESC 21, [2002] 1 IR 385, *Gallagher v Revenue Commissioners* [1995] 1 IR 55, *Dellway Investments Ltd v National Asset Management Agency* [2011] IESC 13 (Unrep, SC, 12/4/2011) and *Efe v Minister for Justice* [2011] IEHC 214, [2011] 2 IR 798 considered – *Molloy v Financial Services Ombudsman* (Unrep, MacMenamin J, 15/4/2011), *Caffrey v Financial Services Ombudsman* [2011] IEHC 285 (Unrep, Hedigan J, 12/7/2011), *Cagney v Financial Services Ombudsman* (Unrep, Hedigan J, 25/2/2011) and *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323 (Unrep, Finnegan J, 1/11/2006) distinguished – *Hyde v Financial Services Ombudsman* [2011] IEHC 422 (Unrep, Cross J, 16/11/2011) approved – Central Bank Act 1942 (No 22), ss 57BA, 57BC, 57BK, 57BX, 57CI, 57CL & 57CM – Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations 2005 (SI 195/2005) – Appeal allowed, complaint remitted for oral hearing (2011/22MCA – Hogan J – 14/12/2011) [2011] IEHC 454
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Dormant accounts (amendment) act 2012 (commencement) order 2012
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In re Ballymitty Supplies Stores Ltd (in liquidation)

Liquidation

Fraudulent preference – Insurance policy – Fire – Company premises leased from directors – Insurance monies payable to company – Insurance monies disbursed to directors personally – Whether insurance monies property of company or directors personally – Whether fraudulent preference – Discrete trial of issue – Whether disbursal of monies by company accountant flawed in principle – Whether insolvency of company taken into account – Whether reliable basis used for determining beneficial ownership of insurance monies – Whether reliable basis for allocation of fixtures and fittings claim to directors personally – Whether claim for business interruption could be related to rent lost by directors personally – Whether invalid preference of creditor over unsecured creditors – Whether continued existence of company contributed to payout of insurance monies – Companies Act 1963 (No 33), s 286 – Discrete issue determined (2011/41COS – Ryan J – 29/11/2011) [2011] IEHC 442
In re Gerry Bredin Hardward Ltd (in liquidation)

Liquidation

Voluntary dissolution – Contingent creditor – Restoration of company – Petition – Whether dissolution should be declared void – Test to be applied – Plenary proceedings – Claim for damages – Trespass to property – Whether dissolution should be declared void or company restored to allow petitioner to pursue existing plenary claim for damages – *Locus standi* – Whether petitioner "person who appears to be interested" – Whether plenary claim neither frivolous nor vexatious and being *bona fide* maintained – Criteria to be applied in exercise of court's discretion – Whether criteria complied with – Whether application in time – Whether fair and equitable for court to exercise discretion – Whether exercise of court's discretion should maintain balance of justice – Whether legitimate purpose in seeking to declare dissolution void – Whether pursuit of claim or initiation of new proceedings constituted legitimate purpose – Jurisdiction – Whether appropriate for court to express view on substantive issues in plenary proceedings – Whether discretion of court broadened by statute – Whether statutory provision empowered court to give ancillary directions – Whether decision could be based on proposition that petitioner would be entitled to pursue plenary proceedings – Limitation of actions – Whether appropriate for court to express view on whether plenary proceedings statute barred – Whether appropriate for court to express view on whether petitioner sued correct defendant in plenary proceedings – Whether appropriate for court to express view on whether respondent stopped from relying on Statute of Limitations – Costs – Whether petitioner entitled to costs where dissolution declared void – Whether possible to assess whether petitioner would be successful in plenary proceedings – Whether costs of petition should be reserved – Whether terms could be imposed on petitioner where dissolution declared void – Whether respondent entitled to costs of petition if plenary proceedings unsuccessful – Whether appropriate to allow petitioner to nominate new liquidator – *In re Deauville Communications Worldwide Ltd* [2002] 2 IR 32 applied – *In re Amantiss Enterprises Ltd* [2000] 2 ILRM 177, *In re Philip Powis Ltd* [1998] 1 BCLC 440, *Morris v Harris* [1927] AC 252, *Foster Yates & Thom Ltd v. H W Edgehill Equipment Ltd* (1978) 122 SJ 860, *Smith v White Knight Laundry Ltd* [2001] 3 All ER 862 approved – *In re Philip Powis Ltd* [1997] 2 BCLC 481, *In Re Mixhurst Ltd* [1994] 2 BLCL 19, *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd* [2005] EWCA Civ 1408, [2006] 1 QB 808 and *In re General Rolling Stock Co* (1872) 7 Ch App 646 distinguished – Companies Act 1963 (No 33), ss 310 & 311 – Companies (Amendment) Act 1982 (No 10), s 12 & 12B – Dissolution declared void (2011/330COS – Laffoy J – 5/12/2011) [2011] IEHC 457
In re Walsh Maguire & O'Shea Ltd

Minority

Oppression – Petition claiming oppression and disregard of interests – Valuation of shareholding on court ordered sale – Whether value to be discounted because minority shareholding – Appropriate date for purpose of valuation – *In re Greenore Trading Co Ltd* [1980] ILRM94 followed; *Irish Press plc v Ingersoll Irish Publications Ltd* [1995] 2 IR 175 distinguished; *In re Bird Precision Bellows Ltd* [1984] Ch 419, *Strahan v Wilcock* [2006] EWCA Civ 13, [2006] 2 BCLC 555, *Irvine v Irvine (No 2)* [2006] EWHC Civ 583, [2007] 1 BCLC 445 and *Fowler v Gruber* [2009] CSOH 36, [2010] 1 BCLC 563 approved – Companies Act 1963 (No 33), s 205 – Relief granted (2010/162Cos – Laffoy J – 29/7/2011) [2011] IEHC 517
Re Skytours Travel Ltd: Doyle v Bergin

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Petition – Limited company – Sole member – Share transfer agreement – Increase of authorised share capital – Validation of invalid issue of shares – Test to be applied – Memorandum of association – Whether memorandum of association gave power to alter share capital – Whether purported issue of share capital invalid – Whether creation by implication of authorised share capital – Whether petitioner was appropriate applicant for validation – Whether validation would be just and equitable – Motivation of petitioner – Whether objective of increase of share capital for restructuring of group of companies – Whether objective of increase of share capital was to gain tax advantage – Whether prejudice to any third party – Whether prejudice to creditors – Whether prejudice to Revenue Commissioners – Whether public policy considerations – Whether invalid issue of share due to oversight – Whether necessary to give notice to any party – *In re Sugar Distributors Ltd* [1995] 2 IR 194 applied – *In re Farnell Electronic Components Pty Ltd* (1997) 25 ACSR 345, *Moran v Moranco Enterprises Pty Ltd* (1996) 22 ACSR 65, *In Re Onslow Salt Pty Ltd* (2003) 45 ACSR 322 and *Millheim v Barewa Oil and Mining NL* [1971] W.A.R. 65 approved – Companies Act 1963 (No 33), s 68 – Orders granted (2011/645COS – Laffoy J – 24/11/2011) [2011] IEHC 455
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CONFLICT OF LAWS

Brussels Regulation

Jurisdiction – European Union law – Commercial litigation – Security – Share pledge agreements – Related proceedings – Whether court had jurisdiction to hear proceedings where proceedings pending in Cyprus – Stay – Whether court should stay proceedings pending determination of proceedings pending in Cyprus – Jurisdiction clauses – Whether jurisdiction clauses non exclusive – Whether prior existence of Irish proceedings, where second proceedings commenced in Cyprus, conferred jurisdiction on Irish courts to hear third proceedings – Whether question should be referred to Court of Justice of the European Union – Whether court should grant protective measures pending determination of Cypriot proceedings – *Bosphorus v Minister for Transport* [1997] 2 IR 1, *Radio Limerick One Ltd v Independent Radio and Television Commission* [1997] 2 IR 291, *Popely v Popely* [2006] 4 IR 356, *The Tatry (Case C-406/92)* [1994] ECR I-5439, *Gonzalez v Mayer* [2004] 3 IR 326, *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32 followed, *Masri v Consolidated Contractors International Company SAL* [2011] EWHC 1780 (Comm), (Unrep, Burton J, 13/7/2011) distinguished – Convention on Jurisdiction and Enforcement of Judgments in Civil

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Anglo Irish Bank Corporation plc v Quinn Investments Sweden AB

Jurisdiction

Children – Parental responsibility – Recognition – Whether recognition manifestly contrary to public policy of State in which recognition sought – *Re: S (Brussels II: Recognition: Best Interests of Child) (No 1)* [2004] 1 FLR 571 approved – Council Regulation (EC) No 2201/2003, arts 21 and 23 – Recognition order granted (2011/10127P – Finlay Geoghegan J – 16/11/2011) [2011] IEHC 468
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CONSTITUTIONAL LAW

Fair procedures

Personal rights – Property rights – *Audi alteram partem* –Money laundering – Proceeds of crime – Garda power to direct freezing of bank account – Whether statutory provision invalid having regard to provisions of Constitution – Whether disproportionate breach of constitutional rights – Whether safeguards protecting constitutional rights – *Heaney v Ireland* [1996] 1 IR 580, *Blehein v Minister for Health* [2008] IESC 40, [2009] 1 IR 275 and *DK v Crowley* [2002] 2 IR 744 applied; *O'Mahony v Melia* [1989] IR 335 and *Hortensius Ltd v Bishop* [1989] ILRM 294 followed; *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317, *Burns v Bank of Ireland* [2007] IEHC 318, [2008] 1 IR 762 *McIvenna v Ferris and Green* [1955] IR 318, *Namlooze Venootschap de Faam v Dorset Manufacturing Company Limited* [1949] IR 203 and *Whitecross Potatoes (International) Ltd v Coyle* [1978] ILRM 31 considered – Criminal Justice Act 1994 (No 15), s 31 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), s 21 – Constitution of Ireland 1937, Articles 40.3 and 43 – Declaration of unconstitutionality granted (2008/6170P – Laffoy J – 4/10/2010) [2010] IEHC 525
Vehicle Tech Ltd v Allied Irish Bank plc and Ireland

Legality of detention

Arrest – Legality – Deportation order – Intention to avoid removal from State – Notice of detention – Deported effected – Deportation flight refused permission to land – Applicant returned to State – Whether return involuntary – Re-arrest – Detention pending deportation – Reasonable cause – Whether opinion of Garda reasonable formed – Alternative bases – Whether detention order invalidated where one of two bases invalid – Whether second notice of detention required to refer to period of detention on foot of first notice – Whether governor could ascertain information from own records – Whether eight week limit on detention calculated in aggregate – Whether eight week limit on detention restarted – *Okoroafor v Governor of Cloverhill Prison* [2003] IEHC 62, (Unrep, Herbert J, 30/9/2003) followed – Immigration Act 1999 (No 22), ss 3(3), 5(1) and (2), Constitution of Ireland 1937, Article 40.4.2° – Relief refused (2011/1562SS – Peart J – 4/8/2011) [2011] IEHC 347
Oguntola v Governor of Cloverhill Prison

Legality of detention

Arrest – Legality – Deportation order – Intention to avoid removal from State – Reasonable cause – Doubt about country of origin of applicant – Credibility of applicant – Whether arrest for purpose of effecting deportation order – Detention pending deportation – Whether detention for purpose of ensuring deportation from State – Whether deportation likely to be effected within eight week period – *Gutrani v Governor of Wheatfield Prison* (Unrep, Flood J, 19/2/1993) and *BFO v Governor of Dóchas Centre* [2005] 2 IR 1 followed – *Walshe v Fennessy* [2005] IESC 51, [2005] 3 IR 516 and *In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 considered – Immigration Act 1999 (No 22), ss 3(1A) and 5(1) – Constitution of Ireland 1937, Article 40.4.2° – Release directed (2011/1478SS – Hogan J – 1/8/2011) [2011] IEHC 341
Om v Governor of Cloverhill Prison

Legality of detention

Arrest – Legality – Detention – Defect in warrant – Grant of order of release – Delay in releasing applicant from custody — Whether governor of prison entitled to delay release pending confirmation in writing – Re-arrest – Whether re-arrest invalidated by unlawful detention – Whether malice, co ordination or ulterior motive on part of prison authorities and an Garda Síochána – Whether unlawful detention was for improper purpose – Whether concluded intention to remove applicant from State – Whether deportation likely to be effected within eight week period – Whether travel document could be obtained within eight week period – Principle of *refoulement* – Country of origin of applicant – Whether applicant originated from Nigeria or Sierra Leone – Whether Minister should conduct *refoulement* assessment – Whether *refoulement* assessment should be conducted despite failure of applicant to raise concerns – Whether refoulement assessment could be conducted within eight week period – *The State (Trimbole) v Governor of Mountjoy Prison* [1985] IR 550, *Oladpo v Governor of Cloverhill Prison* [2009] IESC 42, [2009] 2 ILRM 166 and *Om v Governor of Cloverhill Prison* [2011] IEHC 341, (Unrep, Hogan J, 1/8/2011) distinguished – *Walsh v Ó Buachalla* [1991] 1 IR 56 considered – Immigration Act 2003 (No 26), s 5(2) – Constitution of Ireland 1937, Article 40.4.2° – Relief refused (2011/1747SS – Hogan J – 5/9/2011) [2011] IEHC 351
Ejerenwa v Governor of Cloverhill Prison

Legality of detention

Bail – Surety – Applicant charged with working without work permit – District Court – Guilty plea – No previous convictions – Sentence nine months imprisonment – Application for approval of surety refused on basis surety as former employer would been aware applicant was working illegally – Second surety – No garda objection – Refusal on same basis – Relationship of surety to accused factor in favour of approval – No evidence heard by district judge despite offer that surety not aware of illegality – No cause shown by respondent – Bail Act 1997 (No 16), s 7 – Constitution of Ireland 1937, art 40 – Release ordered (2011/921SS – Kearns P – 13/5/2011) [2011] IEHC 353
Li (J) v Governor of Wheatfield Prison

Legality of detention

Failure to produce identity documentation – Defects in charge sheet – Violation of Constitution – Non-existent and unconstitutional offence – Failure to apply to amend charge – Whether applicant detained in accordance with law – Whether complaint disclosed offence known to law – *Dokie v DPP* [2011] IEHC 110, (Unrep, Kearns P, 25/3/2011) followed; *King v Attorney General* [1981] IR 233; *Attorney General (McDonnell) v Higgins* [1964] IR 385 and *Director of Public Prosecutions (King) v Tallon* [2006] IEHC 232, [2007] 2 IR 230 considered ; *State (Byrne) v Frawley* [1978] IR 88, *A v Governor of Arbour Hill Prison* [2006] IESC 44, [2006] 4 IR 88 and *Corrigan v Irish Land Commission* [1977] IR 317 distinguished – Immigration Act 2004 (No 1), ss 12 and 13 – Civil Law (Miscellaneous Provisions) Act 2011 (No 23), s 34 – Rules of the Superior Courts 1986 (SI 15/1986), O 38 – Constitution of Ireland 1937, Arts 38.1 and 40.4.2 – Applicant released (2011/2009 – Hogan J – 6/10/2011) [2011] IEHC 372
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Legality of detention

Personal rights – Inquiry – Jurisdiction of court – Convicted prisoner – Minimum grounds for remedy – Prison conditions – Separation of powers – Whether breach of constitutional rights having occurred – Whether breach of constitutional rights sufficiently serious as to vitiate lawfulness of detention – *The State (McDonagh) v Frawley* [1978] 1 IR 131 approved; *Brennan v Governor of Mountjoy Prison* [1999] 1 ILRM 190, *N v Health Service Executive* [2006] IESC 60, [2006] 4 IR 374 considered; *The State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 82 and *JH v Russell* [2007] IEHC 7, [2007] 4 IR 242 approved – Constitution of Ireland 1937, Article 40 – Relief refused (2011/1125SS – Hogan J – 12/6/2011) [2011] IEHC 235
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Temporary release – Deportation – Whether lawful to detain after deportation fails through no fault of prisoner – Whether breach of temporary release order – Whether arrested on return to State after aborted deportation – Whether still detained pending deportation – *The People v Murray* [1977] I.R. 360 applied – Criminal Justice Act 1960 (No 27), ss 6 and 7 – Air Navigation and Transport Act 1973 (No 29), ss 1, 2, 3, 5, 6, 7, 8, 9 and 11 – Immigration Act 1999 (No 22), s 5 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 10 – Immigration Act 2004 (No 1), s 4 – Constitution of Ireland 1937, Article 40.4 – Detention found unlawful (2011/1423SS – Charleton J – 26/7/2011) [2011] IEHC 336
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Desmond Murtagh Construction Ltd (in receivership) v Hannon

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Indemnity – Terms and conditions – Variation of terms – Implied terms – Custom and practice within industry – Merchantable quality – Whether contract included plaintiff's purchase order conditions or defendant's terms and conditions – Whether each delivery formed distinct contract – Whether documents formed part of background to formation of contract – Whether initial contract varied – Whether party knew or reasonable man expected document to contain contractual conditions – Whether document purported to have contractual effect – Whether liability limited implied by custom – Whether implied condition of merchantable quality – *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805; *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Grogan v Robin Meredith Plant Hire* [1996] CLC 1127; *Bahamas Oil Refining Co v Kristiansands Tankrederie A/S (The Polyduke)* [1978] 1 Lloyd's Rep 211; *Continental Tyre and Rubber Company Ltd v Trunk Taylor Company Ltd* [1985] SC 163; *Circle Freight v Medeast* [1988] 2 Lloyd's Rep 427; *Vitol SA v Phibro Energy AG, the Maturaki* [1990] 2 Lloyd's Rep 84; *O'Reilly v Irish Press* [1937] 71 ILTR 194; *McCarthy v HSE* [2010] IEHC 75, (Unrep, HC, Hedigan J, 19/3/2010) and *James Elliot Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 269, (Unrep, HC, Charleton J, 25/5/2011) considered – Sale of Goods Act 1893 (56 & 57 Vict), s 14(2) – Sale of Goods and Supply of Services Act 1980 (No 16), s 10 – Declarations made (2009/2593P and 2009/21COM – Finlay Geoghegan J – 4/10/2011) [2011] IEHC 364
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COURTS

Bias

Fair procedures – Constitutional justice – Prior relationship of legal advisor and client between judge and accused – Failure to raise alleged procedural unfairness prior to hearing – Discretion to grant relief – Whether prior relationship of legal advisor and client would disqualify judge – Whether failure to make complaint prior to hearing disentitled applicant from relief – Whether delay in issuing proceedings disentitled applicant from relief – Whether appeal was appropriate remedy – Whether decision of judge not to recuse self was error within jurisdiction – *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412 applied – Orders quashed (2010/960JR – Birmingham J – 26/10/2011) [2011] IEHC 516
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Admissibility – Judges' Rules – Breach of Judges' Rules – Caution – Voir dire – Judge's charge – Adequacy of charge – Assessment of evidence – Circumstantial evidence – Inferences – Whether admitting comment constituted error of law – Whether reference to voir dire affected jury – Whether accused prejudiced – Whether appropriate warning given to jury – *Mitchell v The Queen* [1998] AC 695 and *R v Exall* (1866) 4 F & F 922 considered – Leave to appeal refused

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Admissibility – Treatment of persons in custody – Discretion – Whether breach of regulations where prisoner on phone call when given information – Whether information given orally in meaningful way – Whether meaningful compliance with regulations – Whether discretion should be exercised to exclude evidence in s 17 certificate – Whether any prejudice caused by breach – *Walsh v District Justice O'Buachalla* [1991] 1 IR 56; *Directive of Public Prosecutions v Spratt* [1995] 1 IR 585; *The People (Director of Public Prosecutions) v Diver* [2005] IESC 57, [2005] 3 IR 270 and *Director of Public Prosecutions (Travers) v Brennan* [1998] 4 IR 67 considered – Courts (Supplemental Provisions) Act 1961 (No 39), s 52(1) – Road Traffic Act 1961 (No 24), s 49 – Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987 (SI 119/1987), art 8(1) – Question remitted back to District Judge (2010/2365SS – Hedigan J – 9/6/2011) [2011] IEHC 236
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Disclosure

Third party funding – Maintenance – Champerty – Costs – Whether third party funding of litigation lawful – Whether costs can be awarded against third party funder instead of impecunious party – Whether disclosure of details of third party funding can be ordered prior to judgment – *O'Keeffe v Scales* [1998] 1 IR 290 applied; *Moorview Developments Ltd v First Active plc* [2011] IEHC 117, (Unrep, Clarke J, 16/3/2011) followed; *Cullen v Wicklow County Manager* [2010] IESC 49, [2011] 1 IR 152 considered – *Abraham v Thompson* [1997] 4 All ER 362, *Chartspike Pty Ltd v Chahoud* [2001] NSWSC 585, (Unrep, SC of NSWales, 3/7/2001), *Hill v. Archbold* [1968] 1 QB 686, *Merchantbridge & Co Ltd v Safron General Partner 1 Ltd.* [2011] EWHC 1524 (Comm), (Unrep, HC of England and Wales, Judge Mackie QC, 15/6/2011), *Raiffeisen Zentral Bank Ostereich Ag v Crosseas Shipping Ltd* [2003] EWHC 1381 (Comm), (Unrep, HC of England and Wales, Morison J, 13/6/2003) and *Saunders v Haughton* [2009] NZCA 610, [2010] 3 NZLR 331 distinguished – Disclosure refused on conditions (2008/10983P – Clarke J – 20/9/2011) [2011] IEHC 357
Thema International Fund Ltd v HSBS Institutional Trust Services (Ireland) Ltd

Discovery

Time for making of discovery – Extension of time – Rolling discovery – Electronic discovery – Discovery of documents held abroad – Whether balance struck between need for case to come to court with reasonable expedition and costs that might have to be incurred by greater expedition – Whether appropriate preparatory steps taken in advance of order for discovery – Whether retrieval, uploading and de-duplication of electronic documents carried out in advance – Whether steps taken to ensure timely release of documents held abroad – Whether fact that one party does not have resources for rolling discovery should deprive others of advantage of same – *Cooper Flynn v Radio Telefís Éireann* [2000] 3 IR 344, *Framus Ltd v CRH plc* [2004] IESC 25, [2004] 2 IR 20 and *Telefonica O2 Ireland Ltd v Commission for Communications Regulation* [2011] IEHC 265, (Unrep, Clarke J, 30/6/2011) considered – Directions given for making of discovery (2009/7819P – Clarke J – 17/10/2011) [2011] IEHC 496
Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Ltd

Dismissal of proceedings

Delay – Application to dismiss for delay and want of prosecution – Alleged misconduct by members of An Garda Síochána – Plaintiff witness before Tribunal of Inquiry – Proceedings issued after expiry of statute of limitations in relation to part of reliefs – Delay in serving summons – Refusal to consent to later delivery of statement of claim – Delay post commencement – Pre-commencement delay – Nature of claim – Pre-commencement delay placing onus on Plaintiff to progress without further delay – Inordinate delay – Non-litigation factors relevant to excusability of delay – Insufficiency of evidence to excuse delay – Whether defendant acquiesced – Balance of justice – Whether defendants established prejudice – *Desmond v MGN Limited* [2008] IESC 56, [2009] 1 IR 737, *McBrearty v North Western Health Board* [2010] IESC 27, (Unrep, SC, 10/5/2010), *Primor Plc v Stokes, Kennedy, Crowley* [1996] 2 IR 459 and *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510 applied – *Truck and Machinery Sales Ltd v General Accident Fire and Life Assurance Corporation plc* (Unrep, Geoghegan J, 12/11/1999) f*ollowed* – *O'C(J) v DPP* [2000] 3 IR 478 considered – Relief refused (2005/1261P – Herbert J – 12/11/2010) [2010] IEHC 526
McGlinchey v McMahon

Dismissal of proceedings

Failure to disclose cause of action – Lack of contractual relationship – Court's inherent jurisdiction – Abuse of process – Moot issues which disclose no material benefit – Representative action – Whether pleadings disclosed no cause of action or were frivolous and vexatious and an abuse of process – Whether reliefs were moot or conferred no material benefit – Whether proceedings should be struck out pursuant to rules or inherent jurisdiction – Whether proceedings bound to fail – Whether contractual nexis – Whether authority to sue in representative capacity – *Sun Fat Chan v Osseous Ltd* [1992] 1 IR 425; *McSorley v O'Mahony* (Unrep, Costello J, 6/11/1996); *Barry v Buckley* [1981] IR 306 and *Modhal v British Athletic Federation Ltd* [2002] 1 WLR 1192 considered – Civil Liability Act 1961 (No 41), s 18(1)(b) – Rules of the Superior Courts 1986 (SI 15/1986), O 15, r 9 and O 19, r 28 – Proceedings dismissed (2006/2926P – Laffoy J – 7/6/2011) [2011] IEHC 245
Conway v Irish Tug of War Association

Garnishee

Solicitors – Fees – Professional services – Judgment order – Personal injuries litigation – Settlement of proceedings – Order of garnishee on settlement monies – Conditional order of garnishee – Service of conditional order of garnishee – Appeal of judgment – Appeal of order deeming service good – Final order of garnishee – Stay – Application to set aside final order of garnishee – Principle of finality – Allegation of concealment of material facts – Allegation of fraud – Whether failure of plaintiff to refer to agreement with garnishee constituted fraud – Health of defendant – Capacity of defendant to represent self – Enforcement of judgment – Judgment mortgage – Identity of defendant – Intention of trial judge – Interest – Whether interest should attach to monies garnished – Whether final order of garnishee should be set aside – *Talbot v McCann Fitzgerald Solicitors* [2009] IESC 25, (Unrep, SC, 26/3/2009) applied in part – *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412, *Kenny v Trinity College* [2007] IESC 42, [2008] 2 IR 40, *In re Greendale Developments Ltd (No 3)* [2000] 2 IR 514, *Belville Holdings Ltd v Revenue Commissioners* [1994] 1 ILRM 29 and *Bambrick v Cobley* [2005] IEHC 43, [2006] 1 ILRM 81 considered – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50) – Application refused (2009/20MCA, McCarthy J, 29/7/2011) [2011] IEHC 358
Hackett (t/a William Hackett & Co Solicitors) v Roche

Limitation of actions

Misrepresentation and breach of contract – Accrual of cause of action – Contingent liability – Damage – Function of Financial Services Ombudsman – Issue estoppel – Additional claim – Abuse of litigation – Whether seconds plaintiff's claim statute barred – Whether damage suffered immediately upon misrepresentation – Whether first plaintiff's claim already determined – Whether bound by decision of Financial Services Ombudsman – Whether entitlement to re-litigate – Whether issue could have been raised in previous proceedings – *Ulster Bank Investment Funds Ltd v McCarren* [2006] IEHC 323, (Unrep, HC, Finnegan P, 1/11/2006); *Square Capital Ltd v Financial Services Ombudsman* [2009] IEHC 407, [2010] 2 IR 514; *Hayes v Financial Services Ombudsman* (HC, MacMenamin J, 3/11/2008); *Murray v Trustees and Administrators of the Irish Airlines (General Employees) Superannuation Scheme* [2007] IEHC 27, (Unrep, HC, Kelly J, 25/1/2007); *Doherty v South Dublin County Council (No 2)* [2007] IEHC 4, [2007] 2 IR 696; *Carroll v Ryan* [2003] 1 IR 309; *A(A) v Medial Council* [2003] 4 IR 302; *Arklow Holdings Ltd v An Bord Pleanála* [2011] IESC 29; *Read v Brown* (1888) 22 QBD 128; *Hegarty v O'Loughran* [1990] 1 IR 148; *Irish Equine Foundation Ltd v Robinson* [1999] 2 IR 442; *M(H) v HSE* [2011] IEHC 339, (Unrep, HC, Charleton J, 20/7/2011); *Murphy v McInerney Construction Ltd* [2008] IEHC 323, (Unrep, HC, Dunne J, 22/10/2008); *Moore (DW) & Co Ltd v Ferrier* [1988] 1 WLR 267; *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384; *Forster v Outred & Co* 1982] 1 WLR 86; *Darby v Shanley* [2009] IEHC 459, (Unrep, HC, Irvine J, 16/10/2009); *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863, [2009] Bus LR 42; *Bell v Peter Browne & Co* [1990] 2 QB 495; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 and *Law Society v Sephton* [2006] UKHL 22, [2006] 1 AC 543 considered – Statute of Limitations 1957 (No 6), s 11(1)(a) – Central Bank Act 1942 (No 22), s 57 – Central Bank and Financial Services Authority of Ireland Act 2004 (No 21), s 16 – Application granted against first plaintiff and refused against second plaintiff (2010/1804P & 2010/5537P – Charleton J – 7/10/2011) [2011] IEHC 367
O'Hara and Gallagher v ACC Bank plc

Limitation of actions

Personal injuries – Personal Injuries Assessment Board – Time limits – Date of making of application – Date of completion of application – Date of authorisation – Period of time to be disregarded – Date of knowledge – Whether proceedings statute barred – Whether relevant date of authorisation date of issue or date of receipt – Whether date of knowledge of claim was date of accident – Whether claim made on transmission of relevant documents or acknowledgement of receipt – Whether statutory instrument inconsistent with statute – *Frescati Estates Ltd v Walker* [1975] 1 IR 177 applied – Statute of Limitations (Amendment) Act 1991 (No 18), ss 2 & 3 – Civil Liability and Courts Act 2004 (No 31), s 7 – Personal Injuries Assessment Board Act 2003 (No 46), s 50 – Personal Injuries Assessment Board Rules 2004 (SI 219/2004), r 3 – Limitation period determined (2010/2253P – White J – 23/11/2011) [2011] IEHC 448
Kiernan v J. Brunkard Electrical Ltd

Settlement

Notice indemnity and contribution – Claim of harassment – First defendant employed by second defendant – Vicarious liability

– Second defendant settled case with plaintiff – Whether evidence adduced by second defendant of liability of first defendant to plaintiff – Whether settlement reasonable – Whether second defendant entitled to order of indemnity against first defendant – Finding first defendant acted with malice towards plaintiff – Misfeasance of public office – Indemnity established – Civil Liability Act 1961 (No 41), s 11 – Sum paid in settlement recovered and indemnity in respect of costs incurred in defending proceedings granted (2006/3876P – Clarke – 13/5/2011) [2011] IEHC 270
McAuliffe v O'Dwyer and Minister for Justice

Summary judgment

Banking – Loan – Arguable defence – Test to be applied – Whether fair of reasonable probability of real or *bona fide* defence – Whether loan agreement was non recourse against defendants personally – Whether loan agreement required bank to first recover monies from development lands – Whether conduct of bank led defendants to believe that demand for repayment would not be made provided interest payments continued – Whether bank wrongfully withdrew money from interest fund – Whether bank collected excessive interest – Whether loan given to defendants jointly and severally – Whether proposed defence credible – *Aer Rianta v Ryanair* [2001] IESC 6, [2001] 4 IR 607 and *Harrisrange Ltd v Duncan* [2002] IEHC 14, [2003] 4 IR 1 applied – Summary judgment granted (2011/3116S – Ryan J – 9/12/2011) [2011] IEHC 456
Danske Bank A/S t/a National Irish Bank v Feeley

Summary judgment

Guarantee – Arguable defence – Set off or counterclaim – Test to be applied – Whether fair of reasonable probability of real or *bona fide* defence – Whether counterclaim gave rise to equitable set off – Whether counterclaim arose from same facts as primary claim – Whether independent claim – Execution of judgment – Stay – Whether stay on judgment should be granted if counterclaim arose from different facts as primary claim – Contract – Loan of money – Whether valid contract concluded – Whether alleged contract vague or uncertain – Whether counterclaim of principle debtor actionable by guarantor – *Danske Bank A/S t/a National Irish Bank v Durkan New Homes* [2010] IESC 22 (Unrep, SC, 22/4/2010), *Bank of Ireland v Walsh* [2009] IEHC 220 (Unrep, Finlay Geoghegan J, 8/5/2009), *Harrisrange Ltd v Duncan* [2002] IEHC 14, [2003] 4 IR 1, *Moohan v S&R Motors (Donegal) Ltd* [2007] IEHC 435, [2008] 3 IR 650 and *Prendergast v Biddle* (Unrep, SC, 31/7/1975) approved – Summary judgment granted (2011/2892S – Kelly J – 21/12/2011) [2011] IEHC 463
Bank of Scotland plc v Mansfield

Summary judgment

Guarantee – Indemnity – Arguable defence – Whether any defence – Bankruptcy – Defendant declared bankrupt in Northern Ireland – Application to set aside declaration of bankruptcy in Northern Ireland – Adjournment – Whether granting of summary judgment would impermissibly interfere with jurisdiction of High Court of Justice of Northern Ireland – Whether granting of summary judgment would disadvantage defendant – Whether granting of adjournment would disadvantage plaintiff – Whether granting of summary judgment could be utilised as basis for subsequent bankruptcy proceedings – Whether court should extend courtesy to Official Receiver in granting adjournment – *Danske Bank A/S t/a National Irish Bank v Durkan New Homes* [2010] IESC 22 (Unrep, SC, 22/4/2010) applied – *Harrahill v Cuddy* (Unrep, SC, 20/2/2009) considered – Council Regulation (EC) No 1346/2000 on insolvency proceedings, Articles 2 &3 – Summary judgment granted in part, balance adjourned (2011/4510S, 2011/4511S & 2011/4513S – Kelly J – 23/11/2011) [2011] IEHC 428
Irish Bank Resolution Corporation Ltd v Quinn

Third party procedure

Concurrent wrongdoer – Contribution – Damages – Apportionment of liability – Fault – Test to be applied – Whether liability to be apportioned based on blameworthiness only – Whether court could consider causation in apportionment of liability – Whether court could consider financial circumstances of wrongdoers in apportionment of liability – Whether causal effect of some relevance – Fraud – Whether reasonable to refrain from pleading fraud at time of issue of third party proceedings – Whether application to amend pleadings should have been made – Whether evidence could have been tendered to displace or mitigate allegation of fraud – Whether too late in proceedings to allege fraud – Whether significantly unfair – Whether court had already considered actions and inactions of defendant in determining quantum of damages – Whether gradation of degrees of blameworthiness – Whether breach of undertaking more serious than negligent act – Whether beyond mere inadvertence or minor error – Whether third party deliberately put himself in a position where he knowingly could not comply with undertaking – Whether conscious and deliberate – *Patterson v Murphy* [1978] ILRM 85, *Iarnród Éireann v Ireland* [1996] 3 IR 321 followed – *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 and *Furmedge v Chester-Le-Street District Council* [2011] EWHC 1226 (QB) (Unrep, Foskett J, 16/5/2011) not followed – *ACC Bank plc v Johnston p/a Brian Johnston & Co* [2010] IEHC 236, [2010] 4 IR 605, *ACC Bank plc v Johnston p/a Brian Johnston & Co* [2011] IEHC 108 (Unrep, Clarke J, 4/3/2011), *ACC Bank v Johnston p/a Brian Johnston & Co* [2011] IEHC 376 (Unrep, Clarke J, 22/9/2011) and *ICDL GCC Foundation FZ-LLC v European Computer Driving Licence Foundation Ltd* [2011] IEHC 343 (Unrep, Clarke J, 4/8/2011) – Civil Liability Act 1961 (No 41), s 21 – Liability apportioned (2008/10559P – Clarke J – 9/12/2011) [2011] IEHC 501
ACC Bank plc v Johnston p/a Brian Johnston & Co v Traynor & Mallon

Trial

Personal injuries – Different modes of trial – Separation of issues of liability and *quantum* – Test to be applied – Whether reasonable, convenient or just to separate issues – Whether requirement of special complexity or numerous defendants – Whether time and costs would be saved – Whether medical evidence could have impact on liability issue – Rules of the Superior Courts 1986 (SI 15/1986), O 36, r 9 – Separate trial ordered (2009/8910P – Ryan J – 5/12/11) [2011] IEHC 449
Burke v McKenna

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Article

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Murphy, Colin
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PROBATE

Administration of estates

Circuit Court appeal – Administration of registered land – Injunction directing defendant to vacate subject to compensation for work done – Siblings – Father dying intestate and as registered owner of property – Mother personal representative – Property held in trust – Children transferring interest to mother – No execution of transfer – Absence of assent – Whether interest vested in beneficiary – Wife dying intestate before completion of administration of husband's estate – Whether property formed part of mother's estate – Defendant residing in property – Plaintiff personal representative

of unadministered part of father's estate – Whether plaintiff as personal representative entitled to possession – Whether defendant trespassing – Whether plaintiff entitled to be registered as owner and to order for sale – Defendant sole occupant since mother's death – Large sums spent by defendant – Whether plaintiff guilty of delay – Estoppel – Adverse possession – Whether possession exclusive – Whether plaintiff statute barred – *Ó Domhnaill v Merrick* [1984] IR 151 considered – *Mohan v Roche* [1991] 1 IR 560 distinguished – Registration of Title Act 1964 (No 16), s 72(1)(p) – Succession Act 1965 (No 27), s 54 – Circuit Court order amended (2003/66EQ – Abbott J – 11/2/2011) [2011] IEHC 334
Dolan v Reynolds

Administration of estates

Wills – Contemplation of marriage – Revocation of will by subsequent marriage – Contemplation of testator – Construction of will – Extrinsic evidence – Whether will made in contemplation of marriage – Whether will revoked by subsequent marriage – Succession Act 1965 (No 27), s 85(1) – Application refused (O'Neill J – 29/7/2011) [2011] IEHC 327
Re O'Brien (dcd): O'Brien v Keeshan

Wills

Construction – Ambiguity – Application for assistance of court – Revocation – Presumption against intestacy – Whether implied revocation of earlier will – Whether testator intended to revoke earlier will – Intention of testator – Whether principle duty of court to give effect to testator's intention – Whether will should be considered as piece of English in order to extract meaning – Whether portion of will should be compared with other portions to confirm apparent meaning – Whether overall scheme should be used to discern intention of testator – Whether court should modify will – Whether rules of construction of statutory provisions could be used to modify will – Whether court should consider any rules of law preventing proposed modification – Whether court could have regard to precedent in interpreting will – Whether will unclear on its face – Whether intended beneficiaries could be discerned from extrinsic evidence – Whether 'bottom up' approach consistent with scheme of will – Whether removal of words could allow for fixed trust –Whether extrinsic evidence indicated how beneficiaries to benefit – Whether express intentions of will mutually exclusive – Whether court could insert simple clause to supply proper sense to will – Trusts – Whether 'hybrid trust' recognised by law – Whether presumption of intestacy permitted creation of new concepts in law – *In re Goods of Martin* [1968] IR 1, *In re Curtin, deceased* [1991] 2 IR 562 and *Howell v Howell* [1992] 1 IR 290 applied – *Peck v Halsey* (1726) 2 P WMS 387, *Jubber v Jubber* (1839) 9 Sim 503 and *Robinson v Waddelow* (1836) 8 Sim 134 considered – Succession Act 1965 (No 27), ss 68, 78, 90 & 99 – Will declared void for uncertainty (2011/166SP – Gilligan J – 1/12/2011) [2011] IEHC 511
In re the Estate of O'Donohue; O'Donohue v O'Donohue

PROFESSIONS

Solicitors

Solicitors Disciplinary Tribunal – Appeal – Misconduct – Finding by Tribunal of no *prima facie* case of misconduct – Alleged exclusion of complainant's replying affidavit – Whether tribunal should have considered affidavit filed after making of decision – Whether tribunal breach Solicitors Disciplinary Tribunal Rules – Whether appellant had substantiated allegations of misconduct – Solicitors Disciplinary Tribunal Rules 2003 – Appeal dismissed (2011/39SA – Kearns P – 25/7/2011) [2011] IEHC 355
McDonagh v Tansey

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RESIDENTIAL INSTITUTIONS

Statutory Instrument

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ROAD TRAFFIC

Statutory Instrument

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SI 399/2012

SOCIAL WELFARE

Appeal

Employment – Pay related social insurance – Class – Contract of service – Contract for services – Shareholder director – Whether employed under contract of service or contract for services – Statutory appeal – Test to be applied – Error of law – Whether appeals officer erred in law – Whether acquisition of minority shareholding affected employment status – Whether level of autonomy affected employment status – Whether appeals officer applied appropriate test – Whether worker exposed to financial risk in carrying out work – Whether genuine contract between company and shareholder – Whether services rendered for benefit of company – Whether worker could control decision making at board level – Whether authority which defined contractual status of executive shareholding director – Whether appeals officer acted *ultra vires* – Whether appeals officer purported to make law – Whether decision inherently administrative – Whether definition of "proprietary director" from Tax code should have been applied – Whether appeals officer considered published guidelines – Whether appeals officer discriminated in failing to apply treatment given to partnerships – Quasi partnership private company – Whether basis for appeals officer to consider whether company was a quasi partnership – Minority shareholder – Whether basis for appeals officer to consider whether substantial status of minority shareholder under company law relevant – Jurisdiction – Whether *vires* of appeals officer could be pursued in statutory appeal – Whether court could make order for payment of money in statutory appeal – *Minister for Social, Community and Family Affairs v Scanlon* [2001] 1 IR 64, *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34 and *Castleisland Cattle Breeding Society Ltd v Minister for Social and Family Affairs* [2004] IESC 40, [2004] 4 IR 150 applied – *Secretary of State for Trade and Industry v Bottrill* [2000] 1 All ER 915 approved – *Fleming v Secretary of State for Trade and Industry* [1997] IRLR 682 distinguished – *Cityview Press Ltd v An Chomhairle Oiliúna* [1980] IR 381 and *Salomon v Salomon & Co Ltd* [1897] AC 22 considered – Social Welfare (Consolidation) Act 2005 (No 26), s 327 – Taxes Consolidation Act 1997 (No 39), s 770 – Companies Act 1963 (No 33), s 205 – Appeal dismissed (2008/440SP – Laffoy J – 8/12/2011) [2011] IEHC 458
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SUCCESSION

Joint tenancy

Death of deceased joint tenant caused by second joint tenant – Right of survivorship – Constructive trust – Severance – Applicable law – Principles to be applied – Whether right of survivorship operates – Whether joint tenancy severed – Whether legal title vested in second joint tenant – Whether legal title impressed with constructive trust – Terms of trust – *Re Pechar (Decd)* [1969] NZLR 574 considered – Trustee Act 1893 (56 & 57 Vict, c 53), s 26 – Succession Act 1965 (No 27), ss 24 and 120 – Land and Conveyancing Law Reform Act 2009 (No 27), s 31 – Declaration in favour of defendant (2010/410SP – Laffoy J – 6/12/2011) [2011] IEHC 515
Cawley v Lillis

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TAXATION

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TORT

Assault

Sexual abuse – Statute of limitations – Abuse while plaintiff minor – Defendant teacher – Post traumatic stress disorder – Impairment – Disability affecting limitation period – Whether psychological injury caused by wrongdoer – Whether capacity to bring proceedings substantially impaired – Whether defendant liable – Assessment of damages – Two criminal trials – Two disagreements by jury – *Nolle prosequi* – Undisputed material – Evidence of behaviour close to alleged events – Relatively contemporary responses of defendant – Independent corroborative witnesses – Medical evidence – *MN v SM* [2005] 4 IR at 461 followed – Statute of Limitations 1957 (No 6), s 48A – Award €400,000 damages (2007/9323P – Ryan J – 5/7/2011) [2011] IEHC 361
Doherty v Quigley

Personal Injuries

Fraudulent action – Dismissal – Content of verifying affidavit – Evidence in action –Whether Plaintiff knowingly gave false or misleading evidence in affidavit and in court – Whether action should be dismissed – Mandatory provision – Would injustice result from dismissal – Application of civil fraud standard of proof – Loss of earnings claim – Plaintiff in receipt of salary – Plaintiff returning to work – Agreement reimburse payments out of future compensation – Failure to disclose – Claim for cost of future help based on misleading information – Court satisfied Plaintiff knew parts of affidavit false and misleading – Deprivation of damages award not sufficient injustice to warrant not dismissing action – *Banco Ambrosiano SPA v Ansbacher & Co* [1987] ILRM 669 applied – *Mary Farrell v Dublin Bus* [2010] IEHC 327 (Unrep, Quirke J, 30/7/2010) followed – Civil Liability and Courts Act 2004 (No 31), s 26 – Action dismissed (2004/1440P – Quirke J – 18/11/2010) [2010] IEHC 527
Higgins v Caldark Ltd

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TRUST

Scheme of arrangement

Amended scheme of arrangement – Approval – *In camera* hearing – Whether assented to in writing by each person beneficially interested in trust as currently constituted – Whether carrying out of variations for the benefit of defendant and any of relevant person – Whether other relevant persons – Whether defendant would assent to variations if she had capacity to do so – *In re L(C)* [1969] 1 Ch 587 applied; *In re Whittall* [1973] 1 WLR 1027 considered – Land and Conveyancing Law Reform Act 2009 (No 27), ss 23 and 24 – Rules of the Superior Courts 1986 (SI 15/1986), O 15, r 17 – Amended scheme of arrangement approved (2010/376SP – Laffoy J – 27/5/2011) [2011] IEHC 217
W v M

ACTS OF THE OIREACHTAS AS AT 16TH NOVEMBER 2012

31st Dáil & 24th Seanad

Information compiled by Renate Ní Uigín, Law Library, Four Courts.

Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Act 2012

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

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

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

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

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

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

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

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

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

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

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

12/2012 Social Welfare and Pensions Act 2012
Signed 01/05/2012

13/2012 Protection of Employees (Temporary Agency Work) Act 2012
Signed 16/05/2012 (Only available electronically)

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

15/2012 Electricity Regulation (Carbon Revenue Levy) (Amendment) Act 2012
Signed 25/05/2012

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

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

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

19/2012 Statute Law Revision Act 2012
Signed 02/07/2012 (Only available electronically)

20/2012 European Stability Mechanism Act 2012
Signed 03/07/2012

21/2012 European Communities (Amendment) Act 2012
Signed 03/07/2012

22/2012 Companies (Amendment) Act 2012
Signed 04/07/2012

23/2012 Dormant Accounts (Amendment) Act 2012
Signed 11/07/2012 (Only available electronically)

24/2012 Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012
Signed 18/07/2012 (Only available electronically)

25/2012 Veterinary Practice (Amendment) Act 2012
Signed 18/07/2012 (Only available electronically)

26/2012 Credit Guarantee Act 2012
Signed 18/07/2012 (Only available electronically)

27/2012 Electoral (Amendment) Act 2012
Signed 18/07/2012

28/2012 Qualifications and Quality Assurance (Education and Training) Act 2012
Signed 22/07/2012 (Only available electronically)

29/2012 Wildlife (Amendment) Act 2012
Signed 24/07/2012

30/2012 European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012
Signed 24/07/2012 (Only available electronically)

31/2012 Microenterprise Loan Fund Act 2012
Signed 24/07/2012 (Only available electronically)

32/2012 Industrial Relations (Amendment) Act 2012
Signed 24/07/2012 (Only available electronically)

33/2012 Criminal Justice (Search Warrants) Act 2012
Signed 24/07/2012

34/2012 Gaeltacht Act 2012
Signed 25/07/2012

35/2012 Residential Institutions Statutory Fund Act 2012
Signed 25/07/2012 (Only available electronically)

36/2012 Electoral (Amendment) (Political Funding) Act 2012
Signed 28/07/2012 (Only available electronically)

37/2012 Public Service Pensions (Single Scheme and Other Provisions) Act 2012
Signed 28/07/2012 (Only available electronically)

38/2012 Ombudsman (Amendment Act) 2012
Signed 31/10/2012 (Only available electronically)

BILLS OF THE OIREACHTAS AS AT 16TH NOVEMBER 2012

31st Dáil & 24th Seanad

Information compiled by Renate Ní Uigín, Law Library, Four Courts.

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

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

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

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

Assaults on Emergency Workers Bill 2012
Bill 62/2012
2nd Stage – Dáil [pmb] *Deputy Dara Calleary*

Autism Bill 2012
90/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Michael McCarthy*

Betting (Amendment) Bill 2012
Bill 68/2012
Order for 2nd Stage – Dáil

Brighter Evenings Bill 2012
Bill 96/2012
First Stage – Dáil [pmb] *Deputy Thomas P. Broughan*

Broadcasting (Amendment) Bill 2012
Bill 72/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Éamon Ó Cuív*

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

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

Child Sex Offenders (Information and

Monitoring) Bill 2012
Bill 73/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Denis Naughten*

Civil Defence Bill 2012
Bill 89/2012
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Civil Registration (Amendment) Bill 2011
Bill 65/2011
2nd Stage – Dáil [pmb] *Senator Ivana Bacik (Initiated in Seanad)*

Civil Registration (Amendment) (Domestic Registration of Death Records) 2012
Bill 95/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Seán Kyne*

Competition (Amendment) Bill 2012
Bill 54/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Emmet Stagg*

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

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

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

Credit Institutions (Stabilisation) (Amendment) Bill 2012
Bill 91/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Willie O'Dea*

Credit Reporting Bill 2012
Bill 80/2012
Order for 2nd Stage – Dáil

Credit Union Bill 2012
Bill 82/2012
Order for 2nd Stage – Dáil

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

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

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

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

Education and Training Boards Bill 2012
Bill 83/2012
Committee Stage – Dáil

Education (Welfare) (Amendment) Bill 2012
Bill 44/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Aodhán Ó Ríordáin*

Education (Resource Allocation) Bill 2012
Bill 92/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Charlie McConalogue*

Electoral (Amendment) (Dáil Constituencies) Bill 2012
Bill 84/2012
Order for 2nd Stage – Dáil

Electoral (Amendment) Bill 2012
Bill 57/2012
Order for 2nd Stage – Dail [pmb] *Deputy Alan Farrell*

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

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

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

Environment and Public Health (Wind Turbines) Bill 2012
Bill 98/2012
First Stage – Dáil [pmb] *Deputy Willie Penrose*

Europol Bill 2012
Bill 74/2012
2nd Stage – Dáil

Financial Emergency Measures in the Public Interest (Amendment) Bill 2012
Bill 49/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Mary Lou McDonald*

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

Fiscal Responsibility Bill 2012
Bill 66/2012
Committee Stage – Dáil

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

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

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

Health and Social Care Professionals (Amendment) Bill 2012
Bill 76/2012
Committee Stage – Dáil

Health (Pricing and Supply of Medical Goods) Bill 2012
Bill 63/2012
2nd Stage – Dáil *(Initiated in Seanad)*

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

Health Insurance (Amendment) Bill 2012
Bill 87/2012
Order for 2nd Stage – Dáil

Health Service Executive (Governance) Bill 2012
Bill 65/2012
Report Stage – Seanad *(Initiated in Seanad)*

Houses of the Oireachtas Commission (Amendment) Bill 2012
Bill 77/2012
2nd Stage – Dáil *(Initiated in Seanad)*

Housing Bill 2012
Bill 35/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Niall Collins*

Housing (Miscellaneous Provisions) Bill 2012
Bill 85/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Willie O'Dea*

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

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

Industrial Relations (Amendment) Bill

2011
Bill 39/2011
Committee Stage – Dáil [pmb] *Deputy Willie O'Dea*

Industrial Relations (Amendment) (No.2) Bill 2011
Bill 40/2011
Committee Stage – Dáil [pmb] *Deputy Peadar Tóibín*

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

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

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

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

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

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

Ministers and Secretaries (Amendment) Bill 2012
Bill 81/2012
Order for 2nd Stage – Dáil

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

Mortgage Credit (Loans and Bonds) Bill 2012
Bill 86/2012
Order for 2nd Stage – Seanad [pmb] *Senator Sean D. Barrett (Initiated in Seanad)*

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

National Vetting Bureau (Children and Vulnerable Persons) Bill 2012
Bill 71/2012
Committee Stage – Dáil

Nuclear Weapons (Prohibition of Investments) Bill 2012
Bill 79/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Eoghan Murphy*

Personal Insolvency Bill 2012
Bill 58/2012
Order for Report – Dáil

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

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

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

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

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

Public Health (Tobacco) (Amendment) Bill 2012
Bill 94/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Billy Kelleher*

Public Procurement Bill 2012
Bill 97/2012
First Stage – Dáil [pmb] *Deputy John Lyons*

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

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

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

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

Residential Tenancies (Amendment) (No. 2) Bill 2012
Bill 69/2012
Order for 2nd Stage – Dáil

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

Social Welfare (Amnesty) Bill 2012
Bill 88/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Aengus Ó Snodaigh*

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

State Airports (Amendment) Bill 2012
Bill 99/2012
First Stage – Dáil [pmb] *Deputy Timmy Dooley*

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

Statute of Limitations (Amendment) (Home Remediation-Pyrite) Bill 2012
Bill 67/2012
Order for 2nd Stage – Seanad [pmb] *Senator Darragh O'Brien*

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

Thirty-First Amendment of the Constitution (Children) Bill 2012
Bill 78/2012
Passed by both Houses of the Oireachtas

Thirty-First Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2012
Bill 70/2012
Order for 2nd Stage – Dáil [pmb] *Deputy Kevin Humphreys*

Transport (Córas Iompair Éireann and Subsidiary Companies Borrowings) Bill 2012
Bill 93/2012
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

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

Twenty-Ninth Amendment of the Constitution (No.3) Bill 2011
Bill 28/2011
Order for Committee – Dáil [pmb] *Deputy Charlie McConalogue*

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

Valuation (Amendment) (No. 2) Bill 2012
Bill 75/2012
Committee Stage – Seanad *(Initiated in Seanad)*

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

Wind Turbines Bill 2012
Bill 9/2012
Committee Stage – Seanad [pmb] *Senator John Kelly (Initiated in Seanad)*

ABBREVIATIONS

CLP = Commercial Law Practitioner
ICPLJ = Irish Conveyancing & Property Law Journal
IJFL = Irish Journal of Family Law
ILT = Irish Law Times
LSG = Law Society Gazette

Bankers Beware! Undue Influence and Bank Guarantees

Eimear M. Higgins BL

The recent High Court decision in *Ulster Bank Ireland Limited v Roche & Buttimer*[1] represents a seismic shift in the law of third party undue influence and constructive notice in the enforcement of bank guarantees in this jurisdiction. The law now places heightened obligations on banks to ensure that the proposed surety is openly and freely agreeing to provide the requested security, where there is a non-commercial element to the guarantee. This brings the law in this jurisdiction much more in line with that advanced by the House of Lords in the seminal decision of *Royal Bank of Scotland v Etridge (No.2)*[2].

Third Party Undue Influence

Third party undue influence has always presented a difficult legal issue in the enforcement of banking securities, as noted by Clarke J in *Buttimer:*

> "It is, of course, clearly the case that, where one contracting party induces the other to enter into the relevant contract by the exercise of undue influence, then the contract concerned can be set aside *inter partes*. However, the problem here is that the assertion of undue influence is not made against a contracting party, but rather against a person who, in the context of the guarantee, is a third party, albeit one who had an interest in the execution of the guarantee…"[3]

In order for third party undue influence to ground a successful defence to the enforcement of a security, it must be shown that at the time the security was executed, the party exercising the undue influence was acting as agent of the bank or alternatively that the bank had knowledge, actual or constructive, of the third party undue influence[4]. To many defendants, this represents an insurmountable hurdle given that there will rarely be evidence that the bank had actual knowledge of the third party undue influence, or indeed of any facts which would place it on notice of the third party undue influence.

For over a decade, the banks in this jurisdiction have been afforded a high level of confidence in both the procurement and enforcement of guarantees where the surety was either the spouse or romantic partner of the borrower or its principal as a result of the decision in *Ulster Bank Ireland v Fitzgerald*[5]. This case established that a bank is not fixed with constructive notice of third party undue influence, merely by virtue of the fact that the surety was the wife of the principal in the borrowing company and had no involvement or shareholding in the company. In that case, the bank sued a husband and wife who had both executed personal guarantees in favour of the bank as security for the provision of credit facilities to a company which was owned by the husband and of which the wife was neither a director nor shareholder. The wife argued that the guarantee was not enforceable against her as she was under the undue influence of her husband when executing the said guarantee. She also argued that as she had no financial stake in the company, the bank were on notice that there was a risk that she may have been unduly influenced by her husband to execute the said guarantees and had failed to ensure that she obtained independent legal advice before signing the said guarantee.

In rejecting the wife's arguments, O'Donovan J found that even if the wife had executed the said guarantees as a result of undue influence exercised over her by her husband, he was satisfied that there was no evidence whatsoever to suggest that the bank "had even an inkling that there were difficulties in the marriage" or that there was any other reason why the wife might not have been a free agent in the sense that she did not execute the guarantee of her own free will. He thus found that the bank did not have constructive notice that the wife executed the guarantee as a result of undue influence exercised over her by her husband, and in the absence of same, the bank was under no obligation to take any special steps to ensure that wife obtained independent legal advice. O'Donovan J found that in the circumstances, it was not necessary for him to make a finding as to whether or not the influence exerted upon the wife by the husband was in fact undue or unlawful. In addition, he found that the wife relied on the income generated by the business of the company which her husband ran for her family's day to day living and, thus that she had a financial stake in the business of the company.

The decision has attracted much academic criticism,[6] the substance of such criticism being, as noted by Clarke J in *Buttimer,* that the approach taken "offers insufficient protection to potential vulnerable sureties and leaves a lender with no obligations arising from knowledge that the parties are married or otherwise closely connected unless it has some special reason to believe that a wrong has actually taken place."[7] The criticism was no doubt compounded by the fact that it was delivered only three weeks after the House

1 [2012] IEHC 166
2 [2002] 2 AC 773
3 [2012] IEHC 166 at p.4 para 2.4
4 *Bank of Nova Scotia v. Hogan* [1996] 3 I.R. 239
5 [2001] IEHC 159

6 Donnelly, *The Law of Credit and Security,* para. 19-143; Mee "*Undue Influence on Bank Guarantees*" (2002) 27 Ir. Jur. 292; Delaney, *Equity and the Law of Trusts in Ireland* " (5th Ed. Round Hall 2011), p. 746
7 [2012] IEHC 166 at p.12, para 5.5

of Lords decision in *Royal Bank of Scotland v Etridge (No.2)*[8], which in stark contrast, established in general terms that whenever a wife offered to stand surety for the indebtedness of her husband or his business, or a company in which they both had some shareholding, the bank was put on inquiry and was obliged to take reasonable steps to satisfy itself that she had understood and freely entered into the transaction, by requiring her to take independent advice from a solicitor on whose confirmation the lender might rely that she had understood the nature and effect of the transaction.

Despite the stark dichotomy between the two approaches and the criticisms of *Fitzgerald*, the decision in *Fitzgerald* remained the standing precedent in this jurisdiction for over ten years, the courts having been deprived of an appropriate opportunity to revisit the subject, that is, until *Ulster Bank Ireland Ltd. v Roche & Buttimer*.

Ulster Bank Ireland Ltd. v Roche & Buttimer

The facts of the case were that the first named defendant ran a motor business through a corporate entity called Louis Roche Motors Ltd.[9] The second named defendant was "his partner in the personal sense of that term" and was a director of the company, but notably, not a shareholder. Both the first and second named defendants were both sued by the plaintiff on foot of a personal guarantee in its favour which had been executed in consideration of it providing credit banking facilities to the company. The second named defendant defended the claim *inter alia* on the grounds that at the time the guarantees were entered into, she was under the undue influence of the first named defendant and relied on the House of Lords' decision in *Etridge* in arguing that the guarantee should be set aside as against the plaintiff on that basis.

On the facts of the case, Clarke J found that the second named defendant had in fact been acting under the undue influence of the first named defendant at the time of her signing of the personal guarantee. However, endorsing the criticisms of *Fitzgerald,* Clarke J found that even though there was "absolutely no evidence from which it could be inferred that Ulster Bank in this case was actually aware of the undue influence which I have found Ms. Buttimer to be under from Mr. Roche"[10], the bank was fixed with constructive knowledge of same, on the basis that the bank had been placed on inquiry of the undue influence by virtue of the fact that it was aware of facts which suggested a non-commercial element to the guarantee, and having been placed on inquiry, failed to take any measures to seek to ensure that the proposed surety was openly and freely agreeing to provide the requested security.

The decision represents a definite departure from the decision in *Ulster Bank v Fitzgerald,* and a move toward the principles advanced in *Etridge,* and will undoubtedly have serious consequences for the enforcement of securities where actual undue influence has occurred and where no inquiries have been carried out by the bank to ensure that the surety was openly and freely exercising their own free will.

8 [2002] 2 AC 773
9 Hereinafter referred to as "the company"
10 [2012] IEHC 166 at p.12, para 5.6

The Test for Third Party Undue Influence

Clarke J adopted a two pronged test in order to establish whether third party undue influence could afford a good defence to a defendant against the enforcement of a banking guarantee:

> (1) The first question which must be answered is whether the Defendant was actually acting under the undue influence of another?; and
> (2) Secondly, did the bank have actual or constructive knowledge of that undue influence?

The test advanced by Clarke J is clearly preferable to that adopted by O'Donovan J in *Fitzgerald,* as it is only once it is established as a matter of fact that the security in question has been procured by the undue influence of another, can it be examined with any degree of certainty as to whether the facts as they existed at the date the security was entered into, would have been sufficient to place the bank on notice of such undue influence and whether such undue influence could have been discovered by the bank had appropriate inquiries being made.

1. Was the Defendant acting under Undue Influence?

Establishing the existence of undue influence will be a question of fact depending upon the circumstances of the case, and it should be remembered in this context that the relationship of husband and wife is not one which gives rise to a presumption of undue influence, as most recently confirmed by Kelly J in *IRBC v Quinn.*[11] Thus, in order to overcome the first prong of the test, it will be necessary for a defendant to prove that actual undue influence was exercised upon him/her and that this caused him/her to enter into the transaction against his/her own free will. As stated by Shanley J in *Carroll v Carroll*[12], actual undue influence:

> "arises where no relationship gives rise to any presumption of undue influence, but the parties so alleging undue influence adduce evidence which satisfies the court, on the balance of probabilities, that the transaction was not the result of the free exercise of the will of the donor."[13]

Examples of actual undue influence before the Irish Courts are few and far between, and there is no exhaustive list of conduct which would constitute actual undue influence, but as stated by Kelly J in *Quinn,* "there would have to be, at least, some evidence demonstrative of such impropriety"[14] or as stated in *Etridge* "improper pressure or coercion such as unlawful threats."[15]

In *Royal Bank of Scotland v Etridge (No.2)*, it was stated by Lord Nicholls that:

11 [2011] IEHC 470
12 [1998] 2 ILRM 218
13 *Ibid,* at p. 228-229
14 [2011] IEHC 470 at p.15, para 43
15 [2002] 2 AC 773 at p. 795

> "In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose…The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v Baseley* 14 Ves 273, 300). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion."[16]

There is no need to show a prior relationship of trust and confidence or a history of influence when claiming actual undue influence.[17]As was stated in *Etridge,* actual undue influence does not depend on a pre-existing relationship between the parties,[18] and indeed there is authority to suggest that it is not even necessary to show that the wrongdoer knew he was exerting undue influence over the other party.[19] Nevertheless, it is widely accepted that the threshold for proving the existence of actual undue influence is quite a high one, given that the defence is an all too familiar refuge of defendants who are sued upon guarantees, especially where it stands as security for the debts of the family business operated through a limited liability company.

It is therefore noteworthy that particularly strong evidence of actual undue influence was advanced on behalf of the second named defendant in the *Buttimer* case by a clinical psychologist who had in fact been engaged by the second named defendant contemporaneously with the events concerned. As stated by Clarke J in his judgment:

> "This is not one of those cases where a mental health professional is attempting to reconstruct a situation some time (often years) after the events which are crucial to the proceedings. Rather, this is a case where Ms. Buttimer was in receipt of counselling at the time in question and where her clinical psychologist is in a position to give a professional judgment as to her mental state and the relationship between that mental state and the actions of Mr. Roche, at the very time when the events which are at the heart of this case occurred. I fully accept the evidence of Ms. Buttimer's clinical psychologist and, on that basis, am satisfied that she was in the sort of dependent and abusive relationship with Mr. Roche at the relevant time where she would have done anything that he asked. That leg of the test is, therefore, in my view, met. Ms. Buttimer signed the guarantee in question while under the undue influence of Mr. Roche."[20]

2. Did the Bank have Constructive or Actual Knowledge?

The existence of undue influence being exercised is not of itself sufficient to avoid the transaction. To succeed in its defence, a defendant must be able to show that the bank had knowledge of the undue influence exercised by a third party, actual or constructive. In *Buttimer,* it fell to the court to decide in what circumstances is it appropriate for the court to attribute to a bank, knowledge of undue influence in circumstances where the bank is not actually aware of the exercise of the undue influence concerned?

In analysing same, Clarke J acknowledged that in reality the issue with which he was faced was one of constructive knowledge, and stated that constructive knowledge can usefully be broken down into two separate questions:

(i) The first is as to what factors place a party on inquiry?
(ii) The second is as to the nature of the inquiry or action that may then be required?

He thus concluded:

> "If, in circumstances where a party is put on inquiry, that party does not carry out the inquiries necessary or take whatever other form of action may be mandated, then the party will be fixed with knowledge of matters which it would have discovered had it made the appropriate inquiries or, at least, may be faced with the situation where the court views the case on the basis that appropriate steps were not taken."[21]

(i) Factors Placing the Bank on Inquiry

In respect of the first question, Clarke J found it was appropriate to consider the views expressed by the House of Lords in *Etridge*, given that they had not been considered or referred to in the judgment of O'Donovan J in *Fitzgerald.* The learned judge noted that Lord Nicholls in *Etridge* had found that a bank was put on inquiry "when faced with a transaction which called for explanation"[22] and thus is put on inquiry where a wife stands surety for her husband's debts, where a husband stands surety for his wife's debts, and where unmarried couples, whether heterosexual or homosexual, stand surety for each other's debts in circumstances where the lender is aware of the relationship.[23] He also noted that Lord Nicholls went so far as to suggest that the only practical way of dealing with the matter was to regard the lender as on inquiry in every case where the relationship between the surety and the debtor is non-commercial.

16 *Ibid*
17 O'Sullivan, Elliott & Zakrzewksi, *The Law of Rescission,* (Oxford University Press 2008), at p.165, para 6.88
18 [2002] 2 AC 773 per Lord Hobhouse at p. 820
19 *Papouis v Gibson-West* [2004] All ER (D) 98
20 [2012] IEHC 166 at p. 9, para 4.2
21 [2012] IEHC 166 at p.12, para 5.7
22 [2002] 2 AC 773 at p.796 para 14
23 [2012] IEHC 166 at p.15 para 5.11

Whilst clearly cognisant of the fact that if he were to follow the House of Lords approach in *Etridge* "or go someway down the road towards the position adopted by the House of Lords in that case" he would be necessarily be disagreeing with the decision in *Fitzgerald*, Clarke J stated:

> "It seems to me that the academic criticism of *Fitzgerald* is well founded. A regime which places no obligation on a bank to take any steps to ascertain whether, in the presence of circumstances suggesting a non-commercial aspect to a guarantee, the party offering the guarantee may not be fully and freely entering into same, gives insufficient protection to potentially vulnerable sureties. While not necessarily accepting that the precise parameters, identified in *Etridge*, are those which give rise to an obligation on the bank to inquire, and thus represent the law in this jurisdiction, I am satisfied that the general principle, which underlies *Etridge*, is to the effect that a bank is placed on inquiry where it is aware of facts which suggest, or ought to suggest, that there may be a non-commercial element to a guarantee."[24] (emphasis added)

He stated that in his view, it was not necessary to fully explore the precise parameters of the circumstances in which a bank may be placed on inquiry for the purposes of determining the issues before him, but found that the general principle underlying *Etridge* that a bank is placed on inquiry where it is aware of facts which suggest, or ought to suggest, that there may be a non-commercial element to a guarantee was at a minimum sufficient to cover the facts of the case before him.

In addressing what facts may suggest that there may be non-commercial element to the guarantee, Clarke J found first that the fact that second named defendant was not a shareholder in Roche Motors was a factor which suggested "at least a significant possibility of a non-commercial aspect to the case." This was despite the fact that it was not disputed that she was a director of the company.

Second, he found on the facts of the case that the bank was aware that the defendants were in a relationship, and further that it was clear that all of the discussions between the company and the bank were conducted by the first defendant alone. Clarke J emphasised that this fact, of itself, would not, be sufficient to place the bank on inquiry as to whether others involved in the venture, who are asked to put up security by way of guarantee, might be the subject of undue influence, given that it was frequently the case that one person in a company will be responsible for dealing with the company's banking business. However, he held that in circumstances where the surety was not a shareholder and where there is no evidence to suggest that the bank was aware of any active involvement of that party in the business, "the personal relationship between the parties emerges as a much more significant factor" in determining whether the bank was placed on inquiry.

For the reasons set out, Clarke J therefore found that not only was the bank aware of the personal relationship between defendants at the time the guarantee was executed, but it was also aware that Ms. Buttimer had "no direct interest in the company (other than being a director)" and in what can only be seen as an attempt to distinguish the facts from those in *Fitzgerald,* stated that in those circumstances, the second named defendant was "in a less secure position than a spouse or, in the modern context, a civil partner who has at least certain potential legal rights in the assets or income of the other spouse or partner."[25]

He thus found that:

> "The potential for undue influence against a partner, such as Ms. Buttimer, who has very limited legal rights indeed and who has no interest in the company whose debts it is sought that she should guarantee, seems to me to be well on the side of whatever threshold might ultimately be fixed for determining the point at which a bank is placed on inquiry. In those circumstances I am satisfied that the bank was on inquiry on the facts of this case."[26]

(ii) Nature of Inquiry when on Notice

Having established that the bank was placed on inquiry by virtue of the above facts, Clarke J then turned to the second question as to what a bank must do when placed on inquiry, and stated:

> "I am satisfied that a bank which is placed on inquiry is obliged to take at least some measures to seek to ensure that the proposed surety is openly and freely agreeing to provide the requested security. As Ulster Bank, in this case, took no such steps it is, in my view, unnecessary to consider the precise level of steps which a bank must take."[27]

It is regrettable that Clarke J felt it unnecessary to consider what level of steps a bank must take when placed on inquiry, especially given the impact which the decision will have for banks and lenders across the board who are currently in the process of procuring a guarantee against a party where there may be a non-commercial element and are anxious to ensure that they take appropriate steps to protect their security.

The regime in the U.K., on foot of the judgment of Lord Nicholls, provides that a bank on inquiry is obliged to obtain written confirmation from a solicitor that the wife has obtained independent legal advice prior to entering into the guarantee, by contacting the wife directly, checking the name of the solicitor she wished to act for her and explaining that for its protection, it would require the solicitor's confirmation as to her understanding of the documentation to prevent her from subsequently disputing the transaction. In addition and subject to the husband's consent to disclosure, the bank is obliged to furnish to the nominated solicitor financial information relating to the facility and the husband's existing indebtedness to enable a proper explanation to be given to the wife of the documentation, its practical consequences and inherent risks based on the financial information provided

24 *Ibid* at p.18, para 5.14

25 *Ibid*
26 *Ibid*
27 *Ibid* at p.18 para 5.16

by the lender. Such a regime has the clear benefit of ensuring that both the bank and the vulnerable surety are protected from entering into a transaction with one another due to the undue influence of another.

However, the costs imposed by such a regime remains a significant consideration as to whether it should be adopted within this jurisdiction, especially given that the solicitor engaged assumes professional responsibilities to the proposed surety and does not act as agent for the lender, and so it would be improper for such costs to be paid for by the bank. It is notable that Clarke J felt it necessary to reiterate, having already cited the position in *Etridge* that nothing in his judgement should be taken "as necessarily implying that the full rigours of the regime which applies in the United Kingdom represents the law in Ireland."[28]

Therefore it remains to be seen what level of steps will be imposed upon the banks when placed on inquiry. In any event, however, it would appear prudent for a bank to carry out enquiries as a matter of practice in every surety transaction as to the nature of the relationship between the proposed surety and the borrower/principal of the borrowing company, the degree of involvement of the surety in the business, and the shareholding of the surety in the company, if any. If such facts suggest a non-commercial element to the guarantee, the bank should then take appropriate steps to ensure that that the proposed surety is openly and freely agreeing to provide the requested security. And until the courts enumerate what steps a bank should take when placed upon inquiry, banks may be well advised to follow the steps advanced in *Etridge* to ensure that their security is protected, especially in light of recent decision in *Tynan v County Registrar of Kilkenny & Start Mortgages.*[29] In *Tynan,* Laffoy J appeared to endorse the approach adopted in *Etridge* and found that as a matter of law in this jurisdiction, deficiencies in advice given by a solicitor to a wife that is requested by the bank is a matter between the wife and her solicitor and the bank is entitled to proceed on the assumption that a solicitor advising the wife has done his job properly[30]. However, she cautioned:

> "if the solicitor does not provide the statement and certificate for which the bank has asked, then the bank will not, in the absence of other evidence, have reasonable grounds for being satisfied that the wife's agreement has been properly obtained. Its legal rights will be subject to any equity existing in favour of the wife."[31]

Degree of Involvement in the Debtor Company

On a final note, it is clear from the decision in *Buttimer* that the fact that the surety was not a shareholder in the company played heavily on the judge's considerations as to whether the bank was placed on inquiry, especially when coupled with evidence that she had little to no involvement in the running of the company and was in a 'less secure position' than a spouse in respect of potential legal rights over the assets or income of the other spouse or partner. However, it remains to be seen if a bank would be placed upon inquiry where the surety is in fact a shareholder of the company.

In *Etridge,* Lord Nicholls took the view that a bank was placed on inquiry even where shares were held by both spouses or partners as the shareholding often did not reflect the true situation. However, it must be emphasised that Clarke J made it clear that "Nothing in this judgment should be taken as, therefore, necessarily implying that the law in Ireland goes as far as the position in the United Kingdom as identified in *Etridge* in placing a bank on inquiry"[32], and stated that he would leave it to "another case to deal with any different set of circumstances either as to when a bank is put on inquiry or the steps which a bank must take when put on inquiry."[33]

It has always been the case that where monies are advanced to a husband and wife jointly, the bank will generally not be on inquiry[34], and this has been reaffirmed most recently in *GE Capital Woodchester Home Loans Ltd. v Reade*[35], wherein Laffoy J acknowledged that whilst the decision in *Buttimer* represented a development of the law in this jurisdiction, it had no bearing on the assertion of undue influence in that case, where loan monies had been advanced jointly to the Defendants. Therefore, it is submitted in light of Clarke J's comments in *Buttimer,* and the standing precedent in the area, a bank should not automatically be placed on inquiry where the spouse/partner is a shareholder in the company to whom monies are advanced and/or is a director with direct involvement in the running of the said company.

Conclusion

The decision in *Buttimer* will have wide ranging effects for the enforcement of bank guarantees in this jurisdiction, given the very common trading format in this jurisdiction where both husband and wife act as directors of the family business, which is invariably run primarily by one spouse under the veil of incorporation. It is therefore imperative for the banking community to be aware of its increased obligations after this decision, in order to protect the enforceability of its securities in the future, should a valid claim of undue influence be made against it. ■

28 *Ibid*
29 [2011] IEHC 250
30 *Ibid* at p. 16, para 4.4
31 *Ibid* at p.16-17, para 4.5
32 *Ibid* p.16 para 5.12
33 *Ibid* p.19 para 6.2
34 *CIBC Mortgages plc v Pitt* [1994] 1 AC.200
35 [2012] IEHC 363

Extradition, Extra-Territoriality and Article 3 ECHR: An Absolute case of Relativism

JOANNE WILLIAMS, BL*

Introduction

In two recent decisions concerning proposed extraditions from the United Kingdom to the United States – *Harkins and Edwards*[1] and *Ahmad and Others*[2] – the European Court of Human Rights ("the Court") has clarified the proper approach to the prohibition of torture, inhuman or degrading treatment or punishment found in Article 3 of the European Convention on Human Rights ("the Convention") in extradition cases. The absolute nature of Article 3 clearly does not mean that each and every form of ill-treatment will act as a bar to removal from a Contracting State. Instead, a minimum level of severity must be reached before Article 3 is engaged and that minimum level is often referred to as the "Article 3 threshold". These two decisions impact upon the assessment of whether that threshold has been reached in extra-territorial and intra-territorial removal cases. "*Extra-territorial removals*" involve the removal of a person from a Contracting State to a state outside of the 47 states of the Council of Europe. "*Intra-territorial removals*" involve the removal of a person from one Contracting State to another.

The relevance of the decisions lies in the Court's rejection of the relativist approach advocated by the UK Government in extradition cases and its firm affirmation of the absolute nature of Article 3. However, the promise of that finding is tempered by the Court's clarification that a higher threshold applies to extra-territorial removals than to intra-territorial removals. In effect, the Court has set a lower bar to extra-territorial removals. These double standards apply to all removals, whether by way of extradition, deportation or post-conviction expulsion. The approach taken by the Court eases the way for Contracting States to effect removals to states outside of the Council of Europe where inferior human rights standards prevail. The decisions confirm that Contracting States are at liberty to implement extra-territorial extradition and immigration policies which, if intra-territorial, could run the Article 3 gauntlet. In doing so, the Court has also implicitly reaffirmed that a higher yardstick applies to intra-territorial removals and in that context the decisions also speak to transfers under the Dublin II Regulation and surrenders under the European Arrest Warrant system among other such EU procedures.

The Proposed Extraditions

The applicants in *Harkins* face extradition on separate murder charges – the first applicant is alleged to have killed a man during an armed robbery while the second faces charges relating to the shooting of two people, one of whom died. The applicants argued that they are at risk in the US of sentences of imprisonment for life without parole in violation of Article 3.[3] *Ahmad and Others* are six men facing a variety of terrorism charges in the US. They argued that their extradition would violate Article 3 because they face lengthy sentences up to and including life imprisonment without parole in the notorious ADX Florence "supermax" prison, coupled with sustained "special administrative measures" including sustained solitary confinement and social isolation.

In the cases of seven of the eight men within the two cases, the Court found that the proposed extradition would not contravene Article 3. The Court postponed its decision in relation to the eighth man who has particular psychological difficulties.[4] The decisions have many parallels and several passages from the *Harkins* judgment are repeated verbatim in *Ahmad*. It is curious that while five of the seven judges who decided *Harkins* also decided *Ahmad* just four months later, the latter decision makes scant reference to its predecessor. Of note is that in September 2012, the Grand Chamber declined the request of five of the applicants in the *Ahmad* case to have their application re-examined.

The proposed relativist approach

In both cases, the UK Government argued that a relativist approach applies in Article 3 expulsion cases where there is a risk of ill-treatment falling short of torture. The Government relied on the decision of the House of Lords in *R (Wellington) v Secretary of State for the Home Department* [2009] 1 A.C. 335. Mr Wellington was the subject of a US extradition request.

** With thanks to Ms Cathy Mac Daid, Barrister-at-Law for her helpful advice in the preparation of this article. Any inaccuracies or omissions are my own.*

1 Application Nos. 9146/07 and 32650/07, decision of 17th January 2012 ("*Harkins*").

2 Application Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09; decision of 10th April 2012 ("*Ahmad*").

3 Their additional claim that they could be subject to the death penalty was found to be manifestly inadmissible in the light of US diplomatic assurances.

4 The fifth applicant in *Ahmad* suffers from schizophrenia which necessitated his transfer from high security conditions to hospital where he had relative freedom. The Court felt that it was not in a position to rule on the merits of his complaints without further submissions. His complaints were given a new application number, no. 17299/12. See *Ahmad*, §§ 255-256.

He faced two counts of murder in the first degree. He argued that if convicted, he would be subjected to a sentence of life imprisonment without parole in violation of Article 3. Relying in particular on *Soering v the United Kingdom* (1989) 1 E.H.R.R. 439,[5] the majority of the House of Lords held that in the extradition context, a distinction is drawn between torture and lesser forms of ill-treatment. Where there is a real risk of torture, the prohibition on extradition is absolute. However, where there is a risk of treatment falling short of torture but which might constitute inhuman or degrading treatment, Article 3 applies only in a relativist form to extradition cases. Lord Hoffman, giving the decision of the majority, held:-

> "[…] the desirability of extradition is a factor to be taken into account in deciding whether the punishment likely to be imposed in the receiving state attains the 'minimum level of severity' which would make it inhuman and degrading. Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account".

He concluded that "*A relativist approach to the scope of article 3 seems to me essential if extradition is to continue to function.*" The Government's argument before the Court followed this rationale: it was legitimate to consider the policy objectives pursued by the applicants' extradition in determining whether the conditions and penalties which they faced in the US reached the Article 3 threshold. The Government contended that not every form of ill-treatment in a non-Contracting State could be sufficient to prevent extradition as such an absolutist approach to Article 3 would mean that practices such as slopping out,[6] head shaving[7] or shackling[8] could act as a bar to extradition, those forms of ill-treatment having been found to breach Article 3 in the domestic context.

The applicants rejected any suggestion of a balancing exercise.[9]

Decision: an absolute guarantee …

In each case, the Court considered the relevance of the extradition context to complaints made under Article 3.[10] It rejected the distinctions drawn in *Wellington* and held that when it comes to assessing the minimum level of severity required for a breach of Article 3, there is no distinction between extradition and other removal cases. The Court accepted that it has always distinguished between torture, on the one hand, and inhuman or degrading treatment or punishment on the other. In expulsion cases, however, it has refrained from considering whether the ill-treatment feared by the applicant should be characterised as torture or inhuman or degrading treatment or punishment because both are prohibited in absolute terms. There is no room for balancing a risk of ill-treatment against the reasons for the extradition or the risk and danger which the applicant poses.[11] Instead, the question of whether the Article 3 threshold has been met must be assessed independently of the reasons for extradition or removal.[12] In other words, the proportionality of the proposed removal is not a relevant consideration in Article 3 cases.[13] Article 3 prohibits removal both when there is a real risk of torture and when there is a real risk of other forms of ill-treatment.[14] So, the context of the proposed removal is irrelevant and where there is a real risk that Article 3 will be violated, the removal is prohibited in absolute terms.

The Court thereby forcefully rejected the relativist approach proposed by the UK Government, favouring instead an absolute prohibition on any removal which potentially violates Article 3. In both cases the Court held that this "should be regarded as applying equally to extradition and other types of removal from the territory of a Contracting State and should apply without distinction between the various forms of ill-treatment which are proscribed by Article 3."[15] That assurance was greatly tempered, however, by the Court's subsequent findings on the relevance of extra-territoriality.

… depending on Territoriality

In assessing whether the Article 3 threshold would be reached in *Harkins* and in *Ahmad,* the Court noted that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on non-Contracting States.[16] It found that "treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case."[17] In other words, the Article 3 threshold will vary depending on whether the applicant is to be relocated within or outside the territory of the Contracting States.

With regard to the sentences of life imprisonment faced by the applicants in the US the Court accepted, as it has in other cases,[18] that a violation of Article 3 might arise if the applicant were able to demonstrate that he or she was at a real risk of receiving a "*grossly disproportionate*" sentence in the receiving State. However, the Court qualified that possibility thus in the extra-territorial context:-

> "Due regard must be had to the fact that sentencing practices vary greatly between States and that there will often be legitimate and reasonable differences between States as to the length of sentences which are imposed, even for similar offences. The Court

5 Reliance was placed in particular on § 89 of the *Soering* decision.
6 *Napier v Scottish Ministers* (2005) S.C. 229; [2005] 1 P.L.R. 176.
7 *Yankov v Bulgaria* (2005) 40 E.H.R.R. 36.
8 *Henaf v France* (2005) 40 E.H.R.R. 44.
9 Reliance was placed on *Saadi v Italy* (2009) 49 E.H.R.R. 30 and *Chahal v The United Kingdom* (1997) 23 E.H.R.R. 413.
10 *Harkins*, § 119; *Ahmad*, § 161.
11 *Harkins*, §§ 122-3; *Ahmad*, §§ 170-1.
12 *Harkins*, § 124; *Ahmad*, § 172.
13 *Harkins*, § 125; *Ahmad*, § 173.
14 *Harkins,* § 127; *Ahmad,* § 173.
15 *Harkins*, § 128; *Ahmad*, § 176.
16 *Harkins*, § 129; *Ahmad*, § 177.
17 *Harkins*, § 129; *Ahmad*, § 177. The Court gave the example of the contrasting approach taken in *Aleksanyan v Russia* (2011) 52 E.H.R.R. 18 and *N v the United Kingdom* [GC] (2008) 47 E.H.R.R. 39.
18 See e.g. *Kafkaris v Cyprus* (2009) 49 E.H.R.R. 45; (2011) 53 E.H.R.R. SE14; *Iorgov v Bulgaria (no. 2)* (Application no. 36295/02, decision of 2nd September 2010); *Vinter & Others v the United Kingdom* (Application nos. 66069/09; 130/10 and 3896/10; decision of 17th January 2012).

> therefore considers that it will only be in very exceptional cases that an applicant will be able to demonstrate that the sentence he or she would face in a non-Contracting State would be grossly disproportionate and thus contrary to Article 3."[19] (emphasis added)

In other words, the threshold at which a sentence is deemed grossly disproportionate in breach of Article 3 will vary depending on whether the sentence is to be served in a Contracting State or a non-Contracting State.

In each case, the Court proceeded to assess the proportionality of the sentences which the applicants faced if convicted in the U.S. having regard to each applicant's age, mental health, the nature and gravity of his alleged offences, the number of charges and the nature of the sentence faced by each applicant. Particular emphasis was laid on the existence of judicial discretion in US sentencing and the reducibility of life sentences where applicable. In *Ahmad,* the Court also had regard to the seriousness of terrorist offences and "*particularly those carried out or inspired by Al-Qaeda*".[20] In no case did the Court find that the applicant had demonstrated a real risk of his extradition breaching the Article 3 threshold.

Comment

The Court expounded a number of reasons for the territorial distinction which it expounded. First, it suggested that it is difficult to make a prospective assessment of whether conduct constitutes torture, inhuman or degrading punishment in the extra-territorial context. The foundations for that suggestion are unclear. There is no apparent reason why the difficulty of a prospective assessment should depend on territoriality. It is of course possible that a receiving State will be uncooperative or unforthcoming with information as to its human rights standards, but such reticence exists both within and outside of the territory of the Contracting States.[21] The Court is not limited to considering the documents and witnesses produced by the parties to the case; it retains a residual investigative function and may adopt any measures which it considers capable of clarifying the facts of the case. For example it may appoint a delegate or delegation to conduct an inquiry, to carry out an on-site investigation or to take evidence in some other manner, and it may ask "*any person or institution of its choice*" to express an opinion or make a report on any matter considered by it to be relevant to the case.[22] There is no express territorial limit on these fact-finding powers; the only ostensible limitations are time and resources which cannot determine the substance of the Article 3 guarantee. It is therefore a *canard* to suggest that prospective assessment is necessarily more problematic in relation to extra-territorial removals. The very ease with which the Court gathered reliable information and testimony in these two cases relating to a non-Contracting State undermines the Court's suggestion. Indeed, it is not beyond speculation that it could be much more difficult to obtain such information on human rights practices in Contracting States such as Romania, Russia, Ukraine, Serbia or Turkey.

A further rationale expressed for the extra-territoriality distinction was that the factors which have been decisive in finding a violation of Article 3 in the context of the ill-treatment of prisoners have depended closely upon the facts of the case and so will not be readily established prospectively.[23] That may well be the case but it bears no relationship with territoriality and so this, too, fails to support the distinction drawn. That difficulty will also arise with intra-territorial removals.

Further, the Court recalled that it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention and has only rarely found that Article 3 would be violated in the event of a removal, and even more rarely where the proposed removal is "*to a State which had a long history of respect of democracy, human rights and the rule of law*."[24] It seems clear that the Court was latterly praising the traditions of the US. Universal praise for the US human rights record is far from forthcoming, particularly with respect to the treatment of terror suspects, which serves only to further undermine the Court's rationale for drawing an extra-territoriality distinction.

Conclusion

The *Harkins* and *Ahmad* decisions give with one hand while taking with the other. In eloquent and resolute terms the Court affirms the absolute nature of the prohibition on torture, inhuman or degrading treatment or punishment and indicates that the House of Lords was wrong to adopt a relativist approach in Article 3 cases. However in the same breath, the Court indicates that the Article 3 threshold is a moveable feast depending on whether ill-treatment will prospectively take place within or outside of the territories of the Contracting State. Hence, the Court has itself adopted a relativist approach to an "absolute" guarantee.

The upshot of the Court's decisions is that Article 3 does not afford the same protection to every person who is being removed from a Contracting State. On the contrary, it affords decidedly less protection to persons who are being removed outside of the Council of Europe. It is conceivable that a removal from one Contracting State to another could be found to breach Article 3 on the grounds that the person would be detained in inhuman or degrading conditions, while a removal to a non-contracting state where similar or even worse prison conditions prevail might not reach the Article 3 threshold. Thus, Strasbourg is willing to tolerate Contracting States removing persons to inferior human rights conditions outside of the territory of the Council of Europe.

The incongruity of these double standards is underscored by the fact that Strasbourg retains a degree of oversight in relation to a person transferred from one Contracting State to another, but not where the person is removed from the effective control of a Contracting State outside of the

19 *Harkins*, § 134; *Ahmad*, § 238.
20 *Ahmad*, § 244.
21 See HRSJI, *International Human Rights & Fact-Finding: An analysis of the fact-finding missions conducted by the European Commission and Court of Human Rights* (February 2009).
22 Rule 1A, Rules of Court of the European Court of Human Rights (1st May 2012).
23 *Harkins*, § 130; *Ahmad*, § 177.
24 *Harkins*, § 131; *Ahmad*, at para.179.

territory of the Council of Europe.[25] For example, if a person is intra-territorially extradited or surrendered under an EAW or transferred under the Dublin II Regulation and thereafter suffers or fears ill-treatment, he or she may bring a further complaint to Strasbourg. However, once a person is transferred outside of the effective control of a Contracting State, he or she no longer enjoys the protection of the Convention. Surely, in those circumstances, the European Court of Human Rights should exercise greater caution, not less, before authorising an extra-territorial removal which places a person beyond its oversight.

The European Court of Human Rights repeatedly stressed in *Harkins* and in *Ahmad* that it does not seek to impose Convention standards on non-Contracting States. That goes without saying: states which are not party to the Convention cannot be bound by its terms. It is arguable, however, that in assessing whether a removal is Convention-compatible, it is not the anticipated acts of the receiving State which is subject to Strasbourg's scrutiny *per se* but, rather, the proposed act of removal of the Contracting State. It is at a minimum arguable that Strasbourg should not differentiate between the standards of protection afforded to such persons relative to the territorial location of their proposed removal – a differentiation which certainly occurred in the *Harkins* and *Ahmad* decisions. ■

25 See further *Al-Skeini and Others v the United Kingdom* [GC] (2011) 53 E.H.R.R. 18.

After the Referendum: What next for children's rights in Ireland?

Maria Corbett, The Children's Rights Alliance*

An historic day for children

We believe that Saturday 10 November 2012 will go down in history as one of the most important days for children since the foundation of our State. The passage of the Thirty-first amendment to the Constitution explicitly recognizes the rights of children within the Constitution. We believe that the amendment could help foster a new legal landscape for children in Ireland. Specific actions are needed, however, to breathe life into the amendment and to ensure that it truly makes a difference to the lives of children in Ireland.

The Children's Referendum passed by 58% to 42%, with a low turnout of 33.5%. In real terms, 1,066,239 people voted (that's almost one adult for every child in Ireland today) – out of a total electorate of 3,183,239. The amendment was carried despite a Supreme Court ruling, just two days before polling, that parts of the Government's referendum information materials and advertisements breached the McKenna principles.

Paving the way for children's rights in the Constitution

The campaign to enshrine children's rights into the Constitution has been a long journey. The need for such a change was first raised in 1976 by the then Senator Mary Robinson. A series of official reports have advocated reform, from the infamous Kilkenny Incest Investigation of 1993 to the Report of the Joint Committee on Constitutional Amendment on Children in 2010.

Constitutional reform for children was adopted as a founding objective of the Children's Rights Alliance when established in 1995. The Alliance subsequently raised the issue with the UN Committee on the Rights of the Child – which monitors implementation of the UN Convention on the Rights of the Child – in 1998 and again in 2006. The Alliance's advocacy work culminated in recent months of campaigning to see this amendment finally passed.

The Thirty-first Amendment to the Constitution

The Children's Referendum campaign, as with previous referenda, was characterised by contentious debate, misinformation, apathy and confusion. Now the dust has settled, two questions remain: What does the amendment mean? And what happens next?

Of course, children already had rights in the Constitution prior to the passage of the amendment. What was lacking, however, was a sufficiently clear constitutional recognition of the needs of children that are different from, and additional to, those of adults. The lack of visibility for children in the Constitution, coupled with the express rights of the marital family, has placed restrictions on both the legislation that could be enacted and on judicial decisions. This situation has been further compounded by a lack of consistency in judicial interpretation of a child's personal right under Article 40.3.

The Thirty-first amendment inserts a stand-alone article, Article 42A, dedicated to children into the Constitution between Articles 42 and 43; and repeals Article 42.5. The impact of the new article on children will obviously depend on judicial interpretation and the strength of legislation enacted to give effect to the rights it contains.

The Alliance believes that the new article has the potential to greatly benefit children. It will bring about a rebalancing of the text of the Constitution with a more extensive reference to, and visibility of, children's rights. For the first time, the rights of all children will be brought together in

the same place within the Constitution. Currently, the rights of children of married parents flow from Articles 41 and 42 and the rights of children of unmarried parents from Article 40.3. The Courts are likely to read the provisions of Articles 40, 41, 42 and 42A together and seek to harmonise the rights set out in those provisions. Key to the impact of the amendment will be the initial approach adopted by the Courts to enumerating children's rights, and how they will balance the rights of the martial family and the rights of the child in conflicting circumstances.

Key elements of the Amendment

Article 42A.1 contains an express and general recognition that all children have rights and pledges to protect those rights by law. This provision will enable the Courts to develop new thinking in relation to children's rights and to break with past decisions, some of which have resulted in bad outcomes for children.

Article 42A.2.1 clarifies how and when the State can step in to protect children. Importantly, it shifts the trigger of intervention from focusing on the parents' failures and the reason for that failure, to the impact of that failure on the child's "safety or welfare". State intervention will be by "proportionate means", placing an onus on the State to provide alternative measures, such as family support, prior to removing a child into care.

Article 42A.2.2 commits the Oireachtas to legislate to allow a child the opportunity to be adopted, where the level of the parental failure towards the child has reached a high threshold. Critically, such adoptions can only take place where it is in the best interests of the child and where all other options have been explored and failed. Up to 2,000 children in long term foster care may benefit from this reform.

Article 42A.3 commits the Oireachtas to bring in a law that allows parents, either married or unmarried, to voluntarily place their child for adoption.

Article 42A.4 is unique to the Constitution in that it obliges the Oireachtas to define specific rights and to ensure relevant legislation is in place. Article 42A.4.1 commits the Oireachtas to bring in a law to ensure that the best interests of the child will be "the paramount consideration", in certain areas of decision-making affecting a child: child care proceedings brought by the State and proceedings concerning adoption, guardianship or custody of, or access to, any child. Article 42A.4.2 commits the Oireachtas to legislate for the views of the child to be taken into account in the proceedings listed in Article 42A.4.1.

What's next for children's rights in Ireland?

Much work remains to be done. Our attention now shifts towards actively lobbying for key actions to bring the amendment to life, and ensure that it truly makes a difference to the lives of children in Ireland.

Next Steps

The new article employs a novel, though not unprecedented, approach to a number of the rights provided therein. Some provisions are not constitutional directives but enabling provisions, placing a mandatory obligation on the State to legislate on aspects of adoption (Articles 42A.2.2 and 42A.3), best interests of the child (Article 42A.4.1) and hearing the views of the child (Article 42A.4.2). The wording adopts the imperative "shall" in terms of provision being made in law for these rights. The Alliance will be lobbying for the timely enactment of such legislation and for the strongest legislative provision to be made in these areas.

The amendment sets down a legal minimum standard. The Judiciary, when interpreting the amendment and the Oireachtas, when legislating, should build upon this standard. For example, when drafting legislation as directed by Article 42A.4, we call on the Oireachtas to legislate for a broader set of circumstances, including that:

- the best interests of the child will be the paramount consideration in child care and child protection proceedings brought by a child or third party *against the State and in associated administrative proceedings*
- the best interests of the child will be *a primary consideration in any judicial and administrative decisions concerning the child,* not covered by the amendment
- the views of the child should be considered *in any judicial and administrative proceedings that have a direct impact on the child.*

Aside from the general statement of the rights of children, the amendment largely focuses on child protection, adoption and family law. There are a range of rights, not covered in the amendment, where gaps in legislative protection exist. These include the child's right to know his or her identity and reform of the law on guardianship. The Alliance will be campaigning for the introduction of a comprehensive Children's Bill to address these outstanding gaps.

The Alliance will be advocating that the Judiciary and Oireachtas rely on the principles and provisions of the UN Convention on the Rights of the Child in its interpretation of the amendment, in particular when identifying 'natural and imprescriptible rights' for children under Article 42.A.1.

The impact of the amendment will be determined not only by the Judiciary and the Oireachtas but also by the budgetary decisions of the Executive. For example, to fully uphold Article 42A.2.1 (child protection), adequate resources will be needed to ensure that the new Child and Family Support Agency can fulfil its duty to protect children and support struggling families.

Lastly, while Article 42A.2.1 expressly applies to children, regardless of the marital status of their parents, it does not address the broader right to equality and non-discrimination for both adults and children under the Constitution. Reform of the existing constitutional provision under Article 40.1 should be considered and addressed by the Constitutional Convention which is currently meeting to review aspects of the Constitution.

The Alliance is hugely optimistic about the potential of the constitutional amendment. We see it as a vital first step to better protect, respect and listen to children. We look forward to continuing the journey to make children's rights real in Ireland.

***Maria Corbett is Legal and Policy Director of the Children's Rights Alliance, a coalition of over 100 organisations working to secure the rights of children in Ireland (www.childrensrights.ie)** ■

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