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OF IRELAND

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LAW IN PRACTICE

Surrogacy law  
Dilapidations

INTERVIEW

Dame Siobhan Keegan,  
the Right Honourable  
Lady Chief Justice of  
Northern Ireland

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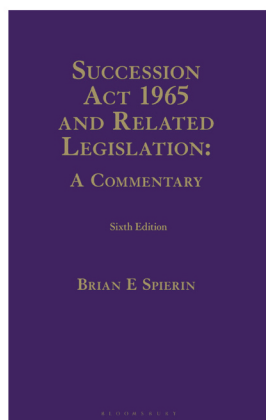
# THE BAR REVIEW

VOLUME 29 / NUMBER 5 / DECEMBER 2024

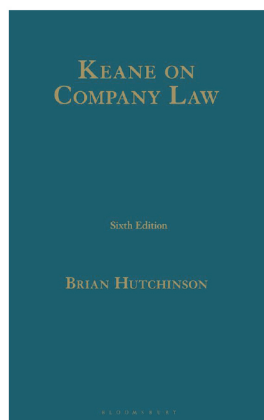


# DECISIONS OF CONVENIENCE

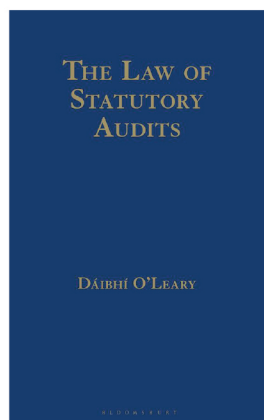
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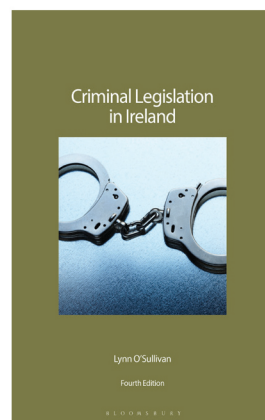
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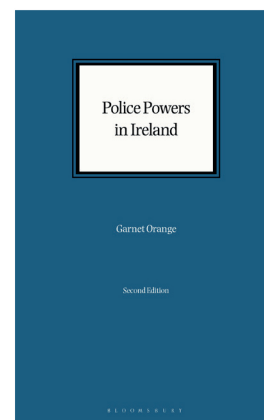
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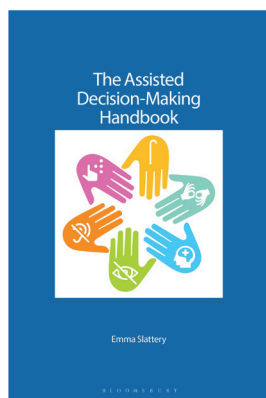
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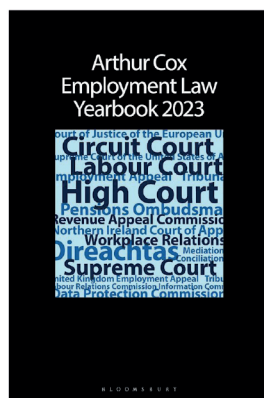
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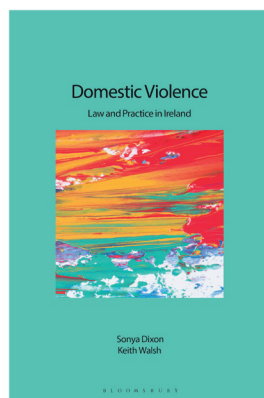
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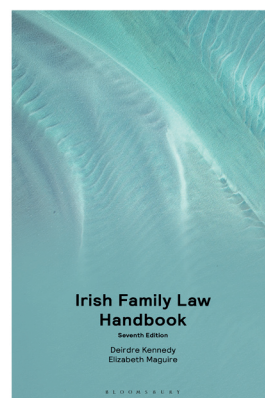
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BARRA NA hÉIREANN  
*An Leabharlann Dlí*

*The Bar Review*  
The Bar of Ireland  
Distillery Building  
145-151 Church Street  
Dublin D07 WDX8

Direct: +353 (0)1 817 5025  
Fax: +353 (0)1 817 5150  
Email: [molly.eastman@lawlibrary.ie](mailto:molly.eastman@lawlibrary.ie)  
Web: [www.lawlibrary.ie](http://www.lawlibrary.ie)

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Editorial: Ann-Marie Hardiman  
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Colm Quinn

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Tony Byrne  
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Commercial matters and news items  
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Paul O'Grady  
*The Bar Review*  
Think Media Ltd The Malthouse, 537 NCR, Dublin  
D01 R5X8  
Tel: +353 (0)1 856 1166  
Email: [paul@thinkmedia.ie](mailto:paul@thinkmedia.ie)  
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# THE CORE VALUE OF INDEPENDENCE

The independence of members of The Bar of Ireland remains a defining feature of the profession, and of paramount importance to the rule of law in Ireland.



**Seán Guerin SC**

*Senior Counsel, Barrister – Member of the Inner Bar  
Chair of the Council of The Bar of Ireland*

---

**N**one but a fool tries to advise another in his choice of a profession; each must decide for himself, and the decision is far from easy. It may have to last him all his life. It may even be better to starve at work you love rather than to earn all the money in the world at work you hate.”  
Hastings, *Cases in Court*

Patrick Hastings, one of the most successful English barristers of the early 20th century, was very far from starving on account of his choice of profession. Yet he thought the Bar the greatest profession in the world not because of the material rewards, but because “I cannot look back upon one moment when I was bored”. To young men and women of talent, curiosity, intelligence and diligence, the Bar remains an attractive profession for that very reason.

Of course, it is not and never has been easy to achieve that reward. Many of our colleagues make their start in the profession “without friends, without connections, without fortune”, as Charles Phillips wrote of John Philpot Curran, an Irish lawyer and politician, in *Curran and his Contemporaries*.

As charming as such tales may be, we now recognise that such hardships can constitute obstacles to entry and endurance in the profession, which can seem all the more daunting to aspiring barristers from backgrounds not traditionally well represented in the profession. The Bar of Ireland has welcomed the publication of the Legal Services Regulatory Authority’s (LSRA) ‘Breaking Down Barriers’ report of January 2024 and the ‘Breaking Down Barriers: Implementation Plan’ of September 2024. Work has already begun on implementation of their

recommendations. Indeed, we welcome these initiatives as proposals intended to ensure that the rewards of the profession will be available to young men and women possessed of the necessary capacities for success at the Bar, whatever their background. Not only their success, but the very idea of the independent referral Bar, depends on the profession’s ability to attract and retain the best and brightest of each new generation of lawyers.

## **New player**

In the competition for their talents, there is now a new player. On October 8, 2024, the LSRA formally launched a new business structure, which for the first time allows solicitors to form partnerships with barristers and barristers to form partnerships with other barristers to deliver legal services.

# CONVENIENCE IN CONTEXT

This edition's articles range from marriages of convenience to dilapidations clauses in lease agreements.



Helen Murray BL

Editor

*The Bar Review*

The Bar of Ireland's membership is exclusively composed of independent referral barristers, making practice under a legal partnership structure incompatible with membership. Where a barrister chooses to be part of a legal partnership, they can no longer retain their membership. Why? Because our core value of professional independence is of paramount importance and is essential to access to justice and the rule of law in Ireland.

A strong and vibrant independent referral Bar ensures access to a wider pool of expertise for solicitors, allowing them to select the barrister or combination of barristers best suited to the specific circumstances, and ensuring that the client receives expert representation tailored to their specific needs. As a result, all citizens have equal access to any barrister to advocate for them before the courts.

A self-employed, independent referral barrister can provide objective and impartial advice without the influence of business interests or other conflicts that can arise in a partnership model.

Our independence ensures that our approach to advising and advocating for our clients is guided solely by our professional judgment, founded on the highest standards of learning in law and advocacy, and ethical obligations. Our willingness to share the costs of professional practice offers savings of up to 90% for the most junior members, an immensely valuable contribution to the sustainability of professional practice for new entrants.

The defining reward of the profession remains, as for Hastings, the satisfaction of a life of purpose and interest in service to others and to the public interest. The defining feature of the profession remains our complete independence.

For some, even with the supports offered by the collegiate structure of The Bar of Ireland, independent self-employment is unattractive. The partnership structure may appeal to them. Each must decide for himself or herself. But the independent referral Bar remains a distinctive and highly attractive career choice for young people, and a flexible and responsive professional structure for clients and their solicitors.

**T**he end of term beckons with the promise of a well-earned break. *The Bar Review* can provide members with some intellectual stimulation in between the box sets and turkey.

The Lady Chief Justice of Northern Ireland, The Right Honourable Dame Siobhan Keegan, is the subject of *The Bar Review* interview this month. Lady Chief Justice Keegan provides a frank and fascinating insight into her career at the Bar and her work as a judge.

Anthony Lowry BL examines the recent Court of Appeal decisions in the area of marriages of convenience within the European Union. The recent case law raises

complex legal questions for both the individuals concerned and the State.

The Health (Assisted Human Reproduction) Act, 2024 is considered by Eithne Reid O'Doherty BL. This article provides a historical context to the law of surrogacy, and compares and contrasts the law in several other jurisdictions. Essential reading for anyone practising in this area of law.

Building dilapidations, for the uninitiated among us, are the "disrepair" that landlords can cite as reason for a claim against tenants when a lease has come to an end. Gemma Carroll BL examines the case law in Ireland and the UK, and provides a comprehensive analysis.

## Know Your Bar

On October 14 and 15, The Bar of Ireland hosted its inaugural Know Your Bar Open Day, an exciting event designed to promote our clubs, societies, wellness initiatives and Specialist Bar Associations (SBAs) to both existing and new members.

The two-day event provided an opportunity for members to have a taster of the different extracurricular activities the Bar has to offer – whether that be golf, creative writing, or the benefits of membership of an SBA. Also present were external organisations such as The Sanctuary, Clever Coaching by Mark Duffy, Nutrition by Laurann, and Suicide or Survive, highlighting the

importance of mindfulness and self-care to members. The Bar’s own communications, library, and fee recovery and practice support teams, along with EDI & Wellbeing Coordinator Sinéad O’Callaghan, each had drop-in desks to aid members with any queries they might have.

Attendees were able to meet representatives from various associations, clubs and societies, learn about their activities, and explore potential collaborations. The event was a resounding success, with participants expressing enthusiasm about the chance to connect with like-minded professionals and discover new opportunities within the Bar.



Paul D. Maier BL, Treasurer of the Employment Bar Association, at Know Your Bar.

## Call to the Inner Bar 2024

The Bar of Ireland extends its congratulations to the 27 members who were called to the Inner Bar at the Supreme Court on October 10 and 11.

Senior counsel, often identified by their silk robes, are entrusted with more complex and high-profile cases, demonstrating mastery in specialised areas such as criminal or civil law. There are now 389 senior counsel at The Bar of Ireland, of which 21% are female. The Bar continues to support and promote the Inner Bar as a viable career route and progression for female colleagues, as well as supporting the continuing development of all our members through extensive work on our professional and training programmes.

Speaking at the event, Seán Guerin SC, Chair, Council of The Bar of Ireland, said: “Today’s call to the Inner Bar marks an exceptional milestone in the professional journeys of these 27 members of the Bar. Taking silk is not only the recognition of their individual legal practice and expertise, but of their contributions to the barrister profession. The



skills in advocacy and the mastery of the law they have shown are invaluable assets, not just to their clients but to the entire justice system. Further, their achievements today

reaffirm the critical role that senior counsel play in supporting the rule of law and strengthening the social and economic framework of the State”.

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## Bar hosts election hustings event



From left: Ruairí Ó Murchú TD, Sinn Féin; Jim O’Callaghan TD, Fianna Fáil; Social Democrat candidate Sinead Gibney; Seán Guerin SC, Chair, Council of The Bar of Ireland; Imogen McGrath SC, Chair, Public Affairs Committee; Senator Barry Ward SC, Fine Gael; Labour Party leader Ivana Bacik TD; and, Patrick Costello TD, Green Party.



Ade Oluborode BL and Karen Kilraine BL review *The Bar’s* manifesto for Government ahead of the GE Justice Hustings on November 12.



Anthony Hanrahan SC speaks with colleague Niall Quinn BL, as General Election candidates arrive for the Justice Hustings.

On November 12, The Bar of Ireland hosted a Justice Hustings at the Law Library ahead of the General Election on November 29.

The event included a discussion with six general election candidates moderated by Seán Guerin SC, Chair, Council of The Bar of Ireland. Candidates were asked their views on the priorities set out in *Justice | A Manifesto for Fairness*, the Bar’s manifesto for Government, which was launched at the event.

In the detailed manifesto document, the Bar calls for a fair system for all, regardless of

means, pointing in particular to the areas of civil legal aid, family law, and criminal justice as in need of significant investment, due to increasing demand.

The candidates who attended included Jim O’Callaghan TD of Fianna Fáil, Senator Barry Ward SC of Fine Gael, Ruairí Ó Murchú TD of Sinn Féin, Labour Party leader Ivana Bacik TD, Patrick Costello TD of the Green Party, and Sinéad Gibney of the Social Democrats.

Speaking ahead of the event, Seán Guerin SC said “One certain route to the diminution of our

system of rule of law is through the inadequate resourcing of our courts and legal system, and for this reason The Bar of Ireland is appealing to candidates and parties in the upcoming general election to commit to an appropriate level of investment, so that public confidence in law and order is not irrevocably eroded”.

Read our manifesto here:

<https://www.lawlibrary.ie/app/uploads/2024/11/GE-Manifesto-2024-FINAL-FBC.pdf>.



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## Modernising the Courts Service

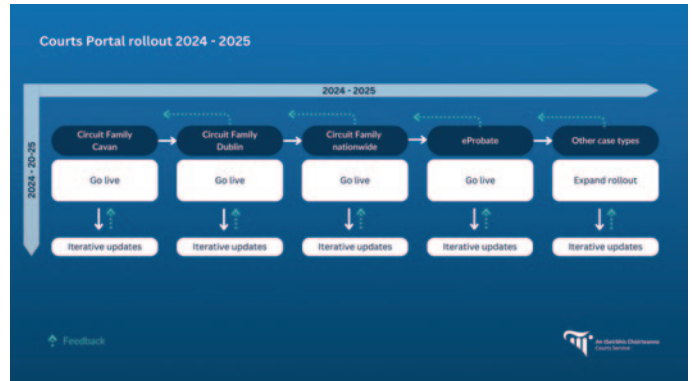
The modernisation of the Courts Service continues with a new online portal, says Owen Harrison, Chief Information Officer.

In modernising the Courts Service ICT infrastructure, we are introducing a modern back office system, and have been working with the Court rules committees on introducing new Digital Rules. We have also been working with the legal profession, the judiciary and internal users to determine how digital interactions with the Courts should work.

We are now starting the introduction of a new online portal. This portal will grow incrementally over time to support digital filing, case tracking, serving, payments (where relevant), order collection, etc.

Working with legal practitioners, staff, judiciary and county registrars, we have introduced the first part of the Portal for Circuit Family in Cavan. In its infancy, this part of the portal supports digital filings for Circuit Family proceedings, including the digital issuance of summonses.

Only when we are satisfied that the portal is working as expected for those involved will we increase functionality, and expand to other counties,



jurisdictions and case types such as probate and some High Court matters over time. This incremental approach will ensure that feedback from the legal profession, Court users and the judiciary will continue to be considered each step of the way, improving as we go.

We will update you regularly on how the Portal is developing and its relevance for you and your work. Thanks to all who have helped get the Portal to this point, and if you want to get in touch, please contact us at [portal@courts.ie](mailto:portal@courts.ie).

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# Specialist Bar Association news

## Renew your SBA membership



New term, new goals: now is the ideal time to consider joining one of our 17 Specialist Bar Associations (SBAs)!

Each SBA serves as a dynamic platform to engage, share and enhance your specialist knowledge and expertise. The suite of offerings includes a programme of continuing professional development (CPD), conferences, and the opportunity to develop a network of equally engaged colleagues.

Playing a vital role in fostering a sense of community and collaboration at the Bar, the SBAs also encourage a culture of knowledge sharing and mentorship, with experienced barristers sharing the platform with those looking to find a footing in a particular area of practice.

Increasingly, SBAs are taking on an external role: providing submissions; engaging with stakeholders on a number of practice-related issues; and, offering a valuable networking opportunity with solicitors and others in the professional services sector. With the support of the Council, each SBA is overseen by a committee, which serves as an important liaison across the Law Library.

The Bar of Ireland's SBAs are inviting members to renew membership, or to join, via their respective websites at <https://www.lawlibrary.ie/legal-services/sba/>.

## The borders of justice

The Immigration, Asylum and Citizenship Bar Association (IACBA) Annual Conference, titled 'The Borders of Justice', took place on Friday, November 1, bringing together legal professionals and experts for an in-depth exploration of pressing issues in international law, migration, and human rights. Chaired by Mr Justice Gerard Hogan, the conference featured a distinguished line-up of speakers, including: Anthony Collins, Advocate General; Prof. Elspeth Guild; Prof. Tobias Lock; Doncha O'Sullivan, Deputy Secretary General at the Department of Justice; Michael Conlon SC; Sarah-Jane Hillery BL; and, Noeleen Healy BL.

The conference covered a wide range of critical topics, including:

- 'The International Protection of Women: Recent Case-law of the Court of Justice';
- 'Access to a Judicial Remedy under the EU Migration Pact';
- 'An Update on the EU's Accession to the ECHR';
- 'Information, Interpretation, and Legal Advice: Reflections on Changes to the IPO Procedure Introduced in November 2022';

## Dublin's new role in CAS arbitration



From left: Cathy Smith SC; Paul McGarry SC; William McAuliffe, Head of Disciplinary at UEFA; Susan Ahern SC; Giovanni Maria Fares, CAS Counsel; and, Aoife Farrelly BL.

Arbitration Ireland, The Bar of Ireland ADR Committee, Dublin Dispute Resolution Centre and the Sports Law Bar Association collaborated recently to present a well-attended event on sports law and arbitration.

Discussion covered the recent UEFA decision to choose Dublin as an alternative seat for Court of Arbitration for Sport (CAS) disputes, and attendees heard from arbitrators based in Ireland, as well as representatives from UEFA and CAS, about the implications of this development.

The panel discussion was chaired by Susan Ahern SC. Speakers included: William McAuliffe, Head of Disciplinary at UEFA; Giovanni Maria Fares, CAS Counsel; and, Paul McGarry SC.



From left: Mr Justice Gerard Gogan; Sarah-Jane Hillery BL, Noeleen Healy BL; Doncha O'Sullivan, Department of Justice; and, Prof. Elspeth Guild.

- 'From Dublin III to the Migration Pact: Recent Case-law and Looking to the Future';
- 'The Palestinian Refugee, Article 1D, and Evolving Jurisprudence from Europe'; and,
- 'Implementing the Asylum Pact in Ireland and Developments in European Policy'.

## Enforcing accountability

The Financial Services Bar Association (FSBA)/ALG seminar, ‘Enforcing the Individual Accountability Framework – Developments and Challenges’, took place on November 12 both online and in the Gaffney room, and consisted of a panel discussion on the practical consequences for Central Bank of Ireland (CBI) enforcement actions arising from the introduction of the Individual Accountability Framework (IAF) and the revamped Administrative Sanctions Procedure (ASP).

Panelists highlighted the complications and conflicts they envisage may arise in the wake of the IAF between senior executives and regulated firms when potential breaches come to light, or when the CBI commences enforcement action. Panelists also provided an overview of the conduct of CBI inquiries and compared the old ASP procedures with the new. Contributors to the seminar included: Mr Justice Rory Mulcahy; Dario Dagostino, Partner, ALG; Mark Devane, Partner, ALG; Elizabeth Corcoran BL; and, Shelley Horan BL.

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## An Irish building regulator?

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**CBA Tech Talk:  
An Irish Building  
Regulator – Definitely  
Maybe, or Hot to Go?**

**Speaker:**  
Deirdre Ní Fhloinn BL

**Chair:**  
Anita Finucane BL

Gaffney Room & Online  
Wed 6 Nov  
8.30am

Specialist Bar Association Event

The first Construction Bar Association (CBA) Tech Talk in the 2024/25 series took place on November 6 in the Gaffney Room. ‘An Irish Building Regulator – Definitely Maybe, or Hot to Go?’ centred around the report of the Building Regulator Steering Group that was published in July 2024, recommending a national building control regulator to improve effectiveness of building regulation and to bring construction products and building control under a single body, with an interim regulator to be appointed pending primary legislation. Dr Deirdre Ní Fhloinn BL provided valuable context and reflections on the proposal, offering insight into the challenges and potential pathways ahead. The event was chaired by Anita Finucane BL. Stay tuned for the next CBA Tech Talk on December 18.

## Updates in tort law



TIBA's first event of the legal year, 'Updates in Tort Law', took place on October 17.

The Tort and Insurance Bar Association (TIBA) held a CPD event on October 17 entitled 'Updates in Tort Law'. Speakers included: Rory White BL; William Binchy BL; and, Sara Moorhead SC. Topics included: recent developments in tort law; and, contributory negligence in the context of clinical negligence and damages – recent developments. The CPD event was well received, with attendees gaining practical knowledge and insights that will enhance their professional understanding of tort and insurance law. The TIBA continues to provide critical educational opportunities for its members, fostering ongoing professional growth and expertise in the area.

## EUBA in Brussels



*Bernadette Quigley SC.*

The EU Bar Association (EUBA) held its Annual Conference in the Irish Embassy in Brussels on Thursday, November 7. The event was held in conjunction with Ireland For Law, and was opened by Kevin Conmy, Ireland's Ambassador to Belgium, and Brian Kennedy SC, EUBA Chair. This was followed by an in-depth keynote speech from Judge Eugene Regan from the Court of Justice of the European Union.

Bernadette Quigley SC chaired a distinguished panel that focused on State aid after the Apple judgment. Panellists Noel J. Travers SC, Dr Andreas von Bonin and Josep Maria Carpi Badia discussed the intricacies of the case and engaged in a meaningful and informative discussion.

There was a unique opportunity to network with international colleagues at a drinks reception following the event.

## Nature Restoration Law



*David Fenner, Assistant Principal – International & EU Affairs Directorate, National Parks and Wildlife Service, speaking at the PELGBA event.*

The Planning, Environmental and Local Government Bar Association (PELGBA) and the Law Society Environmental and Planning Law Committee collaborated recently on an event bringing together barristers and solicitors working in planning and environmental law. The session was chaired by Mr Justice Rory Mulcahy, with presentations by Mema Byrne BL, Rachel Minch SC and David Fenner, Assistant Principal – International & EU Affairs Directorate, National Parks & Wildlife Service.

Topics included the EU Nature Restoration Law, how it is implemented in practice, and an update on the emerging legal issues on

biodiversity. The event aimed to help attendees broaden their knowledge on the new EU law and learn how it can be used.

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## PRDBA Annual Conference

The Professional, Regulatory and Disciplinary Bar Association (PRDBA) celebrated its 10th anniversary at its Annual Conference on Friday, November 8. The conference kicked off with a sit down networking lunch at Jorge's in the Distillery Building.

Mr Justice David Barniville expertly chaired the event, which boasted three insightful sessions. Session one saw Elaine Finneran BL speak on registration appeals and Dee Duffy from Medisec discussed solicitor investigations in fitness to practise appeals. Caroline Murphy chaired the second session and took the panel through the various challenges with mediations and other informal resolutions in fitness to practise. There were interesting views from panellists Lorna Lynch SC, Ciara McGoldrick BL, and Dr Conan McKenna, with contributions from the audience. In the closing session Simon Mills SC discussed expert witnesses at professional disciplinary hearings before the final speaker, Peggy O'Rourke SC, ended



From left: Dr Conan McKenna; Ciara McGoldrick BL; Lorna Lynch SC; Caroline Murphy; and, Frank Beatty SC, PRDBA Chair (standing).

the conference with her presentation on recent developments in professional regulatory law.

The event concluded with a networking reception at the Sheds.

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## Climate Bar event on Irish rivers

The Climate Bar Association recently presented a unique event that shone a light on Ireland's rivers. The event was held in association with the University of Galway Centre for Human Rights, Faculty of Law, as well as Arts in Action at the University of Galway.

At the beginning for the event attendees had the opportunity to view a rehearsed reading of the play *Mountain River* by Gearóid Mac Unfraidh SC. The play explored the themes of climate change, clean water, and the future of Irish nature. This was followed by a panel discussion chaired by Judge Elizabeth Maguire. The discussion was aimed at exploring whether innovative dispute resolution fora would be of benefit to the environmental protection of rivers and lakes, and whether there are models of arbitration or mediation that might be incorporated into Ireland's existing fora to help to enforce laws against water pollution. Speakers included: Cliona Kimber SC; Michael O'Connor SC; Peadar Ó Maolain BL; and, Dr Rónán Kennedy.



From left: Judge Elizabeth Maguire; Dr Rónán Kennedy, Peadar Ó Maolain BL; Michael O'Connor SC; and, Cliona Kimber SC, Chair Comhshaoil.

## VAS Conference highlights human rights

The annual Voluntary Assistance Scheme (VAS) Conference took place on October 4, covering the impact of State funding on charitable advocacy, effective communication and engagement with vulnerable and marginalised groups, and using *pro bono* litigation to protect and vindicate human rights. Attendees were welcomed by Gemma McLoughlin Burke BL, VAS Coordinator, and Colm O'Dwyer SC, Chair of the Human Rights Committee.

The first panel discussed the effect that State funders have on community and voluntary organisations. Mr Justice Gerard Hogan moderated the speakers: Liam Herrick, CEO, Irish Council for Civil Liberties; Nuala Egan SC; and, Ronan Lavery KC.

Working with vulnerable and marginalised groups was the topic of the second panel, chaired by Ms Justice Mary Rose Gearty. Tanya Ward (CEO, Children's Rights Alliance), Sarah Jane Judge BL and Bulelani Mfaco (MASI – the Movement of Asylum Seekers in Ireland) spoke on the nuances of dealing with different vulnerable groups, such as migrants, sexual



From left: Bulelani Mfaco, MASI; Sarah Jane Judge BL; Tanya Ward, Children's Rights Alliance; and, Ms Justice Mary Rose Gearty.

abuse victims and children, while Judge Gearty offered insight into the training the judiciary receives on engaging with vulnerable witnesses. The third panel was chaired by Mr Justice David Scoffield of the High Court in Northern Ireland. Darragh Mackin (Phoenix Law), Sunniva McDonagh SC, Blinne Ní Ghrálaigh KC and Clare McQuillan (Irish Human Rights and Equality

Commission) discussed the development of human rights through litigation, both *pro bono* and no foal, no fee. Each panel member cast a light on specific litigation that they have worked on where this was the case.

Each panel was followed by a stimulating Q&A, with speakers providing specific insight into the issues raised by attendees.

# YOUR ELECTRONIC LIBRARY

This article forms part of a series outlining the many benefits of membership of The Bar of Ireland such as, in this case, access to an extensive electronic library.

The Library & Information Services Department is committed to providing members with high-quality content, and ensuring that they have electronic access to these resources from everywhere. This article runs through some of the key e-resources central to legal practice in Ireland.

Knowing your sources and remembering where the information you need is located is one of the most delicate yet essential parts of the legal research process. Barrister's Desktop, the Library & Information Services Department's platform on The Bar of Ireland website, is designed to facilitate access to legal databases and help members throughout their legal research journey.

## Effective Irish case law searching

Easy access to case law is of paramount importance. A range of databases are available to members, via Barrister's Desktop, with the most commonly used featuring at the top of the Electronic Library page:

- **VLEX JUSTIS**, a core resource providing unique access to unreported Irish cases from the 1930s onwards (including access to signed PDFs of unreported transcripts), and to the Irish Reports from 1838;



**Magalie Guigon**

*Assistant Librarian, Education & Promotion*



**Robert Carey**

*Sub-Librarian, Member Services Delivery*

- **WESTLAW IE**, a popular resource featuring the ILRMs and ELRs, as well as recent unreported Irish cases; and,
- **VIZLEGAL**, which harvests information from different websites and gathers it all on a user-friendly platform, together with a case timeline and High Court Records alert option – Vizlegal also holds International Protection Appeals Tribunal (IPAT), workplace Relations Commission (WRC), An Bord Pleanála, and planning authorities' decisions, to name but a few.

## Irish legal textbooks available electronically

The Library now provides universal access to major Irish legal textbooks. Although the Library has access to over 850 ebooks, we will focus here on two resources where major Irish titles can be accessed: Bloomsbury Professional, with 156 Irish titles; and, Westlaw IE, with 41 Irish titles.

Westlaw IE alone contains all the major Irish practice and procedure titles, including *Delany & McGrath on Civil Procedure* and *Walsh on Criminal Procedure*. Its ebooks are arranged by title and with recognisable book cover images.

Bloomsbury arranges its ebook collection by Irish practice area. These modules include banking, civil litigation, company, commercial, criminal, employment, family, medical, property and planning, tax, and succession. Within these sections you can find major Irish titles such as *McDermott on Contract* or *Wylie on Conveyancing*. With both resources, you can search the whole site, or search titles individually, and work with individual sections and chapters for downloading, printing and bookmarking.

Find out more about ebooks on the Research Skills section of Barrister's Desktop. Here you can find an A-to-Z list of ebooks, multiple ebook guides arranged by practice area, and take the Library's interactive training tutorials.



### Latest additions

The Library prides itself on constantly expanding the range of legal databases available to members. In the past few weeks alone, there have been three important additions to our suite of legal databases:

- **HEIN ONLINE UK CORE MODULE** is now available for searching by Library staff – it contains the full text of more than 3,000 law and law-related journals, English reports, Irish nominative reports, Canadian cases, US federal and state case law, and much more;
- **1.763 MILLION PLANNING APPLICATIONS**, in all local authorities, have recently been added to Vizlegal, some 85,000 of which cover 1960-1995 – An Bord Pleanála databases have also been consolidated and made available on Vizlegal, meaning that 86,000+ cases can now be searched simultaneously; and,
- **OXFORD ENGLISH DICTIONARY (OED) ONLINE** is now part of the Library's suite of legal databases and is available to all members on the Electronic Library page of Barrister's Desktop – the OED will not only display present-

day definitions, but also the history of individual words, making it an invaluable research tool.

### Artificial intelligence – looking to the future of legal research

The Library is actively tracking developments in AI, assessing both its benefits and challenges in legal research. Major legal databases like Lexis+, Thomson Reuters, vLexJustis, and Vizlegal are already exploring AI integration. AI is also a key focus in the Library's new strategic plan, with an emphasis on maximising its potential benefits while minimising risks. To keep members informed, the Library will continue sharing insights and updates on AI in the legal field through its eZine, *DLÍ-Nua*, particularly in a dedicated feature called 'Demystifying AI @ The Law Library'.

#### Learn more from:

- Barrister's Desktop eBooks page – <https://tinyurl.com/397utsj3> – for an A to Z list of ebooks, and ebooks practice area brochures; and,
- Library interactive training tutorials – <https://tinyurl.com/3x338y9m> – for case law searches and working with ebooks.



THE BAR  
OF IRELAND  
*Practice Support & Fee Recovery*

## Practice Support & Fee Recovery We are here to help

### What we can do for you

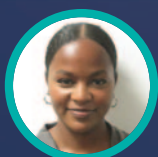
- Fee recovery service (for up to three fee notes at a time that are more than six months overdue)
- Information service on best practice in practice management
- A dedicated practice support hub on the members' website
- A range of practice information guides
- Pre-recorded and live information events/CPD events
- Dedicated email accounts for queries

### How to get in touch

Visit the 'Practice Support & Fee Recovery' hub on the website and familiarise yourself with the range of best practice information and tips on offer. For those who need to avail of the Fee Recovery service, please contact the team whose details are below. A starter pack will be sent to you together with the terms and conditions of the service. This service is included in your membership subscription and there is no additional cost.



**Michelle Farrell**  
Fee Recovery Manager  
Ext: 5053  
[feerecovery@lawlibrary.ie](mailto:feerecovery@lawlibrary.ie)



**Waad Alias**  
Fee Recovery Administrator  
Ext: 5409  
[feerecovery@lawlibrary.ie](mailto:feerecovery@lawlibrary.ie)

# PEOPLE PERSON

Dame Siobhan Keegan, Lady Chief Justice of Northern Ireland, talks about her plans for modernisation of the courts, the valuable skills learned in family law, and the path to inclusion in the legal professions.



**Ann-Marie Hardiman,**  
*Managing Editor, Think Media*

**L**ady Chief Justice of Northern Ireland The Right Honourable Dame Siobhan Keegan has risen impressively through the legal ranks. Called to the Bar of Northern Ireland in 1994, she took silk in 2006, and was appointed to the High Court of Northern Ireland in 2015. Lady Chief Justice Keegan and her colleague Madam Justice Denise McBride were the first women appointed to the Northern Ireland High Court, and Keegan added another first to her career when she was appointed Lady Chief Justice in 2021. It's not a bad trajectory for someone who is not, as she says, from a "legal family": "My parents ran a grocery store in Newry in Co. Down, and I think they realised fairly early on that I wasn't suited to be a shopkeeper because it was such hard work, although I tried!"

She credits the excellent education system in Northern Ireland with putting her on the road to a career in law; a career guidance teacher at Sacred Heart Grammar School in Newry suggested that it might suit a student talented in arts subjects and debating: "Having drifted into law, I realised I was suited to it because I liked the academic side, but I also particularly liked the advocacy side. That's why I went to the Bar. I made the right choice, I think".

There have been several cases that have had an impact on her

throughout her career, but like many barristers, the first case is special: "It was a driving plea, a speeding case. The solicitor sent the cheque with the brief, which was pretty amazing at my stage. It wasn't very much, I think it was £50, but that was great. I arrived at nine o'clock with this rehearsed script, which was totally unnecessary, of course. I got up to make a plea, which went down reasonably well with the judge, but he more or less cut me off after a couple of lines and said, 'It's a £250 fine', and whatever ban it was. While I was a bit annoyed that I didn't get my whole script out, I felt really good. I had done my first case. I had stood up, spoken for somebody, and it was the start".

Of course, some cases stick in the memory for less pleasant reasons, and for the Lady Chief Justice, those are cases where she felt that the people she represented did not get the result they needed, for whatever reason: "Throughout my practice, I represented public bodies, health trusts, and others, but I do remember the people, and I remember how important these, particularly family law decisions, were for them, good or bad. Those people will stay with me".

## A family affair

The Lady Chief Justice's career at the Bar was mainly in family law, an area often associated with female advocates but, it's fair to say, not with chief justices. Staying in the family division was very much a choice: "When I came to the Bar in 1994, the Children Order was just coming in. It was a new piece of legislation, and there were a lot of more senior people to me who were, I think, a bit wary of it. But because I was willing to do the work, I got to the higher courts. I also got the spin-offs, the judicial reviews, the human rights-based cases. It meant that I had a very strong practice established, which enabled me to take silk after 12 years as a family practitioner, which was very young. When I became a silk, I did diversify a bit, particularly into judicial review, and a bit of crime, but I also stayed with family law".

She says the family division gave her a skillset that has been important in her career as a judge: "I think family law has unfortunately been underestimated and perhaps seen in a rather negative way within the hierarchy of other divisions, but it does stand to you in terms of how you deal with people. I think half the battle of being a judge, whether I am delivering bad news, rejecting counsel's argument, or overturning another judge, is how you deliver the message. You should, in my view, always let people down respectfully. I have learned that through my family practice".

She hopes that her career path can serve as an example: “The reality with the Bar is sometimes that you can be siloed, and you wouldn’t be thought about if you’re a family practitioner to do a judicial review or a criminal case. That’s not productive and really shortsighted, particularly when the subject matter overlaps. I hope I have shown people what is achievable and how you can transfer skills”.

### Decision-maker

One of the biggest challenges in the move from Bar to bench is becoming the decision-maker, rather than the person who presents an argument. This is something the Lady Chief Justice takes very seriously, and also enjoys: “There’s a discipline to providing judgments, which you learn as you go. Some people would say, your first thought is your best thought. That’s not necessarily so. Sometimes you have to step away and take a bit of space and come back to a case to really satisfy yourself that you have reached the right decision, or the decision that you are comfortable with. Because, of course, colleagues might disagree with you, other courts might disagree with you. That doesn’t mean you are wrong, necessarily. It means that there are different views. If I can rationalise and stand over my own decisions I am personally satisfied”.

### Modernising ambition

Any person appointed to such a senior role will have a list of things they would like to achieve. Lady Chief Justice Keegan is no different, although her aims were somewhat stymied on her appointment by the fact that the Northern Ireland Assembly was suspended at the time. It has since of course reconvened: “I am really glad the Assembly is up and running. I have a good relationship with the Department and with the Justice Minister. I have a communication stream to try and get things done”.

The Lady Chief Justice is unapologetic about her desire for change and modernisation “I have, from the word go, said that the justice system needs to be open and transparent. I would like to see broadcasting of the courts, under strict conditions. And I publicly said that I think the pace of change on that is slow. I also think that the judiciary needs to be able to communicate on the difficult issues as best it can. For me, the difficult issues are delay in cases progressing through courts. Within the justice system, a lot of good work has been done on that and figures have improved, but I am conscious of the victims of crime, and those accused of serious offences, who need to get cases heard”.

She also wants to engage more widely in the community and with the justice sector: “I would like really to embed an open conversation on issues that affect people. We have had some very good developments in legislation to deal with intimate partner violence, and other issues. I engage with the voluntary sector on this, the profession, and I am also part of the Criminal Justice Board, which is a multidisciplinary group involving me and the Justice Minister, the Chief Constable, the Public Prosecution Service, and others, to try and collectively do better”.

No system will ever be perfect, but she believes that this collective approach can get things done, citing successes in piloting initiatives around case management in serious sex offences involving children as an example of what can be achieved. That simple ability to pick up the phone means issues can sometimes come to light that can be addressed quickly, and make a big difference: “I moved bails in the High Court from Friday to Thursday because the prison staff told me that if people are released on a Friday, the Housing Executive is closed, and people can’t get their benefits on time, so recidivism is high. That was a really simple move that has really proven to be effective”.

The legal system in Northern Ireland, as in other jurisdictions, has its challenges. Many are common to other jurisdictions. Criminal barristers in Northern Ireland, like their colleagues south of the border, have recently protested at fee levels. Lady Chief Justice Keegan sees this in the context of wider resourcing issues: “The judiciary relies on the legal profession, relies on the Bar being strong and independent and properly funded, so it is of concern to me that the Bar have had to strike. I hope that issue can be worked out; publicly funded barristers are publicly funded because they are providing a service to people who can’t afford legal advice. It would be a retrograde step if in our jurisdiction, everybody couldn’t have the best lawyer, no matter if they could pay or not”.

Other challenges are particular to Northern Ireland: “Legacy is an issue here. We need to deal with our past, and there is quite a lot of litigation that’s not finished. It is obviously a concern to me as a Chief Justice that people, after years and years, sometimes over 50 years, still feel they haven’t achieved a resolution”.

### Working towards inclusion

Being one of the first two women appointed to the Northern Ireland High Court is a significant achievement, but the fact that it took until 2015 is also significant for less positive reasons. Lady Chief Justice Keegan feels there’s more than one reason for this: “I think you have to have a body of experienced people to draw from to make High Court judges, and I am not sure there were enough getting through to that level who would be seen to have the experience. But I am not convinced that’s the only issue. I think the other issue is confidence in putting yourself forward as a woman into an environment where there had not been women. My predecessor was strong on this and said, if you are good enough, there is no reason why you shouldn’t put yourself forward. My regret is that since my appointment, there haven’t been any other female High Court judges in Northern Ireland. I am hoping that with more women getting to senior posts, there’ll be a wider body of people that will think about the judiciary because it is a very rewarding career path”.

The Lady Chief Justice has been vocal about her wish for more diversity in the profession, beyond gender to ethnic origin, social background, and persons with disabilities. She feels the value of diversity is well established now, but the issue for the future is inclusion: “You cannot have this conversation about diversity without a parallel piece on making sure that if you are not part of the majority group, you

are comfortable. In other words, the judiciary is not a club for a particular type of person. I think the key is people who are here as members of the judiciary, like me, saying, look, this is a good place, and you can be yourself. The bottom line is we have to keep diversity on the agenda, but we are in a better place where we can talk about these things”.

Other factors are making a difference too. The age profile within the judiciary has fallen (with herself as a prime example), and the Lady Chief Justice is also keen to encourage people to think of the judiciary as a real career option, from an earlier stage: “You can’t just spring up into these roles. You have got to get involved in things, say at the Bar, and/or be appearing in the higher courts. You have got to be thinking about your career path a number of years in advance before you apply for something. My own view is that people should not be shy about that. People have always been reticent about saying they have an ambition for the judiciary in case they don’t get it, which I do understand. But I honestly think it’s better to be thinking about it. I’m Chair of NIJAC in Northern Ireland, which is the Judicial Appointments Commission. It is a Commission that appoints on merit, uses processes that are fair. It is away from the ‘tap on the shoulder’ appointments system, which did, I think, lead to a paradigm judge model, someone who was known to others, as opposed to somebody who was less visible having any chance. You do have a chance, and you have a chance to prove yourself through this appointment system”.

### Building trust

One of the elements of the Lady Chief Justice’s role, as mentioned earlier, is public engagement. Trust in the judiciary, and in the legal system as a whole, is essential in society, but we live in times where trust in traditional institutions of the State has been eroded like never before. For Lady Chief Justice Keegan, the key to addressing this is in that public engagement, and in modernisation: “Public confidence is key to the health of the judiciary. Courts are open and people do come to courts. I think we can probably communicate a little bit better in plain language. I think we can use technology purposefully. In Northern Ireland, the Department is introducing a new operating system called Themis in the near future, which will have the type of functions that you and I would access if we were, for instance, trying to book a flight or seek information about our tax affairs. It is quite an exciting time in Northern Ireland because that project is underway now, and over the next five years we’re going to be totally modernising our operating systems, which I hope will dovetail with the communication piece”.

### Keeping a sense of perspective

Work-life balance in a role like Chief Justice will always be a challenge. Lady Chief Justice Keegan says she has plenty of interests outside of work, enjoying sport, the arts, the cinema, and taking holidays (“I have found the benefit of going to the sun and reading novels and just thinking about where I am having dinner as a way to

### The value of the Bar

During her career at the Bar, Lady Chief Justice Keegan was very involved in The Bar of Northern Ireland, serving as Vice Chair: “I got a lot out of representing the Bar to Government, to other Bars internationally and locally. When I was Vice Chair, there were lots of issues on the agenda that are still on the agenda, such as barristers’ remuneration. I was involved in the Women in Law Programme, which was very good. I did really enjoy my time representing the Bar and trying to be a voice for people. I was Chair of the Young Bar as well way back in 1999. I think that was probably the favourite time in my life. I still see myself as a young barrister! That was brilliant, dynamic, collegiate work that you did with colleagues, which stays with you”.

wind down”), but switching off will always be difficult: “I don’t think I’d be doing my job properly if I was telling you I can totally switch off because ultimately I take it seriously that I am in charge here. But having a good peer group around you that keeps you grounded is really important. And having a bit of perspective is important. I think you get that through your colleagues. Also, the humour of my friends, who aren’t slow about telling me what’s what, which I sometimes don’t agree with, but it does make me laugh! There is a lot of positivity in my life in this job, due to the people I come across every day, my colleagues and my staff, who give me a good sense of perspective I think”.

Being married to a lawyer also means there is less need to explain the vagaries of the job at home: “That’s a challenge in some respects, but also quite refreshing because he’s a very laid back, supportive person, which is good for me”.

Unlike in other jurisdictions, there’s no time limit in Northern Ireland on the role of Chief Justice, so Lady Chief Justice Keegan could in theory stay on for a very long time: “I could technically be in the job for 25 years. I can fairly certainly say I wouldn’t do that. I am not at the point of thinking of retirement. I can see a life beyond where I am, but not immediately. I am pretty happy having got through the first three years, which were full on. I have established an equilibrium about how I want things done and how I do things. I am always learning, and I am happy in what I do. So I’ll be here another while, I think”.

### Privy to history

The Chief Justice of Northern Ireland is also a member of the Privy Council, the formal body of advisers to the UK’s sovereign, and for the Lady Chief Justice it’s a fascinating and valuable role: “It was a pretty special experience to be appointed. You have certain roles that arise on the death of the monarch, so when Queen Elizabeth II died, I was part of the Accession Council for the King. You really felt you were part of history. Other than that, you can appear and be asked to sit on the Judicial Committee of the Privy Council in London as part of the Supreme Court, which is a real honour. I have sat on the Supreme Court in London a number of times, which has been great for me personally and for our jurisdiction”.

# UPDATE

VOLUME 29 / NUMBER 5 / DECEMBER 2024

A directory of legislation, articles and acquisitions received in the Law Library from September 6, 2024, to November 7, 2024. Judgment information supplied by vLex Justis Ltd. Edited by Vanessa Curley, Susan Downes and Clare O'Dwyer, Law Library, Four Courts.

## AGRICULTURE

### Acts

Agriculture Appeals (Amendment) Act 2024 – Act 38/2024 – Signed on October 29, 2024

## ANIMALS

### Statutory instruments

Veterinary Medicinal Products Regulations 2024 – SI 462/2024

Control of Dogs (XL Bully) Regulations 2024 – SI 491/2024

Veterinary Medicinal Products, Medicated Feed and Fertilisers Regulation Act 2023 (Section 7 Commencement) Order 2024 – SI 542/2024

Horse and Greyhound Racing Fund Regulations 2024 – SI 591/2024

## BANKING

Appeal against High Court decision – land certificate – incorrect sum – 16/10/2024 – [2024] IECA 245  
*Governor and Company of The Bank of Ireland v Carey and anor*

### Statutory instruments

Central Bank Act 1942 (Section 32D) Regulations 2024 – SI 493/2024

## BANKRUPTCY

Petition of bankruptcy – Plenary hearing – Cross-examination – Debtor seeking an order directing that the petition of bankruptcy issued against him should proceed by way of plenary hearing – Whether the debtor should

be given leave to cross-examine witnesses – 26/08/2024 – [2024] IEHC 528

*In the matter of Noel Martin [a bankrupt]*

## BUILDING CONTRACTS

### Statutory instruments

Building Control (Amendment) (No. 2) Regulations 2024 – SI 531/2024

Remediation of Dwellings Damaged by the Use of Defective Concrete Blocks Act 2022 (Section 11) Order 2024 – SI 577/2024

Remediation of Dwellings Damaged by the Use of Defective Concrete Blocks Act 2022 (Designation of Sligo County Council) Order 2024 – SI 578/2024

## CHILDREN AND YOUNG PERSONS

### Articles

Sutton, K.J. Navigating the threshold: exploring disparities between the age of responsibility in criminal offences and the age of consent to medical treatment. *Irish Journal of Family Law* 2024; 27 (3): 47-57

### Statutory instruments

Child Care Act 1991 (Early Years Services) (Childminding Services) Regulations 2024 – SI 494/2024

Child Care (Amendment) Act 2024 (Commencement) Order 2024 – SI 495/2024

## CIVIL LAW

### Statutory instruments

Civil Registration (Electronic Registration) Act 2024 (Commencement) Order 2024 – SI 435/2024

## COMPANY LAW

Winding-up proceedings – Substitution – Abuse of process – Joint liquidators of a company seeking to have the company substituted as petitioner –

Whether it would be an abuse of process to permit substitution – 30/08/2024 – [2024] IEHC 530

*City Quarter Capital II PLC v Companies Act 2014*

Minor modifications to proposal – Prejudicial proposal – Creditor's vote – 11/10/2024 – [2024] IEHC 585

*Mainline Power Ltd v Companies Act*

### Library acquisitions

Hutchinson, B., Keane, R. *Keane on Company Law (6th ed.)*. Dublin: Bloomsbury Professional, 2024 – N261.C5

Peelo, D., Porter, M. *The Valuation of Businesses and Shares: A Practitioner's Perspective (3rd ed.)*. Dublin: Chartered Accountants Ireland, 2023 – N263.6

## CONSTITUTIONAL LAW

Unlawful detention – Release – Article 40.4.2 of the Constitution – Applicant seeking release from detention – Whether detention was unlawful – 11/08/2024 – [2024] IEHC 518  
*Abraham v Governor of Cloverhill Prison*

### Library acquisitions

Bogdanor, V. *The New British Constitution*. Oxford: Hart Publishing, 2009 – M31

### Articles

O'Neill, L. Constitutional chaos? *Law Society Gazette* 2024; (Nov): 50-51

## CONSUMER LAW

### Articles

Kenny, G. Between the jigs and the reels. *Law Society Gazette* 2024; (Oct): 24-29

## CONTRACT

Contract – Interpretation – Deference – Applicants seeking leave to appeal – Whether the High Court afforded excessive deference to the respondent's

interpretation of the contract – 20/09/2024 – [2024] IECA 231

*Ulster Bank Ireland DAC v Financial Services and Pensions Ombudsman*

### Library acquisitions

Colgan, S. *Contract Law (2nd ed.)*. Dublin: Round Hall 2024 – N10.C5

### Articles

Clark, R. The incorporation of terms: established foundations and recent case law (part 1). *Commercial Law Practitioner* 2024; 31 (7): 86-91

## CORONERS

### Library acquisitions

Farrell, B. *Coroners: Practice and Procedure*. Dublin: Round Hall Sweet & Maxwell, 2024 – L254.C5

## COSTS

Costs – Unlawful suspension – Legal Services Regulation Act 2015 s.169 – Plaintiff seeking costs – Whether the defendant was entirely unsuccessful in his application – 26/08/2024 – [2024] IEHC 527

*Board and Management of Wilson's Hospital v Burke [No. 2]*

Costs – Rules of the Superior Court 1986 – S.52 Companies Act 2014 – 09/10/2024 – [2024] IEHC 572

*Credebt Exchange Ltd v Aventis Solutions Ltd and another*

Costs – Inordinate and inexcusable delay – Legal Services Regulation Act 2015 s.169(1) – Parties seeking costs – Whether costs should follow the event – 02/08/2024 – [2024] IECA 211

*Framus Limited and ors v CRH Plc and ors*

Superannuation scheme – Terms of order – Costs – Parties seeking costs – Whether there should be no order as to costs – 26/08/2024 – [2024] IEHC 526  
*Masterson and ors v Córás Iompair Éireann [No. 2]*

## COURTS

### Statutory instruments

Courts, Civil Law, Criminal Law and Superannuation (Miscellaneous Provisions) Act 2024 (Part 9) (Commencement) Order 2024 – SI 478/2024

Courts, Civil Law, Criminal Law and Superannuation (Miscellaneous Provisions) Act 2024 (Part 7) (Commencement) Order 2024 – SI 486/2024

## CREDIT UNION

### Statutory instruments

Credit Union (Amendment) Act 2023 (Commencement of Certain Provisions) (No. 2) Order 2024 – SI 475/2024

Credit Institutions Resolution Fund Levy (Amendment) Regulations 2024 – SI 476/2024

Credit Union Act 1997 (Regulatory Requirements) (Amendment) Regulations 2024 – SI 496/2024

## CRIMINAL LAW

Sentencing – Sexual offences – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – 30/07/2024 – [2024] IECA 225

*DPP v A(A)*

Source of law – self-defence – murder – Non-Fatal Offences Against the Person Act 1997 – 14/10/2024 – [2024] IESC 44

*DPP v Crawford*

Sentencing – Sexual offences – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – 30/07/2024 – [2024] IECA 224

*DPP v D(D)*

Sentencing – Harassment – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – 30/07/2024 – [2024] IECA 203

*DPP v Hanna*

Conviction – Sexual offences – Corroboration warning – Appellant seeking to appeal against conviction – Whether a corroboration warning was required – 11/07/2024 – [2024] IECA 219

*DPP v McM(J)*

Sentencing – Sexual offences – Headline sentence – Appellant seeking to appeal against sentence – Whether the sentencing judge erred in law by selecting an excessive headline sentence in the circumstances of the

case – 11/08/2024 – [2024] IECA 220

*DPP v McM(J)*  
Sentencing – Possession of an imitation firearm – Parity – Appellant seeking to appeal against sentence – Whether the trial judge erred in fact and in law in failing to give an equivalent sentence to that of the appellant's co-accused in line with the parity principle – 17/07/2024 – [2024] IECA 221

*DPP v O'Callaghan*

### Library acquisitions

Lucraft, M. *Archbold Criminal Pleading, Evidence and Practice 2025*. London: Sweet & Maxwell, 2025 – M500

### Articles

Casey, P. Corporate criminal liability: an exploration of corporate personhood unveils *mens rea* and culpability. *Irish Criminal Law Journal* 2024; 34 (3): 51-65

### Acts

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Animal Health and Welfare (Prohibition of Animal Testing for Botox) (Amendment) Bill 2024 – Bill 70/2024 [pmb] – Deputy Paul Murphy, Deputy Mick Barry, Deputy Gino Kenny, Deputy Bríd Smith and Deputy Richard Boyd Barrett

Animal Sentience Bill 2024 – Bill 75/2024 [pmb] – Deputy Paul Murphy, Deputy Gino Kenny, Deputy Richard Boyd Barrett and Deputy Bríd Smith

Appropriation Bill 2024 – Bill 97/2024

Credit Review Bill 2024 – Bill 76/2024

Criminal Justice (Amendment) Bill 2024 – Bill 69/2024

Electricity Costs (Emergency Measures) Domestic Accounts Bill 2024 – Bill 80/2024

Health Insurance (Amendment) and Health (Provision of Menopause Products) Bill 2024 – Changed from: Health Insurance (Amendment) Bill 2024 – Bill 91/2024

Houses of the Oireachtas Commission (Amendment) Bill 2024 – Bill 96/2024

Housing (Miscellaneous Provisions) Bill 2024 – Bill 73/2024

Information on Repairability of Certain Products Bill 2024 – Bill 93/2024 [pmb] – Deputy Pa Daly and Deputy Maurice Quinlivan

Land (Zoning Value Sharing) Bill 2024 – Bill 68/2024

Planning and Development (An Taisce) Bill 2024 – Bill 72/2024 [pmb] – Deputy Mattie McGrath

Sale of Nitrous Oxide and Related Products Bill 2024 – Bill 86/2024

Social Welfare Bill 2024 – Bill 81/2024

Transparency and Social Value in Public Procurement Bill 2024 – Bill 90/2024 [pmb] – Deputy Mairéad Farrell

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Autism Action and Oversight Bill 2024 – Bill 94/2024 [pmb] – Senator Micheál Carrigy

Disability (Personalised Budgets) Bill 2024 – Bill 89/2024 [pmb] – Senator Tom Clonan, Senator Victor Boyhan, Senator Michael McDowell, Senator Rónán Mullen, Senator Vincent P. Martin, Senator Marie Sherlock, Senator Rebecca Moynihan, Senator Annie Hoey, Senator Mark Wall, Senator Mary Seery Kearney, Senator Fintan Warfield, Senator Paul Gavan, Senator Erin McGreehan, Senator Fiona O'Loughlin, Senator Micheál Carrigy, Senator Robbie Gallagher, Senator Malcolm Byrne, Senator Pat Casey, Senator Shane Cassells, Senator Ollie Crowe, Senator Aisling Dolan, Senator Eugene Murphy, Senator Aidan Davitt and Senator Nikki Bradley.

Domestic Violence (Amendment) (No. 3) Bill 2024 – Bill 71/2024 [pmb] – Senator Vincent P. Martin

Maternity Protection, Employment Equality and Preservation of Certain Records Bill 2024 – Changed from: Maternity Protection Bill 2024 – Bill 77/2024

National Minimum Wage (Adequate Wages for Living) Bill 2024 – Bill 95/2024 [pmb] – Senator Alice-Mary Higgins, Senator Eileen Flynn, Senator Lynn Ruane and Senator Frances Black

Non-Fatal Offences Against the Person (Amendment) Bill 2024 – Bill 92/2024 [pmb] – Senator Lisa Chambers, Senator Catherine Ardagh, Senator Timmy Dooley and Senator Fiona O'Loughlin

Parole (Special Advocates) Bill 2024 – Bill 88/2024 [pmb] – Senator Lynn Ruane, Senator Alice-Mary Higgins, Senator Frances Black and Senator Eileen Flynn

Sale of Tickets (Cultural, Entertainment, Recreational and Sporting Events) (Amendment) Bill 2024 – Bill 83/2024 [pmb] – Senator Jim O'Callaghan and Senator Niamh Smyth

Sale of Tickets (Cultural, Entertainment, Recreational and Sporting Events) (Amendment) (No. 2) Bill 2024 – Bill 87/2024 [pmb] – Senator Timmy Dooley

Seanad Electoral (University Members) (Amendment) Bill 2024 – Bill 74/2024

Statute Law Revision Bill 2024 – Bill 78/2024

Transport (Vehicle Registration Plate Suppliers) Bill 2024 – Bill 79/2024 [pmb] – Senator Vincent P. Martin

Workplace Relations (Exemplary Damages, Unfair Dismissals and Other Provisions) Bill 2024 – Bill 82/2024 [pmb] – Senator Marie Sherlock, Senator Annie Hoey, Senator Mark Wall and Senator Rebecca Moynihan

### Progress of Bill and Bills amended in Dáil Éireann during the period September 6, 2024, to November 7, 2024

Agriculture Appeals (Amendment) Bill 2024 – Bill 55/2024 – Passed by Dáil Éireann

Criminal Justice (Amendment) Bill 2024 – Bill 69/2024 – Committee Stage

Electricity Costs (Emergency Measures) Domestic Accounts Bill 2024 – Bill 80/2024 – Committee Stage

Family Courts Bill 2022 – Bill 113/2022 – Committee Stage

Finance Bill 2024 – Bill 84/2024 – Committee Stage

Health Insurance (Amendment) and Health (Provision of Menopause Products) Bill 2024 – Changed from: Health Insurance (Amendment) Bill 2024 – Bill 91/2024 – Committee Stage – Passed by Dáil Éireann

Maternity Protection, Employment Equality and Preservation of Certain Records Bill 2024 – Changed from: Maternity Protection Bill 2024 – Bill 77/2024 – Committee Stage – Passed by Dáil Éireann

Merchant Shipping (Investigation of Marine Accidents) Bill 2024 – Bill 64/2024 – Committee Stage

Public Health (Tobacco) (Amendment) Bill 2024 – Bill 51/2024 – Committee Stage – Report Stage

Social Welfare Bill 2024 – Bill 81/2024 – Committee Stage

### Progress of Bill and Bills amended in Seanad Éireann during the period September 6, 2024, to November 7, 2024

Criminal Justice (Amendment) Bill 2024 – Bill 69/2024 – Committee Stage

Criminal Justice (Incitement to Violence or Hatred and Hate Offences) Bill 2022 – Bill 105/2022 – Committee Stage

Family Courts Bill 2022 – Bill 113/2022 – Report Stage – Passed by Seanad Éireann

Gambling Regulation Bill 2022 – Bill 114/2022 – Committee Stage – Report Stage

Housing (Miscellaneous Provisions) Bill 2024 – Bill 73/2024 – Committee Stage

Maternity Protection Bill 2024 – Bill 77/2024 – Committee Stage

Planning and Development Bill 2023 – Bill 23/2023 – Report Stage

Seanad Electoral (University Members) (Amendment) Bill 2024 – Bill 74/2024 – Committee Stage – Passed by Seanad Éireann

Social Welfare Bill 2024 – Bill 81/2024 – Committee Stage

### Supreme Court Determinations – Leave to Appeal Granted Published on Courts.ie – September 6, 2024, to November 7, 2024

*Robert Doe (a minor suing by his mother and next friend Jane Doe) and ors v The Commissioner of An Garda Síochána and ors* [2024] IESCDT 120 – Leave to appeal from the High Court granted on 18/10/2024 – (Charleton J., Collins J., Donnelly, J.)

*GM v IM* [2024] IESCDT 117 – Leave to appeal from the Court of Appeal granted on 14/10/2024 – (Charleton J., Collins J., Donnelly J.)

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*Promontoria Designated Activity company v Keane* [2024] IESCDT 114 – Leave to appeal from the Court of Appeal granted on 16/09/2024 – (Murray J., Collins J., Donnelly J.)

*Peter Thomson and Doreen Thomson v Eircom LTD and An Bord Pleanála* [2024] IESCDT 127 – Leave to appeal from the Court of Appeal granted on 25/10/2024 – (Charleton J., O'Malley J., Woulfe J.)

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# DILAPIDATIONS AND THE LAW

A dilapidations dispute between a landlord and tenant on expiry of a lease can arise from a number of factors.



Gemma Carroll BL

**D**ilapidations are any elements of “disrepair” in a space or property that is let to a tenant under a lease agreement, otherwise known as the “demised premises”. Typically, the main points of contention in a claim by a landlord against a tenant for dilapidations arise by reference to the repair obligation under the lease or the specific obligation arising on termination to yield up in a particular condition. This article focuses on issues that arise upon expiration of the lease and the level of the obligation to repair where the parties accept the fact of dilapidations existing.

## Is the state of disrepair a breach of the covenant to repair?

The particular standard of repair is often a question of interpretation. In *Truscott v Diamond Rock Boring Co Ltd* (1882) 20 ch.D 251, a covenant to repair was interpreted as imposing on

the tenant “..the burden of doing all repairs which are required and that includes all the repairs which but for the agreement the landlord would be obliged to do”. *Truscott* was accepted in *Blue Manchester Ltd v North West Ground Rents* (2019) EWHC 142 as “authority for the proposition that the inclusion of the word “necessary” does not materially qualify or otherwise affect the proper interpretation of a repairing clause”.

It is the breach of covenant that gives rise to the landlord’s claim and not the state of repair or otherwise of the building. The tenant may well have carried out substantial upgrading of the building, yet the landlord may be entitled to require the tenant to restore it to the previous state of repair or disrepair that existed at the time of entry of the lease. This may be met by the argument that the normal measure of loss is damage to the value of the property and that the enhancement of the property negates any claim for damages.

The tenant may simply abandon the premises, leaving it to the landlord to pursue them on foot of the covenant(s). The tenant may have maintained a good record of the condition at time of entry and departure, and may intend to defend a claim on the basis that the premises are in a like state or condition to that required by the covenant. This causes difficulty for the landlord if no agreed schedule of repair at date of entry exists. A landlord who does not engage with the tenant and seeks inspection facilities pre expiry may face a defence that the damage relied upon occurred after yielding up of the demise.

At this point, the argument of disrepair is evidential and courts generally favour joint inspections by surveyors taking place as there is less likelihood of argument in relation to the findings and such meetings may also address evidential deficits.

One form of improvement that potentially constitutes a breach of covenant is where a specific provision to effect certain works has been given. The nature of the consent and

the type of works contemplated may lead to an obligation by the tenant to reinstate what was there previously and in such situations it is helpful to categorise them as either:

- (a) improvements – works amounting to disrepair; or,
- (b) works that are the subject of a special licence or condition, which sets out the terms under which reinstatement is to take place.

In the latter situation, a contractual agreement has been entered into between the parties to allow something that would otherwise be a breach of a covenant against alteration, and the landlord is entitled to require compliance with its terms.

It remains to be seen whether a specific obligation to reinstate is governed by the provisions of s.65 of the Land Law and Tenant (Amendment) Act, 1980 (the 1980 Act) or, whether the court construes it as a “stand alone” obligation arising from a specific request to carry out works for which consent was given on equally specific conditions. This is particularly relevant to alterations or additions carried out during the term and is clearly not a general breach of the repair covenant.

### Scope of repair

The question of what standard of repair is involved was considered in *Proudfoot v Hart* (1890) All ER, 782 and cited with approval in *Newbrigin v S J&J Monk* (2015) 1 WLR, 4817 as “...such repair as, having regard to the age, character and locality of the [property] would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it” ((2015) 1 WLR, 4817 at paragraph 24).

Establishing the scope and standard of repair may call for a variety of potential experts. The repair may no longer be capable of temporary fix, so issues as to full reinstatement or replacement will come to the fore. Attempts by a landlord to obtain “new lamps for old” are likely to be highly contested and an evidential basis would have to be put forward to establish the position at the commencement of the lease, because in long-term leases the issue may be anything but clear. An argument for dilapidations based on the premises being demised in good condition may be sharply undermined by evidence that it was not.

The landlord must make a commercial choice whether he wants the property to be let relatively swiftly, while ensuring that he doesn’t undermine the claim for repairs. The tenant may argue that any voids that arose occurred because of the landlord’s failure to carry out remedial works as opposed to their necessity. There is an obligation to mitigate loss and where possession has been returned it is doubtful a landlord can use periods of discussion, negotiation, or dispute as being an appropriate measure for loss. The decision to carry out

repairs may enhance the prospects of the landlord succeeding because expenditure has been undertaken and a tenant can be then sourced at market rent. If repairs are not carried out and the landlord accepts a tenant paying an inferior rent, it makes the issue of causation more complex. Courts are generally reluctant to allow a party to recover loss they will never in fact sustain.

Where the demised premises form part of a building, it is common for the landlord to retain responsibility for the repairs to the “structure” and “exterior”, and the level and extent of what these constitute should be given careful consideration at the drafting stage to ensure that issues do not arise regarding who is responsible for any dilapidations claimed. It may be important to show that disrepair to the demised portion was not caused by breach of the landlord’s covenant to repair.

### Establishing the state of repair

Qualified covenants frequently limit the obligation for repair by wear and tear exceptions or terms that restrict the obligation so that the tenant is not required to place the premises in a better state than originally demised. Without an adequate record of the baseline position, a tenant may simply remove everything and leave the landlord with a shell and unable to establish what additions were made and even what services were present at the beginning of the lease. A landlord may be better advised to carry out an inspection well in advance of termination. Disputes about whether the removal of a particular object falls within the definition of “tenant’s fixtures” are more difficult to address where the tenant has stripped everything associated with it. Similarly, agreements to carry out works and a reinstatement at termination needs to be documented because otherwise there may be no record of what existed before. Even when properly recorded, it may prove particularly problematic in a listed building where the works cannot be undone.

### Were terms agreed in relation to the carrying out of particular works that may give rise to an obligation to restore to original condition?

The covenant wording around repairs and improvements requires close examination; while leases often contain a general provision for repair, no specific covenant may exist regarding the carrying out of improvements that could otherwise fall under the covenant against alteration.

If an improvement notice is served, the terms of consent ideally should stipulate if restoration to the original condition is required. Arguments can still arise over what the original condition was and the consent furnished should specifically describe this.

Where the tenant carries out the works without consent, the obligation to restore should automatically follow, failure to do so leading to a dilapidation claim by the landlord.

### Can an improvement be a breach of the covenant?

In longer leases the covenant to repair generally places clear responsibility for repairs and/or maintenance on the tenant. When the tenant wishes to carry out works that in fact improve the condition, they may try to seek compensation for them. The landlord's view of the improvements may be different and a dispute can arise upon expiration.

A lease may contain a covenant expressly prohibiting improvements without prior consent of the landlord, or improvements may be conditional and expressly demand that the premises are handed back in the same condition they were in at commencement.

Separate to provisions of the lease, s.68(2)(a) of the 1980 Act allows the tenant to seek the consent of the landlord to carry out improvements and states that such consent "shall not be unreasonably withheld". Therefore, if the tenant serves an improvement notice on the landlord setting out the scope of the intended works, the prudent landlord should specify, if consenting, the precise terms of their consent. These terms should include conditions such as reinstating the premises to the pre-improved condition prior to expiry, or the option requiring the improvements to remain in place.

If the landlord fails to respond to the notice within the one-month statutory timeframe allowed, the tenant can proceed to carry out the works irrespective of the fact that the tenancy may include a covenant expressly prohibiting same, which leaves the landlord open to a claim for compensation for the improvements. Alternatively, if no notice was served, s.54 of the 1980 Act contains various restrictions on the right to compensation by tenants for improvements, if the landlord satisfies the court that:

- (a) he has been prejudiced by the notice not being served; or
- (b) the improvement contravenes any covenant in the tenancy agreement; or
- (c) it injures the amenity or convenience of the neighbourhood.

The improvement carried out without consent is usually a clear breach of the covenant against alterations and the tenant may be obliged to reinstate the premises on expiry of the lease, failing which it gives rise to a dilapidation claim by the landlord.

Under the 1980 Act, it remains unclear if the landlord will be successful in opposing an application for compensation upon expiry where the tenant seeks compensation for improvements made on consent, but where the lease contains an express covenant that the tenant is obliged to reinstate the premises to the pre-improvement condition prior to expiration. The procedure for seeking improvements essentially values the increase in value brought about for the balance of the lifetime of the improvement. This implies that the improvement is to remain in situ, but a landlord might argue that it does not prevent it being a dilapidation.

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### Section 65 of the Landlord & Tenant (Amendment) Act, 1980

Section 65(2) restricts recovery in damages for breaches of a covenant to repair as "shall not in any case exceed the amount (if any) by which the value of the reversion (whether mediate or immediate) in the tenement is diminished owing to the breach".

This constitutes a cap on recovery, because while the landlord may seek the costs of dilapidations by reference to the breach, the amount recoverable is restricted to the effect on the value of the reversion. Evidence relating to the scope and cost of dilapidations are subject to an overall constraint being the effect on the value of the property. Therefore, what might be substantial dilapidations in one case, might be irrecoverable in another.

Section 65(3)(a)-(c) contains further limitations by reference to the character of the tenement and restricts recovery where, due to the age and condition of the tenement, repair in accordance with the covenant is physically impossible, or would involve expenditure excessive in proportion to the value, or where it could not be repaired without a rebuild or substantial alteration to the structure. The reference to want of repair due to wilful damage or waste appears to be solely in the context of s.65(3) and not by reference to the general limit on recovery. In practice, it is probably not material in the majority of cases, because the concept of "wilful" implies a deliberate and intentional act or omission. The purpose of s.65(3) is apparent, but the use of slightly different criteria that apply to each of the separate sub-sections is difficult to interpret. An illustration of s.65(3)(a) (age and condition) is denying recoverability where the repair in accordance with the covenant is physically impossible. It might have been thought that being "physically impossible" was a quite sufficient ground by itself, irrespective of the other characteristics of the tenement. One interpretation of the subsection is an intention of pre-empting tenant-induced impossibility.

## Evidence relating to the scope and cost of dilapidations are subject to an overall constraint being the effect on the value of the property.

### Supersession

In essence, supersession means that either the work will never be carried out because of the intended use of the property by the lessor or, if carried out, the work will have to be immediately removed to allow whatever proposed development is contemplated. It is usually the former; the landlord is unlikely to expend significant amounts of money where the works will have to be undone in the short term.

This phrase references the general principle that it is necessary to establish causation, and that loss is subject to mitigation. This issue of loss was considered in *Peachside Limited v Koon Yau Lee* [2024] EWHC 921. In this matter, the claimant company was the freehold owner of the property that granted the defendants a business tenancy of the first to fourth floors of the property for a term of 14 years. The lease contained an express repair covenant in standard terms. It also contained a five-year and final-year internal and external redecoration covenant, in standard terms. Further, it had covenants to yield up the premises at the end of the lease, not to make alterations without consent, not to obstruct the windows, not to place a strain on the structural parts, and to keep the premises clean. Judge Stephen Davies observed, at paragraph 104:

“In my judgment this is a case where the defendants’ conduct has undoubtedly caused the claimant loss over an extended period due to its failure to vacate in November 2020, its failure to give the claimant notice of its intention to hand back the keys in March 2021, and the nature and extent of the disrepair which the claimant had to arrange to be remedied.

However, it is also the case that the claimant has taken more time than would otherwise have been necessary due to its having to decide the complicated issue of how best to undertake works to factor in the potential redevelopment of the whole property and also, I am satisfied, with at least a weather eye on the progress of the works as compared with the progress of this litigation and the progress of the negotiations as regards the future of the Betfred lease. It would be unrealistic to adopt a mathematical approach to this exercise. Instead, I am satisfied that recovery of

approximately two-thirds of these losses is justified and, hence, I award £100,000 as a global sum under this head”.

Analogous to this is the situation where the actions of the landlord, through delay or otherwise, show that the works will never be carried out and where there is no satisfactory explanation for delay in doing so. This arose in *Car Giant Limited v London Borough of Hammersmith* [2017] EWHC 197 where Judge Furst, in assessing diminution in value, referenced *Latimer v Kearney* [2006] 3 EGLR 13, which said:

“The failure to carry out the repairs would clearly be an indication that the repairs were not necessary as the landlords claim. Put another way, whether sums were actually spent on doing repairs is relevant to the question whether the repairs were necessary or not. If they were not necessary, damage to the reversion could not be inferred from them. But even where repairs had not been carried out there could be other explanations for the failure that could satisfy the judge that the indication was not well founded, as where the landlord decides not to repair the property himself but proceeds to sell it at a lower price than he could have obtained if the repairs had been remedied”.

In *Car Giant*, the court noted that the works had not been carried out for six years and no explanation for this or any evidence they would be carried out was provided. The court factored in that the works involved were not particularly substantial and the units had been let at a market rent, and refused to conclude that the reversion was diminished by an amount associated with the remedying of these outstanding defects. The court noted that while explanations such as lack of finance might be provided to explain the timing of events, such had to be supported by evidence.

Tenants vacating end-of-life buildings or buildings with a larger development value, are likely to approach the defence of dilapidations with two arguments:

- (a) supersession if it is clear that the landlord intends to carry out a different development; or,
- (b) given the age and nature of the building and its capacity for redevelopment, that the full value may be greater in its present condition.

### Conclusion

What appears to be a straightforward contractual claim for damage gives rise to particular issues of recovery as the loss is affected not merely by the objective state of disrepair, but by the future use of the property and the chasm that often arises between experts as to the necessity, scope and cost of the repairs required to achieve compliance.



DECISIONS  
OF CONVENIENCE



Anthony Lowry BL

Recent developments in the Court of Appeal regarding marriages of convenience under EU law have raised a number of legal questions.

Council Directive 2004/38/EC (the Directive) regulates the right of Union citizens and their family members to move to and reside in other member states of the European Union.

In the case of *Metock*,<sup>1</sup> the Court of Justice of the European Union (CJEU) held, *inter alia*, that the Directive could be relied upon by the spouse of a Union citizen to derive a first right of residence for non-nationals in the territory of the EU. Of relevance in the present context, the CJEU also noted that member states could take appropriate measures to combat fraud such as marriages of convenience pursuant to Article 35 of the Directive.

The Irish legislature subsequently took steps to address fraudulent marriages by adopting the European Communities (Free Movement of Persons) Regulations 2015 (the 2015 Regulations). The 2015 Regulations, which replaced the brief rules contained in the earlier 2006 Regulations, adopted detailed measures implementing Article 35 of the Directive. Those rules set out the procedure by which the Minister for Justice (the Minister) can disregard a marriage, which, though

## The Irish legislature took steps to address fraudulent marriages by adopting the European Communities (Free Movement of Persons) Regulations 2015 (the 2015 Regulations).

legally valid, was entered into for the sole purpose of securing an immigration advantage under the Directive.

In *S.A. v The Minister*,<sup>2</sup> the High Court endorsed these initiatives and expressed the view that “there is a clear duty on the State” to tackle “bogus” marriages. Indeed, in *Rana and Ali v The Minister for Justice*,<sup>3</sup> the Supreme Court noted that such marriages amount to bad conduct “at a very high level of gravity” that could be said to be an “attack on the integrity of not only this State’s immigration system but also, in a broader sense, the EU immigration system”.

The Court of Appeal has recently considered the rights and obligations of both individuals and the Minister under the new rules introduced under the 2015 Regulations, as well as the consequences that flow when the Minister determines that the marriage is not genuine pursuant to this procedure. Having regard to the interests at stake, both for the individual and the State, this has raised complex legal questions.

### The right to be heard

Although not expressly provided for in the Directive, the right to be heard is a fundamental right, which must be observed even where legislation does not expressly provide for it. This guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely. However, the right “does not necessarily mean that that person must be given the opportunity to express his or her views orally”.<sup>4</sup>

As with the right to be heard under EU law, fair procedures under Irish administrative law require “that the procedures be reasonably fair in the context of the nature of the decision and the facts which are relevant to it”.<sup>5</sup> As regards the right to express views orally, there are “no hard and fast rules ... as to when the dictates of fairness require the holding of an oral hearing”.<sup>6</sup>

In the case of *Z.K. v The Minister for Justice*,<sup>7</sup> the Courts were asked to consider whether, in the context of a decision to revoke residence based on a marriage of convenience, an oral hearing was required to ensure that the procedure was fair.

The applicant was a Georgian national who had been granted residence under the 2015 Regulations on the basis of his marriage to a Lithuanian national. On the applicant’s account, he had entered Ireland illegally in September 2016 and, on February 22, 2017, submitted an application for international protection. The sole purpose of this application was to obtain



permission to reside and, thereby, be in a position to marry his Lithuanian spouse in Ireland. The couple were married on March 1, 2017, and on April 12, 2017, the applicant applied for residence under the 2015 Regulations. On December 21, 2017, this application was approved by the Minister.

In December 2017, the relationship became strained and the couple ultimately separated in October 2018. The applicant's spouse left their shared accommodation but continued to reside in the State in a series of rented accommodations. At no stage did the applicant inform the Minister of the break-up of the relationship. In February 2019, the applicant notified the Minister that he had lost his passport. This triggered a letter from the Minister dated March 8, 2019, seeking evidence of the couple's current activities. In reply, the couple explained that they were no longer together and, by letter dated April 30, 2019, the Minister initiated the formal revocation process by sending a proposal to revoke the applicant's residence card. The applicant and his spouse submitted an unsigned letter seeking to address these discrepancies. However, on August 8, 2019, the applicant's residence card was revoked and the Minister determined that the marriage was one of convenience.

On September 20, 2019, the applicant submitted a review, which enclosed a transcript of messages between the couple between May and August of 2016. The review offered an explanation for discrepancies regarding the address of the applicant's spouse and also enclosed letters of attestation from friends and acquaintances. On January 24, 2021, a recommendation, prepared for the Minister by a Department official, adjudged the marriage to be one of convenience that should be disregarded for immigration purposes. On February 1, 2021, the applicant was notified of the review refusal. This decision was challenged by way of judicial review on the grounds, *inter alia*, that there had been a breach of fair procedures in rejecting the applicant's account without conducting an oral hearing.

In the High Court, Phelan J. cited the *dicta* of O'Donnell J. in *M.M. v Minister for Justice and Equality*,<sup>8</sup> wherein he observed that "[i]f a decision requires credibility in this classic sense, that is, whether an account of disputed facts is to be believed or not, that, in Irish law can lead rapidly to the necessity for an oral hearing if fair procedures are to be applied".

Having regard to the seriousness of the accusations against the applicant, there was some analogy to be drawn with the position of a person whose Irish citizenship was being revoked, which had been held by the Supreme Court to require an oral hearing. Phelan J. concluded that:

"given the nature of the credibility issues which arise in this case and having regard to the fact that the account given could be true but has been discredited as false and misleading based on an assessment of the veracity of the applicant and his EU national spouse, an oral process is required in this case to ensure fairness".

On appeal, the Court of Appeal was highly critical of the applicant's failure to request an oral hearing prior to the determination of the administrative review. The Court noted that, absent wholly exceptional circumstances, an applicant cannot seek to invalidate a decision by raising an issue not raised before the decision-maker as the law.<sup>9</sup> However, rather than finding this determinative of the appeal, the Court chose to take this factor into account when assessing whether fair procedures obliged the Minister to include an oral stage or hearing in the decision-making process.<sup>10</sup> The Court also noted that neither the Directive nor the 2015 Regulations required an oral hearing and, as such, the failure to conduct one did not breach any statutory safeguards.<sup>11</sup> Further, while the decision to revoke his permission had significant consequences for the applicant, the decision to revoke a person's citizenship is of an altogether different nature.<sup>12</sup>

The Court of Appeal referred to the *dicta* of O'Donnell J. in *M.M. v Minister for Justice and Equality* quoted above, and concluded that an oral hearing may be necessary to ensure fair procedures in cases that involve disputed facts where witnesses give contradictory accounts and the adjudicator must reach a conclusion as to which of the two accounts he or she believes. In such instances, an oral hearing allowed the disputed accounts to be tested against each other, to allow each account to be tested for its own internal consistency, and to allow each disputed account to be tested by the opposing party.<sup>13</sup> The Court of Appeal found that, by contrast, in the present appeal, the decision-maker was dealing with the applicant's account, which was contradicted by no one, nor was it inconsistent with any other account.<sup>14</sup> As a result, the applicant's credibility did not fall, in any way, to be tested against other contradictory evidence.<sup>15</sup>

The Court was influenced by the applicant's conduct, which demonstrated a "willingness to abuse immigration procedures", as well as the accelerated nature of his decision to marry, the rapid breakdown of the relationship, and his failure to adduce documentary evidence that the couple had cohabited. Together with the failure to request an oral hearing at any stage of the administrative procedure, the Court was unable to agree that an oral hearing was necessary to ensure that the procedure was fair. Following *Z.K.*, there would appear to be few cases where a right to an oral hearing will arise under Regulation 28 of the 2015 Regulations given that disputed facts arising from contradictory witness accounts are unlikely to arise in the course of the procedure. As a result, most decisions will be based on documentary evidence only.

### The burden of proof

The Directive is silent as to the burden of proof when measures are adopted under Article 35. According to the European Commission, the burden of proof rests with the member state to establish that a marriage is one of convenience. Where reasonable doubts exist as to the genuineness of the marriage, an

investigation can be launched. The couple can be invited to produce further relevant evidence or documents, but a failure to respond cannot, in itself, form the basis of a decision. Measures under Article 35 of the Directive where this is duly established by the national authorities concerned in compliance with the relevant evidential standard.<sup>16</sup>

Pursuant to Regulation 28(2) of the 2015 Regulations, where the Minister has reasonable grounds for considering that the marriage is one of convenience, a proposal can be sent to the couple requiring them to provide information as is reasonably required within a specified time limit. Under Regulation 28(3), where a person fails to provide the information concerned within the time limit specified in the relevant notice, the Minister may deem the marriage to be a marriage of convenience. Accordingly, the Regulations appear to depart from the guidance provided by the Commission by reversing the burden of proof onto the couple to provide the evidence or documents sought by the Minister, and authorising the Minister to make a determination that the marriage is one of convenience should they fail to do so. Nonetheless, the 2015 Regulations do not make express provision for either the burden or the standard of proof.

In *Z.K.*, the Court of Appeal ruled out the possibility that a criminal standard of proof applied to a determination made under Regulation 28.<sup>17</sup> The Court referred to the decision of Richards L.J. in *Rosa v Home Secretary* [2016] 1 WLR 1206 as authority for the proposition that where the national authorities adduce evidence “capable of pointing to the conclusion that the marriage is one of convenience”, then, in the view of Richards L.J., “the evidential burden shifts to the applicant”.<sup>18</sup> However, the Court of Appeal did not find that the failure to provide evidence or documents sought by the Minister could, in itself, justify making a determination, stating:

“Where there was a failure to provide evidence that dispelled her suspicions where such evidence could reasonably be expected to be available to genuine couples, the Minister was entitled to take that failure into account in combination with the entirety of the information collected during the process”.<sup>19</sup> [Emphasis added.]

Thus, the Court of Appeal confirmed that the burden of proof rests on the Minister and the Courts can review whether a decision is well founded, based on reasonable evidence, regardless of whether a couple have, or have not, responded to a notice under Regulation 28(2), although such failure may be taken into account in that assessment. This approach is consistent with the case law of the CJEU pursuant to which measures adopted under Article 35 of the Directive require an individual examination of the particular case and must be based on concrete evidence related to the individual case that justifies the conclusion that there is an abuse of rights or fraud.<sup>20</sup>

### The need to conduct a personal interview

In *McCarthy*, the CJEU held that measures adopted under Article 35 are subject to procedural safeguards that aim to ensure a high level of protection of the rights of Union citizens and their family members. The CJEU held:

“In the light of the fact that Directive 2004/38 confers rights on an individual basis, the redress procedures are designed to enable the person concerned to put forward circumstances and considerations relating to his individual position, so as to be able to obtain from the competent national authorities and/or courts recognition of the individual right to which he may lay claim”.<sup>21</sup>

If a marriage is genuine, one would expect that sufficient documentary proofs will be capable of being procured by a couple to dispel the Minister’s concerns. Nonetheless, a couple could have limited documentary proofs available for submission to the Minister and offer to undergo an interview to verify that their marriage is genuine in order to put their best case forward. The Commission has advised member states that personal interviews are the most effective technique to verify whether spouses under investigation are providing accurate information.<sup>22</sup>

As noted above, it is unlikely that the Courts will impose an obligation on the Minister to conduct an oral hearing to ensure the procedure was fair. Nonetheless, the Courts could take the Minister’s failure to conduct an interview into account when reviewing whether the decision is well founded. Such an approach is consistent with the need to ensure a “high level of protection” for an individual’s right to put forward circumstances and considerations relating to their individual position as mandated by the CJEU even where they are unable to do so by way of documentary evidence.

### The retrospective effect of findings of fraud

In *R.S. v The Minister for Justice*,<sup>23</sup> the appellant was granted residency in the State based upon his marriage to a Union citizen in 2010. He relied upon his lawful residence in the State under the Directive to apply for Irish citizenship and in 2015, the Minister granted this application. From that point, the appellant’s right to reside in the State derived from the Irish Constitution and his status as an Irish national. Indeed, by virtue of Article 3.1 of the Directive, he was no longer a beneficiary under the Directive.<sup>24</sup>

In 2019, the Minister made a determination that the appellant’s residence had been acquired by an abuse of rights and that his marriage was one of convenience under the 2015 Regulations. Although no rights under the Directive existed that could be revoked, the Minister “hinted” that this might be considered in any reconsideration of his nationality. On this point, it is worth noting that no procedures exist for the revocation of Irish citizenship at the present time. Sections 19(2) and (3) of the Irish Nationality and

Immigration Act 1956, as amended, which governed those procedures, was struck down by the Supreme Court in *Damache v The Minister for Justice* [2022] 1 IR 669 and have not yet been replaced.

On the question whether the Directive continued to apply to the appellant and, by extension, whether the Minister could rely on Article 35 thereof, the Court of Appeal was inclined to the view that, by virtue of the wording of Article 3.1 of the Directive, “the appellant entirely ceased to be the subject of the regime established by the Directive from the date that he acquired citizenship of Ireland”.<sup>25</sup>

However, the Court referred to the CJEU decision in *Chenchooliah*, which established that the Directive continued to govern the expulsion of a non-EU spouse who had lost their right of residence under the Directive.<sup>26</sup> The Court found that it was arguable that, by analogy, “the Directive continues to govern the question of making a determination of whether a person had originally obtained the benefit of residence under the Directive by fraud even if the person has departed from the Directive’s regime of benefits by virtue of having obtained citizenship in the host member state”.<sup>27</sup>

As a result, the Court of Appeal decided to request a preliminary ruling from the CJEU regarding the following question:

“Whether Directive 2004/38/EC applies to a person who previously obtained the benefit of derived residence in a member state by virtue of being a spouse of an EU national exercising Treaty rights but who has more recently become a citizen in the host state and is no longer the beneficiary of any benefit under the Directive, solely for the purpose of investigating and (if appropriate) making a determination or reaching a conclusion that he engaged in a fraud

or abuse of rights and/or a marriage of convenience in the past in order to obtain a benefit under the Directive?”

If, following this case, rights of residence acquired by fraud under the Directive can be revoked even after a person acquires Irish citizenship, this will raise the possibility that steps will be taken by the Minister to revoke citizenship if and when new procedures are introduced by the Oireachtas.

As regards the question referred, it remains to be seen whether the CJEU will answer this question in the affirmative. Article 3.1 itself states that the Directive applies to Union citizens who move to or reside in “a member state other than that of which they are a national”. In addition, the Directive was not intended to govern the residence of a Union citizen in their own member state since, under a principle of international law, those nationals “enjoy an unconditional right of residence” in their own member state.<sup>28</sup>

However, if a person who lawfully resided in a member state under the Directive remains within its scope for the purpose of their removal, they may also fall within its scope when a member state determines that said right of residence was acquired by fraud in the first instance. Moreover, if the loss of residence under the Directive could result in the loss of nationality of a member state, EU law may be engaged.<sup>29</sup> As a result, the ruling raises interesting issues relating to the scope of the Directive and EU law generally, and the reply from the CJEU will be awaited with interest.

### Acknowledgement

With thanks to Luke Flanagan BL for his assistance with research in the preparation of this article.

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5. *Ezeani v Minister for Justice, Equality and Law Reform* [2011] IESC 23.
6. *Galvin v Chief Appeals Officer* [1997] 3 I.R. 240, at p. 251.
7. *Z.K. v The Minister for Justice* [2022] IEHC 278; [2023] IECA 254.
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25. *R.S. v The Minister for Justice* [2024] IECA 151, para 53.
26. *Chenchooliah v Minister for Justice and Equality*, Case C- 94/18.
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28. *Lounes*, C-165/16, EU:C:2017:862, para 37.
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# There's a **buzz** about the Bar these days.

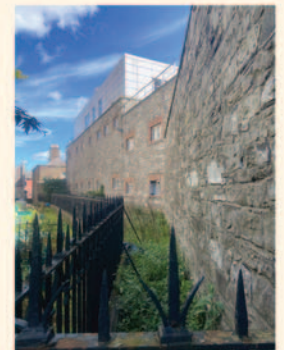


The Bar of Ireland Law Library is taking steps to welcome biodiversity to our spaces. New planters here at The Sheds are the first step; introducing nature-friendly plants for everyone to enjoy.

Working with award-winning social enterprise Pocket Forests we have added 15 new planters with a variety of native and pollinator-friendly plants in peat-free compost. The large circular pots are made from recycled plastic in a factory powered by wind energy. Plants were sourced from Caherhurley Nursery in Co Clare, an organic-certified plant nursery.

We will be introducing native hedgerow plants and trees to the yard later this year. And in winter a side garden bordering St Mary of the Angels Church (pictured) will be planted with a 150 native shrub and tree Pocket Forest.

On the second floor balcony 5 planters have been filled with new native and pollinator friendly plants.



The 21 plants here at The Sheds are:

## **Natives:**

Allium Ampeloprasum Babingtonii (Wild Leek)  
Agrimonia Eupatoria (Stickwort)  
Cardamine Pratensis (Cuckoo flower)  
Dipsacus Fullonum (Wild teasel)  
Fragaria Vesca (Wild strawberry)  
Geranium Sanguineum (Bloody Cranesbill)  
Inula Helenium (Elecampane)  
Lychnis Flos-cuculi (Ragged-robin)  
Pimpinella Saxifraga (Burnet-Saxifrage)  
Primula Vulgaris (Common Primrose)  
Tanacetum Parthenium (Feverfew)  
Tanacetum Vulgare (Tansy)  
Anthriscus Sylvestris (Cow Parsley)  
Galium Verum (Yellow Bedstraw)

## **Pollinator Friendly Perennials:**

Salvia Superba (Woodland Sage)  
Nepeta Hill Grounds (Catmint)  
Rudbeckia Fulgida Fulgida (Orange Coneflower)  
Achillea (Yarrow)  
Scabiosa Ochroleuca (Cream Pincushions)  
Saponaria Sicula Intermedia (Common Soapwort)  
Monarda Bradburiana (Eastern Beebalm)

By supporting Pocket Forests The Bar Council is supporting nature reconnection and a restorative justice project in Shelton Abbey Open Prison, where Pocket Forests have a native tree nursery with more than 2000 native trees being cared for by prisoners.



# SURROGACY AND THE CHANGED LEGAL LANDSCAPE

With the passing of the Health (Assisted Human Reproduction) Act 2024, it is timely to review case law on the issue of surrogacy in Ireland and other jurisdictions.



Eithne Reid O'Doherty BL

The Health (Assisted Human Reproduction) 2022 Bill drew commentary regarding children's rights and lack of provision for international surrogacy.<sup>1</sup> Prof. Conor O'Mahony, Special Rapporteur on Child Protection, recommended "that the State guides intending parents travelling abroad for surrogacy to travel to countries whose surrogacy frameworks and protections most closely align with Ireland's...."<sup>2</sup>

A Joint Oireachtas Committee on International Surrogacy reported in July 2022 with 32 recommendations. Minister for

Health Stephen Donnelly TD approved the proposed committee-stage amendments (CSAs) to the Bill, including new provisions for the regulation of international surrogacy agreements and the recognition of certain past surrogacy arrangements.<sup>3</sup> The Bill was signed by the President on July 2, 2024, and has not yet been commenced.

## Background to surrogacy

### Baby 'Cotton' – England

Surrogacy came to attention in 1985 in England, when Kim Cotton entered a commercial arrangement with a Swedish couple through a US agency with an English office. Ms Cotton was artificially inseminated with the husband's semen in England and paid £6,500. Social Services applied for a "place of safety order" for the baby and the evidence was that the Cottons had a secure and stable home. Ms Cotton left hospital without the baby. The commissioning father applied to the High Court for the baby to be made a ward of court, which was granted under the child's "best interests" principle. The commissioning parents were awarded custody, leave to take the child out of the jurisdiction, and an order for anonymity. The wardship order remained.

The Surrogacy Arrangements Act 1985 was hastily passed criminalising commercial surrogacy agencies and making surrogacy agreements unenforceable. The Human Fertilisation and Embryology Acts 1990 and 2008 followed, and provided for parental orders and expenses reasonably incurred. The Law Commissions of England and Wales and Scotland recommended in March 2023 that intending parents should become legal parents at birth, and recognised contracts and a vouched expenses payment scheme. In November 2023, the Health Minister decided not to forward these proposals. UK surrogates typically receive £12,000 to £25,000 as expenses. In the USA, where surrogacy is commercialised, surrogates receive compensation between €50,000 and €110,000.

#### Baby ‘M’ – New Jersey, USA

In this 1986 case, a New York agency arranged for the surrogate’s ovum and the commissioning father’s sperm to be used. The surrogate mother was paid \$10,000 (plus expenses). The surrogate then wished to keep the baby and the intending parents applied to court to enforce the surrogacy contract. The contract provided for extinguishing the surrogate’s parental rights and for the commissioning mother to adopt. The agreement was upheld at first instance. The New Jersey Supreme Court, however, ruled that the contract was void and unenforceable as a matter of public policy, and determined the matter under the “best interests” principle.<sup>4</sup> The Court held:

“Although in this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, we void both the termination of the surrogate mother’s parental rights and the adoption of the child by the wife/stepparent. We thus restore the “surrogate” as the mother of the child. We remand the issue of the natural mother’s visitation rights to the trial court, since that issue was not reached below and the record before us is not sufficient to permit us to decide it *de novo*”.

#### Current US law

US state law, both legislative and common law, governs surrogacy and varies from state to state. California and New York, for example, permit commercial surrogacy. Some states confine it to married heterosexual couples. Michigan prohibits all forms of surrogacy.

The Wisconsin Supreme Court in 2013 in *Rosecky v Schissel* overruled the Circuit Court in holding that the parentage agreement between the parties was enforceable: “A parentage agreement is a valid enforceable contract ... unless enforcement is contrary to the best interest of the child”.<sup>5</sup> The Court voided the agreement to sever the maternal rights of the surrogate by contract, as contrary to public policy.

**Prof. Conor O’Mahony, Special Rapporteur on Child Protection, recommended “that the State guides intending parents travelling abroad for surrogacy to travel to countries whose surrogacy frameworks and protections most closely align with Ireland’s”.**

The Model Uniform Parentage Act (UPA 2017), a set of model rules drafted by the Uniform Conference of Commissioners of Uniform State Laws, may be adopted by the states. These rules recognise both gestational surrogacies (donor) and genetic surrogacies (the surrogate’s ovum). This contrasts with the Irish legislation, where there must be a genetic link to one intending parent and the surrogate’s ovum is not used.

#### The law in England and Wales since ‘Baby Cotton’

*Whittington Hospital NHS Trust v XX*<sup>6</sup> is the authority in England and Wales. Lady Hale, with Lords Kerr and Wilson agreeing, delivered the lead judgment. Lords Carnwath and Reed dissented. The case was a tort action, whereby the respondent was rendered infertile due to failure to diagnose her cancer of the womb. Before chemotherapy she did retrieve some ova, and her claim included the cost of two commercial surrogacies in California.

Lady Hale in *Whittington Hospital* overturned her own earlier decision in *Briody v St Helens and Knowsley Area Health Authority*,<sup>7</sup> also pertaining to funding a California commercial surrogacy. Lord Carnwath, regarding *Briody*, stated:

“Having observed that: English law on surrogacy is quite clear”, that “the activities of commercial surrogacy agencies are unlawful”, and that it is “an offence for any person to take part in negotiating surrogacy arrangements on a commercial basis” (para 10), and having reviewed the varying practice round the world, she had “no difficulty” in agreeing with the judge – “... that the proposals put to her were contrary to the public policy of this country, clearly established in legislation, and that it would be quite unreasonable to expect a defendant to fund it”. (para 15)

## The Law Commissions of England and Wales and Scotland recommended in March 2023 that intending parents should become legal parents at birth, and recognised contracts and a vouched expenses payment scheme.

Lady Hale in *Whittington Hospital* in contrast held:

“That leaves only the most difficult question: what about the costs of foreign commercial surrogacy? Surrogacy contracts are unenforceable here...Why then should the UK courts facilitate the payment of fees under such contracts by making an award of damages to reflect them?”

Lady Hale then went on to hold that the California fees, save for legal fees, were not much higher than comparable UK fees and:

“The only deterrent is the risk that the court hearing an application for a parental order might refuse retrospectively to authorise the payments. As we have seen, there is no evidence that that has ever been done. The court’s paramount consideration is the welfare of the child involved, which will almost certainly be best served by cementing his home and his family links with the commissioning parents.”

Regarding the English legislation, Lady Hale held that it had “never been the object of the legislation to criminalise the surrogate or commissioning parents,” and:

“Added to that are all the other developments which have taken place since the decision in *Briody*. The courts have bent over backwards to recognise the relationships created by surrogacy, including foreign commercial surrogacy. The Government now supports surrogacy as a valid way of creating family relationships, although there are no plans to allow commercial surrogacy agencies to operate here. The use of assisted reproduction techniques is now widespread and socially acceptable. The Law Commissions have provisionally proposed a new

pathway for surrogacy which, if accepted, would enable the child to be recognised as the child of the commissioning parents from birth, thus bringing the law closer to the Californian model, but with greater safeguards”.<sup>8</sup>

Lords Carnworth and Kerr dissenting took a different view, holding:

“...the objective is consistency or coherence between the civil and criminal law within a particular system of law. The fact that the laws of other jurisdictions and other systems may reflect different policy choices seems to me beside the point. It would in my view be contrary to that principle for the civil courts to award damages on the basis of conduct which, if undertaken in this country, would offend its criminal law”.

### The European Union and European Court of Human Rights Charter of Fundamental Rights of the European Union

Article 3.2 of the Charter provides for “the prohibition of making the human body and its parts as such a source of financial gain”.

### Proposal for an EU Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood

This Regulation was proposed by the European Commission in December 2022 to ensure that parental links established in one member state are recognised in other member states, and to introduce a European Parenthood Certificate. The Regulation would guarantee that all families, including “rainbow families” whose parent-child relations are not currently recognised in all member states, maintain their parental rights when moving across the Union. The report of the proposal was passed by the European Parliament on December 14, 2023, by 366 votes in favour, 145 against and 23 abstentions.

The Council can either approve or disapprove of the report of the Regulation. As the file is a Council Regulation under the consultation procedure, the Council is not bound to follow the advice given by Parliament. The Council will, however, decide unanimously and there is considerable opposition. This current proposal could therefore involve compromise.<sup>9</sup>

### European Court of Human Rights

CJ O’Donnell in *In the Matter of The Adoption Act 2010, Section 49(1) and 49(3)* noted the below judgment of the European Court of Human rights (ECtHR) as relevant. The applicant parties did not reside in Poland:

“*SH v Poland* App nos. 56846/15 and 56849/15 (ECHR, November 16, 2021) establishes that refusal of recognition of a foreign parental order pursuant to a surrogacy arrangement, was not *per se* a breach of Article 8 rights, and a

possible breach could only materialise if the parties took up residence in a Convention State. While, therefore, the jurisprudence of the ECtHR may not be decisive, it is a factor tending towards recognition. It favours the recognition of the reality of family relationships arising from surrogacy and that is a factor which must be considered whenever the issue arises as it does here at least to some extent”.<sup>10</sup>

### Ireland

The Health (Assisted Human Reproduction) Act 2024 defines surrogacy as “an agreement between a woman and the intending parents (or, in the case of a single intending parent, that intending parent) under which the woman agrees to attempt to become pregnant, by the use of an egg other than her own, and, if successful, to transfer the parentage of any child born as a result of the pregnancy to the intending parents (or, in the case of a single intending parent, that intending parent)”.

#### Parental orders for permitted surrogacies

The Act prohibits commercial domestic surrogacy and commercial international surrogacy, at sections 57 and 93, respectively.

Sections 58 and 94, respectively, provide for and define reasonable expenses for the surrogate mother and are identical provisions. The agreement thereto must be effected before the embryo is transferred.

These expenses include becoming or trying to become pregnant and those which relate to pregnancy or birth or entering into and giving effect to the agreement. The expenses associated with getting pregnant or giving birth are:

(a) any prenatal or postnatal medical expenses associated with the pregnancy or birth; (b) any travel or accommodation expenses associated with the pregnancy or birth; and, (c) the expense of reimbursing the surrogate mother for any loss of income entailed in being the surrogate mother but only for the following periods:

- (i) a period of not more than six months during which the birth happened or was expected to happen; and,
- (ii) any other period during the pregnancy or thereafter, not exceeding 12 months in total, when the surrogate mother was unable to work on medical grounds related to pregnancy or birth.

Part 9 of the Act provides for the establishment of the Assisted Human Reproduction Regulatory Authority (AHRRA). The AHRRA gives prior approval for surrogacies that meet the required statutory criteria and are therefore “permitted” surrogacies. One of the criteria for a “permitted surrogacy” is that it is not a commercial surrogacy, section 52(1)(c) domestic and section 89(1)(e) international. Parental orders can only be granted for permitted surrogacies.

## The [Irish] Act prohibits commercial domestic surrogacy and commercial international surrogacy.

### Case law in Ireland

There are two recent decisions of the Supreme Court: *A, B and C (a minor suing by his next friend) v The Minister for Foreign Affairs*<sup>11</sup> by Murray J. and Hogan J. of May 9, 2023; and, *In the Matter of The Adoption Act 2010, Section 49(1) and 49(3)*.<sup>12</sup>

*A, B and C (a minor suing by his next friend) v The Minister for Foreign Affairs*<sup>13</sup> addressed parental orders. The facts were that a child C, born through surrogacy to a male same-sex married couple, A and B, applied for an Irish passport, through the descent of the father A, an Irish citizen. All were domiciled in England. B was not an Irish citizen.

The gamete used was the sperm of B and a donor ovum. The English court had made a parental order in favour of A, at some time after the birth of the child C.

Murray and Hogan JJ held, while refusing the passport application, that the parental order of the England and Wales court was recognised in Ireland under private international law. Hogan J. further stated:

“It may well be that in other cases and other circumstances orders along these lines made by courts in other countries would not necessarily be entitled to recognition in this State. Specifically, there may well be instances where such an order would not be recognised applying our notions of public policy in the sphere of private international law”.

In *In the Matter of The Adoption Act 2010, Section 49(1) and 49(3)*,<sup>14</sup> CJ O’Donnell distinguished between enforcement of a contract and recognition of status under that contract. The application was for the recognition of a US adoption order. The Chief Justice determined that the application could only be considered in the context of the commercial surrogacy agreement that preceded and grounded the adoption. CJ O’Donnell held:

“Accordingly, I do not think it is plausible to approach this case on any other basis than to accept that public policy as it currently stands, certainly expresses a disapproval of commercial surrogacy which would normally require a court to refuse to enforce an agreement providing for it”.



He then went on to hold that there was no public policy bar to recognise a foreign adoption order arising from a commercial surrogacy. The Court went on to set out seven clear reasons for this position and they are summarised below:

“(a) first, there is a strong public policy interest in recognising the status accorded to a person by the law of their domicile and/or habitual residence; (b) second, this policy is explicit in the 2010 Act, which deems an adoption order made pursuant to the law of that State to be a valid adoption unless such deeming is considered to be contrary to public policy, which creates a form of presumption in favour of recognition; (c) third, only public policy which is very clear and strong would justify the denial of a status accorded to a person by the law of their domicile and habitual residence whether as parents, or as children of those parents; (d) fourth, as Lady Hale observed in *Whittington Hospital NHS Trust v X.X.* [2021] A.C. 275, the courts bend over backwards to recognise the status of children born and seek to avoid leaving them parentless and perhaps stateless; (e) fifth, Article 42A of the Constitution is also of some weight – it provides that provision shall be made by law that, in the resolution of all proceedings concerning the adoption, guardianship, or custody of a child, the best interests of the child shall be a paramount consideration; (f) sixth, decisions of the European Court of Human Rights (the “ECtHR”) make it clear that states must provide some level of recognition to and protection for the relationships established, and as touched on above; and,

(g) finally, while the agreements might raise issues of personal autonomy if individual aspects were sought to be enforced, it is not necessary to express a view on those provisions either collectively or individually in the light of the conclusion to which the Court has come on the issue of commerciality, which is the central question and where there is a clearly expressed and deducible public policy”.

### Conclusion

CJ O’Donnell had considered the Health (Assisted Human Reproduction) Bill in his decision above<sup>15</sup> and held:

“While it is always difficult to make some assessment of just how commercial an arrangement would have to be to lead to refusal of recognition, it should be said that the payments here seem to be standard and unexceptional in the context of the USA. It is also an important feature that there is a genetic connection in this case. C is the father of the children and is moreover married to D. Recognition of D’s status as adoptive parent recognises and supports the bonds between A, B, C and D”.

It remains to be seen how reasonable expenses and commercial surrogacy will be interpreted by the Irish courts.<sup>16</sup>

### References

1. McGarry P. Committee urged not to rush decisions on surrogacy law. *The Irish Times*, May 13, 2022. Prof. O’Mahony’s “firm view” was that the Government’s proposals would result in legislation “which is contrary to Ireland’s commitments with respect to the right to family life, the right to identity, the best interests principle and the principle of non-discrimination”.
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3. gov.ie. Government approves Committee Stage Amendments to the Health (Assisted Human Reproduction) Bill 2022. December 12, 2023. Available from: <https://www.gov.ie/en/press-release/1cc16-government-approves-committee-stage-amendments-to-the-health-assisted-human-reproduction-bill-2022/>.
4. 109 N.J. 396 (1988).
5. 2013 WI 66 (July 11, 2013), p2.
6. [2020]UKSC 14.
7. [2001] EWCA Civ 1010; [2002] QB 856.
8. Parliamentary Under Secretary of State, Maria Caulfield MP, on November 8, 2023, announced that the Law Commissions’ recommendations would not be forwarded at that time.
9. European Legal Forum 1/2024: Comments on the Proposal for a Council Regulation on Parenthood. May 26, 2024. Available from: <https://conflictoflaws.net/2024/european-legal-forum-1-2024-comments-on-the-proposal-for-a-council-regulation-on-parenthood/>.
10. [2023] IESC at Para. 90.
11. The Irish Human Rights and Equality Commission was joined as amicus curiae, notice party.
12. [2023] IESC 6.
13. The Irish Human Rights and Equality Commission was joined as amicus curiae, notice party.
14. [2023] IESC 6.
15. *Ibid.*
16. On October 8, 2024, the Minister secured Government approval to draft amending legislation to the Assisted Human Reproduction Act. It will allow Irish residents who undertake a donor-assisted human reproduction (DAHR) procedure abroad to apply for a declaration of parentage in respect of a child born as a result of such a procedure. It will provide for Irish citizens domiciled abroad who have undergone DAHR or surrogacy in another jurisdiction to have their parentage recognised in Ireland, where this is not already the case.

# DIRECT ACCESS

Barristers contemplating offering legal services directly to members of the public should familiarise themselves with The Bar of Ireland’s new guidance on this matter.



Proinsias Ó Maolchalain BL

It is a cornerstone of The Bar of Ireland, as an independent referral Bar, that a practising barrister may only receive instructions directly from a person who is a solicitor. As an exception to that rule, the Council has operated the Direct Professional Access Scheme, which provides for a right of access to barristers for members of “an approved body”, of which there are now some 137, whereby a member of the approved body can access a barrister directly for legal assistance in “non-contentious matters”, without having to go through an instructing solicitor.

Section 101 of the Legal Services Regulation Act 2015 (the 2015 Act) provides that:

“No professional code shall operate to prevent a barrister from providing legal services as a practicing barrister in relation to a matter, other than a contentious matter, where his or her instructions on that matter were received directly from a person who is not a solicitor”.

Section 101 was commenced on September 25, 2024, by the Legal Services Regulation Act 2015 (Commencement of Certain Provisions) Order 2024 (SI 477 of 2024). In contemplation of this Section, the Code of Conduct of The Bar of Ireland was amended so that Rule 3.6 now provides that a member of the Bar may accept instructions directly from a client “in matters other than contentious matters”, but the Rule stipulates that:

“where the matter becomes contentious, the barrister must not draft any formal document, engage in correspondence or make direct contact with third parties and they must direct that a solicitor be

retained in order for them to continue to advise and provide other professional services as barristers”.

### “Contentious matters”

“Contentious matter” is defined by s.99 of the 2015 Act as a “matter that arises in, and that relates to the subject matter of, proceedings before any court, tribunal or other body or person before which the respective legal rights and obligations of two or more parties are determined, to which the person instructing the practising barrister concerned is a party”.

As noted, under the Direct Professional Access Scheme, members of the Bar provide professional services in “non-contentious” matters a range of professional bodies. A move to provide direct access to the public without a member of a regulated profession acting as an intermediary would represent a significant departure from current practice.

### New guidance

Against this background, the Council’s Professional Practices Committee (PPC) has issued guidance. Any barrister contemplating the provision of legal services directly to members of the public in “non-contentious” matters is strongly advised to first carefully review this document.

Members contemplating accepting an instruction directly from a client must therefore satisfy themselves that the matter is not, in fact, “contentious” as defined in s.99 of the 2015 Act, and once instructions are accepted, members must continue to satisfy themselves that the matter has not become “contentious”.

Where a matter does become “contentious”, the member must act in accordance with Rule 3.6 of the Code of Conduct, and direct that a solicitor be retained in order for them to continue to advise and provide other professional services as a barrister.

The guidance explains that as an exception to the cab rank rule, the decision to accept instructions directly from a client is “a matter for the discretion of each individual barrister”. It would not, however, be lawful, or in compliance with the Code of Conduct, if a refusal were to be based on any discriminatory grounds set out in s.3(2) of the Equal Status Act 2000. It may be prudent for a barrister who does not have a policy of refusing direct access, who refuses a particular instruction, to make a brief note of the reasons for so doing in case this is questioned in future.

It is essential that members of the public do not form the impression that a barrister has agreed to provide legal services if that is not in fact the case. The guidance advises that “members should make it clear to prospective clients making inquiries that a professional relationship with the client is not established until the member confirms their engagement by means of a formal engagement letter”.

In this context, the wording of an appropriate notice under s.150 of the 2015 Act will be particularly important.



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