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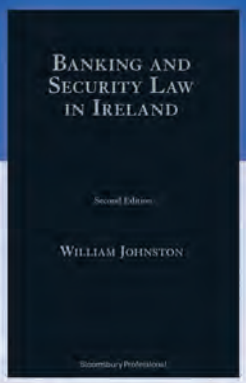

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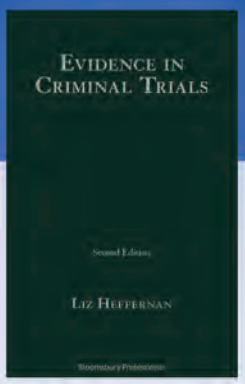

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Direct: +353 (0)1 817 5025
Fax: +353 (0)1 817 5150
Email: aedamair.gallagher@lawlibrary.ie
Web: www.lawlibrary.ie

PUBLISHERS

Published on behalf of The Bar of Ireland by Think Media Ltd

Editorial: Ann-Marie Hardiman
Paul O'Grady
Colm Quinn
Design: Tony Byrne
Tom Cullen
Niamh Short
Advertising: Paul O'Grady

Commercial matters and news items relating to *The Bar Review* should be addressed to:
Paul O'Grady
The Bar Review
Think Media Ltd
The Malthouse,
537 NCR, Dublin DO1 R5X8
Tel: +353 (0)1 856 1166
Fax: +353 (0)1 856 1169
Email: paul@thinkmedia.ie
Web: www.thinkmedia.ie

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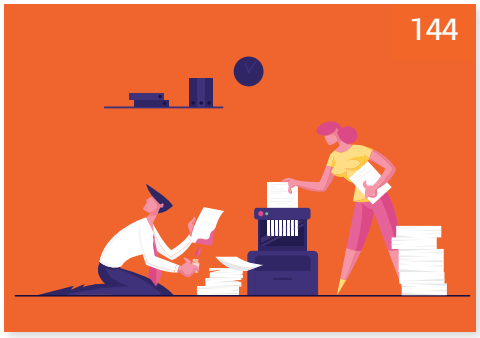

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Aedamair Gallagher at: aedamair.gallagher@lawlibrary.ie

Representation in a time of crisis

A number of important issues for The Bar of Ireland were raised in a recent meeting with the Minister for Justice.

During my first two months as Chair of the Council of The Bar of Ireland, one of my key tasks has been to engage in a series of meetings with partners and stakeholders throughout the justice system on a variety of different matters. As part of these engagements, a meeting was held (remotely) with the Minister for Justice, Helen McEntee TD, in late September. Our meeting covered a wide range of issues and included the impact of Covid-19, an item high on the agenda.

The Minister empathised with the challenges facing our profession and particularly commented upon the results of our member survey undertaken in May 2020, which revealed the stark reality of how Covid-19 has impacted on us, with 44% of respondents indicating that their income had fallen by 80%+, and an additional 31% indicating that their income had fallen by between 60% and 80%. The sustainability of practice is now a major concern for our profession and the re-opening of the Courts will determine the viability of practice into the short and medium term for many. In fact the word "re-opening" should probably be read as "keep-open", in light of the recent surge in Covid-19 cases.

The Minister acknowledged the efforts of the Bar, which have assisted in maintaining access to justice for the public throughout the pandemic. She said that investment in the courts is a priority and invited further engagement with the Bar in relation to the modernisation and reform of the courts.

Justice agenda

I also discussed with the Minister the new Programme for Government (PfG) and the justice agenda within. It contains many provisions that The Bar of Ireland welcomes, and which reflect positions adopted by the Bar.

In terms of family law, the Minister made specific reference to the family law reforms she hopes to introduce and the Joint Committee on Justice and Equality Report on Reform of the Family Law System. She asserted that the Programme will enact a Family Court Bill to create a new dedicated Family Court within the existing court structure and provide for court procedures that support a less adversarial resolution of disputes. The Family Court Bill was published shortly after our meeting, during which she invited and welcomed our engagement on the Bill. Surprisingly, the legal profession has not been included on the oversight group tasked with driving progress on a national family justice service. I have since written to Minister McEntee highlighting this oversight and seeking the inclusion of the Bar on the group. We also discussed the O'Malley Review, which examined the adequacy of current arrangements for the protection of vulnerable witnesses in the investigation and prosecution of sexual offences. The Bar of Ireland welcomed the publication of the report and has already met with the group charged with its implementation, and we have made a written submission setting out how we will play our part in the implementation of the recommendations relevant to the profession. The Minister welcomed the Bar's support in relation to the implementation of the O'Malley recommendations. She noted the important role of the Bar in the delivery of education for members and indicated her support of our efforts in that regard. She also stated that she intended to act upon the 2015 draft legislation in relation to preliminary trials.

Review of civil justice

The final report of the Administration of Civil Justice Review Group, chaired by Mr Justice Peter Kelly, former President of the High Court, is expected in the coming weeks, the aim of which is to make Ireland's legal system even more effective, responsive and user friendly, and to make alternative dispute resolution (ADR) more accessible and cost efficient.

The Minister said she recognised that legal costs are not an isolated issue and that wider reforms to civil litigation and the justice system generally would also have the effect of reducing both cost and time. The Report, when published, will be brought to Government and consideration will be given to the recommendations in their entirety.

Restoration of barristers' fees

Finally, we also raised our concerns regarding the ongoing failure of Government to reverse the FEMPI cuts, which were made to criminal legal aid rates during the period September 2008 to October 2011; cuts ranging from 28.5%-69% were applied and rates payable are now at 2002 levels. We indicated that unlike other sectors, such as the public and civil service and GPs, who have had their FEMPI cuts reversed, there has been no restoration whatsoever of the now draconian cuts applied to the Bar despite a range of submissions and meetings since 2016. We indicated that we were simply seeking equality and parity. In addition, we acknowledged that the pandemic has dramatically changed the economic landscape, but brought to her attention the fact that the payment of the final 2% pay increase under the Public Service Stability Agreement 2018-2020 had occurred, but that no redress of the FEMPI cuts imposed upon the Bar had occurred despite extensive discourse. We indicated that we had difficulty understanding why our profession alone had not had the benefit of any redress. In response, the Minister for Justice undertook to raise this issue with her colleague in Government, the Minister for Finance, Pascal Donohoe TD. I have also since written to the Minister for Finance raising the issue.

As Chair, it is my intention to prioritise lobbying and representation of the interests of our profession throughout the course of my term and I will keep members informed.

Wishing you all a safe and successful new legal year.

Maura McNally SC
Chair,
Council of The Bar of Ireland

Clear guidance

Recent judgments and guidance from the Bar of Ireland offer clarity on legal and practice matters.

For most of us, the cut and thrust of legal practice can be all consuming. What makes Philippe Sands QC so extraordinary is his ability to carry on a high-level international law practice and still find time to play globetrotting sleuth, producing deeply personal books that view horrific atrocities through the lens of family memoir. In our exclusive interview, Sands muses on the crossover of the personal and professional in his work, and sets out his views on the corrosive nature of Brexit. He also reveals further projects in the pipeline, including a follow-up to *East West Street* and *The Ratline*, as well as another book on international law, with an Irish connection.

In *Defender v HSBC*, the Supreme Court has addressed complex provisions of the Civil Liability Act 1961 in relation to concurrent wrongdoers. Our author analyses the implications of this decision and considers whether it has provided clarity for concurrent wrongdoers in the face of concerns that the operation of the Act may discourage plaintiffs from settling with one concurrent wrongdoer.

Recently enacted legislation should now simplify the procedure for the admission of business records as evidence in civil proceedings. These provisions mirror measures already in place for criminal trials and are analysed in detail in this edition. Finally, the Council of The Bar of Ireland has issued guidelines to assist members in understanding their statutory anti-money laundering obligations pursuant to money laundering legislation. Our explanatory note sets out the key need-to-know details for practising barristers.

We hope this edition will provide some diversion from these challenging times.

Eilis Brennan SC
Editor
ebrennan@lawlibrary.ie

LRC Report on Capping Damages in Personal Injuries Actions

The Law Reform Commission has published its Report on Capping Damages in Personal Injuries Actions. In its thorough examination of the various options and issues that arise, the Commission has concluded that it would be entirely appropriate, and desirable, that the will of the Oireachtas, recently expressed through the enactment of the Judicial Council Act 2019, and the Personal Injuries Guidelines Committee established therein, "should be given some time to be applied in practice".

Under the Act, and departing from the Book of Quantum, the Court will effectively reset general damages in accordance with the Guidelines, and where they depart from such Guidelines, they will be obliged to state the reasons why.

The Bar of Ireland advocated in its own submission to the Law Reform Commission that Option 4 of the Issues Paper (Judicial Guidelines) fully respects the separation of powers between the Legislature, the Executive and the Oireachtas, as well as providing for proportionality and fairness for those seeking compensation for injury suffered, and the particular circumstances of their case. The assessment and award of damages should remain an independent judicial function, and is the most constitutionally permissible option available.

A copy of The Bar of Ireland's submission can be found at www.lawlibrary.ie.

Review of the Child Care Act

As part of its ongoing review of the Child Care Act 1991 – the primary piece of legislation regulating child care and child protection policy in Ireland – the Department of Children and Youth Affairs ran a public consultation inviting observations across a series of initial proposals to amend the legislation. In its submission, The Bar of Ireland welcomed the proposals but cautioned the necessity to ensure that any revised legislation does not result in a power imbalance that would enhance the power of the State as against preserving the constitutional rights of children and parents.

A copy of The Bar of Ireland's submission can be found at www.lawlibrary.ie.

Publication of the O'Malley Report

In August 2018, the Minister for Justice and Equality appointed a Working Group with representatives from key criminal justice agencies, to review and report upon the protections available for vulnerable witnesses in the investigation and prosecution of sexual offences. Chaired by Tom O'Malley, the Working Group has now published what is a vital and important analysis of the current criminal justice system's approach to sexual offences and vulnerable witnesses, and it will be foundational in ensuring that the justice system's approach to such cases is effective, humane and respects the fundamental tenets of fairness before the law.

The Bar of Ireland broadly welcomes the recommendations set out in the Report, and looks forward to engaging with the Department to ensure that the recommendations, particularly those relating to the legal profession, are speedily brought to fruition.

An implementation group has been established by the Minister for Justice and Equality, to consider the recommendations and the necessary steps required to effect their implementation. The Bar of Ireland has cautioned that the provision of adequate resources and funding for the recommendations will be critical to the successful reform of the current system.

Community Law and Mediation Outcome Report 2019

Community Law & Mediation
An independent community law centre and charity, providing free legal advice, advocacy and mediation services since 1975 to communities experiencing disadvantage.

Community Law and Mediation (CLM) recently published its 2019 Outcome Report, which provides a statistical overview of its weekly free legal advice clinics. The Bar of Ireland is a proud partner of CLM and the Outcome Report demonstrates how volunteering barristers make a real and discernible impact on the lives and welfare of CLM clients. In 2019, with the assistance of a panel of 18 volunteer barristers, CLM ran 47 free legal advice clinics, providing assistance in relation to 715 legal matters. The Bar of Ireland continues to work with and support the vital work of CLM, especially during these challenging times.

Call for volunteers

CLM is seeking volunteer legal advisors to join its free legal advice clinics. The clinics take place on a weekly basis, operating by phone for the duration of Covid-19 restrictions. If you are interested in volunteering, call Ros Palmer on 01-847 7804 or email rpalmer@communitylawandmediation.ie.

THE BAR OF IRELAND
VAS
Voluntary Assistance Scheme

VAS Speaking for Ourselves

The Bar of Ireland's Annual VAS (Voluntary Assistance Scheme) Conference took place online this year.

Faced with ongoing Covid-19 disruptions, organisations must learn to circumvent new challenges as they seek to engage with stakeholders and policymakers in what is an almost exclusively digital world.

This year's conference was therefore focused on building capacity to enhance digital advocacy and engagement.

Sharing their insights was an esteemed panel of speakers including: Minister Anne Rabbitte TD; Senator Barry Ward; Oonagh Buckley, Deputy Secretary General, Department of Justice and Equality; Ms Justice Úna Ní Raifeartaigh; Nuala Butler SC; and, Lewis Mooney BL.

Special Committee on Covid-19 response

Maura McNally SC (right), Chair of the Council of The Bar of Ireland, and Council Member Joseph O'Sullivan BL, appeared before the Oireachtas Special Committee on Covid-19 Response to provide perspectives and contribute to discussion on the Irish legislative and constitutional framework, the legal issues applying to how statute and regulations were introduced, and other matters pertaining to the justice sector during Covid-19, not least courts' capacity and accommodation. A copy of The Bar of Ireland's submission can be found at www.lawlibrary.ie.

Specialist Bar Associations

Employment Bar Association

The Employment Bar Association (EBA) symposium took place on July 1, and offered members in years 1-7 the opportunity to present to the wider membership. Over 130 people registered to attend and presentations were given by Catherine Dunne BL on 'Zalewski and the WRC', Alison Walker BL on 'Gender Discrimination – Pregnancy-Related Dismissal and Returning to Work after Maternity Leave post Covid-19', Jason Murray BL on 'Protected Disclosure – a Practice Guide for the Junior Bar', and Patrick Marron BL on 'Back to the Office: Legal Issues in Returning to the Workplace'. The event was chaired by Anne Conlon BL and Katherine McVeigh BL moderated the Q&A.

On July 22, 2020, Des Ryan BL gave a comprehensive review of this year's significant employment law cases. Following the recent EBA AGM, the newly elected officers are:

Chair: Alex White SC; Secretary: Katherine McVeigh BL; and, Treasurer: Anne Conlon BL.

Thanks were extended to the outgoing officers and committee members (Clíona Kimber SC, Caoimhe Ruigrok BL, Lorna Lynch BL, Marguerite Bolger SC, Owen Keany BL and Niamh McGowan BL) for all of their diligent work over the past number of years.

Immigration, Asylum and Citizenship Bar Association

On July 16, the last Immigration, Asylum and Citizenship Bar Association (IACBA) CPD of the 2019-2020 legal year took place. John Stanley, Deputy Chairperson, International Protection Appeals Tribunal, presented to members on 'Decisions, Legal Issues and Judicial Review', and Emily Farrell BL presented on 'The Long-Term Effects of Fraud'.

The CPD event was preceded by the inaugural AGM of the Association and the newly elected officers are:

Chair: Denise Brett SC; Vice Chair: Michael Conlon SC; Secretary: William Quill BL; and, Treasurer: Aoife McMahon BL.

Thanks were extended to the outgoing officers and committee members (Patricia Brazil BL and Sarah Jane Hillery BL) for all of their diligent work since the association was established in 2019.

Planning, Environment and Local Government Bar Association

Eamon Galligan SC and Fintan Valentine BL gave a very comprehensive update on recent case law in planning and environmental matters to Planning, Environment and Local Government Bar Association (PELGBA) members on July 23. The presentation notes are available in the members' section of www.pelgba.ie.

EU Bar Association

Before the end of the 2019/20 legal year, the EU Bar Association (EUBA) committee held a webinar, with Judge Anthony Collins, Court of Justice of the European Union, giving an in-depth presentation to members on Covid-19 issues, including remote hearings at the General Court and Court of Justice of the European Union. Noel Travers SC chaired this webinar.

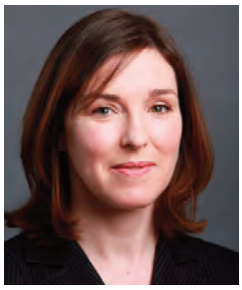
Taking silk

Twenty barristers were recently called to the Inner Bar by Chief Justice Mr Justice Frank Clarke. The Chief Justice also welcomed Sir Declan Morgan, Chief Justice of Northern Ireland, to the online ceremony.

Michael Duffy SC

Catherine Donnelly SC

Maurice Coffey SC



Emily Farrell SC

Marcus Dowling SC

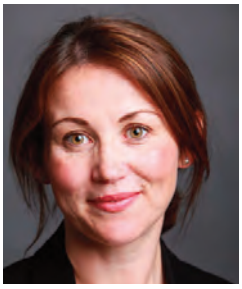
Stephen Dowling SC

David Sharpe SC

Bernadette Quigley SC

Brian Foley SC

Darren Lehane SC



Nessa Cahill SC

Damien Higgins SC

Anthony Moore SC

Dean Kelly SC

Kelley Smith SC

Eoin Carolan SC

John Breslin SC

Suzanne Kingston SC

Brian Kennelly SC

Derek Shortall SC

Safe running

The Bar Flies Running Club held a Start of Term 5k safe distance challenge in the Phoenix Park in October.

Among the runners that day were (from left): Una Cassidy BL; Stephen Dodd SC; Michael Block BL; Cliona Cleary BL; Paul McCarthy SC; Eleanor McPartlin; Gerard Durcan SC; Norma Sammon BL; Lyndsey Keogh BL; Cathrina Keville BL; and, Cliona Kimber SC.

Pension deadline upon us

Take full advantage of the opportunity to get money back from the Government through The Bar of Ireland Retirement Trust Scheme.

Donal Coyne, Director of Pensions, JLT Financial Planning Limited.

The Government wants to help you save for retirement, and will give you a tax refund on pension contributions made to your retirement scheme. So, depending on your rate of income tax (either 20% or 40%) every €1,000 you pay towards your retirement would mean the Government will give you back €200 or €400. Making a once-off lump sum pension contribution offers an excellent opportunity to take full advantage of the tax relief on offer for the 2019 tax year and to maximise the amount of money saved in your pension at a minimum cost to you.
You can make a once-off lump sum payment to your pension scheme by October 31, 2020, to maximise the tax refund you are entitled to for the 2019 tax year. Those using the Revenue Online Service (ROS) have an extended deadline this year as returns do not have to be in until Thursday, December 10, 2020.
There are limits on the amount of pension savings you can make free of income tax each year. The table below shows the maximum tax relief available from Revenue, which is determined by an age-related scale and subject to an overall earnings cap.

Table 1: Tax relief as a percentage of earnings according to age.

Age	Maximum tax-relievable pension contribution (as a percentage of earnings*)
Up to age 29	15%
30 to 39	20%
40 to 49	25%
50 to 54	30%
55 to 59	35%
60 and over	40%

**Subject to an earnings cap of €115,000.*

Normally around this time of year your dedicated JLT Bar Pension Team would be preparing to visit barristers' workplaces to process pension contribution payments and give you advice.

This year, as a result of social distancing measures to limit the spread of Covid-19, we will be unable to make these visits.
In lieu of this, you will have recently received an explanatory form in the post outlining the steps required to make a lump sum contribution. The easiest way for you to make a payment is by electronic funds transfer (EFT). Alternatively, cheques can be returned along with this form, made payable to 'The Bar of Ireland Retirement Trust Scheme'. Once the JLT Bar Pension Team receives payment of your lump sum contribution, it will be invested in the default investment fund unless you advise otherwise.
Remember, for those not filing via ROS, pension contribution payments by cheque or EFT need to be in by October 31, while pension payments made in respect of tax returns online via ROS can be made up until December 10.

Please note: The preferred method for payment is by EFT where possible. Due to Covid-19 restrictions, cheques cannot be accepted in person at our offices.

Should you have any questions please don't hesitate to contact the JLT Bar Pension Team.

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Diploma in Education Law	Certificate in Mediator Training (NEW)
Certificate in Immigration Law and Practice	Certificate in Trademark Law

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Anti-money laundering guidance for barristers

The Bar of Ireland has published a guidance document to assist members in understanding their statutory anti-money laundering obligations.

Mella Kennedy BL

The recently published Bar of Ireland Guidance aims to assist members in understanding their statutory anti-money laundering obligations pursuant to the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 to 2018 (the Act).[1]

There is increasing focus on efforts to prevent money laundering (ML) and terrorist financing (TF) offences at a national, European and global level. European and Irish legislation designates legal professionals, which in Ireland includes barristers, as a category of professionals that have legal obligations to help prevent ML and TF offences from occurring, or where they occur that relevant information is reported to assist in the investigation of such offences.

The Guidance published by The Bar of Ireland seeks to support barristers in meeting their statutory obligations in this area by outlining money laundering offences under the Act and the anti-money laundering and countering the financing of terrorism (AML/CFT) obligations relevant for barristers to help mitigate the risk that members would be involved in ML or TF activities.

Money laundering and terrorist financing

ML is defined in the Act as an offence in terms of property that is the "proceeds of criminal conduct".[2] ML offences are committed where a person knows or believes that (or is reckless as to whether or not) the property represents the proceeds of criminal conduct and the person is involved in:

- concealing or disguising the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property;
- converting, transferring, handling, acquiring, possessing or using the property; or
- removing the property from, or bringing the property into, the State.[3]

TF involves the provision, collection or receipt of funds with the intent or knowledge that the funds will be used to carry out an act of terrorism or any act intended to cause death or serious bodily injury.[4] While the offences of ML and TF are dealt with together in the Act, it is important to note that a distinction exists in the nature of the two offences:

- for ML to occur, the funds involved must be the proceeds of criminal conduct; and,
- for TF to occur, the source of funds is irrelevant, i.e., the funds can be from a legitimate or illegitimate source.

AML/CFT regulatory requirements

Barristers as "designated persons"

The Act imposes AML/CFT obligations on "designated persons" when acting in Ireland, in the course of business carried on in Ireland. The term "designated persons" is defined to include "a relevant independent legal practitioner", which in turn is defined to include "a practising barrister".[5] Section 24 (1) of the Act provides as follows:

"Relevant independent legal professional" means a barrister, solicitor or notary who carries out any of the following services:

(a) the provision of assistance in the planning or execution of transactions for clients concerning any of the following:
  (i) buying or selling land or business entities;
  (ii) managing the money, securities or other assets of clients;
  (iii) opening or managing bank, savings or securities accounts;
  (iv) organising contributions necessary for the creation, operation or management of companies;
  (v) creating, operating or managing trusts, companies or similar structures or arrangements;

(b) acting for or on behalf of clients in financial transactions or transactions relating to land".

The above list is exhaustive and legal work outside of this list is therefore exempt from the requirements of Part 4 of the Act. While the risk of a barrister becoming involved in conduct that involves ML or TF in the provision of the aforementioned services is relatively low (in particular because barristers do not handle client money), barristers should nonetheless be aware of the various ways in which such offences can be committed and the potential for barristers to unwittingly facilitate the commission of same.

Regulatory measures to prevent ML/TF

Barristers are required to comply with the regulatory obligations set out in Part 4 of the Act to ensure that their services are not used to commit or facilitate ML or TF offences. This includes taking appropriate steps to identify, assess and understand the risk of ML or TF offences being committed during the course of the professional relationship they have with a client.

At the time of commencing that relationship, or during the course of that relationship, barristers are obliged to mitigate the risk of assisting the commission of ML and TF offences.

This is done through adhering to the regulatory measures under the Act including identifying the client, understanding the source of his/her funds and wealth (i.e., conduct customer due diligence), and where a suspicion arises that funds emanate from the proceeds of crime or that ML or TF offences are being committed, to report this knowledge or suspicion to An Garda Síochána and the Revenue Commissioners. Failure to comply with these regulatory obligations can result in criminal penalties of up to 14 years' imprisonment.[6]

(a) Customer due diligence

Where a barrister is carrying out any of the services specified in Sections 24 (a) and (b) above, he/she is obliged to carry out due diligence.[7] Section 40 of the Act does provide for reliance on a third party's due diligence, i.e., an instructing solicitor. Barristers, however, are required to satisfy themselves, and not just rely on their instructing solicitor, as to the identity (and verify the identity) of the client and that the relationship does not facilitate ML or TF. The extent to which barristers should satisfy themselves that due diligence has been appropriately carried out will vary from case to case.[8]

(b) Reporting

The Act also imposes an obligation on barristers to the effect that where a barrister knows, suspects or has reasonable grounds to suspect, that another person has been or is engaged in an offence of ML or TF, the barrister is under a statutory obligation to report that knowledge or suspicion to An Garda Síochána (Financial Intelligence Unit) and the Revenue Commissioners.[9]

What may lead to a barrister knowing, suspecting or having reasonable grounds to suspect that an offence has been or is being committed, will depend on the circumstances and might change as the case progresses and the barrister becomes more familiar with the background facts.

For example, undue levels of secrecy from the client, peculiar instructions or where the client is conducting large transactions in cash, might be considered as potential alarm bells or warning signs, which may give rise to a suspicion under the Act that requires a report to be submitted.

It should be noted that, for example, a transaction that is unusually complex or large should not, in and of itself, cause a barrister to have reasonable grounds for suspecting that a relevant offence has been committed.

However, barristers should be aware that they are not entitled to close their mind to the circumstances of a case and should make such reasonable inquiries as a professional of their expertise and experience might be expected to make and which are within the scope of their assignment.

Conclusion

It is important that barristers understand and comply with their statutory AML/CFT obligations under the Act. In this regard, the full Guidance can be found on the Law Library website.

References

1. The Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 to 2018 transposed into Irish law European AML/CFT requirements set out in EU Directive 2015/849 (4AMLD), which was recently amended by EU Directive 2018/843 (5AMLD).
2. Section 6 of the Act.
3. Section 7 of the Act.
4. Section 13 of the Criminal Justice (Terrorist Offences) Act 2005.
5. Section 24 (1) (d) and Section 25 of the Act.
6. Section 7 (3) (b) of the Act.
7. Section 33 of the Act sets out the extent of the due diligence required.
8. Sections 33-35 of the Act set out in detail where standard due diligence is required. Barristers should also be aware that for certain high-risk categories of clients, e.g., politically exposed persons, enhanced due diligence must be undertaken in accordance with Section 37 of the Act.
9. Section 42 of the Act. Section 42 (2) also states that a report should be made as soon as is practicable after acquiring that knowledge or forming that suspicion, or acquiring those reasonable grounds to suspect, that the other person has been or is engaged in ML or TF.

MFA/2FA – it's banking, but not as we know it!

Strong customer authentication measures will shortly be implemented across financial services in the EU, and barristers must familiarise themselves with what this means.

John Kane
ICT Director, The Bar of Ireland

Given that we are all doing more online as a result of Covid-19, the impact of the new strong customer authentication (SCA) measures will be felt immediately and extensively across all online banking and payment platforms. The SCA is the visible part of the revised Payment Services Directive (EU 2015/2366; PSD2), which was conceived as a mechanism to reduce fraud and open payment markets to new entrants.

Key to PSD2 are enhanced security standards, which will impact our online banking and payments experience. The period between October and December 2020 will see a big push from Irish and EU-based finance providers as SCA, a feature of PSD2, is introduced to us all.

The original implementation date for SCA compliance as set out in EU law was September 14, 2019, but during the run-in many providers expressed concern as to their readiness to deploy SCA to online transactions. In order to avoid disruption to consumers and merchants, the central banks of Ireland and other EU countries applied to the European Banking Authority (EBA) for additional time to implement SCA. In Ireland's case, the Central Bank has set a deadline of December 31, 2020, for compliance with SCA for electronic commerce card-based payment transactions.

This deadline for payment firms to complete their transition to SCA was seen as a challenge as compliance will involve new systems, technology and processes, and a widespread customer information campaign.

What is SCA?

SCA is defined as "an authentication based on the use of two or more elements categorised as knowledge (something only the user knows, such as a password), possession (something only the user possesses, such as a mobile phone) and inherence (something the user is, such as a unique fingerprint, facial scan, etc.), that are independent, in that the breach of one does not compromise the reliability of the others, and is designed in such a way as to protect the confidentiality of the authentication data".

This use of multiple forms of identity is called multifactor authentication (MFA or two-factor authentication – 2FA).

So what are the PSD2 and SCA, and how will they impact on each of us? This question was considered at an online CPD for members recently, when Keith Gross, Head of Financial Crime & Security at the Banking & Payments Federation Ireland, outlined what changes we would see and the reasons for these.

Essentially, instead of a username and password when you want to log in to a payment or transaction platform, customers will now need to satisfy two or three different criteria. Typically, a log in ID and password similar to those in use today will be used, but will be augmented by a challenge to an app on a mobile phone, which must be responded to in order to connect or transact.

Why is SCA necessary?

Keith gave a very interesting overview of the reasons SCA was introduced by the EBA and many of these are close to the everyday challenges we all face when dealing with online security for our own lawlibrary.ie services.

The online finance industry suffers losses of millions every year, and thousands of customers are defrauded by very professional criminals who are targeting individuals, companies, institutions and governments. Professional service providers, including lawyers, are not exempt either, and top of the list of prevention measures outlined during the seminar were MFA and good threat protection software.

MFA has been available to members to help protect their accounts for over two years, but is not widely used. The Bar of Ireland hopes that the arrival of MFA and the enhanced protection of online accounts and activity will spur members on to adopt the measure in big numbers.

Asked how this works, Keith Gross said: "The SCA (MFA) technology recognises that an attempt to connect to an account or complete a transaction is underway, and it intervenes to ensure that the person conducting the transaction is authorised to do so".

The system will usually offer you the choice to remember this particular device, so your own devices can be authorised devices on the account, but once-off connections can be supported as well. Anyone who has obtained valid log in and password credentials, and wants to misuse them, is frustrated because the prompt to the account holder's mobile phone that a device requires access is refused as it is not the account holder requesting access.

While different financial institutions will offer variations of the above, the underlying theory is the same across the industry. SCA will make it more difficult for nefarious individuals to access accounts, even with stolen current log in information, thereby protecting us all and lessening the effect of cybercrime. Both Google and Microsoft have estimated that 99% of accounts that suffered a security breach would not have been compromised if MFA had been in operation.

In a time when banks could maybe do with some more money on their balance sheets it is probably appropriate that there is an EU-wide drive to keep the money where it belongs and deprive the cyber criminals of their ill-gotten gains.

The CPD seminar, 'Online Banking Changes: How New EU Measures will Affect your Practice', is available to watch in the online CPD section of the website.

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Ethical guidance for members

The members' section of The Bar of Ireland website now includes an Ethics Hub containing 40 guidance documents for members.

Dr Peter Stafford PhD BL

In July 2019, the ethics sub-committee of the Professional Practices Committee (PPC) launched an initiative to publish guidance documents to help members of the Law Library find solutions to some of the most common ethical questions faced by barristers. These documents bring together into one place the relevant sections of the Law Library Code of Conduct, applicable rules of court and practice directions, Irish and international case law, and legislation. During the course of the year, a number of guidance documents have been prepared and are available on the Ethics Hub of the members' section of the website (see panel). As members of the Law Library are responsible for management of their own practice as well as adherence to the Code of Conduct, these documents fall into two broad groups. The first is those relating to practice management (such as the rules on advertising, handling sensitive data, or record-keeping). The second group is specific to the work of barristers, including what to do when a client absconds, handing over cases to a colleague, or how to respond when a client or their family member approaches you directly for advice in the absence of your instructing solicitor. Obviously, it is not possible to produce a guidance document on every single ethical query a barrister might have, so the PPC, your Master and more senior members of the Bar will always be available to assist members who need advice and guidance on any aspect of their professional practice. The members' section of the website also has details on how to raise queries with the PPC. For the most common issues, however, members should consult the guidance documents first to help decide what action, if any, they should undertake in circumstances where they face an ethical issue relating to their professional conduct, and are uncertain of what to do next.

Case studies and advice

Each document follows the same broad structure. It provides a number of case study examples of how the issue might arise taken from published reports of the Barristers' Professional Conduct Tribunal and equivalent published determinations in the UK, Canada and Australia. The case studies are followed by a reminder of your duties as a member of the Law Library towards your client, instructing solicitor, the court and your colleagues.

The substantive part of the guidance document is under the heading 'Sources of advice and information'. This section provides direct links to the applicable provisions of the Code of Conduct of The Bar of Ireland, which sets out the expected professional standards of members.

The document also provides links to legislation, the rules of court and practice directions issued by the courts, and case law from Ireland and other jurisdictions. The documents will be periodically reviewed and updated in light of any developments in these areas.

If you cannot find an answer to your query in one of the guidance documents, then informal discussions with your Master or a senior colleague in Dublin or the circuit in which you work is the best course of action. If further advice is required, having exhausted these informal options, then the PPC page of the members' website sets out how to structure and submit a query to the PPC for more formal guidance.

It should be remembered that the PPC does not provide legal advice, nor should these documents be taken as offering legal advice or assistance, but they may be a useful starting point to refresh what professional standards are expected of members of the independent referral bar and avoid any breaches of those standards.

The Bar of Ireland Ethics Hub can be accessed at https://members.lawlibrary.ie/members-area/professional-practice-ppc-and-personal-support/ethics-hub/?src=home.

Bar of Ireland ethics guidance notes:

- Handover of Cases
- Direct Professional Access – Contentious matters and non-Contentious matters
- Direct Client/Third-Party Contact
- Client Incapacity
- Reporting Obligations of Volunteering Barristers
- Litigants in Person
- Advertising
- Data Breaches
- Client Money and Payments in Advance
- Devilling
- Media Comment
- Retainers, Fee Arrangements and Non-Standard Work Arrangements
- Witness Handling
- Absconding Clients
- Barrister Witnesses
- Change of Plea
- Client Actions against Instructing Solicitors
- Company Directorship
- Court Dress
- Conflicts of Interest
- Discrimination and Discriminatory Instructions
- Accidental Disclosure of Documents
- Fee Notes and Records
- Foreign Work
- Garda Station Attendance
- Provision of Documents to Non-Parties
- Refusing Work on the Basis of Fees
- Representing Yourself or Friends
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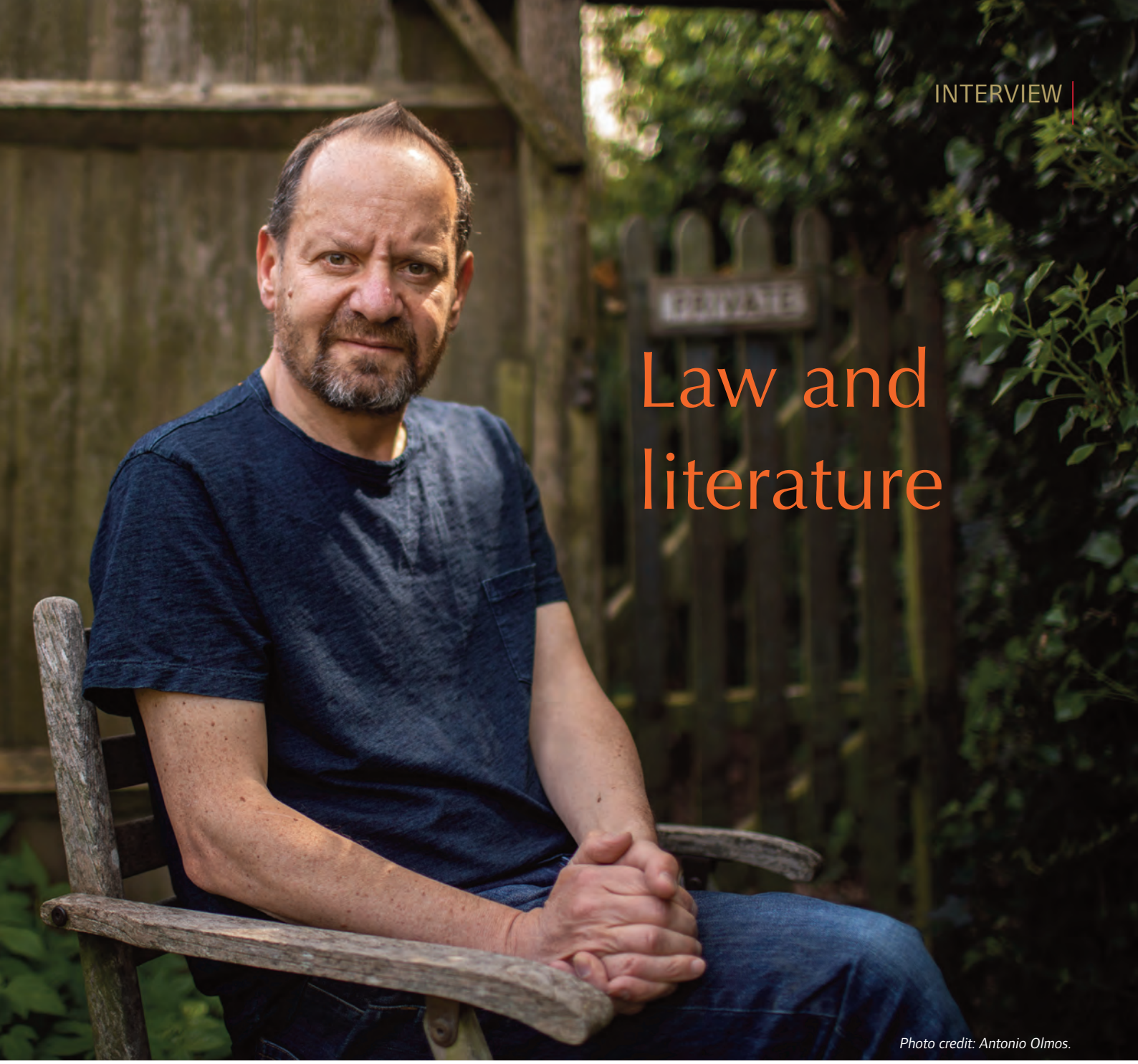

Photo credit: Antonio Olmos.

PHILIPPE SANDS QC spoke to *The Bar Review* about his books, his law practice, and his views on the future of international law.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Lockdown at his house in France has not stopped Philippe Sands' busy working life. Virtual appearances at events such as the Dublin Festival of History to discuss his latest book, *The Ratline*, take place alongside online teaching in his role as Professor of the Public Understanding of Law and Director of the Centre for International Courts and Tribunals at University College London. His legal practice also continues; on the day of our interview he is due to attend an online hearing of the International Tribunal for the Law of the Sea in a dispute between Mauritius and the Maldives, where he is acting for Mauritius. The following week, he will travel to Hamburg for a hybrid hearing on the case: "The people who are in Europe are in the courtroom, and the people who are in Mauritius, the Maldives and the United States and other places will beam in and plead from abroad".

Acting for the underdog

Philippe attributes his interest in international law in part to his own international background, and in part to an inspirational teacher at Cambridge, Sir Robert Jennings: "He really opened my eyes to an area of law that immediately resonated, probably because my Mum had an Austrian-French background. There is no law in the family – no one on my Mum's side had even been to university".

Poetic justice

Philip is currently working on a successor to *East West Street* and *The Ratline*, which further connects those stories with developments in international law: "A minor character in *The Ratline*, a man called Walter Rauff who was an SS comrade of Wächter's, fled to Syria and then to Chile, and it is said that he became an interrogator for Augusto Pinochet's regime and some of his interrogations became part of my case. I'm going to tell the double story of Walter Rauff in Chile and the Pinochet trial in London".

The book will be published in 2024, but in the meantime, he is drawing in his work on the Chagos trial for another book about colonialism and international law, which will have a strong Irish connection: "The UN General Assembly in 1960, which presided over the adoption of Resolution 1514 on the right to self-determination, was presided over by an Irish diplomat, Frederick Boland, the father of the poet, Eavan Boland. The opening words of the book are a quote from her poem *Witness*:

What is a colony
if not the brutal truth
That when we speak
the graves open
and the dead walk?

I think Eavan Boland and her father knew a thing or two about colonialism, and I'm very much inspired by that".

A master's followed, where he was taught by Eli Lauterpacht, the son of Hersch Lauterpacht, whose theories on human rights and crimes against humanity helped to form modern international law, and who would become a central character in Philippe's book, *East West Street*: "Of course, I didn't know any of that until 30 years later. But Eli became my teacher, and he was the one who said you must become a barrister, you must blend ideas and practice".

After qualification he found that international law briefs were few and far between, but an advisory opinion on the legality of the use of nuclear weapons opened the door to a career that has had many high points, not least the indictment of Chilean dictator Augusto Pinochet in 1998 in London: "That moment of standing in the House of Lords, getting the judgment, is a moment I will never forget. But there are a raft of other cases and they invariably relate to the situation where you're acting for the underdog. I feel very proud of the case of Ireland against the United Kingdom on the mixed oxide [MOX] plant [Ireland challenged the UK Government's attempt to construct a mixed oxide fuel plant alongside the Sellafield nuclear plant] because we challenged it, and in the end, the British pulled the plug, so no MOX was ever produced. It was an astonishing thing, turning up with the Irish delegation. Then working with the late Rory Brady SC on the cases that followed was fascinating".

More recent cases include acting for the Gambia against Myanmar in a case involving the genocidal mistreatment of the Rohingya Muslim community, and an ongoing action on behalf of Mauritius against the United Kingdom concerning the Chagos Archipelago: "I have a particular interest in colonialism, and this case is one that I really care about because of the human aspect. It's one of the decisions of the International Court of Justice I'm most proud of. The Court ruled, without dissent, that the Chagos Archipelago belongs to Mauritius, not the United Kingdom. I hope that will open the door to the return of the community that was forcibly evicted".

I feel very proud of the case of Ireland against the United Kingdom on the mixed oxide plant [Ireland challenged the UK Government's attempt to construct a mixed oxide fuel plant alongside the Sellafield nuclear plant] because we challenged it, and in the end, the British pulled the plug, so no MOX was ever produced.

A writing life

Philippe's writing has developed alongside his legal career, and brings his passion for international justice to a wider, non-legal audience. Having written a number of academic books, a conversation with an editor at Penguin led to *Lawless World* in 2005, an examination of, among other issues, the illegality of the Iraq War: "That required me to begin to find a different way to write more accessibly, and to integrate into my writing something that we're not allowed to do in court or in our scholarly work, and that's to talk about our own views and experiences. That became part of a conscious project to reach a broader audience on legal matters".

After the success of *Lawless World*, *Torture Team*, on the Bush administration lawyers, followed in 2008, and that in turn led to an invitation to give a lecture in Lviv, in Ukraine. Motivated at first by a desire to see the house where his grandfather, Leon Buccholz, had lived, Philippe accepted the invitation. This opened the door to six years of research that eventually led to *East West Street*, an award-winning book that blends memoir with legal history and analysis through the stories of three men: his grandfather; Hersch Lauterpacht; and, Raphael Lemkin, another lawyer who developed the concept of 'genocide'. The book weaves the lives of these three men with the development of our modern system of international law as it arose after the Second World War (crimes against humanity and genocide were both first introduced as legal concepts at Nuremberg), and addresses a debate that continues to this day: whether international law and human rights are better served by the concept of crimes against humanity, which focuses on the protection of the individual, or genocide, which focuses on attacks against specific groups.

Special relationship

Philippe feels a special bond with Ireland, having worked on a number of cases here, and is a former member of The Bar of Ireland: "It's a place I feel very connected to for many reasons.

"I've spent a lot of time there, I acted for Ireland in a couple of cases against the UK, and I love the legal community in Ireland. It's a very fine and intelligent legal community. And the books have always done really well in Ireland because people love talking about books and the law and responsibility and justice.

"When I go to Ireland and when I go to Northern Ireland, there is an understanding of what I'm writing about, almost like nowhere else in the world. The Irish and the Northern Irish know better than anyone the relationship between the individual and the group".

In *East West Street*, Philippe's own viewpoint seems to lean towards that of Lauterpacht, but it's more complicated than that: "I do until the last page of the book. And then I find myself at this mass grave [at Zolkiew, close to Lviv] and it's just impossible not to feel a sense of connection to Lemkin and his recognition that each of us feels this sense of connection to the many groups we happen to be a member of – groups of national or religious identity or race or a football team or whatever it is. It's built into us".

The moment you open the door to the reification of group identity, you reinforce the sense of 'them and us'.

He sees it as a troubling truth, however, as in the decades since Nuremberg, international law has leaned towards the concept of genocide as somehow the more serious crime: "The concept of genocide has become seen as the crime of crimes. Is that because of the magic of the word 'genocide'? Is it that it evokes a greater horror? I think there's something in that. Or is it that each of us ultimately feels the pull to the group and that somehow reinforces the power of the concept? I worry that the concept of genocide gives rise to the very conditions that it is intended to address; namely, it reinforces the sense of group identity and hatred, by the perpetrators for the victims and by the victims for the perpetrators. The moment you open the door to the reification of group identity, you reinforce the sense of 'them and us' and, I think, you end up contributing to greater conflict and unhappiness, which is why, intellectually, I'm drawn to Lauterpacht's idea: focus not on the group but every individual human being and give the individual human being rights. But I think it is impossible to over-intellectualise it and not to leave a space in the law for the affections of instinct and kinship and the heart".

In telling the story of his grandfather's escape from the Nazis, along with his wife and daughter (Philippe's mother), Philippe also had to address harrowing elements of his family history, and *East West Street* is all the more compelling for knowing that the terror, humiliation and murder that Philippe describes are happening to his own family. He feels that in a sense his legal training prepared him to address these terrible things: "I've learned that you don't wear your passions and emotions on your sleeve. Judges don't like that and nor do they like being told what they should decide. I've had 35 years of training, of stripping the emotion and the passion that lies just below out of what I present. But plainly, there are moments of acute difficulty".

The Ratline, the recently published follow-up to *East West Street*, continues to address this. It tells the story of Otto Wächter, an Austrian lawyer and high-ranking SS officer, who was the Governor with responsibility for Lviv during the war and oversaw the mass murder of many thousands of Jews and Poles. The book traces his escape at the end of the war, and subsequent death in Rome. It also examines the legacy of Nazism through Philippe's relationship with Horst Wächter, Otto's son. Horst has enormous difficulty accepting his father's crimes, even in the face of damning evidence, and Philippe felt it was important to deal with this honestly and fairly: "It was very important to me to treat Horst just as you would treat a witness in court, very fairly and respectfully and courteously, even if it causes you tremendous trouble".

At a time when environmental groups are beginning to take cases against national governments for failures to adequately address the threat of climate change, including in Ireland, this is a very significant move.

New world order

Philippe's earlier books discuss what he calls a move from multilateralism to bilateralism by some states, namely the UK and US. It's a process that has continued, particularly under the Trump administration in the US, and more recently in the UK around Brexit. As a passionate European who openly opposed Brexit, and as a lawyer, he has been particularly horrified by the UK House of Commons' recent passing of the Internal Market Bill, which the Government has admitted violates its withdrawal agreement with the EU: "What the British Government has done on passing this Bill is not only scandalous, but is deeply disrespectful of the rule of law. I feel a sense of deep embarrassment to be a member of the Bar of England and Wales, an institution I have huge respect for, whose leader is the Attorney General of the United Kingdom who proposed this nonsense and sought to justify it".

He does, however, feel that the Government will withdraw from "this horror that is violating an international treaty obligation".

These issues lead of course to a wider discussion of the evolution of international law, and its enforcement in the modern age. How do we act effectively against states that violate international laws and treaties? "I think that countries like Ireland have a very important role", he says, "to keep reminding that we need a rules-based system and rather than shred the 1945

model, let's improve it, let's make it fit for purpose in this day and age".

He does see movements to achieve this: "A draft convention on crimes against humanity has been laid before the General Assembly of the United Nations and countries that ought to be supporting it, like Britain, the United States, are not – please support it. There are developments in relation to international criminal law. We need to be thinking about expanding, not minimising, the list of crimes".

One area that Philippe sees as part of this expansion is the creation of a working group, which he will chair, to establish a definition of the crime of 'ecocide', the massive destruction of the environment, and putting that into the statute of the International Criminal Court. It's an interesting choice of term, given our previous discussion of whether the power of the word 'genocide' has negative as well as positive connotations, but it's precisely that power that Philippe and his colleagues hope to draw on: "It's been chosen for that reason, and my job and the job of the working group is to come up with a definition that sets the bar considerably lower than the legal bar for genocide. How do you take the magic of Lemkin's word without imposing all the obstacles to decent legal action that the definition of genocide in law imposes?"

At a time when environmental groups are beginning to take cases against national governments for failures to adequately address the threat of climate change, including in Ireland, this is a very significant move. It also has the potential for enormous repercussions in international law generally. In the context of a global pandemic, we discuss the possibility that citizens could in the future, for example, take states to court for failing to act adequately to prevent or mitigate the impact of Covid-19: "The way the law works is it develops incrementally. The 1945 moment was a revolution. And it led to all sorts of interesting and important developments, including cases like Pinochet. But it needs to build and develop incrementally or you get a backlash. I'm a firm believer in incrementalism, step by step, one step at a time".

He believes that we are in a difficult moment, possibly even a crisis, but he remains optimistic: "People like me need to shout very loudly about the vitality and need for a rules-based system. The alternative is far worse. Plainly change is needed and all countries and all communities have a role in that change. But it's about the peaceful evolution of the international legal order, not its shredding and rebuilding. I wonder if we're working our way now towards a moment of collapse. I do fear that. But it will be followed by a moment of renewal and the renewal will build on what has come, so in the long run I'm optimistic".

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

The Bar Review, journal of The Bar of Ireland

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A directory of legislation, articles and acquisitions received in the Law Library from June 19, 2020, to October 5, 2020.
Judgment information supplied by Justis Publishing Ltd.

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ADOPTION

Adoption – Adoption Act 2010 s. 54(2) – Best interests – Applicants seeking an order under s. 54(2) of the Adoption Act 2010 – Whether the best interests of the minor required the granting of the approval sought – [2020] IEHC 419 – 23/07/2020
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Narooma Ltd v Health Service Executive

Articles

Carey, G. Expert determination: recent Irish guidance. *Commercial Law Practitioner* 2020; (27) (6): 111
Rogers, A. AA (arbitration agreement) breakdown: assistance available. *Commercial Law Practitioner* 2020; (27) (8): 177

BANKING

Summary judgment – Defence – Probability – Respondent seeking summary judgment – Whether the appellant had a fair or reasonable probability of having a real or bona fide defence to the claim – [2020] IECA 221 – 04/08/2020
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Summary judgment – Loan agreements – Questions of law – Plaintiffs seeking summary judgment arising out of five loan agreements with the defendants – Whether there was an agreement that if certain properties were sold and the proceeds applied to the fifth loan agreement any residual debt would be written off – 12/06/2020 – [2020] IEHC 442
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Buttimer v Bank of Scotland PLC

Articles

Maddox, N. Bitcoin as property? *Commercial Law Practitioner* 2020; (27) (7): 143
Martin, D. Non-performing loans, banks and Covid-19: a critical analysis of responses and implications. *Commercial Law Practitioner* 2020; (27) (6): 130

Statutory instruments

Central Bank (national claims information database) regulations 2020 – SI 336/2020
Central Bank Act 1942 (section 32D) regulations 2020 – SI 345/2020

BANKRUPTCY

Bankruptcy – Adjudication – Annulment – Applicant seeking an order annulling the adjudication of bankruptcy – Whether the grounds relied upon by the applicant related directly to the bankruptcy process as set out by the Bankruptcy Act 1988 – [2020] IEHC 298 – 19/05/2020
Dennis (a discharged bankrupt), In re
Bankruptcy – Extension – Bankruptcy Act 1988 s. 85A – Applicant seeking an extension of the period of the respondent's bankruptcy – Whether there were grounds for extending the period of the respondent's bankruptcy – [2020] IEHC 223 – 08/04/2020
Lehane v Hoey

BUILDING LAW

Articles

Hughes, P. Covid-19 and construction contracts. *Irish Law Times* 2020; (38) (12): 179

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Statutory instruments

Guardianship of children (statutory declaration) regulations 2020 – SI 210/2020
Child care (placement of children in foster care) (emergency measures in the public interest – Covid19) (amendment) (no. 1) regulations 2020 – SI 312/2020
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Civil Registration Act 2004 (continuation of sections 8A, 19B and 37A) (Covid-19) (no. 2) order 2020 – SI 328/2020

COMMERCIAL LAW

Library acquisitions

Goode, R., McKendrick, E. *Goode and McKendrick on Commercial Law (6th ed.)*. London: LexisNexis, 2020 – N250

Articles

Hanaphy, S. Rule-of-law conditionality: an increasingly potent catalyst in the formation and termination of commercial contracts. *Commercial Law Practitioner* 2020; (27) (8): 163

Acts

Microenterprise Loan Fund (Amendment) Act 2020 – Act No. 3 of 2020 – Signed on July 20, 2020

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Microenterprise Loan Fund (Amendment) Act 2020 (commencement) order 2020 – SI 268/2020

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Scheme of arrangement – Sanction – Modification – Applicant seeking orders sanctioning a proposed scheme of arrangement – Whether sufficient steps had been taken to identify and notify all interested parties – [2020] IEHC 330 – 18/06/2020
Xtrackers (IE) Plc v Companies Act 2014

Articles

Courtney, T.B. The company director's duty to avoid conflicts: from inner core to outer limits. *Irish Jurist* 2019; LXII: 21
O'Leary, D. Captain of my company, but not the master of my fate: justifying corporate veil-piercing. *Irish Law Times* 2020; (38) (13): 196

Acts

Companies (Miscellaneous Provisions) (Covid-19) Act 2020 – Act No. 9 of 2020 – Signed on August 1, 2020

Statutory instruments

Companies (Miscellaneous Provisions) (Covid-19) Act 2020 (commencement) order 2020 – SI 320/2020

COMPETITION LAW

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Foxton, D. *McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd*: in retrospect. *Irish Jurist* 2019; LXII 150

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Constitutional rights – Deportation orders – Revocation – Respondents seeking revocation of deportation orders – Whether the appellant failed to correctly identify and weigh the constitutional rights involved – [2020] IESC 55 – 23/09/2020
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Constitution – Seanad Éireann – Question of exceptional public importance – Plaintiffs seeking determination of a question of exceptional public importance – Whether the Seanad can sit as a House of the Oireachtas in the absence of the nominated senators – [2020] IEHC 313 – 29/06/2020
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Declaratory relief – Personal Injuries Assessment Board Act 2003 s. 51B – Constitutionality – Plaintiff seeking declaratory relief – Whether s.51B of the Personal Injuries Assessment Board Act 2003 is unconstitutional and/or incompatible with the European Convention on Human Rights – [2020] IEHC 296 – 19/05/2020
Skeffington v Ireland and the Attorney General

Articles

Donohue, C. The triangular constitution: constitutional pluralism in Ireland, the EU and the ECHR. *Hibernian Law Journal* 2020; 19: 164
Fisher, J.C. 'No politics please, we're British': *R (Miller) v The Prime Minister; Cherry and Others v Advocate General for Scotland* [2019] UKSC 41. *Hibernian Law Journal* 2020; 19: 140
Girvan, P., The Rt Hon. Sir. Remarks by The Rt Hon. Sir Paul Girvan. *Hibernian Law Journal* 2020; 19: 180
Glynn, B. The constitutionality of the emergency legislation in response to the Covid-19 outbreak. *Irish Law Times* 2020; (38) (14): 214
Hogan, G., Hogan, H. Legal and constitutional issues arising from the 2020 general election. *Irish Jurist* 2020; LXIII: 113
Kelly, A. Shaping the progress of fragile societies. *The Bar Review* 2020: (25) (4): 99
Murray, J.L. Annual lecture 2019 border tariffs, border polls or border madness? Ireland, Northern Ireland and a constitutional conversation. *Hibernian Law Journal* 2020; 19: 175

CONSUMER LAW

Articles

Breslin, J. Consumer protection in loan transactions – recent Irish case law. *Commercial Law Practitioner* 2020; (27) (8): 168

Statutory instruments

Consumer Protection Act 2007 (Competition and Consumer Protection Commission) levy regulations 2020 – SI 305/2020
Consumer Insurance Contracts Act 2019 (commencement) order 2020 – SI 329/2020

CONTRACT

Breach of contract – Breach of statutory duty – Conspiracy – Plaintiff alleging conspiracy, breach of a duty of confidence, breach of contract and inducement of breach of contract, misrepresentation and breach of statutory duty – Whether the defendants had acted negligently – 27/05/2020 – [2020] IEHC 256
Sheehan v Breccia

Library Acquisitions

Peel, E. *Treitel on the Law of Contract (15th ed.).* London: Sweet & Maxwell, 2020 – N10

Articles

Condon, R.R. After *Law Society v MIBI*: Contextualism and contracting in Irish contract law. *Irish Jurist* 2019; LXII: 51

COPYRIGHT

Articles

Flood, K. AI created works and authorship under Irish copyright law: I'm afraid I can't copyright that. *Hibernian Law Journal* 2020; 19: 1
Hyland, M. Copyright and the evolving digital landscape. *Law Society Gazette* 2020; (July): 52

Statutory instruments

Copyright and related rights (certification of licensing scheme for primary schools) (the Irish copyright licensing agency limited) order 2020 – SI 275/2020
Copyright and related rights (certification of licensing scheme for post-primary schools) (the Irish copyright licensing agency limited) order 2020 – SI 276/2020
Copyright and related rights (certification of licensing scheme for higher education institutions) (the Irish copyright licensing agency limited) order 2020 – SI 277/2020
Copyright and related rights (certification of licensing scheme for further education providers) (the Irish copyright licensing agency limited) order 2020 – SI 278/2020

COSTS

Costs – Motion – Leave to amend statement of claim – Plaintiffs seeking the costs of the motion for leave to amend their statement of claim – Whether costs should follow the event – [2020] IEHC 329 – 06/07/2020
Care Prime Holdings FC Ltd v Howth Estate Company
Costs – Injunction – Factual dispute – Parties seeking costs – Whether the plaintiff was justified in seeking the injunction – [2020] IEHC 265 – 27/05/2020
Design Features Ltd v Goldstein Property Icav and ors
Costs – Interests of justice – Threshold – Appellants seeking costs – Whether the general rule that "costs follow the event" was applicable – [2020] IECA 201 – 24/07/2020
Hampshire County Council v E.
Discontinuance – Costs – Want of prosecution – Plaintiffs seeking leave to discontinue – Whether it would be just to fetter an unrestricted right by imposing terms as to the conduct of further litigation in which the same issues might be raised – [2020] IEHC 420 – 21/08/2020
ILG Ltd v Aprilane Ltd
Security for costs – Companies Act 2014 s. 52 – Rules of the Superior Courts O. 86, r. 9 – Respondent seeking an order requiring the appellant to provide security for costs of its appeal – Whether the respondent had demonstrated a risk of added and unnecessary injustice in the bringing of the appeal – [2020] IECA 226 – 06/08/2020
O'Donnell v Saltan Properties Ltd
Counterclaim – Quantum – Costs – Defendants seeking costs – Whether a stay on the order for costs should be granted – [2020] IEHC 320 – 30/06/2020
Sheehan v Breccia and others
Costs – Declaratory relief – Damages – Appellant seeking costs – Whether the appellant was entitled to the costs of the hearing in the High Court – [2020] IESC 52 – 31/07/2020
Simpson v Governor of Mountjoy Prison
Judicial review – Unfair dismissal – Costs – Applicant seeking costs – Whether the proceedings should be characterised as a form of public interest litigation – [2020] IEHC 226 – 21/05/2020
Zalewski v The Workplace Relations Commission

Articles

Carey, G. Defaulting parties and non-standard costs order: recent guidance. *Irish Law Times* 2020; (38) (11): 159

COURTS

Stay – Interests of justice – Change in circumstances – Whether the Court of Appeal erred in its assessment of the weight to be attributed to the various factors in the case – Whether the Supreme Court ought to lift the stay imposed by the Court of Appeal on the High Court order – [2020] IESC 33 – 18/06/2020
Krikke v Barranafaddock Sustainability Electricity Ltd

Acts

Ministers and Secretaries and Ministerial, Parliamentary, Judicial and Court Offices Amendment) Act 2020 – Act No. 10 of 2020 – Signed on August 2, 2020

Statutory Instruments

Rules of the Superior Courts (orders 105 and 106) 2020 – SI 257/2020
District Court (days and hours) (August sittings) order 2019 – SI 274/2020
Circuit Court rules (family law and domestic violence) 2020 – SI 282/2020
District Court (intellectual property) rules 2020 – SI 284/2020
Circuit Court rules (data protection actions) 2020 – SI 291/2020
Circuit Court rules (case stated) 2020 – SI 292/2020

CRIMINAL LAW

Conviction – Indecent assault – Recent complaint – Appellant seeking to appeal against conviction – Whether the trial judge erred in law and in principle in incorrectly admitting evidence under the doctrine of recent complaint – [2020] IECA 227 – 25/02/2020
DPP v A.C.
Miscarriage of justice – Acquittal – Re-trial – Applicant seeking a miscarriage of justice certificate under s. 9 of the Criminal Procedure Act 1993 – Whether newly discovered facts showed that there had been a miscarriage of justice – 02/09/2020 – [2020] IEHC 434
DPP *v Abdi*
Conviction – Money laundering – Misdirection – Appellant seeking to appeal against conviction – Whether the trial judge misdirected the jury – [2019] IECA 368 – 10/12/2019
DPP v Alinta
Sentencing – Sexual assault – Mitigation – Appellant seeking to appeal against sentence – Whether the Circuit judge had regard to all relevant mitigating factors – [2020] IECA 165 – 05/03/2020
DPP v Carey
Sentencing – Threat to kill – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2020] IECA 161 – 08/06/2020
DPP v Coss
Crime and sentencing – Sexual offences – Sexual assault – Appeal against the severity of sentence – [2020] IECA 179 – 03/07/2020
DPP v Ficarelli
Sentencing – Attempted robbery – Undue leniency – Appellant seeking review of sentence – Whether sentence was unduly lenient – [2020] IECA 229 – 22/06/2020
DPP v Glynn
Conviction – Assault causing harm – Self-defence – Appellant seeking to appeal against conviction – Whether the trial judge erred in law by directing the jury on the issue of self-defence – [2020] IECA 164 – 28/02/2020
DPP v Hayden
Bail – False imprisonment – Theft – Appellant seeking bail – Whether the proceedings before the High Court were unsatisfactory – 10/09/2020 – [2020] IEHC 248
DPP v M.G.
Sentencing – Attempted murder – Undue leniency – Appellant seeking review of sentence – Whether sentence was unduly lenient – [2020] IECA 178 – 02/07/2020
DPP v M.S. (a minor)
Sentencing – Harassment – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2020] IECA 254 – 25/09/2020
DPP v Molloy
Sentencing – Drug offences – Undue leniency – Applicant seeking review of sentences – Whether sentences were unduly lenient – [2020] IECA 166 – 13/03/2020
DPP v Naylor and Goddard
Sentencing – Sexual offences – Mitigation – Appellant seeking to appeal against sentence – Whether the mitigating factors present were not adequately reflected in the final sentence imposed – [2020] IECA

173 – 29/06/2020
DPP v O'L. (S)
Sentencing – Importation of a controlled drug – Proportionality – Appellant seeking to appeal against sentence – Whether the judge imposed a sentence which was disproportionate in all the circumstances – 29/05/2020 – [2020] IECA 156
DPP v Monye
Conviction – Sexual offences – Contamination between witnesses – Appellant seeking to appeal against conviction – Whether the trial judge erred in law and in fact in failing to properly address the jury on the danger of contamination between witnesses – [2020] IECA 158 – 17/06/2020
DPP v P.B.
Sentencing – Possession of heroin for sale or supply – Discretion – Appellant seeking to appeal against sentence – Whether the sentence imposed was within the sentencing judge's discretion – [2020] IECA 228 – 29/05/2020
DPP v Ring
Sentencing – Sexual offences – Severity of sentences – Appellant seeking to appeal against sentences – Whether sentences were unduly severe – [2020] IECA 177 – 02/07/2020
DPP v S.L.
Sentencing – Indecent assault – Consecutive sentences– Appellant seeking to appeal against conviction and sentence – Whether the trial judge erred in law and in fact in imposing consecutive sentences – [2020] IECA 170 – 24/06/2020
DPP v S.M.
Conviction – Misuse of Drugs Act offences – Directed acquittal – Appellant seeking to appeal against conviction – Whether there was a failure to accede to an application for a directed acquittal – [2020] IECA 190 – 15/07/2020
DPP v Wyse
Judicial review – Search and seizure – Public interest – Applicants seeking to challenge legality of search and seizure – Whether the Oireachtas had failed to enact legislation which prescribes an appropriate procedure whereby court authorisation is required prior to the issuance of a search warrant in respect of premises or property belonging to a journalist – 11/09/2020 – [2020] IEHC 382
Emmett Corcoran Oncor Ventures Ltd T/A The Democrat *v Cmsr of An Garda Síochána*
Judicial review – Prosecutorial delay – Balance of justice – Applicant seeking to restrain the further prosecution of criminal charges pending against him on the basis of prosecutorial delay – Whether the balance of justice lay in favour of allowing the prosecution to proceed – [2020] IEHC 385 – 18/09/2020
Wilde v DPP

Library acquisitions

Law Reform Commission. *Law Reform Commission Suspended Sentences*. Dublin: Law Reform Commission, 2020 – L160.C5

Articles

Aylmer, W. Criminal damages. *Law Society Gazette* 2020; (Aug/Sep): 32
Breathnach, Á. Rolling back on rights? *Law Society Gazette* 2020; (July): 46
Cummins, C. White-collar crime and the Programme for Government 2020. *Commercial Law Practitioner* 2020; (27) (7): 153
Glynn, B. Sentencing the recidivist. Irish Law Times 2020; (38) (11): 164 [part 1]; *Irish Law Times* 2020; (38) (12): 174 [part 2]
Healy, D., McGrath, J. "Comparing apples with oranges disguised as apples" (but still producing fruit): the methodological difficulties in conducting comparative white-collar crime research and way forward. *Irish Jurist* 2020; LXIII: 61
Holmes, M. Familiarity breeds contempt. *Law Society Gazette* 2020; (Aug/Sep): 18
Holt, J. Drawing adverse inferences from silence – further clarification from the Court of Appeal. *Irish Criminal Law Journal* 2020: (30) (2): 34
Noonan, L. The role of the jury in the insanity defence: *People (DPP) v Alchimionek* [2019] IECA 49. *Hibernian Law Journal* 2020; 19: 130
Ryan, P.J., Dr. Criminal Assets Bureau and the use of divisional criminal asset profilers: traditional techniques with a modern application. *Irish Criminal Law Journal* 2020; (30) (2): 46

Acts

Criminal Justice (Enforcement Powers) (Covid-19) Act 2020 – Act No. 14 of 2020 – Signed on September 11, 2020

Statutory instruments

Criminal Justice (Terrorist Offences) Act 2005 (section 42) (restrictive measures concerning certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations) (no. 3) regulations 2020 – SI 211/2020
Criminal Justice (Terrorist Offences) Act 2005 (section 42) (restrictive Measures concerning certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations) (no. 4) regulations 2020 – SI 286/2020
Criminal Justice (Terrorist Offences) Act 2005 (section 42) (restrictive measures concerning certain persons and entities with a view to combating terrorism) (no. 2) regulations 2020 – SI 362/2020

DAMAGES

Damages – Personal injuries – Liability – Plaintiff seeking damages – Whether the plaintiff was a credible witness – [2020] IEHC 453 – 30/07/2020
Delaney v Circle K Ireland Energy Group Ltd
Fraud – Compensation – Damages – Defendants seeking to stay or strike out the proceedings on the grounds that they involved separate claims on the part of each of the plaintiffs – Whether the proceedings were correctly constituted – [2020] IEHC 284 – 12/06/220
Greffrath and others v Greymountain Management Ltd ((in Liquidation)) and others
Injury – Damages – Liability – Respondent seeking damages – Whether the appellant was liable – [2020] IECA 196 – 23/07/2020
Power v Waterford City and County Council

DATA PROTECTION

Articles

Dermody, J. The second coming. *Law Society Gazette* 2020; (Aug/Sep): 16

DEFAMATION

Defamation – Qualified privilege – Evidence – Defendant seeking to have the plaintiff's case in a defamation suit withdrawn from the jury on all claims for insufficiency of evidence – Whether there was sufficient evidence upon which the jury could find as a matter of probability that the defendant was actuated by malice at the time of the relevant publications – [2020] IEHC 425 – 20/03/2020
Gordon v The Irish Racehorse Trainers Association
Defamation – Damages – Proportionality – Appellant seeking to appeal against an award in damages made in favour of the respondent – Whether the awards of both general damages and aggravated damages were unreasonable, excessive and disproportionate – [2020] IECA 157 – 16/06/2020
Higgins v Irish Aviation Authority

Articles

Buckley, S. Defamation online – defamation, intermediary liability and the threat of data protection law. *Hibernian Law Journal* 2020; 19: 82

DELAY

Personal injuries – Inordinate and inexcusable delay – Balance of justice – Appellant appealing against High Court order striking out personal injuries proceedings – Whether delay was inordinate and inexcusable – [2020] IECA 222 – 04/08/2020
Reilly v Campbell Catering Ltd
Want of prosecution – Inordinate and inexcusable delay – Balance of justice – Defendant seeking an order dismissing the plaintiff's claim for want of prosecution – Whether the delay was inordinate and inexcusable – [2020] IEHC 426 – 07/08/2020
Ulster Bank Ireland Ltd v Sutton

DISCOVERY

Defamation – Discovery – Replies to particulars – Plaintiff seeking discovery and to compel replies to a notice for particulars – Whether the particulars already pleaded were sufficient – [2020] IEHC 441 – 01/07/2020
Adams v British Broadcasting Corporation
Discovery – Relevance – Necessity – Plaintiff seeking discovery – Whether discovery requested was relevant and necessary – [2020] IEHC 287 – 04/06/2020
Clydaville Investments Ltd v Setanta Centre Unlimited Company
Discovery – Categories – Relevance – Defendants seeking discovery – Whether discovery was relevant – [2020] IEHC 321 – 01/07/2020
Evalve Inc. v Edwards Lifesciences Ireland Ltd
Discovery – Strike out – Motions – Parties seeking directions as to the order in which certain motions ought to be considered and determined – Whether the motion for discovery ought to proceed first – [2020] IEHC 263 – 22/05/2020
O'Brien v Red Flag Consulting Ltd (1)
Discovery – Award of a contract – Scope of appeal – Appellant seeking discovery of documents – Whether only some of the grounds of appeal put forward by the appellant could properly be advanced – [2020] IESC 56 – 25/09/2020
Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform

EDUCATION

Judicial review – Calculated grades – Declaratory relief – Applicant seeking an order of certiorari quashing the decisions of the respondent to refuse to provide a calculated grade for the applicant – Whether the refusal to provide a calculated grade, in any circumstances where the applicant is home schooled and the applicant's parents/teacher is not a registered teacher, is irrational, arbitrary, unfair and contrary to constitutional justice – [2020] IEHC 479 – 24/09/2020
N.P. (a minor) v The Minister for Education and Skills

Articles

Keane, E., Ballester, F. The meaning(s) of academic tenure in Ireland. *Irish Jurist* 2019; LXII: 99

Statutory instruments

Teaching Council (registration) (amendment) regulations 2020 – SI 269/2020
Industrial training (recruitment industry) order 2020 – SI 288/2020
Industrial training (arboriculture industry) order 2020 – SI 289/2020
Education (Welfare) Act 2000 (prescribed form) (section 14) regulations 2020 – SI 330/2020
Education (Admission to Schools) Act 2018 (commencement) (no. 2) order 2020 – SI 366/2020

EMPLOYMENT LAW

Register of Nurses and Midwives – Suspension – Nurses and Midwives Act 2011 s. 58 – Respondent seeking to vary and/or vacate an order made suspending the respondent's registration on the Register of Nurses and Midwives – Whether the respondent's right to earn a livelihood had been disproportionately infringed – 2020] IEHC 470 – 21/09/2020
Nugent v The Property Services Regulatory Authority
Employment – Wrongful dismissal – Injunctive relief – Plaintiff seeking interlocutory relief – Whether the

plaintiff's dismissal was effected in breach of contract – [2020] IEHC 291 – 12/06/2020
O'Donovan v Over-C Technology Ltd and anor

Articles

Bruton, C. *Ryanair v Bellew* ([2019] IEHC 907) – what does the decision mean for restrictive covenants in Ireland? *Irish Employment Law Journal* 2020; (17) (2): 36
D'Art, D. Freedom of association and statutory union recognition: a constitutional impossibility? *Irish Jurist* 2020; LXIII: 82
Kirwan, B. A consideration of *Power v HSE*. *Irish Employment Law Journal* 2020; (17) (3): 64
Lafferty, S. *McKelvey v Iarnród Éireann* [2019] IESC 79. *Hibernian Law Journal* 2020; 19: 153
Madden, L. Damages for technical breaches of employment law: did the Labour Court get it right in *Hall v Irish Water*? *Irish Employment Law Journal* 2020; (17) (2): 41
O'Connor, A. *Force majeure* clauses in the time of Covid-19. *The Bar Review* 2020 (25) (4): 113

Statutory instruments

Redundancy Payments Act 1967 (section 12A(2)) (Covid-19) (no. 2) order 2020 – SI 290/2020
Redundancy Payments Act 1967 (section 12A(2)) (Covid-19) (no. 3) order 2020 – SI 349/2020
Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (section 31) (Workplace Relations Commission) (designation) order 2020 – SI 359/2020

ENERGY

Acts

National Oil Reserves Agency (Amendment) and Provision of Central Treasury Services Act 2020 – Act No. 6 of 2020 – Signed on July 29, 2020

Statutory instruments

National Oil Reserves Agency Act 2007 (returns and biofuel levy) (amendment) regulations 2020 – SI 279/2020
National Oil Reserves Agency (Amendment) and Provision of Central Treasury Services Act 2020 (commencement) order 2020 – SI 280/2020

EQUALITY

Articles

McVeigh, K. Race to the front. *Law Society Gazette* 2020; (July): 20
Noonan, L. Prior fault insanity and the impact of the Convention on the Rights of Persons with Disabilities. *Irish Criminal Law Journal* 2020; (30) (1): 12

EQUITY

Articles

Keating, A., Dr. Static and dynamic feature of the economy of Irish equity. *Irish Law Times* 2020; (38) (15): 229

EUROPEAN UNION

Library acquisitions

Nic Shuibhne, N. *EC Law and Minority Language Policy*. Netherlands: Brill Academic Publishers, 2004 – M208.44.N1

Articles

Burke, E., Walsh, D. German ruling a potential threat to EU law. *Law Society Gazette* 2020; (July): 42

Statutory instruments

European Union (waste water discharge) regulations 2020 – SI 214/2020
European Union (insurance distribution) (amendment) regulations 2020 – SI 215/2020
European Union (genetically modified organisms) (restriction or prohibition of cultivation) regulations 2020 – SI 216/2020
European Union (package travel) regulations 2020 – SI 219/2020
European Union (modifications of statutory instrument no. 110 of 2019) (registration of beneficial ownership of certain financial vehicles) regulations 2020 – SI 233/2020
European Union (rights of passengers when travelling by sea and inland waterway) (amendment) regulations 2020 – SI 236/2020
European Union (temporary increase of official controls and measures on imports of food and feed of non-animal origin) (amendment) regulations 2020 – SI 237/2020
European Union (administrative cooperation in the field of taxation) (amendment) regulations 2020 – SI 240/2020
European Union (promoting fairness and transparency for business users of online intermediation services) regulations 2020 – SI 256/2020
European Communities (minimum safety and health requirements for improved medical treatment on board vessels) (amendment) regulations 2020 – SI 258/2020
European Union (International Labour Organisation Work in Fishing Convention) (health protection and medical care on board fishing vessels) regulations 2020 – SI 259/2020
European Union (restriction of certain hazardous substances in electrical and electronic equipment) (amendment) (no. 2) regulations 2020 – SI 264/2020
European Union (international labour organisation work in fishing convention) (medical examination) regulations 2020 – SI 266/2020
European Union (international labour organisation work in fishing convention) (food and accommodation) regulations 2020 – SI 267/2020
European Union (designation of verifying entities for deactivation of firearms) regulations 2020 – SI 283/2020
European Communities (active implantable medical devices) (amendment) regulations 2020 – SI 300/2020
European Communities (medical devices) (amendment) (no. 2) regulations 2020 – SI 301/2020
European Communities (*in vitro* diagnostic medical devices) (amendment) (no. 2) regulations 2020 – SI 302/2020
European Union (common fisheries policy) (point system) regulations 2020 – SI 318/2020
European Union (landfill) regulations 2020 – SI 321/2020
European Union (packaging) (amendment) regulations 2020 – SI 322/2020
European Union (waste directive) regulations 2020 – SI 323/2020
European Union (protection of animals used for scientific purposes) (amendment) regulations 2020 – SI 324/2020
European Union (workers on board seagoing fishing vessels) (organisation of working time) regulations 2020 – SI 331/2020
European Union (international labour organisation work in fishing convention) (fishing vessel owner liability and repatriation) regulations 2020 – SI 332/2020
European Union (international labour organisation work in fishing convention) (crew list and fisherman's work agreement) regulations 2020 – SI 333/2020
European Union (electricity risk preparedness) regulations 2020 – SI 342/2020
European Union (accessibility of websites and mobile applications of public sector bodies) regulations 2020 – SI 358/2020
European Union (restrictive measures concerning ISIL (Da'esh) and Al-Qaeda and natural and legal persons, entities or bodies associated with them) regulations 2020 – SI 360/2020
European Union (restrictive measures against cyber-attacks threatening the Union or its member states) regulations 2020 – SI 361/2020
European Union (restrictive measures concerning Libya) (no. 2) regulations 2020 – SI 363/2020
European Union (restrictive measures concerning Ukraine) (no. 2) regulations 2020 – SI 364/2020
European Union (renewable energy) regulations 2020 – SI 365/2020
European Union (posting of workers) (amendment) regulations 2020 – SI 374/2020

EVIDENCE

Acquittal – Waste Management Acts 1996 to 2011 – Exclusion of evidence – Appellant seeking to appeal from the acquittal of the respondent – Whether the trial judge had erroneously excluded compelling evidence – [2020] IECA 162 – 28/01/2020
DPP v A.B.

Articles

Heffernan, L. The corroboration requirement for confession evidence. *Irish Law Times* 2020; (38) (16): 244
McCutcheon, P. On the possession of digital material. *Irish Criminal Law Journal* 2020; (30) (1): 4

EXTRADITION LAW

European arrest warrant – Surrender – Issuing judicial authority – Applicant seeking an order for the surrender of the respondent to the Republic of Lithuania pursuant to a European arrest warrant – Whether the High Court could be satisfied that the Deputy Prosecutor General of the Republic of Lithuania was to be regarded as an issuing judicial authority for the purposes of the European Arrest Warrant Act 2003 – [2020] IEHC 310 – 11/06/2020
Minister for Justice and Equality v Civinskas
European arrest warrant – Surrender – Prohibition – Applicant seeking an order for the surrender of the respondent to Romania pursuant to a European arrest warrant – Whether the respondent's surrender was prohibited – [2020] IEHC 316 – 01/06/2020
Minister for Justice and Equality v Iancu
European arrest warrant – Surrender – Delay – Applicant seeking an order for the surrender of the respondent to the Republic of Poland pursuant to a European arrest warrant – Whether surrender of the respondent was prohibited on account of the unwarranted and unexplained delays of the issuing State – [2020] IEHC 416 – 10/07/2020
Minister for Justice and Equality v Libera
European arrest warrant – Correspondence – Criminal Justice (Theft and Fraud Offences) Act 2001 – Applicant seeking an order for the surrender of the respondent to Romania pursuant to a European arrest warrant – Whether the actions of the respondent correspond to an offence in the State – [2020] IEHC 413 – 08/04/2020
Minister for Justice and Equality v Muntean
European arrest warrants – Surrender – European Arrest Warrant Act 2003 s. 21A – Applicant seeking orders for the surrender of the respondents to the Kingdom of Belgium pursuant to European arrest warrants – Whether the surrender of the respondents was prohibited by s. 21A of the European Arrest Warrant Act 2003 – [2020] IEHC 414 – 08/04/2020
Minister for Justice and Equality v McPhillips and Hatherley
European arrest warrant – Surrender – Prohibition – Applicant seeking an order for the surrender of the respondent to the Federal Republic of Germany pursuant to a European arrest warrant – Whether the respondent's surrender was prohibited – [2020] IEHC 318 – 25/06/2020
Minister for Justice and Equality v Nicola
European arrest warrant – Certification of points of law – European Arrest Warrant Act 2003 s. 16(11) – Applicant seeking certification of points of law – Whether it was desirable in the public interest that an appeal be taken under s. 16(11) of the European Arrest Warrant Act 2003 – [2020] IEHC 202 – 20/04/2020

Minister for Justice and Equality v Pal
European arrest warrant – Surrender – Delay – Applicant seeking an order for the surrender of the respondent to the Republic of Poland pursuant to a European arrest warrant – Whether the surrender of the respondent was prohibited by reason of the lapse of time since the commission of the offences specified in the European arrest warrant – [2020] IEHC 417 – 10/07/2020
Minister for Justice and Equality v Polak
European arrest warrant – Surrender – European Arrest Warrant Act 2003 s. 21A – Applicant seeking an order for the surrender of the respondent to the Republic of Lithuania pursuant to a European arrest warrant – Whether surrender should be refused due to the lack of clarity as to whether the decision had been made in the issuing member state to charge and try the respondent in respect of the offence referred to in the warrant – [2020] IEHC 433 – 24/07/2020
Minister for Justice and Equality v Tamulaitis
European arrest warrant – Correspondence – Due process – Applicant seeking an order for the surrender of the respondent to the Republic of Lithuania pursuant to a European arrest warrant – Whether the actions of the respondent correspond to an offence in the State – [2020] IEHC 415 – 16/06/2020
Minister for Justice and Equality v Ziznevskis

Statutory instruments
European arrest warrant (application to third countries) (Iceland and Norway) order 2020 – SI 346/2020

FAMILY LAW
Consent – Therapeutic care – Costs – Applicant seeking an order dispensing with the consent of the respondent for children to attend with Professor S. for the purpose of ongoing therapeutic care – Whether Professor S. was precluded from counselling the children – [2020] IEHC 432 – 17/06/2020
B.C. v P.K.
Personal care decision – Rights to life and bodily integrity – Powers of Attorney Act 1996 – Appellant challenging a personal care decision – Whether the evidence supported the view that it was in the donor's best interest to remain in the nursing home – [2020] IECA 250 – 22/09/2020
C.A v B.W. and M.A.
Family law proceedings – Isaac Wunder Order – Judicial review – Respondent seeking an Isaac Wunder Order – Whether the case could be fairly considered without hearing evidence – 13/02/2020 – [2020] IEHC 203
S.L. v M.L.

Articles
Conneely, S., Dr., Dempsey, S., O'Shea, R., Dr. "On such a full sea are we now afloat": family mediation in practice in the wake of the Mediation Act 2017. *Irish Journal of Family Law* 2020; (23) (3): 73
Fitzpatrick, K. Parental alienation, domestic abuse and the views of the child. *Irish Journal of Family Law* 2020; (23) (3): 64
Lyons, D., Dr. Reliance upon public international law treaties for the justification of domestic legislative developments: exploring parts 2 and 3 of the Children and Family Relationships Act 2015 as a case study. *Medico-legal Journal of Ireland* 2020; (26) (1): 17
Quill, W. New constitutional elements to family relocation applications. *Irish Journal of Family Law* 2020; (23) (3): 59

FINANCE
Acts
Financial Provisions (Covid-19) Act 2020 – Act No. 4 of 2020 – Signed on July 17, 2020
Financial Provisions (Covid-19) (no. 2) Act 2020 – Act No. 8 of 2020 – Signed on August 1, 2020

Statutory instruments
Financial accounts reporting (United States of America) (amendment) regulations 2020 – SI 245/2020
Finance Act 2019 (section 63(1)(b)) (commencement) order 2020 – SI 334/2020

FINANCIAL SERVICES
Articles
Corcoran, E. Fiduciary duties and financial services providers. *Irish Jurist* 2020; LXIII: 1

Statutory instruments
Investor Compensation Act 1998 (prescription of bodies and persons) (amendment) regulations 2020 – SI 255/2020
National Treasury Management Agency (delegation of claims management functions) order 2020 – SI 228/2020
National Treasury Management Agency (delegation of claims management functions) (no.2) order 2020 – SI 229/2020

FISHERIES
Statutory instruments
Sea-fisheries and maritime jurisdiction (mussel seed) (opening of fisheries) regulations 2020 – SI 338/2020

FREEDOM OF INFORMATION
Exemption – Public interest – Freedom of Information Act 2014 – Appellant appealing the order of the Court of Appeal reversing the decision of the High Court – Whether the appellant erred in his approach to records in respect of which an exemption was claimed by the respondent – [2020] IESC 57 – 25/09/2020
Minister for Communications, Energy and Natural Resources v The Information Commissioner
Disclosure – Public interest – Freedom of Information Act 2014 – Appellant appealing against the order of the High Court in a statutory appeal under the Freedom of Information Act 2014 – Whether the trial judge erred in his interpretation of the presumption set out in s. 22(12)(b) of the Freedom of Information Act 2014 – [2020] IESC 58 – 25/09/2020
University College Cork v The Information Commissioner

GARDA SÍOCHÁNA
Articles
Fallon, A. The foundational legislation of the Garda Síochána (1922-1926). *Irish Jurist* 2019; LXII: 119
Molloy, C. Policing matters. *Irish Jurist* 2019; LXII: 72

Statutory instruments
Garda Síochána (ranks) regulations 2020 – SI 287/2020

GOVERNMENT
Statutory instruments
Heritage (transfer of departmental administration and ministerial functions) order 2020 – SI 339/2020
Inland waterways and waterways Ireland (transfer of departmental administration and ministerial functions) order 2020 – SI 340/2020
Transport, tourism and sport (alteration of name of department and title of minister) order 2020 – SI 351/2020
Broadcasting (transfer of departmental administration and ministerial functions) order 2020 – SI 372/2020
Communications, climate action and environment (alteration of name of department and title of minister) order 2020 – SI 373/2020

GUARANTEES
Acts
Credit Guarantee (Amendment) Act 2020 – Act No. 5 of 2020 – Signed on July 24, 2020

Statutory instruments
Credit Guarantee (Amendment) Act 2020 (commencement) order 2020 – SI 303/2020
Covid-19 credit guarantee scheme 2020 – SI 326/2020

HEALTH
Articles
Quill, W. Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020. *Medico-legal Journal of Ireland* 2020; (26) (1): 8

Acts
Health (General Practitioner Service and Alteration of Criteria for Eligibility) Act 2020 – Act No. 11 of 2020 – Signed on August 2, 2020

Statutory instruments
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 2) (amendment) regulations 2020
SI 209/2020
Health act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 2) (amendment) (no.2) regulations 2020 – SI 212/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19 passenger locator form) (amendment) regulations 2020 – SI 217/2020
Emergency Measures in the Public Interest (Covid-19) Act 2020 (section 4) order 2020 – SI 224/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 3) regulations 2020 – SI 234/2020
Health Act 1947 (section 31A – temporary requirements) (Covid-19 passenger locator form) (amendment) (no. 2) regulations 2020 – SI 243/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (face coverings on public transport) regulations 2020 – SI 244/2020
Health Act 1947 (section 31A – temporary requirements) (Covid-19 passenger locator form) (amendment) (no. 3) regulations 2020 – SI 251/2020
Health Act 1947 (section 31A – temporary requirements) (Covid-19 passenger locator form) (amendment) (no. 3) (amendment) regulations 2020 – SI 252/2020
Emergency Measures in the Public Interest (Covid-19) Act 2020 (section 4) (no. 2) order 2020 – SI 254/2020
Health and Social Care Professionals Act 2005 (special measures registration having regard to Covid-19) order 2020 – SI 270/2020
Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (continuation of part 2) (no. 3) order 2020 – SI 285/2020
Health Act 1947 (section 31A – temporary requirements) (Covid-19 passenger locator form) (amendment) (no. 4) regulations 2020 – SI 294/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid – 19) (relevant counties) regulations 2020 – SI 295/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (face coverings in certain premises and businesses) regulations 2020 – SI 296/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (relevant counties) (amendment) regulations 2020 – SI 297/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid – 19) (No. 3) (amendment) (no. 2) regulations 2020 – SI 298/2020
Health Act 1947 (section 31A – temporary requirements) (Covid-19 passenger locator form) (amendment) (no. 5) regulations 2020 – SI 304/2020
Health Act 1947 (section 31A – temporary requirements) (Covid-19 passenger locator form) (amendment) (no. 6) regulations 2020 – SI 314/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (relevant counties) (amendment) (no. 2) regulations 2020 – SI 315/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no.

4) regulations 2020 – SI 325/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (relevant counties) (revocation) regulations 2020 – SI 327/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 4) (amendment) regulations 2020 – SI 343/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 4) (amendment) (no. 2) regulations 2020 – SI 344/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 4) (amendment) (no. 3) regulations 2020 – SI 347/2020
Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (continuation of sections 7 and 8 of part 2) order 2020 – SI 350/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 5) regulations 2020 – SI 352/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no. 5) (amendment) regulations 2020 – SI 353/2020
Health Act 1947 (section 31A(6A)) (Covid-19) regulations 2020 – SI 354/2020
Health Act 1947 (section 31A – temporary restrictions) (Covid-19) (no.5) (amendment) (no.2) regulations 2020 – SI 375/2020

HOUSING

Statutory instruments

Rent pressure zone (local electoral area of Bandon – Kinsale) order 2020 – SI 247/2020
Planning and Development Act 2000 (exempted development) (no. 3) regulations 2020 – SI 293/2020

HUMAN RIGHTS

Articles

Lynch, M. Is the rule of law under threat? *Law Society Gazette* 2020; (July): 48

IMMIGRATION

Family reunification – Refugee Act 1996 s. 18 – Eligibility – Appellants seeking family reunification – Whether the fact that the appellants became citizens deprived them of the right to apply for family reunification under s. 18 of the Refugee Act 1996 – [2020] IESC 32 – 19/06/2020
K.N. v Minister for Justice and Equality; M.A.M. v Minister for Justice and Equality
Deportation orders – Orders of certiorari – Illegal Immigrants (Trafficking) Act 2000 s. 5(6) – Respondent seeking a certificate of the court pursuant to s. 5(6) of the Illegal Immigrants (Trafficking) Act 2000 – Whether the respondent rested proposed points of appeal on a mistaken factual and/or legal basis – [2020] IEHC 431 – 02/09/2020
M.H. and S.H. (a minor suing by her mother and next friend M.H.) v Minister for Justice and Equality (No.2)
European arrest warrant – Surrender – Delay – Applicant seeking an order for the surrender of the respondent to the United Kingdom pursuant to a European arrest warrant – Whether any lapse in time was such as would justify the High Court in refusing to make an order for the surrender of the respondent – [2020] IEHC 285 – 10/06/2020
Minister for Justice and Equality v Ahmad
Judicial review – Deportation orders – Acquiescence – Applicants seeking certiorari of deportation orders – Whether the applicants were guilty of acquiescence – [2020] IEHC 451 – 22/09/2020
N.D. (Albania) v The International Protection Appeals Tribunal
International protection – Judicial review – Deportation – Applicant seeking an order of certiorari directed to a deportation order – Whether the deportation order was made without consideration of the review application made by the applicant – [2020] IEHC 304 – 03/06/2020
R.K. (Albania) v The Minister for Justice and Equality

Statutory Instruments

Immigration Act 2004 (visas) (amendment) order 2020 – SI 262/2020

INFORMATION TECHNOLOGY

Library acquisitions

Schulze, R., Staudenmayer, D. *EU Digital Law*. United Kingdom: Nomos/hart, 2020 – W141

Articles

Hardiman, A.-M. The global perspective. *The Bar Review* 2020; (25) (4): 101

INJUNCTIONS

Summary suspension – Injunctive relief – Bye-laws – Plaintiff seeking injunctive relief – Whether the defendant had suspended/restricted the plaintiff's privileges in circumstances where it was not entitled to do so – [2020] IEHC 456 – 17/08/2020
Cahill v Beacon Hospital Sandyford Ltd
Interlocutory injunction – Threshold test – Balance of justice – Plaintiff seeking interlocutory order – Whether the threshold test had been met – [2020] IEHC 319 – 30/06/2020
Madden v Louth County Council
Interlocutory order – Costs – Stay – Plaintiff seeking costs of an interlocutory injunction application – Whether it was appropriate to grant a stay on the proposed interlocutory order pending appeal – [2020] IEHC 327 – 03/07/2020
O'Donovan v Over-C Technology Ltd
Injunctive relief – Declaratory relief – Damages – Plaintiff seeking injunctive relief – Whether the defendant's counterclaim disclosed a reasonable or sustainable cause of action – [2020] IEHC 308 – 22/06/2020
Ryanair DAC v SC Vola.RO SRL

Library acquisitions

Kirwan, B. *Injunctions Law and Practice (3rd ed.)*. Dublin: Round Hall, 2020 – N232.C5

Articles

Biehler, H. Interlocutory injunctions – recent guidance from the Supreme Court. *Irish law Times* 2020; (38) (13): 190

INSOLVENCY

Appointment of receiver – Abuse of process – Redaction – Plaintiff seeking documentary proof of the powers and/or rights as relied upon by the first defendant to validly and lawfully appoint the fourth defendant as receiver to the plaintiff's assets – Whether the appointment of a receiver or his actions constituted an abuse of process – [2020] IEHC 309 – 22/06/2020
Crowley v Promontoria (Oyster) DAC

Articles

Murphy, T. Just a receiver or a receiver and manager: a superfluous term or a substantive contractual issue? *Commercial Law Practitioner* 2020; (27) (6): 120

INTERNATIONAL LAW

Library acquisitions

Law Reform Commission. *Law Reform Commission Domestic Implementation of International Obligations*. Dublin: Law Reform Commission, 2020 – L160.C5

JUDICIAL REVIEW

Judicial review – Leave – Interests of justice – Applicant seeking leave to take judicial review proceedings – Whether the applicant satisfied the test for leave – [2020] IEHC 471 – 15/09/2020
Bradshaw v The County Registrar for the County of Tipperary
Conviction – Dangerous driving – Judicial review – Applicant seeking judicial review – Whether there was sufficient explanation for the procedural deficiencies in the case – [2020] IEHC 328 – 03/07/2020
Brassil v DPP
Judicial review – Natural and constitutional justice – Mootness – Applicant challenging by way of judicial review a decision of the respondent to transfer him – Whether the decision to transfer the applicant was taken in breach of principles of natural and constitutional justice – [2020] IEHC 459 – 03/03/2020
Buckley v Irish Prison Service
Judicial review – Legal aid certificate – Prosecutions – Applicant seeking an order of certiorari quashing the decision to grant the applicant a legal aid certificate when no application for a certificate was made – Whether there has to be an application before a legal aid certificate can be granted – [2020] IEHC 438 – 25/05/2020
Cully v DPP
Judicial review – Natural and constitutional justice – Mediation – Applicant seeking to quash the contents of a report prepared by a designated person under the Dignity at Work policy operating within the respondent – Whether the complaint made against the applicant was made in good faith – [2020] IEHC 460 – 03/03/2020
Dowling v Irish Prison Service
Judicial review – Protected disclosure – Objective bias – Appellant seeking judicial review – Whether the appellant had established a case of objective bias – [2020] IECA 168 – 22/06/2020
Harrison v Charleton
Judicial review – Natural and constitutional justice – Mootness – Applicant challenging by way of judicial review a decision of the respondent to transfer him – Whether the case was moot – [2020] IEHC 458 – 03/03/2020
McDonald v Irish Prison Service
Judicial review – Order of prohibition – Prosecution – Applicant seeking an order of prohibition in respect of a pending prosecution in the District Court – Whether it would be appropriate for the High Court to rule on the issues raised in the judicial review proceedings – [2020] IEHC 469 – 17/09/2020
Nugent v The Property Services Regulatory Authority
Judicial review – Costs – Legal fees – Appellants appealing from the order of the High Court granting judicial review of the refusal of the first appellant to pay the costs and/or fees and expenses incurred by the respondent – Whether the first appellant was bound by a recommendation made by a court under the Legal Aid-Custody Issues Scheme that the legal fees of a party be discharged through the Scheme – [2020] IESC 51 – 31/07/2020
O'Shea v Legal Aid Board
Judicial review – Planning permission – Defence – Applicant seeking judicial review – Whether the notice party should be entitled to continue to defend the proceedings notwithstanding that the respondent was prepared to consent to an order of certiorari – [2020] IEHC 294 – 19/06/2020
Protect East Meath Ltd v An Bord Pleanála
Judicial review – Deportation – Breach of fair procedures – Applicants seeking certiorari of the respondent's decision to make deportation orders in respect of the applicants – Whether the manner and circumstances in which the respondent proceeded to make deportation orders in respect of the applicants was unlawful and breached fundamental principles of fair procedures and due process – [2020] IEHC 283 – 20/05/2020
Ramaabya and another v Minister for Justice and Equality

Articles

O'Leary, D. Wednesbury unreasonableness: a jack of all trades or a jack that should remain in the box? *Irish law Times* 2020; (38) (10): 148

LANDLORD AND TENANT

Library acquisitions

Ring, J., Cassidy, U. *Landlord and Tenant Law: The Residential Sector (2nd ed.)*. Dublin: Thomson Round Hall, 2020 – N90.C5

Articles
Geoghegan, D. Relief from forfeiture: where the boundaries might lie. *Conveyancing and Property Law Journal* 2020; (25) (3): 50
Maddox, N., Dr. Rent control and the constitution. *Conveyancing and Property Law Journal* 2020; (25) (2): 23
O'Connor, A. Down-payment blues. *Law Society Gazette* 2020; (July): 26

Acts
Residential Tenancies and Valuation Act 2020 – Act No. 7 of 2020 – Signed on August 1, 2020

LEGAL AID
Legal Aid – Custody Issues Scheme – Recommendation – Costs – Appellant seeking a recommendation for the purposes of the Legal Aid – Whether the appellant's application for a recommendation under the Legal Aid-Custody Issues Scheme was made at an appropriate time – [2020] IESC 36 – 30/06/2020
M v The Parole Board

Articles
Dignam, C. Our shared future. *The Bar Review* 2020; (25) (4); 117

LEGAL HISTORY

Library acquisitions
Kelly, F. *The MacEgan Legal Treatise* – L403.C5

Articles
Gethings, C. Not so saved by the bell: the deodand in Irish and English law. *Irish law Times* 2020; (38) (15): 223
Meighan, J. A nation once again? *Law Society Gazette* 2020; (Aug/Sep): 36

LEGAL PROFESSION

Roll of Solicitors – Solicitors (Amendment) Act 1960 – "Strike off" application – Applicant seeking to strike the name of the respondent off the Roll of Solicitors – Whether there was a sustainable basis for the findings of the Disciplinary Tribunal of the applicant – [2020] IEHC 381 – 07/09/2020
Law Society of Ireland v Coleman

Articles
Blackwell, N. Rise like a phoenix. *Law Society Gazette* 2020; (Aug/Sep): 42
Gallagher, H. The deployment of big data analytics technologies in law firms in Ireland and the potential impact on the future delivery of legal services: risks and solutions. *Hibernian Law Journal* 2020; 19: 45
Hallissey, M. Elizaveta the first. *Law Society Gazette* 2020; (Aug/Sep): 27
Howard, T., Gartland, L. Parent company. *Law Society Gazette* 2020; (July): 34

Statutory instruments
Solicitors Acts 1954 to 2015 (regulation of practice committee) regulations 2020 – SI 239/2020

LOTTERY

Statutory instruments
Gaming and Lotteries (Amendment) Act 2019 (commencement) order 2020 – SI 227/2020

MEDICAL LAW

Articles
Cowley, C. Selective conscientious objection to abortion in the Irish context. *Medico-legal Journal of Ireland* 2020; (26) (1): 3
Kelly, S. Confidentiality in disarray: should doctors in Ireland disclose genetic information to patients' relatives? *Hibernian Law Journal* 2020; 19: 22

Statutory instruments
Pharmaceutical Society of Ireland (fees) (amendment) rules 2020 – SI 213/2020
Medicinal products (prescription and control of supply) (amendment) (no. 4) regulations 2020 – SI 241/2020
Election of members for appointment to the Physiotherapists Registration Board bye-law 2020 – SI 253/2020
Dentists Act 1985 (special measures registration having regard to Covid-19) order 2020 – SI 271/2020
Medical Practitioners Act 2007 (special measures registration having regard to Covid-19) order 2020 – SI 272/2020
Pharmacy Act 2007 (special measures registration having regard to Covid-19) order 2020 – SI 273/2020
Pharmaceutical Society of Ireland (registration) (amendment) rules 2020 – SI 316/2020
Radiographers Registration Board approved qualifications and divisions of the register bye-law 2020 – SI 319/2020
Rules for the Fitness to Practise Committee and subcommittees of the Fitness to Practise Committee 2020 – SI 355/2020

NEGLIGENCE

Personal injuries – Negligence – Third-party notice – Defendant seeking third-party notice – Whether the court should exercise its discretion on the basis of an apprehension of the next friend not being able to exercise an independence of mind – [2020] IEHC 288 – 02/03/2020
Austin v Hallmark Building Contractors Ltd
Negligence – Harm – Screening – Plaintiff asserting professional negligence – Whether the plaintiff's breast screening was carried out negligently – [2020] IEHC 286 – 29/05/2020
Freeney v Health Service Executive
Personal injuries – Damages – Negligence – Appellant seeking to appeal from the judgment and orders of the High Court dismissing the appellant's claim for damages for personal injuries suffered by him allegedly due to the negligence and breach of duty of the respondents – Whether the appellant had discharged the onus of proof – [2020] IECA 218 – 31/07/2020
Moorehouse v Governor of Wheatfield Prison
Professional negligence – Damages – Abuse of process – Defendant seeking an order striking out the plaintiff's proceedings – Whether the plaintiff's proceedings disclose no reasonable cause of action, are unsustainable, are frivolous and vexatious, are bound to fail and amount to an abuse of process – 21/05/2020
Whearty v Lanigan P/A Poe Kiely Hogan Lanigan Solicitors

Articles
Moorhead, S., Watson, M. Damage limitation. *The Bar Review* 2020; (25) (4): 104

OFFICIAL LANGUAGES

Statutory instruments
Official Languages Act 2003 (public bodies) regulations 2019 – SI 230/2020

PENSIONS

Statutory instruments
Public Service Pay and Pensions Act 2017 (section 42) (payments in respect of certain services rendered in response to the risk to public health posed by Covid-19) (amendment) regulations 2020 – SI 220/2020
Public Service Pay and Pensions Act 2017 (section 42) (payments to general practitioners) (amendment) regulations 2020 – SI 311/2020

PLANNING AND ENVIRONMENTAL LAW

Statement of claim – Liberty to amend – Planning permission – Plaintiffs seeking liberty to amend the statement of claim – Whether the case could properly be added by way of amendment to the statement of claim – [2020] IEHC 289 – 12/06/2020
Care Prime Holdings Ltd v Howth Estate Company
Planning and development – National Development Plan – National Planning Framework – Challenge to Plan and Framework – [2020] IEHC 225 – 24/09/2020
Friends of the Irish Environment Clg v The Government of Ireland
Judicial review – Planning permission – Environmental impact assessment – Applicant seeking judicial review – Whether the provisions of the Planning and Development Regulations 2001 and/or the environmental impact assessment Directive required an Environmental Impact Assessment to be carried out in respect of the development of a solar farm – [2020] IEHC 259 – 29/05/2020
Kavanagh v An Bord Pleanála
Recusal – Objective bias – Judicial review – Applicant asking the High Court judge to recuse himself – Whether the applicant had established a reasonable apprehension of objective bias – [2020] IEHC 477 – 23/09/2020
Kemper v An Bord Pleanála
Judicial review – Planning permission – Rationality – Applicant seeking an order of certiorari quashing the determination of the respondent – Whether the decision of the respondent was irrational – [2020] IEHC 290 – 12/03/2020
Kenny v An Bord Pleanála
Planning and development – Agricultural land – Applicant seeking to challenge the decision of the respondent to refuse an appeal – Whether the decision of the respondent was irrational, *ultra vires* and unlawful – [2020] IEHC 292 – 12/05/2020
Navratil v An Bord Pleanála

Articles
O'Connell, C. The focus of Ireland: homelessness in the courts *Fagan v Dublin City Council* [2019] IESC 96. *Hibernian Law Journal* 2020; 19: 110

Statutory instruments
Planning and Development Act 2000 (section 181(2)(a)) order 2020 – SI 231/2020
Planning and Development Act 2000 (section 181(2)(a)) (no. 2) order 2020 – SI 232/2020
Air Pollution Act (marketing, sale, distribution and burning of specified fuels) (amendment) regulations 2020 – SI 260/2020

PRACTICE AND PROCEDURE

Frivolous and vexatious proceedings – Reasonable cause of action – Bound to fail – Defendant seeking an order striking out the proceedings – Whether the proceedings were frivolous and vexatious and/or disclosed no reasonable cause of action and/or were bound to fail – [2020] IEHC 314 – 29/05/2020
BGB Property Holdings Ltd v Tifco Ltd
Interrogatories – Personal injuries – Breach of the provisions of the Liability for Defective Products Act 1991 – Plaintiff seeking leave to deliver interrogatories for examination of the fourth defendant – Whether injustice would be occasioned to the plaintiff by the refusal to grant leave to deliver the interrogatory – [2020] IEHC 427 – 18/082020
Blackwell v The Minister for Health and Children
Digital audio recording – Jurisdiction – Rules of the Superior Courts O. 123 – Appellant seeking to appeal a decision of the High Court refusing his application for the digital audio recording of the hearing of proceedings to which he had been a party – Whether the Court of Appeal had jurisdiction to entertain the appeal – [2020] IECA 102 – 12/03/2020
The Governor and Company of the Bank of Ireland v Gormley
Limitation – Findings of fact – Cause of action – Appellants appealing from a High Court order directing that the respondent recover damages against the appellants – Whether there were errors in the Judge's engagement with the evidence and in the

findings of fact made by him – [2020] IECA 239 – 06/08/2020
McDonald v Conroy
Third-party notice – Undue delay – Rules of the Superior Courts O. 16 – Third-party seeking to set aside the third-party notice served upon it by the defendant – Whether the defendant unduly delayed in pursuing the joinder of the third-party – [2020] IEHC 390 – 30/07/2020
Morrow v Fields of Life Trust Ltd
Judicial review – Declaratory relief – European Communities (Access to Information on the Environment) Regulations 2007 – Appellant seeking an order setting aside, varying or annulling the decision of the respondent – Whether the respondent erred in law in making the decision – 02/09/2020 – [2020] IEHC 430
M50 Skip Hire & Recycling Ltd v Commissioner for Environmental Information
Point of law – Data controller – Costs – Appellant seeking to appeal on a point of law from a judgment of the High Court – Whether the obligation on the notice party to provide the appellant with personal data extends to an obligation to provide the data in its original material form – [2020] IECA 175 – 01/07/2020
Nowak v The Data Protection Commissioner (2)
Leave to appeal – Points of law – National Asset Management Agency Act 2009 s. 194 – Defendants seeking leave to appeal – Whether the defendants' argument reached the threshold on either aspect of the requirements within s. 194 of the National Asset Management Agency Act 2009 – [2020] IEHC 297 – 26/05/2020
O'Donoghue v Martin
Defamation – Damages – Bound to fail – Defendant seeking to strike out the plaintiff's claims – Whether the plaintiff's claims were bound to fail – [2020] IEHC 472 – 08/07/2020
Scallon v Independent News and Media Plc t/a The Irish Independent and t/a The Sunday Independent and t/aThe Sunday World and t/a The Belfast Telegraph (P&P)
Personal injuries – Intentional trespass to the person – Courts Act 1988 s. 1 – Respondent seeking damages for personal injuries – Whether the actions against the appellants were properly to be characterised as a cause of action in respect of intentional trespass to the person – [2020] IECA 23 – 29/01/2020
X.Y. v Shine

Articles
Biehler, H. Procedural fairness and a two-stage process – why there can be no "single bright line rule". *Irish Jurist* 2020; LXIII; 28
Stafford, P., Dr. Unrepresented parties, lay litigants and McKenzie friends in the Irish Courts – pointers to reform from the UK. *Commercial Law Practitioner* 2020; (27) (7): 147

PRISONS

Declaratory relief – Capacity – Right to bodily integrity – Plaintiff seeking declaratory relief – Whether the defendant had full capacity to decide to refuse food and medical treatment – [2020] IEHC 354 – 10/07/2020
The Governor of a Prison v GDC
Conditional release – Prisoner – Criminal Justice Act 1960 s. 2 – Appellant seeking conditional release – Whether the appellant could be considered for release under s. 2 of the Criminal Justice Act 1960 – [2020] IESC 24 – 12/05/2020
M. v The Parole Board

Statutory Instruments
Prison (amendment) rules 2020 – SI 250/2020
Prison (disciplinary code for officers) (revocation) rules 2020 – SI 261/2020

PROBATE

Articles
Keating, A., Dr. Probate in practice. *Conveyancing and Property Law Journal* 2019; (24) (3); 47 [part 1]; *Conveyancing and Property Law Journal* 2019; (24) (4); 71 [part 2]; *Conveyancing and Property Law Journal* 2020; (25) (1): 9 [part 3]; *Conveyancing and Property Law Journal* 2020; (25) (2): 36 [part 4]; *Conveyancing and Property Law Journal* 2020; (25) (3): 57 [part 5]

PROPERTY

Renewal – Possession of property – Leave to issue execution – Plaintiff seeking renewal of execution order – Whether s. 11(6)(a) of the Statute of Limitations of 1957 applies to the renewal of an order for leave to execute a possession order – [2020] IEHC 293 – 15/06/2020
Start Mortgages DAC v Piggott
Protective certificate – Statute of Limitations – Order for Possession – Plaintiff applying to treat protective certificate as pausing the Statute of Limitations – Whether any reckoning of time for seeking to enforce any order against the defendants was placed on hold pending the expiration of the protective certificate – 11/09/2020
Start Mortgages PLC v Ward

Articles
Thomas, J., Cannon, R. Heavy burden. *Law Society Gazette* 2020; (July): 30

Statutory instruments
Property services (maintenance of professional competence of licensees) (amendment) regulations 2020 – SI 348/2020

ROAD TRAFFIC

Statutory instruments
Road traffic (licensing of drivers) (amendment) (no. 6) regulations 2020 – SI 265/2020
Road traffic (licensing of drivers) (amendment) (no. 7) regulations 2020 – SI 299/2020

SOCIAL SERVICES

Dependent family members – Disability allowance – Residence – Applicant seeking disability allowance – Whether the mother of an EU citizen worker is entitled to receive disability allowance notwithstanding that she has not been economically active in the State and has been resident for less than five years – [2020] IEHC 258 – 29/05/2020
Voican v Chief Appeals Officer, Social Welfare Appeals Office

Articles
Michelle, Dr. Vulnerability, social and economic rights and austerity in Ireland. *Irish Law Times* 2020; (38) (16): 239

Acts
Social Welfare (Covid-19) (Amendment) Act 2020 – Act No. 12 of 2020 – Signed on August 5, 2020

Statutory instruments
Social welfare (increase for qualified adult) (no. 2) regulations 2020 – SI 221/2020
Social welfare (consolidated claims, payments and control) (amendment) (no.7) (emergency measures in the public interest – jobseeker's allowance) regulations 2020 – SI 222/2020
Social welfare (consolidated claims, payments and control) (amendment) (no. 8) (emergency measures in the public interest – jobseeker's benefit) regulations 2020 – SI 223/2020
Social welfare (consolidated claims, payments and control) (amendment) (no. 9) (absence from the state) regulations 2020 – SI 242/2020
Social Workers Registration Board application for registration bye-law 2020 – SI 248/2020
Social Workers Registration Board return to practice bye-law 2020 – SI 249/2020
Social welfare (increase for qualified adult) (no. 3) regulations 2020 – SI 308/2020
Social welfare (consolidated claims, payments and control) (amendment) (no.10) (emergency measures in the public interest – jobseeker's allowance) regulations 2020 – SI 309/2020
Social welfare (consolidated claims, payments and control) (amendment) (no. 11) (emergency measures in the public interest – jobseeker's benefit) regulations 2020 – SI 310/2020
Social welfare (consolidated claims, payments and control) (amendment) (no.12) (emergency measures in the public interest – jobseeker's allowance) regulations 2020 – SI 368/2020
Social welfare (consolidated claims, payments and control) (amendment) (no.13) (emergency measures in the public interest – jobseeker's benefit) regulations 2020 – SI 369/2020
Social welfare (consolidated claims, payments and control) (amendment) (no.14) (Covid-19 pandemic unemployment payment) regulations 2020 – SI 370/2020
Social welfare (increase for qualified adult) (no.4) regulations 2020 – SI 376/2020

STATISTICS

Statutory instruments
Statistics (delegation of ministerial functions) order 2020 – SI 246/2020
Statistics (delegation of ministerial functions) (no. 2) order 2020 – SI 263/2020
Statistics (census of agriculture) order 2020 – SI 281/2020

SUCCESSION

Articles
McGovern, C. Sperm by succession: is stored sperm property for the purposes of testation? *Conveyancing and Property Law Journal* 2020; (25) (2); 28

TAXATION

Tax liability – Garnishee – Rules of the Superior Courts O. 45, r. 5 – Revenue seeking to appear and be heard as part of the Garnishee proceedings – Whether the Revenue enjoyed preferential rights in respect of the monies owed to them – 08/06/2020 – [2020] IEHC 440
A-Data Ltd v McMahon
Case stated – Rates – Premises – Respondent seeking a decree against the appellants for alleged unpaid rates – Whether the District Court erred in law in determining that the premises were 'commercial premises' and were therefore liable to rates – [2020] IEHC 317 – 26/06/2020
Clarke v Halpin
Case stated – Revenue audit – Rule of law – Appellant seeking to appeal by way of case stated – Whether there was no rule of law that precluded the taking of any steps in a revenue audit – [2020] IEHC 295 – 04/06/2020
Murphy v The Revenue Commissioners

Library acquisitions
Cassidy, B., Reade, M. *Law of Value-Added Tax: Finance Act 2019 (21st ed.)*. Dublin: Irish Taxation Institute, 2020 – M337.45.C5
Fennell, D. *Direct Tax Acts: Finance Act 2019 (24th ed.)*. Dublin: Irish Tax Institute, 2020 – M335.C5
Fennell, D. *Taxation Summary: Finance Act 2019 (44th ed.)*. Dublin: Irish Tax Institute, 2020 – M335.C5
Keogan, A., Scully, E. *Law of Capital Acquisitions Tax, Stamp Duty and Local Property Tax: Finance Act 2019 (9th ed.)*. Dublin: Irish Taxation Institute, 2019 – M337.16.C5
Maguire, T. *Irish Income Tax 2020 (2020 ed.)*. Dublin: Bloomsbury Professional, 2020 – M337.11.C5
Mulcahy, P., May, L., Kennedy, P. *Irish Taxation: Law and Practice 2019-2020*

(17th ed.). Dublin: Irish Taxation Institute, 2019 – M335.C5

Statutory instruments
Finance (Tax Appeals and Prospectus Regulation) Act 2019 (commencement) order 2020 – SI 238/2020
Capital Acquisitions Tax (electronic probate) regulations 2020 – SI 341/2020
Taxes Consolidation Act 1997 (section 519C(1)) (prescribed persons) order 2020 – SI 357/2020

TELECOMMUNICATIONS

Statutory instruments
Wireless Telegraphy Act 1926 (section 3) (exemption of terminals for satellite services) order 2020 – SI 226/2020

TORT

Articles
Hogan, G. The farthest – December 1972. *Irish Jurist* 2019; LXII: 1

TOURISM

Articles
Horgan, N. When in Rome... *Law Society Gazette* 2020; (July): 14
Lowry, A., Murtagh, Z. Freedom to travel. *The Bar Review* 2020; (25) (4): 109

Statutory instruments
Tourism and sport (transfer of departmental administration and ministerial functions) order 2020 – SI 356/2020

TRANSPORT

Medical certificates – Motor vehicle costs – Judicial review – Appellants seeking orders of certiorari quashing the decisions of the respondent – Whether Regulation 3 of the Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations 1994 is *ultra vires* the provisions of s. 92 of the Finance Act 1989 – [2020] IESC 31 – 18/05/2020
Reeves v Disabled Drivers Medical Board of Appeal; Lennon v Disabled Drivers Medical Board of Appeal

Statutory instruments
Transport (Tour Operators and Travel Agents) Act 1982 (disbursements from fund) regulations 2020 – SI 218/2020
Road traffic (licensing of drivers) (amendment) (no. 5) regulations 2020 – SI 235/2020

WHISTLEBLOWERS

Statutory instruments
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WORDS AND PHRASES

Articles
Clarke, F. Words, words, words – text in law. *Irish Jurist* 2020; LXIII: 48

Bills initiated in Dáil Éireann during the period June 19, 2020, to October 5, 2020
[pmb]: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Animal health and welfare (ban on hare coursing) bill 2020 – Bill 26/2020 [pmb] – Deputy Paul Murphy, Deputy Joan Collins, Deputy Catherine Connolly, Deputy Bríd Smith, Deputy Gino Kenny, Deputy Richard Boyd Barrett and Deputy Mick Barry
Ban on rent increases bill 2020 – Bill 12/2020 [pmb] – Deputy Eoin Ó Broin
Criminal justice (money laundering and terrorist financing) (amendment) bill 2020 – Bill 23/2020
Dying with dignity bill 2020 – Bill 24/2020 [pmb]: Deputy Gino Kenny, Deputy Bríd Smith, Deputy Paul Murphy, Deputy Mick Barry and Deputy Richard Boyd Barrett
Education (admission to schools) bill 2020 – Bill 35/2020 [pmb] – Deputy Aodhán Ó Ríordáin
Financial provisions (Covid-19) (no. 2) bill 2020 – Bill 19/2020
Health (preservation and protection and other emergency measures in the public interest) bill 2020 – Bill 3/2020
Housing (temporary provisions regarding short-term lettings) bill 2020 – Bill 27/2020 [pmb] – Deputy Peadar Tóibín
Industrial relations (sectoral employment orders confirmation) bill 2020 – Bill 9/2020 [pmb] – Deputy Ged Nash, Deputy Duncan Smith and Deputy Aodhán Ó Ríordáin
Ministers and ministers of state (successors) bill 2020 – Bill 20/2020 [pmb] – Deputy Peadar Tóibín
Ministerial power (repeal) (ban co-living and build to rent) bill 2020 – Bill 34/2020
National oil reserves agency (amendment) and provision of central treasury services bill 2020 – Bill 6/2020
Residential tenancies and valuation bill 2020 – Bill 17/2020
Sick leave and parental leave (Covid-19) bill 2020 – Bill 28/2020
Thirty-ninth amendment of the Constitution (right to housing) bill 2020 – Bill 21/2020 [pmb] – Deputy Richard Boyd Barrett, Deputy Paul Murphy, Deputy Mick Barry, Deputy Bríd Smith and Deputy Gino Kenny

Bills initiated in Seanad Éireann during the period June 19, 2020, to October 5, 2020
Civil law and criminal law (miscellaneous provisions) bill 2020 – Bill 18/2020
Companies (miscellaneous provisions) (Covid-19) bill 2020 – Bill 15/2020
Credit guarantee (amendment) bill 2020 – Bill 10/2020
Forestry (miscellaneous provisions) bill 2020 – Bill 32/2020
Investment limited partnerships (amendment) bill 2020 – Bill 29/2020
Ministers and secretaries and ministerial, parliamentary, judicial and court offices (amendment) bill 2020 – Changed from: Ministers and secretaries (amendment) bill 2020 – Bill 13/2020
National Screening Advisory Committee bill 2020 – Bill 30/2020 [pmb] – Senator David P.B. Norris, Senator Gerard P. Craughwell and Senator Victor Boyhan
Seanad electoral (university members) (amendment) bill 2020 – Bill 11/2020 [pmb] – Senator Malcolm Byrne, Senator Pat Casey and Senator Shane Cassells
Social welfare (Covid-19) (amendment) bill 2020 – Bill 14/2020
State airports (Shannon Group) (amendment) bill 2020 – Bill 31/2020

Progress of Bill and Bills amended in Dáil Éireann during the period June 19, 2020, to October 5, 2020
Companies (miscellaneous provisions) (Covid-19) bill 2020 – Bill 15/2020 – Committee Stage
Credit guarantee (amendment) bill 2020 – Bill 10/2020 – Committee Stage
Financial provisions (Covid-19) (no. 2) bill 2020 – Bill 19/2020 – Committee Stage
Forestry (miscellaneous provisions) bill 2020 – Bill 32/2020 – Committee Stage
Health (preservation and protection and other emergency measures in the public interest) bill 2020 – Bill 3/2020 – Passed by Dáil Éireann
Ministers and secretaries and ministerial, parliamentary, judicial and court offices (amendment) bill 2020 – Changed from: Ministers and secretaries (amendment) bill 2020 – Bill 13/2020 – Committee Stage
National Oil Reserves Agency (amendment) and provision of central treasury services bill 2020 – Bill 6/2020 – Committee Stage
Residential tenancies and valuation bill 2020 – Bill 17/2020 – Committee Stage – Passed by Dáil Éireann

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Civil law and criminal law (miscellaneous provisions) bill 2020 – Bill 18/2020 –Committee Stage
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Financial provisions (Covid-19) (no. 2) bill 2020 – Bill 19/2020 – Committee Stage
Forestry (miscellaneous provisions) bill 2020 – Bill 32/2020 – Committee Stage – Passed by Seanad Éireann
Investment limited partnerships (amendment) bill 2020 – Bill 29/2020 – Committee Stage
Ministers and secretaries and ministerial, parliamentary, judicial and court offices (amendment) bill 2020 – Changed from: Ministers and secretaries (amendment) bill 2020 – Bill 13/2020 – Passed by Seanad Éireann
National oil reserves agency (amendment) and provision of central treasury services bill 2020 – Bill 6/2020 – Committee Stage
Regulated professions (health and social care) (amendment) bill 2019 – Bill 13 of 2019 – Report Stage
Residential tenancies and valuation bill 2020 – Bill 17/2020 – Committee Stage
Social welfare (Covid-19) (amendment) bill 2020 – Bill 14/2020 – Committee Stage

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Supreme Court determinations – leave to appeal granted
Published on Courts.ie – June 19, 2020 to October 5, 2020

Cantrell v Allied Irish Banks and ors [2020] IESCDET 69 – Leave to appeal from the Court of Appeal granted on the 12/06/2020 – (O'Donnell J., Charleton J., Irvine J.)
Bank of Ireland Mortgage Bank v Cody and anor [2020] IESCDET 96 – Leave to appeal from the High Court granted on the 30/07/2020 – (O'Donnell J., Charleton J., O'Malley J.)
Braney v Special Criminal Court and ors [2020] IESCDET 95 – Leave to appeal from the Hight Court granted on the 30/07/2020 – (O'Donnell J., Charleton J., O'Malley J.)
Zalewski v Adjudication Officer and ors [2020] IESCDET 93 – Leave to appeal from the High Court granted on the 28/07/2020 – (O'Donnell J., Charleton J., O'Malley J.)
Quinn Insurance Limited (under administration) v PricewaterhouseCoopers (a firm) [2020] IESCDET 92 – Leave to appeal from the Court of Appeal granted on the 28/07/2020 – (Clarke C.J., O'Donnell J., MacMenamin J.)

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Clarity for concurrent wrongdoers?

The Supreme Court decision in *Defender v HSBC* offers clarity for concurrent wrongdoers, but may have a chilling effect on injured persons considering settlement with one concurrent wrongdoer.

Gerard Downey BL

On December 10, 2008, Bernie Madoff confessed that his investment management operation was "just one big lie". It was in fact the largest private Ponzi scheme in history and the losses it caused to investors continue to be litigated in Ireland. On July 3, 2020, the Supreme Court gave its judgment in relation to the claim by Defender Limited ('Defender') for damages for professional negligence and breach of contract against HSBC France (formerly HSBC Institutional Trust Services (Ireland) Limited) (HSBC) arising from investments made in the Ponzi scheme.

The decision of the Supreme Court involved the interpretation of rarely invoked and complex provisions of the Civil Liability Act 1961 (the CLA) in relation to concurrent wrongdoers. The Court upheld the finding of the High Court that s 17 of the CLA may provide a complete defence to one concurrent wrongdoer, despite their responsibility for damage, in the wake of settlement with another wrongdoer.[1]

However, O'Donnell J. concluded that it was unsafe to make such a determination on the applicability of this defence in the context of a trial of a preliminary issue and this matter was remitted to the High Court to make a determination on the relative liability of each wrongdoer.[2]

This article analyses the implications of this decision and considers whether it has provided clarity for concurrent wrongdoers in the face of concerns that the operation of the CLA may discourage plaintiffs from settling with one concurrent wrongdoer.

It transpired that the investment management business conducted by BLMIS was a large and sophisticated Ponzi scheme, which collapsed after Bernie Madoff disclosed its true nature to the FBI in December 2008.

Background

These proceedings involve a claim made by Defender for damages for professional negligence and breach of contract against HSBC in the sum of US$141m. Pursuant to the terms of a custodian agreement between Defender and HSBC, Defender invested US$540m in an investment management business operated by Bernard L Madoff Investment Securities LLC (BLMIS) between May 2007 and December 2008.

It transpired that the investment management business conducted by BLMIS was a large and sophisticated Ponzi scheme, which collapsed after Bernie Madoff disclosed its true nature to the FBI in December 2008.

Following the collapse of the Ponzi scheme, the liquidation of BLMIS was commenced before the United States Bankruptcy Court. HSBC lodged a claim on behalf of Defender in the bankruptcy arising from its lost investment and the Trustee commenced proceedings against Defender for the return of US$93m, which it had redeemed.

On March 23, 2015, the Trustee and Defender entered into a settlement whereby Defender agreed to abandon all claims in tort or breach of contract against the Trustee and BLMIS in consideration of its claim being allowed in the sum of US$441m plus 88% of the US$93m sought by the Trustee (the settlement). Defender anticipated that it would recover 75% of its loss through the bankruptcy.

In November 2013 Defender commenced these proceedings against HSBC to recover the remaining 25% of its loss. HSBC relied on the provisions of the CLA, in particular s 17 (2), to argue that it had a complete defence to the damages claim. It asserted that, if HSBC was found to be a concurrent wrongdoer with BLMIS, the settlement meant that Defender could not pursue HSBC by operation of s 17 (2) of the CLA.

That preliminary issue was determined before the High Court in December 2018.[3]

Having satisfied itself that Defender was to be identified with the fraud perpetrated by BLMIS by operation of s 17 (2) and s 35 (1) (h) of the CLA, and having determined that a qualitative distinction existed between criminal and civil wrongdoing for the purposes of contribution, the High Court held that BLMIS would have been liable to contribute 100% to Defender's claim had Defender's total claim been paid by HSBC. Accordingly, s 17 (2) of the CLA provided HSBC with a complete defence to the claim notwithstanding its accepted wrongdoing for the purposes of the trial of the preliminary issue.

HSBC relied on the provisions of the CLA, in particular s 17 (2), to argue that it had a complete defence to the damages claim.

Supreme Court

The Supreme Court accepted that the issues which arose in the proceedings met the constitutional threshold of being a matter of general public importance by virtue of the requirement for a proper interpretation of certain provisions of the CLA dealing with concurrent wrongdoers and the practical operation of those provisions where there had been a settlement entered into between certain parties.[4]

As a result of these concerns and having considered certain judicial observations regarding the potential difficulties in the interpretation of the CLA,[5] the Supreme Court was further satisfied that the interests of justice required that leave should be granted to the parties to directly appeal to it by way of 'leapfrog' appeal.[6]

Concurrent wrongdoers

Section 11 (1) of the CLA provides:

"…two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person…for the same damage…"

In approaching the issue of whether HSBC and BLMIS were concurrent wrongdoers for the purposes of s 11 (1) of the CLA, Defender argued, *inter alia*, that there were certain independent claims, which it could assert against HSBC, such as a claim for the recovery of professional fees and advice given prior to the making of the investment, such that HSBC and BLMIS were not concurrent wrongdoers in respect of the damage claimed.

The High Court found that HSBC and BLMIS were concurrent wrongdoers, having satisfied itself, for the purposes of the trial of the preliminary issue, that HSBC and BLMIS were both responsible to Defender for the same damage: the lost investment.[7] This finding was shared by O'Donnell J., on behalf of the Supreme Court, who held that the claim against HSBC for negligence and the claim against BLMIS for fraud related to the same damage. He stated that HSBC and BLMIS must "for these purposes" be considered as concurrent wrongdoers.[8]

Release or accord

Section 17 (2) of the CLA provides as follows:

"If no such intention [to discharge other wrongdoers] is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with [s 35(1)(h)]…"

Having considered the decision of the Supreme Court in *Murphy v J Donohoe Limited*[9] and the High Court in *Arnold v Duffy*,[10] the High Court was satisfied that the settlement constituted an accord for the purpose of the CLA.[11] Having entered into an accord with BLMIS, Defender was deemed to have been "identified with" the fraud perpetrated by BLMIS for the purposes of the Court making a determination on the amount of any contribution that would be made by HSBC to the loss suffered by Defender.[12]

Despite considering the terms of the settlement agreement,[13] the Supreme Court made no determination regarding the status of the settlement agreement as an accord for the purpose of s 17 of the CLA; however, it proceeded to consider the proper interpretation of s 17 (2) premised on the existence of an accord.

Contribution

Having found that Defender was "identified with" the acts of BLMIS, the High Court was required to engage in a hypothetical exercise under s 17 (2) of the CLA to determine what amount BLMIS would have been liable to contribute to HSBC if Defender's total claim had been paid by HSBC having regard to s 21 (2) of the CLA. Section 21 (2) of the CLA provides as follows:

"In any proceedings for contribution under this Part, the amount of the contribution recoverable from any contributor shall be such as may be found by the court to be just and equitable having regard to the degree of that contributor's fault…"

Having considered the decisions of the Supreme Court in *O'Sullivan v Dwyer*[14] and *Carroll v Clare County Council*,[15] the High Court was satisfied that the key factor in determining what was "just and equitable" for the purposes of s 21 (2) of the CLA was the respective blameworthiness of the concurrent wrongdoers.[16] In approaching the issue of blameworthiness, the trial judge identified a qualitative distinction between criminal wrongdoing and civil wrongdoing. This distinction, and the effect it might have on contribution having regard to the decision of the High Court of Australia in *Burke v LFOT Pty Limited*,[17] gave rise to a finding that BLMIS would have been liable to contribute 100% to HSBC if Defender's total claim had been paid by HSBC by virtue of the fraud that had been perpetrated by BLMIS.[18] The trial judge was satisfied that there was no prospect of any apportionment of liability other than 100% to BLMIS.

As a result of the finding that BLMIS was 100% liable for the damage caused to Defender, the High Court held that the claim against HSBC was reduced by 100% by virtue of the operation of s 17 (2) of the CLA. Accordingly, HSBC had a complete defence to the claim, notwithstanding its accepted wrongdoing for the purposes of the trial of the preliminary issue.[19]

Having regard to the identification mechanism provided for by s 17 (2) of the CLA, the Supreme Court recognised that it was "difficult to avoid the conclusion at which the High Court arrived" once it is accepted that the release of BLMIS necessarily has the effect that Defender must be identified with the actions of BLMIS, whether by reference to s 21 or s 34 of the CLA.[20] In so holding, the Supreme Court accepted that s 17 (2) of the CLA operates in an overly rigid, abstract and theoretical way, which may discourage an injured person from entering into a settlement with one concurrent wrongdoer.[21] O'Donnell J. stated:

"…it is quite clear that the CLA in s 17 explicitly and deliberately contemplates the possibility of a plaintiff recovering less than full damages, even though there is a solvent defendant who has been determined to be a wrongdoer and, moreover, responsible for the damage who does not have to make good the deficiency. The section does not distinguish between the case where the deficiency results from a failure of the plaintiff to properly value the claim and the liability of [the settling wrongdoer] and those cases where the plaintiff accepts the settlement as the best that is possible in difficult circumstances".[22]

He continued to note that this "anomaly" was not limited to s 17 but encompasses ss 35 (1) (g) and 35 (1) (h), which contemplate different circumstances where the outcome is that the injured person, rather than the non-settling wrongdoer, bears the deficiency in the claim and may recover less than full damages.[23]

The Supreme Court stated that ss 35 (1) (g) and 35 (1) (h) pursued a policy that the non-settling defendant should not have to pay more than its "fair" share and that any deficiency should be borne by the injured person having regard to the clear statutory language.[24] Ultimately, the Supreme Court held that the High Court was correct in its interpretation of s 17 (2) of the CLA.[25]

Having accepted as correct the interpretation of s 17 by the trial judge, O'Donnell J. proceeded to consider the issue of contribution and the apportionment of liability for the purposes of the trial of a preliminary issue, holding that it was necessary for HSBC to establish that any apportionment of liability between BLMIS and HSBC must always amount to a full indemnity from BLMIS to HSBC.[26] O'Donnell J. then continued to address the qualitative distinction that had been made by the trial judge between criminal wrongdoing and civil wrongdoing, and concluded that the proposition that fraud almost always obliterated negligence in terms of fault could not safely be adopted to dismiss a claim *in limine*.[27]

Having reached this determination, the Supreme Court concluded that it could not be said with the requisite degree of confidence that there was no prospect of any apportionment of liability and damages other than 100% to BLMIS in the context of the trial of a preliminary issue; accordingly, the decision that HSBC enjoyed a complete defence by virtue of s 17 (2) of the CLA to the standard required in the trial of a preliminary issue was overturned.[28]

Additional arguments

Two additional arguments made by HSBC that it had a complete defence to the claim, which were the subject of a determination by the Supreme Court, were: (1) the operation of a contractual indemnity between HSBC and BLMIS; and, (2) s 16 of the CLA.

Pursuant to the sub-custodian agreement, BLMIS was obliged to indemnify HSBC in respect of any loss occasioned as a result of fraud or negligence; accordingly, BLMIS could not obtain any contribution from HSBC and would be obliged to indemnify HSBC if it satisfied Defender's claim by virtue of the terms of their agreement. On the basis that Defender was identified with the acts of BLMIS by operation of s 17 (2) of the CLA, HSBC argued that the effect of the indemnity was to prevent Defender – having been identified with BLMIS – from seeking a contribution by virtue of the contractual indemnity. O'Donnell J. rejected this argument, observing that, pursuant to s 35 (1) (h) of the CLA, Defender is responsible for the acts of BLMIS for the purposes of apportionment of liability under the CLA alone.[29] O'Donnell J. continued to state that the mechanism of the CLA does not allow HSBC the benefit of a contractual indemnity against Defender when there is no contractual or other relationship between the parties other than that created by operation of the CLA.[30] The Supreme Court concluded that a non-settling wrongdoer who was indemnified in respect of the impugned acts by the settling wrongdoer would be required to bring an independent claim against the settling wrongdoer.[31]

Finally, HSBC sought to rely on s 16 of the CLA, which provides that satisfaction of an injured person's claim discharges other wrongdoers. HSBC sought to argue that the settlement constituted an agreed substitution for damages. O'Donnell J. rejected this argument, stating that the circumstances envisaged by s 16 of the CLA "involve either the adjudication, or agreement, of damages".[32] Here, there had been neither

adjudication against nor agreement with BLMIS in respect of damages; rather, Defender released any claim it may have had against BLMIS in consideration of the benefit being conferred on it by the Trustee under the settlement.

Implications of the decision

In a previous edition of this publication, Kelley Smith SC identified how the operation of s 17 (2) following the decision of the High Court was capable of operating contrary to the policy of the CLA; namely, that the injured person – Defender – was not entitled to recover the entirety of its loss despite the fact that two concurrent wrongdoers were deemed responsible for the same damage.[33] The decision of the Supreme Court confirms as correct the interpretation of the High Court and the consequences that may be said to flow therefrom for injured persons who have settled with one concurrent wrongdoer; namely, that injured persons who enter into settlement with one concurrent wrongdoer may not be entitled to full damages by operation of s 17 (2) of the CLA, even when wrongdoing has been proved.

This decision impacts alternative dispute resolution processes. O'Donnell J. observes that "experience shows that litigation has a number of variables and outcomes can vary considerably".[34]

When entering into a settlement, legal practitioners are required to conduct an analysis of potential outcomes should the matter proceed to trial with the possibility of an appeal.

This exercise requires an analysis of calculable and non-calculable factors that may impact that outcome.

The recent decision of the Supreme Court has recognised a further non-calculable risk in settlement: the extent to which a non-settling wrongdoer shall be entitled to a contribution from a settling wrongdoer in respect of the claim brought by an injured person against concurrent wrongdoers. An injured person will be required to make an assessment of that contribution claim, despite not being a party to that theoretical claim.

The Supreme Court has recognised that the operation of s 17 (2) will discourage plaintiffs from settling with one concurrent wrongdoer.[35] However, the decision may be interpreted as the final warning for the legislature to heed ever-increasing calls for reform from the judiciary.[36]

In remitting the proceedings back to the High Court, the Supreme Court identified how the interpretation and constitutionality of s 17 (2) may be argued in the presence of the Attorney General.

O'Donnell J. has warned that "failure to make timely amendments…may have a consequence that the operation of legislation…may be found to be inconsistent with the Constitution".[37]

Until such time as that reform is conducted, the apprehension of injured persons from settling with one concurrent wrongdoer may be said to continue.

While the Supreme Court has brought clarity for concurrent wrongdoers, that clarity may have a chilling effect for injured persons considering settlement with one concurrent wrongdoer.

References

1. [2020] IESC 37 paras 93 and 97.
2. ibid para 112.
3. *Defender Limited v HSBC Institutional Trust Services (Ireland) DAC* [2018] IEHC 706.
4. *Defender Limited v HSBC Institutional Trust Services (Ireland) DAC* [2019] IESCDET 125 para 10.
5. *Cafolla v O'Reilly* [2017] 3 IR 209; *Hickey v McGowan* [2017] 2 I.R. 196; *McCarthy v James Kavanagh t/a Tekken Security* [2018] IEHC 101; *Comcast International Holdings Incorporated v Minister for Public Enterprise* [2018] IEHC 457.
6. [2019] IESCDET 125 para 17.
7. [2018] IEHC 706 para 48.
8. *Defender Limited v HSBC France* [2020] IESC 37 para 21.
9. [1992] ILRM 378.
10. [2012] IEHC 368.
11. [2018] IEHC 706 para 56.
12. ibid para 86.
13. [2020] IESC 37 paras 67-71.
14. [1971] IR 275.
15. [1975] IR 221.
16. [2018] IEHC 706 para 99.
17. [2002] HCA 17.
18. [2018] IEHC 706 para 124.
19. ibid para 124.
20. [2020] IESC 37 para 88.
21. ibid para 91.
22. ibid para 93.
23. ibid para 94.
24. ibid para 95.
25. ibid paras 97 and 133.
26. ibid para 101.
27. ibid para 112.
28. ibid para 116.
29. ibid para 120.
30. ibid para 122.
31. ibid para 123.
32. ibid para 130.
33. Smith, K. Concurrent wrongdoers and the judgment in *Defender v HSBC*. *The Bar Review* 2019; 4: 102.
34. 2020] IESC 37 para 91.
35. ibid para 91.
36. Indeed, O'Donnell J. expressed the view that it is difficult to think that a proviso to s 17 of the CLA that provided that it would not take effect if a court considered that it was not just and equitable in the circumstances, or perhaps where the plaintiff had acted reasonably in making the settlement, would not meet the policy objectives of the CLA more clearly; see, [2020] IESC 37 para 92.
37. ibid para 34.

The business of evidence

New legislation has significant implications regarding the admission of business records as evidence in civil litigation

Nathan Reilly BL

This article, which is based on a longer paper, discusses Chapter 3, Part 3 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (the Act), which simplifies the procedure for the admission of business records as evidence in civil proceedings. These provisions came into operation on August 22, 2020, and are similar (though not identical) to those introduced for criminal trials by the Criminal Evidence Act 1992 (the 1992 Act) in respect of the admission into evidence of information compiled in the ordinary course of business.

Prior to the commencement of the Act, the admission of business records in civil cases was governed by common law rules relating to hearsay. Persuasive arguments had been made for many years that business records should be treated differently from other out of court statements, as there is, it was said, a degree of reliability in relation to information contained in such documents.[1]

Up to now and despite various calls for reform from the Law Reform Commission, the default position, at least in theory, was that oral evidence of the subject matter of the document had to be given by a witness with relevant knowledge of the document. This rule not only applied to evidence given *viva voce*, it also applied to business documents exhibited on affidavit. The mere exhibiting of a document to an affidavit by a person without knowledge of its contents did not, without more, make the contents of such a document admissible evidence as to its truth.[2]

While the potential harshness of rigid application of the hearsay rule was frequently avoided through co-operation of the parties, the rule retained continuing vitality particularly (but not only) in cases where one party had no incentive to co-operate in the admission of documentary evidence, even where the reliability of the records at issue could not reasonably be disputed. In such situations, the exclusion of business records had undesirable consequences, in particular the unnecessary prolongation of civil trials and the exclusion of significant (reliable) documentary evidence of importance to the case.

The continuing vitality of the rule was brought into sharp focus in the decision of the Court of Appeal in *Promontoria v Burns*,[3] where the Court of Appeal dismissed an appeal from a High Court order refusing to grant summary judgment to an assignee of a debt on the grounds that the evidence adduced was insufficient to prove the debt and amounted to hearsay. In that case, Collins J. gave a concurring judgment in which he observed that the law in this area "clearly deserves the attention of the legislature".[4]

The relevant provisions of the Act

Whether as a reaction to the decision in *Burns* or otherwise, the Oireachtas has now taken up the challenge of legislating in the area.

While the Act introduces a number of other important reforms to civil and criminal litigation, the issue of business records and other documents in civil proceedings is addressed in Part 3, Chapter 3 (Chapter 3) of the Act. In large part, Chapter 3 follows the model adopted almost three decades ago in respect of criminal proceedings under the 1992 Act, although there are important distinctions.

The relevant provisions of Chapter 3 are intended to supplement pre-existing rules: section 14 (8) of the 2020 Act provides that nothing in the Chapter shall prejudice the admissibility in evidence in any civil proceedings of information contained in a document that is otherwise admissible to prove the truth of any fact or facts asserted in it.

The Act does not expressly state that Chapter 3 applies to proceedings that have been issued prior to the commencement of the Act. Most practitioners are operating on the view that it does have such retrospective effect inasmuch as the provisions effect procedural rather than substantive entitlements; however, the question is not free from doubt given the absence of any express provision confirming the position equivalent to that contained within Chapter 2, which deals with remote hearings.[5]

(i) The statutory preconditions

At the core of Chapter 3 is the introduction of a statutory presumption of admissibility in respect of business records that are "compiled in the ordinary course of business". The presumption applies to all "civil proceedings", which are broadly defined in section 10 of the Act as "any cause, action, suit or matter, other than a criminal proceeding, in any court".[6]

Therefore, it appears that the presumption will, subject to the other provisions of Chapter 3, apply to business records adduced in evidence in any Court, including civil trials where evidence is given *viva voce*, civil proceedings that are conducted on affidavit (such as debt collection claims and proceedings seeking possession of property), interlocutory applications, and applications for final orders brought by way of motion.

The presumption applies, subject to the other provisions of Chapter 3, to "any record in document form compiled in the ordinary course of business". Hence, it can be potentially applied to a party's own business records, business records procured from an opponent in litigation (whether by discovery or otherwise), or the business records of a non-party.

To benefit from the presumption under section 13, a document must comply with the other "requirements of this Chapter". The main general admissibility requirements are contained within Section 14 (1), which provides that:

"Subject to this Chapter, information contained in a document shall be admissible in any civil proceedings as evidence of any fact in the document of which direct oral evidence would be admissible if the information –

(a) was compiled in the ordinary course of a business,

(b) was supplied by a person … who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with, and

(c) in the case of information in non-legible form that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned".

All of the component parts of section 14 (1) must be fulfilled if a document is to benefit from the presumption.

The first pre-condition of section 14 (1) is that direct oral evidence of the information contained in the document must be admissible. This affords protection against the circumvention of other rules of evidence, such as relevance or opinion evidence.

The second component is that documents must be compiled in the "ordinary course of business". The definitions of "business" and "document" are found in section 12 of the Act. Both are defined extremely broadly. In short, a business document would therefore appear to comprise every document that has been created in the course

of some commercial or professional occupation or within a public organisation.

The range of documents potentially captured by the section would appear vast. To give just a few examples from documents that would routinely be adduced in evidence in Court, the definition would appear to (at least very arguably) include, for example, emails and attachments, account records, bank statements, HR files, minutes of meetings, medical records, product testing records (as adduced in product liability claims), and accident report forms/cleaning records (as relied upon in personal injuries actions).

In the limited case law under the 1992 Act, it is notable that an expansive interpretation has been taken of the definition of "ordinary course of business".[7]

The third component of Section 14 (1)(b) is that the information must have been supplied by a person (whether or not they so compiled it and are identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with. The relevant authorities suggest that this is a low threshold.[8] It is not necessary to demonstrate that the supplier of the information in the document is no longer available or unable to give evidence because: it is not necessary that the individual who created the record be identified so that their personal knowledge can be assessed; and, it must only be shown that the supplier was "reasonably supposed to have had" knowledge of the information, which might presumably be inferred from the nature of the supplier's employment within the organisation.

Section 14 (1)(c) provides that in the case of information in non-legible form that has been reproduced in permanent legible form, such reproduction must occur in the course of the normal operation of the reproduction system concerned.

Apart from the requirements contained within, Section 14 (2) provides that if the information was supplied indirectly, it shall only be admissible under Section 14 (1) if each person (whether or not they are identifiable) through whom the information was supplied received it in the ordinary course of business. This retains an exclusionary rule in respect of so-called "multiple hearsay", where one of the links in the chain received the information otherwise than in the ordinary course of business.[9]

(ii) The statutory exceptions

The main statutory exception is contained in section 14 (3), which provides that the general admissibility provisions contained within section 14 (1) do not apply to information:

- that is privileged from disclosure in criminal or civil proceedings;[10] or
- supplied by a person who would not be compellable to give evidence at the instance of the party wishing to give the information in evidence by virtue of Section 14;[11] or
- information compiled for the purposes of, or in contemplation of any criminal investigation, statutory investigation or inquiry, civil or criminal proceedings or proceedings of a disciplinary nature.[12]

The equivalent of this exception has been given some judicial consideration in the context of the 1992 Act and the cases suggest that the exception should be construed narrowly and a broad approach towards admissibility taken.[13]

(iii) Notification provisions

Section 15 of the Act contains important procedural protections for persons against whom it is intended to adduce business records pursuant to Chapter 3. Specifically, section 15 (1) provides that notice of an intention to adduce evidence under Section 14 must be given 21 days prior to commencement of the trial, which notice period can only be waived with the leave of the court. This requirement to serve notice is expressly stated to apply to "civil trials". While the concept of a "civil trial" is not defined in the Act, it seems reasonable to assume that section 15 only applies to plenary hearings where evidence is given *viva voce*. Section 15 (2) of the Act further provides that a party objecting to such admissibility must serve notice of such objection not later than seven days before the commencement of the trial, which period can only be waived by leave of the court. Section 15 does not provide for a pre-trial procedure to deal with challenges to the admissibility of documents, although presumably this can be done by way of Notice of Motion. It would obviously be desirable for such arguments to be heard at a pre-trial stage in order to minimise any potential disruption to the trial, although in principle, it will be possible to seek to admit business documents under Chapter 3 during a trial, subject to the leave of the court. It will also be possible to seek to object to the admission of business documents that were properly notified under section 15 (1) at any stage, albeit with the leave of the court. If applied strictly, these notification timelines will present challenges, particularly in document-heavy cases. It is suggested that the courts will circumvent the potential issues presented through appropriate case management.

(iv) Safeguards

Drawing again on the provisions of the 1992 Act, Chapter 3 contains a number of safeguards against the abuse of documentary hearsay. Under section 16 (1) the court is given discretion to exclude the document "in the interests of justice". Section 16 (2) provides a non-exhaustive list of factors to be considered by the court in deciding whether or not to admit business documents in evidence, including whether it can be reasonably inferred that the information contained therein is considered to be "reliable'' , "authentic", and whether its "admission or exclusion will result in unfairness to any other party to the civil proceedings". There has been limited case law on these provisions under the 1992 Act. Much will likely depend on the circumstances of the case. Section 16 (3) provides that, in estimating the weight to be attached to any such information, regard must be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise. This is a very significant provision. It will be fully open to the court to decide that a hearsay statement, though admissible, is of little or no weight and consequently deny it any substantive impact on the trial. This provision may lead courts to take an expansive approach towards the question of admissibility. Important in the assessment of weight will be the credibility of the declarant (who is not called as a witness) and Section 17 makes provision for the reception in evidence of a number of categories of evidence relevant to assessing the credibility of the declarant, including any matter that could have been put to such a declarant in the course of cross-examination, or any evidence tending to show that such person made a statement inconsistent with the information contained in the business records.

The equivalent provisions of the 1992 Act have not, to my knowledge, been the subject of any reported judgment. As McGrath states: "The purpose of the section is to place the declarant whose hearsay statement is admitted in the same position, for the purpose of impeaching credibility, as if he or she had been called as a witness".[14]

Invoking Chapter 3 in practice

A party seeking to admit business documents under Chapter 3 will have to satisfy the court that the statutory requirements have been met.

In proceedings/applications conducted on affidavit, where a party intends to rely on Chapter 3 in respect of its own business documents, it would be prudent practice that the affidavit should be sworn by a deponent who can properly satisfy the court that the statutory requirements have been met in respect of such documents. It would also seem prudent to ensure that the relevant statutory requirements for admissibility are referred to in the affidavit.

In proceedings/applications conducted on affidavit, where a party intends to rely on Chapter 3 in respect of the business documents of a third party, more difficult issues arise. It is possible that courts will be prepared to draw inferences that the statutory preconditions have been met from the actual documents, particularly in straightforward situations (for example where the documents speak for themselves as having been prepared in the ordinary course of business).

In terms of adducing business records in civil trials, disputes will inevitably arise. As set out above, in "civil trials" a party objecting to the admission of business records evidence is obliged to serve notification under Section 15 (2) of the Act. What happens then?

In circumstances where a party is seeking to rely on a suite of documents it has obtained by way of discovery against its opponent, it would be surprising if that party would bear the burden of proving that the statutory criterion for admissibility have been met. One would expect that objections made by a party relating to the admissibility of its own discovery against itself will be treated with circumspection. A very good argument can be made that all discovered documents that appear at least ostensibly to be business documents should be *prima facie* admissible against the party who has made discovery, and the burden should shift to the other (discovering) party to show why a document does not meet the statutory criteria.

One issue that arises is whether oral evidence must be called by the party seeking to rely on the documents, or whether the court is entitled to infer that the document meets the requirements for presumptive admissibility of its own motion. Under the 1992 Act, it has been held that the tenderer of the document will usually have to call oral evidence to show that the statutory criteria have been met, although there seems to be some acceptance that the practice of calling evidence may not be an absolute requirement where more minimal controversy arises.[15]

In civil cases, it is possible that courts will more readily draw inferences from the documents themselves and determine most disputes simply by looking at the documents. However, one can also envisage situations in which a court might require a witness to give oral evidence that the statutory criteria have been met. This should be relatively straightforward in most instances.

Conclusion

The enactment of the business records provisions is a potential game changer, with relevance to almost all forms of civil litigation, at all court levels. In civil applications/proceedings advanced on affidavit, there may be a myriad of reasons why it is not possible to procure affidavit evidence from the author of a potentially important business record.

The Act provides a statutory pathway for such documents to be admitted into evidence.

In that regard, and in reference to summary judgment applications in particular, the Act may make life somewhat easier for loan purchasers and banks to prove their claims, although that will obviously depend on the extent of documentation available to such plaintiffs.

These new provisions open up the possibility that a party might be able to prove its entire case, or critical aspects thereof, without calling any oral evidence.

It is theoretically possible that, in determining critical issues in the case, the documentary evidence of a party adduced under Chapter 3 could be preferred over the oral evidence of its opponent, which has been subject to cross-examination.

However, in the view of this author, it seems unlikely that this will happen: it is suggested that courts will be unlikely to tolerate the use of Chapter 3 in respect of issues that are central to the proceedings, unless there is no real controversy over the particular documents in question.[16] The Act should not be seen as intending to provide a substitute for oral evidence or interfering in any radical way with the fundamental constitutional principle that evidence is given orally with the cross-examination of witnesses.

If key witnesses are available to give evidence (or swear affidavits), the more prudent approach is to continue to rely on such evidence (or affidavit) and to only rely on Chapter 3 in respect of business records evidence that is likely to be largely uncontroversial. While it is easy to envisage situations in which a deliberate decision might be taken not to lead evidence under Chapter 3 to avoid having to produce an unreliable witness, the existence of safeguards in Chapter 3 means that a court can always decide that the evidence should be given little or no weight.

References

1. *R v Horncastle* [2010] 1 Cr. App. R. 17 at para. 35.
2. See *RAS Medical Ltd. t/a Park West Clinic v Royal College of Surgeons of Ireland* [2019] IESC 4.
3. [2020] IECA 87.
4. At paragraph 8.
5. S. 11 (10) expressly provides that Chapter 2 – dealing with remote hearings – "applies to civil proceedings whether such proceedings are brought before, on or after the commencement of the section".
6. Section 10.
7. *DPP v Colm Murphy* [2005] 2 IR 125 at 151; *DPP v Hickey* [2007] IECCA 98 at pages 10-12; *Bissett v DPP* [2016] IECA 175.
8. The provision is almost identical to that contained in the UK in s. 117 of the Criminal Evidence Act 2003. See, Phipson, op cit., at 30-37.
9. See, for example, *Maher v Director of Public Prosecutions* [2006] EWHC 1271 (Admin).
10. S 14 (3) (a).
11. S 14 (3) (b).
12. S. 14 (3) (c).
13. See *Bissett v DPP* [2016] IECA 175; *The People (DPP) v Smith* [2016] IECA 154; *R v Bedi* (1992) 95 Cr. App. R. 21.
14. McGrath, op cit, at 5-197.
15. *People (DPP) v O'Mahony and Daly* [2016] IECA 111.
16. A situation that might often arise, for instance, in judicial review proceedings.

Civil defence

Calls to remove juries from civil actions fail to recognise the importance of civil juries in vindicating the rights of litigants.

Mark Harty SC

"It is infinitely preferable to have serious cases involving causes of action concerned with the vindication of fundamental rights guaranteed by the Constitution, such as the rights to bodily integrity, a good name and individual liberty, determined by a jury of fellow citizens rather than by a judge sitting alone. As the great commentator on the common law Blackstone observed, trial by jury is looked upon as the glory of English law. Of the many attributes is the protection of the litigant from the caprice of the judge."[1]

These are the observations of Barton J. in the recent case of *Gordon v IRTA*. As the judge with seisin of the jury list and therefore, in recent times at least, the lawyer best placed to observe civil juries, it behoves all lawyers and legislators to pay close attention to his words.

Despite the long line of authority confirming the importance of jury verdicts, we are faced yet again with calls for the removal of juries in civil actions. These calls come, as always, from those with a vested interest in restricting the protections offered by the defamation laws – the potential defendants and their legal representatives. The only other party to theoretically benefit from the removal of jury actions would be the State as the party most commonly defending proceedings for trespass to the person in the jury list.

Arguments and solutions

The argument being made against civil juries hinges on two issues. Commentators complain that jury awards are, on occasion, excessive, and that jury trials are too long and therefore too expensive. However, this is to throw the jury out with the bathwater. It would be far more appropriate to consider how these matters can be addressed in a manner that preserves the longstanding right to have one's reputation or bodily integrity vindicated by a jury of one's peers. No analysis is attempted of the decisions made by parties in defending cases of this nature and the effect those decisions can have in prolonging trials and inflating damages.

It is important to observe that none of these commentators argue that juries are ill equipped to deal with the most fundamental question, namely liability. Surely an arbiter that gets it right on the issue of liability is, first and foremost, one to be cherished.

There are certainly difficulties in ensuring consistency in jury awards, but these difficulties are neither universal nor are they insurmountable. Parties remain nervous, for legitimate reasons, of raising specific arguments on quantum before a jury, particularly where liability has yet to be determined. Clear parameters from an appellate court, which could be utilised by the trial judge, would go a long way to providing a solution. An alternative would be to provide an expedited appeal on quantum. These are only two of many potential corrective measures that come to mind.

The second argument is premised on received wisdom that jury trials take longer and are therefore more costly. There is no analysis to support this case. Actions in defamation and trespass to the person are by their very nature dependant on the examination and cross-examination of multiple witnesses with complex legal argument. In this author's experience, an action for defamation can take just as long before a judge alone as it does before a judge and jury, with the sole distinguishing factor that the decision of the jury, not requiring a reasoned decision, invariably is delivered more quickly.

The case for pre-trial applications

There are certainly inefficiencies in the hearing of jury actions but these arise not by reason of the nature of the decisionmaker but rather because of the approach taken by the parties. Many issues are argued during the course of a jury trial such as meaning, availability of certain defences and admissibility of evidence, which should more properly be dealt with by way of pre-trial applications. Jury actions are almost unique in this jurisdiction in requiring no pre-trial disclosure of expert reports or witness lists. This operates to the benefit of defendants, who can choose to keep all defences alive until the last possible moment. Thus, for example, if a defendant were obliged to disclose its witness list, it would become apparent at an early stage that a pleaded defence was in fact incapable of being maintained. It is regularly the case that defences are relied upon by the defendant up to and until the moment the defendant is required to go into evidence. It is the legal argument surrounding these matters, together with cross-examination relating to defences that are then abandoned, which has the effect of unnecessarily prolonging trials. Furthermore, perhaps illustrating that the issues of duration and awards are not necessarily unconnected, experience has shown that juries will inevitably take last-minute abandonment of defences into consideration when measuring damages.

References

1. *Gordon v Irish Racehorse Trainers Association* [2020] IEHC 446.

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