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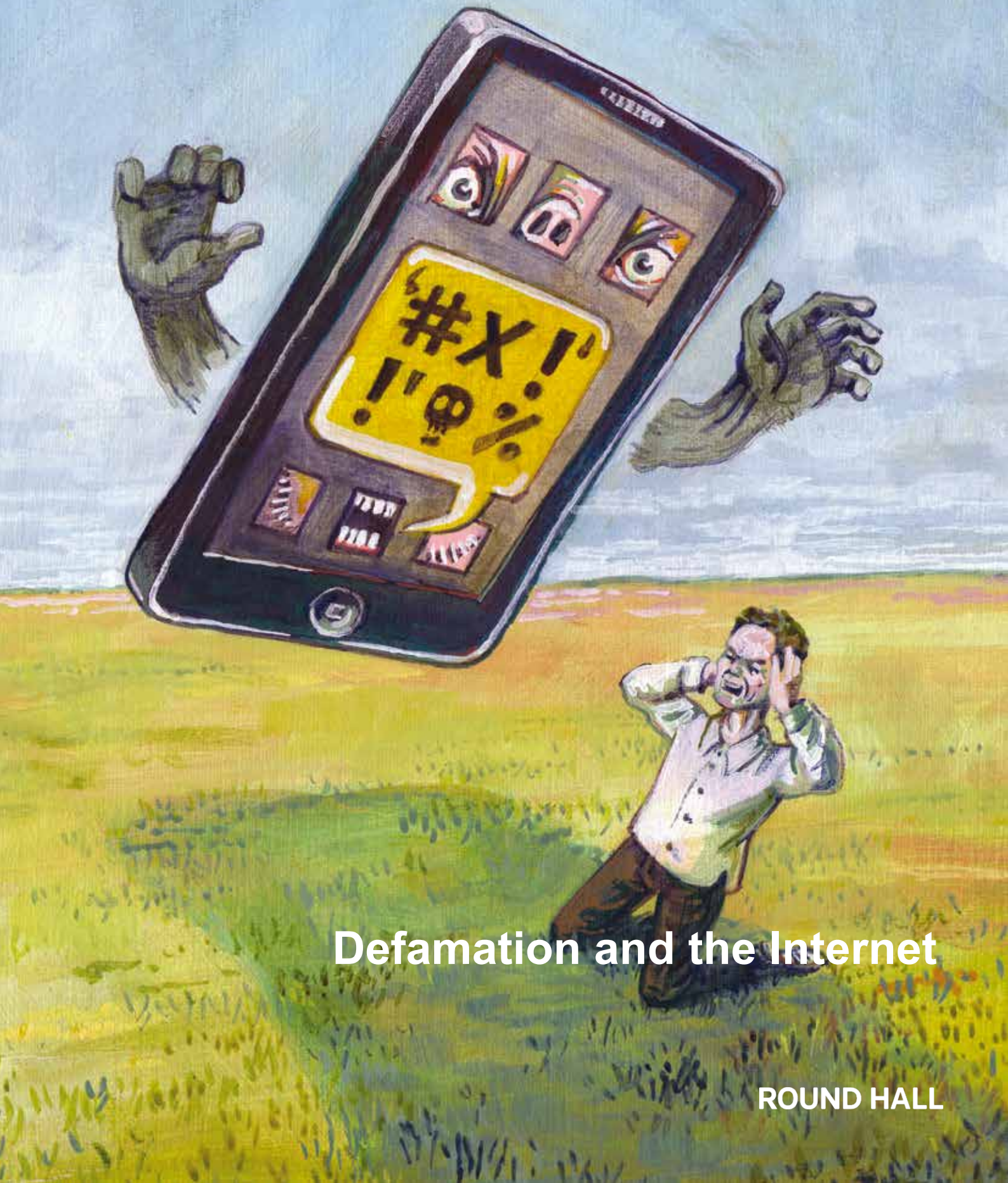

Defamation and the Internet

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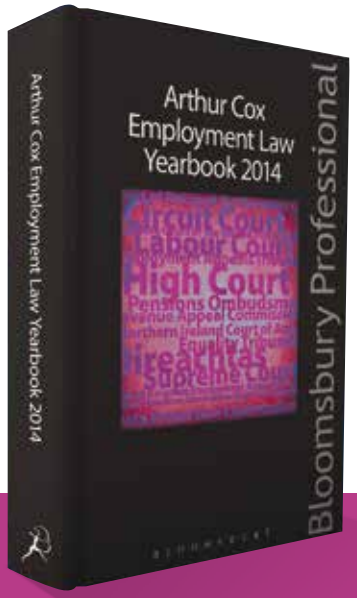

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The Monetary Increase in Circuit and District Court jurisdiction and the impact on personal injuries actions

David McParland BL

Introduction

It is an appropriate time to reflect on how personal injuries cases may be affected by the increase in the monetary jurisdiction of the District and Circuit Courts which came into effect on 3rd February 2014[1]. Part 3 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013, increased the District Court's jurisdiction from €6,384 to €15,000, and the Circuit Court's jurisdiction from €38,092 to €75,000, but was limited to €60,000 for personal injuries actions[2].

A Department of Justice press release in March 2013 stated:

> "The extension in the jurisdiction of the District Court will result in a portion of litigation presently undertaken in the Circuit Court in the future being dealt with at District Court level. The changes will also result in a proportion of litigation presently being conducted in the High Court in the future being dealt with at Circuit Court level."

It stated the proposed changes should lead to a reduction in legal costs for parties involved in litigation. The jurisdiction of the Circuit Court was restricted to €60,000 for personal injury actions to deal with concerns relating to possible inflation of awards[3].

The jurisdictional levels had remained unchanged since 1991. The increases in jurisdiction are less radical than those planned a decade ago. The Courts and Court Officers Act, 2002 provided for increases in the District Court limit to €20,000 and the Circuit Court to €100,000 but these changes were never brought into force.

As many of the cases issued post February 2014 may take some time before going to trial, it is still too early to say what the effects of the changes will mean in the longer term, but it is worth examining the statistics for personal injuries cases published by the Court Service for the Circuit and High Courts for 2013[4].

1 The Courts and Civil Law (Miscellaneous Provisions) Act 2013 (Jurisdiction of District Court and Circuit Court) (Commencement) Order 2013 – S.I. No. 566 Of 2013.

2 A 'personal injuries action' is defined under section 2 of the Civil Liability and Courts Act 2004. It does not include an action for false imprisonment or trespass to the person.

3 Statement of Minister for Justice, Alan Shatter TD on 19 March 2013.

4 Courts Service Annual Report 2013.

Circuit Court awards

In 2013, 37,808 actions were issued in the Circuit Court and 22.5% (8,505) were personal injury cases. The Circuit Court disposed of or made orders in 3,599 personal injury cases. Where the Court made an award, the breakdown of the level of awards was as follows:

Amount	Cases
€0 to €9999	493
€10,000 to €19,999	474
€20,000 to €29,999	111
€30,000 +	31
Total:	1,109

High Court awards

In 2013, 26,422 civil cases were issued in the High Court and 36.2% (9,561) were personal injury cases. The High Court disposed of, or made orders in 4,392 personal injury cases. Where the Court made an award, the breakdown of the levels of awards was as follows:

Amount	Cases
€0 to €37,999	173
€38,000 to €99,999	257
€100,000 to €199,999	63
€200,000 to €999,000	70
€1m+	27
Total:	590

The question is whether the cases in the above tables, which went to trial or were ruled, are representative of all actions. This may not be the case. Actions settled at an early stage or where a Court order was not required were not recorded by the Courts Service. Cases which came before the Courts and were settled and typically struck out, with or without an order for costs, were included as disposed of, but the amount of the award was not recorded. The figures are silent on the number of cases dismissed or withdrawn. Notwithstanding these matters, some issues emerge from the above figures.

1. Approximately two third (65.8%) of the 2013 Circuit Court awards were below €15,000, within the new District Court jurisdiction. This figure may be slightly underestimated as more cases may have

fallen at the lower end of the €10,000 to €9,999 band[5].

2. The figures show a surprisingly low level of awards in the Circuit Court in the €30,000 to €38,092 range (2.8%). This suggests that few cases in this range were issued in the Circuit Court and instead were issued in the High Court. This is corroborated by High Court figures which show 29.3% of its awards were below €38,000.
3. At least 45% and probably more of the 2013 High Court awards were below €60,000, within the new Circuit Court jurisdiction. This figure may be significantly underestimated as cases were recorded in a wide band (€38,000 to €99,999) and more cases may have fallen at the lower end of the band[6].
4. High Court figures show that 29.3% of its awards were below €38,000. This casts doubt on the inflation of awards theory which was the basis for restricting the jurisdiction of the Circuit Court to €60,000 for personal injury actions. The figures show that High Court judges made a significant number of awards below the High Court threshold.

The District Court

The Courts Service did not record the number of personal injury cases issued or disposed of in the District Court in 2013. One suspects the number was small.

An aim of the new legislation was to put most of the Circuit Court's current business through the District Court. In 2013, 110,179 District Court Civil Summonses were issued. This is greatly in excess of the sum of civil cases issued in the High and Circuit Courts. If the District Court it is to deal effectively with an additional load of personal injuries cases, significant resources must be applied to it. Otherwise, delays will be inevitable which will make it an unattractive venue.

Section 15 of the Courts Act (as amended by section 20 of the 2013 Act) provides that where an action for unliquidated damages is remitted to the District Court from the Circuit or High Court, the District Court may make an award of up to €30,000.

The Supreme Court

In 2013 the Supreme Court received appeals in 34 personal injuries cases. It disposed of 28 personal injuries cases in 2013. This figure may include settled cases which were struck out. The figures do not record the result of the appeals or the amount of awards. In 2013, the waiting time in the Court's general list for non-priority cases was 4 years. One assumes this was a disincentive to appeal. It will be of interest to see whether appeals rise in personal injuries cases with the operation of the new Court of Appeal.

Costs

When a plaintiff's award fails to meet the jurisdiction of the Court where the case is issued, his or her costs may be limited under section 17 of the Courts Act 1981 (as inserted by section 14 of the Courts Act 1991). Section 17 was amended by the 2013 Act. The substance remains the same but the monetary amounts were adjusted. The monetary amounts differ for personal injuries actions and other cases. The provisions of the amended section 17 may be summarised as follows[7]:

1. Where a court makes an order in favour of the plaintiff, and the court is not the lowest court having jurisdiction, the plaintiff shall not be entitled to recover more costs than he would have recovered if he commenced proceedings in the lower court (subject to paragraphs 2 and 3 below).
2. In a personal injuries action commenced and determined in the High Court, where the plaintiff recovers damages exceeding €51,000 but less than €60,000, he or she may not recover more costs than he would have, had the proceedings been commenced in the Circuit Court, unless the High Court grants a certificate that it was reasonable that the proceedings should have been commenced in the High Court. (In non-personal injuries actions, the relevant figures are €64,000 and €75,000).
3. In a personal injuries action commenced and determined in the High Court, where the plaintiff recovers damages exceeding €15,000 but less than €30,000, he or she shall not be entitled to recover more costs than the amount of the damages, or the amount of costs on the Circuit Court scale, whichever is the lesser. (In non-personal injuries actions, the upper figure is €38,000).
4. Section 17(5) provides that where a court makes an order in favour of the plaintiff, and the court is not the lowest court having jurisdiction, the Court may, if appropriate, make orders for the payment to the defendant by the plaintiff of a sum representing the additional cost incurred in defending the matter in the higher court rather than the lower court. The amounts may be taxed or measured by the Court.

Section 17 applies to cases determined following a hearing in Court. It does not apply to settled cases. Following a settlement, a defendant cannot invoke the section to restrict the plaintiff's costs before the Taxing Master. (See decision of Dunne J in *Kelly v. Minister for Defence* [2009] 1 IR 244).

Orders against plaintiffs under section 17(5) for the plaintiff to pay the defendant's additional costs of defending

5 The limit of €15,000 is halfway between the €10,000 to €19,999 band. If the 474 cases in this band were distributed evenly, half (237) would fall below €15,000. Thus 730 of 1109 cases (65.8%) would fall below €15,000.

6 The new limit of €60,000 falls within the €38,000 to €99,999 band. If the 257 cases in this band were distributed evenly, 35.5% (91) would fall between €38,000 and €60,000. Thus in total 44.7% of High Court cases had awards below €60,000. Having regard to the table as a whole, it seems more likely that more cases fell at the lower end of the band so the figure of 44.7% may be underestimated.

7 The text of the Act has been paraphrased. See section 17 of the Courts Act 1981 (as amended by section 14 of the Courts Act 1991 and section 19 of Courts and Civil Law (Miscellaneous Provisions) Act, 2013.

the action in the higher, rather than the lower court, are relatively rare. The only reported case concerning a personal injuries action appears to be *O'Connor v. Bus Atha Cliath* [2003] 4 IR 459. In the High Court, the plaintiff withdrew his claim for loss of earnings on the morning of the trial. O'Donovan J found the plaintiff had grossly exaggerated his injuries but was an honest witness and had not exaggerated deliberately. He was awarded €20,431, and Circuit Court costs. The Court declined to make an order under s. 17(5).

On appeal, the Supreme Court, (Murray and Hardiman JJ; Denham J dissenting) made an order under s. 17(5) of the Act of 1981 in favour of the defendant. The majority found the plaintiff's claim for loss of earnings should not have been made; his claim should have been brought in the Circuit Court, and an order under this section was appropriate given the trial judge's finding that the claim was grossly exaggerated. There are strong statements in the separate judgments of Murray and Hardiman JJ supporting the policy behind section 17(5), however both judgments accepted that in general, a plaintiff should be allowed some leeway where his or her case does not meet the High Court jurisdiction.

Conclusions

1. As the first cases issued under the new jurisdictional limits in February 2014 may not come on for hearing for some time, it is still too early to say what the effects of the changes in jurisdiction will mean for personal injuries actions. The Courts Service statistics for the coming years should make interesting reading.
2. Using the Courts Service figures for 2013, it appears that the effect of the legislation will be to take almost half the personal injuries case from the High Court jurisdiction and move them to the Circuit Court, and take two thirds of cases from the Circuit Court jurisdiction and move them to the District Court. As both the District and Circuit Courts will face an increased workload, it must follow that they should be properly resourced to prevent delays.
3. It is inevitable that some plaintiffs who issue in the High Court will receive awards in the Circuit Court jurisdiction. To date, the Courts have reserved making orders under section 17(5) of the Courts Act, 1981 (for the plaintiff to pay the defendant's additional costs of defending the action in the higher rather than the lower court) for the more blatant cases.
4. The change to the upper jurisdiction of the Circuit Court appears to have been necessary as the 2013 figures show this Court was not being used for personal injuries cases at the upper end of its jurisdiction.
5. Circuit Court litigants are not subject to the disclosure obligations which apply to personal injuries cases in the High Court[8]. It will be of interest to see whether the jurisdictional increase leads to the extension of these obligations to Circuit Court cases.
6. As wider question, it may be appropriate to ask whether it is sensible to have three different layers of Courts dealing with personal injuries cases at first instance, the only difference being the value of the case. In a 2001 article entitled *The Irish Court System in the Twenty First Century: Planning for the Future*, the then Chief Justice, Mr Justice Keane considered that a three tier system of courts of first instance led to "anomalous and irrational features of our court system" and suggested a wide ranging consultation process which could form the basis of reforms in the Courts[9]. This is worthy of further consideration. ■

8 S.I. No. 391/1998 - Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements), 1998

9 Bar Review April 2001 p321

Law and Government – A Tribute to Rory Brady

Pictured at the launch of Law and Government – A Tribute to Rory Brady *are Dr Mary McAleese, former President of Ireland with Siobhán, Maeve and Aoife Brady.*

A New Patent Court?

Jonathan Newman SC

The Government has recently announced its decision that, in the event that an amendment to the Constitution to provide for the new Unified Patent Court is approved by the People, it will establish a local division of the new court sitting in Ireland.

When established, the Unified Patent Court will be responsible for disposing of disputes involving European patents, including European patents granted in respect of Ireland, and the new unitary European patent. The vast majority of long-term patents granted for Ireland are now European patents granted through the European Patent Office.

A consultation document issued by the Department of Jobs, Enterprise and Innovation last year had indicated that the Government was giving consideration to not establishing an Irish division of the court, given the low number of patent cases which take place before the Irish Courts. The Bar Council, together with the Law Society, IBEC and other interested organisations, made submissions arguing strongly in favour of the establishment of a local court, and were supported in doing so by retired Justices Fidelma Macken SC and John Cooke SC who have a particular interest in and experience of this field of law.

The alternative to the establishment of an Irish division of the court would have been participation in a regional court sitting in the UK. The Bar Council in its submissions argued that joining in a regional division of the court based in the UK would convey the impression to potential foreign direct investors that the intellectual property of hi-tech industries was not of real concern to Ireland and that Irish expertise did not stretch to being able to advise on patents and handle patent litigation. It was noted that the UK already had a specialised technology and intellectual property court and was using that fact to enhance its attractiveness as a centre for innovation and research and development.

A decision by Ireland not to have established a local division of the court in Ireland, and instead to join in a UK regional division, would be, the Bar Council submission argued, simply a decision to hand over the provision of legal services in connection with those disputes to the UK, and the fruits thereof to the UK exchequer. The result would have been a loss of work, existing experience and specialist knowledge in that sector, to the loss both of lawyers and the hi-tech sectors based in Ireland.

It was also argued that opting for a regional court in London would have impeded access to justice for businesses based in Ireland and would have required those businesses to pay the high level of legal costs applicable in the UK legal services market in patent disputes, which in this field were far higher than legal costs associated with patent disputes in Ireland.

It was argued that a specialist technology court should be established in the Irish High Court to promote the effective resolution of technology disputes, including patent disputes, before the Irish courts and to send the message that Ireland is serious about attracting hi-tech industries and protecting the fruits of those industries.

The Bar Council is extremely pleased at the decision of the Government, as it was extremely concerned that any other decision would have cut across years of work of the Government and former Governments in promoting Ireland as a destination for foreign direct investment in high technology industries. ■

Defamation and the Internet

Michelle Liddy BL

Introduction

Like many areas of the law, defamation is an area that has had to deal with changes as society and technology develop. Previously, anybody who had been defamed may have had a statement made about them to a third party or worst case scenario had an article printed about them in a widely circulated newspaper. Now there is the chance that something may be published on the internet and be seen by millions of people all over the world with the chance that it could be accessed for many years. This article seeks to set out the principles which apply to defamation and the internet particularly in the light of recent developments relating to

the right to be forgotten. The article will first examine the liability of search engines for the content they publish and locate for users and will also look at the situation in relation to online archived materials. I will then go on to consider the right to be forgotten and the complex issues thrown up by the arrival of social media.

The liability of internet search engines for content they publish

Search engines such as Google are of paramount importance in the functioning of the internet. Google is responsible for 75% of referrals to external websites and provides access to over 2 billion web pages.[1] The question then is are internet search engines responsible for potentially defamatory content which they locate for users?

The Irish position for electronic publication is now dealt with in the Defamation Act, 2009 ("the 2009 Act"). Section 2 provides that a defamatory statement includes a statement published on the internet or contained in an electronic communication. Section 27 provides for a defence based on the old common law defence of innocent publication but the statutory defence differs from the old common law one in many respects. Innocent publication is now available to a defendant where (s) he is not the author, editor or publisher of the statement. In order to avail of this defence, the Defendant must show that they;

(a) took reasonable care in relation to the publication of the statement and
(b) neither knew nor had reason to believe that what (s) he did caused or contributed to the defamatory publication.

It has been said that what the 2009 Act really provides is that innocent publishers now have a defence provided they did not act negligently, i.e. they took reasonable care in how they operated. In accordance with section 27 (3), in determining whether reasonable care was taken, the court will consider;

1. the extent of the Defendant's responsibility for the actual content of the statement or the decision to publish it;
2. the nature or circumstances of the publication;
3. the previous conduct or character of the Defendant.

In contrast to common law the 2009 Act places the burden of proof on the defendant to show (s) he was not the publisher. There is no proper definition of "author, editor or publisher" in the 2009 Act, but certain categories of persons who escape being labelled a publisher under section 27 (2) (c) include:

1. distributors/sellers of printed material
2. distributors/sellers of film and sound recordings
3. processors/copiers/distributors/sellers of electronic media, or operators of equipment by which the statement is made available.

It seems then, that as a general rule, search engines would not be held liable for defamation on the basis that they were innocent publishers of material under section 27 (2) (c). However it would be dangerous for publishers to become complacent as there is a very real chance that if a search engine was informed by an individual that there was material which was defamatory of them accessible via the particular search engine, and the search engine chose not to remove it, that they would then not be able to make out the innocent publication defence.

Useful guidance can be found in the U.K case law. The Defamation Act, 2013 retained many of the provisions relating to innocent publication which were contained in its predecessor, the Defamation Act, 1996 ("the 1996 Act"). The requirements in relation to taking reasonable care and the Defendants' belief that he was not contributing to the publication of a defamatory statement are the same in the 1996 Act in the U.K and the 2009 Act here.[2]

In the case of *Godfrey v Demon Internet Ltd*[3], the Defendants, who carried on business as an Internet service provider, received and stored on their news server, an article which the Plaintiff claimed was defamatory of him. The article had been posted by an unknown person using another service provider and claimed to emanate from the Plaintiff although it was common case that it was a forgery. The Plaintiff informed the Defendants that the article was defamatory and asked them to remove it from their news server. The Defendants failed to do so and it remained available on the server for some 10 days until its automatic expiry. There was no dispute about the fact that the Defendants' could have removed the offending material on receipt of the Plaintiffs' request, but failed to do so. The Plaintiff brought proceedings for libel. The Defendants, who relied on the innocent publication defence in the 1996 Act, claimed that they were not the publisher of the statement complained of, that they had taken reasonable care in relation to its publication, and that they did not know and had no reason to believe that they had caused or contributed to the publication of a defamatory statement. The Defendant Company was held not to be a publisher as required under the 1996 Act (which is the same as the 2009 Act here) for the purposes of availing of the defence of innocent publication. The Defendants were not entitled to succeed in their defence though as a result of their failure to satisfy the requirement to have taken reasonable care in relation to the publication and their inability to show that they did not believe that they were contributing to the publication of a defamatory statement.

The law developed further in *Bunt v Tilley & Ors.*[4] The facts were that the first three Defendants' were individuals who the Plaintiff claimed posted material defamatory of him on websites, access to which was provided by the fourth, fifth and sixth named Defendants (all of whom were internet search providers). The fourth to sixth defendants applied to have the case against them struck out on the basis that they were not publishers of the material and had innocently published it. In this case there was a dispute as to whether

1 Bohan, F. 2006 *Liability of Internet Search Engines* 2006(6) 1 HLJ 181 at 181.

2 Even under the Defamation Act, 2013 the changes were procedural rather than changes to the basic principles.

3 [2001] 1 BQ 201.

4 [2006] EWHC 407 (QB).

the fourth to sixth Defendants' had been notified of the concerns of the Plaintiff and if they had, whether they had been asked to remove the material. The Court seemed to accept that even if there was notification to the Defendants', the request to remove the material was not clearly made and as a result, the Defendants were not in the same category as the Defendant in Godfrey. Eady J held that;

> "In all the circumstances I am quite prepared to hold that there is no realistic prospect of the claimant being able to establish that any of the corporate defendants, in any meaningful sense, knowingly participated in the relevant publications. His own pleaded case is defective in this respect in any event. More generally, I am also prepared to hold as a matter of law that an ISP which performs no more than a passive role in facilitating postings on the Internet cannot be deemed to be a publisher at common law."[5]

In the case of *Tamiz v Google,*[6] the claim was in respect of comments made about the Plaintiff which were posted anonymously on a blog hosted on a blogging platform provided by the Defendant. The platform allowed any internet user to create an independent blog, supplied design tools to help the users create layouts for their blogs, and permitted the use of the platform's URL if required. The Defendant was first notified of the Plaintiffs' complaint about the comments when it received the letter of claim, some two months after the comments were posted. Five weeks later the Defendant forwarded the complaint to the blogger who, three days later, voluntarily removed all comments. The Court of Appeal, in overturning the decision of the lower Court, held that once the Defendant had been made aware of the defamatory material, it should be given a reasonable period of time in which to act and if it did not do so it was held to be a secondary publisher of the material. In this case, the 5 week period taken by the Defendant to act allowed the Court to label it as a secondary publisher. Richards LJ held that

> "… if Google Inc. allows defamatory material to remain on a Blogger blog after it has been notified of the presence of that material, it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of that material on the blog and thereby to have become a publisher of the material."[7]

He also held that;

> "The provision of a platform for the blogs is equivalent to the provision of a notice board; and Google Inc. goes further than this by providing tools to help a blogger design the layout of his part of the notice board and by providing a service that enables a blogger to display advertisements alongside the notices on his part of the notice board. Most importantly, it makes the notice board available to bloggers on terms of its own choice and it can readily remove or block access to any notice that does not comply with those terms."[8]

So rather than google being like a wall on which graffiti is sprayed (as the lower Court had held), Google is more like the provider of a giant notice board and is obliged to remove defamatory content once it becomes aware of it, or risk losing the benefit of the innocent publication defence.

Online Archived Materials

While the 2009 Act has remedied the unfairness of the old multiple publication, it would be foolish for those who keep online archived materials not to take care particularly where there is a change in the circumstances surrounding the publication e.g. if a subsequent investigation showed that the person concerned was not involved in certain activities which were the subject of an article or statement. The English case of *Flood v Times Newspapers Ltd*[9] (hereinafter "*Flood*") shows the dangers of not monitoring archived materials.

In *Flood,* the Defendant published an article in June 2006 alleging that the Plaintiff, who was a detective, had taken bribes. A subsequent investigation showed there was no evidence to support such an allegation. In May 2007, before the results of the investigation became known to either party, the Plaintiff sued. The Defendant attempted to plead qualified privilege, claimed the publication was in the public interest and that it had acted responsibly. In the High Court, the Defendant succeeded in the defence of qualified privilege concerning the original publication but not in respect of the archived material left in place after the results of the investigation were made known. The Court was not convinced that the Defendant had acted responsibly either.

The decision was appealed and the Court of Appeal held that the Defendant was not entitled to rely on the qualified privilege defence either in respect of the original article or the archived copy. The Supreme Court overturned the Court of Appeal, in part holding that the High Court had been correct in allowing the defence of qualified privilege in respect of the initial publication but made no finding in respect of the archived material and so the decision in relation to the archived material stands.

Flood is a clear statement, although it is only of persuasive authority, that even if you can make out a section 26 defence or a qualified privilege defence, it is still of paramount importance that publishers update, qualify or remove offending articles from their archives if further relevant information comes to light.

In the Irish context, it may very well prove to be the case that the Courts would allow a Plaintiff to sue for archived material by invoking their discretion to extend the Statute of Limitations to 2 years as permitted under the 2009 Act (assuming that the 1 year limitation period was up and there had been no other proceedings). Furthermore, if a Plaintiff has made a request to remove material or have it qualified and that has not been done, a Defendant will find it very hard to make out a section 26 "fair and reasonable" defence.

5 *Ibid* at 1252.
6 [2013] EWCA Civ 68.
7 *Ibid* at 2164.
8 *Ibid* at 2165.
9 [2012] UKSC 11.

The problem with the removal of material from either search engine results or from specific websites is that freedom of expression is severely limited. The material may be removed by the provider to avoid legal action being taken but the material which is removed may not be defamatory, may be true or may be covered by one of the other recognised defences in the 2009 Act. As Bohan notes;

> "It is submitted that notice should not be sufficient to hold ISPs liable as it forces them to be the judge of content. Also another problem arises. If the ISP monitors, it will lose the defence of mere conduit in the E Commerce Directive 2000/31/EC of June 8, 2000 [hereinafter "ECD"]. On the other hand, if they don't monitor they will lose the defence of innocent disseminator for failing to exercise reasonable care. The problem also arises that when ISPs are put on notice they simply remove the material to avoid the risk of secondary liability, whether or not the alleged defamatory material is true or in the public interest, etc. There are freedom of expression concerns in such situations."[10]

The Right to be forgotten

A further issue that arises is the right to be forgotten. Recent caselaw has led to significant developments in this area.

The case of *Google Spain v AEPD and Mario Costeja González*[11], was a decision of the European Court of Justice which essentially upheld a right to be forgotten. The case centred on Directive 95/46/EC (Data Protection Directive). The facts were that González asked Google Spain to remove links in its search results that pointed to a 1998 newspaper article that detailed his social security debts. He claimed the debts had long been resolved, and the Google link to this outdated information had violated his data protection rights.

The Court held that that Google was more than simply a "processor" of information but rather a "controller" of information. As a controller, it is responsible for the links it provides in its search results, and Google should be compelled to remove them when they encroach on personal privacy. The ECJ held that search engines should allow users to be "forgotten" after a period of time by removing search links to web pages unless there is a "particular reason" to retain them.

The result was that Google was forced to implement a new privacy policy allowing people to request that their information be removed. The decision has been criticised for a number of reasons. Firstly, other internet service providers are concerned about the cost. It has cost Google and will continue to cost millions of euro to comply with the ruling. Others feel this is too much of restriction on free speech and people should not be entitled to censor what information is available about them if that information is accurate. While this case was more about privacy than defamation, it is interesting to note categorisation by the ECJ of Google as more than just a processor of information. How this will marry with other decisions relating to Google's activities remains to be seen.

The process for removal is that you supply a reason for the request for the removal and then the request is processed by a person (not a machine) at Google. If your request is denied, the request is then sent to the relevant State's Information Commissioner who will decide what to do. In the first day that the procedure was available, there were 12,000 requests for information to be removed. Some merely related to embarrassing or unflattering photos, others to more serious information.

Of those sites affected by the removals, Facebook, profileengine.com, YouTube, badoo.com and Google Groups saw the most URLs removed. The removal of search results only applies to those queries relating to an individual's name. If a request is approved, it means the article or page relating to that person does not appear for any search results using the person's name (eg: John Smith Dublin court case), but will show it in a general query (eg: Dublin court case).

Twitter, Facebook and defamation

Twitter, Facebook and their counterparts are relatively recent phenomenon, but they have a major impact on society. Not all of the comments posted are favourable, however, with the result that Facebook deletes about 20,000 profiles a day for spamming, posting inappropriate content, and violating age restrictions.[12] Those who feel that content posted on social networking sites is defamatory of them have the option of obtaining an injunction to prevent the further publication of that content and also have the option of pursuing a defamation action against the specific user who posted the statement.

In terms of injunctive relief, it is possible to obtain orders prohibiting the further publication of certain statements on social networking sites.

In the case of *Tansey v Gill,*[13] a solicitor took a defamation action against the *www.rate-your-solicitor.com* website after a number of unflattering comments were published on the website. Having requested that the Defendants remove the material and having received no satisfaction, the Plaintiff sought interlocutory orders against the Defendants

1. prohibiting the further publication of the material complained of;
2. requiring the removal of the material from the internet;
3. restraining the Defendants from publishing further material defamatory of and concerning the Plaintiff;
4. requiring the Defendants to terminate the operation of the website and
5. requiring the Defendants to provide the names and addresses of all persons involved and concerned in the publication of defamatory material concerning the Plaintiff and all persons involved in maintaining the website.

Peart J. was of the opinion that the first named Defendant had established the website in an effort to launch an attack on

10 Bohan, F. 2006 Liability of Internet Search Engines 2006(6) 1 HLJ 181 at 196.
11 Case C131/12.
12 *Ibid* at 30.
13 [2012] 1 IR 380.

the Solicitors profession in general after he had allegedly had a number of bad experiences but that his plea of justification had no prospect of success. As a result, the Court had no difficulty granting the orders sought. The orders made effectively closed down the site.

Following on from that, interim orders of a similar nature were made in the case of *McKeogh v John Doe1 & Ors*[14] (hereinafter "*McKeogh*") (in which Google, Yahoo, You Tube and a number of newspapers were named as Defendants). The facts of *McKeogh* were that a taxi driver uploaded video footage to You Tube of a young man making off without paying his fare. This individual was incorrectly identified by a user using a pseudonym as the Plaintiff. It was accepted that it could not have been the Plaintiff in the video as he was in Japan at the time of the incident.

The Plaintiff sought and was granted interim orders which required the removal of the video him from You Tube or from any other website. Orders were also made restraining the Defendants from publishing material, including but not limited to the video, which would defame the Plaintiff. Peart J also granted orders (known as Norwich Pharmacal orders) requiring some of the Defendants to reveal to the Plaintiff the identity of certain users. The case would throw up other issues in terms of whether the public hearing of these types of proceedings served to spread the defamation also but the Plaintiff was not successful on that point.

In the U.K., the fact that the internet users responsible for the defamation could not be identified did not stop the Court making orders. In *AMP v Persons Unknown,*[15] the Plaintiffs mobile phone had been lost or stolen. The camera on the phone had been used to take photographs of an explicit nature. Shortly afterwards, she was contacted on Facebook by a person who threatened to expose her identity, post the images widely online and tell her friends about the images if she did not add him as a friend on Facebook. The images were subsequently posted to Facebook but once Facebook were contacted, they were promptly removed. The images were subsequently uploaded to a Swedish website hosting Bit Torrent files.

This result was that the link to the Bit Torrent files appeared at the top of the list of search engine searches for her name. The Court noted that the Defendants' were listed as a person or persons unknown but what was intended by that was to cover any person in possession or control of any part or parts of the relevant files which contained the relevant digital photographic images. That would be a sufficient description of the Defendants to enable them to be served with any order which the court might make. It would be unfair on the Plaintiff to require her to identify each individual at this stage.

It is arguable that the Plaintiff obtained an order which was not much use to her but the fact that it was there and available to her if she did manage to identify the individuals is surely beneficial. The case really turns on the technology because it was the nature of Bit Torrent files which made the identification difficult but it does demonstrate that the Courts (in the U.K at least) will not allow users to escape liability just because of identification issues.

14 [2012] IEHC 95.

15 [2011] EWHC 3454 (TCC).

It is possible to recover damages from users of social media for comments made by them. Many people view tweets or Facebook status updates as a private conversation between them and their followers/friends. That is simply not the case. The 2009 Act makes it perfectly clear that such internet communications are publications for the purpose of the Act. It may also be possible to join the website if they had been informed that the individual to whom the comments related had taken issue with them and had made no effort to have the comments removed. In Ireland, there is very little case law in this area but in 2013, businessman Declan Ganley received an apology and reached an out of Court settlement with a blogger for defamatory tweets posted in December 2012.[16]

The Ganley case followed on from developments in the U.K after the case of *McAlpine v Bercow.*[17] In November 2012, a report by BBC Two's Newsnight falsely linked an unnamed "senior Conservative" politician to sex abuse claims. On 4 November 2012, Sally Bercow, the wife of the speaker of the House of Commons, tweeted *"Why is Lord McAlpine trending? *innocent face*"* When the allegations against McAlpine proved to be unfounded, the BBC apologised and paid £185,000 to Lord McAlpine in damages and the ITV television network paid him £125,000 in damages. Mrs. Bercow continued to maintain her tweet was not defamatory. As a result, she was one of a number of people sued. The trial was broken into two phases with the first to determine if the tweet was defamatory and the second to decide on damages if it was. The question of whether the tweet was defamatory really focused on the meaning of the phrase "innocent face" which was used. In holding that the tweet was defamatory, the Court applied the normal rules of defamation concluding that:

> "I find that the Tweet meant, in its natural and ordinary defamatory meaning, that the Claimant was a paedophile who was guilty of sexually abusing boys living in care. If I were wrong about that, I would find that the Tweet bore an innuendo meaning to the same effect. But if it is an innuendo meaning, it is one that was understood by that small number of readers who, before reading the Tweet on 4 November, either remembered, or had learnt, that the Claimant had been a prominent Conservative politician in the Thatcher years.[18]"

Following on from that finding, Mrs. Bercow settled the case as did a number of other high profile tweeters.

After that, there was a case in which a New Zealand cricket captain, Chris Cairns, was awarded £90,000 as a result of a defamatory tweet posted by the president of the Indian Premier League, Lalit Modi. The tweet claimed that Cairns had been responsible for match fixing.[19] There was no basis for that allegation and there had been no apology for the tweet. The damages included including £15,000 in punitive damages as a result of the way the defence had been conducted. The

16 RTE News "Declan Ganley receives an apology after reaching settlement over defamatory tweet" Tuesday 08th January 2013 Accessed at http://www.rte.ie/news/2013/0108/361786-declan-ganley/ Last Accessed 27.05.2014.

17 [2013] EWHC 1342 (QB).

18 [2013] EWHC 1342 (QB).

19 Cairns v Modi [2013] 1 WLR 1015.

Plaintiff had been called a liar in one form or another 24 times in the course of the hearing.

It seems that at present, there have not been any cases in England or Ireland where the actual sites themselves have been sued but it seems entirely plausible that they could. The same principles that apply to search engines could very well apply to Facebook and Twitter particularly where both sites have the function to report content as inappropriate. If nothing is done following such a report, then the site could be identified as a publisher also.

In terms of users who post under a pseudonym, there can be hurdles to be overcome in respect of identifying the appropriate Defendant. The English case of *Norwich Pharmacal Co. v Customs and Excise Commissioners*[20] was one of the first cases where an order of this type was made. In this case, the Plaintiffs were the owners of a patent of a certain pharmaceutical and were convinced that their patent was being infringed by illicit importers. In order to obtain the names and addresses of the importers, the Plaintiff brought actions against the Commissioners of Customs and Excise seeking disclosure of certain information to reveal the names of the illicit importers. At first instance, the Plaintiffs were granted the order they sought but that decision was reversed by the Court of Appeal. The matter came before the House of Lords who reversed the Court of Appeal and held that the Plaintiffs were entitled to have the Defendants furnish them with the information they sought. The Defendants argued that discovery was only available against an individual who had been responsible for some wrongdoing. Lord Reid noted that

> "….discovery to find the identity of a wrongdoer is available against anyone against whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection with the wrong than that he was a spectator or has some document relating to it in his possession. But the respondents are in an intermediate position. Their conduct was entirely innocent; it was in execution of their statutory duty. But without certain action on their part the infringements could never have been committed."[21]

And later at page 169 of the judgment he held;

> "…..it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged, he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability. I would therefore hold that the respondents must disclose the information now sought unless there is some consideration of public policy which prevents that."[22]

The result then is that a party may be obliged to disclose the names or identities of third parties who have committed a wrong if they have facilitated the wrongdoer. It does not matter if the Plaintiff does not intend to pursue the individual in possession of the information but if the lack of information would make it impossible for the Plaintiff to pursue the wrongdoer, then the third party will be obliged to disclose. The test which can be distilled from the Norwich Pharmacal case is that an order will be granted if the seeker can demonstrate

1. a reasonable basis to allege that a wrong has actually been committed
2. the disclosure of documents or information from the third party is needed to enable action against the wrongdoer
3. the respondent is not a "mere witness", but is sufficiently mixed up in the wrongdoing so as to have facilitated it, even if innocently, and therefore be in a position to provide the information
4. the order is necessary in the interests of justice on the facts of the case.

The case has been followed in Ireland in *I'OT v B*[23]*, EMI Records (Ireland) Ltd and others v UPC Communications Ireland Ltd*[24] and the *McKeogh* case as mentioned earlier. The Norwich Pharmacal principles have a wide application but will be particularly relevant in the context of internet defamation.

Conclusion

What we can see from the above is that while the law in relation to online defamation is a relatively new phenomenon, it is being managed by the Courts in a very pragmatic manner. The principles are being kept in line with those which have existed traditionally but are being adapted to accommodate new technology. The 2009 Act has specifically taken account of potential online cases but there will undoubtedly be issues to be overcome in this jurisdiction as the cases arise and as more complex technological issues present themselves. For the moment, it would be wise for all practitioners to be aware of the principles which are in existence and keep abreast of case law in other jurisdiction which may be of persuasive authority here. ■

20 [1973] 3 WLR 164.
21 *Ibid* at 168.
22 *Ibid* at 169.
23 [1998] 2 IR 321
24 [2010] IHC 377

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Application for judicial review of decision not to consider application for temporary release – Mandatory minimum sentence – Statutory interpretation – Strict interpretation of penal statutes – Suspended sentence – Whether "minimum period of imprisonment to be served" included suspended portion of sentence – Whether Minister was unfettered in discretion as to temporary release – *DPP v Moorehouse* [2005] IESC 52, [2006] 1 IR 421 applied – Misuse of Drugs Act 1977 (No 12), ss 3, 15, 15A and 27 – Criminal Justice Act 1999 (No 10), s 5 – Criminal Justice Act 1960 (No 27), s 2 – Criminal Justice Act 2006 (No 26), s 99 – *Certiorari* granted (2013/320JR – White J – 5/9/2013) [2013] IEHC 626
Kavanagh v Minister for Justice Equality & Law Reform

Judicial review

Application for order prohibiting trial – Real risk would not receive fair trial – Onus on applicant – Duty on gardaí to seek out and preserve relevant evidence – Effect of unavailable evidence – Fingerprint evidence – Role of court in judicial review – Role of trial judge in ensuring fair trial – Standard of review – Centrality of unobtained evidence – Scope of investigative duty – Public interest – Duty of gardaí towards person under active investigation – Whether duty owed by gardaí towards applicant as person under investigation at relevant time – *Beatty v Rent Tribunal* [2005] IESC 66, [2006] 2 IR191; *Bowes v Director of Public Prosecutions* [2003] 2 IR 25; *Braddish v Director of Public Prosecutions* [2001] 3 IR 127; *Byrne v Director of Public Prosecutions* [2010] IEHC 382, [2011] 2 IR 461; *Conlon v Kelly* [2002] 1 IR 10; *D v Director of Public Prosecutions* [1994] 2 IR 405; *DC v Director of Public Prosecutions* [2005] IESC 77, [2005] 4 IR 281; *Daly v Director of Public Prosecutions*

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Licensing

Licensed premises – Public health – Ban on smoking in indoor workplaces – Smoking area – Exemption – Specified place – Statutory interpretation – Whether smoking area exempt from smoking ban – Whether area outdoors – Whether fixed or immovable roof – Whether 50% of perimeter of area surrounded by walls or similar structure – *Health Service Executive v Brookshore Ltd* [2010] IEHC 165, [2012] 3 IR 518; *Howard v Commissioners of Public Works* [1994] 1 IR 101; *Inspector of Taxes v Kiernan* [1981] IR 117 and *Malone Engineering Products Ltd v Health Service Executive* [2006] IEHC 307, (Unrep, Murphy J, 21/7/2006) considered – Summary Jurisdiction Act 1857 (No 43), s 2 – Courts (Supplemental Provisions) Act 1961 (No 39), s 51 – Income Tax Act 1967 (No 6) – Public Health (Tobacco) Act 2002 (No 6), ss 5 and 47 – Public Health (Tobacco)(Amendment) Act 2004 (No 6), ss 3 and 16 – Case stated answered (2012/1266SS – Kearns P – 15/2/2013) [2013] IEHC 69
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Prohibition

Inter partes application for leave to seek judicial review – Seeking order of prohibition to prevent trial proceeding before full and proper disclosure made – Failure to make disclosure of relevant documentation in criminal case – Right to trial in due course of law – Multiple crimes, witnesses and victims – Large volume of hand-written prosecution documentation – 500 witness statements not given to defence – Defence invited to attend garda station to make copies – Breach of DPP's guidelines for prosecutors – Obligation to disclose material not intended for use at trial – Trial judge managing disclosure issues – Onus on applicant to overturn presumption he could not obtain fair trial – Applicant dismissed three legal teams – Cross-examination – Witness credibility – Oppression – Legal aid – Judicial review proceedings brought during currency of criminal trial – Whether real risk applicant would not receive fair trial – Whether failure to adequately provide legal aid for costs of copying disclosure amounted to breach of right to trial in due course of law – *DPP v Special Criminal Court & Paul Ward* [1999] 1 IR 60; *DC v Director of Public Prosecutions* [2005] IESC 77, [2005] 4 IR 281 and *Corporation of Dublin v Flynn* [1980] IR 357 considered – Constitution of Ireland 1937, art 38(1) – European Convention on Human Rights 1950, art 6 – Application refused (2012/593JR – Hedigan J – 26/7/2012) [2012] IEHC 320
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Road traffic offences

Statutory interpretation – Judicial review of conviction for driving under the influence of intoxicant – Certification of analysis of blood or urine samples for alcohol or drugs – Analysis conducted in two stages as test for alcohol different to test for drugs – First certificate certified nil alcohol in sample of applicant – Second certificate certified cocaine present in sample of applicant – Second certificate adduced in evidence in prosecution of applicant – Nature and purpose of certificate evidence in criminal cases – Certificates rendering admissible in specified proceedings otherwise hearsay evidence – Whether certificate not adduced in evidence by prosecution was certificate for purpose set out in act – Whether intrinsically wrong to have two certificates in existence relating to procedures adopted – Whether one valid certificate only could be given under section – Whether second certificate valid – Whether second certificate admissible into evidence – Proper interpretation of Road Traffic Acts – *DPP v Kemmy* [1980] IR 160; *DPP v Ennis* [2011] IESC 46, (Unrep, SC, 6/12/2011); *Sweeney v Fahy* [2009] IEHC 212, (Unrep, O'Keeffe J, 27/4/2009) and *Ivers v Murphy* [1999] 1 IR 98 considered – *DPP v Canavan* [2007] IEHC 46, [2007] 3 IR 160 distinguished – Road Traffic Act 1994 (Part III) (Amendment) Regulations 2001 (SI 173/2001) – Road Traffic Act 1961 (No 24), s 49(1) – Road Traffic Act 1994 (No 7), ss 10, 19 and 21 – Criminal Justice (Miscellaneous Provisions) Act 1997 (No 4), s 6(1) – Interpretation Act 2005 (No 23), s 18 – Relief refused (2013/273JR – O'Malley J – 18/04/2013) [2013] IEHC 174
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Search warrant

Evidence – Admissibility – Illegally obtained evidence – Dismissal of charge – Summary dismissal of charges – Sufficient evidence – Admissible evidence – Preliminary issue – Whether application as to admissibility of evidence may be taken pursuant to s 4E of Criminal Procedure Act 1967 prior to commencement of trial – Whether admissibility of illegally obtained evidence may be subject of application under s 4E of Act of 1967 – Whether admissibility of unconstitutionally obtained evidence may be subject of application under s 4E of Act of 1967 – *Cruise v O'Donnell* [2007] IESC 67, [2008] 3 IR 230 and *The People (Attorney General) v O'Brien* [1965] IR 142; (1964) 103 ILTR 109 applied – *Lynch v Moran* [2006] IESC 31, [2006] 3 IR 389; *People (DPP) v McCarthy* [2010] IECCA 89; [2011] 1 ILRM 430; *The People (Director of Public Prosecutions) v Mallon* [2011] IECCA 29, [2011] 2 IR 544 and *Shell E & P Ireland Ltd v McGrath* [2013] IESC 1, [2013] 1 IR 235 considered – Criminal Justice Act 1967 (No 12), s 4E – Criminal Justice Act 1999 (No 10), s 9 – Appeal against dismissal of charges allowed (231/2011 – CCA – 7/3/2013) [2013] IECCA 4
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Remission – Commutation of death sentence to penal servitude – Penal servitude changed to "imprisonment" in Act of 1997 – Whether plaintiff serving a sentence or a commutation – Whether plaintiff entitled to remission of sentence – *Callan v Ireland* [2011] IEHC 190, (Unrep, High Court, Hanna J, 15/4/2011) and *The State (Carney) v Governor of Port- Laoighise Prison* [1957] 1 IR 25 considered – Prison Rules 2007 (SI 252/2007), r 59 – Criminal Law Act 1997 (No 14), s 11(5) – Constitution of Ireland 1937, Art 13.6 – Appeal allowed and eligibility to earn remission declared – (371 & 375/2011 – SC – 18/7/2013) [2013] IESC 35
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DATA PROTECTION

Access

Appeal on a point of law from Circuit Court – Right of access to personal data – Trial judge upheld decision of Data Protection Commissioner to issue enforcement notice requiring CCTV footage to be provided – Alleged fall on bus – Access request rejected – Litigation privilege – Personal injuries proceedings commenced after investigation began but before enforcement notice issued – *Seisin* of proceedings – Discovery – Power to order production of documents – Test to apply to statutory appeal – No point of law set out or identified – Whether existence of legal proceedings between data requester and data controller precluded data requester making access request – *Murphy v Corporation of Dublin* [1972] IR 215; *Durant v Financial Services Authority* [2003] EWCA Civ 1746, (Unrep, Auld LJ, 8/12/2003); *Ulster Bank Investment Funds Ltd v Financial Services Ombudsman* [2006] IEHC 323, (Unrep, Finnegan P, 1/11/2006) and *Nowak v Data Protection Commissioner*, [2012] IEHC 449, (Unrep, Birmingham J, 7/3/2012) considered – Data Protection Act 1988 (No 25), ss 4, 10(1) and 26(3)(b) – Data Protection (Amendment) Act 2003 (No 6) – Central Bank and Financial Services Authority of Ireland Act 2004 (No 21), s 57CL – Directive 95/46/EC – Appeal dismissed (2011/123CA – Hedigan J – 8/8/2012) [2012] IEHC 339
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Libel

Publication – Qualified privilege – Malice – Golf Club – Unincorporated association with rules – Conspiracy claim – Handicap certificate – Imputation as to cheating at golf – Words 'general play (handicap building)' used – Reflection of true playing ability – Handicapping score scheme – Natural and ordinary meaning – Score cards submitted to handicap committee – Playing handicap score adjusted on numerous times by committee – Written complaint about reduction in handicap to all members of committee – Minutes of meetings – Training on new handicap system given to committee members – Interest to make and receive communication – Public interest – Rebuttal of inference of malice – Onus of proof – Audit of golf club – Inference to be drawn from minutes of meeting – Capacity of unincorporated association to publish libel – Whether interest in making and receiving communication – Whether publication was an occasion of qualified privilege – Whether malice proven – Whether honest belief in truth – Whether words published recklessly without caring whether true or false – Whether publication of words to third party – Whether words used capable of bearing defamatory meaning – Whether words would reasonably be understood by hypothetical reasonable member of class of persons interested in playing golf to mean cheated – Whether conspiracy to injure plaintiff – *Lewis v Daily Telegraph Limited* [1964] AC 234; *Griffin v Sunday Newspapers Limited* [2011] IEHC 331, [2012] 1 ILRM 260; *McGrath v Independent Newspapers (Ireland) Limited* [2004] 2 IR 425; *Capital and Counties Bank v Henty* [1882] 7 AC 741; *Boston v Bagshaw* [1966] 1 WLR 1126; *Henwood v Harrison* [1872] LR7 CP 606l; *Wright v Woodgate* [1835] 2 CMR 573; *Harris v Arnott* (No 2) [1890] 26 LR Ir 75; *Horrocks v Lowe* [1975] AC 135 and *Mercantile Marine Service Association v Toms* [1916] 2 KB 243 considered – Claim dismissed (2006/950P – Herbert J – 27/7/2012) [2012] IEHC 372
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Employment

Traineeship – Enlistment – Maximum age – Employment equality – Discrimination – Age – Minister – Powers – Statute – Construction – Derogation – Contract – Whether formal offer of traineeship made to applicant – Whether offer binding – Whether derogation from equality legislation applying to recruitment – Whether scope of derogation adequately defined – Whether Minister having prescribed relevant date for upper age limit – Whether respondents entitled to rely upon derogation where relevant date not prescribed – *Minister for Justice v Director of the Equality Tribunal* [2009] IEHC 72, [2010] 2 IR 455; *In re The Employment Equality Bill 1996* [1997] 2 IR 321 and *Kudukdeveci v SwedeX GmbH & Co* [2010] All ER (EC) 867 considered – Employment Equality Act 1998 (No 21), ss 6, 8 and 37 – Equality Act 2004 (No 24) –Directive 78/2000/EC, arts 1, 2, 26, 31, recitals 18 and 19 – Constitution of Ireland 1937, Arts 4.1 & 40.3.1° – Findings made (2011/1182JR – Dunne J – 1/2/2013) [2013] IEHC 110
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EMPLOYMENT LAW

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Decision of Labour Court – Less favourable treatment – Comparator – Jurisdiction of court to interfere with decision of Labour Court – Whether subdivision of category of comparators permitted – Respondent part time teacher at privately funded appellant – Complaint made to rights commissioner of less favourable treatment than State funded full time teachers – Complaint found to be well founded – Appeal by appellant to Labour Court – Preliminary ruling State funded teacher appropriate comparator – Appeal of ruling to High Court – Whether appeal of decision appropriate – Whether error in law in finding State funded full time teacher appropriate comparator – *EMI Records (Ireland) Ltd v Data Protection* [2013] IESC 34, (Unrep, Clarke J, 3/7/2013); *C.I.L.F.I.T. v Ministry of Health (Case C-283/81)* [1982] ECR 3415; *Monin Automobiles (Case C-428/93)* 1994 ECR I-01707 and *National University of Ireland Cork v Ahern* [2005] IESC 40, [2005] 2 IR 577 applied – *Koczan v Financial Services Ombudsman* [2010] IEHC 407, (Unrep, Hogan J, 1/11/2010); *An Post v Monaghan* [2013] IEHC 404, (Unrep, Hedigan J, 26/8/2013) and *Minister for Finance v McArdle* [2007] IEHC 98, [2007] 2 ILRM 438 approved – *Metock v Minister For Justice, Equality and Law Reform* [2008] IEHC 77, (Unrep, Finlay Geoghegan J, 14/3/2008); *Irish Trust Bank v Central Bank of Ireland* [1976-7] ILRM 50; *Minister For Agriculture v Barry* [2008] IEHC 216, [2009] 1 IR 215; *O'Kelly v Trusthouse Forte Plc* [1984] QB 90; *Catholic University School v Dooley* [2010] IEHC 496, [2011] 4 IR 517*; Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34; *Royal Copenhagen* [1995] ECR I-1275; *Wilton v Steel Company of Ireland Ltd* (Unrep, O'Sullivan J, 28/5/1998); *O'Keeffe v Hickey* [2008] IESC 72, [2009] 2 IR 302 and *Enderby (Case C-127/92)* [1993] ECR I-5535 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Education Act 1998 (No 51), s 24(3) – Protection of Employees (Part-Time Work) Act 2001 (No 45), ss 7, 16 and 17 – Treaty on the Functioning of the European Union, art 267 – Council Directive 97/81/EC of 15 December 1997, cl 3(2) – Appeal allowed (2012/286MCA – Hedigan J – 20/12/2013) [2013] IEHC 607
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Injunction

Application for injunction setting aside dismissal – Employment contract – Finding of serious misconduct – Revelation on appeal that gratuity received – Breach of constitutional right to fair procedures – Absence of opportunity to cross-examine complainant – Strength of case – Balance of convenience – Relationship of trust – Whether breach of fair procedures – Whether strong case which was likely to succeed at hearing – Whether balance of convenience lay in favour of granting injunction – *Fennelly v Assicurazioni Generali* [1985] 3 ILTR 73; *Maha Lingam v HSE* [2005] IESC 89, [2006] ELR 137 and *Joyce v HSE* [2005] IEHC 174, (Unrep, Finnegan J, 27/5/2005) considered – Application refused (2013/12018P – Ryan J – 19/12/2013) [2013] IEHC 615
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Judicial review

Appeal – Fitness to work – Independent medical assessment – Board of management – Local medical advisor – Sick leave scheme – Contractual interpretation – Public law element – Improper purpose – Mootness – Whether board erred in law in nominating medical specialist – Whether breach of fair procedures in furnishing documentation to nominated medical specialist – Whether subsequent referral of applicant by local medical advisor to independent specialist remedied position – *Delaney v Central Bank* [2011] IEHC 212, (Unrep, Laffoy J, 15/4/2011) distinguished – *McCormack v The Garda Síochána Complaints Board & Ors* [1997] 2 IR 489; *Keegan v Garda Síochána Ombudsman Commission* [2012] IESC 29, [2012] 2 IR 570; *Analog Devices BV & Ors v Zurich Insurance Company & Ors* [2002] 1 IR 272; *Investors Compensation Scheme Ltd v West Bromwich Building Society; Same v Hopkin & Sons (a firm) & Ors* [1998] 1 WLR 896; *Cassidy & Ors v Minister for Industry and Commerce* [1978] IR 297; *Kennedy v The Law Society of Ireland & Ors* [2000] 2 IR 104; *The Director of Corporate Enforcement v DCC Plc & Ors* [2008] IEHC 260, [2009] 1 IR 464; *Glover v BLN Ltd & Ors* [1973] IR 388 and *Lofinmakin (a minor) & Ors v The Minister for Justice, Equality and Law Reform & Ors* [2013] IESC 49, (Unrep, SC, 20/11/2013) considered – Education Act 1998 (No 51), s 15 – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 23(1) – Rules of the Superior Courts (Mediation and Conciliation) 2010 (SI 502/2010) – Appeal dismissed (298/08 – SC – 19/12/2013) [2013] IESC 62
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Redundancy

Appeal from dismissal of complaint by tribunal – Obligation on employer to consult employee representatives when proposing to creative collective redundancies – Notice of dismissal – Redundancy package – Consultation process – Finding of fact – Strategic or operational decision – Whether valid point of law raised on appeal – Whether notice of dismissal took place – Whether consultation took place after notice of dismissal given – *Junk v Kühnel (Case C-188/03)* [2005] ECR I-855; *Akavan Erityisalojen Keskusliitto AEK v Fujitsu Siemens Computers Oy (Case C-44/08)* [2009] ECR I-8163; *United States of America v Christine Nolan (Case C-583/10)* (Unrep, ECJ, 18/10/2012); *R v British Coal Corporation* [1993] IRLR 10; *UK Coal Mining Limited v National Union of Mineworkers (Northumberland Area)* [2008] IRLR 4; *Middlesbrough Borough Council v Transport and General Workers Union* [2002] IRLR 332; *Securicor Omega Express v GMB* [2004] IRLR 9 and *United States of America v Nolan* [2010] EWCA Civ 1223, (Unrep, COA, 9/11/2010) considered – Protection of Employment Act 1977 (No 7), s 9 – Terms of Employment (Information) Act 1994 (No 5), s 8(4)(b) – Council Directive 98/59/EC, arts 2(1) and

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EXTRADITION LAW

European arrest warrant

Application seeking postponement of surrender – Surrender order made – Humanitarian grounds – Care proceedings in respect of son pending – Guardian – Right to be heard – Prison sentence – Requirement for surrender to be effected as quickly as possible – Flight risk – Bail – Production order – Whether motivated by genuine desire to participate in care proceedings – Whether participation in care proceedings desirable – Whether to admit to bail – European Arrest Warrant Act 2003 (No 45), ss 16, 18(1)(a) and 18(4) – Child Care Act 1991 (No 17), s 18 – Council Framework Decision 2002/584/JHA, art 26 – Application granted (2013/112EXT – Edwards J – 22/10/2013) [2013] IEHC 601
Minister for Justice and Equality v G(P)

European arrest warrant

Appeal from decision refusing surrender – Question certified for Supreme Court – Sentence – Incompatibility with State's obligations under European Convention on Human Rights – European arrest warrant – New form of sentencing obliging indeterminate sentences for public protection in United Kingdom – Indeterminate sentence – Tariff period – Absconding on temporary release – Indeterminate sentencing abolished by statute not applying retrospectively – Whether surrender contrary to State's obligations under European Convention on Human Rights – *James v The United Kingdom* (App Nos 25119/09, 57715/09 and 57877/09) (Unrep, ECHR, 18/9/2012) considered – European Arrest Warrant Act 2003 (No 45), ss 13 and 37(1)(a)(i) – European Convention on Human Rights 1950, art

5(1) – Appeal dismissed (316/2012 – SC – 10/12/2013) [2013] IESC 54
Minister for Justice and Equality v Kelly

European arrest warrant

Application for surrender – European arrest warrant executed and endorsed prior to commencement of legislative changes – Poland – Service of sentence of eight months imprisonment – Effect of legislative amendments – Retrospectivity – Subsidiary issues – Form of warrant – Pre-conditions to non-voluntary surrender – Undertaking from issuing authority that person be retried for offence when not present at original trial and conviction –Right to a fair trial – Right to take part in hearing – Trial *in absentia* – Waiver of right to be present – Consequences of waiver – Notification of hearing – Representation by lawyer – Transposition dates – No specific commencement date – Standard form of warrant replaced with questionnaire – Establishment of unequivocal waiver – Principle of mutual recognition – Review of assessment of issuing authority – Point of exceptional public importance – Presumption against retrospective effect – Distinction between substantive and procedural provisions – Temporal applicability – Objectives of instrument – Seeking of additional information from issuing State – Whether legislative amendments procedural or substantive – Whether amendments had retrospective effect – Whether warrant in correct form – *Colozza v Italy* (App No 9024/80) (1985) 7 EHRR 516; *Jones v United Kingdom* (App No 30900/02) (2003) 37 EHRR CD 269; *Poitrimol v France* (App No 10432/88) (1994) 18 EHRR 130; *Krombach v France* (App No 29731/96) (Unrep, ECHR, 13/2/2001); *Somogyi v Italy* (App No 67972/01)(2008) 46 EHRR 5; *Sejdovic v Italy* (App No 56581/00) (2006) 42 EHRR 17; *Makarenko v Russia* (App No 5962/03) (Unrep, ECHR, 22/12/2009); *Neumeister v Austria* (App No 1936/63) (1979-1980) 1 EHRR 136; *Le Compte v Belgium* (App No 6878/75) (1983) 5 EHRR 130; *Medenica v Switzerland* (App No 20491/92) (Unrep, ECHR, 12/12/2001); *Demebukov v Bulgaria* (App No 68020/01) (2010) 50 EHRR 41; *T v Italy* (App No 14104/88) (Unrep, ECHR, 12/10/1992); *Van Geyseghem v Belgium* (App No 26103/95) (2001) 32 EHRR 24; *Minister for Justice, Equality and Law Reform v Jastrzebski* [2010] IEHC 201, (Unrep, Peart J, 12/1/2010); *Minister for Justice, Equality and Law Reform v Jastrzebski (No 2)* [2010] IEHC 202, (Unrep, Peart J, 3/2/2010); *Hamilton v Hamilton* [1982] IR 466; *Cork County Council v Slattery Pre-Cast Concrete* [2008] IEHC 291, (Unrep, Clarke J, 19/9/2008); *Toss Limited v District Court Justice Ireland* (Unrep, Blaney J, 24/5/1987); *Stefano Melloni v Ministerio Fiscal* (Case C-399/11) [2013] 2 CMLR 43; Criminal *Proceedings against Pupino* (Case C-105/03) [2005] ECR I- 5285; *Sloan v Culligan* [1992] 1 IR 223; *Kenny v An Bord Pleanala (No 1)* [2001] 1 IR 565; *Child v Wicklow County Council* [1995] 2 IR 447; *Minister for Justice and Equality v Tokarski* [2012] IESC 61, (Unrep, SC, 6/12/2012); *Minister for Justice and Equality v Gheorghe* [2009] IESC 76, (Unrep, SC, 18/11/2009); *Start Mortgages Ltd v Gunn* [2011] IEHC 275, (Unrep, Dunne J, 25/7/2011) and *Minister for Justice and Equality v Horvath* [2013] IEHC 534, (Unrep, Edwards J, 5/11/2013) considered – Criminal Justice (Miscellaneous Provisions) Act 2009 (Commencement) (No. 3) Order 2009 (SI 330/2009) – European Arrest Warrant Act 2003 (No 45), ss 6, 11(1), 13, 16, 20(1), 45, 45A, 45B and 45C – European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012 (No 30), ss 6, 10 and 23 – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28), ss 6 and 20 – Interpretation Act 2005 (No 23), ss 16, 26 and 27 – Criminal Justice (Terrorist Offences) Act 2005 (No 2), s 68 – Planning and Development Act 2000 (No 30), s 160 – Interpretation Act 1937 (No 38), s 21(1)(c) – Registration of Title Act 1964 (No 16), s 62(7) – Constitution of Ireland 1937, Arts 15.5 and 25.4.1 – Council Framework Decision 2002/584/JHA, arts 1(2), 1(3), 3, 4, 5 – Council Framework Decision 2009/299/JHA, arts 2, 3, 4, 5, 6, 8 – Council Framework Decision 2005/214/JHA – Council Framework Decision 2006/783/JHA – Council Framework Decision 2008/909/JHA – Council Framework Decision 2008/947/JHA – Treaty on European Union, art 6(1) – Charter of Fundamental Rights of the European Union, arts 47(2), 48(2) and 52(3) – European Convention on Human Rights and Fundamental Freedoms 1950, art 6 – Surrender ordered (2012/154EXT – Edwards J – 3/12/2013) [2013] IEHC 618
Minister for Justice and Equality v Surma

European arrest warrant

Correspondence – Territoriality of offences – Relationship between Irish central authority, judicial authorities and the State – Role of central authority – Nature of extradition proceedings – Standard of proof – Approach to determining whether surrender appropriate –Offences of hoax threats made to persons in Scotland while respondent resident in the State – Whether offences committed outside territory of issuing State – Respondent previously tried for similar offences in State where court found State had jurisdiction – Whether abuse of process to seek surrender of respondent for subsequent similar offences – Whether correspondence – Whether issuing State had jurisdiction to prosecute – Whether s 44 of the European Arrest Warrant Act 2003 engaged where offences both territorial and extra-territorial – Whether s 44 satisfied – *Minister for Justice, Equality and Law Reform v Sliczynski* [2008] IESC 73, (Unrep, SC, 19/12/2008); *Wyatt v McLoughlin* [1974] IR 378 and *Minister for Justice v Bailey* [2012] IESC 16, (Unrep, SC, 1/3/2012) applied – *Minister for Justice v McGrath* [2005] IEHC 116, [2006] 1 IR 321; *Minister for Justice, Equality and Law Reform v Gorka* [2011] IEHC 121, (Unrep, Edwards J, 29/3/2011); *Minister for Justice and Law Reform v Walkowiak* [2011] IEHC 182, (Unrep, Edwards J, 6/5/2011) and *Minister for Justice and Equality v Guz* [2012] IEHC 388, (Unrep, Edwards J, 31/7/2012) approved – *R (Bermingham) v Director of SFO* [2006] EWHC 200 (Admin), [2007] QB 727; *Laird v HM Advocate* 1985 JC 37; *Lipsey* v *Mackintosh* (1913) 7 Adam 182; *Clements v HM Advocate* 1991 JC 62; *HM Advocate v Megrahi* 2000 JC 555; *Reg v Doot* [1973] AC 807; *Liangsiriprasert v United States* [1991] 1 AC 225*; Office of the King's Prosecutor, Brussels v Cando Armas* [2005] UKHL 67, [2006] 2 AC 1; *Attorney General v Parke* [2004] IESC 100, (Unrep, SC, 6/12/2004); *Wm Allan* (1872) 2 Couper 402; *John McKay* (1866) 5 Irv 329; *Wm Jeffrey* (1842) 1 Broun 337; *John Thomas Witherington* (1881) 4 Couper 475 and *Wm Edward Bradbury* (1872) 2 Couper 311 considered – European Arrest Warrant Act 2003 (Designated Member States) Order 2004 (SI 4/2004), art 2 and sch 2 – Post Office (Amendment) Act 1951 (No 17), ss 13 and 51 –European Arrest Warrant Act 2003 (No 45), ss 2, 3, 5, 6, 9, 10, 12, 13, 16, 20, 21A, 22, 23, 24, 34, 37, 38, 44, 45 and 47 – Criminal Justice (Terrorist Offences) Act 2005 (No 2), ss 6, 43 and sch 2 – Council Framework Decision of 13/6/2002, recitals 5, 6, 8, and 9, arts 2, 4, 6 and 7 – European Convention on Extradition of 13/12/1957, arts 7 and 26 – Order for surrender granted (2012/211EXT – Edwards J – 30/7/2013) [2013] IEHC 455
Minister for Justice and Equality v Busby

European arrest warrant

Surrender – Offences – Correspondence – Activation of suspended sentence – Trial *in absentia* – Whether actual notification of trial – Whether respondent fled from charges – Whether undertaking as to retrial given – *Minister for Justice v Serdiuk* [2010] IEHC 242, (Unrep, Peart J, 11/6/2010), *Minister for Justice v Tokarski* [2012] IEHC 148, (Unrep, Edwards J, 9/3/2012); *Minister for Justice v Tokarski* [2012] IESC 61, (Unrep, SC, 6/12/2012) and *Minister for Justice v Petrasek* [2012] IEHC 212, (Unrep, Edwards J, 16/5/2012) followed – *Minister for Justice v Sliczynski* [2008] IESC 73, (Unrep, SC, 19/12/2008); *Minister for Justice v Marjasz* [2012] IEHC 233, (Unrep, Edwards J, 24/4/2012) and *Minister for Justice v Ostrowski* [2012] IEHC 57, (Unrep, Edwards J, 8/2/2012) considered – European Arrest Warrant Act (Designated Member States) (No 3) Order 2004 (SI 206/2004) – Road Traffic Act 1961 (No 24), s 49 – Road Traffic Act 1994 (No 7), s 10 – European Arrest Warrant Act 2003 (No 45), ss 3, 5, 10, 11, 13, 16, 22, 37, 38 and 45 – Criminal Justice (Terrorist Offences) Act 2005 (No 2), ss 72 and 80 – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28), ss 6 and 17 – European Union Council Framework Decision 13/6/2002, arts 2, 4, 7, 8, 14, 15, 24, 33 and 45 – European Convention on Human Rights 1950, art 8 – Surrender refused (2011/317EXT – Edwards J – 15/2/2013) [2013] IEHC 101
Minister for Justice and Equality v Ciesielski

European arrest warrant

Surrender – Offences – Correspondence – Description of penalties on conviction – Minimum gravity – Offences committed while juvenile – Prison conditions – Inhumane and

degrading treatment – Right to bodily integrity – Family rights – Whether correspondence between Latvian and Irish offences – Whether minimum gravity of offences established – Whether less serious offences meeting threshold of minimum gravity – Whether substantial grounds for believing respondent would be exposed to real risk of treatment contrary to fundamental rights in Latvian prison – Whether surrender would result in disproportionate interference with family rights – *Minister for Justice v Mazurek* [2011] IEHC 204, (Unrep, Edwards J, 13/5/2011) applied – *Minister for Justice v Rettinger* [2010] IESC 45, [2010] 3 IR 783; *Minister for Justice v Stapleton* [2007] IESC 30, [2008] 1 IR 669; *Saadi v Italy* [2009] EHRR 30 and *Miklis v Lithuania* [2006] EWHC 1032 (Admin), [2006] 4 All ER 808 approved – *Minister for Justice v Wlodarcyzk* [2011] IEHC 209, (Unrep, Edwards J, 19/5/2011); *Minister for Justice v Mihai* [2011] IEHC 386, (Unrep, Edwards J, 10/10/2011); *Minister for Justice v Machaczka* [2012] IEHC 434, (Unrep, Edwards J, 12/10/2012); *Price v United Kingdom* (2002) 34 EHRR 53; *Mouisel v France* (2004) 38 EHRR 34; *Jalloh v Germany* (2007) 44 EHRR 32; *Labitav v Italy* (2008) 46 EHRR 50; *Aydin v Turkey* (1998) 25 EHRR 251 and *Selmouni v France* (2000) 29 EHRR 403 considered – European Arrest Warrant Act 2003 (Designated Member States)(No 5) Order 2004 (SI 449/2004), art 2 – European Arrest Warrant Act 2003 (No 45), ss 1, 2, 3, 4, 4A, 5, 6, 7, 11, 13, 16, 21, 22, 23, 24, 37, 38 and 45 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 2, 3, 4, 12 and 19 – Criminal Damage Act 1991 (No 31), s 2 – Constitution of Ireland 1937, Art 40.3.2° – European Union Council Framework Decision 13/6/2002, arts 2, 4 and 37 – Charter of Fundamental Rights of the European Union 2010, arts 7 and 47 – European Convention on Human Rights 1950, arts 3, 6 and 8 – Application granted in part; surrender ordered (2012/82EXT – Edwards J – 12/2/2013) [2013] IEHC 102
Minister for Justice and Equality v Jermolajevs

FAMILY LAW

Child abduction

Return – Grave risk of harm – Intolerable situation – Mental health of mother – Welfare of children – Views of children – Behaviour of parties – Whether parties exaggerating allegations against each other – Whether risk to mental health of mother – Whether return of children giving rise to risk of grave harm or intolerable situation – Whether children objecting to return – Whether appropriate to take views of children into account having regard to age and maturity – Whether mother having influenced views of children – Whether mother having failed to afford father access to children – *AU v TNU* [2011] IESC 39, [2011] 3 IR 683; *PL v EC* [2008] IESC 19, [2009] 1 IR 1; *In re S (A Child)(Abduction: Custody Rights)* [2002] EWCA Civ 908, [2002] 1 WLR 3355; *In re E (Children)(Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144 and *S (A Child)(Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 AC 257 considered – Hague Convention on the Civil Aspects of International Child Abduction 1980, art 13(B) – Application refused (2013/12HLC – White J – 2/9/2013) [2013] IEHC 641
L(M) v C(J)

Child abduction

Removal – Return – Welfare of child – Grave risk of harm – Intolerable situation – Objections of child to return – Whether social services in United Kingdom providing adequate support – Whether grave risk to welfare of child in United Kingdom – Whether child having necessary degree of emotional maturity and capacity for independent thought to express views – *RT v SM* [2008] IEHC 212, (Unrep, MacMenamin J, 4/7/2008) and *AS v PS* [1998] 2 IR 244 considered – Child Abduction and Enforcement of Custody Orders Act 1991 (No 6), s 6 – Regulation 2201/2003/EEC – Hague Convention on the Civil Aspects of International Child Abduction 1980, arts 1, 2, 3, 12 and 13 – Application granted (2011/10HLC – Clark J – 28/7/2011) [2011] IEHC 554
L(M) v L(J)

Children

Custody – Welfare – Marital difficulties – Behaviour of father – Whether allegations against father meeting standard of proof – Whether custody should vest in either party – Whether joint custody appropriate – Guardianship of Infants Act 1964 (No 7), ss 11 and 47 – Orders made (2011/5M – White J – 21/6/2013) [2013] IEHC 638
B(A) v D(C)

Children

Judicial review of *interim* care order – Jurisdiction to take children into care – Whether parents failed in parental duty such to warrant care order – Supervision order made – Direction in supervision order that parents must submit to parental capacity assessment valid – Direction in supervision order that mother attend psychotherapy – Failure by parents to comply with supervision order – Factor taken into account when granting subsequent *interim* care order – Whether proper legal basis for such directions – Whether finding by District Court of emotional abuse valid – *N v Health Service Executive* [2006] IESC 60, [2006] 4 IR 374; *Southern Health Board v CH* [1996] 1 IR 219; *Western Health Board v KM* [2002] 2 IR 493; *The State (Lynch) v Cooney* [1982] IR 337 and *Mallak v Minister For Justice* [2012] IESC 59, [2012] 3 IR 297 applied – *Wicklow County Council v Fortune* [2012] IEHC 406, (Unrep, Hogan J, 4/10/2012); *Fitzpatrick v FK* [2008] IEHC 104, [2009] 2 IR 7 and *Eastern Health Board v Mcdonnell* [1999] 1 IR 174 approved – Rules of the Superior Courts 1986 (SI 15/1986), O 84, rr 20(7) and 27(4) – Courts (Supplemental Provisions) Act 1961 (No 39), s 45(1) – Child Care Act 1991 (No 17), ss 12, 17, 18, 19 and 47 – Constitution of Ireland 1937, Articles 15.2, 40.3, 40.4, 40.5, 41, 42, 42.1 and 42.5 – *Certiorari* granted (2013/688JR – Hogan J – 27/11/2013) [2013] IEHC 533
G(J) v Judge Staunton

Children

Custody – Relocation – Applicable principle to determine application for relocation of child – Factors to be taken into account – Order to relocate child to England granted – Order appealed by respondent – Whether in best interests of child to affirm order – *UV v VU* [2011] IEHC 519, [2012] 3 IR 19 approved – *P(S) v E(J),* (Unrep, High Court of England and Wales, 26/3/2010); *M(E) v M(A)* (Unrep, Flood J, 16/6/1992); *KB v LO'R* [2009] IEHC 247, [2010] 2 ILRM 131 and *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 Fam 473 considered – Council Regulation (EC) No 2201 of 2003 of 27/11/2003, art 41 – European Convention on Human Rights 1950, art 8 – Appeal dismissed (2012/814CAF – White J – 21/3/2013) [2013] IEHC 634
P(S) v E(J)

Children

Guardianship – Custody – Abandonment – Jurisdiction – Whether mother fit person to have custody of children – Whether mother allowed former partner to bring up children – Whether mother wilfully failed to comply with undertaking given in Hague Convention proceedings – Whether court having jurisdiction to appoint mother's former partner as joint guardian where former partner not biological father of children – Whether court could exercise inherent jurisdiction in private law proceedings – *N v Health Service Executive* [2006] IESC 60, [2006] 4 IR 374; *Re FD (Ward of Court)* [2008] IEHC 264, [2011] 1 IR 75; *G McG v DW (No 2)* [2000] 4 IR 1 and *AB v CD* [2011] IEHC 543, (Unrep, Abbott J, 26/7/2011) considered – Guardianship of Infants Act 1964 (No 7), ss 4, 14, 15, and 16 – Orders made (2011/9M – Abbott J – 27/9/2013) [2013] IEHC 647
R(M) v B(S)

Costs

Judicial separation – Discontinuance of proceedings – Fault based judicial separation proceedings discontinued by applicant prior to delivery of defence – Subsequent no fault based judicial separation proceedings issued by applicant – Application by respondent for costs of discontinued proceedings – Undesirability of costs orders at interlocutory stages of family law proceedings – *Barretts & Baird (Wholesale) Ltd v IPCS* (1988) 138 NLJ 357 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 26, r1 – Costs reserved (2010/68M – Abbott J – 13/12/2013) [2013] IEHC 645
H(F) v H(D)

Divorce

Appeal – Access – Proper provision – Maintenance – Pension order adjustment – Appropriate orders to be made – Guardianship of Infants Act 1964 (No 7), s 11 – Family Law Act 1995 (No 26), ss 36 and 47 – Family Law

(Divorce) Act 1996 (No 33), ss 13, 14, 15, 17 and 18 – Order of Circuit Court varied (2012/13CAF & 2012/22CAF – White J – 7/2/2013) [2013] IEHC 632
A(K) v A(LT)

Divorce

Variation order – Proper provision – Financial circumstances – Whether new events having occurred – Whether application made promptly – Whether prejudice to third parties – Whether parties having acted unreasonably in conduct of divorce proceedings – Whether maintenance instalments should be varied – *OC v OC* [2009] IEHC 248, (Unrep, Dunne J, 14/5/2009) applied – Family Law (Divorce) Act 1996 (No 33), ss 18(10), 22 and 35 – Application granted; order varied (2011/6M – White J – 31/7/2013) [2013] IEHC 640
J(D) v J(MK)

Divorce

Distribution of proceeds of assets – Specified purpose for proceeds – Proceeds used for different purpose by third party – Whether third party acted *bona fide* without notice – Proceeds of asset being sold for purpose of reducing mortgage on family home – Indication by respondent of intention to use proceeds to discharge different loan – *Ex parte* order obtained restraining respondent from doing this – Proceeds furnished to third party and used to discharge loan – Notification given to third party on day of receipt of proceeds – Whether third party acted *bona fide* without notice in using proceeds to discharge loan – *Ansari v Ansari* [2008] Ewca Civ 1456, [2009] 3 WLR 1092; *B v B (P Ltd intervening) (No 2)* [1995] 1 FLR 374 and *Kemmis v Kemmis* [1988] 1 WLR 1307 considered – Family Law Act 1995 (No. 26), ss 9(1) and 35 – Order directing proceeds be placed in joint account for solicitors for parties (2012/90CAF – White J – 22/2/2013) [2013] IEHC 636
M(C) v M(A)

Divorce

Application to vary – Applicable test – Whether 'clean break' in family litigation – Settlement agreement including terms to make payment by instalment – Term to sell property if default of payment of instalment term – Application to vary instalment order refused – Refusal appealed – Whether appropriate to vary instalment order – *NF v EF (Divorce)* [2008] IEHC 471, [2011] 2 IR 100; *DT v CT (Divorce: Ample resources)* [2002] 3 IR 334 and *AK v JK (Variation of ancillary orders)* [2008] IEHC 341, [2009] 1 IR 814 approved – *Thwaite v Thwaite* [1981] 3 WLR 96 considered – Judicial Separation and Family Law Reform Act 1989 (No 6), s 18 – Family Law (Divorce) Act 1996 (No 33), ss 10, 13(2), 19 and 22 – Constitution of Ireland 1937 – Appeal dismissed (2012/96CAF – White J – 15/3/2013) [2013] IEHC 635
R(PC) (Otherwise R(C)) v R(G)

Divorce

Action for judicial separation or alternatively divorce – Preliminary issues – Undertaking to refrain from raising further preliminary issues – Earning capacity of parties – Financial obligations of parties – Degree to which earning capacity impaired due to care of family – Pension adjustment order – Accommodation needs of parties – Effects of purported Dutch divorce settlement – Failure of settlement to address certain needs – *G v G* [2011] IESC 40, (Unrep, SC, 19/10/2011) considered – Family Law (Divorce) Act 1996 (No 33), ss 5 and 20, Constitution of Ireland 1937, Art 41.3.2° – Decree of divorce granted; Orders regarding provisions and costs made (2000/82M – Abbott J – 10/2/2012) [2012] IEHC 612
T(D) v L(F)

Family home

Sale – Apportionment of proceeds – Children – Access – Failure to implement order granting father access to children – Whether parties contributing to failure to implement access order – Whether court should vary order of apportionment of proceeds of sale of family home – Family Law Act 1995 (No 26), s 18 – Applications refused (2011/77CAF – White J – 17/12/2013) [2013] IEHC 642
S(B) v S(B)

Practice and procedure

Motion seeking an order setting aside disposition – Nullity – Special summons – Transfer of properties to a trust – Transfer by gift – Property adjustment order – *Lis pendens* – Presumption of intention to prevent relief – Whether presumption rebutted – Whether purchaser for value without notice – *S(A) v S(G)* [1994] 1 IR 407 and *ACC Bank Plc v Vincent Markham and Mary Casey* [2005] IEHC 437, [2007] 3 IR 533 considered – Family Law Act 1995 (No 26), s 35 – Attribution of value of some dispositions to respondent (2010/11M – White J – 7/6/2012) [2012] IEHC 613
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Signed on 19th December 2014

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Prize bonds (amendment) (no. 2) regulations 2014
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SI 442/2014

FREEDOM OF INFORMATION

Appeal

Appeal against decision to affirm decision to refuse request for copy of social work report – Report prepared in contemplation of District Court child care proceedings concerning child – Report previously furnished but removed from possession by order of District Court judge – Request for copy of report refused on basis that disclosure would constitute contempt of court – Review of decision sought by appellant – Right of access to records – Exempt records – Powers of commissioner – Whether legislative provisions correctly interpreted – *EH v Information Commissioner* [2001] 2 IR 463 followed – *Eastern Health Board v Fitness to Practice Committee* [1998] 3 IR 399 considered – Freedom of Information Acts 1997 to 2003, ss 6, 7, 8, 22 and 42 – Child Care Act 1991 (No 17), ss 20, 27 and 29 – Relief refused (2012/415MCA – O'Malley J – 24/7/2013) [2013] IEHC 373
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GARDA SÍOCHÁNA

Compensation

Garda injured in course of duties – Punched by prisoner – Psychological injuries – Post traumatic stress disorder – Depression – Existing post traumatic stress disorder – Headaches – Calculation of damages – Loss of earnings – Mitigation of loss – Medical expenses – Whether fit to take up employment after discharge – Whether failure to mitigate loss – Damages awarded (2007/553SP – Irvine J – 26/7/2012) [2012] IEHC 342
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Jurisdiction – Retrospectivity of legislation – New investigative body established – Bias by prejudgment – Objectives of ombudsman – Efficiency – Extension of time for complaint – Whether Ombudsman precluded from taking further action once complaint declared inadmissible – Whether new material warranting public interest investigation – Whether Garda Síochána Act 2005 retrospective – Whether investigator prejudged complaint – *AP v Judge McDonagh* [2009] IEHC 316, (Unrep, Clarke J, 10/7/2009); *Dublin Wellwoman Centre Ltd v Ireland* [1995] 1 ILRM 408; *Jordan v United Kingdom* [2001] 37 EHRR 52; *Kimbray v Draper* [1868] LR 3 QB 160 and *In Re Hefferon Kearns Ltd (No 1)* [1993] 3 IR 177 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Garda Síochána (Discipline) Regulations 1989 (SI 94/1989) – Garda Síochána (Discipline) Regulations 2007 (SI 214/2007) – Garda Síochána Act 2005 (No 20), ss 64, 67, 87, 88, 94, 95, 97, 102, 111 and 128 – Garda Síochána (Complaints) Act 1986 (No 29) – Interpretation Act 2005 (No 23), ss 25 and 27(1)(c) – European Convention on Human Rights 1950 – Application granted (2011/462JR – Hedigan J – 17/8/2012) [2012] IEHC 356
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Asylum

Judicial review – *Certiorari* – Sudan – Challenge to assessment that applicant not at risk of female genital mutilation due to opposition of parents to practice – No dispute on material facts or country of origin information – Undisputed high incidence of female genital mutilation in country of origin – Not disputed that female genital mutilation capable of amounting to persecution – Fear that prevention of genital mutilation of applicant impossible if returned to county of origin – Decision that opposition to practice of parents sufficient to prevent circumcision of applicant – Credibility – Whether tribunal took all relevant factors into account – Whether reasonable to expect parents to resist social pressure to point of social isolation – Whether evidence supported conclusion that parents could maintain opposition to female genital mutilation in country of origin – Whether decision unreasonable – Whether error of law – Whether case made at appeal stage – *Meadows v Minister for Justice* [2010] IESC 3, [2010] 2 IR 701 applied – *K v Secretary of State for the Home Department; Fornah v Secretary of State for the Home Department* [2007] 1 AC 412 and *FM (FGM) Sudan CG* [2007] UKAIT00060 considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Refugee Act 1996 (No 17), s 2 – Criminal Justice (Female Genital Mutilation) Act 2012 (No 11) – Relief granted (2012/584JR – Clark J – 21/3/2013) [2013] IEHC 163

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Asylum

Motion to dismiss application for judicial review – Claim that no stateable grounds disclosed and application noncompliant with rules – Application for asylum by children whose parents were previously refused asylum – Applications for asylum of both parents rejected upon credibility grounds – Claim by applicants based exclusively on previously rejected claims of parents – Detail required in statement of grounds – Whether application made out of time – Whether failure formally to seek extension of time precluded granting of extension of time by court – Whether possible basis upon which applicants could challenge impugned decisions – Whether decision of tribunal properly arrived at – *Lofinmakin v Minister for Justice* [2011] IEHC 38, (Unrep, Cooke J, 1/2/2011) and *Saleem v Minister for Justice* [2011] IEHC 55, (Unrep, Cooke J, 4/2/2011) followed – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 20 – Refugee Act 1996 (No 17), s 17 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s. 5 – Council Directive 2005/85/EC, art 39 – Council Directive 2004/83/EC – Application dismissed (2012/14JR – Cooke J – 7/6/2012) [2012] IEHC 225

M(D) v Minister for Justice and Equality

Deportation

Judicial review – *Non-refoulement* – *Carltona* principle – Whether Minister must personally consider issue of *non-refoulement* – Approach to be taken in considering issue of *non-refoulement* – *Tang v Minister for Justice* [1996] 2 ILRM 46 and *Devanney v Shields* [1998] 1 IR 230 applied – *T(LA) v the Minister for Justice and Equality* [2011] IEHC 404, (Unrep, Hogan J, 2/11/2011); *McNamara v An Bord Pleanála* [1995] 2 ILRM 125; *Carltona Ltd v. Comrs of Works* [1943] 2 All ER 560; *Reg v Home Secretary, Ex p Oladehinde* [1991] 1 AC 254; *L(F) v. Minister for Justice and Equality* [2012] IEHC 189, (Unrep, Hogan J, 10/5/2012) and *O(PU) v Minister for Justice and Equality* [2012] IEHC 458, (Unrep, McDermott J, 6/11/2012) approved – *Afolabi v Minister for Justice and Equality* [2012] IEHC 192, (Unrep, Cooke J, 17/5/2012) considered – *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 IR 701 distinguished – Aliens Act 1935 (No 14) – Refugee Act 1996 (No 17), s 5 – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Criminal Justice (United Nations Convention against Torture) Act 2000 (No 11), s 4 – European Convention on Human Rights 1950, art 8 – Constitution of Ireland 1937, Article 28.4 – *Certiorari* refused (2011/1007 JR – McDermott J – 10/09/2013) [2013] IEHC 422

A(AA) v- Minister for Justice and Equality

Deportation

Judicial review – Telescoped hearing – Leave to remain – Evidence – Medical report – No reference to medical report in decision – Whether applicant established on balance of probabilities that report not considered – *GK v Minister For Justice* [2002] 2 IR 418 considered – Refugee Act 1996 (No 17) – Immigration Act 1999 (No 22), s 3 – European Convention on Human Rights Act 2003 (No 20), s 3(1) – *Certiorari* granted (2009/1240JR – Mac Eochaidh J – 19/12/2013) [2013] IEHC 603

J(N) v Minister for Justice, Equality and Law Reform

Deportation

Judicial review – Application for declaration of unconstitutionality – Application for declaration of incompatibility with ECHR – Application to quash deportation order – Fourth applicant evaded deportation subsequent to refused asylum application – Marriage subsequent to deportation order – Delay between making and implementation of deportation order attributable to conduct of fourth applicant – Claim that deportation order of indefinite duration disproportionate – Claim that no principles or policies enacted to govern exercise of power to amend or revoke deportation order – Claim of interference with right to family life – Abuse of asylum laws not tolerated – Principle of proportionality – Whether deportation legislation rationally connected with important state interests – Whether Article 41 rights impaired as little as possible – Whether the effect on rights proportional to the objective where deportation order not time specific in duration – Discretion of Minister – Real and genuine connection with host country – Whether statutory provision operated disproportionately – Whether constitutional obligation to limit deportation order to specific time duration – Whether jurisdiction to interfere with exercise of discretion – Whether decision made in accordance with constitutional principles –Whether insurmountable obstacle to establishing family unit in country of origin – *AO and DL v Minister for Justice* [2003] 1 IR 1; *C(T) v Minister for Justice* [2005] 4 IR 109; *Baby O v Minister for Justice* [2002] 2 IR 169 *and East Donegal Co-Operative v Attorney General* [1970] 1 IR 317 applied – *Heaney v Ireland* [1994] 3 IR 593; *Osheku v Ireland* [1987] ILRM 330; *D(OS) (Infant) v Minister for Justice* [2010] IEHC 390, (Unrep, Clark J, 30/7/2010); *C(R) v Refugee Applications Commissioner* [2010] IEHC 490, (Unrep, Clark J, 15/7/2010); *O(AGA) v Minister for Justice, Equality and Law Reform* [2006] IEHC 251, [2007] 2 IR 492; *O(G) v Minister for Justice, Equality and Law Reform* [2008] IEHC 190, [2010] 2 IR 19; *Afolabi v Minister for Justice* [2012] IEHC 192, (Unrep, Cooke J, 17/5/2012); *Irfan v Minister for Justice, Equality and Law Reform* [2010] IEHC 422, (Unrep, Cooke J, 23/11/2010); *Nunez v Norway* [2011] ECHR 1047; *Dalia v France* [1998] ECHR 5 and *Omoregie v Norway* [2008] ECHR 761 followed – *Fajujonu v Minister for Justice* [1990] 1 IR 151; *Oguekwe v Minister for Justice* [2008] IESC 25, [2008] 3 IR 795; *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Sezen v The Netherlands* (2006) 43 EHRR 30; *Ezzouhdi v France* [2001] ECHR 85; *Yilmaz v Germany* [2003] ECHR 187; *Benhebba v France* [2003] ECHR 342; *Uner v The Netherlands* [2006] ECHR 873; *Emre (No 1) v Switzerland* (App 42034/04) (Unrep, ECtHR, 22/8/2008); *Emre (No 2) v Switzerland* (App 5056/10) (Unrep, ECtHR, 11/10/2011); *Re Haughey* [1971] 1 IR 217; *Pok Sun Shun v Ireland* [1986] 1 ILRM 593; *Kaya v Germany* [2007] ECHR 538; *Antwi v Norway* [2012] ECHR 259; *Cirpaci v Minister for Justice and Equality* [2005] IESC 42, (Unrep, SC, 20/6/2005); *Mehemi v France* [1997] ECHR 77; *Bousarra v France* [2010] ECHR1999; *Bouchelkia v France* [1997] ECHR 1; *Boujlifa v France* [1997] ECHR 83; *Biraga v Sweden* [2012] ECHR 785; *Haghigi v The Netherlands* [2009] ECHR 765; *Konstatinov v The Netherlands* [2007] ECHR 336; *GI v Switzerland* (1996) 22 EHRR 93 and *Aponte v The Netherlands* [2011] ECHR 1850 considered – Aliens Order 1946, reg 13 – Refugee Act 1996 (No 17), ss 11C and 20(2) – Immigration Act 1999 (No 22), s 3 – European Convention on Human Rights Act 2003 (No 20), ss 2 and 5 – Immigration Act 2004 (No 1), s 5 – Council Directive 2005/85/EC, art 11 – European Convention on Human Rights and Fundamental Freedoms 1950, art 8 – Constitution of Ireland 1937, Arts 15.2.1°, 41.1 and 41.3.1° – Relief refused (2011/1066JR – Kearns P – 21/6/2012) [2012] IEHC 244

Sivsivadze v Minister for Justice

Deportation

Service – Proposal to deport – Address

– Whether applicant validly served with proposal to deport – Whether applicant obliged to provide address to registration officer – Whether applicant changed address without notifying minister – Whether service of statutory notices effected – *DP v Governor of the Training Unit* [2001] 1 IR 492 followed – *Leontjava v DPP* [2004] IEHC 58, [2004] IESC 37, [2004] 1 IR 591 considered – Aliens Order 1946 (SI 395/1946), arts 3, 11 and 13 – Immigration Act 1999 (No 22), ss 2 and 6 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 10 – Immigration Act 2004 (No 1), s 14 – Proceedings dismissed (2011/1098JR – Hogan J – 17/7/2012) [2012] IEHC 375
W(Q) v Minister for Justice and Equality

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Application for leave to apply for judicial review – Subsidiary protection – Procedural issues Extension of time – Effective remedy – Consideration of post-dated materials – Automatic suspensive effect – Appeal on merits – Principles of equivalence and effectiveness – Duty to cooperate – Whether selective treatment of country of origin information – Proportionality – Unfair procedures – Whether judicial review effective remedy – Whether breach of duty to cooperate – Whether procedures applied with regard to subsidiary protection unfair – *Efe v Minister for Justice, Equality and Law Reform (No 2)* [2011] IEHC 214, [2011] 2 IR 798; *Donegan v Dublin City Council, Ireland and the Attorney General; Gallagher v the Attorney General* [2012] IESC 18, (Unrep, SC, 27/2/2012); *Muminov v Russia* (2011) 52 EHRR 23; *Hristo Gaydarov (Case C-430/10)*, (Unrep, CJEU, 15/11/2011); *Conka v Belgium* (2002) 34 EHRR 54; *MSS v Belgium* (2011) 53 EHRR 2; *APA (a minor) v Minister for Justice and Equality* [2010] IEHC 297, (Unrep, Cooke J, 20/7/2010); *Meadows v Minister for Justice and Equality* [2010] IESC 3, [2010] 2 IR 701; *Gaydarov v Bulgaria (Case C-430/10),* (Unrep, CJEU, 17/11/2011); *Diouf v Luxembourg (Case C-69/10)*, (Unrep, CJEU, 28/7/2011); *BJSA v Minister for Justice and Equality* [2011] IEHC 381, (Unrep, Cooke J, 12/10/2011); *SL v Minister for Justice and Equality* [2011] IEHC 370, (Unrep, Cooke J, 6/10/2011); *NO v Minister for Justice and Equality* [2011] IEHC 472, (Unrep, Ryan J, 14/12/2011); *PI & Others v Minister for Justice and Equality* [2012] IEHC 7, (Unrep, Hogan J, 11/1/2012); *MM v Minister for Justice and Equality (Case C-277/11)*, (Unrep, CJEU, 22/11/2012); *Sivsivadze & Others v Minister for Justice and Equality* [2012] IEHC 244, (Unrep, Kearns P, 21/6/2012) and *VJ (Moldova) v Minister for Justice and Equality* [2012] IEHC 337, (Unrep, Cooke J, 31/7/2012) considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 4 – European Communities (Asylum Procedures) Regulations 2011 (SI 51/2011) – Refugee Act (Asylum Procedures) Regulations 2011 (SI 52/2011), reg 3 – Immigration Act 1999 (No 22), s 3 – Refugee Act 1996 (No 17), ss 6, 15 and 17 – Directive 2005/85/EC, recital 27, arts 4 and 8 – Directive 2004/83/EC, art 4 – European Convention of Human Rights 1950, arts 3 and 13 – Charter of Fundamental Rights of the European Union, art 47 – Extension of time granted; leave granted on ground relating to fairness of subsidiary protection procedures (2011/853JR – Clark J – 12/10/2012) [2012] IEHC 485
M(JC) v Minister for Justice and Equality

Judicial review

Leave – Extension of time – Good and sufficient reason – Refugee – Asylum – Refugee Applications Commissioner – Refugee Appeals Tribunal – Substantial grounds – Whether good and sufficient reason to grant extension of time to apply for leave to seek judicial review – Whether substantial grounds shown – *SUN (South Africa) v Refugee Applications Commissioner* [2012] IEHC 338, (Unrep, Cooke J, 30/3/2012) considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Refugee Act 1996 (No 17), ss 5, 11, 12, 13 and 17 – Directive 85/2005/EC, arts 23 and 39 – European Convention on Human Rights 1950, art 8 – Leave refused (2009/948JR – Cooke J – 31/7/2012) [2012] IEHC 470
M(M)(a minor) v Refugee Applications Commissioner

Practice and procedure

Application for leave to appeal to Supreme Court – Reference for preliminary ruling to European Court of Justice – Compatibility of tribunal with requirement for 'effective remedy'– Legality of accelerated procedure – Status of tribunal – Totality of remedies available – Availability of judicial review – Independence of tribunal – Removal of members – Protection against external influences – Intention and effect of ruling of Court of Justice – Language used by Court of Justice – Delay – Costs – Whether point of law of exceptional public importance – Whether desirable in public interest that appeal be taken – Whether 'final decision' that of the tribunal – Whether judicial review formed part of 'effective remedy' – Whether to award costs to unsuccessful party – Whether public interest litigation – *HID v Refugee Applications Commissioner (Case C-175/11)* (Unrep, Court of Justice, 31/1/2013); *Glancré Teoranta v An Bord Pleanála* [2006] IEHC 250, (Unrep, MacMenamin, 13/7/2006); *Arklow Holidays Limited v An Bord Pleanála* [2008] IEHC 2, (Unrep, Clarke J, 11/1/2008); *Raiu v RAT* (Unrep, Finlay Geoghegan J, 26/2/2003); *IR v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009); *Curtin v Dáil Éireann* [2006] IESC 27, [2006] 2 IR 556; *Dunne v Minister for Environment* [2007] IESC 60, [2008] 2 IR 775 and *Hewthorn v Heathcott* [1905] 39 ILTR 248 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 99, r 4 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(3)(a) – Refugee Act 1996 (No 17), ss 12, 15(2), 16(2B)(b), 16(11) and 17(1) – Council Directive 2005/85/EC, arts 2(d), 8(2)(b), 8(3), 9(2), 10(1), 15(3)(a) and 39 – Application refused (2008/1261JR & 2009/56JR – Cooke J – 22/3/2013) [2013] IEHC 146
D(HI) v Refugee Applications Commissioner

Practice and procedure

Application for leave to apply for judicial review – Recommendation that refugee status be refused – Application to strike out as frivolous or vexatious – Abuse of process – Inherent jurisdiction of court to strike out – Number of grounds subject of previous judicial decisions – Availability of statutory appeal mechanism – Grounds lacking in clarity – Fear of persecution – State protection – Nature of grounds advanced – Grounds concerning quality of decision – Whether appeal appropriate remedy – Whether abuse of process – Whether ground moot – Whether grounds ill-founded – Whether 'exceptional' case – Whether substantial grounds demonstrated – *Barry v Buckley* [1981] IR 306; *Davey v Bentinck* [1893] 1 QB 185; *Goodson v Grierson* [1908] 1 KB 761; *A(MA) v Minister for Justice and Equality* [2011] IEHC 485, (Unrep, Cooke J, 19/12/2011); *Diallo v Refugee Applications Commissioner* (Unrep, *ex tempore*, Cooke J, 27/1/2009); *BNN v Minister for Justice* [2008] IEHC 308, [2009] I IR 719; *McNamara v An Bord Pleanála* [1995] 2 ILRM 125; *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *KA v Minister for Justice* [2003] 2 IR 93; *HID v Refugee Applications Commissioner (Case C-175/11)* (Unrep, Court of Justice, 31/1/2013); *D(HI) v Refugee Applications Commissioner* [2011] IEHC 33, (Unrep, Cooke J, 9/2/2011); *O(J) v Minister for Justice, Equality and Law Reform* [2009] IEHC 478, (Unrep, Cooke J, 28/10/2009); *Harding v Cork County Council* [2006] IEHC 295, [2008] 4 IR 318 and *TRO v Refugee Applications Commissioner* (Unrep, *ex tempore*, MacEochaidh J, 19/2/2013) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 28, O 84 and O 125, r 1 – Refugee Act 1996 (No 17), ss 2 and 13 – Illegal Immigrant (Trafficking) Act 2000 (No 29), s 5 – Council Directive 2005/85/EC – Proceedings dismissed (2010/1351JR – McDermott J – 19/12/2013) [2013] IEHC 616
O(DO) v Minister for Justice, Equality and Law Reform

Subsidiary protection

Application for judicial review of refusal of subsidiary protection – Allegation that determination failed to deal with core element of claim – Burmese Rohingyen ethnic minority in Bangladesh – Country of origin information – Refugee status refused – Serious harm – Torture, inhuman or degrading treatment or punishment – Credibility – Inauthentic documentation – No finding made that applicant not a member of minority – No evidence of inhuman or degrading treatment of applicant – Scope of subsidiary protection under heading of serious harm – Whether Minister obliged to determine whether applicant, as Rohingya, faced real risk of degrading treatment if returned to Bangladesh – Whether Minister

determined if conditions amounted to degrading treatment – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Refugee Act 1996 (No 17), s 13 – European Convention on Human Rights and Fundamental Freedoms 1950, art 3 – Relief refused (2011/888JR – Cooke J – 25/6/2012) [2012] IEHC 252
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Preliminary point of law – Time limit for bringing application – Application to set aside leave to apply for judicial review pursuant to inherent jurisdiction of court – Challenge to submission of haulage route survey pursuant to variation of planning permission condition – Decision made that submission compliant with condition – Date of impugned decision – Internal document – Written communication of decision – Manner in which decision recorded – Mistaken apprehension as to purpose and effect – Extension of time – Public interest – Whether challenge to impugned decision taken outside statutory time-limit – Whether decision properly recorded – Whether good and sufficient reason to extend time – Whether circumstances that resulted in failure to make application within period limited were outside control of applicant – Whether court should act *proprio motu* to extend time – *Openneer v Donegal County Council* [2005] IEHC 156, (Unrep, Macken J, 13/4/2005); *Adam v Minister for Justice* [2001] 3 IR 53; *Gordon v DPP* [2002] 2 IR 369; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 3; *R v The Chief Constable of North Wales XP Evans* [1982] 1 WLR 1155 and *The State (Keegan) v The Stardust Victims Compensation Tribunal* [1986] IR 642 considered – Planning and Development Act 2000 (No 30), ss 50(6) and 50(8) – Local Government Act 2001 (No 37), s 151 – Application refused and time extended so as to permit decision to be challenged (2011/359JR – Hedigan J – 24/7/2012) [2012] IEHC 300
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Burke v Minister for Health and Children

Delay

Motion to dismiss for want of prosecution on basis of inordinate and inexcusable delay – Appeal – Matters not raised in High Court – Test to determine whether appropriate to dismiss – Balance of justice – Conduct of parties – Prejudice – Unilateral decision to defer proceedings – Added obligation in libel actions – Mitigation – Whether possibility of fair trial imperilled – Whether justice favoured continuation of proceedings or immediate termination with irreversible effect – *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 and *Comcast International Holdings Inc & Ors v Minister for Public Enterprise & Ors; Persona Digital Telephony Ltd & Anor v Minister for Public Enterprise & Ors* [2012] IESC 50 (Unrep, Supreme Court, 17/10/2012) approved – *Stephens v Paul Flynn Ltd* [2008] IESC 4, [2008] 4 IR 31; *Anglo Irish Beef Processors Ltd v Montgomery* [2002] 3 IR 510; *Gilroy v Flynn* [2004] IESC 98, [2005] 1 ILRM 290; *Desmond v MGN Ltd* [2008] IESC 56, [2009] 1 IR 737; *Ewins v Independent Newspapers (Ireland) Ltd & Anor* [2003] 1 IR 583; *Grovit v Doctor & Ors* (Unrep, Court of Appeal, Civil Division, Glidewell J, 28/10/1997); *Clarke v Molyneaux* (1877-78) LR 3 QBD 237; *Hynes-O'Sullivan v O'Driscoll* [1988] IR 436; *Dowd v Kerry County Council & Anor* [1970] IR 27 and *Hogan & Ors v Jones & Ors* [1994] 1 ILRM 512 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 122, r 11 – Constitution of Ireland 1937, Art 40.6.1° – European Convention on Human Rights 1950, Art 10 – Appeal dismissed (1998/4771P and 1998/5045P – SC – 17/12/2013) [2013] IESC 59

Desmond v Doyle; Desmond v Times Newspapers Ltd & ors

Discovery

Application for discovery for production of digital audio recording of District Court hearing – Seeking to quash conviction – Factual issue – Cost implications – Courts of summary jurisdiction – Record of proceedings – Whether just to order production of recording – *R v Crown Court ex p International Sporting Club Ltd* [1982] QB 304; *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 and *O'Connor v Carroll* [1999] 2 IR 160 considered – Summary Jurisdiction (Ireland) Act 1851 (14 & 15 Vict, c 92) – The Courts of Justice Act 1924, (No 10) – Application granted (2011/1153JR – Hogan J – 15/1/2013) [2013] IEHC 4
Hudson v Judge Halpin

Discovery

Application for discovery of documents pursuant to earlier High Court order – Statutory interpretation – Claim that investments held by custodian had been lost – Issue as to whether custodian had cause for concern in placing investments with sub-custodian – Documents relating to selection, appointment and monitoring of sub-custodian – Procurement – Various international entities comprised in corporate structure of party – No possession of or power over documents – Meaning of 'procurement' – Legislative history – Intention of legislature – Natural and ordinary meaning – Use of dictionaries – Whether defendant could procure documents – Whether documents relevant and necessary – *Hansfield Developments v Irish Asphalt Ltd* [2009] IESC 4, (Unrep, SC, 23/1/2009); *Compagnie Financiere du Pacifique v Peruvian Guano Company* [1882] 11 QBD 55; *Brooks Thomas Limited v Impac Limited* [1999] ILRM 171; *Ryanair Plc v Aer Rianta CPT* [2003] 4 IR 264; *Taylor v Anderton* [1995] 1 WLR 447; *Iarnród Éireann v Hallbrooke* [2001] 1 IR 237; *Cork County Council v Whillock* [1993] 1 IR 231; *Northern Bank Finance Corporation Ltd v Charlton* (Unrep, Finlay P, 26/5/1977); *Yates v Ciba Geigy Agro Ltd* (Unrep, Barron J, 29/4/1986); *Rafidain Bank v Agom Universal Sugar Trading Co Ltd* [1987] 1 WLR 1606; *Johnson v Church of Scientology* [2001] 1 IR 682; *Bula Ltd (in receivership) v Tara Mines Ltd* [1994] 1 ILRM 111; *Inspector of Taxes v Kiernan* [1981] IR 117; *Health Service Executive v Brookshore Ltd* [2010] IEHC 165, (Unrep, Charleton J, 19/5/2010) and *Framus v CRH* [2004] IR 20 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 31, r 12 – Rules of the Superior Courts (Discovery) 2009 (SI 93/2009) – Trade Union Act 1941 (No 22) – Trade Union Act 1942 (No 23) – Application granted (2008/10983P – Charleton J – 27/7/2012) [2012] IEHC 298
Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Limited

Discovery

Test to be applied – Relevance – Necessity – Claims made against conduct of bank in respect of which complaint pending before Financial Services Ombudsman – Whether matters in respect of which discovery sought in issue – Whether categories of documents sought relevant – Whether necessary – Whether weight to be attached to documentation previously provided under freedom of information request – *Ryanair plc v Aer Rianta cpt* [2003] 4 IR 264 applied – *Kinsella v Wallace* [2013] IEHC 112, (Urep, Laffoy J, 12/3/2013) considered – *Compagnie Financiere Du Pacifique v Peruvian Guano Co.* (1882) 11 QBD 55; *Hannon v The Commissioners of Public Works* (Unrep, McCracken J, 4/4/2001) and *Taylor v Anderton* [1995] 1 WLR 447 approved – Central Bank Act 1942 (No 22), s 57 and Part VIIB, ch 5 – Order for discovery granted (2013/1915P – Laffoy J – 13/12/2013) [2013] IEHC 573
Kinsella v Wallace

Inspection

Application for inspection – Application for order permitting inspection of computer files to enable drafting statement of claim – Design and supply of computer software – Document management supplier – Termination of agreement – Access to records stored in system – Migration of archived data – No licence to migrate data – Pleadings not closed – Necessity – Strength of case – Delay – Opportunity to cover tracks – Policing of inspection – Whether inspection necessary to enable party make its case – Rules of the Superior Courts 1986 (SI 15/1986), O 50, r 4 – *Bula Limited v Tara Mines Limited* [1987] IR 85 considered – Application refused (2012/13167P– Ryan J – 20/12/2013) [2013] IEHC 623
Softco v DHL Information Services Europe sro

Jurisdiction

Motion to set aside service of summary summons – Application to have Irish proceedings stayed pending determination of proceedings in Italy – Related actions – *Lis pendens* – Exclusive jurisdiction – Jurisdiction clause in distribution agreement – Discretion to stay proceedings – Delay – Whether related actions – Whether delay could correctly be taken into consideration – Whether Irish courts had exclusive jurisdiction – Whether appropriate to grant stay of proceedings – *Erich Gasser GmbH v MISAT Srl (Case C-116/02)* [2003] ECR 1-14693; *Popely v Popely* [2006] IEHC 134, [2006] 4 IR 356; *Gantner Electronic GmbH v Basch Expolitatie Maatschappij BV (Case C-111/01)* [2003] ECR 1-4207; *Tatry v Maciej Rataj (Case C-406/92)* [1994] ECR I-05439 and *Sarrio SA v Kuwait Investment Authority* [1999] 1 AC 32; *Gonzalez v Mayer* [2004] 3 IR 326 considered – Council Regulation EC/44/2001 – European Communities (Civil and Commercial Judgment) Regulations 2002 (SI 52/2002), regs 2, 17, 22, 23, 27, 28 and 60 – Rules of the Superior Courts 1986 (SI 15/1986), O 11A – Stay granted pending decision of Italian court on jurisdiction (2012/1332S and 2012/150COM – McGovern J – 6/11/2012) [2012] IEHC 446
Websense International Technology Ltd v ITWAY SpA

Lodgment

Application for leave to pay sum of money into court in satisfaction of claim – Account of profits – Infringement of copyright in bread packaging – Passing off – Claim for damages or account of profits – Defendant found liable – No knowledge of amount of profit – Nature of relief – Restitutionary damages – Jurisdiction of the court – Construction of rules – Interests of justice – Whether defendant sued for account of profits entitled to pay sum into court pursuant to O 22, r 1 of the Rules of the Superior Courts – Whether claim for account of profits action for damages – *Nichols v Evens* [1883] 22 Ch D 611; *O'Neill v Ryanair Limited* [1992] 1 IR 160; *Larkin v Whitony Limited* (Unrep, SC, 19/6/2002); *House of Spring Gardens v Point Blank Limited* [1984] IR 611; *Hollister Incorporated v Medik Ostomy Supplies Limited* [2012] EWCA Civ 1419, (Unrep, Court of Appeal, 9/11/2012); *Ely v Dargan* [1967] IR 89; *Window & Roofing Concepts Limited v Tolmac Construction Limited* [2004] ILRM 554; *Kearney & Anor v Barrett* [2004] 1 IR 1 – *Dome Telecom v Eircom Ltd* [2007] IESC 59, [2008] 2 IR 726 and *PJ Carroll & Co Ltd v Minister for Health (No 2)* [2005] IEHC 267, [2005] 3 IR 457 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 22, r 1 – Application refused (2011/2925P & 2011/74COM – Kelly J – 12/12/2013) [2013] IEHC 569
McCambridge Limited v Brennan Bakeries

Lodgment

Account of profits – Passing off – Whether claim for account of profits constituting claim for damages – Whether rules of court permitting lodgment in claim for account of profits – Whether rules of court to be interpreted broadly – Whether court having inherent jurisdiction to devise own procedure in interests of justice – Whether party claiming account of profits capable of making informed decision on acceptance of lodgment – Whether defendant to be permitted to make lodgment – *Nichols v Evens* (1883) 22 Ch D 611 approved – *Dome Telecom Ltd v Eircom Ltd* [2007] IESC 59; [2008] 2 IR 726; *Ely v Dargan* [1967] IR 89; *Hollister v Medik* [2012] EWCA Civ 1419, [2013] IP & T 577; *House of Spring Gardens v Point Blank* [1984] IR 611; *Kearney v Barrett* [2004] IEHC 39, [2004] 1 IR 1; *Larkin v Whitony Ltd* (Unrep, SC, 19/6/2002); *My Kinda Town Ltd v Soll* [1983] RPC 15; *O'Neill v Ryanair Ltd (No 2)* [1992] 1 IR 160; *PJ Carroll & Co Ltd v Minister for Health (No 2)* [2005] IEHC 267, [2005] 3 IR 457; *Peter Pan Manufacturing Corporation v Corsets Silhouette Ltd* [1964] 1 WLR 96 and *Window and Roofing v Tolmac Const* [2004] 1 ILRM 556 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 22, r 1 – Application refused (2011/2925P & 2011/74COM – Kelly J – 12/12/2013)
McCambridge Ltd v Brennan Bakeries

Lodgment

Lodgment made in proceedings arising

out of termination of franchise agreement – Lodgement intended to satisfy entirety of claim – Several causes of action in proceedings – Certain of causes of action disallowed – Separate awards of damages in respect of remaining causes of action – Lodgment not compliant with rules – Notice of lodgment failed to specify causes of action in respect of which lodgment made and to specify sum lodged in respect of each cause of action – Award slightly lower than total of lodgment – Whether strict compliance with rule required – Whether lodgment valid – Whether Calderbank letter relevant to question of costs in particular circumstances – Whether submission of defendants that plaintiffs exaggerated and subsequently withdrew aspects of claim relevant in extremely contentious proceedings – Desirability of settlement of proceedings out of court – Exercise of discretion – *Pedley v Cambridge Newspapers Ltd* [1964] 1 WLR 988 and *Norbrook Laboratories Ltd v Smithkline Beecham (Ireland) Ltd* [1999] 2 IR 192 considered – Civil Liability and Courts Act 2004 – Rules of the Superior Courts 1986 (SI 15/1986) O 22, rr 1 and 6 – Partial costs order made (2008/5797P and 2010/6530P – Gilligan J – 30/11/2012) [2012] IEHC 609
Reaney v Interlink Ireland Ltd t/a DPD

Motion

Motion by third party for access to affidavits – Documents generated for purposes of litigation – Right to good name – Right to know nature of allegation – Documents opened in court – Open administration of justice – Whether entitled to access to affidavits – Whether permission of court required – *Breslin v McKenna* [2008] IESC 43, [2009] 1 IR 298 distinguished – *de Búrca v Wicklow County Council* [2009] IEHC 54, (Unrep, Hedigan J, 4/2/2009) followed – Defamation Act 2009 (No 31), s 17 – Constitution of Ireland 1937, Arts 34.1 and 40.3.2° – Applicant entitled to have access to affidavits filed by respondent in present proceedings (2011/2791S – Hogan J – 21/3/2013) [2013] IEHC 242
Allied Irish Bank Plc v Tracey (No 2)

Order

Application to amend perfected order – Tribunal of inquiry into certain planning matters and payments – Appeal pending in Supreme Court – Motion to dismiss aspects of case – Tribunal made costs order – Balance of justice – Failure of fair procedures and constitutional justice – Whether order as drawn up and perfected adequately reflected decision of court – *Murphy v Flood* [2010] IESC 21, [2010] 3 IR 136 considered – Application refused (2005/1367P – Gilligan J – 31/7/2012) [2012] IEHC 346
Redmond v Judge Flood

Parties

Motion to add notice parties to a special proceeding in High Court – Appeal – Direction order of Minister for Finance – Relevant institution – Order to add as notice parties with limitations – Judicial review – Appropriate test for judicial review proceedings – Interlocutory motion – Prejudice – Discretion of court – Delay – Preliminary reference – Principle of national procedural autonomy – Whether interested party directly affected – Whether appropriate to make reference at stage of proceedings – *Barlow v Fanning* [2002] 2 IR 593; *Fincoriz SAS Di Bruno Tassin Din e C v Ansbacher & Co Ltd* (Unrep, Lynch J, 20/4/1987); BUPA Ireland Ltd v Health Insurance Authority [2006] 1 IR 201; *O'Keeffe v An Bórd Pleanála* [1993] 1 IR 39; *Spin Communications T/A Storm FM v Independent Radio and Television Commission* (Unrep, SC, 14/4/2000); *Yap v Children's University Hospital Temple Street Ltd* [2006] IEHC 308, [2006] 4 IR 298; *Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/85)* [1986] ECR 1651; *Grundig Italiana Spa v Ministero delle Finanze (C-255/00)* [2002] ECR I-8003 and *Kempter (Case C-2/06)* [2008] ECR I-411 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 15 r 13 and O 84 – European Communities (Companies) Regulations, 1973 (SI 163/1973), reg 6 – Credit Institutions (Stabilisation) Act 2010 (No 36), ss 2, 7, 9 and 11 – Directive 2009/101/EC, art 10 – Treaty on the Functioning of the European Union, art 267 – Appeal allowed; order permitting appellants to be joined as notice without limitations (2011/239MCA(1) – SC – 19/12/2013) [2013] IESC 58
Dowling & ors v Minister for Finance

Parties

Joinder – Substitution of plaintiff – Assignment of right of action – Whether non-party can be substituted as plaintiff in proceedings – Chose in action – Validity of assignment – Statutory requirements for assignment of right of action – Absence of valuable consideration – Whether assignment valid – Whether valuable consideration necessary for valid assignment –Doctrine of subrogation – Unjust enrichment – Champerty –Whether doctrine of subrogation should apply – Whether plaintiff unjustly enriched –Whether arrangement between plaintiff and non-party champertous – *O'Rourke v Considine* [2011] IEHC 191, (Unrep, Finlay Geogheghan J, 10/5/2011) and *Boscawen v Bajwa* [1996] 1 WLR 328 followed – *Law Society of Ireland v O'Malley* [1999] 1 IR 162 applied – *Fincoriz SAS Di Bruno Tassan Din e C v Ansbacher and Co Ltd* (Unrep, Lynch J, 20/3/1987); *Highland Finance (Ireland) Ltd v Sacred Heart College of Agriculture* [1998] 2 IR 180; [1997] 2 ILRM 87 (HC); [1992] IR 472; [1993] 1 ILRM 260 (SC); *Kennemerland v Montgomery* [2000] 1 ILRM 370; *Orakpo v Manson Investments Ltd* [1978] AC 95; *Southern Mineral Oil Ltd v Cooney (No 2)* [1999] 1 IR 237; *Thema Intl Fund v HSBC Inst Trust Services (Ireland)* [2011] IEHC 357, [2011] 3 IR 654 and *Three Rivers District Council v Bank of England* [1996] QB 292 considered – Rules of the Superior Courts 1986 (SI 15/1986) O 15, rr 2 and 13 – Statute of Frauds (Ireland) Act 1695, s 6 – Supreme Court of Judicature (Ireland) Act 1877, s 28 (6) – Non-party bank substituted for plaintiff (2011/2644P – Edwards J – 28/6/2013) [2013] IEHC 294
Waldron v Herring

Pleadings

Industrial relations dispute – Applicants previously successful in proving purported removal from payroll of Department of Agriculture was unlawful – Appeal from decision that workers not entitled to payment for period between removal from payroll and return to work – Workers on strike – No entitlement of striking workers to pay – Different groups of applicants – Estoppel – Rolling industrial action – Statement of opposition in earlier proceedings had pleaded workers not entitled to pay on different basis – Discretion – Determination of true issues between parties – Whether estopped from relying on strike to justify non-payment due to way in which earlier proceedings pleaded – Whether to exercise discretion to prevent raising issue which should have been advanced in earlier proceedings – *Fuller v Minister for Agriculture and Food* [2003] IEHC 27, (Unrep, Carroll J, 8/7/2003); *Fuller v Minister for Agriculture* [2005] IESC 14, [2005] 1 IR 529; *Thoday v Thoday* [1964] 1 All ER 341; *Carl-Zeiss-Stiftung v Rayner (No2)* [1966] 2 All ER 536; *AA v Medical Council* [2003] 4 IR 302; *Henderson v Henderson* [1843] 3 Hare 100 and *Johnson v Gore Wood & Co* [2002] 2 AC 1 considered – Civil Service Regulation Act 1956 (No 46), s 16 – Appeal allowed (132/2008 – SC – 27/11/2013) [2013] IESC 52
Fuller v Minister for Agriculture, Food and Forestry

Production

Affidavits – Access to documents generated for purposes of litigation – Affidavits opened in court – Privilege – Confidentiality – Right to good name – Reputation – Open administration of justice – Collateral purpose – Whether access to documents permissible – Whether court's permission required for access to documents – *Breslin v McKenna* [2008] IESC 43, [2009] 1 IR 298 distinguished – *de Búrca v Wicklow County Manager* [2009] IEHC 54, (Unrep, Hedigan J, 4/2/2009) followed – Constitution of Ireland 1937, Article 40.3.2° – Access granted (2011/2790S & 2011/2792S – Hogan J – 21/3/2013) [2013] IEHC 242
Allied Irish Bank plc v Tracey

Renewal

Land law – Order for possession – Time to make application for second or subsequent renewal of order – Original order for possession renewed for specified period – Applicant unable to execute order within that period – Application for further renewal after that period expired – Whether applicant permitted to make application – *Bingham v Crowley* [2008] IEHC 453, (Unrep, Feeney J, 17/12/2008) approved – *Cavern Systems* [1984] ILRM 24 considered – *Wymes v Tehan* [1988] IR 717 distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O 8 rr 1 and 2, O 42 rr 5, 17 and 20, O 52 r 2, O 63 rr 1 and 4 – Registration of Title Act 1964 (No 16),

s 62(7) – Application refused (2007/938SP – Dunne J – 03/12/2013) [2013] IEHC 552
Carlisle Mortgages Ltd v Canty

Res judicata

Abuse of process – Settlement of proceedings – Estoppel – Real property – Registration of title – Whether settlement of previous proceedings amounting to final determination of issues – Whether plaintiff estopped by conduct – Whether strike out of "balance of proceedings" rendering matter *res judicata* – *Sweeney v Bus Átha Cliath* [2004] IEHC 70, [2004] IESC 87, [2004] 1 IR 576 applied – *Henderson v Henderson* (1843) 2 Hare 100; *Bradshaw v McMullen* [1920] 2 IR 412; *Trainor v McKee* [1988] NI 556; *McCauley v McDermot* [1997] 2 ILRM 486, and *In re Vantive Holdings* [2009] IESC 69, [2010] 2 IR 188 considered – Appeal allowed; application to strike out proceedings refused (2011/E/21CAT – Peart J – 25/1/2013) [2013] IEHC 16
Carrickfin Trust Limited v Forker

Res judicata

Abuse of process – Rule in *Henderson v Henderson* – Arbitration – Stay – Whether previous hearing on jurisdiction preventing reliance upon arbitration clause – Whether both jurisdiction and arbitration issues ought to have been heard together – *Henderson v Henderson* (1843) 2 Hare 100 applied – *Heifer International Inc v Christiansen* [2007] EWHC 3015, [2008] All ER (Comm) 831 – Rules of the Superior Courts 1986 (SI 15/1986), O 56, r 4 – Regulation 44/2001/EC, arts 23 and 24 – Application refused (2011/4865P – Hedigan J – 9/11/2012) [2012] IEHC 597
Walsh v Newlyn Homes (Portugal) Limited

Security for costs

Appeal of refusal of application for security for costs – Claim for damages for breach of contract – Establishment of *prima facie* defence to claim and plaintiff's inability to pay costs of unsuccessful proceedings – Special circumstances – 'Reason to believe' – Credible testimony – Examination of evidence – Absence of cross-examination – Balance of probabilities – Weight attaching to evidence – Impecuniosity – Assessment of risk – Future uncertain or hypothetical events – Company accounts – Standard of proof – Reference in note in accounts to inability to pay liabilities – Role of cross-examination in interlocutory matters – Usefulness of earnings before interest, taxes, depreciation and amortisation – Whether 'reason to believe' differed from matter being established on 'balance of probabilities' – Whether reason to believe plaintiff would be unable to pay costs if it lost – *IBB Internet Services Ltd v Motorola Ltd* [2011] IEHC 253, (Unrep, Kelly J, 6/7/2011); *IBB Internet Services Ltd v Motorola Ltd* [2011] IEHC 504, (Unrep, Clarke J, 9/11/2011); *IBB Internet Services Ltd v Motorola Ltd* [2012] IEHC 567, (Unrep, McGovern, 2/10/2012); *Usk & District Residents Association Ltd v EPA* [2006] IESC 1, [2007] 4 IR 157; *Inter finance Group Limited v KPMG Peat Marwick* (Unrep, Morris J, 29/6/1998); *IIB Internet Services Ltd v Motorola Ltd* [2013] IEHC 48, (Unrep, McGovern J, 7/2/2013); *Jirehouse Capital v Beller* [2008] EWCA Civ 908, [2009] 1 WLR 751; *Phillips v Eversheds* [2002] EWCA Civ 486, (Unrep, COA, 18/4/2002); *Philip v Ryan* [2004] 4 IR 241; *Boliden Tara Mines v Cosgrove* [2010] IESC 62, (Unrep, SC, 21/12/2010) and *In re McInerney Homes Limited* (No2) [2011] IEHC 4, (Unrep, Clarke J, 10/1/2011) considered – Companies Act 1963 (No 33), s 390 – Appeal dismissed (63/2013 – SC – 27/11/2013) [2013] IESC 53
IBB Internet Services Limited v Motorola Limited

Security for costs

Motion seeking security for costs – *Prima facie* defence – Ability of plaintiff to pay costs in event unsuccessful – Discretion of court – Delay – Inability to discharge costs due to wrongdoing of defendant – Actionable wrongdoing – Causal connection – Specific level of loss – Loss concerned sufficient to affect ability to pay costs – Whether special circumstances established enabling refusal of order – *Connaughton Road Construction Ltd v Laing O'Rourke (Ireland) Ltd* [2009] IEHC 7, (Unrep, Clarke J, 16/1/2009) and *Jack O'Toole Ltd v MacEoin Kelly Associates* [1986] 1 IR 277 followed – Rules of the Superior Courts 1986 (SI 15/1986), O 29 – Companies Act 1963 (No 33), s 390 – Order that plaintiff provide security for costs (2009/8050P – White J – 12/12/2013) [2013] IEHC 643
Leftbrook Ltd v Nicholas

Security for costs

Competition – Action for damages – Claim of abuse of dominant position – Motion for security for costs – Development of private hospital – Unsuccessful negotiations between parties for approval of private hospital by defendant insurers – Plaintiff company ceased operating and wound up – Claim that refusal to approve hospital abuse of dominant position – Inability of plaintiff to pay costs agreed – *Prima facie* defence in existence agreed – Whether special circumstances in existence to justify refusal of security for costs – Whether inability of plaintiff to pay costs due to unlawful conduct of defendant – Whether actionable wrongdoing on part of defendant – Whether causal connection between wrong and practical consequences of wrong for plaintiff – Whether consequence has resulted in loss to plaintiff recoverable in law – Whether loss sufficient to account for plaintiff's inability to meet order for costs – *Prima facie* basis – Evidential deficit – *Usk & District Residents Association Ltd v Environmental Protection Agency* [2006] IESC 1, (Unrep, SC, 13/1/2006) applied – *Interfinance Group Ltd v KPMG Pete Marwick* (Unrep, Morris P, 29/6/1998) and *Connaughton Road Construction Ltd v Laing O'Rourke Ltd* [2009] IEHC 7, (Unrep, Clarke J, 16/1/2009) followed – Companies Act 1963 (No 33), s 390 – Competition Act 2002 (No 14), s 5 – Treaty on the Functioning of the European Union, art 102 – Security for costs granted – (2012/1101P – Cooke J – 12/6/2012) [2012] IEHC 232
CMC Medical Operations Ltd (in liquidation) t/a Cork Medical Centre v The Vluntary Insurance Health Board

Security for costs

Application for interlocutory injunction – Application to restrain breach of franchise agreement – Application for security for costs – Plaintiff holder of master franchise of printing company in Ireland –Allegation that third party company operated with same equipment, staff, directors as franchised business – Allegation that third party company targeted customers of franchised business and accessed and used confidential information – Notice of termination of franchise agreement given – Whether fair *bona fide* question to be tried – Whether third party company setting out to take business from plaintiff and thereby damaging its good will – Whether damages adequate remedy – Whether dispute inherently capable of being addressed by payment of compensation – Whether balance of convenience favoured granting of injunction – Security for costs – Whether *prima facie* defence to claim made out – Whether plaintiffs would not be able to pay costs if claim failed – Discretionary nature of jurisdiction to award security for costs – Security for costs not confined to where impecuniosity caused by defendants – Power of court to have regard to any relevant circumstances causing it to conclude as matter of justice that security for costs order should not be made – Whether allegations of deliberate breach of agreement militated against making of security for costs order – *Hidden Ireland Heritage Holdings Ltd v Indigo Services Ltd* [2005] IESC 38, [2005] 2 IR 115 applied – *Goode Concrete v CRH Plc* [2012] IEHC 116, (Unrep, Cooke J, 21/3/2012) followed – *Irish School of Yoga Ltd v Murphy* [2012] IEHC 218 (Unrep, Laffoy J, 28/5/2012) considered – Applications refused (2013/1796P – Birmingham J – 7/12/2013) [2013] IEHC 331
KM Franchising Ltd v Tedco Ltd

Stay

Motion to vacate stay – Notice for particulars – Whether full and comprehensive reply to particulars – *Foss v Harbottle* [1843] 2 Hare 461 and *ASI Sugar v Greencore* (Unrep, Finnegan P, 16/2/2004) considered – Relief granted (2009/9729P – O'Malley J – 13/3/2013) [2013] IEHC 629
McAteer v Burke & ors p/a Adams Corporate Solicitors

Stay on proceedings

Jurisdiction of court to manage cases – Principles to be applied – Factors to be taken into account – Application by defendant to stay proceedings pending conclusion of other proceedings against same defendant – Whether fair to plaintiff to stay proceedings – Whether waste of court resources for proceedings to come on for trial pending conclusion of other case – *Kalix Fund Ltd v HSBC Institutional Trust Services (Ire) Ltd* [2009] IEHC 457, [2010] 2 IR 581; *Cork Plastics*

v Ineos UK Ltd [2008] IEHC 93, (Unrep, Clarke J, 7/3/2008); *Re Norton Health Care Ltd* [2005] IEHC 411, [2006] IR 321 and *Kelly v. Lennon* [2009] IEHC 320, [2009] 3 IR 794 approved – *James Elliot Construction Ltd v Irish Asphalt Ltd* [2014] IEHC 208, (Unrep, Ryan J, 11/4/2014) and *Hansfield Developments v Irish Asphalt Ltd* [2010] IEHC 330 (Unrep Gilligan 10/3/2010) considered – Limited relief granted (2010/1138P – Birmingham J – 27/4/2012) [2012] IEHC 614
Charles Gallagher Limited v Irish Asphalt Limited

Strike out

Motion to strike out proceedings – Motion in alternative seeking security for costs – Insolvency of plaintiff company – Preservation of company for purposes of litigation – Negligence in conduct of proceedings – Financial viability of plaintiff company – Special circumstances where inability to discharge costs flows from wrong of defendant – Date on which financial viability of company examinable – Onus of proof – Evidentiary requirements – Collateral attack of previous judgment of court of competent jurisdiction – Whether action vexatious and frivolous – Whether special circumstances such as to resist order for security for costs – *Jack O'Toole Ltd v MacEoin Kelly Associates* [1986] IR 277 and *Connaughton Road Construction Limited v Laing O'Rourke Ireland Limited* [2009] IEHC 7, (Unrep, Clarke J, 16/1/2009) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 19, rr 27 and 28 – Action of plaintiff struck out (2010/4539P – White J – 12/6/2013) [2013] IEHC 627
Rayan Restaurant Limited v Kean p/a Keans Solicitors

Summary judgment

Application for summary judgment – Loan – Defence that insufficient or no notice given prior to issue of repayment demand – Breach of loan agreement clause – No money to repay debt – Non-merger clause – Technical point – Clause required that prior notice of breach must have been given before any demand made for early repayment – Whether demands for repayment valid – Whether defence on the merits – Whether defendants should have been given notice of default before letter of demand – *Cripps (Pharmaceuticals) Ltd v Wickenden and Another* [1973] 2 ALL ER 606; *Sheppard & Cooper Ltd v TSB Bank plc* [1996] 2 ALL ER; *Baroda v Panessar* [1986] 3 ALL ER 751 and *Hawtin & Partners Ltd v Pugh* (Unrep, Walton J, 25/6/1975) considered – Application granted (2012/1271S – McGovern J – 27/7/2012) [2012] IEHC 323
Allied Irish Banks plc v Moran

Summary judgment

Application for liberty to enter final judgment – Construction contractor – Sub-contractor – Agreement reached as to amount of money owed – Entitlement to sue reserved if not paid within six months – Agreement to pay monies once same received from developer – Whether real or *bona fide* defence – Whether real defence asserted – *Harrisrange Ltd v Michael Duncan* [2003] 4 IR 1 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 37 – Application refused; adjourned to plenary hearing (2010/5967S – Mac Eochaidh J – 31/7/2012) [2012] IEHC 345
Winthrop Engineering Limited v David Flynn Limited

Summary judgment

Motion to set aside refusal to enter final judgment – Evidence – Bank books – Applicable rules to prove books in court – Burden of proof – Whether *prima facie* case made out by plaintiff – Whether uncertainty regarding debt owed – Test to be applied – *Moorview Developments Ltd v First Active Plc* [2010] IEHC 275, (Unrep, Clarke J, 9/7/2010); *Bank of Scotland Plc v Fergus* [2012] IEHC 131, (Unrep, Finlay Geoghegan J, 30/3/2012) and *Bank Of Scotland Plc v Stapleton* [2012] IEHC 549, (Unrep, Peart J, 29/11/2012) approved – *O'Gorman v Long* (1959) 93 ILTR 3 distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O 63, r 9 – Bankers Book Evidence Act 1879 (57 & 58 Vict c 56), ss 3, 4, 5 and 9 – Central Bank Act 1989 (No 16), s 131 – Order plaintiff entitled to judgment (2012/1950S – Ryan – High – 16/09/2013) [2013] IEHC 631
Bank of Ireland v Keehan

Summary judgment

Defence – Principles to be applied – Applicable standard of proof – Contract for supply of laptops to defendant – Motion for summary judgment – Dispute as to whether or not laptops received by defendant – Whether *bona fide* defence – *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607 applied – *First National Commercial Bank v Anglin* [1996] 1 IR 75; *Banque de Paris v de Naray* [1984] 1 Lloyd's Rep 21 and *Harrisrange Ltd v Duncan* [2003] 4 IR 1 approved – *National Westminster Bank Plc v Daniel* [1993] 1 WLR 1453; *Standard Chartered Bank v Yaacoub* (Unrep, Court of Appeal (Civil Division), Lloyd J, 3/8/1990) and *Irish Dunlop Co. Ltd v. Ralph* (1961) 95 ILTR 70 considered – Motion granted (2012/4564S – Ryan J – 31/7/2013) [2013] IEHC 376
BT Business Direct Limited Trading as Dabs4work.ie v Montara Limited trading as Total Import Solutions

Summary judgment

Leave to defend – Arguable or *bona fide* defence – Debt – Guarantee – Whether principal debt paid – Whether guarantees extinguished or continuing – Whether arguable grounds of defence raised – Whether summary judgment ought to be granted – *Aer Rianta v Ryanair* [2001] 4 IR 607 and *First National Bank v Anglin* [1996] 1 IR 75 applied – *Harrisgrange Ltd v Duncan* [2003] 4 IR 1 and *Danske Bank A/S (trading as National Irish Bank) v Durkan Homes* [2010] IESC 22, (Unrep, SC, 22/4/2010) considered – Application for summary judgment refused (2011/3507S – Ryan J – 19/9/2012) [2012] IEHC 400
Danske Bank A/S trading as National Irish Bank v Kirwan

Summary judgment

Defence – *Bona fide* – Obligations under Consumer Credit Act 1995 – Two hire purchase agreements and one loan entered into between plaintiff and consumer defendant – Failure to make repayments – Motion for summary judgment – Whether interest in first hire purchase agreement assigned to company – Whether plaintiff entitled to judgment of principal sum –Whether *bona fide* defence plaintiff not entitled to interest – Shares in plaintiff given as security for loan – Shares not sold by plaintiff before becoming worthless – Whether plaintiff entitled to pursue defendant personally for loss – Whether *bona fide* defence plaintiff must exercise reasonable duty of care in choosing time to sell security and failed to do so – Whether *bona fide* defence interest claimed miscalculated by plaintiff – Whether potential counterclaim served as *bona fide* defence – Whether stay on summary judgment appropriate where potential counterclaim to be brought – Whether failure to make payments in second hire purchase agreement amounted to repudiation of agreement – Whether plaintiff required to serve notice of termination – Whether plaintiff complied with requirement to serve notice – Whether just and equitable to dispense with requirement to serve notice – Whether defendant furnished with copy of either first or second agreement within 10 days – Whether *bona fide* defence agreements unenforceable – *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607 and *Prendergast v Biddle* (Unrep, SC, 31/7/1957) applied – *Harrisrange Ltd v Duncan* [2003] 4 IR 1; *Irish Life and Permanent plc trading as Permanent TSB v Hudson* [2012] IEHC 11, (Unrep, Ryan J, 13/1/2012); *China & South Sea Bank v Tan* [1990] 1 AC 536 and *Moohan v S & R Motors (Donegal) Ltd* [2007] IEHC 435, [2008] 3 I.R. 650 approved – *Bank of Ireland v Flanagan* [2012] IEHC 197, (Unrep, Ryan J, 14/5/2012); *Watts v Shuttleworth* (1860) 157 ER 1171; *Palk v Mortgage Services Funding Plc* [1993] Ch 330 and *Standard Chartered Bank v Walker* [1982] 1 WLR 1410 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 2, r 1 – Consumer Credit Act 1995 (No 24), s 2, 9, 10, 30, 31 to 37, 36, 38, 50, 54, 58, 62 and 63 – Motion granted in part; portion of claim remitted to plenary hearing (2012/2015 S – Herbert J – 30/07/2013) [2013] IEHC 378
Irish Bank Resolution Corporation Limited v Drumm

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aspirational and did not have status of legal obligation – Parol evidence rule –Whether loans repayable on demand – Whether arguable defence disclosed – *Macklin v Graecen & Co* [1983] IR 61 and *O'Neill v Ryan* [1992] 1 IR 166 applied – *GE Capital Woodchester Ltd v Aktiv Kapital Asset Investment Ltd* [2009] IEHC 512, (Unrep, Clarke J, 19/11/2009) followed – *City and Westminster [1934] Properties Ltd v Mudd* [1958] 2 All ER 733 and *AIB v Galvin Developments (Killarney) Ltd* [2011] IEHC 314, (Unrep, Finlay Geoghegan J, 29/7/2011) distinguished – Summary judgment granted (2012/768S and 2012/769S – McGovern J – 27/6/2012) [2012] IEHC 248
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BILLS INITIATED IN DÁIL ÉIREANN DURING THE PERIOD 11TH NOVEMBER 2014 TO THE 27THJANUARY 2015

[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.

Appropriation Bill 2014
Bill 112/2014

Climate Action and Low Carbon Development Bill 2015
Bill 2/2015

Consumer Protection (Regulation of Credit Servicing Firms) Bill 2015
Bill 1/2015

Family Home Mortgage Settlement Arrangement Bill 2014
Bill 118/2014
[pmb] Michael McGrath

Health (Amendment) Bill 2014
Bill 114/2014

Redress for Women Resident in Certain Institutions Bill 2014
Bill 111/2014

Road Traffic Bill 2014
Bill 10/2014

Road Traffic (No. 2) Bill 2014
Bill 113/2014

State Boards (Appointments) Bill 2014
Bill 104/2014
[pmb] Sean Fleming

Teaching Council (Amendment) Bill 2015
Bill 3/2015

Thirty-fourth Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2014
Bill 115/2014
[pmb] Thomas Pringle

Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015
Bill 5/2015

Thirty-fourth Amendment of the Constitution (Right to Personal Autonomy and Bodily Integrity) Bill 2014
Bill 105/2014
[pmb] Clare Daly

Thirty-Fourth Amendment of the Constitution (Peace and Neutrality) Bill 2014
Bill 117/2014
[pmb] Mick Wallace

Thirty-fifth Amendment of the Constitution (Age of Eligibility for Election to the Office of President) Bill 2015
Bill 6/2015

Water Services Bill 2014
Bill 106/2014

Water Services (Amendment) (No. 2) Bill 2014
Bill 107/2014
[pmb] Mattie McGrath

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Adoption (Identity and Information) Bill 2014
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[pmb] Averil Power, Jillian van Turnhout and Fidelma Healy Eames

Central Bank (Amendment) Bill 2014
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Bill 116/2014

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Bill 4/2015

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Finance Bill 2014
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Merchant Shipping (Registration of Ships) Bill 2013
Bill 139/2013
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Enacted – 25/12/2014

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Bill 59/2014
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Report Stage – Dáil

Social Welfare and Pensions (No. 2) Bill 2014- changed from Social Welfare Bill 2014
Bill 97/2014
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Report Stage – Dáil
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Enacted- 25/12/2014

Sport Ireland Bill 2014
Bill 85/2014
Committee Stage – Dáil

Water Services Bill 2014
Bill 106/2014
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Enacted – 28/12/2014

Workplace Relations Bill 2014
Bill 79/2014
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Passed by Dáil Éireann

Central Bank (Amendment) Bill 2014
Bill 108/2014
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Education (Miscellaneous Provisions) Bill 2014
Bill 61/2014
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Passed by Seanad

Health Insurance (Amendment) Bill 2014
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Health (Miscellaneous Provisions) Bill 2014
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Enacted on 19/11/2014

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Passed by Seanad
Enacted – 25/12/2014
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Bill 49/2013
Committee Stage – Seanad

Valuation (Amendment) (No. 2) Bill 2012
Bill 75/2012
Report Stage – Seanad
Passed by Seanad

FOR UP TO DATE INFORMATION PLEASE CHECK THE FOLLOWING WEBSITES:

Bills & Legislation

http://www.oireachtas.ie/parliament/

Government Legislation Programme updated 14th January 2015

http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Innocence Project 2014

Introduction

For the last number of years, the Bar Council has run an Innocence Project USA programme. With the support of the External Relations Committee, Inga Ryan, the Bar's CPD Manager and Susan Lennox BL have run the programme, notwithstanding recent tightening of precious funding belts.

We continue to do so because participants consistently tell us of life changing experiences and they return with rare insights to share with colleagues. Some of the stories recounted have been horrifying, others are about differences in our legal systems, but all are fascinating! In 2014, Christina Daly BL, Michael McCormack BL and Adrian Harte BL participated in the scheme and below are articles about the experience.

The Ohio Innocence Project

Christina Daly BL.

As I sit here writing this, I am awaiting the release of one of the Ohio Innocence Project (OIP) clients, Ricky Jackson aged 57.

I thought long and hard about what way to word my experience, an experience I was privileged to have. Writing about my personal experience is one thing but I feel that writing about anything other than what happened with Ricky Jackson would not be reflective of the true work, emotion and persistence of OIP and all involved.

By the time you read this, his release will have been global news, it already has been picked up by our national news and other countries from Iceland to Sydney. His online Ohio Correctional Department record is now deleted. Why? Ricky Jackson is 57 years old. Today on his release, he will be the longest USA incarcerated wrongfully convicted person. He has spent 39 years in prison for a crime he did not commit. A record no one would ever want.

Mr Jackson - It will be Mr for this piece, as this will be the first time in many years he will be addressed by any other way than a prison number. Mr Jackson was convicted along with two other men, Ronnie (17) and Wylie Bridgeman (20) for the 1975 murder of Harold Franks, a Cleveland-area money order salesman, upon 12-year-old Eddie Vernon's eye witness testimony. Ricky Jackson was the alleged shooter, and with him was Wylie Bridgman, whilst it was claimed that Ronnie Bridgeman was the getaway driver of a distinctive two tone green car.

All three friends lived on the same block. None had previous convictions and all were seen in the community as good, young men. Mr Jackson had been honourably discharged from the US Marines on medical grounds and was just back home. During the Autumn of 1975, Wiley, Ricky, and Ronnie were tried separately, convicted, and sentenced to death for the murder of Harry Franks. After Arthur Avenue, their home street, the next address the Bridgeman brothers and Ricky Jackson shared was Cell Block J at the Southern Ohio Correctional Facility in Lucasville — Ohio's death row at the time. Their cases were tried as capital cases. Mr Jackson was originally sentenced to death but that sentence was vacated due to a paperwork error. The Bridgemans remained on death row until Ohio declared the death penalty unconstitutional in 1978.

The State did not make their case on any physical evidence as there wasn't any. The gun used to kill Franks was never recovered; the victim's briefcase never turned up; the green getaway car spotted speeding from the scene was never found, nor was a link established between the vehicle and the defendants. The only evidence taken from the scene was a plastic-coated paper cup police guessed contained the acidic substance splashed in Franks' face in the course of the robbery. But after initial tests turned up no fingerprints, the cup disappeared. Instead of concrete evidence, the state produced a witness: a 12-year-old boy from the neighbourhood named Edward Vernon. The area paperboy, Vernon, had large, thick glasses and a quiet demeanour. He was the kind of polite kid people forgot about after he was gone from the room, it was recalled by people from the area in the 2011 Cleveland Scene Article by Kyle Swenson.

The importance of this article was that Mr Swenson brought his six months of investigation work, hundreds of old pages, court records, and new interviews with people from the neighbourhood to the Ohio Innocence Project. He wrote the article "What the boy saw". At the time of the article, the one person who won't discuss the events of 1975 is Edward Vernon. Contacted by Cleveland Scene for this story, he declined to discuss the crime or his testimony. "I'm not even going to talk about it," he says. "As far as I'm concerned, it's a done deal."

Ohio Innocence project contacted and obtained testimony from Karen Smith. She was a 16 year girl in the Cut -Rite shop at the time of the shooting, she passed two black men prior to entering the shop and stated it was not Mr Jackson or Bridgeman. She did not identify them in a line up. When interviewed in 2011, she still maintains the men she passed that afternoon outside the Cut-Rate were not Ronnie Bridgeman and Ricky Jackson. "Over the years, it's kind of bothered me that people didn't take my word to be the truth," she says in the article.

But this is not new evidence and therefore would not be enough to have the matter brought before the Courts. In 2013, after an illness and some encouragement from his pastor, Eddie Vernon now 53, finally made contact with Ohio Innocence Project. He recanted his original testimony and agreed to finally give his testimony in a Court. He had never actually witnessed the crime. There was no other evidence linking Mr Jackson to the killing.

Ohio Innocence Project in March 2014 filed a motion for a new trial after Mr Vernon told a pastor he was on a school bus at the time of the murder, which other witnesses have confirmed.

On Wednesday 19th November 2014 after two days at hearing, the unbelievable happened.

Unlike what one might perceive, it is almost impossible to have the US/Ohio authorities admit they were wrong. I say "almost" as Ohio IP will be freeing their eighteenth wrongfully convicted person today, since its inception in 2004. This is a phenomenal record in the face of constant adversity. OIP struggles daily with police departments and prosecuting attorneys to build their cases, get into Court and to be heard. I was lucky to be just a small part of that process.

Cuyahoga County Prosecutor, Timothy McGinty, said in court on Tuesday that without an eyewitness, there was not much of a case. "The state is conceding the obvious," he said.

He was released, 21st November, 2014, at 9 am - 2 pm Irish time, and my input continues with OIP and funding for Mr Jackson upon his release by way of idea for a gofundme page in the name of Ricky Jackson and spreading the word online. Every cent goes to him to help set up his life. He will not be entitled automatically to compensation or damages. The Director of the Ohio Innocence Project, Professor Mark Godsey, through his endless campaigns for statutory provisions for those wrongful convicted, has secured a statutory entitlement to $40,333 for every year of wrongful incarceration. This amount, the State of Ohio recognizes in lieu of wages per annum and not for compensation. It will take a number of years to get even the statutory entitlement. OIP are currently requesting that the State of Ohio use their discretion as allowed under the act, to issue a declaration of innocence. This will expedite Mr Jackson's claim. Until then, he is being supported by OIP and the funds raised by the gofundme campaign. Mr Jackson lost his freedom when Gerald Ford was the US president, AIDS was unknown, the Berlin wall was still intact, as was the USSR, John Lennon was alive, not to mention the technological advances and the invention of the worldwide web.

In a show of support, a number of other Ohio Innocence Project exonerees, Raymond Towler (28.5 years) Dean Gillespe (20 years), Robert McClendon (17 years), and Clarence Elkins (6 .5 years) as well as everyone involved in the Ohio Innocence Project travelled to Cleveland to support the release of Mr Jackson. It has been a privilege and honor to be a part of this and in OIP. No matter how small a part of their work, you are forever in their community.

Mr Jackson leaves prison with nothing, only his freedom, more than enough for him.

http://www.gofundme.com/rickyjackson
http://www.gofundme.com/wiley

Mid-Atlantic Innocence Project/Are There Any Wrongful Convictions in Ireland?

Michael McCormack BL

Introduction

I recently spent three months working with the Washington DC-based Mid-Atlantic Innocence Project[1] assisting with the investigation and litigation of potential wrongful convictions. DC is a vibrant city, and is a very pleasant place to spend a few months – even though the US Supreme Court and Congress are in recess over the summer, there is still no mistaking that it is a significant centre of global power. I would recommend the opportunity of working with MAIP to anyone with an interest in criminal law or constitutional law, whether or not they are currently practising in the area. Having experience of both civil and criminal litigation in Ireland, I found the Innocence Project to be a distinct area of legal work, involving skills from both areas of practice, and involving considerably more investigative work than lawyers in Ireland would generally conduct.

Despite the significant differences between the Irish and US systems, the characteristics which most frequently give rise to wrongful convictions are common to both systems and properly combatting wrongful convictions requires systemic reform. For example, eyewitness identification evidence is inherently unreliable, but this is increased by police procedures which are not sufficiently impartial, and which can reinforce a witness's confidence in an initially unsure identification. There is little that cross-examination can achieve in obtaining the truth from a witness who believes honestly and completely in their false identification. What is really required to reduce the unreliability of identification evidence is the reform of police procedures. John Berry BL, in an article in the July 2014 issue of the *Bar Review* reviews various scientific studies into identification procedures and outlines some simple recommendations for reform, which would require no legislative intervention. Hopefully the new Garda Commissioner will consider such reforms.

It is very difficult to say how many wrongful convictions occur in Ireland. Systematic analysis of wrongful convictions is particularly useful to discover the most common causes. In a 2011 book, *Convicting the Innocent*, Brandon Garrett, an American lawyer, analysed the first 250 DNA exonerations achieved by the New York Innocence Project according to the type of unreliable evidence used to convict. Although the sample size would be considerably smaller in Ireland, a similar analysis of wrongful convictions would be very useful to highlight the areas in which reform or greater vigilance is most required.

Police and prosecutor misconduct

We are fortunate in Ireland to have a police force that is generally respected by society, notwithstanding some significant recent controversies. Although some of those controversies have suggested inappropriate political influence in An Garda Síochána, the force itself, in contrast to some forces in the US, is non-political in that police chiefs are not elected[2] and are therefore not motivated by the need to frequently seek re-election. However, misconduct and corruption do not of themselves *directly* result in wrongful convictions – it is unreliable or unavailable evidence at trial which results in the convictions. Almost all of the various types of evidence discussed below can arise accidentally through poor procedures or as a result of misconduct or corruption.

1 www.exonerate.org

2 Although the system for promoting Gardaí to senior positions should arguably be more removed from government than it currently is.

Disclosure

A frequent feature of Innocence Project cases is a breach of the prosecution's duty to disclose all relevant evidence to the defence. Prosecutors in the US have broadly similar disclosure responsibilities to prosecutors in Ireland, but in my limited experience of US criminal cases, I felt that that responsibility is not taken as seriously there as it should be. This is possibly a consequence of one of the other significant differences between the two jurisdictions – the dual prosecution and defence role of many criminal barristers in Ireland, which possibly cultivates a greater commitment to the concept of equality of arms, and therefore greater respect for the duty to disclose all relevant evidence.

However, wrongful convictions do occur in Ireland as a result of non-disclosure. One of the most recent wrongful convictions in Ireland is that of Martin Conmey, wrongfully convicted of manslaughter in 1972, in which the Court of Criminal Appeal recently found that there had been non-disclosure of "radically inconsistent" earlier statements made by prosecution witnesses.[3]

Another characteristic of the US system which struck me was the extent of use of private investigators by the defence – it seemed to me to be unusual for the defence not to use an investigator in any serious case. Even if Irish criminal defence practitioners have complete faith in the Gardaí's and the DPP's commitment to seeking out, preserving, and disclosing all relevant evidence, I think that the services of a defence investigator could go some way towards reducing the incidence of wrongful convictions and perhaps funding for such investigations should be made available in appropriate cases in Ireland.

Reform of Evidence Retention Provisions

A further weakness in the wrongfully convicted person's weaponry is that Ireland currently provides no specific right to DNA testing or re-testing for convicted people. Even in the US, where most states now have statutory regimes for post-conviction preservation and testing, orders for preservation and testing can be difficult to obtain. This issue was recently before the High Court in the case of *John McDonagh v. Commissioner of An Garda Síochána & ors*[4], in which Mr. Justice McDermott has reserved judgment.

Even if an order for testing or re-testing were obtained, the recently enacted Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 makes no provision for the mandatory retention of biological samples from crime scenes, despite recommendations by the Law Reform Commission[5] and the Irish Innocence Project. Re-testing cannot happen unless crime scene samples are available. The retention of the DNA profiles developed from such samples is insufficient, as it is inherent in the nature of forensic testing that methods will be developed which extract DNA profiles from samples which previously yielded insufficient or no profiles. We should not have to rely on the discretion of the Gardaí or Forensic Science Ireland to retain samples after a person's conviction.

False Testimony

Witnesses sometimes fabricate testimony. To give an Irish example, in the case of Michael Hannon, who was convicted by a jury in 1999 of sexually assaulting a ten year old child, it transpired that the alleged victim had fabricated her entire complaint because of a land dispute between her family and Mr Hannon's. Mr Hannon's conviction was quashed in 2008 and declared a miscarriage of justice in 2009, opening the way for Mr Hannon to seek compensation. The case was described by Mr Justice Hardiman as "most alarming and disturbing".[6]

Perjury should probably be prosecuted more frequently in Ireland (Garda figures suggest that the "detection" of the offence of perjury is in the single digit figures per year).[7] The excuse sometimes offered is that it is a difficult offence to prove. This is a poor excuse – lots of offences are difficult to prove, and more prosecutions and convictions for perjury may actually have some influence on the successful prosecution of offences generally. Furthermore, many jurisdictions, in particular the US, but also the UK, manage to regularly and successfully prosecute perjurers. A real possibility of prosecution may be more effective to encourage witnesses to tell the truth than the oath or affirmation. However, prosecuting authorities must be willing to grant immunity from prosecution for perjury in some cases, where it is necessary to encourage perjurers to recant their false testimony and secure the exoneration of a wrongfully convicted person.

Conclusion

Several potential causes of wrongful convictions are present in the Irish criminal justice system and it would be a mistake to suppose that wrongful convictions in this jurisdiction are so rare as to not be a concern. There is therefore a need for continual vigilance to reduce that risk. This should take the form of both improvement of procedures (such as identification parades referred to above) and a willingness to review convictions when required (and the legislative structures to do so).

Black Robes and Lawyers

Adrian Harte BL

It was Monday the 25th August 2014 and the legal giants of the Duke Wrongful Convictions clinic were gathering outside their prestigious law school in the glorious morning sunshine for what was truly going to be another remarkable achievement for them. This was the day when Mr. Michael Alan Parker who was wrongfully convicted in January 1994 on 8 charges of first degree sexual offences and 4 charges of taking indecent liberties with a minor, would have all his

3 *DPP v. Conmey* [2014] IECCA 31

4 2013/72 JR

5 Specifically the LRC noted that *samples* are data-rich, whereas the mere *profiles* developed from them are not, and it recommended "that where biological samples are found at the scene of a crime they should be retained, principally as a safeguard in the event that an individual convicted of the offence to which the sample relates alleges that a miscarriage of justice has occurred and wishes to challenge the veracity of the original evidence."

6 *DPP v. Hannon* [2009] IECCA 43

7 Remy Farrell SC discusses the offence and the low rate of prosecutions in the *Irish Independent* on the 9th August 2014.

charges dismissed and be given back his liberty. Parker, his mother, and seven others were indicted on multiple counts of child sex abuse involving his three children who alleged the Defendants had taken part in acts of the most shocking Satanic ritualised abuse on them during a time when the United States was inundated with trials of this kind, the most notorious being the "Little Rascals Daycare trial" which had taken place just a few years earlier in another part of the state.

Among all the nine defendants charged in this case, Parker was the only one to go to trial to try and prove his innocence. Parker's mother and the remaining 7 defendants had all their charges put on hold during his trial, but when Parker was found guilty on all counts and given 8 consecutive life sentences on the first degree sexual offences plus an additional 40 years for taking indecent liberties with a minor, Parker's elderly mother, clearly worried about spending the rest of her life behind bars accepted a plea bargain, pleading guilty to one count of taking indecent liberties with a minor in return for a probationary sentence. After Mr. Parker's conviction was upheld on appeal, the remaining 7 defendants had all their charges dropped on the ground that the children had recanted during Mr. Parker's trial.

As the Duke Law motorcade cruised down the highway on the 4 hour drive to the picturesque town of Asheville in the mountains where the hearing was going to take place, "black robes and lawyers" a song written by singer songwriter William Michael Dillon, who himself was wrongfully convicted of murder and later exonerated, sounded on the airwaves. The lyrics of this song emphasised how important it is to have someone stand up for you when all the odds are stacked up against you. The Duke Wrongful convictions clinic together with outside Attorney Mr. Sean Devereux had never lost faith in trying to free Michael Parker and had championed his cause tirelessly since Mr. Parker had asked them for their help back in 1999. The Duke Wrongful Convictions Clinic comprises of Professor Theresa Newman, Professor Jim Coleman, Mr. Jamie Laou, Supervising Attorney and a mix of current and former students from the law school who actively take part in the preparation, investigation and research into the filing of the many motions for appropriate relief for the people who are lucky enough to have Duke take on their case. Winning someone back their liberty is by no means an easy task. One of Mr. Parker's three children had recanted her trial testimony several years after their father's conviction and admitted to being put under pressure to testify against him in a number of ways, including by their mother during a complicated marital breakup. The other two Parker children have not recanted, but their accusations were utterly undermined by expert and other evidence included in the motion filed on Mr. Parker's behalf.

I think it's fair to say Mr. Parker holds no grudges against his children for saying what they said but is more so disappointed with the system for not properly investigating the children's allegations and allowing his children be used as fuel for the hysteria of unchecked and unfounded child sex abuse claims that engulfed the United States in the early 1990's.

At 2pm, the ceremonial courtroom that was allocated for this remarkable event was beginning to fill up with all those who had worked on the case, media and some other folk who were there for the proceeding. His Honour Judge Marvin Pope of the North Carolina Superior Court was presiding, and from an early stage following the filing of the motion, he had made it known that he believed the basis for Mr. Parker's conviction was very weak. In post-conviction work in the United States, the lawyers from both sides often engage with the Judge from the outset and correspond through email to discuss how the case is progressing. Judge Pope had taken a remarkable interest in this case from the very start and engaged fairly with both sides throughout. Mr. Parker was led in to the courtroom in what would be his last time in handcuffs (so we thought and hoped) and sat down next to his lawyers with Professor Newman holding his hand tightly. The case of Michael Alan Parker was then called into order and all the parties introduced themselves. Mr. Devereux petitioned the court for a dismissal of all charges against Mr. Parker. The Prosecutor neither objected nor consented for various reasons, but Judge Pope knew where this was going, as he had already read the motion in great detail and decided he was going to grant the requested relief. He asked a few short questions and in an instant dismissed all the charges against Mr. Parker.

Something that will always stick in my head is when Judge Pope remarked to Mr. Parker at the end of the brief hearing "good luck to you. Sir," which one could say stopped short of an apology on behalf of the justice system. The mood in the court had now changed from nervousness to one of celebration; the justice system had shown its true colours and had worked, well with one minor glitch: Mr. Parker could not walk out the front door of the courthouse as everyone wanted, but would have to walk through the gates of the prison the following day as the paperwork to order his release from the Craggy Correctional Institution was not available that same day.

"One more night isn't going to put me up or down," laughed Mr. Parker as he was ironically for the second time in his life taken back to prison an innocent man. Mr. Parker was released the following day and does all the things we take for granted like look at the stars at night and ride a bicycle.

It is truly amazing to know that the hard work put into this project by faculty, students and alumni lead to the freedom of the many wrongfully convicted people in the United States. I would like to thank the Duke Wrongful Convictions Clinic and the Bar Council of Ireland for giving me this life changing opportunity. ■

Enforcement of Adjudicators' Decisions in Northern Ireland

THE HONOURABLE MR JUSTICE WEATHERUP*

Introduction

There are statutory schemes for interim decisions on construction disputes in Northern Ireland as well as in England and Wales and in Scotland and a similar statutory scheme is also to be introduced in Ireland.

The underlying social policy was to oil the financial wheels in the construction industry by facilitating cash flow for contractors and avoiding a breakdown of relations and a standstill in the construction works. It is in effect a form of ADR, whether that be called appropriate or additional or alternative dispute resolution, albeit temporary and compulsory.

The legislative framework

The statutory scheme for Adjudicators' decisions in construction disputes was introduced in Northern Ireland in 1999 and amended in 2012. [1]

The legislation provides that a party to a construction contract has the right to refer a dispute for adjudication under a specified procedure. The contract is required to include provision in writing to enable a party to give notice of an intention to refer a dispute to adjudication, to provide a timetable with the object of securing the appointment of the Adjudicator and referral of the dispute within 7 days of the notice and to require the Adjudicator to reach a decision within 28 days of referral, with limited powers to extend that time. There is an exclusion of construction contracts with a residential occupier.[2]

Of particular note is the provision that the contract shall provide in writing that the decision of the Adjudicator is binding until the dispute is finally determined by legal proceedings or by arbitration or by agreement.

The Department of the Environment was required to introduce Regulations to provide for the 'Scheme for Construction Contracts in Northern Ireland'. The Scheme sets out certain requirements of an adjudication process. In default of contractual provisions agreed by the parties, the provisions of the Scheme have effect as implied terms of the contract.[3]

This statutory process was introduced by Parliament to provide for temporary decisions by an industry expert to be made with expedition pending a final determination of disputes by arbitration, litigation or agreement.[4]

The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional basis, and requiring the decisions of Adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement.

Parliament has not abolished arbitration or litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.[5]

Summary Judgment

For the most part, Adjudicators decisions concern a determination of the sum then due by the employer to the contractor, although there are occasions when a decision is required on the manner in which the contract is to operate. The enforcement of an Adjudicator's award is by the issue of legal proceedings for the recovery of the amount of the Adjudicator's award. Upon the issue of a Writ claiming the amount of the Adjudicator's award, an application may be made for summary judgment.[6]

Such an application receives special treatment in the High Court in two respects. First of all, the procedures applied by the Court give priority to such applications. There is no

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* This article was first delivered as a speech by The Honourable Mr Justice Weatherup, Commerical Judge of the Northern Ireland High Court on 18 June 2014 at a seminar of the British Irish Commercial Bar Association in Belfast.

1 The Northern Ireland provisions are contained in the Construction Contracts (NI) Order 1997 (which commenced on 1 June 1999) and the Construction Contracts (Amendment) Act (NI) 2011 (commencing 14 November 2012).

The equivalent provisions in England, Wales and Scotland are contained in the Housing Grants Construction and Regeneration Act 1996 (commencing 1 May 1998) and the Local Democracy Economic Development and Construction Act 2009 (commencing October 2011).

In Ireland the Construction Contracts Act 2013 (applied to "payment" disputes) is not yet in force.

2 The Construction Contracts Exclusion Order (NI) 1999/33 also excludes certain agreements under statute, private finance initiatives, finance agreements and development agreements.

3 Scheme for Construction Contracts in NI Regulations (NI) 1999/32 (amended 2012). Separate amended Regulations apply in England (2011/2333) Wales (2011/1715) and Scotland (2011/371)

4 For texts, see Coulson on *Construction Adjudication* and Rawley's *Construction Adjudication and Payments Handbook*

5 Macob, *Civil Engineering v Morrison Construction* [1999] BLR 97 Dyson J

6 In Northern Ireland this process is undertaken on affidavit under Order 14 of the Rules of the Court of Judicature

Technology and Construction Court in Northern Ireland. The Writ claiming the amount of the Adjudicator's award will be transferred to the Commercial List. A Pre-Action Protocol applicable to commercial actions requires the exchange of correspondence as to the nature of the dispute prior to the issue of proceedings and arrangements for a meeting between the prospective parties to the proceedings. The Pre-Action Protocol does not apply to proceedings relating to Adjudicators' decisions as the time taken to comply with these preliminary measures is not compatible with the expedition inherent in the adjudication scheme.

Upon the issues of a Writ for the enforcement of an Adjudicator's decision, the proceedings are referred to the Commercial Judge for directions. A Commercial Practice Note provides that applications for summary judgment on an Adjudicator's award shall be made to the Commercial Judge (as opposed to the Master). The standard directions issued by the Judge are to admit the case to the Commercial List, to require the plaintiff's solicitors to lodge a summons and a grounding affidavit for summary judgment within 10 days (even though the time for appearance will not then have lapsed), to require the defendant to file a replying affidavit within a further 10 days and to list the summons for hearing within 28 days of directions. If the statutory scheme is to require the Adjudicator to make his decision within 28 days then the Court should attempt a timetable that permits any dispute on the Adjudicator's decision to be heard within the same period.[7]

Secondly, the applications receive special treatment, in common with England and Wales and Scotland, in that while a defence to an application for summary judgment is, in general, made out by establishing on affidavit an arguable defence, the grounds for resisting summary judgment in the enforcement of an Adjudicator's decision are more restricted, this approach reflecting the policy behind the statutory scheme. The defence of an application for summary judgment of an Adjudicator's decision is limited to issues concerning the jurisdiction of the Adjudicator and the operation of the rules of natural justice in the conduct of the adjudication. If the Adjudicator lacked jurisdiction or breached the rules of natural justice, the Adjudicator's award will be invalidated. Otherwise there will be judgment for the amount of the Adjudicator's award, even if the Adjudicator was wrong on procedure, or on the facts or in law. There is no rehearing in the Court of the merits of the award made by the Adjudicator. The party dissatisfied with the award has to raise any issues on the merits of the award in any later determination of the dispute in arbitration or litigation or by agreement.

Jurisdiction issues include for example whether the dispute concerned a 'construction contract', whether there was a 'dispute, whether there was a proper appointment of the Adjudicator, whether there had been observance of the time limits and whether the Adjudicator answered the correct question.

Issues of natural justice include for example whether an opportunity was afforded to respond to the submission of the party making the referral, whether the Adjudicator considered the defence raised and whether there was bias.

The nature of the task faced by a defendant resisting summary judgment has been described as follows:

> "To seek to challenge the Adjudicator's decision on the ground that he has exceeded his jurisdiction or breach the rules of natural justice, save in the plainest cases, is likely to lead to a substantial waste of time and expense."[8]

I turn to some examples from Northern Ireland of the operation of the two grounds for resisting summary judgment.

The Jurisdiction of the Adjudicator

The statutory adjudication process applies to 'construction contracts' which in turn are defined to include an agreement to carry out 'construction operations'.

In *Coleraine Skip Hire Limited v Ecomesh Limited*[9], the defendant contractor undertook remediation works at a landfill site and obtained an Adjudicator's award. The plaintiff employer sued for overpayment and the defendant counterclaimed for the amount of the Adjudicator's award and applied for summary judgment on the counterclaim. The plaintiff challenged the jurisdiction of the Adjudicator, first of all on the basis that the works did not involve 'construction operations' and secondly for non-observance of time limits relating to the issue of the decision.

As to 'construction operations', the works involved placing a capping layer over an existing landfill cell and the creation of a new landfill cell to receive new waste material. 'Construction operations' are defined as including (a) the construction or alteration of structures forming, or to form, part of the land and (e) operations which form an integral part of, or are preparatory to, or are for rendering complete such operations. The Court concluded that the landfill cell was a 'structure' to form part of the land and that while the capping layer was not a structure, it did involve operations which formed an integral part of, or were preparatory to, or were for rendering complete the operations relating to the landfill cell. Thus the works were construction operations.

The Adjudicator is required to reach a decision within 28 days of referral or such longer period as may be agreed by the parties. An Adjudicator may make a 'correction' to his decision under the 'slip rule' but may not change his mind about the decision after the time has expired.

In *Coleraine Skip Hire,* the Adjudicator's decision was to be issued by 15 April 2008. The decision was dated 15 April and communicated on 15 April. However the Adjudicator then reviewed his decision on 16 April and the result was communicated on 17 April. The reason for the review was that the Adjudicator had identified a mistake in the calculation on which he based his decision. It was held that the decision had been made and communicated within time on 15 April. The review amounted to a correction and not a further decision. A correction may be made within a reasonable time.

7 Pre-Action Protocol in Commercial Actions and Commercial Practice Note both issued on 21 December 2012

8 *Carillion Construction v Devonport Royal Dock Yard* [2005] EWCA Civ 1358 Chadwick LJ.

9 [2008] NIQB 141

It was held that the Adjudicator had made the correction within a reasonable time.

The 2012 amendments to the Order make specific provision for the 'slip rule'. The Adjudicator may correct his decision to remove a clerical or typographical error arising by accident or omission within 5 days of the delivery of the decision and must as soon as possible deliver a copy of the corrected decision to each party.

A Dispute

The right to refer to adjudication relates to 'a dispute'. A 'dispute' does not arise from the mere fact that one party notifies the other party of a claim unless and until it emerges that the claim is not admitted. The non- admission of the claim may be express or may be implied from the character of the response or the passage of time.

The approach has been stated as follows:

> "The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.
>
> The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute."[10]

In *Gibson (Banbridge) Limited v Fermanagh District Council*[11], the plaintiff contractor applied for summary judgment to enforce an Adjudicator's award. The defendant employer resisted on the ground that the Adjudicator did not have jurisdiction because a 'dispute' had not crystallised at the date of the issue of the notice of adjudication. The works were completed in February 2008 and followed by the contractor's application for payment in April 2008. After further applications in February 2010 and again in October 2011, no payment had been made and notice of adjudication was issued in September 2012. There had been on-going correspondence between the parties, the contractor pressing for payment and the employer contending that the contractor had failed to provide the necessary documentation to permit a proper assessment of the claim.

The contract was the ICE Engineering and Construction Contract Option C, which provided for a project manager to assess the amount due every four weeks and that the contractor must allow the project manager to inspect at any time within working hours the accounts and records that the contractor was obliged to keep. The employer alleged that the contractor's failed to provide complete particulars and records to substantiate the claim as a basis for not issuing a decision on the claim. Inspections of the documents had occurred in the summer of 2012.

Where a claim has been submitted and discussions ensue between the contractor and the contract administrator a reasonable time must be allowed for the contract administrator to prepare a response before it can be concluded that a dispute has arisen. Regard will be had to the terms of the contract and the contractor's obligations in relation to documentation. It was decided by the Court that reasonable time was afforded to the project manager to make the assessment after the inspections had taken place. If the supporting documentation was not sufficient to support the application for payment then no doubt that would have been reflected in the assessment. What the scheme does not envisage is that a dispute about the adequacy of the documentation should result in there being no assessment or that the assessment should be unduly delayed.

In the event, the project manager assessed the claim at £300,000 and the employer paid that amount rather than the £3 million awarded by the Adjudicator. The plaintiff obtained judgment for the amount of the Adjudicator's award.

Procedural Unfairness in the course of the Adjudication

Breach of the rules of natural justice is a further ground for resisting an application for summary judgment on an Adjudicator's decision. Any breach of the rules of natural justice must be 'material' in that it is decisive or of considerable potential importance to the outcome.[12]

However the context is important. I return to the temporary and expedited nature of the statutory process. The Adjudicator is not an Arbitrator or a Judge and may have to deal with complex issues within the limited time scales. The requirements of procedural fairness will be tailored to that context. The respondent to a referral to adjudication should be afforded a reasonable opportunity to make a replying submission.

Gibson (Banbridge) Limited v Fermanagh District Council (as cited above) also concerned a complaint by the employer that there had been a breach of the rules of natural justice. The Adjudicator had required the plaintiff to submit his supporting papers to the Adjudicator in 7 days and the defendant to respond in a further 7 days. The Adjudicator refused the defendant's application for an extension to 21 days to reply.

It was decided that there was no breach of the rules of natural justice. The 7 day response could not be looked at in isolation. The claim had been pending for many months. The defendant had had the opportunity for extensive inspection of the records and had spent many days examining the records. The basic time for the adjudication process of 28

10 *Amec Civil Engineering Ltd v Secretary of State for Transport* [2004] EWHC 2339 (TCC) Jackson J

11 [2013] NIQB 16

12 *Cantillion Limited v Urvasco Limited* (2008) EWHC 282, Aikenhead J.

days from notice to decision served to demonstrate the expedition demanded by the process and consequently that many cases would necessarily have to be dealt with in a summary manner.

It is now considered that resort to breach of natural justice would rarely be successful. A recent instance of a successful resistance arose in England where the clause relied on in the Adjudicator decision was not mentioned by either party in the adjudication and the Adjudicator failed to raise or invite comment or evidence on the clause. The Adjudicator's decision was found to be invalid.[13]

Set-Off against the Adjudicator's Award

A defendant who is unable to resist the claim for the amount of the Adjudicator's award may seek to set-off against that amount a sum otherwise claimed to be due to the defendant. Here again the courts have been resistant to any undermining of the statutory purpose of the adjudication system. The general approach is that payment of the Adjudicator's award should be made without any set off being permitted for sums otherwise due.

However, a limited exception has developed in respect of liquidated and ascertained damages where a set-off may be allowed based on either the terms of the Adjudicator's award or the terms of the contract if (a) it follows logically from an Adjudicator's award that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages (provided that the employer gives proper notice) and (b) recovery of liquidated or ascertained damages is otherwise permitted by the terms of the contract in the circumstances.[14]

In *Charles Brand Limited v Donegal Quay Limited*[15], the contractor constructed a two storey basement car park in Belfast. The employer claimed entitlement to a set off against an Adjudicator's award, first of all in the amount of a claim for liquidated and ascertained damages and secondly for that part of the Adjudicator's award that the employer had already paid under an interim certificate.

On the issue of liquidated and ascertained damages, the plaintiff contractor claimed for extension of the contract period by 147 days and the Adjudicator awarded 44 days. The defendant employer then claimed liquidated and ascertained damages for the remaining 103 days and issued a withholding notice under the contract. The first part of the exception requires consideration of the Adjudicator's decision and the requirements as to notices by the employer. The entitlement to liquidated and ascertained damages in respect of the 103 additional days was not an issue before the Adjudicator. The notice requirements under the contract had not been satisfied - at the date the payment on foot of the Adjudicator's award became due there was no architect's certificate of non-completion, no warning notice of payment or deduction of liquidated and ascertained damages and no notice of any specific payment to be made or to be deducted. The defendant had no entitlement to any specific sum for liquidated and ascertained damages and accordingly no right to a set off in respect of liquidated and ascertained damages.

The robust approach of the courts appears from the treatment of the issue arising out of the interim certificate. The plaintiff had claimed £90,000 for additional works and this was conceded during the adjudication and included in the Adjudicator's award. However the sum of £90,000 had been included in an interim certificate issued after the referral to adjudication and prior to the Adjudicator's decision, presumably because the architect had heard of the concession. Thus there was the prospect of double recovery by the contractor, at least temporarily.

It was held that the defendant was not entitled to set off the sum of £90,000. The Adjudicator's award was payable and enforceable until it had been decided otherwise by arbitration or legal proceedings or agreement. The amount due to the plaintiff incorrectly stated in the interim certificate could be adjusted in a subsequent certificate. Perhaps the architect had been rather hasty in including the sum of £90,000 in an interim certificate when liability for that amount was the subject of referral to the Adjudicator.

A further example of the rejection of set-off arose in *Henry Brothers (Magherafelt) Limited v Brunswick (8 Lanyon Place) Limited.*[16] The parties entered a JCT98 contract for the construction of an office block and a residential block in Belfast. On a first notice of adjudication, the dispute was whether the works were complete and if so when they were complete and what sums were due. The Adjudicator found the works were complete and the defects liability period had ended and awarded one half of the retention monies. In respect of the second half of the retention, the Adjudicator found that the defendant had given notice of defects without particulars so that, while there may be outstanding defects, he could not decide when the second half of the retention should be released.

By a second notice of adjudication, the dispute was stated to be whether alleged defects were properly notified and when the defendant should release the second part of the retention monies. The defendant had not issued a schedule of defects within 14 days of the end of the defects liability period because, as contended in the first adjudication, the defendant did not accept that practical completion had been achieved. When the Adjudicator issued his first decision to the contrary the period for issuing the schedule of defects had expired. The defendant, by a counterclaim, alleged defects of a value that exceeded the retention monies and resisted summary judgment. Neither ground for set off was found to have arisen. At the date of the Adjudicator's first decision the defendant had no entitlement to any sum for damages as no such liability had been determined.

Further, the defendant also relied on the terms of the JCT contract which stated that the decision of the Adjudicator was "without prejudice to their other rights under the contract". This clause was found not to provide a basis for resisting the Adjudicator's decision but was intended to preserve a defendant's rights in any challenge to the decision of the Adjudicator in subsequent litigation or arbitration.

13 *ABB Limited v BAM Nuttall Limited* (2013) EWHC 1983 (TCC) Aikenhead J.

14 *Balfour Beattie Construction v SERCO Limited* (2004) EWHC 3336 (TCC) Jackson J.

15 [2010] NIQB 67

16 [2011] NIQB 102

The Grant of a Stay on the Judgment

While the defendant may be unable to resist the claim for the amount of the Adjudicator's award and may be unable to obtain a set-off for a sum otherwise due, the defendant may be able to obtain a stay on the judgment. The Court has an inherent jurisdiction to order a stay 'in the interests of justice'. Further, the Rules provide that the Court may order a stay pending the determination of a counterclaim.[17]

The Court will not order a stay of judgment on an Adjudicator's award merely because the defendant has a counterclaim. At the stage of proceedings where there is a contested application for summary judgment there is unlikely to be a counterclaim filed in the action, the issue probably being raised in affidavits filed on behalf of the employer in resisting the application for summary judgment. Prior to that there may only have been notice that a claim will be made, there may have been particulars of a proposed claim, there may have been referral of issues to arbitration.

A stay may be ordered on the grounds of the impecuniosity of the plaintiff. This approach arises on the basis that, if the defendant were to pay the amount of the Adjudicator's award and it were to be determined at a later date in arbitration or litigation or by agreement that money was to be repaid by the plaintiff to the defendant, the plaintiff, by reason of impecuniosity, would be unable to make such repayment.

The general approach is that if there is evidence that the plaintiff is insolvent or will probably be unable to repay the judgment sum, if later required to do so, then the Court will grant a stay. However the stay will not be granted if (i) the plaintiff's financial position is the same or similar to its financial position at the time when the relevant contract was made or (ii) the plaintiff's financial position is due wholly or in significant part to the defendant's failure to pay the sums due under the Adjudicator's award.[18]

In *Coleraine Skip Hire Limited* (cited above), the contractor was claiming, from the VAT authorities, bad debt relief in respect of over £300,000 worth of invoices. The accounts showed net assets of less than that amount. The contractor's Writ claimed the amount of the Adjudicator's award and also unquantified damages for breach of contract. The employer claimed overpayment. It was held that the contractor's probable inability to repay the amount of the Adjudicator's award had not been established. However, as there were additional claims and counterclaims beyond the amount of the Adjudicator's award and the party ultimately entitled to payment could not be ascertained, a stay was granted on the judgment for the amount of the Adjudicator's award, pending the outcome of the trial on the other issues, with the amount of the Adjudicator's award to be lodged in the joint names of the respective solicitors for the parties and to be paid out at the conclusion of the trial.

A stay in the interests of justice affords wide discretion to the Court. In *Rogers Contracts (Ballynahinch) Limited v Merex Construction Limited,*[19] the contract was for certain works at Musgrave Scrap Wharf at Queen's Island, Belfast. The contractors sought to enforce an Adjudicator's award and a dispute about the plaintiff's supply of defective concrete had been referred to arbitration and was due to be dealt the following month. The defendant sought a stay, first of all by reason of the impecuniosity of the plaintiff who had entered a creditor's voluntary arrangement with debts of £1 million and creditors to receive 50p in the pound, and secondly pending the outcome of the arbitration. The contractor countered by contending that there was a significant risk that the employer was also in financial difficulties and would be unable to pay any monies found due to the contractor in the arbitration, referring to the substantial reduction in the assets of the defendant and a director's note in the accounts casting doubt on the company's ability to continue as a going concern. A stay was granted because of the plaintiff's financial difficulties. However as a result of the defendant's financial uncertainty it was ordered that the money be paid into Court to be paid out as appropriate in the light of the Arbitrator's award.

The flexibility of the approach to the grant of a stay appears *in Sutton Services International Ltd v Vaughan Engineering Services Ltd*[20] which concerned a water treatment contract at the Royal Victoria Hospital in Belfast. There was no dispute that the plaintiff contractor should have judgment for the amount of the Adjudicator's award and the issue was whether a stay should be granted because of the alleged impecuniosity of the plaintiff. The defendant intended to issue proceedings against the contractor for defective work and contended that the plaintiff would be unable to repay the award. The plaintiff disputed the impecuniosity and in any event relied on a contract of insurance to cover claims. However the assurance offered by the plaintiff's broker was qualified as to the nature of the claim, the terms of the policy and the period to which the policy applied. It was found that the defendant had satisfied the burden of establishing the reasonable prospect of non payment of any sum awarded against the plaintiff in the proposed proceedings. It was ordered that one half of the award, £150,000, be paid forthwith, that a stay would be ordered on the other half provided that within 3 days the sum was paid into Court and the defendant issued proceedings. The stay was to be reviewed in 4 months to consider the progress of the defendants claim.

The conditions were complied with and after 4 months the plaintiff applied for removal of the stay on the balance. At that stage, a new assurance was provided from the plaintiff's broker which established insurance cover on the defendant's claim. The balance was released to the plaintiff.[21]

The grant of a stay is not limited to the impecuniosity of the contractor. In *Henry Brothers (Magherafelt) Limited* (cited above), the employer sought a stay on the ground of the alleged injustice arising from the requirement to make the payment in the circumstances. It will be remembered that the employer had been put in a dilemma by contesting, in the first adjudication, the date of practical completion, so

17 Order 14 Rule 3(2) of the Rules of the Court of Judicature. The Northern Ireland Rules do not apply the approach under the English Rules in Order 47 Rule 1 (and the Schedule to the Civil Procedure Rules) which provides for a stay of a money judgment where there are "special circumstances which render it inexpedient to enforce the judgment".

18 *Wimbledon Construction Co. 2000 v Viajo* (2005) EWHC 1986 (TCC).

19 [2011] NIQB 94

20 [2013] NIQB 63

21 [2013] NIQB 99

that the employer could not consistently deliver a schedule of defects when it was being contended that the relevant period had not arrived. A stay was refused. The defendant had made the wrong call in relation to practical completion.

Non-Monetary Adjudicators' Decisions

While for the most part, there is referral to adjudication to secure payment, there may be referral to obtain a ruling in principle on a matter arising under the contract. Legal proceedings may follow the Adjudicator's decision to obtain a declaration, whether to confirm or displace the Adjudicator's decision.

In *Northern Ireland Housing Executive v Healthy Buildings Ltd,*[22] the contractor undertook asbestos surveys of the employer's housing stock and a dispute arose over whether an instruction gave rise to a compensation event and whether the claim was time barred. The Adjudicator found for the contractor. The plaintiff employer applied to the Court for a declaration that the decision of the Adjudicator was wrong. The case proceeded on the papers in the adjudication without oral evidence. The decision of the Adjudicator was upheld in the High Court and the Court of Appeal.

While the case did not involve an award, the consequence of the Adjudicator's decision was that an assessment of compensation would follow. The general approach to Adjudicator's awards might suggest that the unsuccessful party, should not, at that stage, be entitled to a rehearing by the Court of the Adjudicator's decision. However the decision affected the manner of operation of the contract and the implementation of the Adjudicator's decision was in effect irreversible, unlike a monetary award where repayment can be ordered and the payment protected if repayment is considered to be at risk. In any event, the Court has power to make a declaration on contractual rights. This is an efficient process when it can be operated without a factual dispute requiring oral evidence, as for example when it concerns the interpretation of the terms of the contract.

In *Northern Ireland Housing Executive v Combined Frameworks Management*[23], NIHE was the unsuccessful party before the Adjudicator rerunning an issue about the interpretation of the contract before the Court. Again there was no requirement for oral evidence. There was inconsistency between contract clauses. One clause provided that the employer could review the contractor's claim for payment and pay only the revised amount. A later clause provided that where the amount of a set-off claimed by the employer was disputed by the contractor the amount was not to be deducted and the dispute referred to adjudication. Lewison on *Interpretation of Contracts* promotes an 'Internal inconsistency Rule' that the first clause prevails – a rule said to be based on a case of no less a vintage than *Slingsby's Case* of 1587.[24] It was held that the first clause was to be read subject to the second clause, the internal inconsistency rule being described as arbitrary.

Conclusion

The adjudication procedure for construction disputes has addressed a social need identified in the industry. Construction contracts with residential occupiers have been excluded from the procedure. Of course the parties to such a contract are free to include an adjudication procedure in the terms of the contract. However we need an appropriate procedure for disputes with residential occupiers.

It has to be recognised that the adjudication system places a considerable burden on the Adjudicator who may have to deal with complex issues and voluminous paperwork within tight time limits. Overall I have the impression that the adjudication system has worked well. I hope the judicial contribution has been effective in achieving the statutory purpose. ■

22 [2013] NIQB 124 and [2014] NICA 27

23 [2014] NIQB 75

24 (1587) 5 Co Rep 186

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