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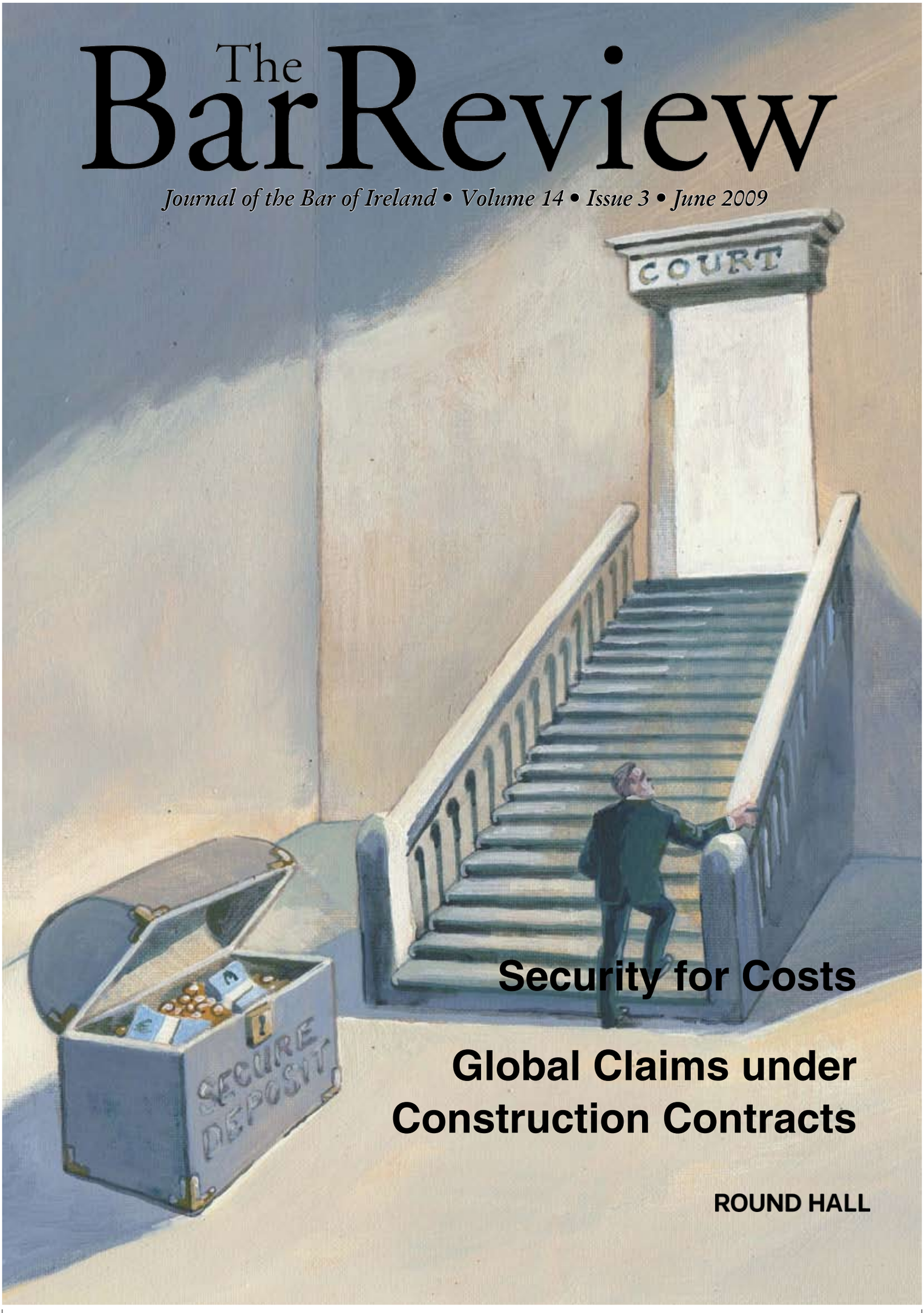

Security for Costs

Global Claims under Construction Contracts

ROUND HALL

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Recent Developments in EU law

Dr Elaine Fahey BL

Introduction

The Court of Justice delivered a number of particularly important decisions in 2008 that are the subject of analysis here. 2008 marked a year where the Court was operating in the shadow of a ratification crisis surrounding the Treaty of Lisbon. Nonetheless, key decisions in favour of individual rights at the expense of Member State sovereignty were delivered by the Court in 2008 and the Irish State was involved in and lost, or will be affected by a number of noteworthy decisions. The areas considered in this review here are the free movement of persons, free movement of goods, fundamental rights, legislative competence, competition law, freedom of establishment and employment law.

Free Movement of Persons

Despite the introduction of the Citizens Rights Directive,[1] European Union law had been silent on key issues as to the entry and residence rights for Third Country National spouses of Union citizens. A major issue raised by the recent decision of the Court of Justice (Grand Chamber) in *Metock*,[2] a referral from Finlay Geoghegan J. in the Irish High Court, was as to whether national law or secondary Community law governs such entry and residence requirements, in light of the *Akrich*[3] decision of the Court. In *Akrich*, the requirement for third country national spouses of Union citizens of having a "prior lawful residence" in another State prior to entry to the host State was first introduced.

The (Irish) European Communities (Freedom of Movement of Person) Regulations, 2006 purported to transpose the Directive into Irish law and the "prior lawful residence" requirement. The Irish High Court in *Metock* was faced with several third country national spouses of Union citizens who were refused residence in Ireland on account of their absence of "prior lawful residence" in another EU State.

The judgment of the Court of Justice was delivered pursuant to the accelerated reference procedure on account of the significance of the decision. The Court acknowledged that no provision of the Directive made its application to family members of a Union citizen conditional on previous residence in another Member State and in an unusually explicit breach of precedent, held that the "prior lawful residency" requirement introduced in *Akrich* had to be "reconsidered" and that the benefit of such free movement rights to the family members and dependants could not now depend on such a condition. Rather, the Court held that the Community legislature was competent to regulate this issue and that the timing of a marriage or place of establishment of a citizen and their family was irrelevant, contrary to arguments submitted.

The importance of the *Metock* decision cannot be underestimated in terms of its constitutional re-enforcement of the centrality of free movement and Union competence in this area to the European project, a tremendous decision in favour of the individual.[4] The Irish State lobbied unsuccessfully after *Metock* for an amendment to the Citizens' Rights Directive.

Free Movement of Goods

In the recent decision of *Dynamic Medien*[5], the Court (Third Chamber) considered a German law prohibiting sale by mail order of image storage media (eg DVD) not labelled as having been examined in Germany to be suitable for young persons. The issue arose as to *inter alia* whether the law was in breach of Article 28 EC or whether the rule could be deemed to be a "selling arrangement" within the meaning of *Keck*[6] and thus fall outside the scope of Article 28 EC. The prohibition had as its objective the protection of young persons and constituted a form of administrative censorship.

The decision of the Court began with the formulaic outline of the law as to Article 28 EC and the well-settled definition of quantitative restrictions and subsequent clarification of "selling arrangements" and the scope of Article 28 EC.[7] Thus the Court held that a number of marketing methods had been held by the Court to constitute selling arrangements. Rather the need to adapt products to the rules in force in a State would prevent such rules constituting a selling arrangement. The Court held that the rules at issue could not constitute a selling arrangement as the rules provided for a labelling requirement that made the import of image storage media more difficult and expensive and could dissuade persons from marketing their products in Germany. However, the protection of young persons was a possible justification for the restrictions imposed and was for the national court to

1 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

2 C-127/08 *Metock & others v. Minister for Justice, Equality & Law Reform* [2008] 3 CMLR 39.

3 Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] ECR I-9607.

4 Although the decision has been criticised for its excessively speedy delivery: Currie "Accelerated justice or a step too far? Residence rights of non-EU family members and the court's ruling in Metock" (2009) 34 European Law Review 310; Costello "*Metock*: Free Movement and "Normal Family Life" in the Union" (2009) 46 CMLRev 58.

5 C-244/06 *Dynamic Medien* [2008] 2 CMLR 23.

6 Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

7 Case 8/74 *Dassonville* [1974] ECR 837 and Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

determine. In light of the fact that the prohibition did not prevent the marketing of all such media, this had a significant bearing upon proportionality. Moreover, the examination process of such media needed consideration in this regard and the Court held that in principle, the prohibition was not precluded by Article 28 EC unless the classification procedure was not accessible or amenable to challenge.

The decision in *Dynamic Medien* is a significant one for the simple reason that it demonstrates a certain clarity and maturity of the caselaw, given that the Court sets out the governing caselaw with admirable economy, whatever the merits of the selling arrangement distinction introduced by *Keck* and the ongoing debate as to the role discrimination or the appropriate application of market access in the caselaw as to the internal market.[8] The Court also referred to a diverse range of human rights instruments, itself a sign of much jurisprudential evolution. [9]

Fundamental Rights

The decision in *Kadi v. Council*[10] represents one of the most significant decisions of the Court of Justice in many decades. The decision is a controversial one and to many outside of the European Union, the decision represents a European misunderstanding of International law and a parochial view of the role of judicial review as to fundamental rights. [11] The decision concerned the freezing of funds of persons alleged to be connected to *inter alia* the Taliban and Bin Laden pursuant to Council Regulation EC 881/02, that in turn implemented a UN Security Council resolution, adopted in the wake of the atrocities of 9/11.

The Court of First Instance had held that it had no ability to review the validity of Regulation and was bound as a matter of International law to comply with UN Security Council resolutions. The plaintiffs on appeal from the Court of First Instance, sought to claim that their inclusion on the aforesaid list breached their respective rights of defence and right to property and that they had no ability to remove themselves from the list by way of judicial review. Advocate General Maduro held that the mere existence of the possibility that the sanctions imposed may have been disproportionate was an "anathema in a society that respects the rule of law", in so far as diplomatic discretion would decide the outcome of any challenge. The Court of Justice (Grand Chamber) in its decision held that such review was in fact possible and that:

> "… that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council …"[12]

ECJ thus held that the regulation was unfair and infringed the fundamental rights of the applicant and that the regulation would be annulled. The decision has been criticized extensively for its conclusions as to sources of law and the apparent supremacy of EU law.[13] Nonetheless, the decision represents a strong reading of fundamental rights within EU law, although the decision is largely grounded in procedural concerns and not substantive grounds. *Kadi* also represents a tremendously important reading of the hierarchy of sources of law in the European legal order, whereby the EU as a new legal order remains distinctly autonomous and independent from international law, however novel such a claim appears.

Legislative competence

Ireland recently failed in its challenge before the Court of Justice (Grand Chamber) to the validity of the use of Article 95 EC as the basis for the Data Retention Directive[14] in *Ireland v. Council and European Parliament*.[15] Ireland contended that the correct legal base for the Directive was rather Title VI of the Treaty on the European Union. In 2004, France, Ireland, Sweden and the UK introduced a proposal for a draft framework decision under Title IV EU which would have harmonised data retention obligations of service providers. The Directive was subsequently adopted pursuant to Article 95 EC which purported to harmonise the laws of the Member States with respect to data retention so as to ensure data was available to investigate serious crime, adopted in response to terrorism concerns arising within the European Union, with its preamble explicitly referencing the London terrorist attacks of 2005. However, in the adoption of the instrument, Ireland and Slovakia were outvoted in the Council of Ministers and the Directive benefited from an unusually speedy publication. The Directive now imposes far-reaching obligations on the States *inter alia,* to retain, trace and identify telephone and Internet data.

The Court of Justice, in rejecting the Irish challenge, held that the Directive 2006/24 related predominantly to the functioning of the internal market. The Court concluded that the directive covered "the activities of service providers in the internal market and does not contain any rules governing

8 Wilsher "Does Keck discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market" (2009) 34 European Law Review 3, although see "Editorial: A court within a court: is it time to rebuild the Court of Justice?" (2009) 34 European Law Review 173.

9 For example, the reference to the Convention on the Rights of the Child. See also Case C-540/03 *European Parliament v. Council of the European Union* [2006] ECR I-5769.

10 C-402/05P and C-415/05P *Kadi v. Council* [2008] 3 CMLR 41.

11 Halberstam & Stein "The United Nations, the European Union and the King of Sweden: economic sanctions and individual rights in a plural world order" (2009) 46 CMLRev 13; De Burca "The European Court of Justice and the International Legal Order after *Kadi*" (Jean Monnet Programme Working Paper No. 01/09).

12 At para. 299.

13 See above.

14 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

15 Case C-301/06 *Ireland v. Council and European Parliament* [2009] ECR I-000.

the activities of public authorities for law-enforcement purposes."[16]

A negative decision would have represented a major blow to the operation of this anti-terrorism instrument, however cast. Ireland had based its arguments in the case on the tersely worded *Passenger Name Records* decision of the Court of Justice, that annulled certain Council and Commission decisions for lack of competence outside of the Data Protection Directive, a decision that has not found universal approval.[17] The Court and the Grand Chamber in particular, has, however, annulled a wide range of measures in 2008 and the infamous *Tobacco Advertising*[18] from less than a decade ago largely stands alone, rejecting a general community competence to legislature pursuant to Article 95 EC. Competence and the legality of legal base chosen in legislative instruments remains a live issue for a Court operating in the shadow of a ratification crisis, post- Lisbon.

Competition Law

In Competition law, the case of *Competition Authority v Beef Industry Development Society Limited (BIDS) and Barry Bros. (Carrigmore) Meats Limited*[19] resulted from proceedings brought by the Irish Competition Authority concerning an agreement between beef processers to rationalise the capacity of the Irish beef processing industry. The Competition Authority believed this agreement would result in anti-competitive effects, an agreement which had a high level of government involvement. In July 2006, the High Court (McKechnie J.) found against the Competition Authority. The Competition Authority appealed the High Court decision to the Supreme Court. The appeal hearing began in early 2007 and was suspended shortly thereafter when the Supreme Court held that the interpretation of the Court of Justice of Article 81(1) EC was necessary to enable it to give judgment. The Supreme Court sent a question to determine whether the agreement among beef processors to reduce beef processing capacity is "to be regarded as having as its object, as distinct from effect, the prevention, restriction or distortion of competition within the common market and therefore, incompatible with Article 81(1) of the Treaty establishing the European Community?"

The Court of Justice (Third Chamber) in a short judgment held that the agreement with features such as those of the standard form of contract concluded had as its object the prevention, restriction or distortion of competition within the meaning of Article 81(1) EC. The Court held that any agreement between competitors that aimed to reduce excess capacity was highly likely to fall under this prohibition and that Article 81(1) of the EC Treaty prohibition could not be interpreted in a formalistic and narrow way, as the Irish High Court had done. The fact that there was a crisis in the beef industry was of little consequence to the Court.

The Court has now clarified that the concept of agreement by object is not limited to hard core restrictions. The decision represents a strong reading of the Treaty as against the agreement, designed to deal with over-production in difficult times for an industry with much involvement by the Irish State and the economic analysis applied by the Advocate General and the Court of Justice are not analogous. However, the short judgment of the Court indicates a firm view of the correct interpretation of Article 81(1) EC. The ongoing decentralisation of competition law resulted in this reference from Ireland and the Irish courts must now conduct an assessment under Article 81(3) EC.

Freedom of establishment, Article 234 EC

The interesting decision of the Grand Chamber of the Court of Justice in *Cartesio*[20] considered a Hungarian limited partnership that sought to transfer its *de facto* head office to Italy prior to such a transfer being effectuated. National law entailed that the company had to be wound up in Hungary first and its compatibility with Article 43 EC and 48 EC and freedom of establishment was considered. Advocate General Maduro held that:

> "it is impossible in my view to argue … that Member States enjoy an absolute freedom to determine the life and death of companies constituted under their domestic law, irrespective of the consequences for the freedom of establishment …"

He thus held that Articles 43 and 48 EC precluded national rules making it impossible for such a purported exercise of free movement, a conclusion that did not find favour with the Court. However, the Court of Justice held that a Member State (the State of incorporation) could prevent a company from transferring its seat to another Member State. The Court held that the question as to whether a company could rely on Article 43 EC in this regard was a preliminary matter that could only be resolved with reference to national law and that previous caselaw was decided pursuant to Article 58 EEC. Thus Member States could determine the connecting factor for the purposes of enjoying incorporation and establishment. The Court sought also *obiter* to distinguish the possibility that a company could convert itself into a company governed by the law of another Member State.

In *Cartesio*, in contrast to the Advocate General, the Court sought to reaffirm the correctness of the *Daily Mail*,[21] a decision from two decades earlier and in a different economic climate of a smaller Union, to the effect that the UK was allowed to impose an exit tax on the newspaper if it transferred its management to another State. *Cartesio* may now dissuade many companies from moving across the European

16 At para. 91.

17 C-317/04 *European Parliament v. Council* [2006] ECR I-472 (Passenger name records).

18 See Case C-376/98 *Germany v. European Parliament and Council* [2000] ECR 1-8419, where the Court famously annulled the Tobacco Advertising directive. But *cf.* Case C-380/03 *Germany v European Parliament* [2007] 2 CMLR 1, where the revised directive was upheld (Tobacco II). See also Case C-176/03 *Commission v. Coun*cil [2005] ECR I-7879 (Environmental crimes).

19 Case C-209/07 *The Competition Authority v Beef Industry Development Society Limited and Barry Bros. (Carrigmore) Meats Limited* [2009] 4 CMLR 6.

20 C-210/06 *Cartesio Oktató és Szolgáltató bt.* [2009] 1 CMLR 50.

21 Case 81/87 *Daily Mail* [1988] ECR 5483.

Union, at a time when free movement might be perceived as fundamental to economic activity for some entities.

Cartesio also raised the question as to whether the referring body was a suitable entity for the purposes of Article 234 EC. The referring court was hearing appeals against decisions from lower courts maintaining a commercial register and this Court could amend information in the register. A party sought to set aside decision made by this body and then the question arose as to whether the referring court was merely an administrative body not exercising an *inter partes* function or whether the body was one capable of constituting a court for the purposes of Article 234 function. The Court of Justice held that if the referring court could adversely affect rights of the applicant on appeal and give judgment, that the court was exercising a judicial function, a decision largely consistent with the general tenor of its caselaw in favour of referring bodies falling within the ambit of Article 234 EC.

Employment law

Finally, the decision of the Court of Justice in *Impact v Minister for Agriculture and Food*,[22] concerned a claim by Irish civil servants challenging their pay and pension entitlements as fixed-term contract workers and the manner and effect of the renewal thereof. The issue arose *inter alia* as to the direct effect of a Directive implementing a Framework Agreement[23] and the jurisdiction of the Irish Rights Commissioner or Labour Court to consider the claim of a fixed-term worker as to direct effect in respect of a period after the due date for implementation and prior to the date of transposition of the directive.

No express jurisdiction had been conferred on the Rights Commissioner or Labour Court as to European law matters under Irish law, although generally they had what was argued by the Irish State to be "an optional jurisdiction" over claims arising, and so a High Court challenge could have been initiated by the claimants in the alternative. The Court of Justice held that to compel the applicants to have to bring a separate action before the High Court to assert their rights would have resulted in procedural disadvantages to them, including cost and time disincentives, which the national referring court would have to consider. The Court of Justice reasoned that:

> "principle of effectiveness requires that those individuals should also be able to seek before the same courts the protection of the rights which they can derive directly from the directive itself … the obligation to divide their action into two separate claims and to bring the claim based directly on the directive before an ordinary court leads to procedural complications liable to render excessively difficult the exercise of those rights conferred on the parties by Community law…"

Clause 4 of the framework agreement prohibited the treatment of fixed-term workers in a less favourable manner than comparable permanent workers and the issue arose as to its direct effect. The Court held that Clause 4(1) was unconditional and sufficiently precise for individuals to be able to rely upon it before a national court. Clause 5 also arose for analysis, which required States to adopt measures in order to prevent abuse arising from the use of successive fixed-term employment contracts or relationships, which was held by the Court of Justice not to have direct effect, not satisfying the conditions for the doctrine. The Court, however, held that a public employer could not renew contracts for an unusually long term in the period between the deadline for transposing the Directive and the enactment of implementation legislation. The decision of the Court of Justice has received a favourable reading from the Labour Court itself, practitioners and scholars but not from the Irish High Court.[24]

Conclusion

The involvement of the Irish State in a range of free movement and competition law decisions in 2008 is a most remarkable development and not in keeping with trends in recent years. In 2008, Ireland has lost important legal battles in free movement, employment law and competition law, or at the least will be affected adversely by the operation of these major decisions, especially in *Metock, BIDS, Cartesio* and *Impact*. ■

22 Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] 2 CMLR 47, a referral from the Irish Labour Court.

23 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

24 *Kildare County Council v. Halton* (FTC/05/15 21st November, 2008 (Labour Court)); O' Mara "European Developments" (2008) 5(2) Irish Employment Law Journal 80. But see *Minister for Justice, Equality & Law Reform & Commissioner of An Garda Siochana v. Director of Equality Tribunal* [2009] IEHC 72 and Fahey "A Constitutional Crisis in a Tea-Cup: The Supremacy of EC law in Ireland" (2009, forthcoming).

Recent Developments in the law of prohibition

Part 2

Mícheál P. O'Higgins SC

This is the second part of a two part article dealing with the prohibition of criminal trials. The first part of this article discussed cases where the DPP reviews an earlier decision to prosecute and also analysed recent court decisions on the failure to preserve evidence and delay. The second part of this article will deal with repeat trials, abuse of process, the issue of disclosure and admissions of guilt.

Repeat Trials

The Supreme Court recently considered the concepts of oppression and double jeopardy in the context of repeat trials after two hung juries. In *DS v. DPP*,[1] it was proposed to put the applicant on trial for a third time, two earlier juries having disagreed. A five judge court sat.[2] Denham J. gave a judgment with Hardiman, Fennelly and Finnegan JJ. concurring. Kearns J. gave a separate judgment with which Fennelly and Finnegan JJ. agreed. There were considerable differences in the approach adopted in the two judgements.[3]

In *DS*, the applicant was charged with six counts of sexual assault, three charges relating to the complainant, TL and three charges relating to her cousin, SL. The applicant applied successfully to sever the indictment and separate trials in relation to each complainant were ordered. The trial of the charges relating to TL commenced in November, 2002 and on day 2 of the trial, the jury was discharged. The applicant was re-tried on the TL charges on the 6th, 7th, 11th and 12th of March, 2003 and the jury acquitted the applicant. The first trial of the applicant on the charges relating to SL took place over the 3rd and 4th of July, 2003 and ended in a jury disagreement. A re-trial took place on the 2nd, 3rd and 4th of March, 2004. This time the applicant was acquitted of count number 3 but the jury were unable to reach a verdict on count numbers 1 and 2. The applicant then moved for judicial review and sought an order of prohibition injuncting a third trial on counts numbers 1 and 2 relating to SL. On the particular facts of the case therefore, this prohibition action was in fact an attempt to stop what would have been trial number 5 (if one deals with the complaints of both complainants in the round).

In the High Court, O'Neill J. granted an order of prohibition, concluding that the ancient common law prohibition on multiple trials known as the double jeopardy principle had application to the case. The learned Judge concluded that the third trial of a person for the same offence where in the two previous trials a jury has disagreed, would not be a trial in due course of law as required by Article 38 of the Constitution. From that judgment, the DPP appealed. On the particular facts of the case, the appeal was refused and the applicant held the order of prohibition that had been granted in the High Court. However, the DPP was successful on a number of the grounds argued, principally the contention that it was inappropriate to apply a "two strikes and you're out" rule against the State.

Denham J. held that there was no hard and fast rule that there should be two trials only. That would be to legislate. Each case should be judged on its own facts. It is a matter for the exercise of a discretion as to the number of prosecutions that may be brought. The principle of double-jeopardy has no application where there is no verdict of guilty or not guilty. The Court may need to guard against the inherent dangers of repeat trials. A third trial may not *per se* be a breach of a trial in due course of law. All the facts of each case require to be considered.

Denham J. emphasised the unusual facts in the case including the question of stress and hardship of the applicant and also his family and children. A psychiatrist's report takes up some four pages of the judgment. In addition the charges involved events between 1994 and 1997. All told, proceedings of one sort or another were before the Courts for 6 years. Viewing the matter in the round, this would be trial number 5. Considering all the factors cumulatively, and since the ultimate decision should be proportionate and should relate to the process as a whole and to the fairness of the procedures, the Court was required to exercise a supervisory role and to take into account all the circumstances of the case. With that in mind, Denham J. held that it would oppressive and unfair to put the applicant on trial again.

Mr. Justice Kearns took a somewhat different approach. He noted that in England and Wales there existed a convention that there should not be a third trial after two jury disagreements. He said that the principle of double-jeopardy cannot arise in the context of the criminal process until there has been either a conviction or an acquittal. There

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This is an edited version of a paper delivered by the author at a Bar Council CPD Seminar on Judicial Review on Wednesday, the 3rd of December, 2008.

1 Unreported, Supreme Court, 10th June, 2008.

2 The members of the Court were Denham, Hardiman, Fennelly, Kearns and Finnegan JJ.

3 An analysis of the case can be found in an article by David Goldberg S.C., Bar Review, November, 2008 at p.119 entitled *Double Jeopardy – How Many Trials to Babylon.*

is only one continuing jeopardy until the case is finalised. He noted too that the practice which operates in England and Wales has traditionally existed in this jurisdiction. There must come a time when repeated trials may come to be seen as oppressive and as an abuse of discretion on the part of the DPP. It may become an unfair procedure in itself to retry an accused. A breaking point may be reached. A one size fits all approach is not appropriate. In the ordinary course, two trials which end in jury disagreement should be seen as an effective discharge of the public's interest in the prosecution of crime, unless there are unusual factual circumstances which suggest otherwise. Kearns J. held that when considering an application to prevent a third trial the Court should have regard to the following matters[4]:

1. The seriousness of the offence or offences.
2. The extent if any to which the applicant may himself have contributed to any trial mishap.
3. Any period of delay which is plainly excessive.
4. The extent to which the case now to be met has altered from that which was considered in previous trials.

On reviewing the case as a whole, Kearns J. stated there were no unusual or exceptional circumstances present which would justify treating this case as one where a third trial should be permitted following the two jury disagreements to date.

Abuse of Process Cases

This is another line of attack which accused persons might consider to challenge a decision to prosecute. This area is to my mind under utilised, and has not received much judicial scrutiny in this jurisdiction. It is the area of abuse of process of the courts.

The High Court has an inherent discretion to prevent proceedings which are oppressive or an abuse of process.[5]An abuse of process was defined in *Hui Chi-Ming v. R*[6]as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding". According to *Archbold* 2006, the jurisdiction to stay for an abuse of process can be exercised in many different circumstances, but two strands have been identified in the authorities, namely (a) where the defendant would not receive a fair trial and (b) where it would be unfair for the defendant to be tried. The latter includes cases where the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality. The burden of establishing that the pursuit of particular proceedings would amount to an abuse of process is on an accused and the standard of proof is the balance of probabilities.

In *Ryan v Director of Public Prosecutions* [7] Barron J. stated:

> "The expression "abuse of the process of the court" is one which refers to a contamination of the entire proceedings. In the two cases relied upon, the objection is to the fundamental basis upon which the proceedings are brought. No such objection is laid in the present case. The grounds for relief follow the passage which I have cited from the judgment of Finlay P., as he then was, in *The State (O'Callaghan) v. O hUadhaigh* [1977] I.R. 42. The applicant is concerned solely with advantage. That is not the test. Justice must be done and must be seen to be done. Where proceedings are commenced which violate this principle, then they are an abuse of the process of the court."

Academics differ on whether the use of abuse of process in this way is appropriate, or something to be condemned. Keane J. suggested it can be used "without doing violence to the established principles of issue estoppel".[8] However, the use of the doctrine as a means of avoiding the rules of estoppel has been heavily criticised by some commentators:

> "This approach is totally inadequate. It involves the exercise of an unprincipled discretion, without substantive guidance, except for a few analogous cases and the Judge's own *ad hoc* sense of what is appropriate. The absence of any attempt to articulate a rationale or standard deprives litigants of any guidance as to their conduct in the litigation process, and constitutes an abrogation of judicial responsibility."[9]

It is submitted there is nothing wrong in principle with availing of the doctrine to stay a criminal prosecution, provided a litigant is not reliant on purely discretionary impulses of sympathy, and can bring himself within the established parameters of the doctrine.

There has been a creeping tendency of late for judicial review cases to be decided on purely discretionary grounds, unrelated to the application of established legal principles.[10] This approach has been criticised, as it tends to involve the judicial review judge focusing on the merits of the substantive case, rather than the procedures under attack in the judicial review.[11] The same thinking has it that all drunk driving points should be disallowed, and legal arguments based on so called "technicalities" rejected.

However, that is not to say the Courts cannot continue developing a structured and coherent set of legal principles in

4 P.22 of the judgment.
5 In a purely civil context see for example *Barry v. Buckley* [1981] IR 306 (Costello J.).
6 [1992] 1 AC 34
7 [1988] IR 232
8 *McAuley v. McDermott* [1997] 2 ILRM 486 at 497.
9 Tim Pinos, "*Res Judicata Redux*", (1988) 26 Osgood Hall LJ. 713 at 746, as quoted in P.A. McDermott's text on *Res Judicata* at p.176.
10 Perhaps an example of this is *Noonan v. Director of Public Prosecutions* [2007] IESC 34.
11 See AM Collins S.C. "*Thomson Round Hall Judicial review Conference -- Judicial Discretion in Judicial Review*" Bar Review, February, 2008 at p.27.

this area of abuse of process, so that justice in individual cases can be achieved, by applying established principles of law.

In the United Kingdom, some challenges to the DPP's prosecutorial discretion have been successful on abuse of process grounds. A number of cases in the United Kingdom have held that in certain circumstances, a reversal of a decision not to prosecute may amount to an abuse of process.

In *R v. Croydon Justices, ex parte Dean,*[12] the applicant had been arrested and interviewed by the police in the course of a murder investigation. He was released on the basis that he was going to be a prosecution witness. He subsequently made a prosecution witness statement and continued to assist the police voluntarily for a period of over five weeks. The police continued to refer to him as a prosecution witness and he alleged that they made specific assurances that he would not be prosecuted in connection with the murder. Thereafter, the Crown Prosecution Service decided that the applicant should be charged with doing acts with intent to impede the apprehension of another. He was later charged and committed for trial. His application for *certiorari* was granted and the Court held that:

> "The prosecution of a person who had received a representation or promise from the police that he would not be prosecuted was capable of being an abuse of the process of the court notwithstanding the absence of bad faith on the part of the police or of any authority in them to make such a representation or promise; and that, since the court was satisfied that the police had told the applicant that he would not be prosecuted and having particular regard to his age, it was an abuse of process for him to be prosecuted subsequently, and the justices had been bound to treat the case as one of abuse of process."

In *R v. Mulla,*[13] an argument based on abuse of process grounds failed. The court stated that factors to be taken into account include whether the prosecution had indicated to the Court what its view was, the views expressed by the judge when the prosecution gives its indication, the period of time over which the prosecution reconsiders the matter before they change their mind, whether or not the defendant's hopes have been inappropriately raised, and whether there has been, by reason of the change of course by the prosecution, any prejudice to the defence.

On the other side of the coin, an abuse of process was accepted in *R v Bloomfield*[14]**.** Police officers arrested Mr. Bloomfield in possession of 100 ecstasy tablets. The man's defence was that a woman whom he named, had given him the drugs for safe keeping as she was about to be raided by the police. He felt that he had been set up. His account was that at about 8:00pm on the 31st of May, 1995 he had a phone call from a named woman who said she had heard over the police scanner that her house was going to be raided and asked him to pop up and see her. He went to her house, she gave him the ecstasy tablets and asked him to hold onto them until the next day. When he got home three quarters of an hour later, he was arrested.

The case was listed for a plea and directions on the 20th of December, 1995 at Luton Crown Court. Prosecution counsel approached defence counsel and indicated, in the clearest of terms, that the Crown wished to offer no evidence against the defendant on the charge of possession. This was because the prosecution accepted the defence account as to how he came to be in possession of the ecstasy tablets. They accepted he had been the victim of a set up.

Prosecution counsel openly stated to the trial judge that because of the presence in Court of certain other people it would be embarrassing to the police and prosecution if no evidence were to be offered that day. It was therefore suggested that if the plea and directions hearing could be adjourned to a later date, then "no evidence" would be offered at that adjourned hearing.

Subsequently the Crown Prosecution Service arranged a conference with new prosecuting counsel and thereafter informed the defence solicitors that the Crown intended to continue with the prosecution. The defence moved an application at the trial to stay the proceedings as an abuse of process of the Court. That application failed. The defendant then pleaded guilty and was sentenced to three months imprisonment. The conviction was then appealed to the Court of Appeal. Counsel for the Crown ran the argument that prosecution counsel in the Court below was "inexperienced" and had acted without instructions.

The Court of Appeal held that:

1. Whether or not there was prejudice to the defendant, it would bring the administration of justice into disrepute to allow the Crown to revoke its original decision without any reason been given as to what was wrong with it, particularly as it was made *coram judice* in the presence of the Judge and,
2. That neither the Court nor the defendant could be expected to enquire whether prosecuting counsel had authority to conduct a case in court in any particular way and they were therefore entitled to assume in ordinary circumstances that counsel did have such authority.

The Court of Appeal also rejected the Crown's argument that the fact the defendant had pleaded guilty showed it cannot have been an abuse of process to prosecute him. It is often the case that a defendant pleads guilty when some application made on his behalf fails, and that was not a bar to him appealing. It cannot be right that an accused has to plead not guilty in order to preserve his right of appeal against a refusal of a stay.

Litigating Disclosure in Judicial Review

For reasons that are probably obvious, disclosure in criminal cases is something which should usually be litigated at the local level, before the Court of trial, and should not form the basis for a prohibition action in judicial review. However, to

12 [1993] 3 WLR 198
13 [2004] 1 Cr. App. R. 6
14 [1997] 1 Cr. App. R. 135

every general rule, there are exceptions and it is submitted that, in an appropriate case, it is in accordance with legal principle to seek prohibition where an applicant is able to demonstrate that, due to the State's default in failing to make proper disclosure, there is a real or serious risk he cannot get a fair trial.

It is contended that floodgate type arguments which might be made on behalf of the DPP should be faced down, where an applicant can meet the necessary evidential threshold. So where an accused person can demonstrate:

(a) the strong probability that unobtained materials exist,
(b) a refusal on the part of the gardai to either obtain such material, or if they have it in their possession, to share it,
(c) that the missing or unobtained material has a bearing on a relevant trial issue, and
(d) that the accused has exhausted other less nuclear options of obtaining the material, such as by sending letters to the DPP or by litigating the issue at a pre-trial hearing, there is nothing in principle wrong with the idea of the High Court being asked to intervene, so as to temporarily stay the trial, to give the prosecution an opportunity to get its act together.

Practitioners may be aware of recent cases in which the High Court has been minded to grant "unless and until" type orders in judicial review cases concerned with either a failure to make proper disclosure, or a failure to seek out relevant evidence.

In the cases of *Florence Healy v. DPP* and *Vincent Dodd v. DPP*,[15] the High Court was asked to stay a criminal prosecution in the District Court in circumstances where the gardai had failed to provide relevant disclosure material and had also failed to carry out enquiries with the Garda Siochana Complaints Board as to whether it would be willing to disclose certain statements made to it by gardai concerning the events the subject matter of the criminal proceedings which the applicants sought to injunct. The applicants faced allegations of assault and obstruction of a garda arising from an incident on the 18th of May, 2003. The applicant, Mr Dodd, said that he had been subjected to a violent assault by a named garda in the course of the incident. He made a complaint to the Garda Siochana Complaints Board concerning what he said was excessive brutality on the part of the gardai. He sought from the gardai a copy of the statements which the gardai would inevitably have provided to the Complaints Board to rebut Mr. Dodd's complaint of garda brutality. The applicants launched judicial review proceedings, seeking to stay their criminal trial on the basis of the non-provision of the statements which the gardai had provided to the Complaints Board. In an ex-tempore ruling, Hanna J. granted an injunction restraining the DPP from taking any further steps in the prosecutions, unless and until the DPP at least wrote to the Garda Siochana Complaints Board to see could the statements in question be obtained and shared with the defence.

In subsequent judicial review proceedings heard before McGovern J., a permanent injunction was granted, stopping the applicants' trials. [16]

Slightly conflicting dicta are available from the Supreme Court on this issue of the appropriateness of litigating disclosure complaints in judicial review.

PG v. DPP[17] was a sex abuse delay prohibition action. One issue which arose in the case was the contention that the DPP's failure to disclose certain evidence, principally the notes of psychological or other experts attending the complainants, had deprived the applicant of his right to fair procedures and natural justice and, hence, to a fair trial in due course of law. Murphy J. in the High Court refused the application for an injunction and the applicant appealed to the Supreme Court. The Supreme Court[18] dismissed the appeal. The Court held that whilst there had been significant delay in reporting the alleged sexual offences, the DPP had discharged the burden of proving that adequate explanation had been given for that delay. The Court found that the complainant's extreme youth, the applicant's adult status and their very close family relationship meant it was appropriate to conclude that a relationship of dominance or authority existed.

More relevant to the remit of this paper, the Court also held that it was appropriate for the Court to take into account, when considering the effect of the delay, that the applicant had made certain admissions when questioned by An Garda Siochana. We will come back to that issue in due course when we come to consider the extent to which alleged admissions can be taken into account in judicial review applications.

In *PG*, Mr. Justice Fennelly (with whom Murray CJ. Denham and Geoghegan JJ. agreed) observed that matters of disclosure were within the province of the trial judge and were not matters for judicial review, except to the extent that the accused could show that, having taken all reasonable steps to obtain disclosure, necessary material was being withheld from him to such an extent as to give rise to a real risk of an unfair trial.

In an interesting *obiter dictum*, Hardiman J. stated that until satisfactory provision was made for disclosure or discovery in criminal cases, applicants were, in suitable cases, entitled to raise the question of disclosure on judicial review. In particular, applicants in all sexual abuse cases might be entitled to sight of all statements of complaint or disclosures of alleged abuse as, in many instances, such evidence might be the only "islands of fact" available to such applicants.

As stated, in three recent examples, three different High Court judges have been prepared to impose a temporary prohibition order, staying a prosecution from proceeding, until a disclosure logjam has been sorted out. In *Traynor v. Judge Delahunt, the DPP and An Garda Siochana Complaints Board,*[19] the issue was whether the applicant was entitled to disclosure of certain documents and reports sent by the Garda Siochana Complaints Board to the DPP, which the applicant claimed

15 Unreported, High Court (Hanna J.), 30th May, 2005.

16 McGovern J's written judgment, setting out the history of the matter, was delivered on the 13th day of March, 2007.
17 [2007] 3 IR 39.
18 Murphy CJ. Denham, Hardiman, Geoghegan and Fennelly JJ.
19 Unreported, High Court (McMahon J.) 31st July, 2008

might assist her in defending herself in a criminal trial. The facts of the case were quite analogous to the facts of *Dodd* and *Healy* described above. In *Traynor,* the gardai were called out to a public order disturbance in March of 2003. One of the gardai called to the scene was involved in an altercation with the applicant's daughter. When the applicant tried to intervene, she alleged she was assaulted by the garda in question. The applicant's daughter was arrested. Subsequently the applicant made a complaint to the Complaints Board about the garda concerned. The Board investigated the complaint, having held that the complaint was admissible, completed its investigation and sent a report to the DPP. The DPP decided eventually not to prosecute the garda. The Complaints Board stated that having regard to the decision of the DPP, it too had concluded with the matter.

A day under 6 months after the incident, and the last day for doing so, the garda applied for the issuance of summonses against the applicant in which the applicant was charged with assault and violent disorder. At the callover of cases in the Circuit Court, the applicant sought disclosure, both from the DPP and also from the Garda Siochana Complaints Board, of all material generated from the Complaints Board's investigation of the matter. Both parties resisted all disclosure except the statement of complaint made by the applicant herself to the Board and the findings of the Board itself, both of which were sent to the applicant. On the DPP's assurance that he was not going to rely on any of the said documents in the case, the Learned Circuit Judge refused to make any order of disclosure against either party. The applicant then launched judicial review proceedings, seeking to quash the Circuit Judge's order and also seeking declaratory relief obliging the Complaints Board and the DPP to disclose the relevant documents. It was indicated that if the Court was not disposed to grant the applicant such orders, the applicant's submission was that the Court should prohibit the further prosecution of the charges.

It is interesting to note the arguments made by State counsel in the matter. The applicant must engage with the evidence in order to demonstrate how the matter complained of creates a real or serious risk of an unfair trial and it was argued the applicant had failed to discharge that onus in the present case. In reality what the applicant was seeking was discovery of material within the possession or procurement of the Complaints Board, and that it was well established that discovery against third parties was not available in criminal proceedings.[20]

Counsel for the Board submitted that the Complaints Board was not a party to the criminal proceedings and was not subject to any obligations of disclosure in the said proceedings. The applicant was attempting to obtain what was effectively third party discovery. It was argued that the applicant, as a party in criminal proceedings, has no legally enforceable right or statutory entitlement to disclosure from a non-party to those proceedings. The Board also argued the documents in question were confidential.

In finding against the State, McMahon J. commenced with a description of the State's duty to disclose. He cited Fennelly J's dictum in *People (DPP) v. Kelly*[21] as follows:

> "…the prosecution must disclose to the defence any material of possible relevance to the guilt or innocence of the accused."

The evidence before the Complaints Board could be described as both "relevant" and "material" even if those words were not synonymous. Judge McMahon held that it was not an adequate excuse for the DPP's reluctance to disclose such material as was sent to it by the Complaints Board to say that it does not propose to rely on it in its prosecution of the defendant. Reliance is not the test for excusing disclosure. The material in question was, in the Judge's view, the very kind of matter that would impede the prosecution's case, advance the defendant's case or lead to a new line of enquiry of assistance to the defendant, the test as set out by Carney J. in *DPP v. Special Criminal Court*[22](often referred to as the *Ward* case).

In relation to the DPP's submission that the matter of disclosure is a matter for the trial judge primarily, McMahon J. had this to say:

> "I agree to this extent: it is for the trial judge to examine the particular documents and engage in the weighing exercise to ensure that the accused gets a fair trial. The trial judge has not done so in this case, contenting herself with the Director of Public Prosecution's assurance that it does not intend to rely on these documents. For that reason alone, the accused is entitled to an order of this Court".

In this case, where the documents and reports in question relate to the very same incident, where the main parties involved in the prosecution are the same as those involved in the Board's investigation and the Director of Public Prosecution's previous consideration, it is inconceivable that they would not fall within the principle enunciated in *Ward,* and for this reason; the onus on the accused/applicant to show relevance and that there is a real risk of a fair trial, is easily discharged.

Of particular interest is the actual orders made by McMahon J: The Learned Judge granted an order of *certiorari* quashing the Circuit Judge's decision and also directed, if the DPP was to continue with the prosecution, that the applicant be furnished by the DPP with all documents received by it from the Complaints Board in respect of the complaint made by the accused against the gardai, arising out of the incident the subject matter of the proceedings. Since those orders against the DPP met the justice of the case, it was unnecessary for the Court to make any orders against the Garda Siochana Complaints Board.

An "unless and until" order was also made by Herbert J. in the case of *McG v. DPP*[23], continuing a stay against the

20 See the decision of the Supreme Court in *People (DPP) v. Sweeney* [2001] 4 IR 102 and also *DH v. Groarke* [2002] 3 IR 522.

21 [2006] 3 IR 115

22 [1999] 1 IR 60.

23 23rd October, 2008.

Director so as to give the gardai an opportunity to consider the applicant's disclosure complaints and, if they felt it appropriate, to take steps to remedy those complaints. That case is still before the Court.

A potentially very important case on the *Braddish*/ disclosure line of jurisprudence is the decision of O'Neill J. in *MR v. DPP*[24]. The case probably merits an article in its own right. O'Neill J. granted prohibition restraining the DPP from prosecuting a retired parish priest on old indecent assault charges in circumstances where the investigation carried out by the gardai was shown to be deficient and there had been a point blank refusal to obtain a statement from the complainant's mother.

From the point of view of practitioners, it would be very important not to abuse this developing jurisprudence by bringing unmeritorious judicial reviews before the High Court, without litigating the issue properly in correspondence and before the court of trial. An early hearing date could also be sought, by seeking an hour slot on a Monday from the judicial review judge, so as to avoid the delays associated with the list to fix dates.

Can Judicial Review Court take account of Admissions?

There are a number of dicta to the effect that the existence of admissions is a relevant factor to be taken into account when considering whether to prohibit a criminal trial. Most of these dicta trace their origins to observations made by Ms. Justice Denham in the Supreme Court in *B v. DPP*[25] where the Learned Judge, in the context of a sex abuse delay prohibition action, set out a range of factors to which regard should be had when considering whether to grant prohibition. That list included the question whether admissions had been made by the applicant as to the matters charged and also the extent to which those alleged admissions were being contested.

McGuinness J. made similar observations in a 2003 case entitled *DW v. DPP*[26]. See also the observations of Lynch J. in *PC v. DPP*[27] and also Kearns J. in *O'Callaghan v. Judges of the Dublin Metropolitan District Court*[28].

More recently in *SA v. DPP*,[29] Hardiman J. (with whom Macken and Finnegan JJ. agreed) commented that it would be "extraordinary" to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature. It should be noted that Hardiman J. went on to add that the applicant had not disputed the admissions and he therefore cautioned that the case could not be regarded as a useful precedent in circumstances where alleged admissions are hotly disputed and not independently verified. That dictum was cited with approval by Kearns J. in *McFarlane (No.2)*.[30]

Different views are also evident on the question of taking into account "inferred admissions" as indicated in the judgments of Geoghegan J. and Hardiman J. respectively in *Rattigan v. DPP*[31].

In the face of such impressive pedigree, any barrister seeking to argue that a judicial review judge has no business troubling himself with the question of admissions, faces something of an uphill battle. Having said that, an argument could certainly be made that it is contrary to the presumption of innocence for a Court to presume that any part of the prosecution case is true and accurate, and to allow the allegation that such admissions were made be used as a basis for refusing judicial review.

Prior to the Supreme Court's landmark decision in *H v. DPP*[32], it was necessary for a judicial review court asked to consider granting prohibition in a sexual abuse delay case, to temporarily suspend the presumption of innocence, so that the Court could carry out the exercise of assessing whether the defendant's conduct (which for the purpose of the exercise was assumed to be true) had caused the complainant to delay in making her complaint. In the countless sex abuse delay cases that came before the superior courts during the relevant period, it was deemed necessary for the judicial review court to carry out this somewhat artificial exercise and, whilst doing so, to suspend temporarily the presumption of innocence to which the accused was otherwise entitled. Since the Supreme Court's decision in *H v. DPP* in July, 2006, it is no longer necessary for the Court to carry out this exercise, since it is now to be assumed the complainant's delay in reporting was attributable to the alleged abuse. For that reason, it is no longer necessary to suspend, even temporarily, the presumption of innocence. And since an accused person enjoys the presumption of innocence at all times, it could be argued it is a violation of that fundamental principle to assume that that part of the prosecution case which alleges such admissions were made, is true.

Moreover, since a number of the dicta in favour of allowing a judicial review judge to take account of admissions trace their source to Denham J's dictum in *B v. DPP*, it may be seen that the apparent entitlement to do so stems from a time when it was necessary to suspend the presumption, for the purposes of carrying out the artificial exercise concerning the assessment of the reasons for the complainant's late disclosure. Since that rationale no longer applies post *H*, it might be argued that, from the point of view of principle, the rationale for suspending the presumption of innocence no longer applies.

Having said all of that, practitioners should be aware of the need to take instructions from their client on the question of any admissions allegedly made. If it is intended to challenge the reliability or admissibility of any such admissions at trial, that is something which should be deposed on affidavit for the purposes of the judicial review application. If this is not done, the judicial review judge may feel entitled to have regard to the existence of such alleged admissions when considering whether to grant the discretionary relief of prohibition. [33]

Obviously, if alleged admissions are being put in issue,

24 Unreported, High Court (O'Neill J.) 20th February, 2009.
25 [1997] IR 140, 202.
26 Unreported, Supreme Court, 31st October, 2003.
27 [1999] 2 IR 25, 80.
28 Unreported, High Court, 20th May, 2004, 15.
29 Unreported, Supreme Court, 17th October, 2007.
30 Unreported, Supreme Court, 5th March, 2008 (the judgment was delivered by Kearns J. with Hardiman and Macken JJ. concurring).
31 Unreported, Supreme Court, 7th May, 2008.
32 [2006] IESC 55.
33 For a recent example of this, see the decision of McCarthy J. in *P v DPP*, Unreported, High Court, 13th February, 2009.

whether it be a question of their admissibility, voluntariness or reliability, that should preclude the judicial review judge from taking any account of them. A judicial review judge will be disinclined to engage in any assessment of the admissibility question, since to do so would be to transgress into the field of the trial judge. Obviously it would not be appropriate for the judicial review judge to engage in the equivalent of a *voir dire,* since again that should be the exclusive terrain of the court of trial. As with any case involving an application for prohibition, it is necessary that the applicant's side engage with the prosecution case, including (if it arises) any question of admissions allegedly made by the applicant whilst in custody.

Conclusion

Recent cases, particularly under the *lost evidence* heading, demonstrate that the parameters for seeking prohibition have narrowed and that, by and large, exceptional circumstances have to be found before either a decision to charge can be challenged, or an existing prosecution halted on fair trial grounds. However, recent developments also demonstrate that the category of cases in which a review can be brought is not closed.

Post *Eviston* cases such as the Wexford statutory rape case[34] and the abuse of process cases show clearly that the traffic is not all one way. Where an injustice has occurred, or where an accused can demonstrate a situation of unfairness, it should be possible to litigate that grievance in judicial review. The challenge will be to frame the action within existing judicial review parameters, so as to maximise the chances of getting an order useful to the client's position.

Practitioners will be mindful of the necessity not to launch contrived or inappropriate applications which would neither be in the client's interests, or in the interests of the community. The good news from the recent case law is that where a marked unfairness or illegality can be identified, the rules of judicial review are sufficiently flexible to meet such a grievance. Recent cases make it clear that neither *male fides* nor evidence of an improper motive on the prosecutor's part is essential for an order of prohibition. As ever, the lawyer's challenge will be to convert the client's sense of injustice into an enforceable legal right. ■

34 *GE v. DPP*, Unreported, Supreme Court, 30th October, 2008.

Bar Council Special Olympics Fundraiser

On Friday 24th April, the Bar Council held a Casino Night fundraiser for the Special Olympics in the Distillery Building. Following a night of frantic gambling and an auction which included the Grand Slam team jersey and corporate tickets to Ireland v. Italy, courtesy of the FAI, a total of nearly €25,000 was raised. Much thanks to the auctioneer, Fergus O'Hagan SC, the organisers and our many sponsors on the night who included Clare Hanley catering, Space Design and the FAI. Thanks also to the many staff that worked for free at the event and helped ensure its success.

Legal The Bar Review Update

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A directory of legislation, articles and acquisitions received in the Law Library from the 19th March 2009 up to 8th May 2009.
Judgment Information Supplied by The Incorporated Council of Law Reporting

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ADMINISTRATIVE LAW

Library Acquisitions

Lewis, Clive
Judicial remedies in public law
4th ed
London: Thomson Sweet & Maxwell, 2009
M300

Moules, Richard
Actions against public officials: legitimate expectations, misstatements and misconduct
London: Sweet & Maxwell, 2009
M31

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Library Acquisition

Council of Europe
European convention on the adoption of children (revised), Council of Europe treaty series no. 202 (10/2/2009)
Strasbourg: Council of Europe, 2009
N176.1

ARBITRATION

Stay

Arbitration clause – Mandatory injunction seeking access to books and records – Hotel – Management agreement – Obligation of defendant to keep books and records – Liability of plaintiff to account for tax liability – Problems with financial management – Referral to arbitration –Whether application for injunctive relief captured by arbitration clause – Principles applicable to interlocutory mandatory relief – Whether obligation to demonstrate serious issue for trial or strong likelihood of success – Adequacy of damages – Seriousness of revenue obligations – Possibility of penalties and prosecution – Reputation – Balance of convenience – Urgency – Confidentiality concerns – *Telenor Invest AS v IIU Nominees Limited* (Unrep, O'Sullivan J, 20/7/1999), *Campus Oil Limited v Minister for Energy (No 2)* [1983] IR 88; *American Cyanamid Co v Ethicon Limited* [1975] AC 396, *Cronin v Minister for Education* [2004] IEHC 255, [2004] 3 IR 205, *A & M Pharmacy Limited v United Drug Wholesale Limited* [1996] 2 ILRM 46, *Sheehy v Ryan* (Unrep, Peart J, 29/8/2002), *Shepherd Homes Limited v Shandham* [1971] Ch 340, *Locabail International Finance Limited v Agroexport* [1986] 1 All ER 901, *Irish Shell Limited v Elm Motors* [1984] 1 IR 200, *Boyhan v Tribunal of Inquiry into the Beef Industry* [1993] 1 IR 210, *Ling ham v Health Service Executive* [2005] IESC 89, [2006] 17 ELR 137 and *Zockoll Group Limited v Mercury Communications* [1998] FSR 354 considered – Arbitration Act 1954 (No 26), s 22 – Arbitration Act 1980 (No 7), s 5 – Action but not motion stayed and access to specific information granted - (2008/9112P – Kelly J – 18/12/2008) [2008] IEHC 376
Shelbourne Hotel Holdings Ltd v Torriam Hotel Operating Company Ltd

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Dowling Hussey, Arran
Arbitration: the award on costs
2009 ILT 316

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Warne, Jonathan
International commercial dispute resolution
Haywards Heath: Tottel Publishing, 2009
C1250

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Airport charges

Fixing – Review – Method – Capital expenditure – Regulatory asset base – Building blocks approach – Powers of Commissioner – Whether method of fixing charge permissible – Whether rational or transparent – Whether properly applied – Whether review of charges lawful – Aviation Regulation Act 2001 (No 1) - Decision remitted for clarification (2007/1246JR – Clarke J – 11/4/2008) [2008] IEHC 98
Ryanair Ltd v Commissioner for Aviation Regulation

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Jack, Raymond
Jack: documentary credits: the law and practice of documentary credits including standby credits and demand guarantees
4th ed
Haywards Heath: Tottel Publishing, 2006
N306.42

BROADCASTING

Statutory Instrument

Broadcasting amendment act 2007 digital sound broadcasting licence fees regulations 2009
SI 80/2009

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Clarke, Oisin
Virtual child pornography: a victimless crime
14 (1) BR 4

Daly, Aoife
Considered or merely heard? The views of young children in Hague Convention cases in Ireland
2009 (1) IJFL 16

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European convention on the adoption of children (revised), Council of Europe treaty series no. 202 (10/2/2009)

Strasbourg: Council of Europe, 2009
N176.1

Craig, Rosemary
A discussion on the re-introduction of corporal punishment in Northern Ireland
M208.11

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Hague conference on private international law: guide to transfrontier contact concerning children: general principles and guide to good practice.
Bristol: Jordan Publishing, 2008
N176

Parkinson, Patrick
The voice of the child in family law disputes
Oxford: Oxford University Press, 2008
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Conway, Sarah
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2009 ILT 58

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Stokes, Rob
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N250

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C1250

COMPANY LAW

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Shadow directors – Restriction order – Whether body corporate could be shadow director for purposes of application for restriction – Whether foreign body corporate could be shadow director for purposes of application for restriction – Whether contrary intention to displace statutory rule of interpretation that person included body corporate – *Fyffes plc v DCC plc* [2005] IEHC 477, (Unrep, Laffoy J, 21/12/2005) followed - Interpretation Act 1937 (No 38), s 11(c) – Companies Act 1963 (No 33), s 176 – Companies Act 1990 (No 33), ss 27 and 150 – Respondent's appeal allowed (155/2005 – SC – 16/12/2008) [2008] IESC 68
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2009 (March) GLSI 26

Ryan, Gerard
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McKenna, Justin
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Macnab, Andrew
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Oxford: Oxford University Press, 2009
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Lawfulness of detention – Charge of failure to produce passport or equivalent document – Efforts to establish identity – Refusal of consulate to provide assistance – Refusal of District Judge to hear bail application – Refusal of application to have charge finalised on guilty plea – Remand – Whether case appropriate for inquiry – Inherent jurisdiction to treat application as application for leave to apply for judicial review – Reasons for exercise of inherent jurisdiction – Complaint regarding conduct of third party rather than detainer – Absence of provision for representation of third party within inquiry – Entitlement of District Judge to make observations – Disproportionate nature of unconditional release – Absence of power of remittal in context of inquiry – *McSorley v Governor of Mountjoy Prison* [1997] 2 IR 258 considered – Constitution of Ireland, 1937, art 40.4.2° – Leave for judicial review granted and short service for bail application granted (2009/8JR - Edwards J – 12/01/2009) [2009] IEHC 31
Koranteng v Judge Sheridan

CONSUMER LAW

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Atwood, Barry
Food law
3rd edition
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W112.4

CONTRACT

Breach

Commercial list – Multiple claims - Development of building as theme pub and restaurant – Necessity for investment to complete project – Negotiations – Heads of agreement - Whether document concluded and binding agreement – Prior agreement with third party – Draft nature of agreement - Claim that defendant engaged to obtain and negotiate with investment partner – Claim that defendant engaged to provide independent financial advice – Breach of contract - Whether

contract for professional services – Offer – Refusal of offer – Absence of payment – Absence of evidence of binding contract for services – Negligence – Whether duty of care – Whether breach of duty of care – Damages – Independent legal advice – Causative link between action and alleged damage - Allegation of conflict of interest – Allegation of close existing conflicting business and personal relationship – Knowledge of relationship – Whether obligation to discharge debts of company – Terms of contract - Absence of reference to company in concluded agreement – Deed of release – Agreed terms – Definition of obligations in deed – Receipt of good and valuable consideration – Failure to identify basis for impugning deed – Legal advice – Binding nature of deed – Deed of assignment - Whether deed void or voidable -Recited consideration on deed — Dating of deed – Whether incorrect date had material effect as to validity or efficacy – Whether attempt to avoid stamp duty – Whether intent to defraud or deceive – Recital acknowledging receipt of consideration – Whether entitlement to go behind recital – *Kwei Tek Chao v British Traders & Shippers Limited* [1954] 2 QB 459 and *Kredithank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826 considered – Stamp Duties Consolidation Act 1999 (No 31), s 41 – Claims dismissed (2006/593P – Feeney J – 19/12/2008) [2008] IEHC 372
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Terms

Interpretation – Insurance contract – Ordinary and natural meaning – Parties objective intention – Whether term ambiguous – Whether insolvency of insured buyer occurring within period of insurance – Whether insured entitled to indemnity under policy – *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989, *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, *Re Walter L Jacob & Co Ltd* [1993] BCC 512 and *Analog Devices v Zurich Insurance* [2005] 1 IR 274 applied – Appeal allowed (217/2006 – SC – 22/1/2009) [2009] IESC 2
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Data protection

Unsolicited communications – Summons - Electronic communications service – Direct marketing – Complaints - Whether condition precedent to prosecution that attempts to seek amicable resolution of complaints made – Bases for investigation of complaints – Whether proper construction of legislation in light of European Directive gave rise to condition precedent – Whether interpretation of Directive necessary – Balance between legitimate interests of business and privacy and data protection rights of individuals – Intention of Oireachtas – Literal interpretation – Nature of criminal prosecution – Whether requirement for attempt to seek amicable resolution would fetter prosecutor in exercise of discretion – Summary prosecution – *DB v Minister for Health* [2003] 3 IR 12 and *MO'C v Minister for Health* [2002] 1 IR 234 considered – Data Protection Act 1988 (No 25), ss 10 and 31 – Data Protection (Amendment) Act 2003 (No 6), s 10 - European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003 (SI 535/2003), regs 13 and 17 – Relief refused (2008/489JR – McCarthy J – 9/1/2009) [2009] IEHC 1
Realm Communications Ltd v Data Protection Commissioner

Delay

Right to fair trial – Right to expeditious trial - Prosecutorial delay - Application for judicial review – Whether inordinate inexcusable and culpable delay on part of prosecution - Whether delay on part of prosecution culpable or blameworthy - Balancing exercise - Prejudice – Whether causative link between delay and prejudice - Inculpatory admissions - Whether challenged inculpatory statements should be disregarded – Public interest - *Barker v. Wingo* (1972) 407 US 514 applied; *Devoy v DPP* [2008] IESC 13, (Unrep, SC, 7/4/2008) considered - Relief refused (2006/1311JR - Ó Néill J - 5/12/2008) [2008] IEHC 414
Campbell v Director of Public Prosecutions

Delay

Right to fair trial – Right to trial with due expedition – Prohibition of trial sought – Delay of 6 years in executing bench warrant – Whether inordinate delay - Whether delay caused by applicant absconding – Whether culpable delay on part of gardaí in executing warrant – Whether reasonable efforts made to execute bench warrant – Discretion – Whether prejudice to defence or stress required to be established - Constitution of Ireland 1937, article 38 – Relief refused (2007/1550JR - Ó Néill J - 12/12/2008) [2008] IEHC 381
Shields v Director of Public Prosecutions

Disclosure

Summary road traffic fixed penalty offence - 29 categories of disclosure sought – Order for disclosure granted in District Court – Judicial review - Whether applicant could receive fair trial in absence of disclosure - Relevance of information sought – Onus on applicant to prove relevancy - No relevancy hearing - Duty on prosecution to disclose evidence in summary trial - Constitutional obligation to disclose certain evidence – Nature of offence – Common sense parameters – Interests of justice – Proportionality – Nature and importance of information – Whether applicant must prove real risk of unfair trial – Factual basis for disclosure – Whether applicant must engage in specific way with evidence – Applicable criteria - *Whelan v Kirby* [2004] IESC 17, [2005] 2 IR 30, *DPP v Doyle* [1994] 2 IR 286, *B v DPP* [1997] 3 IR 140, *DPP v Ní Chonduin* [2007] IEHC 321, (Unrep, MacMenamin J, 31/7/2007), *Maher v Judge O'Donnell* [1995] 3 IR 530, *McFarlane v DPP* [2006] IESC 11, [2007] 1 IR 134, *Scully v DPP* [2005] IESC 11, [2005] 1 IR 242 and *Dunne v DPP* [2002] 2 IR 305 applied; *DPP v Sweeney* (Unrep, DC, Browne J, 21/2/2007), *McGonnell v Attorney General* [2006] IESC 64, [2007] IR 400, *People (DPP) v Tuite* [1983] 2 Frewen 175, *DPP v McCarthy* [2007] IECCA 64, [2008] 3 IR 1 and *Kenny v Judge Coughlin* [2008] IEHC 28, (Unrep, Ó Néill J, 8/2/2008) considered - District Court Rules 1997 (SI 93/1997), O 31, r 1- *Certiorari* granted (2007/1668JR - McMahon J - 9/12/2008) [2008] IEHC 391
DPP v Judge Browne

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Admissibility – Verbal statements – Physical restraint – Armed gardaí – Whether statements given prior to arrest when accused physically restrained and surrounded by armed gardaí admissible - *The People v Kehoe* [1985] IR 444 distinguished – Appeal allowed (263/2007 – CCA – 1/12/2008) [2008] IECCA 136
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Evidence

Loss – Fair trial – Duty to preserve - Application to restrain further prosecution of offences – Delay – Whether fair trial prejudiced by loss of cctv recording – Whether fair trial prejudiced by delay – *Braddish v DPP* [2001] 3 IR 127 distinguished – Relief refused (2008/371JR – Ó Néill J – 23/1/2009) [2009] IEHC 27
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Offences

Child care - Applicant convicted in District Court – Offence of failing to ensure that "sufficient" number of competent adults supervised pre-school children at all times – Whether any valid offence in law created by Regulations - Whether article capable of constituting a criminal offence - Degree of specificity required for valid criminal offence - Whether offence uncertain or imprecise – Principles of statutory interpretation – Purposive approach – Determination of "sufficiency" – Whether District Judge acted properly in convicting – Standard of assessment - *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 applied; *King v Attorney General* [1981] IR 233 distinguished; *Dundalk Town Council v Lawlor* [2005] IEHC 73, (Unrep, Ó Néill J, 18/3/2005), *Western Health Board v KM* [2002] 2 IR 493, *DPP v Best* [2000] 2 IR 17 and *Cityview Press Ltd v An Chomlairle Oiliúna* [1980] 1 IR 381 considered - Child Care Act 1991 (No 17), ss 50, 57 and 68 - Child Care (Pre-School Services) Regulations 1996 (SI 398/1996), art 7 - Relief refused (2006/630 JR - McMahon J - 5/12/2008) [2008] IEHC 398
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Public order offence

Breach of peace – Intention – Direct intention – Oblique intention – Recklessness – Failure to appear – Facts not requiring formal proof – Orders of court of record – Warrant for arrest of accused upon failure to appear – *DPP v Orum* [1989] 1 WLR 88 distinguished - Criminal Justice (Public Order) Act 1994 (No 2), s 6 – Criminal Justice Act 1984 (No 22), s 13 – Accused's appeal by cases stated dismissed (2008/643SS – Charleton J – 29/10/2008) [2008] IEHC 322
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Road traffic offences

Drink driving – Section 17 statement not signed by garda - Whether s 17 certificate duly completed – Plea of guilty – Inquiry by judge - Change of plea – Charge struck out without hearing prosecution case – Whether judge correct to strike out charge – Whether inquiry by judge error of law – Whether absence of garda signature fatal –Road Traffic Act 1994 (No 7), s 17 – Road Traffic Act 1994 (Section 17) Regulations 1999 (SI 326/1999) - Case remitted to District Court for re-hearing (2008/1402SS - Ó Néill J - 8/12/2008) [2008] IEHC 413
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Severity – Penalty provisions - Correct interpretation and application of penalty provisions of legislative scheme - Whether legislative scheme permitted imposition of custodial sentence - Applicable penalties not specifically drawn to attention of sentencing judge - Prior conviction in respect of drugs offence not disclosed - Whether error in principle - *People (DPP) v Boyce* [2008] IESC 62, (Unrep, SC, 18/11/2008) considered - Misuse of Drugs Act 1977 (No 12), ss 3, 21(1) and 27 - Misuse of Drugs Act 1984 (No 18), ss 2 and 6(5) - Sentence set aside; sentence of 3 years imprisonment with final year suspended imposed (219/07 – CCA - 11/12/2008) [2008] IECCA 135
People (DPP) v Quigley

Sentence

Undue leniency – Robbery and false imprisonment – Applicable principles – Onus of proof – Whether sentence unduly lenient – Affording of weight to reasons of trial judge – Balance between circumstances of offence and personal circumstances of person sentenced – Constitutional principle of proportionality – Aggravating features – Mitigating factors – Whether decision rational – Whether evidential support for decision – *DPP v Byrne* [1995] 1 ILRM 279 applied; *People (DPP) v C(W)* [1994] 1 ILRM 321, *DPP v Clarkin* (Unrep, CCA, 10/02/2003), *DPP v Barrett* (Unrep, CCA, 19/05/2003) and *DPP v Keegan* (Unrep, CCA, 28/4/2003) considered – Criminal Justice Act 1993 (No 6), s 2 - Application refused (91 & 92CJA/08 - CCA – 19/12/2008) [2008] IECCA 137
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Book of evidence - Service - Extension of time – Constitutional right to expeditious trial – Evidence – Statutory interpretation – Words and phrases – "satisfied" – Whether evidence required to be given in support of prosecutor's reasons for extension of time for service of book of evidence where application is contested by accused – *Dunne v Cloverhill Prison* [2008] IEHC 16 (Unrep, Edwards J, 25/1/2008) applied – Criminal Procedure Act 1967 (No 12), s 4B – Constitution of Ireland 1937, Article 38.1 –*Certiorari* granted (2008/1112JR – O'Neill J – 23/1/2009) [2009] IEHC 29
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Breach of contract – Decision to reduce reimbursement rate for ingredient cost of medicines – Failure to obtain ministerial approval following consultation process - Whether entitlement to substantive award of damages – Whether entitlement to nominal damages only – *Quantum* - Applicable principles – Difference between position as result of breach and position had contract been performed – Whether breach procedural failure – Whether as matter of probability minister would have approved reduction – Limiting event occurring subsequent to breach of contract and prior to assessment – Interest –*Robinson v Harman* (1848) 1 Ex 850, *Doran v Delaney* [1999] 1 IR 303 and *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 considered; *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448 distinguished – Courts Act 1981 No 11), s 22 – Plaintiff entitled to substantive award and interest (2007/8432P – Finlay Geoghegan J – 19/12/2008) [2008] IEHC 373
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Compulsory random drug testing – Illegal substances – Positive result – Discharge - Challenge to decision – Whether breach of fair procedures - Whether regulatory provisions governing discharge unfair and unreasonable – Cut off level set in order to accommodate consumption by passive inhalation - Whether applicant passively inhaled some illegal substance – Applicant's tests over twice cut-off level – Whether any reasonable or rational basis for decision to discharge - Permanent Defence Force Compulsory Random Drug Testing Regulations - Relief refused (2007/88JR - Hedigan J - 2/12/2008) [2008] IEHC 404
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Free movement of persons

Professional qualifications - Mutual recognition – Overseas territories of member states – Whether certificate from overseas territory of member state entitled to automatic recognition within European Union – Right of establishment in member state – Whether respondent conducting proper assessment of applicant's ability to establish himself as doctor in State – Whether duty on respondent to register applicant as specialist doctor – *Vlassopoulou v Ministerium fur Justiz* (Case C-340/89) [1991] ECR I-2357 and *Hocsman v Ministre de l'Emploi* (Case C-238/98) [2000] ECR I-6623 considered – Council Directive 93/16/EEC – EU Treaty, Articles 43 and 299(3) – Relief refused (2009/1143JR – McMahon J – 20/1/2009) [2009] IEHC 12
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Certainty - Reference to two domestic warrants – Whether inadequate description of offences in warrant – Whether surrender prohibited due to lack of proof as to location where offences committed – Correspondence – Allegation of conspiracy – Whether fact that conspiracy offence marked as one to which Article 2.2 applies obviates requirement to establish correspondence – Whether sufficient evidence to establish that surrender would breach respondent's right to bodily integrity – Whether order for surrender of applicant should be made – European Arrest Warrant Act 2003 (No 45), ss 11, 37 and 4 – Surrender ordered (2008/48EXT – Peart J – 28/1/2009) [2009] IEHC 33
Minister for Justice v Tighe

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Correspondence – Issuing state indicating on warrant that offence one to which no correspondence required to be established and at same time indicating that offence one to which correspondence needs to be established – Whether mutually exclusive – Whether correspondence made out – Whether order for surrender of applicant should be made — *Minister for Justice v Desjatnikovs* [2008] IESC 53 (Unrep, SC, 31/7/2008) distinguished – European Arrest Warrant Act 2003 (No 45) s 38 - Surrender ordered (2008/117EXT – Peart J – 28/1/2009) [2009] IEHC 32
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European arrest warrant

Evasion – Fleeing - Whether respondent fleeing requesting state for purposes of evading service of balance of sentence – Correspondence - Composite sentence imposed in issuing state for multiple offences – Whether offence coming within category such that correspondence not required to be verified – Statutory interpretation – Words and phrases – "sentence" – Whether word importing singular to be read as also importing plural – Intention of Oireachtas – Whether order for surrender should be made – *Minster for Justice v Ferenca* [2008] IESC 52 (Unrep, SC, 31/7/2008) distinguished – European Arrest Warrant Act 2003 (No 45), ss 10 and 38 – Interpretation Act 2005 (No 23), ss 4(1), 5(1) and 18(a) – Surrender ordered (2008/80EXT – Peart J – 28/1/2009) [2009] IEHC 34
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European arrest warrant

Request for surrender – Points of objection – Requirement to deduct any period of detention served by issuing state - Whether any failure by State to implement art 26(2) of Framework Decision - Failure in text of Act to specifically empower central authority or court to communicate information as to period of detention with issuing judicial authority – Meaning of 'practical and administrative assistance' – Whether court deprived of jurisdiction to order surrender – Minimum gravity requirement – Offences in warrant stated to be art 2.2 offences – Warrant clear that 3 offences were not art 2.2 offences - Correspondence – Whether offence inappropriately marked as art 2.2 offence – Whether warrant clear – Whether court entitled to look behind marking – Whether surrender prohibited in those circumstances – Whether need to issue fresh warrant – Whether prior consent of High Court required if issuing state wish

to prosecute in respect of offence for which extradition not ordered – *Criminal Proceedings against Pupino (Case C 105/03)* [2005] 3 WLR 1102 considered - European Arrest Warrant Act 2003 (No 45), ss 5, 10, 17, 22 and 38 - Council Framework Decision 2002/584/JHA, art s 2.2, 7 and 26(2) - Order for surrender granted but excluding 3 counts (2007/149Ext - Peart J - 25/11/2008) [2008] IEHC 411
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remedy where facts upon which decision based disputed – Whether interference with family rights in accordance with law – Whether interference necessary – Proportionality – Relevant principles – Procedural safeguards – Alternative procedure available which would have provided requisite procedural safeguards - *Sweetman v An Bord Pleanála* [2007] IEHC 153, [2007] 2 ILRM 328, *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, *Blecic v Croatia* (2004) 41 EHRR 185, *Dublin Corporation v Hamilton* [1988] 2 ILRM 542 , *State (O'Rourke) v Kelly* [1983] IR 58, *Dublin City Council v Fennell* [2005] IESC 33, [2005] 1 IR 604, *Konig v Germany (No.1)* (1979-80) 2 EHRR 170, *Feldbrugge v. Netherlands* (1986) 8 EHRR 425, *Salesi v. Italy* (1993) 26 EHRR 187, *Mennitto v Italy* (2002) 34 EHRR 1122, *Kurzac v Poland* No 31382/96 (Unrep, ECHR, 22/2/2001), *Bryan v United Kingdom* (1995) 21 EHRR 342, *Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, *Irish Trust Bank Ltd v Central Bank* [1976-7] ILRM 50, *Metock v Minister for Justice* [2008] IEHC 77, [2008] FCR 425, *Handyside v. United Kingdom* (1979-80) 1 EHRR 737 and *McMichael v United Kingdom* No 16424/90 (Unrep, ECHR, 24/2/1995) considered; *Connors v United Kingdom* (2004) 40 EHRR 189, *McCann v United Kingdom* No 19009/04 (Unrep, ECHR, 13/8/2008) and *Tsfayo v United Kingdom* No. 60860/00 (Unrep, ECHR, 14/11/2006) followed; *Leonard v Dublin City Council* [2008] IEHC 79, (Unrep, Dunne J, 31/3/2008) distinguished; *Donegan v Dublin City Council* [2008] IEHC 79, (Unrep, Laffoy J, 8/5/2008) applied - Housing Act 1966 (No 21), s 62 - European Convention on Human Rights Act 2003 (No 20), ss 3 and 5 - Conveyancing Act 1881, s 14 - Housing (Miscellaneous Provisions) Act 1997 (No 21), ss 1(1), 14 (1) and 15(2) - European Convention on Human Rights 1950, arts 6(1), 8(1) and 14 - Relief granted (2006/5888P - Irvine J - 12/12/2008) [2008] IEHC 379
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Appeal - Role of court in assessment of credibility – Whether cogent reasons for reaching adverse findings on credibility – Obligation to give reasons – Purpose of requirement for reasons – Physical evidence possibly linked to mistreatment – Failure to give adequate explanation for discounting of physical evidence –Finding that well founded fear of persecution not established – Assessment of credibility – Whether failure to consider medical and psychiatric evidence properly – Whether failure to give opportunity to explain discrepancies – Significance of scars – Post traumatic stress disorder –Refugee Act 1996 (No 17), s 2 – *Certiorari* granted (2006/1257JR – Cooke J – 15/1/2009) [2009] IEHC 23
T (MA) v Refugee Appeals Tribunal

Asylum

Fair procedures - Hearing in absence of applicant – Claim of persecution - Adverse credibility finding – Doubts about plausibility of account – Whether errors of fact that render decision *ultra vires* or in breach of fair procedures – Whether error so insignificant that immaterial to assessment of credibility - Whether treatment of credibility flawed – Applicable principles – Whether sufficient basis for credibility findings – Whether rational and appropriate basis for finding set out - Whether failure to have regard to evidence of attacks – Whether failure to assess credibility by reference to objective country of origin information – Whether failure to consider explanations for perceived discrepancies – Whether failure to consider risk to right to respect for private life under Convention – Test of anxious scrutiny – Obligation on organ of State to perform functions in manner compatible with obligations under Convention – Whether article 8 rights arise for consideration at tribunal stage – *Bisong v Minister for Justice* [2005] IEHC 157 (Unrep, O'Leary J, 25/4/2005), *AMT v Refugee Appeals Tribunal* [2005] IEHC 221, [2005] 2 IR 607, *L(D) v Refugee Appeals Tribunal* [2008] IEHC 351 (Unrep, Hedigan J, 11/11/2008), *Simo v Minister for Justice* [2007] IEHC 305 (Unrep, Edwards J, 4/7/2007), *Traore v Refugee Appeals Tribunal* [2004] IEHC 606 (Unrep, Finlay Geoghegan J, 14/5/2004), *Camara v Minister for Justice* (Unrep, Kelly J, 26/7/2000), *Banzuzi v Refugee Appeals* Tribunal [2007] IEHC 2 (Unrep, Feeney J, 18/1/2007), *X & Y v Netherlands* (1986) 8 EHRR 235, *O(H) v Refugee Appeals Tribunal* [2007] IEHC 299 (Unrep, Hedigan J, 19/7/2007), *O(O)(L) v Minister for Justice* [2008] IEHC 307 (Unrep, Hedigan, 9/10/2008), *W(E)(A) v Refugee Appeals Tribunal* [2008] IEHC 343 (Unrep, Hedigan J, 4/11/2008), *E(P)(I) v Refugee Appeals Tribunal* [2008] IEHC 339 (Unrep, Hedigan J, 30/10/2008), *Imafu v Refugee Appeals Tribunal* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005), *Kouaype v Minister for Justice* [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005), *Kozhukarov v Minister for Justice* [2005] IEHC 424 (Unrep, Clarke J, 14/12/2004) and *H(N) v Minister for Justice* [2007] IEHC 277 (Unrep, Feeney J, 27/7/2007) considered; *Imafu v Refugee Appeals Tribunal* [2005] IEHC 182 (Unrep, Clarke J, 27/5/2005) applied – European Convention on Human Rights 1950, article 8 - Refugee Act 1996 (No 17), s 5 – Immigration Act 1999 (No 22), s 3 - European Convention on Human Rights Act 2003 (No 20), ss 1 and 3 - Relief refused (2006/50JR – Hedigan J – 20/1/2009) [2009] IEHC 17
S (A) v Refugee Appeals Tribunal

Asylum

Fair procedures - Internal relocation – Leave refused to challenge credibility findings - Whether necessary for tribunal to consider relocation where finding of lack of credibility – Whether comments on relocation *obiter* - Whether consideration of issue of relocation without up to date information – Fair procedures – Whether decision made *intra vires* – *Matijevic v Minister for Justice* (Unrep, Finlay Geoghegan J, 4/06/2003), *W(A) v Refugee Appeals Tribunal* [2008] IEHC 343 (Unrep, Hedigan J, 4/11/2008) and *K v Refugee Appeals Tribunal* [2007] IEHC 397 (Unrep, Clark J, 30/11/2007) considered – Refugee Act 1996 (No 17), s 2 – Relief refused (2006/1236JR – McGovern J – 16/1/2009) [2009] IEHC 9
F (A)(A) v Refugee Appeals Tribunal

Asylum

Judicial review - Leave – Credibility - Adverse findings of credibility – Illiteracy of applicant - Alleged failure to properly consider documentation - Contradictions in evidence - Whether process flawed by fundamental error of fact or natural justice - Whether substantial grounds established – Decision viewed as a whole - Burden of proof – Whether decision made in accordance with legal principles and fair procedures - *GT v Minister for Justice* [2007] IEHC 287, (Unrep, Peart J, 27/7/2007) followed; *VZ v Minister for Justice* [2002] 2 I.R. 135 and *JBR v Refugee Appeals Tribunal* [2007] IEHC 288, (Unrep, Peart J, 31/7/2007) considered - Refugee Act 1996 (No 17), s 11A (3) - Leave refused (2006/924JR - Clark J - 7/11/2008) [2008] IEHC 420
Z (AIM) v Refugee Applications Commissioner

Asylum

Judicial review - Leave – Fair procedures – Credibility –Whether finding on credibility *ultra vires* – Evidence – Medical reports supportive of applicant's claim furnished – Whether cogent reasons for rejecting medical reports furnished by Tribunal – Consideration of previous Tribunal decisions – Whether properly assessed – Whether cogent reasons given for deeming prior Tribunal decisions irrelevant – Whether alleged errors of fact made in assessment of credibility material or relevant – Whether country of origin information submitted in support of claim for asylum relevant – Whether substantial grounds for contending that decision invalid — *Imafu v Refugee Appeals Tribunal* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) applied; *Keagnene v Refugee Appeals Tribunal* [2007] IEHC 17 (Unrep, Herbert J, 31/1/2007) considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - Leave granted (2007/1436JR – Clark J – 21/1/2009) [2009] IEHC 26
L (CL) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave - Fair procedures – Assessment of credibility – Country of origin information – Whether mandatory for Refuge Applications Commissioner to consult country of origin information where applicant fails to call such information – Whether Commissioner entitled to make credibility findings without consulting country of origin information – Whether decision *ultra vires* – Whether substantial grounds for contending that decision invalid – *Kramarenko v Refugee Appeals Tribunal* [2005] 4 IR 321 and *Imafu v Refugee Appeals Tribunal* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005) applied; *F(B) v Minister for Justice* [2008] IEHC 126 (Unrep, Peart J, 2/5/2008) and *E(PI) v Refugee Appeals Tribunal* [2008] IEHC 339 (Unrep, Hedigan J, 30/10/2008) adopted; *Horvath v Secretary of State* [1999] INLR 7 considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Leave refused (2006/1361JR – Clark J – 23/1/2009) [2009] IEHC 21
O (V) v Refugee Applications Commissioner

Asylum

Judicial review – Leave – Extension of time – Delay – Serious nature of delay – Burden on applicant to show good reason for delay – Legislative scheme – Intention of Oireachtas to put in place speedy mechanism for resolving applications – Reason offered for delay – Awaiting of funds – Whether reasonable grounds for extending time limit – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Extension of time limit refused (2006/1236JR – McGovern J – 15/1/2009) [2009] IEHC 10
E (A) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Leave - Substantial grounds - Assessment of credibility – Tribunal refusal of refugee status – Lebanese nationals – Sunni Muslims – Country of origin information – Medical reports – Depressive anxiety and post traumatic stress disorder – Absence of negative credibility findings – Finding that fear of persecution not well-founded – Extension of time – Whether failure to assess relevant evidence – Whether failure to take account of explanation for failure to seek police protection – Whether failure to take account of evidence regarding period in hiding – Whether failure to take account of evidence regarding destruction of passports –*Bujari v Minister for Justice, Equality and Law Reform* [2003] IEHC 18 (Unrep, Finlay Geoghegan J, 7/05/03), *T(M)(A) v Refugee Appeals Tribunal* [2004] IEHC 219 [2004] 2 IR 607, *P(V) v Refugee Appeals Tribunal* [2007] IEHC 415 (Unrep, Feeney J, 7/12/2007) and *K(D) v Refugee Appeals Tribunal* [2006] IEHC 132, [2006] 3 IR 368 considered – Refugee Act 1996 (No 17), ss 11 and 13 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Leave refused (2006/1269JR – Hedigan J – 16/12/2008) [2008] IEHC 409
H (I) v Refugee Appeals Tribunal

Asylum

Judicial review – Leave – Substantial grounds - Negative credibility finding – Whether error in assessing evidence – Country of origin information – Substantive and procedural legality of decision – Onus of proof – Whether cogent reason for negative finding of credibility – Acceptance of credibility of country of origin information - Personal credibility of applicant in issue – Identification of specific questionable aspects of factual basis of claim – Evidence regarding detention and release – Evidence regarding necessity for medical treatment – Implausibility of account of escape – Implausibility regarding travel – Whether failure to consider totality of claim – Risk of persecution as failed asylum seeker – Refugee Act 1996 (No 17), ss 11 and 13 – Leave refused (2007/1521JR – Cooke J – 16/1/2009) [2009] IEHC 22
K (GK) v Refugee Appeals Tribunal

Asylum

Transfer of refugee status – Asylum granted in another member state – Asylum sought here - Refusal to conduct investigation on basis of futility – Absence of power to make declaration where refugee status granted in another state – Absence of fear of persecution if returned to member state – Whether mandatory obligation to conduct interview – Legitimate expectation – Reliance on report – Unspecified origin and status of report – Document not emanating from official State organ – Essential elements for legitimate expectation – Whether representation by public authority addressed to identifiable person or group – Whether representation such as to create expectation that public authority would abide by it – Statement not made by State organ - Absence of reliance on report – Inapplicability of doctrine of legitimate expectation where unlawful to permit benefit – Absence of ministerial discretion – Citizenship of daughter – Failure to apply for certificate of nationality – *Nwole v Minister for Justice* [2004] IEHC 433, (Unrep, Peart J, 26/05/2004), *Emekobum v Minister for Justice* (Unrep, Smyth J, 28/07/2002), *Nwole v Minister for Justice* [2003] IEHC 72 (Unrep, Finlay Geoghegan J, 31/10/2003), *AN v Minister for Justice* [2007] IESC 44 [2008] 2 IR 48, *Glencar Exploration v Mayo County Council (No 2)* [2002] 1 IR 84, *Power v Minister for Social and Family Affairs* [2006] IEHC 170, [2007] 1 IR 543 and *Abrahamson v Law Society of Ireland* [1996] 1 IR 403 considered – Irish Nationality and Citizenship Act 1956 (No 26), ss 6 and 28

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Y (S) v Refugee Appeals Tribunal

Deportation

Revocation - Judicial review – Leave – Substantial grounds - Claim that decision to make deportation order based on information which was two years and nine months old and out of date – Whether breach of fair procedures - Substantial grounds – Delay – Whether any prejudice to applicant - Additional representations not made by applicant - Whether any relevant or significant changes in applicant's circumstances - *Butusha v Minister for Justice* (Unrep, Peart J, 29/10/2003), *Abdukhareem v Minister for Justice* (Unrep, Gilligan J, 7/7/2006), *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2008] 3 WLR 178 distinguished; *Lupascu v Minister for Justice* [2004] IEHC 400, (Unrep, Peart J, 21/12/2004) followed - Immigration Act 1999 (No 22), s 3(6) - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - Relief refused (2005/739JR - Hedigan J - 28/11/2008) [2008] IEHC 402
N (U) v Minister for Justice, Equality and Law Reform

Leave to remain

Revoked – Visit to United Kingdom – United Kingdom authorities informed that re-entry would be refused - Suspicion of trafficking – Whether ground moot as applicant outside jurisdiction with no right of entitlement to obtain new visa – Subsequent refusal of application for visa with reference to immigration history – Absence of prosecution for trafficking – Whether sufficient continuing live issue – Whether gardaí acted lawfully in informing United Kingdom authorities of decision to revoke leave – Whether power to revoke leave can be exercised in respect of someone outside jurisdiction – Minimum procedural rights – Right to be notified and heard – *Goold v Collins* [2004] IESC 38 (Unrep, SC, 12/7/2004) and *K v Minister for Justice* [2008] IEHC 35 (Unrep, Charleton J, 20/2/2008) considered – Immigration Act 2004 (No 1), s 4 – *Certiorari* granted (2007/1028JR – Cooke J – 14/1/2009) [2009] IEHC 24
C (J) v Minister for Justice, Equality and Law Reform

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Interlocutory injunction

Deportation order – Applicant to raise fair question to be tried – Balance of convenience – Whether fair question to be tried flows from grant of leave to apply for judicial review – Whether evidence of irreparable loss – Whether balance of convenience favoured enforcement of deportation order – Subsidiary protection application – Additional evidence submitted after order made – Respondent failing to give undertaking not to deport pending determination of proceedings – Whether interlocutory injunction should be granted when valid deportation order in existence – *Campus Oil v Minister for Industry (No 2)* [1983] 1 IR 88 applied and *G v DPP* [1994] 1 IR 374 considered - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 4(2) – Injunction refused (2008/303JR – Hedigan J – 18/11/2008) [2008] IEHC 358
I (EP) v Minister for Justice

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Motor insurance

Motor Insurers' Bureau – Road traffic accident – Fatal claim – Claim involving both identified and uninsured driver and unidentified or untraced driver – Interpretation of M.I.B.I.I. agreement – Whether permissible under M.I.B.I.I. agreement to join M.I.B.I.I. as co–defendant where claim also against unidentified or untraced driver – Delay in moving for relief – Disjoinder of issues – *Gilroy v Flynn* [2004] IEHC 98, [2005] 1 ILRM 290, *Stephens v Flynn* [2008] IESC 4, (Unrep, SC, 25/2/2008) and *Desmond v MGN Ltd* [2008] IESC 56, (Unrep, SC, 15/10/2008) considered - Rules of the Superior Courts 1986 (SI 15/1986), O 18 – Motor Insurers' Bureau of Ireland Agreement, 1988 – MIBI's appeal dismissed (429/2005 – SC – 22/1/2009) [2009] IESC 3
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JUDICIAL REVIEW

Certiorari

Consequences of order – Conviction in District Court quashed – Impropriety at trial - Whether prosecution of case should be remitted for fresh hearing or whether acquittal should be ordered - Conduct of trial – Whether accused in peril – Jurisdiction - Whether any valid adjudication – Whether jurisdiction lost

due to impropriety – Whether lawful jurisdiction vitiated by fundamental error - Whether proceedings void *ab initio* – Whether plea of *autrefois acquit* permissible – Whether wrong to remit case to re-hearing - *State (Keane) v O'Malley* [1986] ILRM 31 followed; *O'Mahony v Ballagh* [2002] IR 410, *State (Tynan) v Keane* [1986] IR 348 and *Stephens v Connellan* [2002] 4 IR 321 considered; *Singh v Ruane* [1989] IR 610 distinguished - No retrial ordered (2007/1656JR - Clark J - 9/12/2008) [2008] IEHC 416
Fitzgerald v Judge O'Neill

Jurisdiction

District Court - Hearing of preliminary issues – Adjournment of substantive hearing – Exercise of discretion in judicial review – Intervention in criminal proceedings – Ability of trial judge to deal with alleged irregularities – Request for stenographer – Whether permission of court required – Entitlement to engage stenographer at own expense subject to entitlement of trial judge to ensure proceedings conducted efficiently – Right to be assisted by McKenzie friend – Whether entitlement to have evidence of making of complaints presented – Whether charges properly before court – Curing of alleged procedural defects by appearance – Whether undue haste or unfairness in manner of dealing with preliminary issues – *Director of Public Prosecutions v Special Criminal Court* [1999] 1 IR 60, *People (Attorney General) v McGlynn* [1967] IR 232, *D(R) v McGuinness* [1999] 2 IR 412 and *Director of Public Prosecutions v Clein* [1983] ILRM 76 considered – Petty Sessions (Ireland) Act 1851 (14 7 15 Vict, c 93), ss 10 & 12 – Courts (No 3) Act 1986 (No 33), ss 1, 4 and 7 – Declaration confirming entitlement to stenographer made and all other claims dismissed (2006/1221JR – Cooke J – 20/1/2009) [2009] IEHC 14
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Adverse possession

Action for recovery of land - Whether defendant in exclusive occupation of lands in excess of 12 years – Whether title of plaintiff extinguished – Statute of Limitations – *Animus possidendi* – Possessory title – Applicable legal principles – Fact of possession – Nature of land – Nature of occupation – Whether minimal acts of possession by owner of paper title sufficient to establish no dispossession - *Durack Manufacturing v Considine* (Unrep, Barron J, 27/5/1987), *Gleeson v Feehan* (Unrep, Finnegan P, 29/5/2001), *Dunne v Iarnrod Eireann* 2007 IEHC 314, (Unrep, Clarke J, 7/9/2007), *Murphy v Murphy* [1980] IR 183, *Wallis's Holiday Camp v Shell-Max* [1975] QB 94, *Trelor v Nute* [1976] 1 WLR 1295, *Lord Advocate v Lovat* (1880) 5 App Cas 273, *Keelgrove Properties Ltd v Shelbourne Development Ltd* [2005] IEHC 238, [2007] 3 IR 1, *Doyle v O'Neill* (Unrep, O'Hanlon J, 13/1/1995) , *Griffin v Bleithin* [1999] 2 ILRM 182, *Powell v McFarlane* [1979] 38 P&CR 452 and *Williams v Usherwood* (1983) 45 P. & C.R. 235 considered; *Tracey Enterprises Macadum Ltd v Drury* [2006] IEHC 381, (Unrep, Laffoy J, 24/11/2006) approved; Statute of Limitations Act 1957 (No 6), ss 13(2), 18(1) and 24 – Plaintiff declared to be owner of land (2006/3276 - Clark J - 10/12/2008) [2008] IEHC 417
Kelleher v Botany Weaving Mills Ltd

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MENTAL HEALTH

Detention

Central Mental hospital - Discharge – Conditional - Application for order compelling conditional discharge of applicant– Statutory framework - Preconditions for order of detention - Powers of Board - Whether applicant entitled to be discharged subject to conditions – Deprivation of liberty – Whether continued detention compatible with Convention - Whether applicant fulfilled criteria which authorised continued detention – Whether suffering from mental illness – Whether applicant required continued in-patient treatment - No provision for enforcement of conditions - Whether release of applicant in absence of suitable enforcement regime amounted to unconditional discharge of the applicant - Absence of compliance mechanism - Clear and unambiguous interpretation of Act - Whether any power to enforce conditions including power to recall patient - Effective implementation of treatment or supervisory regime - Interpretation - Cannons of construction - Literal test - Natural and ordinary meaning - Intention of Oireachtas - Purposive approach - Nature and purpose of Act - Act silent as to any regime for the supervision of a person provisionally discharged from a designated centre - No statutorily created means of enforcing any conditions imposed - No supervisory functions once discharging order effected - Whether court should interpret Act purposively to such extent as to identify implicit authority to enforce compliance - Whether Board acted lawfully and within jurisdiction in ordering further detention – Whether applicant at liberty to degree commensurate with medical needs - Public interest - Whether finding that mental disorder which justified patient's compulsory confinement no longer persisted meant applicant must be immediately and unconditionally released – *Keane v An Bord Pleanála* [1997] 1 IR 184, *DPP (Ivers) v Murphy* [1999] 1 IR 98, *Dundon v Governor of Cloverhill Prison* [2005] IESC 83, [2006] 1 I.R. 518, *MR v Byrne* [2007] IEHC 73, [2007] 3 IR 211, *Application of Gallagher (No. 2)* [1996] 3 IR 10, *Gooden v St. Otteran's Hospital* [2005] 3 IR 617, *Re Philip Clarke* [1950] IR 235, *Luberti v Italy* (1984) 6 E.H.R.R. 440 and *Inspector of Taxes v Kiernan* [1981] IR 118 considered - *Winterwerp v Netherlands* (1979 – 1980) 2 EHRR 387and *Johnson v UK* (1999) 27 EHRR 296 distinguished - Mental Health Act 2001 (No 25), s 3 - European Convention on Human Rights Act 2003 (No 20), ss 2(1) and 3(1) - Interpretation Act 2005 (No 23), s 5 - Criminal Law (Insanity) Act 2006 (No 11), ss 5(2) and 13(8) - Criminal Justice Act 2006 (No 26), s 197 - Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, art 5 - Constitution of Ireland 1937, article 40.4.1° - Continued detention authorised (2007/1517JR- Hanna J - 25/7/2008) [2008] IEHC 303
B (J) v Mental Health (Criminal Law) Review Board

Detention

Unlawfulness – Inquiry – Whether alleged unlawful detention by gardaí tainted subsequent detention – Absence of details of garda involvement – Powers of gardaí under legislation – Alleged excess of powers – Legislative safeguards – Statutory obligations – Absence of *mala fides* – Absence of conscious breach of rights – Validity of admission order – Lack of awareness of illegality of initial detention – Whether lawfulness of detention affected when issue raised before tribunal – Jurisdiction of tribunal – Participation in process – Modification of duty to release from unlawful detention where incapacity – Whether clinical director acted reasonably and in accordance with law – Ability to bring separate legal proceedings regarding initial wrongful detention – Whether tribunal should have ordered release – Statutory creature – Failure to direct complaint to clinical director – *L(R) v Clinical Director of St Brendan's Hospital* [2008] IEHC 11 (Unrep, Feeney J, 17/1/2008), *JH v Lawlor* [2007] IEHC 225 [2008] 1 IR 476, *State (McDonagh) v Frawley* [1978] IR 131 and *W(F) v James Memorial Connolly Hospital* [2008] IEHC 283 (Unrep, Hedigan J, 18/8/2008) considered; *Storck v Germany* (2006) 43 EHRR 6 distinguished – Mental Health Act 2001 (No 25), ss 9, 13, 14, 15 and 18 – Constitution of Ireland 1937, Article 40.4.2° - Detention found to be lawful (2008/2034SS – McMahon J – 20/1/2009) [2009] IEHC 13
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Appeal

Leave to appeal to Supreme Court – Whether decision involved point of law of exceptional public importance and whether desirable in public interest that appeal be taken to Supreme Court – Estoppel – *Res judicata* – Special circumstances - Criterion – Whether point of law arising must be one of more than usual general importance - Dual test - *Raiu v Minister for Justice* (Unrep, Finlay Geoghegan J, 26/2/2003), *Henderson v Henderson* (1843) All ER 378, *Carl Zeiss Stiftung v Rayner* [1966] 2 All ER 536, *Yat Tung Investment Company Ltd v Dao Heng Bank Ltd* [1975] AC 581, *Moorgate Mercantile Company v Twitchings* [1975] 3 All ER 314, *The Mekhanic Evgrafou (No 2)* [1988] 1 Lloyds Reports 303, *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, *Arklow Holidays Ltd v An Bórd Pleanála* [2008] IEHC 2, (Unrep, Clarke J, 11/1/2008), *Kenny v An Bórd Pleanála* (Unrep, McKechnie J, 2/3/2001), *Glancre Teo v An Bórd Pleanála* [2006] IEHC 205, (Unrep, MacMenamin J, 13/7/2006), *Hamid-Yacef v Minister for Justice* (Unrep, Smyth J, 4/10/2002), *DVTS v Minister for Justice* [2007] IEHC 451 (Unrep, Edwards J, 30/11/2007), *Thoday v Thoday* [1964] 1 All ER 341 and *Traore v Refugee Appeals Tribunal* [2004] 2 IR 607 considered; *Imoh v Refugee Appeals Tribunal* [2005] IEHC 220, (Unrep, Clarke J, 24/6/2005) distinguished - Refugee Act 1996 (No 17), s 6 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(3)(a) - Application refused (2005/868JR - Herbert J - 5/12/2008) [2008] IEHC 395
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Costs

Extent of liability for costs – Whether each party should bear own costs – Discretion – Primary rule that costs follow the event – Success of plaintiff on principal issues – Failure of counterclaim – Award within jurisdiction of lower court – Cap on costs unless special certificate granted – Whether special certificate appropriate – Declaratory and injunctive principal relief - Ancillary nature of claim for damages - Interests of justice – Difficult issues of law – Possibility of greater damages had case not been given early hearing – Whether claim exaggerated – Courts Act 1981 (No 11), s 17 – Courts Act 1991 (No 20), s 14 - Rules of the Superior Courts 1986 (SI 15/1986), O 99 – Costs awarded on High Court scale (2008/1683P – Laffoy J – 15/1/2009) [2009] IEHC 30
O'Brien's Irish Sandwich Bars Limited v Byrne

Costs

Third party notice - Third party served with unissued third party notice - Motion to set aside issued by proposed third party – Application dealt with on consent and time for issue and service extended - Whether third party should be penalised in costs in respect of motion issued - Whether normal rule that costs follow event applicable - Delay by defendant in seeking leave to issue third party notice and failure to issue same prior to service - Third party entitled to costs (2004/17054P - Peart J - 25/11/2008) [2008] IEHC 410
Touhy v North Tipperary County Council

Discovery

Legal professional privilege - Inspection of documents – Previous negligence claim against former solicitors – Dispute regarding terms of settlement - Claim that solicitor influenced counsel to give evidence in defence of negligence claim – Whether privilege belonged to former clients as opposed to solicitor – Whether evidence

in support of contention that counsel induced to give evidence – Exception against legal professional privilege – Whether balance of public interest and disclosure outweighed maintenance of privilege - Court inspection of documents – Whether relevant material which should be disclosed – *McMullen v McGinley* [2005] IESC 10, [2005] 2 IR 445, *Smurfit Paribas v AAB Export Finance* [1990] 1 IR 469, *Fyffes plc v DCC plc* [2005] IEHC 3, [2005] 1 IR 59, *Paragon Finance v Freshfields* [1999] 1 WLR 1183, *Crawford v Treacy* [1999] 2 IR 171, *Murphy v Minister for Defence* [1991] IR 161, *Murphy v Kirwan* [1993] 3 IR 501, *Bula Ltd v Crowley (No 2)* [1994] 2 IR 54, *Murphy v Corporation of Dublin* [1972] IR 215, *Logue v Redmond* [1999] 2 ILRM 498 and *McDonald v RTE* [2001] IR 355 considered – Appeal allowed and inspection ordered (244/2007 & 249/2007 – SC – 17/12/2008) [2008] IESC 69
McMullen v Kennedy

Discovery

Non party discovery – Relevance – Test of relevance – Whether party having documents in power or possession relevant to issue in proceedings – Whether documents sought necessary for disposing fairly of cause or matter – Oppression or prejudice caused by discovery to non party – Whether capable of being adequately compensated for by payment of costs – Discretion of court on appeal – *Compagnie Financiere du Pacifique v Peruvian Guano Co* [1882] 11 QBD 55, *Allied Irish Banks plc v Ernest and Whinny* [1993] 1 IR 375 and *Ryanair plc v Aer Rianta cpt* [2003] 4 IR 264 applied; *O'Domhnaill v Merrick* [1984] 1 IR 151, *Cooper Flynn v Radio Telefís Éireann* [2000] 3 IR 344 and *Dome Telecom v Eircom* [2007] IESC 59 [2008] 2 IR 726 considered – – Rules of the Superior Courts 1986 (SI 15/1986), O 31, rr 12 and 29 - Discovery refused (361/2008 – SC – 23/1/2009) [2009] IESC 4
Hansfield Developments v Irish Asphalt Ltd

Discovery

Privilege - Judicial note taking – Constitution – Judicial independence – Constitutional immunity – Equality of arms – Whether privilege extending to judge's notes – Whether judge's notes compellable in aid of judicial review proceedings – Whether judicial notes discoverable – Whether discovery relevant and necessary – *State (Sharkey) v McArdle* (Unrep, SC, 4/6/1981) and *Desmond v Riordan* [2000] 1 IR 505 considered; *Quinn's Supermarket* [1972] IR 1 distinguished – Constitution of Ireland 1937, Articles 34, 35 and 40.1 –Appeal against Master's order directing discovery allowed (2006/679JR – Edwards J – 26/1/2009) [2009] IEHC 25
O'Q v Judge Buttimer

Execution

Sequestration – Penal endorsement - Order for discovery – Failure by notice party to comply therewith – Failure to include penal endorsement on order for discovery prior to service thereof – Whether sequestration available in absence of penal endorsement – Whether court having discretion to consider application for sequestration notwithstanding absence of penal endorsement – Whether appropriate to enforce order for discovery by way of sequestration – Whether normal remedies for failure to comply with order for discovery adequate – *Hampden v Wallis* (1884) 26 Ch D 746 applied; *Husson v Husson* [1962] 1 WLR 1434 distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O 41, r 8 – Application adjourned to allow penal endorsement to be added to order for discovery prior to service (2004/423SP – Clarke J – 21/1/2009) [2009] IEHC 16
Ulster Bank v Whitaker

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SI 24/2009

Social welfare (miscellaneous provisions) act 2008 (section 24) (commencement) order 2009
SI 69/2009

SOLICITORS

Article

Farrell, Declan
Dancing at the crossroads
2009 (March) GLSI 37

Flood, Deborah
Lands of opportunity? (part 1)
2009 (March) GLSI 18

SUCCESSION

Article

Keating, Albert
"Court" grants of representation
2009 C & PLJ 2

TAXATION

Income tax

Assessment – Application to quash tax assessment – Withdrawal of statutory tax relief eight years after grant thereof – *Vires* of respondent to ensure compliance with Ministerial certification of tax relief scheme – Statutory interpretation – Whether amending legislation can be used as interpretative tool for prior legislation – Whether respondent in breach of statutory jurisdiction – Legitimate expectation – Whether delay in withdrawing relief creating legitimate expectation – Whether representation made such as to create legitimate expectation – Natural and constitutional justice – Fair procedures – Delay – Whether inordinate and inexcusable – Whether applicant prejudiced by delay such that relief should issue – *Cronin v Cork and County Property Co* [1986] 1 IR 559, *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84 and *Ferrazzini v Italy* (2002) 34 EHRR 45 applied; *Wiley v Revenue Commissioners* [1994] 2 IR 160 and *Deighan v Hearne* [1990] 1 IR 499 considered – Finance Act 1987 (No 10), s 35 – European Convention on Human Rights, art 6 – Relief refused (2005/1148JR – Ó Néill J – 23/1/2009) [2009] IEHC 28
Fortune v Revenue Commissioners

Value added tax

Refund – Refusal of refund – Set off against tax liabilities of related companies – Whether express authority for set off – Evidence of witnesses - Whether statutory authority required for set off against liability of third party – Absence of statutory authority – Absence of statutory prohibition – Power to set off against tax owed by taxpayer – Whether failure to furnish notification of offsets – *Revenue & Custom Commissioners v Total Network SL* [2008] 2 WLR 711 and *Inland Revenue Commissioners v Gold Blatt* [1972] Ch 498 considered – Taxes Consolidation Act 1997 (No 39), s 1006A – Claim dismissed (2003/12427P – Hedigan J – 17/12/2008) [2008] IESC 380
Kanwell Developments Ltd v Revenue Commissioners

Vehicle registration tax

Condemnation - Non- payment of vehicle registration tax - Application for order of forfeiture and condemnation of six vehicles –*Locus standi* - Whether Attorney General had *locus standi* to maintain proceedings – Whether application for condemnation could be brought in absence of conviction for offence under Act – Search warrant procedure – Delay – Prejudice – Proportionality – Deterrent penalty - *LC Autolink Ltd v Feehily* [2008] IEHC 397, (Unrep, MacMenamin J, 12/12/2008) applied; *Attorney General v Simons* (1957) ILTR 162 followed - Finance Act 1987 (No 10), s 53 - Finance Act 1992 (No 9), s 139(6) - Finance Act 2001 (No 7), ss 126, 127(2), 136(5), 140 and 140(1) - Order for condemnation granted (2006/883P - MacMenamin J - 12/12/2008) [2008] IEHC 396
Attorney General v Rafferty

Vehicle registration tax

Vehicles detained and seized – Breach of law relating to vehicle registration tax and value added tax - Detention – Seizure – Forfeiture – Condemnation - Statutory powers - Law relating to vehicle registration tax – Exemptions - Nature of vehicles - Special purpose vehicles - Procedural steps - Manner in which powers exercised – Inaccuracies on notices of detention and seizure - Whether defects errors on record which go to jurisdiction – Whether provisions construed mandatory directory or discretionary – Whether technical or substantive errors - *Inspector of Taxes v Kiernan* [1981] IR 117, *R v Northumberland Compensation Appeal Tribunal* [1952] 1 KB 338, *Bannon v Employment Appeals Tribunal* [1993] 1 IR 500 and *Director of Public Prosecutions v Kemmy* [1980] 1 IR 160 considered; *Simple Imports Ltd v Revenue Commissioners* [2000] 2 IR 243 distinguished - Whether seizure unlawful – Admissions – Appeals procedure - Discretion of court – Ownership – Whether want of candour bar to relief – Failure to avail of appeals procedure – Parameters of appeal – Whether revenue acted reasonably in light of information available – *O'Keefe v An Bord Pleanála* [1993] IR 39 applied – Whether vehicles liable to VRT – Whether judicial review would serve useful purpose - Whether Revenue acted lawfully and within jurisdiction – Whether denial of natural justice - Whether any breach of fair procedures - *Director of Public Prosecutions v Collins* [1981] ILRM 447 distinguished; *Keogh v Criminal Assets Bureau* [2004] IESC 32, [2004] 2 IR 159 and *Deighan v Hearne* [1990] 1 IR 499 applied - Finance Act 1992 Act (No 9), ss 130, 131 and 139(6) - Finance Act 2001 (No 7), ss 127, 140, 141, 142, 143, 145 and 146 - Application for judicial review refused (2008/348JR - MacMenamin J - 12/12/2008) [2008] IEHC 397
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TORT

Negligence

Animals - Road traffic accident caused by wandering horses – Whether horses owned and controlled by defendants – Whether negligence in manner of keeping of horses – Burden of proof – Standard of proof – Balance of probability – Circumstantial evidence – Application of circumstantial evidence in civil cases – Duty to first consider each piece of evidence in isolation – Obligation to consider all proved pieces of evidence together – Evidence of witnesses – Hoof prints – Fencing – Identification of horse – Prior inconsistent statements – Credibility of witnesses – Assessment of damages – Medical evidence – Special damages – Whether entitlement to damages for home care or allowance for home care – Quantum – Book of Quantum – Cap on award of general damages – Skull fracture and brain injury – Loss of earnings – Uncertainties of labour market – *Miller v Minister for Pensions* [1947] 2 All ER 372, *Wakelin v London and South Western Railway* (1886) 12 App Cas 41, *Jones v Great Western Railway* (1930) 144 LT 194, *Searle v Wallbank* [1947] AC 341, *O'Shea v Anhold and Horse Holiday Farm Limited* (Unrep, SC, 23/10/1996), *O'Reilly v Lavelle* [1990] 2 IR 372 and *M(N) v M(S)* [2005] IESC 17, [2005] IESC 30, [2005] 4 IR 461 considered; *Reddy v Bates*[1983] IR 141 applied – Defendants found jointly and severally liable and damages awarded (2001/14715P – Charleton J – 14/1/2009) [2009] IEHC 2
O'Brien v Derwin

Negligence

Personal injuries - Duty of care – Employer's liability – Accident at work – Safe system of work - Plaintiff struck by car whilst loading van – Onus on plaintiff to take care for his own safety at work – Whether accident could have been prevented – Whether plaintiff on 'frolic of his own' – Meaning of 'in the course of employment' – Reasonable precautions - Contributory negligence - Safety, Health and Welfare at Work (General Application) Regulations 1993 (SI 44/1993) - Damages awarded; plaintiff contributory negligence at 40% deducted (2007/147P - Peart J 10/12/2008) [2008] IEHC 412
Lendrum v Clones Poultry Processors Ltd

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Laden, the Al-Qaida network and the Taliban) (financial sanctions) regulations 2009
REG/881-2002
SI 37/2009

European communities (authorization, placing on the market, use and control of biocidal products) (amendment) regulations 2009
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SI 84/2009

European communities (bluetongue) (amendment) regulations 2009
DIR/2000-75
SI 79/2009

European communities (control of salmonella in broilers) regulations 2009
REG/646-2007, REG/2160-2003
SI 64/2009

European communities (internal market in electricity) (amendment) regulations 2009
DIR/2003-54
SI 59/2009

European communities (labelling, presentation and advertising of foodstuffs) (amendment) regulations 2009
DIR/2000-13, DIR/2008-5
SI 61/2009

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DIR/2002-13
SI 25/2009

European communities (organic farming) (amendment) regulations 2009
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SI 83/2009

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SI 77/2009

European communities (quality of shellfish waters) (amendment) regulations 2009
DIR/2006-113
SI 55/2009

European communities (safety of third-country aircraft using community airports) (amendment) regulations 2009
DIR/2008-49
SI 60/2009

European communities (seed of fodder plants) (amendment) regulations 2009
DIR/2007-72, DIR/2008-124
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DIR/2008-124
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REG/437-2003
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REG/1359-2008
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ACTS OF THE OIREACHTAS AS AT THE 8TH MAY 2009 (30TH DÁIL & 23RD SEANAD)

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

1/2009 Anglo Irish Bank Corporation Act 2009
Signed 21/01/2009

2/2009 Residential Tenancies (Amendment) Act 2009
Signed 28/01/2009

3/2009 Gas (Amendment) Act 2009
Signed 17/02/2009

4/2009 Electoral Amendment Act 2009
Signed 24/02/2009

5/2009 Financial Emergency Measures in the Public Interest Act 2009
Signed 27/02/2009

6/2009 Charities Act 2009
Signed 28/02/2009

7/2009 Investment of the National Pensions Reserve Fund and Miscellaneous Provisions Act 2009
Signed 05/03/2009

8/2009 Legal Services Ombudsman Act 2009
Signed 10/03/2009

9/2009 Electoral (Amendment) (No. 2) Act 2009
Signed 25/03/2009

BILLS OF THE OIREACHTAS AS AT 8TH MAY 2009 (30TH DÁIL & 23RD SEANAD)

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

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

Adoption Bill 2009
Bill 2/2009
Report Stage – Seanad *(Initiated in Seanad)*

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

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

Arbitration Bill 2008
Bill 33/2008
Committee Stage - Dáil

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

Broadcasting Bill 2008
Bill 29/2008
Report and Final Stages– Dáil *(Initiated in Seanad)*

Central Bank and Financial Services Authority of Ireland (Protection of Debtors) Bill 2009
Bill 20/2009
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

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

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

Civil Partnership Bill 2004
Bill 54/2004
2nd Stage – Seanad **[pmb]** *Senator David Norris*

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

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

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad **[pmb]** *Senators Ivana Bacik, Joe O'Toole, Shane Ross, David Norris and Feargal Quinn*

Companies (Amendment Bill) 2009
Bill 14/2009
2nd Stage - Seanad *(Initiated in Seanad)*

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

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

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

Credit Institutions (Financial Support) (Amendment) Bill 2009
Bill 12/2009
1st Stage – Seanad **[pmb]** *Senators Paul Coghlan, Maurice Cummins and Frances Fitzgerald*

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

Criminal Justice (Surveillance) Bill 2009
Bill 16/2009
Order for 2nd Stage - Dáil

Criminal Justice (Violent Crime Prevention) Bill 2008
Bill 58/2008
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

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

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

Defamation Bill 2006
Bill 43/2006
Awaiting Committee – Dáil *(Initiated in Seanad)*

Defence of Life and Property Bill 2006
Bill 30/2006
2nd Stage – Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

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

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

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

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

Ethics in Public Office (Amendment) Bill 2007
Bill 27/2007
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Bill 23/2009
Order for 2nd Stage - Dáil

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Order for 2nd Stage - Dáil

Fines Bill 2007
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Order for 2nd Stage – Dáil

Freedom of Information (Amendment) Bill 2008
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2nd Stage – Seanad **[pmb]** *Senators Alex White, Dominic Hannigan, Brendan Ryan, Alan Kelly, Michael McCarthy and Phil Prendergast*

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

Freedom of Information (Amendment) (No. 2) Bill 2003
Bill 12/2003
2nd Stage – Seanad **[pmb]** *Senator Brendan Ryan*

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

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

Genealogy and Heraldry Bill 2006
Bill 23/2006
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Harbours (Amendment) Bill 2008
Bill 42/2008
2nd Stage – Dáil *(Initiated in Seanad)*

Health (Miscellaneous Provisions) Bill 2009
Bill 11/2009
2nd Stage - Dáil

Health Insurance (Miscellaneous Provisions) Bill 2008
Bill 67/2008
Order for 2nd Stage - Dáil

Housing (Miscellaneous Provisions) Bill 2008
Bill 41/2008
2nd Stage – Dáil *(Initiated in Seanad)*

Housing (Stage Payments) Bill 2006
Bill 16/2006
2nd Stage – Seanad **[pmb]** *Senator Paul Coughlan*

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

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

Immigration, Residence and Protection Bill 2008
Bill 2/2008
Order for Report – Dáil

Industrial Development Bill 2008
Bill 65/2008
Order for Report - Dáil *(Initiated in Seanad)*

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

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

Land and Conveyancing Law Reform Bill 2006
Bill 31/2006
Order for Report – Dáil *(Initiated in Seanad)*

Legal Practitioners (Qualification) (Amendment) Bill 2007
Bill 46/2007
2nd Stage – Dáil **[pmb]** *Deputy Brian O'Shea*

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

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

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

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

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

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

National Cultural Institutions (Amendment) Bill 2008
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Order for 2nd Stage – Seanad **[pmb]** *Senator Alex White*

National Pensions Reserve Fund (Ethical Investment) (Amendment) Bill 2006
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1st Stage – Dáil **[pmb]** *Deputy Dan Boyle*

Nursing Homes Support Scheme Bill 2008
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Order for Report – Dáil

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2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh, Martin Ferris, Caomhghin Ó Caoláin and Arthur Morgan*

Offences Against the State (Amendment) Bill 2006
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1st Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Mary Henry and Feargal Quinn*

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2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Paul Coghlan and David Norris*

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Bill 40/2008
Order for Report – Dáil

Planning and Development (Amendment) Bill 2008
Bill 49/2008
2nd Stage – Dáil **[pmb]** *Deputy Joe Costello*

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2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

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

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2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

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Order for 2nd Stage – Seanad **[pmb]** *Senator Maurice Cummins*

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

Stem-Cell Research (Protection of Human Embyros) Bill 2008
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2nd Stage – Seanad **[pmb]** *Senators Rónán Mullen, Jim Walsh and John Hanafin*

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Awaiting Committee – Dáil

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Order for Report – Dáil

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Bill 31/2008
2nd Stage – Dáil **[pmb]** *Deputy Arthur Morgan*

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Twenty-eighth Amendment of the Constitution Bill 2007 (Rights of Child)
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Order for 2nd Stage - Dáil

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Bill 1/2008
2nd Stage – Dáil **[pmb]** *Deputies Alan Shatter and Charles Flanagan*

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

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

ABBREVIATIONS

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

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Security for Costs under S.390 of the Companies Act, 1963 - An Overview

ANTHONY BARR S.C.

Introduction

This article examines a number of recent developments in the area of applications made for security for costs under S.390 of the Companies Act, 1963. Such applications constitute an important procedural weapon in the armory of a defendant. If successful in the application, the defendant will often find that the requirement placed upon the plaintiff to provide security for costs will be too great a financial burden; with the result that the action will die at this preliminary stage of the proceedings. Such a result obviously has benefits for the defendant, as it removes both the risks and costs of proceeding to a trial of the action. For plaintiff companies, the application under S.390 represents a significant threat to their action. Accordingly, the application deserves careful and detailed preparation, lest the plaintiff should find itself locked out of the litigation without getting to argue the merits of the substantive action itself. Given the current economic situation in the country, it is reasonable to assume that there will be a rise in commercial and contract related litigation, with a similar rise in the number of S.390 applications.

The object of this article is to provide an overview of recent decisions in this area, with a view to helping practitioners to identify the issues that they are likely to encounter when either moving or resisting such applications.

Section 390 of the Companies Act, 1963

Section 390 of the Companies Act, 1963, provides as follows:

> Where a limited company is plaintiff in any action or other legal proceeding, any Judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given.

In *Pearson v. Naydler*[1], Megarry V.C. gave the following rationale for the equivalent English statutory provision:

> "The whole concept of the section is contrary to the rule developed by the cases that poverty is not to be made a bar to bringing an action. There is nothing in the statutory language (the substance of which goes back at least as far as the Companies Act 1862, Section 69) to indicate that there are any exceptions to what is laid down as a broad and general rule for all limited companies. Nor is it surprising that there should be such a rule. A man may bring into being as many limited companies as he wishes,with the privilege of limited liability; and Section 447 provides some protection for the community against litigious abuses by artificial persons manipulated by natural persons. One should be as slow to whittle away this protection as one should be to whittle away a natural persons right to litigate despite poverty".

Later in the course of the judgment, Megarry V.C. noted that the inability of the plaintiff company to pay the defendant's costs was a matter, which not only opened the jurisdiction under the section, but also provided a substantial factor in the decision whether to exercise it. It was inherent in the whole concept of the section that the Court was to have power to order the company to do what it was likely to find difficulty in doing namely, to provide security for costs, which ex-hypothesi it would be unlikely to be able to pay. He stated that the Court must not allow this section to be used as an instrument of oppression, by shutting out a small company from making a genuine claim against a large company. However, as against that the Court must not show such a reluctance to order security for costs that this becomes a weapon whereby an impecunious company can use its inability to pay costs as a means of putting unfair pressure on a more prosperous company. He warned that the Court ought not to be unduly reluctant to exercise its power to order security for costs in cases that fall squarely within the section.

In *Mooreview Developments Ltd (in Receivership) v. William Fagan Ltd*[2], Keane C.J. gave the following rationale behind S.390:

> "It is clear, and again one does not have to refer to the authorities in any detail, that the jurisdiction under S.390 of the Companies Act is a specific jurisdiction in relation to security for costs which is quite different from the normal, wider jurisdiction under the Rules of Court. It is expressly predicated on the basis that the plaintiff company will not be in a position to pay the costs and it is accordingly intended to ensure that parties who have got the benefit of limited liability, which they are perfectly entitled to, do not fireproof themselves against the subsequent responsibility for

1 1977 1WLR 899

2 Unreported Supreme Court 9/6/2004

costs in the event of the action failing ensuring that they are not to be under any personal liability."

In *Lismore Homes Ltd v. Bank of Ireland Finance (No.3)*[3], Murphy J. in considering the amount of security for costs that should be provided under S.390 noted that the legislation had conferred many benefits on limited liability companies including, in particular, the fact of limited liability and stated that it was not surprising to find that some burdens had been cast by the legislature on companies which enjoyed these advantages. Thus, it can be seen that S.390 is designed to protect defendants from unmeritorious claims brought by impecunious companies which could avoid the usual penalty for costs by shielding behind the privilege of limited liability.

Approach of the Courts to Applications under S.390

In a number of cases, the Courts have emphasised that the provisions of S.390 involve the Court in the exercise of its discretion. In *Peppard & Co. Ltd v. Bogoff*[4], Kingsmill Moore J. stated as follows at p.188 of his judgment in relation to the equivalent section in the Companies (Consolidation) Act, 1908:

> "I am of opinion that this section does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the Court which may be exercised in special circumstances. In this case I find two special circumstances. The financial position of the plaintiff may, if he substantiates this case, be due to the very actions of the defendants for which they are sued; and there is a co-plaintiff within the jurisdiction to whom the defendants may look for payment of their costs".

In *Jack O'Toole Ltd v. MacEoin Kelly Associates*[5], Finlay C.J. stated that it was clear that the making of an order under S.390 was a matter of discretion to be exercised having regard to all the circumstances of the case. He stated that there was no presumption either in favour of making an order for security for costs, or against it, but he was satisfied that where it was established or conceded that a limited liability company which, as a plaintiff, would be unable to meet the costs of a successful defendant, that if the plaintiff seeks to avoid an order for security for costs, it must as a matter of onus of proof establish to the satisfaction of the Judge the special circumstances justifying the refusal of an order.

The approach which the Court should take to such applications, was set out with clarity by Morris P. in *Inter Finance Group Ltd v. KPMG Peat Marwick*[6]:

> "From these authorities it emerges that to succeed there is an onus on the moving party, the defendant, to establish (a) that he has a prima facie defence to the plaintiff's claim and (b) that the plaintiff will not be able to pay the defendant's costs if successful in his defence. On establishing these two facts then the order sought should be made unless it can be shown that there are specific circumstances in the case, which would cause the Court to exercise its discretion not to make the order sought. Such special circumstances might be; (1) that the plaintiff's inability to discharge the defendant's costs of successfully defending the action flow from the wrong allegedly committed by the parties seeking the security, or (2) there has been delay by the moving party in seeking the relief now claimed, (3) some other circumstance which might arise in the case."

That statement of principle has been cited with approval in a number of subsequent decisions in both the Supreme Court and the High Court: *Usk District Resident's Association v. Environmental Protection Agency*[7], *Boyle v. McGilloway*,[8] *Superwood Holdings plc v. Sun Alliance & London Insurance plc*[9] and *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd*[10].

In embarking on an examination of these factors, the courts have stated time and again that it is not appropriate on an interlocutory application to examine the merits of the case in any detail. Nor is it appropriate for the court to forecast the outcome of the litigation or to pre-judge the facts or express an interim view on the questions of law involved. In *Comhlucht Pabair Riomhaireachta Teo v. Udaras Na Gaeltachta*[11], McCarthy J. stated that the Court was not concerned with the strength or otherwise of a defendant's defence. It would only be relevant if it could be demonstrated that the defendant had no real defence, in which case security for costs should be denied. The fact that the plaintiff appeared to have a very strong case was not a ground for refusing security for costs, unless the strength of their case was such as to show that the defendant had no real defence.

It is only necessary to establish the relevant elements on a prima facie basis. The onus rests on the defendant moving party to establish the first two limbs. The defendant will have to put some evidence before the court to establish that it has a prima facie defence to the action. This will inevitably require some analysis of the subject matter of the dispute. However, the defendant does not have to formally prove his defence; merely to show that he has an arguable, or prima facie, defence to the plaintiff's action. In *Ferrotec Ltd v. Myles Bramwell Executive Services Ltd*[12], Dunne J accepted as correct a submission that in considering the question as to whether a *prima facie* defence had been established by the defendant, the court should have regard to the same factors as are applicable when considering whether a defendant on an application by a plaintiff for summary judgment has established a bone fida defence. The judge held that similar

3 2001 3 IR 536
4 1962 IR 180
5 1986 IR 277
6 Unreported (Morris P.) 29/6/1998
7 Unreported Supreme Court 13/1/2006
8 Unreported (Clarke J.) 19/1/2006
9 Unreported (Quirke J.) 26/4/2006
10 Unreported (Clarke J.) 16/1/2009
11 1990 1IR 320
12 Unreported (Dunne J.) 5/2/2009

considerations applied when considering this limb of the requirements under S.390.

The defendant also has to establish on a prima facie basis that the plaintiff company will be unlikely to meet the costs incurred by the defendant if he is successful at the trial of the action. This can usually be established by examining the annual account filed on behalf of the plaintiff company. There may also be evidence of the existence of creditors of the plaintiff company, which would tend to establish insolvency on the part of the plaintiff, or at least an inability to discharge the defendant's costs of proceeding to trial. In many cases, there is no great dispute that the plaintiff company is insolvent, or in such a financial position that it would not be able to discharge the costs of a successful defendant.

Assuming that the defendant can establish these two limbs on a prima facie basis, the onus of proof then shifts to the plaintiff to establish, again on a prima facie basis, the existence of special circumstances, which would persuade the court to exercise its discretion to decline the orders sought by the defendant. It is now proposed to look at the most common factors, which have been invoked by plaintiffs as constituting "*special circumstances*".

Inability to pay costs due to wrongdoing of the defendant

The most common ground invoked with a view to resisting the granting of an order for security for costs is the argument that the plaintiff's impecuniosity was caused by the wrongdoing of the defendant in respect of which the plaintiff sues in the substantive action. It is important to note that the plaintiff in advancing this ground will have to put before the court fairly convincing evidence that it was in fact the wrongdoing of the defendant, which led to its impoverished state. A mere "*bald assertion*" of such fact without more, will not be sufficient to discharge the onus of proof. In *Jack O'Toole Ltd v. Mac Eoin Kelly Associates*[13], Finlay C.J. stated that for the plaintiff to satisfy even the duty of establishing on a prima facie basis this special circumstance, it will be necessary for some accounts, even though they might be in an informal form such as bank accounts, or the state of a bank overdraft of the plaintiff company to be produced. In *S.E.E. Co. Ltd v. Public Lighting Services Ltd*[14], the plaintiff did manage to establish that its impecuniosity was due to the alleged wrongdoing of the defendant. McCarthy J. in the course of his judgment referred to "compelling evidence" that the subject matter of the claim had been the major cause of the collapse of the plaintiff company. In that case accountants' and auditors' evidence was available to link the failure of certain equipment in respect of which the claim was being brought against the defendants, with the financial collapse of the company.

The S.E.E. case can be contrasted with the decision in *Rayan Restaurant Ltd v. Julies Company Restaurant Ltd & Others*[15]. This case involved an application by the second and third named defendants for security for costs in respect of a circuit appeal to the High Court. The plaintiff accepted that it was not in a position to pay the costs of the defendant, but argued that there was a special circumstance in the case in that their impecuniosity was due to the fact that they had been locked out of the restaurant premises and therefore unable to earn any money. The trial Judge looked at the earlier cases of *Campbells Seafoods* and *S.E.E.* and noted that in both these cases there was "*strong positive evidence*" that the defendants had been the cause of the plaintiff's financial embarrassment. The Judge held that in the present case there was a dearth of evidence to show that the parlous state of the plaintiff company was due to any activity of the defendants. There was no evidence adduced that the plaintiff would have been able to trade out of its financial difficulty if it had not been excluded from the premises. In these circumstances the Judge held that the second and third named defendants were entitled to an order for security for costs.

In the recent case of *Connaughton Road Construction Ltd v. Laing O'Rourke Ireland Ltd*[16], Clarke J. analysed the legal principles applicable when a plaintiff resists the defendant's application on the basis that his impecuniosity was caused by the wrongdoing of the defendant. According to the learned trial Judge, in order for a plaintiff to be correct in his assertion that his inability to pay the costs arose from the wrongdoing asserted, the plaintiff must establish on a prima facie basis four things:

> "(1) That there was actionable wrongdoing on the part of the defendant (for example a breach of contract or tort);
> (2) That there is a causal connection between that actionable wrongdoing and a practical consequence or consequences for the plaintiff;
> (3) That the consequences referred to in (2) have given rise to some specific level of loss in the hands of the plaintiff, which loss is recoverable as a matter of law (for example by not being too remote); and
> (4) That the loss concerned is sufficient to make the difference between the plaintiff being in a position to meet the costs of the defendant in the event that the defendant should succeed, and the plaintiff not being in such a position".

Clarke J. noted that items (1) and (2) did no more than state that the plaintiff must establish a prima facie case on liability and causation. If a plaintiff could not establish these matters, there could be no basis for finding even on a prima facie basis that any lack of resources of the plaintiff were due to wrongdoing on the part of the defendant. In relation to the third criterion, the learned Judge was of the view that a plaintiff must at least establish a prima facie case that the quantum of damages which he might obtain in the event that he was successful, was of an order of magnitude sufficient to reverse the financial position whereby the plaintiff company would be able to pay the defendant's costs in the event that the defendant was successful. The Judge noted that in *Framus Ltd & Others v. CRH*[17], the plaintiff in that case had shown

13 1986 IR 277
14 1987 ILRM 255
15 Unreported (Budd J.) 18/4/2005
16 Unreported (Clarke J.) 16/1/2009
17 Unreported (Supreme Court) 22/4/2004

some evidence of wrongdoing on the part of the defendant but not even on a prima facie basis that its impecuniosity was due to that wrongdoing. Clarke J. went on to describe the effect of items (3) and (4) as follows:

> "It is not, of course, necessary for the plaintiff to seek to establish the precise quantum of damages which it might recover in the event of it being successful. But it must show, at least on a prima facie basis, that the losses allegedly attributable to the defendant's wrongdoing are sufficiently large to justify a finding that those losses can explain, by themselves, the plaintiff's inability to pay costs. That is, in substance, the requirement of point (4) referred to above. Even if, therefore, a plaintiff can show a prima facie case, it is also necessary to show a prima facie level of losses attributable to the defendant's wrongdoing so as to enable the court to assess whether, again on a prima facie basis those losses are sufficient to justify attributing the plaintiff's inability to pay costs, in the event of losing, to the asserted wrongdoing. On that basis, I am satisfied that the Court can have some regard to quantum in an application such as this."

In the course of his judgment, Clarke J. gave an example of the circumstances in which the analysis under headings (3) and (4) would be relevant. He gave the example of a plaintiff company, which had an excess of liabilities over assets of €200,000. They would manifestly be unable to pay the defendant's costs should the defendant succeed. If the high water mark of the plaintiff's claim was only for €100,000, then it followed that the plaintiff's inability to pay costs had not been caused by the defendant's wrongdoing in that, even if the plaintiff were to succeed, there would still be an excess of liabilities over assets of €100,000.

Clarke J. went on to consider what the position would be in relation to a company, which had no significant assets prior to the events which gave rise to the proceedings. He noted that it was not unusual for parties to procure the establishment of a so-called "*special purpose company*" which would be set up for the purpose of a single transaction, or series of connected transactions. The share capital of such a company may be purely nominal. While not insolvent, such a company would clearly not have the means to meet the costs of any unsuccessful litigation, which it might mount. Clarke J. held that there were no special considerations to be given to such companies one way or the other. However, the learned Judge went on to state that the plaintiff company would have to be in a position to establish on a prima facie basis that were it not for the wrongdoing asserted, not only would it not have lost money, but it would have made sufficient profit so as to be in funds sufficient to pay the likely costs of a successful defendant. In such circumstances, a plaintiff will have to be able to show that its inability to pay costs was due to the wrongdoing, which was at the heart of the proceedings. Again, Clarke J. illustrated his view with an example: a company with only nominal share capital might acquire an asset worth €200,000 with wholly borrowed money. It might assert that, due to wrongdoing on the part of the defendant, it had lost that asset so that it no longer had any assets, but retained a liability of €200,000 to the lender. It might sue the defendant for the €200,000 concerned, being the value of the asset, which it said was lost by the defendant's wrongdoing. However, even if it be correct in that assertion, success in the proceedings would simply restore the company to a position where it had broadly matching assets and liabilities, so that the consequences of the alleged wrongdoing could do no more than explain the reason why the company was in debt to the tune of €200,000 rather than having broadly equivalent assets and liabilities and thus no net assets. In neither circumstance would the plaintiff company concerned be in a position to pay the costs of a successful defendant. The learned trial Judge summed up his ruling on this aspect in the following way:

> "As part, therefore, of the overall question of assessing whether it has been shown, on a prima facie basis, that the plaintiff's inability to pay potential costs is due to the wrongdoing asserted, the court must look at all of the circumstances asserted on behalf of the parties. In particular in a case where prior to any possible wrongdoing, the plaintiff company had no significant net assets, it seems to me that it follows that such a company will need to establish that, in the absence of the wrongdoing alleged, it would have acquired net assets sufficient to enable it to discharge the defendant's costs in the event that the defendant were successful."

This decision merits careful reading because it introduces a new element, that of quantum, into the consideration as to whether the plaintiff has established that his inability to pay costs was due to the wrongdoing of the defendant. It seems that as a result of this decision, the plaintiff must now establish that as a matter of mathematics, the quantum of his claim, either on its own or when added to the company's remaining assets, amounts to more than the quantum of costs, which the defendant might incur at the end of the day. Thus it appears that under S.390, there are two quite separate questions to be asked; the first is whether it has been established by the defendant that the plaintiff company will be unlikely to be able to discharge the defendant's costs. This involves an examination of the financial state of affairs of the company at the time that the application is made. The amount of assets available to the company is then compared with the estimate of likely costs as furnished by the legal costs accountant. If the plaintiff company cannot pay the estimate of costs likely to be incurred by the defendant, then it can try to establish that its inability to pay such costs was due to the wrongdoing of the defendant. But it seems that the plaintiff company must go further and prove that but for the wrongdoing of the defendant, the plaintiff company would have had sufficient net assets to cover the quantum of likely costs of the defendant. In such circumstances, the existence of other liabilities of a plaintiff company will be a significant consideration.

Delay

The case law makes it clear that there is an onus on the moving party to apply for security for costs without delay. In

Beauross Ltd v. Kennedy[18], Morris J gave the rationale in relation to operative delay:

> "If the party seeking security has delayed to such an extent as to commit the other party to an amount and a level of costs which it would never have become committed to had it known that it was to be required to provide security for costs and thereby altered its position to its detriment, then the Court will not make the order."

In *Beauross Ltd v. Kennedy*, it was held that a time lapse between mid-November 1994 and February 1995 while short, was nevertheless excessive. The Judge laid significance on the fact that in the period concerned comprehensive legal costs had been incurred by attendance before the Master of the High Court and cross-examination of the defendant. The Judge exercised his discretion by refusing to grant security for costs. In *S.E.E. Co. Ltd v. Public Lighting Services Ltd*[19], McCarthy J. considered that a delay of approximately seven months in seeking security for costs of an appeal was excessive. A significant feature in that case was that during that seven month period, the cost of preparing the transcript from the notes of counsel had been incurred.

In *Wexford Rope & Twine Co. Ltd v. Gaynor*[20], Barr J. held that delay could be a factor, which would cause the Court to exercise its discretion to refuse to grant security for costs. In that case, it was held that it was reasonable for the defendants to await delivery of a Statement of Claim before issuing a motion seeking security for costs. In *Ferrotec Ltd v. Myles Bramwell Executive Services Ltd*[21], Dunne J held that a delay of eight months between filing of the Statement of Claim and the letter seeking security for costs was not excessive having regard to the fact that there was nothing in the affidavit sworn on behalf of the plaintiff to suggest that the delay had had any impact on the plaintiff's position.

In *Hidden Ireland Heritage Holdings Ltd v. Indigo Services Ltd*[22], Fennelly J. giving the unanimous judgment of the Supreme Court, stated as follows:

> "The special circumstance most commonly advanced is, as in *Peppard & Co. Ltd v Bogoff* (1962) IR 180 that the wrongs complained of in the action caused or contributed to the very impecuniosity of the company upon which the defendant relies. However, the discretion is not limited to that element. The Court may have regard to any relevant circumstance, which, as a matter of justice, would cause it to conclude that the order should not be made…. A review of the authorities shows that the delay in applying for security may, depending on the circumstances, be a ground for refusing security. The Court will look at the facts of the particular case, the impact of the delay, other surrounding circumstances, and, in the end, will seek to find a fair balance."

18 Unreported (Morris J) 18/10/1995
19 1987 ILRM 255
20 Unreported (Barr J) 6/3/2000
21 Unreported (Dunne J) 5/2/2009
22 2005 2IR 115

In the *Hidden Ireland* case, the Court held that a delay of approximately one year from commencement of proceedings to the time when security was first requested, during which time the plaintiffs incurred the cost of extensive work done in preparing replies to the defendant's very extensive and detailed Notice for Particulars and the pursuit of the defendant's own implied invitation to seek discovery of documents, was such as to deprive the defendants of the entitlement to ask the court to exercise its discretion in their favour. From the foregoing review of the authorities, it emerges that a prudent defendant will ensure that his request for security for costs and his motion seeking such security are issued without delay.

Other special circumstances

Denham J in a dissenting judgment in *West Donegal Land League Ltd v. Udaras na Gaeltachta*[23], stated that the categories of "special circumstances" were not closed:

> "The analysis of "special circumstances" is not closed. No exhaustive list or definition has been made. In considering the concept of "special circumstances" it should be remembered that the essence of the order for security for costs (or not) is "to advance the ends of justice and not to hinder them" per Kingsmill Moore J. above. It is for a Court on such an application to consider, and to balance, the interests of the plaintiff company and those of the second named defendant in a fair and proportionate manner."

Geoghan J. delivering the majority judgment agreed with Denham J. that the categories of special circumstances were not closed. He noted that four sets of special circumstances were detailed by Delaney & McGrath in the second edition of their textbook "*Civil Procedure in the Superior Courts*". He stated that these were simply sets of circumstances, which had in fact influenced Courts in particular cases to refuse the order for security for costs. The Judge pointed out that this did not mean that a court was wide open in its discretion as to whether to grant or refuse the order. That approach would defeat a clear and reasonable aim of the Oireachtas as enacted in Section 390. It is not proposed in this article to deal with the remaining two sets of special circumstances as outlined by Delaney & McGrath, being (1) point of law of exceptional public importance (2) the existence of an individual co-plaintiff. The reader is referred to their excellent textbook for analysis and commentary on these grounds, which are not commonly encountered in practice.

The amount of security

In applications brought under Order 29 of the Rules of the Superior Courts, 1986, seeking security for costs from foreign resident plaintiffs, the general rule has been, that if security was ordered to be given, it would be fixed by the Master of the High Court at approximately one third of the costs likely to be incurred by a successful defendant. The

23 2007 1ILRM 1

position is different for applications brought pursuant to section 390 of the Companies Act 1963. The decision of the Supreme Court in *Lismore Homes v. Bank of Ireland Finance (No.3)*[24] has established that because the section speaks of "sufficient security" this means sufficient to discharge the full reasonable costs likely to be incurred by the defendant at the trial of the action. This was an appeal by the plaintiffs against the quantum of the security, which had been fixed in the High Court. The Supreme Court declined to follow a line of authorities from the Court of Appeal in England and preferred the reasoning of Kingsmill Moore J. in *Thalle v. Suares*[25] in holding that "*sufficient security*" in S.390 meant sufficient for the actual amount of costs which the defendant was likely to incur in defending the action:

> "The word "sufficient", in its plain meaning, signifies adequate or enough and it is directly related in this section to the defendant's costs. The section does not provide for – as it might have – a sufficient sum "to meet the justice of the case" or some such phrase as would give a general discretion to the Court. Harsh though it may be, I am convinced that "sufficient security" involves making a reasonable estimate or assessment of the actual costs, which it is anticipated that the defendant will have to meet. Much of the injustice which may be anticipated by the operation of the section can be avoided by the application of the established principles in granting or withholding the order for security. Insofar as the quantum of the security may be oppressive in a case where security is in fact ordered, this must be seen in the context in which it arises. It applies only to limited liability companies who are shown to be insolvent. Legislation has conferred many benefits on limited liability companies including, in particular, that very limitation and it is not surprising to find that some burdens are likewise cast by the legislature on companies which enjoy those advantages."

A question can arise where it is argued that the amount of security is fixed at a level, which effectively makes it impossible for the plaintiff to continue with the action. In *Mooreview Developments Ltd (in Receivership) v. William Fagan Ltd*[26], the plaintiff company was in receivership. It owed €38 million to a financial institution. In a substantive action it was seeking specific performance of a contract for the sale of land for €5 million. The defendants obtained an order for security for costs, which was assessed by the Master of the High Court at €318,833.30. This was confirmed by the High Court. On appeal to the Supreme Court, the plaintiff argued that it could only pay €100,000 as security for costs and that to set the amount at the full costs of the defence would stifle the action at birth. The receiver who had been appointed over the assets and undertaking of the company did not take any part in the proceedings being maintained by the company. Keane C.J. in giving the judgment of the Court noted that there was no indication that even if the amount of security for costs was reduced, that the plaintiff would be in a position to complete the contract for the purchase of the land in respect of which specific performance was being sought. The Court was satisfied that this could not be regarded as a case in which the High Court in the exercise of its discretion, should have allowed the action to proceed on the basis that otherwise an action which had a substantial basis of success was, as it were, stifled at birth.

The Supreme Court affirmed the Order of the High Court. In the course of his judgment, the Chief Justice did indicate that there were circumstances where the Court might direct that the plaintiff should provide a level of security, which was less than the actual amount, which might be incurred by the Defendant:

> "There are, of course, circumstances, given that it is a discretionary Order, where the Court may not require the sufficient security to consist of the entire amount of the costs although again the cases make it clear that the Court is not, in such cases, normally confined to the measurement of approximately one third of the estimated costs. It can require the company to provide security in the full amount of the costs. It is clear that one ground on which the Court might refrain from exercising its jurisdiction is where the action would be stifled if such an Order to be made."

In the *West Donegal Land League Ltd* case, Geoghegan J. noted that in some cases it would be appropriate to order that less than the full amount of the likely costs should be fixed as the amount of the security. This would be appropriate in cases, such as certain types of land disputes, where the courts traditionally did not always award full costs to the winning party.

The European Convention on Human Rights has also had an impact in this area. The relevant part of Article 6 of the Convention provides that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The provisions of this article have been considered in a number of cases dealing with security for costs. In *Superwood Holdings Plc v. Sun Alliance & London Insurance plc*[27], the plaintiff argued that due to Art. 6 of the European Convention on Human Rights and the decision of the European Court of Human Rights in *Tolstoy Miloslavsky v. United Kingdom*[28] that the Courts must take a "*tentative view*" of the overall merits of the substantive proceedings when considering applications for security for costs. As this was an application seeking security for costs in respect of a review of taxation of costs, the trial Judge did not see how any consideration of the merits of the substantive proceedings could be of assistance or relevance to the taxation of costs or to a review of such taxation. The learned trial Judge made no finding on the question whether the principles applicable to applications for security for costs have been affected by the decision in the Tolstoy case.

In *Superwood Holdings Plc v. Ireland*[29], the Plaintiff argued,

24 2001 3IR 536
25 1957 IR 182
26 Unreported (Supreme Court) 9/6/2004
27 Unreported (Quirke J.) 26/4/2006
28 (1995) 20 EHRR 442
29 (2005) 3IR 398

inter alia, that S.390 was incompatible with Article 6 of the European Convention on Human Rights. Murphy J. in the High Court rejected this argument. Having referred to the salient parts of the judgment of the European Court of Human Rights in the Tolstoy case, he found that the provisions of S.390 fell clearly within the margin of appreciation enjoyed by the State in legislating for a balance between litigants. He found that the restriction pursued a legitimate aim and that there was a reasonable relationship or proportionality between the means employed and the aims sought to be achieved to regulate limited liability plaintiff's rights of action. Moreover, he found that the courts had taken the entirely of the proceedings in the domestic legal order into account. The Judge held that Section 390 had a reasonable and objective justification. Its aim was legitimate to balance the rights of access to Courts with the rights of a defendant to resist unstateable claims. He found that no ground of prohibited discrimination had been indicated by the plaintiffs. He was of the view that none of the recognised grounds of discrimination under the European Convention had any application. Accordingly, he held that there was no basis for the plaintiff's claim that Section 390 was incompatible with the European Convention on Human Rights.

The facts of *Tolstoy Miloslavsky v. United Kingdom* were that the applicant had written a pamphlet highly defamatory of Lord Aldington. He obtained damages of £1.5 million for libel against the applicant. The applicant appealed this award. He was ordered to pay £124, 900 as security for costs in respect of the appeal within a period of fourteen days. The applicant claimed that this requirement was in contravention of Article 6 of the European Convention on Human Rights. The European Court of Human Rights held that the right of access to the courts may be subject to limitations in the form of regulation by the State. However, states cannot reduce the right of access to such an extent that the right is impaired. The restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aims sought to be achieved. In this case there had been a hearing of the security for costs issue before the Registrar (who had declined to grant security) followed by a six day hearing before the Court of Appeal. The Court of Appeal's decision was based on a full and thorough evaluation of the relevant factors. In these circumstances, the Court held that the national authorities did not breach Article 6 by requiring the applicant to provide security for costs in respect of the appeal.

The *Tolstoy* case can be contrasted with the case of *Ait-Mouhoub v. France*[30] where the plaintiff wished to bring civil proceedings against members of the French police. He was told that he would have to lodge 80,000 French francs as security for costs. The applicant did not have the means to discharge this amount. In fact, he had been assessed by the Legal Aid Board as having no means whatsoever. The European Court of Human Rights held that requiring the applicant to pay such a large sum had amounted in practice to depriving him of his recourse before the investigating Judge and that therefore the applicant's right of access to a "tribunal' within the meaning of Article 6 had been infringed.

30 1998 Reports VIII 1 (28/10/1998)

In the course of its judgment the European Court of Human Rights stated as follows:

> "As to the merits, it re-iterates that the "right to a Court", of which the right of access constitutes one aspect… is not absolute but may be subject to limitations permitted by implication. However, these limitations must not restrict or reduce a persons access in such a way or to such an extent that the very essence of the right is impaired, and they will not be compatible with Article 6.1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be achieved…. Furthermore, the convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so with the right of access to the Courts in view of the prominent place held in a democratic society by the right to a fair trial (see the *Airey v. Ireland* judgment of 9th October 1979, Series A No. 33, EP.12-13,24).
>
> It is not for the Court to asses the merits of the complaint lodged by the applicant with the appropriate judge. It considers however that the setting of such a large sum by the senior investigating Judge was disproportionate, seeing that Mr. Ait Mouhoub – who had never received a reply from the Legal Aid Office, as he had informed the Judge in a letter of 9th September 1993, that he had no financial resources whatsoever. Requiring the applicant to pay such a large sum amounted in practice to depriving him of his recourse before the investigating Judge…. having regard to all these factors, the Court concludes that the applicant's right of access to a "tribunal" within the meaning of Article 6.1 was infringed."

Arbitrations

For domestic arbitrations, S.22 of the Arbitration Act, 1954, provides that the High Court can make a number of orders designed to aid the arbitral proceedings, including that one of the parties thereto should provide security for costs. A similar provision is contained in S.7 of the Arbitration (International Commercial) Act, 1998. S.7(2) provides that a party shall not be ordered to provide such security on the grounds that the party is an individual who is ordinarily resident outside the State, or is a corporation or association incorporated or formed under a law other than the law of the State, or whose central management and control is exercised outside the State. Finally, it is worth noting that S.19 of the Arbitration Bill 2008 provides that without prejudice to the generality of Article 19, the Arbitral Tribunal may, unless otherwise agreed by the parties, order a party to provide security for the costs of the arbitration. The section contains the same limitations in respect of foreign parties and companies as are contained in S.7(2) of the 1998 Act. Thus for both domestic and international arbitrations, the arbitrator will be able to make orders that the claimant should provide security for costs.

Conclusions

In the current economic environment, one can expect an increase in litigation involving claims for breach of contract and other forms of action giving rise to economic loss. It is reasonable to assume that in a significant number of these cases, the plaintiff will be a company, which will be unable to discharge the costs of a successful defendant. In such circumstances, one is likely to see an increase in the number of applications seeking security for costs from plaintiffs. The overview of the case law outlined above would seem to suggest the following:

- The defendant bears the burden of establishing on a prima facie basis that the plaintiff (a) would be unlikely to be able to discharge any award of costs which might be granted in favour of the defendant and (b) that he has a prima facie defence to the plaintiff's claim. If he can establish these matters, the burden of proof then passes to the plaintiff to establish, again on a prima facie basis, that there are special circumstances in the case, which should cause the court to exercise its discretion by refusing the order, sought.
- If the plaintiff wishes to make the case that its inability to pay costs was due to the wrongdoing of the defendant, it must do more than make a mere bald assertion to this effect. The plaintiff must set about providing some evidence sufficient to satisfy the four criteria laid down by Clarke J. in the *Connaughton Road* case.
- Based on the decision in *Connaughton Road*, it seems that the plaintiff must establish not only that the defendant's wrongdoing has led to its inability to discharge the costs of a successful defendant, but also that if the wrongdoing had not occurred, the plaintiff would have had sufficient assets to discharge the amount of those costs.
- The defendant should be wary that it does not delay unduly in writing to the plaintiff seeking security for its costs; as delay is one of the grounds on which the court may exercise its discretion by refusing the order sought. While longer periods seem to be allowable when the application is made prior to the trial of the action, it would appear that where one is seeking security for the costs of an appeal, the acceptable time period is appreciably shorter.
- The amount of security fixed will usually be an amount sufficient to cover the full actual costs, which are likely to be incurred by the defendant in defending the action.
- It may be possible to argue by reference to Article 6 of the European Convention on Human Rights that the level of security for costs should not be fixed at an amount which the plaintiff cannot possibly afford, which would thereby have the result of preventing it bringing a justifiable claim before the Court. Though how such an argument would sit with the decision in *Lismore Homes Ltd (In Receivership) v. Bank of Ireland Finance (No. 3)* remains to be seen. ■

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Global Claims under Construction Contracts

Gerard Meehan BL

Introduction

Ordinarily, in order to make a successful claim for damages under a construction contract, a claimant must establish that a breach of contract or other 'claim event' has occurred, that the claimant has suffered a loss, and that there is a causal link between the claim event and the loss. Obviously, once it is established that loss occurred, the claimant also has the burden of proving the amount of that loss.

> For a claimant to succeed in a claim for damages, he must establish on the balance of probabilities an effective causal connection between the defendant's breach of contract or negligence and the claimant's loss.[1]

On the other hand, construction projects tend to be long and complex and it is not always practical or possible to identify the precise consequences of a particular event. Many construction projects take months or years to complete and cover large geographical areas. There are usually a myriad of different parties, works packages and programme activities so that it is often practically impossible to identify the effect (s) of any particular claim event. For example, a late instruction from an engineer on a large civil engineering project might have a local effect, cause delay to the commencement of subsequent works packages, disrupt the performance of sub-contracts and push out the critical path.

Given the above difficulties, situations arise where the claimant cannot trace each causal thread from cause to effect and instead offers a collection of breaches/events and asserts that those breaches/events caused a total sum of loss.

Definitions of Global Claims

The leading textbook on Building and Construction Contracts[2] offers the following definition: "Global claims may be defined as those where a global or composite sum, however computed, is put forward as the measure of damage or of contractual compensation where there are two or more separate matters of claim or complaint, and where it is said to be impractical or impossible to provide a breakdown or sub-division of the sum claimed between those matters".

In the leading case of *Laing Management (Scotland) Ltd v John Doyle Construction Ltd*[3], Lord MacLean defines a global claim as: "a claim in which the individual causal connections between the events giving rise to the claim and the items of loss and expense making up the claim are not specified, but the totality of the loss and expense is said to be a consequence of the totality of the events giving rise to the claim."

A further definition was given by Byrne J of the Supreme Court of Victoria: "… the claimant does not seek to attribute any specific loss to a specific breach of contract, but is content to allege a composite loss as a result of all of the breaches alleged, or presumably as a result of such breaches as are ultimately proved. Such claim has been held to be permissible in the case where it is impractical to disentangle that part of the loss which is attributable to each head of claim, and this situation has not been brought about by delay or other conduct of the claimant…"[4]

It is relatively common in construction projects for a whole series of events to occur which individually would form the basis of a claim for loss and expense. These events may interact with each other in complex ways, so that it becomes very difficult, if not impossible, to identify the precise loss and expense caused by each event. In those circumstances, the claimant then points to a global loss which he claims is the result of the series of breaches. Such claims are known as global claims.

Difficulties with global claims

The obvious difficulty with global claims is that they do not meet the classic requirement for the party making a claim to particularise his case. Even where a claimant can show a number of breaches of contract by the defendant and where he can show that he suffered a loss (e.g. that the total cost of delivering the project was in excess of the tender price) that is not in itself evidence of a valid claim because there is no way of knowing what part of the loss was caused by the breaches. There are obviously many possible causes for cost overrun and not all of them are necessarily the responsibility of the defendant. It is generally an essential part of any valid claim that the party seeking damages must show causation.

A further difficulty with global claims is that there is a lack of specificity in their pleading. The purpose of pleadings as set out by Fitzgerald J in *Mahon v Celbridge Spinning Co Ltd*[5] , "is to define the issues between the parties … and to ensure that the trial may proceed to judgment without either party

1 Stephen Furst and Vivian Ramsey; *Keating on Construction Contracts* Eighth Edition Thomson Sweet & Maxwell London 2006
2 I.N. Duncan Wallace; *Hudson's Building and Engineering Contracts* Eleventh Edition Sweet & Maxwell London 1995
3 [2004] BLR 295
4 John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd (1996) 82 BLR 81
5 [1967] IR 1

being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings".[6]

The pleadings in a global claim will be unfair and prejudicial against the defendants as they will not set out the exact case to be met. This will enable the claimants to change course during the course of their evidence. An Irish court might be quite critical of such an approach given the general move towards requiring greater specificity in pleadings.

Case Law

There are a number of cases that tend to be cited in the treatment of this topic by the various text books and articles. The earliest of these is *J Crosby & Sons Ltd v Portland Urban District Council*[7]. In that case, Donaldson J said he could see no reason " why the arbitrator should not recognize the realities of the situation and make individual awards in respect of those parts of individual items of the claim which can be dealt with in isolation and a supplementary award in respect of these claims as a composite whole."

The commentary on this case; contained in the Building Law Reports, contains the following passage:

> "[Donaldson J] acceded to the argument that where a claim depends on 'an extremely complex interaction in the consequences of various denials, suspensions and variations, it may well be difficult or even impossible to make an accurate apportionment of the total extra cost between the several causative events'. In doing so he gave judicial approval to a widespread and commonsense method of measuring claims."[8]

It is only that part of the award that Donaldson J refers to as the "supplementary" award that is a global claim. In those circumstances, the Judge envisages a cause and effect analysis for those individual items where such an analysis is possible and a rolled up claim for the remaining items. This however, by definition is the part of the claim where the sources of the loss cannot be identified.

It is submitted that this makes the claim almost impossible for a defendant to defend. The claimant, typically a contractor who has an intimate knowledge of the construction project, and who is in the best position to keep proper records of the job, cannot identify the cause of the loss. Yet the employer, who has not the same intimate knowledge of the carrying out of the job is expected to defend it by identifying causal elements for which the employer is responsible.

In London *Borough of Merton v. Leach (1985)*[9], the contractors' claims were for damages for breach of contract, and also for direct loss and expense under the clauses of the contract dealing with variations and late instructions. Vinelott J in that case, referring to the Crosby decision said that it was: "implicit in the reasoning of Donaldson J first, that a rolled up award can only be made in the case where the loss or expense attributable to each head of claim cannot in reality be separated and secondly that a rolled up award can only be made where apart from that practical impossibility the conditions which had to be satisfied before an award can be made have been satisfied in relation to each head of claim."

It is respectfully submitted that there is an inherent contradiction in the above passage. One of the conditions that must be satisfied before an award can be made in relation to an individual head of claim is that there is a causal link between that head of claim and an item or items of loss. It is impossible to satisfy that condition where the loss or expense attributable to each head of claim cannot in reality be separated (Donaldson J's first condition).

Wharf Properties Ltd v Eric Cumine Associates (1991)[10] concerned a development in Hong Kong. A separate foundations contract for the development was delayed and this in turn delayed the contractor who was retained to build the super-structure. The latter contractor sued the employer and the proceedings were settled. The employer then went after the architect for the cost of the settlement alleging that the architect had failed properly to manage control, co-ordinate, supervise or administer the foundation contract, or to provide information or instructions for it in time.

The Privy Council held that whereas there was a reasonable cause of action pleaded, the pleadings failed to explain the nexus between the individual breaches and the sums claimed, and they should be struck out as embarrassing and prejudicial to a fair trial.

This case is slightly different from the previous ones in that it was not a total cost claim. The damages claimed were ascertained and precise. Lord Oliver of Aylmerton in his consideration of the *Crosby* and *Leach* cases distinguished them as follows:

> "ECA are concerned at this stage not so much with quantification of the financial consequences – the point with which the two cases referred to were concerned – but with the specification of the factual consequences of the breaches pleaded in terms of period of delay. The failure even to attempt to specify any discernable nexus between the wrong alleged and the consequent delay provides…'no agenda' for trial."[11]

The sum sought was an exact amount and in principle it was recoverable provided each causal nexus was fully explored and its effect identified. The separate delay consequences of the separate breaches were not identified however and therefore, an unparticularised pleading in such a form would not be allowed to stand.

In it's analysis of this case; Hudson states:

> "The *Wharf* case is, however, an example of how global claims, which can be relatively rapidly and easily assembled, can be presented in the form of "a document of immense length and complication" which serves both to conceal the absence of any real substratum of supporting fact from a weak or inexperienced tribunal, and to impede the defendant's

6 Per Fitzgerald Ibid. at 3
7 [1967] 5 BLR 121
8 Ibid. p. 123
9 32 BLR 68
10 52 BLR 8
11 *Per* Lord Oliver, *ibid.* at p. 9.

preparation of a detailed and convincing case by way of rebuttal.

…neither the *Crosby* nor the *Leach* cases indicate any considered judicial support for the use of global claims even in the particular construction contracts before the courts – in the Crosby case, Donaldson J. was dealing with a finding of fact by an arbitrator, binding on the Court, to the effect that the particular causes of delay in that case could not as a fact be separated as to delay or disturbance, while Vinelott J. in *Leach* was dealing with an entirely hypothetical case of loss and expense due to combined variation and late instruction grounds of claim, with no findings of fact as yet made by the arbitrator at all.[12]

In *McAlpine Humberoak Ltd. v. McDermott International Inc (1992)*[13] the contractor defendant engaged the claimant as a sub-contractor to construct steel pallets forming part of a weather platform for an oil rig. The claimant's case was that it had been considerably delayed in constructing the pallets by late receipt of materials, revised drawings and late replies to technical queries and was entitled to extra payments in respect of the delays it had suffered. The direct costs of these events was agreed and paid but indirect costs were also sought. The claimants assessed the time needed for each individual revision , their evidence on *quantum* being based on the assumption that during that time no other work could be performed and that the contract as a whole had been delayed to that extent. The Court of Appeal held that the claimant had not established a right to be paid any sum in respect of its indirect costs as a result of the variations and revisions in the absence of any evidence showing that the individual variations and revisions had caused delay to progress. The Court essentially disallowed the claim because the claimants had failed to show causation.

Hudson opines that :

"The *Humberoak* case reflects an increasingly common tendency for exaggerated claims to be advanced … The *Wharf* and *Humberoak* judgments represent a fully justified and overdue judicial response to these tendencies, and should provide *valuable* support where better particularisation of claims is sought by defendants at the interlocutory stages of either litigation or arbitration."[14]

It must have appeared therefore at the time of the publication of the eleventh edition of *Hudson's Building and Engineering Contracts* (1995) that the *Humberoak* and *Wharf* decisions pointed to a move away from global claims by the courts. Two recent decisions however seem to adopt a more permissive approach to global claims.

In *Laing Management (Scotland) Ltd v John Doyle Construction Ltd,*[15] the court found that if a claimant puts forward a global claim, he must eliminate all causes of loss and expense that are either the claimant's responsibility or neutral events (a contractor is entitled to claim an extension of time for some neutral events but not loss and expense). In other words no causative element can be included in a global claim that is not the responsibility of the defendant.

Lord MacLean sets forth the following analysis of the nature of a global claim:

"Frequently … the loss and expense results from delay and disruption caused by a number of different events, in such a way that it is impossible to separate out the consequences of each of those events. In that event, the events for which the employer is responsible may interact with one another in such a way as to produce a cumulative effect. If, however, the contractor is able to demonstrate that all of the events on which he relies are in law the responsibility of the employer, it is not necessary for him to demonstrate causal links between individual events and particular heads of loss. In such a case, because all the causative events are matters for which the employer is responsible, any loss and expense that is caused by those events and no other must necessarily be the responsibility of the employer. That is in essence the nature of a global claim…if the claim is to fail, the matter for which the employer is not responsible in law must play a significant part in the causation of the loss and expense. In some cases it may be possible to separate out the matters for which the employer is not responsible."[16]

The passage does not provide for the very common scenario; where events for which the contractor is responsible interact with events for which the employer is not responsible to produce the cumulative effect. The foregoing analysis of Lord MacLean only requires the contractor to demonstrate that all the events on which he *relies* are in law the responsibility of the employer. There is no provision for a situation where there are causal factors contributing to the consequences that are difficult to identify (or perhaps easy for a claiming contractor to conceal) and are not the employer's responsibility.

There is an inherent contradiction in this approach. If the contractor is not required to demonstrate causal links between individual events and particular heads of loss it cannot be said (in the very next sentence) that all the causative events are matters for which the employer is responsible. At best, all that can be said is that the causative events *identified* are matters for which the employer is responsible. Clearly the court is correct in stating that any loss and expense caused exclusively by events for which the employer is responsible must necessarily be the responsibility of the employer. The problem however is that the contractor is not required to show that such events are in fact the cause of the loss and expense.

This approach shifts the burden of proof from the claimant to the defendant. This is obviously contrary to a fundamental rule of law. Furthermore it places the burden of proof on the party who is worst placed to shift it. Typically, global claims will be taken by contractors against employers. Contractors are generally in the best position to monitor the progress of a construction project and to keep records. If

12 *Ibid.* para. 8.208
13 58 BLR 1
14 Hudson para 8.211
15 [2004] BLR 295
16 Per Lord MacLean, ibid. at pp. 300-301

a contractor, who has first hand knowledge of the carrying out of a job is unable to separate out the consequences of the various events, the employer is unlikely to be able to do so. This, it is submitted is prejudicial and highly unfair to an employer.

Lord MacLean's judgment in Laing goes on to cite the following passage from the judgment of Byrne J in *John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd (1996)*[17]*:*

> "… a contractor, as the maker of such a claim (total cost claim), alleges against a proprietor a number of breaches of contract and quantifies its global loss as the actual cost of the work less the expected cost. The logic of such a claim is this:
>
> (a) the contractor might reasonably have expected to perform the work for a particular sum, usually the contract price;
> (b) the proprietor committed breaches of contract;
> (c) the actual reasonable cost of the work was a sum greater than the expected cost.
>
> The logical consequence implicit in this is that the proprietor's breaches caused the extra cost or cost overrun. This implication is valid only so long as, and to the extent that, the three propositions are proved and a further unstated one accepted: the proprietor's breaches represent the only causally significant factor responsible for the difference between the expected cost and the actual cost. In such a case the causal nexus is inferred rather than demonstrated…The under-stated assumption underlying the inference may be further analysed. What is involved here is two things: first, the breaches of contract caused some extra cost, secondly, the contractor's cost overrun is this extra cost. The first aspect will often cause little difficulty but it should not…be ignored…It is the second aspect…which is likely to cause the more obvious problem because it involves an allegation that the breaches of contract were the material cause of all of the contractor's cost overrun. This involves an assertion that, given that the breaches of contract caused some extra cost, they must have caused the whole of the extra cost because no other relevant cause was responsible for any part of it.[18]

In considering the *John Holland Construction* case, Lord Mac Lean continued:

> "Byrne J went on to consider the claim made by the plaintiffs in the case before him, and pointed out that, because it was a total cost claim, it was necessary to eliminate any causes of inadequacy in the tender price other than matters for which the employer was responsible. It was also necessary to eliminate any causes of overrun in the construction cost other than matters for which the employer was responsible".

This, it is submitted is clearly impossible unless every single causal link is examined. In order to eliminate any causes of overrun in the construction cost other than matters for which the employer is responsible, every cause of overrun must be identified and analysed to see who is responsible. If it is the case that this is possible, then it should not be necessary to present a global claim because it would not be impossible or impractical to separate out the consequences of each claim event.

After considering the John Holland case and following consideration of *Boyajian v United States*[19] (1970), Lord MacLean went on to state that: "If a global claim is to succeed, whether it is a total cost claim or not, the contractor must eliminate from the causes of his loss and expense all matters that are not the responsibility of the employer…"[20]

As outlined above, it is difficult to see how it is possible for a contractor to demonstrate that he has eliminated such matters other than by the making of a bald assertion.

Laing has received some measure of approval from the English Courts in *London Underground Ltd v Citylink Telecommunications Ltd*[21]. That case involved the replacement of the telecommunications network throughout the London underground network. Certain enabling works needed to be carried out by the employer prior to the start of the contract works and these works were delayed. The contractor claimed there were a large number of alleged breaches and claimed an overall extension of time. The arbitrator found that the claim was a global claim. The case came before Ramsey J in the High Court in England and he endorsed the *Laing v Doyle* approach.

Despite this, both the arbitrator and the Judge went on to reject the global claim and decide only those issues where the evidence showed a connection between the delay and the event. The Judge went on to find that in circumstances where the arbitrator considers the global claim to have failed, it is open to him, on the evidence before him, to establish causation and make appropriate findings.

Conclusion

There does not seem to be a large body of judicial support for the concept of global claims. Indeed it is possible that if the concept was tested in the Irish courts, it would be met with an unfavourable response. This is unlikely to happen in the near future however given that all standard forms of construction contracts contain arbitration clauses. It seems to be the case that every large construction project in Ireland in recent years involves a number of significant claims by the contractor against the employer. Most claimants will include a global claim. These claims are used as currency in settlement negotiations to put pressure on employers in the context of alternative dispute resolution. They are so familiar now in the world of construction claims that they barely raise an eyebrow when they land with a thud on the employer's desk. It is questionable whether one would carry any weight if it was to be subjected to the scrutiny of the High Court. ■

17 82 BLR 81
18 *Ibid.* pp. 85-87)
19 423 F 2d 1231
20 Per Lord MacLean, ibid. at p. 302
21 [2007] BLR 391 at 414