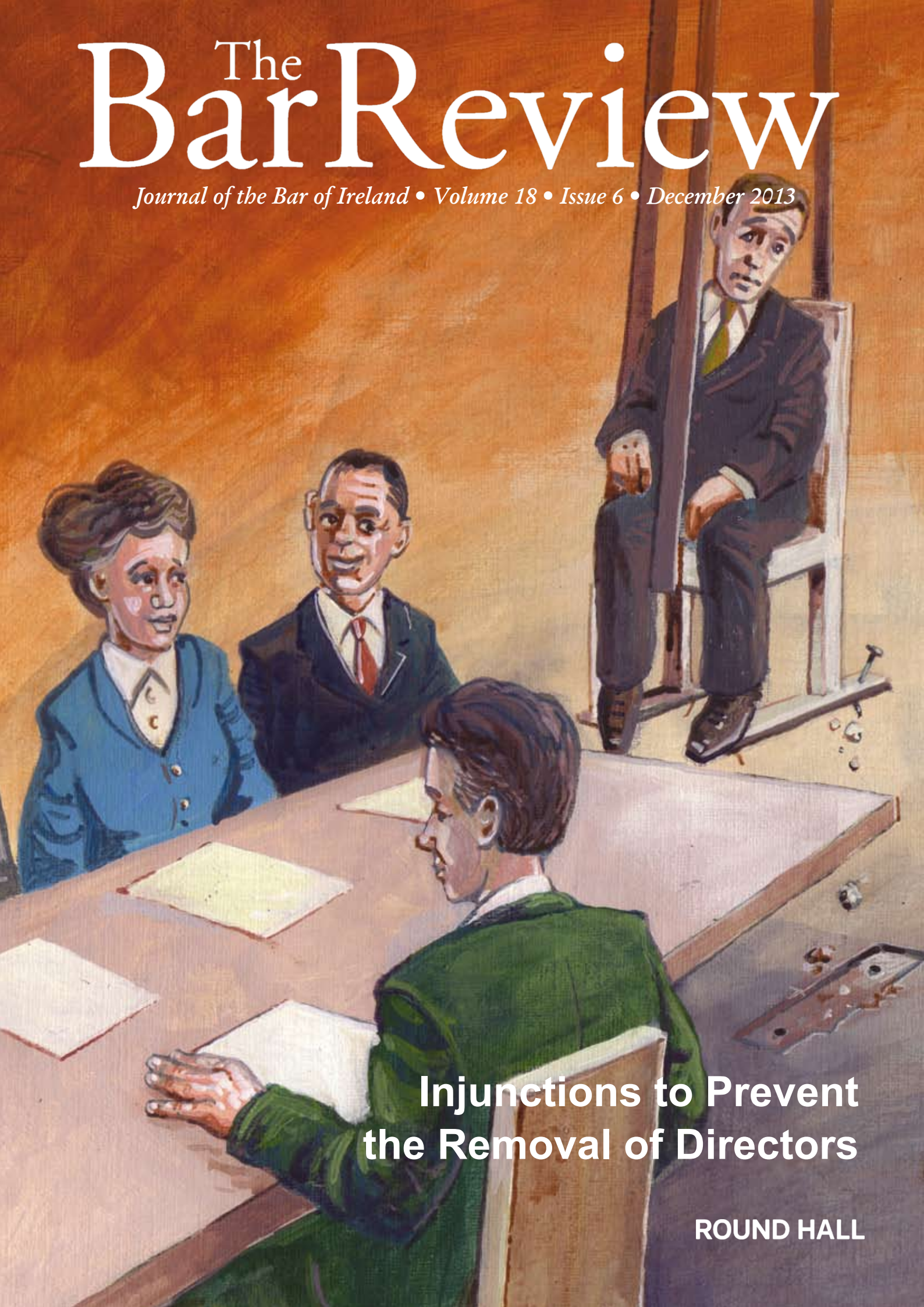
The Bar Review

Journal of the Bar of Ireland • Volume 18 • Issue 6 • December 2013



Injunctions to Prevent the Removal of Directors

ROUND HALL

The Arthur Cox Employment Law Yearbook 2012

The Arthur Cox Employment Law Yearbook 2012 provides in-depth coverage of the different areas of Irish law associated with employment law. Updated annually in an alphabetical format, it leads you quickly to your specialist area of interest and includes the following:

- Decisions of the superior courts, Labour Court, Equality Tribunal, Employment Appeals Tribunal
- Irish legislation and statutory instruments
- English law relevant to common law decisions and EU law
- Decisions of the Court of Justice of European Communities and Directives/ Regulations
- Decisions of the European Court of Human Rights

Includes developments and announcements during 2012 such as:
Legislating for a World-Class Workplace Relations Service July 2012, presented to Oireachtas Committee by the Minister on Jobs, Enterprise and Innovation.

The Arthur Cox Employment Law Yearbook 2012 e-book gives you instant access online to the sources and materials selected and includes the following:

- Annual report of Employment Appeals Tribunal (EAT)
- Annual report of Labour Relations Commission
- Annual report of Health & Safety Authority
- Data Protection Commissioner reports, guidance and case law

BILLS or HEADS OF BILLS AT END 2012 INCLUDE:

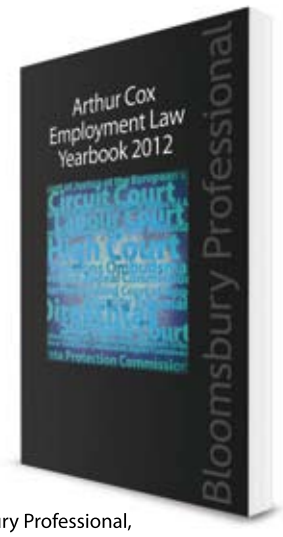
- Criminal Justice (Spent Convictions) Bill
- Companies Bill
- Health and Social Care Professionals (Amendment) Bill
- Mediation Bill
- National Vetting Bureau (Children and Vulnerable Persons)
- Protected Disclosure in the Public Interest Bill
- Employment Permits (Amendment) Bill
- Human Rights and Equality Commission Bill

Also featured:

- Public Service Pensions (Single Scheme) and Remuneration Act 2012
- Statute Law Revision Act 2012
- European Stability Mechanism Act 2012
- Financial Emergency Measures in the Public Interest (Amendment) Act 2011

IMPORTANT STATUTES COVERED:

- *Protection of Employees (Temporary Agency Work) Act 2012*
- *Industrial Relations (Amendment) Act 2012*



ISBN **978 1 78043 149 9**
Publication date **February 2013**
Format **Paperback + e-book**
List price **€90.00 + 23% VAT (applied to 50% of product).**
TOTAL €100.35 + P&P €5.50

Place your order today by contacting Jennifer Simpson, Bloomsbury Professional, Fitzwilliam Business Centre, 26 Upper Pembroke Street, Dublin 2. DX 109035 Fitzwilliam

Tel (01) 6373920 **Fax** (01) 6620365 **Email** jennifer.simpson@bloomsburyprofessional.com
(Please make cheques payable to Gill & Macmillan Ltd)

Arthur Cox Employment Law Group

IMPORTANT RECENT CASES include:

Employment Rights of Undocumented Workers: Hussein v The Labour Court & Younis [2012] IEHC 364

Non-pay or reduction in bonus awards: Lichters and Hass v DEPFA Bank [2009] 1510S and 20091509S

Employee withdrawing from disciplinary inquiry: McGlinchey v Ryan [2010] IEHC 536, 537

Contractual right to remain in situ pending appeal: Wallace v Irish Aviation Authority [2012] IEHC 178

Springboard injunctions: Allied Irish Bank PLC and Others v Diamond and Others [2011] IEHC 505; QBE Management Services (UK) Ltd v Dymoke & Ros [2012] EWHC 80; CEF Holdings Ltd v Mundey
[2012] IRLR 912

Costs of interlocutory application for injunction: Tekenable Ltd v Morrissey, Ghent and Critical Village Ltd [2012] [1590P]

Equal Pay Comparators: Kenny & Ors v Minister for Justice Equality and Law Reform & Ors Case C-427/11A

Victimisation: O'Brien v Persian Properties t/a O'Callaghan Hotels DEC-E2012-010; A female teacher v Board of Management of a Secondary School – DEC-E2012-103; Kealy v Brothers of Charity Services (Clare) Ltd - DEC-E2012-042

Bullying and harassment: Kelly v Bon Secours Health System Limited [2012] IEHC 21

Fixed term employees: University College Cork v Bushin [2011]; Huet v Université de Bretagne occidentale Case C-235/11

Extraterritoriality and unfair dismissal: Duncombe and Others v Secretary of State for Children, Schools and Families (No 2) [2011] UKSC 36; Ravat v Halliburton Manufacturing and Services Ltd [2012] IRLR 315; Clyde & Co LLP & Anor v Van Winkelhof [2012] EWCA Civ 1207

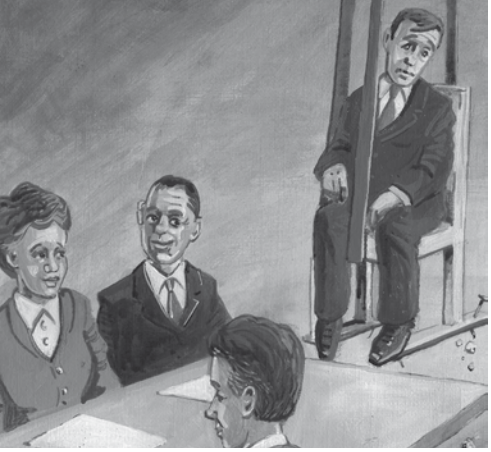
Precautionary suspensions: Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402

Evidence: CCTV footage: Dublin Bus v The Data Protection Commissioner [2012] IEHC 339

Alternative remedies: Stephens v Archaeological Development Services Ltd [2010] IEHC 540; Halstead v Paymentshield Group Holdings Ltd [2012] EWCA Civ 524

Working Time Directive: Fraser v Southwest London St George's Mental Health Trust [2012] IRLR 100; NHS Leeds v Larner [2012] EWCA Civ 103; Neidel Case C-337/10 [2012] IRLR 607; Asociacion Nacional de Grandes Empresas de Distribución (ANGED) v Federación de Asociaciones Sindicales (FASGA), Federación de Trabajadores Independientes de Comercio (Fetico), Federación Estatal de Trabajadores Case C-78/11; Dominguez v Centre informatique du Centre Ouest Atlantique, Préfet de région Centre C282/10; Roskell Limited and Armands Rikmanis DET No DWT12147 (probably the first in Ireland on the entitlement of employees to annual leave while on sick leave).

Bloomsbury Professional



Cover Illustration: Brian Gallagher T: 01 4973389
E: bdgallagher@eircom.net W: www.bdgart.com
Typeset by Gough Typesetting Services, Dublin
shane@goughtypesetting.ie T: 01 8727305

The Bar Review

Volume 18, Issue 6, December 2013, ISSN 1339-3426

Contents

ROUND HALL

THOMSON REUTERS

Editorial Correspondence to:

Eilis Brennan BL
The Editor
Bar Review
Law Library
Four Courts
Dublin 7
DX 813154
Telephone: 353-1-817 5505
Fax: 353-1-872 0455
E: eilisebrennan@eircom.net

The Bar Review is published by Round Hall in association with The Bar Council of Ireland.

For all subscription queries contact:
Round Hall
Thomson Reuters (Professional) Ireland Limited
43 Fitzwilliam Place, Dublin 2
Telephone: + 353 1 662 5301
Fax: + 353 1 662 5302
E: info@roundhall.ie
web: www.roundhall.ie

Subscriptions: January 2013 to December 2013—6 issues
Annual Subscription: €297.00 + VAT

For all advertising queries contact:
David Dooley,
Direct line: + 44 20 7393 7775
E: david.dooley@thomsonreuters.com
Directories Unit. Sweet & Maxwell
Telephone: + 44 20 7393 7000

Gross Abuse of Power and Unlawful Detention under the Mental Health Act 2001

Julia Fox BL

Introduction

The legislative basis for the involuntary admission of persons to approved centres for treatment for mental illness is the Mental Health Act 2001, as amended (hereafter "the 2001 Act"). It provides, *inter alia*, that certain steps are to be followed prior to involuntary admission. These statutory procedures are aimed at promoting consistency, efficiency and safeguarding against arbitrary detention. This article looks at applications by patients under Article 40 of the Constitution wherein the patient claimed to be in unlawful detention by virtue of alleged breaches in the statutory procedure leading up to admission, in particular, the provision that a registered medical practitioner ("RMP") examine the person prior to recommending his admission.

The Statutory Procedure

Section 9 of the 2001 Act provides that an application to admit a person to an approved centre may be made to a RMP by certain persons, including a spouse, relative or a member of the Garda Síochána. Section 10 provides that where the RMP is satisfied, following an examination of the person that the person is suffering from a mental disorder, he shall make a recommendation that the person be involuntarily admitted. The recommendation shall be sent by the RMP to the clinical director of the approved centre. Section 12 provides that a member of the Garda Síochána can take a person into custody where he believes that a person is suffering from a mental disorder and there is a serious likelihood of the person causing immediate and serious harm to himself or to other persons. The Garda Síochána shall then apply to a RMP for a recommendation. Section 13 (1) provides that where a recommendation is made (other than a recommendation made following an application under s.12), the applicant shall arrange for the removal of the person to the approved centre. Section 13(2) provides that where the applicant is unable to arrange for the removal, the clinical director of the approved centre or a consultant psychiatrist acting on his behalf shall, at the request of the RMP who made the recommendation, arrange for the removal of the person by members of staff or by authorised persons. Where the clinical director or a consultant psychiatrist acting on his behalf and the RMP are of the opinion that there is a serious likelihood of the person causing immediate and serious harm to himself or to other persons, the clinical director or the consultant psychiatrist may, if necessary, request the Garda Síochána to assist in such removal and the Garda Síochána shall comply with any such request.

Section 14 then provides that a consultant psychiatrist on the staff of the hospital must carry out a full examination of the patient within 24 hours of the person being received. If satisfied that the patient is suffering from a mental disorder, the consultant psychiatrist can make an involuntary admission which authorises the reception, detention and treatment of a patient for 21 days. He can then make further renewal orders extending the patient's detention. When an admission or renewal order is made, the Mental Health Commission will be notified and the matter will be referred to a Mental Health Tribunal. The Tribunal will assign a legal representative to represent the patient, review the patient's records and order an examination of the patient by an independent psychiatrist. The Tribunal will then review the detention of the patient and either affirm or revoke the order.

The Case of *R.L.* and Alleged Breaches of s.13

There is a body of case law that looks at the affect that an alleged breach of s.13 (the provision regarding removal of the person to hospital) will have on the validity of a subsequent detention. [1] This caselaw is relevant to the question of when a failure to comply with s.10 (the examination procedure) will render an admission order invalid. The principle that emerges is that a breach in the s.13 procedure will generally not contaminate a subsequent valid admission order or render a detention unlawful. It will only render a detention invalid if there has been a gross abuse of power or a default in fundamental requirements. Generally, if there has been non-compliance with s.13, the remedy is proceedings by way of judicial review or a claim for compensation.

In *R.L. v The Clinical Director of St. Brendan's Hospital & Ors*[2], the Applicant claimed that because she has been removed to hospital by independent contractors who were not staff of the hospital, there had been a breach of s.13(2) of the 2001 Act (as it then was) and that this rendered invalid the subsequent admission order made under s.14.[3] The late

1 For a more detailed analysis of this caselaw, please see, Fox Julia "*Assisted Admissions and Section 13 of the Mental Health Act 2001*" (2010) 28 Irish Law Times 79.

2 [2008] 3 I.R. 296.

3 At that time, s.13 provided for removal by members of the hospital's staff . S.63 of the Health (Miscellaneous Provisions) Act 2009 amended s.13 to permit removal by members of the approved centre's staff or "authorised persons", e.g. independent contractors.

Mr Justice Feeney held that the only question he had to consider was whether the Applicant was lawfully detained. He held that even if non-compliance with s.13 was established, this did not vitiate a valid admission order made under s.14. He held that, *"removal or means of removal is not and cannot be read as a sine qua non to an admission order. An admission order is a separate and stand alone matter"*[4]. He quoted the following passage from the judgment of O'Higgins CJ in the *State (McDonagh) v. Frawley*:-

> "The Stipulation in Article 40 of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with law' does not mean that a convicted person must be released on habeas corpus merely because some defect or illegality attached to his detention. The phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law".[5]

Mr Justice Feeney did not consider that such a default had occurred:

> "The facts herein demonstrate the very limited nature of the alleged wrong…In this instance any wrong which might potentially have been done to this Applicant is cured by the complete and proper implementation of the provisions in relation to an admission order and, as the court had already indicated, it is the admission order which is the order which in the first instance results in the detention of this particular applicant. There has been no breach of fundamental requirements causing a wanting in due process of law."[6]

Mr Justice Feeney asserted that if there was a complaint regarding a breach of s.13, the appropriate remedy was to bring proceedings by way of judicial review.[7] In the Supreme Court on appeal, Mr Justice Hardiman upheld this view. He said that while it was not a *"light matter that a statute has been breached…the Court can simply see no reason whatever to believe that an irregularity or a direct breach of s.13 would render what is on the face of it a lawful detention on foot of an admission order invalid.*[8]

There was a suggestion in some judgments that if a challenge was made in the initial stages of detention or if the breach of s.13 represented a default in fundamental requirements, an Article 40 application might be successful[9]. However, a patient is not assigned a legal representative until a week to ten days after the admission order is made and therefore he is very unlikely to be in a position to make a challenge in that early stage of detention. On the whole, the door appeared closed to Article 40 applications based on breaches of s.13. In *E.H. v The Clinical Director of St Vincent's Hospital*[10], the Supreme Court was highly critical of an Article 40 application by a patient who complained that she was unlawfully detained by virtue of a prior and, as the Court saw it, unconnected period of unlawful detention. It held that, *"only in cases where there had been a gross abuse of power or default of fundamental requirements would a defect in an earlier period of detention justify release from a later one"*[11].This strengthened the perception that the superior courts were unsympathetic to applications claiming a 'domino effect' rendering invalid an otherwise valid detention order.

In recent years, when patients claimed they were in unlawful detention because of alleged breaches of the s.10 examination criteria, *dicta* from *R.L.* and *E.H.* was applied to refuse relief. However, we shall see that Mr Justice Hogan ultimately applied *dicta* from *R.L* and *E.H.* to find that a patient was unlawfully detained. Case law had alluded to the possibility that a default in fundamental requirements might render an otherwise valid admission or renewal order invalid and yet it was difficult to see what that might mean in practice. The recent decisions regarding the examination requirement under s.10 of the 2001 Act shed some light on this.

What Constitutes an Examination for the purposes of the 2001 Act?

Section 2 of the 2001 Act defines examination as follows:

> "'Examination', in relation to a recommendation, an admission order or a renewal order, means a personal examination carried out by a registered medical practitioner or a consultant psychiatrist of the process and content of thought, the mood and the behaviour of the person concerned."

In *Z(M) v Abid Saeed Khattak and Tallaght Hospital Board*[12], the Applicant claimed that he was in unlawful detention because, *inter alia,* a proper examination in compliance with s.10 had not taken place .[13] The Applicant argued that although he had been examined by a consultant psychiatrist upon arrival at the hospital, the admission order made was invalidated by the earlier breach. Prior to making the recommendation that the Applicant be admitted, the RMP had gone to the garda station where the Applicant was detained under the provisions of s.12 of the 2001 Act. He had spoken to the Applicant's brother who had told him that the Applicant suffered from bipolar disorder and was not taking his medication. The doctor joined the patient and the garda sergeant outside

4 [2008] 3 IR 296 at 299.
5 [1978] 1 IR. 131 at 136.
6 [2008] 3 IR 296 at 302.
7 [2008] 3 IR 296 at 301.
8 *R.L. v Clinical Director of St. Brendan's Hospital & Ors.* Supreme Court, *ex tempore,* 15th February, 2008, pp.5-6. Hardiman J suggested that *R.L.* would have a right to compensation in another forum. In *E.F. v The Clinical Director of St. Ita's Hospital, Unreported, O'Keefe J,21st May, 2009,* an Applicant complained that she had been forcibly removed to hospital by persons other than staff of the approved centre. She successfully brought judicial review proceedings for the breach of s.13.
9 See also *C.C. v Clinical Director of St Patrick's Hospital* (No.1) , Unreported, McMahon J., 20th January, 2009.
10 [2009] 3 IR 774.
11 *Ibid.* pp.792-793.
12 [2009] 1 IR 417
13 A further ground was that since the Applicant was taken into custody by the Garda Síochána under s.12 of the 2001 Act, the process which led to his detention in Tallaght Hospital should have continued under that section, with the application for a recommendation being made to the RMP by a member of the Garda Siochána under s. 12(2), whereas it was in fact made by the Applicant's brother under s.9.

the station where they were having a cigarette and for approximately ten minutes, the RMP chatted to the Applicant. He had never met the Applicant before and accepted under cross examination that he did not carry out what might be termed a mental state examination and did not know what that might constitute. However, he said that as a result of his chat, he was satisfied that the Applicant was elated, was not taking his medication, was suffering from paranoia, and needed to go to hospital.

Mr Justice Peart held that the examination required under s.10 (prior to a recommendation) is less rigorous that that required under s.14 (upon arrival at the hospital) [14] He was satisfied that the RMP's experience enabled him to reach the necessary conclusions for the purposes of making a recommendation. It was not necessary for Mr Justice Peart to deal with the question of whether a breach in the statutory procedures would render a subsequent admission order invalid. While he expressed some disquiet about the manner in which the examination was carried out and while he found that there was a somewhat unusual sequence of events in terms of the making of a recommendation, he did not find that there had in fact been a breach.

X.Y. v Clinical Director of St Patricks University Hospital & Anor.[15]

On its face, this judgment would appear to endorse the view that even if no examination at all took place, this would not necessarily render invalid an admission order. However, Mr Justice Hogan's subsequent decision in *S.O. v Clinical Director of the Adelaide and Meath Hospital*[16] makes clear that this is not the true *ratio*. The facts of *X.Y.* were that the Applicant's husband had advised the RMP who made the recommendation that the Applicant would be in attendance at a graduation mass at her son's school. The RMP gave evidence that he had already formed his opinion from a previous assessment that the Applicant was suffering from a major psychiatric illness but that he felt he had to see the Applicant in order to be clinically appropriate and legally compliant. He did not speak to the Applicant and simply examined her through observation. He said he remained of the belief that she required treatment at an approved centre and consequently made the recommendation.

Mr Justice Hogan noted that the plain intention of the Oireachtas, in including in the 2001 Act, the statutory requirement that the examination constitute a "personal examination" was to ensure that safeguards for patients be appreciably improved. He held:

> "It is true that the definition of examination in s.2(1) as requiring a personal examination might be thought to require a face to face meeting between the doctor and the patient. At the same time, the fact that s.10(2) envisages that a registered medical practitioner can carry out an examination without informing the patient where the doctor concludes that this "might be prejudicial to the person's mental health, well-being or emotional condition" necessarily suggests that an observation of the patient from a distance can-at least in some circumstances—also constitute a "personal examination" for this purpose, not least where (as here) the registered medical practitioner is very familiar with the patient's clinical presentation. Beyond expressing sympathy in respect of the enormously difficult situation in which Dr B. found himself, I think it is unnecessary to decide this difficult question. Even if it were to be accepted that Dr. B's observations of Ms. Y on 20th May did not constitute an "examination" in this sense, it is clear that such a failure does not invalidate a subsequent detention under s.14 if this detention is otherwise valid."[17]

It is questionable whether s.10(2) of the 2001 Act necessarily suggests that observation from a distance can constitute a 'personal examination'. It provides that the RCP *"shall inform the person of the purpose of the examination unless… the provision of such information would be prejudicial to the person's mental health…"*. The provision simply allows the RMP not to *inform* the person of the *purpose* of the examination. One can surmise that this might extend to not telling the person that they are being examined but it does not negate the necessity for a face to face meeting.

Mr Justice Hogan held that the reasoning in *R.L.* applied by analogy to the case before him. He said:-

> "If—as I have held—a valid admission order was made by Dr O'Ceallaigh following an examination of Ms.Y. under s.14, then it is immaterial **so far as the continued validity of the detention under that admission order** is concerned that the requirements of s.10 were not perfectly complied with by the registered medical practitioner."[18]

S.O. v Clinical Director of the Adelaide and Meath Hospital[19]

The Applicant had been a patient of Dr C. for over ten years and during that period had required on-going psychiatric assessment and monitoring, frequently expressing paranoid obsessions. The Applicant's brother attended Dr C.'s surgery and told him that the Applicant's mental health had deteriorated significantly and that he was engaging in bizarre behaviour. Dr C. was told that family members were fearful for their safety because of the Applicant's paranoid delusional thinking. The Applicant's brother then played for Dr C. a tape recording of a conversation which he had with the Applicant the previous day. This served to corroborate the fears expressed by the family members. Dr C. signed a recommendation and the Applicant was removed to hospital early that evening. He was examined the following morning and an admission order subsequently made under s.14. The admission record described him as having persecutory delusions, being aggressive and homicidal and of having no insight and wishing to leave hospital.

The Applicant brought Article 40 proceedings in which

14 It might be noted that there is a single definition of "examination" in the 2001 Act.
15 Unreported, Hogan J., 8th June, 2012.
16 Unreported, Hogan J., 25th March, 2013.
17 Unreported, Hogan J., 8th June, 2012. Paragraphs 39-40.
18 *Ibid.* Paragraph 43.
19 Unreported, Hogan J.,25th March, 2013.

he claimed that he was in unlawful detention because Dr C. had not examined him prior to making a recommendation for involuntary admission. In a letter, which was exhibited to the court, Dr. C. recalled that based on all that had occurred and out of concern for the possibility that the Applicant might abscond and given his long standing and extensive knowledge of the patient's history, he signed the recommendation.

Mr Justice Hogan held that it was plain that Dr C. had not conducted an examination of the Applicant and that this failure rendered the subsequent detention unlawful. He distinguished this case from *M.Z.* and *X.Y.* and emphasised that *R.L.* did not excuse every instance of non-compliance with the statutory procedures. Here there had been a complete failure to comply with the statutory procedures and this could not be excused:-

> "The applicant here is certainly in need of psychiatric care…Yet I find myself obliged to conclude that there was a default of fundamental requirements in that the applicant was not examined *at all* in the manner required by s.10 by the registered medical practitioner in the twenty-four hour period prior to the making of the recommendation. In this respect, the present case is different from both *MZ*....and *XY*.....In *MZ,* Peart J. held – albeit with understandable reluctance and unease - that an informal conversation between a registered medical practitioner of some experience and a patient at the rear of a Garda station constituted an "examination" of the patient for the purposes of s. 10. One might say that this was a case where the detention order was not invalid because the examination requirements had, at least, been substantially complied with, even if the manner and nature of the examination had been somewhat unconventional. In *XY,* I did not find it necessary to reach a concluded view on the question of whether the observation of the patient from a short distance by a medical practitioner in a car park constituted an "examination" in this sense, because even if there had not been such an examination in the statutory sense of that term, any invalidity had been cured by the subsequent admissions order…The true ratio of XY, accordingly, is that an incidental invalidity in the examination process will not render invalid an otherwise valid admissions order which was subsequently made thereafter... The essential point of difference, therefore, between this case and XY is that in the latter case the medical practitioner at least endeavoured – again under exceedingly difficult circumstances – to examine the patient, whereas (for perfectly understandable reasons) this was not attempted here. It is rather the complete failure to comply with the requirement of s. 10 that there be a prior examination which renders invalid the subsequent admissions order"[20].

Mr Justice Hogan identified a breach in fundamental requirements and held that it followed that the Applicant's detention was unlawful:-

> "There is accordingly here a default of fundamental requirements in the sense canvassed by Kearns J. in *EH*. If it were otherwise, it would mean that a patient could be validly admitted on an involuntary basis without the necessity for an examination within the previous 24 hour period or even, perhaps, without a recommendation at all. If this were so, it would entirely set at naught the safeguards deemed to be fundamental by the Oireachtas. In so far as any dicta of mine in *XY* suggested that any defect whatever attaching to the s. 10(1) examination procedure could subsequently be automatically cured by a valid admissions order, I think that these should stand qualified in the light of the present case…."[21]

Conclusion

For a breach in procedures prior to admission to render invalid an otherwise valid admission order, there must have been a gross abuse of power or a default of fundamental requirements. A fundamental requirement is that the RMP must attempt to carry out a personal examination before recommending a person's admission to hospital. *R.L.* should not be interpreted to mean that the court will never look behind an otherwise valid admission or renewal order to scrutinise the procedures that led up to the making of that order. However, the courts may be more willing to declare a breach fundamental where it relates to one section of the 2001 Act as opposed to another.[22] Finally, it appears that the *S.O.* decision has placed a renewed emphasis on the need for compliance with statutory procedures, without which patients' rights may be set at naught. It remains to be seen how it will be interpreted in subsequent cases. ■

---

20 *Ibid.* Paragraphs 18-22.

21 *Ibid.* Paragraphs 22-23.

22 It might be argued that Section 13 should be distinguished from s.10 as s.13 is not one of the provisions that the Mental Health Tribunal, when it decides whether to affirm an admission or renewal order, is statutorily obliged to consider."Section 18(1) ….the tribunal shall review the detention of the patient concerned and shall either---(a) if satisfied that the patient is suffering from a mental disorder, and (i) that the provisions of sections 9,10,12,14,15 and 16, where applicable, have been complied with, or (ii) if there has been a failure to comply with any such provision, that the failure does not affect the substance of the order and does not cause an injustice, affirm the order…."

THOMSON REUTERS
ROUND HALL

REUTERS/Yuriko Nakao

CIVIL PROCEDURE IN THE CIRCUIT COURT

Karl Dowling & Karen McDonnell

KEY FEATURES

- Includes an in-depth analysis of the day-to-day activities dealt with by the Circuit Court, including; Intoxicating Liquor Licenses, Probate Actions, Landlord & Tenant, Planning, Employment and Family Law Proceedings
- Helps you fully understand the role of the County Registrar
- Handy format that is ideal to bring to Court with you, making sure you always have the civil practice and procedure information at your fingertips and saving you from making costly mistakes

NEW TO THIS EDITION

- New decisions dealing with procedural matters
- Recent legislation, including the Land And Conveyancing Law Reform Act 2009 and Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010
- Examines all significant amendments to Circuit Court Rules

November 2013
9781858007182, **€265**

FREE DELIVERY TO IRELAND

PLACE YOUR ORDER TODAY QUOTING REFERENCE 1272603A

roundhall.ie

TRLUKI.CS@thomsonreuters.com

1 800 937 982 (Ireland)
0845 600 9355 (UK)
+44 (0) 1264 388 570 (International)

THOMSON REUTERS

Sports Injury and the Law: An Issue to be Tackled

Michelle Liddy BL*

Introduction

When Luis Suarez bit off more than he could chew in Liverpool's last Premier League encounter with Chelsea, there was a storm of controversy. If the same incident had occurred on the street rather than on the pitch, no one would have been surprised if civil or even criminal action was initiated. The 10 match ban and a fine (which would have very little impact on Suarez's finances) seem a small price to pay for sinking his teeth into the arm of an opposing player. Does this incident give the misleading impression that any assault that occurs on the pitch is sidelined and will not attract civil or criminal liability? This is an issue which has not been litigated to any great degree in this jurisdiction.

It is important to note that in terms of fitness and strength, players nowadays are significantly bigger and stronger than their counterparts were 20 years ago. Consequently, aggressive play will result in more significant injuries that would merit substantial damages awards if they were inflicted elsewhere. It is submitted that liability for injuries in sports is an issue that the Irish Courts will soon have to grapple with. This article seeks to provide an overview of the general principles and leading authorities from jurisdictions which have already developed jurisprudence on the issue.

Basic Priniples in a Civil Context

As noted earlier, there has been very little litigation in this jurisdiction that is relevant for current purposes. The majority of the case law has developed in England or Australia and since the general legal principles of negligence and trespass to the person are very similar in all three jurisdictions, the case law is relevant in Ireland. An action arising out of a sporting event can be grounded on trespass but is, as Cox and Schuster note, usually grounded on negligence.[1] The reason negligence is the more commonly used cause of action is due to the fact that a trespass must be committed intentionally and there are difficulties in proving that in a sporting context.

The way in which trespass applies in sports is that participants consent to a certain level of contact which may cause injury but will not be precluded from suing for personal injuries purely on that basis. According to McMahon and Binchy, a flagrant, intentional breach of the rules and also dangerous play in breach of the rules which result in injury is a battery while dangerous play in accordance with the rules could in some cases constitute a battery.[2] Support for this proposition can be found in the Australian case of *Rootes v Shelton* (although that case was a negligence one, there are some interesting points that relate to consent and trespass).[3] That case arose out of an injury sustained during water sports. In the course of his judgment, Barwick CJ said that;

> "(b)y engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are….."[4]

Similarly in *McNamara v Duncan*[5] the plaintiff suffered a fractured skull in the course of an Australian Rules Football match by a sharp blow to the head inflicted by the defendant and sought damages for trespass to the person. In respect of the level of contact to which players consent, Fox J, quoting a passage from Street on Torts, held that sports players consented to

> "those tackles which the rules permit, and, it is thought to those tackles contravening the rules where the rule infringed is framed to maintain the skill of the game; but otherwise if his opponent gouges out an eye or perhaps even tackles against the rules and dangerously."[6]

In relation to the impact of the rules of the game, the Court held that the blow in question was intentional and that it could "hardly be understood as an act in the ordinary, legitimate, course of a game of football". It also constituted a "serious infringement of the rules" and "(t)he risk of being injured by such an act is not part of the game"[7] On that basis, the defendant was liable for the plaintiff's injuries. The relevance of the rules of the game came up in England in *May v Strong*[8]. Here, the plaintiff who was a 19 year old semi professional footballer, suffered a career ending injury as a result of a very

* Barrister-at-law on the South Western Circuit. The author wishes to acknowledge the kind assistance of Jack Nicholas BL in this and earlier drafts of this article. Any mistakes and/or omissions are the authors own.

1 Cox, N & Schuster, A 2004 *Sport and the Law*, First Law Publishing, Dublin at 199.

2 McMahon, Bryan & Binchy, William, 2000. *Law of Torts* Butterworths, Dublin pp633-634 at 22.60. See Proctor, B 2012. "*When should criminal liability be attached to harmful challenges in football?*" *The Student Journal of Law"* Issue 3. Available from http://www.sjol.co.uk/issue-3 for a discussion of conduct which is outside the rules but within the "playing culture" of particular sports.

3 (1967) 116 CLR 383

4 *Ibid* at para. 6.

5 (1971) 26 ALR 584

6 *Ibid* at 588.

7 *Ibid* at 587.

8 [1991] B.P.I.L.S 2274

later tackle. The tackle was from behind and was after the plaintiff had laid off the ball to another player. The defendant had been immediately sent off for violent conduct and serious foul play. The trial Judge held that the tackle amounted to an assault and consideration was given to the rules of the game and the referees' decision at the time.

To a Willing Person, no Harm is Done?

Suffice it to say that considering the aforementioned cases, there is no defence of *volenti non fit injuria* available to a defendant in a sports injury case. Generally in trespass it will be a defence for the defendant to say that the injured party consented to the contact.[9] Clearly, participation in sports will not be regarded as *carte blanche* for another player to inflict serious injury, under the guise of a legitimate tackle, and then claim that participation in the game by that other player amounted to consent to same. In negligence, *volenti* will only operate as a defence once the elements of negligence have been made out. The cases generally turn on the issue of whether there was a breach of duty by one party, which is more a case of trying to establish that a claim in negligence isn't made out rather than defending one that is.

As noted earlier, the majority of cases arising out of sporting fixtures are negligence actions. As a broad statement of principle, there is certainly a duty of care owed from one participant to another and that duty is to avoid causing injury to others. In assessing whether there has been a breach of the duty, there are a number of factors to be looked at, *inter alia,* the sport which is being played, the rules and "playing culture" of same, the level at which it is being played and the circumstances of the injury. In fact there are so many factors that are to be taken into account that essentially, each case will turn on its facts. However, previous case law provides some guidance in relation to both the duty which is owed and the point at which it is breached.

One of the earliest cases was *Rootes v Shelton.*[10] Again the Court noted that there are certain risks which participants in a sport are deemed to have voluntarily accepted but that does not negate the duty of one participant to the other.[11] In this instance, the plaintiff, who was a water skier, sued the driver of the towing boat for failure to take due control of the boat and for failing to warn him of the presence of a stationery boat with which he collided. Barwick CJ in this judgment held that the purpose of the driver was to warn the water skiers of any obstruction and while collision with any obstacle which the driver cannot see is a risk inherent in the sport, collision with an obstacle which the driver can see is not. Barwick CJ went on to say that the plaintiff was entitled to expect that the driver would carry out his function with reasonable care and that the drivers' actions on the day amounted to a breach of that duty.[12] Kitto J preferred a different approach, not based on what a participant was assumed to have voluntarily accepted but based upon a general standard of care which is to be looked at in light of the circumstances of the game.[13] Whichever way it is looked at, the result is the same.

When the issue first came before the English Courts in the case of *Condon v Basi,* [14] Lord Donaldson MR, in preferring the approach of Kitto J, held that there is a general standard of care whereby all participants are under a duty to take all reasonable care to avoid causing injury to each other but that duty will be looked at in the light of the circumstances of the injury and the sport.[15] In the later case of *Vowels v Evans & Another,*[16] the Court proceeded by using the established principles of negligence and adapting them to a sporting context as Lord Donaldson had done. There was nothing complex in the manner which the principles were applied and that is always welcome in emerging areas of the law. What we can take from this is that the facts of each case are of paramount importance and liability can be imposed on two bases.

Firstly, if the injury occurred by reason of an action which is not one of the inherent risks of the sport, the plaintiff is entitled to recover. Secondly, a plaintiff may succeed on the basis that a general duty of care, which is tailored to a sporting scenario, has been breached. There is a certain amount of semantics involved here but also adding the notion of `consent to risk' to this situation is muddying the waters and complicating the issue. It would be best to keep the concept of negligence as it is but to tailor the test to a sporting context, as both Kitto J and Lord Donaldson MR chose to do.

Who Should be Sued?

Once it has been established that the consent of the injured party was exceeded, the question becomes who is liable? There is nothing to stop a player from suing the player who caused the injury. In a South African case, a schools rugby player suffered a broken neck when a player from the opposing team caused the scrum to collapse. His case against the coach of the opposing team, the principal of the opposing teams' school and the local education authority settled. It was held by the Western Cape High Court that the player who caused the scrum to collapse was liable for the injury and obliged to pay compensation.[17] It is worth noting that while the player was held liable, the plaintiff had not taken the chance of suing him alone, which could have been nothing more than a pyrrhic victory. In an amateur situation, it is always advisable to sue the other relevant bodies (in this case, the local education authority etc).

Vowels v Evans & Another[18] came about as a result of a semi-professional rugby match when a player was rendered paraplegic as a result of a collapsed scrum. The plaintiff sued the referee, the Welsh Rugby Union (who had appointed him) and various other members of the board of the Welsh Rugby Union for negligence. It is worth noting that this

9 *Supra* n1 p577 at 20.61.
10 (1968) ALR 33
11 *Ibid* at 34
12 *Ibid.*
13 *Ibid* at 37

14 [1985] 1 WLR 866 at 868.
15 *Ibid.*
16 [2003] 1 WLR 1607
17 Schroeder. F 2011 "*Court Victory for Paralysed Rugby Player*" *The Cape Argus,* 5th May 2011. Available from http://www.iol.co.za/capeargus [23rd April 2013] And Laing. A 2011 "*Rugby Player to be awarded compensation for scrum 'jack knife*'" *The Telegraph* 5th May 2011. Available from http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/8495505/Rugby-player-to-be-awarded-compensation-for-scrum-jack-knife.html.
18 [2003] 1 WLR 1607

case differs from the South African one mentioned above in that the referee had been appointed by a governing body (who accepted that if the referee was liable, then they were vicariously liable), had received intensive training and was by no means taking on the role by way of a casual arrangement. The Court, in giving a very comprehensive judgment, held *inter alia*;

> " 1. that it was fair, just and reasonable for the players to rely on the referee to exercise reasonable care in performing his role and as the relationship between player and referee was sufficiently proximate it was reasonably foreseeable that failure by the referee to exercise reasonable care could result in injury to a player;
>
> 2. that while the referee most certainly owed a duty of care to the players, the threshold for liability had to be high;
>
> 3. that on the facts of the case, the referee had abdicated his responsibility for the decision making in the match and as such, he had breached the duty of care which he owed to the plaintiff and was liable for the injuries."[19]

Of course this case does turn on the fact that the referee failed to apply the rules correctly, which resulted in a player taking on a specialist role in the game which he was not suited to. It was as a result of this player's inexperience that the scrum collapsed. It will not always be appropriate to sue the referee and the liability of the referee really depends on whether there is some failure in the application of the rules which resulted in injury.

Vicarious Liability

In a professional or semi professional capacity, the most obvious defendant, in terms of being a mark for damages, is the club. The club is an employer and the player an employee so there is nothing novel in that, so much so that the discussion of vicarious liability in the case law has been very limited. Following *Condon v Basi*[20] came *Elliott v Saunders and Liverpool Football Club*[21] which acknowledged that a club could be vicariously liable for the injury caused to another player.[22] After that, there were a number of other cases[23] which all came to the same conclusion and from that point on, this issue has been fairly non-contentious.

Interestingly, James and McArdle[24] query whether this is an area which could find the threshold for vicarious liability being lowered rather than increased in the light of *Lister v Hesley Hall Ltd*[25] and *Mattis v Pollock t/a Flamingo's Nightclub*.[26] Both of those cases resulted in employers being held vicariously liable for acts which would previously have been held to be outside the scope of employment. It stands to reason that a club should not be allowed to escape liability for the actions of a player just because the act in question is so beyond what anybody could have expected in the context of a sports match, particularly when there is a worrying trend of dangerous tackles and violent conduct emerging.

Criminal Liability

While the focus of this article is the civil liability for injuries sustained by competitors, there have been cases of criminal prosecution arising from incidents on the pitch. Some of these incidents have been blatant assaults and even deaths[27] which could not be regarded as being within the rules of the sport and clearly attract criminal liability. There are certain actions, such as extremely hard tackles, which put prosecutors and Judges in the difficult position of having to decide that such an action exceeds what a player could consent to and is criminal. In general terms, if the harm inflicted on the victim is more than "transient or trifling," then the consent of the victim is invalid unless the conduct is within one of the recognised exceptional categories (of which sport is one).[28] The basis for this is the case of *R v Brown*.[29]

Smith and Hogan point to a number of basic principles which have developed.[30] Firstly, if the sport permits an unacceptably dangerous act, then the law is not obliged to accept the consent of the victim. Secondly, where the rules of the sport do not necessarily involve the commission of harm but harm is intentionally inflicted, then consent is irrelevant and the perpetrator has committed a criminal act. Finally, if the perpetrator was reckless as to the causing of the injury, the question is whether the injured party impliedly consented to the injury in the context in which it was inflicted. The leading case in the context of sport is *R v Barnes*.[31] This case arose out of a vicious tackle at an amateur football match for which Barnes was charged with Grievous Bodily Harm under section 20 of the Offences Against the Person Act, 1861. Barnes successfully appealed his conviction but the case provided some useful guidelines for identifying the point at which consent becomes irrelevant and the act in question becomes criminal.[32]

19 Ibid.
20 *Supra n15*.
21 Unreported, English High Court 10th of June 1994.
22 It is worth noting that this was a claim in negligence and there was some discussion as to whether a claim of vicarious liability would succeed if the claim was grounded on trespass. This case failed on its facts in any event.
23 *McCord v Cornforth and Swansea City Football Club* "Football: £250,000 award for foul that ruined career" *The Independent* 20th December 1996. Available from http://www.independent.co.uk/sport/football-pounds-250000-award-for-foul-that-ruined-career-1315401.html [17th June 2013] and *Watson and Bradford City Football Club v Gray and Huddersfield Town Football Club* "Watson awarded in dangerous tackle case" *BBC News* 29th October 1998. Available at http://news.bbc.co.uk/2/hi/uk_news/204017.stm [17th June 2013].
24 *Supra n10* at 5-6.
25 [2002] 1 AC 215.
26 [2003] IRLR 603.
27 Brennan, Richard 1995 "*Soccer player jailed for foul play*", *The Independent* 12th October 1995, Available from http://www.independent.co.uk/news/soccer-player-jailed-for-foul-play-1577101.html. [25th April 2013] and also BBC News 2009, "*Footballer jailed for match death*" Available from http://news.bbc.co.uk/2/hi/uk_news/england/london/8136829.stm [25th April 2013].
28 Ormerod, David 2005 *"Smith and Hogan, Criminal Law"* Oxford University Press, London p 531. [Hereinafter referred to as "Smith and Hogan"]
29 [1994] 1 AC 212
30 *Supra n*2 at 534-535.
31 [2005] 1 WLR 910
32 The guidelines as set out in *Barnes* were based on those used in

The Court in *Barnes* noted that "if what occurred went beyond what a player could reasonably be regarded as having accepted by taking part in the sport, that indicated that the conduct would not be covered by the defence" of consent[33] and in competitive sport, while conduct outside the rules was to be expected that, in and of itself, did not make the conduct criminal.[34] In deciding whether a certain action amounts to something criminal, the factors to be taken into account include the type of sport, the level at which it was played, the nature of the act, the degree of force used, the extent of the risk of injury and the defendant's state of mind.[35] A Court could also be guided by looking at whether the contact was so obviously late and/or violent that it could not be regarded as an instinctive reaction, error or misjudgment in the heat of the game.[36]

While the conviction in *Barnes* was ultimately held to be unsafe, an amateur footballer was sentenced to a six month term of imprisonment for a tackle on an opponent in 2010.[37] In that case, which was the first of its kind to result in a prison sentence, the defendants tackle resulted in the injured parties leg being broken in two places which made the Court's decision somewhat easier. The Court described the tackle as "a deliberate and premeditated attack" which had to be considered a "very deliberate criminal act".[38] Somewhat worryingly, the Court in *Barnes* noted that until recently, prosecutions in these circumstances were very rare ("h)owever, there is now a steady but, fortunately, still modest flow of cases of this type coming before the courts"[39]

Conclusion

This issue is one that has troubled the Courts of both England and Australia. While it has not yet arisen in Ireland, there is a strong probability that it will very soon. The principles are by now well settled in other jurisdictions and it is submitted that the approach adopted in England is both sensible and reasonable. The possible expansion of the vicarious liability which could be imposed on clubs is to be welcomed and can hopefully serve as a warning to clubs to impress upon their players the dangers of engaging in violent or reckless conduct on the pitch. This will have the benefit for the club of avoiding large awards of damages and the advantage of cleaning up sports, where violence is too acceptable and aggression successfully masked as a competitive nature. ■

the Canadian case of *R v Cey* 48 C.C.C. [1989] Sask. CA. (3d) 480 which was a case which arose out an ice-hockey game. For a detailed analysis of *Cey* and its application see Proctor, Ben 2012 "When should criminal liability be attached to harmful challenges in football?" *The Student Journal of Law* Issue 3 Available from http://www.sjol.co.uk/issue-3 [24th April 2013].

33 *Ibid* at p 914

34 *Ibid* at p 915.

35 *Ibid* at 915.

36 *Ibid* at 915.

37 Tozer, James 2010 "*Footballer who broke opponent's leg in two places becomes first player jailed for violent tackle*" *The Daily Mail* 5th March 2010 Available at http://www.dailymail.co.uk/news/article-1255414/Footballer-jailed-horrific-tackle-left-victim-broken-leg.html [22nd April 2013].

38 *Ibid.*

39 *Supra n*5 at 912.

Official Launch of *Merger Control*

Pictured at the official launch of Merger Control *by Marco Hickey published by Thomson Reuters/ Round Hall: The Hon Mr Justice John Cooke, author Marco Hickey and Catherine Dolan (Director, Round Hall, Thomson Reuters).*

THOMSON REUTERS
ROUND HALL™

REUTERS/Jumana El Heloueh

LANDLORD & TENANT LAW

THE COMMERCIAL SECTOR

Mema Byrne

November 2013 9780414031487
€295

Landlord & Tenant Law – The Commercial Sector features everything you need to know and key updates in this important area of the law, as well as flagging changes due to be enacted in forthcoming legislation in Ireland.

This concise presentation of law as it applies to the commercial sector also examines recent developments in the area of rent review and highlights the growing influence of contractual principles in the area of landlord and tenant.

Landlord & Tenant Law – The Commercial Sector addresses the legislative changes introduced by:

- The Land and Conveyancing Law Reform Act, 2009
- Multi-Unit Developments Act, 2011
- The Residential Tenancies Act, 2004
- The Personal Insolvency Act, 2012

The book also flags proposed changes to each area under the Draft General Scheme of Landlord and Tenant Law Reform Bill, 2011.

It also provides analysis of recent key cases, such as: *Ickendel Ltd v. Bewley's Café Grafton Street Ltd* (2013); *Westpark Investments Ltd v Leisureworld Ltd* (2012); *Harrisrange v Duncan* (2003) and *Le Chatelaine Thudichum Limited (in Voluntary Liquidation) v Conway* (2008)

PLACE YOUR ORDER TODAY, quoting reference 1273003A

FREE DELIVERY TO IRELAND

VISIT www.roundhall.ie
EMAIL TRLUKI.CS@thomsonreuters.com
CALL 1 800 937982 (IRE) +44 (0) 1264 388570 (INT)

THOMSON REUTERS™

Obituary

The Honorable Mr Justice Kevin Feeney

I first met Kevin when I came from Dundalk to college in UCD in 1968. We were both called to the Bar in 1973. From the outset, it was clear to me that Kevin was going to make it at the Bar. He was extremely industrious from the outset. Not only did he get papers back by return, but delivered them personally, usually the next day, by bicycle. Would that I had behaved likewise.

Yet for all his industry, he found time to play many, many sports. He was an extremely proficient tennis player and played class one league for Donnybrook. He was a first division squash player playing for the University Club. He played division one hockey, albeit as a goalie, so proving that there was a slightly mad streak in the lad. He played cricket for Phoenix and was an active member of Portmarnock Golf Club, playing off thirteen.

It might be said that his sporting habits were somewhat curtailed on his marriage to Geraldine Davy in 1979. Kevin and I were best men to one another. He has four children- Andrew, Peter, Kevin and Barbara all of whom he adored. I always felt to hear the special affection for Barbara, his only daughter and the first female Feeney for several decades.

As I have already said, Kevin was an extremely industrious and successful Junior but an even more successful Senior Counsel. He was involved in some of the most difficult, complex cases in court. He specialised in Defamation actions, the most famous involving "Slab" Murphy. He was also involved in many complex commercial cases notably- *Fyffe's v DCC* case which occupied most of his time up to his appointment to the bench.

From the outset, Kevin was at home on the bench. He had all the attributes that appealed to practitioners. He was patient, understanding and courteous although it has to be conceded that he did not suffer fools gladly. He could be placed in any court be it Chancery, Commercial or Personal Injuries and was patently comfortable. Although he never sat in the Criminal Courts he nevertheless, could have done so bearing in mind that as a Junior Counsel he prosecuted criminal cases.

Kevin was also a much travelled man and was particularly keen on cruises, nevertheless, he was probably most at home in Ballycotton, County Cork, where he spent a great deal of time. I also have a house in Ballycotton as had our mutual friend and colleague Colm Allen, alas also no longer with us.

Kevin was a voracious reader. Not for him were the novels of Conan Doyle or John Grisham (which might I say satisfied me). Give him a biography or autobiography or a book on sport or the great wars and he was in his element.

Kevin had limited interest in music considering himself "tone deaf". He was hugely interested in the theatre and was an active member of the Dublin Theatre Festival. He had an extraordinary memory for facts which everyone else had forgotten which served him well, both as a practitioner and as a judge. He was particularly knowledgeable in relation to sport- I always felt he could have given the memory man, Jimmy McGee, a run for his money in this regard.

His funeral took place on the 19th of August and the vast numbers of people who attended bore witness to the high regard in which he was held. He will be sadly missed as a judge, father, husband, sportsman and friend. ■

Jim McArdle BL

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 18, Issue 6, December 2013

A directory of legislation, articles and acquisitions received in the Law Library from the 17th October 2013 up to 14th November 2013
Judgment Information Supplied by The Incorporated Council of Law Reporting

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

ADMINISTRATIVE LAW

Statutory Instruments

Agriculture, food and the marine (delegation of ministerial functions) order 2013
SI 371/2013

Environment, Community and Local Government (delegation of ministerial functions) order 2013
SI 375/2013

ADOPTION

Article

Bracken, Lydia
Is there a case for same-sex adoption in Ireland?
2013 (3) Irish family law journal 79

AGENCY

Library Acquisition

Munday, Roderick
Agency law and principles
2nd ed
Oxford : Oxford University Press, 2013
N25

AGRICULTURE

Statutory Instrument

European Union (African swine fever) (non-EU countries) regulations 2013
(DIR/2013-426)
SI 325/2013

ALTERNATIVE DISPUTE RESOLUTION

Article

Dowling-Hussey, Arran
Alternative dispute resolution education and training in the Republic of Ireland: a worrying lacuna
2013 (1) (1) Irish business law review 73

ANIMALS

Statutory Instruments

Bovine viral diarrhoea (amendment) (no. 2) order 2013
SI 315/2013

Diseases of animals act 1966 (control on animal and poultry vaccines) (amendment) order 2013
SI 379/2013

ARBITRATION

Extension of time

Contract for engineering works – Dispute regarding value of works – Whether Act of 2010 applied to claim – Preservation of rights acquired prior to operative date – Whether notice to refer served in timely fashion – Date of receipt of notice – Whether notice to refer validly served – Whether time should be extended – Whether undue hardship would otherwise be caused – Whether refusal to extend time out of proportion with degree of fault on part of applicant – Delay – Whether delay relevant to exercise of discretion – Explanation for delay – Unilateral decision to prioritise other projects – Failure to notify other party of intention to prioritise other work – Inordinate delay – Prejudicial delay – Degree of objective fault - *On-Site Welding Ltd v Quinn Insurance* [2011] IEHC 215, (Unrep, Laffoy J, 23/5/2011); *Moscow V/O Export Khleb v Helmville Ltd ("The Jocelyne")* [1977] 2 Lloyds Rep 121; *East Donegal Co-Operatives Ltd v Attorney General* [1970] IR 317; *Donnellan v Westport Textiles Ltd* [2011] IEHC 11, (Unrep, Hogan J, 18/1/2011); *Desmond v MGN Ltd* [2009] 1 IR 737 and *Dekra Eireann Teo v Minister for Environment* [2003] IESC 25, [2003] 2 IR 270 considered – Arbitration Act 1954 (No 26), s 45 – Interpretation Act 2005 (No 23), s 25 - Arbitration Act 2010 (No 1), s 4 – Application refused (2012/121MCA – Hogan J – 6/11/2012) [2012] IEHC 463
Regan Civil Engineering Ltd v Minister for Defence

Procedure

Issuing of proceedings – Estoppel – Engagement in proceedings by defendant – Subsequent invocation of arbitration clause – Whether defendant estopped by conduct from relying on arbitration clause – Whether seeking statement of claim constituted engagement in proceedings – Whether change of title of Minister of State rendered contractual clause inoperative – Contract – Interpretation – Change of name – Change of title of Minister of State – *Furey v Lurgan-ville Construction Co Ltd* [2012] IESC 38 (Unrep, SC, 21/6/2012) considered - Arbitration Act 2010 (No 1), s 6 – United Nations Commission on International Trade Law Model Law on International Commercial Litigation, 1985 - Environment, Heritage and Local Government (Alteration of Name of Department and Title of Minister) Order 2011 (SI 193/2011) – Ministers and Secretaries Act 1924 (No 16), ss 1 and 2 – Ministers and Secretaries (Amendment) Act 1939 (No 36), s 6 – Stay refused (2009/4373P – Hogan J – 20/12/2012) [2012] IEHC 561
Mitchell v Mulvey Developments Ltd

Stay

Step in proceedings – Estoppel – Multiplicity of actions – Clause providing that disputes be submitted to arbitration – Statutory interpretation – Consent order extending time for delivery of defence – Whether step taken in proceedings – Whether clear unequivocal promise or representation made – Level of general discretion of court – *Brighton Marine Palace and Pier Limited v Woodhouse* [1893] 2 Ch 486; *County Theatres and Hotels Limited v Knowles* [1902] 1 KB 480; *Ford's Hotel Company Limited v Bartlett* [1896] AC 1; *Gleeson and Gleeson v Grimes and McQuillan* (2002) [2007] 4 IR 417; *O'Flynn v An Bord Gáis Eireann* [1982] ILRM 324; *Patel v Patel* [2000] QB 551; *Richardson v Le Maître* [1903] 2 Ch 222; *Taunton-Collins v Cromie and Others* [1964] 1 WLR 633 and *Truck and Machinery Sales Limited v Marubeni Komatsu Limited* [1996] 1 IR 12 considered – Arbitration Act 1980 (No 7), s 5 - Appeal dismissed (86/2007 – SC – 21/6/2012) [2012] IESC 38
Furey v Lurgan-ville Construction Co Ltd

BANKING

Statutory Instruments

Central Bank act 1942 (section 32D) regulations 2013
SI 359/2013

Credit Institutions Resolution Fund levy regulations 2013
SI 376/2013

BRUSSELS I

Article

Ferri, Delia
An end to abusive litigation tactics within the EU? New perspectives under Brussels I recast
2013 (1) (1) Irish business law review 21

BUILDING LAW

Library Acquisition

Horne, Robert
Mullen, John
The expert witness in construction
UK : Wiley-Blackwell, 2013
M604.9

CHILDREN RESIDENTIAL INSTITUTIONS REDRESS BOARD

Judicial review

Applicant bringing claim four years after statutory deadline – Applicant deciding to delay claim until mother's claim completed – Respondent refusing to extend time – Statutory interpretation – "Exceptional circumstances" – Respondent finding that exceptional circumstances not established – Whether error by respondent – Whether respondent's findings based on evidence before it – *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 applied – Residential Institutions Redress Act 2002 (No 13), s 8 – *Certiorari* granted (2012/64JR – Peart J – 8/2/2013) [2013] IEHC 52
K(T) v Residential Institutions Redress Board

Article

Arnold, Samantha
European core standards for guardians of separated children in context: Ireland
2013 (31) (18) Irish law times 268 [part I]
COMMERCIAL LAW

LIBRARY ACQUISITION

Christou, Richard

Drafting commercial agreements
5th ed
London : Sweet & Maxwell, 2013
N250

COMPANY LAW

Directors

Liquidation – Application to restrict respondents – Failure to make annual returns for one year – Failure to prepare management accounts and board minutes – Whether failure to prepare management accounts potentially constituting breach of respondents' common law duty – Whether failure by respondents to act responsibly – *Fennell v Rochford* [2009] IEHC 397, (Unrep, MacMenamin J, 18/8/2009) considered - Companies Act 1990 (No 33), s 150 – Declarations granted against first and third respondents (2008/339COS – Herbert J – 8/2/2013) [2013] IEHC 53
Wallace v Fergus

Liquidation

Application for order directing appointment of new liquidator – Application for order declaring vote passed at creditors meeting invalid – Application for declaration regarding value of security held by creditor in respect of assets of company - Meeting of creditors – Unlimited company involved in residential property development – Judgment obtained by creditor against company – Amount of unsecured debt held by creditor – Value of land listed in statement of affairs of assets – Value as per statement of affairs accepted for purpose of voting at meeting - Appointment of liquidator – Whether basis for interference with appointment – Security valued by directors of company in statement of affairs – Failure to assert at meeting that wrong amount admitted – Absence of jurisdiction to put value on secured element of claim – Whether inappropriate for liquidator to retain solicitors acting for creditor – *Re Centrum Products Ltd* [2009] IEHC 592, (Unrep, Laffoy J, 15/2/2009) and *Re Jim Murnane Ltd* [2010] 3 IR 468 considered – Companies Act 1963 (No33), ss 266 and 267 – Rules of the Superior Courts 1986 (SI 15/1986), O 74 – Relief refused (2012/496COS – Laffoy J – 12/11/2012) [2012] IEHC 460
Aken Ltd v Maplewood Developments

Practice and procedure

Liquidation – Restriction of directors – Application for restriction not brought by liquidator within statutory time period – Application for extension of time for making restriction application – Whether application not brought due to inaction on part of liquidator – Whether appropriate to extend time – *Coyle v O'Brien* [2003] 2 IR 627 followed – Companies Act 1990 (No 33), s 150 – Company Law Enforcement Act 2001 (No 28), s 56 – Extension of time refused (2010/187COS - Herbert J – 30/1/2013) [2013] IEHC 31
Boyle v Higgins

Practice and procedure

Security for costs – Test to be applied – Whether sufficient for defendant to show "credible testimony" on *prima facie* basis – Whether reason to believe plaintiff unable to pay defendant's costs if unsuccessful – Whether special factor existing such as not to grant application – Whether delay in bringing application - *Inter Finance Group Ltd v KPMG Peat Marwick* (Unrep, Morris P, 29/6/1998) followed - *Peppard & Co Ltd v Bogoff* [1962] IR 180 and *Parolen Ltd v Doherty* [2010] IEHC 71, (Unrep, Clarke J, 12/3/2010) considered – Companies Act 1963 (No 33), s 390 – Application refused (2010/11862P & 2010/36COM – McGovern J – 7/2/2013) [2013] IEHC 48
IIB Internet Services Ltd v Motorola Ltd

Library Acquisition

Samad, Mahmud
Court applications under the companies acts
Dublin : Bloomsbury Professional, 2013
N261.C5

COMPETITION LAW

Dominant position

Undertaking – Economic activity – Meaning of "for gain" – Public authority providing ambulance services – Company providing ambulance services – Difference between European law "undertaking" and Competition Act "undertaking" – Nature of defendant's activity – Statutory responsibilities – Service in public interest – Exemption from competition rules – Duty to use resources efficiently – Whether defendant conducting economic activity for gain – Whether undertaking for some but not all of its services – Whether defendant obliged to continue to purchase ambulance services from private operators – Whether possible to distinguish between ambulance services for public patient transport/emergency response and ambulance services for private patient transport/events – Whether end user of supplementary ambulance services purchased from private operators – Whether any abuse of dominant position – *In re Arthur Average Association for British, Foreign and Colonial Ships* (1875) 10 LR Ch App 542; *Bettercare Group Ltd v Director General of Fair Trading* (Case No 1006/2/1/01) [2002] Competition Appeal Reports 299; *Competition Authority Enforcement Decision* ED/01/008 (10/10/2008); *Competition Authority v O'Regan* [2007] IESC 22, [2007] 4 IR 737; *Deane v Voluntary Health Insurance Board* [1992] 2 IR 319; *FENIN v European Commission* (Case C-205/03P) [2003] ECR II-357 (Court of First Instance); [2006] ECR I-6295; *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* (Case C-475/99) [2001] ECR I-8089; *Geraets-Smits v Stichting Ziekenfonds VGZ* (Case C-157/99) [2001] E.C.R. I-5473; *Höfner and Elser v Macrotron GmbH* (Case C-41/90) [1991] ECR I-1979; *IMS Health GmbH v NDC Health GmbH* (Case C-418/01) [2004] ECR I-5039; *LTU v Eurocontrol* (Case C-29/76) [1976] ECR 1541; *Medicall Ambulance Limited v Health Service Executive* [2011] IEHC 76, [2011] 1 IR 402; *MOTOE v Dimosio* (C-49/07) [2008] ECR I-4863, [2009] All ER (EC) 150; *Oscar Bronner GmbH v Mediaprint* (Case C-7/97) [1998] ECR I-7791; *SAT Fluggesellschaft mbH v Eurocontrol* (Case C-364/92) [1994] ECR I-43 and *Sodemare SA v Regione Lombardia* (Case C-70/95) [1997] ECR I-3395 considered - Competition Act 2002 (No 14), ss 3 and 5 – Health Act 2004 (No 42), s 7 – Council Regulation No 1/2003 (EC), Articles 3 and 35 – Treaty on the Functioning of the European Union, Articles 102 and 106 – Finding that claim based on competition rules could not be maintained (2011/6256P – Cooke J – 23/10/2012) [2012] IEHC 432
Lifeline Ambulance Services Ltd v Health Service Executive

Library Acquisitions

van der Woude, Marc
Jones, Christopher
EU competition law handbook 2014
London : Sweet & Maxwell, 2013
W110

O'Donoghue, Robert
Padilla, Jorge
The law and economics of article 102 TFEU
2nd ed
Oxford : Hart Publishing, 2013
W110

Article

Eaton, Sinead

The Competition Authority and Double Bay Enterprises Ltd t/a Brazil Body Sportwear (the Fitflop case)
2013 (20) 9 Commercial law practitioner 212

COMPUTER LAW

Library Acquisition

Stewart, Daxton
Social media and the law: a guidebook for communication students and professionals
London : Routledge, 2013
N347.46

Articles

Murray, Karen
Legal aspects of cloud computing
2013 (20) 9 Commercial law practitioner 195

Hallissey, Brian
Trolling in the deep - social network sites, discovery and legal remedies
2013 (31) (18) Irish law times 263

CONSTITUTIONAL LAW

Legality of detention

Applicant serving life sentence – Applicant not legally represented – Applicant's request for inquiry into legality of detention made by post – Whether detention unlawful by reason of applicant's restricted access to court – Whether application having possibility of success – Application for inquiry refused (2012/1577SS – Peart J – 13/8/2012) [2012] IEHC 586
O'Reilly v Governor of Midlands Prison

Personal rights

Constitutional law – Right to redress – Statute – Invalidity - Right to damages for breach of constitutional rights – Unconstitutionality of legislation – Impact upon citizen of invalidity of legislation – Whether plaintiff entitled to damages for alleged breach of constitutional rights – Factors to consider – Whether transcendent considerations applicable regarding award of redress for alleged breach of constitutional rights – Whether claim statute-barred – Importance of bed of facts – Whether matter could be determined in absence of concrete factual matrix – Whether preferable to decide Statute of Limitations point prior to availability of redress point – *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88; *An Blascaod Mór Teo v Commissioners of Public Works (No 3)* [2000] 1 I.R. 6; *An Blascaod Mór Teo v Commissioners of Public Works (No 4)* [2000] 3 I.R. 565; *Blehein v Minister for Health* [2004] IEHC 374, [2004] 3 I.R. 610; *Blehein v Minister for Health* [2008] IESC 40, [2009] 1 IR 275; *Blehein v Minister for Health* [2009] IEHC 182, (Unrep, Laffoy J, 16/3/2009); *Blehein v Murphy* [2000] 2 I.R. 231; *Blehein v Murphy (No 2)* [2000] 3 IR 359; *Blehein v St. John of God Hospital* (Unrep, O'Sullivan J, 6/7/2000); *Blehein v St. John of God Hospital* (Unrep, SC, 31/5/2002); *Byrne v Ireland* [1972] IR 241; *In re Philip Clarke* [1950] IR 235; *Cox v Ireland* [1992] IR 503; *Croke v Smith (No 2)* [1998] 1 IR 101; *TD v Minister for Education* [2001] 4 IR 259; *DK v Crowley* [2002] 2 IR 74; *DK v Crowley* [2005] IEHC 375, (Unrep, Abbott J, 29/7/2005); *In re Haughey* [1971] IR 217; *Heaney v Ireland* [1994] 3 IR 593; *Kearney v Minister for Justice* [1986] IR 116; *Keating v Crowley* [2010] IESC 29, [2010] 3 IR 648; *King v Minister for Environment (No 2)* [2006] IESC 61, [2007] 1 IR 296; *McDonnell v Ireland* [1998] 1 IR 134; *Meskell v Coras Iompair Éireann* [1973] IR 121; *Murphy v Attorney General* [1982] IR 241; *Murphy v Greene* [1990] 2 IR 566; *O'Dowd v North Western Health Board* [1983] ILRM 186; *Pine Valley Developments Ltd v Minister for the Environment* [1987] IR 23; *Redmond v Minister for the Environment* [2001] 4 IR 61 and *Redmond v Minister for the Environment (No 2)* [2006] IEHC 24, [2006] 3 IR 1 considered - Mental Treatment Act 1945 (No 19), s 260 – Constitution of Ireland 1937, Articles 6, 34, and 40 – Finding that application of Statute of Limitations should be addressed first (2002/9652P – Laffoy J – 24/8/2010) [2010] IEHC 329
Blehein v Minister for Health

Personal rights

Right to privacy – Discovery – Sexual activity – Welfare of child – Health and safety of parent – Whether welfare of child affected – Practice and procedure – Family law proceedings – In camera proceedings – Discovery – Illegally obtained evidence – Whether privacy breached illegally – Whether evidence admissible – *Compagnie Financiare du Pacifique v Peruvian Guano Co* [1882] 11 QBD 55; *G v An Bord Uchtála* [1980] IR 32; *Kennedy v Ireland* [1987] IR 587; *M O'R v CL* (Unrep, SC, 9/11/1998); *FP v. SP* [2002] 4 IR 280; *R v Brown* [1993] 2 All ER 75 and *Sterling-Winthrop Group Ltd v Farbenfabriken Bayer Aktiengesellschaft* [1967] IR 97 considered - European Convention on Human Rights, article 8 – Circuit Court order to disclose material affirmed (2012/18CAF – White J – 5/7/2012) [2012] IEHC 593
P v Q

Statute

Validity –*Locus standi* – *Ius tertii* – Delay in bringing application – Support to financial institutions – Promissory notes – Whether litigant's rights infringed or threatened – Whether justification for relaxation of *locus standi* rules – Whether appropriate plaintiff existed – *Cahill v Sutton* [1980] IR 269; *Crotty v An Taoiseach* [1987] IR 713; *TD v Minister for Education* [2001] 4 IR 259; *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317; *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 and *Riordan v Government of Ireland* [2009] IESC 44, [2009] 3 IR 745 considered - Credit Institutions (Financial Support) Act 2008 (No 18), s 6 – Constitution of Ireland 1937, Article 17 – Claim dismissed (2012/3230P – Kearns P – 31/1/2013) [2013] IEHC 39
Hall v Minister for Finance

Library Acquisition

Forde, Michael
Leonard, David
Constitutional law of Ireland
3rd ed
Dublin : Bloomsbury Professional, 2013
M31.C5

Act

Thirty-third Amendment of the Constitution (Court of Appeal) Act 2013
Signed on 1st November 2013

CONSUMER LAW

Library Acquisition

Weatherill, Stephen
EU consumer law and policy
2nd ed
Cheltenham : Edward Elgar Publishing Ltd, 2013
W112

CONTRACT

Fraud

Contract – Tort – Tort obligations arising in contractual relationship – Extent –Exemption clause – Fraud – Fraudulent misrepresentation/concealment – Whether plaintiff estopped by exemption clause from pursuing claims other than fraud – Whether fraudulent misrepresentation or fraudulent concealment by defendants – *Barings Plc (In Liquidation) v Coopers* [2002] EWHC 461 (Ch), [2002] PNLR 39; *City of NY v Victory Van Lines* (1979) 69 AD 2d 605; *Colchester BC v Smith* [1992] Ch 421; *Derry v Peek* (1889) 14 App Cas 337; *EA Grimstead & Son Ltd v McGarrigan* [1998-99] Info TLR 384; *Forshall v Walsh* (Unrep, Shanley J, 18/6/1997); *HIH Casualty & General Insurances v. Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 CLC 358; *ICS Ltd v West Bromwich BS* [1998] 1 WLR 896; *Interfoto Library Ltd v Stiletto Ltd* [1989] 1 QB 433; *Kennedy v Allied Irish Banks plc* [1998] 2 IR 48; *National Bank Greece v Pinios Co No 1* [1989] 3 WLR 185; [1989] 1 All ER 213; *Oakes v Turquand and Harding* (1867) 2 HL 325; *Peekay Intermark v ANZ Banking Group* [2006] EWCA Civ 386, (2006) 1 CLC 582; *Re NIB Ltd: Director of Corporate Enforcement v D'Arcy* [2005] IEHC 333, [2006] 2 IR 163; *Springwell Navigation Corporation v J P Morgan Chase Bank* [2010] EWCA Civ 1221, (Unrep, Court of Appeal (Civil Division), 1/11/2010); *Walsh v Jones Lang LaSalle Ltd* [2007] IEHC 28, [2009] 4 IR 401; *Wildgust v Bank of Ireland* [2006] IESC 19, [2006] 1 IR 570 and *Zurich Bank v McConnon* [2011] IEHC 75, (Unrep, Birmingham J, 4/3/2011) considered - European Community (Unfair Terms in Consumer Contracts) Regulations 1995 (SI 27/1995) – Central Bank 1989 (No 16), s 117 – Investment Intermediaries Act 1995 (No 11) – Investor Compensation Act 1998 (No 37) – Central Bank Act 1942 to 1998 – Relief refused (2009/9042P and 2009/347COM – Birmingham J – 27/7/2011) [2011] IEHC 546
McCaughey v Anglo Irish Bank Corporation Ltd

Library Acquisition

Clark, Robert
Contract law in Ireland
7th ed
Dublin : Round Hall, 2013
N10.C5

COPYRIGHT

Article

Langwallner, David
Copyright law and the internet after SABAM
Kolodzinski, Krzysztof
2013 (1) (1) Irish business law review 47

Statutory Instrument

European Union (term of protection of copyright and certain related rights) (directive 2011/77/EU) regulations 2013
SI 411/2013

CORPORATE INSOLVENCY

Library Acquisition

Faber, Dennis
Vermunt, Niels
Kilborn, Jason
Van der Linde, Kathleen
Treatment of contracts in insolvency
Oxford : Oxford University Press, 2013
N312

COURTS

Article

Haynes, Shannon Michael
Time's up
2013 (Nov) Law Society Gazette 34

Statutory Instruments

Circuit Court rules (personal insolvency) 2013
SI 317/2013

District Court districts and areas (amendment) and variation of days and hours (Doire and Fhéich, An Speidéal, Galway, Ballyconnell and Swanlinbar and Cavan) order 2013
SI 322/2013

District Court districts and areas (amendment) and variation of days and hours (Cavan) order, 2013
SI 353/2013

Rules of Superior Courts (personal insolvency) 2013
SI 316/2013

CRIMINAL LAW

Evidence

Criminal law – Evidence – Mutual assistance – Assistance to foreign criminal – Whether lawful for Minister to accept request for assistance from prosecuting authority – Whether Minister required to screen request – Whether Minister entitled to exercise discretion to accede to request – Which Minister required to investigate background facts and allegations in request – Whether Minister required to consider representations relating to request – *Brady v Haughton* [2005] IESC 54, [2006] 1 IR 1; *R v Secretary of State for the Home Department ex p. Fininvest Spa* [1997] 1 WLR 743; [1997] 1 All ER. 942; [1997] Crim LR 213 and *Zardari v Secretary of State for the Home Department* [2001] EWHC Admin 275 (Unrep, High Court of Justice, 9/4/2001) considered - Criminal Justice Act 1994 (No 15), s 51, sch 2 – Council of Europe Convention on Mutual Assistance in Criminal Matters 1959 - Relief refused (2008/397JR – Peart J – 25/1/2013) [2013] IEHC 15
Agrama v Minister for Justice, Equality and Law Reform

Trial

Criminal process – Criminal trial – Prosecution of offences – Trial in due course of law – Role of Director of Public Prosecutions – Abuse of process – Duty to bring all prosecutions at first opportunity – Obligation to inform of potential prosecution – Accomplice – Corroboration warning – Whether prosecution abuse of process, oppressive or unfair – Whether duty to bring all prosecutions at first opportunity – Whether charges based on substantially same set of facts or similar offences – Whether real risk of unfair trial – Whether court should prohibit trial proceeding – Whether court could review decision of prosecutor – *AA v Medical Council* [2003] 4 IR 302; *Arklow Holidays Ltd v An Bord Pleanála* [2007] IEHC 327, (Unrep, Clarke J., 5/10/2007); *Attorney General for Gibraltar v Leoni* (Unrep, Court of Appeal for Gibraltar, 19/3/1999); *Attorney General v Linehan* [1929] IR 19; *Barker v Wingo* (1972) 407 US 514; *DC v Director of Public Prosecutions* [2005] IESC 77, [2005] 4 IR 281; *Carlin v Director of Public Prosecutions* [2010] IESC 14, [2010] 3 IR 547; *Connelly v Director of Public Prosecutions* [1964] AC 1254; *Cox v Dublin City Distillery* (No 2) [1915] 1 IR 345; *D v Director of Public Prosecutions* [1994] 2 IR 465; *Davies v Director of Public Prosecutions* [1954] AC 378; *Dental Board v O'Callaghan* [1969] IR 181; *Eviston v Director of Public Prosecutions* [2002] IESC 62, [2002] 3 IR 260; *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84; *Henderson v Henderson* (1843) 3 Hare 100; *Johnson v Gore Wood & Co* [2002] 2 AC 1. *PM v Malone* [2002] 2 IR 560; *SM v Ireland* [2007] IESC 11, [2007] 3 IR 283; *McFarlane v. Director of Public Prosecutions* [2008] IESC 7, [2008] 4 IR 117; *McNee v Kay* [1953] VLR 520; *O'Flynn v District Justice Clifford* [1988] IR 740; *R v Baskerville* [1916] 2 KB 658; *R v Beedie* [1998] QB 356; *R v Elrington* (1861) 1 B & S 688; *R v Green* (1825) 1 Craw and Dix 158; *R v Mattu* [2009] EWCA Crim 1483, [2010] Crim LR 229; *R v Riebold* [1967] 1 WLR 674; *State (McCormack) v Curran* [1987] ILRM 225; *Woodhouse v Consigna plc* [2002] EWCA Civ 275, [2002] 1 WLR 2558 and *Z v Director of Public Prosecutions* [1994] 2 IR 476 considered - Appeal dismissed (322/2011 – SC – 26/4/2012) [2012] IESC 24
Cosgrave v Director of Public Prosecutions

Road traffic offences

Consultative case stated - Drink driving - Statutory interpretation - Failure to provide breath samples – Failure due to transient medical condition – Whether special and substantial reason for failure - Defendant not complying or offering to comply with requirement relating to provision of blood or urine sample – Whether obligation on gardaí to alert defendant to need to offer blood or urine sample – Whether defendant entitled to acquittal in absence of garda warning – *Brennan v Director of Public Prosecutions* [1996] 1 ILRM 267; *Director of Public Prosecutions v Behan* (Unrep, Ó Caoimh J, 3/3/2003); *Director of Public Prosecutions v Cabot* [2004] IEHC 153, (Unrep, Ó Caoimh J, 20/4/2004); *Director of Public Prosecutions v Finnegan* [2008] IEHC 347, [2009] 1 IR 48; *Director of Public Prosecutions v McGarrigle* (1987) [1996] 1 ILRM 271 and *Director of Public Prosecutions v Mangan* [2001] 2 IR 373 considered - Road Traffic Act 1994 (No 7), ss 13 and 23 – Answer given *inter alia* that judge correct to find special and substantial reason for failure (130/2008 – SC – 11/3/2013) [2013] IESC 13
Director of Public Prosecutions (Keoghan) v Cagney

Library Acquisition

Thomson Round Hall
Offences handbook 2013: criminal and road traffic
Dublin: Thomson Round Hall: 2013
M500.C5.Z14

DATA PROTECTION

Statutory Instrument

Data protection act 1988 (section 2A) regulations 2013
SI 313/2013

EDUCATION

Statutory Instrument

Education act 1998 (section 42) (designation of organisations) order 2013
SI 344/2013

EMPLOYMENT LAW

Injunctions

Springboard injunctions – Principles to be applied – Whether applicable law to be determined at interlocutory stage – Fiduciary duty – Duty of fidelity – Confidential information – Extent employee entitled to put in place plans regarding competitive employment – Restrictions on use of information – Whether strong arguable case – Whether damages adequate – Balance of convenience – Nature of order – Whether springboard injunction appropriate – *Bergin v Galway Clinic Doughiska Ltd* [2007] IEHC 386, [2008] 2 IR 205; *Bristol and West Building Society v Mothew* [1998] Ch 1; *Campus Oil v Minister for Industry (No 2)* [1983] IR 88;
Crowson Fabrics Ltd v Rider [2007] EWHC 2942 (Ch), [2008] IRLR 288; *Evans v IRFB Services (Ireland) Ltd* [2005] IEHC 107, [2005] 2 ILRM 358; *Faccenda Chicken Ltd v Fowler* [1987] 1 Ch 117; *Helmet Integrated Systems Ltd v Tunnard* [2007] EWCA Civ 1735, [2007] IRLR 126; *Hivac, LD v Park Royal Scientific Instruments, LD* [1946] Ch. 169;
ICDL GCC Foundation FZ-LLC v European Computer Driving Licence [2011] IEHC 343, (Unrep, Clarke J., 4/8/2011); *Industrial Development v Cooley (Assizes)* [1972] 1 WLR 443; *Lingam v Health Service Executive* [2005]

IESC 89, [2006] 17 ELR 137; *Metro Inter v Independent News* [2005] IEHC 309, [2006] 1 ILRM 414; *Net Affinity Limited v Conaghan* [2011] IEHC 160, (Unrep, Dunne J., 22/3/2011); *Nottingham University v Fishel* [2000] ICR 1462; *NWL Ltd v Woods* [1979] 1 W.L.R. 1294; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Robb v Green* [1895] 2 QB 1; *Roger Bullivant Ltd v Ellis* [1987] ICR 464; *Salinas de Gortari v Smithwick* [1999] 4 IR 223; *Sanders v Parry* [1967] 1 WLR 753; *Sectrack NV v Satamatics Limited* [2007] EWHC 3003, (Unrep, Commercial Court, Flaux J., 19/12/2007); *SG & R Valuation Service Co LLC v Boudrais* [2008] EWHC 1340; [2008] IRLR 770; *Shelbourne Hotel Ltd v Torriam Hotel Operating Co Ltd* [2008] IEHC 376, [2010] 2 IR 52; *The Pulse Group Limited v O'Reilly* [2006] IEHC 50, (Unrep, Clarke J., 17th February, 2006); *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2009] EWHC 1456 (Ch), [2010] FSR 2 and *Wessex Dairies Ld v Smith* [1935] 2 KB 80 considered - Rules of the Superior Courts 1986 (SI15/1986), O 50 – Regulation (EC) No 593/2008, arts 4, 6 and 14 – Regulation (EC) No 864/2007 – Regulation (EC) No 44/2001 – Interlocutory injunction granted (2011/8022P – Clarke J – 14/10/2011) [2011] IEHC 505
Allied Irish Banks plc v Diamond

Judicial review

Dismissal – Applicant dismissed as harbour master – Standard of proof – Involvement of government minister – Whether delay – Whether disciplinary process fair – Whether objective bias – *Re Haughey* [1971] IR 217; *Georgopoulus v Beaumont Hospital Board* [1998] 3 IR 132 and *Re National Irish Bank (No 3)* [1999] 3 IR 145 considered – Relief refused (2010/319JR – Hedigan J – 21/12/2012) [2012] IEHC 358
Kelly v Minister for Agriculture, Fisheries and Food

Restraint of trade

Contract of employment – Confidentiality clause – Injunctions – Interlocutory – Documents copied in electronic format by electronic means – Whether non-compete clause too wide – Whether non-compete clause void and unenforceable– Whether injunctive relief appropriate – Whether legitimate interests of employer protected – Whether necessary to prevent employee working for competitor – Whether temporal limitation appropriate – Whether geographical limitation necessary – Whether customer connections could be provided to competitor – Whether breach of confidentiality – *CR Smith Glaziers (Dunfermline) Ltd v Michael John Greenan* [1993] SCLR 231; *Faccenda Chicken Ltd v Fowler* [1987] Ch 117; [1986] 3 W.L.R. 288; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688; *Johnson & Bloy (Holdings) v Wolstenholme Rink* [1987] IRLR 499; *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch 108; *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251; *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 147; *McEllistrim v Ballymacelligot Co-Operative Agricultural and Dairy Society* [1919] AC 548; *Marion White Ltd v Francis* [1972] 1 WLR 1423; [1972] 3 All E.R. 857; *Murgitroyd & Co Ltd v Purdy* [2005] IEHC 159, [2005] 3 IR 12; *Norbrook Laboratories (GB) Ltd v Adair* [2008] EWHC 978, [2008] IRLR 878; *Printers & Finishers Ltd v Holloway* [1965] 1 WLR 1; *Stenhouse Ltd v Phillips* [1974] AC 391 and *TFS Derivatives Ltd v Morgan* [2004] EWHC 3181, [2005] IRLR 246 considered – Injunction granted (2011/1574P – Dunne J – 22/3/2011) [2011] IEHC 160
Net Affinity Ltd v Conaghan

Article

Kimber, Cliona
Password protected?
O'Reilly, Hannah Lowry
2013 (Nov) Law Society Gazette 18

EUROPEAN UNION

Library Acquisitions

van der Woude, Marc
Jones, Christopher
EU competition law handbook 2014
London : Sweet & Maxwell, 2013
W110

Weatherill, Stephen
EU consumer law and policy
2nd ed
Cheltenham : Edward Elgar Publishing Ltd, 2013
W112

Bacon, Kelyn
European Union law of state aid
2nd ed
Oxford : Oxford University Press, 2013
W110.1

Gragl, Paul
The accession of the European Union to the European convention on human rights
Oxford : Hart Publishing, 2013
C200

O'Donoghue, Robert
Padilla, Jorge
The law and economics of article 102 TFEU
2nd ed
Oxford : Hart Publishing, 2013
W110

Eeckhout, Piet
Tridimas, Takis
Yearbook of European law Vol.30 2011
Oxford : Oxford University Press, 2011
Tridimas, Takis
W70

Article

Kelly, Lisa
Fleck, Kieran
European motor insurance directives: recent case law
2013 (1) (1) Irish business law review 59

Statutory Instruments

European Communities (placing on the market of pyrotechnic articles) (amendment) regulations 2013
(DIR/2013-29)
SI 373/2013

European Union (food safety and veterinary) (accession of Croatia) regulations 2013
(DIR/2013-20)
SI 361/2013

European Union (packaging) (amendment) regulations 2013
(DIR/2013-2)
SI 363/2013

European Union (public procurement contracts) (accession of the Republic of Croatia) regulations 2013
SI 413/2013

EVIDENCE

Library Acquisition

Horne, Robert
Mullen, John
The expert witness in construction
UK : Wiley-Blackwell, 2013
M604.9

EXTRADITION LAW

European arrest warrant

Surrender – Second surrender application – Abuse of process – Separation of powers – Fair procedures – Family rights – Right to finality in litigation – Amending legislation – Delay – Vested rights – Previous surrender application refused on grounds that respondent had not "fled" – "Fled" requirement removed by amending legislation – Amending legislation not published at time of issue of warrant – Whether abuse of process – Whether infringement of right acquired from previous court decisions – Whether presumption that right not to be infringed rebutted by intention of Oireachtas evident from legislation – Whether contrary interpretation required to conform with European Union legislation – Whether surrender can be ordered for offences committed prior to accession to European Union – Whether sentence properly set forth in warrant – Whether application should be refused on grounds of delay – Whether correspondence with offence in State – European law – Interpretation – Framework decision – Conforming interpretation – European arrest warrant – Whether amendment applicable to persons who successfully challenged surrender application on grounds of requirement now removed – Whether contrary interpretation required to conform with European Union legislation – *AA v Medical Council* [2003] 4 IR 302; *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88; *Portland v Commission* (Cases C-204, 205, 211, 213,217 & 219/00P [2004] ECR I-123; *Abbott v Minister for Lands* [1895] AC 425; *Andersson and Wåkerås-Andersson v Sweden* (Case C-321/97) [1999] ECR I-3551; *Attorney General v Gibson* [2004] IESC 340, (Unrep, SC, 10/6/2004); *Bolger v O'Toole* (Unrep, SC, 2/12/2002); *Buckley and Others (Sinn Féin) v Attorney General* [1950] IR 67; *CC v Ireland* [2005] IESC 48, [2006] 4 IR 1; *Chaos v Kingdom of Spain* [2010] NIQB 68, [2010] NI 264; *Chief Adjudication Officer v Maguire* [1999] 1 WLR 1778; *Commissions v Poland* (Case C-642/05) [2008] ECR I-4183; *Costello v Director of Public Prosecutions* [1984] IR 436; *Crilly v T & J Farrington Ltd* [2001] 3 IR 251; *Criminal proceeding*

against Gasparini (Case C-467/04) [2006] ECR I-9199; *Criminal Proceedings against Santesteban Goicoechea* (Case C-296/08 PPU) [2008] ECR I-6307; *Criminal Proceedings against Maria Pupino* (Case C-105/03) [2005] ECR I-5285; *Curtin v Dáil Éireann* [2006] IESC 14, [2006] 2 IR 556; *Dorene Ltd v Suedes* (Ireland) Ltd [1981] IR 312; *Gairy v A-G of Grenada* [2002] 1 AC 167; [2001] 3 W.L.R. 779; *Green v United States* (1957) 355 US 184; *Hamburg Public Proasecutor's Office, Germany v Altun* [2011] EWHC 397 (Admin), [2011] All ER (D) 25 (Mar); *Henderson v.Henderson* (1843) 3 Hare 100; *Hosie v Kildare Co Council* [1928] IR 47; *Howard v Commissioners for Public Works* [1994] 1 IR 101; *Howard v Commissioners for Public Works (No 3)* [1994] 3 IR 394; [1993] I.L.R.M. 665; *IB* (Case C-306/09) [2010] ECR I-10341; *In re Greendale Developments Ltd. (No 3)* [2000] 2 IR 514; *Johnson v Gore Wood & Co* [2002] 2 AC 1; *J Wood & Company Ltd v Wicklow County Council* [1995] 2 ILRM 51; *Kay v Goodwin* (1830) 6 Bing 576; *Kepter v Hauptzollaut Hamburg* (Case C-2/06) [2008] ECR I-411; *Kozlowski* (Case C-66/08) [2008] ECR I-6041; *LM v His Honour Judge Liam Devally* [1997] 2 ILRM 369; *McGlinchey v Wren* [1982] IR 154; *McKone Estates Ltd v. Dublin County Council* [1995] 2 ILRM 283; *McMahon v Leahy* [1984] 1 IR 525; *Minister for Justice v Aamond* [2006] IEHC 382, (Unrep, Peart J, 24/11/2006); *Minister for Justice v Adach* [2010] IESC 33, [2010] 3 IR402; *Minister for Justice v Altaravicius* [2006] IESC 23, [2006] 3 IR 148; [2006] 2 I.L.R.M. 241; *Minister for Justice . Altaravicius (No 2)* [2006] IEHC 270, [2007] 2 IR 265; *Minister for Justice v Bailey* [2012] IESC 16, (Unrep, SC, 1/3/2012); *Minister for Justice v Brennan* [2007] IESC 21, [2007] 3 IR 732; *Minister for Justice v Doran* [2010] IEHC 1 (Unrep, Peart J, 5/11/2010); *Minster for Justice v Gheorghe* [2009] IESC 76, (Unrep, SC, 18/11/2009); *Minister for Justice v Gorman* [2010] IEHC 10, [2010] 3 IR 583; *Minister for Justice v McG* [2007] IEHC 47, (Unrep, Peart J, 30/1/2007); *Minister for Justice v. McGrath* [2005] IEHC 116, [2006] 1 IR 321; *Minister for Justice v Ó Fallúin* [2010] IESC 37; *Minister for Justice v Stapleton* [2007] IESC 30, [2008] 1 IR 669; *Minister for Justice v Sulej and Puta* [2007] IEHC 132, (Unrep, Peart J, 24/4/2007); *Minister for Justice v Tobin* [2007] IEHC 15 & [2008] IESC 3, [2008] 4 IR 42; *Nolan and K v Russia* (App No 2512/04) (Unrep, ECHR, 12/2/2009); *Office of the Prosecutor General of Turin v Barone* [2010] EWHC 3004 (Admin) (Unrep, High Court of England and Wales, 19/11/2010); *O'Keeffe v O'Toole* [2005] IEHC 246 & [2007] IESC 13, [2008] 1 IR 227; *Pardo v Bingham* (1865) LR 4 Ch App 735; *Pine Valley Developments Ltd v Ireland* (App No A/ 222) (1992) 14 EHRR 319; *Pine Valley Developments v Minister for the Environment* [1987] IR 23; *Re Vantive Holdings* [2009] IESC 69, [2010] 2 IR 118; *Reg (Kashamu) v Governor of Brixton Prison* [2002] QB 887; *SGL Carbon v Commission* (Case C-309/04) [2006] ECR I-5977; *Simple Imports Ltd v Revenue Commissioners* [2000] 2 IR 243; *Sloan v Culligan* [1992] 1 IR 223; *Szombathely City Court v Fenyvesi* [2009] EWHC 231, [2009] 4 All ER 324; *The State (O'Callaghan) v O hUadhaigh* [1977] IR 42; *The State (Quinn) v Ryan* [1965] IR 70; *The State (Trimbole) v The Governor of Mountjoy Prison* [1985] IR 550; *Toshiba Corporation v Úřad Pro ochrann hospodářské soutěže* (Case C-17/10) [2012] ECR NYP; *Wenting v High Court of Valenciennes, France* [2009] EWHC 3528 (Admin), [2010] All ER (D) 302 (Feb); *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816; *Wolzenburg* (Case C-123/08) [2009] ECR I-9621; *Woodhouse v Consignia plc* [2002] 1 WLR 2558 and *Ynos kft v János Varga* (Case C-302/04) [2006] ECR I-371 considered - European Arrest Warrant Act 2003 (No 45), ss 2, 5, 10, 11 and 37 – Interpretation Act 2005 (No 23), ss 2, 4 and 27 – Transfer of Execution of Sentences Act 2005 (No 28), s 7 – Council Framework Decision of 13th June, 2002, on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), arts 1, 2, 3, 4, 5, 26 and 32 – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, arts 5, 6 and 8 – Constitution of Ireland 1937, Articles 6, 25, 34, 37, 40, 41, 42 – Surrender ordered by High Court; appeal allowed by Supreme Court and surrender refused (2009/259EXT - Peart J – 11/2/2011 and 98/2011 - SC - 19/6/2012) [2011] IEHC 72 and [2012] IESC 37

Minister for Justice, Equality and Law Reform v Tobin

Practice and procedure

Surrender to Czech Republic – Points of objection – Previous seeking of surrender by issuing state – Previous refusal of surrender on basis that proceeding under old legislation incorrect – Issuing of fresh warrant – Delay – Alleged breach of constitutional rights – Failure to identify constitutional rights – Absence of substantive ruling in previous extradition proceedings – Absence of exceptional circumstances justifying non-surrender - *Attorney General v Klier* [2005] IEHC 254; [2005] 3 IR 447; *Minister for Justice, Equality and Law Reform v Stapleton* [2007] IESC 30, [2008] 1 IR 669; *Minister for Justice and Equality v Staniak* [2002] IEHC 133, (Unrep, Edwards J, 22/11/2012); *Bolger v O'Toole* (Unrep, SC, 2/12/2002); *Minister for Justice, Equality and Law Reform v O'Fallúin* [2010] IESC 37, (Unrep, SC, 19/5/2010); *Minister for Justice, Equality and Law Reform v Koncis* [2011] IESC 37, (Unrep SC, 29/7/2011) and *Minister for Justice, Equality and Law Reform v Machaczka* [2012] IEHC 434, (Unrep, Edwards J, 12/10/2012) considered - *Minister for Justice, Equality and Law Reform v Tobin* [2012] IESC 37, (Unrep, SC, 19/6/2012) distinguished – Surrender ordered (2011/222EXT – Edwards J – 27/11/2012) [2012] IEHC 533

Minister for Justice and Equality v Klier

FAMILY LAW

Civil registration

Application for declaration that genetic mother entitled to be registered as mother - Surrogacy – Whether genetic parents entitled to be treated as parents – Evidence of expert witnesses – Blood link – Constitutional rights – Principle of *mater semper certa est* - Whether rebuttable presumption – Family arrangements – Registration of births – Purpose of the register - Genetics versus epigenetics – Determinative nature of chromosomal DNA – Surrogacy contract – Alternative arrangements – Media reporting – Discretion to rule parts of evidence be heard in public and parts in private - *N v Health Service Executive* [2006] 4 IR 374; *In re G* [2006] UKHL, [2006] 1 WLR 2305; *G v An Bord Uchtála* [1980] IR 32; *I O'T v B* [1998] 2 IR 321; *JK v VW* [1992] 2 IR 437; *JMcD v PL* [2010] 2 IR 199; *FN v CO* [2004] IEHC 60, (Unrep, Finlay Geoghegan J, 23/3/2004); *DG v The Eastern Health Board* [1997] 3 IR 511; *S v S* [1983] 1 IR 68; *Russell v Russell* [1924] AC 687; *JPD v MG* [1991] 1 IR 47; *Roche v Roche* [2010] 2 IR 321; *WOR v EH* [1996] 2 IR 248; *D (a minor) v Ireland* [2010] IEHC 101, (Unrep, Dunne J, 26/3/2010); *Foy v An tArd Cháraitheoir* [2002] IEHC 116, (Unrep, McKechnie J, 19/10/2007); *Independent News Media Limited* [2010] 1 WLR 2262 and *Re Ward of Court* [1996] 2 IR 79 considered – Status of Children Act 1987 (No 26), ss 35 and 36 – Civil Registration Act 2004 (No 3), s 60(8) – Declarations granted (2011/46M – Abbott J – 5/3/2013) [2013] IEHC 91

R(M) v An tArd Chláraitheoir

Family home

Proceedings seeking declaratory relief and damages for court ordered property transfers – Prior challenges to constitutionality of legislative basis for property and pension adjustment orders – Property purchased and paid for by plaintiff – State constitutionally enjoined to enact legislation providing for proper provision for benefit of spouse – Obligations stemming from nature of marriage – *Res judicata - LB v Ireland* [2006] IEHC 275, [2008] 1 IR 134; *DT v CT (Divorce: ample resources)* [2002] 3 IR 334; *TF v Ireland* [1995] 1 IR 321; *Re Article 26 and the Matrimonial Homes Bill 1993* [1994] IESC 5, [1994] 1 IR 305 and *Buckley v Attorney General* [1950] IR 67 considered - Constitution of Ireland 1937, Art 41 – Claim struck out (2011/10255P - Hogan J – 9/11/2012) [2012] IEHC 461

L(B) v Ireland

Judicial separation

Appeal from Circuit Court – Conduct of parties – Custody and access – Proper financial provision – Distribution of assets and liabilities - Whether appellant having relinquished opportunity of remunerative activity to care for family – Whether appellant entitled to maintenance – Whether property held on resulting trust for respondent's father – Family Law Act 1995 (No 26), ss 8, 16 & 36 – Orders and declarations made (2012/CAF31 – White J – 23/11/2012) [2012] IEHC 584

D(L) v A(M)

Maintenance

Judicial separation – Previous orders – Supreme Court remitting maintenance issue to High Court – Respondent failing to disclose financial affairs – Respondent failing to comply with orders – Property adjustment orders - Whether court entitled on rehearing to go beyond terms under which matter remitted to it – Whether variation of maintenance necessary to ensure justice – *O'C(C) v O'C(D)* [2009] IEHC 248, (Unrep, Dunne J, 14/5/2009) considered – Family Law Act 1995 (No 26), ss 9 & 16 – Property adjustment orders made, maintenance

varied (2009/3M – White J – 7/12/2012) [2012] IEHC 589
S(E) v S(D)

Practice and procedure

Appeal from Circuit Court – Judgment delivered – Application to re-enter proceedings and seek other relief – Whether court having discretion to accept or reject jurisdiction of motion seeking variation of orders – Whether appropriate to re-enter proceedings – Proceedings re-entered (2011/32CAF – White J – 14/12/2012) [2012] IEHC 588
T(L) v T(J)

Library Acquisition

Stewart, James
Family law: jurisdictional comparisons
2nd ed
London : Sweet & Maxwell, 2013
N170.008

Articles

Healy, Connie
"On the plus side, I empathise more with my clients. On the negative side, I empathise more with my clients!" - Training as a collaborative lawyer: an empirical analysis
2013 (3) Irish family law journal 70

Irwin, Kathy
The parent trap
2013 (Nov) Law Society Gazette 30

FINANCE

Statutory Instrument

Finance act 2013 (section 20(1)) (commencement of certain provisions) order 2013
SI 378/2013

FINANCIAL SERVICES

Article

Dunne, Peter
Beyond jurisdiction and oral hearings: the unexplored challenges to the Financial Services Ombudsman Bureau
2013 (20) 9 Commercial law practitioner 206 [part I]

Statutory Instruments

Credit Union and co-operation with overseas regulators act 2012
(commencement of certain provisions) (no. 2) order 2013
SI 393/2013

National Asset Management Agency act 2009 (section 210) amending guidelines 2013
SI 374/2013

National Treasury Management Agency (delegation of claims management functions) (amendment) order 2013
SI 405/2013

FISHERIES

Title

Ownership of fishing rights in portion of river – Plaintiff claiming sole right to manage and control fishery – Plaintiff claiming trespass by defendants – Whether plaintiff entitled to maintain action in trespass against defendants – Whether defendants having right to fish in river – *Manchester Airport plc v Dutton* [2000] QB 133 followed – *Harris v Chesterfield (Earl)* [1911] AC 623 distinguished – *Gannon v Walsh* [1998] 3 IR 245 considered – Findings in favour of plaintiff (2009/5228P – Laffoy J – 19/12/2012) [2012] IEHC 550
Inland Fisheries Ireland v O'Baoill

Statutory Instruments

European Communities (control on mussel fishing) regulations 2008 (revocation) regulations 2013
(DIR/92-43 [DIR/1992-43])
SI 355/2013

Sea-fisheries and maritime jurisdiction (mussel seed) (opening of fisheries) regulations 2013
SI 352/2013

Sea-fisheries (community control system) (amendment) (no. 2) regulations 2013
(REG/811-2004 Art 9, REG/1342-2008 Art 25, REG/1224-2009 (other than Article 92), REG/404-2011)
SI 354/2013

FOOD

Statutory Instruments

European Communities (certain contaminants in foodstuffs) (amendment) regulations 2013
(REG/1058-2012)
SI 380/2013

European Communities (dietary foods for special medical purposes) (amendment) regulations 2013
(DIR/2013-26, DIR/1999-21 [DIR/99-21])
SI 382/2013

European Communities (general food law) (amendment) regulations 2013
(REG/208-2013)
SI 383/2013

European Communities (infant formulae and follow-on formulae) (amendment) regulations 2013
(DIR/2013-26, DIR/92-52 [DIR/1992-52])
SI 384/2013

European Communities (labelling, presentation and advertising of foodstuffs) (amendment) regulations 2013
(DIR/2013-20, DIR/2000-13)
SI 381/2013

European Communities (official controls on the import of food of non-animal origin) (amendment) (no. 4) regulations 2013
(REG/925-2013)
SI 423/2013

FREEDOM OF INFORMATION

Access to records

"Personal information" – Exemption from disclosure – Hospital records – Statutory interpretation– Whether Act of 1997 applying to information regarding age recorded in 1922 – Whether information regarding age "personal information" – Whether information regarding age exempt from disclosure – Whether Act applying to records created before commencement – Appeal – Whether court should consider issue not raised before Commissioner –*Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63; *CC v Ireland* [2005] IESC 48 and [2006] IESC 33, [2006] 4 IR 1; *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415; *Health Service Executive v Information Commissioner* [2008] IEHC 298, [2009] 1 IR 700; *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, [1995] 1 WLR 804; *House of Spring Gardens Ltd v Point Blank Ltd* [1984] IR 611; *Howard v Commissioner of Public Works* [1994] 1 IR 101; *I O' v B* [1998] 2 IR 321; *Odievre v France* (App No 42326/98) (2004) 38 EHRR 43; *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203; *Sheedy v Information Commissioner* [2005] IESC 35, [2005] 2 IR 272 and *South Western Area Health Board v Information Commissioner* [2005] IEHC 177, [2005] 2 IR 547 considered - Freedom of Information Act 1997 (Section 28(6)) Regulations 1999 (SI 47/1999), reg 3 – Freedom of Information Act 1997 (No 13), ss 2, 6, 26, 28, 34 and 42 – Appeal allowed (357 & 357/2009 – SC – 19/7/2011) [2011] IESC 26
Rotunda Hospital v The Information Commissioner

HEALTH

Statutory Instruments

Health act 2007 (care and support of the residents in designated centres for persons (children and adults) with disabilities) regulations 2013
SI 367/2013

Health act 2007 (care and welfare of residents in designated centres for older people) regulations 2013
SI 415/2013

Health act 2007 (commencement) order 2013
SI 365/2013

Health act 2007 (registration of designated centres for persons) (children and adults) with disabilities) regulations 2013
SI 366/2013

Health and social care professionals act 2005 (commencement) order 2013
SI 385/2013

Physiotherapists Registration Board (establishment day) order 2013
SI 386/2013

HUMAN RIGHTS

Library Acquisition

Gragl, Paul
The accession of the European Union to the European convention on human rights
Oxford : Hart Publishing, 2013
C200

IMMIGRATION

Asylum

Judicial review – Application for leave - Judicial review of decisions of tribunal – *Certiorari* – Claim that assessment of credibility deficient given age and mental health of applicant – Delay – Application for extension of time – Significance of age to assessment of credibility – Reasonableness of credibility findings – Finding that failure to claim asylum in Iran or Turkey not indicative of genuine fear of persecution – Whether open to tribunal member to find explanation given unreasonable – Whether substantial grounds for contention that tribunal member erred in finding reasons given not in accordance with reality - *CS v Minister for Justice* [2005] 1 IR 343; *SBE v Minister for Justice, Equality and Law Reform* [2010] EHC 133, (Unrep, Cooke J, 25/2/2010) and *HO v Refugee Appeals Tribunal* [2007] IEHC 299, (Unrep, Hedigan J, 19/7/2007) considered – Leave granted (2011/121R – O'Keeffe J – 20/11/2012) [2012] IEHC 479
AMK v Refugee Appeals Tribunal

Asylum

Judicial review of decisions of tribunal – *Certiorari* – Alleged failure of tribunal to analyse risk of future persecution – Alleged material errors of fact and unfair findings in decision – Alleged failure to give due regard to documents submitted by applicant – Negative credibility findings – Untruths on form and in interview – Necessity for assessment of future risk of persecution even where doubts regarding credibility – *QFC v Refugee Appeals Tribunal* [2012] IEHC 4, (Unrep, Cooke J, 12/1/2012); *A (MAM) v Refugee Appeals Tribunal* [2011] IEHC 147, (Unrep, Cooke J, 8/4/2011); *MSA v Refugee Appeals Tribunal* [2009] IEHC 435, (Unrep, Clarke J, 13/10/2009) and *Murkhtar v Minister for Justice, Equality and Law Reform* [2012] IEHC 123, (Unrep, Cross J, 23/3/2012) considered – Relief granted (2011/489JR – O'Keeffe J – 20/11/2012) [2012] IEHC 480
A (JN) v Refugee Appeals Tribunal

Asylum

Judicial review – Respondent finding that applicant not at risk – Respondent finding that applicant not coming within definition of refugee – Whether error of law – Whether error of law capable of being severed from decision – Whether respondent acted irrationally - *Mostafa Abed El Karem El Kott v Bevándorlási és Állampolgársági Hivatal* (Case C-364/11) (Unrep, CJEU, 19/12/2012) considered – United Nations Convention Relating to the Status of Refugees 1951, art 1D – *Certiorari* granted, matter remitted (2009/789JR – Hanna J – 31/1/2013) [2013] IEHC 36
A(M) (Iran) v Refugee Appeals Tribunal

Asylum

Judicial review - Refusal of refugee status – Negative credibility findings – Whether factual errors by first respondent – Whether first respondent engaged in speculation or conjecture – Whether credibility findings unreasonable – Whether failure to have due regard to applicant's explanations – *R(I) v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009) considered – Relief refused (2009/861JR – MacEochaidh J – 8/2/2013) [2013] IEHC 46
B(A) v Refugee Appeals Tribunal

Asylum

Family reunification – Dependency – Ward – Statutory interpretation – Whether proper assessment of dependency – *Ali v Minister for Justice, Equality and Law Reform* [2011] IEHC 115, (Unrep, Cooke J, 25/3/2011); *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427, (Unrep, Cooke J, 25/11/2010); *Hassan v Minister for Justice, Equality and Law Reform* [2010] IEHC 426, (Unrep, Cooke J, 25/11/2010); *ZMH (Somalia) v Minister for Justice and Equality* [2012] IEHC 221, (Unrep, Cooke J, 24/5/2012); *DM v CF* [2011] IEHC 415, (Unrep, Clark J., 27/5/2011); *TM v Minister for Justice, Equality and Law Reform* [2009] IEHC 500, (Unrep, Edwards J., 23/11/2009); *AMS (Somalia) v Minister for Justice and Equality* [2012] IEHC 72, (Unrep, Cross J., 14/2/2012) and *RX v Minister for Justice, Equality and Law Reform* [2010] IEHC 446, [2011] 1 ILRM 444 considered - Refugee Act 1996 (No 17), s 18(4) – Relief granted and matter remitted (2012/142JR – Clark J – 22/1/2013) [2013] IEHC 25
Ducale v Minister for Justice and Equality

Asylum

Judicial review - Applicant exposed to activities of sect in Kenya – Applicant asserting fear of persecution – Respondent finding that applicant not at risk from sect – Whether decision irrational – Whether breach of fair procedures – Whether breach of duty – *Certiorari* granted, matter remitted to respondent (2009/156JR – Clark J – 29/1/2013) [2013] IEHC 24
M(V) (Kenya) v Refugee Appeals Tribunal

Judicial review

Leave to apply – On notice or ex parte – Positive decision not to deport – Whether application for leave to apply should have been made on notice – *The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360 and *Sulaimon v. Minister for Justice* [2012] IESC 63, (Unrep, SC, 21/12/2012) considered - Immigration Act 1999 (No 22), s 3(3) – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Immigration Act 2004 (No 1), s 4 – Rules of the Superior Courts, 1986 (SI 15/1986), O 84, r 21(1) – Motion to set aside grant of leave refused (2012/786JR – Clark J – 24/1/2013) [2013] IEHC 27
Jamali v Minister for Justice

Leave

Refugee status refused – Subsequent application for subsidiary protection refused – Deportation order against applicant – Whether first respondent providing effective remedy – Whether applicant prejudiced – Whether judicial review providing effective remedy – *Donegan v Dublin City Council* [2012] IESC 18, (Unrep, 27/2/2012) distinguished – *Diouf v Ministre du Travail* (Case C-69/10) (Unrep, CJEU, 28/7/2011) and *K(EK) v Minister for Justice and Equality* (Unrep, Cooke J, 5/3/2012) considered – Leave refused (2011/1005JR – Clark J – 27/6/2012) [2012] IEHC 569
Khattak v Refugee Appeals Tribunal

Practice and procedure

Costs – Applicant's father served with deportation order – *Zambrano* decision – Applicant granted leave for judicial review – First respondent revoking deportation order and granting leave to remain – Applicant seeking to continue proceedings – Applicant subsequently agreeing proceedings moot – Applicant seeking costs – Whether proceedings rendered moot by unilateral action of first respondent – Whether applicant entitled to costs – Whether appropriate to set off costs – *Cunningham v President of Circuit Court* [2012] IESC 39, (Unrep, SC, 21/6/2012) applied - *Ruiz Zambrano v Office national de l'emploi* (Case C-34/09) [2011] ECR I-01177 considered – Order for set off of costs (2009/1175JR – Clark J – 8/2/2013) [2013] IEHC 47
Amobi v Minister for Justice, Equality and Law Reform

Subsidiary protection

Judicial review of refusal of subsidiary protection and leave to remain – National of Bangladesh – Buddhist – Alleged failure to address documents already on file of applicant – Absence of challenge to authenticity of documents submitted in asylum application – Use of documents – Reference to country of origin information suggesting ready availability of forged documents in Bangladesh – Failure to identify potentially fraudulent documents – Failure to address all documentation submitted – Whether findings on lack of credibility strong enough to allow decision maker give no weight to apparently corroborative documentation – Obligation to consider documentation – Principles for treatment of evidence going to credibility – Obligation to give reasonable explanation for administrative decision – Whether duty on applicant to bring dispute to attention of decision maker – *HM v Minster for Justice, Equality and Law Reform* [2011] IEHC 16, (Unrep, Hogan J, 21/1/2011); *IR v Minister for Justice, Equality and Law Reform* [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009); *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, (Unrep, SC, 21/1/2010); *AMN v Refugee Appeals Tribunal* [2012] IEHC 393, (Unrep, McDermott J, 3/8/2012); *HM v Minister for Justice and Law Reform* [2012] IEHC 176, (Unrep, Cross J, 27/4/2012); *Debisi v Minister for Justice and Law Reform* [2012] IEHC 44, (Unrep, Cooke J, 2/2/2012) and *Okunade v Minister for Justice, Equality and Law Reform* [2012] IESC 49, (Unrep, SC, 16/10/2012) considered

- European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5 – Decisions quashed (2011/737JR – MacEochaidh J – 9/11/2012) [2012] IEHC 456
Barua v Minister for Justice and Equality

Subsidiary protection

Fair procedures – Credibility – Oral hearing – European Union law – Preliminary ruling of European Court of Justice – Requirement to cooperate with applicant – Whether adverse credibilty findings in asylum decision could be taken into account in subsidiary protection decision – Whether European Court of Justice required oral hearing for subsidiary protection claims – Whether applicant entitled to re-open determinations in asylum process – Whether applicant entitled to separate and independent adjudication of credibility – *Barua v Minister for Justice* [2012] IEHC 456 (Unrep, Mac Eochaidh J, 9/11/2012); *ND v Minister for Justice* [2012] IEHC 44, (Unrep, Cooke J, 2/2/2012); *France v People's Mojahedin Organisation of Iran* (Case C27/09P) (Unrep, ECJ, 21/12/2011); *OJ v Minister for Justice* [2012] IEHC 71, (Unrep, Cross J, 3/2/2012); *Lyons v Financial Services Ombudsman* [2011] IEHC 454, (Unrep, Hogan J., 14/12/2011); *HM v Minister for Justice* [2012] IEHC 176, (Unrep, Cross J, 27/4/2012); *MM v Minister for Justice* (Case C-277/2011) (Unrep, ECJ, 22/11/2012); *MM v. Minister for Justice* [2011] IEHC 547, (Unrep, Hogan J, 18/5/2011); *MM v Minister for Justice* [2011] IEHC 346, (Unrep, Hogan J, 5/9/2011); *NN v Minister for Justice* [2012] IEHC 499, (Unrep, Clark J, 28/11/2012); *Okunade v Minister for Justice* [2012] IESC 44, [2013] ? I.R. ???; *NS v Secretary of State for the Home Department* (C-411/10 and C-493/10) (Unrep, ECJ, 21/12/2011); *Transocean Marine Paint Association v Commission* (Case C-17/74) [1974] ECR 1063 and *World Wide Fund v Autonome Provinz Bozen* (Case C-435/97) [1999] ECR I-5613 considered - Directive 2004/83/EC, article 4 – Relief granted (2011/8JR – Hogan J – 23/1/2013) [2013] IEHC 9
M (M) v Minister for Justice and Law Reform

INSURANCE

Contract

Privity of contract – Liquidation of insured – Third parties' rights under policy – Statutory interpretation – Claim against first to third defendants not yet determined – Whether plaintiff entitled to bring claim against fourth defendant – Appropriate time to bring such claim – *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957; *Dunne v PJ White Construction Co Ltd* [1989] ILRM 803; *McKenna v Best Travel Ltd* [1995] 1 IR 577 and *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 considered - Statute of Limitations 1957 (No 6) – Civil Liability Act 1961 (No 41), s 62 – Relief granted (2010/3594P – Kearns P – 3/12/2012) [2012] IEHC 530
McCarron v Modern Timber Homes Ltd (in liquidation)

Health

Statutory interpretation - Terms – Definitions – Meaning – Express provision that term to be construed in certain sense – Objective intention of Oireachtas – Whether provision that term to be construed in accordance with particular section applies where term used in different section and context – Whether context requires different meaning – Words and phrases – Insurance – Health – Risk equalisation – "Community rating" - *Crilly v T & J Farrington Ltd* [2001] 3 IR 251 considered - Risk Equalisation Scheme 2003 (SI 261/2003) – Health Insurance Act 1994 (No 16), ss 2, 7 and 12 – Health Insurance (Amendment) Act 2001 (No 17), ss 5 and 9 – Appeal allowed and scheme quashed (17/2007 – SC – 16/7/2008) [2008] IESC 42
Bupa Ireland Ltd v Health Insurance Authority

Articles

Kelly, Lisa
Fleck, Kieran
European motor insurance directives: recent case law
2013 (1) (1) Irish business law review 59

INTERNATIONAL LAW

Library Acquisition

de Londras, Fiona
The Irish yearbook of international law volume 6, 201
Oxford : Hart Publishing, 2013
C100

IRISH LANGUAGE

Statutory Instrument

Gaeltacht act 2012 (section 12) regulations 2013
SI 357/2013

LAND LAW

Library Acquisition

Newsom, G L
Preston and Newsom's restrictive covenants affecting freehold land
10th ed
London : Sweet & Maxwell, 2013
N65.6

LANDLORD AND TENANT

Library Acquisition

Brennan, Gabriel
Linnane, Michelle
Soden, David
Law Society of Ireland
Landlord and tenant law
6th ed
Oxford : Oxford University Press, 2013
N90.C5

LEGAL AID

Statutory Instrument

Civil legal aid regulations 2013
SI 346/2013

LEGAL HISTORY

Library Acquisition

Hogan, Daire
Changes in practice and law: a selection of essays by members of the legal profession to mark twenty-five years of the Irish Legal History Society
Dublin : Four Courts Press, 2013
L403

LOCAL GOVERNMENT

Judicial review

Housing – Housing authority – Warrant for possession – Dispute on facts – Application to District Court for warrant for possession – Provision for summary procedure on application for warrant – Judicial review – Whether alternative remedy – Whether requirement for independent hearing on merits – Whether infringement of European Convention on Human Rights and Fundamental Freedoms – Human rights – Home – Right to respect for home – Whether interference in accordance with law – Whether interference had legitimate aim and necessary in democratic society - Independent hearing - Right to fair procedures – Interpretative obligation – Requirement that statutory provisions be applied by courts in manner compatible with Convention provisions – Extent of obligation – Express provision for summary procedure – Whether interpretative obligation gave rise to discretion to explore merits of matter – Whether District Court entitled to address merits of procedure – Whether adequate procedural safeguards provided – Whether availability of judicial review provided adequate procedural safeguard – Words – Meaning – "In any proceedings" – Whether court could grant declaration of incompatibility in context of consultative case stated - *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] KB 223; *R (on the Application of Bewry) v Norwich City Council* [2001] All ER (D) 461; *Blečić v Croatia* (App No 59532/00) (2004) 41 EHRR 13; *Bristol District Council v Clark* [1975] 1 WLR 1443; *Bryan v United Kingdom* (App No 19178/91) (1996) 21 EHRR 342; *Buckley v United Kingdom* (App No 20348/92) (1996) 23 EHRR 101; *Byrne v Scally* (Unrep, Ó Caoimh J, 12/10/2000); *Chapman v United Kingdom* (App No 27238/95) (2001) 33 EHRR 399; *Connors v United Kingdom* (App No 66746/01) (2004) 40 EHRR 189; *Coombes v Waltham Forest LBC and Secretary of State for the Communities and Local Government* [2010] EWHC 666 (Admin), [2010] 2 All ER. 940; *Doherty v Birmingham City Council* [2006] EWCA Civ 1739, [2007] LGR 165; *Donegan v Dublin City Council* [2008] IEHC 288, (Unrep, Laffoy J, 8/5/2008); *Doran v Ireland* (App No 50389/99) (2006) 42 EHRR 13; *Dublin City Council v Fennell* [2005] IESC

33, [2005] 1 IR 604; *Dublin City Council v Gallagher* [2008] IEHC 354, (Unrep, Ó Néill J, 11/11/2008); *Dublin Corporation v McDonnell* [1946] IR Jur Rep 18; *Dublin City Council v Hamilton* [1999] 2 IR 486; *Flanagan v University College Dublin* [1988] 1 IR 724; *Harrow LBC v Qazi* [2003] UKHL 43, [2004] 1 AC 983; *Howard v Commissioner of Public Works* [1994] 1 IR 101; *In re Haughey* [1971] IR 217; *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465; *Kerry County Council v McCarthy* [1997] 2 ILRM 481; *Larkos v Cyprus* (App No 29515/95) (1999) 30 EHRR 597; *Leeds City Council v Price* [2006] UKHL 10, [2006] 2 AC 265; *Leonard v Dublin City Council* [2007] IEHC 404, (Unrep, Peart J, 3/12/2007); *Leonard v Dublin City Council* [2008] IEHC 79, (Unrep, Dunne J., 31/3/2008); *JMcD v PL* [2009] IESC 81, [2010] 2 IR 199; *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701; *Manchester City Council v Pinnock* [2010] UKSC 45, [2010] 1 WLR 713; *McCann v United Kingdom* (App No 19009/04) (Unrep, European Court of Human Rights, 13/5/2008); *McConnell v Dublin City Council* [2008] IESC 53 (Unrep, SC 15/12/2008); *McGrath v McDermott* [1988] IR 258; *McMichael v United Kindgom* (App No 16424/90) (1995) 20 EHRR 205; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *Paulic v Croatia* (App No 3572/06) (Unrep, European Court of Human Rights, 22/10/2009);
R v A [2002] 1 AC 45; *R (Quinn) v Justices of Tipperary* (1883) 12 LR Ir 393; *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430; *Rock v Dublin City Council* (Unrep, SC, 8/2/2006); *Secretary of State, Education and Science v Tameside* [1977] AC 1014; *Smith v Evans* [2007] EWCA Civ 1318, [2008] 1 WLR 661; *The State (Keegan) v Stardust Victims Compensation Tribunal* [1986] IR 642; *State (Kathleen Litzouw) v Dublin Corporation* [1981] ILRM 273; *The State (O'Rourke) v Kelly* [1983] IR 58; *Sweetman v An Bord Pleanála* [2007] IEHC 153, [2007] 2 ILRM 328 and *Tsfayo v United Kingdom* (App No. 60860/00) (2009) 48 EHRR 18 considered - Rules of the Superior Courts 1986 (SI 15/1986), O. 60 – Housing Act 1966 (No 21), ss 11, 60 and 62 – Landlord and Tenant Law Amendment Act Ireland 1860 (23 & 24 Vict, c 154), s 86 – European Convention on Human Rights Act 2003 (No 20), ss 2, 3, 4 and 5 – (United Kingdom) European Human Rights Act 1998 (Eliz II), s. 3 – Constitution of Ireland 1937, Article 40.1.3° – European Convention on Human Rights and Fundamental Freedoms, articles 6, 8, 13 and 14 – Appeal dismissed in case of *Donegan v Dublin City Council* and allowed in case of *Dublin City Council v Gallagher* (265/2008 and 34, 54 & 65/2009 - SC – 27/2/2012) [2012] IESC 18
Donegan v Dublin City Council

Traveller accommodation

Judicial review – Applicants illegally occupying land owned by first respondent – Applicants refusing offers of alternative accommodation – First respondent issuing notice requiring applicants to remove dwellings – Whether judicial review providing effective remedy – Whether breach of fair procedures – Whether failure to give reasons for issuance of notice – Whether failure to vindicate applicants' rights – Whether lack of independent tribunal constituting breach of applicants' rights – Whether *locus standi* – *McDonagh v Kilkenny County Council* [2007] IEHC 350, [2011] 3 IR 455; *Leonard v Dublin City Council* [2008] IEHC 79 (Unrep, Dunne J, 31/3/2008); *Deerland Construction Ltd v Aquaculture Licences Appeal Board* [2008] IEHC 289, [2009] 1 IR 673; *Efe v Minister for Justice, Equality and Law Reform* [2011] IEHC 214, [2011] 2 IR 798 followed – *Cahill v Sutton* [1980] IR 269; *B(J)(A minor) v Minster for Justice, Equality and Law Reform* [2010] IEHC 296, (Unrep, Cooke J, 14/7/2010) and *Donegan v Dublin City Council* [2012] IESC 18 (Unrep, SC, 27/2/2012) considered – Housing (Miscellaneous Provisions) Act 1992 (No 18), s 10 – Housing (Traveller Accommodation) Act 1998 (No 33), s 32 – European Convention on Human Rights and Fundamental Freedoms 1950, arts 6 & 8 – Relief refused (2010/1328JR – Feeney J – 9/11/2012) [2012] IEHC 594
O'Driscoll v Limerick City Council

Membership

Whether co-option of notice party as member of county council unlawful – Appointment of member to Seanad creating vacancy – Rules for casual vacancies - Requirement for vacancy created to be filled by non-party candidate as departing member non-party candidate at time of election –Whether notice party independent candidate when co-opted – Contention of applicant that notice party Labour Party nominee – Affidavit evidence – Media reports – Definition of 'non party candidate' - Express averments of notice party – Distinction between being nominated by party and being candidate of party – *O'Doherty v Attorney General* [2010] 3 IR 482 considered – Local Government Act 2001 (No 37), s 19 – Electoral (Amendment) Act 2009 (No 4), s 16 – Relief refused (2011/541JR - Dunne J – 7/11/2012) [2012] IEHC 417
Shiels v Donegal County Council

MARITIME LAW

Library Acquisition

Tiberg, Hugo
The law of demurrage
5th ed
London : Sweet & Maxwell, 2013
N337.5

MEDICAL NEGLIGENCE

Library Acquisition

Goldberg, Richard
Medicinal product liability and regulation
Oxford : Hart Publishing, 2013
M608

MENTAL HEALTH

Detention

Human rights – European Convention – Declaration of incompatibility – Margin of appreciation – Mental health –Involuntary detention – Unlawful detention – Capacity to give informed consent to remain as a voluntary patient – *G v E* [2010] EWHC 621 (Fam); [2010] 1 MHLR 364; *Guzzardi v Italy* (1980) 3 EHRR 333; *HL v United Kingdom* (2005) 40 EHRR 761; *JE v DE and Surrey CC* [2006] EWHC 3459 (Fam); [2007] 2 FLR 1150; [2007] 1 MHLR 39; *M v Ukraine* (App No 2452/04) (Unrep, ECHR, 19/4/2012); *R v Bournewood Community and Mental Health NHS Trust, ex parte L* [1998] UKHL 24, [1999] AC 458 and *Storck v Germany* (2006) 43 EHRR 96 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 60 and 60A – Human Rights Commission Act 2000 (No 9), s 8 – Mental Health Act 2001 (No 25), ss 3, 23 and 24 – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, articles 5 and 13 – Declaration refused (2011/1122JR – Peart J – 14/12/2012) [2012] IEHC 547
L (P) v Clinical Director of St Patrick's University Hospital

PENSIONS

Article

Hayes, Gary
Pensions: as safe as houses
2013 (1) (1) Irish business law review 67

PERSONAL INSOLVENCY & BANKRUPTCY

Jurisdiction

Non-vesting proposal – Amendment of proposal to vesting arrangement – Assignment of property not belonging to petitioner – Whether jurisdiction of court could be challenged prior to request for approval of proposal – Whether proposal constituted vesting arrangement – Whether amendment of proposal from non-vesting to vesting arrangement permissible – Whether proposal to vest property not belonging to petitioner permissible – Bankruptcy – Jurisdiction – Centre of main interest – Time to consider centre of main interest – Residency of petitioner – Nationality of petitioner – Location of creditors – When issues concerning centre of main interest to be decided – Whether possession of passport or payment of tax determined centre of main interest – Whether location of creditors relevant in determining centre of main interest – *Re Eurofood IFSC Ltd (No. 2)* [2006] IESC 41, [2006] 4 IR. 307; *In the Matter of Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC Ch 3199, [2010] BCC 295; *Official Receiver v Eichler* [2007] BPIR 1636; *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, [2005] 1 WLR 3966 and *Thompson v Shiel* (1840) 3 Ir Eq R 135 considered - Council Regulation EC/1346/2000, arts 2(a) and 3 - Bankruptcy Act 1988 (No 27), s 93 – Protection order set aside (2010/2335AD – Dunne J – 20/1/2012) [2012] IEHC 574
Re PAD (Bankruptcy)

Practice and procedure

Bankruptcy – Presentation of petition – Time limit – Validity of bankruptcy summons

– Application to dismiss bankruptcy summons – Act of bankruptcy – Whether three month period for presentation of petition ran notwithstanding proceedings to determine validity of bankruptcy summons – Whether no execution issued in respect of debt where receiver appointed pursuant to deed of mortgage – Whether bankruptcy summons should be dismissed where judgment against debtor under appeal – Whether bankruptcy summons should be dismissed where debtor had challenged constitutionality of Bankruptcy Act 1988 – Whether corporate applicant for bankruptcy summons required to include written nomination by officer of deponent of grounding affidavit – *In re Drumgoole* (1887) 21 ILTR 32; *Henderson v Henderson* (1843) 3 Hare 100; *Jackson v Hall* [1980] AC 854; McConnon v President of Ireland [2012] IEHC 184, (Unrep, Kelly J, 23/5/2012); *Minister for Communications v MW* [2009] IEHC 413, [2010] 3 IR 1; *Ryley v Taaffe* [1932] IR 194; *Ex parte Wier* (1871) LR. 6 Ch App 875 - *Zurich Bank v McConnon* [2011] IEHC 75, (Unrep, Birmingham J, 4/3/2011) considered - Rules of the Superior Courts 1986 (No 15), O 76, rr 11(1), 12(3) and 19 – Irish Bankrupt and Insolvent Act 1857 (20&21 Vic, c 60), s 115 – Bankruptcy (Ireland) Amendment Act 1872 (35&36 Vic, c 58), s 80 – Bankruptcy Act 1988 (No 27), ss 7, 7(1)(g), 8(5), 8(6)(b), 11 and 11(1)(c) – Application dismissed (Bankruptcy No 5281 – Dunne J – 31/7/2012) [2012] IEHC 587
McConnon v Zurich Bank

Library Acquisition

Thomson Round Hall
Holohan, Bill
Sanfey, Mark
The personal insolvency practitioner conference 2013: papers
Dublin : Thomson Round Hall, 2013
N313.C5

Article

Murphy, Trevor
DSAs and PIAs from a creditor's perspective: the protections available to
creditors and the scope for challenges under the Personal insolvency act 2012
2013 (20) 9 Commercial law practitioner 201

Statutory Instruments

Circuit Court rules (personal insolvency) 2013
SI 317/2013

Rules of Superior Courts (personal insolvency) 2013
SI 316/2013

Personal insolvency act 2012 (additional information to be contained in the registers) regulations 2013
SI 356/2013

Personal insolvency act 2012 (notification in relation to excludable debt) regulations 2013
SI 337/2013

Personal insolvency act 2012 (prescribed debt relief notice application form) regulations 2013
SI 333/2013

Personal insolvency act 2012 (prescribed fees) regulations 2013
SI 329/2013

Personal insolvency act 2012 (prescribed financial statement) regulations 2013
SI 326/2013

Personal insolvency act 2012 (prescribed protective certificate personal insolvency arrangement application form) regulations 2013
SI 331/2013

Personal insolvency act 2012 (prescribed protective certificate debt settlement arrangement application form) regulations 2013
SI 332/2013

Personal insolvency act 2012 (procedures for the conduct of creditors' meetings) regulations 2013
SI 335/2013

Personal insolvency act 2012 (schedule of creditors) regulations 2013
SI 334/2013

Personal insolvency act 2012 (value above which a debtor must not transfer, lease, grant security over, or otherwise dispose of any interest in property) regulations 2013
SI 330/2013

PLANNING & ENVIRONMENTAL LAW

Costs

Statutory exemption from liability for costs - Exceptions to statutory exemption – Conduct of proceedings – Delay – Whether unnecessary prolongation of proceedings – Whether intention to continue case - Abuse of court process – Whether respondent and second notice party entitled to costs – *Commission v Ireland* (Case C-427/07) [2009] ECR I-6277; *JC Savage Supermarket Ltd v An Bord Pleanála* [2011] IEHC 488, (Unrep, Charleton J, 22/11/2012); *McEvoy v Meath County Council* [2003] 1 IR 208 and *Shillelagh Quarries Ltd v An Bord Pleanála* [2012] IEHC 402, (Unrep, Hedigan J, 31/7/2012) considered - Planning and Development Act 2000 (No 30), s 50B – Planning and Development (Amendment) Act 2010 (No 30), s 33 – Environment (Miscellaneous Provisions) Act 2011 (No 30), s 21 – Council Directive 85/337/EEC, article 10a – Parliament and Council Directive 2003/35/EC – Costs awarded to respondent and notice party (2011/650JR – Kearns P – 21/1/2013) [2013] IEHC 11
Indaver NV t/a Indaver Ireland v An Bord Pleanála

Library Acquisition

Galligan, Eamon
McGrath, Michael
Compulsory purchase and compensation in Ireland: law and practice
2nd ed
Dublin : Bloomsbury Professional, 2013
N96.3.C5

Statutory Instruments

European Union (conservation of wild birds (Ballymacoda Bay special protection area)) regulations 2013
(DIR/2009-147, DIR/92-43 [DIR/1992-43])
SI 338/2013

Radiological protection act 1991 (responsible and safe management of radioactive waste) order 2013
(DIR/2011-70)
SI 320/2013

PRACTICE AND PROCEDURE

Abuse of process

Administration of estate – Special summons - Plaintiff seeking "monetary retribution in the sum of €8,000,000" – Allegations against defendant – Replication of previous proceedings – Application to dismiss proceedings – Whether proceedings vexatious or abuse of process – Whether *Isaac Wunder* order appropriate – *Riordan v Ireland (No 5)* [2001] 4 IR 463; *Behan v McGinley* [2008] IEHC 18, [2011] 1 IR 47 considered – Proceedings dismissed, *Isaac Wunder* order granted (2012/362SP – Laffoy J – 30/11/2012) [2012] IEHC 578
Loughrey v Dolan

Amendment to pleadings

Application for liberty to file and serve amended defence – Proposed amendments in context of existing pleadings – Preventing of renewal of membership of national association of game councils – Disaffiliation of council from national association subsequent to passing of motion – Application to amend defence to plead that plaintiff without nexus to association or *locus standi* – Delay in seeking leave to amend – Absence of excuse for delay – Discretion in permitting amendments – Whether necessary for purpose of clarifying real questions of controversy – Whether allowing of amendment would give rise to real prejudice – Irrelevance of amendment to issue of liability – *McFadden v Dundalk and Dowdallshill Coursing Club* (Unrep, SC, 22/4/1994); *Allen v Irish Holemasters Ltd* [2007] IESC 33, (Unrep, SC, 27/7/2007); *Shepperton Investment Company Ltd v Concast* (1975) Ltd (Unrep, Barron J, 21/12/1992); *Palamos Properties Ltd v Brooks* [1996] 3 IR 597 and *Croke v Waterford Crystal Ltd* [2005] 2 IR 383 considered - Rules of the Superior Courts 1986 (SI 15/1986), O28, r 1 – Application dismissed (2004/16720P – Laffoy J – 21/11/2012)
Fitzharris v O'Keeffe

Case management

Modular trials – Jurisdiction of appellate court to interfere with case management orders – Principles to be applied regarding modular trials – Whether trial judge erred in directing modular trial – *Atlantic Shellfish Limited v Cork County Council* [2010] IEHC 294, (Unrep, Laffoy

J, 20/5/2010); *Cork Plastics (Manufacturing) v Ineos Compound UK Limited* [2008] IEHC 93, (Unrep, Clarke J, 7/3/2008); *Dowling v Minister for Finance* [2012] IESC 32, (Unrep, SC, 24/5/2012); *Kilty v Hayden* [1969] IR 261; *McCabe v Ireland* [1999] 4 IR 151; *McCann v Desmond* [2010] IEHC 164, [2010] 4 IR 554; *McDonald v Bord na gCon* [1964] IR 350; *Millar v Peeples* [1995] NI 6; *PJ Carroll & Co Ltd v Minister for Health and Children* [2005] IESC 26, [2005] 1 IR 294; *PJ Carroll & Co Ltd v Minister for Health (No 2)* [2005] IEHC 267, [2005] 3 IR 457; *RN v Refugee Appeals Tribunal* [2007] IESC 25, [2008] 1 ILRM 289 and *Ryan v Minister for Justice* (Unrep, SC, 21/12/2000) considered - Rules of the Superior Courts 1986 (SI 15/1986), O 25, 34 and 35 – Relief allowed including *inter alia* setting aside of direction for modular trial (86/2012 – SC – 4/12/2012) [2012] IESC 60
Weavering Macro Fixed Income v PNC global Investment

Cross-examination

Deponents – Injunction – Mareva injunction – Defendants ordered to disclose assets – Plaintiffs alleging non-compliance – Plaintiffs seeking to cross-examine defendants – Whether cross-examination appropriate – *AJ Bekhor & Co Ltd v Bilton* [1981] QB 923; *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67; *Den Norske Bank ASA v Antonatos* [1999] QB 271; *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1989] 2 WLR 412; *Deutsche Bank AG v Murtagh* [1995] 2 IR 122; *Director of Corporate Enforcement v Seymour* [2006] IEHC 369, (Unrep, O'Donovan J, 16/11/2006) and *Holland v Information Commissioner* (Unrep, SC, 15/12/2003) and *House of Gardens Ltd v Waite* [1985] FSR 173 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 40 – Cross-examination directed (2011/5843P and 2012/120COM – Kelly J – 11/12/2012) –[2012] IEHC 510
Irish Bank Resolution Corporation Ltd v Quinn

Delay

Second defendant consenting to judgment – Subsequent death of second defendant – No action taken to prosecute case against first defendant for four years – First defendant seeking dismissal of plaintiffs' case – Whether delay in prosecuting case against first defendant – Whether delay inordinate – Whether delay excusable – Whether balance of justice requiring dismissal of proceedings – *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459 applied – Application refused (2004/19197P – O'Malley J – 1/2/2013) [2013] IEHC 30
O'Carroll v EBS Building Society

Dismissal

Tort – Personal injuries - Road traffic accident – Application to dismiss on grounds of false and misleading evidence of material kind – Allegation that plaintiff grossly exaggerated complaints and engaged in material non-disclosure to doctors and in pleadings – Failure to disclose previous back injury - Failure to disclose subsequent serious road traffic accident – Whether non-disclosure material to assessment of damages – Whether false claim made regarding loss of opportunity to pursue career as dancing teacher – Civil Liability and Courts Act 2004 (No 31), s 26 – Claim dismissed (2009/2969P – O'Neill J – 23/10/2012) [2012] IEHC 443
Montgomery v Minister for Justice, Equality and Defence

Judiciary

Costs – Judicial review – Certiorari – Whether correct to name judge as notice party to judicial review – Absence of allegation of mala fides or impropriety – Judicial immunity from suit – Whether correct to award costs against judge whose decision is quashed – Independence of judiciary – Human rights – European convention – Denial of access to court or tribunal – Denial of effective remedy – Whether ability to obtain order for costs essential aspect of effective remedy – *Aksoy v Turkey* (App No 21987/93) (1997) 23 EHRR 553; *Beatty v The Rent Tribunal* [2005] IESC 66; [2006] 2 IR 191; *Bertuzzi v France* (App. No. 36378/97) (Unrep, ECHR, 12/2/2003); *Chahal v The United Kingdom* (App No 22414/93) (1997) 23 EHRR 413; *Curtis v Kenny* [2001] 2 IR 96; *Deighan v Ireland* [1995] 2 IR 56; *Desmond v Riordan* [2000] 1 IR 505; *Dello Preite v Italy* (App No 15488/89) (Unrep, ECHR, 27/2/1995); *Doran v Ireland* (App No 50389/99) (2006) 42 EHRR 13; *Garnett v Ferrand* (1827) 6 B&C 611; *Hasan and Chaush v Bulgaria* (App No 30985/96) (2002) 34 EHRR 55; *Ilhan v Turkey* [GC] (App No 22277/93) (2002) 34 EHRR 36; *Kaya v Turkey* (App No 22729/93) (1999) 28 EHRR 1; *The King v The Justices of Salford Hundred Division* [1912] 2 KB 567; *Kudła v Poland* (App. No. 30210/96) (2002) 35 EHRR 11; *McCoppin v Kennedy* [2005] IEHC 194; [2005] 4 IR 66; *McIlraith v Fawsitt* [1990] 1 IR 343; *O'Connor v Carroll* [1999] 2 IR 160; *Podbielski and PPU Polpure v Poland* (App No 39199/98) (Unrep, ECHR, 26/7/2005); *Rex (John Conn King) v Justices of Londonderry* (1912) 46 ILTR 105; *Robins v United Kingdom* (App No 22410/93) (1998) 26 EHRR 527; *Silver and Others v The United Kingdom* (App Nos 5947/72, 6205/73, 7052, 7061, 7107, 7113 and 7136/75) (1983) 5 EHRR 347; *Sirros v Moore* [1975] QB 118; *Stankiewicz v Poland* (App No 46917/99) (2007) 44 EHRR 47; *The State (Prendergast) v District Justice Rochford and Judge Durcan* (Unrep, SC, 1/7/1952); *Stephens v Connellan* [2002] 4 IR 321; *Tabor v Poland* (App No 12825/02) (Unrep, ECHR, 27/6/2006); *Tomašić v Croatia* (App No 21753/02) (Unrep, ECHR, 19/10/2006) and *X and Y v The Netherlands* (App No 6202/73) (Unrep, ECHR, 26/3/1975) considered - Rules of the Superior Courts 1986 (SI 15/1986) O 84, r 23(2) and O 99, r 3 - European Convention on Human Rights Act 2003 (No 20), ss 2 and 5 – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, articles 2, 3, 6 and 13 - Declarations refused (2006/507JR & 2008/424JR – O Néill J – 27/3/2009) [2009] IEHC 142
F (O) v Judge O'Donnell

Jurisdiction

Fair procedure - Order for disclosure - Order for joinder- Whether court has jurisdiction to direct disclosure – Whether court has jurisdiction to direct joinder of party - Whether "cause or matter" before Irish courts – *Effer SpA v Kantner* (Case 38/81) [1982] ECR 825; *EMI Records (Ireland) Ltd v Eircom Ltd* [2005] IEHC 233, [2005] 4 IR 148; *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133; *Reichert and Kockler v Dresdner Bank* (Case C-261/90) [1992] ECR I- 2149; *Ryanair v Unister* [2011] IEHC 167, (Unrep, Gilligan J, 22/3/2011); *Societe Romanaise de la Chaussure SA v British Shoe Corporation Limited* [1991] FSR 1; *St Paul Dairy Industries NV v Unibel Exser BVBA* (Case C-104/03) [2005] ECR I-3481 and *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* (Case C-159/97) [1999] ECR I-1597 considered - Rules of the Superior Courts 1986 (SI 15/1986), O 15, r 13 - Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968 - Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters – Appeal against disclosure allowed; appeal against joinder dismissed (139, 288, 290 & 320/2011 – SC – 13/3/2013) [2013] IESC 14
Ryanair Ltd v Unister GmbH

Locus standi

Provision of financial support to certain institutions by means of special investment shares and promissory notes – Plaintiff seeking declaration that provision of financial support without vote by Dáil Éireann unlawful – Plaintiff not a member of Dáil Éireann – Whether plaintiff attempting to assert *ius tertii* – Whether plaintiff suffering particular prejudice – Whether delay in bring application by plaintiff – Whether plaintiff having *locus standi* – *Cahill v Sutton* [1980] IR 269 applied – *Crotty v An Taoiseach* [1987] IR 713; *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 distinguished – *Riordan v Government of Ireland* [2009] IESC 44, [2009] 3 IR 745 considered – Claim dismissed (2012/3230P – Kearns P – 31/1/2013) [2013] IEHC 39
Hall v Minister for Finance

Security for costs

Application for security for costs - Unlimited company resident in jurisdiction – Building agreement to carry out repair and reinstatement works to hotels – Claim that sums due and owing – Submission that *bona fide* defence and plaintiff would be unable to meet order for costs – Jurisdiction to make order in relation to person suing as nominal plaintiff on grounds of insolvency – Inherent jurisdiction to prevent abuse in proceedings – Whether plaintiff nominal plaintiff – Legal person with cause of action – *Goode Concrete v CRH* [2012] IEHC 116, (Unrep, Cooke J, 21/3/2012); *ABM Construction v Habbingley Ltd* [2012] IEHC 61, (Unrep, Laffoy J, 15/2/2012); *Salthill Properties Ltd v Royal Bank of Scotland* [2010] IEHC 31, [2011] 2 IR 441; *Pitt v Bolger* [1996] 1 IR 108; *GMcG v DW (No 2)* [2000] 4 IR 1; *Proetta v Neil* [1996] 1 IR 100; *Kenealy v Keane* [1901] 2 IR 640 and *Barry v Buckley* [1981] IR 306 considered - Rules of the Superior Courts 1986 (SI 15/1986), O29 – Application refused (2012/3956P – Finlay Geoghegan J – 22/11/2012)
Mavior v Zerko Ltd

Security for costs

Application to fix amount of security for costs for appeals to Supreme Court – Party and party costs – Simulating taxation – Whether costs of appeals to be assessed separately or as a whole – Discretion – Context of party and party costs – Costs necessary or proper for attainment of justice – Rules governing taxable party and party costs – Intangible factors - Legislative change – Whether poverty factor to be considered in fixing security – Whether departure from 'one third rule' for individual parties appropriate – Whether proceedings carried out in oppressive manner – *Kelly v Breen* [1978] ILRM 63; *Scott Bourbon (a minor) v Ward* [2012] IEHC 30, (Unrep, Kearns P, 17/2/2012); *Midland Bank Ltd v Crossley-Cooke* [1969] IR 56; *Farrell v Bank of Ireland* [2012] IESC 42, (Unrep, SC, 10/7/2012); *Hemed v Israel* [2004] ISR SC 58(2) 498; *Mahony v KCR Heating Supplies* [2007] IEHC 61, (Unrep, Charleton J, 22/2/2007); *Best v Wellcome (No 3)* [1996] 3 IR 378; *Bloomer v Incorporated Law Society* [2000] IR 383; *Cremin v Lynch* [2008] IEHC 161, (Unrep, Herbert J, 27/5/2008); *Brehony v Longford Westmeath Farmers Mart Ltd* [2012] IEHC 247, (Unrep, Hanna J, 30/3/2012) and *Crotty v An Taoiseach* [1990] ILRM 617 considered - Rules of the Superior Courts 1986 (SI 15/1986), O99, r 37 – Corporate appellants to provide full security; one third rule applied to individual appellant (250/10– Master Honohan – 17/1/2013)
Moorview Developments Ltd v First Active Plc

Security for costs

Limited company – Counterclaim – Test to be applied – Special factors – Whether appropriate to make order for security for costs – *Anglo Petroleum Ltd v TFB* (Mortgages) Ltd. [2004] EWHC 1177 (Ch), (Unrep, High Court of England and Wales, Park J, 7/4/2004); *Barry v Buckley* [1981] IR 306; *BJ Crabtree (Insulation) Ltd v GPT Communication Systems Ltd* (1990) 59 BLR 43; *Collins v Doyle* [1982] ILRM 495; *Comhlucht Páipéar Riomhaireachta Teo v Údarás na Gaeltachta* [1987] IR 684; *Connaughton Road Construction Ltd v Laing O'Rourke Ireland Ltd* [2009] IEHC 7, (Unrep, Clarke J, 16/1/2009); *Dome Telecom Ltd v Eircom Ltd* [2007] IESC 59, [2008] 2 IR 726; *Dumrul v Standard Chartered Bank* [2010] EWHC 2625 (Comm), [2010] NLJR 1532; *Framus Ltd v CRH plc* [2004] IESC 25, [2004] 2 IR 20; *Goode Concrete v CRH plc* [2012] IEHC 116, (Unrep, Cooke J, 21/3/2012); *Hutchinson Telephone (UK) Ltd v Ultimate Response Ltd* [1993] BCLC 307; *Inter Finance Group Ltd v KPMG Peat Marwick* (Unrep, Morris P, 29/6/1998); *Irish Commercial Society Ltd v Plunkett* [1988] IR 1; *Irish Conservation and Cleaning Ltd v. International Cleaners Ltd* (Unrep, SC, 19/7/2001); *Kenny v An Bord Pleanála* [2010] IEHC 321, (Unrep, Cooke J, 23/7/2010); *Lancefort Ltd v An Bord Pleanála* [1998] 2 IR 511; *Lismore Homes Ltd (in receivership) v Bank of Ireland Finance Ltd* [1992] 2 IR 57; *Lismore Homes Ltd (in receivership) v Bank of Ireland Finance Ltd (No 2)* [1999] 1 IR 501; *Lismore Homes Ltd v Bank of Ireland Finance Ltd (No 3)* [2001] 3 IR 536; *Macauley v Minister for Posts and Telegraphs* [1966] IR 345; *Millstream Recycling Ltd v Tierney* [2010] IEHC 55, (Unrep, Charleton J, 9/3/2010); *Moorview Developments Ltd v First Active plc* [2012] IESC 22, (Unrep, SC, 23/2/2012); *Newman v Wenden Properties Ltd* [2007] EWHC 336 (TCC), 144 Con LR 95; *O'B v W* [1982] ILRM 234; *Peppard & Co Ltd v Bogoff* [1962] IR 180; *SEE Co Ltd v Public Lighting Services Ltd* [1987] ILRM 255; *Shaw-Lloyd v ASM Shipping* [2006] EWHC 1958 (QB), (Unrep, High Court of England and Wales, Gloster J, 6/2/2006); *Thalle v Soares and Others* [1957] IR 182; *Usk District Residents Association Ltd v Environmental Protection Agency* [2006] IESC 1, [2006] 1 ILRM 363 and *West Donegal Land League Ltd v Údarás na Gaeltachta* [2006] IESC 29, (Unrep, SC, 15/5/2006) considered - Rules of the Superior Courts 1986 (SI 15/1986), O 29 – Companies Act 1963 (No 33), s 390 – Application refused (2012/6910P – Charleton J – 30/11/2012) [2012] IEHC 512
Oltech (Systems) Ltd v Olivetti UK Ltd

Summary judgment

Sums due on foot of personal guarantee – Sums due on personal bank accounts – Defence raised that guarantee not executed – Defence raised that bank in breach of consumer credit legislation – Defence raised that personal accounts were operated for benefit of company to knowledge of plaintiff - Whether plaintiff entitled to summary judgment – Applicable test – Whether clear defendant had no case – Cogency of evidence to be assessed – Determining factor of achievement of just result – Application of credibility test to proposed defence – *Non est factum* – Whether radical difference between what was signed and what defendant thought he was signing – whether mistake as to general character of document as opposed to legal effect – Whether lack of negligence – Burden of proof on party disowning signature – Application of consumer credit legislation - *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607; *First National Commercial Bank v Anglin* [1996] 1 IR 75; *Irish Dunlop Co Ltd v Ralph* (1958) 95 ILTR 70; *Banque de Paris v de Nara y* [1984] 1 Lloyd's Rep 21; *National Westminster Bank v Daniel* [1993] 1 WLR 1453 and *Harrisrange Ltd v Duncan* [2003] 4 IR 1; *Tedcastle and Company Ltd v McCrystle* (Unrep, Morris J, 15/3/1999); *Allied Irish Banks Plc v Higgins* [2010] IEHC 219, (Unrep, Kelly J, 3/6/2010) and *Saunders v Anglia Building Society* [1971] AC 1004 considered – Judgment granted (2010/1951S – Ryan J – 5/10/2012) [2012] IEHC 381
Allied Irish Banks Plc v Smith

Summary judgment

Defence – Bona fide defence – Whether bona fide defence – Whether defence had foundation – Whether judgment should be granted – Contract law – Construction of loan facility – Business efficacy – Intention of parties – Standstill arrangement – Forbearance to sue – Promissory estoppel – Appointment of receiver – Whether loan repayable on demand – Whether promise final and irrevocable – Whether reasonable notice given – Whether appointment of receiver unlawful – Judicial review – NAMA – Public law remedy – Time limits for institution of proceedings – Statutory interpretation – Legislative intention – Whether statutory competence question for judicial review – Whether substantial issue for court's determination – *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607; *Association of General Practitioners Ltd v Minister for Health* [1995] 1 IR 382; *Bank of Ireland v AMCD (Property Holdings) Ltd* [2001] 2 All ER (Comm) 894; *Bank of Ireland v Educational Building Society* [1999] 1 IR 220; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; [1956] 1 All E.R. 256; *Danske Bank v Durkan New Homes Ltd* [2010] IESC 22, (Unrep, SC, 22/4/2010); *Harrisrange Ltd v Duncan* [2003] 4 IR 1; *McGrath v O'Driscoll* [2006] IEHC 195, [2007] 1 ILRM 203; *Moran v AIB Mortgage Bank* [2012] IEHC 322, (Unrep, McGovern J, 27/7/2012); *O'Donnell v Dún Laoghaire Corporation* [1991] ILRM 301 and *Zurich Bank v McConnon* [2011] IEHC 75, (Unrep, Birmingham J, 4/3/2011) considered - Rules of the Superior Courts 1986 (SI15/1986), O 84 – Conveyancing Act 1881 (44 & 45 Vict c 41), s 20 - Statute of Limitations 1957 (No 6) – National Asset Management Act 2009 (No 34), s 193 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Planning and Development Act 2000 (No 30), s 50 – Planning and Development (Strategic Infrastructure) Act 2006 (No 27), s 13 - National Asset Management Agency Act 2009 (No 34), ss 10, 84, 85(4), 96, 119 to 122, 193 – Judgment entered (2012/2762S – Charleton J – 4/2/2012) [2013] IEHC 32
National Asset Loan Management Ltd v Barden

Strike out

Application for order striking out matters in statement of claim – Application that claim be struck out on basis that claim before Employment Appeals Tribunal – Application for court to decline jurisdiction as prior authorisation from Injuries Board not obtained – Whether plaintiff should have first applied to Injuries board – Definition of 'civil action' – Whether *bona fide* intended to claim relief in respect of other cause of action not for purpose of circumventing operation of section – Intention to claim injunctive relief Whether plaintiff debarred from proceeding in both High Court and Employment Appeals Tribunal – Jurisdiction of tribunal - Serving of plenary summons prior to discharging of employment contract – Absence of plea of wrongful dismissal – Whether pleadings in accordance with rules of court – *Sherry v Primark* [2010] IEHC 66, (Unrep, O'Neill J, 19/3/2010); *Berber v Dunnes Stores* [2009] IESC 10, (Unrep, SC, 12/2/2009); *Pickering v Microsoft Ireland Operations Ltd* [2006] 17 ELR 65; *State (Dublin Corporation) v Employment Appeals Tribunal* (Unrep, Gannon J, 20/10/1986); *State (Ferris) v Employment Appeals Tribunal* (Unrep, SC, 10/12/1984); *Quigley v Complex Tooling and Moulding Ltd* [2009] 1 IR 349; *Eastwood v Manox Electric plc* [2004] 3 WLR 322; *Johnson v Unisys Ltd* [2003] 1 AC 518; *Mahmud v Bank of Credit and Commerce International SA* [1997] 3 All ER 1; *Lac v Chevron* [1995] 1 ILRM 161 and *Riordan v Ireland (No 5)* [2001] 4 IR 263 considered – Unfair Dismissals Act 1977 (No 10), ss 7 and 15 - Rules of the Superior Courts 1986 (SI 15/1986), O 19, rr 1 and 3 and O 20 – Personal Injuries Assessment Board Act 2003 (No 46), ss 3 and 4 - Proceedings stayed pending EAT; statement of claim to

be amended (2008/10492P – MacMenamin J – 21/12/2010) [2010] IEHC 540
Stephens v Archaeological Development Services Ltd

Time limits

Plenary action – Declaratory relief – Counterclaim – Judicial review – Certiorari – Limitation period – Whether reliefs sought by plenary action within scope of judicial review – Whether time limit applied by analogy to reliefs sought by plenary action – *Blanchfield v Hartnett* [2002] 3 IR 207; [2002] 2 I.L.R.M. 435; *BTF v Director of Public Prosecutions* [2005] IESC 37, [2005] 2 IR 559; *Dekra Éireann Teo v Minister for Environment* [2003] 2 IR 270; *De Róiste v Minister for Defence* [2001] 1 IR 190; *Dublin City Council v Williams* [2010] IESC 7, [2010] 1 IR 801; *Farrell v Bank of Ireland* [2012] IESC 42, (Unrep, SC, 10/7/2012); *Re the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360; *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104; *Murphy v Flood* [2010] IESC 21, [2010] 3 IR 136; *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301; *O'Reilly v Mackman* [1983] 2 AC 237; *Shell E & P Ireland Ltd vMcGrath* [2006] IEHC 99, [2006] 2 ILRM 299; *Shell E & P Ireland Ltd v McGrath* [2010] IEHC 363, (Unrep, Laffoy J, 4/3/2010); *Slatterys Ltd v Commissioner of Valuation* [2001] 4 IR 91; *The State (Cussen) v Brennan* [1981] IR 181 and *Wandsworth LBC v Winder* [1985] AC 461 - Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Appeal allowed (249/2010 – SC – 22/1/2013) [2013] IEHC 1
Shell E & P Ireland Ltd v McGrath

PROFESSIONS

Statutory Instrument

Physiotherapists Registration Board (establishment day) order 2013
SI 386/2013

REAL PROPERTY

Possession

Application for possession – Application for findings made in judgment to be revisited – Findings made in relation to inadequacy of letter of demand – Submission that similar letters of demand accepted by other judges – Submission that plaintiff deprived of opportunity to address issue as issue not raised by defendant – Onus of proof on applicant for possession – Necessity of demand to render unpaid monies due and payable – *Start Mortgages Ltd v Gunn* [2011] IEHC 275, (Unrep, Dunne J, 25/7/2011) and *The Wise Finance Co Ltd v John Lanigan* (Unrep, SC, 21/1/2004) considered - Registration of Title Act 1964 (No 16), s 62 – Claim dismissed (2012/237SP – Laffoy J – 12/11/2012) [2012] IEHC 459
GE Capital Woodchester Home Loans Ltd v Reade

Possession

Application for order for vacant possession – Judgment for unpaid legal costs – Monies paid in course of bankruptcy proceedings – Defendant unrepresented in settlement of bankruptcy proceedings – Contention that acceptance of monies not expressly made without prejudice to proceedings for possession – Whether sums declared to be well charged continued to be due and owing – Dispensing of usual requirement for conditions of sale be settled by counsel prior to order for possession – Interests of justice – Order for possession (2004/135SP – Finlay Geoghegan J – 8/11/2012) [2012] IEHC 410
Sheridan v Gaynor

REVENUE

Judicial review

Application for *certiorari* quashing notice of opinion – Challenge to tax avoidance transaction – Nature of inquiry – Whether notice of opinion given immediately – Whether decision made long before notice given – Whether opinion tainted by pre-judgment and apparent bias – Whether breach of natural or constitutional justice – Alleged lack of opportunity to make representations – Delay – Failure to exhaust alternative remedies – *Revenue Commissioners v O'Flynn Construction Ltd* [2011] IESC 47, (Unrep, SC, 14/12/2011); *Dellway Investment v NAMA* [2011] IESC 14, (Unrep, SC, 12/4/2011); *Treasury Holdings v NAMA* [2010] IEHC 237, (Unrep, Finlay Geoghegan J, 12/6/2012) and *Gammel v Dublin County Council* [1983] ILRM 413 considered – Taxes Consolidation Act 1997 (No 39), s 811 – Relief refused (2012/51JR – McGovern J – 27/11/2012) [2011] IEHC 500
McNamee v Revenue Commissioners

Taxation

Disclosure – Statutory powers of Revenue – Financial institutions – Right to apply to court for disclosure of bank account documents and information – Right to inspect and take copies as evidence – Customer accounts in foreign jurisdiction – Whether financial institution – Whether legislation applies to bank branches outside jurisdiction – Whether legislation has extra-territorial effect – Whether order to furnish information and documentation to be made – Whether clear that disclosure order would breach law of foreign jurisdiction – Whether order can be fashioned to obtain view of courts of foreign jurisdiction – Courts – Jurisdiction – Extra-territorial effect – Comity of courts – Whether order sought would have extra-territorial effect – Jurisdiction of court to make an order with extra–territorial effect – Rules of international law – Presumption legislature limited to its jurisdiction – Intention of legislature – Interpretation of statute - Conflict of laws – Contract – Proper law – Whether proper law of contract relevant to order sought – Whether proper law of banking contract Ireland or the Isle of Man – Test for displacing proper law – Whether banking contract governed by law of place where that account was held – Solid grounds required to displace proper law of jurisdiction where account held – Whether infringement of sovereignty of Isle of Man – Banking – Banker and customer – Duty of confidentiality – Tax evasion – Whether duty of confidentiality absolute – Public interest requirements – Whether duty of confidentiality ceased upon account being closed – *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109; *Barclays Bank Plc v Taylor* [1989] 1 WLR 1066; *Chemical Bank v McCormack* [1983] ILRM 350; *Cooper Flynn v Radio Telefís Éireann* [2000] 3 IR 344; [2001] 1 ILRM 208; *Cripps Warburg v Cologne Investment* [1980] IR 321; *FDC Co Ltd v Chase Manhattan Bank* (Unrep, Hong Kong Court of Appeal, Huggins VP, 17/10/1984, No 65); *Gladstone v Brunning* (CP 2004/146) (Unrep, Isle of Man High Court, Deemster Doyle, 7/3/2006); *In re Impex Services Worldwide Ltd* [2004] BPIR 564; *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110; *Libyan Arab Bank v Bankers Trust Co* [1989] 1 QB 728; *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co* [1988] 2 Lloyd's Rep 494; *Libyan Arab Foreign Bank v Manufacturers Hanover Trust Co (No 2)* [1989] 1 Lloyd's Rep 608; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; *Mackinnon v Donaldson, Lufkin and Jenrette Corpn* [1986] 1 Ch 482; *McCormack v Campbell* [1930] St R Qd 228; *National Irish Bank Ltd v Radio Telifís Éireann* [1998] 2 IR 465; *Northern Bank Limited v Edwards* [1985] IR 284; *In re Norway's Application (Nos 1 & 2)* [1990] 1 AC 723; *Petition of Blayney and Grace* (2001-2003) MLR 13; *Pharaon v BCCI* [1998] 4 All ER 455; *R v Grossman* (1981) 73 Cr App R 302; *Reg v West Yorks. Coroner, Ex p Smith* [1983] 1 QB 335; *Sierratel v Barclays Bank* [1998] 2 All ER 821; *Tournier v National Prudential and Union Bank of England* [1924] 1 KB 461; *Wine v Wine* (CP 2007/10) (Unrep, Isle of Man High Court, Deemster Doyle, 29/5/2007) and *X AG v A bank* [1983] 2 All ER 464 considered - Contractual Obligations (Applicable Law) Act 1991 (No. 8) – Convention on the Law Applicable to Contractual Obligations 1980, articles 3 and 4.Taxes Consolidation Act 1997 (No. 39), ss. 906A and 908 – Application refused by High Court; Appeal allowed by Supreme Court but order deferred to allow application to court in Isle of Man (2006/13MCA – McKechnie J - 4/5/2007 and 267/2007 – SC – 25/1/2013) [2007] IEHC 325 and [2013] IESC 2
Walsh v National Irish Bank Ltd

ROAD TRAFFIC

Article

Manninger, Deirdre
Take my breath away
2013 (Nov) Law Society Gazette 26

Statutory Instruments

European Union (end-of-life vehicles) (amendment) regulations 2013
(DIR/2013-28)
SI 327/2013

Non-use of motor vehicles (section 3) regulations 2013
SI 318/2013

Road vehicles (registration and licensing) (amendment) regulations 2013
SI 328/2013

SOCIAL WELFARE

Act

Social Welfare and Pensions Act 2013
Act No. 38 of 2013
Signed on 9th November 2013

Statutory Instruments

Social welfare and pensions act 2010 (section 37) (transfer day) order 2013
SI 388/2013

Social welfare and pensions (miscellaneous provisions) act 2013 (section 3) (commencement) order 2013
SI 404/2013

Social welfare (consolidated supplementary welfare allowances) (amendment) (no. 4) (rent and mortgage interest supplement) regulations 2013
SI 422/2013

Social Workers Registration Board return to practice bye-law
SI 319/2013

STATUTORY INTERPRETATION

Commencement

Interpretation - Commencement provisions – Intention of Oireachtas – Commencement of amending provision – Whether necessary for provision amending parent Act to be commenced by order where parent Act contained commencement provision – Whether commencement of amending Act sufficient to commence provision amending parent Act – Practice – Appeal to Supreme Court – Enlargement of time to serve notice of appeal - Extension of time to appeal – Discretionary order – Amendment of High Court order – Whether time limit for appeal of order can be enlarged where order amended — Whether Supreme Court may consider arguments not raised in High Court – *AA v Medical Council* [2003] 4 IR 302; *Dunnes Stores Ireland Company v Ryan* [2002] 2 IR 60; *Éire Continental Trading Co Ltd v Clonmel Foods Ltd* [1955] IR 170; *F McK v. TH (Proceeds of crime)* [2006] IESC 63, [2007] 4 IR 186; *Fagan v Dominitz* [1958] SR (NSW) 122; *Fitzgerald v Kenny* [1994] 2 IR 383; *Henderson v Henderson* (1843) 3 Hare 100; *KD (orse C) v MC* [1985] IR 697; *M v Scottish Ministers* [2012] UKSC 58, [2012] 1 WLR 3386; *Movie News Ltd v Galway County Council* (Unreported, Supreme Court, 25th July, 1977); *Podger v Minister for Agriculture* [2002] 4 IR 16 and *Rex v Minister of Town and Country Planning. Montague Burton Ltd and Others, ex parte* [1951] 1 KB 1 considered - Rules of the Superior Court 1986 (SI 15/1986), O 58 - Fisheries (Amendment) Act 1997 (No 23), s 19A(4) – Sea-Fisheries and Maritime Jurisdiction Act 2006 (No 8), s 101(c) – Constitution of Ireland 1937, Article 25.4.1° - Appeal dismissed (259/2011 – SC – 13/3/2013) [2013] IESC 16
Lough Swilly Shellfish Growers Co-op Society Ltd v Bradley

Construction

Case stated - Statute – Interpretation – Statute prohibiting giving of financial assistance in consideration for promotion of tobacco products – Words and phrases – "Financial assistance" – Role of courts in statutory interpretation – Intention of legislature – Natural and ordinary meaning – Legislative history – Statutory interpretation in penal statutes – *British & Commonwealth plc v Barclays Bank* (CA) [1996] 1 WLR 1; *Charterhouse Investment Trust Ltd v Tempest Diesels Ltd* (1986) BCLC 1; *CH (Ireland) Inc (in liquidation) v Credit Suisse Canada* [1999] 4 IR 542; *Crilly v T & J Farrington Ltd* [2001] 3 IR 251; *DB v Minister for Health* [2003] 3 IR 12; *Direct United States Cable Co v Anglo-American Telegraph Co* (1877) 2 App Cas 394; *Howard v Commissioners for Public Works* [1994] 1 IR 101; *Minister for Justice v Dundon* [2005] IESC 13, [2005] 1 IR 261; *Maher v An Bord Pleanála* [1999] 2 ILRM 198; *O'Brien v Moriarty (No 2)* [2005] IEHC 343 & [2006] IESC 6, [2006] 2 IR 415; *Rahill v Brady* [1971] IR 69 and *R v Secretary of State for the Environment, ex p Spath Holme Ltd* [2001] 2 WLR 15 considered - Public Health (Tobacco) Act 2002 (No 6), s 36 – Public Health (Tobacco) Amendment Act 2004 (No 6), s 7 – Questions answered in affirmative (2011/2108SS – Kearns P – 29/3/2012) [2012] IEHC 141
Health Service Executive v P J Carroll and Co Ltd

TORT

Medical negligence

Motor cycle accident – Alleged failure to diagnose fractures of vertebrae – Alleged failure to give appropriate advice and treatment – Denial that problems caused by negligence – Claim that development of condition caused by progression of underlying injury – Expert evidence – Worsened outcome caused by additional loss of height of vertebral body - Damages awarded (2011/2411P – O'Neill J – 9/11/2-12) [2012] IEHC 465
Greaney v Health Service Executive

Personal injuries

Road traffic accident – Head injury – Claim that struck on head by wing mirror of lorry – Submission by defendant that plaintiff walked or ran into contact with lorry – Engineering evidence – Failure to keep proper look out – Liability – Damages awarded (2009/5017P – O'Neill J – 15/11/2012) [2012] IEHC 503
Chestnutt v Coyne

Personal injuries

Trip and fall on pavement – Extent of liability as highway authority to pedestrians – Nature of pavement – Whether pavement improperly laid – Liability – Misfeasance – Nonfeasance – Whether local authority guilty of misfeasance – Possible causes of deterioration in pavement – Whether established as matter of probability that differential in slabs caused by poor specification and design or fault construction – Whether differential dangerous – Quantum – *Kelly v Mayo County Council* [1964] IR 315; *State (Sheehan) v Government of Ireland* [1987] IR 550; *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR 291; *Meggs v Liverpool Corporation* [1968] 1 WLR 689; *Littler v Liverpool Corporation* [1968] 2 All ER 343 and *McArdle v Department of Regional Development (Northern Ireland)* [2005] QB 13 considered – Civil Liability Act 1961 (No 41), s 60 - Damages awarded (2003/3273P – Cross J – 23/11/2012) [2012] IEHC 502
Loughrey v Dun Laoghaire County Council

Article

Fitzgerald, Ciara
Extending the scope of vicarious liability? E v English Province of Our Lady of Charity & others and various claimants v Catholic Child Welfare Society & others
2013 (1) (1) Irish business law review 35

TRANSPORT

Driving test

Case stated – Applicant failing driving test – Applicant appealing to District Court – Whether court limited to inquiring into whether test properly conducted – Whether court entitled to review findings of fact – Whether decision to allow appeal abrogating original test – *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 considered – Road Traffic Act 1961 (No 24), s 33 - Questions answered (2012/532SS – Hedigan J – 25/7/2012) [2012] IESC 592
Ardiff v Road Safety Authority

Act

Taxi Regulation Act 2013
Act No. 37 of 2013
Signed on 23rd October 2013

Statutory Instrument

Taxi regulation act 2003 (vehicle licensing and standards) (amendment) regulations 2013
SI 370/2013

TRIBUNAL OF INQUIRY

Library Acquisition

Mahon, Judge, Alan
The final report (Mahon) of the tribunal of inquiry into certain planning matters and payments
Dublin : Stationery Office, 2012
N398.1.C5

WHISTLEBLOWERS

Article

Kierans, Lauren
An analysis of the current sectoral approach and the proposed generic
approach to whistleblowing law in Ireland
2013 (1) (1) Irish business law review 1

BILLS INITIATED IN DÁIL ÉIREANN DURING THE PERIOD 18TH OCTOBER 2013 TO THE 14TH NOVEMBER 2013

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

Social Welfare and Pensions Bill 2013
Bill No. 101 of 2013 *[enacted]*

Finance (No. 2) Bill 2013
Bill No. 102 of 2013

Health (Alteration of Criteria for Eligibility) (No. 2) Bill 2013
Bill No. 106 of 2013

Health Insurance (Amendment) Bill 2013
Bill No. 112 of 2013

Local Government (Town Centres) Bill 2013
Bill No. 99 of 2013
[pmb] *Deputy Barry Cowen*

Censorship of Publications Board Repeal Bill 2013
Bill No. 104 of 2013
[pmb] *Deputy Niall Collins*

Restorative Justice (Reparation of Victims) Bill 2013
Bill No. 105 of 2013
[pmb] *Deputy John Halligan*

Parental Leave (Amendment) Bill 2013
Bill No. 107 of 2013
[pmb] *Deputy Patrick Nulty*

Protection of Minimum Wage Earners Bill 2013
Bill No. 108 of 2013
[pmb] *Deputy Pearse Doherty*

Cyberbullying Bill 2013
Bill No. 110 of 2013
[pmb] *Deputy Robert Troy*

Thirty-Fourth Amendment to the Constitution (Judicial Appointments) Bill 2013
Bill No. 111 of 2013
[pmb] Deputy Shane Ross

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 18TH OCTOBER 2013 TO THE 14TH NOVEMBER 2013

Oireachtas (Ministerial and Parliamentary Offices) (Amendment) Bill 2013
Bill No. 100 of 2013

Companies (Miscellaneous Provisions) Bill 2013
Bill No. 109 of 2013

Seanad Electoral (University Members) (Amendment) Bill 2013
Bill No. 103 of 2013
[pmb] *Senators Terry Leyden, Thomas Byrne, Marc MacSharry and Mary M. White*

PROGRESS OF BILL AND BILLS AMENDED DURING THE PERIOD 18TH OCTOBER 2013 TO THE 14TH NOVEMBER 2013

Child and Family Agency Bill 2013
Bill No. 81 of 2013
As amended in the Select sub-Committee on Finance

Companies Bill 2012
Bill No. 116 of 2012
Committee Amendments

Country Enterprise Boards (Dissolution) Bill 2013 [Seanad]
Bill No. 92 of 2013
Passed by Seanad Éireann

Credit Reporting Bill 2012
Bill No. 80 of 2013
Committee Amendments

Freedom of Information Bill 2013
Bill No. 89 of 2013
Committee Amendments

Gas Regulation Bill 2013
Bill No. 91 of 2013
Committee Amendments

Oireachtas (Ministerial and Parliamentary Offices) (Amendment) Bill 2013
Bill No. 100 of 2013
Committee Amendments

Social Welfare and Pensions Bill 2013
Bill No. 101 of 2013
Committee Amendments
[enacted]

For up to date information please check the following websites:

Bills & Legislation
http://www.oireachtas.ie/parliament/

Government Legislation Programme updated 18th September 2013
http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Directors' Injunctions

Ibar McCarthy BL

Introduction

The recent decisions of *Dowling & Others v Cook & Others*[1] and *Ancorde Limited & Another v Miranda Horgan & Others*[2] highlight the High Court's jurisdiction to prohibit the removal of a company director pending the ultimate determination of a section 205 oppression[3] application or a plenary claim. Prior to these cases, the last reported judgment to deal with this issue was made by the High Court in 2005 and before that, by the Supreme Court in 1998. Given that the two decisions were handed down this year in quick succession, both of which are on-going cases, and one of which is firmly in the public eye, it is time to analyse the factors likely to be considered in an interlocutory application of this nature.

Section 182 (1) of the Act of Companies Act of 1963 provides that a company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or any agreement between it and him. It is against the force and effect of this legislative power that most of these applications are taken.

The *Feighery* and *McGilligan* decisions

Feighery v Feighery[4] marks the starting point for a consideration of the jurisprudence in this area. It concerned an application by a minority shareholder and director against other family members. Laffoy J. gave due attention as to whether there was a fair issue to be tried, the balance of convenience and the question of damages as an adequate remedy. However, as a preliminary issue, she held:

> "In my view, even assuming that the petitioner has an arguable case for relief under s.205 and an arguable case that the respondents, as shareholders and directors, owe him fiduciary duties and are in breach of those duties, I must nonetheless be satisfied that I have jurisdiction to override the shareholders' statutory powers under s.182 to remove the petitioner from the board. I am not satisfied that I have such jurisdiction and none of the cases cited by counsel for the petitioner support a contrary conclusion"

Laffoy J. could find no authority for the proposition that she had the jurisdiction to grant an order restricting the removal of a director by a company, and this formed the cornerstone of her refusal of the application. However, when the Supreme Court was faced with a similar question merely ten months later, with the same dearth of case law to back the petitioner's application, it held that the facts before it warranted the granting of interlocutory relief.

In *Mc Gilligan & Others v O' Grady & Others*[5] the first plaintiff was Managing Director of a company that was engaged in arranging the investment of funds on behalf of a group of clients. It was decided to make such an investment in the fourth defendant company. Under the terms of a 1989 investment agreement, the company was to be kept fully informed of the progress of the business of the fourth defendant. In addition the agreement provided that both the plaintiffs were to be appointed as directors of the fourth defendant. The first and second defendants effectively had a controlling interest in both the third and fourth defendants, whereas the first plaintiff had a 1% shareholding in the third defendant. As a result of an offer made in 1995, the defendant became a wholly owned subsidiary of the third defendant and the first plaintiff was appointed as non–executive director thereof. Disagreements between the first plaintiff (who was safeguarding the interests of the clients) and the first and second defendants about various management decisions eventually led to the convening of an extraordinary general meeting of the third defendant for the purposes of considering a resolution to remove the first plaintiff from his directorship. That notice, along with the defendants' refusal to provide the plaintiff with financial information led to the institution of section 205 proceedings and an interlocutory application. The plaintiffs claimed that the original investment in the fourth defendant had effectively become an investment in the third defendant and sought the reliefs against the company on that basis.

Keane J. held in relation to the balance of convenience:

> "If the plaintiff is excluded from participation at the board meetings of the third named defendant and is denied the financial information and audited accounts pending the hearing of the s. 205 petition, the asset base of the company could be seriously damaged and the efficacy of the winding up order to which the plaintiffs may ultimately be entitled significantly affected. On the other side of the scales, the interests of the defendants would not appear to be significantly affected by the affording of the financial information in question or the presence of the first plaintiff at the board meetings…"

He also found that it was beyond argument that the plaintiffs had established that there was a serious question to be tried as to whether there had been oppression or disregard of the interests of the members. However, what distinguished this

1 [2013] IEHC 129.
2 [2013] IEHC 265.
3 Section 205 of the Companies Act 1963: "Any member of a company who complains that the affairs of the company are being exercised in a manner oppressive to him or any of the members (including himself), or in disregard of his or their interests as members, may apply to the court for an order under this section.
4 [1999] 1 IR 321.
5 [1999] 1 IR 346.

case from the *Feighery* case in his eyes was the existence of the 1989 agreement:

> "The defendants are admittedly acting in breach of the 1989 agreement with the bank and B.T.H. in seeking to remove the first plaintiff as director and the withholding of relevant financial information from the first plaintiff and the failure to produce audited accounts in equally a clear breach of the agreement. The agreement was expressly intended to protect the interests of the B.E.S investors and it could not seriously be disputed that these admitted breaches of its terms would afford the bank, as the nominee of the investors, not merely a case, but a strong arguable case, for relief under this section."

Having answered all the relevant questions in favour of the applicant, Keane J. failed to see any reason why the injunction should not be granted:

> "Why then should the court, on an application for interlocutory injunction, be unable to restrain the company from removing a director pending the hearing of a petition under s. 205, where he has established that there is a serious question to be tried as to whether his exclusion from the affairs of the company constitutes conduct which would entitle shareholders to relief under s. 205... I am bound to say, with all respect, that I do not understand why it should be thought that, because the relief sought in the interlocutory proceedings is not the same as the relief sought which will ultimately be sought in the s. 205 proceedings, an interlocutory injunction should not be granted on that ground alone. If it is desirable, in accordance with the principles laid down in... *Campus Oil v Minister for Industry (No.2)*..., to preserve the plaintiffs' rights pending the hearing of a s.205 proceedings and the balance of convenience does not point to a different conclusion, I see no reason why interlocutory relief should not be granted."

The *Avoca Capital* decison

Although the Supreme Court held that there existed the necessary jurisdiction to grant such relief, this does not mean that shareholders in every case will be blocked from exercising their statutory right to remove a shareholding director. *Re Avoca Capital Holdings*[6] concerned section 205 and interlocutory applications brought by a shareholding employee–director. Clarke J. found that there was a serious issue to be tried. He put much emphasis on an applicable shareholders' agreement. He held that under it, the petitioner was entitled to continue as director as long as he remained a shareholding employee. He found that an unfair dismissal action taken by the applicant had a reasonable chance of success and as such there was a serious issue to be tried as to whether his purported removal was valid.

He also referred to the agreement in considering the balance of convenience. He found that under a certain clause, the petitioner as a shareholder was entitled to full information and that the only added entitlement he enjoyed as a shareholding director was to participation at board meetings. Clarke J. found that such participation would not be in the best interests of the company:

> "Given the fraught relations between the parties, I am not satisfied, on the evidence before me, that requiring the petitioner to be involved in decision making would be in the overall interests of the company."

He could find no evidence that the board had any intention to conduct the company in a way that would be detrimental to the interests of the company as a whole or to the applicant in particular. He therefore refused the relief.

The *Dowling* Case

In *Dowling,* the petitioners are all members of Permanent TSB Group Holdings plc (the company). The Respondents are all directors of the company. The petitioners claim that certain Orders made by the High Court pursuant to the Credit Institutions (Stabilisation) Act 2010 reversing decisions made by them at an Extraordinary General Meeting and actions by the respondents blocking one of their number (Mr. Skoczylas) from discharging his duties as a director amount to oppression. An interlocutory application was made seeking a prohibition on the removal of Mr. Skoczylas as a director of the company pending the outcome of the substantive claim. This case differs from the previous cases in that there was no meeting convened to vote on the removal of Mr. Skoczylas. Here, Article 87 of the Articles of Association provide for retirement by rotation of the members of the board of directors. The directors to retire by rotation are those who have been longest serving in office since their last appointment or reappointment. Mr. Skoczylas was provided with a legal opinion which indicated that he ought to resign from the Board because he was the longest director in office since all other directors had been re-elected at the AGM on 22nd May 2012.

Gilligan J. found that the petitioners were essentially seeking interlocutory relief restraining the respondents from acting in compliance with the Articles of Association, Article 87 thereof being mandatory in nature and operating without any scope for discretion being exercised by the Directors. He further found that there was to be an AGM on the 22nd May 2013 and that no finding of fact could be made that the Board have sought to preclude him from standing for re-election or that he would not be re-elected by shareholders. He noted that Mr. Skoczylas claims to represent the interests of other minority shareholders but that no agreement exists between them and him. It is in this way that the case is distinguished from *Mc Gilligan,* where there was such an express agreement. Gilligan J. found that the balance of convenience favoured the respondents in that there were 134,000 shareholders whose rights had to be respected. This was against the 400 shareholders who had voted in Mr. Skoczlas. He also held that the application, as made by Mr. Skoczylas, was to ask the court to ignore the Articles of Association to which he agreed to be bound. Much the same as the Supreme Court in *Mc Gilligan* and the High Court in *Re Avoca* based their

6 [2005] IEHC 302

decisions on the existence of an investment and shareholders' agreement respectively, Gilligan J. gave due deference to what he regarded as a binding contract.

This decision was quickly appealed and heard before the AGM of the 22nd May. Mr. Skoczylas relied very largely on the *Mc Gilligan* and the *Avoca* cases in his submissions. However, Hardiman J. felt that there was a distinction to be made between his case and the authorities cited:

> "In the Mc Gilligan case, however, the plaintiff had been elected a director of the Company by reason of an agreement between the parties interested in the Company, which was a Business Expansion Scheme funded Company. The plaintiff was to be appointed a director in order to represent the interests of the investors. Persons interested in the Company had, accordingly, contracted to have and to maintain on *the* relevant Board or Boards a representative of a particular interest and this arrangement was being undermined by the s.182 motion. Similarly, in the *Avoca* case, the Company "essentially operated as a partnership between the members" and the conduct of the members was governed by the shareholders' agreement. It thus appears that in each of these cases, the relevant petitioner had what one might call an external title, deriving from the agreements between those interested in the Company, apart from the standing in Company Law. This feature is absent from the present case."

The *Ancorde* Case

There was no such document of influence in the *Ancorde* case. This related to two sets of plenary proceedings rather than a section 205 application. The proceedings had at their core a dispute as to the ownership of 33% of the company in question. The interlocutory application with which we are concerned sought an order restraining the defendants from purporting to transfer the applicant's shares to a third party and an order restraining the defendants from removing him as a director of the company. Laffoy J. found that the defendants' objective was to remove the applicant on the basis that a third party was now the legal and beneficial owner of his shareholding and as such, the defendants and the third party had the capacity to vote him out of office. The court determined that there was a fair issue to be tried as to whether, in fact and in law, the third party had acquired the applicant's shareholding and that there therefore was a fair issue to be tried as to whether the defendants had the authority to remove him as a director. .

Laffoy J. then inquired as to whether damages would be an adequate remedy for the applicant. She held that it would not:

> "By way of general observation, I think it is important to emphasise that, as regards both the shareholder issue and the directorship issue, essentially the only remedy that would be adequate for the successful party is the protection of his or her ownership of the shares and the rights and privileges attaching to them. It is for that reason that I find that damages would not be an adequate remedy for the claimants on each application for interlocutory relief"

Finally, she linked her holding on the balance of convenience to her decision on the adequacy of damages:

> "Given that, in this case, the interest which is sought to be protected by interlocutory relief is the ownership of shares in the Company and the entitlement to exercise the rights and privileges attaching to the shares, and having found that damages would not be an adequate remedy if those interests were not protected pending the trial of the action, I have come to the conclusion that the lesser risk of injustice and, accordingly, where the balance of convenience lies, is in protecting those interests by an interlocutory injunction"

Laffoy J. put much emphasis on the fact there was a dispute as to the ownership of the shares in question and felt that grave damage could be done to the interests of the applicant had she not granted the orders and he was then ultimately successful at the substantive hearing.

Conclusion

It is clear that the courts are reticent about interfering with shareholders'statutory right to remove a director. However, the Courts recognise that shareholders do not have an absolute right. As Barron J. held in *Mc Gilligan:*

> "The essence of the instant case is that no absolute reliance can be placed upon a statutory right given to the general meeting of a company when the exercise of that right is alleged to be wrongful; in this case a breach of the provisions of s. 205 of the Companies Act, 1963. In all such cases, the determination of the issue as to the granting of interlocutory relief must be dependent upon the general rules applicable"

However, on both occasions when applications of this nature have reached the Supreme Court, the presiding judges have placed great emphasis on what Hardiman J. describes as "external title". Whilst Laffoy J. in *Ancorde* did grant injunctive relief without the presence of such title on the facts before her, it is clear that, whenever present, an external agreement will hold at least as much and arguably more influence than the general rules. ■

The Rule of Law: What it is and What it does*

Brendan Gogarty BL

Introduction

The concept of the rule of law is not particularly new. It has engaged the minds of philosophers from many different traditions for millennia. Aristotle in his treatise on "Politics" observed that "The rule of law is better than that of the individual." The nature of the rule of law has slowly evolved in tandem with political and legal thought. Its modern expression is embedded in the Charter of the United Nations and in the Universal Declaration of Human Rights. In essence, the rule of law envisages legal systems that provide access to justice, systems which administer justice fairly and which provide constitutional protections for individual rights.

The O.S.C.E. in its Copenhagen Document of 1990, paid particular attention to the rule of law. Its member States committed to "support and advance those principles of justice which form the basis of the rule of law" and recognised that "the rule of law does not mean merely a legal formula which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and the full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression." These are not lofty words of pious intent. At present, the European Rule of Law Mission to Kosovo (Eulex Kosovo) has over 2000 personnel devoted to its work, at the cost of hundreds of millions. Such work is not welcomed by all, as is clear from the September gun attack on Eulex staff, leaving several injured and a Lithuanian colleague dead. Evidently the rule of law threatens those who profit by its absence.

Difficulties of Definition

On the face of it, the concept of the rule of law should lend itself to a relatively straightforward definition, setting out its component parts. Approaching a definition at the international level, where States are subject to binding international laws, agreements, declarations and treaties, is a somewhat less difficult task than definition at the national level. This is so as different regions and countries have different legal systems, cultures and traditions. In certain countries the legal system is an amalgamation of various legal systems. The rule of law as it applies to common law or to civil law jurisdictions would appear to be free of complication. However even within these " legal families" complications may arise. In the case of Canada, its national legal system belongs to the common law tradition, while the legal system of Quebec belongs to the civil law tradition. In Latin American countries with significant indigenous populations e.g. Guatemala, civil law applies at the national level with indigenous law being evident at the district level. Guyana, with a British colonial past, has a common law system at the national level, together with indigenous law being evident in amer-indian districts. Consequently a "one hat fits all approach" definition of the rule of law is not without its difficulties.

Definition

The Secretary-General of the United Nations in his report: *The rule of law and transitional justice in conflict and post-conflict societies (2004)*, defined the rule of law in the following terms:

> " A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights, norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

This definition has at its heart, accountable government, protection of fundamental rights and accessible justice which is under-pinned by an independent judiciary.

Universal Principles

The World Justice Project, when devising its rule of law index, identified the rule of law as being a system in which four universal principles are upheld:

1. The government and its officials and agents as well as individuals and private entities are accountable under the law.
2. The laws are clear, publicised, stable and just, are

* This article is the second in a series of three articles examining the rule of law. The first article "*Democratization and the Rule of Law*" (Bar Review: July 2013) considered the importance of democratic structures to the rule of law. This second article examines the evolution of the rule of law and future developments. The third article takes a specific example of the use of rule of law tools in post conflict societies, namely the role of Truth Commissions in Guatemala. The author has been a member of missions with the U. N. and the O.S.C.E. in the Balkans and Latin America.

applied evenly, and protect fundamental rights, including the security of persons and property.

3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals, who are of sufficient number, have adequate resources, and reflect the make-up of the communities they serve.

Importance

Without a commitment to the rule of law, it is easy to see why the protection of an individual's rights would be in doubt. Arguably it is the basic pillar upon which the protection of human rights rests. Should that pillar not be embedded in a system of good governance/laws, there would be no effective legal protections, particularly in the criminal justice system.

Without judicial independence, it is difficult to be confident that fundamental rights would be protected. This being so, it falls on the Courts to ensure that no-one is above the law and to further ensure that remedies are applied, as appropriate. Apart from the important matter of fair adjudication in individual cases, it is vital to the rule of law that the Courts may independently exercise their powers of judicial review and, further, may safely be " a thorn in the side of authority", as is sometimes necessary.

The U.N.'s "Basic Principles on the Independence of the Judiciary" forms part of its strategy towards strengthening the rule of law. Likewise, the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010) is another example of international efforts to promote measures essential for judicial independence, including measures dealing with selection criteria and procedures.

Recent Developments

On the 24th September 2012, a "High-Level Meeting" of the 67th Session of the U.N. General Assembly was convened in New York. This meeting was unique and was of considerable importance to the evolution of the rule of law. It was the first meeting ever held at such a senior level and solely concerned with the rule of law both at the national and at the international levels. This meeting, which was attended by more than 65 Presidents and Ministers of Government, illustrates the increasing importance attached by the international community to rule of law principles.

In July 2013, and in follow-up to the "High-Level Meeting", the Secretary-General submitted a detailed report which highlighted rule of law activities carried out further to the Declaration of the High-Level Meeting of the 67th General Assembly on the rule of law at the national and international levels.

Apart from the central role played by the United Nations, several other international bodies have been actively promoting the rule of law throughout 2013. The Organisation for Security and Cooperation in Europe (the O.S.C.E.) promotes rule of law principles under the umbrella of the Office for Democratic Institutions and Human Rights (ODIHR). The European Commission for Democracy through Law (the Venice Commission),which is the Council of Europe's advisory body on constitutional matters, also works with ODIHR in strengthening the rule of law, particularly in former Soviet-Bloc countries. In July 2013, representatives of the 57 participating States in the O.S.C.E. convened a major rule of law conference in Vienna, on the topic the " Rule of Law in the Promotion and Protection of Human Rights".

Doubtless, some may wonder as to whether or not these various international conferences and commitments lead to material changes "on the ground". The O.S.C.E. has an active presence in the Balkans e.g. Albania. Having recently returned from an O.S.C.E. mission to Albania, I have witnessed at first hand the practical implementation of international commitments and the beneficial effects such implementation has upon host countries.

Key Achievements

The rule of law, in its modern inception, has major achievements to its credit both at the national and at the international levels. However, in my view, its primary achievements to date have been in relation to international criminal justice. Perhaps this is not a surprise in an age of violent conflicts and the apparent inevitability of war crimes. It is now 11 years since the creation of the International Criminal Court, established as a permanent autonomous institution under the Rome Statute. Furthermore it is now some 20 years since the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR). A feature of the crimes committed was the absolute sense of impunity enjoyed by the perpetrators. This is all too evident in General Dallaire's disturbing book *Shake Hands with the Devil*, concerning his time as force commander of the U.N. mission to Rwanda. Heads of State were not exempted from these international criminal mechanisms, thereby dismantling a tradition of impunity for war crimes. The work of the criminal tribunals has been an assurance to humanity that impunity has been replaced by a culture of accountability. The indictment for genocide of Bosnian Serb leaders, for the massacre of some 8000 Muslim men, women and children at Srebrenica in July 1995 was of major importance to the rule of law and to demands for accountability.

Future Developments

The rule of law at the national and international levels is necessarily interconnected. Obviously, international laws, standards and determinations will eventually impact upon the national level. On the other side of the coin, the quality of that impact is dependent on the degree to which international norms are implemented at domestic level. As there have been considerable rule of law successes in the international criminal justice arena, it is to be expected that the decisions of the ICC and international criminal tribunals will have national impacts in the longer term.

Traditionally, the rule of law has been viewed from a human rights/criminal accountability perspective. But a stable system of laws benefits society in the broader economic sense. The rule of law is now also seen as having a direct relevance to economic growth and prosperity. In

March 2012, the Legal and Constitutional Affairs Division of the Commonwealth Secretariat convened in partnership with the Zambian Judiciary at Livingstone in Zambia. The rule of law and proper regulation was deemed to be key to attracting investment.

The evolving importance of the rule of law to international trade and commerce was also evident at the "High-Level Meeting" of the 67th General Assembly concerning the rule of law at the national and international level and at which the United Nations Commission on International Trade Law was represented. This is a further significant indication of the importance of the rule of law in assisting sustained economic growth and eradicating poverty.

Conclusion

Many Bar Associations, including the Irish Bar, participate in rule of law programmes. The American Bar Association is a world leader, with programmes in over 60 countries. Promotion of the rule of law is vital to sustaining human and economic rights. This is particularly true of countries emerging from conflicts and with weak or non-existent legal systems. It is hoped that this article sheds some light on what the rule of law is, what it does and what its absence means to those who are without it. ■

International Arbitration – Risks, Challenges and Opportunities*

His Honour Judge Mark Pelling Q.C., Chancery Judge of the Northern Circuit of England and Wales

Introduction

I practised at the Bar in London from Monckton Chambers and latterly at 3 Verulam Buildings, both in Grays Inn. During that time and while a junior and after I took silk, I undertook a substantial amount of domestic and international arbitration work both in London and elsewhere. At various stages of my career, I acted for commercial and state Government clients in India, Bangladesh, the UAE, and Russia as well as other more familiar locations in Europe. I was a qualified Adjudicator and Mediator. As well as acting as mediator in both commercial and construction disputes, shortly before appointment to my present post I sat as chairman of an Arbitral Tribunal hearing an international arbitration sitting under the Rules of the LCIA.

In London I acted on behalf of a number of UK and non-UK based clients in international arbitrations in both the commercial and construction and civil engineering sectors.

The variety of disputes that I became involved in was I suppose what you would expect of a non-marine commercial practitioner. There were disputes concerning concession agreements between Governments or titular heads of state on the one hand and their counter parties on the other; there were disputes concerning long term management agreements relating to everything from ships to land mark buildings and enterprises of various sorts; there were disputes concerning long term raw material supply contracts, sale and supply agreements and syndicated loan agreements. There were disputes between service supply entities and their general agents, particularly in the airline sector. Many and perhaps most of the arbitrations that I was involved in were subject to institutional rules – primarily the LCIA and ICC – though some were not. At various stages I appeared before Professors of law and legal practitioners from England, various European and Middle East jurisdictions and was instructed not merely by Solicitors in London but under the Overseas Practice Rules by lawyers from the USA, from various states in the Middle East as well as by in-house legal counsel in similar jurisdictions. I was lucky enough to work with and against practitioners in India, Bangladesh, Russia, the UAE and various European jurisdictions.

In the end for me the abiding interest of the work was not so much the cases themselves, but the places that I was privileged to travel to and work in, the local client representatives and local lawyers that I was able to work with and the cultural, commercial and legal insights they offered.

The Relevance of Comparative Law

At a technical level international arbitral practice is one of the few areas of professional legal activity where an interest in comparative law has a practical as well as academic significance. I have long considered that the professional war stories of retired barristers are best avoided both by teller and recipient and I promised myself I would resist. However, an illustration of the challenges that can arise concerned a dispute that arose under a contract that was expressly governed by the Law of one of the Gulf States. At the time when the contract had been entered into the law of contract in relation to non-domestic party contracts in the State concerned had been the Trucial States Contract Ordinance. This law dated back to the period prior to the UK's retreat from East of Suez in the early 1970s and was in very large part a reproduction of the Indian Contract Act, which as we all know was a 19th Century codification of the common law of contract. Time passed, the UK retrenched westwards and the state concerned was born. Her birth coincided with what is sometimes referred to as the Pan Arabic movement, which in legal terms led to a number of different Gulf and other Arab Peninsular states adopting Civil Codes that were and are very similar in nature. The common origin of these Codes was the Egyptian Civil Code drafted by Professor Sanhoury, regarded by many as the father of modern Islamic jurisprudence, which in turn owed much to the Napoleonic Code and thus to the Civil law tradition. By the time of the dispute with which I became concerned, it was necessary to consider the effect of a Civilian legal code with its emphasis of strict compliance with contractual obligations subject to the broadly mitigating effects of the doctrines of Good Faith and Abuse of Right on a contract drafted entirely on the assumption that it was governed in effect by English common law.

The interesting aspect of all this was that in relation to the issues of law that arose (and there were a number) the conclusions that were reached were similar whichever system of law was applied although the routes by which those conclusions were reached were very different. There were two references. The first was heard by a panel consisting of three retired English Court of Appeal judges and was unsurprisingly unanimous. More significantly, the Tribunal

* This article was first delivered as a speech by HHJ Pelling QC on 18 April 2013 at the Dublin International Arbitration Centre at the launch of the British Irish Commercial Bar Association

in the second reference consisted of a retired law lord from England and Wales, a Professor of Law from Belgium and a Professor of law and practicing lawyer from Denmark but the outcome was a unanimous final Award as well.

Ireland and International Arbitration

It is clear that Ireland and the profession in Ireland have embraced the world of International Arbitration. On 8th June 2010, The Arbitration Act 2010 took effect in relation to all arbitrations commenced in Ireland after that date. At a stroke, it replaced all previous arbitration statute law and gave effect in Ireland to UNCITRAL Model Law. The profession has invested heavily in this wonderful facility in the clear expectation that arbitration both domestic and international will become an increasingly important part of the commercial and legal life of this country. For outsiders, the question that naturally arises then is why parties might choose Dublin as a venue or Irish jurists as arbitrators – in other words for users and for jurists alike what are the risks, challenges and opportunities.

In my view to answer those questions requires some consideration of the principles that underlie the choice of arbitration over state court systems and the factors that influence choice of particular arbitral seats and arbitrators. The limited insights that I can offer are those of an English common law lawyer – they are not intended to offer any useful commentary on the Irish law of arbitration. Where I touch on Irish law I hope you will forgive any errors that might emerge.

Why Choose Arbitration?

Why choose Arbitration over the state Courts? From an English and I suspect an Irish perspective, the answer in relation to domestic contracts may well be a very narrow one. The Courts are well respected. They offer reasonably speedy determinations and are staffed by competent Judges assisted in their task by a vibrant profession and committed support staff. Even allowing for increased court fees it is likely at any rate in England and Wales that it will be cheaper to litigate than to arbitrate because arbitrators fees, the cost of hiring facilities such as this and the fees that have to be paid to arbitral institutions such as the ICC, LCIA and others in combination will be more than court fees.

The factors that will influence the decision therefore are likely to be limited. In the banking and financial services, commodities trading, shipping, construction and engineering sectors, it may be because arbitration provides the best opportunity of obtaining a truly specialist tribunal to resolve what may be a highly technical dispute or one that requires an instinctive knowledge of the particular market concerned or the practices and conventions by reference to which particular trades are carried on. This type of arbitration is likely to be most effective where the issues are technical rather than legal. If the dispute concerns the quality of a consignment of coffee that has arrived in Tilbury and was purportedly rejected on discharge, a speedy resolution by a panel of professional coffee traders and brokers may provide precisely the solution required.

The other significant factor is likely to be confidentiality. This is not the time or place to attempt a comprehensive analysis of the scope of confidentiality and privacy in arbitration beyond acknowledging that both have for many years been assumed to be the general rule in English Arbitration law though subject to exceptions[2]. The importance of this factor to commercial parties is not to be underestimated. It is frequently identified in the academic literature as being a major advantage over state court litigation and was so identified in the Departmental Advisory Committee on Arbitration Law that led to the UK Arbitration Act 1996 where at Paragraph 12 the Committee's conclusions were expressed in these terms:

> "… users of commercial arbitration in England place much importance on privacy and confidentiality as essential features of English arbitrations (e.g. see survey of users amongst the Fortune 500 US Corporations conducted for the LCIA by London Business School in 1992). Indeed, as Sir Patrick Neill QC stated in his 1995 Bernstein Lecture, it would be difficult to conceive of any greater threat to the success of English arbitration than the removal of the general principles of confidentiality and privacy"

Therein lies an opportunity. Most but not all jurisdictions adopt this approach. It is as much a point in favour of arbitrating in Ireland, where I understand a broadly similar approach is or is likely to be adopted, as it is in England.
More generally for those undertaking business with foreign based counter parties, the drivers towards arbitration over state court litigation will include each of the factors that I have mentioned already but are likely to be more wide ranging.

First, there is likely to be a natural nervousness about allowing a counter party the hometown advantage of litigating in the courts of the state where it has its economic seat. That concern is likely to be heightened if the putative contract is to be subject to the law of the counter party's home state. There may be a perceived risk based on a lack of familiarity with the principles of law that might be applied, with the procedures that might be adopted or the delays that might occur and the language used by the Court. Two examples again from my own professional experience illustrate the likely drivers.

Examples of International Arbitration

In the late 90s' I was involved in an arbitration on behalf of an Indian Company arbitrating against a counter party in relation to a major infra structure project located in India The arbitration was to be in London under the LCIA Rules.

2 See by way of example *Dolling-Baker v. Merrett* [1990] 1 WLR 1205 *per* Parker LJ at 1213E-H: *"As between parties to an arbitration … there very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for or used … or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award and indeed not to disclose in any other way what evidence has been given by any witness in the arbitration … it an implied obligation arising out of the nature of arbitration itself …"* For an analysis of the exceptions, see *Ali Shipping Corporation v. Shipyard Trogir* [1999] 1 WLR 316 *per* Potter LJ (as he then was) at 326H-327C, where the general rule was held to extend to pleadings, written submissions and the statements of witnesses – see 327C-D.

I asked why this particular solution had been adopted. The answer was simple – it then took approximately 15-20 years for a claim started in the High Court in Mumbai to be completed. The Indian SC that I worked with on that arbitration visited Manchester a couple of years ago now to see the new Civil Justice Centre. Over lunch I enquired whether anything had altered. The answer concurred in by his colleagues was that it had not. It does not require much imagination to appreciate that such a delay is likely to be wholly unacceptable to commercial parties and how such a situation could be used to tactical advantage. I was told that all properly drawn commercial agreements involving projects in India or entities based in India at that time would include an arbitration clause[3].

Another example comes from the Arab Middle East. A number of Gulf states have local laws that prohibit Government controlled entities from entering into contracts that provide for disputes to be resolved other than locally but are accepted by most governments concerned as permitting arbitration providing that it is conducted in accordance with the laws of the state concerned and in the state concerned. Faced with the choice of resolution of any disputes before a state court and resolution by arbitration where there is a degree of freedom concerning the choice of arbitrators and an opportunity to incorporate the rules of an arbitral institution, the choice is likely to be regarded as obvious.

Choice of Forum

What then is likely to inform choices of forum. It is likely that issues concerning cost, speed and the prospect of early finality will inform the choice. Finality is what commercial parties crave most. Thus they are likely to choose an arbitral seat where local law minimises the possibility of judicial interference in the arbitral process.

One of the reasons why there was a fundamental review of the law of Arbitration in England in the mid 1990s was because of international criticism that the Courts interfered more than they should in the arbitral process. The underlying rationale of the Arbitration Act 1996[4] was to discourage delay, curb expense, severely curtail the circumstances in which the courts would interfere in the process and to limit interventions by the courts to those that supported rather than displaced party autonomy. The circumstances in which the court is able to interfere with the conduct of an arbitration is limited to statutorily defined (and closed) classes of serious irregularity[5] and only then where substantial injustice can be demonstrated. There is also a very limited appeal route[6].

The Right of Appeal

This last mentioned power is one that was controversial at the time and is a significant difference between the Irish Arbitration Act 2010 and the English Arbitration Act 1996. The English solution is superficially inconsistent with party autonomy and its capacity to add cost and delay could arguably have made England a less attractive forum as a result. In practice however that does not seem to have been the effect, largely because leave is required before an appeal can be launched. The Civil Procedure Rules that apply to such appeals provide for leave to be considered in the first instance on paper thereby avoiding expensive and time consuming oral hearings in unmeritorious cases and the hurdle that has to be overcome if leave is to be granted is a high one. Any further appeal requires the permission of the Judge hearing the original appeal. If that is refused, permission cannot be obtained from the Court of Appeal. Finally the parties are expressly enabled to contract out of the appeal mechanism if they choose to do so.

The Arbitration Act 2010 gives the Model Law the force of law in Ireland. Article 34 of the Model Law, as amended, limits challenges to awards to areas that include only challenges based on incapacity, lack of notice of commencement, lack of jurisdiction, a departure from the procedure agreed by the parties, a conflict with public policy of Ireland and the subject matter of the dispute not being capable of settlement by arbitration under the law of Ireland. The ability of a disappointed party to challenge an award on the basis of an error of law has been abolished.

This I believe represents both an opportunity and a challenge. It is an opportunity because the effect of these provisions in particular has been to maximise the opportunities for delivering a final award quickly and at a relatively modest cost. However it also means that far more responsibility rests on the shoulders of arbitrators to be procedurally proactive in managing the reference to a conclusion, personally punctilious in delivering Awards within a reasonable timescale and substantively correct in the final result.

Commercial parties and particularly those with dispute resolution options in a large number of different jurisdictions are risk averse. The risk of a slow and expensive process or of an obviously incorrect result that cannot be corrected, is not likely to be attractive. All the appealing to party autonomy in the world will not provide an answer for even the most radical proponent of that concept could not seriously contend that the parties have agreed that the tribunal will obviously misapply the law that parties have chosen to govern their contract. It was this point that led to the inclusion of the limited right of appeal in the English Act.

3 India substantially adopted the Model Law in 1996 when India's Arbitration and Conciliation Act became law. India has been a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1960.

4 The Arbitration Act 1996 came into force in relation to arbitrations started on and after 31st January 1997 under an arbitration agreement whenever made where the seat of the arbitration was England Wales or Northern Ireland. The stimulus for its enactment was the UNCITRAL Model law that was first produced in 1985. The Departmental Advisory Committee was established following this event and was chaired initially by Mustill LJ (later Lord Mustill). It reported in June 1989 and recommended that the Model law should not be adopted in England Wales and Northern Ireland. A draft Bill and consultation document was circulated by the DAC (by then chaired by Lord Saville) in February 1994. The DAC report that followed suggested that the first draft Bill did not command sufficient support. It was re-drafted and recirculated for consultation in July 1995. It was this draft that formed the basis of the Arbitration Act 1996.

5 s.68 Arbitration Act 1996.

6 s.69 Arbitration Act 1996.

An Error of Law

The risk of a gross error of law is very unlikely to be an issue in references where the arbitrators concerned are practicing lawyers or former judicial office holders because each bring to bear a wealth of experience to the process and are unlikely to be appointed unless they are regarded as being outstanding in their profession. The problem is more likely to arise where non-lawyers are appointed arbitrators. This is not obviously the fault of the arbitrators concerned. They are not appointed for their skills as lawyers but for their skills as accountants, surveyors, architects, insurance and financial services professionals, shipping industry professionals and the like. Errors can occur however, even where the arbitrators are lawyers who are familiar with the relevant substantive law, and the absence of a safety valve to enable gross errors of law to be corrected may be a step too far, particularly where very substantial sums are likely to be at stake.

It is interesting to note that while continuing professional education has been a feature of the professional life of practising lawyers and other professionals for a number of years and increasingly for judges, arbitrators are unregulated by anyone other than their parent professional bodies. No one has yet suggested that those who are eligible for appointment as arbitrators should be able to demonstrate minimum levels of training specifically in the skills taught for example by the Chartered Institute of Arbitrators – probably because to do so might be perceived as being itself an interference with party autonomy and would probably be regarded as unacceptable to trade associations that undertake highly specialist arbitrations by arbitrators who are experienced market professionals.

As I have said, those who are parties to international arbitration agreements will have choices available to them. Ireland is not the only jurisdiction to have moved towards either adopting the Model Law or most of it in recent years. Over 60 States or States within Federal States have adopted the Model Law or have substantially adopted the Model Law.[7] In Europe, Germany (1998), Spain (2003), Denmark (2005) and Austria (2006) and many others have adopted that course. Others however have not. I venture to suggest however that Ireland's major competitor in the International Arbitration market will be England and that one of the distinctions between the two is that which I have identified.

Delay

Earlier, I noted that a slow and expensive process is unlikely to recommend itself to commercial parties with choices. This represents both a challenge and an opportunity. It might be thought that large organisations are immune to the economic effects of a slow and expensive process. They are not. In 2008, two general counsel of a multi national company[8] defined what customers sought as being "… *fairness efficiency (including speed and cost) and certainty in the enforcement of contractual rights and protections …"*. Delay is significant for any number of different reasons. Very often, arbitrations concern major players in specialist markets for whom the existence of an unresolved dispute can be a disincentive for undertaking new work, or can disrupt the orderly progress of other transactions. Unresolved disputes delay the receipt of what is due and affects the way in which the financial state of a company is reported while matters remain unresolved. Aside from that, there are obvious forensic difficulties that arise from delay – witnesses move jobs, retire or die, documentation is dispersed and recollections dim.

The Stages of Arbitration

There are broadly three stages to an arbitration – From reference to appointment of the Tribunal; from Appointment of the Tribunal to completion of evidence taking and submissions and from completion of evidence taking and submissions to publication of the Award. Each can be a cause of delay. Most international arbitrations are institutional rather than ad hoc and thus the appointment of arbitrators may to an extent be in the hands of the arbitral institution concerned.

The main areas where a Tribunal can make a difference so far as delay is concerned is in the time taken to complete the second and third stages. It was a recurring feature of these types of arbitration while I was in practice that serious delay occurred in the publication of Awards. This was particularly so where as is usually the case with high value arbitrations, the tribunal consisted of three arbitrators. Some delay where each was based in different countries or even continents might be justifiable. Where all three are based in London, it is less so. I became a Judge in February 2006. Things have not changed. In 2012, Berwin Leighton Paisner, a major London law firm with an established presence in the international arbitration market published some research on this topic[9]. The sample was a small one of some 70 established practitioners in the field based in different parts of the world. Its findings are significant nonetheless. Of those that took part, 86% thought 3-6 months was an acceptable time for publication of an Award but none considered a delay of more than a year was acceptable. Sixty six percent of those canvassed had reason to be dissatisfied with the time that they or their clients had to wait for an Award. Twenty five percent of those canvassed had complained to the Tribunal concerned about delay and 58% thought that arbitral institutions should do more to ensure that awards were published in a timely fashion. The message is clear: those who work in the field are likely to appoint as arbitrators those who can and will minimise delay. It is perhaps significant that the expectation in England now is that Judges will deliver fully reasoned judgments within 3 months of the completion of the case. The expectation of arbitrators ought to be no less.

In relation to the second of the three broad stages of a reference I have mentioned, there is again a challenge and an opportunity. The theory of international arbitration is that it is supposed to provide a private mechanism that is applied by agreement of the parties to the resolution of a dispute in a

7 See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

8 Mcllwrath and Schroeder, *The View of an International Arbitration Customer: In Dire Need of Early Resolution* (2008) 74 Arbitration 3. For a valuable summary of the material on this topic see Mulcahy, Carol: *Delay in Arbitration: Reversing The Trend* (2013) 79 Arbitration 1.

9 http://www.blplaw.com/media/pdfs/Reports/BLP_International_Arbitration_Survey_Delay_in_the Arbitration_Process_July_2012.pdf

manner that does not suffer from the perceived defects of a state court – cost complexity and technicality. All too often, however, the process takes on all the features that might be expected of a piece of litigation passing its way through the state court. Pleadings are exchanged, expert reports are exchanged, witness statements are produced and discovery (disclosure as English lawyers now call it) takes place, followed by inspection and then a hearing follows, which in everything but name is a civil trial without robes.

It was this approach that led one probably exasperated Australian Judge[10] to observe recently in an appeal from an arbitral Award that the process appeared to offer no advantage over commercial litigation where "…*a commercial trial judge would have ensured more speed and less expense* …"

Case Management

As I have said already, most international arbitrations are institutional. Most of those institutions have rules that enable arbitrators to control the process if disposed to do so[11]. One party (usually the party initiating the reference) will be anxious to proceed. The party defending the proceedings may not be. In those circumstances, the arbitrator's case management role is engaged. I suggest that in such circumstances and to the extent permitted by the rules applicable to the arbitration, the tribunal can and should consider with care how most speedily and effectively to identify the issues that need to be resolved, and the evidence that is required.

It may be that a single issue can be identified that if resolved ahead of all other issues may result in early settlement of the dispute. If the issue is one that concerns the true meaning and effect of an agreement, why not focus on that at least initially? Is an oral hearing necessary? Often the evidence relevant to a construction issue is not contentious. If that is so, what does an oral hearing add that is not catered for by full written submissions and why cannot the risk of something arising be catered for either by provision for a tribunal directed further round of written submissions, or by the reservation of a right to call an oral hearing if necessary? It is after all how most disputes are resolved in civil law jurisdictions where the norm is at most a very short oral hearing measured in hours rather than days, even where there are contested issues of fact. Many arbitrations in civil law jurisdictions follow that pattern. While at the Bar, I acted for a commercial entity with a quality dispute concerning some big ticket mining equipment. The contract was subject to an arbitration agreement requiring the arbitration to be conducted before a single arbitrator in English in Zurich. That arbitration was conducted throughout as a paper exercise.

Is expert evidence really necessary? If so, can the tribunal circumscribe it by directing expert meetings to narrow and agree issues? Do the rules permit concurrent expert evidence at a hearing – a hot tub in which all experts of the same discipline are called at the same time with a quasi inquisitorial process following which the tribunal starts and the party's lawyers are given a short opportunity after that to bring out any point not at that stage dealt with to their satisfaction. This process originated in Australian state court proceedings and has been tested in England in the Mercantile Court and the Technology and Construction Court, and latterly, the Chancery Division in Manchester District Registry. It has now become enshrined in the English Civil Procedure Rules. It has the capacity to save substantial amounts of time in what is the most expensive part of a trial – an oral hearing attended by experts. It does of course mean that the workload of the tribunal increases significantly but the benefits in terms of helping deliver an affordable and expeditious result are significant too. It is interesting to note that in almost every case where concurrent evidence was directed, agreement was reached. If the prospect of a concurrent approach focuses the minds of experts ahead of trial so that in the end, expert evidence is not required, that is of itself progress.

Why Choose Ireland?

I have so far focussed primarily on process. It remains the case however that all the major arbitration centres and institutions have recognised the need to address some or all of the points that I have so far mentioned. The question remains: does Ireland have a unique selling point and if so what it is. This question arises at an interesting time for those in the field. As the opening lines of an article in the Law section of the Times published recently noted[12] "*London's dominant position in international arbitration is under growing threat from abroad*". I have asked former colleagues at the Bar in England with significant arbitration practices both as advocates and arbitrators, what they perceive to be the big issues. Two were identified to me.

The first concerns the way in which legal arbitrators manage their practices. As you will be aware, international arbitration focuses primarily on the shipping, carriage of goods, commercial and construction and engineering sectors of the legal market. Most of the barristers in London who practice in those sectors are to be found in a limited group of sets of chambers. Most of those who are regularly appointed as arbitrators are either practicing members of those chambers or are retired judges who were formerly members of those sets. For many years, it has been the convention that retired judges return to those chambers as arbitrator members when they leave judicial office. Many who are not familiar with the way in which the English Bar carries on business are increasingly uncomfortable with situations in which the arbitrator is apparently operating from the same set of chambers as one of the advocates in the case.

In English law, the test applied in deciding whether there is sufficient apparent bias to justify requiring either the arbitrator or barrister to withdraw is whether the circumstances are such as to give rise to justifiable doubts as to an arbitrator's impartiality. This has led to the general rule in England being that in the absence of a personal connection between the barrister and arbitrator concerned, a barrister may properly accept appointment as an arbitrator even though a barrister from the same set of chambers is representing one of the parties[13]. This approach has been followed I understand by the LCIA. However, the International Centre For Settlement

10 *Westport Insurance Corp. v. Gordian Runoff Ltd* [2011] HCA 37 (Heydon J).

11 e.g. Articles 14.2 LCIA Rules and Article 22 of the ICC Rules.

12 Jonathan Ames: *London's Arbitration Role Under Threat?*

13 See Kendall: *Barristers' Independence and Disclosure* (1992) 8 Arb Int 287, Para. 102 of the DAC Report (Feb.1996) and *Laker Airways Incorporated v. FLS Aerospace Limited* [1999] 2 Lloyd's Rep 45, noted

of Investment Disputes (ICSID) took a different view relatively recently,[14] where a relevant consideration in deciding the fact sensitive question of apparent bias was said to include *"… the fact that the London Chambers system is wholly foreign to the Claimant …"*. The outcome in that case was that the barrister concerned was required to withdraw, both parties having expressed the view that they did not want the Chairman to resign. This outcome was all the more startling because the arbitrator concerned was a door tenant and not a full member of the chambers concerned.

I do not believe that the objection is reasonable for any number of reasons including the fact that chambers are not partnerships but a mechanism by which expenses can be shared[15]. That view is not universally shared, however, even by experienced English international arbitrators. Moreover, my understanding is that the current practice of the ICC is to refuse nominations as arbitrators from parties represented by barristers in the same chambers as counsel for one of the parties. However, the reasonableness of the concern is not the central relevant point. Party perception is what matters.

Two years ago, a City law firm with a significant international arbitration practice carried out some research amongst practitioners across the world concerning the impact of this issue[16]. The findings are striking. Sixty five percent of the lawyers responding viewed the prospect of counsel for one of the parties and one of the arbitrators coming from the same set of chambers negatively. When the focus of the question changed to client perception, 78% of the lawyers approached believed their clients would not be happy with barristers from the same set acting as arbitrator and appearing for one of the parties. The significant point therefore is that the problem is seen as being one of client perception. The solution for members of chambers, whose only practice is to accept appointment as arbitrators, may be to establish arbitrator only chambers. However that solution cannot work for barristers who practice both as barristers and arbitrators. For English-speaking arbitrators, with a strong common law background and extensive commercial law experience who are not tenants or door tenants in such sets, the opportunities are obvious.

The other issue that was seen as representing a significant opportunity arises from one particular commercial sector, which traditionally generates a significant amount of international arbitration business. The non-marine insurance and reinsurance market is a major user of arbitration services, particularly in relation to disputes between insureds based in North America and brokers and/or underwriters based in London. The arbitrations concerned usually involve very substantial sums and will usually be subject to an institutional arbitration agreement that requires the appointment of three arbitrators. Attorneys in the US are suspicious of English arbitrators and vice versa. The reasons for this largely centre on a belief that English arbitrators tend to favour the insurers whereas English underwriters tend to be suspicious of American insurance lawyers as too willing to find for insureds. Whether there is any justification for any of this is not what matters. The realities are that a US party to an insurance dispute against a UK underwriter will not willingly agree to the third arbitrator being an English lawyer and English underwriters will not willingly agree to the third arbitrator being a US Lawyer. For one of the major common law jurisdictions in the Northern hemisphere, this too represents an obvious opportunity for Ireland.

Conclusion

I also consulted a few of those who used to instruct me as to what they saw as the currently hot issues in the field. One partner of a major City practice who instructed me for almost all my career at the Bar responded:

> "I think the big point is that there is a real danger that arbitration will lose its edge. Arbitrators need to be both energetic in making sure they are on top of a dispute from the beginning and, more importantly, be prepared to be more imaginative about how they manage the process. We're experiencing quite poor practice on both aspects at the moment. I think the magic circle of elite arbitrators have become a bit too complacent. If the Irish could shake things up a bit I think there is some ground to be gained."

International arbitration is a service provided to an international business community with choices and an expectation of a private, consensual, robust and reliable dispute resolution mechanism that does not bring with it all of the formality, expense and delay too often associated with state court procedures. For those willing to recognise and deliver what the international business community expects, the future is bright. ■

---

with commentary by Kendall (2000) 16 Arb Int 343 and Brown (2001) 18 J Int Arb 123.

14 *Hrvatska Elektroprivreda v. Republic of Slovenia* ICSID ARB/05/24 6th May 2008.

15 It was this that was relied on by Rix J, as he then was, in *Laker Airways Incorporated v. FLS Aerospace Limited* (*ante*).

16 Berwin Leighton Paisner: *International Arbitration: Research Based Report on Perceived Conflicts of Interest*. The sample was of 69 arbitration practitioners. 75% of the respondents were firms where partners sat as arbitrators and lawyers at the firms concerned also acted as counsel in arbitrations.

THOMSON REUTERS

ROUND HALL™

REUTERS/Paul Hackett

Discovery & Disclosure

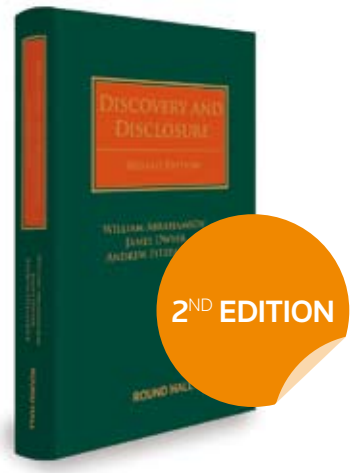
William Abrahamson, James B. Dwyer, Andrew Fitzpatrick

Your only up-to-date comprehensive book on the subject, **Discovery & Disclosure** ensures the practitioner knows the What, When, Where and How To of each procedure by going through each process step-by-step.

Since discovery and disclosure arise in every aspect of the court process and form vital parts of the procedural mechanisms in both civil and criminal litigation, this practical guide is a must-have for the serious practitioner's library.

What's new?

- Significantly expanded criminal section covering particular types of disclosure, such as expert evidence, background material in sex cases, drug valuations, police complaint material, opinion of membership of an unlawful organisation.
- A section on discovery in Criminal Assets Bureau cases
- A section on discovery in extradition
- A section on electronic discovery



PLACE YOUR ORDER TODAY, quoting reference 1272503A

FREE DELIVERY TO IRELAND

www.roundhall.ie

TRLUKI.CS@thomsonreuters.com

1 800 937982 (IRE) **+44 (0) 1264 388570** (INT)

December 2013
€265
ISBN: 9781858007175

THOMSON REUTERS™

THOMSON REUTERS
ROUND HALL™

REUTERS/Jason Lee

FAMILY LAW

LOUISE CROWLEY

Family Law provides comprehensive coverage of all aspects of the law but additionally addresses 'modern' family law issues, including rights of same sex couples, private ordering on marital breakdown, the Europeanisation of family law and the increasing role of mediation and collaboration in family law disputes.

BRINGING YOU UP TO DATE ON:

- Nearly 20 years of divorce law outlined
- The growing impact of European law on domestic family law regulation
- The impact of the elevated Constitutional position of the child
- The shift towards broadening the traditional concept of the family under Irish law
- Current reform proposals in relation to the traditional concepts of guardianship, custody and access
- The role of the State in protecting vulnerable family members
- Proposals for change in the Irish family law courts system

November 2013
ISBN 9780414032286
€245

PLACE YOUR ORDER TODAY QUOTING REFERENCE 1273401A

roundhall.ie
TRLUKI.CS@thomsonreuters.com
1 800 937 982 (Ireland)
0845 600 9355 (UK)
+44 (0) 1264 388 570 (International)

THOMSON REUTERS™