The Bar Review

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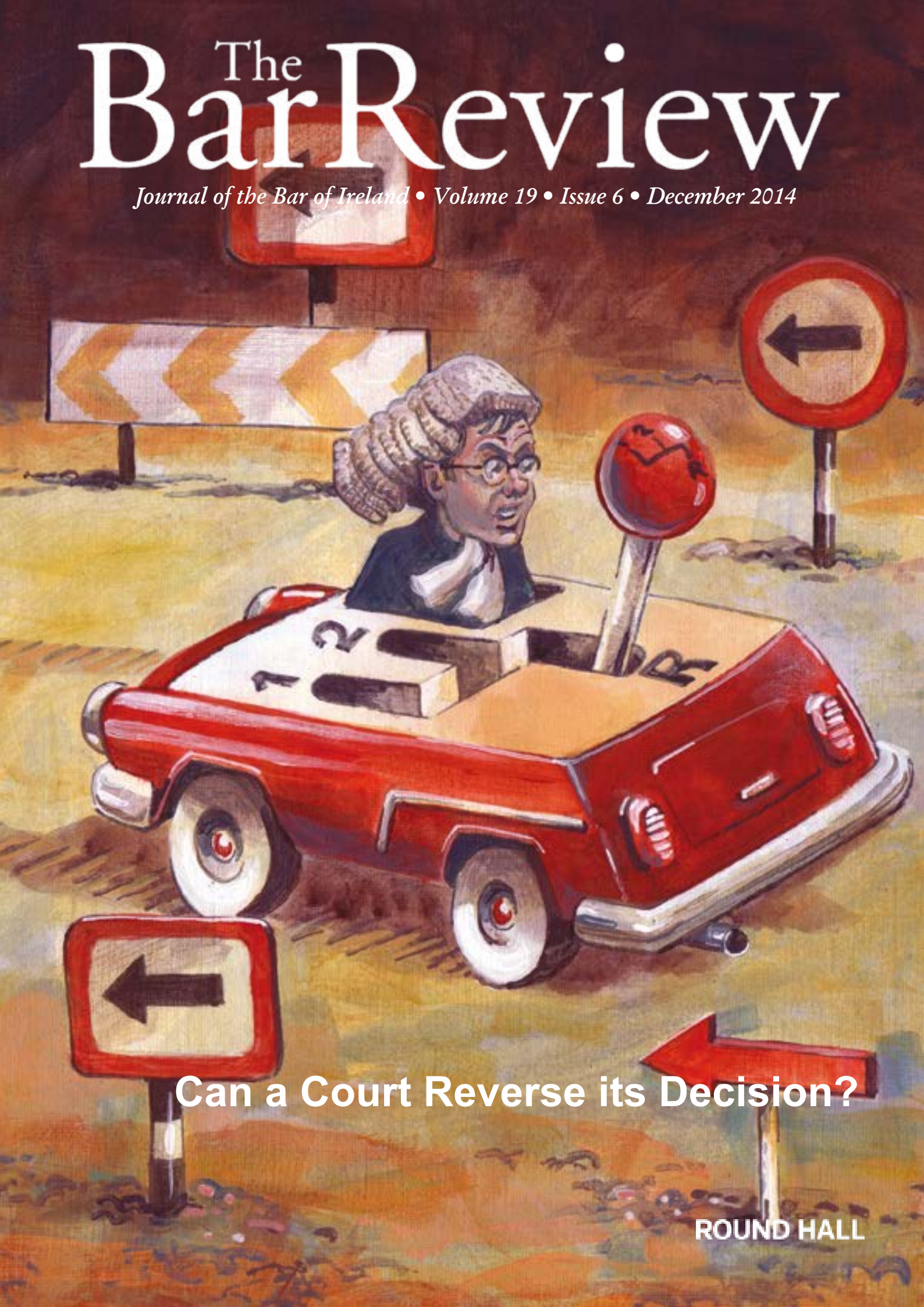

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Section 16 of the Criminal Justice Act 2006 and The Judge's Charge

Simon Donagh BL

Introduction

Section 16 of the Criminal Justice Act 2006 has been considered in two relatively recent decisions of the Court of the Criminal Appeal. A number of issues arose in these cases, but most significantly is the guidance given by the Court as to what is required from the trial judge in charging the jury where statements have been admitted pursuant to section 16. A number of other issues are also discussed below including the requirement that the statement be necessary in order to be admitted. The two decisions in question are *DPP v Rattigan*[1] and *DPP v Murphy*.[2]

Summary of Section 16

Section 16 addresses the situation whereby a witness does not give evidence in accordance with their prior statement. This could arise in a number of ways: the witness could simply refuse to give evidence; they could deny making the initial statement; they could give different evidence on the stand, or they could claim to have forgetten the incident in question. Prior to the enactment of s.16, the hostile witness procedure was used in such circumstances. This was limited insofar as the statement's use was confined to impeaching the credibility of the witness - it could not be used as evidence of its contents per se. Thus if the witness continued to give different evidence, the contents of the statement could not be relied upon at trial. This presented particular difficulties in cases of organised or gangland crime where a witness would be too frightened to give evidence against dangerous criminals for fear of reprisal. Section 16 was designed to address this situation and allow the statement (subject to many conditions and safeguards) to be admitted in evidence as the truth of its contents. Thus section 16 constitutes a radical exception to the rule against hearsay insofar as an accused can now be convicted of serious crime based on an out-of-court statement.

Facts of the two cases

In *DPP v Murphy*, the defendant was accused of setting fire to a car which was parked in the driveway of a dwelling house. The fire caused the mechanisms in the car to melt, which in turn caused the car to roll forward into the house. The house caught fire and the female occupant was killed. The accused was convicted of manslaughter and two counts of arson. Much of the prosecution case rested on the statements of two people to whom it was alleged the accused had admitted lighting the fire. Both statements were admitted into evidence by the trial judge. This decision was challenged on appeal by the accused, as was the manner in which the judge charged the jury in relation to the statements.

DPP v Rattigan was a murder case in which the accused was convicted of stabbing his victim in the early hours of the morning outside a fast food restaurant. Having been stabbed by the accused, the victim made his way inside the fast food restaurant. The security guard closed the door behind him which prevented the accused gaining entry. The accused then ran back to a waiting car and left the scene. A number of people who had witnessed the incident gave evidence as to what they saw. At trial they were able to give precise evidence about the night in general, but then professed to have no memory of the stabbing itself or the 'knife man.' Their evidence was crucial as it indicated that the perpetrator pursued the victim all the way to the door of the restaurant. This put the perpetrator at the door of the restaurant where the blood of the victim was found along with a palm-print of the accused. The trial judge admitted two statements pursuant to s.16 and this decision was challenged by the accused on appeal.

The judge's charge

The manner in which a trial judge should charge the jury in relation to s.16 received extensive treatment by the Court of Criminal Appeal, for the first time, in Murphy. The Court indicated that there should be two aspects to the charge – a general aspect, and a specific aspect. The general aspect should be suitable to any case in which s.16 has been invoked, whereas the specific aspect to the charge should draw the attention of the jury to the relevant facts of the particular case. This is consistent with the manner in which a trial judge would normally charge a jury insofar as the judge would always explain the general concepts (the presumption of innocence, proof beyond reasonable doubt, etc.), but would then draw the attention of the jury to issues which are particular to the case before them. In Murphy McKechnie J stated:

> "The approach suggested could conveniently have a general and specific level to it. General as in all cases where s.16 is invoked and specific as to particular circumstances, relating to the individual case and that or those aspects of the section which are involved. In addition it will be necessary to isolate the evidence at issue and to treat it quite distinctly from the more

1 [2013] IECCA 13
2 [2013] IECCA 1

general observations which trial judges usually make on the body of the evidence available."[3]

The 'general' charge

The purpose of the general charge is to draw the attention of the jury to the risks associated with admitting evidence pursuant to s.16. The Court was critical of the fact that this had not been done sufficiently in the trial court. The following were identified as matters which should feature in the judge's charge:[4]

1. the historical role of the hearsay rule and the reasons underlying it;
2. the court's preference for direct sworn evidence tested by existing safeguards; and
3. the difference between oral evidence and witness statements.

The above clearly aims to instill in the jury an appreciation of the fact that s.16 is an exception to the hearsay rule. The law has long appreciated the importance of direct sworn evidence. While the jury are invited to accept the evidence in the statement, in the absence of appropriate guidance, there is always the danger that a jury will over-readily accept what is written on paper before them.

The Court also directed that the jury should be reminded that it remains a matter exclusively for them to determine what weight or value, if any, they place on witness testimony, whether given outside the trial of before them.[5] In essence, the jury should be told of all the traditional concerns about hearsay evidence, and why such evidence can be unreliable, but also be reminded that the decision whether to accept such evidence is ultimately a matter for them.

The 'specific' charge

In additional to the above general observations the Court said that the charge must be tailored to the facts of the particular case in question. Thus all matters relevant to the accuracy and reliability of testimony should be brought to the attention of the jury.[6] This would include pointing out whether any sworn evidence is inconsistent with a statement, or whether sworn evidence denies the statement's existence. The court noted:

> "Unless the jury is so fully informed, their critical role in this context will almost certainly be impaired and could easily be fatally jeopardised."[7]

On the facts of Murphy, the Court held that the following should have been brought to the attention of the jury: the circumstances by reference to which the statements were admitted; the fact that each statement was supported by statutory declaration; and the individual explanations offered by the witness for making the statement and the latter reason for recanting it.[8] The Court cites with approval a passage from the Canadian case *R v B (KG)*[9] which is instructive:

> "… where appropriate the trial judge might make specific reference to the significance of the demeanour of the witness at all relevant times (which could include when making the statement, when recanting at trial, and/or when presenting conflicting testimony at trial), the reasons offered by the witness for his or her recantation, any motivation and/or opportunity the witness had to fabricate his or her evidence when making the previous statement or when testifying at trial, the events leading up to the making of the first statement and the nature of the interview at which the statement was made (including the use of leading questions, and the existence of pre-statement interviews or coaching), corroboration of the facts in the statement by other evidence, and the extent to which the nature of the witness's recantation limits the effectiveness of cross-examination on the previous statement. There may be other factors the trier of fact should consider, and the trial judge should impress upon the trier of fact the importance of carefully assessing all such matters in determining the weight to be afforded prior inconsistent statements as substantive evidence."[10]

Thus, in appropriate circumstances, the following should be canvassed with the jury:

1. the witness's demeanor at all relevant times i.e. when making the statements, when recanting the statement, or when presenting conflicting testimony;
2. any reasons offered by a witness for changing or recanting their statement;
3. any motivation or opportunity the witness may have had to fabricate either his statement or subsequent evidence at trial;
4. the events leading up to the making of the initial statement;
5. the nature of the interview at which the statement was made - particularly highlighting the use of leading questions, the existence or a pre-statement, or evidence of coaching;
6. any corroboration of the statement by other evidence; and
7. the extent to which the nature of the witness's recantation limits the effectiveness of cross-examination on the previous statement.

In reality, the jury will have to decide between two conflicting accounts from the same witness i.e. do they believe the recanting witness before them in the box, or do they prefer the evidence in the statement. The above are all relevant considerations in weighing such evidence. A comparison of the demeanor of the witness when making the statement,

3 *ibid* at par 84
4 *ibid* at par 85
5 *ibid* at par 85
6 *ibid* at par 82
7 *ibid* at par 82

8 *ibid* at par 82
9 [1993] 1 SCR 740
10 [2013] IECCA 1 at par 87, referencing [1993] 1 SCR 740, at p. 208

as against their demeanor on the stand is clearly relevant. A free talking witness at interview, who now appears hesitant (even scared) on the stand, might well be viewed as indicating a preference for the evidence contained in the statement. If the witness changes their testimony, how credible is their explanation? If they claim to subsequently forget, how credible is that claim? The statement could be devalued if it were merely the repetition of the word "yes" in response to several leading questions. Is there a question of any threats or inducements prior to the statement and/or subsequent testimony? Is either version corroborated by other evidence in the case? There are endless questions which could arise but by drawing the jury's attention to such issues they will clearly be better equipped to make an informed decision on how they weigh the evidence.

The statement must be necessary

Only statements which are necessary may be admitted pursuant to s.16.[11] A statement will not be admitted if it is unnecessary having regard to the other evidence in the case.[12] The precise parameters of the concept of necessity have yet to be fully considered but it was stated in Murphy that: "evidence which is merely supportive, useful, helpful or even desirable is not sufficient."[13] McKechnie J elaborated:

> "It must be essential in a material and substantive respect. This obviously means that every statement, certainty from the different witnesses, must, at the time of assessment, be critically judged against the existing evidence."[14]

Thus, the trial judge must be satisfied that the statement is more than merely supportive or helpful, but also that it is to be considered in the context of the other evidence in the case. This is particularly important where more than one statement is concerned. For example, in *Murphy* the statements of three witnesses were admitted pursuant to s.16. The Court of Criminal Appeal noted that all three were considered and ruled upon concurrently. McKechnie J stated that such an approach was not in compliance with the statute. Each statement ought to have been considered independently of the other two.[15] This clearly allows for the fact that one statement might be necessary, perhaps even two, but that multiple statements containing substantially the same evidence might be excessive. Interestingly, this appears consistent with the approach of the trial judge in *Rattigan* (Birmingham J) who refused one prosecution application on the basis that it was unnecessary, but admitted two other statements.[16]

Does s.16 apply where a witness forgets his evidence?

Per the wording of the Act, s.16 applies in three situations: where the witness refuses to give evidence; denies making the statement; or gives materially inconsistent evidence.[17] On one view an assertion by a witness that he cannot remember the relevant evidence appears not to satisfy either of these criteria in the sense that the witness is not refusing to give evidence, he is not denying that he made the statement, nor is he giving materially inconsistent evidence.[18]

This issue arose in *DPP v Rattigan* as the witnesses purported to have no recollection of the stabbing. The Court of Criminal Appeal held that s.16 could be used in such circumstances on the basis that such forgetfulness could amount to giving evidence which was materially inconsistent with the prior statement:[19]

> "While there was some argument as to whether section 16 could be said to apply to a situation in which a witness had given some evidence and then professed a lack of memory on other matters, this Court is satisfied that it can be said of the two relevant witnesses here that they had given evidence which was materially inconsistent with their statements and therefore came within the terms of the statute, if it was properly applicable in the case."

Can s.16 be used in the prosecution of offences which pre-date its enactment?

In *Rattigan*, it was also argued that s.16 statements were unlawfully used in his murder trial as the murder pre-dated the enactment of the section. This, according to the applicant, violated the constitutional prohibition of statutes acting retrospectively. In rejecting this argument O'Donnell J noted:

> "on its face, the legislation acts prospectively. It only applies when at a trial, which necessarily must occur after the coming into force of the Act..."[20]

The applicant also made a related argument based on the language of s.16(4) which provides, inter alia, that a statement shall not be admitted if it is unfair to the accused. In this case there had been some delay on the part of the prosecution. In essence the argument was that had the prosecution been conducted with appropriate speed, the trial would have occurred at a time prior to the coming into force of the 2006 Act, and accordingly the applicant suffered a prejudice because s.16 could not have been invoked against him in such proceedings. Again this argument was rejected on appeal on the basis that no prejudice was suffered by the accused. O'Donnell J stated:

> "It is not normally a prejudice if applicable law is applied in fact. It cannot be the case that the invocation of section 16 per se is unfair or a prejudice to the accused. … It is difficult to see how the applicant's position can be said to have suffered the

11 Criminal Justice Act 2006, s.16(4)(b)
12 *ibid* s.16(4)(b)
13 [2013] IECCA 1 at par 28
14 *ibid* at par 28
15 *ibid* at par 61. As no such objection had been made at the trial the appellant was not permitted to rely on this ground on appeal.
16 *ibid* at par 10
17 Criminal Justice Act 2006, s.16(1)
18 See Coonnan, Genevieve, "Admitting 'Statements' in Evidence Pursuant to Section 16 of the Criminal Justice Act 2006," Bar Review (2007)
19 *DPP v Rattigan* [2013] IECCA 13, at par 10
20 *ibid* at par 15

type of prejudice which would render the trial, or the admission of the statements, unfair to him particularly when the prejudice asserted amounts to a contention that the accused was no longer able to benefit from the lamentable fact that a witness might refuse to give evidence in accordance with a formal statement of evidence provided by him or her, should that occur."[21]

The statement must be voluntary and reliable

In order for a statement to be admitted pursuant to s.16, it must have been made voluntarily and be otherwise reliable.[22] Neither of these two cases shed much light on what these concepts entail except insofar as Murphy notes that counsel for both parties sought to rely on the case law dealing with voluntariness in the context of confession statements which it described as "analogous,"[23] and stated:

> "[a]s the Court can see no material difference in the underlying principles, there is no reason why such should not also apply to that requirement of s.16 of the 2006 Act."[24]

Discretionary admissibility

It was confirmed in *Murphy* that the trial judge always retains a discretion not to admit a statement pursuant to s.16 even if it otherwise complies with the statute. This is apparent from two distinct subjections within the Act: first, s.16(1) provides that statements "may, with the leave of the court" be admitted; and second, s.16(4) provides, inter alia, that the statement cannot be admitted if it is not in the interests of justice to do so where this includes a consideration of whether admission would be unfair to the accused. McKechnie J observed that the use of the word "may" (as opposed to "shall") in the context of s.16(1) clearly indicates that a court has a discretion to admit the statement.[25] He continued:

> "Express recognition is given to this view by virtue of sub. (4)(a), which in fact prohibits a court from admitting a statement, even if the requisite conditions have been established, where there is a risk of an unfair trial or where the justice of the overall circumstances require it. Given the significance of the legal alteration which the provision has brought about, such overall discretion is well justified."[26]

Limited to gangland and organised crime?

Section 16 was enacted as a response to the difficulties in prosecuting organised or gangland crime. It had been argued in *DPP v O'Brien*,[27] that the section was limited in its scope to such offences. However, the Court of Criminal Appeal held that the section was not so limited.[28] In Murphy, the Court affirmed that decision. McKechnie J observed;

> "[i]ts provisions however to not appear to be so limited in their application, as the instant case shows, where there is an entire absence of any of the features said to have underlain its creation."[29]

It is interesting to note that out of the three case referred to, it is only *Rattigan* which related to organised crime.

Conclusion

A number of principles emerge from the two cases discussed: s.16 can be used in non-gangland crime cases; it can be used for offences which pre-date its enactment; and it can apply where a witness claims to forget his evidence. It is also noteworthy that the case-law on voluntariness in the context of confessions is applicable in the s.16 context.

Perhaps, however, the most important features of the judgments are the comments relating to, first, what should feature in the judge's charge and, secondly, the manner in which the court should consider whether admitting a statement is necessary. In a case where there is an application to admit more than one statement pursuant to s.16, the court must consider each statement separately. It may be necessary to admit one (or two) statements, but three, four or five may be excessive. As regards the judge's charge, it is clear that it should contain reference to the traditional preference for viva voce evidence, as well as drawing to the attention of the jury all matters relevant to the accuracy and reliability of testimony. ■

21 *ibid* at par 17

22 Criminal Justice Act 206, ss.16(2)(b)(ii) and (iii)

23 [2013] IECCA 1, at par 31

24 *ibid* at par 31. It is both undesirable and beyond the scope of this article to rehash that case-law at this point; however, the Court did summarise the position as follows: "*In summary, as the aforegoing principles apply to the relevant provisions of s. 16 of the 2006 Act, the position of the Court is to determine whether any relevant statement was made under the influence of an inducement from a person in authority which was calculated to induce that result. The motive or intention of such person is irrelevant. The test has both objective and subjective elements. Even if such inducement is found to have been made, but it did not in fact influence the mind of the person in making the statement, the same shall be regarded as having been made voluntarily and therefore is admissible in evidence. Finally, the burden of proof lies on the prosecution, where it invokes the section, to show beyond reasonable doubt that the statement was made voluntarily.*" (par 37)

25 *ibid* at par 24

26 *ibid* at par 25

27 [2011] 1 IR 272

28 *O'Brien* was a sexual assault case in which the accused was convicted of several counts of sexual assault of his two daughters. The Court adopted a literal interpretation noting that there was no provision which limited the scope of section 16 to such offences. Macken J stated: "*It may well be that developments in this area [gangland or organised crime] some time ago precipitated the enactment of the section. However, the section must be read as enacted. It is not confined to gangland crime or to any particular offence or category of offence, and is in no way restricted either expressly or by implication by the words of the section itself or by any other provision of the Act of 2006, or by any other statute produced to the Court. ... There is no basis in law for suggesting that it is to be limited in its application in the manner contended for.*" at par 69

29 [2013] IECCA 1, at par 22

Recent Developments in Charities Regulation

Louise Beirne BL

Introduction

To coincide with the planned enactment of the Charities Act, 2009 and the establishment of the Charities Regulatory Authority ("CRA"), the Bar Voluntary Assistance Scheme VAS hosted a conference on Charities Regulation on 3rd July, 2014. Mr. Justice Clarke chaired the conference, which was well attended by lawyers and representatives of various charities. There were four speakers at the conference: the CEO Designate of the CRA, a senior counsel and two representatives from charities. In addition to presentations from the point of view of the regulator and the regulated, there was an analysis of some of the major changes in the law to be effected by the Charities Act, 2009 ("the 2009 Act").

Implementing the 2009 Charities Act

Úna Ní Dhubhghaill, CEO Designate of the CRA, opened the conference explaining that the CRA was in the process of coming into existence. She described the steps which were being taken to implement the 2009 Act from a public administration perspective.

The CEO outlined the various areas of work which the CRA shall be engaged in, namely the establishment of a register of charities, the preparation of reporting frameworks for charities, the provision of education and advice to charities, monitoring and ensuring compliance with the 2009 Act and the regulation of charitable fundraising. The CEO stated that the current focus of the CRA was on its establishment as an agency and the development of an initial register of charities. She stated that a 16 member Board was appointed on 30th April, 2014, that the staff team of the CRA comprised the CEO and 10 members of staff drawn from the Department of Justice and Equality and the Office of the Commissioners of Charitable Donations and Bequests for Ireland and that the CRA was to be formally established on 16th October, 2014.

She stated that the implementation of the 2009 Act shall bring major changes in that charities, which have never before been regulated as charities, shall now be regulated as charities. She stated that the requirement that charities are registered with the CRA, the publication of the register, the submission of annual reports and accounts by charities to the CRA and the publication of these reports and accounts are all major changes, which shall enhance transparency and the accountability of charities. As regards accountability, she referred to the CRA's powers in terms of investigations and sanctions under the 2009 Act. At the same time that the CEO highlighted the number of changes which were coming down the tracks, she also stated there are more matters staying the same; for example, she highlighted the definition of charitable purpose which has not changed. Therefore, the CRA shall not be able to grant charitable status to an organisation which did not previously meet the definition of a charity. She also stared that there is no change as regards charitable tax exemptions and that this matter is not within the remit of the CRA.

The CEO stated that all charities that are recognised by the Revenue for the purpose of a tax exemption shall be automatically recognised as charities by the CRA. She stated that the register shall contain mandatory data fields, as required by the 2009 Act, but added that the CRA would hope to collect more information than that required by the 2009 Act. She pointed to section 39 of the 2009 Act, which allows for additional information to be collected.

She highlighted that the Act provides that every charity registered is required to submit an annual activity report. She stated that every report submitted shall be published, save for reports submitted by entirely private charitable trusts. She added that the form and content of these reports and audit thresholds shall be set out in regulations.

The CEO stated that the education and advice function of the CRA shall comprise an important part of its work. She envisaged that this function shall involve communicating what the CRA does, in addition to providing advices to charities and information to members of the public. She stated that the next step after the establishment of the initial register shall be communicating with individual charities in such a way that complements existing advisory initiatives.

Fundraising

She explained that monitoring and compliance was not a key area of work for the CRA at this stage of its existence. She also stated that the CRA would not have a direct regulatory role in terms of charitable fundraising and that the *Street and House to House Collections Act, 1962* shall remain the key piece of legislation. However, she also stated that the implementation of the 2009 Act shall have an impact on fundraising. For example, she stated that it is an offence under the 2009 Act for an unregistered charity to fundraise and for an unregistered charity to hold itself out as being registered. She also stated that the requirements of the 2009 shall have an impact in terms of increased transparency as regards the use of money which is fundraised. She stated that the CRA has capacity in terms of its advisory role to develop a code of practice for fundraising and that the Minister has powers under section 97 of the Act to make regulations in relation to charitable fundraising.

The CEO hopes that the register of charities shall be published early next year. She stated that there is no definitive date for its publication and that the CRA is in the process of developing an online registration system, which is currently being tested by a small group of charities.

Changes in the Law to be effected by the Charities Act, 2009

Denis McDonald SC presented a paper dealing with some of the major changes to charity law, particularly as regards the regulation of charities, which shall take effect once the 2009 Act is brought into force. He firstly outlined some of the key features of the present system. There was no system providing for the registration of charities in Ireland or unified system for supervising charities or regulating their activities prior to the introduction of the 2009 Act. He stated that such regulation that did exist was carried out by the Commissioners of Charitable Donations and Bequests, the Attorney General, the Garda Siochána and the Revenue Commissioners. He stated that the Commissioners of Charitable Donations and Bequests did not have any real regulatory power, but had limited powers to assist charities. He further noted that the Garda Siochána could intervene in the exercise of its normal powers; for example, if there were evidence of fraud. He stated that the Revenue Commissioners did not really perform a regulatory role as regards charities, but noted that it has had a role, which it shall continue to perform, in the context of tax relief for charities.

Charitable Purpose

He highlighted the new statutory definition of *"charitable purpose"*. He referred to section 3 of the 2009 Act, which sets out what will be regarded as a charitable purpose:

(a) The relief of poverty or economic hardship;
(b) The advancement of education;
(c) The advancement of religion; and
(d) Any other purpose that is of benefit to the community.

He noted that although these categories are formulated in modern language, they are not in themselves new. He stated that while the definition has not changed, the definition has been developed through judge-made law. The definition is now enshrined in statute.

He also highlighted section 3(2) which states that a "purpose shall not be a charitable purpose unless it is of public benefit". He stated that the requirement of public benefit is not new; however, prior to the coming into force of the 2009 Act, trusts falling within the first three categories (namely the relief of poverty, the advancement of education and the advancement of religion) were presumed to be for the benefit of the community unless the contrary was shown. He pointed out that the 2009 Act removes this presumption, except in the case of religious charities. He stated that once the 2009 Act is brought into force, it will be necessary to prove that a charity (other than one for religious purposes) is of public benefit.

He stated that there were a number of curious provisions in the 2009 Act as regards religious charities. By way of example, he highlighted section 3(10). He stated that this provision makes clear that a gift will not be treated as a gift for the advancement of religion if it is made for the benefit of an organisation or cult, the principal object of which is the making of profit or that employs *"oppressive psychological manipulation"* of its followers or for the purposes of gaining new followers. He pointed out that there is no definition of *"cult"* or *"religion"* in the 2009 Act and described these omissions as curious.

He stated that up to recently, the case law has been quite clear that religion must involve belief in a *"supreme being"*. However, he stated that very recently, the U.K. Supreme Court has taken the view that belief in a supreme being is not required and in those circumstances, in the case of *R (Hodkin) v. Registrar General of Births, Deaths & Marriages* [2013] UKSC 77, the U.K. Supreme Court held that Scientology should be recognised as a religion.

Charitable Organisation

He also highlighted the definition of *"charitable organisation"* contained in section 2(1) of the 2009 Act, taking care to point out that this is a newly defined concept. In particular, he noted that that this provision clearly envisages that a charitable organisation that is required under its constitution to expend monies in remuneration and superannuation of staff members shall still be regarded as a charitable organisation. He characterised this as a sensible arrangement given that many charities can only operate with the assistance of paid staff. He also noted that section 2(1) envisages that a religious community may allow some of the funds of that community to be spent on accommodation and care of the community concerned and characterised that provision as unremarkable. However, he also drew attention to the fact that the reference to remuneration and superannuation and to accommodation and care (in the case of religious communities) in this provision is not qualified in any way. He pointed out that the definition does not refer to *"reasonable remuneration and superannuation"* or to *"reasonable accommodation and care"*. There is, nonetheless, a requirement that a charity should be of public benefit. While religious charities have a presumption of public benefit, if it transpired that, in fact, a religious organisation was devoting its funds exclusively to the care and accommodation of its members, it is doubtful that it could still be characterised as a charity.

Removal from the Register of Charities

He went on to consider section 43 of the 2009 Act, which sets out the circumstances in which a charitable organisation can be removed from the register: where the CRA, after consultation with An Garda Siochána, is of opinion that the registered body is or has become an *"excluded body"* by virtue of its promoting purposes that are unlawful or contrary to public morality or public policy or in support of terrorism or terrorist activities or for the benefit of an organisation, the membership of which is unlawful; where the name of the body has been changed without the consent of the CRA, where the charitable organisation has been convicted of an offence, where there has been a contravention of certain provisions of the 2009 Act or where the charitable organisation has contravened or failed to comply with

a direction of the CRA. He noted that the CRA has an important power under section 43(6) of the 2009 Act to apply to the High Court for a declaration that the body is not a charitable organisation in circumstances where the CRA forms the opinion that a body which has previously been registered on the register is not a charitable organisation within the meaning of the Act.

He queried whether the requirement to keep proper books and records actually constitutes a new departure for charities. While he noted that there was no statutory requirement for a charity (which had not been incorporated as a company under the Companies Acts) to maintain any books and records, he added that the non-statutory requirement of a trustee to keep accounts of trust property must surely have applied to charities.

He highlighted section 50 of the Act as an important new requirement that captures charities that are not companies registered under the Companies Acts. He outlined how this provision imposes an obligation on charitable organisations to have the accounts of the organisation audited on an annual basis save where the gross income or total expenditure of the charitable organisation does not exceed a limit which may be prescribed by the Minister but which must not be greater than €500,000. He noted that charities which come within this exception must at minimum, be examined by an independent person approved by the CRA. He further noted that the CRA has the power under section 50(4) of the 2009 Act to give a direction to the charity trustees of an organisation coming within this category requiring the charity to be audited.

Finally, he noted in terms of this provision, that the CRA is given significant powers in the event that a charitable organisation, which is required to file accounts under Section 50(1), either does not have its accounts audited or the CRA is not satisfied with the manner in which the accounts have been audited. He stated that in such circumstances, the CRA may appoint a qualified person to audit the accounts concerned.

He referred to section 52 of the 2009 Act, which concerns the publication of reports submitted to the CRA. In that regard, he considered that companies are only required to provide details of salaries on an aggregate basis. In light of recent controversies, he wondered whether the Minister for Justice might be inclined to require charities to list renumerations over a particular level.

Powers of investigation

He referred to the CRA's powers of investigation, which he characterised as very significant. He pointed out that section 64 of the 2009 Act, which allows the CRA to appoint an *"inspector"* to investigate the affairs of the charitable organisation and to prepare a report to the CRA does not contain any requirement that the CRA have a particular concern in order to exercise this power. He compared this provision to the equivalent provision under the Companies Act, which requires that there are good grounds and that an application be made to the High Court.

He stated that where an inspector is appointed, the charity trustees or the agents of the charitable organisation must produce all books, documents and other records and noted that this power is similar to that which previously existed under the 1961 Act. He further noted that the charity trustees or the agents of the charitable organisation must attend before the inspector and give to the inspector all assistance in connection with the investigation as they are reasonably capable of providing. He concluded by observing that this obligation to provide assistance goes well beyond existing law.

The perspective of charities

The next two speakers spoke about the 2009 Act from the perspective of charities. Both speakers have extensive experience of working in and with charities and the voluntary sector and both have been involved in assisting in the development of codes of practice for charities.

Fr. Gerard O'Connor, whose experience includes leadership of the Audit Committee of the Department of Foreign Affairs, spoke first. He outlined how international NGOs have been working with the guidance of Dóchas International NGOs Code of Corporate Governance for the last 10 years. He also noted that most of the seasoned charitable organisations in Ireland have been following SORP (the Statement of Recommended Practice, Accounting and Reporting by Charities) for years. These guidelines were developed, in accordance with Accounting Standards Board guidelines, by the Charity Commission for England and Wales, and by the Scottish regulator.

The burden of regulation

He expressed concern that people who have a genuine interest in making a positive change to their communities might be frightened off by the burden of regulation. He wondered where the next generation of Board Directors or Trustees would come from. He emphasised the difficulty in getting people involved in charities and attending meetings.

He stated that there will be a need for the media to be prudent as regards how it reports on the voluntary sector. By way of example, he examined the potential for misinterpreting a reserve a charity might hold. While a charity might hold a large amount on reserve, this can occur where the funds are designated for a large-scale project, such as the building of a school in Haiti after the earthquake. Charities will need to be able to explain these matters in their reports.

Deirdre Garvey, CEO of The Wheel, which is a support and representative body for community, voluntary and charity organisations in Ireland, spoke next. She stated that The Wheel had advocated for legislation regulating charities. While echoing the concerns expressed by Fr. O'Connor, she stated that The Wheel is of the view that charity regulation is a good idea. She stated that the approach and culture of the CRA in rolling out the legislation will be of paramount importance and that it is also important that the CRA be adequately resourced.

She noted that 50% of the organisations operating in this sector have no paid staff. Bearing in mind the resource constraints which these organisations experience, she identified some of the challenges which the implementation of the 2009 Act will bring; for example she noted that charities must ensure that the information contained on the register is correct. She noted that a Director's report for SORP accounts can be 35 pages long and suggested that the CRA would ensure that reporting requirements are proportionate to the size of reporting organisations. She also pointed out

that charities have no idea at present how much registration will cost and suggested that the cost of registration also be graded depending on the size of the charity. She noted that the provisions in the 2009 Act concerning whistleblowers will oblige charities to put new policies and procedures in place. She noted that the 2009 Act is silent on advocacy and thus the current situation will continue whereby advocacy is allowed so long as it is limited to charitable purposes.

She welcomed the amendments to the 1962 Act which are contained in the 2009 Act. She noted that these amendments will mean that charities who do not currently have to get a permit for a non-cash pledge donation shall require a permit. She also welcomed the requirement concerning sealed containers with numbers prominently displayed for cash collections.

She concluded by saying that there is a need for those who run charities to communicate differently with the public about what the charity does because the traditional trust which people have had in charities is broken.

Post-script

The CRA was formally established on 16th October, 2014 and the planned enactment of many of the key provisions of the Charities Act, 2009 is awaited. ■

Child Care Law Reporting Project

Pictured at the launch of the second interim report for the Child Care Law Reporting Project are Dr Rosemary Horgan, President of the District Court and director of the project Carol Coulter.

President Higgins Visits Irish Rule of Law Project in Malawi

Emma Dwyer, IRLI Coordinator

The Irish Rule of Law International (IRLI) team in Malawi had the opportunity to meet with President Michael D Higgins on 11th November during his visit to the country. This was part of a three-country trip including Ethiopia and South Africa, where President Higgins recognized the immense contribution that Irish aid agencies, workers and missionaries have made in Africa.

As part of his meetings with Irish aid organisations, IRLI gave a presentation about the work being done by Irish lawyers to strengthen the criminal justice system in Malawi. Excessive use of detention and the lack of a comprehensive legal aid system, amongst other factors, have resulted in considerable overcrowding in Malawi's prisons. The work of IRLI in Malawi involves supporting the provision of legal representation to prisoners being detained for prolonged periods without trial, as well as providing targeted training to advocates, police officers, magistrates and other key stakeholders.

IRLI Project Coordinator, Jane O'Connell and Programme Lawyer, Morgan Crowe explained to President Higgins the overall approach of the project in Malawi, while some of IRLS's local partners outlined other specific activities. The Chief Resident Magistrate Ms. Ruth Chinanga, spoke about IRLI's magistrates training workshops; Constable Yotamu Chaoaine of the Malawi Police Force explained how he has worked with IRLI to facilitate police trainings as part of the Diversion Training Programme; and young Thokozani Malimbika spoke about her participation in 'Mwai Wosinthika', a life skills education programme for at risk youth and young offenders. In addition, IRLI also works in the Legal Aid Department and Office of the Director of Public Prosecution to support improved case management and case file review, in addition to facilitating Community information sessions to educate people about their legal rights and about the criminal justice system itself.

The project in Malawi has been running since 2011 and is supported by Irish Aid and the Human Dignity Foundation, as well as from donations and fundraising events. Irish lawyers travel to work on the project for periods of 6-12 months and the success of the project is as a result of the incredible work that these volunteers have done. In an interview for the Irish Times, the President said that the project is an "initiative that is being assisted by very fine young people from the legal system in Ireland".

IRLI is a joint initiative of the Law Society of Ireland and Bar Council of Ireland, and the project in Malawi is one of a number of interventions aimed at strengthening the rule of law in development countries. You can read more about the work of IRLI on our website *www.irishruleoflaw.ie.* ■

Pictured are President Higgins with his wife, Sabina, IRLI Project Coordinator, Jane O'Connell, IRLI Programme Lawyer, Morgan Crowe and Chief Resident Magistrate Ms. Ruth Chinanga

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 19, Issue 6, December 2014

A directory of legislation, articles and acquisitions received in the Law Library from the 14th October 2014 up to 11th November 2014
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Deirdre Lambe and Vanessa Curley, Law Library, Four Courts.

ADMINISTRATIVE LAW

Statutory Instruments

Appointment of special advisers (minister for arts, heritage and the gaeltacht) (no.2) order 2014
SI 403/2014

AVIATION

Library Acquisitions

Hanley, Donal Patrick
Aircraft operating leasing: a legal and practical analysis in the context of public and private international air law
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N327

CHARITY

Statutory Instruments

Charities act 2009 (commencement) order 2014
SI 457/2014

Charities act 2009 (establishment day) order 2014
SI 456/2014

COMPANY LAW

Insolvency

Direction order made to sell business of notice party – Application to set aside – Locus standi – Interpretation of Credit Institutions (Stabilisation) Act 2010, s 11 – Nature of application under s 11 – Nature of a direction order – Principles to be applied – Proportionality – Interpretation of 'necessary' under Credit Institutions (Stabilisation) Act, 2010, s 7 – Whether opinion leading to order not opinion any Minister acting reasonably would have made – Requirement to consult with Governor of Central Bank – Principles to be applied – Whether requirements under s 7 complied with – Whether applicants required notice in writing – Whether opinion vitiated by errors of law – Whether breach of constitutional rights – Whether lack of candour at ex parte application – State (Keegan) v Stardust Compensation Tribunal [1986] IR 642; O'Keeffe v An Bord Pleanála [1993] 1 IR 39; Meadows v Minister for Justice, Equality and Law Reform [2010] IESC 3, [2010] 2 IR 701 and Dunnes Stores Ireland Company v Ryan [2002] 2 IR 60 applied – Foss v Harbottle (1843) 2 Hare 461; Behan v Governor and Company of the Bank of Ireland (Unrep, Morris J, 14/12/1995); Chambers v Kenefick [2005] IEHC 402, [2007] 3 IR 526; Moloney v Lacey Building and Civil Engineering Ltd. [2010] IEHC 8, [2010] 4 IR 417; O'Keeffe v G &T Crampton Ltd [2009] IEHC 366, (2009) 16(9) CLP 208; In re an Inquiry [1988] AC 660; R v London Borough of Brent, ex parte Gunning [1985] 84 LGR 168 and Heaney v Ireland [1994] 3 IR 593 approved – Madden v Anglo Irish Bank [2004] IESC 108, [2005] I ILRM 294; Dowling v Minister for Finance [2012] IEHC 89, (Unrep, Feeney J, 2/3/2012); O'Neill v Ryan (No 3) [1990] 2 IR 200 and O-A(OO) v Minister for Justice, Equality and Law Reform [2011] IEHC 78, (Unrep, Clark J, 28/1/2011) considered – Adam v Minister for Justice [2001] 3 IR 53 distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O 8, r 84 – European Communities (Capital Adequacy of Credit Institutions) Regulations 2006 (SI 661/2006) – European Communities (Reorganisation and Winding Up of Credit Institutions) Regulations 2011 (SI 48/2011) – Central Bank Act 1942 (No 22) – Companies Act 1963 (No 33) , s 31 – Building Societies Act 1989 (No 17), s 18 – Companies Act 1990 (No 33), s 19 – European Convention on Human Rights Act 2003 (No 20), s 1 – Credit Institutions (Financial Support) Act 2008 (No 18) – Anglo Irish Bank Corporation Act 2009 (No 1) – Credit Institutions (Stabilisation) Act 2010 (No 36), ss 2, 4, 7, 9, 11, 13, 28, 33, 50, 52, 53, 61 and 63 – Constitution of Ireland 1937, Art 15 – Council Regulation (EC) No 407/2010 of 11/5/2010, article 3 (5) – Council Implementing Decision 15/10/2013, article 5 – Council Implementing Decision 30/5/2011, recital (6) – Implementing Council Decision 2/9/2011 (2011/542/EU) – Directive 2001/24/EC of 4/3/2001, article 2 – Charter of Fundamental Rights of the European Union (2000/C 364/01), article 17 – Treaty on the Functioning of the European Union, arts 18, 63, 101 to 109 and 260 – Reliefs refused (2012/116MCA – Peart J – 28/6/2012) [2012] IEHC 436
Dowling v Minister for Finance

Liquidation

Remuneration of liquidator – Principles to be applied – Amount of remuneration contested – Whether reasonable amount – Appropriate quantum of remuneration – Re Car Replacements Limited (In liquidation) (Unrep, Murphy J, 15/12/1999); Re Sharmane Ltd [2009] IEHC 377, [2009] 4 IR 285; Re Missford Ltd t/a Residence Members Club [2010] IEHC 240, [2010] 3 IR 756; Re ESG Reinsurance Ireland Ltd [2010] IEHC 365, [2011] 1 ILRM 197; Re Marino Ltd [2010] IEHC 394, (Unrep, Clarke J, 29/7/2010); Re Red Sail Frozen Foods Ltd (In receivership) [2006] IEHC 328, [2007] 2 IR 361 and Mirror Group Newspapers plc v Maxwell [1998] BCLC 638 approved – In re Merchant Banking Ltd [1987] ILRM 260 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 74 – Companies Act 1963 (No 33), s 228 – Insurance (No 2) Act 1983 (No 29) – Companies (Amendment) Act 1990 (No 27), s 29(1) – Companies Act 1990 (No 33), s 150 – Company Law Enforcement Act 2001 (No 28), s 56 – Remuneration measured (2005/279COS – Finlay Geoghegan J – 09/10/2012) [2012] IEHC 418
Farrell v Plastronix Investments Limited

COMPETITION LAW

Energy

Telescoped application for leave and for an order of certiorari – Legality of gas tariff regime – Methodology proposed for calculation of tariffs relating to use of and access to State transmission system – Assertions of illegality – Treatment of undersea inter-connectors to transmission network in United Kingdom – Decision that reform of current regulatory regime necessary impugned – Decision to abolish distinction between onshore assets and interconnectors – Two new sources of supply anticipated – Mandatory cross-subsidisation – Regarded interconnectors as part of transmission system – Actual costs incurred – Entry/exit tariffs – Incompatibility with legislation – European Union legislative regime – Aim of establishment of internal market in natural gas – Access to system – Single entry tariff charge – Required to pay for infrastructure not used – Abuse of dominant position – Scope and standard of review – Statutory interpretation – Proportionality – Infringement of competition rules – Whether acted unlawfully –Whether acted ultra vires – Whether abolition of infrastructure

distinction between onshore assets and interconnectors incompatible with legislation – Whether definition of 'interconnector' constituted basis for separate treatment for tariff setting purposes – Whether infringement of European Union law – Whether abuse of dominant position – Whether application premature – Whether any obligation on State to notify new regime as alleged State aid – Whether tariffs discriminatory – Vodafone Ireland Ltd v Commission for Communications Regulation [2013] IEHC 382, (Unrep, Cooke J, 14/8/2013); Orange Ltd v Director of Telecoms (No2) [2000] 4 IR 159; Canada (Director of Investigation and Research) v Southam Inc [1997] 1 SCR 748 and Deutsche Telekom v Commission (Case C-280/08P) [2010] I-ECR 3555 considered – European Communities (Internal Market in Natural Gas) Regulations 2005 (SI 320/2005) – European Communities (Internal Market in Natural Gas and Electricity) Regulations 2011 (SI 630/2011) – European Communities (Mobile and Personal Communications Regulations 1996 (SI 123/1996), reg 4 – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (SI 333/2011), reg 4 – Electricity Regulation Act 1999 (No 23), ss 8, 9 and 32 – Gas (Interim) (Regulation) Act 2002 (No 10), s 5 – Gas Act 1976 (No 30), s 10(a) – Postal and Telecommunications Services Act 1983 (No 24), s 111(2) – Competition Act 2002 (No 14), s 24 – Gas (Amendment) Act 2000 (No 26), s 15 – Directive 2009/73/EC, arts 2, 13, 32(1), 35, 41 and 46(10) – Directive 2003/55/EC – Directive 2002/21/EC, reg 4 – Regulation (EC) 715/2009, arts 2(2), 13 and 27(1) – Regulation (EC) 1775/2005 – Regulation (EC) 713/2009 – Treaty on the Functioning of the European Union, arts 53, 102, 107, 108 and 114 – Application refused (2012/760JR – Cooke J – 11/12/2013) [2013] IEHC 568

Shannon LNG Limited v Commission for Energy for Regulation

CONSTITUTIONAL LAW

Legality of detention

Habeas corpus – Challenge to legality of detention under Mental Health Act – Affirmation of admission order – Part of form giving reason for admission not completed – Clinical description of condition given – Submission that medical practitioner had not made recommendation – Conclusion by tribunal that substance of admission order not affected and no injustice caused – Whether tribunal entitled to conclude that substance of protections provided for admission of patient safeguarded – Whether tribunal entitled to apply powers under Act – Whether detention legal – O(S) v Clinical Director of Adelaide and Meath Hospital [2013] IEHC 132, (Unrep, Hogan J, 25/3/2013); Q(W) v Mental Health Commission [2007] IEHC 154, [2007] 3 IR 755 and O'D (T) v Kennedy [2007] IEHC 129, [2007] 3 IR 689 considered – R(A) v Clinical Director of St Brendan's Hospital [2009] IEHC 143, (Unrep, O'Keeffe J, 24/3/2009) followed – Mental Health Act 2001 (No 25), ss 10, 14 and 18 – Constitution of Ireland 1937, Art 40.4.2° – Relief refused (2013/1104 SS – Hogan J – 4/7/2013) [2013] IEHC 309

F(G) v Clinical Director of Acute Psychiatric Unit, Tallaght Hospital

Legality of detention

Habeas corpus – Albanian national living in Ireland illegally – Apprehended in Netherlands with false passport and charged with offence – Refusal of entry and arrest on return to Ireland – Statutory obligation on person without leave to land to cooperate with authorities engaged in removal of person from state – Alleged deficiencies of arrest and detention – Whether provision authorising arrest applied to applicant – Mandatory wording of section – Whether non-nationals arriving involuntarily obliged to seek permission to land – Whether applicant lawfully arrested – Whether detention in airports or seaports permitted by legislation – Whether detention unlawful – Whether legality of detention affected by incorrect title of minister on warrant – Dunne v Clinton [1930] IR 366 followed – Ni v Garda Commissioner [2013] IEHC 134, (Unrep, Hogan J, 27/3/2013) distinguished – M(T) v Governor of Mountjoy Prison [2011] IEHC 336, (Unrep, Charleton J, 26/7/2011); Kadri v Governor of Wheatfield Prison [2012] IESC 27, (Unrep, SC, 10/5/2012); State (McDonagh) v Frawley [1978] IR 131 and Athanassiadis v Government of Greece [1971] AC 282 considered – Immigration Act 2003 (Removal Places of Detention) Regulations 2005 (SI 56/2005) – Immigration Act 2003 (No 26), s 5 – Immigration Act 2004 (No 1), s 4 – Constitution of Ireland 1937, Art 40.4.2° – Relief refused (2013/844SS – Mac Eochaidh J – 16/5/2013) [2013] IEHC 218

Kristo v Governor of Cloverhill Prison

Legislation

Challenge to constitutionality of Criminal Law (Amendment) Act 1935, s 18 – Whether offence sufficiently precise and certain as to meet test for legal certainty in criminal matters – Charge of causing scandal and injuring morals of community – Clothed genital massage in public area – Provision of pre-Constitution statute amended by post-Constitution statute – Whether provision enjoyed presumption of constitutionality – Whether amendment of pre-Constitution provision by post-Constitution statute confers presumption of validity on pre-Constitution provision – Whether provision inconsistent with Constitution and not carried over by Article 50.1 of Constitution – Locus standi – Entitlement of plaintiff to know nature of offence charged – Exclusive legislative powers of Oireachtas – Duty of Oireachtas to articulate principles and policies defining contours of offence – Prohibition of retrospective creation of criminal offence – Prohibition of retrospective imposition of criminal liability – Distinction between summary and indictable offences where community standards to be measured – Existence of objective and ascertainable standard indicated where jury arbiter of violation of community standards – Whether offences under provision so vague as to lead to inconsistent and arbitrary application – Whether principles and policies enumerated to define scope – Whether possible to sever impugned offences from remainder of provision – Gormley v Electricity Supply Board [1985] IR 129 and King v Attorney General [1981] IR 23 applied – R v Rimmington [2005] UKHL 63, [2006] 1 AC 459 and Dokie v DPP [2011] IEHC 110, [2011] 1 IR 805 followed – S(Z) v DPP [2011] IESC 49, (Unrep, SC, 21/12/2011); C(C) v Ireland [2005] IESC 48, [2006] 4 IR 1; Osmanovic v DPP [2006] IESC 50, [2006] 3 IR 504; Cahill v Sutton [1980] IR 269; Maloney v Ireland [2009] IEHC 291, (Unrep, Laffoy J, 25/6/2009); Salaja v Minister for Justice [2011] IEHC 51, (Unrep, Hogan J, 10/2/2011); People (DPP) v Cagney [2007] IESC 46, [2008] 2 IR 111; Kokkinakis v Greece (1993) 17 EHRR 397; W(S) v United Kingdom (1995) 21 EHRR 363; Sunday Times v United Kingdom (1979) 2 EHRR 245; G v Federal Republic of Germany (1989) 60 DR 256; X v United Kingdom (1982) 28 DR 77; City View Press Ltd v AnCO [1980] IR 381; McGowan v Labour Court [2013] IESC 21, (Unrep, SC, 9/5/2013); Grayned v City of Rockford 408 US 104; Evans v Ewals [1972] 2 All ER 22; Doolan v DPP [1993] ILRM 387; R v Rolfe (1952) 36 Crim App Rep 4; Chorherr v Austria (App 13308/87) (Unrep, ECtHR, 25/8/1993); Hashman v United Kingdom [1999] ECHR 133; Percy v DPP [1995] 1 WLR 1382; Steel v United Kingdom (App 24838/94) (Unrep, ECtHR, 23/9/1998); Kershaw v Ireland [2009] IEHC 166, (Unrep, O Néill J, 27/3/2009); R v Lunderbech [1991] Crim LR 784; Attorney General (SPUC) v Open Door Counselling Ltd [1986] IR 593 and Maher v Attorney General [1973] IR 140 considered – Criminal Law Amendment Act 1935 (No 6), s 18 – Criminal Law (Rape)(Amendment) Act 1990 (No 32), s 18 – Constitution of Ireland 1937, Arts 5, 15.2.1°, 15.5.1°, 38.1, 40.1, 40.4.1° and 50.1 – Declaration of inconsistency with Constitution granted (2010/4603P – Hogan J – 26/7/2013) [2013] IEHC 343

Douglas v DPP

Legislation

Challenge to constitutionality of Criminal Law (Suicide) Act 1993, s 2(2) – Declaration sought that criminalisation of aiding, abetting counselling or procuring suicide or attempted suicide of another invalid having regard to the Constitution and incompatible with State's obligations under ECHR – Plaintiff in late stage of incurable degenerative condition – Unable to end own life – Severe pain – Locus standi – Whether possible to argue constitutional rights interfered with by measure indirectly preventing exercise of

asserted right – Hypothetical application of provision – Whether possible to have standing where no immediate threat of challenged measure being applied to a plaintiff – Presumption of constitutionality – Whether right to life imports right to die – Right to personal and bodily autonomy – Right to self-determination – Right to privacy – Right to live – Right to equality before the law – Unenumerated rights – Discrimination – Whether provision discriminated between able-bodied and disabled persons suffering from terminal illnesses – Proportionality – Entitlement of state to regulate activities detrimental to the life and safety of persons – D(M) v Ireland [2012] IESC 10 (Unrep, SC, 23/2/2012); Pretty v United Kingdom (2002) 35 EHRR 1; Heaney v Ireland [1996] 1 IR 580; Rock v Ireland [1997] 3 IR 484; Carter v Canada [2012] BCSC 886; Re a Ward of Court (withholding medical treatment) (No 2) [1996] 2 IR 79; Rodriguez v British Colombia [1993] 3 SCR 519; Washington v Glucksberg 521 US 702; R (Pretty) v DPP [2001] UKHL 61; Norris v Attorney General [1984] IR 36; Cahill v Sutton [1980] IR 269; Curtin v Dáil Éireann [2006] IESC 14, [2006] 2 IR 556; Pigs Marketing Board v Donnelly (Dublin) Ltd [1939] IR 413; In re Article 26 of the Constitution and the Offences Against the State (Amendment) Bill [1940] IR 470; Buckley (Sinn Féin) v Attorney General [1950] IR 67; McGee v Attorney General [1974] IR 284; Brennan v Attorney General [1983] ILRM 449; Quinn's Supermarket v Attorney General [1972] IR 1; An Blascaod Mór Teo v Commissioner of Public Works [2000] 1 IR 6; De Burca v Attorney General [1976] IR 38 and Haas v Switzerland (App 31322/07) (Unrep, ECtHR, 20/1/2011) considered – Criminal Law (Suicide) Act 1993 (No 11), s 2(2) – European Convention on Human Rights Act 2003 (No 20), s 5 – European Convention on Human Rights 1950, arts 8 and 14 – Constitution of Ireland 1937, Arts 40.1 and 40.3 – Appeal dismissed (19/2013 – SC – 29/4/2013) [2013] IESC 19
Fleming v Ireland

CONTRACT

Breach

Acceptance – Offer of voluntary redundancy – Notice circulated inviting expressions of interest in voluntary severance – Document labelled 'offer' signed and witnessed – Informed severance not approved and returned to work – Acceptance conditional on business case being approved – Whether offer and acceptance – Whether binding contract came into existence – Whether breach of contract – Wiltshere v University of the North [2005] ZALC 94; Billings v Arnott & Co Ltd [1946] 80 ILTR 50 and Kelly v Cruise Catering Ltd [1994] 2 ILRM 394 considered – Finding of binding contract (2008/379S – Hogan J – 11/12/2013) [2013] IEHC 585
Browne v Iarnród Éireann – Irish Rail

Fraud

Declaration sought that monies held held on trust for plaintiffs and that funds constitute unjust enrichment – Alleged misappropriation of funds – Alleged fraud – Alleged fraudulent misrepresentation – Whether representations made knowing that they were untrue or recklessly as to their truth – Whether plaintiffs relied on representations – Deceit – Proof on balance of probabilities required to establish fraudulent misrepresentation – Whether first defendant misappropriated monies – Whether use of corporate vehicles in carrying out fraud conferred personal exemption or immunity in respect of fraud – Whether court entitled to lift corporate veil – Companies close to insolvency – Directors' duties to creditors in circumstances of clear insolvency – Nature of Quistclose trust – Requirements for Quistclose trust – Whether monies held by first defendant on Quistclose trust for plaintiffs – Constructive trust – Whether monies held by second defendant on constructive trust for plaintiffs – Knowing receipt – Entitlement to trace funds – Whether second defendant knowingly a party to misappropriation of funds – Whether first defendant guilty of fraudulent misrepresentation and deceit – Whether second defendant liable to pay monies – Shinkwin v Quin-Con Ltd [2001] 1 IR 514 applied – Banco Ambrosiano SPA v Ansbacher & Co Ltd [1987] ILRM 669 and Bieber v Teathers Ltd [2012] EWCA Civ 1466 followed – Derry v Peek [1889] 14 App Cas 337; Northern Bank Finance v Charleton [1979] IR 149; Mulcahy v Mulcahy [2011] IEHC 186, (Unrep, Laffoy J, 6/5/2011); British Airways Board v Taylor [1976] 1 All ER 65; Cecil v Bayat [2010] EWHC 641 (Comm); Edgington v Fitzmaurice (1885) 29 Ch D 459; Standard Chartered Bank v Pakistan National Shipping Corporation [2003] 3 WLR 1547; Jones v Gunn [1997] 3 IR 1; In re Frederick Inns [1991] ILRM 582 & [1994] ILRM 387; West Mercia Safetywear v Dodd [1988] BCLC 250; Winkworth v Edward Baron Development Co [1987] 1 All ER 114; Yukong Lines Ltd of Korea v Rendsbury Investments Corp of Liberia (No 2) [1998] 4 All ER 82; Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567; Re Money Markets International Stockbrokers Ltd (No 2) [2001] 2 IR 17; Twinsectra Ltd v Yardley [2002] UKHL12; Re Goldcorp Exchange [1995] 1 AC 74; Toovey v Milne (1819) 2 B&A 683; Re Kayford [1975] 1 All ER 604; East Cork Foods Ltd v O'Dwyer Steel Company [1978] IR 103; Murphy v Attorney General [1982] IR 241; Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2) [1980] 1 All ER 393 and Charter plc v City Index Ltd [2008] 2 WLR 950 considered – Order for damages against first defendant (2010/6443P & 2010/223COM – McGovern J – 25/7/2013) [2013] IEHC 362
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Director of Public Prosecutions v Dunne [1994] 2 IR 537; Camenzind v Switzerland (1997) 28 EHRR 458 and Hunter v Southam Inc. [1984] 2 SCR 145 considered – Rules of the Superior Courts 1986 (SI 15/1986), Os 5, 28, 52, 98 and 122 – Offences Against the State Act 1939, s 29(1) – Criminal Law Act 1976 (No 32) – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50) – European Arrest Warrant Act 2003 (No 45), ss 13, 14, 16, 20, 25 and 37 –Constitution of Ireland 1937, Art 40 – Council Framework Decision 13/6/2002 – Application refused (2011/252EXT – Edwards J – 17/10/2012) [2012] IEHC 433
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Extradition

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Child abduction

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Child abduction

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Judicial separation

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Judicial review – Telescoped hearing – Refusal of application for refugee status – War broke out in country of origin prior to hearing – Supplemental submission – Refugee sur place – Tribunal obliged to decide claim advanced – Whether refugee sur place claim determined – A(EP) v Refugee Appeals Tribunal [2013] IEHC 85, (Unrep, Mac Eochaidh J, 27/2/2013); B(BO) v Refugee Appeals Tribunal [2013] IEHC 187, (Unrep, Mac Eochaidh J, 2/5/2013); S(AA) v Refugee Appeals Tribunal [2013] IEHC 44, (Unrep, Mac Eochaidh J, 7/2/2013); Voga v Refugee Appeals Tribunal (Unrep, Ryan J, 6/10/10) and Meadows v Minister for Justice, Equality and Law Reform [2010] IESC 3, [2010] 2 IR 701 applied – Cyprus v Turkey (2002) 35 EHRR 731 considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 6 and 9 – Leave and certiorari granted (2009/267JR – Mac Eochaidh J – 11/6/2013) [2013] IEHC 281
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– Whether failure to apply provisions of s 11(b) of the Refugee Act 1996 – Whether best interests of children considered in making of deportation order – Whether claim unlawfully prioritised – L(BMJ) v Minister for Justice and Equality [2012] IEHC 74, (Unrep, Cross J, 14/2/2012); TD v Minister for Justice, Equality and Law Reform (Unrep, Hogan J, 25/1/2011); Januzi v Secretary of State for the Home Department [2006] UKHL 5, [2006] 2 AC 426; Imoh v Refugee Appeals Tribunal (Unrep, Clarke J, 24/6/2005); LD v Refugee Appeals Tribunal [2006] IEHC 218, [2006] 3 IR 439; MI v Refugee Appeals Tribunal [2013] IEHC 368, (Unrep, McDermott J, 26/7/2013); IR v Minister for Justice, Equality and Law Reform [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009); AM v Chairperson of the Refugee Appeals Tribunal (Unrep, High Court, 29/7/2004); Biti v Refugee Appeals Tribunal [2005] IEHC 13, (Unrep, Finlay-Geoghegan J, 24/1/2005); HID & BA v Refugee Applications Commissioner (Case C-175/11) (Unrep, ECJ, 31/1/2013); MM v Minister for Justice, Equality and Law Reform (Case C-277/11) (Unrep, First Chamber, 22/11/2012); MM v Minister for Justice and Law Reform (No 3) [2013] IEHC 9, (Unrep, Hogan J, 23/1/2013) and FP v Minister for Justice [2002] 1 IR 164 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21 – Refugee Act 1996 (No 17), ss 11, 12(1) and 17 – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Constitution of Ireland 1937, arts 34(1), 34(3), 43(1) and 43(2) – Council Directive 2005/85/EC, arts 23 and 39 – Directive 89/665 – European Convention on Human Rights, art 13 – Council Directive 2004/83/EC, art 8 – Applications refused (2009/182JR, 2010/313JR & 2011/277 JR – McDermott J – 19/12/2013) [2013] IEHC 586

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M(LA) v Minister for Justice and Law Reform

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Applicable time limits to seek to review decision refusing refugee status, issuing deportation order, revoking deportation order, granting priority to application for asylum – Constitutionality of Immigration Act 1999, s 3(1) and/or s 3(11) – Compatibility of s 3 with State obligations under European Convention on Human Rights – Effective remedy – Carltona doctrine – Conduct of applicant – Medical treatment – Substantial grounds – Stateable grounds – Leave to apply for judicial review – Application for asylum given priority on ground of being from Nigeria – Refugee status refused – Deportation order issued – Application to revoke order refused – Whether statutory time limit equivalent and effective – Whether O 84, r 21 applied where statutory limit not equivalent and effective – Whether application for leave brought promptly – Whether conduct of applicant precluded applicant impugning decision of Minister – Whether prioritisation of claim permitted – Whether stateable ground on point of priority –Whether applicant could establish prejudice or failure in fundamental procedures such as to deny effective remedy – Whether stateable grounds for contending s 3(11) unconstitutional – Whether stateable grounds for contending s 3(11) incompatible with State obligations – Whether Minister obliged to personally consider issue of refoulement – Whether Minister obliged to personally sign deportation order – Whether substantial grounds –Whether stateable ground to challenge refusal to revoke deportation order on treatment of medical condition – The Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 IR 360; G v Director of Public Prosecutions [1994] 1 IR 374; Pontin v T-Comalux SA (Case C-63/08) [2009] ECR I-10467; White v Dublin City Council [2004] IESC 35, [2004] 1 IR 545; Devanney v Sheils [1998] 1 IR 230 and Tang v Minister for Justice [1996] 2 ILRM 46 applied – D v United Kingdom, [1997] 24 EHRR 423; L(I) v Minister for Justice and Equality [2012] IEHC 74, (Unrep, Cross J, 14/2/2012); Re Worldport Ireland Limited (In liquidation) [2005] IEHC 189 (Unrep, Clarke J, 16/6/2005); Jerry Beades Construction Limited v Dublin City Council [2005] IEHC 406, (Unrep, McKechnie J, 7/5/2005); Lennon v Cork City Council [2006] IEHC 438 (Unrep, Smyth J, 19/12/2006); A (O) v Refugee Appeals Tribunal [2009] IEHC 296 (Unrep, Cooke J, 25/6/2009); HID v Refugee Applications Commissioner (Case C-175111), OJ C 204, 09/07/2011 p 0014; D(HI) v Refugee Applications Commissioner [2011] IEHC 33, (Unrep, Cooke J, 9/2/2011); S(L) v Minister for Justice and Equality [2012] IEHC 244, (Unrep, Kearns P, 21/6/2012); Carltona Ltd v Commissioners of Works [1943] 2 All ER 560; T(LA) v Minister for

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O(R) v Minister for Justice and Equality

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R(R) (No 2) v Refugee Appeals Tribunal

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Application for judicial review – Certiorari – Challenge to negative recommendation of Tribunal – Georgia – Credibility – Documentary evidence – Internal relocation – Whether credibility of core claim considered – Whether clear reasons given – Whether proper consideration of documentary evidence – Whether consideration of internal relocation appropriate and adequate – R(I) v Refugee Appeals Tribunal [2009] IEHC 353, (Unrep, Cooke J, 24/7/2009); Z(S) v Refugee Appeals Tribunal [2013] IEHC 325, (Unrep, MacEochaidh J, 10/7/2013) and O(R) (an infant) v Refugee Appeals Tribunal [2012] IEHC 573, (Unrep, MacEochaidh J, 20/12/2012) considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 5 and 7 – UNHCR Guidelines on International Protection: Internal Flight or Relocation Alternative 2003 – Decision quashed and appeal remitted for fresh assessment by different Tribunal Member (2009/987JR – Clark J – 30/10/2013) [2013] IEHC 482

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Asylum

Application for leave to seek judicial review – Certiorari – Refusal of application for refugee status – Syria – Allegation that decision made ultra vires and in breach of fair procedures – Alleged fear of persecution for status as homosexual man and failed asylum seeker – Credibility – Evidence – Submission of presenting officer to Tribunal that he could not stand over s.13 report and that applicant was telling truth – Determination of Tribunal stated that report had been resubmitted – Whether error of fact on part of Tribunal – Whether failure by Tribunal to have regard to submissions – Whether substantial grounds established – J(H) (Iran) v Home Secretary [2010] UKSC 31, [2011] 1 AC 596 followed – I(S) v RAT (Unrep, Finlay Geoghegan J, 11/5/2007); Norris v Attorney General [1988] ECHR 22 and Dudgeon v United Kingdom (1982) 4 EHRR 149 considered – Refugee Act 1996 (Appeals) Regulations (SI 424/2003) – Refugee Act 1996 (No 17), ss 2 and 16 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2)(b) – Leave granted (2008/1445JR – McDermott J – 28/2/2013) [2013] IEHC 94

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U(SF) v Minister for Justice and Law Reform

Deportation

Judicial review – Certiorari – Deportation husband – Disproportionality – Allegation of infringement of constitutional rights of family and family rights under European Convention on Human Rights – Husband resident in Ireland since 2003 – Conviction for sexual assault – First conviction – No convictions following release – Application for extension of permission to remain in state refused – Three Irish citizen children – Wife permitted to remain in state – Obligation of respondent when considering deporting application to consider constitutional rights of Irish citizen children – Nature of rights – Extent of ministerial obligation to have regard to constitutional rights of Irish citizen child when considering deportation order against parent – Entitlement to take into account broader considerations of public policy when considering rights – Standard of judicial scrutiny appropriate to a case in which constitutional rights engaged – No material difference between evaluation of proportionality as regards interference with qualified rights and absolute rights – Whether all relevant facts and submissions considered – Whether constitutional rights of parents and Irish born children fully considered – Obligation to obey laws of state – Decision to deport not imposition of penalty as part of sentencing process – Difference between deportation order by Minister and suspension of conviction on condition that accused leave state – Whether decision to deport unreasonable, irrational or disproportionate – People (DPP) v Alexiou [2003] 3 IR 513; O(A) v Minister for Justice [2003] 1 IR 1;

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Revocation – New grounds in application to revoke – Second applicant father to four citizen children – Deportation order made – Application to revoke on Zambrano ground – Application to revoke on medical grounds – Revocation refused – Whether grounds new –Zambrano v ONEm [2011] ECR I-01177; CRA v Minister for Justice [2007] IEHC 19, [2007] 3 IR 603 and D v United Kingdom, [1997] 24 EHRR 423 approved – Refugee Act 1996 (No 17), s 5 – Immigration Act 1999 (No 22), s 3 – Constitution of Ireland 1937, Arts 40, 41 and 42 – European Convention on Human Rights 1950, arts 3 and 8 – Leave refused (2012/249JR – Cooke J – 16/04/2012)[2012] IEHC 466
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Application to annul adjudication and to show cause against validity of adjudication – Adjudicated bankrupt – Revenue – Tax arrears – Outstanding court judgments – Method of calculating interest on amount due – Application of credit to tax liabilities – Charging interest on interest – Existence and enforceability of settlement arrangement – Alleged embezzlement – Courts Act interest – Pre-judgment interest – Annul adjudication – Imposition of penalties – Statute of limitations – Calculation of post-judgment interest for six years and one day to allow for leap year – Abuse of process – Hampering of ability to earn a living as solicitor – Whether just and equitable to annul adjudication – Whether wrong to allow for leap year in calculation of post-judgment interest – Whether proceedings amounted to abuse of process – Whether evidence of ulterior or collateral purpose for adjudication proceedings – Whether post-judgment interest charged correctly – Whether entitlement of Revenue to charge interest on tax overdue constituted penalty – Whether judgment creditor entitled to look for interest on the judgment debt if judgment included interest – Whether issue to be litigated – St Kevin's Company v A Debtor (Unrep, ex tempore, SC, 27/1/1995); Minister for Communications v MW [2009] IEHC 413, [2010] 3 IR 1 and McGinn v Beagan [1962] IR 364 considered – Bankruptcy Act 1988 (No 27), ss 8(6)(b) and 16 – Courts Act 1981 (No 11), ss 2A and 22(1) – Taxes Consolidation Act 1997 (No 39), s 1080 – Value-Added Tax Consolidation Act 2010 (No 31), s 114 – Value-Added Tax Act 1972 (No 22), s 21 – Debtors Ireland Act 1840 (3 & 4 Vict c 105), s 26 – Courts (Supplemental Provisions) Act 1961 (No 39), s 47(2) – Statute of Limitations 1957 (No 6), ss 3(2)(a) and 11(6)(b) – Solicitors Act 1954 (No 36), s 50 – Application refused (2424 – Dunne J – 14/6/2013) [2013] IEHC 539
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PLANNING & ENVIRONMENTAL LAW

Compulsory purchase order

Judicial review – Power of Industrial Development Authority to compulsorily acquire land – Development will or likely to occur – Positive evidence – Environmental impact assessment – Objective bias – Duty to give reasons – Nemo iudex in causa sua – Property rights – Proportionality – Whether there must be positive evidence that development will or likely to occur before respondent could move to acquire – Whether objective bias – Whether applicant suffered detriment as a result of failure to give reasons – Whether entitled to independent arbiter – Whether disproportionate interference with property rights – O'Brien v Bord na Mona [1983] IR 255; Donegan v Dublin City Council [2012] IESC 18, (Unrep, SC, 27/2/2012); Damache v DPP & Ors [2012] IESC 11, [2012] 2 IR 266; The People v Barnes [2006] IECCA 165, [2007] 3 IR 130; Paul Clinton v An Bord Pleanála (No 2) [2007] IESC 19, [2007] 4 IR 701; Lithgow v UK (App no 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81 and 9405/81), (1986) 8 EHRR 329; Yordanova & Ors v Bulgaria (App No 25446/06), (Unrep, ECHR, 24/4/2012); Bjedov v Croatia (App No 42150/09), (Unrep, ECHR, 29/5/2012); Buckland v United Kingdom (App No 40060/08), (Unrep, ECHR, 18/9/2012); Henry A Crosbie v Custom House Dock Development Authority [1996] 2 IR 531; Mc Cormack v An Garda Siochana Complaints Board [1997] 2 ILRM 321; South Bucks DC v Porter [2004] UKHC 33; O'Cleirigh v Minister for Agriculture [1998] 4 IR 15; Ballyedmond v Commissioner for Energy Regulation [2006] IEHC 206, (Unrep, Clarke J, 22/6/2006); Albert and Le Compte v Belgium [1983] 5 EHRR 533;

Alconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; Bryan v United Kingdom (App no 19178/91), (Unrep, ECHR, 9/9/1997); Chapman v United Kingdom (App no 27238/95), (Unrep, ECHR, 18/1/2001); Zumtobel v Austria (App No 12235/86), (Unrep, ECHR, 21/9/1993); Deerland Construction Ltd v Aquaculture Licences Appeals Board [2008] IEHC 289, (Unrep, Kelly J, 9/9/2008); Meadows v the Minister for Justice, Equality and Law Reform [2010] IESC 3, (Unrep, SC, 21/1/2010); Kenny v Trinity College [2007] IESC 42, [2008] 2 IR 40; Carmody v Minister for Justice and Equality [2009] IESC 71, [2010] 1 IR 635 considered – O'Keeffe v An Bord Pleanála [1993] 1 IR 39; Bula Ltd v Tara Mines Ltd & Ors (No 6) [2000] 4 IR 412; McCormack v An Garda Síochána Complaints Board [1997] 2 ILRM 321 and O'Brien v Bord na Móna [1983] IR 255 applied – Industrial Development Act 1986 (No 9), s 16, 21 and 25 – European Convention on Human Rights Act 2003 (No 20), s 3 – Industrial Development Act 1995 (No 28), s 3 – Planning & Development Act 2000 (No 30), s 213 – Constitution of Ireland 1937, arts 40.3, 40.5 and 43 – Directive 92/43/EC, art 6 – European Convention on Human Rights 1950, arts 6, 8, 13 and Protocol 10, art 1 – Reliefs refused (2013/16JR – Hedigan J – 19/9/2013) [2013] IEHC 433
Reid v Industrial Development Agency (Ireland)

Costs

Ex parte application to guarantee no costs liability if proceedings brought – Whether application appropriate – Appropriate course of action – Application no orders be awarded against applicant if motion seeking no order as to costs if proceedings brought – Whether open to court to make such order – Environmental (Miscellaneous Provisions) Protection Act 2011 (No 20), s 3 – Aarhus Convention 1998 – Applications refused (2012/389MCA – Hedigan J – 22/10/2012) [2012] IEHC 445
Re Maher

Costs

Refusal of leave to seek judicial review – Challenge to refusal of permission – Quarry – Application for costs – Statutory provisions – Whether costs should follow event – Whether proceedings came within class of proceedings to which default rule that costs follow event did not apply – Project requiring environmental impact assessment – Whether notice party should be awarded costs – Whether case of exceptional public importance – Whether special circumstances existed – JC Savage Supermarket Ltd v An Bord Pleanála [2011] IEHC 488, (Unrep, Charleton J, 22/11/2011) considered – Planning and Development Act 2000 (No 30), s 50B – Order that each party bear own costs (2011/154JR – Hedigan J – 31/7/2012) [2012] IEHC 402
Shillelagh Quarries Limited v An Bord Pleanála

Practice and procedure

Costs – Planning and development costs – Applicant successful in proceedings – General rule regarding no order as to costs – Discretion to award costs – Costs reflecting extent to which applicant succeeded – Acts or omissions of respondent – Portion of costs – Number of grounds raised – Length of case – Documentation – Apportionment of responsibility – Whether to exercise discretion to award costs – Whether additional grounds materially added to length of proceedings – Whether grounds frivolous or vexatious – Rules of the Superior Courts 1986 (SI 15/1986), O 99 – Planning and Development Act 2000 (No 30), ss 20(3)(q) and 50B – Costs awarded to successful applicant (2011/863JR – Peart J – 11/12/2013) [2013] IEHC 580
Tesco Ireland Limited v Cork County Council

Unauthorised use

Application for injunction restraining use of unauthorised car park development – No planning permission – Vehicular access – Traffic volumes – Public right of way extinguished – Service road constructed – Danger to pedestrians – Safety – Impact on architectural and archaeological heritage – Environmental impact assessment or statement not carried out – River location – Application for retention planning permission – Claim of hardship – Breach of planning laws – Delay – Stay – Benefits conferred by development – Tree preservation order – Discretion of court – Whether to exercise discretion to restrain development – Whether applicants delayed – Whether environmental impact assessment required – Whether development dangerous – Whether intentionally in breach of planning laws – Commission v Ireland (Case C- 215/06) [2008] ECR I-4911; Morris v Garvey [1983] 1 IR 319; Wicklow County Council v Forest Fencing Limited [2007] IEHC 242, [2008] 1 ILRM 357; The Right Honourable the Lord Mayor v O'Dwyer Brothers (Mount Street) Limited, (Unrep, Kelly J, 2/5/1997); Smyth v Dan Morrissey Ireland Ltd [2012] IEHC 14, (Unrep, Hedigan J, 25/1/2012); Leen v Aer Rianta cpt [2003] 4 IR 394; Wicklow County Council v Fortune [2012] IEHC 406, (Unrep, Hogan J, 4/10/2012) and Cork County Council v Slattery Pre-Cast Concrete Limited [2008] IEHC 291, (Unrep, Clarke J, 19/9/2008) considered – Planning and Development Regulations 2001 (SI 600/2001) – Planning and Development Act 2000 (No 30), ss 4(1), 160 and 162 – Local Government Act 2001 (No 37), s 183 – Roads Act 1993 (No 14), s 73 – Planning and Development (Amendment) Act 2010 (No 30), s 23(12) – Local Government (Planning and Development) Act 1976 (No 20), s 27(2) – Directive 85/337 EEC, arts 1 and 2 – Application granted (2012/432MCA – Hedigan J – 17/12/2013) [2013] IEHC 570
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PRACTICE AND PROCEDURE

Appeal

Preliminary objection to appeal to Supreme Court – Proceedings seeking declaratory relief and damages – Declarations sought that certain guarantees and charges of shares of plaintiffs invalid and that purported deeds of appointment of second defendant on foot of charges be set aside – Preliminary point of law determined by High Court – Whether plaintiffs should be prevented from relying on acts of illegality alleged against first defendant in advance of any other issue – High Court determination that plaintiffs should not be so prevented – View expressed by judge determining preliminary objection that there should not be an appeal at that stage – Appeal by first defendant – Contention of plaintiffs that first defendant obliged to await final determination of High Court action to proceed with appeal – Absence of determination that appeal impermissible – Whether first defendant obliged to pursue before High Court right to appeal to Supreme Court in advance of main proceedings – Alleged undertaking of first defendant not to appeal order determining preliminary issue until after final determination of proceedings – Whether order of High Court contained any restriction on right of appeal of either party – Whether any reference to alleged undertaking in High Court order – Whether first defendant entitled to proceed with appeal – Distinction between determination of preliminary issue in advance of trial and determination of distinct issues of fact or law in course of trial – Directive 03/6/EC – Companies Act 1963 (No 33), s 60 – Appeal permitted to proceed (150/2012 – SC – 12/6/2013) [2013] IESC 27
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Contempt

Application for leave to issue motion to commit respondent for contempt – Undertaking – Judicial review proceedings – Responsibility of Minister – Mutual mistake – Whether appropriate to order committal – Whether undertaking nullity by reason of mutual mistake – Carolan v Minister for Defence [1927] IR 62 and Re Article 26 and the Employment Equality Bill 1997 [1997] 2 IR 321 considered – Mespil Ltd v Capaldi [1986] ILRM 373 applied – Rules of the Superior Courts 1986 (SI 15/1986), O 44 r 3 – Ministers and Secretaries Act 1924 (No 16), s 2 – Public Service Agreement 2010-2014 – Constitution of Ireland 1937, Arts 28.4.1° and 28.4.2° – Leave refused (2013/608JR – Hogan J – 14/10/2013) [2013] IEHC 459

Gormley v Minister for Agriculture, Food & Marine

Costs

Solicitor and client – Plaintiff acted for defendant in proceedings which were compromised – Dispute in relation to amount of fees due – Defendant claiming agreement reached on fees due – Plaintiff submitted bill of costs for larger sum – Interlocutory application – Plaintiff seeking to restrain defendant from reducing bank balance below particular figure – Plaintiff seeking declaration of entitlement to charge upon funds – Mareva injunction – Applicable tests for injunction – Whether disposal of assets for purpose of preventing plaintiff from recovering damages and frustrating possible future court orders – Whether proposed transfer would render defendant judgment-proof – Balance of convenience – Conduct of defendant – Necessity of fees being due for making of declaration sought – Whether appropriate to make declaration sought at interlocutory stage in light of significant factual dispute – Implications of order sought for third parties – O'Mahony v Horgan [1995] 2 IR 411 applied – Bennett Enterprises v Lipton [1999] 2 IR 221 followed – Aerospares Ltd v Thompson (Unrep, Kearns J, 13/1/1999); Lister & Co v Stubbs (1890) 45 Ch D 1; McGowan Roofing Contractors Ltd v Manley Construction Ltd [2011] IEHC 317, (Unrep, Laffoy J, 23/7/2011) and Mount Kennett Investment Co v O'Meara [2012] IEHC 167, (Unrep, Clarke J, 29/3/2012) considered – Legal Practitioners (Ireland) Act 1876 (39 & 40 Vict), s 3 – Arbitration Act 2010 (No 1), s 21(7) – Reliefs refused (2012/10065P – Birmingham J – 9/7/2013) [2013] IEHC 316
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Costs

Taxation – Solicitor and client – Plenary proceedings by client against former solicitor – Breach of contract – Breach of fiduciary relationship – Fee dispute – Fees deducted from monies held for client – Interlocutory application – Plaintiff seeking order for taxation – When taxation of costs available – Obligation of solicitor to prepare bill of costs – Requirement that valid bill of costs be in accordance with rules – Centrality to proceedings of issue of how much solicitor entitled to charge – Documents relating to fees not before court – Whether court entitled to refer previous transaction between parties to taxation – State (Gallagher Shatter & Co) v de Valera [1986] ILRM 3; In re Osborn v Osborn [1913] 3 KB 862 and Smyth v Montgomery (Unrep, Blayney J, 7/7/1986) considered – Rules of the Superior Courts 1986 (SI 15/1986), O99, r 29(5) – Solicitors (Ireland) Act 1849 (12 & 13 Vict), s2 – Matters referred to taxation (2011/6056P – Charleton J – 25/3/2013) [2013] IEHC 292
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Costs

Application for security for costs – Judicial review – Planning and development – Environmental litigation – Enforcement actions – Remedies not being prohibitively expensive – Stare decisis – Whether costs follow the event – Whether each party bearing their own costs – Whether security for costs to be ordered – JC Savage Supermarket Ltd v An Bord Pleanála [2011] IEHC 488, (Unrep, Charleton J, 22/11/2011); Shillelagh Quarries Ltd v An Bord Pleanála [2012] IEHC 402, (Unrep, Hedigan J, 31/7/2012) and AG v Residential Institutions Redress Board [2012] IEHC 492, (Unrep, Hogan J, 6/11/2012) followed – Hunter v Nurendale Ltd [2013] IEHC 430, (Unrep, Hedigan J, 17/9/2013) approved – Board of Mgt.of St Molaga's NS v Department of Education [2010] IESC 57, [2011] 1 IR 362; [2011] 1 ILRM 389; Coffey v Environmental Protection Agency [2013] IESC 31, (Unrep, SC, 25/6/2013); Commission v Ireland (Case C-427/07) [2009] ECR I-6277; Indaver NV v An Bord Pleanála [2013] IEHC 11, (Unrep, Hogan J, 21/1/2013); Li v Governor of Cloverhill Prison [2012] IEHC 493, [2012] 2 IR 400 and Parolen Ltd v Doherty [2010] IEHC 71, (Unrep, Clarke J, 12/3/2010) considered – Companies Act 1963 (No 33), s 390 – Planning and Development Act 2000 (No 30), s 50B – Planning and Development (Amendment) Act 2010 (No 30), ss 1, 33 – Environment (Miscellaneous Provisions) Act 2011 (No 20), ss 3,4,6,7,8, 21 – Constitution of Ireland 1937, Article 29.6 – Council Directive 85/337/EEC – Council Directive 2001/42/EC – Council Directive 2008/1/EC – Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998, articles 6, 9 – Security for costs ordered (2011/125JR – Hogan J – 4/10/2013) [2013] IEHC 442
Kimpton Vale Limited v An Bord Pleanála

Delay

Motion to dismiss for delay and/or want of prosecution – Principles to be applied – Three proceedings taken against respondent – Plenary summons issued in all proceedings in 2001 – Decision to await conclusion of investigative stage of Moriarty Tribunal before delivering statement of claims – Whether delay inordinate – Whether excusable – Whether interests of justice to dismiss – Nature of civil proceedings – Distinction between civil proceedings and public statutory procedure – Abuse of process – Consent to late delivery of statement of Claim in second proceedings – Statement of claim delivered within period of consent – Whether motion to dismiss thereafter abuse of process – Whether real risk of unfair trial – O'Domhnaill v Merrick [1984] IR 151; Toal v Duignan (No 1) [1991] ILRM 135; Toal v Duignan (No 2) [1991] ILRM 140; Primor plc v Stokes Kennedy Crowley [1996] 2 IR 459; Price and Lowe v United Kingdom (Apps nos 43185/98 and 43186/98) (2002) 35 EHRR CD 316; Cosgrave v Director of Public Prosecutions [2012] IESC 24, (Unrep, SC, 26/4/2012); Kennedy v Director of Public Prosecutions [2012] IESC 34, (Unrep, SC, 7/6/2012); Grant v Roche Products (Ireland) Ltd [2008] IESC 35, [2008] 4 IR 679; Meskell v Coras Iompair Éireann [1973] IR 121; Hanrahan v Merk Sharpe and Dohme (Ireland) Ltd [1988] ILRM 629; Stephens v Paul Flynn Ltd [2005] IEHC 148, (Unrep, Clarke J, 28/4/2005); Desmond v MGN Ltd [2008] IESC 56, [2009] 1 IR 737; Hogan v Jones [1994] 1 ILRM 512; J O'C v Director of Public Prosecutions [2000] 3 IR 478; Rainsford v Limerick Corporation [1995] 2 ILRM 561; Anglo Irish Beef Processors Ltd v Montgomery [2002] 3 IR 510; Guerin v Guerin [1992] 2 IR 287; Dowd v Kerry County Council [1970] IR 27; Calvert v Stollznow [1980] 2 NSWLR 749; Celtic Ceramics Ltd v Industrial Development Authority [1993] ILRM 248, (Unrep, SC, 4/2/1993); Manning v Benson and Hedges Ltd [2004] IEHC 316, [2004] 3 IR 556; Donnellan v Westport Textiles Limited (In Voluntary Liquidation) [2011] IEHC 11, (Unrep, Hogan J, 18/1/2011); McIlkenny v Chief Constable [1980] QB 283; Smyth v Tunney [2009] IESC 5, [2009] 3 IR 322; Stephens v Paul Flynn Ltd [2008] IESC 4, [2008] 4 IR 31; Rodenhuis and Verloop BV v HDS Energy Ltd [2010] IEHC 465, [2011] 1 IR 611 and Birkett v James [1978] AC 297 approved – McMullen v Ireland (App no 42297/98, 29/7/2004); Gilroy v Flynn [2004] IESC 98, [2005] 1 ILRM 290; Kategrove Ltd (In Receivership, Hugo Merry and Peter Schofield) v Anglo Irish Bank Corporation plc [2006] IEHC 210, (Unrep, Clarke J, 5/7/2005) and McBrearty v North Western Health Board [2010] IESC 27, (Unrep, SC, 10/5/2010) considered – Rogers v Michelin Tyre Plc [2005] IEHC 294 (Unrep, Clarke J, 28/6/2005); Doe v Armour Pharmaceutical Co Inc [1994] 3 IR 78 and Collins v Dublin Bus (Unrep, SC, 22nd October, 1999) distinguished – Rules of the Superior Courts 1986 (SI 15/1986), Os 20, 27, 36, 108 and 122 – European Communities (Mobiles and Personal Communications) Regulations 1996 (SI 123/1996) – Tribunals of Inquiry (Evidence) Acts 1921 and 1979 (No 2) Order 1997 – Prevention of Corruption Act 1906 (6 Edw 7 c 34) – Freedom of Information Acts 1997 to 2009 – Constitution of Ireland 1937, Art 40.3 – European Convention on Human Rights 1950, article 6 – Appeals allowed (213, 215 and 216/2007 – SC – 17/10/2012) [2012] IESC 50
Comcast International Holdings Inc v Minister for Public Enterprise

Dismissal of proceedings

Application to dismiss on grounds of inordinate and inexcusable delay – Inherent jurisdiction of court – Delay on part of defendants – Prejudice – Reliance on documentary evidence – Whether inordinate delay – Whether delay excusable – Whether mutual understanding or implied agreement – Whether balance of justice favoured continuance of proceedings – Primor plc v Stokes Kennedy Crowley [1996] 2 IR 465 and Comcast International Holdings Inc v Minister for Public Enterprise [2012] IESC 50, (Unrep, SC, 17/10/2012) applied – Rodenhuis and Verloop BV v HDS Energy

Ltd [2010] IEHC 465, [2011] 1 IR 611; Roebuck v Mungovin [1994] 2 AC 224; Dowd v Kerry County Council [1970] IR 27; Rainsford v Limerick Corporation [1995] 2 ILRM 561; Roderick Rogers v Michelin Tyre plc and Michelin Pensions Trust (No 2) [2005] IEHC 294, (Unrep, Clarke J, 28/6/2005); Trill v Sacher [1993] 1 WLR 1379 and McBrearty v The North Western Health Board and Others [2010] IESC 27, (Unrep, SC, 10/5/2010) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 122, r 11 – Application dismissed (2004/547P, 2004/3591P and 2004/18771P – Hanna J – 31/7/2013) [2013] IEHC 470

Campbell-Sharp Associates Ltd v MVMBNI JV Ltd

Dismissal of proceedings

Application to dismiss claim pursuant to inherent jurisdiction for no cause of action and no reasonable prospect of success – Company law – Loan to wind farm company – Written agreement – Security in form of lien over shares in subsidiary company – Repayment of loan sought – Interim injunction restraining dealing with shares sought – Change to structure and name of company – Charge – Constructive trust – Notice as to stock – Transfer of shares – No wrongdoing alleged – Whether no cause of action – Whether reasonable prospect of success – Whether balance of justice permitted injunction over shares – Barry v Buckley [1981] IR 306; Rogers v Michelin Tyre Plc [2005] IEHC 294, (Unrep, Clarke J, 28/6/2005); McKillen v Misland (Cyprus) Investments Ltd [2013] ECWA Civ 781, (Unrep, COA, 3/7/2013); Tett v Phoenix Property and Investments Company Ltd [1986] BCLC 149; In re Claygreen Ltd [2005] EWHC 2032 (CH), (Unrep, HC, 21/9/2005); In re Champion Publications Ltd (Unrep, Blayney J, 4/6/1991) – HKN Invest Oy v Incotrade PVT Ltd [1993] 3 IR 152; Kelly v Cahill [2001] 1 IR 56; In re Varko Ltd (In Liquidation) [2012] IEHC 278, (Unrep, Gilligan J 3/2/2012); Eves v Eves [1975] 1 WLR 1338 and Fitzpatrick v DAF Sales [1988] 1 IR 464 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 28 – Companies Act 1963 (No 33), s 123 – Application dismissed and order preventing disposal of assets granted (2013/6852P – Ryan J – 31/10/2013) [2013] IEHC 489

Anderson v Finavera Wind and Energy Inc

Judgment

Application to revisit judgment and vary outcome – Liability for costs – Damages for breach of contract – Debt collection – Guarantors' liability – Mistake in judgment – Actuarial calculations agreed – Incomplete schedule – Loss of future rent – No evidence from actuary – Figures agreed – Quantum – Quantification of loss – Costs follow the event – Offer to mediate – Whether strong reasons to revisit judgment – Whether costs follow event – Tempany v Royal Liver Trustees Limited [1984] ILRM 273; In re McInerney Homes Limited [2011] IEHC 25, (Unrep, Clarke J, 21/1/2011) and Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 1 WLR 3002 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 56A, r 2 and O 99, r 1B – Application refused (2011/8119P – Laffoy J – 1/11/2013) [2013] IEHC 602

Kilarden Investments Limited v Kirwans (Galway) Limited (in liquidation)

Judgment

Application to revisit decision – Factual error in setting out reasons for decision – Consequences of factual error – Whether factual error by court – Whether error sole and exclusive basis for finding – Jurisdiction to re-open case after judgment – Right of access to justice – Judicial review proceedings to quash decision to grant planning permission – Matter remitted for reconsideration – Material contravention of development plan – In Re McInerney Homes Ltd & Companies (Amendment) Act 1990 [2011] IESC 31, (Unrep, SC, 22/7/2011); Paulin v Paulin [2009] EWCA Civ 221, [2010] 1WLR 1057 and Byrne v Judges of the Circuit Court [2013] IEHC 396, (Unrep, Hogan J, 5/9/2013) considered – Planning and Development Act 2000 (No 30), s 37(2) – Application refused (2011/878JR – O'Malley J – 29/10/2013) [2013] IEHC 584

Nee v An Bord Pleanála

Limitation of actions

Preliminary issue – Application to dismiss proceedings on grounds of delay – Proceedings seeking damages for trespass and interference with property – Fire in house – Disappearance of house – Site used as car park – Time between accrual of cause of action and initiation of proceedings – Concealment – Whether cause of action accrued before identity of wrongdoer known to plaintiff – Disability of plaintiff – Whether plaintiff of unsound mind as a result of disappearance of house – Whether plaintiff incapable by reason of mental illness of protecting legal rights in relation to property as reasonable man would – Rohan v Bord na Mona [1990] 2 IR 425; Kirby v Leather [1965] 2 QB 367 and McDonald v McBain [1991] 1 IR 284 followed – Statute of Limitations 1957 (No 6), ss 48(2), 49 and 71(1)(b) – Application refused (2006/4P – Murphy J – 29/4/2009) [2009] IEHC 631

Presho v Doohan

Security for costs

Discovery – Principles to be applied regarding security for costs– Whether prima facie defence – Whether special circumstances to refuse order – Discovery agreement – Whether complied with – Whether strike out of defence appropriate – Hidden Ireland Heritage Holidays Ltd v Indigo Services Ltd [2005] IESC 38, [2005] 2 IR 115; Lismore Homes Ltd (In receivership) v Bank of Ireland Finance Ltd [1999] 1 IR 501; Norta Wallpapers v John Sisk Ltd [1978] IR 114; SEE Company Ltd v Public Lighting Services Ltd [1987] ILRM 255; Dublin International Arena Limited v Campus and Stadium Ireland Development Limited [2007] IESC 48, [2008] 1 ILRM 496; Comhlucht Páipéar Ríomhaireachta Teo v Údarás na Gaeltachta [1990] 1 IR 320; Murphy v J. Donoghue Ltd [1996] 1 IR 123 and Mercantile Credit Company of Ireland Ltd v Heelan [1998] 1 IR 81 applied – Tribune Newspapers v Associated Newspapers Ireland t/a The Irish Mail on Sunday (Unrep, Finlay Geoghegan J, 25/3/2011); Phillip Harrington Daly and Company (Dublin) Ltd v JVC (UK) Ltd (Unrep, O'Hanlon J, 16/3/1995); Robinson v PE Jones (Contractors) Limited [2011] 3 WLR 815; Parolen Limited v Doherty [2010] IEHC 71, (Unrep, Clarke J 12/3/2010); Dunnes Stores (Ilac Centre) Ltd v Irish Life Assurance plc [2008] IEHC 114, [2010] 4 IR 1 and Bula Ltd (In Receivership) v Tara Mines Ltd [1987] IR 494 approved – Rules of the Superior Courts 1986 (SI 15/1986), O 31 – Companies Act 1963 (No 33), s 390 – Security for costs ordered; application to strike out defence refused (2005/3623P – Birmingham J – 02/11/2012) [2012] IEHC 541

Paulson Investments Ltd v Jons Civil Engineering Ltd

Service

Application to set aside judgment for liquidated sum in default of appearance – Summons not received – Service by prepaid ordinary post on foot of order for substituted service – Awareness on enforcement – Lack of residence at address – House owned and occupied by sister – Service of orders for discovery of assets, of garnishee and for attachment served on same address – Order for substituted service on solicitor – Credibility – No defence set out on affidavit – Whether aware of proceedings – Whether sufficient basis to set aside order for substituted service – Whether judgment obtained irregularly – Crane & Son v Wallis [1915] 2 IR 411 and Farden v Richter [1889] 23 QBD 124 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 124, r 3 – Application refused (2013/176S – Peart J – 4/10/2013) [2013] IEHC 496

Danske Bank A/S (t/a Danske Bank) v Meagher

Settlement

Action for implementation of settlement agreement – Plaintiffs seeking to re-enter proceedings on foot of allegation that defendants breached terms of settlement – Whether defendants in breach of terms of settlement – Whether plaintiffs in breach of terms of settlement – Whether architect appointed in accordance with settlement agreement – Ascough v Roe (Unrep, Barron J, 21/5/1982) and Hollingsworth v Humphrey (Unrep, English Court of Appeal, 10/12/1987) followed – Specific performance of settlement agreement ordered (2008/2759P – Murphy J – 6/3/2013) [2013] IEHC 107

Corcoran v Eassda Ireland Limited

Settlement

All in sum – Damages – Whether agreed that sum to be paid in settlement all in sum

including damages and costs – Solicitors (Amendment) Act 1994 (No 27), ss 3, 4, 5 and 68 – Attorneys' and Solicitors' Remuneration Act 1870 (Chap XXVIII), s 4 – Determination that sum paid in settlement all in sum including damages and costs (2010/11346P – Hedigan J – 22/10/2013) [2013] IEHC 462
Reidy v Bradshaw p/a W & E Bradshaw Solicitors

Strike out

Application to strike out proceedings as disclosing no cause of action – No statement of claim delivered – Declaratory relief sought in relation to freezing and forfeiture of assets – Inherent jurisdiction of court – Multiplicity of proceedings – Previous decision not to discharge order under appeal – Constitutional challenge – Re-litigation of issues – 'Grounding statement' delivered – Whether abuse of process – Whether proceedings fail to disclose any reasonable cause of action – Whether proceedings vexatious – Damache v Director of Public Prosecutions [2012] 2 ILRM 153 and Henderson v Henderson [1844] 6 QB 288 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 19, r 28 – Proceeds of Crime Act 1996 (No 30), ss 2,3 and 7 – Order striking out the proceedings granted (2013/9813P – Birmingham J – 20/12/2013) [2013] IEHC 609
Gilligan v Criminal Assets Bureau

Summary judgment

Application for summary judgment for loan – Loan to fund investment ventures – Sum not repaid despite demand – Estoppel – Representation that loan would not be called in – Date of representation – Subsequent agreement – Consolidation of accounts – Conflict of interest – Option to obtain legal advice – Interest – Conflict of fact – Whether arguable defence – Whether bona fide defence raised – Whether representation too vague to amount to a legally binding representation – Whether consolidation of accounts altered liability – Whether overcharged interest – Danske Bank a/s v Durkan New Homes [2010] IESC 22, (Unrep, SC, 22/4/2010); First National Commercial Bank plc v Anglin [1996] 1 IR 75 and Banque de Paris v de Naray [1984] 1 Lloyd's Rep 21 considered – National Asset Management Agency Act 2009, (No 34) – Summary judgment for principal sum granted; issue of interest remitted to plenary hearing (2013/1997S & 2013/155COM – McGovern J – 19/12/2013) [2013] IEHC 606
National Asset Loan Management Limited v Coyle

Summary summons

Appeal against order of Master dismissing summary summons – Averment in grounding affidavit of belief that defendants had no bona fide defence – Knowledge that defendants intended to contest case – Whether papers "in order" – Whether Master had jurisdiction to dismiss summary summons where contested case – ACC Bank plc v Thomas Heffernan and Mary Heffernan, (Unrep, Master of the High Court, 18/10/2012) considered – Rules of the Superior Courts 1986 (SI 15/1986), O 37, rr 1, 4, 6 and 7 – Appeal allowed; direction that matter be entered in judge's list (2012/595S – Kearns P – 8/11/2013) [2013] IEHC 484
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Bill 96/2014

Social Welfare Bill 2014
Bill 97/2014

Housing (Homeless Prevention) Bill 2014
Bill 100/2014
[pmb] Maureen O'Sullivan

Thirty-fourth Amendment of the Constitution (No.2) Bill 2014
Bill 98/2014
[pmb] Deputy Brian Stanley

Thirty-Fourth Amendment of the Constitution (No.3) Bill 2014
Bill 102/2014
[pmb] Deputy Brian Stanley

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Immigration (Reform) (Regularisation of Residency Statue) Bill 2014
Bill 94/2014
[pmb] David Norris, Fiach Mac Conghail, Sean D. Barrett

Social Welfare and Pensions (Amendment) Bill 2014
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[pmb] Feargal Quinn, Rónán Mullen, Katherine Zappone

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Health (Miscellaneous provisions) Bill 2014
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When the Court can Reverse its Decision

John Cotter BL*

Introduction

It is a long established principle that a court has jurisdiction to reverse its decision at any time until the order is perfected, but not afterwards.[1] Until early 2013, the courts of England and Wales had taken a restrictive approach in identifying circumstances in which it would be appropriate for a court to exercise this jurisdiction; the Court of Appeal ruling in a series of cases that it should not be exercised "save in most exceptional circumstances"[2] or where there were "strong reasons"[3] for doing so. This approach, synthesised by the Court of Appeal in *Paulin v Paulin*[4], was approved by Clarke J in the High Court in *In Re McInerney Homes Ltd*[5] as representing the law in Ireland.

In February 2013, however, the UK Supreme Court in *In re L*[6] rejected the approach taken theretofore, ruling that jurisdiction to reverse before the perfection of an order was not limited to exceptional circumstances and that the overriding objective in the exercise of the power was to deal with the case in question justly. This article sets out a brief history of the jurisdiction and the development of the courts' attitude to its exercise, before moving on to more recent developments including Irish acceptance of the approach of the Court of Appeal in *Paulin* and the subsequent rejection by the UK Supreme Court of that approach. Finally, the article will ask whether the Irish courts should retain the status quo or whether the latest approach of the UK Supreme Court should be adopted in Ireland.

Historical Background [7]

In *In Re Suffield and Watts; Ex p Brown*[8], the Court of Appeal of England and Wales made a distinction between orders which had been perfected, in which cases, appeal was the appropriate course of action for a party seeking to reverse the decision, and orders which had not yet been perfected, in which case the court had the power to re-consider the matter. However, as Lady Hale pointed out in *In re L*, the comments of the judges of the Court of Appeal on the position concerning unperfected orders were *obiter* as the case at bar concerned the varying of an order made in bankruptcy proceedings which had been perfected.[9] However, the principle that a court could reverse its decision prior to perfection of the order was definitively established, in Lady Hale's words, "no later than" the decision of the Court of Appeal in *Millensted v Grosvenor House (Park Lane) Ltd.*[10]

Until 1972, no attempt had been made by the courts in the England and Wales or in Ireland to define or limit the circumstances in which a court should exercise this jurisdiction. Indeed, there seemed initially to be a marked reluctance to place restrictions on the exercise of this jurisdiction. In *In re Harrison's Share under a Settlement*[11], the Court of Appeal of England and Wales[12] rejected the submission that it should be exercised in cases of manifest error or omission only. In that case, Jenkins LJ appeared particularly worried about judges being bound by their *ex tempore* judgments, stating that since in practice few judgments were reserved, "it would be unfortunate if once the words of a judgment were pronounced there were no locus poenitentiae".[13]

However, the decision of the Court of Appeal of England and Wales in *Barrell* marked a significant tightening up of the circumstances in which the jurisdiction could be exercised. In *Barrell*, the Court of Appeal held that where judgment had been given, but the order had not been perfected, the matter could not be reopened, "save in the most exceptional

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1 Delany, H. and McGrath, D., *Civil Procedure in the Superior Courts* (Dublin: Roundhall, 2012), p. 784. The judgments of the Court of Appeal in *In re Suffield and Watts, Ex p Brown* (1888) 20 QBD 693 are generally cited as the first decided authority for this principle, even though the judges' comments were *obiter*.

2 *In Re Barrell Enterprises* [1973] 1 WLR 19.

3 *Cie Noga d'Importation et 'Exportation SA v Abacha* [2001] 3 All ER 513.

4 *Paulin v Paulin* [2010] 1 WLR 1057.

5 *Re McInerney Homes Ltd* [2011] IEHC 25.

6 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634.

7 The judgments of Wilson LJ in *Paulin v Paulin* [2010] 1 WLR 1057 at 1069-1074 and Lady Hale in *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 640-643 set out useful histories of the jurisdiction and the circumstances in which it should be exercised.

8 *In re Suffield and Watts, Ex p Brown* (1888) 20 QBD 693.

9 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 641.

10 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 641; *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717.

11 *In re Harrison's Share under a Settlement* [1955] Ch 260.

12 Jenkins LJ; Hodson LJ and Vaisey J concurring.

13 *In re Harrison's Share under a Settlement* [1955] Ch 260 at 276.

circumstances".[14] The decision in *Barrell* was subsequently affirmed by the majority of the Court of Appeal in *Stewart v Engel*.[15] However, there was subsequently some disquiet about the "save in the most exceptional circumstances" formula, with Rix LJ in *Cie Noga d'Importation et 'Exportation SA v Abacha*[16] expressing his concern about the possibility of the existing formula becoming a straitjacket at the cost of the interests of justice and his promotion of a formula of "strong reasons" as an acceptable alternative. Wilson LJ (as he was then) giving the judgment of the Court of Appeal in *Paulin* carried out a comprehensive analysis of the existing authorities[17], which may act as a useful summary of the law prior to the judgment of the UK Supreme Court in *In re L)*:

(a) A judge's reversal of a decision should be distinguished from his or her absolute discretion to amplify the reasons for a decision at any time prior to the perfection of the order;
(b) A judge has jurisdiction to reverse his or her decision at any time prior to the perfection of his or her order;
(c) However, the jurisdiction to reverse prior to perfection of an order should not be exercised "save in the most exceptional circumstances", as *per* the judgment in *Barrell*;
(d) The formula suggested by Rix LJ in *Cie Noga d'Importation et 'Exportation SA v Abacha* and approved by May LJ in *Robinson v Fernsby*[18] to the effect that the jurisdiction to reverse could only be exercised where there were "strong reasons" for doing so was an acceptable alternative to the "save in the most exceptional circumstances" formula of the Court of Appeal in *Barrell*.

This summation of the law was approved by Clarke J in the High Court as representing the law in this jurisdiction in *McInerney*.

In Re McInerney Homes Ltd; Irish Acceptance of *Paulin*

The *McInerney* case arose in the context of examinership proceedings. On Monday, the 10th January 2011, Clarke J in the High Court gave judgment refusing to confirm a scheme of arrangement proposed by the examiner on the grounds that the scheme proposed would be unfairly prejudicial to a number of creditor banks (referred to as the "Banking Syndicate" in the judgment), which had opposed confirmation of the scheme. In particular, Clarke J was of the view that the Banking Syndicate had made out a credible case that a form of long term receivership proposed by the Syndicate would secure a superior income stream than that under the scheme proposed by the examiner. However, Clarke J decided not to make any formal order on that date, adjourning the matter instead to that Friday, the 14th January 2011, for the making of a formal order, and to hear counsel as to any other orders to be made.

However, when the matter came before Clarke J on the Friday, counsel on behalf of McInerney informed Clarke J of the company's intention to invite him to reconsider his judgment of the previous Monday. It was asserted on behalf of McInerney that evidence had emerged, in the days subsequent to the judgment, from two e-mails sent to it on behalf of Bank of Ireland Group Legal Services to the effect that there was a very high degree of likelihood that the interests held by Bank of Ireland and Anglo Irish Bank, two members of the Banking Syndicate, in the loans advanced to McInerney would be transferred to the National Asset Management Agency (NAMA). Clarke J after hearing counsel for McInerney, the examiner and the Banking Syndicate adjourned the matter to the following Monday, the 17th January, to allow the Banking Syndicate to file a replying affidavit, which it duly did.

The argument advanced by counsel on behalf of the Banking Syndicate was that the possible involvement of NAMA had been known to all parties from the earliest stages and that McInerney could have advanced this argument at the hearing prior to the judgment of the 10th January. However, counsel on behalf of McInerney argued in response that it had been misled by the complete absence of any materials put before the Court by the Banking Syndicate that the loans in question could be taken over by NAMA.

Clarke J quoted at length the judgment of Wilson LJ in *Paulin* stating that the quoted portion of that judgment "represents the law in this jurisdiction".[19] The judge continued that where the basis for seeking that a court revisit its judgment is to be found in the proposed presentation of new evidence or materials, the new materials must be such "that same would probably have an important influence on the result of the case, even if not decisive and be credible"[20]. Moreover, the learned judge held that such new evidence should "not ordinarily be permitted to be relied on if the relevant evidence could, with reasonable diligence, have been put before the court at the trial."[21] Applying these tests to the case before him, Clarke J concluded, firstly, that the new material placed before the Court was credible and had the potential to be of real significance to the outcome of the proceedings.[22] Secondly, the learned judge determined that although McInerney shared some of the blame for the material not being before the Court at the hearing due to its failure to make enquiries, the Banking Syndicate's failure to advert to the possibility of the loans being taken over by NAMA was "objectively apt to mislead".[23] Accordingly, Clarke J held that the matter should be re-opened.

The decision of Clarke J to reverse his decision was subsequently raised on appeal to the Supreme Court, where the decision of the High Court was upheld.[24] However,

14 *Per* Russell LJ at 23-24; Karminski and Cairns LJJ concurring. Russell LJ referred specifically to oral judgments, through his words have generally been understood be "in contradistinction not to written, reserved judgments, but to written, sealed orders" (*per* Jenkins LJ in *Paulin v Paulin* [2010] 1 WLR 1057 at 1070).
15 *Stewart v Engel* [2000] 1 WLR 2268 (*per* Sir Christopher Slade at 2275-2276 and Roch LJ at 2292; Clarke LJ dissenting).
16 *Cie Noga d'Importation et 'Exportation SA v Abacha* [2001] 3 All ER 513.
17 *Paulin v Paulin* [2010] 1 WLR 1057 at 1069-1071.
18 *Robinson v Fernsby* [2004] WTLR 257.
19 *Re McInerney Homes Ltd* [2011] IEHC 25, para. 3.7.
20 *Re McInerney Homes Ltd* [2011] IEHC 25, para. 3.12.
21 *Re McInerney Homes Ltd* [2011] IEHC 25, para. 3.12.
22 *Re McInerney Homes Ltd* [2011] IEHC 25, para. 5.9.
23 *Re McInerney Homes Ltd* [2011] IEHC 25, para. 6.5.
24 *Re McInerney Homes Ltd* [2011] IESC 31. O'Donnell J; Finnegan,

neither O'Donnell J[25] in the judgment for the majority nor Fennelly J[26] in his dissenting judgment found it necessary to express any view on the criteria set out in *Paulin*.

In Re L: The UK Supreme Court's Rejection of *Paulin*

The case of *In Re L* arose in the context of care proceedings brought by a local authority in respect of two children who had suffered numerous non-accidental injuries. However, it could not be determined which of the parents of the children had caused the injuries in circumstances where both parents blamed each other. To resolve the issue of the identity of the perpetrator or perpetrators, the judge at Manchester County Court held a fact-finding hearing. The County Court judge delivered an oral judgment on the 15th December 2011, finding that the father had been responsible. When the judgment was transcribed subsequently, it was headed "preliminary outline judgment approved by the court".

The order of the 15th December had not been perfected when on the 15th February 2012, without having first heard from counsel for either of the parents, the judge delivered a written "perfected judgment" in which she ruled that she could not on the evidence before her decide which of the parents had caused the injuries and that it could have been either of them. A majority of the Court of Appeal upheld the mother's appeal on the ground that the judge should not have reversed her judgment. The father then appealed the judgment of the Court of Appeal to the Supreme Court.

Lady Hale, delivering the judgment of the Supreme Court[27], having considered the authorities, pointed out that unlike the Court of Appeal, the Supreme Court was not bound by the *Barrell* line of authority.[28] Rather, Lady Hale expressed her agreement with the dissenting judgment of Clarke LJ in *Stewart v Engel* that a court when considering re-visiting an unperfected order should do so in accordance with the overriding objective in rule 1.1 of the Civil Procedure Rules to "to deal with cases justly."[29] Lady Hale stated further that a relevant factor must be "whether any party has acted upon the [original] decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up."[30] Lady Hale also approved the examples provided by Neuberger J (as he was then) in *In Re Blenheim Leisure (Restaurants) Ltd (No 3)*[31] as to when it might be appropriate to exercise the jurisdiction: where the court had made a plain mistake; where the parties had failed to draw to the court's attention a plainly relevant fact or point of law; where new facts had been discovered after judgment was given.[32] However, Lady Hale emphasised that Neuberger J had considered these as mere examples, and adding a further nail to the coffin of *Barrell* and *Paulin v Paulin* and their "exceptional circumstances"/"strong reasons" *rationes*, Lady Hale stated that "[a] carefully considered change of mind" could be a sufficient reason for a court to exercise its jurisdiction to reverse, stating further that every case was going to depend on its particular circumstances.[33]

Turning to the case at bar, Lady Hale considered the question of whether anyone involved in the case had irretrievably changed their position as a result of the judgment of the 15th December. The learned judge concluded that the placement of the child in question had not yet been decided and the child had remained where she was for the time being.[34] Lady Hale then addressed an argument which had been raised by counsel on behalf of the mother to the effect that even if the County Court judge were entitled to change her mind, she should not have delivered her second judgment of the 15th February without first having given notice to both parties of her intention and provided them with an opportunity to address her. Lady Hale, relying on *In Re Harrison's Share under a Settlement*, acknowledged that the jurisdiction to reverse should be exercised "judicially and not capriciously".[35] However, the learned judge took the view that there had already been a mass of documentary material before the County Court, together with "the long drawn-out process of hearing oral evidence", and very full written submissions, and that it was "difficult to see what any further submissions could have done, other than to reiterate what had already been said."[36] Accordingly, the Supreme Court allowed the father's appeal, resulting in the reinstatement of the judgment of the 15th February 2012.[37]

Should the Irish Courts Re-visit the Decision in *McInerney Homes*?

The Irish courts have not yet considered the impact, if any, of the decision of the UK Supreme Court in *In Re L*. On five occasions since the judgment of Lady Hale (delivered on the 20th February 2013), High Court judges have considered the jurisdiction to re-open a judgment before perfection.[38]In each of these cases, the judges have referred to the judgments of the Supreme Court and High Court in *McInerney* without

Macken and McKechnie JJ concurring. Fennelly J dissented on the substance of the appeal, but concurred with the majority on the procedural issue at issue in this article, agreeing that Clarke J was correct to have re-opened the matter after the emergence of the new material.

25 *Re McInerney Homes Ltd* [2011] IESC 31, para. 23 of the judgment of O'Donnell J.

26 *Re McInerney Homes Ltd* [2011] IESC 31, para. 62 of the judgment of Fennelly J.

27 Lord Neuberger, Lord Kerr, Lord Wilson and Lord Sumption concurring.

28 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 642.

29 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 642 and 643.

30 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 643.

31 *In Re Blenheim Leisure (Restaurants) Ltd (No 3)*, The Times, 9th November 1999.

32 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 642.

33 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 643.

34 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 644.

35 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 644.

36 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 644.

37 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 644.

38 *SZ (Pakistan) v Minister for Justice & Law Reform and Others* [2013] IEHC 95 (Hogan J); *PM (Botswana) v Minister for Justice & Law Reform and Others* [2013] IEHC 271 (Hogan J); *Byrne v Judges of the Circuit Court and Another* [2013] IEHC 396 (Hogan J); *Nee v An Bord Pleanala* [2013] IEHC 584 (O'Malley J); *Kilarden Investments Limited v Kirwans (Galway) Limited and Others* [2013] IEHC (Laffoy J).

mentioning the change of direction in the neighbouring jurisdiction. It will be recalled that the Supreme Court in *McInerney* refused to be drawn as to whether *Paulin* represented the law in Ireland. The way forward is, therefore, less than clear.

The factual circumstances in which *In Re L* arose may go some way to explaining the UK Supreme Court's decision to re-draw the legal principles surrounding the exercise of a judge's jurisdiction to reverse. What is striking when one considers the facts of the cases concerning the jurisdiction to reverse is the fact that the majority of such cases prior to *In Re L* concerned commercial or insolvency law.[39] Arising as it did in the context of child custody proceedings, the principles developed in cases such as *Barrell* may have appeared inflexible and capable of perpetrating an injustice in the case before the UK Supreme Court. Lady Hale was quite correct to point out that "[i]t could not be in the interests of the child to require a judge to shut his eyes to the reality of the case and embrace a fiction."[40] Nevertheless, the rationale for the less flexible approach taken by the courts hitherto cannot be ignored: the concern of Clarke J in *McInerney* about reversals causing "procedural chaos"[41] is equally valid. So how may these equally reasonable positions be reconciled?

In considering its judgment in *In Re L*, one suspects that Supreme Court was presented with three less than ideal choices. Firstly, the Court could have upheld the *Barrell* and *Paulin* line of authority and ruled that the County Court judge in the case at bar had merely changed her mind which did not amount to "exceptional circumstances" or "strong reasons". The result, of course, would have been the judgment of the 15th December being allowed to stand in circumstances where it was now clear that even the judge who had passed that judgment believed it to be wrong.

Secondly, Lady Hale could have upheld *Barrell* and *Paulin* and ruled in the immediate case that given that the best interests of the child were at stake, the exceptional circumstances or strong reasons test had been met. While this approach might have brought a more just outcome in the immediate case and theoretically kept the *Barrell* and *Paulin* line of authority intact, it would have provided minimal guidance for courts in future cases where a judge was simply changing his or her mind. If the best interests of the child could provide an exceptional circumstance or strong reason, would a human rights dimension provide such grounds for a judicial change of mind? If so, where should the line be drawn, given that even cases such as *McInerney* could be framed as involving property rights?

Thirdly, the Court could take the approach which it did in fact take: disapprove the *Barrell* and *Paulin* line of authority and rule that the jurisdiction to reverse be exercised in accordance with the exigencies of the case. Like the second option, this approach allowed the Supreme Court to reach a perceived just outcome in the immediate case. However, the judgment of Lady Hale, leaving as it does even less guidance than the second option would have done, will engender a great deal of uncertainty.

The foregoing makes it clear that the facts of the case before the Supreme Court placed the judges in an invidious position. From the options which were available to the Court, however, it is regrettable that the Supreme Court felt it necessary to take such a scorched-earth approach with such a well-established and reasoned line of authority. The concurrence of Lord Wilson with the judgment of Lady Hale is surprising in this regard, given that his was the judgment of the Court of Appeal in *Paulin* (later relied upon by Clarke J in *McInerney*). It may be argued that the *Barrell* and *Paulin rationes* would have retained a useful check on the exercise of the jurisdiction to reverse in the majority of cases. Certainly, a general rule that a simple judicial change-of-mind would not be sufficient reason for its exercise could have been maintained.

Another regrettable aspect of Lady Hale's judgment was the view taken of the County Court judge's handling of matters once she had determined that she wished to change her mind. Lady Hale may well have been correct that there were no further submissions which could have been made on behalf of the parties. Nevertheless, even if the *audi alteram partem* principle did not require both sides to be re-heard, and even that is not obvious, it would surely have been a common courtesy for the County Court judge to have informed the parties of her intention, rather than drop a "bombshell"[42], as Lady Hale referred to the second judgment. Lady Hale's judgment could certainly have been stronger in its censure of the County Court judge's conduct in that regard.

In conclusion, it is submitted that the approach of Clarke J in *McInerney* should be retained in Ireland as the general rule in favour of what appears to be an overly flexible and indeterminate approach taken by the UK Supreme Court. Cases may well arise in Ireland along the lines of that in *In Re L*, the facts of which may require greater flexibility. However, there should be no reason why these cases cannot be accommodated within the existing legal framework as "exceptional circumstances" or "strong reasons", and authority developed in a more considered manner than has occurred in England and Wales. It should also be recalled that Lady Hale in setting out the new standard for the exercise of the discretion to reverse (the overriding objective being to deal with the case in question justly), identified explicitly as its basis rule 1.1 of the Civil Procedure Rules, a paper rule peculiar to England and Wales. It may, therefore, be argued that the decision of the UK Supreme Court is of no application outside of England and Wales given its normative underpinnings.

Whatever approach is taken by the Irish courts, Lady Hale's comments at the conclusion of her judgment are, notwithstanding the practical pressures faced by the modern judiciary, surely incontrovertible: "judicial tergiversation is not to be encouraged" and the best safeguard against having to re-visit a judgment is "a fully and properly reasoned judgment in the first place."[43] ■

39 That being said, *Paulin* did arise in the context of divorce proceedings.

40 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 644.

41 *Re McInerney Homes Ltd* [2011] IEHC 25, para. 3.11.

42 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 638.

43 *In re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 at 647.

Potential Difficulties Arising in Section 117 and Proprietary Estoppel Claims

Daniel Dwyer BL

Introduction

Two recent judgments have made significant changes to essential issues in respect of the administration of estates. The judgments of the High Court (Laffoy J.) in *S. 1 v P.R. 1 and P.R. 2* [2013] IEHC 407 and the Supreme Court in *Cavey v Cavey & Ors* [2014] IESC 16 respectively, have ramifications firstly, for the six month time limit for issuing proceedings under Section 117 of the Succession act 1965 and secondly, on whether pleas which are essentially grounded in proprietary estoppel come within the provisions of Section 9 of the Civil Liability Act 1961 and the two year limitation period from the date of death in respect of such claims.

Background in *S.1 v P.R. 1 and P.R.2*

The case relates to the administration of the estate of F who died testate on the 6th July 2008. During his lifetime, F was a successful businessman who left behind a very significant estate. Under the terms of his will, should his wife predecease him, as she did, F's six children, including the Plaintiff, S.1, and another son S.2, Plaintiff in related proceedings were to be the beneficial owners of his estate in equal shares. The Plaintiff and the two Defendants were to be the executors of the estate of F.

The Plaintiff's claim was that in July 2000 whilst in the midst of changing employment his father had persuaded him to join his father's company rather than taking up the job he had been offered elsewhere. The promise which formed the basis of the claim for proprietary estoppel was that the father would ultimately transfer his entire shareholding to the Plaintiff, a promise alleged to have been repeated many times by the father prior to his death.

Just over two years after the death of F, on the 15th October 2010, on foot of a Court Order obtained by a creditor bank, Letters of Administration issued appointing AAL, Administrator *ad litem* of the Estate of the deceased F for the limited purpose of defending proceedings the creditor bank intended to issue against the estate of F.

Two years and eight months after the death of F on the 28th March 2011, a grant of probate of the Testator's last will was made from the District Probate Registry at Limerick to the Plaintiff and Defendants. This grant was in the usual form and followed Form No. 6 of Appendix Q to the Rules of the Superior Courts, 1986. It was recorded on the face of the said grant that an Inland Revenue affidavit had been delivered showing the gross value of the estate of F was in excess of €25.8m and the net value in excess of €23.8m.

The Plaintiff issued proceedings claiming relief on the basis of proprietary estoppel and also claiming a declaration pursuant to Section 117 of the Succession Act 1965 that F had failed in his moral duty to make proper or adequate provision for the Plaintiff in accordance with his means.

Legal Position as to time limits applied to Section 117 Applications

It would ordinarily have been accepted that having regard to the decision of Carroll J in *MPD v MD* [1981] ILRM 179 that an application for relief under Section 117 of the Succession Act had to be brought within the appropriate time limit, which was reduced from twelve to six months by the provisions of the Family Law (Divorce) Act 1996. Furthermore, it was held that it was not possible for that said period to be extended.

In *S.1. v P.R.1 and P.R.2* counsel for the Defendants argued that having regard to the provisions of S.117(6), proceedings would of necessity had to have issued within six months of the date of issue of the initial Limited Grant. Section 117(6) provides as follows:

> "6 An order under this section shall not be made except on an application made within six months from the first taking out of representation of a deceased's estate."

Section 3, which contains interpretation provisions of the 1965 Act provides the following definitions:

a. 'Representation' means probate or administration;
b. 'Probate' means probate of a Will;
c. 'Administration', in relation to the estate of a deceased person, means letter of administration with or without a Will annexed and whether granted for special or limited purposes; and,
d. 'Grant' means Grant of Representation.

Applying the strict interpretation of the provisions of the Act would indicate that the relevant six month period ran from the date of taking of any Grant, whether limited or otherwise, however Laffoy J held that when applying the rules of interpretation, and in particular Section 5 of the Interpretation Act of 2005, it could not be what the Oireachtas intended given that a Court would have to know the nature and terms of the Last Will and Codicils of any testator and equally the extent of the estate of the testator has to be identified. Often, in the case of a limited liability company, as was the case in *S.1. v P.R.1 and P.R.2,* these requirements are often not fulfilled in time.

On that basis, Laffoy J held that the period for instituting proceedings pursuant to the provisions of Section 117 did

not run from the date of the Limited Grant, as to hold as such would be to crystallise a patent absurdity, instead, the time limits would run from a full Grant of Probate, which, in the case of *S.1. v P.R.1 and P.R.2* would be the date of the 28th March 2011, and as such, the Plaintiff's application under Section 117 was held to be within time.

Time limits for Promissory or Proprietary Estoppel actions

In *S.1.,* Laffoy J indicated that she felt in light of a lack of clarity as to how a debt had arisen, it would be inappropriate to express a definitive view on the issue of Section 9. Notwithstanding same, Laffoy J did offer some analysis of the authorities governing the question of Section 9 and estoppel claims.

Initially, it appeared to be the case that in estoppel proceedings, Section 9 would not be applied in circumstances where it could not reasonably be held that a cause of action pre-dated the death of the party alleged to have made a promise. In *Reidy v McGreevy* (Unreported, High Court, Barron J, 19th March 1993), the court held that in that case, no cause of action could have arisen before death (assuming the promise was not repudiated prior to death) as it could not be ascertained if the testator had or had not honoured his promise until he died.

This decision is, as Laffoy J put it, "irreconcilable" with two later decisions. In *Corrigan v Martin* (Unreported, Fennelly J, 13th March 2006), the judge held that when interpreting the provisions of the 1961 Act it was the case that:

> "The Oireachtas intended that provision to apply to all causes of action coming into existence right up to the point of death itself. It is unreal and almost metaphysical to distinguish between causes of action existing immediately prior to the death and those which matured on the death itself. I do not believe that the Oireachtas can have intended to make such a fine distinction. It could serve no useful purpose which has been identified in this case."

Furthermore, Fennelly J relied upon the judgment of O'Higgins CJ in *Moynihan v Greensmyth* [1977] IR 55 which identified policy considerations in the application of the two year time limit for bringing actions against the estate of a deceased on the grounds that:

> "Those charged as executors and administrators of estates of deceased persons are entitled and indeed bound to carry out their tasks with reasonable expedition and that creditors of the estate and ultimately the beneficiaries are entitled to have the estate administered in a reasonable time."

In those circumstances, Fennelly J held that the Plaintiff's action was barred by the provisions of Section 9 of the 1961 Act.

In *Prendergast v McLaughlin* [2011] 1 IR 102, the deceased had died on 28th August 2003 and the Plaintiff had instituted proceedings on the 25th July 2006. The Plaintiff claimed that the deceased had made promises that he would bequeath certain lands to the Plaintiff. In holding that the claim was statute-barred, O'Keefe J considered both *Corrigan v Martin* and *Moynihan v Greensmyth*, preferring the reasoning of *Corrigan* on the grounds that Section 8(1) of the 1961 Act indicated that it governed *"all causes of action…subsisting against him."*

In O'Keefe J's view, any obligation on the part of the deceased to perform a contract or quasi-contract to devise the lands to the Plaintiff was to perform same during his life rather than at the moment of death. In those circumstances, he held that Section 9(2)(b) of the 1961 Act applied and the Plaintiff's claim was statute-barred.

Cavey v Cavey & Ors and Section 9

Cavey v Cavey & Ors [2014] IESC 16 was a somewhat convoluted series of proceedings, a brief timeline of which is as follows. The father of the parties to the action "the deceased" died testate on the 18th December 2006. Probate of his will was granted to the executors on the 13th March 2008. The Plaintiff first brought proceedings seeking reliefs under Section 117 on the 12th December 2008. These proceedings were heard by Laffoy J on the 23rd April 2009 and were dismissed. The decision of Laffoy J was initially appealed to the Supreme Court, however, the Plaintiff, at all times appearing as a litigant in person, advised the Supreme Court on the 23th July 2010 that he was withdrawing his claim. On the 27th July 2010, a second set of proceedings was commenced, the substance of which was what was said to be a representation to the Plaintiff by both of his parents that he would inherit the family home.

A motion was brought by the executors before the High Court seeking to have the action dismissed as:

a) An abuse of process in accordance with the rule in *Henderson v Henderson* (1843) 3 Hare 100 and/or;
b) That the proceedings must invariably fail as being statute-barred having regard to the provisions of Section 9 of the Civil Liability Act 1961.

Herbert J. delivered judgment on the 7th February 2012 (*C v C & Ors* [2012] IEHC 537) holding that the proceedings were statute barred under the 1961 Act and thus bound to fail and the proceedings were dismissed on that basis.

As the second set of proceedings had been issued in July 2010, some three and a half years following the death of the Plaintiff's father, were the proceedings to be held to be bound by Section 9, the Plaintiff's claim would have to be held to be statute-barred.

In considering the decisions of *Prendergast v McLaughlin, Corrigan v Martin* and *Reidy v McGreavey*, Clarke J in the Supreme Court held that *"a significant distinction is made in Section 9(2) so far as claims against an estate of the deceased, on the one hand, and a cause of action which may exist against those in charge of the administration of the deceased, on the other."* The judge held that the Plaintiff could only have a cause of action under estoppel if he could establish his father was in breach of a legally enforceable promise in respect of bequeathing the disputed properties to him. If the Plaintiff could establish that such a promise existed, then the failure of his father to make an appropriate will would give rise to a claim.

Clarke J held that such a claim would arise because of a

failure on the part of the Plaintiff's father rather than any failure on the part of the estate. As such, the judge held that it would fall within the scope of the phrase *"a claim surviving against the estate of the deceased."* The judge acknowledged that the deceased could have remedied the alleged breach of the promise at any point up until death by executing a will bequeathing the property in question to the Plaintiff.

Potential issues arising following the decision in *Cavey*

The *Cavey* decision offers some much needed clarity in the area of claims against an estate brought on the basis of the doctrines of promissory or proprietary estoppel. Notwithstanding same, a potential issue could arise in relation to claims where a party may also seek to bring a claim under Section 117.

Following the decision of Laffoy J in *S.1. v P.R.1 and P.R.2* it is clear that an action brought seeking relief under Section 117 is to be brought within six months of a full Grant of Probate as to hold otherwise would lead to an absurd situation where a court could be forced to consider the application without knowledge of the nature and terms of the Last Will and Codicils, something that could never have been the intention of the Oireachtas when enacting the Succession Act.

Notwithstanding same, problems may arise in the common scenario where a Plaintiff seeks relief under both Section 117 and under the doctrine of proprietary and/or promissory estoppel. It is not uncommon in some circumstances for the executors to be slow in extracting a full Grant of Probate. This is much more common in cases involving large estates, especially in circumstances where there may be outstanding debts in light of the current economic situation. Given the relatively slow operating speed of some financial institutions, a Plaintiff may find that the two year limitation period under Section 9 can expire before a Grant of Probate is extracted. If that is to happen, a Plaintiff may be forced to either apply to a court for sight of the deceased's will before issuing proceedings or to have an Administrator ad litem appointed, or, in the alternative, issuing two sets of proceedings, one in relation to the estoppel issue and another for relief under Section 117. If there is a necessity to "double-up" on sets of proceedings then it could prove unnecessarily burdensome on Court lists and to place an extra costs burden on disputed estates. ■

Voluntary Assistance Scheme Update

Diane Duggan BL

VAS is operated by the Bar Council of Ireland and accepts requests for legal assistance from NGOs, civic society organisations and charities acting on behalf of individuals who are having difficulty accessing justice. Please contact us for further details or see the Law Library website under 'Bar Council and You'.

European Pro Bono Nomination

In April and May 2013, thirty-three barristers volunteered with Mr. Justice Quirke on the Magdalen Commission to assist him in conducting a needs assessment of women who had spent time in the Magdalene Laundries. The volunteers dedicated a huge amount of time speaking to these women. The Voluntary Assistance Scheme and the Magdalen Commission Volunteers were recently listed among the top four pro bono projects shortlisted for PILnet's 2014 European Pro Bono Award for Partnership in the Public Interest.

PILnet is the Global Network for Public Interest Law, an international *pro bono* organisation. The project was nominated by Ireland's Public Interest Law Alliance (PILA). Earlier this year, the Magdalen Commission volunteers received an Honorary Human Rights Awards at the 2014 Irish Law Awards.

The thirty-three volunteers were inspirational in their task; demonstrating enormous skill, compassion and integrity in carrying out their work. VAS were incredibly proud to be associated with the project and are delighted that this experience is being recognised in the European context of partnership in pro bono law.

Legislative Drafting Committee

Over the past number of months, a legislative drafting committee has been formed to look at the possibility of producing a piece of legislation at the request of Ana Liffey Drug Project. The committee is chaired by Emily Egan SC and its members include Bernard Condon SC, Rebecca Broderick BL, Rebecca Graydon BL, Marcus Keane BL and Brendan Savage BL. These members are providing an enormous amount of time and expertise to a worthwhile project. If you have experience in legislative drafting and would like to get involved in future projects, please get in touch with VAS.

Get Involved

VAS has been incredibly busy since the beginning of the legal year with new requests for assistance frequently being made. VAS continue to provide help to NGOs and their clients on an advisory basis. If you would like to get involved, please get in touch with us by contacting either Diane Duggan at dduggan@lawlibrary.ie or Jeanne McDonagh at jmcdonagh@lawlibrary.ie. ■

Irish Women Lawyers' Association

Mary Rose Gearty SC

In a world where most films and story-books for children, and indeed those for adults, still hold out the high office of Princess as being the loftiest aspiration for a young woman, it is still necessary to remind ourselves that girls too can hope to become Chief Justice, Attorney General or the Director of Public Prosecutions. The fact that a woman currently holds each of these positions does not mean that the culture in which this was unusual has changed. At least, it has not changed enough to encourage equal participation by women in politics, law and business at the most senior levels.

The Irish Women Lawyers' Association (www.iwla.ie) exists because many of us want to meet other women who have encountered similar experiences in their careers and we want to encourage each other in our professional lives. ■

Anyone who would like to join is encouraged to contact Aoife McNickle BL: email: admin@iwla.ie

IWA Dinner 2014

Front Seated L to R: Maura Butler, Chairperson IWLA, Claire Loftus, DPP The Hon. Ms. Carmel Stewart; The Hon. Ms. Catherine McGuinness; The Hon. Ms. Mary Faherty, Catherine Dolan, CEO Thomson Reuters, Maura Smyth, Thomson Reuters Back Standing L to R: Dearbhail McDonald, Irish Independent, IWLA Standing Committee Members Sarah Harmon, Aoife McNickle, Jane Murphy, Síle Larkin, Lisa Chambers and Irene Lynch Fannon; EU Ombudsman and Keynote Speaker, Emily O'Reilly, Her Hon. Judge Grainne Malone; Her Hon. Judge Mary Emer Larkin; Her Hon. Judge Mary Ellen Ring of the Circuit Court; Her Hon. Judge Sinéad Ní Chúlacháin, Noeline Blackwell, IWLA Woman Lawyer of the Year, Her Hon. Judge Rosemary Horgan, President of the District Court ; Her Hon. Judge Patricia McNamara, Attracta O'Regan and Sonia McEntee, of Law Society Skillnet, Tracey Donnery of Skillnets, Mary Rose Gearty and Gráinne Larkin of The Bar Council of Ireland

Law and Government – A Tribute to Rory Brady

Rory Brady

Photograph courtesy of Irish Independent. Photographer Tom Burke.

Bláthna Ruane, Jim O'Callaghan, David Barniville, (editors), *Law and Government – A Tribute to Rory Brady*; ISBN: 9781858007137; price 50 euro; Round Hall

This month sees the publication of a new book *Law and Government – A Tribute to Rory Brady.* This book is a collection of essays by former colleagues and friends. The inspiration for this collection of essays came from a suggestion by Jim O'Callaghan in the aftermath of Rory's untimely death that something should be done in his honour and after careful consideration it was decided that the most appropriate way to honour Rory was to produce a book of essays that reflected areas of interest in Rory's professional life. The editors Blathna Ruane SC, Jim O'Callaghan SC and David Barniville SC carefully chose the topics with the contributors and the book is divided into three sections: a portrait of Rory Brady by David Barniville and Jim O'Callaghan; a section dealing with topical contemporary issues and a section dealing with historical issues.

In his foreword, The Hon Mr Justice John Murray says:

> "There are those who are remembered with great respect and those who are remembered with great affection. Anyone who knew the late Rory Brady remembers him with both. Indeed, this book pays tribute to the greatly respected reputation which he enjoyed as a Senior Counsel and Attorney General. But its publication has been largely conceived and motivated by an enduring affection for Rory which was engendered by his infectious warmth and good humour which touched everyone who found themselves in his company ... As David Barniville and Jim O'Callaghan explain in their illuminating personal portrait of Rory, he made a formidable contribution to the good governance of this country in the spheres of both public and private law. That, as those authors show, is part of the abundant legacy which he left behind. This publication comprises contributions which profoundly analyse the impact of the law and the administration of justice on the governance of our democracy from a range of different perspectives, both national and international. In doing so, it at once acknowledges his legacy and becomes part of it."

The first essay in Section II is written by Rory himself (previously published in the *Virginia Journal of International Law* in 2008). It deals with insights into some of the legal issues relating to combating terrorism which he gained when in his role as Attorney General and his involvement in the Northern Ireland peace process. Other contributions are as follows:

- **Michael McDowell** – Reflections on the Limits to the law's ambitions
- **Noel Whelan** – Changing the Rules of the Political Game
- **Paul Gallagher** – The Changing Face of law and legal regulation
- **Hugh Geoghegan** – The Relationship of the Attorney General to Bar and Bench
- **Brian Murray** – Judges: Institutional independence and financial security
- **Paul Sreenan** – The State in international litigation – the capacity to sue other Member States of the EU before international tribunals – the MOX litigation
- **Michael M. Collins** – Public Policy constraints in international commercial arbitration: competition law, private choices and mandatory rules
- **Turlough O'Donnell** – Reflections on the role of mediation in the resolution of disputes
- **Donal O'Donnell** – "The Most Curious Forerunner" to the fundamental rights provisions in the 1937 Constitution
- **Gerard Hogan** – The influence of the continental constitutional tradition on the drafting of the Constitution
- **Blathna Ruane** – Democratic Control and Constitutional Referenda – the failure of the popular initiative mechanism for constitutional referenda under the Irish Free State Constitution

"In a Foreword I cannot do justice to the calibre of the essays in this volume but, more importantly, what I can say is that they do justice to the legacy and memory of Rory Brady. For that we must be truly grateful to each of the contributors to this book and in particular to Bláthna Ruane, Jim O'Callaghan and David Barniville who also undertook the onerous task of editors and, of course, to the publishers, Thomson Reuters Round Hall.": Murray J.

The book is dedicated to his wife Siobhán and his daughters Maeve and Aoife.

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