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# THE BAR REVIEW

Journal of The Bar of Ireland

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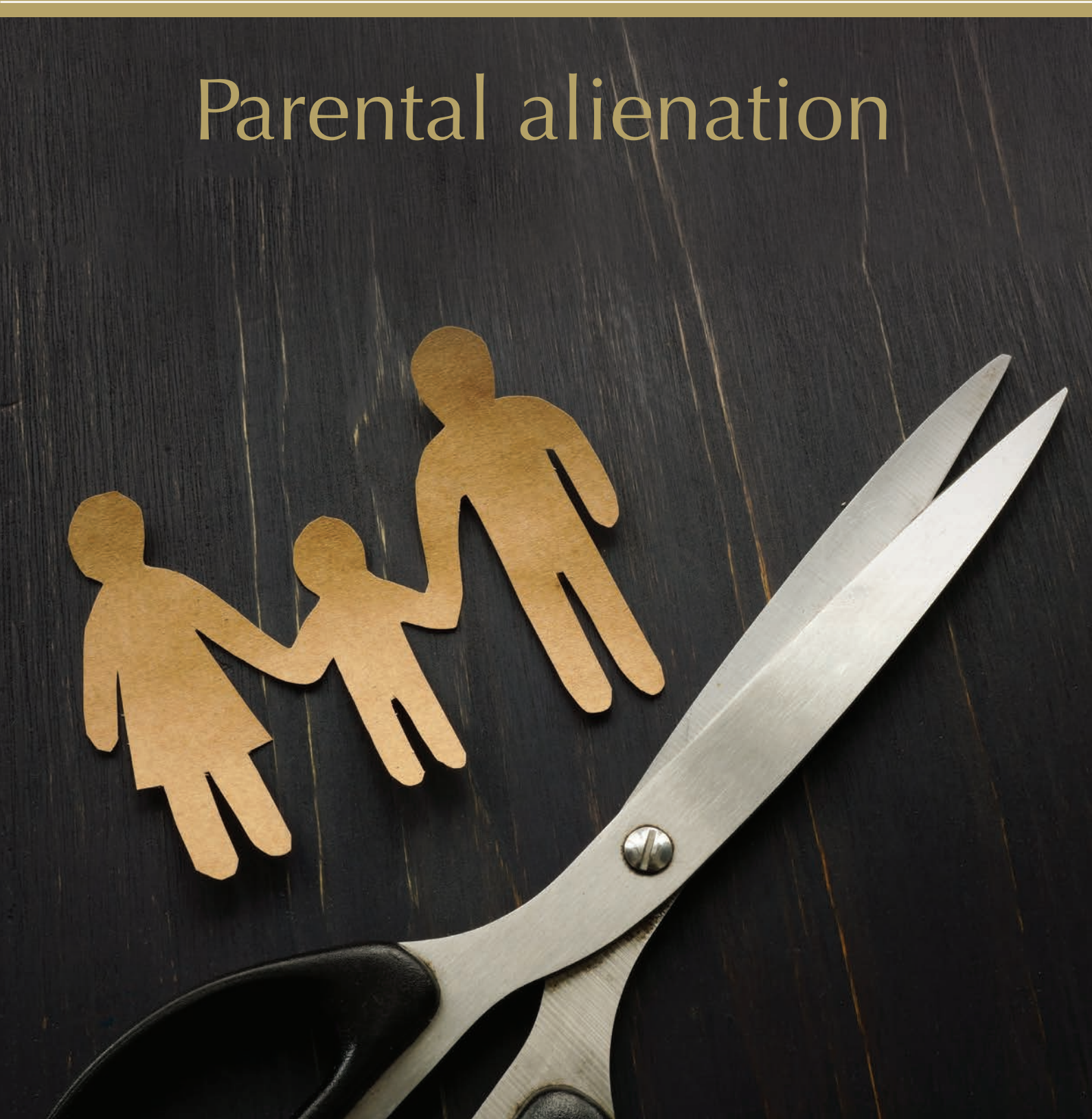
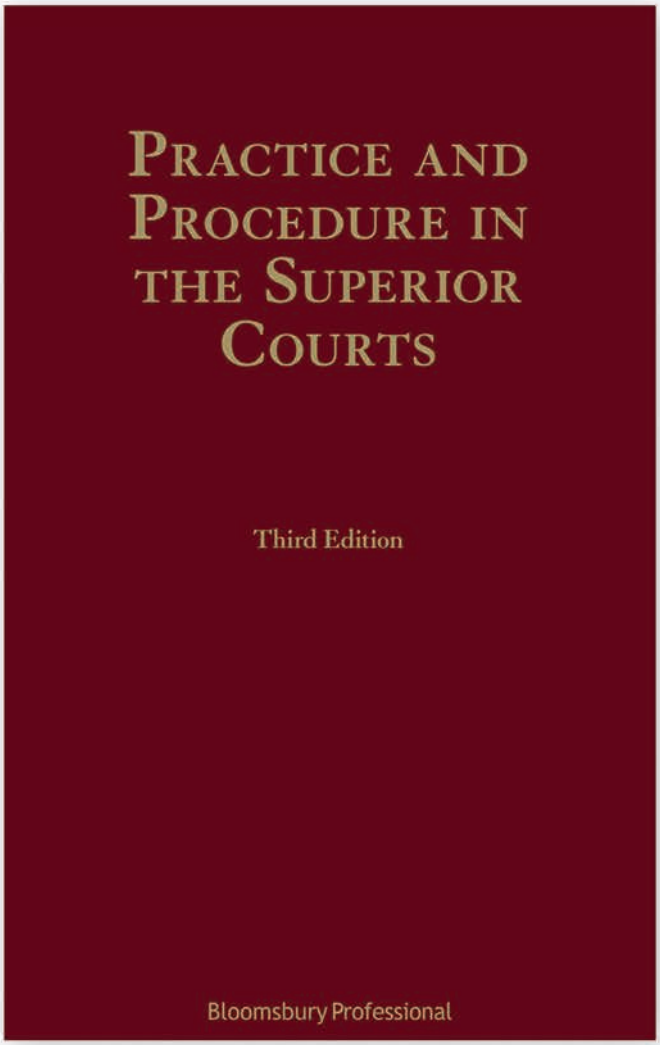
## Parental alienation



# COMING SOON




## Practice and Procedure in the Superior Courts

### 3rd edition

By Benedict Ó Floinn

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The Bar of Ireland
Distillery Building
145-151 Church Street
Dublin DO7 WDX8

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



PUBLISHERS

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

Editorial: Ann-Marie Hardiman
Paul O'Grady
Colm Quinn
Design: Rebecca Bohan
Tony Byrne
Meliosa Fitzgibbon
Advertising: Paul O'Grady

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

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**Papers, editorial items, and all queries regarding subscriptions should be addressed to:**
Therese Barry at: therese.barry@lawlibrary.ie

# The value of independence

## New Chair of The Bar of Ireland, Sara Phelan SC, writes on barristers' independence and the impact it has had on the legal profession, the justice system, and the development of Irish society.

As I commence my term of office as Chair of The Bar of Ireland, I would like to record my heartfelt thanks to my predecessor, Maura McNally SC, whose leadership through a most difficult and trying two years was simply second to none and leaves the Bar very well placed to return to a more 'normal' practice in, hopefully, a post-Covid world.

### Independence

While reading *The Last Colony: A Tale of Exile, Justice and Britain's Colonial Legacy* by Prof. Philippe Sands KC over the vacation, the description of a potential judicial candidate for the International Court of Justice, by some of those opposed to his appointment, as being "too independent, extremely difficult to influence and prone to adhere to his own view in all circumstances", set me thinking about the independent referral Bar and what 'independence' means to us.

Independence is one of our core values and at the beginning of a new legal year, it is of no harm to reflect on why it is so important.

Independence is clearly intertwined with our integrity and expertise and, as sole practitioners, the advice we give to our clients can be said to be truly independent because we are not beholden to, or answerable to, any partners, shareholders or other third parties. The best interests of our clients can therefore be truly front and centre, and we can defend the interests of our clients fearlessly and without favour, subject only to adherence to our ethical principles and our overriding duty to the proper administration of justice.

### Independent advice for all

Our independence also ensures that the very best legal advice and representation in the country is available to any party who requires it, through the operation of the 'cab rank rule'. Or, put another way, our independence ensures that a David, anywhere in the country, can take on the might of a Goliath – such as the State or commercial interests – on an equal footing. This equality of arms is essential in the administration of justice and ensuring equal access to justice for all, and our independence ensures that the operation of the law serves as a bulwark between the State and the citizen, protecting the Constitution and the individual's rights, without which we would not have a functioning democracy.

But for our independence, many of the seminal cases of the past 50 years or so might never have come to pass. *The State (Healy) v Donoghue*, *Airey v Ireland*, *Ryan v The Attorney General* and *McGee v The Attorney General* are just a very small number that spring to mind, and each of these cases and many many more have served to develop our constitutional jurisprudence. I wonder if this jurisprudence would have so developed in the absence of an independent referral Bar? It seems to me that it is at least possible, if not probable, that these cases might never have seen the light of day but for the fact that members of the Law Library were prepared to 'take on' the case. And the existence of an independent referral Bar meant that the plaintiffs – regardless of their background, status, or funding – benefitted from the best of legal minds.

### More important than ever

Some half century later, the availability of such independent expertise to litigants today is just as crucial in the face of the many current issues – for example, the housing, economic, climate, environmental and biodiversity, health, and humanitarian crises – where plaintiffs in the front line (who are almost invariably the community/the individual/the NGO), deserve counsel and expertise on a par with their opponents. The independent referral Bar is and should remain at the forefront of our justice system in terms of upholding the rule of law, to ensure the protection of all members of society, but particularly those – including the vulnerable and disadvantaged – who may not find their voice without our independence and expertise.

It is by adherence to our core value of independence, and related values such as integrity, duty to the court, professionalism, and collegiality, that we will manage to set ourselves apart and continue to make ourselves relevant to the consumers of our services as the world as we know it continues to change. Let us strive to be as relevant and as necessary in the future as we have been in the past.

I look forward over the course of my term to engaging with all my colleagues, and to advancing the issues and priorities of the profession. In the meantime, I wish you all the best as we embark on the 2022/23 legal year.

**Sara Phelan SC**
*Senior Counsel, Barrister*
*– Member of the Inner Bar*
*Chair of the Council of*
*The Bar of Ireland*

# Essential reading

## As a new legal year begins, *The Bar Review* covers topics that all practitioners need to be aware of.

*The Bar Review* begins the new legal year with an interview with the Chief Justice of Ireland, Mr Justice Donal O'Donnell, during which he discusses his student days and his years in practice as a barrister.

In keeping with the sense of being back at school, John Breslin SC and David Sweetman BL have provided a comprehensive guide to cryptocurrency – its regulation, and recent litigation in the EU and internationally. Their article is essential reading for everyone regardless of whether or not their practice involves cryptocurrency.

Tomás Keys BL analyses the reach of a wasted costs order in light of the changes made to the Superior Court Rules and highlights the ramifications for all legal practitioners.

Parental alienation and the industry of experts that has developed around this singularly tragic aspect of relationship breakdown are scrutinised by Lyndsey Keogh BL. Her article provides a thorough analysis of the approach taken by the courts in Ireland, the UK and the United States.

Every October we welcome new members to the Bar and in this edition's Closing Argument, William Quill BL asks several important questions about the current supports available to pupils and the financial challenges faced by many of our junior colleagues.

**Helen Murray BL**
*Editor*
*The Bar Review*

## Central Bank Acts launch

*Pictured at the launch of* The Central Bank Acts – Annotated and Consolidated *were (from left): Mr Justice David Barniville; John Freeman BL; and, John McCarroll SC, Harneys.*

Mr Justice David Barniville launched *The Central Bank Acts – Annotated and Consolidated* by John Freeman BL with consultant editor John McCarroll SC of Harneys, at Dublin's Westin Hotel on July 6, 2022. Mr Justice Barniville welcomed the text as the first complete consolidation and annotation of the Central Bank Acts, and noted the importance of accessible and clear legislation in the context of the Ireland for Law initiative.

## Portraits unveiled

*Pictured at the unveiling of the portrait of Frances Kyle BL and Averil Deverell BL were (from left): Maura McNally SC; artist Emma Stroude; and, Hugh Mohan SC.*

A portrait of the first female barristers to be called to the Bar in Ireland was unveiled at The Honorable Society of King's Inns on July 26. The portrait, which was commissioned as part of the In Plain Sight initiative, depicts Frances Kyle BL and Averil Deverell BL, who were called to the Bar in 1921 after the enactment of the Sex Disqualification (Removal) Act 1919.

To find out more, or to support In Plain Sight, visit https://www.lawlibrary.ie/inplainsight/.

## Equality at the Bar


*James Browne TD, Minister of State at the Department of Justice with responsibility for law reform, launched The Bar of Ireland's first ever Equality Action Plan on June 1. Pictured at the launch were (from left): Aoife McNickle BL, Chair, Equality and Resilience Committee; James Browne TD; and, Maura McNally SC.*

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*All lectures and workshops are webcast and available to view on playback, allowing participants to catch up on coursework at a time suitable to their own needs. Diploma Centre reserves the right to change the courses that may be offered and course prices may be subject to change.*

# Deadline for pension contributions

## The Bar of Ireland Retirement Trust Scheme gives you the opportunity to get money back from the Government. You should take full advantage.

The Government wants to help you to save for retirement, and will give you a tax refund on pension contributions made to your retirement scheme. So, depending on your rate of income tax (20% or 40%), every €1,000 you pay towards your retirement would mean that the Government will give you back €200 or €400.

Making a once-off lump sum pension contribution offers an excellent opportunity to take full advantage of the tax relief on offer for the 2021 tax year and to maximise the amount of money saved in your pension at a minimum cost to you. You can make a once-off lump sum payment to your pension scheme by October 31, 2022, to maximise the tax refund you are entitled to for the 2021 tax year. Those using the Revenue Online Service (ROS) have an extended deadline this year, as returns do not have to be in until Wednesday November 16, 2022.

There are limits on the amount of pension savings you can make free of income tax each year. **Table 1** shows the maximum tax relief available from Revenue, which is determined by an age-related scale and subject to an overall earnings cap.

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

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

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

*Donal Coyne, Client Relationship Executive, Mercer.*

You will shortly receive a newsletter in the post outlining the steps required to make a lump sum contribution. The easiest way for you to make a payment is by electronic funds transfer (EFT). Alternatively, cheques can be returned made payable to 'The Bar of Ireland Retirement Trust Scheme'. Please email our once-off AVC form, which will be included in our newsletter, with proof of EFT or cheque, to justask@mercer.com. Once Mercer receives payment of your lump sum contribution, it will be automatically invested in your current investment choice.

Remember, for those not filing via ROS, pension contribution payments by cheque or EFT need to be in by October 31, while pension payments made in respect of tax returns online via ROS can be made until November 16.

**Please note:** The preferred method for payment is by EFT where possible.

Should you have any questions, please don't hesitate to contact the Mercer JustAsk Team at justask@mercer.com or 01-411 8505.

# Beyond the Bar: Alumni Network launch event

Beyond the Bar, The Bar of Ireland's Alumni Network launch event, will take place on October 20 at 6.00pm in the Atrium, Distillery Building. We are currently contacting former members by post with invitations to this event. We would be grateful if you could bring this notice to the attention of any former colleagues in your network.

To learn more about our offering, visit www.lawlibrary.ie/alumni. For colleagues to update their contact details, please email alumni@lawlibrary.ie.

Please let your colleagues know!

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## Employment Equality Law | Second Edition

**Marguerite Bolger, Claire Bruton and Clíona Kimber**

The new edition of ***Employment Equality Law*** provides practitioners with a comprehensive and definitive analysis of employment equality law, practice and procedure in the Workplace Relations Commission, Labour Court, Circuit Court, Superior Courts and Court of Justice of the European Union. It also provides a wealth of resources for further research.

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# Specialist Bar Association news

## Construction Bar Association

The CBA held a satellite event in association with Dublin International Disputes Week 2022 on June 16. Speakers Deirdre Ní Fhloinn BL, Philip Britton, Kim Vernau and Matthew Bell gave detailed presentations on international perspectives on regulation and risk in residential construction.

## Cuman Barra na Gaeilge

Reáchtáil Cumann Barra na Gaeilge léacht ar Iúil 1. An Breitheamh Conor Dignam ina Chathaoirleach. Phléigh na cainteoirí Micheál Ó Scannail SC agus Catherine Dunne BL 'Suaitheadh Néarógach – Nuashonrú i ndiaidh *Sheehan*'. Tar éis na léachta bhí ócáid thraidisiúnta ar siúl sna The Sheds.

## Employment Bar Association

On June 21, Kevin Bell BL provided an update on the employment status of pizza delivery drivers, after the recent Court of Appeal judgments in *Karshan (Midlands Limited) t/a Domino's Pizza v The Revenue Commissioners*. Des Ryan BL delivered a comprehensive review of this year's significant employment law cases, which was followed by the EBA AGM. Both events were chaired by Alex White SC.

## EU Bar Association

On June 1, Brian Kennedy SC chaired the EUBA briefing entitled 'A Radical Overhaul of Consumer Rights Law in Ireland?' Patrick Fitzgerald BL covered the main features of the Consumer Rights Bill 2022. As part of Dublin International Disputes Week 2022, the EUBA held a very topical event entitled 'EU-UK Trade and Cooperation Agreement and Protocols'. George Peretz KC and Catherine Donnelly SC discussed this very relevant situation. Paul McGarry SC chaired the event.

## Immigration, Asylum and Citizenship Bar Association

On July 21, the IACBA CPD seminar heard from Mr Justice Charles Meenan and 2021 IACBA Bursary recipient, Mariana Verdes BL. The event was chaired by Denise Brett SC.

## Planning, Environmental, and Local Government Bar Association

The PELGBA held its Annual Conference on June 24. The conference was opened by Stephen Dodd SC, Chair, PELGBA, with a keynote address by Mr Frank Clarke SC, former Chief Justice of Ireland, on 'Mediation in environmental and planning disputes'. The conference was chaired by Mr Justice Gerard Hogan, with presentations from Dermot Flanagan SC, Tom Flynn SC, Suzanne Murray SC, Aoife Carroll BL, and Aine Ryall, Centre for Law & the Environment, UCC. The speakers presented on a range of topics including general updates on planning and environmental law, height and apartment guidelines, Section 5 determinations, climate change, costs in judicial review, strategic litigation against public participation, and the future of environmental rule of law.

## Probate Bar Association

The Probate Bar Association held a breakfast briefing on June 28. Chaired by Vinog Faughnan SC, Nick Reilly BL considered The Fair Deal Nursing Home Scheme. On July 19, Maurice Osborne BL dealt with complaints about estate matters before the Legal Services Regulatory Authority, the

steps in such complaints, how to advise a solicitor who is in receipt of a complaint, who can complain, who is a client, what determinations can be made at each step, and the legislative framework under the 2015 Act.

### Professional Regulatory and Disciplinary Bar Association

A joint PRDBA and Mason Hayes & Curran LLP event took place on June 24. Speakers included: Helen Callanan SC, Vice Chair, PRDBA; Lorna Lynch BL; and, Catherine Allen, Mason Hayes & Curran LLP. This event was chaired by Frank Beatty SC, Chair, PRDBA, and topics comprised common aspects between employment and regulatory law, and frivolous and vexatious complaints.

### Sports Law Bar Association

On July 5, the SLBA held its event entitled 'Banning Athletes From Competitions & The Rise of "Sports-Washing"', chaired by Béhinn Murphy BL. Speakers included: Susan Ahern FCIArb BL, Chair, SLBA; Tim O'Connor BL; and, Prof. Simon Chadwick, Emlyon Business School.

**We would also like to welcome four new Specialist Bar Associations to the organisation:**

### Financial Services Bar Association

The FSBA launch event took place on July 15 with welcoming remarks by Mr Justice David Barniville in his first official event as President of the High Court. John Breslin SC opened the event.

### Corporate & Insolvency Bar Association

The CIBA held a fantastic launch event in the Gaffney Room on July 27, chaired by Kelley Smith SC, and with guest speaker Mr Justice Brian Murray. This new Specialist Bar Association is looking forward to a busy legal year 2022/23, and to advancing members' interest and involvement in this field. On September 21, the CIBA held its first breakfast briefing on 'Recent Developments in Examinership Law – Consideration of likely changes resulting from the transposition of EU Directive 2019/1023 on Restructuring and Insolvency'. The event was chaired by Kelley Smith SC, Chair, CIBA. Speakers John Kennedy SC and Ross Gorman BL gave very insightful and interesting presentations.

### Tort & Insurance Specialist Bar Association

The Tort & Insurance Specialist Bar Association launch event took place on June 2, with Mr Justice Paul Coffey, Ronnie Robbins SC, Elizabeth O'Connell SC, Chair of The Bar of Ireland's Personal Injuries (PI) Committee, and Michael Gleeson SC delivering insightful presentations to a full Gaffney Room. On July 20, Maura McNally SC chaired a lively Q&A with Ms Justice Mary Rose Gearty.

### Tax Bar Association

Kelley Smith SC chaired the TBA's talk on July 6. Julie Burke BL reviewed the revised Civil Code of Practice for Revenue Compliance Interventions, and Kieran Binchy BL examined the Tax Geared Civil Penalty Regime.

# Call to the Inner Bar

Twenty-seven members of The Bar of Ireland were called to the Inner Bar at the Supreme Court on Wednesday, October 5. Of the 27 members taking Silk, 15 were female, representing a three-fold increase on last year's Call. This is a significant historic moment as it is the first time more female barristers were called than male.


*Sara Antoniotti SC.*


*Garret Baker SC.*


*Garvan Corkery SC.*


*Daniel Cronin SC.*


*Elva Duffy SC.*


*Nuala Egan SC.*

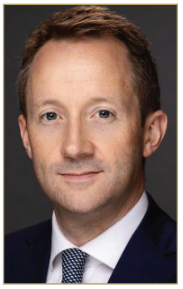

*Moira Flahive SC.*


*Glen Gibbons SC.*


*Michael Hourican SC.*


*Jane Hyland SC.*


*Reg Jackson SC.*


*Joe Jeffers SC.*


*David Leahy SC.*


*Lorna Lynch SC.*


*Padraic Lyons SC.*


*Tony McGillicuddy SC.*


*Imogen McGrath SC.*


*Sinead McGrath SC.*


*Mairéad McKenna SC.*


*Gerard Meehan SC.*


*Jennifer O'Connell SC.*


*Michael O'Connor SC.*


*Leesha O'Driscoll SC.*


*Ailbhe O'Neill SC.*


*Bairbre O'Neill SC.*


*Fiona O'Sullivan SC.*


*Geraldine Small SC.*

# Celebrating Denham Fellows

*Pictured at the Denham Fellowship reception were (from left): Desmond Ryan BL; Seán Guerin SC; Ms Justice Caroline Costello; former Chief Justice Susan Denham; Joy-Tendai Kangere BL; and, David Leonard BL.*

*Former Chief Justice Susan Denham and Liam O'Flaherty BL.*

As we celebrated the end of another legal year, the first Denham Fellow to graduate presented the opportunity to enjoy a reception in the beautiful surroundings of the Benchers' Room in the King's Inns. Many of those who have been involved in the success of the Denham Fellowship were in attendance including the Denham Fellows, their masters and mentors, along with members of the Board and executive staff from The Bar of Ireland and King's Inns.

Further information on the Denham Fellowship is available from: https://www.lawlibrary.ie/join-us/becoming-a-barrister/the-denham-fellowship/.

Chief Justice Donal O'Donnell

# Justice at the core

Chief Justice Donal O'Donnell spoke to *The Bar Review* about his career, his views on access to justice, and his wishes for his tenure.

**Ann-Marie Hardiman**
Managing Editor, Think Media Ltd.

Chief Justice Donal O'Donnell was appointed in October 2021 following a distinguished career at the Bar and the Supreme Court, to which he was appointed directly from the Bar in 2010. Originally from Belfast, his formative years coincided with a time of enormous difficulty and tragedy for Northern Ireland. Attending St Mary's CBS from 1969 to 1976, he says it was impossible not to be affected by events, especially as his father, Turlough O'Donnell, who had been active in the civil rights movement, became a High Court and later Court of Appeal Justice in Northern Ireland: "I enjoyed school. I liked being from Belfast, but those were really tough times in west Belfast where I lived, even if you were not the son of a judge. I think the poet Gerald Dawe said there is nobody who lived through that time who doesn't carry it with them, and I think that's the reality".

This undoubtedly informed his decision to study law at University College Dublin, which he found both a shock and a relief: "Objectively, Dublin in 1976 was quite grey, depressed, not that vibrant, but I thought it was amazing. I still have this memory of the first time I was walking around St Stephen's Green. At the time, the cars used to park nose into the Green, and I remember becoming anxious saying to one of my friends, 'There's nobody in those cars', and I realised then that there was a control zone in Belfast and you weren't allowed to park without leaving a person in the car because of the risk that an unoccupied car could be a car bomb. I had never consciously attended to that or thought about it, but seeing all these cars without people in them, and my reaction to it, I realised we had been living with every aspect of this, and even in a relatively small thing we had internalised this really abnormal situation as normal, so getting to Dublin felt like a release".

The Chief Justice originally considered the possibility of returning to the North to practise, but says that even without the political situation, it felt easier not to uproot from the life he had made in Dublin, and so he chose King's Inns (as did his older brother Turlough O'Donnell SC). Before that, however, he spent a year at the University of Virginia, studying for an LLM. He recalls this as a very positive experience: "At that stage US law was very exciting. There was that sense in which a lot of the constitutional law being developed here was influenced by or looked to the US. I had a Rotary scholarship and there was some discussion about where I would go. I had this idea about Virginia as being regarded as the best law school in the south because it was the law school that Bobby Kennedy went to, and he was a hero of mine. Virginia had a very small LLM programme, and a big emphasis on teaching, which was very exciting and stimulating. It was a great experience".

## Life at the Bar

The Chief Justice returned to Ireland and commenced practice at the Bar in 1983. He says that he didn't feel a great weight of expectation because of his family background, as he might have done if he'd chosen to stay in Belfast: "That was partly why I think we came to Dublin, a sort of slightly perverse sense of wanting to do it on your own. I think that there are benefits but also problems with carrying a name. You do get a chance, you're recognised. On the other hand, you probably do feel a bit of the weight of expectation. I didn't feel that so much here in Dublin. You were more worried about making a mess of the case!"

He highlights some cases that were particularly memorable for him in his career at the Bar, such as *McCann v Monaghan District Judge*: "I was acting for the Coolock Community Law Centre and they were challenging the law permitting the imprisonment of people for debt. We won in the High Court

before Justice Mary Laffoy, who gave a great judgment. It wasn't appealed to the Supreme Court, so it doesn't stand out as a landmark in the textbooks, but that was a satisfying case to do".

He also recalls *Nolan Transport and SIPTU* as significant: "I came into it in the Supreme Court, and I liked that because my grandfather had been a trade unionist, and I'd quite like to have done union work in the sense of labour law, for example, but that never came to me. I thought the people involved were very interesting to meet, and good people. I thought the judgment in the High Court had weighed heavily on them, so it was really satisfying to win in the Supreme Court".

*Orange v ODTR* and *Maguire v Ardagh* were also both significant cases for him in different ways.

In terms of cases that didn't go as well as he might have wished, he says that it's much harder to think of any, and that this ability to move on from a case that doesn't go your way can be one of many attributes that make a good counsel: "The truth is there's no single quality. That's why it's difficult to do it really well, because you need intelligence, energy, hard work, resilience, common sense empathy and judgement. But I do think that possibly the capacity to put the disasters behind you is a good thing. That's one of the troubles of being at the junior Bar: it was hard when you weren't getting steady work because you thought far too much about the case coming up, and you certainly dwelled too much on it after the fact if it had gone wrong".

The qualities he mentions might be said to have as much to do with character as with a skillset that can be learned, but the Chief Justice feels that with hard work, and a focus on getting the job done to the best of your ability, these things can be learned and improved upon: "Hard work is really important and you can compensate for not starting off with the rhetorical skills of some people you admire because somebody starting off can spend a lot more time reading every part of the case and following every possible line, and that stands to you. People watch other barristers and say, well, why did that work? Or, why did I think that was effective? They pick it up and you see that people become much more effective as they go along".

The Chief justice has, of course, seen change over the course of his career, such as the move to specialisation, and the change in the status of personal injuries cases: "When I started, that was the engine that drove the Bar, that most people did personal injuries. It was also the daily diet of the Circuit Court. That has changed very dramatically, and specialisation has grown very significantly. There is also a shift towards more law, more written submissions, more than the traditional model of the day in court, examining and cross-examining witnesses".

As someone who has been away from the Bar for 12 years, the Chief Justice is wary of listing changes he would like to see, but he does wish to see the core principles of the profession maintained: "The strength of the Bar has always been expertise, ability, merit. I think that has to be at the core of what the Bar does, and I worry about its capacity to continue to attract the most able people and to retain them. I'd like to see any changes that made it easier for people of ability to come to the Bar and stay at the Bar. It may be that you have to look at the structure of the profession, because the structure of the legal profession generally has changed dramatically, and I think you need to be able to offer some sort of career path to people other than: there's the market, go out and battle it".

## The move to the Bench

Chief Justice O'Donnell is one of a small group of barristers who were elevated straight from the Bar to the Supreme Court. He says there was a significant adjustment in mindset to be made: "I have a very vivid recollection of my first day on the Court hearing a case. It was a very interesting case, and it wasn't clear cut who was going to win. I could almost see the thought going through the senior counsel's mind, you could see him relaxing and saying, 'well, there's nothing more I can do in the case. I wonder what they'll do'. And I sat there thinking well, that's what it looks like from up here, and this isn't so bad. Then I realised, what are they going to do? That's what are *we* going to do? And the convention in the Supreme Court is that the most junior judge goes first in the conference, so in a few minutes, we were going to go into the conference room, and the next thing was going to be, 'Well Donal, what do you think?'".

There are, of course, aspects of his role that he enjoys more than others: "I enjoy the judging, I enjoy being in court, and I enjoy trying to work out the answer. Sometimes it's a bit like a puzzle. If you feel you can make it fit together in a coherent picture, that's satisfying. I don't enjoy writing judgments because it's hard work, but I enjoy sometimes if I feel I've come to a conclusion and explained why, and it fits together, at least as far as I'm concerned. I enjoy the interaction with people in the universities, and I've really enjoyed the interaction with other courts. You don't particularly enjoy all the stuff that goes with it, all the administration, the management. The Chief Justice has a whole other job on top of the job of being a Supreme Court judge – there's 20 plus committees and boards. Each of those things is interesting in itself, but the fact that there's also the day job to be done is sometimes quite difficult".

He acknowledges that judges get more support than they used to, with judicial assistants in particular a welcome development, but says more could be done, especially with Ireland's role in post-Brexit Europe as a representative of the common law: "We're the only common law jurisdiction and inevitably we need to explain ourselves more because it looks different to most of the other participants. But I would also say that I think our contribution is valued because the common law system is valued and admired within Europe. And I do think that Ireland is taken quite seriously at the European level even though we're only five million people in a huge community".

## Access to justice

Access to justice is a vital issue right across the legal community, and indeed society at large, and Chief Justice O'Donnell is quick to agree that the courts system is not sufficiently accessible for many people: "Access to justice is not something that the courts control but it is something that we have to be involved in. My predecessor Frank Clarke set up the Chief Justice's Access to Justice group and the Bar was involved in that. We had a very successful two-day conference and produced a very good report. We're planning another conference looking at the specific topic of civil legal aid in the context of the review of legal aid".

He notes initiatives that have been mooted in other jurisdictions: "In the UK, the Master of the Rolls, Sir Geoffrey Vos, is taking a quite radical approach involving artificial intelligence and technology, and saying maybe we should be using artificial intelligence to deal with a whole series of disputes that

aren't coming to court at all. Some lawyers react against that in horror. But on the other hand, I can see the argument that if you're not going to get this dispute resolved, or you're faced with taking a big risk to have it resolved, then is it not better that it's resolved in some way, or that we devise some system? It's a multifactorial problem, but it is really important, it's critical".

It's vital too, that initiatives actually achieve what they set out to do while retaining the core principles of the justice system: "We cannot exclude any possible solution that broadens access to justice, but you have to make sure that it's justice that people are getting access to. People have a real belief in the idea of somebody neutral who has been asked to finally resolve an issue, and that's not something that should be taken for granted. It is in fact a very difficult thing to establish and a very easy thing to undermine and pull apart".

If the Chief Justice has any aims or ambitions for his tenure, it is to see real progress in this area, and also that more might be done to improve public knowledge and understanding of the justice system, starting in schools: "I don't know why CSPE, for example, doesn't have a much more significant module about the court system. We have our own Comhrá programme where members of the Supreme Court meet remotely with various schools, and when we sit outside Dublin we interact with universities and schools. I think that is important, that we would all have a general understanding of the function the law performs, and then that that understanding is shared at the level of civil society generally. That's an important part of keeping a liberal democratic society functioning". Fundamental to this aim is the idea that the courts would be worthy of respect: "That we hold ourselves to the highest standards and that people say, from the Supreme Court to the District, those are places where you will get measured, thoughtful, fair consideration. These are difficult times for courts all across the world and for societies all across the world, so I'd be more than happy if at the end of my tenure, I was able to say, well, we did make some progress on those aspects".

## The living tree

The Chief Justice's interest in US law and constitutional law continues to this day. Recent events in the US, in particular the overturning of Roe v Wade and the ongoing debates around gun control, have reanimated the debate about the status of a constitution, with the 'originalist' position holding that it must reflect the wishes and intentions of the men who drafted it over 200 years ago, and others arguing for a 'living tree' interpretation: a document that changes over time to reflect the society of the day. For the Chief Justice, this is a fascinating, complex and, at times, frustrating debate: "There isn't a binary choice and there isn't a single answer. The 'living tree' language for example goes back to a judgment of Viscount Sankey in the Privy Council in a Canadian case in 1929, but what he actually said was it's a living tree within natural limits. Lord Bingham repeated in 2000 that those limits have to be very carefully identified. There are natural limits, and we would be very offended if people took that to mean the Constitution is a blank piece of paper on which judges are somehow to write their own predilections".

The strength of a constitution, he says, is in the core principles it sets down, agreed by society, which give a strong basis for any decisions arising from it. The idea of a document that can fundamentally change at any time undermines this idea, and can be particularly dangerous in light of, for example, the rise of populism in many countries: "What you're saying is these principles never change – freedom of speech, liberty of the person, equality – but they may be applied in different situations that people in 1937 could not have anticipated. But if you buy into the idea that those fundamental principles actually change, or can be changed by judicial decisions then the idea of a constitution protecting fundamental rights loses its entire force. The idea of fundamental timeless values is one of the things that allows it to operate as it should operate, which is in that really difficult situation when you're supposed to say, 'I know this isn't popular, but this is the principle that we said was so important that we put it into the Constitution and we agreed it and now we are required to live up to it '".

He refers to two recent Irish Constitutional amendments as examples of this: "If you take the recent marriage referendum and the repeal of the 8th Amendment, they were, I think, really good examples of Irish people having to confront an issue collectively and make a decision. And I don't think, for example, any of us would say, well, that language is up for grabs: it can be whatever the judges want to say about marriage or about abortion".

This brings us back to the importance of education, and building an understanding of the justice system in civil society: "The idea of judges being free to interpret the Constitution without limits and to achieve objectives they think sensible and desirable may seem fine as long as those interpretations are interpretations you like, and objectives you agree with. But once you have agreed to that, you have also agreed to the possibility of interpretations and objectives with which you profoundly disagree, and there's no limit to that. It's a much more complex question than a take it or leave it choice between an approach that tries to divine what a few men in 1937 thought or would have thought, and one that sees no limits to the interpretive obligation. That's exactly the sort of thing that I think it's important that people in society have some understanding of. It takes time and thought and an appreciation of a number of factors. You need people to work through that, and that's why you need to be introduced to these ideas and decisions, and the place of the courts and the Constitution in our society. But it is really important, and it's not just for lawyers".

## Outside the Court

**The Chief Justice unwinds by walking, swimming and particularly playing golf, and says he finds the sport a great way to switch off: "It pushes things out of your head and for this period at least, all you're worrying about is how to get the ball from A to B, and can I do this correctly and have some fun? I find that really good and most of the time when you come in things seem a little calmer and clearer".**

**He also loves a good book, and says he's read a lot of fiction this summer, mentioning *The Slowworm's Song* by Andrew Miller, *Haven* by Emma Donoghue, and *Spies in Canaan* by David Park as books he particularly enjoyed.**

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library
BARRA NA HÉIREANN
An Leabharlann Dlí

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**A directory of legislation, articles and acquisitions received in the Law Library from June 17, 2022, to September 2, 2022. Judgment information supplied by Justis Publishing Ltd.**
**Edited by Vanessa Curley, Susan Downes and Clare O'Dwyer, Law Library, Four Courts.**

## ADMINISTRATIVE LAW

Disclosure – Production of documents – European Communities (Access to Information on the Environment) Regulations 2007-2014 – Respondent appealing from the High Court's refusal to compel production of documents by the Council of State – Whether the President was amenable to request under Directive 2003/4/EC – 29/04/2022 – [2022] IESC 19
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*Bank of Ireland v Hickey*
Summary judgment – Want of prosecution – Inordinate and inexcusable delay – Defendant seeking to dismiss the proceedings for want of prosecution and/or on the grounds of inordinate and inexcusable delay – Whether prejudice to the defendant had been demonstrated – 13/07/2022 – [2022] IEHC 433
*Bank of Ireland v Wales*
Abuse of process – Frivolous and vexatious claims – Bound to fail – Appellant appealing against the order striking out his claim – Whether the claims the appellant sought to pursue against the respondent were still frivolous and vexatious and bound to fail – 23/06/2022 – [2022] IEHC 139
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*Connors v Kinsella*

Committal – Contempt – Costs – Applicants seeking costs protection – Whether costs protection applied – 19/07/2022 – [2022] IEHC 427
*Dunne v Guessford Ltd T/A Oxigen Environmental (Costs)*

Costs – Order of certiorari – Remittal – Appellant seeking costs – Whether an award of costs in favour of the appellant should be reduced – 26/07/2022 – [2022] IECA 168
*J.B. v Minister for Justice*

Judicial review – Form of order – Costs – Applicant seeking to challenge a decision to grant a small public service vehicle driver's licence with a duration coterminous with that of the applicant's temporary immigration permission – Whether the decision to grant a small public service vehicle driver's licence with a duration coterminous with that of the applicant's temporary immigration permission was invalid – 20/06/2022 – [2022] IEHC 354
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Acquittal – Robbery – Identification evidence – Applicant seeking to appeal, with prejudice, pursuant to the provisions of s. 23 of the Criminal Procedure Act 2010 – Whether the identification evidence of the witness of itself was such that a jury properly charged could have been satisfied beyond reasonable doubt of the guilt of the respondent – 29/07/2022 – [2022] IEHC 190
*DPP v J.P.C*

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*DPP v McDonagh*

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*DPP v O'F*

Contempt of court – Perjury – Strike out – Plaintiff asking the High Court to find the fourth and fifth defendants and their solicitors in contempt of court – Whether a letter from the solicitors for the fourth and fifth defendants constituted a contempt of court – 20/05/2022 – [2022] IEHC 296
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## DAMAGES

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*Cogley (a minor) v Foley*

Fatal injuries – Assessment of damages – Approval – Applicant seeking approval of an assessment of damages – Whether the application ought to be adjourned to allow further evidence – 29/07/2022 – [2022] IEHC 428
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### Acts

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# Crypto-assets and the law

The crypto-asset market has increasingly become an area of intense interest for policymakers and regulators in recent years.

**John Breslin SC**
**David Sweetman BL**

Financial institutions are no longer needed for the transfer of digital currency. This is the central thesis of crypto-assets as set out in the bitcoin white paper published by the pseudonymous Satoshi Nakamoto in 2008.

By using a decentralised digital ledger, whereby immutable transactions can be cryptographically verified by a network of users, there is no need for a traditional third party – such as a bank – to confirm the debit and credit associated with a transaction.

Since 2008, the value of crypto-assets has exploded, reaching a global market capitalisation of approximately US$3bn in late 2021. While that value has fallen precipitously in 2022, crypto-assets are now part of the financial landscape, on a retail and wholesale level. With an estimated 10,000 crypto-assets available as of April 2022,[1] the crypto-asset market has increasingly become an area of intense interest for policymakers and regulators in recent years.

## What are crypto-assets?

Crypto-assets are, in broad terms, a type of financial asset that depends on cryptography and distributed ledger technology. They can function not only as a means of payment between parties, but also as containers of rights for the purposes of investment, akin to shares in a company. The proposed regulation on Markets in Crypto-Assets (MiCA), discussed further below, defines crypto-assets as: "[A] digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology".[2]

This broad definition is intended to capture the various types and features of crypto-assets that have emerged since 2009. Whereas some well-known crypto-assets were originally intended to function as a means of payment for the purchase of everyday items, many have attracted speculative investment from those who expect secondary market prices to increase.

## The current regulatory position

At present, there is no dedicated regime for the regulation of crypto-assets. Furthermore, the extent to which existing regulatory regimes may apply is not always clear, and is a matter upon which there is no consensus even among financial regulators.[3] For example, whether crypto-assets can qualify as "electronic money" under the Electronic Money Directive (Directive 2009/110/EC) is fundamentally dependent

*The Markets in Financial Instruments Directive (MiFID) (Directive 2014/65/EU) regulates investment services and markets in the EU in respect of "financial instruments", such as "transferable securities".*

on what constitutes "stored monetary value", as represented by a claim on an issuer issued on receipt of funds for the purpose of making payment transactions and accepted by persons other than the e-money issuer itself. At least one European regulator was prepared to accept that, in certain cases, a crypto-asset could qualify as e-money. This included where it was held on an open blockchain-based payment network, and where the issuer issued these on receipt of fiat currency[4] intended to be the means of payment in the network, pegged to that fiat currency on a 1:1 basis, and redeemable at any time.[5]

"Stored monetary value" must be interpreted by reference to the concept of "money" itself, which in spite of its prevalence in everyday life, is notoriously difficult to define. One definition of "money" is found in s. 28 of the Central Bank Act 1997 as including "any representation of money (such as a cheque) and any means by which monetary value is stored". As a matter of policy, the European Central Bank has previously stated that while parties are free to use privately issued money, this not governed by monetary law.[6] The following extract from Mann best summarises the legal position:

"…circulating media of exchange in law only constitute 'money' if (a) they are created by or with the supreme legislative authority of the State, and (b) the relevant law confers on those circulating media a nominal value which is independent of the intrinsic value of the paper/metal from which they are made, of their actual purchasing power, and of their external value measured against other currencies. It follows that gift vouchers, tokens, and similar items – even though exchangeable against the provision of goods or services by their issuers – do not constitute 'money' because they lack the support of the supreme legislative authority within the State concerned".[7]

The Markets in Financial Instruments Directive (MiFID) (Directive 2014/65/EU) regulates investment services and markets in the EU in respect of "financial instruments", such as "transferable securities". Whether crypto-assets come within this regime is not clear. This ultimately depends upon how the MiFID has been transposed in individual EU member states. Most EU financial regulators consider that an "investment component" is a necessary element of transferable securities.[8] This component involves a promise or indication of sharing future profits or revenue, and not merely where, *inter alia*, the purchaser's expectation of an increase in value arises from trading on a secondary market.[9]

The Central Bank of Ireland has adopted a pragmatic approach to the application of MiFID, stating in 2020 that where crypto-assets did not meet the definition of transferable securities under MiFID, but exhibited some of their characteristics, they should be considered as instruments governed by MiFID.[10] These features included a "reasonable expectation of financial gain" and a "reasonable expectation of transferability of the security" on the part of the investor. More recently, in the context of sanctions imposed on Russia following its invasion of Ukraine, the Council of the European Union has clarified that transferable securities include crypto-assets that are negotiable on the capital market, with the exception of instruments of payment.[11]

The above highlights some of the conceptual issues encountered when considering the extent to which existing financial services regulatory regimes may apply to a crypto-asset. It is therefore unsurprising that EU policymakers have proposed a dedicated regulatory regime for this new asset class, the need for which has become ever clearer.

## Markets in crypto-assets regulation proposal

In September 2020, the European Commission published its proposal for MiCA. This seeks to achieve legal certainty, support innovation, protect consumers and investors, and maintain financial stability. MiCA will apply to persons who issue crypto-assets in the EU, or who provide services related to them ("crypto-asset service providers" or "CASPs"). MiCA will not cover "financial instruments" under the MiFID, or electronic money under the Electronic Money Directive. The MiCA proposal categorises crypto-assets as:

(a) asset-referenced tokens: these purport to maintain a stable value by reference to the value of several fiat currencies that are legal tender, or one or several commodities, or one or several crypto-assets, or a combination of the foregoing;
(b) electronic money tokens: these are intended to function as a means of exchange by reference to the value of a fiat currency that is legal tender;
(c) crypto-assets other than asset-referenced tokens or electronic money tokens; and,
(d) utility tokens: these are intended to provide digital access to certain goods or services, which are only accepted by the issuer.

When enacted, MiCA will impose a range of regulatory requirements on issuers of asset-referenced and e-money tokens, including authorisation and ongoing regulatory obligations. Asset-referenced token issuers will be obliged to maintain asset reserves and own funds. E-money token issuers will need to be authorised as either electronic money institutions or credit institutions. Similarly, CASPs will have safekeeping obligations in relation to client crypto-assets and funds, and obligations in respect of the execution of client orders. MiCA is currently under negotiation and is due to be finalised in 2024.

## Are crypto-assets property?

There is an emerging consensus in common law jurisdictions that

cryptocurrencies are a new form of intangible asset. A number of decisions from different jurisdictions confirm that crypto-assets (including cryptocurrencies) meet the criteria of "property" at common law. In brief, "property" is something that is capable of definition and identification, which can be assumed by third parties, and which has a degree of permanence. This is the House of Lords' definition in *National Provincial Bank Ltd v Ainsworth* (*Ainsworth*).[12]

There are two landmark decisions from other common law jurisdictions.[13] First is the decision of the Singapore International Commercial Court[14] and Court of Appeal in *Quoine Pte Ltd v B2C2 Ltd* (*Quoine*).[15] In this case the claimant, B2C2 Ltd, was a high-frequency algorithmic trader[16] in cryptocurrencies: that is to say it traded for its own account in circumstances where its decisions to effect a transaction involved no direct human intervention, but were machine generated by reference to preset trading parameters. The defendant was a cryptocurrency exchange that provided trading facilities whereby customers could, among other things, trade in "pairs" of cryptocurrencies.[17] On a particular date, B2C2 effected a transaction on the exchange whereby it effectively swapped bitcoin for ethereum. However, it did so at a rate that was significantly divergent from the prevailing market rate, and was very much to B2C2's advantage[18] (it later transpired that B2C2 was able to effect the trade at the relevant price due to a programming error in Quoine's trading platform). On the day following the trade, Quoine personnel unilaterally reversed the transaction on B2C2's account. B2C2 brought proceedings against Quoine, claiming that Quoine had no contractual right to cancel the trade, and that Quoine held the proceeds of the trade on trust for B2C2.

Simon Thorley I.J. concluded that the cryptocurrency alleged to have been subject to a trust in favour of B2C2 met the common law criteria of "property" as set out in *Ainsworth*. However, the Court of Appeal was more reticent on the issue and preferred to rule definitively on the matter in a case where it was squarely addressed (there had been a degree of consensus between the parties as to the "property" issue in principle). Notwithstanding, in the subsequent case of *CLM v CN*,[19] the Singapore High Court was satisfied, for the purposes of identifying a serious arguable case to be tried, that cryptocurrency allegedly stolen from the plaintiff gave rise to proprietary rights, which could be protected by a freezing injunction. The court in the latter case was also satisfied that the proper tests of what constituted property were the criteria set out in *Ainsworth*.

The second landmark decision is that of the New Zealand High Court in *Ruscoe v Cryptopia (in liquidation)*.[20] This case also raised the question as to whether cryptocurrency could constitute property and be the subject matter of trust. Cryptopia operated a cryptocurrency exchange and provided services as a "wallet provider".[21] In January 2019, Cryptopia was the victim of a hacking operation whereby up to 14% of its cryptocurrency holdings were stolen. Losses were estimated at around NZ$20m, with Cryptopia going into insolvent liquidation in May 2019.

The liquidators applied for directions from the High Court as to how cryptocurrencies held by Cryptopia were to be distributed in the liquidation. The manner of distribution depended on whether the cryptocurrencies were held on trust for the platform's customers, or whether they were owned by the company with a corresponding repayment obligation to customers. If the cryptocurrencies were held on trust, then customers would enjoy a proprietary claim, which would rank ahead of the general creditors of the company. Customers would, in effect, be repaid their cryptocurrency entitlements with (presumably) an appropriate write down to reflect losses occasioned by the hack. Conversely, if the cryptocurrencies were not held on trust, they would be available on a *pari passu* basis to all of the company's unsecured creditors, subject to any applicable statutory preferential claims.

*There is an emerging consensus in common law jurisdictions that cryptocurrencies are a new form of intangible asset. A number of decisions from different jurisdictions confirm that crypto-assets (including cryptocurrencies) meet the criteria of "property" at common law.*

In a comprehensive judgment, Gendall J. held that the cryptocurrencies were "property" for the purposes of New Zealand companies legislation. Gendall J. also strongly suggested that cryptocurrencies met the common law definition of "property" as set out in *Ainsworth*. Accordingly, the cryptocurrencies could potentially be the subject matter of a trust. The Court held that in the circumstances the company evinced an intention to hold the cryptocurrencies on trust for its customers. In this regard, it was not material that a number of those customers were not capable of precise identification due to the pseudonymisation of their account details. This was merely an evidential matter for the liquidators to engage with as part of the process of distributing the trust assets.

The Court held that cryptocurrency was not a thing in action, nor was it a thing in possession; however, in Gendall J.'s view this was not fatal to the analysis. A cryptocurrency could nonetheless be classified as property. Accordingly, the decision sends a strong signal that the common law recognises cryptocurrencies as a new species of intangible property.

## UK case law

This line of thinking has been reflected in UK decisions. Before summarising the UK case law, however, it is convenient to start with the ground-breaking work of the UK Jurisdiction Task Force (UKJT) and its Legal Statement on Crypto Assets and Smart Contracts.[22] The UKJT concluded that crypto-assets were a species of intangible property. It

discounted reasoning adapted by reference to 19th century case law[23] to the effect that the classes of things in action are permanently closed under English law. Were such reasoning to be accepted, it would follow that crypto-assets would not be capable of being classified as property – being neither things in possession[24] nor things in action.[25] The UKJT concluded that cryptocurrencies are a form of intangible property and meet the test set out in *Ainsworth*.

The UKJT's conclusion was strongly endorsed by Bryan J. in *AA v persons unknown*.[26] In that case, the court addressed the question as to whether "stolen" bitcoin was property, so that proprietary injunctive relief could issue against alleged recipients. Bryan J. held that "it is fallacious to proceed on the basis that the English law of property recognises no forms of property other than choses in possession and choses in action". Bryan J. adopted the UKJT's reasoning and concluded that cryptocurrency is a form of intangible property, which could be made the subject of a freezing injunction. Similarly, in *Fetch.ai Limited v persons unknown and Binance Holdings Limited*,[27] the court was satisfied that, in the context of an application for interlocutory orders, there was a realistically arguable claim that assets held to the claimant's accounts on a cryptocurrency exchange were to be regarded as property for the purposes of English law, and were a chose in action. This reasoning has been extended beyond cryptocurrencies to other crypto-assets such as non-fungible tokens (NFTs) in *Osborne v persons unknown and Ozone*.[28]

## Bringing a claim in Ireland

Although crypto-assets have featured by way of background in some Irish cases to date, at the time of writing there is no reported Irish case law that analyses the legal incidents of cryptocurrencies or other forms of crypto-assets. As noted by Thuillier, crypto-assets have formed the factual backdrop to cyber-hacking injunctions, applications for interim disclosure orders and applications by the Criminal Assets Bureau.[29] However, none of these cases engage with the question as to whether a crypto-asset is a form of "property" and, if it is, what kind of asset it is. This contrasts starkly with the position in other common law jurisdictions such as the UK, New Zealand, and Singapore, where there has been extensive, detailed judicial consideration of whether cryptocurrencies are a species of property.

Consequently, practitioners embarking on pursuing or defending litigation for clients in the crypto space face a challenge at a conceptual level: is a cryptocurrency or other form of crypto-asset "property"? This is clearly an issue of fundamental importance because if the answer is "no", then the powerful array of equitable personal and proprietary remedies honed over centuries by reference to property (both tangible and intangible) will be unavailable. The cases summarised above will be of key significance.

There are also significant challenges at a procedural level: are the mechanisms available in the Rules of the Superior Courts (RSC), and interim equitable remedies, available in a crypto-dispute? Very often a plaintiff will have to move at great speed to recover stolen assets, and

*The issues that potentially can arise in crypto proceedings will be varied and potentially complex. Useful guidance is to be found in case law from other common law jurisdictions.*

sue defendants based outside Ireland, whose identity will in many cases be unknown. This anonymity presents significant issues for a plaintiff pursuing a claim to recover stolen crypto-assets.

The jurisdiction to sue 'persons unknown' is well known to landowners and receivers. However, a key risk with framing a claim against 'persons unknown' in asset-recovery proceedings is that a person may unwittingly find himself or herself in breach of a court order without knowing the existence of the order (or, indeed, the proceedings), and without knowing the conduct that has resulted in a breach of the order. A 'persons unknown' defendant may effectively be deprived of the opportunity of contesting the plaintiff's entitlement to the court's order if an alternative mode of service is permitted that did not in fact result in the proceedings coming to the defendant's notice. Furthermore, framing the class of 'persons unknown' too widely runs the risk that orders (such as freezing orders or injunctions) are made against innocent parties.[30] The essential point, therefore, is that a plaintiff suing 'persons unknown' must define the class (and sub-classes) of person against whom remedies are sought with maximum precision, so that parties who are potentially caught up in the fact pattern know whether they are inside a class or not, and so that it is clear what form of order (whether freezing injunction, disclosure, etc.) is directed at them.

Where the would-be defendants are known, but are located in a state outside the EU that is not a signatory to the Lugano Convention, a further issue arises as to whether the claim can be properly framed under one of the relevant "gateways" under O. 11 RSC for the purpose of obtaining an order for service out of the jurisdiction. Even if these gateways are satisfied, O. 11, r. 2 RSC enjoins the court to consider the relative cost of pursuing proceedings in Ireland bearing in mind the value of the claim, and O. 11, r. 5 RSC requires, among other things, that the court be satisfied that Ireland is the suitable or appropriate forum to litigate the dispute.[31]

Having passed through the O. 11 gateway, a plaintiff must then navigate the complex process of serving the proceedings on a timely basis.[32]

## Conclusions

As can be seen, the issues that potentially arise in crypto proceedings will be varied and potentially complex. Useful guidance is to be found in case law from other common law jurisdictions. However, it must, of course, be noted that these authorities are of persuasive value only. Further, as stated by a judge in England and Wales with considerable experience in this area, Judge Pelling KC:

"[N]o cryptocurrency fraud claim has yet reached the [England and Wales] Court of Appeal, very few if any have yet been the subject of fully contested hearings between claimants and respondents and in consequence most of the principles that the courts have applied to date have been developed in without notice hearings or hearings of which the respondents have chosen not to participate".[33]

Accordingly, practitioners are forging a new path in an area where the common law is in a state of rapid development, and in some respects the RSC could present procedural challenges.

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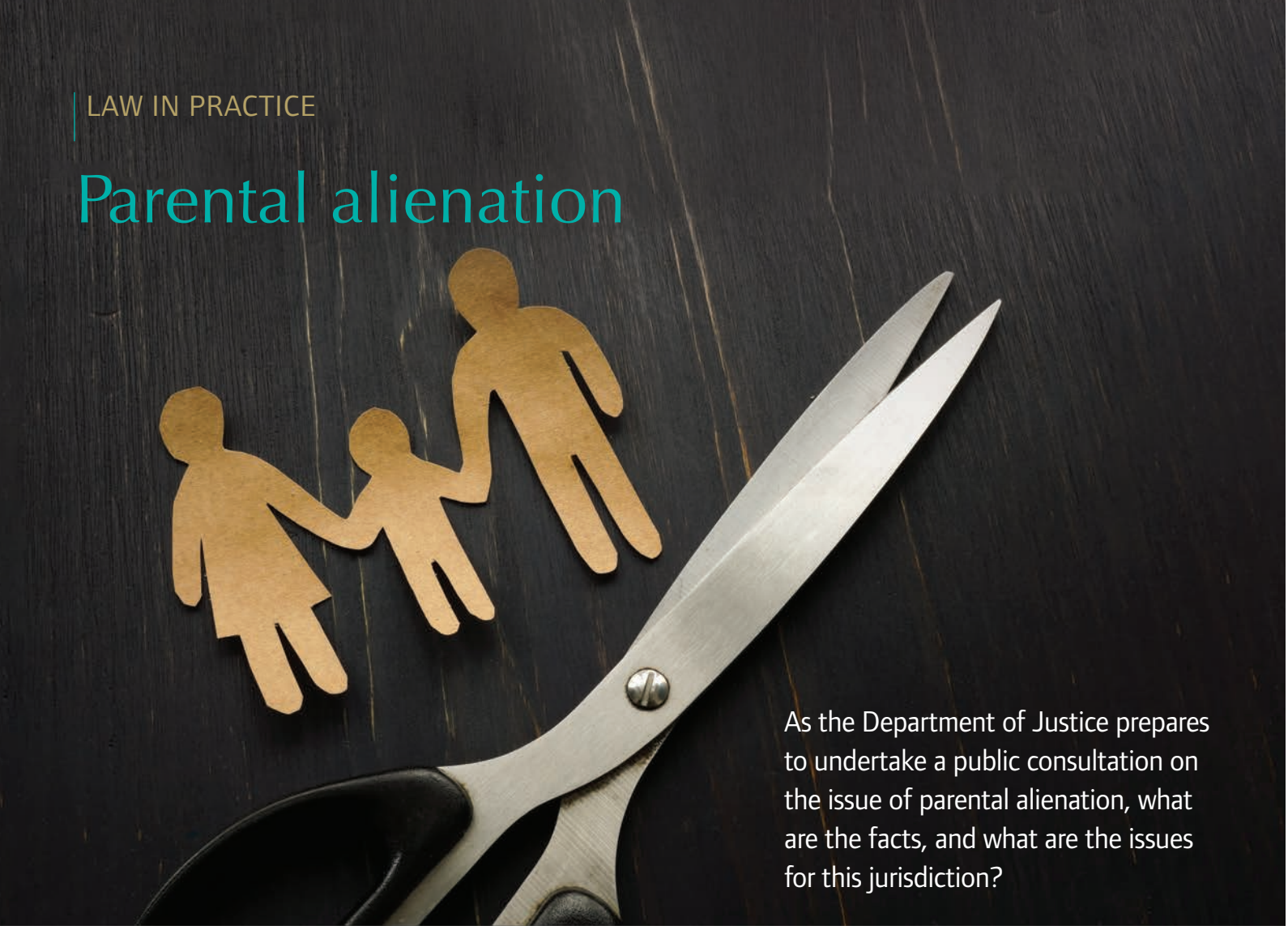
1. See: https://www.statista.com/statistics/863917/number-crypto-coins-tokens/. Cited by Fabio Panetta, Member of the European Central Bank Executive Board, in a speech entitled 'For a few cryptos more: the Wild West of crypto finance', April 25, 2022. Available from: https://www.ecb.europa.eu/press/key/date/2022/html/ecb.sp220425~6436006db0.en.html.
2. Article 3(1)(2), Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, 2020/0265(COD), September 24, 2020.
3. EBA Report with Advice for the European Commission on crypto-assets (January 9, 2019); ESMA, 'Advice on Initial Coin Offerings and Crypto-Assets' (January 9, 2019) (a legal notice on the ESMA website obliges us to state: 1. ESMA material may be obtained free of charge on the ESMA website; 2. this article has been drafted using material from the ESMA website; and 3. ESMA does not endorse this publication and in no way is liable for copyright or other third-party rights infringements nor for any damages caused to third parties through this publication).
4. Fiat money is a currency that lacks intrinsic value and is established as a legal tender by government regulation. Traditionally, currencies were backed by physical commodities such as silver and gold, but fiat money is based on the creditworthiness of the issuing government.
5. EBA Report with Advice for the European Commission on crypto-assets (January 9, 2019), p. 13.
6. See: https://economy-finance.ec.europa.eu/euro/use-euro/euro-legal-tender_en.
7. Proctor, C. (ed.). *Mann on the Legal Aspect of Money (7th ed.)*. Oxford: Oxford University Press, 2012: para. 1.24.
8. ESMA Advice on Initial Coin Offerings and Crypto-Assets, Annex 1, para. 31. Available from: https://www.esma.europa.eu/sites/default/files/library/esma50-157-1384_annex.pdf.
9. ESMA Advice on Initial Coin Offerings and Crypto-Assets, Annex 1, para. 36. Available from: https://www.esma.europa.eu/sites/default/files/library/esma50-157-1384_annex.pdf.
10. European Commission. Public Consultation—An EU Framework for Markets in Crypto-assets. Letter of April 30, 2020.
11. Article 1(1) of Council Regulation (EU) 2022/394.
12. *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247-1248.
13. The cases are also highly significant because each went to a contested hearing, with each side legally represented. As will appear below in the section of this article on procedural considerations, nearly all of the relevant case law arises in the context of interlocutory applications where defendants do not appear or choose not to oppose the granting of relief.
14. Simon Thorley I.J.
15. [2019] 4 SLR 17 (High Court); [2020] SGCA (1) 02 (Court of Appeal).
16. More specifically, it was a "market maker": namely, it actively quoted buy and sell prices for cryptocurrencies. Market makers provide "liquidity" to the market: that is to say, for each asset tradeable on the exchange the presence of market makers means that there will (usually) always be a party ready to quote a price. Market makers generate revenue, in simple terms, by buying high and selling low or, in more technical terms, in exploiting the difference between the bid (purchase) and offer (sale) spread (price difference).
17. Trading "pairs" of cryptocurrency generally arises in two circumstances. First, some cryptocurrencies are only exchangeable for another cryptocurrency, with bitcoin and ethereum being the most common "base" currencies. Second, trading "pairs" is a form of arbitrage whereby sophisticated investors can exploit price differentials between different cryptocurrencies.
18. In simple terms, the trade involved the exchange of 10 bitcoin for 1 ethereum when the actual market rate was 0.04 bitcoin for 1 ethereum. In effect, therefore, B2C2 needed to put up significantly less bitcoin for 1 ethereum. This was 250 times the market rate: 0.4 x 250 = 10. See par [4] of judgment.
19. [2022] SGHC 46.
20. [2020] 2 NZLR 728.
21. In simple terms, a "wallet provider" will be entrusted with the public and private keys to a blockchain by its customer so that the wallet provider can, on its customer's behalf, effect purchases and sales of cryptocurrency.
22. LawTech Delivery Panel. UK Jurisdiction Taskforce Report, November 2019. The UKJT was comprised of a number of leading practitioners, and was headed by Chancellor Sir Geoffrey Vos, as he then was, now Master of the Rolls.
23. *Colonial Bank v Whinney* (1885) 30 CH 261 CA, and (1886) LR 11 App Cas 426 HL.
24. Cryptocurrency is (obviously) incapable of physical possession.
25. Most cryptocurrencies are not a thing in action because, in brief, of the absence of a single issuing authority – as is the case with fiat currencies.
26. *AA v persons unknown* [2019] EWHC 3556 (Comm).
27. *Fetch.ai Limited et al. v persons unknown and Binance Holdings Ltd* [2021] EWHC 2254 (Comm).
28. *Osborne v persons unknown and Ozone* [2022] EWHC 2021 (Comm).
29. Thullier, A. Irish legal system not fully ready for crypto-litigation. *Commercial Law Practitioner* 2022; 29 (6): 107-112.
30. See *Fetch.ai Ltd et al. v persons unknown and Binance Holdings Ltd* [2021] EWHC 2254 (Comm.).
31. Practitioners should be aware of the comments of Ní Raifeartaigh J. in the recent Court of Appeal decision in *Donnelly v Vivier Company Limited* [2022] IECA 104, where she noted that there was no "gateway" in O. 11 RSC for claims in restitution, or for breach of a constructive trust. This is clearly a very significant lacuna in O. 11 RSC. Restitution, or claims for unjust enrichment, is now a recognised body of law in Ireland, and such claims are a central part of a plaintiff's armoury in asset recovery proceedings. See also: Thullier, A. Irish legal system not fully ready for crypto-litigation. *Commercial Law Practitioner* 2022; 29 (6): 107-112. Furthermore, there is no express gateway under O. 11 for service out of a Norwich Pharmacal/Banker's Trust claim: namely, a freestanding claim against a defendant (usually a bank or other financial intermediary) who has unwittingly become caught up in a third party's wrongdoing, and who has information concerning the identity of the wrongdoer. See: *Mitsui v Nexen Petroleum UK Limited* [2005] All ER 511.
32. In cases of "hot pursuit", the plaintiff will have to seek an order for substituted service. In this regard the courts of England and Wales have shown themselves to be particularly flexible, having recently permitted service by way of "air-dropping" an NFT (containing a link to the court papers) into the relevant part of the blockchain: *D'Aloia v persons unknown* [2022] EWHC 1723 (Ch).
33. Pelling, M. QC. Speech entitled 'Issues in crypto currency fraud claims', July 20, 2022. Available from: https://www.judiciary.uk/announcements/speech-by-judge-mark-pelling-qc-issues-in-crypto-currency-fraud-claims.

# Parental alienation



As the Department of Justice prepares to undertake a public consultation on the issue of parental alienation, what are the facts, and what are the issues for this jurisdiction?

**Lyndsey Keogh BL**

The breakdown of a family where children are involved is often a tricky situation. It becomes even more difficult if a child decides that they do not want to have a relationship with one parent (usually the non-resident parent). A controversial label of 'parental alienation' is often used to describe such situations.

At the Five Jurisdictions Family Law Conference in Dublin in May 2022, the Minister for State with responsibility for Law Reform, James Browne TD, announced that the Department of Justice was undertaking a public consultation process that would inform future actions taken by the Government to address parental alienation in the context of family law proceedings. This development came as a surprise to many of the Irish delegates. It seems, however, that in the spring of 2021, the Department of Justice invited tenders for research into "the framing – legislative and otherwise – of the concept of parental alienation internationally and the various approaches being taken to deal with this issue in other jurisdictions".[1]

The research aims (as set out in the tender document) can be summarised as follows:

- identify the various definitions of parental alienation being used internationally;
- identify and outline the various approaches and responses being taken in other jurisdictions (legislative and otherwise);
- evaluate any studies that have examined the effectiveness of these various international approaches;
- assess the relevance of these studies to the Irish context;
- investigate what is known about the prevalence of this issue (in Ireland or internationally) through examination of the literature; and,
- identify any gaps on a policy and/or legislative level in Ireland that need to be addressed.[2]

This article will touch upon some of the issues set out in the research aims. It will set out a short history of parental alienation, how it is being addressed in this jurisdiction, the role of experts in the context of assessments being carried out where parental alienation is raised by a parent and/or guardian and, finally, it will consider whether we are at risk of allowing a parental alienation industry to develop in this jurisdiction.

## Parental alienation as a concept

Parental alienation as a concept was first recognised by Wallerstein and Kelly in 1976[3] in the context of divorcing families and the effects upon children. However, it was Gardner's opinion paper in 1985,[4] wherein he suggested that parental alienation was a syndrome or mental condition suffered by children who are alienated by their mothers, which has led to many years of

controversy and hot debate, often focusing on the difference between parental alienation and parental alienation syndrome. As a general issue, parental alienation is widely discussed by legal practitioners in family law, academics and non-legal professionals such as psychologists and social workers, but is often misunderstood. Many have polarised opinions on the subject and there is no real agreement as to the prevalence of parental alienation in this jurisdiction or elsewhere. It is worth noting that Gardner provided no research or actual data to legitimatise his initial theory, which we do not have time to consider in detail. However, it cannot be denied that it was Gardner's work that started the debate. Following criticism of his paper over a number of years, Gardner later created eight behaviours, which he said children with parental alienation syndrome would exhibit, including:

- campaign of denigration by one parent;
- weak, frivolous and absurd rationalisations for the deprecation of the parent;
- lack of ambivalence;
- the "independent-thinker" phenomenon;
- reflexive support of the alienating parent in the parental conflict;
- absence of guilt over cruelty to and/or exploitation of the alienated parent;
- the presence of borrowed scenarios; and,
- spread of animosity to the friends and/or extended family of the alienated parent.[5]

The symptoms suggested by Gardner to be indicative of parental alienation syndrome "contradict basic psychological theories and principles in child development, family psychology, and trauma psychology", according to Geffner and Sandoval (2020).[6] They further state that the disconnect in the field, and the tendency to use the term alienation for both inappropriate parenting and the claims brought about by followers of Gardner, have caused confusion among professions. Geffner and Sandoval advocate for the need to eliminate the labels and focus on behaviour that can be described and observed, with a focus on facts, evidence, observable behaviour and research when conducting evaluations and investigations in child custody cases, and not to rely on assumptions "based on junk science".

Similar to the research commissioned by the Department of Justice in 2021, the Welsh Government for Cafcass Cymru in 2018 commissioned a review of the research and case law on parental alienation.[7] Doughty *et al.* reviewed the research and found that it was dominated by a few authors, predominantly in the United States and Canada. They found that there is a "dearth of robust empirical studies",[8] with studies being qualitative in nature, and that the sampling and research design quality were generally poor. As a result, Doughty *et al.* found that reliable prevalence rates[9] are difficult to calculate due to the lack of a single definition for parental alienation, the diversity of associated behaviours, and changing demographics (i.e., an increase in cohabitation and blended families), and that the vast differences in methodology and sampling meant that the results were meaningless. In addition, the research does not establish a causal link between adverse outcomes and alienation.[10]

As a result, despite our common understanding of the term parental alienation, there is no universal definition for parental alienation in general. However, Doughty *et al.* note that the general consensus is that "parental alienation refers to the unwarranted rejection of the alienated parent and an alliance with the alienating parent, characterised by the child's extreme negativity towards the alienated parent due to the deliberate or unintentional actions of the alienating parent so as to adversely affect the relationship with the alienated parent".[11] Doughty *et al.* further differentiate between parental alienation and parental estrangement, with the latter being characterised as when "there is a basis for rejecting a parent such as neglect, abuse, abandonment or domestic violence", as opposed to parental alienation, which refers to "unjustified fear, hatred and rejection".[12]

Practitioners should be mindful that there are a vast number of reasons why a child may reject a parent. Doughty *et al*. referenced that children often align with one parent over another as a normal consequence of child development according to the needs of the child,[13] and that the argument as to whether or not parental alienation syndrome is a diagnosable condition:

"appears to have created confusion in attaching an unnecessary label to the very rare instances of a parent instilling false beliefs in a child, which is a form of emotional abuse. While such extreme cases are rare, they clearly fall within definitions of significant harm in statutory guidance. What is far less clear is the level of risk of emotional harm to a child who is refusing contact when there are no real or fabricated allegations of violence or abuse, and how the reasons for a child's resistance can be identified and resolved so as to resume what had been a positive relationship prior to separation".[14]

Milchman (2020)[15] noted that there was:

"little meaningful dispute that parental alienation is a serious parent-child relationship problem but that the dispute is about the accuracy of the behavioural criteria used to identify it and, more precisely, whether that accuracy has been established scientifically, which it has not. Further, the assessment criteria for parental alienation, abusive parenting, harsh, insensitive, unattuned or incompetent parenting must be specific to each cause and differentiate that cause from other causes. Furthermore, since the criteria are different, evidence for one does not prove or disprove any of the others. Each must be assessed and proven independently".

## Parental alienation – how is it being addressed in Ireland?

In the context of considering how cases where parental alienation is raised are addressed and determined in this jurisdiction, we must turn our attention to the relevant legislation governing custody/access arrangements, which is the Guardianship of Infants Act, 1964 (as amended). The 1964 Act, in addition to Article 42A of the Constitution, mandates that in all access/custody disputes the best interests of the children must be the paramount consideration, with section 31 of the Act[16] setting out a list of factors and circumstances that must be considered. It is noteworthy that there is no specific reference to parental alienation, although s. 31(2)(j) makes reference to the "willingness and ability of each of the child's parents to

facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives" as a factor that the court must have regard to. The overall objective of the court is the best interests of the child.

If the issue of parental alienation is raised within the context of proceedings in Ireland, the court will most likely make an order for a suitably qualified professional to carry out an assessment of the breakdown of the relationship/marriage and to make recommendations to the court in respect of access and/or custody arrangements, which often include the proposed residence of a child. The order for a report can be made at any time following the commencement of legal proceedings. These reports usually take a number of months to complete and are a costly extra for separated parents, who often do not have access to the funds needed to discharge the substantial cost. The order will usually reference a report to be carried out either by reference to Section 32 of the 1964 Act or by reference to Section 47 of the Family Law Act, 1995. It would be unusual for parameters to be placed on the remit of the court-appointed assessor.

## The role of the expert

The appointment of suitable professionals with the relevant experience and/or qualifications is a current significant issue in this jurisdiction.[17] In general, the professionals prepared to carry out such reports in private family law range from systemic family therapists and psychotherapists to child psychologists and clinical psychologists, with the latter generally being the most expensive. Such reports are usually relied upon significantly by the court in making decisions regarding the existence or otherwise of parental alienation; however, it is accepted that any recommendations or findings are not binding on the court, which is the ultimate fact finder and decision maker. It is crucial that experts engaged to carry out assessments as directed by the court in suspected parental alienation cases, and indeed any custody/access cases, remain independent. As referenced in a recent decision concerning parental alienation in *B. v C. (private law – allegation of parental alienation)*,[18] expert evidence does not stand alone in a case. Vincent J. stated that: "I need to come to my conclusions based not on general theories but about this particular child, what he is saying, and what the reasons are for it".[19] The court went on to say that: "I found that there was a tendency by [named expert] to fit the evidence to his cogent and coherent formulation, rather than standing back and testing it".[20] Anecdotally, this issue of confirmation bias arises often in cases of alleged parental alienation in this jurisdiction; however, there are no reported decisions that categorically set this out.

The issue of non-regulated experts was addressed in the case of *Re A. and B. (children)*[21] in the UK in 2021, when an expert was appointed to conduct an assessment based on the expert's CV referring to themselves as a psychologist. However, following the appointment, the mother later discovered that the expert was not in fact a regulated psychologist by either the British Psychology Society or the Health and Care Professions Council. She sought to have the expert replaced in the case and was successful. Thereafter, the Association of Clinical Psychologists UK (ACP-UK) released a statement in December 2021, which took issue with so-called psychological experts without the necessary qualifications and experience being instructed to act as expert witnesses in family court, which has resulted in harm to the public. It went on to say that the ACP-UK is aware of several cases in which psychological experts who are not registered have suggested inappropriate diagnoses and made recommendations for children to be removed from their mothers based on these diagnoses. While there are no reported instances of inappropriate experts being appointed in this jurisdiction, the situation in England and Wales should serve as a timely warning that experts should be appropriately qualified to carry out the task assigned to them, and should assess each case as a whole without having a predetermined view that parental alienation is the cause for a child refusing to see their parent.

In the context of testing each case on its own merits before attaching a label of parental alienation to it, Milchman, Geffner and Meier (2020)[22] mused that labels create an ideology that replaces science. The use of rhetoric and ideology distracts researchers, professionals and the courts from the substantive issues that must be addressed to advance the understanding of resistance to or rejection of a parent. Further, it is important to ensure that those conducting evaluations and making decisions in court are knowledgeable about child abuse, domestic violence, trauma, bad parenting, and other key factors in family dynamics, so that they do not miss the relevant details. Labelling the case an alienation case implies that other causes have been ruled out when this may not be the case. They also opine that labelling a behaviour problem as if it were a scientifically validated diagnosis, which has specific implications for children, families and their treatment, in the absence of the necessary empirical research, encourages the legal system to ignore the risk that legitimate abuse cases are being misinterpreted and misclassified as parental alienation cases.

In England and Wales, where there are allegations of parental alienation, abuse and/or behaviour that directly affects the welfare of the child and future custody/access arrangements, the court embarks upon an early fact-finding hearing before a report is commissioned to analyse the reasons for a child's opposition to contact with the other parent. In *Re S. (parental alienation: cult)* [2020][23] Peter Jackson LJ explained the importance of early fact finding where there are allegations of parental alienation:

"It must be acknowledged that, whether a family is united or divided, it is not uncommon for there to be difficulties in a parent-child relationship that cannot fairly be laid at the door of the other parent. Children have their own feelings and needs, and where their parents are polarised, they are bound to feel the effects. Situations of this kind, where the concerned parent is being no more than properly supportive, must obviously be distinguished from those where an emotionally abusive process is taking place. For that reason, the value of early fact finding has repeatedly been emphasised".[24]

While early fact-finding hearings are not normal practice in this jurisdiction, there is one documented case of a fact-finding hearing taking place to determine whether or not sexual abuse had taken place. In 2015, O'Hanlon J. in *D.E. v C.D.*[25] dealt with an application for an order for a stay on an order by the Circuit Court to direct that a report be carried out by a clinical psychologist to effectively make recommendations as to how to reunify a father with a child. This was following a fact-finding hearing by the Circuit

Court whereby the Court found that the allegations of sexual abuse in respect of the child and the father were unfounded, and therefore the assessment should proceed to consider whether or not access between the father and the child should take place. The assessor was not prohibited from having regard to the fact that the child had indicated that abuse had taken place, but instead was directed not to embark on an assessment that was essentially making recommendations based on the allegations that had been made. This approach of early fact-finding hearings would be helpful prior to assessments being ordered, but may impact on an already stretched system, which is running well above capacity.

## Treatment and intervention

In terms of treatment and intervention options available when a legitimate finding of parental alienation has been made, the tendency in this jurisdiction is to direct therapy to take place between the alienated parent and the child. This is generally ineffective but can sometimes improve the situation. Sometimes experts recommend a change of custody to the alienated parent, with such recommendations often including a suggestion that the alienating parent would have no contact with the child for a period of up to 90 days so as to break the cycle of alienation. This is referred to as "parentectomy". Gardner recommended this kind of deprogramming for moderate to severe cases of parental alienation syndrome. However, Doughty *et al.* confirm that there is a consistent lack of robust evaluations of the interventions and treatments described in the literature (such as those described above). The current versions of parentectomy include reunification programmes in the United States according to Geffner and Sandoval (2020), where children are sent to deprogramming camps and are later visited by the alienated parent. They note that "these deprogramming centres were essentially designed to pressure a child until he or she recants what the child has said and feels". Doughty *et al.*[26] found that many of the emerging interventions focus upon psycho-educational approaches working with children and estranged parents but more robust evaluation is needed to determine their effectiveness. Thankfully, in this jurisdiction, we do not have such treatment programmes for alienated children. However, we do use therapy as a means to re-establish the relationship where there is no reason for the alienation and, in some cases, a transfer of custody is ordered to the non-residential parent.

While we are not currently at the point where an industry of parental alienation has established here, we do run that risk that without proper research and studies, and due consideration of the reasons why a child may not want to have a relationship with a parent, further irreparable damage may be done to children who are the subject of custody disputes where alienation is alleged. While we await sight of the research commissioned by the Department of Justice, perhaps now is a good time to stop and reflect on our role as practitioners in cases of alleged alienation, and how we can contribute to healthy discussion with a view to improving outcomes for children and families.

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9. *Ibid* at pages 18-19.
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13. *Ibid* at page 17.
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15. Milchman, M. Is a critique of parental alienation syndrome/parental alienation disorder (PAS/PAD) timely? *APSAC Advisor* 2020; April: 43-44.
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17. While the Minister, in accordance with section 32(10) of the 1964 Act, can specify the qualifications and experience of an expert appointed under section 32 of the 1964 Act, the only statutory regulation issued by the Minister relates to reports directed by the court under section 32(1)(b) and not reports directed under section 32(1)(a) only, or indeed section 47 reports directed under the Family Law Act, 1995.
18. [2021] EWFC B61.
19. *Ibid* at para 56.
20. *Ibid* at para 59.
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# Wasted costs orders

The new Order 99 Rule 9 of the Rules of the Superior Courts has implications for barristers in relation to wasted costs orders.

**Tomás Keys BL**

Several judgments have been delivered by the Superior Courts on foot of applications for wasted costs orders since the new provisions of Order 99 Rule 9 of the Rules of the Superior Courts, which became effective as of September 9, 2019 ('the new Order 99').[1] However, the recent judgment by the Court of Appeal in *Ward v Tower Trade Finance Ireland Limited and Burns (No. 2)*[2] is the first judgment delivered since the new Order 99 was introduced that considers, in detail, the principles that a court should apply when considering whether to make a wasted costs order. During the course of his judgment, Noonan J. also referred, *obiter,* to the apparent expansion of the jurisdiction under Order 99 Rule 9, which appears to give the Superior Courts jurisdiction to make a barrister the subject of wasted costs orders. The expanded jurisdiction arises from the replacement of the word "solicitor" under the old Order 99 Rule 7, which deals with wasted costs, with the words "legal practitioner" in the new iteration of Order 99 Rule 9.[3]

This article will set out the background to the dispute, the principles to consider when deciding whether to make a wasted costs order, and the potential consequences for practitioners (both solicitor and counsel).

## Background to the dispute

In December 2014, Tower Trade Finance Ireland Limited ('Tower Trade') agreed to make a finance facility available to Michael Ward Engineering Limited ('the company'). The agreement was described by Allen J. in his judgment in *Ward v Tower Trade Finance Ireland Limited and Burns (No. 1)*[4] as follows:

"Tower Trade agreed to make available to the company a finance facility pursuant to which Tower Trade would pay the company's suppliers and the company would, in respect of each such payment, draw a bill of exchange for the amount of the payment, plus Tower Trade's commission and charges".[5]

Mr Michael Ward and his father Phillip Ward, who were both directors of the company, accepted the facility agreement on behalf of the company. Mr Michael Ward also executed a personal guarantee and indemnity in favour of Tower Trade in relation to the indebtedness of the company on foot of the agreement. The financing agreement provided that it was to

be construed in accordance with the laws of South Africa and that it was subject to the non-exclusive jurisdiction of the High Court of South Africa. The company defaulted on its obligations and Tower Trade issued proceedings against Michael Ward by way of summary summons in this jurisdiction in 2015. Ultimately, Michael Ward reached a negotiated settlement agreement through his solicitors with the solicitors for Tower Trade. The terms of the negotiated settlement agreement included the following provisions:

- Michael Ward would consent to judgment in the sum of €132,032.40 plus costs to be taxed in default of agreement;
- there was to be a stay on entry and execution for a period of 12 months;
- if, during that 12-month period, Michael Ward paid the sum of €100,000, then Tower Trade agreed that the stay would become permanent;
- Phillip Ward was required to provide a limited recourse guarantee of Michael Ward's indebtedness; and,
- the guarantee was to be supported by a first legal charge over land owned by Phillip Ward ('the property').

Both Phillip Ward and Michael Ward had the benefit of independent legal advice before executing the necessary documentation and deeds, and the charge was duly registered on the folio. The negotiated settlement agreement specifically provided that it was governed by Irish law and that the parties submitted to the exclusive jurisdiction of the Irish courts.
There was default on the part of Michael Ward and Tower Trade duly appointed Aengus Burns ('the receiver') as receiver over the property. The receiver initially sought to sell the property by public auction in December 2020, but attempts were made by Michael Ward and a man described as 'a family friend' to stop that auction from proceeding. In or about that time, it appears that a plenary summons on behalf of Michael Ward, wherein Tower Trade, the receiver, the receiver's firm, solicitors and auctioneers were named as defendants, was sent to the proposed defendants but never filed. Noonan J. referred to the draft summons at paragraphs 12 and 13 of his judgment in *Ward v Tower Trade Finance Ireland Limited and Burns (No. 1)*:[6]

"The summons alleges that all of the defendants conspired and colluded to sell his lands unlawfully on foot of fraudulent documents. The summons went on to allege that these matters had caused the plaintiff high blood pressure, respiratory illness, lower self-esteem and life satisfaction, psychological distress, depression and anxiety, suicidal tendencies, stress and anger, psychosis and more work-limiting long-term illness and disability. It goes on to allege defamation of the plaintiff's name and professional reputation, and claimed damages of €500,000.
This document, while never issued as a summons, was circulated to all relevant parties. Despite this entirely improper attempt by the plaintiff to scupper the auction, it went ahead but failed for lack of interest. Of note, however, earlier in December and prior to the date of the auction, the plaintiff consulted his current solicitors who, despite making phone calls to the receiver's solicitors on his behalf, claim not to have been formally instructed until some months later".

The receiver attempted to sell the property at auction in February 2021 and this precipitated the plaintiff (Michael Ward) in issuing proceedings through his solicitors on February 10, 2021. The plaintiff, through his lawyers, sought an interim injunction on an *ex parte* basis but the grounding affidavit was entirely silent on the attempts to prevent the December 2020 auction from proceeding. The plaintiff and his solicitor subsequently swore further affidavits to address the omission before the interlocutory motion was heard and dismissed.
Having set out the relevant factual background to the case in the course of his judgment,[7] Allen J. identified the key argument relied on by the plaintiff and his view on the merits of the case:

"The plaintiff's case is that this non-exclusive jurisdiction clause in the trading agreement confers exclusive jurisdiction on the High Court of South Africa to deal with any claim by Tower Trade against Mr Michael Ward on foot of his guarantee and indemnity dated December 8, 2014, which by its express terms was to be governed by and construed in accordance with Irish law and by which Mr Michael Ward irrevocably submitted to the jurisdiction of the Irish courts.
It is unstateable.
The effect of clause 24 of the trading agreement is that any dispute between the parties to that agreement as to the construction of that agreement was to be determined in accordance with the laws of South Africa. It is not suggested that there ever was such a dispute. A choice of law clause is not the same as a choice of jurisdiction clause. A choice of law will not carry with it the exclusive jurisdiction of the courts for the place of the law chosen".

The injunction was dismissed on the basis that the claim was unstateable and did not meet the threshold requirement that there was a fair issue to be tried. While the auction was unsuccessful in February 2021, the receiver ultimately entered into a contract for sale of the property on April 29, 2021, which, as of January 2022, had yet to be closed. Thereafter, the plaintiff sought an injunction in the Court of Appeal on April 30, 2021, pending the hearing of the substantive appeal against the order of Allen J. This was refused by Costello J. on "on broadly the same basis as the High Court".[8] The substantive appeal of the dismissal of the interlocutory injunction was refused on January 13, 2022. In his *ex tempore* judgment on behalf of the Court of Appeal, Noonan J. observed at paragraph 43:

"Finally, it only remains for me to say that it is a matter of regret and concern that such patently untenable and misconceived arguments as have been advanced in this case, now for the third time, and possibly a fourth if the Supreme Court grants leave to appeal, have allowed the accumulation of enormous costs, almost certainly well in excess of the value of the property concerned, and thus at an entirely disproportionate level, which all ultimately fall for the account of the plaintiff".[9]

*"A choice of law clause is not the same as a choice of jurisdiction clause. A choice of law will not carry with it the exclusive jurisdiction of the courts for the place of the law chosen."*

In a concurring judgment, Haughton J. set out his views on the merits of the case at paragraphs 4-6:

"These arguments, which were made and correctly rejected in the High Court, do not come near reaching the relatively low threshold test of a fair or serious question to be tried. They are, as Judge Noonan has said, "patently untenable and misconceived".
I would go further, and describe them as spurious, being entirely unfounded in law and fact, and entirely without merit.
This appeal is frivolous and vexatious and in my view should not have been pursued. It is one that in my view responsible solicitors and counsel would have advised their client should not be pursued".

## The costs judgment

Upon the delivery of the judgments of the Court of Appeal in *Ward v Tower Trade Finance Ireland Limited and Burns (No. 1)*, an application was made by the defendant for a wasted costs order against the solicitor for the plaintiff. In the circumstances, the Court allowed the parties time to file written legal submissions, and both the plaintiff's solicitor and the defendant's solicitor swore further affidavits. Paragraphs 7 and 8 of Noonan J.'s costs judgment in *Ward v Tower Trade Finance Ireland Limited and Burns (No. 2)*[10] briefly sets out what occurred prior to the first auction taking place:

"Three days before the auction, on December 14, 2020, the plaintiff consulted with Mr William Murphy in the office of GN & Co., solicitors, of which the principal is Mr Geoffrey Nwadike. As confirmed by counsel for the plaintiff in the course of the hearing of the appeal, Mr Murphy had previously acted in a number of cases before the court as a McKenzie friend to litigants in person. He is now employed as an assistant by Mr Nwadike.
Mr Murphy telephoned the defendants' solicitors in relation to the matter when it transpired that they had received the earlier purported and unissued plenary summons. Mr Nwadike says, in his affidavit sworn in respect to this application, that because of the existence of this document, he declined to accept instructions from the plaintiff on that day".[11]

Noonan J. then summarised the history of the matter and the findings of the High Court and the Court of Appeal in the principal judgments dismissing the appeal. After reviewing the leading authorities in this jurisdiction on wasted costs orders, Noonan J. summarised the position at paragraph 33 of the costs judgment:

"I think the following points can be derived from the authorities summarised above: -

(i) The jurisdiction arising under O. 99, r. 9 permits the court to make two types of wasted costs orders, the first disentitling the solicitor from recovering costs from his or her own client and the second, rendering the solicitor in effect personally liable for the costs of any third party whose costs the client has been ordered to pay;
(ii) The jurisdiction is a wide one which empowers the court to make "such order as the justice of the case may require";
(iii) However, the jurisdiction is one to be exercised sparingly and only in the clearest of cases;
(iv) In the absence of deliberate dishonesty or misbehaviour, a mere error of judgment, even one amounting to negligence, will not suffice to warrant the exercise of the jurisdiction;
(v) What is required is gross negligence amounting to a serious dereliction of the duty of a solicitor to the court, which may in this sense be described as misconduct;
(vi) Such misconduct includes the institution, pursuit and continuation of litigation which the solicitor knows, or ought reasonably to know, is vexatious, wasteful of court resources or otherwise an abuse of process;
(vii) Pursuing litigation on the advice of counsel may afford a solicitor a defence to a wasted costs application, unless that advice is so obviously wrong that any reasonable solicitor giving the matter due consideration would realise that fact;
(viii) The fact that a claim is likely to be hopeless does not necessarily give rise to the potential for a wasted costs order, provided the case has at least some stateable basis, even if theoretical. Development of the law is often advanced by the bringing of claims that are novel, without precedent or even contrary to existing authority, and such claims ought not be stifled by an overzealous application of the jurisdiction;
(ix) The presence or absence of bona fides by the solicitor in pursuing litigation is not relevant to whether there has been gross negligence or not, but the presence of mala fides or an improper motive may render the pursuit of litigation, which might otherwise be regarded as merely negligent, properly the subject of a wasted costs application;
(x) The jurisdiction is properly regarded as both punitive and compensatory".

In considering the above principles and applying them to the facts, Noonan J. stated at paragraph 41:

"Thereafter, it seems to me clear that the decision by Mr Nwadike to persist with the appeal, notwithstanding everything that had gone before, cannot be viewed as other than a complete and deliberate waste of valuable court resources. To pursue the appeal in those circumstances was at best grossly negligent and at worst, a deliberate dereliction of Mr Nwadike's duty to the court.
Having regard to these factors, the court must in my judgment mark its

*"It seems to me clear that the decision by Mr Nwadike to persist with the appeal, notwithstanding everything that had gone before, cannot be viewed as other than a complete and deliberate waste of valuable court resources."*

disapproval of the manner in which this appeal was initiated, pursued and continued by Mr Nwadike and protect its process from such abuse now and in the future".

The plaintiff's solicitor argued that if he was to be made personally liable for the defendant's costs that as he was a sole practitioner, it would "in practical terms bring his practice to an end". Noonan J. was ultimately persuaded that in the particular circumstances it would be disproportionate to order the plaintiff's solicitor to personally meet the defendant's costs, but he disallowed any costs between the solicitor and his client, and ordered any reimbursement of monies that may have been paid on account.

## Potential consequences for practitioners

The costs judgment in *Ward v Tower Trade Finance Ireland Limited and Burns (No. 2)*[12] serves as a timely reminder to solicitors and, it would appear, barristers, of the risks in "[instituting, pursuing and continuing] litigation which the solicitor knows, or ought reasonably to know, is vexatious, wasteful of court resources or otherwise an abuse of process". Not only is there a risk that lawyers may be disallowed the fees that otherwise would be due to them from their clients, but depending on the circumstances of the case, there is a risk of lawyers being made personally responsible for the other parties' costs, and there is a significant risk that same would not be covered by any professional indemnity insurance.

In circumstances where one of the factors that should be considered when determining whether to make a wasted costs order against a solicitor was whether they were acting on advice of counsel, Noonan J. noted the change in the wording of Order 99 Rule 9. He made the following *obiter* observation at paragraph 34:

"I would note in passing that the new O. 99 came into effect in consequence of the passage of the Legal Services Regulation Act 2015. One potentially significant change made by O. 99, r. 9 over the previous O. 99, r. 7 is that where "solicitor" appears in the old order, the term "legal practitioner" appears in the new one. S. 2 of the 2015 Act defines the term "legal practitioner" as "a person who is a practising solicitor or a practising barrister". On its face therefore, the new rule appears to expand the jurisdiction in relation to wasted costs orders to now include barristers. While the point does not arise for consideration on the facts of this case, the comments [relating to a solicitor acting on the advice of counsel] above are derived from the law relating to the old O. 99, r. 7 which exclusively concerned solicitors and should be seen in that context".

While the Superior Court Rules Committee has not set out the definition of legal practitioner in the body of Order 99, the term legal practitioner is defined in the Legal Services Regulation Act 2015 as a "a person who is a practising solicitor or a practising barrister…", as noted by Noonan J. A similar power to make a costs order against barristers in England and Wales was put on a statutory footing by virtue of the Courts and Legal Services Act 1990.[13]

Although the actions and/or advices of counsel were not an issue that the court had to consider on the application for a wasted costs order, Noonan J. recognised that such a scenario may arise in a future case. It may arise that during the course of a wasted costs application, a solicitor may argue that they only took a certain course of action as a result of advice of counsel. Under the old regime, this may have insulated the solicitor from having a wasted costs order made against him or her.

However, it would appear that under the new Order 99 regime, a court may wish to consider evidence or submission from counsel as to their actions and advices. In light of the potential risks, barristers should bear in mind that the veil of professional legal privilege could be pierced in such circumstances and barristers may have to justify their advices to the court.

## References


1. Statutory Instrument 584 of 2019.
2. 2022 IECA 70.
3. As of July 21, 2022, there is no such provision in the Circuit Court Rules or the District Court Rules.
4. [2021] IEHC 165.
5. *Ibid* at paragraph 3.
6. [2022] IECA 9.
7. [2021] IEHC 165.
8. [2022] IECA 9 paragraph 42.
9. By determination dated April 25, 2022, bearing neutral citation [2022] IESCDET 49, the Supreme Court dismissed the plaintiff's application for leave to appeal against the decision of Costello J. not to grant an injunction pending the hearing of the substantive appeal on the basis that the plaintiff had failed to lodge the necessary documentation as required under Practice Direction SC 19 and on the basis that the application for leave had become moot.
10. [2022] IECA 70.
11. For the avoidance of doubt, it was not suggested during the course of the judgment that Mr Murphy had drafted the plenary summons.
12. [2022] IECA 70.
13. The *Law Society Gazette* in England reported in June 2022, that in a statement to judges entitled 'non-attendance at court by members of the bar', the Lord Chief Justice of England and Wales referred to the possibility of the Crown Prosecution Service considering whether to make wasted costs applications against barristers on foot of the strike by the criminal bar in that jurisdiction. See: https://www.lawgazette.co.uk/news/lcj-warns-barristers-over-court-walkouts/5112870.article (accessed on July 21, 2022).

# Supporting the young Bar

## The Bar can and should make changes to support colleagues in the early years of practice.

**William Quill BL**

Is the Law Library representative of those who study law in measures of diversity, including socioeconomic background? If it is not, we do a disservice not only to those considering a career in law, but also to The Bar of Ireland. In a competitive professional market, particularly since the establishment of the Legal Services Regulatory Authority, we will lose out on capable members. This affects the reputation of our profession and has an impact in turn on access to justice and perceptions of the rule of law.

It is in the wider interests of justice that the Bar should be more socially diverse. Even as we act in our clients' interests, the range of perspectives we can offer will be greater when there is more diversity.

A career as a barrister can never be a certain one. No reform of our governance structure can provide the guarantees of other professions or the civil service. Different areas of practice draw different practitioners, depending on our skills and interests. Indeed, that flexibility and ability to forge one's own path is what draws many of us to this profession. We can protect the best aspects of self-employment, while considering what changes we can make to our current system of pupillage to support colleagues in the early years of practice.

### Affordability

The costs of the barrister-at-law degree are comparable to other professional courses, and the equivalent of library subscription fees exist in other professions. It is not these direct costs that affect the decision to be a barrister, but rather the prospect of working for little or no income compared to careers where, from the start, professionals are paid in accordance with their skill and qualifications.

We are now in a cost-of-living and inflation crisis, and the past number of years have seen a nationwide housing and rental shortage, particularly in Dublin. Practice in Dublin is mandatory in the first year and remains advisable for most junior practitioners. Some are lucky enough to either live with family or receive direct support from them. Others rely on personal savings or work outside the Bar. In some cases, external work can assist them in their practice, such as teaching in law. In others, it is a continuation of the evening or weekend work that sustained them through years of study. To reduce the reliance on external work, the Bar should consider income supports and direct assistance for rent and commuting costs specifically for members in the early years of practice.

### Developing pupillage

Schemes such as the Denham Fellowship are welcome but are in their nature limited and do not reflect changes in individual circumstances. The recent requirement for pupil-masters to pay fees in the first year provided a measure of equality, but is only one aspect of the financial burden on junior barristers. Devilling has evolved from a time when the Bar and the range of specialised areas of practice were much smaller. It should now be properly regulated, from the entry to the end of the period of training. Under the current system, prospective entrants to the Bar contact those on the pupil-master list to determine their availability. A centralised and transparent system could lead to a better fit with the skills and interests of new entrants. There should be an assessment of professional development after the year or two years of devilling. Both pupil and pupil-master should know what to expect of each other.

### Considering new structures

Unlike other self-employed professionals, a barrister cannot expect to be paid immediately. The backlog affects junior barristers in particular, as the delay can mean full years of decent work not being remunerated for a year or two to come. Structures allowing barristers to work as groups, within the framework of the independent referral Bar, are common in many jurisdictions. We should consider whether they could be applied within the Irish Bar in an equitable manner, with the aim of providing greater financial certainty, allowing barristers to promote their work collectively, and providing a more fulfilling experience of pupillage by allowing new entrants to experience a greater range of work. This could also be the means by which invoices are used.

Now beginning my seventh year at the Bar, I have seen a reasonable number of my contemporaries move to other careers. There is an unfortunate tendency to consider that this might be someone for whom a career at the Bar did not work out. I would never presume to imagine so. In many cases, it may well be the reverse; that success here led to opportunities elsewhere. We should not think of work here as a vocation, fundamentally different from other types of work, but as a profession we can confidently promote both to potential entrants and to those seeking legal services, as a place where the best can thrive.

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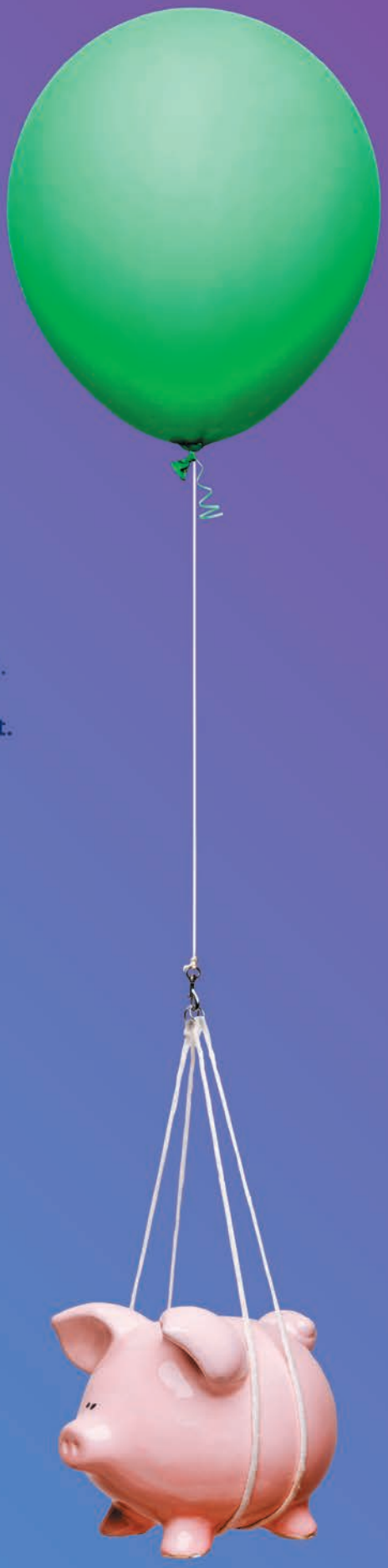

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