Contents

50  Recent Developments in EU law
    Dr Elaine Fahey BL

54  Recent Developments in the law of prohibition
    Part 2
    Micheál P. O’Higgins SC

xlv  Legal Update:
    A Guide to Legal Developments from
    19th March 2009 up to 8th May 2009

61  Security for Costs under S.390 of the Companies Act, 1963
    Anthony Barr S.C.

69  Global Claims under Construction Contracts
    Gerard Meehan BL

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

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

Subscriptions: January 2009 to December 2009—6 issues
Annual Subscription: £240.00 + VAT

For all advertising queries contact:
Sean Duffy,
Direct line: + 44 20 7393 7602
E: sean.duffy@thomsonreuters.com
Directories Unit: Sweet & Maxwell
Telephone: + 44 20 7393 7000

Contributions published in this journal are not intended to, and do not represent, legal advice
on the subject matter contained herein. This publication should not be used as a substitute for or
as a supplement to, legal advice. The views expressed in the articles herein are the views of the
contributing authors and do not represent the views or opinions of the Bar Review or the Bar
Council.

The Bar Review June 2009
Recent Developments in EU law

DR ELAINE FAHEY BL

Introduction

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

Free Movement of Persons

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

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

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

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

Free Movement of Goods

In the recent decision of Dynamic Medien;5 the Court (Third Chamber) considered a German law prohibiting sale by mail order of image storage media (eg DVD) not labelled as having been examined in Germany to be suitable for young persons. The issue arose as to inter alia whether the law was in breach of Article 28 EC or whether the rule could be deemed to be a “selling arrangement” within the meaning of Keck6 and thus fall outside the scope of Article 28 EC. The prohibition had as its objective the protection of young persons and constituted a form of administrative censorship.

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

---

1 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.
3 Case C-109/01 Secretary of State for the Home Department v Hassane Akrich [2003] ECR 1-9607.
4 Although the decision has been criticised for its excessively speedy delivery: Currie “Accelerated justice or a step too far? Residence rights of non-EU family members and the court’s ruling in Metock” (2009) 34 European Law Review 310; Costello “Metock: Free Movement and “Normal Family Life” in the Union” (2009) 46 CMLR Rev 58.
5 C.244/06 Dynamic Medien [2008] 2 CMLR 23.
The decision in *Dynamic Medien* is a significant one for the simple reason that it demonstrates a certain clarity and maturity of the caselaw, given that the Court sets out the governing caselaw with admirable economy, whatever the merits of the selling arrangement distinction introduced by *Keck* and the ongoing debate as to the role discrimination or the appropriate application of market access in the caselaw as to the internal market.8 The Court also referred to a diverse range of human rights instruments, itself a sign of much jurisprudential evolution.9

**Fundamental Rights**

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

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

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

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

**Legislative competence**

Ireland recently failed in its challenge before the Court of Justice (Grand Chamber) to the validity of the use of Article 95 EC as the basis for the Data Retention Directive14 in *Ireland v. Council and European Parliament*.15 Ireland contended that the correct legal base for the Directive was rather Title VI of the Treaty on the European Union. In 2004, France, Ireland, Sweden and the UK introduced a proposal for a draft framework decision under Title IV EU which would have harmonised data retention obligations of service providers. The Directive was subsequently adopted pursuant to Article 95 EC which purported to harmonise the laws of the Member States with respect to data retention so as to ensure data was available to investigate serious crime, adopted in response to terrorism concerns arising within the European Union, with its preamble explicitly referencing the London terrorist attacks of 2005. However, in the adoption of the instrument, Ireland and Slovakia were outvoted in the Council of Ministers and the Directive benefited from an unusually speedy publication. The Directive now imposes far-reaching obligations on the States *inter alia*, to retain, trace and identify telephone and Internet data.

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

---


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

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


12 At para. 299.

13 See above.


the activities of public authorities for law-enforcement purposes.”

A negative decision would have represented a major blow to the operation of this anti-terrorism instrument, however cast. Ireland had based its arguments in the case on the tersely worded Passenger Name Records decision of the Court of Justice, that annulled certain Council and Commission decisions for lack of competence outside of the Data Protection Directive, a decision that has not found universal approval.16 The Court and the Grand Chamber in particular, has, however, annulled a wide range of measures in 2008 and the infamous Tobacco Advertising17 from less than a decade ago largely stands alone, rejecting a general community competence to legislature pursuant to Article 95 EC. Competence and the legality of legal base chosen in legislative instruments remains a live issue for a Court operating in the shadow of a ratification crisis, post- Lisbon.

**Competition Law**

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

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

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

**Freedom of establishment, Article 234 EC**

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

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

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

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

---

16 At para. 91.


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

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

**Employment law**

Finally, the decision of the Court of Justice in *Impact v Minister for Agriculture and Food*,22 concerned a claim by Irish civil servants challenging their pay and pension entitlements as fixed-term contract workers and the manner and effect of the renewal thereof. The issue arose *inter alia* as to the direct effect of a Directive implementing a Framework Agreement23 and the jurisdiction of the Irish Rights Commissioner or Labour Court to consider the claim of a fixed-term worker as to direct effect in respect of a period after the due date for implementation and prior to the date of transposition of the directive.

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

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

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

**Conclusion**

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

---

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

Part 2

Mícheál P. O’Higgins SC

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

Repeat Trials

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

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

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

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

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

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

---

1 Unreported, Supreme Court, 10th June, 2008.
2 The members of the Court were Denham, Hardiman, Fennelly, Kearns and Finnegan JJ.
is only one continuing jeopardy until the case is finalised. He noted too that the practice which operates in England and Wales has traditionally existed in this jurisdiction. There must come a time when repeated trials may come to be seen as oppressive and as an abuse of discretion on the part of the DPP. It may become an unfair procedure in itself to retry an accused. A breaking point may be reached. A one size fits all approach is not appropriate. In the ordinary course, two trials which end in jury disagreement should be seen as an effective discharge of the public's interest in the prosecution of crime, unless there are unusual factual circumstances which suggest otherwise. Kearns J. held that when considering an application to prevent a third trial the Court should have regard to the following matters:

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

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

Abuse of Process Cases

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

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

In Ryan v Director of Public Prosecutions Barron J. stated:

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

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

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

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

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

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

4 P.22 of the judgment.
5 In a purely civil context see for example Barry v. Buckley [1981] IR 306 (Costello J.).
6 [1992] 1 AC 34.

---

7 [1988] IR 232
10 Perhaps an example of this is Noonan v. Director of Public Prosecutions [2007] IESC 34.
this area of abuse of process, so that justice in individual cases can be achieved, by applying established principles of law.

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

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

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

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

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

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

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

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

The Court of Appeal held that:

1. Whether or not there was prejudice to the defendant, it would bring the administration of justice into disrepute to allow the Crown to revoke its original decision without any reason been given as to what was wrong with it, particularly as it was made coram judice in the presence of the Judge and,

2. That neither the Court nor the defendant could be expected to enquire whether prosecuting counsel had authority to conduct a case in court in any particular way and they were therefore entitled to assume in ordinary circumstances that counsel did have such authority.

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

**Litigating Disclosure in Judicial Review**

For reasons that are probably obvious, disclosure in criminal cases is something which should usually be litigated at the local level, before the Court of trial, and should not form the basis for a prohibition action in judicial review. However, to
every general rule, there are exceptions and it is submitted that, in an appropriate case, it is in accordance with legal principle to seek prohibition where an applicant is able to demonstrate that, due to the State’s default in failing to make proper disclosure, there is a real or serious risk he cannot get a fair trial.

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

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

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

In the cases of Florence Healy v. DPP and Vincent Dodd v. DPP,15 the High Court was asked to stay a criminal prosecution in the District Court in circumstances where the gardaí had failed to provide relevant disclosure material and had also failed to carry out enquiries with the Garda Síochána Complaints Board as to whether it would be willing to disclose certain statements made to it by gardaí concerning the events the subject matter of the criminal proceedings which the applicants sought to injunct. The applicants faced allegations of assault and obstruction of a garda arising from an incident on the 18th of May, 2003. The applicant, Mr. Dodd, said that he had been subjected to a violent assault by a named garda in the course of the incident. He made a complaint to the Garda Síochána Complaints Board concerning what he said was excessive brutality on the part of the garda. He sought from the gardaí a copy of the statements which the gardaí would inevitably have provided to the Complaints Board to see if the statements in question be obtained and shared with the defence.

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

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

PG v. DPP17 was a sex abuse delay prohibition action. One issue which arose in the case was the contention that the DPP’s failure to disclose certain evidence, principally the notes of psychological or other experts attending the complainants, had deprived the applicant of his right to fair procedures and natural justice and, hence, to a fair trial in due course of law. Murphy J. in the High Court refused the application for an injunction and the applicant appealed to the Supreme Court. The Supreme Court18 dismissed the appeal. The Court held that whilst there had been significant delay in reporting the alleged sexual offences, the DPP had discharged the burden of proving that adequate explanation had been given for that delay. The Court found that the complainant’s extreme youth, the applicant’s adult status and their very close family relationship meant it was appropriate to conclude that a relationship of dominance or authority existed.

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

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

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

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

15 Unreported, High Court (Hanna J.), 30th May, 2005.
16 McGovern J’s written judgment, setting out the history of the matter, was delivered on the 13th day of March, 2007.
17 [2007] 3 IR 39.
18 Murphy CJ. Denham, Hardiman, Geoghegan and Fennelly JJ.
19 Unreported, High Court (McMalton J.) 31st July, 2008
might assist her in defending herself in a criminal trial. The facts of the case were quite analogous to the facts of Dodd and Healy described above. In Traynor, the gardai were called out to a public order disturbance in March of 2003. One of the gardai called to the scene was involved in an altercation with the applicant’s daughter. When the applicant tried to intervene, she alleged she was assaulted by the garda in question. The applicant’s daughter was arrested. Subsequently the applicant made a complaint to the Complaints Board about the garda concerned. The Board investigated the complaint, having held that the complaint was admissible, completed its investigation and sent a report to the DPP. The DPP decided eventually not to prosecute the garda. The Complaints Board stated that having regard to the decision of the DPP, it too had concluded with the matter.

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

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

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

In finding against the State, McMahon J. commenced with a description of the State’s duty to disclose. He cited Fennelly J’s dictum in People (DPP) v. Kelly21 as follows:

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

The evidence before the Complaints Board could be described as both “relevant” and “material” even if those words were not synonymous. Judge McMahon held that it was not an adequate excuse for the DPP’s reluctance to disclose such material as was sent to it by the Complaints Board to say that it does not propose to rely on it in its prosecution of the defendant. Reliance is not the test for excusing disclosure. The material in question was, in the Judge’s view, the very kind of matter that would impede the prosecution’s case, advance the defendant’s case or lead to a new line of enquiry of assistance to the defendant, the test as set out by Carney J. in DPP v. Special Criminal Court22 (often referred to as the Ward case).

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

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

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

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

An “unless and until” order was also made by Herbert J. in the case of McG v. DPP23, continuing a stay against the
taking into account “inferred admissions” as indicated in the judgments of Geoghegan J. and Hardiman J. respectively in Rattigan v. DPP21.

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

Prior to the Supreme Court’s landmark decision in H v. DPP22, it was necessary for a judicial review court asked to consider granting prohibition in a sexual abuse delay case, to temporarily suspend the presumption of innocence, so that the Court could carry out the exercise of assessing whether the defendant’s conduct (which for the purpose of the exercise was assumed to be true) had caused the complainant to delay in making her complaint. In the countless sex abuse delay cases that came before the superior courts during the relevant period, it was deemed necessary for the judicial review court to carry out this somewhat artificial exercise and, whilst doing so, to suspend temporarily the presumption of innocence to which the accused was otherwise entitled. Since the Supreme Court’s decision in H v. DPP in July, 2006, it is no longer necessary for the Court to carry out this exercise, since it is now to be assumed the complainant’s delay in reporting was attributable to the alleged abuse. For that reason, it is no longer necessary to suspend, even temporarily, the presumption of innocence. And since an accused person enjoys the presumption of innocence at all times, it could be argued it is a violation of that fundamental principle to assume that that part of the prosecution case which alleges such admissions were made, is true.

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

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

Obviously, if alleged admissions are being put in issue,

Can Judicial Review Court take account of Admissions?

There are a number of dicta to the effect that the existence of admissions is a relevant factor to be taken into account when considering whether to prohibit a criminal trial. Most of these dicta trace their origins to observations made by Ms. Justice Denham in the Supreme Court in B v. DPP23 where the Learned Judge, in the context of a sex abuse delay prohibition action, set out a range of factors to which regard should be had when considering whether to grant prohibition. That list included the question whether admissions had been made by the applicant as to the matters charged and also the extent to which those alleged admissions were being contested.

McGuinness J. made similar observations in a 2003 case entitled DII v. DPP24. See also the observations of Lynch J. in PC v. DPP25 and also Kearns J. in O’Callaghan v. Judges of the Dublin Metropolitan District Court26.

More recently in S.A v. DPP27, Hardiman J. (with whom Macken and Finnegan J.J. agreed) commented that it would be “extraordinary” to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature. It should be noted that Hardiman J. went on to add that the applicant had not disputed the admissions and he therefore cautioned that the case could not be regarded as a useful precedent in circumstances where the investigation carried out by the gardai was shown to be deficient and there had been a point blank refusal to obtain a statement from the complainant’s mother.

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

Bar Review June 2009

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

A potentially very important case on the Braddish/ disclosure line of jurisprudence is the decision of O’Neill J. in MR v. DPP28. The case probably merits an article in its own right. O’Neill J. granted prohibition restraining the DPP from prosecuting a retired parish priest on old indecent assault charges in circumstances where the investigation carried out by the gardai was shown to be deficient and there had been a point blank refusal to obtain a statement from the complainant’s mother.

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

Different views are also evident on the question of whether admissions are relevant when considering whether to grant the discretionary relief of prohibition. That list included the question whether admissions had been made by the applicant as to the matters charged and also the extent to which those alleged admissions were being contested.

McGuinness J. made similar observations in a 2003 case entitled DII v. DPP24. See also the observations of Lynch J. in PC v. DPP25 and also Kearns J. in O’Callaghan v. Judges of the Dublin Metropolitan District Court26.

More recently in S.A v. DPP27, Hardiman J. (with whom Macken and Finnegan J.J. agreed) commented that it would be “extraordinary” to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature. It should be noted that Hardiman J. went on to add that the applicant had not disputed the admissions and he therefore cautioned that the case could not be regarded as a useful precedent in circumstances where the investigation carried out by the gardai was shown to be deficient and there had been a point blank refusal to obtain a statement from the complainant’s mother.

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

Different views are also evident on the question of whether admissions are relevant when considering whether to grant the discretionary relief of prohibition. That list included the question whether admissions had been made by the applicant as to the matters charged and also the extent to which those alleged admissions were being contested.

McGuinness J. made similar observations in a 2003 case entitled DII v. DPP24. See also the observations of Lynch J. in PC v. DPP25 and also Kearns J. in O’Callaghan v. Judges of the Dublin Metropolitan District Court26.

More recently in S.A v. DPP27, Hardiman J. (with whom Macken and Finnegan J.J. agreed) commented that it would be “extraordinary” to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature. It should be noted that Hardiman J. went on to add that the applicant had not disputed the admissions and he therefore cautioned that the case could not be regarded as a useful precedent in circumstances where the investigation carried out by the gardai was shown to be deficient and there had been a point blank refusal to obtain a statement from the complainant’s mother.

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

Different views are also evident on the question of whether admissions are relevant when considering whether to grant the discretionary relief of prohibition. That list included the question whether admissions had been made by the applicant as to the matters charged and also the extent to which those alleged admissions were being contested.

McGuinness J. made similar observations in a 2003 case entitled DII v. DPP24. See also the observations of Lynch J. in PC v. DPP25 and also Kearns J. in O’Callaghan v. Judges of the Dublin Metropolitan District Court26.

More recently in S.A v. DPP27, Hardiman J. (with whom Macken and Finnegan J.J. agreed) commented that it would be “extraordinary” to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature. It should be noted that Hardiman J. went on to add that the applicant had not disputed the admissions and he therefore cautioned that the case could not be regarded as a useful precedent in circumstances where the investigation carried out by the gardai was shown to be deficient and there had been a point blank refusal to obtain a statement from the complainant’s mother.

From the point of view of practitioners, it would be very important not to abuse this developing jurisprudence by bringing unmeritorious judicial review practices before the High Court, without litigating the issue properly in correspondence and before the court of trial. An early hearing date could also be sought, by seeking an hour slot on a Monday from the judicial review judge, so as to avoid the delays associated with the list to fix dates.
whether it be a question of their admissibility, voluntariness or reliability, that should preclude the judicial review judge from taking any account of them. A judicial review judge will be disinclined to engage in any assessment of the admissibility question, since to do so would be to transgress into the field of the trial judge. Obviously it would not be appropriate for the judicial review judge to engage in the equivalent of a voir dire, since again that should be the exclusive terrain of the court of trial. As with any case involving an application for prohibition, it is necessary that the applicant’s side engage with the prosecution case, including (if it arises) any question of admissions allegedly made by the applicant whilst in custody.

Conclusion

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

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

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

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

Bar Council Special Olympics Fundraiser

On Friday 24th April, the Bar Council held a Casino Night fundraiser for the Special Olympics in the Distillery Building. Following a night of frantic gambling and an auction which included the Grand Slam team jersey and corporate tickets to Ireland v. Italy, courtesy of the FAI, a total of nearly €25,000 was raised. Much thanks to the auctioneer, Fergus O’Hagan SC, the organisers and our many sponsors on the night who included Clare Hanley catering, Space Design and the FAI. Thanks also to the many staff that worked for free at the event and helped ensure its success.
A directory of legislation, articles and acquisitions received in the Law Library from the 19th March 2009 up to 8th May 2009.

Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

**ADMINISTRATIVE LAW**

**Library Acquisitions**

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

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

**ADOPTION**

**Library Acquisition**

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

**ARBITRATION**

**Stay**

Arbitration clause – Mandatory injunction seeking access to books and records – Hotel – Management agreement – Obligation of defendant to keep books and records – Liability of plaintiff to account for tax liability – Problems with financial management – Referral to arbitration – Whether application for injunctive relief captured by arbitration clause – Principles applicable to interlocutory mandatory relief – Whether obligation to demonstrate serious issue for trial or strong likelihood of success – Adequacy of damages – Seriousness of revenue obligations – Possibility of penalties and prosecution – Reputation – Balance of convenience – Urgency – Confidentiality concerns –

Shelbourne Hotel Holdings Ltd v Torriam Hotel Operating Company Ltd

**Article**

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

**AVIATION**

**Airport charges**

Ryanair Ltd v Commissioner for Aviation Regulation

**BANKING**

**Library Acquisition**

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

**BROADCASTING**

**Statutory Instrument**

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

**CHILDREN**

**Articles**

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

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

**Library Acquisitions**

Council of Europe
European convention on the adoption of children (revised), Council of Europe treaty series no. 202 (10/2/2009)
Strasbourg: Council of Europe, 2009
N176.1
Craig, Rosemary
A discussion on the re-introduction of corporal punishment in Northern Ireland
M208.11
Hague Conference on Private International Law
Hague conference on private international law: guide to transfrontier contact concerning children: general principles and guide to good practice.
N176
Parkinson, Patrick
The voice of the child in family law disputes
N176

Statutory Instrument
Commission to inquire into child abuse act 2000 (section 5) (specified period) order 2009
SI 26/2009

COMMERCIAL LAW

Article
Conway, Sarah
Recent developments in Irish commercial mediation - part I
2009 ILT 58

Library Acquisitions
Stokes, Rob
Commercial law
7th ed
London: Sweet & Maxwell, 2008
N250

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

COMPANY LAW

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

Articles
Prentice, William
Wheeling and dealing
2009 (March) GLSI 26
Ryan, Gerard
Interaction of company law and family law
2009 (1) IJFL 3

Library Acquisitions
Eastaway, Nigel A
Practical share valuation
5th ed
Haywards Heath: Tottel Publishing, 2009
N263.6

Moss, Gabriel
The EC regulation on insolvency proceedings
2nd edition
Oxford: Oxford University Press, 2009
N312

COMPETITION LAW

Library Acquisition
Macnab, Andrew
Bellamy & Child: materials on European Community law of competition
2009 ed
Oxford: Oxford University Press, 2009
W110

CONFLICT OF LAWS

Library Acquisition
Dickinson, Andrew
The Rome II regulation: the law applicable to non-contractual obligations
C2000

CONSTITUTIONAL LAW

Habeas corpus
Koranteng v Judge Sheridan

CONSUMER LAW

Library Acquisition
Atwood, Barry
Food law
3rd edition
Haywards Heath: Tottel Publishing, 2009
W112.4

CONTRACT

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

**Keywords**: Sheehan, Ronan Colmille and the Irish copyright tradition

**Article**

Sheehan, Ronan

**Library Acquisition**

Arnold, Richard

Performers’ rights

4th ed

London: Sweet & Maxwell, 2008

N112.4

**CRIMINAL LAW**

**Data protection**


**Realcom Communications Ltd v Data Protection Commissioner**

**Delay**


**Shields v Director of Public Prosecutions**


**Disclosure**


**COPYRIGHT**

**Terms**


**Emo Oil Ltd v Sun Alliance**

**Statutory Instrument**

Vogenauser, Stefan

Commentary on the UNIDROIT principles of international commercial contracts


C233

Legal Update June 2009
Evidence


Evidence


Offences


Public order offence


Road traffic offences


Sentence


Trial


Articles

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

Collins, Diarmuid 42 days for the service of a book of evidence: the decision in Eamon Dunne, practical consequences and the question of re-arrest 2009 (19) ICLJ 15

Duffy, Deirdre “Balance” in the criminal justice system: misrepresenting the relationship between the rights of victims and defendants 2009 (19) ICLJ 2

McElrney, Patrick A. Do we need a jury? - Composition and function of the jury and the trend away from jury trials in serious criminal cases 2009 (19) ICLJ 9

Library Acquisitions

Corker, David Abuse of process in criminal proceedings 3rd edition

Haywards Heath: Tottel Publishing, 2009

N38.3

Elks, Laurie Righting miscarriages of justice? Ten years of the Criminal Cases Review Commission London: JUSTICE, 2008 MS00.2Z


Legal Update June 2009

Page xlviii
Mitsilegas, Valsamis
EU criminal law
W133
School of Law, Trinity College
Developments in criminal law and procedure
Dublin: Trinity College, 2008
M500.C5
Stone, Marcus
Cross-examination in criminal trials
3rd edition
Haywards Heath: Tottel Publishing, 2009
M650
Statutory Instruments
Criminal justice (legal aid) (amendment) (no. 2) regulations 2009
SI 74/2009
Misuse of drugs (amendment) regulations 2009
SI 63/2009

DAMAGES
Assessment

ELECTIONS
Statutory Instruments
Borough of Sligo local electoral areas order 2009
SI 48/2009
County of south Dublin local electoral areas order 2009
SI 47/2009
Electoral (amendment) regulations 2009
SI 75/2009
Town of Bray local electoral areas order 2009
SI 50/2009
Town of Dundalk local electoral areas order 2009
SI 49/2009

EMPLOYMENT
Injunction

EDUCATION
Library Acquisition
Glendenning, Dympna
Religion, education and the law
N184.2.C5

Articles
Connolly, Serena
Compulsory retirement ages - a thing of the past?
2009 IELJ 4
Craig, Rosemary
The stolen child: a discussion on the ramifications of the death of Baby P with regard to employment law
2009 IELJ 16
Middlemiss, Sam
Liability of employers for verbal harassment in the workplace
2009 IELJ 8

Library Acquisitions
Clifton-Dey, Edzard
Employment law in Europe
2nd edition
W130
Rubenstein, Michael
Discrimination a guide to the relevant case law
22nd ed
London: LexisNexis Butterworths, 2009
N191.2
Rubenstein, Michael
Unfair dismissal: a guide to relevant case law
27th ed
London: LexisNexis Butterworths, 2009
N192.24

Statutory Instruments
Occupational pension schemes (revaluation) regulations 2009
SI 22/2009
Occupational pension schemes (funding standard) (amendment) regulations, 2009
SI 62/2009

EQUITY & TRUSTS
Article
Kiernan, Nessa
Report on the Law Reform Commission’s report on trust law
2009 C & PLJ 18

DEFENCE FORCES
Discharge
Compulsory random drug testing – Illegal substances – Positive result – Discharge
EUROPEAN UNION

Free movement of persons

Statutory Instrument

Evidence
Collins, Diarmuid
42 days for the service of a book of evidence: the decision in Eamon Dunne, practical consequences and the question of re-arrest 2009 (19) ICLJ 15

Library Acquisition
Atwood, Barry
Food law 3rd edition
Haywards Heath: Tottel Publishing, 2009 W112.4

Eeckhout, Piet
Yearbook of European law Vol.27 2008 Oxford: Oxford University Press, 2009 W70

Klabbers, Jan

Macnab, Andrew

McGlynn, Clare
Families and the European Union Cambridge: Cambridge University Press, 2006 W128.2

Mitsilegas, Valsamis

Moss, Gabriel
The EC regulation on insolvency proceedings 2nd edition

Oxford: Oxford University Press, 2009 N312

van Zyl Smit, Dirk

Walden, Ian
Telecommunications law and regulation 3rd edition
Oxford: Oxford University Press, 2008 W119.6

EXTRADITION

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

European arrest warrant

European arrest warrant
Request for surrender – Points of objection – Requirement to deduct any period of detention served by issuing state - Whether any failure by State to implement art 26(2) of Framework Decision - Failure in text of Act to specifically empower central authority or court to communicate information as to period of detention with issuing judicial authority – Meaning of “practical and administrative assistance” – Whether court deprived of jurisdiction to order surrender – Minimum gravity requirement – Offences in warrant stated to be art 2.2 offences – Warrant clear that 3 offences were not art 2.2 offences - Correspondence – Whether offence inappropriately marked as art 2.2 offence – Whether warrant clear – Whether court entitled to look behind marking – Whether surrender prohibited in those circumstances – Whether need to issue fresh warrant – Whether prior consent of High Court required if issuing state wish
to prosecute in respect of offence for which extradition not ordered – Criminal Proceedings against Pupino (Case C 105/03) [2005] 3 WLR 1102 considered - European Arrest Warrant Act 2003 (No 45), ss 5, 10, 17, 22 and 38 - Council Framework Decision 2002/584/JHA, art s 2.2, 7 and 26(2) - Order for surrender granted but excluding 3 counts (2007/149Ext - Peart J - 25/11/2008) [2008] IEHC 411

Minister for Justice v Horvath

**FAMILY LAW**

**Judicial separation**


K (A) v K (J)

**Articles**

Aylward, Ross
Dissolved marriages and recession: the variation of orders for ancillary relief: the variation of orders for ancillary relief: 2009 (1) IJFL 9

O’Shea, Rosin
Go your own way 2009 (March) GLSI 22

Ryan, Gerard
Interaction of company law and family law 2009 (1) IJFL 3

**Library Acquisitions**

Coulter, Carol

Matthews, Ciara

McGlynn, Clare
Families and the European Union Cambridge: Cambridge University Press, 2006 W128.2

**FISHERIES**

**Statutory Instruments**

Monkfish (control of landings) regulations 2009 SI 33/2009

Sea-fisheries (control of catches) regulations 2009 SI 31/2009

**FREEDOM OF INFORMATION**

**Library Acquisition**

Macdonald, John
The law of freedom of information 2nd ed Oxford: Oxford University Press, 2009 M209.16

**GAMING AND LOTTERIES**

**Library Acquisition**

Monkcom, Stephen Philip

**GARDA SÍOCHÁNA**

**Discipline**


Sheehan v Garda Síochána Complaints Tribunal

**Library Acquisition**

English, Jack

**Statutory Instrument**

Garda Síochána (ranks) regulations 2009 SI 53/2009

**HEALTH**

**Statutory Instruments**

Health act 2007 (section 103) (commencement) order 2009 SI 27/2009

Health insurance act 1994 (registration) (amendment) regulations 2009 SI 72/2009

Public health (tobacco) (retail sign) regulations 2009 SI 57/2009

**HOUSING**

**Housing authority**


HUMAN RIGHTS

Library Acquisitions
Clayton, Richard
The law of human rights
2nd ed
Oxford: Oxford University Press, 2009
C200

Harris, David
Harris, O’Boyle & Warbrick law of the European convention on human rights
2nd ed
Oxford: Oxford University Press, 2009
C200

Kilkelly, Ursula
ECHR and Irish law
2nd ed
Bristol: Jordan Publishing, 2009
C200

Nicol, Andrew
Media law and human rights
Oxford: Oxford University Press, 2009
N343

IMMIGRATION

Asylum

Asylum

Asylum

Legal Update June 2009
Legal Update June 2009

Asylum


Z (A1M) v Refugee Applications Commissioner

Asylum


O (V) v Refugee Applications Commissioner

Asylum


E (A) v Minister for Justice, Equality and Law Reform

Asylum


H (I) v Refugee Appeals Tribunal

Asylum


K (GK) v Refugee Appeals Tribunal

Asylum

Deportation


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

Leave to remain


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

INFORMATION TECHNOLOGY

Library Acquisition

Room, Stewart
Email law, practice and compliance
London: The Law Society, 2009 N342.4

INJUNCTIONS

Interlocutory injunction


I (EP) v Minister for Justice

INSURANCE

Motor insurance


O’donnell v Buckley & others

INTERNATIONAL LAW

Library Acquisitions

Hague Conference on Private International Law


Lazure, Cyril

The annotated digest of the International Criminal Court 2007

The Netherlands: Martinus Nijhoff Publishers, 2008 C219

Warne, Jonathan

International commercial dispute resolution

Haywards Heath: Tottel Publishing, 2009 C1250

JUDICIAL REVIEW

Certiorari

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

Jurisdiction

Tracy v Judge Malone

Article

Cleary, Niamh
Round Hall judicial review conference 2008
14 (1) BR 11

Library Acquisition

Thomson Round Hall
The 2nd Round Hall judicial review conference 2008
Dublin: Thomson Round Hall, 2008
M306.C5

JURIES

Article

McNerny, Patrick A.
Do we need a jury? - Composition and function of the jury and the trend away from jury trials in serious criminal cases 2009 (19) ICLR 9

LAND LAW

Adverse possession

Kelleher v Botany Weaving Mills Ltd

Statutory Instrument

Land registration (fees relating to discharges lodged by electronic means) order 2009
SI 52/2009

LANDLORD & TENANT

Article

Buckley, Niall F.
Ground rents revisited 2009 C & PJ 6

LEGAL AID

Statutory Instrument

Criminal justice (legal aid) (amendment) (no. 2) regulations 2009 (SI 74/2009)

LEGAL MISCELLANY

Library Acquisition

Raffield, Paul
Shakespeare and the law
B30

Schrage, Eltjo
Art and the law
A70.A7

LEGAL PROFESSION

Article

Conlan Smyth, David
An introduction to the CCBE
14 (1) BR 2

LEGAL SYSTEMS

Article

Ryan, Moling
Access to justice and unmet legal needs 2009 ILT 323

LICENSEING

Library Acquisition

Hyde, Philip
Licensing law and practice
1st ed
London: Sweet & Maxwell, 2008
N186.4

LOCAL GOVERNMENT

Library Acquisitions

Morrell, John
Local authority liability
4th ed
Bristol: Jordan Publishing, 2009
M361

Moules, Richard
Actions against public officials: legitimate expectations, misstatements and misconduct

Legal Update June 2009
Page lvi


2009 (March) GLSI 34

2009 ILT 58

2009 (March) GLSI 34

MEDITATION

Article
Conway, Sarah Recent developments in Irish commercial mediation - part I 2009 ILT 58

Gilhooley, Stuart A costly affair 2009 (March) GLSI 34

MEDICAL LAW

Statutory Instrument

MENTAL HEALTH

Detention

Article
Nolan, Niall Case law on the mental health act 2001: part 1 14 (1) BR 13

MORTGAGES

Article
Dewhurst, Elaine The power of sale without a court order: a deprivation of possession or a contractual right? 2009 C & PIJ 13

PENSIONS

Statutory Instrument
Occupational pension schemes (revaluation) regulations 2009 SI 22/2009
Application for leave refused (2008/884JR
Act 2000 (No 30), ss 37(1)(b), 50 and 146 -
and 50A(9) - Planning and Development
Development (Strategic Infrastructure)

Pleanála

IR 39,

Pleanála

IR 39,

Pleanála

IR 39,

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Pleanála

Ple...

McMullen v Kennedy

Discovery


Ulster Bank v Whitaker

Statutory Instruments

District court (forms) rules 2009

SI 92/2009

Rules of the Superior Courts (affidavits) 2009

SI 95/2009

Rules of the Superior Courts (discovery) 2009

SI 93/2009

PRISON LAW

Library Acquisition

van Zyl Smit, Dirk

Principles of European prison law and policy: penology and human rights

Oxford: Oxford University Press, 2009

W133.6

PROBATE

Article

Kennelly, Barry

Trouble with a capital T

2009 (March) GLSI 30

Legal Update June 2009

PROPERTY

Article

Dewhurst, Elaine

The power of sale without a court order: a deprivation of possession or a contractual right?

2009 C & PLJ 13

Library Acquisition

Waite, Andrew

Environmental law in property transactions

3rd edition

Haywards Heath: Tottel Publishing, 2009

N94

Statutory Instrument

Land registration (fees relating to discharges lodged by electronic means) order 2009

SI 52/2009

REPRESENT

Library Acquisition

Glendenning, Dymnpa

Religion, education and the law


N184.2.C5

RESTITUTION

Library Acquisition

Baloch, Tariq

Unjust enrichment and contract


N20.2.008

SEA & SEASHORE

Statutory Instruments

Harbours act, 1996 (Kilrush Harbour) transfer order, 2009

SI 29/2009

Harbours act, 1996 (Youghal Harbour) transfer order, 2009

SI 28/2009
SHARES

Library Acquisition
Eastaway, Nigel A
Practical share valuation
5th ed
Haywards Heath: Tottel Publishing, 2009
N263.6

SOCIAL WELFARE

Statutory Instruments
Social welfare (consolidated claims, payments and control) (amendment) (no. 2) (early childcare supplement) regulations
SI 54/2009
Social welfare (consolidated claims, payments and control) (amendment) (jobseeker's benefit) regulations 2009, SI 24/2009

SOLICITORS

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

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

SUCCESSION

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

TAXATION

Income tax

Value added tax

Vehicle registration tax

Vehicle registration tax

Article
Kennelly, Barry
Trouble with a capital T
2009 (March) GLSI 30

Library Acquisitions
Clarke, Giles
Offshore tax planning
15th ed
M336.76

Legal Update June 2009
Statutory Instruments
Finance act 2007 (commencement of section 51(1)) order 2009 SI 68/2009
Stamp duty (designation of exchanges and markets) regulations 2009 SI 46/2009
Taxes consolidation act, 1997 (accelerated capital allowances for energy efficient equipment) order 2009 SI 76/2009

TELECOMMUNICATIONS LAW
Library Acquisition
Walden, Ian
Telecommunications law and regulation 3rd edition
Oxford: Oxford University Press, 2008 W119.6

TORT
Negligence
O’Brien v Derwin

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

TRIBUNALS OF INQUIRY
Library Acquisition
Buckley, John
Comptroller and Auditor General Comptroller and Auditor General- special report - Tribunals of Inquiry - report no. 63
Dublin: Stationery Office, 2008

WILLS
Article
Keating, Albert
“Court” grants of representation 2009 C & PLJ 2

Library Acquisition
Waterworth, Michael
Parker’s modern wills precedents 6th ed
Haywards Heath: Tottel Publishing, 2009
N125

AT A GLANCE
Court Rules
District court (forms) rules 2009 SI 92/2009

Rules of the Superior Courts (affidavits) 2009 SI 95/2009

European Directives implemented into Irish Law up to 08/05/2009
Arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air regulations 2009 (DIR/2004-107)
SI 58/2009
Criminal justice (terrorist offences) act 2005 (section 42 (6)) (Usama bin Laden, the Al-Qaida network and the Taliban) (financial sanctions) regulations 2009 REG/881-2002 SI 37/2009
European communities (authorization, placing on the market, use and control of biocidal products) (amendment) regulations 2009 Please see S.I as it implements a number of Directives SI 84/2009
European communities (internal market in electricity) (amendment) regulations 2009 DIR/2003-54 SI 59/2009
European communities (control of organisms harmful to plants and plant products) (amendment) (no. 1) regulations 2009 DIR/2009-7 SI 83/2009

Legal Update June 2009
European communities (identification of bovines) regulations 2009  
Please see S.I as it implements a number of Directives  
SI 77/2009

European communities (quality of shellfish waters) (amendment) regulations 2009  
DIR/2008-49  
SI 60/2009

European communities (safety of third-country aircraft using community airports) (amendment) regulations 2009  
DIR/2008-119  
SI 32/2009

European communities (seed of fodder plants) (amendment) regulations 2009  
DIR/2007-124, DIR/2008-124  
SI 78/2009

European communities (seed of oil plants and fibre plants) (amendment) regulations 2009  
DIR/2008-124  
SI 85/2009

European communities (statistics in respect of carriage of passengers, freight and mail by air) regulations 2008  
REG/437-2003  
SI 56/2009

European communities (welfare of farmed animals) (amendment) regulations 2009  
DIR/2008-119  
SI 32/2009

European Communities (welfare of farmed animals) (amendment) (No.2) regulations 2009  
DIR/2008-120  
SI 71/2009

Sea-fisheries (control of catches) (deep-sea stocks) regulations 2009  
REG/1359-2008  
SI 38/2009

Sea-fisheries (fishing for herring) (West of Scotland) regulations 2009  
REG/1300-2008  
SI 39/2009

Statistics (quarterly survey of construction) order 2009  
REG/1165-98  
SI 73/2009

---

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

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

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

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

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

Signed 24/02/2009

Signed 27/02/2009

Signed 28/02/2009

Signed 05/03/2009

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

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

---

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

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

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

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

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

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

Arbitration Bill 2008  
Bill 33/2008  
Committee Stage - Dáil

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

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

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

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

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

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

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

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

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

Companies (Amendment Bill) 2009  
Bill 14/2009  
2nd Stage - Seanad (Initiated in Seanad)
Bill 26/2008
Electoral Commission Bill 2008
Minihan
Tom Morrissey, Michael Brennan and John

Bill 30/2006
Defence of Life and Property Bill 2006
Awaiting Committee – Dáil

Bill 43/2006
Defamation Bill 2006
Coveney
2

Bill 2008
Data Protection (Disclosure) (Amendment) Bill 2008
Cummins
2

Bill 39/2008
Bill 2008
Criminal Law (Admissibility of Evidence) Bill 2008
Fitzgerald

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

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

Corporate Governance (Codes of Practice) Bill 2009
Bill

2nd Stage – Dáil [pmb] Deputy Eamon Gilmore

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

Credit Union Savings Protection Bill 2008
Bill 12/2008
2nd Stage – Seanad [pmb] Senators Joe O’Toole, David Norris, Feargal Quinn, Shane Ross, Ismaa Bakti and Róinín Mullen

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

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

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

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

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

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

Electoral Commission Bill 2008
Bill 26/2008

2nd Stage – Dáil [pmb] Deputy Ciarán Lynch

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

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

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

Ethics in Public Office (Amendment) Bill 2007
Bill 27/2007
2nd Stage – Dáil (Initiated in Seanad)

Financial Services (Deposit Guarantee Scheme) Bill 2009
Bill 23/2009
Order for 2nd Stage - Dáil

Fines Bill 2009
Bill 18/2009
Order for 2nd Stage - Dáil

Fines Bill 2007
Order for 2nd Stage – Dáil

Freedom of Information (Amendment) Bill 2008
Bill 24/2008
2nd Stage – Seanad [pmb] Senators Alex White, Dominic Hannigan, Brendan Ryan, Alan Kelly, Michael McCarthy and Phil Prendergast

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Legal Update June 2009
Legal Practitioners (Qualification) (Amendment) Bill 2007
Bill 46/2007
2nd Stage – Dáil [pmb] Deputy Brian O’Shea

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

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

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

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

Merchant Shipping Bill 2009
Bill 25/2009
1st Stage – Dáil

Ministers and Secretaries (Ministers of State) Bill 2009
Bill 19/2009
Order for 2nd Stage – Dáil [pmb] Deputy Alan Shatter

National Archives (Amendment) Bill 2009
Bill 13/2009
2nd Stage – Dáil [pmb] Deputy Mary Upton

National Cultural Institutions (Amendment) Bill 2008
Bill 66/2008
Order for 2nd Stage – Seanad [pmb] Senator Alex White

National Pensions Reserve Fund (Ethical Investment) (Amendment) Bill 2006
Bill 34/2006
1st Stage – Dáil [pmb] Deputy Don Boyle

Nursing Homes Support Scheme Bill 2008
Bill 48/2008
Order for Report – Dáil

Offences Against the State Acts Repeal Bill 2008
Bill 37/2008
2nd Stage – Dáil [pmb] Deputy Aengus Ó Snodaigh, Martin Ferris, Caoimhghin Ó Caoláin and Arthur Morgan

Offences Against the State (Amendment) Bill 2006
Bill 10/2006
1st Stage – Seanad [pmb] Senators Joe O’Toole, David Norris, Mary Henry and Fergal Quinn

Official Languages (Amendment) Bill 2005
Bill 24/2005
2nd Stage – Seanad [pmb] Senators Joe O’Toole, Paul Coghlan and David Norris

Ombudsman (Amendment) Bill 2008
Bill 40/2008
Order for Report – Dáil

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

Planning and Development (Enforcement Proceedings) Bill 2008
Bill 63/2008
2nd Stage – Dáil [pmb] Deputy Mary Upton

Prevention of Corruption (Amendment) Bill 2008
Bill 34/2008
Committee Stage – Dáil

Privacy Bill 2006
Bill 44/2006
Order for Second Stage – Seanad (Initiated in Seanad)

Protection of Employees (Agency Workers) Bill 2008
Bill 15/2008
2nd Stage – Dáil [pmb] Deputy Willie Peelo

Public Appointments Transparency Bill 2008
Bill 44/2008
2nd Stage – Dáil [pmb] Deputy Leo Varadkar

Registration of Lobbyists Bill 2008
Bill 28/2008
2nd Stage – Dáil [pmb] Deputy Brendan Howlin

Residential Tenancies (Amendment) (No. 2) Bill 2009
Bill 15/2009
2nd Stage – Dáil [pmb] Deputy Ciarán Lynch

Sea fisheries and maritime jurisdiction (fixed penalty notice) (amendment) bill 2009
Bill 27/2009
1st Stage – Dáil

Sea Fisheries and Maritime Jurisdiction (Fixed Penalty Notice) (Amendment) Bill 2009
Bill 23/2009
Bill 12/2009
2nd Stage – Dáil [pmb] Senator Maurice Cummins

Small claims (protection of small businesses) Bill 2009
Bill 26/2009
1st Stage – Dáil

Social Welfare Bill 2009
Bill 17/2009
Committee Stage – Dáil

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

Stem-Cell Research (Protection of Human Embryos) Bill 2008
Bill 60/2008
2nd Stage – Seanad [pmb] Senators Róinín Mullen, Jim Walsh and John Hanafin

Student Support Bill 2008
Bill 6/2008
Awaiting Committee – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
Order for Report – Dáil

Twenty-ninth Amendment of the Constitution Bill 2008
Bill 31/2008
2nd Stage – Dáil [pmb] Deputy Arthur Morgan

Twenty-eighth Amendment of the Constitution Bill 2008
Bill 14/2008
Passed by Dáil Éireann

Twenty-eighth Amendment of the Constitution Bill 2008 (Rights of Child)
Bill 14/2008
Order for 2nd Stage – Dáil

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

Vocational Education (Primary Education) Bill 2008
Bill 1/2008
Bill 51/2008
2nd Stage – Dáil [pmb] Deputy Ruairí Quinn

Witness Protection Programme (No. 2) Bill 2009
Bill 52/2007
2nd Stage – Dáil [pmb] Deputy Pat Rabbitte

Legal Update June 2009

Page lxiii
ABBREVIATIONS

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

The references at the foot of entries for Library acquisitions are to the shelf mark for the book.
Security for Costs under S.390 of the Companies Act, 1963 - An Overview

ANTHONY BARR S.C.

Introduction

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

Section 390 of the Companies Act, 1963

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

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

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

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

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

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

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

1 1977 1WLR 899
2 Unreported Supreme Court 9/6/2004
In Lismore Homes Ltd v. Bank of Ireland Finance (No.3), Murphy J. in considering the amount of security for costs that should be provided under S.390 noted that the legislation had conferred many benefits on limited liability companies including, in particular, the fact of limited liability and stated that it was not surprising to find that some burdens had been cast by the legislature on companies which enjoyed these advantages. Thus, it can be seen that S.390 is designed to protect defendants from unmeritorious claims brought by impecunious companies which could avoid the usual penalty for costs by shielding behind the privilege of limited liability.

**Approach of the Courts to Applications under S.390**

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

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

In Jack O’Toole Ltd v. MacEoin Kelly Associates, Finlay C.J. stated that it was clear that the making of an order under S.390 was a matter of discretion to be exercised having regard to all the circumstances of the case. He stated that there was no presumption either in favour of making an order for security for costs, or against it, but he was satisfied that where it was established or conceded that a limited liability company which, as a plaintiff, would be unable to meet the costs of a successful defendant, the court should have regard to the same factors to whether a defendant had no real defence. It would only be relevant if it could be demonstrated that the defendant had no real defence, in which case security for costs should be denied. The fact that the plaintiff appeared to have a very strong case was not a ground for refusing security for costs, unless the strength of their case was such as to show that the defendant had no real defence.

That statement of principle has been cited with approval in a number of subsequent decisions in both the Supreme Court and the High Court. In Usk District Residents’ Association v. Environmental Protection Agency, Boyle v. McGilloway, Superwood Holdings plc v. Sun Alliance & London Insurance plc and Connaughton Road Construction Ltd v. Laing O’Rourke Ireland Ltd.

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

It is only necessary to establish the relevant elements on a prima facie basis. The onus rests on the defendant moving party to establish the first two limbs. The defendant will have to put some evidence before the court to establish that it has a prima facie defence to the action. This will inevitably require some analysis of the subject matter of the dispute. However, the defendant does not have to formally prove his defence; merely to show that he has an arguable, or prima facie, defence to the plaintiff’s action. In Ferrotec Ltd v. Myles Beamwall Executive Services Ltd, Dunne J accepted as correct a submission that in considering the question as to whether a prima facie defence had been established by the defendant, the court should have regard to the same factors as are applicable when considering whether a defendant on an application by a plaintiff for summary judgment has established a bone fida defence. The judge held that similar...
considerations applied when considering this limb of the requirements under S.390.

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

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

Inability to pay costs due to wrongdoing of the defendant

The most common ground invoked with a view to resisting the granting of an order for security for costs is the argument that the plaintiff’s impecuniosity was caused by the wrongdoing of the defendant in respect of which the plaintiff sues in the substantive action. It is important to note that the plaintiff in advancing this ground will have to put before the court fairly convincing evidence that it was in fact the wrongdoing of the defendant, which led to its impoverished state. A mere “bald assertion” of such fact without more, will not be sufficient to discharge the onus of proof. In Jack O’Toole Ltd v. Mac Eoin Kelly Associates14, Finlay C.J. stated that for the plaintiff to satisfy even the duty of establishing on a prima facie basis this special circumstance, it will be necessary for some accounts, even though they might be in an informal form such as bank accounts, or the state of a bank overdraft of the plaintiff company to be produced. In S.E.E. Co. Ltd v. Public Lighting Services Ltd15, the plaintiff did manage to establish that its impecuniosity was due to the alleged wrongdoing of the defendant. McCarthy J. in the course of his judgment referred to “compelling evidence” that the subject matter of the claim had been the major cause of the collapse of the plaintiff company. In that case accountants’ and auditors’ evidence was available to link the failure of certain equipment in respect of which the claim was being brought against the defendants, with the financial collapse of the company.

The S.E.E. case can be contrasted with the decision in Rayan Restaurant Ltd v. Judges Company Restaurant Ltd & Others16. This case involved an application by the second and third named defendants for security for costs in respect of a circuit appeal to the High Court. The plaintiff accepted that it was not in a position to pay the costs of the defendant, but argued that there was a special circumstance in the case in that their impecuniosity was due to the fact that they had been locked out of the restaurant premises and therefore unable to earn any money. The trial judge looked at the earlier cases of Campbells Seafoods and S.E.E. and noted that in both these cases there was “strong positive evidence” that the defendants had been the cause of the plaintiff’s financial embarrassment. The judge held that in the present case there was a dearth of evidence to show that the parlous state of the plaintiff company was due to any activity of the defendants. There was no evidence adduced that the plaintiff would have been able to trade out of its financial difficulty if it had not been excluded from the premises. In these circumstances the judge held that the second and third named defendants were entitled to an order for security for costs.

In the recent case of Connaughton Road Construction Ltd v. Laing O’Rourke Ireland Ltd17, Clarke J. analysed the legal principles applicable when a plaintiff resists the defendant’s application on the basis that his impecuniosity was caused by the wrongdoing of the defendant. According to the learned trial judge, in order for a plaintiff to be correct in his assertion that his inability to pay the costs arose from the wrongdoing asserted, the plaintiff must establish on a prima facie basis four things:

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

Clarke J. noted that items (1) and (2) did no more than state that the plaintiff must establish a prima facie case on liability and causation. If a plaintiff could not establish these matters, there could be no basis for finding even on a prima facie basis that any lack of resources of the plaintiff were due to wrongdoing on the part of the defendant. In relation to the third criterion, the learned judge was of the view that a plaintiff must at least establish a prima facie case that the quantum of damages which he might obtain in the event that he was successful, was of an order of magnitude sufficient to reverse the financial position whereby the plaintiff company would be able to pay the defendant’s costs in the event that the defendant was successful. The judge noted that in Framus Ltd & Others v. CRF18, the plaintiff in that case had shown

---

13 1986 IR 277
14 1987 ILRM 255
15 Unreported (Budd J) 18/4/2005
16 Unreported (Clarke J) 16/1/2009
17 Unreported (Supreme Court) 22/4/2004
some evidence of wrongdoing on the part of the defendant but not even on a prima facie basis that its impecuniosity was due to that wrongdoing. Clarke J. went on to describe the effect of items (3) and (4) as follows:

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

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

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

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

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

Delay

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

**Other special circumstances**

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

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

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

**The amount of security**

In applications brought under Order 29 of the Rules of the Superior Courts, 1986, seeking security for costs from foreign resident plaintiffs, the general rule has been, that if security was ordered to be given, it would be fixed by the Master of the High Court at approximately one third of the costs likely to be incurred by a successful defendant. The
position is different for applications brought pursuant to section 390 of the Companies Act 1963. The decision of the Supreme Court in Lismore Homes v. Bank of Ireland Finance (Na.3)\textsuperscript{24} has established that because the section speaks of “sufficient security” this means sufficient to discharge the full reasonable costs likely to be incurred by the defendant at the trial of the action. This was an appeal by the plaintiffs against the quantum of the security, which had been fixed in the High Court. The Supreme Court declined to follow a line of authorities from the Court of Appeal in England and preferred the reasoning of Kingsmill Moore J. in Thalle v. Naures\textsuperscript{25} in holding that “sufficient security” in S.390 meant sufficient for the actual amount of costs which the defendant was likely to incur in defending the action:

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

A question can arise where it is argued that the amount of security for costs was reduced, that the plaintiff would be in a position to complete the contract for the purchase of the land in respect of which specific performance was being sought. The Court was satisfied that this could not be regarded as a case in which the High Court in the exercise of its discretion, should have allowed the action to proceed on the basis that otherwise an action which had a substantial basis of success was, as it were, stifled at birth.

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

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

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

The European Convention on Human Rights has also had an impact in this area. The relevant part of Article 6 of the Convention provides that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The provisions of this article have been considered in a number of cases dealing with security for costs. In Superwood Holdings Plc v. Sun Alliance & London Insurance plc\textsuperscript{26}, the plaintiff argued that due to Art. 6 of the European Convention on Human Rights and the decision of the European Court of Human Rights in Tolstoy Miloslavsky v. United Kingdom\textsuperscript{27} that the Courts must take a “tentative view” of the overall merits of the substantive proceedings when considering applications for security for costs. As this was an application seeking security for costs in respect of a review of taxation of costs, the trial Judge did not see how any consideration of the merits of the substantive proceedings could be of assistance or relevance to the taxation of costs or to a review of such taxation. The learned trial Judge made no finding on the question whether the principles applicable to applications for security for costs have been affected by the decision in the Tolstoy case.

In Superwood Holdings Plc v. Ireland\textsuperscript{28}, the Plaintiff argued,
inter alia, that S.390 was incompatible with Article 6 of the European Convention on Human Rights. Murphy J. in the High Court rejected this argument. Having referred to the salient parts of the judgment of the European Court of Human Rights in the Tolstoy case, he found that the provisions of S.390 fell clearly within the margin of appreciation enjoyed by the State in legislating for a balance between litigants. He found that the restriction pursued a legitimate aim and that there was a reasonable relationship or proportionality between the means employed and the aims sought to be achieved to regulate limited liability plaintiff’s rights of action. Moreover, he found that the courts had taken the entirely of the proceedings in the domestic legal order into account. The Judge held that Section 390 had a reasonable and objective justification. Its aim was legitimate to balance the rights of access to Courts with the rights of a defendant to resist unstateable claims. He found that no ground of prohibited discrimination had been indicated by the plaintiffs. He was of the view that none of the recognised grounds of discrimination under the European Convention had any application. Accordingly, he held that there was no basis for the plaintiff’s claim that Section 390 was incompatible with the European Convention on Human Rights.

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

The Tolstoy case can be contrasted with the case of Ait Mouhoub v. France30 where the plaintiff wished to bring civil proceedings against members of the French police. He was told that he would have to lodge 80,000 French francs as security for costs. The applicant did not have the means to discharge this amount. In fact, he had been assessed by the Legal Aid Board as having no means whatsoever. The European Court of Human Rights held that requiring the applicant to pay such a large sum had amounted in practice to depriving him of his recourse before the investigating Judge and that therefore the applicant’s right of access to a “tribunal” within the meaning of Article 6 had been infringed.

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

“As to the merits, it re-iterates that the “right to a Court”, of which the right of access constitutes one aspect… is not absolute but may be subject to limitations permitted by implication. However, these limitations must not restrict or reduce a persons access in such a way or to such an extent that the very essence of the right is impaired, and they will not be compatible with Article 6.1 if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be achieved…. Furthermore, the convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so with the right of access to the Courts in view of the prominent place held in a democratic society by the right to a fair trial (see the Airey v. Ireland judgment of 9th October 1979, Series A No. 33, EP12-13,24).

It is not for the Court to assess the merits of the complaint lodged by the applicant with the appropriate judge. It considers however that the setting of such a large sum by the senior investigating Judge was disproportionate, seeing that Mr. Ait Mouhoub – who had never received a reply from the Legal Aid Office, as he had informed the judge in a letter of 9th September 1993, that he had no financial resources whatsoever. Requiring the applicant to pay such a large sum amounted in practice to depriving him of his recourse before the investigating Judge…. having regard to all these factors, the Court concludes that the applicant’s right of access to a “tribunal” within the meaning of Article 6.1 was infringed.”

Arbitrations

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

Conclusions

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

• The defendant bears the burden of establishing on a prima facie basis that the plaintiff (a) would be unlikely to be able to discharge any award of costs which might be granted in favour of the defendant and (b) that he has a prima facie defence to the plaintiff’s claim. If he can establish these matters, the burden of proof then passes to the plaintiff to establish, again on a prima facie basis, that there are special circumstances in the case, which should cause the court to exercise its discretion by refusing the order, sought.

• If the plaintiff wishes to make the case that its inability to pay costs was due to the wrongdoing of the defendant, it must do more than make a mere bald assertion to this effect. The plaintiff must set about providing some evidence sufficient to satisfy the four criteria laid down by Clarke J. in the Connaughton Road case.

• Based on the decision in Connaughton Road, it seems that the plaintiff must establish not only that the defendant’s wrongdoing has led to its inability to discharge the costs of a successful defendant, but also that if the wrongdoing had not occurred, the plaintiff would have had sufficient assets to discharge the amount of those costs.

• The defendant should be wary that it does not delay unduly in writing to the plaintiff seeking security for its costs; as delay is one of the grounds on which the court may exercise its discretion by refusing the order sought. While longer periods seem to be allowable when the application is made prior to the trial of the action, it would appear that where one is seeking security for the costs of an appeal, the acceptable time period is appreciably shorter.

• The amount of security fixed will usually be an amount sufficient to cover the full actual costs, which are likely to be incurred by the defendant in defending the action.

• It may be possible to argue by reference to Article 6 of the European Convention on Human Rights that the level of security for costs should not be fixed at an amount which the plaintiff cannot possibly afford, which would thereby have the result of preventing it bringing a justifiable claim before the Court. Though how such an argument would sit with the decision in Lismore Homes Ltd (In Receivership) v. Bank of Ireland Finance (No. 3) remains to be seen.

Canadian Bar Association Conference
16-18 August 2009

For 3 days in August, Dublin will be the venue for the 2009 Canadian Legal Conference, an opportunity to meet leaders in law from Canada and Europe.

Speakers include former Irish President, Mary Robinson, visionary Leonard Brody and legal futurist, Richard Susskind.

Conference events will also include welcome reception at the Mansion House, opening ceremony at the National Concert Hall, a dinner event at Dublin Castle and an evening at the Guinness Storehouse & Museum. For further information please visit http://www.cba.org/cba/dublin2009/main/.
Global Claims under Construction Contracts

GERARD MEEHAN BL

Introduction

Ordinarily, in order to make a successful claim for damages under a construction contract, a claimant must establish that a breach of contract or other ‘claim event’ has occurred, that the claimant has suffered a loss, and that there is a causal link between the claim event and the loss. Obviously, once it is established that loss occurred, the claimant also has the burden of proving the amount of that loss.1

For a claimant to succeed in a claim for damages, he must establish on the balance of probabilities an effective causal connection between the defendant’s breach of contract or negligence and the claimant’s loss.2

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

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

Definitions of Global Claims

The leading textbook on Building and Construction Contracts3 offers the following definition: “Global claims may be defined as those where a global or composite sum, however computed, is put forward as the measure of damage or of contractual compensation where there are two or more separate matters of claim or complaint, and where it is said to be impractical or impossible to provide a breakdown or sub-division of the sum claimed between those matters”.4

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

A further definition was given by Byrne J of the Supreme Court of Victoria: “… the claimant does not seek to attribute any specific loss to a specific breach of contract, but is content to allege a composite loss as a result of all of the breaches alleged, or presumably as a result of such breaches as are ultimately proved. Such claim has been held to be permissible in the case where it is impractical to disentangle that part of the loss which is attributable to each head of claim, and this situation has not been brought about by delay or other conduct of the claimant…”5

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

Difficulties with global claims

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

A further difficulty with global claims is that there is a lack of specificity in their pleading. The purpose of pleadings as set out by Fitzgerald J in Mahon v Celbridge Spinning Co Ltd6 is “to define the issues between the parties … and to ensure that the trial may proceed to judgment without either party

3 [2004] BLR 295
4 John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd (1996) 82 BLR 81
5 [1967] IR 1
being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings”.\(^6\)

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

**Case Law**

There are a number of cases that tend to be cited in the treatment of this topic by the various text books and articles. The earliest of these is *Crosby & Sons Ltd v Portland Urban District Council*. In that case, Donaldson J said he could see no reason “why the arbitrator should not recognize the realities of the situation and make individual awards in respect of those parts of individual items of the claim which can be dealt with in isolation and a supplementary award in respect of these claims as a composite whole.”\(^6\)

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

“[Donaldson J] acceded to the argument that where a claim depends on ‘an extremely complex interaction in the consequences of various denials, suspensions and variations, it may well be difficult or even impossible to make an accurate apportionment of the total extra cost between the several causative events’. In doing so he gave judicial approval to a widespread and commonsense method of measuring claims.”\(^6\)

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

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

In *London Borough of Merton v Leach (1985)*\(^7\), the contractors’ claims were for damages for breach of contract, and also for direct loss and expense under the clauses of the contract dealing with variations and late instructions. Vinelott J in that case, referring to the Crosby decision said that it was: “implicit in the reasoning of Donaldson J first, that a rolled up award can only be made in the case where the loss or expense attributable to each head of claim cannot in reality be separated and secondly that a rolled up award can only be made where apart from that practical impossibility the conditions which had to be satisfied before an award can be made have been satisfied in relation to each head of claim.”

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

*Wharf Properties Ltd v Eric Camine Associates (1991)*\(^8\) concerned a development in Hong Kong. A separate foundations contract for the development was delayed and this in turn delayed the contractor who was retained to build the super-structure. The latter contractor sued the employer and the proceedings were settled. The employer then went after the architect for the cost of the settlement alleging that the architect had failed properly to manage control, co-ordinate, supervise or administer the foundation contract, or to provide information or instructions for it in time.

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

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

“ECA are concerned at this stage not so much with quantification of the financial consequences – the point with which the two cases referred to were concerned – but with the specification of the factual consequences of the breaches pleaded in terms of period of delay. The failure even to attempt to specify any discernable nexus between the wrong alleged and the consequent delay provides…‘no agenda’ for trial.”\(^9\)

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

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

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

---

\(^6\) Per Fitzgerald *ibid.* at 3

\(^7\) [1967] 5 BLR 121

\(^8\) *ibid.* p. 123

\(^9\) 32 BLR 68

\(^10\) 52 BLR 8

\(^11\) Per Lord Oliver, *ibid.* at p. 9.
preparation of a detailed and convincing case by way of rebuttal.

… neither the 

Crosby nor the Leach cases indicate any considered judicial support for the use of global claims even in the particular construction contracts before the courts – in the Crosby case, Donaldson J. was dealing with a finding of fact by an arbitrator, binding on the Court, to the effect that the particular causes of delay in that case could not as a fact be separated as to delay or disturbance, while Vinelott J. in Leach was dealing with an entirely hypothetical case of loss and expense due to combined variation and late instruction grounds of claim, with no findings of fact as yet made by the arbitrator at all.12

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

Hudson opines that:

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

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

In Leasing Management (Scotland) Ltd v John Doyle Construction Ltd15 the court found that if a claimant puts forward a global claim, he must eliminate all causes of loss and expense that are either the claimant’s responsibility or neutral events (a contractor is entitled to claim an extension of time for some neutral events but not loss and expense). In other words no causative element can be included in a global claim that is not the responsibility of the defendant.

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

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

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

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

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

---

12 Ibid para. 8.208
13 58 BLR 1
14 Hudson para 8.211
15 [2004] BLR 295
16 Per Lord MacLean, ibid. at pp. 300-301
a contractor, who has first hand knowledge of the carrying out of a job is unable to separate out the consequences of the various events, the employer is unlikely to be able to do so. This, it is submitted is prejudicial and highly unfair to an employer.

Lord MacLean’s judgment in Laing goes on to cite the following passage from the judgment of Byrne J in John Holland Construction & Engineering Pty Ltd v Kvaerner RJ Brown Pty Ltd (1996)18:

“… a contractor, as the maker of such a claim (total cost claim), alleges against a proprietor a number of breaches of contract and quantifies its global loss as the actual cost of the work less the expected cost. The logic of such a claim is this:

(a) the contractor might reasonably have expected to perform the work for a particular sum, usually the contract price;
(b) the proprietor committed breaches of contract;
(c) the actual reasonable cost of the work was a sum greater than the expected cost.

The logical consequence implicit in this is that the proprietor’s breaches caused the extra cost or cost overrun. This implication is valid only so long as, and to the extent that, the three propositions are proved and a further unsted one accepted: the proprietor’s breaches represent the only causally significant factor responsible for the difference between the expected cost and the actual cost. In such a case the causal nexus is inferred rather than demonstrated… The under-stated assumption underlying the inference may be further analysed. What is involved here is two things: first, the breaches of contract caused some extra cost, secondly, the contractor’s cost overrun is this extra cost. The first aspect will often cause little difficulty but it should not be ignored… It is the second aspect… which is likely to cause the more obvious problem because it involves an allegation that the breaches of contract were the material cause of all of the contractor’s cost overrun. This involves an assertion that, given that the breaches of contract caused some extra cost, they must have caused the whole of the extra cost because no other relevant cause was responsible for any part of it.18

In considering the John Holland Construction case, Lord MacLean continued:

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

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

After considering the John Holland case and following consideration of Boyajian v United States19 (1970), Lord MacLean went on to state that: “If a global claim is to succeed, whether it is a total cost claim or not, the contractor must eliminate from the causes of his loss and expense all matters that are not the responsibility of the employer…”20

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

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

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

Conclusion

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

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