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Irish lawyers deliver professional course in Kosovo

DARAGH O’SHEA AND ANGELA RUTTLEDGE

During the second week of September, a faculty of 12 Irish lawyers travelled to Prishtina to deliver intensive training to members of the legal profession. The objective of the course was to bridge the gap between legal teaching at university level and those practical skills required to deal with difficulties and issues faced in legal practice in Kosovo.

The training project was created following a request for assistance in the development of a professional practice course from the Kosovo Chamber of Advocates (the regulatory/representative body for lawyers in Kosovo) (“KCA”). The project was undertaken by a committee of solicitors and barristers from the collaborative Law Society/Bar Council Rule of Law Development Initiative.

Between 1989 and 1999 Albanians were restricted from practising law in Kosovo and many Kosovar Albanian lawyers dropped out of the profession altogether. When NATO and the UN moved in to administer Kosovo in 1999, Kosovar Albanians were again entitled to practice and, in 2002, the KCA was reconvened. In February 2008, Kosovo declared independence and Ireland is one of the many European countries, along with the United States, Australia and Canada, to have recognised its declaration. As a potential candidate for EU accession, the little nation has its work cut out for it.

Kosovo’s lawyers face a skills gap a decade wide and a new market structure. While trainee “advokats” must undergo a period of work experience, the absence of a professional training programme compounds the challenges facing the legal community there.

Funded primarily by Irish Aid, the week long pilot course was designed bearing in mind particular aspects of the legal system in Kosovo but delivered in much the same way as the Law Society and Kings’ Inns professional practice courses: a mixture of lectures and small group tutorials. The project was designed and coordinated by barristers Leesha O’Driscoll and Kieran Falvey, solicitors Daragh O’Shea, Angela Rutledge, Betsy Keys Farrell and the Law Society’s Eva Massa.

A number of shadow trainers were identified amongst the participants and it is hoped that these young lawyers will take over the development and facilitation of the professional practice course in the coming years. Many thanks for the support from Turlough O’Donnell, SC former Chairman of the Bar Council, Aine Shannon and Tom MacDonald, Kings’ Inns, TP Kennedy and Cillian MacDomhnaill of the Law Society.

Promoting the Rule of Law – Pamodzi

RACHEL POWER

Originally founded in 2007, the joint Law Society and Bar Council Rule of Law initiative has collaborated with academics, judges, legal practitioners, policymakers and civil society around the world to advance collective knowledge of the relationship between Rule of Law, democracy, sustained economic development and human rights. The project originated in recognition of the increased emphasis placed on Rule of Law in development aid, and in response to the number of requests for assistance received by Ireland involving the Rule of Law.

In the hope of driving the Irish legal profession’s interest in overseas work, the project has recently gained formal footing in the shape of a newly incorporated charitable company. The charity is now called Pamodzi - Promoting Rule of Law: The word Pamodzi means ‘unity’ or ‘together’ in Nyanja, a language of southern Africa. The name was proposed by the High Court Judge, the Honorable Mr Justice Garrett Sheehan. Judge Sheehan has had particular involvement in Zambia and is an ardent advocate of the ideals upheld by this project.

In recent years, projects have addressed the broad spectrum of Rule of Law from capacity development of national judiciary to legal aid and legal information at a community level; and has spanned the globe from Kosovo to Malawi, South Africa to Bosnia. Pamodzi is now looking to expand on these projects.

Pamodzi is seeking enthusiastic and committed individuals to get involved, identify new projects and assist with research and fundraising. We are interested in hearing from all sectors of the legal community be it experienced judges, barristers, solicitors, academics or students. We truly believe that members of the Irish legal profession have a significant role to play in enhancing the Rule of Law and shaping the progress of fragile societies.

Pamodzi - Promoting Rule of Law will officially be launched at our next quarterly meeting on Thursday the 27th of January 2011 at The Distillery Building, Church Street. It will be a chance to hear more about our work, meet with those involved and see how you can contribute. For further information please visit our website www.pamodzi.ie. Alternatively you can email r.power@pamodzi.ie to register an interest or sign up for our Newsletter.
The Cityview Press v AnCo Principles and Administrative Discretion. Form or Substance?

BRIAN FOLEY BL*

The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

- Article 15.2.1º

The Cityview Press v AnCo Principles

Article 15.2.1º of the Constitution is quite specific. It says that the only (“the sole and exclusive”) law-maker for the State is the Oireachtas. Obviously, this creates something of a problem for statutory instruments and other forms of secondary legislation. From a layman’s perspective, surely the Planning and Development Regulations, 2001 are as much “law” as the Planning and Development Acts, 2000-2006. After all, they both have something to say about what he can and cannot legally do. From such a perspective one could see how secondary legislation as “law” would be constitutionally suspicious. On the other hand, it is probably beyond debate that our Constitution simply must recognise the legitimacy of secondary legislation because it is absolutely essential for efficient governance. Our constitutional solution, of course, is to refuse to deem secondary legislation to be “law” within the meaning of Article 15.2.1º if that secondary legislation does no more than flesh out the “principles and policies” contained in its parent (or “delegating”) legislation. O’Higgins C.J. put it as follows in Cityview v An Chomhairle Oiliúna:

“In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits — if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body — there is no unauthorised delegation of legislative power.”

General Efficacy of Article 15.2.1

Article 15.2.1º has not always proven to be an incredibly effective constraint on the legislature in respect of controlling its delegations of power. Indeed, as regards Cityview Press itself, one struggles to see precisely where the relevant principles and policies were contained in the Industrial Training Act, 1967 which apparently legitimated the delegation of power to An Chomhairle Oiliúna to raise particular levies to fund its activities. One can also point to cases such as McDaid v Sheehy where, one could argue, a perhaps-too-cautious application of the doctrine of mootness has left an otherwise grossly unconstitutional delegation of power in the form of s.1 of the Imposition of Duties Act, 1957 on the statute book. Perhaps, however, it is the operation of the presumption of constitutionality in tandem with the Cityview Press principles that has created most difficulty. We have seen that the legislature is not constitutionally permitted to delegate law-making power. Thus, if legislation gives a power to make secondary legislation without accompanying principles and policies the legislation is unconstitutional and it should fall. However, it is probably beyond debate that our Constitution simply must recognise the legitimacy of secondary legislation because it is absolutely essential for efficient governance.

Our constitutional solution, of course, is to refuse to deem secondary legislation to be “law” within the meaning of Article 15.2.1º if that secondary legislation does no more than flesh out the “principles and policies” contained in its parent (or “delegating”) legislation. O’Higgins C.J. put it as follows in Cityview v An Chomhairle Oiliúna:

“...”


6 [1984] IR 710.
for any service under this Act being made available only to a particular class of that persons who have eligibility for that service.”

One could fairly understand a sincerely held belief that such a provision would permit the regulations as passed. The Supreme Court held that it must, where possible, interpret the provision in a manner which would avoid leading to a finding of unconstitutionality. If it was interpreted allow the Minister to do as he did—i.e. effectively amend primary legislation—then it would have to fall:

“It must therefore be presumed that in relation to the provisions of s. 72, sub-s. 1, the Oireachtas intended only a constitutional construction thereof and that the powers conferred on the Minister were merely for the purpose of giving effect to principles and policies which are contained in the Act itself.”

And thus, the section was upheld, but the regulations condemned as ultra vires. With such cases in mind, it could be argued that Article 15.2.1º can prove to offer very little incentive to the legislature to ensure that delegations of power are within constitutional limits. The ambit of the delegation in s.72(2) was truly broad and it is fairly difficult to see what in the Health Act, 1970 was there to guide its application. One could query whether the presumption of constitutionality was truly intended to save what appears to be a classic example of legislative neglect of Article 15.2.1º from challenge.8

**Administrative Controls**

**The Cases: Casey, Salafia and Dunne**

In recent years, something of a new challenge to the efficacy of Article 15.2.1º has emerged. This can be illustrated best with Casey v Minister for Arts, Heritage, Gaeltacht and the Islands.9 Timothy Casey was a boat operator who was involved in the transport of persons to Skellig Michéal (a national monument). Unfortunately, increasing number of visitors to the site had caused damage and deterioration to the area and particular safety issues had been identified. As a result, the Minister decided that landing on Skellig Michéal would require a permit and Mr. Casey was refused such a permit. The Minister’s decision to impose the permit requirements were based on provisions of the National Monuments Act, 1930 which empowered the Minister to “admit the public to enter on and view such monument … subject to such conditions and limitations as the [respondent] … shall prescribe.” Similarly, reference was made the obligations on the Minister to ensure the maintenance of such monuments. After holding that the imposition of the permit system was intra vires, Murray J., for the Supreme Court, 10 turned to consider the constitutionality of the delegation. In respect of the constitutionality of such, it was said that:-

“We are not concerned here with the making or the enforcement of a legislative instrument. The preservation and protection of national monuments is quintessentially an administrative matter to be achieved by implementing policy decisions.”11

The significance of this ought not be understated. The Court appears to make a distinction (which is entirely valid in theory) between the delegation of formal law-making power (i.e. a power to pass or make secondary legislation) and the delegation or granting of decision-making power in what are described as “quintessentially” administrative matters. The latter, it would appear, are not required to comply with the Cityview Press principles.

Similar conclusions were reached in Salafia v Minister for Environment2 and Dunne v The Minister for the Environment.3 In Salafia it was argued that s.14A of the National Monuments Act, 19304 was unconstitutional for breach of the non-delegation doctrine. The argument failed. Smyth J held as follows:-

“In my judgment the authorities clearly establish that Article 15.2 is not engaged by a statutory provision conferring a power of discretionary decision making….Section 14A does not involve a delegated power to legislate, it involves the exercise of an administrative discretion by the Minister and that discretion is not unqualified but is drawn in necessarily broad terms having regard to the variety of circumstances in which the discretion may fall to be exercised.”

In Dunne, the High and Supreme Court were concerned with s.8 of the National Monuments (Amendment) Act, 2004 which permitted the operation of a special permission system in relation to works affecting a national monument where same could be carried out under directions given by the relevant Minister. Of the section, the Supreme Court noted:-

“[T]he section is concerned with the making of an administrative decision which consists of the giving of directions. This is an entirely different legal concept as the exercise of a statutorily conferred discretion is not governed by the provisions of Article 15 of the Constitution, but is instead subject to the requirements of administrative law.”15

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8 In that regard, it is interesting to note in Dunne, that the Supreme Court held “It goes without saying that if powers had been delegated to the first defendant to make regulations or orders which went outside the principles and policies of the Act of 2004, any such measure would be unconstitutional.” This does not seem to be part of the ratio and it does not appear as if the relevance of the presumption of constitutionality had been considered.
9 [2004] 1 IR 402.
10 McGuinness and McCracken JJ concurred.
14 Section 5 of the National Monuments (Amendment) Act 2004.
15 [2007] 1 IR 194, at 209. Laffoy J had reached a similar conclusion in the High Court.
Analysis

It would seem then, that Article 15.2.1º bites against a delegation to legislate and a power to legislate only. If such a power is apparently given, the actual “legislating” which can be done can only be such as to flesh out the principles and policies of parent legislation. On the other hand, Article 15.2.1º does not bite against the delegation of discretionary decision making or the delegation of purely administrative powers. In principle, this makes a good deal of sense. It is certainly clear that Article 15.2.1º cannot mean that every single piece of decision making carried out by the executive must be buttressed by principles and policies in parent legislation. Indeed, in many other jurisdiction very little attention is paid to controlling the scope of delegated legislative powers and to such audiences, it may make eminent sense to permit wide ranging delegation. On the other hand, whatever functional advantages there may be to a generous approach to delegation, Article 15.2.1º is clear in its terms and ought to be taken seriously. Thus, it stands to reason that the distinction between law-making power and purely administrative functions should not be taken too far lest Article 15.2.1º itself become endangered.

Possible Difficulties: Form over Substance?

The decisions in Casey, Salafia and Dunne, however, do prompt the unsettling suggestion that the difference between the engagement and non-engagement of Article 15.2.1º may be the form in which the relevant power is delegated or granted. Suppose the (fictional) Fishing Act, 2010 provided that the “Minister may by Regulation limit the types of fish which may be fished in Irish waters”. That grants the Minister a power to make regulations to do just that and would have to survive Article 15.2.1º scrutiny. On the other hand, suppose the Act provided instead that the “Minister may limit the types of fish which may be fished in Irish waters”. It is not clear, on the basis of the above, that this would be caught by Article 15.2.1º.

The examples could be multiplied, but it seems reasonable to suggest that the form of the grant is not, of itself, an appropriate decider as to the application or non-application of an important constitutional safeguard. Indeed, one could make the point that the non-delegation doctrine itself appears to favor substance over form. This is because in many situations it is very difficult to view the making of secondary legislation as anything other than policy-making.

Nonetheless, the courts will have to become engaged in a qualitative assessment of the type of choice and discretion vested – i.e. policy-making is acceptable as long it is hemmed by principles and policies. Of course, this won’t be very helpful. The very essence of the Casey, Salafia and Dunne decisions are that purely administrative grants do not need to be governed by such a structure. Thus, it cannot follow that categorisation as a purely administrative power depends on the presence of such a structure. That would be circular. It would seem, therefore, that the Courts will have to become engaged in a qualitative assessment of the type of choice and discretion vested – i.e. as to whether it is “purely administrative” or not.

In that regard, there then seems to be no more obvious a test as to consider the nature of the power and examine whether it appears to be intended to govern matters traditionally or historically regulated by secondary legislation in the sense that some kinds of powers are traditionally those which have been exercised by the public administration and some kinds of powers are traditionally those that have been exercised by the promulgation of secondary legislation. That, however, is necessarily a very subjective enquiry and one which may not provide helpful in all cases and the matter is likely to be largely one of judicial impression, exercised against the best analysis of the relevant power that the court is permitted to engage in by the arguments provided by both sides. Of course, there will have to be a good deal of common

16 For an overview, see Fahey, “Reconsidering the Merits of the “Principles and Policies Test – A Step Towards the Reform of Article 29.4.10º of the Constitution” (2006) 24 IL/T 70.


18 [2001] 2 IR 139, at 223-223.
the value that law-making is done through the full processes of the Oireachtas, a Court might also consider the general significance and importance of the particular power at hand and the extent to which its regulatory reach could be regarded as truly “legislative”.

**Conclusion**

In truth, many of the criteria one may suggest would not satisfy pure logic as to whether a power is administrative or legislative. Indeed, on the assumption that one rejects the formal description of the power as determinative, one could query whether, in fact, it is workable to distinguish between those powers to which Article 15.2.1º applies and those to which they do not. That said, the Courts have proved quite able to identify other abstract concepts such as the “administration of justice” within the meaning of Article 34 and perhaps Irish constitutional law is about to see a rich new line of authority on what it truly means to be a law maker within the meaning of Article 15.2.1º. It ought be remembered that there is inherent democratic value in important civic regulation being traceable in a real and substantive form to decisions of the legislature rather than the executive (or members thereof). It would certainly be a shame if the Casey, Salafia and Dunne line of authority were ultimately to contribute to a further dilution of such values and of the general efficacy of Article 15.2.1º as a restraint on the legislatures ability to delegate important functions.

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20 See *Dunne v Minister for the Environment* [2007] 1 IR 194, 209.
21 See *Dunne v Minister for the Environment* [2007] 1 IR 194, 210. “It can hardly be disputed that it is within the competence of the Oireachtas under Article 15.2 of the Constitution to make a law giving the first defendant a wide discretion both in terms of the scope of the direction under s. 8 and the criteria to which he may have regard, provided that no other provision of the Constitution is thereby infringed.”

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**President Addresses Medico Legal Society**

At the recent Medico Legal Society of Ireland meeting held at the Kildare Street and University Club, the speaker for the night was President McAleese, who attended with Martin McAleese. The President and her husband were presented with citations of Honorary Life Membership of the Society. Pictured from left to right are: Dolores Keane BL, Honorary Treasurer, Dr. Mary Davin Power, Honorary Secretary, President McAleese, Martin McAleese, Dr. Antonia Lehane, Immediate Past President and Dermot Manning BL, President.
Appointing a receiver by way of equitable execution in relation to future debts

SAM COLLINS BL*

Introduction

In recent years a number of high profile actions have been heard regarding execution of substantial judgments against impecunious judgment debtors. A significant weapon in a judgment creditor’s arsenal is to apply to appoint a receiver by way of equitable execution.  

The purpose of this article is to consider this jurisdiction and, in particular, examine whether a receiver may be appointed in relation to future debts, in light of three important cases: Soinco SACA v Novokuznetsk Aluminium Plant and ors, O’Connell v An Bord Pleanála¹, and Masri v Consolidated Contractors Int (UK) Ltd (No 2)².

Background and procedure

The jurisdiction to appoint a receiver by way of equitable execution was developed by the Courts of Chancery in the 19th century³. The power was provided for in section 28(8) of the Supreme Court of Judicature (Ireland) Act 1877 as follows:

“A…receiver [may be] appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order shall be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just”⁴.

Applications to appoint a receiver under the Rules of the Superior Courts (RSC) are governed by O.50 r.6 RSC.⁵ The jurisdiction is discretionary. Applications may be made ex parte or on notice.⁶

O.45 r.9 RSC provides that, in determining whether it is “just and convenient” to appoint a receiver by way of equitable execution, the Court should have regard to the quantum of the judgment debt, the probable costs of appointment and the probable sum to be obtained. The Court may direct inquiries and the order “shall be made upon such terms as the Court may direct.”

The receiver may be required to provide security (Fahey v Tobin⁷) in particular where the value of the property in relation to which appointment is made exceeds the value of the judgment debt (Condon v Quinn⁸).

Accessing those hard-to-reach assets

A receiver will not be appointed where legal execution is possible (Re Shepherd⁹; O’Connell¹⁰). Space exists for the jurisdiction’s operation, however, at the boundaries of these alternative mechanisms. A fi. ja. may only be executed against physical assets. A Mareva-type injunction requires evidence of an intention to defeat judgment¹¹, and has a freezing rather than executive effect. A third party debt or garnishee order may require information beyond a judgment creditor’s knowledge¹².

Conditions under which the Court may order appointment

Courtney sets out the test for appointment thus:¹³

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* The author wishes to thank Declan McGrath BL for his help with this article.


7. In England, procedures to appoint a receiver are detailed in CPR 69, supplemented by Practice Direction 69 (published April 2010).

8. O.50 r.7 RSC; Flannery v Ryan [1919] 2 IR 338. Two notable exceptions, where applications must be made on notice, arise in respect of pension benefits (Campbell v Usher 47 ILTR 165; Moran v Headlip 67 ILTR 212) and salary (Clery v O’Donnell 78 ILTR 199).

9. [1901] 1 IR 511.

10. 32 ILTR 44.

11. (1889) 43 Ch D 131.

12. p.15.

13. Courtney, op. cit., [10.80].

14. cf. O’Connell, p.14, where Peart J. said, regarding an application to appoint a receiver over prospective damages in a personal injury action, that the judgment creditor would be unaware of settlement discussions and so could not “make any timely application for an order of garnishee over any settlement money”.

15. Courtney, op. cit., [10.80]; See also Keane, op. cit., [22.05].
equitable mortgage\textsuperscript{25}); O’Donovan v Goggin\textsuperscript{26} (deposit receipt held jointly between judgment debtor and another, with judgment debtor holding entire beneficial interest); In re Peace and Walker\textsuperscript{30} (payment of a taxed bill of costs under the Solicitors Acts).

The most notable asset which is immune from the appointment of a receiver is future earnings (\textit{Homes v Millage}\textsuperscript{29}), though receivers have been appointed in relation to earnings which have already accrued but not yet been paid (\textit{Picon v Caller}\textsuperscript{28}). A significant question arises as to whether this rule applies only to future earnings or to future debts, which will be discussed in more detail below.

**Can a receiver be appointed in respect of future debts?**

Future debts are debts not yet owed but which may subsequently be owed. Several considerations arise in respect of such assets.

First, they may be indeterminate (as to both amount and due date). This raises a question as to whether the Court’s order could ultimately be futile to effect even a \textit{pro tanto} reduction in the judgment debt (for instance, if no monies are ultimately received).\textsuperscript{30}

Second, in particular where future earnings (either salary or pension benefits) are concerned, a hardship argument arises, since denying a judgment debtor his future income could render him destitute. As Lindley L.J. noted in \textit{Holmes v Millage}, such applications raise a “question… of great importance, not only to the parties immediately concerned, but to every wage-earning person in the country.”

In \textit{O’Flolm, Practice and Procedure in the Superior Courts}, the learned author states that “[a] receiver will not generally be appointed over payments to be made in futuro but only over payments which have already accrued but have yet to be paid over to a defendant”, citing \textit{Re Johnson}\textsuperscript{31} and \textit{Ahern v O’Brien}\textsuperscript{32}, and noting \textit{Clery v O’Donnell}, \textit{Garrahan v Garrahan} and \textit{O’Connell v An Bord Pleanála}.

Regarding these authorities, it is notable that, while the Court reiterated the general rule in \textit{Ahern}, it did in fact make the order sought, appointing a receiver over ground rents payable to the defendant (this order was made on a conditional basis, but was not challenged and subsequently was made absolute). In \textit{Garrahan}, a receiver was appointed over a Garda pension. Also in \textit{O’Connell}, the Court appointed a receiver over future damages arising from personal injury litigation.

It is respectfully suggested that, especially in light of the

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17 See also \textit{In re Shephard} (1889) 43 Ch D 131 at 138 (per Fry L.J.): “A receiver was appointed by the Court of Chancery in aid of a judgment at law when the plaintiff showed that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for a legal debt.”
20 The Court declined to appoint a receiver on different grounds; however, it found no technical reason why a receiver could not be appointed over the putative asset class, namely prospective litigation involving ITC members.
21 op. cit., [10.80].
22 A comparable meaning has been given to the expression “\textit{debt owing or accruing}” in section 61 of the Common Law Procedure Act, 1854, with “\textit{accruing}” held by Wightman and Crompton J.J. in \textit{Jones v Thompson} E.L., BL., & E.L. 63 at [64] as referring to debitory in \textit{pro tanto, solvendum in futuro}. See generally: Courtney, op. cit., [10.80]; Wylie, op. cit., pp.79-81; Frisby and Davis-White, \textit{Kerr and Hunter on Receivers and Administrators} (19th ed, 2010) Sweet & Maxwell, pp.108-110.
24 17 QBD 743.
25 While the order appointing the receiver was discharged, this was on different grounds, namely a failure to register.
26 [1892] 30 LR Ir 579.
27 24 Ch D 495.
29 34 ILTR 139.
30 A similar point concern was raised by Lord Bingham in the context of a decision on third party debt orders, \textit{Société Euro Shipping Co Ltd v Cie Internationale de Navigation} [2004] 1 AC 260, [26].
31 [1893] 1 QB 551 at 554.
33 [1898] 2 IR 551.
34 [1991] 1 IR 421.
35 78 ILTR 190.
recent *Masri* decision, the better view is that future debts can be the subject of an order appointing a receiver by way of equitable execution, subject to an important exception in respect of future earnings. This is based on an English decision at first instance as recently endorsed by the Irish High Court and developed in the Court of Appeal, which decisions are discussed below.

**Soinco SACA v Novokuznetsk Aluminium Plant and ors**

The plaintiff applied to appoint a receiver by way of equitable execution in respect of monies which might become due to a judgment debtor pursuant to a supply contract.

Colman J., in granting the relief sought, took a progressive view of the jurisdiction to appoint receivers by way of equitable execution. He noted that “English law has traditionally developed by means of identifying broad but established juridical principles which have been extended incrementally to new factual situations when the interests of justice required such extension”\(^{37}\), drawing an analogy with the development of Mareva-type injunctions and summarising:

> “I can see no reason whatever why, 124 years after the Judicature Acts, the court should deny to itself a jurisdiction which is self-evidently likely to be extremely useful as an ancillary form of execution. I would therefore hold that there is jurisdiction to appoint a receiver by way of equitable execution to receive future debts as well as debts due or accruing due at the date of the order.”\(^{38}\)

It is notable that, as distinct from personal hardship, the argument that the order would have the effect of “bringing the business of the judgment debtor to a standstill by cutting off payment otherwise available to it” was held to be irrelevant by Colman J:

> “Impact on the judgment debtor’s business is not a consideration material to the availability of legal process of execution and there is no reason in principle why it should be introduced as material to the availability of equitable execution.”\(^{39}\)

**O’Connell v An Bord Pleanála**

The second named notice party, Lavine Ltd, sought appointment of a receiver by way of equitable execution over any monies which the applicant (a judgment debtor of Lavine Ltd) might recover in an action she commenced in the High Court arising out of an assault.

The Court was cognisant of personal hardship in exercising its discretion. Peart J. noted at page 14 of his judgment:

> “The sum of damages is not to be in any way equated with earnings or wages necessary for the applicant to live. It is a fund entirely removed from such a category. It is in the nature of a debt due for payment in the future in the event of an award of damages being made in her favour.”

Peart J. cited *Soinco* with approval, noting in passing that Courtney had endorsed the decision in his book, and quoted extensively from that judgment. He noted that “I am satisfied that the reasoning of Colman J. in *Soinco* is equally persuasive in this jurisdiction, and I see no reason why this Court should conclude that the law here should be different”\(^{40}\). Peart J. was satisfied that making the order was both just (since it was limited to the amount of the judgment debt, plus interest) and convenient (noting in particular that, since Lavine Ltd was at an informational disadvantage in respect of the applicant’s proceedings, it would be unable to move a garnishee application in respect of any damages or settlement monies obtained), though importantly he noted:

> “I should add of course that simply because it would be “convenient” in the broad sense of that word [that] a judgment creditor would have a receiver appointed, would not justify the Court in appointing a receiver. Any judgment creditor must be expected to exhaust any reasonable method of legal execution before equity could be expected to provide assistance. That is clear from the authorities.”\(^{41}\)

This latter comment reiterates what has been clear throughout the cases (for instance, *Re Shepherd*), that a judgment creditor cannot elect to appoint a receiver by way of equitable execution where execution at law is available.

**Masri v Consolidated Contractors Int (UK) Ltd (No 2)**

Mr. Masri brought an action in the English Courts for breach of contract in respect of an interest in an oil concession in the Yemen against, inter alios, Consolidated Contracts (Oil & Gas) Co SAL (“CCOG”). By two decisions Gloster J. found for Mr. Masri as to liability and quantum, and, by a further decision in December 2007, she made several orders, including the appointment of a receiver by way of equitable execution in relation to CCOG’s interest in revenues from the oil concession. By permission from the Court of Appeal (Rix and Jacob L.J.), CCOG appealed against the receivership order on several grounds.

First, it said that an English Court had no jurisdiction to make a receivership order by way of equitable execution in relation to foreign debts. Lawrence Collins L.J. rejected this argument after extensive consideration which will not be discussed here.\(^{42}\)

As regards the appointment of a receiver by way of

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37 p.420.
38 p.421.
39 p.421.
41 p.15.
42 [2006] EWHC 1931 (Comm).
43 [2007] EWHC 468 (Comm).
44 Note that, in *Masri v Consolidated Contractors Int (UK) Ltd (No 4)* [2010] 1 AC 90 (dealing with a different issue), Lawrence Collins L.J., now in the House of Lords, noted that he agreed with Sir Anthony Clarke M.R.’s observation that in *Masri* (No 2) [2009] QB 450, para 31, “I may have understated the current relevance of the presumption against extraterritoriality”.

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equitable execution in relation to future debts, Lawrence Collins L.J. (with whom Lord Neuberger and Ward L.J. agreed) extensively reviewed the authorities in this area.\(^{45}\) This review is discussed below.

(i) The older authorities

The Court was referred to “a series of authorities from 1883 to 1914, most of which, says CCOG, support the proposition that a receiver may not be appointed over future debts”\(^{46}\).

Two of these were “of no direct assistance”, namely Cadogan v Lyric Theatre\(^{47}\) (which was decided on the basis that profits at a theatre were not “rent” and so not subject to an order which had been made appointing a receiver) and Morgan v Hart\(^{48}\) (where an order appointing a receiver to “recover the rents, profits and moneys receivable in respect of the defendant’s interest in ... furniture and effects” was equivalent to an injunction restraining the defendant from dealing with his furniture, and was irregular as its purpose was to maintain the status quo in advance of discovery).

In Edwards & Co v Picard\(^{49}\), where a receiver was appointed in respect of the judgment debtor’s interest in three patents, there was held to be no property to receive. The case contained differing obiter views on appointing a receiver over future debts.\(^{50}\)

Lawrence Collins L.J. summarised the effect of the relevant authorities into four propositions:

“The position, then, was, first, that there was consistent Court of Appeal authority (based on what I have suggested was a misunderstanding of the decision in North London Railway Co v Great Northern Railway Co 11 QBD 30) that the power to appoint a receiver by way of equitable execution was limited to the pre-1873 practice. Second, in Webb v Stenton 11 QBD 518 two members of this court had expressed a view, obiter, which is only consistent with a view that the court had power to appoint a receiver over future trust income. Third, in Holmes v Millage [1893] 1 QB 551 it had been held that a receiver could not be appointed by way of equitable execution over a man’s future earnings. Fourth, there was no decision among the older authorities that the court had no power to appoint a receiver by way of equitable execution over debts which had not accrued, but which would accrue in the future.”\(^{51}\)

(ii) The indemnity cases

Following examination of the 1883-1914 authorities, Lawrence Collins L.J. concluded that “until recently there was no authority bearing on the question whether there was a power to appoint a receiver by way of equitable execution over future debts, but the question arose whether there was such a power in relation to a right of indemnity”.\(^{52}\) Two cases were considered, Bourne v Coldene Ltd\(^{53}\) and Maclaine Watson & Co Ltd v International Tin Council\(^{54}\). CCOG had argued\(^{55}\) that these cases did not bear on the question of future debts but this was rejected “because the same objection could be made to such an order as to an order in relation to future debts, namely that a right of indemnity is not subject to a process of execution at law.”\(^{56}\)

In both cases a receiver had been appointed: in the former, in relation to a union indemnity for legal costs; in the latter, in relation to the right of the judgment debtor to be indemnified against liabilities to, and make demands for payment of, member states of the International Tin Council.

(iii) Recent authorities

Lawrence Collins L.J. further discussed Soinco\(^{57}\) and noted that it had been applied by the Irish High Court in O’Connell\(^{58}\). He concluded:

“In my judgment there is no reason why in 2008 the court should not exercise a power to appoint a receiver by way of equitable execution over future receipts from a defined asset. There is no longer a rule, if there ever was one, that an order can only be made in relation to property which is presently amenable to legal execution. There is no firm foundation in authority for a rule that the remedy is not available in relation to future debts. There is no principle which prevents the development of existing authority to extend the remedy to the property which was the subject of the receivership order in this case.”\(^{59}\)

The judgment of the Court of Appeal in Masri is, with respect, a logical development of the principles outlined in Soinco and endorsed in O’Connell. The historic belief that future debts cannot be the subject of an appointment of a receiver by way of equitable execution appears to be increasingly infirm.

Conclusion

The incremental expansion in the jurisdiction to appoint a receiver by way of equitable execution now appears to have embraced future debts (subject to the important exception of future earnings). This has potentially wide-ranging effects for an already useful tool for judgment creditors. It is hoped that the Irish Courts, having already endorsed Soinco, soon have the opportunity to consider Masri.

\(^{45}\) [136]-[184].
\(^{46}\) [150].
\(^{47}\) [1894] 3 Ch 338.
\(^{48}\) [1914] 2 KB 183.
\(^{49}\) [1909] 2 KB 903.
\(^{50}\) Moulton L.J., 908-909.; Buckley L.J., 910.
\(^{51}\) [162].

52 [163].
55 [139].
56 [163].
57 [169] – [170]. CCOG had argued that Soinco had been wrongly decided, but did not succeed on this point: [139].
58 [171].
59 [184].
Administrative Law

Article

Wakely, Jenny Social and economic rights – a retreat by the South African Constitutional Court? 2010 ILTR 153

Air Transport

Statutory Instrument

Air navigation and transport (international conventions) act 2004 (revision of limits of liability) order 2010 SI 390/2010

Animals

Statutory Instrument

Diseases of animals act 1966 (control on animal and poultry vaccines)(amendment) order 2010 DIR/2001-82 SI 289/2010

Arbitration

Award


Award


Library Acquisition


Banking

Article

Donnelly, Mary Loan contract and the unfair terms regulations 2010 (17) 6 CLP 107

Library Acquisitions

Byrne, Hugh The national asset management agency act 2009: annotations and commentary Heywards Heath: Bloomsbury Professional, 2010 N303,9,55

Proctor, Charles The law and practice of international banking Oxford: Oxford University Press, 2010 N303

Bankruptcy

Practice and procedure

CASES

Charities act 2009 (commencement) order 2010 S1 315/2010

COMPANY LAW

Directors

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Section of arrangement
Lease – Repudiation of leases sought by examiner – Whether lease was contract requiring performance other than payment of money – Statutory interpretation –
Whether court should approve repudiation – Provision prohibiting reduction of rent or extinguishment of lease under scheme of arrangement – Alternative application by examiner for transfer of powers of directors to examiner – Intention to disclaim lease in order that lease might be repudiated – Whether powers might be transferred – In re O’Brien’s Irish Sandwich Bars Limited [2009] IEHC 465 (Unrep, Ryan J, 16/10/09) considered – Companies (Amendment) Act 1990 (No 27), s 9, s 20(1) and 3, Companies Act 1963 (No 33) s290 – Relief refused – (2009/523 COS – McGovern J – 4/12/2009) [2009] IEHC 544
Re Linen Supply of Ireland and Companies Acts

Library Acquisitions
Walmsley, Keith
Butterworths company law handbook 2010
24th ed
London: LexisNexis, 2010
N261

Statutory Instruments
Companies act 1990 (relevant jurisdictions under section 256(F) regulations 2010 SI 425/2010
Companies act 1990 (section 256(F)) (registration documents) regulations 2010 SI 426/2010
Companies (fees) order 2010 SI 430/2010
Companies (forms) order 2010 SI 429/2010
Companies (forms) (no. 2) regulations 2010 SI 436/2010
Companies (forms) (no.3) regulations 2010 SI 428/2010
Companies (miscellaneous provisions) act 2009 (commencement) order 2010 SI 424/2010

CONSTITUTIONAL LAW

National language
O Griofáin v Eire

National language
O Conaire v Breitbeamb Mac Gruaíre

Statute

J Haire & Co Ltd v Minister for Health and Children

Articles
Hogan, Gerard
Taxpayers – their constitutional and human rights 2010 (June) ITR 83

Wakely, Jenny
Social and economic rights – a retreat by the South African Constitutional Court?
2010 ITR 153

Library Acquisitions
Klug, Heinz
The constitution of South Africa: a contextual analysis
M31.S57

Martinico, Giuseppe
The national judicial treatment of the ECHR and EU laws: a comparative constitutional perspective
M31.008

CONTRACT LAW

Rescission
Marlan Homes Ltd v Walsh

Legal Update December 2010
Sale of land

Damas v DPP – 1999 1 IR 42

Sale of lands


Shaw v Derkins Ltd

CRIMINAL LAW

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Mounsey v Governor of St Patrick’s Institution

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Broe v DPP

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Procedures of crime


Pop v Judge Smyth

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People (DPP) v Norris

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People (DPP) v O’Connor

Sentence


People (DPP) v Byrne

Sentence


People (DPP) v Doherty

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People (DPP) v Kavanagh

Sentence


People (DPP) v Tobin

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People (DPP) v Goodspeed
practice to pitch offence at appropriate range – Exceptional circumstances where non-custodial sentence appropriate – Factors that ought to have been properly taken into account – People (DPP) v O'Reilly [2007] IECCA 118, (Unrep, CCA, 11/12/2007) considered – Criminal Justice Act 1993 (No 6), s 2 – Application granted; sentence of 15 months imprisonment imposed (276CA/08 – CCA – 14/12/2009) [2009] IECCA 154 People (DPP) v Burke

Summons


Trial


Library Acquisitions

Card, Richard
Card, Cross and Jones: criminal law 19th edition
Oxford: Oxford University Press, 2010 M500

Clough, Jonathan
Principles of cybercrime
Cambridge: Cambridge University Press, 2010 N347.4

Richardson, P J
Archbold criminal pleading, evidence and practice 2010
London: Sweet & Maxwell, 2010 M500

Roberts, Julian V
Previous convictions at sentencing: theoretical and applied perspectives

School of Law Trinity College
Criminal law update 2010
Dublin: Trinity College, 2010 M500 C8

Statutory Instruments

Criminal justice act 2006 (commencement) order 2010
SI 336/2010

Criminal justice act 2006 (electronic monitoring devices) regulations 2010
SI 409/2010

Criminal justice (money laundering and terrorist financing) (commencement) order 2010
SI 342/2010

Criminal justice (money laundering and terrorist financing) (section 31) order 2010
SI 343/2010

DEFAMATION

Library Acquisition

School of Law Trinity College
Recent developments in Irish defamation law, including the defamation act 2009
Dublin: Trinity College, 2009 N38.2 C5

DEFENCE FORCES

Statutory Instrument

Courts-martial (legal aid) (amendment) regulations 2010
SI 327/2010

EDUCATION

ELECTIONS AND REFERENDA

Local authorities


O’Doherty v AG, Ireland & Limerick County Council

EMPLOYMENT

Inquiry


Gama Etablimenti Tesideri v Minister for Enterprise, Trade and Employment

Articles

Lowey, Tiernan

NERA in a changing legal environment 2010 ELR 14

MacMolain, Caomh ìn

Compensating for employment training costs: Olympique Lyonnais SASP v Olivier Bernard and Newcastle United FC 2010 ELR 62

Regan, Mave

Agency workers: an analysis of key legal developments 2010 ELR 3

Library Acquisitions

Blackhall Publishing


Redmond, Mary


EUROPEAN LAW

Library Acquisitions

Galera, S

Council of Europe Judicial review – a comparative analysis inside the European legal system Strasbourg: Council of Europe, 2010 W71

Garzanti, Laurent


Martinico, Guiseppe


Oliver, Peter


Piris, Jean-Claude

The Lisbon Treaty: a legal and political analysis Cambridge: Cambridge University Press, 2010 W4

Williams, Rebecca


EXTRADITION

European arrest warrant


Minister for Justice v Barry

European arrest warrant

Fleeing – Reference to ‘fleeing’ removed from s 10 (d) – Whether amendment operated in respect of application for order for surrender on date subsequent to date of operation of Act regardless of date of warrant, endorsement or arrest – Whether fact that argument that respondent did not flee of any relevance – Delay – Whether any obligation on requesting authority to explain why there has been some delay – European Arrest Warrant Act 2003 (No 45), ss 10

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Practice and procedure


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Judicial Separation

Legal Update December 2010

**Statutory Instrument**

District Court (enforcement of maintenance orders) rules 2010
SI 325/2010

**FISHERIES**

**Statutory Instruments**

Inland fisheries act (establishment day) order 2010
SI 262/2010

Inland fisheries (fixed charge notice) regulations 2010
SI 324/2010

Inland fisheries act 2010 (form of instrument of appointment) regulations 2010
SI 316/2010

Sea-fisheries (control on fishing for razor clams in Rosslare Harbour) regulations 2010
SI 310/2010

Sea-fisheries (prohibition on fishing for clams in Waterford estuary) regulations 2010
SI 378/2010

Wild salmon and sea trout tagging scheme regulations 2010
SI 325/2010

**FREEDOM OF INFORMATION**

**Appeal**


**Library Acquisition**

Coppel, Philip
Information rights law and practice 3rd edition
M209.16

**HEALTH**

**Statutory Instruments**

Health (amendment) (No.2) act 2010 (commencement) Order 2010
SI 415/2010

Health and social care professionals act 2005 (commencement) order 2010
SI 263/2010

Health (definition of marginal, localised and restricted activity) (butcher shop) regulations 2010
SI 340/2010

Health (miscellaneous provisions) act 2010 (commencement) order 2010
SI 392/2010

Health Service Executive employee superannuation scheme, 2010
SI 362/2010

**HOUSING**

**Statutory Instrument**

Housing (rent books) (amendment) regulations 2010
SI 357/2010

**HUMAN RIGHTS**

**Library Acquisition**

Brownlie, Ian
Brownlie’s documents on human rights 6th edition
Oxford: Oxford University Press, 2010
C200

Martinico, Giuseppe
The national judicial treatment of the ECHR and EU laws: a comparative constitutional perspective

M31.008

**IMMIGRATION**

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R (I) v Minister for Justice
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*A (A H) v Refugee Appeals Tribunal*

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*A (T M) v Minister for Justice*

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*S (H A) v Refugee Appeals Tribunal & Min for Justice*

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*C (B) v Refugee Appeals Tribunal*
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D (H I) (A Minor) & A (B) v Refugee Applications Commissioner

Interlocutory injunction


Tejo Ventures International Ltd v O’Callaghan

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Clough, Jonathan Principles of cybercrime Cambridge: Cambridge University Press, 2010 N347.4

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Articles

Mee, John

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O’Hara, Kelly

Land and conveyancing law reform act 2009 – part 1 2010 (June) ITR 97

Library Acquisition

Thomson Round Hall

Enhance your property law knowledge: Round Hall property law conference 2009 – Issues facing practitioners in 2010 — 2009 conference papers

Dublin: Thomson Round Hall, 2009

N50.C5

LANDLORD & TENANT

Statutory Instrument

Housing (rent books) (amendment) regulations 2010 SI 357/2010

LEGAL SYSTEMS

Article

Brooke, David

The eclipse of the common law 2010 ILTR 157

LIMITATION OF ACTIONS

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Canny, Martin

Limitation of actions Dublin: Round Hall, 2010 N355.C5

MEDICAL NEGLIGENCE

Medical negligence


Warnock v National Maternity Hospital

Library Acquisition

School of Law Trinity College

Medical negligence: recent developments impacting on practice Dublin: Trinity College, 2010 N337.1.C5

MORTGAGE

Article

Mee, John

Mortgages, repeals and the Land and Conveyancing Law Reform Act 2009 2010 (17) 6 CLP 115
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Reynolds v Woodman Inns Ltd (t/a Ruby’s Nightclub)

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Derrybrien Co-op v Saorgas Energy Ltd

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Dublin City Council v Grant

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Cusson v Judge Coughlan

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Public service pension rights order 2010 SI 302/2010

Planning and development (amendment) act 2010 ( commencement) (no. 2) order 2010 SI 451/2010


PATENTS & TRADEMARKS

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Patents (amendment) act 2006 (section 41) (commencement) order 2010 SI 432/2010

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Jackman v Gettins AB

Statutory Instruments

District Court (enforcement of maintenance orders) rules 2010 SI 325/2010

District Court (intellectual property) rules 2010 SI 421/2010

Rules of the Superior Courts (arbitration) 2010 SI 361/2010

PROBATE

Library Acquisition

School of Law Trinity College

Probate and succession: recent developments impacting on legal practice


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Allied Irish Banks plc v Dormer

Articles

Mee, John

Mortgages, repeal and the Land and Conveyancing Law Reform Act 2009 2010 (17) 6 CLP 115

O’Hara, Kelly

Land and conveyancing law reform act 2009 – part I 2010 (June) ITR 97

Library Acquisitions

Byrne, Hugh
The national asset management agency act 2009: annotations and commentary
Haywards Heath: Bloomsbury Professional, 2010
N303.9.C5

Thomson Round Hall
Enhance your property law knowledge: Round Hall property law conference 2009 – Issues facing practitioners in 2010 – 2009 conference papers
Dublin: Thomson Round Hall, 2009
N50.C5

RESIDENTIAL INSTITUTIONS REDRESS BOARD

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RESTITUTION

Library Acquisition
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Unjust enrichment and public law: a comparative study of England, France and the EU
N20.2.008

ROAD TRAFFIC

Library Acquisition
McCormac, Kevin
Wilkinson’s road traffic offences

24th ed
London: Sweet & Maxwell, 2009
M565.T7

Statutory Instruments
Road traffic act 2010 (certain provisions) (commencement) order 2010 SI 394/2010
Road traffic act 1994 (section 17) (prescribed form and manner of statements) regulations 2010 SI 433/2010
Road traffic act 1994 (section 22) (costs and expenses) regulations 2010 SI 435/2010
Road traffic act 1994 (sections 18 and 19) (prescribed forms) regulations 2010 SI 434/2010
Road traffic (weight laden of 5 axle articulated vehicles) regulations 2010 SI 452/2010

SOLICITORS

Disciplinary tribunal

Statutory Instrument
Solicitors (professional practice, conduct and discipline – commercial property transactions) regulations 2010 SI 366/2010

STATUTE

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References

Waxy O’Connors Ltd v Judge Riordan
SUCCESSION
Library Acquisition
School of Law Trinity College
Probate and succession: recent developments impacting on legal practice
Dublin: Trinity College, 2010
N127.C5

TAXATION
Articles
Brady, Paul
Risky business – income tax on gambling
2010 (June) ITR 103

Duggan, Grainne
The tax adviser and legal advice privilege – Prudential v Special Commissioner of Income Tax
2010 (June) ITR 94

Heffernan, John
Taxation of intellectual property – part 1
2010 (June) ITR 73

Hogan, Carol
Capital acquisitions tax legislation: recent amendments
2010 (June) ITR 49

Hogan, Gerard
Taxpayers – their constitutional and human rights
2010 (June) ITR 83

Kennedy, Conor
Reversing the burden of proof in tax litigation
2010 (June) ITR 68

Kennon, Eithna
Unwrapping the VAT package – what do you need to know?
Egan, Andrew
2010 (June) ITR 54

Masterson, Jackie
Topical taxation for SMEs
2010 (June) ITR 65

Perry, John
US tax reporting – impact on the Irish funds industry
Wall, Pat
2010 (June) ITR 80

Library Acquisitions
Brennan, Philip
Capital tax acts 2010

Haywards Heath: Bloomsbury Professional, 2010
M335.C5.Z14

Brodie, Sean
Value-added tax: finance act 2010
16th ed
Dublin: Irish Taxation Institute, 2010
M337.45.C5

Comyn, Amanda-Jayne
Taxation in the Republic of Ireland 2010
Haywards Heath: Bloomsbury Professional, 2010
M335.C5

Feeney, Michael
Taxation of companies 2010
Haywards Heath: Bloomsbury Professional, 2010
M337.2.C5

Gaffney, Michael
Taxation of property transactions: National Asset Management Agency act 2009, finance act 2010
6th ed
Dublin: Institute of Taxation, 2010
M337.6.C5

Gaynor, Caitriona
Irish taxation: law and practice, finance act 2010
Dublin: Irish Taxation Institute, 2010
M335.C5

Homer, Arnold
Tolley’s tax guide 2010-2011
29th ed
London: LexisNexis Tolley, 2010
M335

Irish income tax 2010
2010 edition
Dublin: Bloomsbury Professional, 2010
M337.11.C5

Maguire, Tom
Direct tax acts: finance act 2010
14th ed
Dublin: Irish Taxation Institute, 2010
M335.C5

Martyn, Joe
Taxation summary: finance act 2010
Dublin: Irish Taxation Institute, 2010
M335.C5

McCullagh, Vincent
VAT on property: finance act 2010
10th ed
Dublin: Irish Taxation Institute, 2010
M337.45.C5

O’Mara, John
Tax guide 2010
Haywards Heath: Bloomsbury Professional, 2010
M335.C5

Picken, Charles H
Handbook to stamp duties...
19th ed
London: Waterlow, 1928
M337.5

Statutory Instruments
Capital acquisitions tax consolidation act 2003 (section 46(2B) (appointed day) order 2010
SI 282/2010

Stamp duty (designation of exchanges and markets) (no. 3) regulations 2010
SI 395/2010

Taxes consolidation act 1997 (accelerated capital allowances for energy efficient equipment
SI 341/2010

Vehicle registration and taxation (amendment) regulations 2010
SI 400/2010

TELECOMMUNICATIONS
Library Acquisition
Garzaniti, Laurent
Telecommunications, broadcasting and the internet: EU competition law and regulation
3rd ed
London: Sweet & Maxwell, 2010
W119.6

Statutory Instrument
Wireless telegraphy act, 1926 (section 3) (exemption of 406MHz personal locator beacons) order 2010
SI 290/2010

TORT
Nuisance
Ambrose v Sleavin
TRADE MARKS

Statutory Instrument
Trade marks (amendment) rules 2010
SI 410/2010

TRANSPORT

Statutory Instruments
Taxi regulation act 2003 (wheelchair accessible hackneys)
SI 291/2010
Vehicle registration and taxation (amendment) regulations 2010
SI 400/2010

AT A GLANCE

European Directives implemented into Irish Law 15/11/2010
Information compiled by Clare O’Dwyer, Law Library, Four Courts

European Communities (authorisation, placing on the market, use and control of plant protection products) (amendment) (no. 3) regulations 2010
SI 344/2010

European Communities (beef carcase classification) regulations 2010
REG/1234-2007, REG/1249-2008
SI 363/2010

European communities (common agricultural policy) (scrutiny of transactions) regulations 2010
REG/485-2008
SI 422/2010

European communities (conservation of wild birds (Baldoye bay special protection area 004016)) regulations 2010
DIR/2009-147
SI 275/2010

European Communities (conservation of wild birds (Ballyteigue Burrow special protection area 004020)) regulations 2010
DIR/2009-147
SI 268/2010

European Communities (control of mussel fishing) regulations 2008 (amendment) regulations 2010
DIR/1992-43
SI 412/2010

European Communities (cosmetic products) (amendment) (No.2) regulations 2010
DIR/2010-4
SI 417/2010

European Communities (cosmetic products) (amendment) (no.3) regulations 2010
DIR/1976-768
SI 440/2010

European Communities (establishing an infrastructure for spatial information in the European communities (INSPIRE)) regulations 2010
DIR/2007/2
SI 382/2010

European Communities (food supplements) (amendment) regulations 2010
DIR/2002-46, REG/1170-2009
SI 355/2010

European Communities (internal market in electricity) regulations 2010
DIR/2009-72
SI 450/2010

European Communities (licensing of railway undertakings) (amendment) regulations 2010
DIR/95-18
SI 298/2010

European Communities (marketing standards for poultry meat) regulations 2010
REG/1234-2007
SI 328/2010

European Communities (phytosanitary measures) (Anoplophora chinensis) (amendment) regulations 2010
DEC/2010-380
SI 404/2010

European Communities (placing on the market of pyrotechnic articles) (amendment) regulations 2010
DIR/2007-23
SI 416/2010

European Communities (public participation) regulations 2010
DIR/2003-35
SI 352/2010

European Communities (restrictive measures) (Iran) (amendment) regulations 2010
REG/423-2007
SI 265/2010

European Communities (road transport) (working conditions and road safety) (amendment) regulations 2010
REG/3821-1985, REG/561-2006, REG/581-2010
SI 431/2010

European communities (traditional specialities guaranteed) regulations 2010
REG/509-2006
SI 379/2010

European Communities (train drivers certification) regulations 2010
DIR/2007-59
SI 399/2010

European Communities (trust or company service providers) (temporary authorisation) regulations 2010
DIR/2005-60
SI 347/2010

European Communities (water policy)
Anglo Irish Bank Corporation (No. 2) Bill 2009
Order for 2nd Stage – Dáil [pmb] Deputy Joan Burton

Appointments to Public Bodies Bill 2009
Bill 64/2009
2nd Stage – Seanad [pmb] Senator Shane Ross (Initiated in Seanad)

Biological Weapons Bill 2010
Bill 43/2010
Committee Stage – Dáil

Broadband Infrastructure Bill 2008
Bill 8/2008
2nd Stage – Seanad [pmb] Senators Shane Ross, Feardal Quinn, David Norris, Joe O’Toole, Róinín Mullen and Ivana Bacik (Initiated in Seanad)

Building Control (Amendment) Bill 2010
Bill 41/2010
1st Stage – Dáil [pmb] Deputy John O’Donoghue

Chemicals (Amendment) Bill 2010
Bill 47/2010
Report Stage – Dáil

Child Care (Amendment) Bill 2009
Bill 61/2009
Committee Stage – Dáil (Initiated in Seanad)

Civil Law (Miscellaneous Provisions) Bill 2010
Bill 44/2010
2nd Stage – Dáil

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

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

Civil Liability (Good Samaritans and Volunteers) Bill 2009
Bill 38/2009
2nd Stage – Dáil [pmb] Deputies Billy Timmins and Charles Flanagan

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

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

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad [pmb] Senators Ivana Bacik

Committees of the Houses of the Oireachtas (Powers of Inquiry) Bill 2010
Bill 1/2010
2nd Stage – Dáil [pmb] Deputy Pat Rabbitte

Communications (Retention of Data) Bill 2009
Bill 52/2009
Committee Stage – Seanad

Construction Contracts Bill 2010
Bill 21/2010
Order for Committee Stage – Seanad [pmb] Senator Fergal Quinn

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

Consumer Protection (Gift Vouchers) Bill 2009
Bill 66/2009
2nd Stage – Seanad [pmb] Senators Brendan Ryan, Alex White, Michael McCarthy, Phil Prendergast, Ivana Bacik and Dominic Hannigan (Initiated in Seanad)

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

Corporate Governance (Codes of Practice) Bill 2009
Bill 22/2009
Order for 2nd Stage – Dáil [pmb] Deputy Eamon Gilmore

Credit Institutions (Financial Support) (Amendment) Bill 2009
Bill 12/2009
2nd Stage – Seanad [pmb] Senators Paul Coghlan, Maurice Cummins and Frances Fitzgerald (Initiated in Seanad)

Credit Union Savings Protection Bill 2008
Bill 12/2008
2nd Stage – Seanad [pmb] Senators Joe O’Toole, David Norris, Feardal Quinn, Shane Ross, Ivana Bacik and Rónín Mullen (Initiated in Seanad)

Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010
Bill 2/2010
Committee Stage – Dáil

Criminal Justice (Public Order) Bill 2010
Bill 7/2010
Committee Stage – Dáil

Criminal Justice (Violent Crime Prevention) Bill 2008
Bill 58/2008
Committee 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 (Initiated in Seanad)

Criminal Law (Defence and Dwellings) Bill 2010
Bill 42/2010
2nd Stage – Dáil

Criminal Law (Insanity) Bill 2010
Bill 5/2010
Committee Stage – Dáil (Initiated in Seanad)

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

Dublin Docklands Development (Amendment) Bill 2009
Bill 75/2009
2nd Stage – Dáil [pmb] Deputy Phil Hogan

Education (Amendment) Bill 2010
Bill 45/2010
2nd Stage – Dáil

Electoral (Amendment) Bill 2010
Bill 24/2010

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

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

Electoral Representation (Amendment) Bill 2010
Bill 23/2010
2nd Stage – Dáil [pmb] Deputy Phil Hogan

Employment Agency Regulation Bill 2009
Bill 54/2009
Order for Report Stage – Dáil

Employment Law Compliance Bill 2008
Bill 18/2008
Committee Stage – 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)

Female Genital Mutilation Bill 2010
Bill 14/2010
2nd Stage – Seanad [pmb] Senator Ivana Baik

Financial Emergency Measures in the Public Interest Bill 2010
Bill 17/2010
2nd Stage – Dáil [pmb] Deputy Leo Varadkar

2nd Stage – Dáil [pmb] Deputy Ciaran Lynch

Food (Fair Trade and Information) Bill 2009
Bill 73/2009
1st Stage – Dáil [pmb] Deputies Michael Creed and Andrew Doyle

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

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

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

Guardianship of Children Bill 2010
Bill 13/2010
1st Stage – Dáil [pmb] Deputy Kathleen Lynch

Human Body Organs and Human Tissue Bill 2008
Bill 43/2008
2nd Stage – Seanad [pmb] Senator Fergal Quinn (Initiated in Seanad)

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

Immigration, Residence and Protection Bill 2010
Bill 38/2010
Committee Stage – Dáil

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

Industrial Relations (Protection of Employment) (Amendment) Bill 2009

Institutional Child Abuse Bill 2009
Bill 46/2009
2nd Stage – Dáil [pmb] Deputy Ruairí Quinn

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

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

Local Government (Mayor and Regional Authority of Dublin) Bill 2010
Bill 48/2010
2nd Stage – Dáil

Local Government (Planning and Development) (Amendment) Bill 2009
Bill 21/2009
Order for 2nd Stage – Dáil [pmb] Deputy Martin Ferris

Local Government (Rates) (Amendment) Bill 2009
Bill 40/2009
2nd Stage – Dáil [pmb] Deputy Ciarán Lynch

Medical Practitioners (Professional Indemnity) (Amendment) Bill 2009
Bill 53/2009
2nd Stage – Dáil [pmb] Deputy James O’Reilly

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

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

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

Mobile Phone Radiation Warning Bill 2010
Bill 40/2010

Order for 2nd Stage – Seanad [pmb] Senator Mark Daly

Multi-Unit Developments Bill 2009
Bill 32/2009
Committee Stage – Dáil (Initiated in Seanad)

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

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

Non-medicinal Psychoactive Substances Bill 2010
Bill 18/2010
1st Stage – Dáil [pmb] Deputy Aengus Ó Snodaigh

Nurses and Midwives Bill 2010
Bill 16/2010
Committee Stage – Dáil

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

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
2nd Stage – Seanad (Initiated in Dáil)

Planning and Development (Amendment) Bill 2010
Bill 10/2010
Order for 2nd Stage – Dáil [pmb] Deputies for Costello and Jan O’Sullivan

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

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

Planning and Development (Taking in Charge of Estates) (Time Limit) Bill 2009
Bill 67/2009
Order for 2nd Stage – Dáil [pmb] Deputy Sean Sherlock

Prevention of Corruption (Amendment)
Bill 2008
Bill 34/2008
Order for Report Stage – Dáil

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

Proceeds of Crime (Amendment) Bill 2010
Bill 30/2010
1st Stage – Dáil [pmb] Deputy Pat Rabbitte

Prohibition of Depleted Uranium Weapons Bill 2009
Bill 48/2009
Committee Stage – Seanad [pmb] Senators Dan Boyle, Deirdre de Burca and Fiona O’Malley

Prohibition of Female Genital Mutilation Bill 2009
Bill 48/2009
Committee Stage – Dáil [pmb] Deputy Jan Sullivan

Property Services (Regulation) Bill 2009
Bill 28/2009
2nd Stage – Dáil (Initiated in Seanad)

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

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

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

Sea Fisheries and Maritime Jurisdiction (Fixed Penalty Notice) (Amendment) Bill 2009
Bill 27/2009
2nd Stage – Dáil [pmb] Deputy Jim O’Keffe

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
2nd Stage – Seanad [pmb] Senator Maurice Cummins

Small Claims (Protection of Small Businesses) Bill 2009
Bill 26/2009
2nd Stage – Dáil [pmb] Deputy Leo Varadkar

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

Statistics (Heritage Amendment) Bill 2010
Bill 36/2010
Order for 2nd Stage – Seanad [pmb] Senator Labhrás Ó Murchú

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

Sunbeds Regulation Bill 2010
Bill 29/2010
Order for 2nd Stage – Seanad [pmb] Senator Frances Fitzgerald

Sunbeds Regulation (No. 2) Bill 2010
Bill 33/2010
Order for 2nd Stage – Dáil [pmb] Deputy Jan O’Sullivan

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

Twenty-eighth Amendment of the Constitution Bill 2007
Bill 14/2007
Order for 2nd Stage – Dáil

Twenty-ninth Amendment of the Constitution Bill 2009
Bill 71/2009
Order for 2nd Stage – Dáil [pmb] Deputy Arthur Morgan

Value-Added Tax Consolidation Bill 2010
Bill 49/2010
Committee Stage – Dáil

Vehicle Immobilisation Regulation Bill 2010
Bill 46/2010
1st Stage – Dáil [pmb] Deputy Simon Coveney

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

Whistleblowers Protection Bill 2010
Bill 8/2010
Order for 2nd Stage – Dáil [pmb] Deputy Pat Rabbitte

Whistleblowers Protection (No. 2) Bill 2010
Bill 1st Stage – Seanad [pmb] Senators Dominic Hannigan, Brendan Ryan, Alex White, Michael McCarthy, Phil Prendergast and Ivana Bacik

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

**ABBREVIATIONS**

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
ELR = Employment Law Review
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
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.
Introduction

It is often recalled that Al Capone was jailed for tax evasion rather than the other more nefarious pursuits with which he occupied himself. As we are inundated with revelations of apparent rife criminality in the Irish banking sector and other related fields, there has been an understandable public outcry for prosecutions.

The prospect of numerous long and expensive fraud trials is not at all attractive for prosecution authorities, not least, given the traditionally perceived difficulties of bringing such prosecutions home. However, other avenues are open.

There has yet to be a single prosecution in Ireland under the Market Abuse Regulations which set out at Regulation 49 a number of offences all of which on summary conviction carry a fine of €5,000 and/or 12 months’ imprisonment.

Although, naturally, one’s eye is drawn to the ‘head-line’ offences of Insider Dealing and Market Manipulation (which are also indictable with a maximum penalty of a €10,000,000 fine and/or 10 years’ imprisonment) the other ‘summary trial only’ offences also deserve our attention.

It should be appreciated that for a former pillar of society, a criminal conviction and the loss of one’s liberty for a number of months can be a heavy penalty indeed, involving, as it does, the loss of social standing and the stigma attached to having a criminal record, not to mention the difficulties involved in securing entry to the United States.

Summary trials, as well as being cheaper to run, are shorter and more focused and give the opportunity to address widespread systematic abuse in a measured fashion.

Where a person is convicted of a Regulation 49 offence and the contravention continues after the conviction, that person is guilty of a further offence on every day which the contravention continues and is liable on summary conviction to the same penalty for each such further offence. The Central Bank may also bring such summary prosecutions. The offences are as follows:

1. Insider Dealing (Regulation 5),
2. Market Manipulation (Regulation 6),
3. Failure to comply with a requirement to prevent and detect market manipulation practices (Regulation 7),
4. Failure to disclose inside information (Regulations 10 & 11),
5. Failure of managers to disclose information in relation to certain of their transactions (Regulation 12),
6. Failure to notified suspicious transactions (Regulations 13 & 14),
7. Failure to fairly present recommendations on investment strategy (Regulations 17-20),
8. Failure to disclose (conflicts of) interest(s) in recommendations (Regulations 21 & 22),
9. Failure when disseminating recommendations produced by third parties to disclose certain information relating thereto (Regulations 23 & 24),
10. Managing a regulated financial service provider while disqualified (Regulation 47).

Insider Dealing (Regulation 5) and Market Manipulation (Regulation 6) are also triable on indictment and, when so tried, carry a maximum penalty on conviction of a €10,000,000 fine and/or 10 years’ imprisonment.

The Central Bank also has extrajudicial enforcement powers under Part 5 of the Regulations in relation to all the above offences and may, where it has reason to suspect that a prescribed activity is being, or has been, committed, appoint assessors to investigate and if appropriate recommend sanctions. Sanctions range from cautions and reprimands to monetary penalties and disqualification from

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1 Regulations (S.I. No. 342/2005) implementing Market Abuse Directive (2003/6/EC). The Regulations cover actions in Ireland regarding financial instruments admitted to, or seeking admission to, trading on a regulated market in any EU state and to actions taken anywhere in relation to financial instruments admitted to, or seeking admission to, trading on any regulated market in Ireland (Regulation 4(1)(2)).
2 They are also offences to which s.32 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 apply by virtue of Regulation 49(2).
3 Central Bank and Financial Services Authority of Ireland.
4 Regulation 53.
5 They are offences to which s.32 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005 apply by virtue of Regulation 49(2).
6 Regulations 34-48.
7 Regulation 35.
8 Either public or private. Regulation 41(a)&(b).
9 Up to €2,500,000 in any case (Regulation 41(c)). See also regulation 46(2).
the management of, or having a qualifying holding\textsuperscript{10} in, any regulated financial service provider\textsuperscript{11}.

**Regulation 49 offences**

**Insider Dealing (Regulation 5)**

Insider Dealing is a person who possesses information not available to the general public using that information to acquire or dispose of financial instruments to which that information relates either on his own account or that of a third party or to attempt to do so directly or indirectly.

Insider dealing is also dealt with in Part V of the Companies Act 1990\textsuperscript{12}, as amended, a scheme parallel to the Market Abuse Regulations carrying both civil and criminal liabilities.

Inside information is of a precise nature\textsuperscript{13} relating to one or more issuers of financial instruments or to one or more financial instruments which has not been made public and which information, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

This includes non-public precise information relating to one or more such derivatives which users of markets on which such derivatives are traded would expect to receive in accordance with accepted market practices on those markets\textsuperscript{14}.

Inside information also means, in the case of persons charged with the execution of orders concerning financial instruments, precise information conveyed by a client relating to that client's pending orders regarding one or more issuers of financial instruments or one or more financial instruments, and which information, were it made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments\textsuperscript{15}.

The view of the Supreme Court in *Fyffes plc v DCC plc* [2009] 2 IR 417 is that the test of what constitutes inside information is an objective test. Per Denham J. at p 714:-

> “The test, as set out clearly in s 108(1) [of the Companies Act 1990, which outlaws insider dealing]\textsuperscript{16}, is an objective test. Was there information? Was it generally available? If it was made generally available, would it be likely materially to affect the price of the shares on the market?”

The regulation goes on to state that inside information may not be disclosed except in the normal course of the exercise one's employment, profession or duties, nor may one recommend or induce another, on the basis of inside information, to acquire or dispose of financial instruments to which that inside information relates\textsuperscript{17}.

This ban relates to anyone possessing inside information by virtue of his membership of the administrative, management or supervisory bodies of the issuer of the financial instrument in question, his holding in the capital of the issuer, his having access to the information through the exercise of his employment, profession or duties, or as a result of criminal activities. The ban also relates to natural persons who take part in the decision to carry out transactions on behalf of legal persons\textsuperscript{18} and any other person who possesses information which he knows or ought to know is inside information\textsuperscript{19}.

Insider dealing also includes financial instruments not admitted to, or seeking admission to, trading on a regulated market in an EU state but the value of which depends on such instruments\textsuperscript{20}.

There are a number of statutory defences. The first is an understandable exemption relating to transactions conducted in the discharge of an obligation to acquire or dispose of a financial instrument that has become due and which results from an agreement concluded before the person concerned possessed the inside information\textsuperscript{21}.

There also an exemption for actions taken in conformity with takeover rules. Having access to inside information relating to another company and using it in the context of a public takeover offer for the purpose of gaining control of that company or proposing a merger with that company in conformity with rules made under s. 8 of the Irish Takeover Panel Act 1997 is not a contravention of Regulation 5\textsuperscript{22}.

\textsuperscript{10} A direct or indirect holding of shares or other interest in a regulated financial service provider which represents 10% or more of the capital or the voting rights or a direct or indirect holding of shares or other interest in a regulated financial service provider which represents less than 10% of the capital or voting rights but which, in the opinion of the Bank, makes it possible to control or exercise a significant influence over the management of the regulated financial service provider. (Regulation 34).

\textsuperscript{11} Regulation 41(d).

\textsuperscript{12} Nis. 33 of 1990.

\textsuperscript{13} “Information of a precise nature” (also ‘precise information’ in this article) is that which indicates a set of circumstances which exists or may reasonably be expected to come into existence, or an event which has occurred or may reasonably be expected to occur, and is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments (Regulation 2).

\textsuperscript{14} Regulation 2(1).

\textsuperscript{15} Regulation 2(1) i.e. Information that a reasonable investor would be likely to use as part of the basis of his investment decisions. The difficulties in profiling the ‘reasonable investor’ were explored by the Supreme Court in *Fyffes plc v DCC plc* [2009] 2 IR 417.

\textsuperscript{16} “It shall not be lawful for a person who is, or at any time in the preceding 6 months has been, connected with a company to deal in any securities of that company if by reason of his so being, or having been, connected with that company he is in possession of information that is not generally available, but, if it were, would be likely materially to affect the price of those securities.”

\textsuperscript{17} Regulation 5(1)&(2)

\textsuperscript{18} Regulation 5(3)(b)

\textsuperscript{19} Regulation 5(3)(c). This however does not preclude one company dealing in the financial instruments of another if an officer of the first company has information received in the course of his duties consisting only of the fact that the first named company proposes to (attempt to) acquire such financial instruments (Regulation 8(3)).

\textsuperscript{20} Regulation 5(4).

\textsuperscript{21} Regulation 5(5).

\textsuperscript{22} Regulation 8(2). Actions taken in compliance with rules made under s. 8 of the Irish Takeover Panel Act 1997 (in particular rules relating to the timing, dissemination or availability, content and standard of care applicable to a disclosure, announcement, communication or release of information during the course of a public takeover offer) is not a contravention of Regulation 5 provided that the
The final exemption/statutory defence concerns buy-back programmes or stabilisation measures\(^ {23} \). Regulation 5 does not apply to trading in own shares in buy-back programmes, or to trading to secure the stabilisation of a financial instrument, provided that such trading is carried out in accordance with the EU Market Abuse Regulation\(^ {24} \), or to the purchase of own shares carried out in accordance with Part XI of the Companies Act 1990.

**Market Manipulation (Regulation 6)**

Market Manipulation is defined as transactions or orders to trade which give, or are likely to give, false or misleading signals as to the supply of, demand for, or price of, financial instruments, or which secure by a person or persons acting in collaboration the price of one or several financial instruments at an abnormal or artificial level.

There is an exception where the person, who enters into the transactions or issues the orders to trade, establishes that the reasons for so doing are legitimate and that the transactions or orders to trade, as the case may be, conform to accepted market practices on the regulated market concerned\(^ {25} \).

Market Manipulation also covers transactions or orders to trade which employ fictitious devices or any other form of deception or contrivance\(^ {26} \), or dissemination of information through the media, including the Internet, or by any other means, which gives, or is likely to give, false or misleading signals as to financial instruments. This also including the dissemination of rumours and false or misleading news, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading\(^ {27} \).

There an exemption for actions taken in conformity with takeover rules. Having access to inside information relating to another company and using it in the context of a public takeover offer for the purpose of gaining control of that company or proposing a merger with that company in conformity with rules made under s. 8 of the Irish Takeover Panel Act 1997 is not a contravention of Regulation 6\(^ {28} \).

Another exemption/statutory defence relates to buy-back programmes or stabilisation measures\(^ {29} \). Regulation 6 does not apply to trading in own shares in buy-back programmes, or to trading to secure the stabilisation of a financial instrument, provided that such trading is carried out in accordance with the EU Market Abuse Regulation\(^ {30} \), or to the purchase of own shares carried out in accordance with Part XI of the Companies Act 1990.

**Requirements to prevent and detect market manipulation practices (Regulation 7)**

The Central Bank is obliged to require that market operators\(^ {31} \) structure their operations so that market manipulation practices are prevented and detected, and that market operators report to it on a regular basis in accordance with arrangements drawn up by the Bank\(^ {32} \).

The Central Bank may – but had not done as yet - impose requirements concerning transparency of transactions concluded, total disclosure of price-regulation agreements, a fair system of order pairing, the introduction of an effective atypical order detection scheme, sufficiently robust financial instrument reference price-fixing schemes and clarity of rules on the suspension of transactions\(^ {33} \) and any person who contravenes any such requirement would be guilty of an offence\(^ {34} \).

**Failure to disclose inside information (Regulations 10 & 11)**

Regulation 10 imposes a positive duty on the issuer of financial instruments to disclose publicly and without delay inside information which directly concerns the said issuer. Such disclosure must be done in a way that enables fast access to it and enables the public to assess it correctly and in a timely manner. This duty includes the positive obligation to disclose publicly any significant change concerning such information already disclosed and to do so immediately and through the same channels used for the original disclosure\(^ {35} \).

The fact that an issuer does not disclose such information does not mean that it can be used by an insider. Per Fennelly J. (Supreme Court) in *Fyffes plc v DCC plc* [2009] 2 IR 417 at 742:

> “Insiders cannot be allowed to use inside information merely because – perhaps especially because – the company does not itself disclose it.”

This regulation only applies to financial instruments where the issuer has made a request for its admittance to trading on a regulated market or has approved its admittance to trading on a regulated market\(^ {36} \).

In particular, the issuer is required to post on its internet site(s) for at least six months any inside information which is required to publicly disclose\(^ {37} \). Such disclosure may not be combined by the issuer with the marketing of its activities in a manner which is likely to mislead the public\(^ {38} \).

Given the regulations’ genesis as an EU directive, the issuer is obliged take reasonable care to ensure that such disclosure is synchronised as closely as possible between all

\(^ {23} \) See Regulation 8(4).


\(^ {25} \) See also Regulation 2(4) & Schedule 2.

\(^ {26} \) See also Regulation 2(5) & Schedule 3

\(^ {27} \) Regulation 2(1) & (3).

\(^ {28} \) Cf. Footnote 21.

\(^ {29} \) Regulation 9(1).

\(^ {30} \) Commission Regulation (EC) No 2273/2003 (Supra).

\(^ {31} \) Market operators are persons who manage and/or operate the business of a regulated market, including regulated markets which manage and/or operate their own business as a regulated market (Regulation 2).

\(^ {32} \) Regulation 7(1).

\(^ {33} \) Regulation 7(2).

\(^ {34} \) Regulation 49(1)(c)

\(^ {35} \) Regulation 10(1)&(4)&(5)

\(^ {36} \) Regulation 10(12).

\(^ {37} \) Regulation 10(2).

\(^ {38} \) Regulation 10(3).
categories of investors across the regulated markets of the EU states.\(^{39}\)

An exception/statutory defence allowing the issuer to delay public disclosure of inside information is set out at Regulation 10(7). Such disclosure may be delayed to avoid prejudicing the issuer’s “legitimate interests” provided that such failure to disclose would not be likely to mislead the public and that the issuer is able to ensure the confidentiality of that non-disclosed inside information.

The issuer’s “legitimate interests” may include negotiations in being where such negotiations would be likely to be affected by public disclosure in particular where the issuer is in grave financial difficulties, though still solvent, and said negotiations are designed to ensure the issuer’s long-term financial recovery and would be jeopardised by such disclosure. Even in these circumstances public disclosure of information may only be delayed for a limited period.\(^{40}\)

The issuer’s “legitimate interests” may also include decisions taken or contracts made by the issuer’s management body which need the approval of another body of the issuer in order to become effective. This provided that the organisation of the issuer requires separation between those bodies and that public disclosure of the information before such approval together with the simultaneous announcement that the approval was still pending would jeopardise the correct assessment of the information by the public.\(^{41}\)

To avoid the misuse of this undisclosed inside information by its being leaked, the issuer has several positive obligations:

Firstly, to take effective measures to deny access to the information to persons other than those who require it for the exercise of their functions within the issuer.

Secondly to take the measures necessary to ensure that persons with access to the information acknowledge the legal and regulatory duties entailed and are aware of the sanctions attaching to the misuse or improper circulation of that information.

Thirdly, to have in place measures which allow immediate public disclosure in case the issuer is not able to ensure the confidentiality of the information.\(^{42}\)

Where the issuer, its servants or agents, discloses any inside information to a third party in the normal course of business, the party which made the leak, must make complete and effective public disclosure of the leaked information (except where the third party receiving the inside information is under an obligation of confidentiality).\(^{43}\)

As regards timing, the party which made the leak must come clean simultaneously in the case of an intentional disclosure and must come clean without delay in the case of a non-intentional disclosure.\(^{44}\)

Regulation 11 imposes a further obligation on the issuer and anyone acting on his behalf or for his account to draw up a list of all persons working for them, as employees or otherwise, who have access to inside information relating directly or indirectly to the issuer. This duty only arises where the issuer has made a request that the financial instrument concerned be admitted to trading on a regulated market or has approved its admission to a regulated market.

This “list of insiders” must contain the following information:\(^{45}\): (a) the name of any person having access to inside information; (b) the reason why any such person is on the list, and (c) the date on which the list of insiders was created and updated. The issuer and anyone acting on his behalf or for his account must regularly update this list and give a copy to the Central Bank if the Bank so requests.\(^{46}\)

Managers’ transactions (Regulation 12)

Managers operating within an issuer of financial instruments registered in the State and persons closely associated with them must notify to the Central Bank within five working days of transactions conducted on their own account relating to shares in the issuer, or to derivatives other financial instruments linked to them.\(^{47}\)

A ‘manager’ in the context of Regulation 12 or to give him his full title a “person discharging managerial responsibilities” is either a member of one or more of the administrative, management or supervisory bodies of the issuer of the relevant instrument or a senior executive who is not a member of any such body but who has regular access to inside information relating to the issuer and the power to make managerial decisions affecting the future developments and business prospects of the issuer.\(^{48}\)

“Persons closely associated” with managers in the context of Regulation 12 are:

- (a) The manager’s spouse;
- (b) The manager’s dependant children;
- (c) Other relatives of the manager who have lived under his roof for at least one year on the date of the transaction concerned;
- (d) Any person whose managerial responsibilities are discharged by a manager in the issuer, or whose managerial responsibilities are discharged by such a manager’s spouse, dependant child or other of his relatives who has lived under that manager’s roof for at least one year on the date of the transaction concerned, or a company controlled by such a person or set up to benefit such a person or a person or company whose economic interests are substantially equivalent to such a person.

If the issuer is not registered in Ireland, but in another EU state, managers and their close associates must notify the making such transactions in accordance with the rules of notification of that EU state as they relate to such instruments.\(^{49}\)

Similarly, where such issuers are not registered in Ireland, but in a non-EU state, managers and their close associates must notify within five working days the making such transactions to the competent authority in the EU state to

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39 Regulation 10(6) where the instrument concerned has been admitted to trading or has requested admission.
40 Regulation 10(8)(a)
41 Regulation 10(8)(b)
42 Regulation 10(9)
43 Regulation 10(10) & (11)
44 Schedule 4
45 Regulation 11(3) & (4)
46 Regulation 12(1) & (3).
47 Both definitions are in Regulation 12(8).
48 Regulation 12(2)(a).
which the issuer is required to file its annual information under the Prospectus Directive\textsuperscript{49}. The Central Bank must ensure that public access to such information is readily available without delay.\textsuperscript{50}

**Failure to notify suspicious transactions (Regulations 13 & 14)**

Regulation 13 obliges certain classes of prescribed persons to notify the Central Bank without delay of transactions which they reasonably suspect constitute market abuse\textsuperscript{51}. A “prescribed person” is any natural or legal person (including investment firms, credit institutions or market operators) which arranges transactions in financial instruments on a professional basis and is registered in Ireland or is a branch operating in Ireland of any such person or company which is registered in another EU state\textsuperscript{52}.

The required notification must include (a) a description of the transaction, including the type of order and the type of trading market concerned; (b) the reasons for the suspicion; (c) the identity of the persons on whose behalf the transaction was carried out and the other persons involved; (d) the prescribed person’s role in the transaction; and (e) other relevant information\textsuperscript{53}. The notification must at least contain the reasons for the suspicion and any gaps in the information at the time of notification must be furnished as soon as such information becomes available\textsuperscript{54}.

Prescribed persons enjoy immunity for acts done in good faith pursuant to their duty to notify the Central Bank of such transactions but may not inform any other person of this notification, in particular they may not ‘tip off’ the persons on whose behalf the transaction was carried out or parties related to them unless otherwise legally obliged to so do\textsuperscript{55}. Likewise, the Central Bank may not disclose the name of the notifier if such disclosure would harm or be likely to harm the notifier\textsuperscript{56}.

On receipt of such notification the Central Bank must share this information with the relevant competent authorities of each regulated market on which the instrument concerned is admitted to trading or is the subject of a request to be so admitted\textsuperscript{57}.

In a Common Law context, where importance is placed on the *mens rea*, Regulation 13(2) which provides that “[a]ny prescribed person shall decide on a case-by-case basis whether there are reasonable grounds for suspecting that a transaction involves market abuse after taking into account the elements constituting market abuse” would appear to construct a de jure statutory defence. Evidence to ground such a notification would appear to need to be as clear as one’s proverbial nose before failure to notify could be deemed a criminal dereliction of a statutory duty. It is a separate offence to give the Central Bank a Regulation 13 Notification which one knows to be false or misleading in a material particular or which one does not believe to be true, carrying upon summary conviction a fine of €5,000 and/or 12 months’ imprisonment\textsuperscript{58}.

**Failure to present fairly investment strategy recommendations (Regulations 17-20)**

Recommendations in this context consist of information, produced by independent analysts, investment firms, credit institutions, or any other person whose main business it is to produce such recommendations, their servants or agents, that express, directly or indirectly, a particular investment recommendation in respect of a financial instrument or an issuer thereof or information produced by other persons which directly recommends a particular investment decision in respect of financial instruments\textsuperscript{59} and which is intended for distribution channels\textsuperscript{60} or for the public\textsuperscript{61}.

A person who produces or disseminates such recommendations must take reasonable care to ensure that such recommendations are fairly presented, and must disclose any of its interests in, or conflicts of interest concerning, the financial instruments and issuers to which the recommendation relates\textsuperscript{62}.

Except in the case of recommendations produced or disseminated in Ireland by journalists who are subject to equivalent appropriate regulation which satisfies the Central Bank\textsuperscript{63}, anyone who produces a recommendation must ensure that it discloses clearly and prominently the name and job title of the individual who prepared it and the name of the person responsible for its production\textsuperscript{64}.

Journalists however do not have *carte blanche*. Where a journalist acts in his professional capacity, the dissemination of information will be assessed, for the purposes of the definition of “market manipulation” taking into account the code of conduct governing the journalist’s profession. This privilege is set at naught, however, where the journalist derives, either directly or indirectly, an advantage or profit from the dissemination of the information concerned\textsuperscript{65}.

Where an investment firm or credit institution is responsible for the preparation or production of a recommendation in the conduct of its business, it must ensure that the recommendation indicates clearly and prominently the identity of the relevant competent authority of the investment firm or credit institution\textsuperscript{66}.

Where neither an investment firm nor a credit institution is responsible for the preparation or the production of a recommendation but rather a person subject to self-
regulatory standards or codes of conduct is, such a person must ensure that a reference to those standards or codes, as the case may be, be disclosed clearly and prominently in the recommendations\(^7\).

These recommendations must in all circumstances be fairly presented and, subject to the aforementioned journalistic exemption, the person responsible for their preparation or production in the course of his business or profession must take reasonable care to ensure that:-

(a) facts be distinguished from comment;
(b) sources be reliable and, if not, that doubtful sources be identified;
(c) all projections, forecasts and price targets be clearly labelled as such and that the material assumptions made in producing or using them be indicated\(^8\).
(d) any recommendation can be justified to the Central Bank if it so requests\(^9\).

In addition, where the producer or disseminator of recommendations in the course of his business or profession is an independent analyst, an investment firm, a credit institution, a related company within the meaning of s.140 of the Companies Act 1990, a person whose main business or profession is to produce such recommendations, or a person working for any of the aforesaid, the said producer/disseminator must take reasonable care to ensure\(^10\):

(a) that all material sources are indicated;
(b) that any basis of valuation or other methodology used to evaluate a financial instrument or an issuer of a financial instrument, or to set a price target for a financial instrument, is adequately summarised (unless this would be disproportionately long in relation to the length of the recommendation\(^1\));
(c) that the meaning of any recommendation made, such as ‘buy’, ‘sell’ or ‘hold’, which may include the time horizon of the investment to which the recommendation relates, is adequately explained and that any appropriate risk warning\(^2\) is indicated (unless this would be disproportionately long in relation to the length of the recommendation\(^3\));
(d) that reference is made to the planned frequency of any updates of the recommendation and to any major changes in any coverage policy previously announced;
(e) that the date on which the recommendation was first released for distribution is indicated clearly and prominently, as well as the relevant date and time for any financial instrument price mentioned, and
(f) where a recommendation differs from a recommendation concerning that the same financial instrument or issuer, issued during the previous 12 months, this change and the date of the earlier recommendation must be indicated clearly and prominently.

**Disclosure of (conflicts of) interest(s) in recommendations (Regulations 21 & 22)**

Persons who make such recommendations in the course of their business or profession have a obligation to disclose therein any interests or conflict of interest they may have in relation the financial instrument or issuer in question\(^4\).

Their obligation is fleshed out in Regulations 21 & 22: They must disclose all relationships and circumstances that might reasonably be expected to impair the objectivity of their recommendations, in particular where they have a significant financial interest in one or more of the financial instruments which are the subject of the recommendations, or where they have a significant conflict of interest with respect to any issuer to which the recommendations relate\(^5\).

In the case of a company, this obligation extends to any person working for, or providing a service to, the company who was involved in preparing the recommendation\(^6\).

It must also include any and all such interests or conflicts of interest of that company, or of related companies, which would be reasonably expected to be accessible to the persons involved in the preparation of the recommendations and also those interest and conflicts of interest known to persons who, although not involved in the preparation of the recommendations, could reasonably be expected to have access to the recommendations prior to their dissemination to customers or the public\(^7\).

Where the producer of the recommendations is an independent analyst, an investment firm, a credit institution, a related company, or a person whose main business it is to produce recommendations, that producer, in any recommendations it produces, must disclose clearly and prominently the following information on its interests and conflicts of interest\(^8\):-

(a) any major shareholding\(^9\) that exists between that producer or any related company on the one hand and the issuer on the other;
(b) any other significant financial interest held by that producer or any related company in relation to the issuer;
(c) where applicable, a statement that the producer or any related company is a market maker\(^10\) or

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\(^7\) The recommendations having been produced or disseminated in the manner of the producer’s business or profession. Regulation 18(3).

\(^8\) Regulation 19(1).

\(^9\) Regulation 19(2).

\(^10\) Regulation 20.

\(^1\) Regulation 21(1).

\(^2\) Regulation 21(2).

\(^3\) Regulation 21(3).

\(^4\) Regulation 21(4).

\(^5\) Regulation 22(1).

\(^6\) Regulation 22(2).

\(^7\) This includes (a) a shareholding held by the producer or any related company that exceeds 5% of the total issued share capital in the issuer, and (b) a shareholding held by the issuer exceeding 5% of the total issued share capital in the producer or any related company (Regulation 22(2)).

\(^8\) A market maker is a company, or an individual, that quotes both a buy and a sell price in a financial instrument or commodity held in inventory, hoping to make a profit on the bid-offer spread (the
liquidity provider in the financial instruments of the issuer;
(d) where applicable, a statement that the producer or any related company has been lead manager or co-lead manager during the previous 12 months of any publicly disclosed offer of financial instruments of the issuer;
(e) where applicable, a statement that the producer or any related company is party to any other agreement with the issuer relating to the provision of investment banking services, and
(f) where applicable, a statement that the producer or any related company is party to an agreement with the issuer relating to the production of the recommendations.

Also, where such a producer of recommendations is an investment firm or credit institution it must disclose clearly and prominently the following information:

(a) in general terms, its organisational and administrative arrangements for the prevention and avoidance of conflicts of interest with respect to recommendations, including information barriers;
(b) with respect to persons working for them who are involved in preparing recommendations: whether or not their remuneration is tied to the company’s investment banking transactions or that of any related company;
(c) where persons referred to above receive or purchase the shares of the issuers prior to a public offering of the shares, the price at which the shares were acquired and the date of their acquisition, and
(d) on a quarterly basis, the proportion of all recommendations that fall within the categories of ‘buy’, ‘hold’, ‘sell’ or equivalent terms, as well as the proportion of issuers corresponding to each of those categories to which it has supplied material investment banking services over the previous 12 months.

Where a full disclosure under these regulations would be disproportionately long given the length of the recommendations, a clear and prominent reference to where the disclosure can be directly and easily accessed by the public is sufficient.

Dissemination of recommendations produced by third parties (Regulations 23 & 24)

Except in the case of news reporting on recommendations produced by a third party where the substance of the recommendations is not altered, a person which produces or disseminates recommendations in the course its business or profession (a “relevant person”) disseminating recommendations produced by a third party must ensure that such recommendations indicate clearly and prominently the identity of that relevant person.

Subject to this news reporting exception, in the case where such recommendations are substantially altered within the disseminated information, the person disseminating the information must clearly indicate the substantial alteration in detail and where such a substantial alteration consists of a change of the direction of the recommendation the person disseminating the substantial alteration must comply with the above regulations to fairly present recommendations on investment strategy, vie à vie that substantial alteration.

Again, subject to the news reporting exception, a relevant person who disseminates substantially altered recommendations must have a formal written policy so that the persons receiving the information may be directed to where they can access (a) the identity of the producer of the recommendations; (b) the recommendations themselves, and (c) the disclosure of the producer’s interests or conflicts of interest in so much as those details are already made publicly available.

Where there is dissemination of a summary of recommendations produced by a third party, the relevant persons disseminating the summary must ensure that the summary is clear and not misleading and mentions such of the following that are publicly available: the source document and where disclosures relating to the source document can be directly and easily accessed by the public.

Where the relevant person is an investment firm or credit institution (or a person working for such a body) and it disseminates recommendations produced by a third party, the relevant person must ensure that the recommendations include clear and prominent disclosure of the name of the competent authority of that firm or institution.

Where such a firm or institution has substantially altered a recommendation it must comply with the above regulations to fairly present recommendations on investment strategy as applicable.

Where such a relevant person has not already disseminated the recommendation through a distribution channel, the disseminator of the recommendation must fulfil the requirements of disclosure of the relevant person’s interest and conflicts of interest.

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81 Provided that this would not entail the disclosure of any confidential commercial information and that the agreement has been in effect during the previous 12 months, or has given rise during the same period to a payment of compensation or to a promise to pay compensation.
82 Regulations 21(4) & 22(4). Such as a direct Internet link to the disclosure on an appropriate Internet site of the relevant person.
Non-written recommendations

The requirements regarding the fair presentation of recommendations on investment strategies and the duty to disclose interests and conflicts of interest in such recommendations\(^9\) may be satisfied in the case of non-written recommendations by reference to a place where the information concerned may be directly and easily accessed by the public\(^9\).

Managing a regulated financial service provider while disqualified (Regulation 47).

A regulated financial service provider\(^9\) must ensure that any and all persons concerned in the management thereof, or having a qualifying holding\(^9\) therein, are not subject to a disqualification pursuant to Regulation 41(d)\(^9\). This offence differs from the other created by the Regulations in that it is the only one where the Central Bank must first have applied a sanction under its Part 5 procedures, rather than the option being open to prosecute the offender without such prior action having been taken by the Central Bank.

Conclusion

One will expect both the Central Bank/Financial Regulator and the Director to bring prosecutions both summarily and on indictment. In addition, they will wish to navigate safely the choppy waters which often result where European and domestic principles meet as well being mindful of the Regulations’ interaction with the Companies Acts.

From the point of view of justice being seen to be done, it is heartening that the Regulations explicitly provide for a lifting of the corporate veil: Where an offence committed by a body corporate is proved to have been committed with the consent, connivance or approval of any director, manager, secretary or other officer of the body corporate or a person who was purporting to act in any such capacity, or to have been attributable to the wilful neglect on the part thereof, that person as well as the body corporate shall be guilty of an offence and shall be liable to be proceeded against and punished as if that person were guilty of the first-mentioned offence\(^9\).

Individuals may be charged with having committed offences under these Regulations even if the body corporate concerned is not so charged in relation to the same matter\(^9\).

Such prosecutions would be a welcome step toward a more accountable financial sector and would do much to build public confidence in our civic and public institutions.

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95 Regulations 18, 19, 20, 21(1) & 22.
96 Such as a direct Internet link to an appropriate Internet site of the relevant person (Regulation 25).
97 As defined in the Central Bank and Financial Services Authority of Ireland Act 2004 s. 2(g). (Regulation 34).
98 Cf. Footnote 9 (supra).
99 Regulation 47.

Confessions and Camera Perspective Bias

PAUL LAMBERT*

Introduction

The author\(^1\) is researching certain aspects of television courtroom broadcasting effects research for a PhD thesis\(^2\) and in the course of that research,\(^3\) has become aware of substantial studies on the issue of confession camera perspective bias. These studies examine how the camera

News, Articles and Blog, 12/8/10; and at www.scl.org, last accessed on 12/8/10.

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1 The author would like to acknowledge the thoughtful comments of Mr Tom O'Malley on an earlier draft. The views, comments and responsibility for any inaccuracies, remain with the author. Contact: lambertp@tcd.ie
3 The issue arises as to whether another camera focus effect can arise with cameras in court and courtroom footage. There is an obvious need for research. The research into false confessions and camera perspective bias shows that more sophisticated research can be applied to legal issues and problems. Not only should eye tracking be applied to television courtroom broadcasting effects research, but the US Supreme Court has called for empirical research. Another example occurred recently when research was published in the Harvard Law Review questioning via empirical research, the comments of the US Supreme Court in a particular case. See Kahan, D.M., Hoffman, D.A., and Braman, D., “Whose Eyes Are You Going to Believe? Scott v Harris and the Perils of Cognitive Illiberalism,” Harvard Law Review, (January 2009), pp. 837 – 906, referring to the case of Scott v Harris, 127 S Ct 1769 (2007).
angle (and what the camera focuses on) actually affect the viewer's perspective of a recorded interview. This important topic is discussed below, given its applicability to criminal legal practice and the video recording of Garda confession interviews in Ireland. This is important because, far too often, we ignore relevant, and often compelling, social science and empirical research which investigates current legal issues. It has taken a long time for legal practice to recognise important psychological research into the separate issue of eye witness identification.

False Confessions

False confession research is particularly important. There are many instances where people have been recorded on television and on video recording confessing to crimes that they have not committed. This is additionally significant since the Innocence Project in the US which applies DNA technology and techniques to past conviction cases. This was founded by Barry Scheck, the noted American lawyer and academic. It has proven that many innocent people have been convicted and gaoled. It found that a quarter of the DNA exoneration cases originally relied strongly on false confessions.

Camera Perspective Bias

There is increasing psychology and eye tracking research into the effects of cameras and camera perspective in recorded police interviews and false confessions. This is partly driven by the knowledge that there are false convictions and confessions – some captured on video recording.

The research has found that different camera angles and focus orientations of the interview recording camera, can alter significantly how viewers of such film footage rate the genuineness and voluntariness of the recorded “confessions.” The manner in which the evidence is filmed, i.e. the confession footage, can influence judgements of guilt. Mock jurors have been found to be influenced by the camera angle from which the interrogation is filmed. This is now known as camera perspective bias.

Many criminal investigation interviews that are recorded, adopt a suspect focused angle only, instead of focusing on the police officer or focusing on both of them at the same time. This enhances the perceived voluntariness of any confession. Lassiter and Irvine showed the same interview recorded on different cameras to show: suspect only, police officer only, and both equally focused. The research study subjects then viewed one of the videos, depending on which group they were in. The ones who saw the suspect only video, perceived less coercion. Other research also confirmed that suspect focus only videos, yielded significantly higher ratings for perceived guilt and voluntariness. Ware also examined camera perspective bias and used eye trackers to monitor visual attention. She also refers to studies and the literature which shows that suspect focus only camera perspective, creates a bias for judgements of voluntariness and guilt.

As a result of the Lassiter and Irvine study, police practice in New Zealand changed to ensure that there was no suspect only video recordings, and that both the suspect and questioner were always in frame. Pressure is increasing to change policies elsewhere also.

Andrew Ashworth in his recent 4th edition of Criminal Process (page 36) also briefly highlights the empirical social science research on camera perspective bias, including the seminal research by G.D. Lassiter. Ashworth also refers to New Zealand research.

Irish Video Recording Practice

In Ireland the relevant legislation in relation video recording of police interviews is S.I. 74 of 1997, which is the Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 (the “Regulations”). This permits the electronic recording of Garda interviews.

However, there are a number of issues that need to be pointed out. Obviously, from the date of the original Act (in 1984) and the Regulations (in 1997), we can say that the rules date from well before the contemporary research on camera perspective bias. In fact the Regulations refer to “tapes” which predates many modern technology recording media and devices (see, for example, definitions of “electronic recording” and “equipment”).

In terms of the specifics of the Regulations, there is actually no explicit reference to video recordings per se. Regulation 4(1) provides that “interviews of persons detained

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5 See http://www.innocenceproject.org, and as referred to in Schmidt, H.C., below, 11.

6 This is also noted by Ware, L.J., Monitoring Visual Attention in Videotaped Interrogations: An Investigation of the Camera Perspective Bias, MSc thesis, Ohio University (2006), p. 35.


11 Ibid.


13 Ware, L.J., above.


16 See Schmidt, H.C., above, p. 31.

17 Namely, Dixon and Travers, Interrogating Images: Audio-Visually Recording of Police Interviews with Suspects, (Sydney Institute of Criminology, 2007).
under s4 CJA 1984, s30 OASA 1939, s2 CJ(DT)A 1996] ... shall be electronically recorded.” There is no definition of “electronically recorded.” Albeit, there is a definition of “electronic recording.” This definition does not explicitly refer to videos or film.

The author, however, understands that in Ireland when videos are used to record Garda interviews and confessions, one video camera (feeding to three video recorders) is used. The logic behind the three feeds is understood to be a foil in the event of breakdowns, etcetera. It is also understood that the practice in Ireland is to have the video focus on the interview suspect only.

Therefore, to the extent that the interview suspect only, is visible in the recordings means that camera perspective bias is a real and live concern in Ireland. In terms of the perspective focus of the interview suspect, it is unclear if this is head on, side on, angled, etcetera. There does not appear to be any official documents, reports or regular reviews of practice in Ireland to make the process and practice transparent. In order to be assured that in fact camera perspective bias is not an issue of concern, greater illumination of the actual use and practice surrounding the Garda video recording of interviews is needed. However, it appears from even this admittedly short review, that the Irish practice of Garda video filming of suspect interviews is questionable in light of modern social science empirical evidence.

However, further considerations also arise. Modern IT and intellectual property laws attempt to be technology neutral, so as to avoid becoming out of date in the face of rapidly changing technology. The Irish laws highlighted above in terms of electronically recording Garda interviews are at this stage out of date. While the previous practice appears to be that the defendant would automatically receive a copy of one of the video recordings, it is understood that s/he or his/her solicitor now has to apply for such a copy. Unfortunately, as the law has not been updated, the defence receive a copy video cassette recording. One does not need to be a tech savvy teenager to know that video cassettes are dated and obsolete. It is not practical or indeed possible in most instances to find a video recorder to play the defence video cassette on. How are the defendant’s rights to be preserved? A technology neutral law, or amendment, might assist.

While the original legislation dates to approximately 20 years ago, it is understood that actual examples of video recording interviews have only occurred within the last 10 years. Unfortunately, there is no research and ongoing monitoring, so it is not possible to examine any globally accurate statistics or information, whether third party or official.

This is certainly an area which requires and will benefit from further more in depth research in Ireland.

Photographs and Consent Considered

While the author originally set out to highlight the issue of camera perspective bias, some further issues are worthy of mention. For example, is the Regulation successful in achieving its aim?

Regulation 17 refers to “photographs.” The intention appears to be that still photographs may not be printed or produced from video recordings per se or for identification purposes, in particular without the written consent of the interview subject. However, are there some unintended results from the drafting of the Regulation?

Consider that the Regulation refers to a “tape.” In addition, it refers to “a photograph.” Yet there is no definition of a “photograph” at all in the Regulation. A photograph can be hard copy printed (or developed) photograph. It can also be an electronically produced photograph on screen, whether on a video screen, computer screen, mobile device screen, etcetera. The point is that there can be hard copy photograph and electronic copy photograph. In addition, electronic photographs can be single still image photographs and or a series of “moving” image photographs. A video recording when played can be described as a series of moving image photographs.

Technologically speaking also, a video recording on a tape is the data which is recorded on the magnetic tape media. The video [moving] images or photographs are not the data so recorded on the electronic media device. The data has to be interpreted and decoded in order to produce or play the images on a screen for the user.

Could it be the case, therefore, that the written consent of the suspect is required to even “play” the video recording of the interview? This would be an unintended consequence of the Regulation. The least that can be said is that the intention behind the Regulation, and whether this is actually achieved, requires further consideration. It is not guaranteed that it has been successful.

Conclusion

The author briefly has highlighted the issue of camera perspective bias and recent research in the field. Official policy on this issue should reflect and guard against the camera perspective bias and other issues that can arise. Greater transparency and ongoing monitoring research is needed in order to assess the bias issues that may exist, and then to amend policy if this is necessary – which it appears to be. It may be that the Regulation itself is the appropriate place to include explicit reference to at least some of the mechanics of guarding against bias effects. Separately, the Regulation requires to be updated to respect, if not reflect, modern technology. It is significantly out of date. The technology neutral approach might be considered in this regard. More detailed consideration of the Regulation may also confirm if there are unintended effects which need to be corrected, such as the photograph and consent issue.

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Housing Authority Law by Neil Maddox is the first book to examine in detail the law governing housing authorities in Ireland. It focuses in particular on the role of local authorities as housing providers. It centres on the Housing Acts 1966 – 2002, and also includes coverage of the Planning Acts to the extent that they govern housing. The work deals with a wide range of issues, such as: social and affordable housing; local authority powers of CPO in respect of their housing function; housing authorities and the Traveller community; the impact of the ECHR Act 2003 upon housing authorities; the problem of anti-social behaviour; the potential liability of housing authorities in respect of the exercise, or non-exercise, of their functions; and the provisions of the Housing (Miscellaneous Provisions Acts) 2009.

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