Conflict of Interest: The Solicitor's Duty in an Impossible Situation

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Whereas the essence of a claim against a lawyer may arise in contract, most modern claims are framed in negligence. Obviously, the duty of care is primarily owed to the client. But, it may extend to persons for whom he undertakes to act professionally without reward and others, such as the beneficiaries under a will (*Finlay v Murtagh* [1979] IR 249 *per* Henchy J, *Wall v Hegarty* [1980] ILRM 124 *per* Barrington J) or the purchasers of property (*Doran v Delaney* [1998] 2 IR 61 and *Doran v Delaney* (*No 2*) [1999] 1 IR 303). It may arise in the giving of advice, the selection of counsel, acting on counsel's advice and the conducting of conveyances and other transactions. In *Roche v Peilow* [1986] ILRM 189, the Supreme Court, in this regard, endorsed the professional negligence standard set out in *O'Donovan v Cork County Council* [1967] IR 173.

Claims may arise in respect of the purchase of a public house (*Kelly v Crowley* [1985] IR 212 – damages for mental distress refused); the issuing of proceedings within the limitation period and relying on counsel's advice as to whether or not a cause of action existed against another firm of solicitors (*Fox v O'Carroll*, unreported, High Court, O'Sullivan J, April 29, 1999 – claim dismissed); advising in respect of the extent of property purchased (*Murphy & anor v Proctor & Co,* unreported, High Court, Kelly J, October 11, 2000 – claim dismissed); in the giving of advice and conducting litigation (*Hussey v Dillon,* unreported, Supreme Court June 26, 1996 (O'Flaherty, Barrington, Keane JJ) *aff'g* unreported, High Court June 23, 1995 (Costello P) – bankruptcy proceedings, claim dismissed); in the preparation of a case (*Lopes v Walker,* unreported, Supreme Court July 28, 1997 (Lynch and Barron JJ, Murphy J *diss*.) – plaintiff succeeded, damages awarded amounting to IR£155,000); or an alleged conflict of interest (*Phelan Holdings (Kilkenny) Ltd & Phelan v Hogan & ors t/a Poe Kiely Hogan,* unreported, High Court, Barron J, October 15, 1996) – solicitor a party to transaction with the plaintiff while acting as solicitor, claim succeeded). One obvious pitfall, however, arises in settlements in respect of advice given on settlement (*McMullen v Carty,* unreported, Supreme Court January 27, 1998 (Lynch, O'Flaherty and Barrington JJ *aff'g*) High Court, (Carroll J) July 13, 1993) – claim dismissed); and the Rules of Professional Conduct for Barristers (*McMullen v McGinley* [2005] IESC 10 *aff'g McMullen v Clancy,* unreported High Court, McGuinness J, September 3, 1999 – claim also dismissed); and subsequent advice defending negligence proceedings (*McMullen v Kennedy,* unreported, High Court, O'Caoimh J, October 18, 2001, – proceedings struck out).

A difficult question as to how to resolve with an apparent conflict of interest when dealing with a husband and wife arose for consideration in *O'Carroll v Diamond* ([2004] IESC 21 *aff'g* unreported, High Court, (O'Neill J), July 31, 2002). Here, the plaintiff's husband entered into an agreement that involved a charge on the family home in settlement of proceedings against him for the return of £100,000 given to him for the purpose of investment. That claim was based on fraud. In Mareva proceedings against him, he was required to swear an affidavit in relation to the acquisition of the moneys by him and their subsequent disposal. It became clear that were he to swear such an affidavit, it would have left him at risk of criminal proceedings and he was advised, and agreed to settle them. He consented to judgment with charging of his assets pending their sale to realise the amount of the judgment. He did not tell the plaintiff, it appeared, until the adjourned date for the application. Although there was some conflict of evidence, the trial judge was satisfied that the plaintiff did contact her husband's solicitor, the defendant, who advised her to seek independent legal advice in connection with protecting her share of the house. The plaintiff duly attended at her husband's solicitor's office the next day when it appeared that she was quite willing to execute the necessary documents.

The defendant's evidence was that the plaintiff became his client from the point at which she indicated her willingness to proceed with the various transactions. Although he recognised that there was a conflict of interest, he asserted that he could not take on the plaintiff as a client

unless it was clear that there was a unity or commonality of interest between the plaintiff and her husband and he could not advise the plaintiff of her options because to do so would conflict with his obligation to her husband. Up to the point at which she became his client, his only obligation to her was to advise her to get independent legal advice, which he had already done. Once she became his client, his duty was merely to provide her with legal assistance in the execution of the necessary documents.

In answering the first question, as to when the relationship of solicitor and client commenced between the plaintiff and the defendant, O'Neill J was satisfied that it was when the plaintiff first attended at the defendant's offices. Up to that time, the settlement agreement reached by her husband was unenforceable by virtue of the absence of her consent to the execution of certain documents necessary for that purpose. The question was, he noted:

> "Knowing as he must have that her knowledge of the transactions was very lately acquired, and perhaps incomplete, and knowing as he must have that she at that point had not the benefit of legal advice on her options and allowing for the effect which discussing the settlement in the High Court proceedings would have had upon her and with knowledge of what he knew had been said to her by him concerning her husband and jail should he have accepted her as a client and proceeded on to the execution of the documents or should he have refused to allow her to execute the documents at that point in time and insisted on her going to another solicitor to get advice. In other words, did he adequately discharge his duty to both his clients in those circumstances by a passivity which undoubtedly enhanced and protected the interest of [the husband] but so far as the plaintiff was concerned involved standing aside, while she, without the benefit of his advice, took steps which she might otherwise not have done if fully advised and informed."

He found:

> "In my view unless the defendant had been instructed by [the husband] not to discuss or to advise the plaintiff of her options, there would have been no good reason why he should not have done so. At the very least he should have enquired from [the husband] if he had any objection to that course and perhaps even invited him to discuss collectively with his wife all of the options available to both of them. It is quite clear from the evidence that nothing of this kind ever arose and in the context of a husband and wife who were then united as a couple, it should have arisen".

While acknowledging that the position adopted by the defendant was arrived at conscientiously and having carefully had regard to the husband's interests, nevertheless:

> " ... it had the result of leaving entirely unserved the interests of the plaintiff and indeed also the interests of both [the husband] and the plaintiff jointly as a couple because it deprived them as a united married couple of the opportunity to jointly make choices which would have been in the best interest of them and their family."

O'Neill J concluded:

> "I am compelled to conclude that the defendant was wrong in withholding advice from [the plaintiff] either separately or jointly with her husband and that his omission in this regard is of such an obvious or even glaring nature as to lead inexorably to a finding that his conduct of this aspect of the transaction was not of a standard of which one would have expected from a member of the solicitor's profession of his standing and thus was negligent. I am also satisfied that in withholding from [the plaintiff] advice in relation to the options that were available to her ... he was in breach of his contract with her".

Although an issue was raised as to whether the damage done could have been undone subsequently, in other proceedings that arose out of the sale of the family home, O'Neill J considered that there was "not much reality in that suggestion" in the absence of the defendant himself taking an initiative to alert the plaintiff or her husband to the other options, which was unlikely given his fixed view of his duty.

On the causation point, however, the plaintiff failed. O'Neill J considered what the plaintiff, as a matter of probability, would have done, even if she had been properly advised. Had she refused to co-operate in the charging and sale of the family home, the husband's settlement would have broken down, and the court found that it is likely that he would have been pursued aggressively, with an application for his attachment for contempt for failing to have filed an affidavit disclosing where the moneys in question had gone. If, in order to avoid contempt, he filed the required affidavit, he would then have made admissions that would have placed him in jeopardy of a criminal investigation. In addition, it was probable as well that a complaint would have been made to the Gardaí and a fraud investigation, with a criminal prosecution, was likely. O'Neill J found:

> " ... it was very unlikely that she would have left him exposed to the risk of criminal prosecution and a custodial sentence, with all the attendant consequences of that for [the husband], but more particularly for the plaintiff herself and her children. It would seem to me that the salvaging of her half share from the sale of the family home would not in all probability have outweighed the terrible consequences for the family as a whole, of criminal proceedings against [the husband]. That is the choice she would have faced at that time. I do not think that the threat of bankruptcy proceedings

would have had decisive weight for her. If that was the only threat on her horizon, I would have said it was probable she would have taken her share in the family home in the hope of being able to acquire a smaller cheaper house for the family. However, the impending disaster of criminal proceedings which threatened at that time was a different matter entirely".

Having found that no loss resulted from the defendant's negligence and breach of contract, he dismissed the plaintiff's action and she appealed to the Supreme Court. The defendant solicitor cross-appealed on the finding of negligence. Three principal issues were addressed: liability, causation and the admissibility of expert evidence.

LIABILITY

Insofar as liability was concerned, Hardiman J (Geoghegan and Kearns JJ concurring) noted that although the plaintiff had made a number of allegations in her claim, it reduced as the case unfolded to the claim that she had never been advised to take independent legal advice before deciding to sign the documents which she did sign in the defendant's office. (The claim that the defendant had fabricated his attendance notes of his dealings with the plaintiff was rejected on the evidence. On the hearing of the appeal the case proceeded on the basis that the solicitor had indeed advised the plaintiff to take independent advice, and that his attendances accurately reflected what occurred.) It was contended that, even assuming the advice to take independent advice to have been given, there was also a breach of the solicitor's duty in other ways: that he should have done more to get her to take independent advice, at one point its being suggested that he should personally have telephoned another solicitor in the plaintiff's presence and put her on the line, therefore compelling her to say something to the other practitioner.

THE DUTY ISSUE

It was specifically suggested, in part on the basis of the expert evidence adduced that, having accepted her as a client, the solicitor should have advised her on the merits of the issue as to whether or not she should sign the documentation. Hardiman J stated:

"The relations between the plaintiff and the defendant were difficult and marked by obvious potential for conflict, for two quite separate reasons. From a legal point of view, [the defendant] was requested to act for two parties, husband and wife, one of whom was going to charge her property for the benefit of the other."

He referred to the decision of Barron J in *Carroll v Carroll* [1999] 4 IR 241, and the earlier decision of Budd J (on the question of advice by a solicitor) in *Gregg v Kidd* [1956] IR 183 which approved certain principles from the judgment of Farwell J in *Powell v Powell* [1900] 1 Ch 243) as follows:

"(1) A solicitor who acts for both parties cannot be independent of the donee in fact; and
(2) To satisfy the court that the donor was acting independently of any influence from the donee and with a full appreciation of what he was doing it should be established that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person. Further, the advice must be given with knowledge of all relevant circumstances and must be such as a competent advisor would give if acting solely in the interests of the donor".

Barron J had stated:

"… a solicitor or other professional person does not fulfil his obligation to his client or patient by simply doing what he has been asked or instructed to do. He owes such person a duty to exercise his professional skill and judgment and he does not fulfil that duty by blithely following instructions without stopping to consider whether to do so is appropriate. Having done so, he must then give advice as to whether or not what is required of him is proper. Here his duty was to advise the donor to obtain independent advice".

It might be noted that this is not wholly consistent with what was asserted in *Wolfe v St James's Hospital*, (unreported, Supreme Court, (Fennelly and Murray JJ, Geoghegan J *diss*), February 20, 2002 *rev'g* unreported, High Court, (Barr J), November 22, 2000. Geoghegan J (who gave the dissenting judgment) was of the view that once a patient makes a particular complaint, a court is entitled to take the view that there is a clear duty to ensure that those complaints will be investigated as required by a patient and that issues of professional judgment do not arise. Questions of duty and standard of care are seamlessly merged in that assertion and it seems to represent a significant re-casting of the application of these principles in professional negligence. Although this issue was not addressed by the majority in *Wolfe*, Geoghegan J's view reflects that of the Supreme Court in *Collins v Mid-Western Health Board* [2000] 2 IR 154, when considering the role of a general practitioner. Barron J's analogy of a patient-doctor consultation in that case, however, with a client-solicitor consultation neither reflects the reality of doctor-patient interactions nor the fuller and more expansive consideration of the duty issue that arises in *Carroll*. Given the protean manifestations of even common conditions (in medical practice) and the standard response that will be required in relation to a straightforward problem (in legal practice), analysis of such consultations along these lines runs the very real risk of imposing a standard that it might not be possible to discharge. It also suggests a fragmentation of the duty issue. If, on the other hand, all that is suggested is that

some reasonable attempt to address, insofar as that is possible, the patient's complaints, then it is unexceptional. The language of Barron J in *Collins*, however, does not clearly suggest such an interpretation, unlike in *Carroll*.

Hardiman J was of the view that:

> " ... this passage [of Barron J] is a clear and concise statement of the law and is fatal to the proposition that the defendant should have advised the plaintiff in relation to the transaction, and 'was wrong in withholding advice from [her]'. Indeed, as the learned trial judge at one point said ... 'That would suggest to me that in a situation of conflict between the plaintiff and [her husband], the one person who could not advise [the plaintiff] was the defendant'".

Although *Carroll* postdated the events in this case, it re-stated "legal propositions established since 1900, if not earlier" in Hardiman J's assessment. In *Hilton v Barker Booth & Eastwood* [2005] 1 All ER 651, a firm of solicitors acted for two separate persons engaged in a property development. The firm was privy to information about one party (that he had served a prison sentence for a commercial offence) in respect of which he was owed a duty of confidentiality. In addition, the solicitors had themselves advanced a substantial loan to one of the clients which in practice would only be recoupable if the other client participated in the planned development. Neither of these facts was disclosed to the other client. The House of Lords held that if a solicitor put himself into a position of having two irreconcilable duties, that was his own fault: he could not prefer one to the other and had to perform both as best he could though "this may involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other". The House of Lords was also satisfied that, in any case, "the fact that he has chosen to put himself in an impossible position does not exonerate him from liability". Accepting this to be correct, Hardiman J found that the defendant had not put himself into an "impossible position". He continued:

> "In the present case [the solicitor] made it clear not only that the plaintiff should take independent legal advice but that he could not possibly advise her on the vital question of whether to charge and subsequently to sell the family home and other property. On the authority of *Carroll v Carroll*, he was absolutely correct in saying this. Does the fact that, having said it, and having received the plaintiff's instructions that 'she was quite willing to go along with the situation now that she understood it more so ... she knew the house would have to be sold and they had both decided that this was the only course of action open to them', he proceeded to explain the necessary documents to her and have her sign them in his office alter his duty? I do not believe that it does, at least in the dramatic and urgent circumstances of this case".

Not accepting that there was a representation, as in *Hedley Byrne v Heller* [1964] AC 465, Hardiman J stated:

> "It appears to me that the defendant ... here did not undertake to show professional care and skill towards the plaintiff except in the purely ministerial matter of effecting charges and other documents. He made it perfectly clear that in the circumstances of the case he could not discharge the other and broader duties which a solicitor giving her independent advice would discharge i.e. to discuss whether, from her point of view, it was wise, proper, necessary or desirable to sign the relevant documents.
>
> Furthermore, I do not think that, if [the defendant] had taken it on himself to advise [the plaintiff] as to the merits of the transaction, and she proceeded with it, such advice would have been effective to uphold the transaction against challenge. The situation which would then arise could certainly have been distinguished from *Carroll v Carroll*, where the solicitor did not give any advice at all. But [the defendant] would still have been a person who, on criteria established for upwards of a century, could not be independent of [the plaintiff's husband], the person for whose benefit the transaction was to be. Equally, no advice by him could have met the requirement that 'the nature and effect of the transaction [be] fully explained to the donor by some independent and qualified person'. [The defendant] was of course a qualified person but in the circumstances of the case he could never have been an independent person.
>
> The other aspect of great difficulty confronting both plaintiff and defendant was the extremely fraught and extremely urgent nature of the transaction in contemplation. Because of this it was not remotely comparable to an ordinary charging or conveyancing transaction. There was an immediate threat to the livelihood and earning capacity of [the plaintiff's husband] and therefore to the wellbeing of his family. This threat also extended to the destruction of his reputation, which would make it difficult or impossible to generate earnings in any alternative way. His professional standing as an accountant was also under immediate threat. Less immediate, but very real, was the threat of criminal proceedings for fraud. I am satisfied that a complaint of fraud would have been made to the guards if the [complainants'] proceedings were not settled ...".

STANDARD OF CARE

Insofar as discharging the duty was concerned, it was clear that the very acute circumstances that arose in this case prevented the defendant from taking a number of courses of action which might otherwise have been open to him. As Hardiman J noted:

> "He could not ... say that he would not act for either party in the transaction or would not act until she took the advice; he owed a duty to [the husband] which he could not then resign. That is why he could

not advise the plaintiff .... [I]t is utterly impractical to say that he could have forced [the plaintiff] to consult another solicitor in the manner suggested or otherwise. Indeed, it was much to be preferred that [she] would consult a solicitor of her own choosing and not of [the defendant's]".

Having said that, Hardiman J did not address, specifically, the course that O'Neill J, at first instance, had suggested: a joint consultation and advice. Nor did he address the question of when the duty arose. He was satisfied that there had been no breach of duty. The defendant had taken "the only steps possible in urging [the plaintiff] to take independent legal advice and in stating emphatically that he could not advise her as to whether or not she should proceed to carry out the proposed transaction". Any less, and the defendant would have failed to meet the requirements laid down in *Carroll v Carroll.* Any more, and "his advice would not have been independent and would not have met th[os]e ... requirements in that respect. He would then, indeed, have 'chosen to put himself in an impossible position'".

Although *Carroll v Carroll* was the touchstone in this case, there were also the "very difficult and unusual circumstances". In this, Hardiman J sounded a warning. His decision:

"... should not be taken as implying that, in other circumstances, a solicitor necessarily discharges his duty merely by urging a person to take independent advice and blandly accepting a decision not to do so. Depending on the circumstances his obligations may be much greater and may include declining to act until such advice is taken. This, indeed, may be a prudent course in the interest of his original client, the person making a disposition or giving a security, and the person for whose benefit any security is given. But each case must be assessed on its own facts".

Hardiman J's view on the question of the standard of care was clear. He stated:

"Quite clearly it would have been reasonable for [the defendant solicitor] to have acted as he did in relation to the charging documents if another solicitor had discussed with the plaintiff the consequences of signing them or not signing them".

But what of the situation where the person refuses to take independent advice and the solicitor is disqualified as an independent adviser by reason of conflict of interest, and incapable of disentangling his professional obligation to the other party? In this case, in the view of Hardiman J:

"... there is no basis in law for the suggestion that [the defendant], as opposed to any other solicitor, could or should have 'discussed' with [the plaintiff] the consequences of signing or not signing the relevant documents, or in any fashion given her legal advice, as opposed to ministerial legal assistance .... The plaintiff submitted that [the defendant's] duty as a solicitor "overrode" his statement that he could give no advice. Since, however, the latter statement is correct in law, the submission means that anything he did would be wrong, a classic 'Catch 22', which would be most unjust to a person in [the defendant's] position".

CAUSATION

Liability having been determined, consideration of causation must be considered to be obiter. Nevertheless, Kearns J (Geoghegan and Hardiman JJ concurring) took the opportunity of re-visiting the question, in the professional negligence context, that he had first articulated in *Geoghegan v Harris* [2000] 3 IR 536. There he had adopted a "pragmatic" approach to what a claimant would have decided was the preferred course to follow, which he again advanced, having considered the authorities for the competing approaches (*Canterbury v Spence* [1972] 464 F. 2d 772; *Reibl v Hughes* [1980] 1 14 DLR (3d) 1 – applying an objective test; and *Ellis v Wallsend District Hospital* [1990] 2 Med LR 103; *Bustos v Hair Transplant PTY Ltd*, unreported, New South Wales Court of Appeal, April 15, 1997; and *O'Brien v Wheeler*, unreported, Supreme Court of New South Wales, May 23, 1997; *Chatterton v Gerson* [1981] QB 432; *Hills v Potter* [1984] 1 WLR 641; and *Smyth v Barking HA* [1994] 5 Med LR 285 – applying a subjective test).

What, however, does taking a pragmatic approach mean? Kearns J provided the answer in *O'Carroll.*

"This I took as meaning that the court could be guided, and might in certain cases be compelled, where there was a lack of other evidence, to adopt an objective test, but in other instances, where there was reliable and cogent evidence of subjective intent, then it was open to a court to take the view that the objective test could and should yield to a subjective one. I see no reason for adopting a different approach in the instant case in trying to determine what this plaintiff would have done. There is further guidance to be derived from the medical cases. In cases of elective surgery, the failure to warn must be regarded as more likely to have caused the loss, given that a patient might well decide to forego surgery when he has a real choice in the matter. Conversely, where the medical procedure is absolutely essential and there are no real alternatives, the failure to warn of an inherent risk may be seen as making little or no contribution to the decision of the patient as to which course he or she will adopt".

He considered that the instant case fell "four square into the latter category because of the crisis precipitated by the financial difficulties of the plaintiff's husband". Assessment of credibility in relation to how a particular plaintiff would have acted were matters, however, for the trial judge and "it would require something quite out

of the ordinary" to persuade him to invade that function. The question was, accordingly, decided at trial stage. Having said that, Kearns J's assessment of the transcript evidence suggests that irrespective of being able to establish causation, on an application of the "but for" test he advanced, for the majority, in *Quinn (a minor) v Mid-Western Health Board* [2005] IESC 1919 (and irrespective of whether it is based on an objective or subjective assessment), the plaintiff's case was about a loss of opportunity. In this case, the loss of opportunity complained of was an opportunity of negotiating with one of the complainants to whom her husband owed money for an extension of time within which to vacate the family home in circumstances where the plaintiff was, up to the previous day, unaware that there were any proceedings. Kearns J did not engage the question of loss of opportunity. Given the findings on liability, this was probably unnecessary. However, in *Quinn*, although the causation question was decided on orthodox "but for" principles, nevertheless Kearns J (for the majority in that case) expressed the view that recovery did not lie for loss of opportunity, a conclusion manifestly at variance with the decision of the majority of a differently constituted Supreme Court some four months earlier in *Philip v Ryan* [2004] 4 IR 241. Having regard to how events subsequently unfolded (in that there was considerable delay in the sale of the family home, in any event), any such claim, too (even if admissible), would surely have been difficult to sustain.

THE ROLE OF EXPERT EVIDENCE IN SOLICITORS' NEGLIGENCE ACTIONS

Insofar as expert evidence had been adduced at first instance, Hardiman J took the opportunity to make a number of general observations. However, these were not actually critical of the solicitor who gave that evidence at trial. The first question that arose was in relation to the admissibility of the evidence, a matter of central importance in any future such actions.

Here, after a 19-line statement of assumptions about the facts of the case, counsel for the plaintiff asked what the defendant solicitor's obligations would have been. In *Midland Bank v Hett, Stubs & Kemp* [1979] Ch. 384, Oliver J (at 402) had doubted the "value, or even the admissibility" of such evidence, noting that the extent of the legal duty in any particular situation was a matter for the court, being a question of law. Evidence as to the standard of care was however, admissible. Having said that, Oliver J continued:

> "But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court ...".

As Hardiman J put it: "The input of the parties on matters of law is to be by submission, and not by evidence". As the matter had not been fully argued at first instance, Hardiman J was reluctant to make any decisive assertion other than to note that the dictum of Oliver J in *Midland Bank* had much to commend it. As in other areas of professional negligence, the Supreme Court, here, asserted its function in matters other than, perhaps, determination of the appropriate standard of care, subject to the reservation that applies in all such cases and as set out in *O'Donovan v Cork County Council* [1967] IR 173, at 183. In the medical negligence context, the input of experts has otherwise been characterised as amounting to an excessive *Bolam*-isation of the professional negligence action. The decision of Hardiman J in *O'Carroll* – albeit *obiter* – clearly signals that such an approach is wholly inappropriate.

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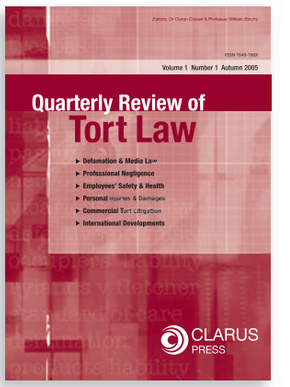

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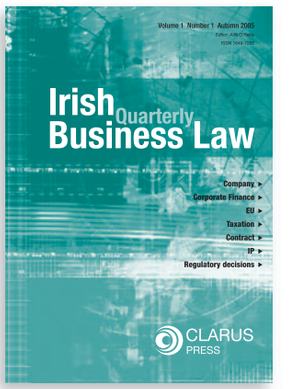

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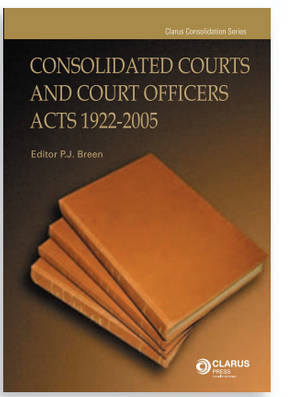

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