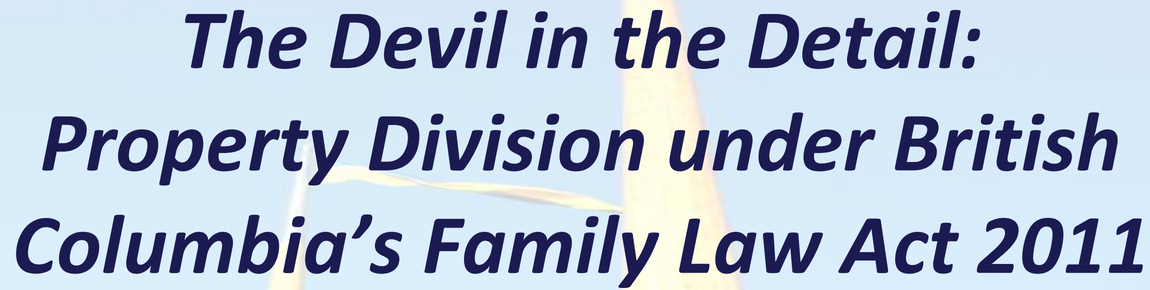


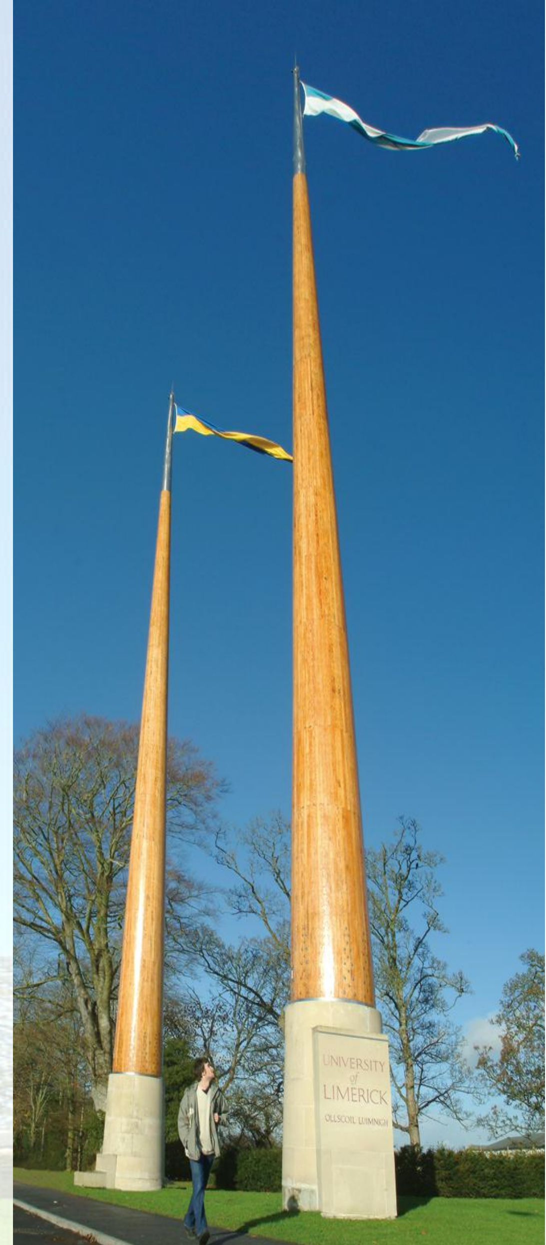
The Devil in the Detail: Property Division under British Columbia's Family Law Act 2011

Dr Kathryn O'Sullivan, University of Limerick, Ireland

SLSA Annual Conference

6th April, 2016

University of Lancaster, England



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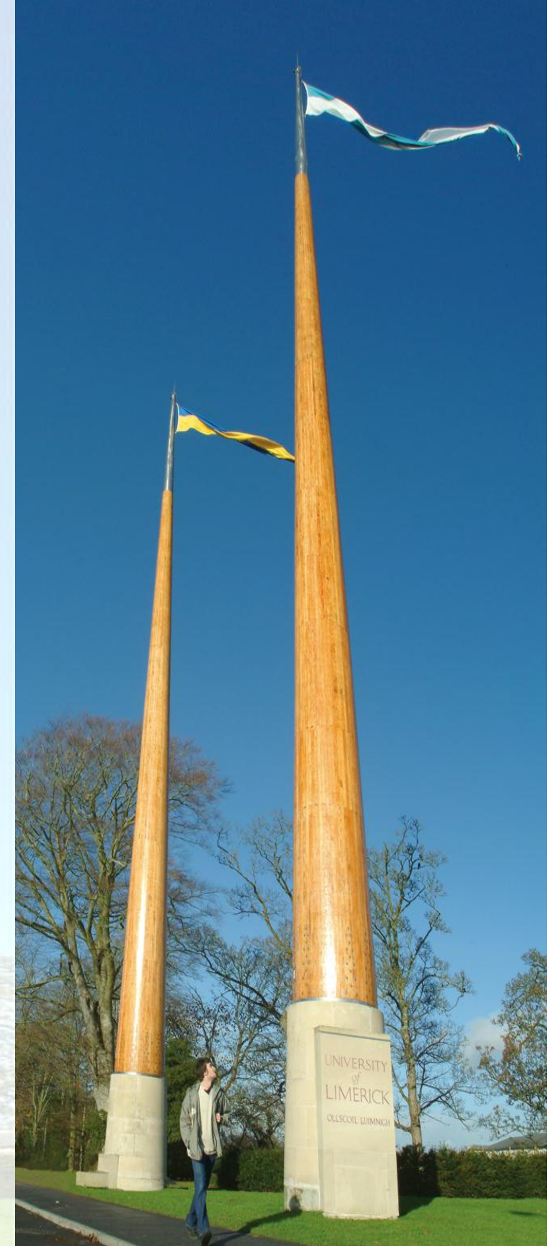
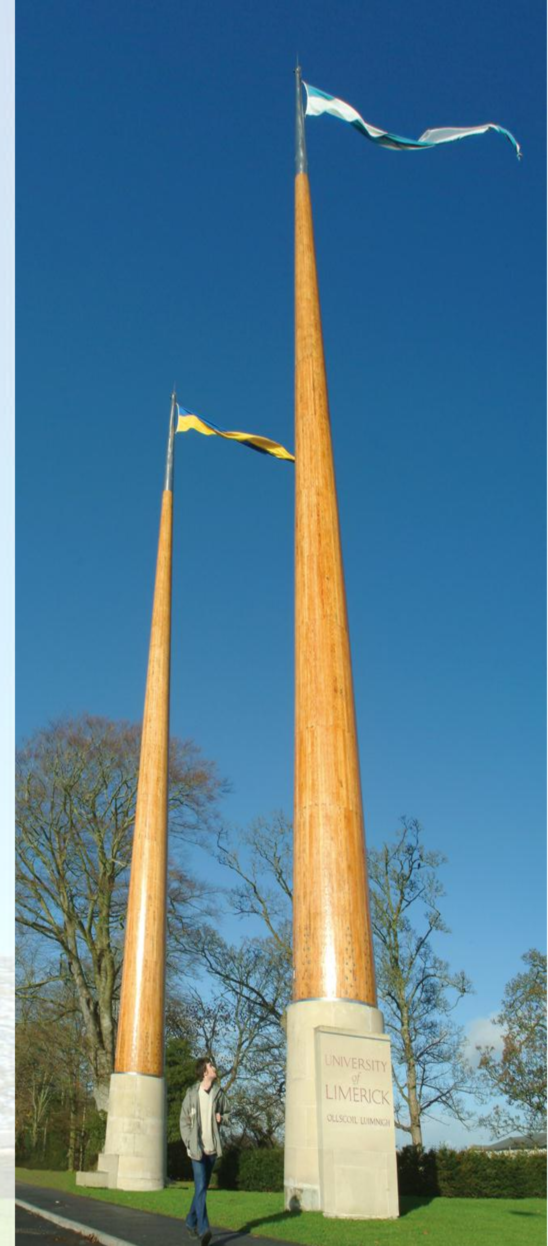
Background

- Structure of presentation
- British Columbia, Canada – recent focus of major family (property) law reform
  - Focus of PhD research (pre-2013)
- *Family Law Act 2011*
  - Dramatic changes in family law
  - New property division scheme on divorce
    - Qualitative & quantitative importance
    - Commenced March 2013



Context of 2011 Act

- Aim: to modernise and update the family law regime
- Drafted to "*support co-operative rather than adversarial approaches [to family dispute resolution]*" and to "*support non-court processes*"



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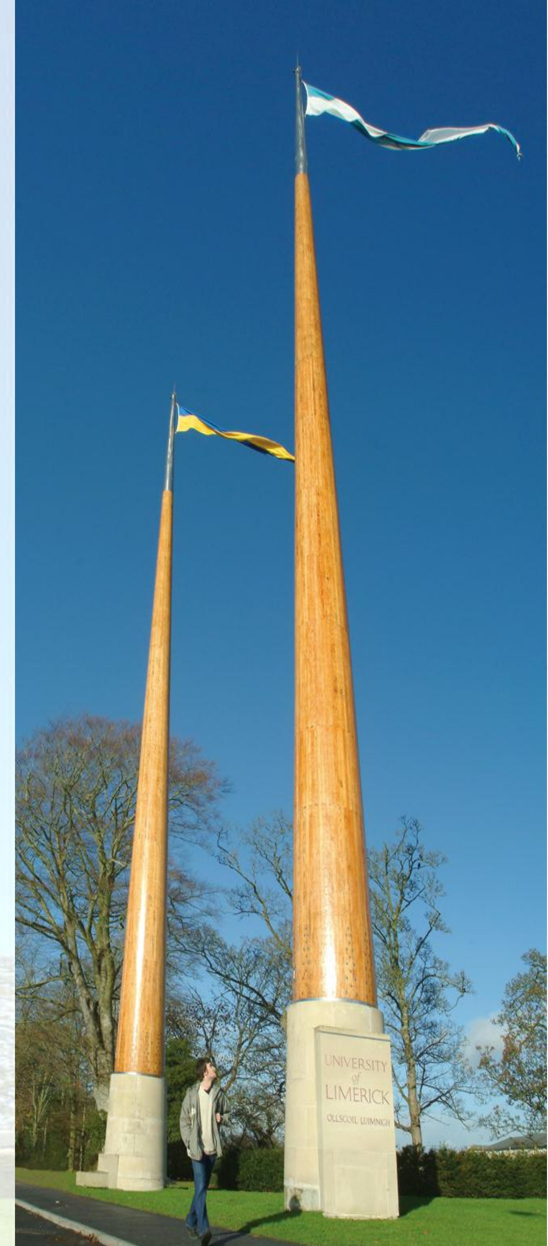
Property Division

- Two main objectives of reform:
  - Reducing discretion
  - Ensuring greater certainty in the scheme



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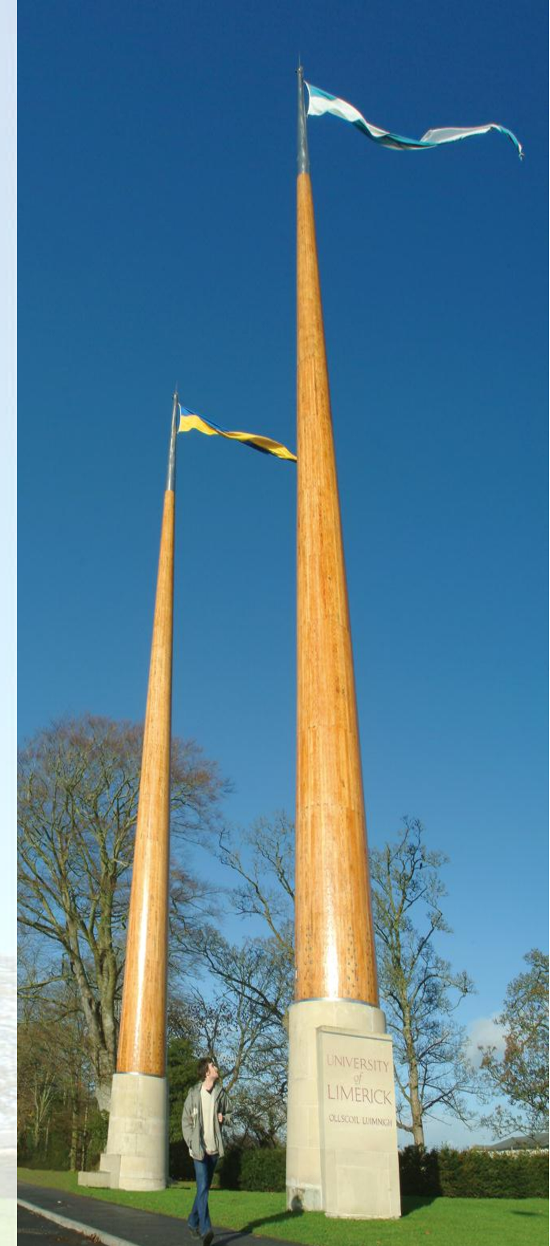
Family Law Act 2011

- <u>First Major Reform:</u>
  - Moved to an excluded assets/community of acquests model
    - It would be “simpler”, “clearer”, reduce litigation, and accord better with “most people’s intuitive sense of fairness”
  - Retained limited judicial discretion to include “excluded assets”



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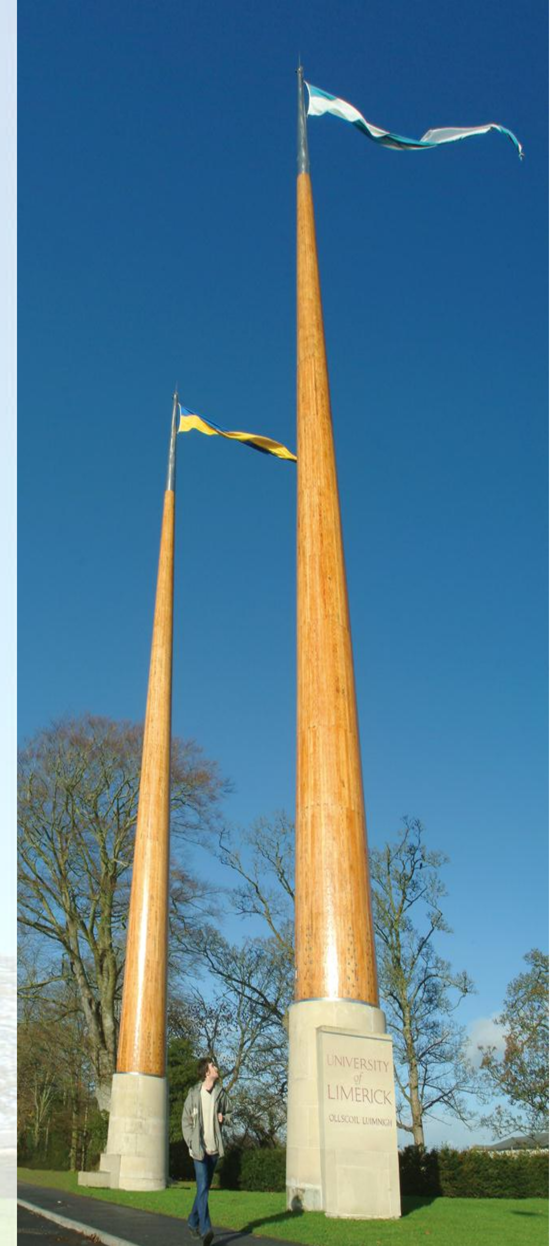
Family Law Act 2011

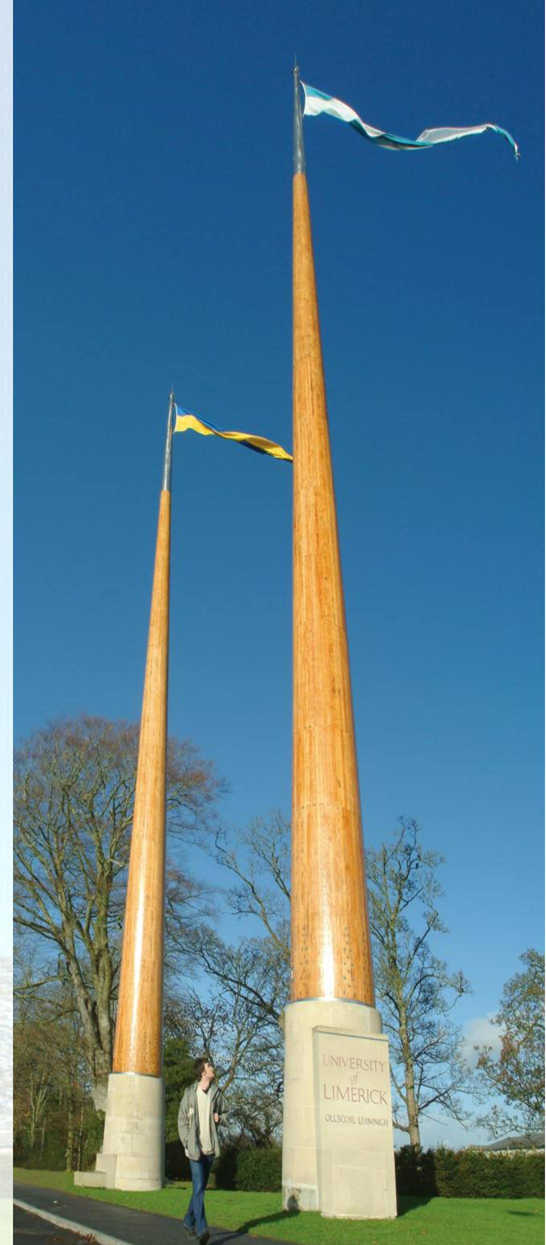
- <u>Second Major Reform:</u>
- Strengthened the presumption of equal sharing
  - Reapportionment now only available if 50/50 would be “*significantly* unfair”
  - The list of factors to be considered have also been changed

- Main objective: Reduce recourse to the courts



How has the 2011 Act been applied?

Has it achieved its goals?



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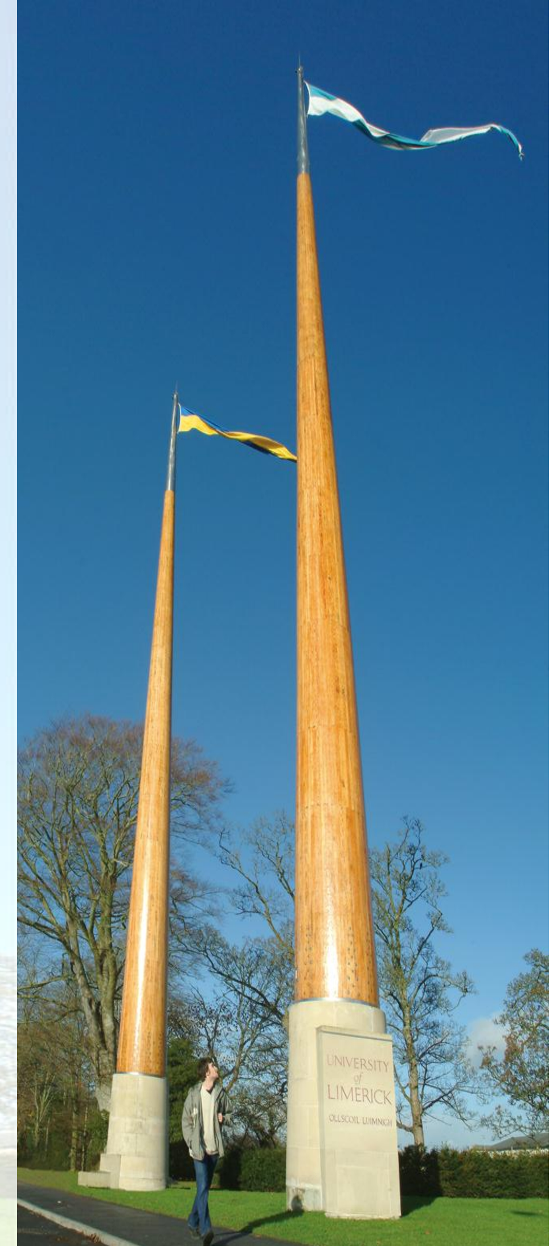
Reformulation of the community of assets

- Section 85: Only assets acquired during the relationship, otherwise than by gift from a third party or inheritance, are subject to sharing
- Despite simplicity, some issues have arisen
  - Interesting in context of Law Commission for England and Wales discussion (2014)
- Key problem: Tracing provisions



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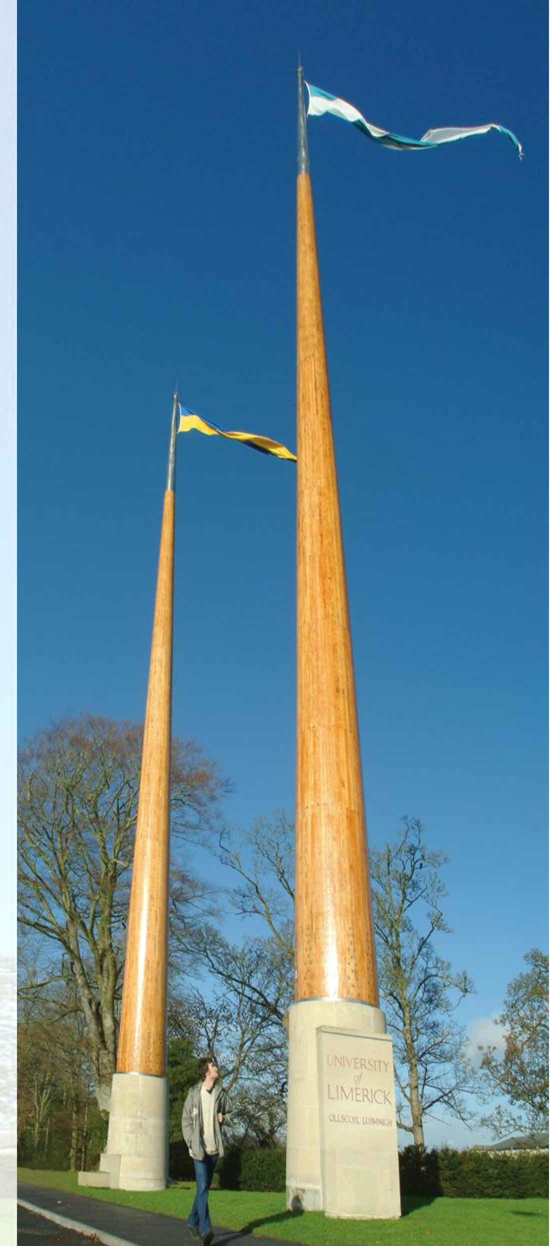
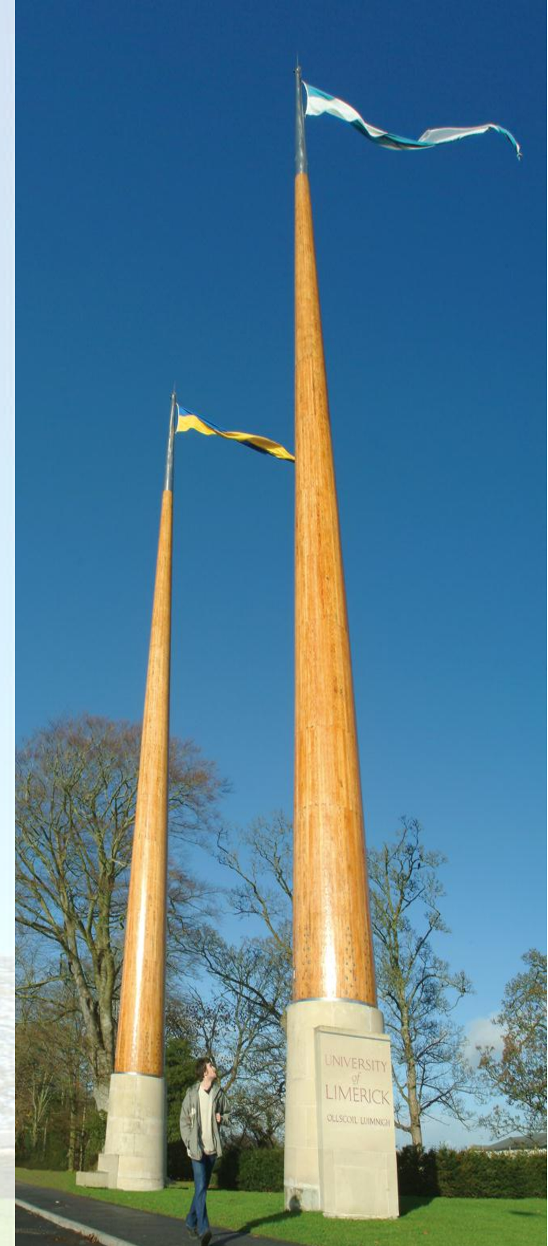
Reformulation of the community of assets

- Section 85(1)(g) provides that property derived from excluded property or the disposition of excluded property continues to be excluded property
  - Would these provisions apply when excluded property was transferred into the name of the other spouse or into the spouses' joint names?
  - Or when the proceeds of sale of excluded property were used to purchase property in the name of the other spouse or in the spouses' joint names?
- Practical implications of distinction



Reformulation of the community of assets

- *Remmem v Remmem* [2014] BCSC 1552
  - Husband argued that he should be given credit for the full value of each of the excluded assets he brought into the relationship notwithstanding that the proceeds from the sale of one of the assets was subsequently used to purchase a new property in the joint names of both he and his wife.
  - Claimant argued that the presumption of advancement between spouses was “alive and well in British Columbia” and that the respondent had presumptively gifted her one-half of his interest in those proceeds.
  - BCSC: Found for husband



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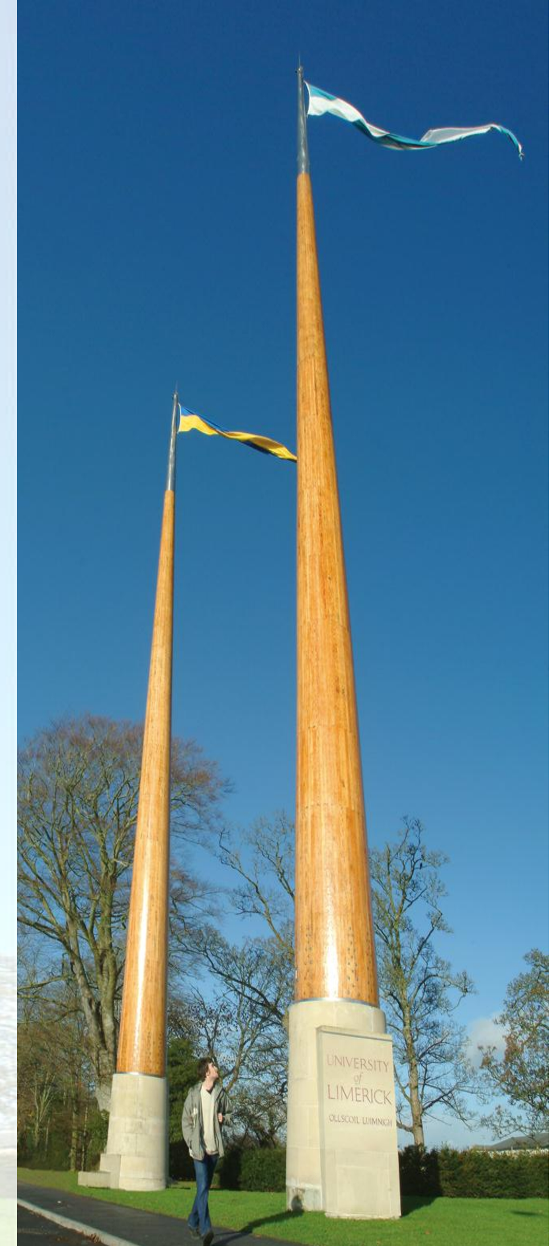
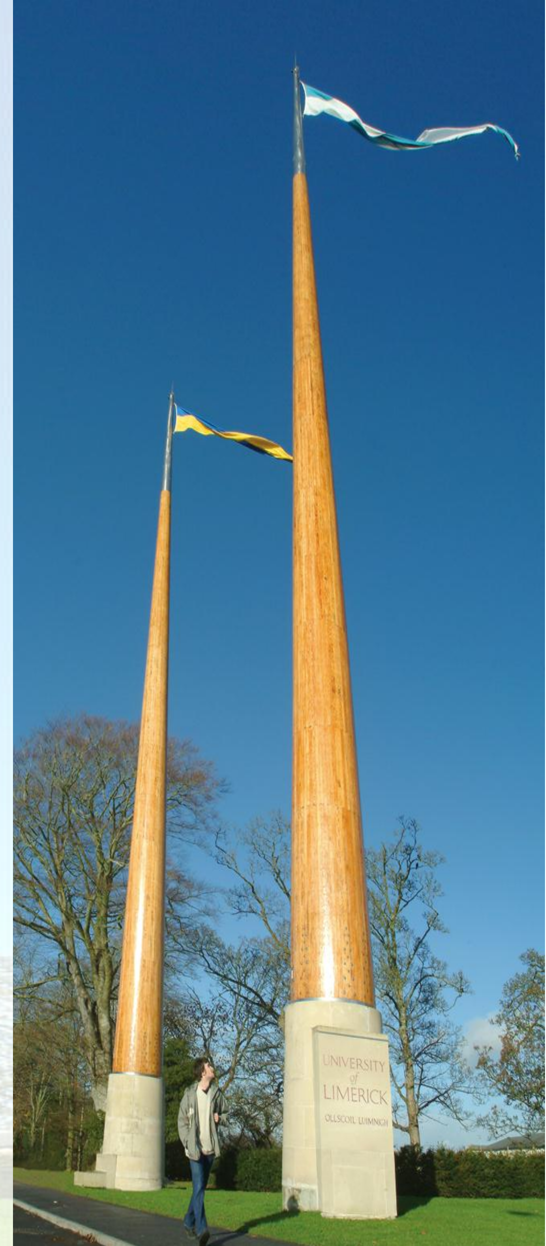
Reformulation of the community of assets

- *Wells v Campbell* [2015] BCSC 3
  - Opposite conclusion reached
  - Family home had been brought into the relationship by the husband and years later transferred into a joint tenancy
  - BCSC held claimant was entitled to share in the entire value of the property as the presumption of advancement applied
  - The court alluded to the "overriding fact" the home was put into a joint tenancy



Reformulation of the community of assets

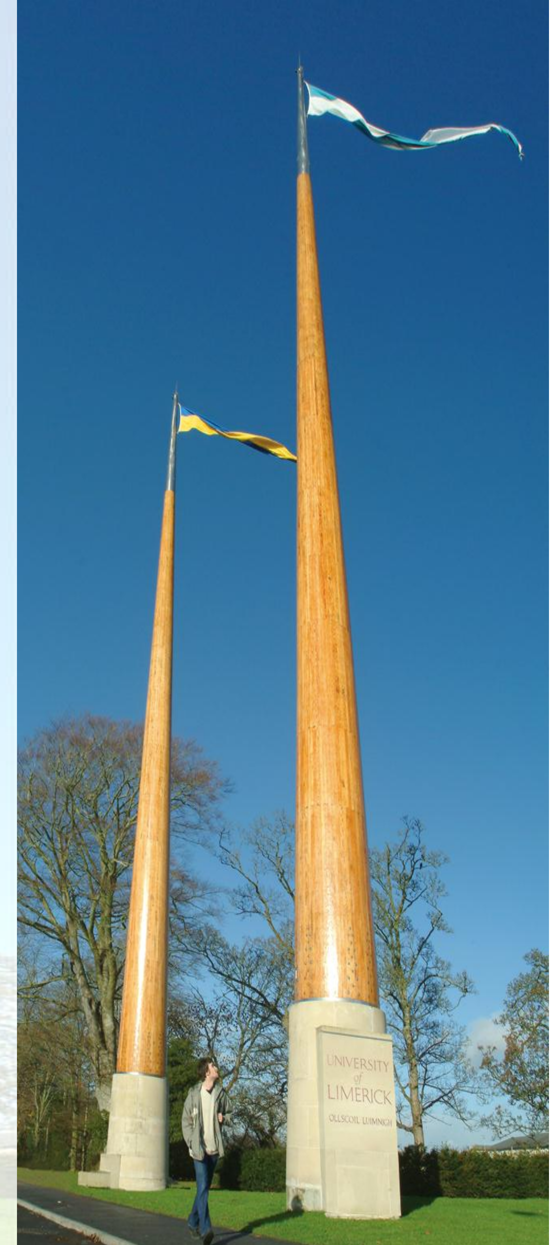
- Decisions going in both directions since…
- However, *Remmem* approach seems to be dominant (once excluded, always excluded)



Reapportionment under the 2011 Act

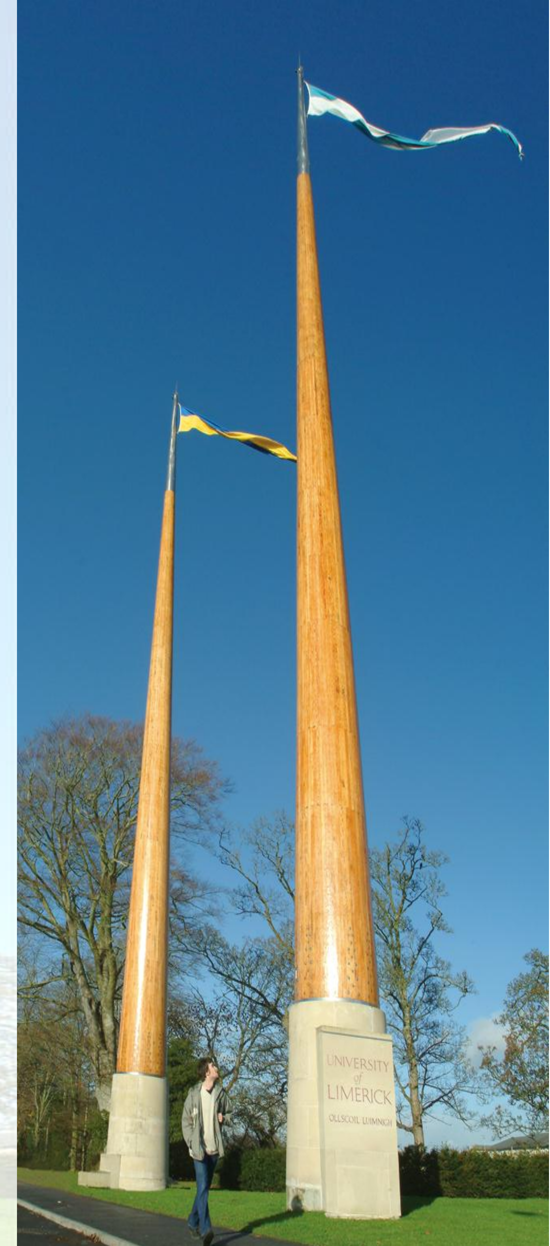
- No legislative definition of "*significant unfairness*"
  - Multiple judicial statements, trying to provide some meaning

- Judicial factors
  - Assumed heightened importance
  - Some inconsistency emerging (eg relevance of duration in mid-length relationships)



Reapportionment under the 2011 Act

- Should the courts have regard to the spouses' contributions to the overall pool of family assets in ordering a reapportionment?
  - Seemingly not
    - Section 81: spouses are both entitled to family property "*regardless of their respective use or contribution*"
  - However, some courts have taken it into account (eg *GP v MP* [2015] BCSC 1757)



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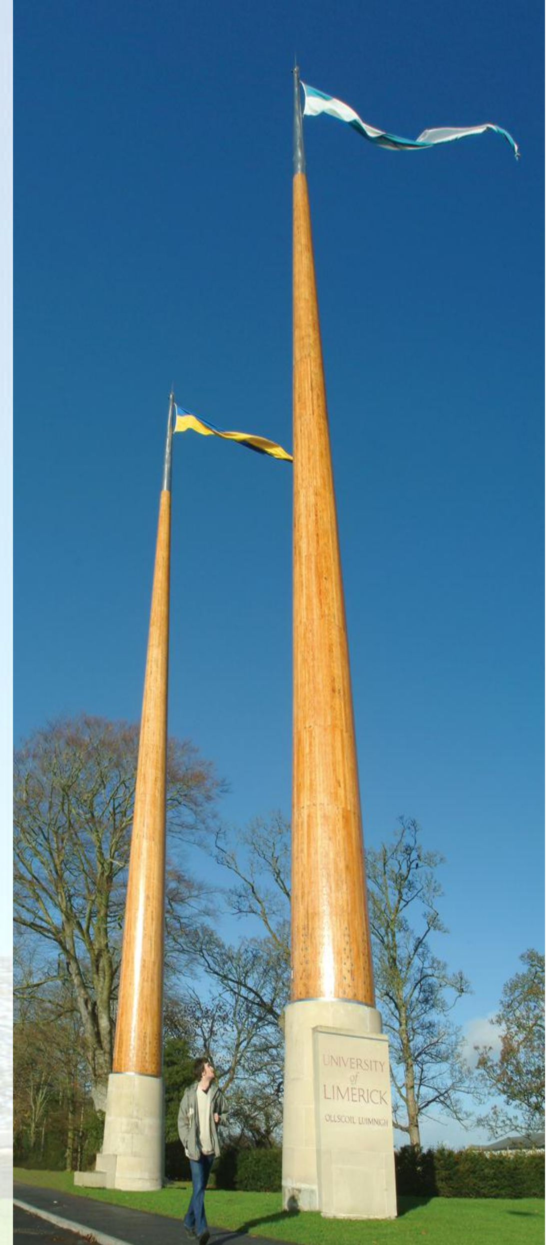
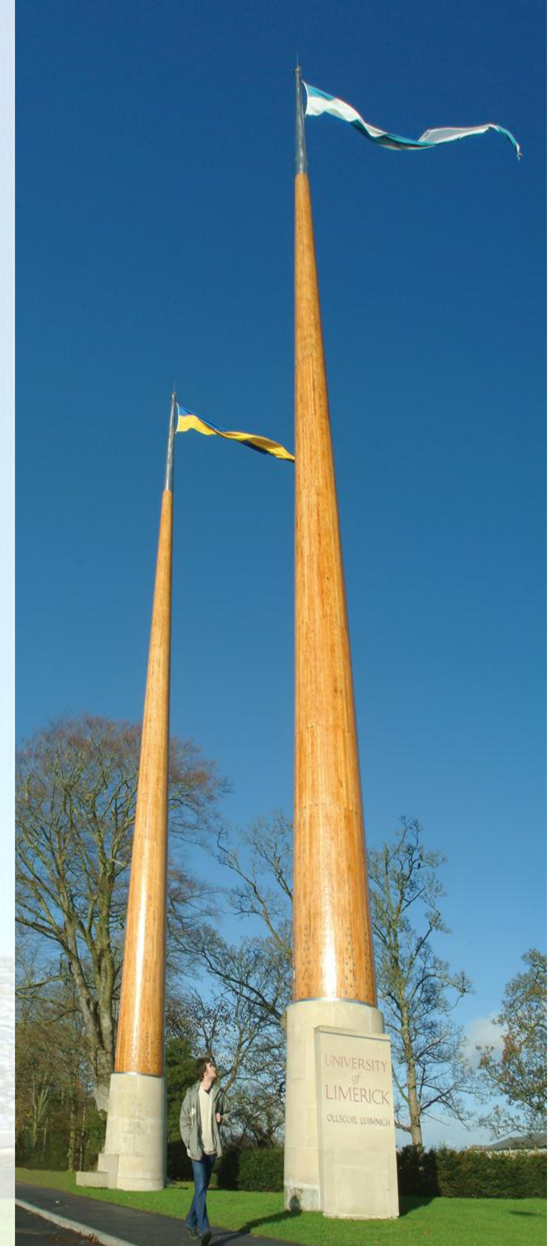
One Other Quirk…

- Debt sharing
  - Presumptive equal sharing of all “*family debts*”
  - Difference to 1996 Act?
  - Valuation date – major issues



Assessment!

- Aim of “not making court a presumptive starting point”
  - Some success
    - Simpler “bright-line” approach to asset identification
      - Tracing issue being cleared up
    - Presumption of equal sharing seemingly strengthened



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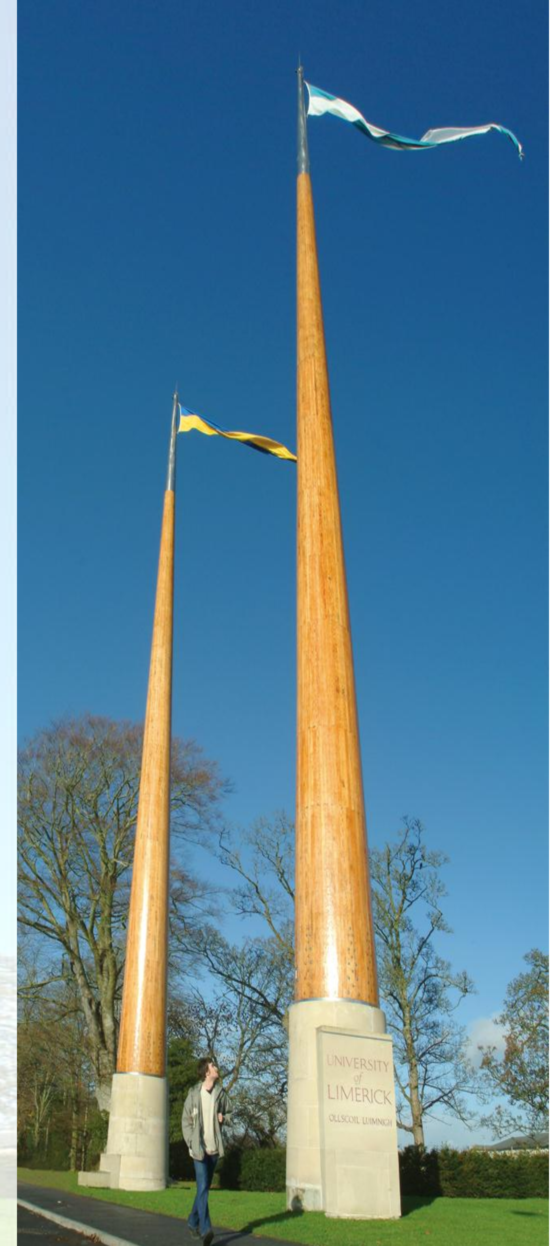
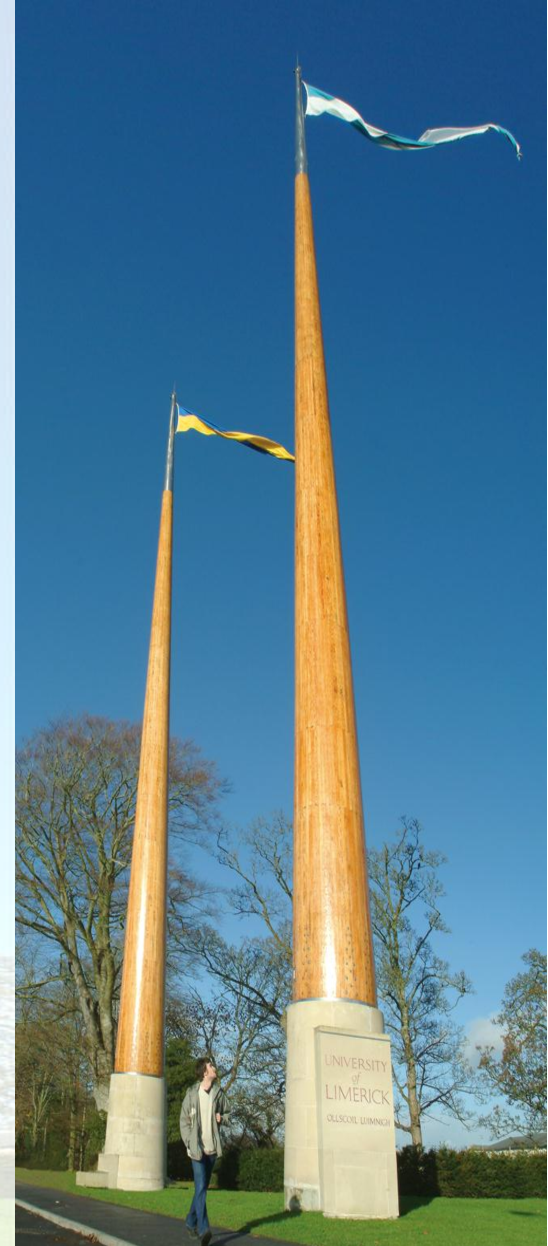
Assessment!

- Aim of increasing certainty and foreseeability?
  - Debatable to what extent its achieved…
    - Significant volume of cases seeking (& securing) a reapportionment despite higher threshold
    - Inconsistency in interpretation of statutory factors
    - Conflicting lines of authority on various aspects (eg contribution to asset base)



Assessment!

- Aim of making it “simpler” and “easier to understand”, better fitting with “people’s expectations about what is fair” and ensuring people “keep what is theirs”…
  - Questionable
    - Tracing & family home – not very intuitive for lay person
      - Importance of title?
      - Divergence from old system



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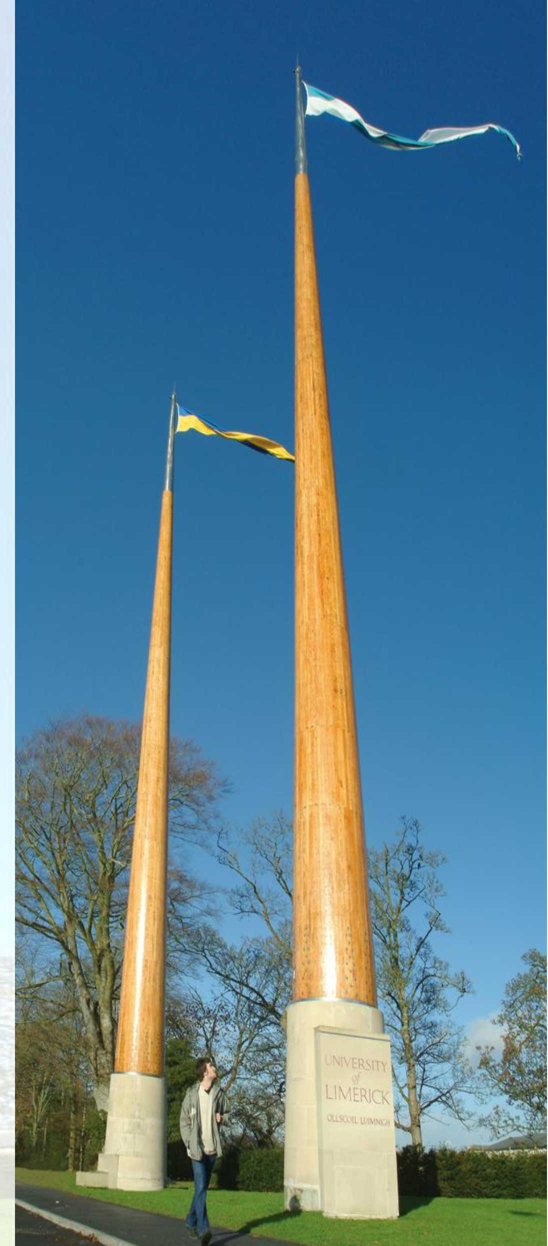
Conclusion

- Certain admirable qualities & teething problems were to be expected. However..
  – Some of the issues could have been offset
  – Some tweaking may be necessary
  – Some policy choices (eg vis-à-vis the home) seem liable to provoke sense of unfairness & confusion
- Potentially useful lessons to be learned!



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