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NEW TITLE

Internet Law

By Michael O'Doherty

Ireland is home to the European headquarters of many international IT and tech firms such as Google, Facebook, LinkedIn, Amazon and Twitter. As such, key cases involving these firms are being played out in Irish courts.

In addition, the law in Ireland regarding causes of action involving the internet is a rapidly growing area of law and litigation. This book examines issues such as defamation, data protection, e-commerce and intellectual property through the lens of the internet.

Internet Law by Michael O'Doherty looks at key pieces of legislation such as the EU General Data Protection Regulation and Defamation Act 2009; forthcoming legislation such as the Harmful Digital Communications Act; and the EU ePrivacy Regulation, which aims to ensure stronger privacy rules for all electronic communications.

Key cases discussed in this title include:

- *Schrems* v *Data Protection Commissioner*
- *Savage* v *Data Protection Commissioner & Google Ireland*
- *Sony Music* v *UPC*
- *CG* v *Facebook*

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Protecting all parties

The Council of The Bar of Ireland is continuing to work to ensure access to justice for all during the pandemic, while also supporting the needs of members.

One of the things the Covid-19 pandemic has taught us is that once you start to think of the value of a life in purely economic terms, the battle is over. Maintaining income is critical but not as critical as life or health. But for self-employed professionals, without the comfort of a guaranteed weekly pay cheque, restoring an income stream is vital, not just to pay bills and service loans, but to maintain well-being and preserve mental health. In this way, the economic necessity becomes a health necessity. Lives and livelihoods are intertwined.

As the Government commences the re-awakening of our economy through a five-phase roadmap, the Council continues to engage with the judiciary and the Courts Service on how to resume normal court business across all jurisdictions. Access to justice for all citizens is paramount. It is in the public interest and the interests of litigants that all options for the continuation of court business are explored, in line with necessary safety measures. This includes witness actions and jury actions, each of which presents its own challenges.

Gradual re-opening of courts

Through the weekly Chairman's updates, we have sought to keep members abreast of ongoing representations being made to the Courts Service in order to safely re-open the courts. In response to our request, the Courts Service established a Consultative User Group that provides an opportunity for all court users to provide feedback to manage and improve the ongoing difficult situation. Our intention is to maximise the number of cases that the courts can deal with, consistent with public safety. It is strongly in the public interest for the courts to resume hearings to the greatest extent possible and for witness actions to resume. All court users, including members, must exercise personal responsibility and are urged to co-operate with the safety measures that are being taken to ensure that safety remains the priority. The success of these measures will permit the opening up of other areas of court business, including and especially witness actions.

Member supports

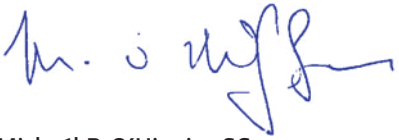
The financial pressures presented by the shutdown are immense. For many members this is a very difficult and stressful time. We hope that the Council's decision to apply a credit of 25% to the annual membership subscription has gone some way to help alleviate some of those pressures. Anyone under particular financial strain and unable to pay their subscription can make an application to the Library Committee, who will give discreet consideration to the situation of each member. Personal support is also available through the 'Consult a Colleague' Helpline. Any such contact will be dealt with sensitively and with the utmost discretion.

CPD

In light of the ongoing restriction of physical gatherings and the risk posed by attendance at seminars, the Education and Training Committee has revised the rules related to online CPD activities. The limit regarding the number of points that can be claimed from participation in online CPD activities has been removed for the 2019/20 CPD year. This means that there is no limit on the number of hours you can claim for online learning and research. I encourage members to tune in to the extensive range of live and pre-recorded webinars, which are advertised through *In Brief* and the *Education and Training Bulletin*. The Events and CPD team, speakers and participants are doing superb work behind the scenes, continuing to produce high-quality outputs for our members and Specialist Bar Associations. Sincere thanks also to all members who have participated in the interviews as part of our ongoing CPD review project. Your insights have been instrumental in shaping a model for the future of CPD and highlighting areas where the Council can continue to support you in meeting your CPD needs.

I would like to reiterate my thanks to the 24 members of the Council, the Executive and the wider membership for their continued support and understanding at this challenging time. We all share in the frustrations at having our lives restricted and the whole uncertainty around the question of when things will go back to normal. I hope you can take comfort from the realisation that the Council is continuing to work on your behalf, thinking ahead and planning our way to recovery. We look forward to emerging safely from this crisis.

Wishing you and your family members good health.



Micheál P. O'Higgins SC
Chairman,
Council of The Bar of Ireland

New ways of working

One of the greatest changes wrought by the Covid-19 pandemic has been the manner in which many of us (without warning) have been pitched head first in to a countrywide working from home experiment.

Some workers have had positive experiences and some negative but there is no doubt that the increased focus on remote working will have enormous ramifications for the employment relationship. We analyse the legal implications of the home becoming a place of work, and the increased responsibilities that will result for employers.

Another inevitable result of the economic shutdown is that many employers will find some of the employment contracts they have entered into no longer tenable. We examine the options for employers to alter the terms and conditions of their employees' employment in an attempt to stay in business, as well as the protections available to employees who are faced with the prospect of pay cuts and/or reductions to their working hours that they can ill afford.

Elsewhere, practitioners considering moving or contesting an application for security for costs under section 52 of the Companies Act 2014 will take some guidance from a recent High Court decision, which sets out the key principles that need to be considered.

Finally, while sporting events have been cancelled worldwide, the Secretary General of the Court of Arbitration for Sport remains ambitious for the organisation he has managed for 20 years. In an interview with *The Bar Review*, Matthieu Reeb explains the role of the Court in doping controversies and high-profile sporting events such as the Olympics.

We hope you stay safe in these strange times.

Eilis Brennan SC
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EBA online

The Employment Bar Association (EBA) had scheduled several breakfast briefings to take place between March and the end of the legal year. However, with Covid-19 and the necessary restrictions imposed, all physical events were cancelled from mid March until further notice. In an effort to continue the CPD programme, and maintain communication and collegiality with EBA members and colleagues at the Bar, the EBA decided to run a series of webinars commencing with the impact of the Covid-19 restrictions and how these may affect employment rights.

To date, speakers have included Oisín Quinn SC, Alex White SC, Kevin Bell BL, Claire Bruton BL, April Duff BL, Rosemary Mallon BL, Katherine McVeigh BL and Orla Murphy BL. Topics have focused on the challenges to employment law rights arising from the pandemic, such as: 'Covid-19 redundancies and unfair selection'; 'Lay-off, short time and the Emergency Powers Act 2020'; 'Leave in a time of Covid-19'; 'Home working'; 'Changing an employee's terms and conditions of employment in a time of emergency'; and, 'Sick leave, age discrimination and disability discrimination for employees arising out of health concerns and coronavirus'. To access recordings of the webinars, please go to employmentbar.ie or the CPD section of the Law Library Members' Section. For details of upcoming webinars, please go to employmentbar.ie or *In Brief*.

Family law via Zoom

The Family Lawyers' Association's annual Circuit Conference was due to be held in Kilkenny on April 27, 2020, and Judge Alice Doyle of the South Eastern Circuit had kindly agreed to chair the event. With the cessation of events due to Covid-19, it was clear that a physical event could not be held, but the Association was keen not to cancel as speakers had prepared excellent papers and it was also the committee's view that this would be a shared experience for colleagues who were experiencing isolation, in common with all.

The task seemed daunting at first but assistance came in the form of Flor McCarthy, solicitor, who has considerable experience of the webinar format. After a discussion with him about the available platforms, the committee opted for Zoom, signing up for Zoom Pro and also for the additional webinar platform. Flor assisted with initial set-up (which the Association has used for two shorter webinars since) and the registration link was advertised. The registrations came rolling in. The Zoom programme allowed for 500 participants and this was exceeded (some people were disappointed!). Paul McCarthy SC was host for the event and did webinar tutorials with speakers in advance. Technical assistance was available throughout if attendees experienced difficulties logging in – few did.

It was a steep learning curve but, like riding a bike, once mastered, the Association never looked back!

Life After Covid-19

Norma Sammon BL
Bar of Ireland Performance & Resilience Committee

As we emerge from our respective cocoons, dust down our crumpled gowns and head back into courts all around the country, we might find that our perspective has changed. With the restrictions that came in mid March, our resilience was thrown into sharp focus. Out of nowhere, our professional lives ground to a halt and we were reminded of just how challenging life at the Bar can be. Many of us were forced to take stock. Now, as we gradually return to work, it is worth reflecting on what has helped or hindered us during the enforced break. Out of this extraordinary experience, what can we bring into our practice that might enhance it? Apart from re-assessing where our focus lies and our financial priorities, perhaps we took the opportunity to 'upskill'. Many of us completed an online course, finally watched that CPD, or read or even wrote that article we had been meaning to look at.

Maybe we learned how to get the most out of the software we have access to and to maximise our efficiency using the library databases. Maybe we realised how invaluable the staff in the library are and will make sure to show our appreciation from now on. Maybe we took a well-deserved break from the madness and are now refreshed and ready to dive back in. Maybe we decided that our social and professional network is very important and are going to make a conscious effort to connect with other colleagues or contribute to the work of The Bar of Ireland. Maybe you've learned something that could contribute to how we perform or how we can make ourselves more resilient in times of fear and unknown outcomes. Many of us acquire such skills as we battle our way up the ranks trying to make a living at the Bar. During lockdown we relied on that resilience, and now we can continue to build on it to improve our performance. The Performance & Resilience Committee offers support and resources to all members who wish to maximise their skills and enhance their practice.

The Committee is actively developing and supporting resources and courses to help barristers to fulfil their potential. If you have any suggestions for how to make working as a barrister more efficient, or have acquired new skills that you think could enhance your practice, please share by emailing norma.sammon@lawlibrary.ie.

Consult a Colleague

The Consult a Colleague Helpline is a confidential helpline available to support all members of The Bar of Ireland with any problem, whether personal or professional. Two barristers are always on call and can be contacted on 01-817 4790 and 01-817 4971.

IACBA adapting to new technology

The bi-monthly CPD events scheduled by the Immigration, Asylum and Citizenship Bar Association (IACBA) this year were, like everything else, stopped short by the Covid-19 crisis, which put paid to all gatherings from mid March.

With a view to keeping members up to date with the latest legal issues, putting the enforced halt in court activity to good use, and maintaining the opportunity for collegiate interaction, IACBA members adapted quickly to new technological skills and the schedule was moved online.

In a stimulating series of well-attended live webinars to date, Anthony Lowry BL (with contribution from Zachary Murtagh BL), Michael Lynn SC and William Quill BL have shared topical thoughts on 'Restricting free movement on grounds of public health under European Union law', 'Marriages of convenience and retrospectivity', and 'Running a case at the International Protection Appeals Tribunal (IPAT)', respectively.

The latter session on the IPAT was a joint endeavour with the Young Bar Committee and provided an ideal introduction for junior members of the Bar to Tribunal workings, complementary to court work. It was chaired by Anita Finucane BL, Chair, Young Bar Committee.

The joint webinar on May 21, by Aoife McMahon BL, on 'Reception conditions: EU standards during Covid-19 and beyond' and Hugh McDowell BL on 'Citizenship and s. 19 inquiries' was the first of the fortnightly series, with more to follow. Chaired by Denise Brett SC, Chair, IACBA, and carrying CPD points for all attendees, webinars are recorded and made available to view via the IACBA website. Members are invited to keep an eye on *In Brief* and iacba.ie for details of the rest of the series.

Bar proposal to Courts Service on resumption of court hearings

The Council of The Bar of Ireland has submitted to the Courts Service detailed proposals on how physical hearings might be resumed while adhering to public health advice and social distancing requirements during the coronavirus pandemic. The Council welcomes the continued roll-out of remote hearings as an essential step in the public interest to ensure the continuation of court business during this time; however, it is the view of the Council that physical hearings should also be resumed to the greatest extent possible, consistent with all necessary safety measures.

The Council of The Bar of Ireland established two working groups (one civil, one criminal), comprising members of the Council working across the State, and in all jurisdictions, to provide suggestions to the judiciary and the Courts Service. The resulting proposals were submitted to the Courts Service in early May and are available on The Bar of Ireland's website here (civil) and here (criminal).

The former suggests the listing of cases at staggered times, with time limitations imposed, and the possibility of particular witnesses giving their evidence remotely to limit the need for the attendance in court of persons other than the judge, registrar and legal practitioners, abiding by social distancing. The latter gives consideration to a range of measures that may be of assistance in the re-commencement of criminal jury trials, including the safe empanelling of jurors and their participation in the court process.

As the Covid-19 context continues to evolve, The Bar of Ireland will continue to explore feasible options for the continuing administration of justice in a safe and productive manner, and welcomes ongoing dialogue with the judiciary and Courts Service to ensure effective access to justice for all litigants.

Bar CPD adapting to changing times

According to Albert Einstein: "The measure of intelligence is the ability to change". Ability to change – indeed to change rapidly – has been evident across the world over the past few months. Expressions such as social distancing, cocooning, self-isolation and contact tracing have all, in such a short space of months, become a part of our daily vernacular. In the Events and CPD function of The Bar of Ireland, speakers have become presenters, event managers are now known as producers, and we now know the difference between a webinar and a webcast (the former is live, the latter is pre-recorded).

Overnight, members and staff moved to remote working or WFH (working from home) and all live events were cancelled or postponed, initially for March and April and then sadly more long term. However, as author and motivational speaker Garrison Wynn has noted, "action and adaptability create opportunity", and this has certainly proved the case for the event organisers at The Bar of Ireland.

The Specialist Bar Associations and the Education & Training Committee enthusiastically embraced the overnight move to online content. In the first two months of lockdown there have been nine webinars and a further four webcasts. Twenty-seven speakers have been involved and they must be commended for their swift and professional transition to online delivery. Over 630 people have attended live events and 304 have viewed the new offering of webcasts.

Just as remote hearings are quite different from hearings in person, online seminars mean that speakers are more akin to radio presenters. For most events they can't see or hear their audience but they know that they are there.

Their only engagement is via a Q&A panel on screen. For barristers used to actively engaging with and responding to their audience, it is a dramatic change.

A significant benefit of online delivery is that events can be organised in a far shorter time and attendees do not have to factor in travel times to attend. However, online content also requires a far greater input from the executive staff, as well as a rapid upskilling in how to best manage and produce online content.

Members should note that the CPD rules for the current legal year were amended to remove the limit on the number of points that can be claimed via online activities. If you have not yet explored the Education & Training Hub and the variety of Bar of Ireland educational content, we would encourage you to do so.

Unfortunately many members have more time on their hands and engaging with the varied selection of online events on offer would be a useful exercise during these challenging times. We look forward to seeing you in person again but until then, we will see you online.

Council denounces mistreatment of lawyers in Hong Kong

The Human Rights Committee of the Council of The Bar of Ireland has written to Carrie Lam, Chief Executive of the Hong Kong Special Administrative Region (HKSAR), and to the embassy of the People's Republic of China in Ireland, condemning the recent arrests of lawyers and democracy activists Martin Lee QC and Dr Margaret Ng.

The Human Rights Committee regularly monitors reports of alleged mistreatment of lawyers and has written to a number of embassies and governments in recent times condemning the harassment, prosecution, arbitrary detention and torture of lawyers targeted for their peaceful and legitimate work in defence of human rights in countries such as Turkey, India, China, Russia, Egypt, Iran and the Philippines. The arrests of Mr Lee and Dr Ng, whose peaceful and legitimate protection of human rights is in accordance with domestic and international legal frameworks, causes grave concerns for access to justice and the rule of law in Hong Kong. The Council joined its colleagues across the international legal community in calling on the Hong Kong authorities to immediately release these detainees, to drop all charges against them, and to cease what are alleged to be politicised and targeted prosecutions against those involved in peaceful demonstrations. A copy of the letter can be viewed here.

Green Street lecture podcasts

In 2016, under the Chairmanship of Mr Justice David Barniville, The Bar of Ireland held a series of lectures celebrating the role of the courts and barristers in Irish history.

Originally delivered to a live audience in Green St Courthouse, these lectures are now being brought to a wider audience through the format of podcasts. Presented by a range of legal luminaries including Mr Justice Gerard Hogan and the late Mr Justice Adrian Hardiman, listeners can tune in to hear a recounting and an examination of some of the key junctures that shaped the history of our State in the struggle for Irish independence.

Available now on Apple Podcasts, Google Podcasts and Spotify.

This sporting life

Following his presentation to the Sports Law Bar Association earlier this year, Secretary General of the Court of Arbitration for Sport Matthieu Reeb spoke to *The Bar Review* about the Court's history and development.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

As Secretary General of the Court of Arbitration for Sport (CAS), a post he has held for 20 years, Matthieu Reeb is responsible for the Court's management (39 employees, 400 arbitrators and 60 mediators), public relations, the monitoring of approximately 600 arbitration and mediation procedures every year, and for the organisation of the CAS *ad hoc* Divisions (established during the Olympic Games and other major sporting events). Founded in 1984, the CAS was originally funded by the International Olympic Committee (IOC), but in 1994, in order to copper-fasten its independence, a new entity, the International Council of Arbitration for Sport (ICAS), was created (see panel). This independence is extremely important to the organisation, as Matthieu explains: "The independence of the CAS, and of the ICAS, was a key argument among those who were critical of the CAS system. This criticism was mainly caused by the origin of the institution as a creation of the IOC and that link continued to be emphasised until recently".

Much work has been done in recent years to further cement this independence through changes in the CAS' composition and through international case law: "Since 2014, the composition of the ICAS has changed considerably. Before, it was composed of a majority of sports administrators and officials. At present, the ICAS is constituted of only five of these sports officials (out of a total of 20) and the majority of members are active or retired judges and lawyers who are expert in international arbitration. Furthermore, in the last four years, important decisions have been rendered by major courts, in particular in relation to the case of the German speed skater Claudia Pechstein: the German Federal Tribunal has recognised the CAS as a genuine arbitration tribunal, independent and impartial, following the opinion of the Swiss Federal Tribunal some years ago. The European Court of Human Rights (ECHR) also considers that the CAS system and procedures are compatible with the requirements of the European Convention on Human Rights".

Meeting standards

CAS arbitrators and mediators are held to the highest standards: "The 400 CAS arbitrators are appointed by the ICAS for a renewable term of four years. They must have a full legal training, recognised competence with regard to sports law and/or international arbitration, a good knowledge of sport in general, and a good command of at least one CAS working language [currently English and French, although Spanish will shortly be added]. They must carry out their functions with total objectivity and independence (when they are appointed, arbitrators have to sign a declaration to this effect).

"In addition, it is important to underline that the CAS arbitrators who are in charge of the arbitration procedures must remain independent from the parties at all times and can be removed from a panel in the case of a conflict of interest".

The independence of the CAS, and of the ICAS, was a key argument among those who were critical of the CAS system.

The Irish connection

Ireland has always had strong links to the CAS, as Matthieu explains: "In 2020, the CAS counts eight Irish arbitrators among its numbers. We also have a fair number of procedures involving Irish athletes, clubs or sports bodies, represented by Irish counsel. I should also mention that two of my former colleagues at the CAS Court Office were Irish: Louise Reilly and David Casserly. The Irish tradition at the CAS continues, as we have recently hired a new secretary from Ireland".

As a large organisation, with a remit right across the sporting world, the CAS faces ongoing challenges in managing a workload that can be hard to predict at the best of times, never mind during a global pandemic: "As a tribunal, we can never be sure of what the future workload will be. The difficulty is to maintain the quality and efficiency of our services in all situations. In the first part of 2020, we were registering a wave of new appeals against decisions rendered by FIFA [the international body governing soccer], because FIFA has made a specific effort in recent times to reduce its backlog. Later in the year, we anticipate a significant decrease, because of the current limited sports activity due to the Covid-19 crisis".

The Covid-19 pandemic is likely to have the opposite effect in the future, he feels: "There will be a third phase where the economic consequences of the Covid-19 crisis will be visible (contractual disputes, governance issues, etc.). In short, the CAS needs to be flexible and to adapt its organisation to continue to meet all expectations".

Innovation

While managing its ongoing caseload, the CAS is also constantly seeking to evolve and innovate. The adoption in 2020 of Spanish as a third working language is one such development, and another is the decision, in accordance with recent jurisprudence of the ECHR, to amend its regulations to allow public hearings at the sole request of an athlete involved in a disciplinary case: "Public hearings have always been possible at the CAS, but previously it was necessary to have the agreement of all parties concerned. We had our first experience under this new regime in November 2019 with the hearing of *WADA v Sun Yang and FINA* [In February 2020, Chinese swimming star Sun Yang was banned for eight years after the CAS upheld the World Anti-Doping Agency's appeal against a decision by swimming's governing body FINA to clear him of a doping offence]. We had around 160 spectators (media and public) present in the hearing room and a few million viewers on television and internet".

The Covid-19 pandemic has also brought changes: "The CAS Court Office has developed and promoted the use of its e-filing platform to reduce paperwork and mailing of documents. It is likely that this will be strengthened in the future, even after the end of the pandemic".

Another major innovation in recent years was the establishment in January 2019 of the CAS Anti-doping Division (CAS ADD), which substitutes for the anti-doping panels of international federations (IFs) and delivers awards that can be appealed at the classic CAS. While recognition of the CAS ADD is on a voluntary basis, by the end of April 2020, 12 international sporting federations had recognised its jurisdiction and updated their regulations accordingly: "There is a specific list of CAS ADD arbitrators, and these arbitrators cannot sit in appeals cases. The procedure is inexpensive, if not totally free, and cases are managed by a sole arbitrator by default. During its first year of activity, the CAS ADD handled five cases".

Chinese swimming star Sun Yang was banned for eight years after the CAS upheld the World Anti-Doping Agency's appeal against a decision by swimming's governing body FINA to clear him of a doping offence. We had around 160 spectators (media and public) present in the hearing room and a few million viewers on television and internet.

International alignment and *ad hoc* divisions

Mention of IFs raises an important and sometimes thorny issue for the CAS: the challenge of bringing as many IFs as possible under its aegis. Matthieu says that CAS' ongoing efforts over many years to achieve this continue to bear fruit: "I was lucky enough to join the CAS at a time when the first international sports federations started to recognise its jurisdiction. The hard work had already been done by my predecessors, who had the difficult mission of convincing all sports organisations to adhere to the CAS system at a time when it was not very active. When I started in 1995, only three IFs were still reluctant to use CAS services: FIFA, the IAAF (now World Athletics) and the FIVB (volleyball). The FIVB accepted CAS jurisdiction in doping matters only, but it was more difficult with the other two. My task was to convince them to allow a legal remedy before the CAS as an

CAS

The Court of Arbitration for Sport (CAS), founded in 1984, is an institution independent of any sports organisation, which facilitates the settlement of sports-related disputes through arbitration or mediation. Any disputes directly or indirectly linked to sport may be submitted to the CAS, whether of a commercial (e.g., a sponsorship contract) or a disciplinary (e.g., a doping case) nature.

The CAS is based in Lausanne, Switzerland, and during its first decade, was financed and administered by the International Olympic Committee (IOC). However, in 1994, following a procedure before the Swiss Federal Tribunal (SFT) where the independence of the CAS was a central issue, the connection with the IOC was definitively cut and a new entity created, the International Council of Arbitration for Sport (ICAS), as the governing body of the CAS. In another judgment in 2003, the SFT concluded that the CAS was sufficiently independent of the IOC, as it was of all other parties that called upon its services, and that its decisions were to be considered as true awards, comparable to the judgments of a state court.

The ICAS is composed of 20 members, who must all be high-level jurists well acquainted with the issues of arbitration and sports law. The founding ICAS President was H.E. the Judge Kéba Mbaye of Senegal. Mr John Coates of Australia has served as ICAS President since 2010.

Work-life balance

An attorney at law from Neuchâtel in Switzerland, Matthieu joined the CAS in September 1995 in the role of Counsel to CAS, managing arbitration procedures. He was appointed CAS Secretary General in 2000. When he has time, Matthieu is a keen sportsman, and the former Swiss rugby international enjoys running, cycling, skiing and playing rugby with the veterans of his former team. He also enjoys watching sport live and on television: "Sport is my passion and it was very important for me to combine it with my professional legal education. After 25 years at the CAS, I feel as if it is my first day at work… probably a good sign!"

independent last-instance authority. This happened in 2001 for the IAAF and in 2004 for FIFA. At the same time, it was also important to keep all other IFs under the CAS aegis. This was possible thanks to the good work of the CAS as a whole, and to the quality of service of the CAS administration, and of CAS arbitrators".

At the time of Matthieu's visit to Dublin, the CAS was deep in preparation for the Tokyo Olympics, where the special CAS *ad hoc* Division was preparing to deal with any disputes arising during the Games. This year's Olympics have since, of course, been postponed, but the work of the CAS *ad hoc* Division, which has been present at every Olympic Games since Atlanta in 1996, and at other multisport events, will resume when these events are once again cleared to take place.

The CAS still has the potential to attract more users from professional sport, especially outside Europe, but this will probably require some time – maybe less now with the development of electronic means of communication and case management.

These events, by their very nature, create particular and complex challenges: "As the period of the Games is short and more than 30 different sports have their competitions within 17 days, it is essential to be very quick. The CAS Olympic procedure is very fast (24 to 48 hours) depending on the urgency of the matter. Obviously, it is necessary to be quick in matters where an athlete is supposed to compete on the following day, while the pressure is not the same with athletes who have already finished their event(s). The procedure is simplified: one written application, one hearing and a decision. There is no time for written proceedings. The hearing is the moment when the parties can present their evidence and arguments. We also have a service of lawyers during the operation of the CAS *ad hoc* Division". From the perspective of athletes, whether at the Olympic Games or in other circumstances, a CAS process can be difficult, intimidating, and potentially expensive. Matthieu says that the CAS tries to have a range of supports in place to make the process as easy as possible: "The ICAS has implemented a legal aid system, which is not unusual with State courts but is exceptional in arbitration, a private judicial system. With the financial contributions that the ICAS receives from the Olympic movement, we have established a legal aid scheme to assist individuals without sufficient financial means to access CAS justice. This legal aid has three components: it can cover the arbitration costs; it offers the services of *pro bono* lawyers; and, it can cover travel and accommodation expenses in case of a hearing in person".

The adventure continues

With so many cases and so much innovation in recent years, Matthieu finds it hard to point to one instance of which he is most proud. For him, it's about the journey: "I feel that the collective adventure, the harmonious evolution of the CAS, is the success story. Starting with three employees and 40 procedures in 1995, and developing to manage nearly 40 employees and 600 procedures nowadays, is certainly noteworthy. A great achievement to come is also the move of our headquarters to a new and bigger office, the Palais de Beaulieu in Lausanne, which should happen at the end of 2021".

As for the future, as the whole world navigates its way through a global pandemic, it might seem difficult to make plans, but Matthieu remains ambitious for the organisation to which he has dedicated his career: "The CAS still has the potential to attract more users from professional sport, especially outside Europe, but this will probably require some time – maybe less now with the development of electronic means of communication and case management. There is also a discussion as to whether the CAS should be officially recognised as an international tribunal, like the International Court of Justice. The condition for this is the signing of an international agreement by governments, but this could strengthen the status of the CAS, provided that its flexibility and efficiency is not compromised by slower and heavier decision-making processes".

There's no place like home

The increase in home working that has occurred as a result of the Covid-19 pandemic has some legal implications from an employment law perspective.*

Claire Bruton BL

Due to Government policy and measures to deal with the Covid-19 pandemic, many non-essential workers are working from home, where it is possible to do so. In many respects, the current emergency situation in Ireland was unexpected, and employers and employees had to grapple with speed with many unanticipated issues in the context of home working. As a result, employees and employers have had to consider how best to work from home, in line, insofar as possible, with legislative requirements relating thereto. In this article, I will consider two of the legal issues that arise for employers in the context of employees working from home: the obligations that arise from a health and safety perspective; and, the data protection obligations to protect personal data.

I have concentrated on these two areas because practical and common sense guidance was recently published by two statutory bodies with relevant expertise – the Health and Safety Authority (HSA) and the Office of the Data Protection Commissioner (DPC).[1,2] Helpfully, these publications provide advice for employees and employers, but for the purposes of this article I will concentrate on the obligations of employers.

Health and safety considerations

Key considerations for employers for home working

It is important for a decision to require employees to work from home to be documented as part of an employer's overall risk assessment carried out in respect of Covid-19. In addition, employees should be reminded that relevant provisions of the organisation's health and safety policy continue to apply in respect of home working arrangements. Employees should also be reminded that they are required to take reasonable care to protect their safety, health and welfare, and the safety, health and welfare of any other person who may be affected by the employee's acts or omissions at work. Finally, organisations should review whether their employers' liability insurance covers staff working from home.

Prior to considering the HSA advice, key practical considerations arise for employers in the context of providing home working arrangements, when this was not common in the past. These are likely to involve employers ensuring that they:

- engage regularly with key providers, such as IT, HR and external advisors, to ensure that the company is functioning as well as possible and has the necessary infrastructure, including servers and IT security arrangements, in place to enable home working arrangements;
- remind employees of their duties and obligations under their contracts of employment and applicable policies, in particular their obligations and duties in relation to health and safety, confidentiality, data protection, emails and intellectual property;
- remind employees to continue to take their rest breaks in line with the Organisation of Working Time Act 1997;

- request employees to turn off and remove smart devices, such as Alexa, from their home working area in order to maintain client/customer confidentiality;
- ensure that it is possible to continue to communicate with staff during periods of home working (whether by email, mobile or telephone); and,
- provide for an emergency contact service for employees to contact the employer out of hours.

HSA guidance

As a matter of law, employers have duties to ensure employees' health, safety and welfare, and this extends to an employee's workspace even when an employee is working from home.[3] It is clear that consultation with employees is required regarding home working and how it works practically. The HSA guidance is useful in this respect.

The HSA guidance is in the form of frequently asked questions (FAQs) on the practicalities of facilitating remote working on a temporary basis,[1] including what equipment should be provided, what questions employers should ask employees about their workspaces, and what other supports and means of communication should be put in place to protect employees. For example, the advice indicates that an agreed means of contact should be in place and employees should be updated regularly via phone or email. Technical support should be accessible remotely and employers should ensure that work is organised in such a way that the employee can take regular breaks and can separate his/her work life and personal life.

It is important that employees have regular contact from their employer – both formal and informal – to protect their physical and mental health, including reducing psychological stress.

The HSA acknowledges that special consideration should be given to employees from sensitive risk groups, for example employees with disabilities, pregnant employees and older or younger workers, who are classified as sensitive employees, in respect of which specific legislative requirements exist.[4]

In requesting an employee from a sensitive risk group to work from home, the HSA states that an employer should consider the suitability of the person to the work in the context of their home working space. It is essential that work tasks and working conditions do not adversely affect the health of employees with a disability, pregnant employees, and young workers. The HSA advises the employer to examine whether safe access to the workspace for sensitive employees requires an examination of the equipment necessary to complete the work: sufficient workspace; adequate lighting, heat and ventilation to allow comfortable working; adequate breaks; regular contact with his/her employer; and, putting in place emergency contacts and procedures.

In my view, employers should also consider their obligations to employees with disabilities under the Employment Equality Acts 1998-2018,[5] including the obligation of reasonable accommodation, in relation to employees with disabilities in the context of home working. In many respects, that is unlikely to be onerous given that an employee with a disability will be working in their home environment such that access will not arise. However, in the context of equipment for such employees, particular regard should be had to their specific requirements, similar to what is required in the workplace.

In terms of general consultation with employees regarding home working, the HSA has indicated that employers should consult with their employees to assure themselves that:

- the employee is aware of any **specific risks** regarding working from home;
- the **work activity and the temporary workspace are suitable**;
- **suitable equipment is provided** to enable the work to be done; and,
- there is a pre-arranged **means of contact**.[6]

The latter reflects the likelihood that employees may feel disconnected, isolated or abandoned if they not familiar with working from home, particularly given the unprecedented times in which we find ourselves. It is important, therefore, that employees have regular contact from their employer – both formal and informal – to protect their physical and mental health, including reducing psychological stress.

Risk assessments

It is also worth noting that the Safety, Health and Welfare at Work Act 2005, as amended, will continue to apply in respect of remote/home working arrangements for employees, and in particular the obligation for risk assessments to take place.[7]

It is likely that a thorough risk assessment of working from home will include the following –

a. Examination of the area where the home working takes place, e.g., is there sufficient ventilation, and is there sufficient space?
b. Electrical safety – is the fixed electrical system safe; are extension leads fused and switch type?
c. Safe posture – has training been provided on how to set up the work station? Is there sufficient space in front of the keyboard to allow resting of hands between typing?
d. Visual fatigue – is the screen position at the correct height and viewing distance? Is the eye line of the employee just below the top of the screen? Is the screen free from glare?
e. Manual handling – is there a need for manual handling training?
f. Stress – is there sufficient segregation from disruptions, e.g., children, pets; are there arrangements for contact with the employee?
g. Emergency arrangements – has the home worker access to a first aid kit? Does the home working place have access to a working smoke alarm?

Further, it is likely that persons working from home are lone workers for the purposes of the 2005 Act, as they are working alone and away from their place of work/fixed base without close or direct supervision.[8] In addition, given that employees working from home are juggling other responsibilities during the Covid-19 pandemic, such as caring responsibilities towards family members, the times at which they work are more likely to be outside of normal business hours. Again, this is suggestive of such employees being lone workers for the purposes of the 2005 Act.

The practical effect of employees working from home being lone workers is that the 2005 Act requires that a specific risk assessment regarding lone workers and whether the work can be completed by a lone worker must be carried out by employers.[7] In separate guidance on lone workers, the HSA states that, in general, in completing the risk assessment exercise an employer must assess whether an employee is at significantly higher risk when working alone of being exposed to hazards such as inadequate provision of rest periods, sudden illnesses, accidents or physical violence.[9]

Some of these risks are unlikely to arise in the context of many employees working from home as they are designed to cover employees such as security guards, but it is conceivable that if an employer becomes aware that an employee is not availing of their rest breaks or has been exposed to Covid-19, action to protect the lone worker must be taken, such as: advising the employee to take rest breaks; providing advice to employees as to how to take rest breaks when home working; taking active steps to encourage an employee working from home to take rest breaks when aware that such rest breaks are not being taken; and, advising the employee to self-isolate if they are exposed to Covid-19. If it is not possible for an employee to work from home as a lone worker, it is likely that such an employee should be placed on a period of lay-off from his or her employment, if the employee is a non-essential worker. It is also important for an employer to be aware that where an employee is working from home and is a lone worker, they are likely to be liable for any accident or injury of a home worker that takes place at the employee's home. It is for that reason that employers' liability insurance policies should be examined to ensure that home workers are covered.

Data protection considerations: working from home

On March 12, 2020, the Office of the DPC published guidance for employees working from home to assist in the protection of personal data. The practical approach therein is useful for employers to provide to their employees, to ensure that data protection concerns do not arise when employees are working from home or remotely from the office.

The guidance note provides detailed advice for employees concerning protecting data when working from home in the context of devices, emails, cloud and network devices, and hard copy paper records. The guidance is common sense in nature and not overly onerous, effectively being a summary of ordinary steps to protect data protection that employers should make employees aware of in their written data protection policy.

In summary, the guidance provides as follows:

(a) it is important for devices to be safely secured at the end of each day, that care is taken with devices to ensure they are not lost or misplaced, that all antivirus software and updates are installed, that necessary security and encryption of personal data is in place and, if any device is lost or stolen, that immediate steps are taken to ensure a complete wipe of same is completed, where possible;

(b) employees should be reminded of the employers' email policy – including ensuring that work email accounts are used for work-related emails involving personal data or, if personal email accounts are used, that such accounts are encrypted;

(c) employees should only use the employer's cloud-based service for work-related material, and if no such cloud-based service exists remotely, employees should ensure that data is adequately backed up in a secure manner;

(d) employees should be advised that paper records attract the same level of protection from a data protection perspective as soft copy or electronically stored and processed personal data – it is advisable that any paper records should be retained securely, destroyed by way of shredding, and that a note of all paper records, including personal data removed from the workplace, be retained; and,

(e) employees should also not retain or use sensitive personal data from a secure location when working remotely unless it is strictly necessary for the carrying out of their duties and is kept confidential.

Conclusions

The advice provided both by the HSA and the DPC is useful and welcome. The Covid-19 pandemic is expected to result in lengthy curtailment of the ability of non-essential workers to travel to their place of work. Indeed, it is likely that home working will become more prevalent in this country even when matters return to normal. However, we cannot divorce the guidance published from the current emergency situation, and the practical and logistical difficulties experienced by many employers grappling to deal generally with the Covid-19 pandemic and its economic effects. It is therefore incumbent on employers to adopt a practical and reasonable approach towards their employees. In particular, when considering the health and safety of employees working remotely during the crisis, perfection is not likely to be required and rather consultation with employees is key.

The advance of technology means that many risk assessments could be undertaken with relative ease, or by way of the employee engaging with a written risk assessment completed by an employer. While it may not be possible for an employer to comply strictly with the provisions, genuine attempts should be made by employers to do so and all consultations/discussions with employees documented. Given the strict requirements of the Data Protection Act 2018 and the General Data Protection Regulation (GDPR) regarding the processing of personal data and sensitive data, the guidance of the DPC is particularly important for employers to impart to employees. Indeed, the guidance of both the DPC and HSA could be usefully provided by employers to employees working remotely or from home during the Covid-19 pandemic.

**This is an edited version of a paper delivered at the Employment Bar Association online seminar on April 15, 2020.*

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Judge John Hannan

John Anthony Hannan, a judge of the Circuit Court and formerly a barrister of the Western Circuit, was born in Limerick on March 23, 1963. His secondary schooling was in Ardscoil Rís in Limerick and he then studied in Galway for his BA in Politics and Archaeology. From then on, save for a short period working in Loughborough, Galway was his home. John had huge enthusiasm for adventure sports. He loved kayaking from childhood, and in 1986 he was a leading member of the first Irish kayaking expedition to Nepal, venturing down Himalayan rivers in locations where there were no roads. He returned to Nepal for mountain treks on many occasions. In his early career, John worked as a project manager for multinationals, and matched extensive international travel for work with recreational travel to rivers and mountains all across Europe.

Call to the Bar

On gaining employment in Galway, he returned to UCG and obtained an LLB, which he followed with studies at the King's Inns. He was called to the Bar in 1995. John devilled in Dublin with Seamus Noonan, now of the Court of Appeal, and in Galway with the County Prosecutor, Conor Fahy. Both attended his funeral, among many members of the judiciary, the legal profession and his wide circle of friends. Without prior contacts in the legal world, John showed determination in building up a general practice on the Western Circuit. It was on travelling back from Dublin by train in April 1998, having dealt with a motion for a colleague, that he had the great good fortune to sit beside Stephanie Adams from Melbourne. They married in 2001 and within the formula used in Kerry family law pleadings (a formula commented on by John), and most certainly in reality, they were blessed with two children: Marcus and Sarah. John's practice continued to develop across all areas of law. He had a remarkably good strike rate in challenging plaintiff personal injuries claims, strong results in criminal jury trials, and a pronounced capacity to immerse himself completely in the analysis of complicated equity and commercial disputes to positive effect. John was a keen problem solver.

Fair and compassionate

John's interests outside of court continued. He was a good friend to many and a good man to turn to in times of trouble. In 2002, he led a climb of Kilimanjaro by Western Circuit lawyers to raise money for the Special Olympics. He remained devoted to kayaking, both in river and sea, and gave generously of his time. His marriage brought a focus on Australia, which the family visited regularly. He loved the wilderness of Tasmania and took up the opportunity of lessons in flying fixed-wing aircraft.

John was a prominent junior counsel in Galway when he was appointed to the Circuit Court in 2014. His temperament and skills found their perfect fit as a judge. He was dedicated in his service and had a great interest in every county in which he sat. John proved adept at finding fair solutions to disputes. He always had respect for a litigant who was true to their own views, and was compassionate in recognising the burdens of litigation. From an early stage, John was assigned to hear lengthy and heavily contested criminal trials in Tipperary and Limerick, which he conducted with great expertise and fairness. He had true independence of mind and was an exemplary Circuit Court judge. John's assignments were primarily outside Dublin and far from Galway, often in Kerry. He strove to return home for at least one night mid week to his family, and when staying in Circuit towns, he took advantage of the surrounds. He could be cycling up Moll's Gap after Court in Killarney, or doing a night climb of Slieve Foy when in Dundalk.

It was in the course of his duties and travels as a Circuit Court judge in 2018 that John began to show signs of headaches and fatigue, which led to the diagnosis of a brain tumour. John battled against his illness, undergoing surgery and taxing treatment with great support and love from Stephanie, Marcus and Sarah. He remained interested and engaged in law and in life, and there were times when a recovery and a return to work were anticipated. Throughout his illness he was cared for with the loving support of his family and extended family, including members who travelled from Australia. His condition deteriorated in early 2020 and his family were with him when he died at Galway Hospice on February 21. He is mourned by a wide circle of close friends and by colleagues on the Circuit Court bench, who valued him greatly. Large numbers of the judiciary, legal profession and court staff attended the removal and funeral. His family was touched by the numbers who travelled from Kerry to pay their respects. His passing is a great loss to the Circuit Court. John is survived and grieved for by Stephanie, his children Marcus and Sarah, his mother Claire and brother Gerard. He lived life to the full.

Judge Francis Comerford

LEGAL UPDATE

THE BAR OF IRELAND
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Volume 25 Number 3
June 2020

A directory of legislation, articles and acquisitions received in the Law Library from March 13, 2020, to May 8, 2020.
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12/03/2020
O'Sullivan v Brozda
Damages – Insurance – Declaratory relief – Plaintiff seeking damages – Whether the plaintiff made any misrepresentation with regard to the incepting of his insurance policy – [2020] IEHC 167 – 03/04/2020
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Statutory Instruments

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A recent High Court decision, subsequently approved by the Court of Appeal, has provided clarity around applications for security of costs in litigation.

Raphael O'Leary BL

The recent High Court decision in the case of *Coolbrook Developments Ltd v Lington Development Ltd and Davy Target Investments (DTI) Plc*[1] provides an insightful analysis of the factors at play in a security for costs application under section 52 of the Companies Act 2014. The true importance of the case, however, lies with the manner in which it addresses the amount of security to be awarded if the application is successful.

Competing rationales and interests were dissected by Barniville J. and placed into a framework wherein judicial discretion influenced by a number of factors is paramount. This new test and its associated factors will be of great significance for practitioners moving or resisting future applications for security for costs. This statement takes on even more significance given the Court of Appeal's recent approval of the *Coolbrook* decision in *Hedgecroft Ltd T/A Beary Capital Partners v Htremfta Ltd (formerly Dolmen Securities Ltd)*[2] and *Quinn Insurance Limited (under administration) v PriceWaterhouseCoopers (a firm)*.[3]

The proceedings

Coolbrook initiated proceedings alleging breach of contract and/or breaches of duty against two defendants: Lington and DTI. The thrust of Coolbrook's claim was that Lington had breached an agreement when it sold a property to DTI. The defendants entered full defences and brought separate applications

seeking security for costs. They were represented by different solicitors and by different counsel at the hearing of the action. Coolbrook provided one single replying affidavit to contest both applications, which were heard together. As in any security for costs application, the moving party must establish:

- that it has a *prima facie* defence; and,
- that the plaintiff will be unable to pay its costs if unsuccessful at the trial of the action (otherwise known as the impecuniosity test).

If these are satisfied, the onus then shifts onto the plaintiff, who can only resist the application by invoking the court's discretion. The most common discretionary grounds for refusal are that the plaintiff's claim involves a matter of public importance and/or that the plaintiff's impecuniosity was caused by the defendant(s).

In this case, Coolbrook conceded that the defendants had *prima facie* defences. It also indicated that it would not rely on any of the discretionary exceptions. Therefore, the applications turned on two discrete issues: firstly, whether Coolbrook would be in a position to meet any adverse costs orders should it lose its claim; and, secondly, what amount of security should be ordered if the first question is answered in the negative.

Coolbrook maintained that it would be able to meet any potential adverse costs orders because its financial lending institutions would relax the need for monthly repayments. Consequently, the money saved could be used to pay for legal costs. In support of this position, Coolbrook opened a comfort letter to the Court. Without prejudice to this point, reliance was also placed on the practice of awarding defendants one-third of their costs in these types of applications. It was argued that such an amount would be appropriate in all of the circumstances.

For their part, the defendants rejected and denounced Coolbrook's claim that it was not impecunious, as well as its purported reliance on support from its financial institution. They based their demand for security at over €400,000 each and argued that full security should be awarded. They argued that the Court has complete discretion to direct full security under section 52 of the 2014 Act and that the Court was not bound by the one-third practice.

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Establishing impecuniosity

Under section 52, the moving party is required to show that there "is reason to believe" that the plaintiff company "will" be unable to pay the costs of the defendant if the defendant is successful in their defence of the proceedings.

Barniville J. referred to the Supreme Court decision in *IBB Internet Services Ltd v Motorola Ltd*[4] and the Court of Appeal decision in *Flannery v Walters,*[5] and clarified the evidential position as follows:

"the court is required to consider all of the material evidence and to reach an assessment of the range of likely eventualities in the case and thereby to determine whether it is truly the case that there is 'reason to believe' that the company 'will' be unable to pay the costs of the defendant should it successfully defend the proceedings. The evidence must satisfy the court that there is 'significantly greater than a mere risk' of that eventuality arising".[6]

Helpfully, Barniville J. then addressed how the Court will assess the evidence before it and the considerations that will take place. The features can be summarised as follows:

- financial reports of the plaintiff company are valuable evidence, but they are not completely determinative of the matter;
- evidence presented by the defendant may require the plaintiff to provide an explanation as to the state of affairs;
- explanations, or the lack thereof, will be considered by the Court in attempting to ascertain the true financial position of the plaintiff company;
- explanations are particularly necessary where the financial reports presented to the Court are not up to date; and,
- gaps or uncertainties in the plaintiff's true financial position will not be interpreted or resolved by the Court in a manner favourable to the plaintiff company.

Here, the defendants relied on the legal estimates provided by their legal costs accountants to quantify the costs of defending the action. Interestingly, Lington's estimate provided for €400,828, while DTI's was significantly higher, approximately €550,000 (both exclusive of VAT). The total security sought was therefore over €950,000.

It was argued that it was simply not conceivable that Coolbrook would be able to pay these costs if unsuccessful at the trial of action. The defendants relied on Coolbrook's annual returns to establish impecuniosity. These revealed that the company was in a net asset position of just €2. Coolbrook did not dispute its net asset position but instead relied on the comfort letter from its financial institution. This letter suggested that Coolbrook would be able to retain monies owed to it, instead of immediately paying same to its financial institution, to which it was indebted. Coolbrook argued that regardless of its current financial situation, these letters demonstrated that there would be money there when it was needed.

In considering the contrasting positions, Barniville J. methodically applied the factors he had identified and ruled in favour of the defendants. Crucial to this was Coolbrook's reliance on support from its financial institution, which the learned judge deemed "highly qualified, conditional and restricted". Barniville J. continued, commenting that the letter "contained no binding undertaking or other binding commitment…which Lington and DTI could rely [on] in the event that they have to seek to recover costs on the successful defence in the proceedings". Having reached this conclusion, the application then turned on the amount of security to be awarded.

Rationale for security

The rationale for security for costs was Barniville J.'s starting point for the second issue in this case. The Court's task was identified from the Supreme Court decision in *Farrell v Governor and Company of the Bank of Ireland,*[7] which provides for the striking of a balance between the plaintiff's right to access justice and the defendant's right not to suffer the injustice of being unable to recover costs if the proceedings are successfully defended. This balance requires the court to act proportionally, with the fairness of the proceedings and the interests of both parties in mind at all times. Yet, a further factor comes into the equation in security for costs applications concerning a plaintiff company. In this context, the courts are aware of the advantage of limited liability and they are uncomfortable with the idea of the shareholders profiting from litigation if successful, but being shielded by limited liability if not. These rationales and considerations would go on to shape Barniville J.'s approach towards the amount of security to be provided by corporate plaintiffs.

Statutory interpretation

Barniville J. then had to clarify the position concerning the amended statutory provision governing security for costs under the Companies Act 2014. Prior to the 2014 Act, the relevant provision was found in section 390 of the Companies Act 1963. This provided that a court should grant "sufficient security" in successful applications. The word 'sufficient' is removed from the 2014 Act, thereby requiring the court to grant 'security' *simpliciter*.

There were two previous High Court cases that referred to this distinction: *Fides Capital Ltd v Alchemy Projects Ltd*;[8] and, *Werdna v MD Insurance Services Limited t/a Premier Guarantee*.[9] Both of these decisions identify the Supreme Court's decision in *Lismore Homes Ltd v Bank of Ireland Finance Ltd (No. 3)*[10] as the authoritative statement on the meaning of 'sufficient security'. In that case, 'sufficient' was interpreted as meaning adequate or enough, and was applied in a manner that gave the moving party the full amount of their estimated costs. With 'sufficient' now being removed, the conclusion in both those cases was that the law reverted to the pre-*Lismore* position, which centred around judicial discretion. While there was agreement on this point, the actual application of the pre-Lismore position differed among the judges. In *Fides*, Barrett J. focused on decisions wherein one-third of the defendant's total anticipated costs were ordered by way of security. It was stated that this would set the order at a level that was neither an encouragement to luxurious litigation nor a mere token. Baker J. took a different approach in *Werdna*. While not binding herself to any particular test or approach, she was instead guided by certain discretionary factors and awarded the defendant therein two-thirds of their anticipated costs by way of security.

Barniville J. agreed with the two judges insofar as the law now reverted to the pre-*Lismore* position. However, this position itself was lacking in clarity and structure, especially given the popularity of the one-third practice in certain cases. In tackling this issue, Barniville J. took matters further and set down a conclusive legal test, accompanied by a range of factors and influenced by the rationale for security for costs in our legal system.

Complete judicial discretion

In ruling out the validity of a practice whereby one-third of the anticipated costs were awarded, and in adopting a wholly discretionary approach, Barniville J. held: "In my view, the court has complete judicial discretion as to the amount of security to be ordered. In exercising that discretion in determining the amount of security to be provided, the court is required to carry out the balancing exercise described by the Supreme Court in *Farrell*".[11]

Barniville J. noted that the courts would be unduly restricted in achieving the appropriate balance between the competing rights of the parties if they were dogmatic in their views as to the amount of security. The learned judge then turned to the factors that would (or should) influence the court's discretion. The most important factor is the presence or absence of averments and evidence establishing that the plaintiff would have to discontinue their proceedings should security be granted. This goes to the heart of the competing rights rationale and the danger of jeopardising the plaintiff's right to access justice. Another factor seems to be the absence of factors, in and of itself. Barniville J. stressed that in these situations "the court will in most cases direct the provision of full security" as there would be nothing to trigger the court's discretion. Further factors can be extrapolated from the facts of the case at hand.

The courts are aware of the advantage of limited liability and they are uncomfortable with the idea of the shareholders profiting from litigation if successful, but being shielded by limited liability if not.

Discretion applied in *Coolbrook*

As discussed above, the main emphasis of Coolbrook's defence to the applications for security for costs was the availability of support from its financial institution. The logic behind this approach is difficult to fault. It goes straight to the consideration as to whether the defending party will be able to pay an adverse costs order should they lose their action. If it can be shown that the company will have money when required, then the urgency of the application loses all force and the moving party will have failed to satisfy the court on the impecuniosity part of the test. Notwithstanding the apparent merit in such an approach, Barniville J. strongly rejected Coolbrook's stance, given the equivocal and aspirational nature of the alleged support. However, he went a step further and found that the alleged support, if available, could be a discretionary factor that militated against reducing the security provided.

It was maintained by Coolbrook that granting the defendants the security they sought would make it more difficult for Coolbrook to proceed with its case. This was an attempt to invoke its access to justice rights. Barniville J. was not easily persuaded and noted that it was not credible that Coolbrook would abandon its proceedings or find them more difficult to maintain if security was ordered. Such an argument lacked any basis given that Coolbrook had also maintained that it was not impecunious and that it was supported by its financial institution. In simple terms, if the support was available for an adverse costs order in the future, it was also available for a security for costs order right now.

The second major consideration in this case was the fact that there were two defendants seeking security. As one would expect, this fact was deployed by Coolbrook in seeking a reduction in the amount of security. Barniville J. accepted that such a fact was relevant to the exercise of the Court's discretion but then proceeded to rule out a reduction in security in the case at hand. The learned judge noted that it was inescapable that he was presented with two separate legal entities that were separately represented and that had both satisfied him of the proofs of the application.

He ultimately concluded that in most cases where there are two (or more) defendants, there should be no reduction in the amount of security ordered just because of this fact.

Judicial discretion was applied in favour of Coolbrook on the issue of the variance between the two legal costs estimates presented by the defendants. Coolbrook maintained that there was no reason for the disparity in amounts and argued that it should only have to pay the lower amount for both defendants, respectively.

This position was accepted by Barniville J., who adopted the lower legal costs estimate for both defendants. In the circumstances, the order stipulated that the plaintiff was to pay €801,648 before it could continue with its proceedings.

In light of Barniville J.'s conclusions, it could be argued that defendants seeking to inflict an early litigious blow (potentially a knockout blow) might purposefully get separate legal representation and defend the proceedings separately.

Strategic issues

A brief comment should be made on all of the above as it gives rise to important strategic considerations for practitioners briefed in a security for costs matter. The most significant point is the effect of the double-edged sword of reliance on outside financial support.

Here, not only did the comfort letter not satisfy the Court of the fact that Coolbrook would be able to pay any adverse costs orders, but the same letter then negated their chances of invoking the discretion of the Court in reducing the amount of security.

Henceforth, greater strategic care will need to be taken when deploying such a comfort letter. If external financial support is to be relied on in some capacity, it will need to go considerably further than a comfort letter. Greater specificity regarding the financials as well as a binding undertaking will be required. Any letter that does not live up to this standard could do more harm than good.

Given the difficulties seen in *Coolbrook* between the impecuniosity test and the considerations around the amount of security, it will be interesting to see if in any subsequent cases a plaintiff puts all their eggs into the one basket. Instead of arguing that they are not in fact impecunious, they could just concede same and strongly maintain that they would not in a position to continue with the proceedings if security is ordered. Under Barniville J.'s own approach, this would arguably have the effect of reducing the level of security ordered.

The extent of that reduction is also up for debate given that the one-third practice has been overruled. It is conceivable that an even lower amount of security could be awarded to safeguard a plaintiff's right to access justice. Interestingly, Baker J. noted in the *Quinn Insurance Ltd* case that there were "[n]o useful authorit[ies]" that could instruct the courts on how to manage a situation wherein an order for security would stifle a claim in its entirety.[12] It appears, therefore, that this is an area ripe for further developments that tease out the boundaries of the courts' discretionary powers.

Another takeaway point is the difficulty presented by two (or more) defendants in these applications. In light of Barniville J.'s conclusions, it could be argued that defendants seeking to inflict an early litigious blow (potentially a knockout blow) might purposefully get separate legal representation and defend the proceedings separately. They both know they may get their own separate security and double the immediate payment required from the plaintiff in order to continue their proceedings. Naturally, this would depend on the particular circumstances of the case, but it does give rise to new strategic and commercial considerations.

Conclusion

In brief, by bringing total discretion back into the mix, Barniville J.'s decision in *Coolbrook* provides for a recalibration of the law governing this area. Furthermore, the range of factors presented and applied in the decision also raise important strategic considerations for future cases. Practitioners briefed in moving or contesting an application for security for costs should be cognisant of the importance of these factors.

The manner in which they are invoked and emphasised, both in the affidavits as well as the direction taken during oral submissions, will be crucial. In terms of the outcome in this case, a knockout blow was inflicted by the defendants' applications as Coolbrook discontinued proceedings shortly after Barniville J. delivered judgment. Examining the case in hindsight, the lesson seems to be that sometimes less can be more.

References

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2. [2018] IECA 364.
3. [2020] IECA 109.
4. [2013] IESC 53.
5. [2015] IECA 147.
6. [2018] IEHC 634, para 54.
7. [2012] IESC 42; [2013] ILRM 183.
8. [2017] IEHC 266.
9. [2018] IEHC 194.
10. [2001] 3 IR 536.
11. [2018] IEHC 634, para 105.
12. [2020] IECA 109, para 80.

Contract complications

Changing an employee's terms and conditions of employment in a time of emergency can only be done if it does not breach the employee's contract of employment and relevant employment legislation.

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April Duff BL

The rate at which our world has changed in a few short weeks – from the pre-Covid-19 landscape to a drastically different post-Covid-19 era – is unprecedented.[1] Thousands of businesses found themselves forced to close or to fundamentally alter the way their businesses operated. The current situation of near economic shutdown, as well as the predicted economic recession in the coming months, means that many employers will find some or all of the employment contracts they have entered into no longer tenable.

Redundancies in large numbers are inevitable, and have been discussed elsewhere.[2] This paper explores the possibilities for employers to alter the terms and conditions of their employees' employment in an attempt to cope without resorting to redundancies. It analyses in turn the ways in which terms and conditions of employment, primarily those terms relating to pay and working hours, may be altered: (a) with the employee's consent; (b) without the employee's consent but in reliance on a contractual provision allowing for variation of the contract; and, (c) without either the employee's consent or a variation clause. The paper considers the protections available to employees who are faced with the prospect of pay cuts and/or reductions to their working hours that they can ill afford.

Legal framework governing changes to employment contracts

Provisions governing an employee's remuneration and working hours are fundamental terms of any employment contract.[3] A proposal to alter these terms, either by way of pay cuts, reductions in working hours, or both, will inevitably raise questions of straightforward contract law. It is a general principle of contract law that the terms of the contract cannot be altered without the agreement of both parties, meaning that unilateral alterations of these provisions by an employer will generally amount to a breach of contract.[4] In *RF Hill v Mooney*,[5] Browne-Wilkinson J. observed: "The obligation on an employer to pay remuneration is one of the fundamental terms of a contract. In our view, if an employer seeks to alter that contractual obligation in a fundamental way... such attempt is a breach going to the very root of the contract and is necessarily a repudiation".

In the particular context of employment law, the rules of contract are supplemented by various statutory protections, such that an employment lawyer advising an employer on proposed alterations to an employee's terms and conditions of employment will have to consider not only potential breaches of the contract of employment, but also whether the changes could leave the employer open to Workplace Relations Commission (WRC) claims for breaches of statutory rules.

Reductions in an employee's rate of pay and withdrawal of bonuses without the employee's consent are likely to fall foul of the Payment of Wages Act 1991 (the 1991 Act). Section 5(1) of the 1991 Act prohibits deductions from an employee's wages unless the deduction is: (a) required by statute (PAYE, PRSI, etc.); (b) authorised under the contract (e.g., pension contributions); or, (c) made with the prior written consent of the employee. The term 'deduction' is specified in section 5(6) to include a situation where "the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act)".

In *McKenzie v Minister for Finance,*[6] the High Court commented that the 1991 Act "has no application to reductions as distinct from 'deductions'" (para. 5.8). Since the High Court judge then went on to find that an alleged breach of the 1991 Act was not justiciable in the High Court, the comments about 'reductions' as opposed to 'deductions' were strictly *obiter*.

However, they were followed in a number of decisions by the Employment Appeals Tribunal (EAT),[7] with the result that for a number of years following *McKenzie*, it appeared that unilateral pay cuts were not prohibited by the 1991 Act despite what would appear to be the clear intention of subsection 5(6) to bring any reductions from 'properly payable' wages within the meaning of 'deductions'. However, the *McKenzie* decision has been distinguished in a number of High Court decisions, beginning with *Earagail Eisc Teoranta v Doherty*[8] *in 2015, and subsequently in Cleary v B&Q Ireland Ltd*[9] and *Petkus v Complete Highway Ltd*.[10] In *Petkus*, the appellant employees alleged that the respondent unlawfully deducted 10% from their wages and withdrew a bonus. White J. in the High Court stated categorically that "[t]he McKenzie case is not precedent to allow a reduction of wages which does not offend s. 5 of the Payment of Wages Act 1991". It would appear that the matter has finally been put beyond doubt, and that reductions in rates of pay and

withdrawal of bonuses already accrued will be treated as deductions for the purposes of the 1991 Act. Pay cuts imposed without employees' consent may therefore lead to successful statutory payment of wages claims, as well as breach of contract suits.

The question of lawfully reducing an employee's pay will arise for many businesses availing of Revenue's Temporary Covid-19 Wage Subsidy Scheme.

Changes with the employee's consent

The safest and most desirable manner of introducing changes to employees' terms and conditions in response to post-Covid-19 conditions is by way of agreement between employer and employee. As a general principle of contract law, parties who have freely entered into a contract are at liberty to alter its terms as they see fit. In the context of the Covid-19 emergency, many employees will be expecting pay cuts and/or reductions in hours, and some will be willing to accept less favourable terms of employment if this avoids job losses. Where employees are contemplating agreeing to proposed alterations to their contract, they should be advised to set out clearly in writing the conditions on which they agree to such changes. While the economic consequences of the pandemic will be felt for a number of years by some businesses, others will experience a more time-limited difficulty associated primarily with Government-imposed restrictions, which will justify alterations to an employee's terms of employment for only a limited period of time. In either situation, employees would be prudently advised to clearly specify that their agreement to less favourable terms of employment is only for a specified period of time, and should be reviewed on a specified date with a view to returning to pre-Covid-19 terms from the review date if possible.

An unfortunate reality of the post-Covid-19 world is that for many employees, consent to changes to their terms and conditions of employment will in effect be forced consent, where the employee is faced with a choice between pay cuts and/or reduced hours on the one hand, and redundancy on the other. Where an employee refuses to agree to the proposed alteration of her contract and is subsequently made redundant, this may give rise to a claim for unfair dismissal arising from unfair selection for redundancy. An employer must therefore be aware of the need to select candidates for pay cut or redundancy situations fairly so that any resultant redundancies can also be shown to be fair.[11]

The question of lawfully reducing an employee's pay will arise for many businesses availing of Revenue's Temporary Covid-19 Wage Subsidy Scheme. This Scheme provides for gradated subsidies to employers based on employees' previous net weekly pay. Under the scheme, employers are permitted – but not obliged – to top up employees' pay to make up the difference between the subsidy amount and their previous pay.[12] Where an employer availing of the Scheme chooses not to top up an employee's pay or to only partially top it up, the result for the employee will be a reduction in remuneration. It is important for employers to be aware that the Scheme provides no legal basis for reducing an employee's rate of pay. Such a reduction will constitute a change to the terms of the employee's employment and will ordinarily require the employee's consent in order to avoid a breach of contract.

The extent to which an employer can introduce pay cuts, even with the employee's consent, is constrained by the terms of the National Minimum Wage Act 2000 (the 2000 Act). The 2000 Act prevents even a willing employee from consenting to a pay cut that would result in her being paid an hourly rate of pay that is less than an average of the national minimum hourly rate of pay[13] within any reference period (a period not exceeding one calendar month).[14]

However, an exception is created by section 41 of the 2000 Act, which allows for the Labour Court to grant employers a once-off exemption from the requirement to pay the minimum wage for a period of between three months and one year due to financial difficulty. From a review of the Labour Court's annual reports from 2011 to 2018, it appears that no section 41 applications were made during this period.[15] It may be that this provision gains increased importance in the immediate post-Covid-19 era, where many businesses find themselves in precisely the type of temporary financial difficulty the section is designed to cater for.

Another source of constraint on changes to employment terms is Sectoral Employment Orders (SEOs) covering rates of pay, sick pay, and pensions across the construction sector, the mechanical engineering sector and the electrical sector, which have been introduced as Statutory Instruments following recommendations from the Labour Court. Such SEOs place a legally binding floor on rates and obligations in these sectors throughout the country. Section 21 of the Industrial Relations Act 2015 allows the Labour Court to exempt an employer from an SEO where the "employer's business is experiencing severe financial difficulties". Again, there do not appear to have been any applications so far.

Unilateral changes in reliance on contractual variation clauses

Where an employee's agreement to alterations to the contract of employment is not forthcoming, employers may seek to invoke a variation clause contained in the contract. It is not uncommon for a contract of employment to contain a clause reserving the employer's right to vary the terms of employment. Such clauses should not, however, be viewed by an employer as a *carte blanche* to freely change the employee's terms of employment. The courts have consistently held that such clauses may only be exercised reasonably, and it seems unlikely that use of such a clause to change fundamental terms such as pay and working hours without the employee's consent would be deemed reasonable.

In *Wandsworth London Borough Council v D'Silva,*[16] the Court of Appeal of England and Wales held that while an employer may reserve a contractual right to unilaterally change a particular aspect of an employment contract, clear language must be used, and if the unilateral change could produce an unreasonable result the courts, in construing the contract, would "seek to avoid such a result".

The Irish courts have been similarly cautious in respect of variation clauses, implying a term into the contract that such clauses may only be exercised reasonably. In *O'Byrne v Dunnes Stores,*[17] the Supreme Court held that the employer breached the plaintiff's contract of employment where it invoked a general mobility clause to move the claimant from Tallaght to Blanchardstown without consulting with him prior to the decision. The Court held that while there should be some form of flexibility on the part of the employee, the employer should have notified him in advance of the details of and reasons for the move, and afforded him an opportunity to make representations in respect of the proposed move.

Similarly, in the English case *United Bank v Akhtar,*[18] the employee received a written notice on a Friday requiring him to move to the bank's Birmingham branch the following Monday. He asked that the transfer be postponed by three months, in view of his wife's ill health and the impending sale of his house. The bank refused to postpone the transfer and Mr Akhtar considered himself constructively dismissed. The English Employment Appeals Tribunal held that the mobility clause was limited by an implied duty of co-operation. It said:

"There is a clear distinction between implying a term which negatives a provision which is expressly stated in the contract and implying a term which controls the exercise of a discretion which is expressly conferred in a contract. The first is not permissible but the second is permissible since there may well be circumstances where discretions are conferred but which nevertheless are not unfettered discretions which can be exercised in a capricious way".

These decisions indicate generally that variation/mobility clauses will be read subject to a requirement that they are exercised reasonably. They may also be of more specific interest in a context where an employer seeks to cut costs in a post-Covid-19 world by implementing working from home as the norm after Government restrictions have lifted. Does a mobility clause allowing for an employee to be relocated include relocation to her own home as her new 'workplace'? Anecdotal evidence has shown that while some employees have flourished while working from home, others have struggled hugely with the loss of routine, loss of structure and challenges posed by family arrangements. The above decisions indicate that employers proposing to reduce off-site working will at least have to consult with and consider the wishes of employees before introducing such measures.

Where provisions in relation to bonuses are expressed to be at the discretion of the employer, such discretion is also constrained by the obligation to act reasonably. In *Cleary v B&Q,*[19] the respondent employer operated a bonus scheme and a 'zone allowance' for Dublin employees, both of which it discontinued due to financial difficulties. The appellants successfully complained to the Rights Commissioner under the Payment of Wages Act 1991. On appeal, the EAT determined that the bonus scheme was discretionary and could be withdrawn at any time, and that the zone allowance was a form of compensation for working in a certain area, and was not 'wages' under section 1(1) of the 1991 Act. McDermott J. in the High Court allowed the appeal in respect of the bonus payment issue. He held that the payment of a bonus crystallised as a contractual obligation once it was earned in accordance with the terms of the bonus scheme under a contract of employment. McDermott J. held that an employer's discretion in respect of bonus payments had to be exercised reasonably, saying: "I accept that the employer had a wide discretion under the terms of the contract and scheme to withdraw the scheme, which must be exercised reasonably. If the discretion is exercised unreasonably the employer will be in breach of contract if no reasonable employer would have exercised the discretion in that way".[20]

The discretion to withdraw the bonus scheme at any time, in the Court's view, was always intended to apply *in futuro* and attached to the conferring of bonuses, as yet unaccrued, under the terms of the scheme. The payment of the bonus crystallised as a contractual obligation once it was "earned" in accordance with the terms of the scheme as operated. A bonus so accrued was a bonus 'properly payable' as wages under section 5(1) of the 1991 Act.

McDermott J. therefore held that the Tribunal erred in law in interpreting the discretion vested in the employer to withdraw the bonus scheme at any time as being applicable or attaching to this period.

The thrust of the case law, requiring that variation clauses must be exercised reasonably, would suggest that a unilateral cut to an employee's rate of pay or working hours, either without consultation or following consultation where an employee has refused to consent to such a cut, would be to unilaterally change fundamental terms of the employment relationship and would not be considered reasonable.

Changes to terms of employment may extend so far as to amount to a situation of short time, where either an employee's weekly working hours or weekly pay are reduced by more than 50%, or lay-off, where the employee is not required to work for a temporary period of time. In order to place an employee on lay-off or short time, the right to do so must be expressly provided for in the contract, or implied into the contract by custom and practice in the area of employment, or the employer must obtain the employee's agreement. Where an employee has been laid off or put on short time for a period of four consecutive weeks, or six weeks in the last 13 weeks, she is ordinarily entitled to claim a redundancy payment under section 12 of the Redundancy Payments Act 1967. However, the Emergency Measures in the Public Interest (Covid-19) Act 2020 has now suspended the right to claim redundancy in these circumstances for the duration of the 'emergency period',[21] where the employee has been laid off or put on short time due to Covid-19 measures.[22]

Unilateral changes in the absence of a variation clause

Generally speaking, a unilateral change to the terms of employment, without consent or successful reliance on a variation clause, will constitute a breach of the contract of employment. It is very unlikely that an employer could successfully argue that the contract contained an implied term allowing it to unilaterally alter fundamental terms such as pay or hours of work, under either the officious bystander[23] or custom and practice tests.[24]

Where an employer unilaterally changes an employee's terms and conditions, the employee will have a number of avenues for redress open to her. She could institute a claim in the civil courts for breach of contract. If the change in terms of employment consists of a pay cut, she would have the alternative option of making a complaint under the Payment of Wages Act 1991 in the WRC. If the employee feels the changes imposed make her continued employment with the employer untenable, she may be able to resign and claim constructive dismissal in the WRC, on the basis that her employer has fundamentally breached and repudiated the contract of employment. On the other hand, as noted above, if the employer terminates the employee's employment because she refuses to agree to proposed changes to her contract, this may give rise to a claim for unfair dismissal, either in the form of a straightforward unfair dismissal[25] or an unfair selection for redundancy.

Conclusion

Both redundancies and difficult changes to employees' terms of employment are, sadly, an inevitable consequence of the Covid-19 pandemic. While many changes will be accepted by employees faced with a choice between pay cuts and redundancy, others will not.

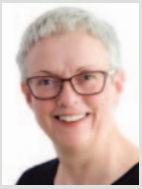
What is clear from these discussions is that reasonableness, consultation, negotiation and, where possible, agreement, will be the essential tools of an employer seeking to avoid costly employment rights claims it can ill afford in these times.

References

1. Although many businesses will see unhappy parallels with choices they faced during the global financial crisis of 2008-2010, employers' adaptations to those economic circumstances are discussed in: Connolly, M. Management of employment in an economic downturn. *IELJ* 2009; 6 (2): 48.
2. White, A. Covid-19 redundancies and unfair selection. April 15, 2020. Available from https://members.lawlibrary.ie/app/uploads/2019/09/Alex-White-SC-Covid-19-Redundancies-and-Unfair-Selection.pdf.
3. See *Dunne v Fitzpatrick* [1958] 1 IR 29 (HC), where Budd J. said that "the 'terms of employment' of a worker… appear to include all matters covered by the contract of employment, either express or implied, such as hours of work, wages, holidays and overtime". These can be contrasted with mere work practices, which can be subject to change: *Kenny v An Post* [1988] IR 285; *Ó Cearbhaill v Bord Telecom Éireann* [1994] ELR 54; *Rafferty v Bus Éireann* [1997] 2 IR 424.
4. See, for example, *Irish Pharmaceutical Union v Minister for Health* [2007] IEHC 222, where Clarke J. held that unilateral freezing of advance payments to pharmacists under the General Medical Scheme was impermissible.
5. [1981] IRLR 258.
6. [2010] IEHC 461; [2011] 22 ELR 109.
7. See, for example, *Santry Sports Injury Clinic v Padden* [2014] 25 ELR 46, in which the EAT found that an 8% pay cut imposed on five nurses, without their consent, was a 'reduction' as distinct from a 'deduction', and it was bound to follow the High Court's decision on a point of law in *McKenzie*.
8. [2015] IEHC 347; [2015] ELR 326.
9. [2016] IEHC 119; [2016] 1 IR 276.
10. [2017] IEHC 12.
11. The question of unfair selection for redundancy in the Covid-19 context has already been considered in an EBA paper last month and will not be dealt with in detail here – see Alex White (2020) cited above.
12. Called the Average Revenue Net Weekly Pay, calculated based on pay in January and February 2020.
13. At the time of writing, the national minimum wage is €10.10 per hour.
14. National Minimum Wage Act 2000, section 10.
15. Available from: https://www.labourcourt.ie/en/publications/annual-reports/.
16. [1998] IRLR 19.
17. [2003] 14 ELR 297.
18. [1989] IRLR 507.
19. [2016] 1 IR 276.
20. Ibid at p. 293.
21. At the time of writing, the 'emergency period' is due to expire on May 31, 2020, but this is extendable.
22. Provisions concerning lay-off and short time have been considered in more detail in the context of the Covid-19 crisis in: McVeigh, K. Lay-off, short time and the emergency powers. April 15, 2020. Available from: https://members.lawlibrary.ie/app/uploads/2019/09/Katherine-McVeigh-BL-EBA-Lay-Off-Short-Time-and-the-Emergency-Powers-Act-2020.pdf.
23. *Shirlaw v Southern Foundries* (1939) 2 KB 206.
24. *O'Reilly v Irish Press* [1937] 71 ILTR 194.
25. See, for example, *A Bar Manager v A Public House* ADJ-00021175, January 16, 2020.

In the interests of justice

Since the lockdown in March, a mix of remote and physical hearings has ensured that access to justice is delivered, but the need to balance fairness with expediency must always be borne in mind.



Sara Phelan SC
Chair, Working Group on Business Continuity,
Council of The Bar of Ireland

Much has been written about Covid-19 since the first indications on March 12 last of the 'lockdown' that was to come, and the restrictions that have been imposed on our daily lives and activities since that time.

For those members of society who require access to justice, and for those of us working in the legal sphere, life as we know it has very much changed since the middle of March. Thankfully, the rights of those who require access to justice have been maintained and preserved (albeit in an attenuated form), but such access has not been without difficulty in terms of the countervailing imperative that National Public Health Emergency Team (NPHET)/Government guidance on social distancing and public health and safety be fully upheld and maintained.

It is easy to think of matters that are urgent by reason of the issues involved (e.g., domestic violence applications, Article 40 applications, issues involving an immediate threat to the life of an individual, time-sensitive matters, etc.), but as time marches on, matters that were not urgent in March may become urgent very quickly, simply by virtue of the passage of time.

Bearing all of this in mind, there is a very fine balancing act between ensuring that those who require access to justice get that access, acknowledging that all litigants have a right to a fair trial within a reasonable time, and maintaining the fairness of the process as against procedural expediency.

Thus far, the judiciary and the Courts Service have set about achieving this balance by having a mix of remote and physical hearings, and it appears that this mix will be with us for quite some time to come.

Remote hearings not a panacea

Through co-operation and collaboration, the judiciary, the Courts Service and legal practitioners have trialled remote hearings and, thanks to the efforts of all concerned, remote hearings are now up and running in various courts. By all accounts these have been successful, notwithstanding technological issues from time to time.

However, remote hearings are not a panacea for all ills and one must bear in mind that not all issues are capable of being disposed of in this way (witness actions spring to mind). Not all litigants have access to the necessary technology and/or sufficient familiarity with technology and, very importantly, justice is not always going to be seen to be done if promulgated by way of a remote hearing.

Furthermore, the success of a remote hearing must be judged not just from the perspective of the judiciary, the Courts Service and the legal practitioners involved, but also from the perspective of the litigant and whether or not that litigant perceives justice as having been done, not from the point of view of the outcome (there will generally be at least one disappointed party!) but from a consideration of the reasonableness of the process. Notwithstanding the foregoing, remote hearings certainly play their part in a suite of solutions to enable access to justice for all in a timely manner during the Covid-19 pandemic.

Striking the right balance

That said, it cannot be gainsaid that physical hearings and oral advocacy remain at the forefront of our legal system, a system that has been tried and tested down through the years, *inter alia*, for jury trials, plenary hearings, and for matters solely involving oral submissions/argument. Nothing can replace the impact of a judge and/or jury observing and hearing witnesses (and practitioners) in the flesh, noting their body language and reactions. Similarly, from a practitioner's perspective, being able to read a judge or one's opponent is a vital component of oral advocacy.

However, perfection is said to be the enemy of the good and in times such as this, the legal world must make the best of what is available to it, since to do otherwise would be to deny access to justice to those who need it and to wholly infringe upon a person's right to a fair trial within a reasonable time. The ultimate balancing exercise, as set out above, is fairness as against expediency, and the best solution in each case must be decided on a case-by-case basis, while always bearing in mind that just because a case can be heard remotely, does not mean it should be heard remotely.

It behoves us all to ensure that the rights and interests of all litigants continue to be best served by us and the system within which we operate, and to the best extent possible within the constraints imposed upon us by the Covid-19 pandemic, while not forgetting that each of us has a personal and professional responsibility to abide by NPHET/Government guidance when attending at court and going about our daily and professional business.

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