THE BAR OF IRELAND
The Law Library

THE BAR REVIEW

Journal of The Bar of Ireland

Volume 24 Number 2
April 2019

Signing away your life

17 May 2019 Chartered Accountants House, Dublin

Bloomsbury Professional Irish Family Law Conference

Timely and highly practical, the Bloomsbury Professional Irish Family Law Conference will be held just a week before the upcoming referendum amending the constitutional provisions on Divorce and Family Law Reform. Minister Josepha Madigan will speak on this topic in her opening address.

This half-day conference will see expert speakers from a range of backgrounds come together. They will cover the key developments in legislation and case law in the Circuit, District and Superior Courts including an in-depth look at The Domestic Violence Act 2018. The financial aspects of family law cases will also be examined, including spousal support, valuing assets and pensions.

SPEAKERS: Josepha Madigan TD, Gerard Durcan SC, Keith Walsh, Solicitor, **Sonya Dixon**, Barrister, **Tom Murray**, Forensic Accountant, **and Olga Daly**, Consulting Actuary

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DONT MISS OUT!

Book your place now at:
bloomsburyprofessionalireland.com/familylawconference

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Events

The Bar Review
The Bar of Ireland
Distillery Building
145-151 Church Street
Dublin DO7 WDX8

Direct: +353 (0)1 817 5166
Fax: +353 (0)1 817 5150
Email: aedamair.gallagher@lawlibrary.ie
Web: www.lawlibrary.ie

PUBLISHERS

Published on behalf of The Bar of Ireland by Think Media Ltd

Editorial: Ann-Marie Hardiman
Paul O'Grady
Colm Quinn
Design: Tony Byrne
Tom Cullen
Niamh Short
Advertising: Paul O'Grady

Commercial matters and news items relating to *The Bar Review* should be addressed to:
Paul O'Grady
The Bar Review
Think Media Ltd
The Malthouse,
537 NCR, Dublin DO1 R5X8
Tel: +353 (0)1 856 1166
Fax: +353 (0)1 856 1169
Email: paul@thinkmedia.ie
Web: www.thinkmedia.ie

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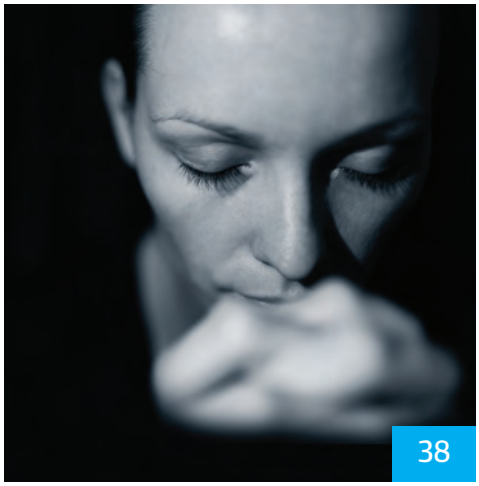

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Aedamair Gallagher at: aedamair.gallagher@lawlibrary.ie

Supporting specialism at the Bar

The Bar of Ireland is committed to supporting members through a range of initiatives, including support to the Specialist Bar Associations.

At the time of writing, I have just returned from a very successful CPD event that took place with members of the Western Circuit in Galway. The event was arranged in conjunction with the Circuit Liaison Committee representatives who are delivering on a plan to hold events on circuit at least once in every legal year that bring both solicitors and barristers together in a learning environment and provide an opportunity to socialise and network with colleagues. Over 80 members of both branches of the profession attended the event on March 29, and feedback on the format, quality of talks and the social aspect was excellent. I am looking forward to attending other similar events that have been organised throughout the Circuits during the rest of this year.

Commitment to CPD

Members will have noticed that they are now receiving an additional communication every other Friday to notify them of details of a range of education and training events taking place throughout the country. This new bulletin is published on a fortnightly basis in term time, providing members with information on upcoming CPD seminars, as well as providing links to CPD webcasts on demand. These links include the most recent CPD webcast on demand, as well as highlighting others that may have been missed first time around. The webcast facility is a particular benefit for members on circuit as it facilitates easy access to a wide collection of CPD events.

This edition of *The Bar Review* provides details of the forthcoming conference – Laws & Effect. An outstanding line-up of speakers will offer their expertise and insights on the issues of redress, damages and victims' rights. We have deliberately chosen a venue that is accessible from all the Circuits and yet close to Dublin. This year's conference takes place in the Heritage Hotel and Spa in Killenard, Co. Laois, which is a five-star hotel less than an hour's drive or train journey from Dublin. Colleagues have the option of a 'day trip' or making a weekend of it and staying overnight.

Supporting Specialist Bar Associations

To maintain as broad an appeal as possible for all members, we have partnered with some of our Specialist Bar Associations to give them a platform during the conference to promote their Associations and deliver talks on a wide range of topics that are accessible to members from all over the country, regardless of practice area.

In 2015, arising from the then strategic plan of the Council, a decision was taken to support and develop closer working relations with our Specialist Bar Associations, which at that time were five in number and included the Employment Bar Association (EBA), the Construction Bar Association (CBA), the Family Lawyers Association (FLA), the Professional Regulatory and Disciplinary Bar Association (PRDBA) and the Irish Criminal Bar Association (ICBA).

Each Specialist Bar Association is a vibrant hub of activity that facilitates the exchange and advance of specialist knowledge and expertise through conferences, seminars, papers and periodicals, and at the same time provides an opportunity to promote members of the Law Library as specialists in advocacy and legal services across a range of practice areas. Many of the Specialist Bar Associations have flourished in recent years, in part arising from the decision to provide resources from the Council to assist each Association to deliver on its remit and enable access to the expertise and professionalism of our staff resources to promote and market their activities to a wide-ranging audience, including solicitors and the business community. The success of this initiative has caused the number of Specialist Bar Associations to rise and there are now ten Associations being supported by the staff and resources of the Council. The EU Bar Association (EUBA), the Sports Law Bar Association (SLBA), and the Planning, Environment and Local Government Bar Association (PELGBA) were established in 2016, 2017 and 2018, respectively. More recently, plans are afoot to launch an Asylum & Immigration Bar Association (AIBA) and a Probate Bar Association (PBA). The Council is committed to the provision of ongoing support for the development of the Specialist Bar Associations.

I hope to see as many members as possible at the conference – bookings can be made online at www.lawlibrary.ie/LawsandEffect or you can contact Aoife Kinnarney on 01-817 5166.

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

The challenges of data

Our focus in the current edition is on all kinds of documents and data, and the role of documentary evidence in both criminal and civil trials.

In a recent ruling, the Supreme Court grasped the opportunity to reiterate some of the basic rules of evidence in relation to the status of documents discovered in a trial and/or exhibited on affidavit. We analyse the judgment of the Court in *RAS Medical v Royal College of Surgeons*, which also reiterates the appropriate procedure to resolve conflicts of fact that arise on affidavit.

In the criminal context, white-collar crime trials now require practitioners to grapple with huge volumes of business documents, phone records and electronic data. This presents challenges in relation to seizing the information, sifting through it, and then ultimately adducing that evidence in court. Our writer looks at some of the lessons that have been learned from the Anglo trials and explores the basic rules in relation to the admissibility of various types of business records.

When it comes to personal information, many of us will be surprised at the extent to which we give consent to the processing of our own private data. The recent decision from the French data protection agency fining Google €50 million should give pause for thought to anyone clicking the ok button when accessing information on the internet.

In our interview, Claire Loftus shares with us some of the challenges that come with her role as Director of Public Prosecutions. In particular, she believes that a pre-trial hearing process would have a significant impact in making trials more efficient. In her view, this would help to crystallise the relevant legal issues at a much earlier stage and could obviate the need for a victim to sit around court for days or even weeks while legal argument is ongoing.

We hope you enjoy this edition. Happy Easter!

Eilis Brennan SC
Editor
ebrennan@lawlibrary.ie

Rule of law in Tanzania

Tanzania may seem an unlikely country to twin with Ireland but our similarities – historically, socially and culturally – were at the heart of a recent trip to the east coast of Africa, and may prove crucial to the success of a proposed rule of law project. At the request of Irish Aid, Irish Rule of Law International (IRLI), an initiative established by the Bars of Ireland and Northern Ireland and the Law Society to promote the rule of law in developing countries, sent three delegates to Dar Es Salaam. Ms Justice Aileen Donnelly, Kate Mulkerrins and myself met ministers, judges, lawyers, police officers and others to assess whether there were opportunities to help combat gender-based violence in that jurisdiction.

Like Ireland, Tanzania is a former colony of the British Empire, it too is a democracy, and its legal system is adversarial, based on a written constitution setting out a tripartite separation of powers. In the 1960s, Tanganyika and Zanzibar (an island to the east of the country) joined together as a political entity: Tanzania. Zanzibar is a beautiful tropical island, boasting a multicultural population, and currently enjoying some celluloid fame as the birthplace of Freddie Mercury.

In Tanzania, we found a historically familiar story of gender-based violence revolving around a view of women as second-class citizens or items of property. The phenomenon of intrafamilial violence is as prevalent there as it is worldwide, but far fewer cases of sexual violence, per capita, are being reported and prosecuted than here in Ireland, and fewer still result in a conviction. There is a strong cultural bias against reporting domestic violence and there is a widespread view that violence is a necessary component of a loving marriage.

Against this depressing background, our meetings were uniformly positive and enthusiastic. We were warmly welcomed by our colleagues and facilitated in every way by our Embassy in Dar. Irish national experiences, in particular the media exposure of historic abuse and the gradual vindication of the rights of some of the victims, were of great interest to our hosts, and provided profound hope for change in the eyes of our Tanzanian colleagues.

Our report to IRLI makes several specific recommendations for technical and personal exchanges, which we believe will strengthen social and legal cultures that promote gender equality. The report was submitted to the Embassy and we hope to return to this beautiful country to implement some of the proposed interventions. For more information about IRLI, go to: www.irishruleoflaw.ie.

Mary Rose Gearty SC

Promotion of Irish law post Brexit

From left: Seamus Woulfe SC, Attorney General; Mr Justice Frank Clarke, Chief Justice; Micheál P O'Higgins SC, Chairman, Council of The Bar of Ireland; Gemma Allen, IDA Ireland; and, Patrick Dorgan, President of the Law Society, who attended an event in the Irish Embassy, Washington DC, on Friday, March 15, 2019, to promote the Government-backed legal services initiative to make Ireland a global hub for international legal services post Brexit. The initiative, led by the Council of The Bar of Ireland in conjunction with the Law Society of Ireland and the wider legal community, with support from the IDA and the Department of Justice and Equality, seeks to position Ireland to fully capitalise on the opportunities that may arise from the UK exiting the European Union, effectively making Ireland the only English-speaking common law jurisdiction fully integrated into the European legal order.

Important information for prospective masters

The Education & Training Committee has updated the application process concerning members planning to apply to become a first year master. Prospective masters must complete the new application form and submit it by May 1 of each legal year to be considered for the following legal year.

New masters, once approved, will be obliged to attend a mandatory CPD seminar in May of that year (date to be announced). Master application forms can be found in the members' section of the website on the Membership Information page. The new master's form is only relevant to new masters and not to existing ones. Please direct any queries to the Education & Training Committee.

Oireachtas committee appearance on family law

Sean Ó hUallacháin SC, Rachel Baldwin BL and Dr Sarah Fennell BL appeared before the Joint Oireachtas Committee on Justice and Equality on behalf of the Council of The Bar of Ireland on March 6, 2019, to discuss much-needed reform of the family law system.

The Joint Committee sought observations across four key strands: (i) the courts structure; (ii) the costs of family law cases; (iii) the application of alternative dispute resolution processes; and, (iv) the conduct of family law proceedings, including the role of children and the rights of fathers.

Among the solutions recommended by the Council is the creation of a specialist division of family law courts and judges. A specialist division with specially trained judges would ensure that the same judges would deal with family law lists on an ongoing basis, ensuring greater efficiency and consistency in the approach to proceedings, particularly where the views of a child are to be ascertained. It is not envisaged that specialist judges would be confined to family law, but would be assigned from the pool of general judges.

The construction of dedicated family law facilities at Hammond Lane is also urged. The failure to construct a purpose-built family law court venue at Hammond Lane, in conjunction with inadequate facilities, gives rise to a significant and serious risk that the existing system cannot adequately protect the rights of individuals or children participating in family law proceedings.

In the absence of a purpose-built family law complex in Dublin, applications are heard and determined in various locations that are unfit for use and have a direct impact on the way in which family law proceedings are conducted.

It is inappropriate for consultations to take place between legal practitioners and parties to proceedings, including children, in public areas such as corridors adjacent to a courtroom. It is entirely contrary to the legislative and public policy purpose behind the in camera nature of family law proceedings. The failure to provide separate waiting areas in court venues, whereby parties are forced to conduct themselves in close proximity, can also increase anxiety and tension, and has given rise to significant safety issues.

The Council also highlighted chronic delays experienced in courtrooms outside Dublin. The number of days allocated to family law sittings can be quite limited on circuit, which results in system clogging and long gaps between the institution of proceedings and their determination. Such delays only serve to increase the difficulties and complications that arise in the context of relationship breakdown. A specialist division of family law courts and judges would go a long way towards addressing these deficiencies.

The Council also stated that an adequately resourced civil legal aid system is fundamental to family law proceedings, and that the Legal Aid Board requires significant additional resources if a properly functioning civil legal aid system is to be provided.

A copy of the full submission can be found on the Law Library website.

International Women's Day 2019

The Bar of Ireland hosted its fourth annual International Women's Day Dinner on Thursday, March 7. Over two hundred women attended the dinner in the historic surroundings of King's Inns, including members of the Law Library, judiciary, solicitors, and other guests. The opening address was given by Moira Flahive BL, Chair of The Bar of Ireland's Equality, Diversity & Inclusion Committee. Judge Siofra O'Leary of the European Court of Human Rights was the keynote speaker, and gave an inspiring and memorable speech.

Moira Flahive BL (left), Chair of The Bar of Ireland's Equality, Diversity & Inclusion Committee, with Judge Siofra O'Leary, European Court of Human Rights.

Look into Law 2019

One hundred students representing 100 schools from across the country, including 32 from designated disadvantaged schools, attended The Bar of Ireland's Look into Law Transition Year Programme in February.

The students arrive not knowing anyone else, but leave having formed friendships within their groups and having enjoyed a unique insight into life at the Bar.

Every morning they shadowed a barrister in small groups, learning about day-to-day life at the Bar. In the afternoons they convened in larger groups of 25, participating in guided tours and talks, including talks from various members of the judiciary and the Bar, the office of the DPP and defence solicitors, legal affairs correspondents and members of An Garda Síochána.

On the final day, they participated in mock trials in Green Street Courthouse, providing a unique, interactive experience where they got the opportunity to act the parts of witnesses, the registrar, and members of the jury. Finally, they returned to the Distillery Building to be met by the Chairman of the Council of The Bar of Ireland, and received their certificates of participation from the Chief Justice, Mr Justice Frank Clarke.

The evaluations at the end of the week demonstrate that not only do students get to see what life is like as a barrister, but also the Programme helps to dispel myths and misunderstandings about the courts and the justice system. Students get to experience first hand the highs and lows of life at the Bar, learning about life as a pupil and progressing as a junior counsel. Most are surprised to learn that our members are self-employed and it can take years to build a steady practice. All of the students said that they would recommend this programme to a friend.

This year's students were a highly engaged and interactive group. The Bar of Ireland wishes them every success in whatever future careers they choose, and we hope to see some of them returning here one day as barristers.

Students participating in the Bar's TY Programme got to take part in mock trials in Green Street Courthouse.

Look into Law gave participants a unique opportunity to act the part of witnesses, the registrar and members of the jury.

On the Basis of Sex at the Stella

Back row (from left): Ken Murphy, Director General of the Law Society; Cathy Smith BL; Rosemarie Hayden, IWLA; Patrick Dorgan, President of the Law Society; Ms Justice Marie Baker; Ms Justice Caroline Costello; Maeve Delargy, Chairperson, IWLA; Fiona McNulty, IWLA; Aisling Gannon, Eversheds Sutherland; and, Aoife McNicholl, IWLA. Front row (from left): Jane McGowan BL; Maria Browne, Chief State Solicitor; Professor Irene Lynch Fanin; Pauline Marilyn Quinn SC; Ms Justice Catherine McGuinness; Judge Anne Watkins; Ms Justice Teresa Pilkington; Maura Butler, Law Society; Minister Katherine Zappone; Aisling Mulligan BL; and, Judge Patricia McNamara.

On February 25, the Irish Women Lawyers Association (IWLA) took the opportunity to kickstart the celebrations for International Women's Day by hosting a special preview of the movie *On the Basis of Sex*, starring Felicity Jones and featuring the early career of US Supreme Court Justice Ruth Bader Ginsburg. In the fabulous surroundings of the Stella Cinema in Rathmines, and preceded by a cocktail party in the Stella Cocktail Club, the movie was enjoyed by a group of esteemed legal women and men. The inspired introduction to the evening was provided by a warm insight kindly given by former Supreme Court judge Ms Justice Catherine McGuinness, who met and dined with Ms Bader Ginsburg in Galway some years ago.

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LAWS & EFFECT

This year, The Bar of Ireland Conference focuses on the important topics of redress and victims' rights.

The Bar of Ireland Conference takes place this year on May 25 at the Heritage Hotel and Spa, Killenard, Co. Laois. The theme of 'Laws & Effect' is an extremely topical one and an outstanding line-up of speakers will offer their expertise and insights on the issues.

The first session of the day deals with the issue of right to redress in personal injury and medical negligence cases, and will be chaired by Mr Justice George Birmingham. Keynote speaker Vicky Phelan has become a national figure due to her court action against the HSE and Clinical Pathology Laboratories Ltd over incorrect reading of a cervical smear test, which resulted in her being diagnosed with terminal cancer. Her actions led to the uncovering of the Cervical Check scandal, and Vicky has become a tireless campaigner for families affected by the scandal.

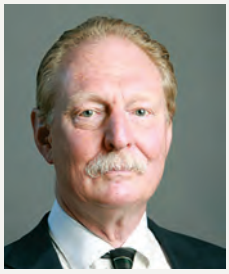
Also contributing to this session will be Denis McCullough SC and Eileen Barrington SC, who both bring a wealth of experience in medical negligence cases to the discussion. The second session on Saturday afternoon, 'Serving justice', focuses on the experience of victims in criminal trials. This session will be chaired by Ms Justice Isobel Kennedy, and the keynote speaker is Leona O'Callaghan. When the man who sexually abused her was convicted, Leona chose to waive her anonymity so that he could be named. She now advocates for better rights for survivors of sexual trauma. Caroline Biggs SC, Sean Gillane SC and Charles MacCreanor QC will add their expertise to this session, tackling issues like treatment of vulnerable witnesses, and the impact of social media in obtaining a fair trial.

Breakout

In between the main sessions, the Conference will also feature breakout sessions focusing on specialist areas of legal practice. Jane McGowan BL will speak at a session on the Irish Criminal Bar Association, and Clíona Kimber SC will speak at the Employment Bar Association's session. The EU Bar Association will be represented by David Conlan Smyth SC, while Helen Callanan SC will represent the Professional Regulatory and Disciplinary Bar Association.

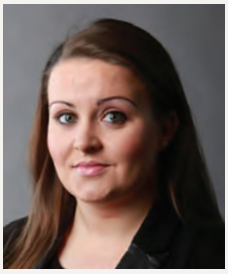
Micheál P O'Higgins SC, Chairman, Council of The Bar of Ireland

Vicky Phelan



Denis McCullough SC

Eileen Barrington SC



Jane McGowan BL

The Heritage Hotel and Spa

This year's conference takes place in the beautiful, five-star Heritage Hotel and Spa in Killenard, Co. Laois. The Heritage Hotel and Spa opened its doors in June 2005 and offers sophisticated elegance with impeccable hospitality in the Laois countryside. The world-class hotel, award-winning spa, the Arlington Restaurant, the Slieve Bloom Bar, and a lobby lounge serving afternoon tea are all available to guests. The Heritage Hotel and Spa also offers a number of onsite activities such as a health club with leisure pool, The Heritage Spa Experience (10% discount for attendees), jacuzzi, sauna and steam rooms, tennis court, 5km walking track, trim trail, cinema, golf – with discounted green fees for attendees – and fishing. A Kids' Club is also available during both the day and evening.

Social

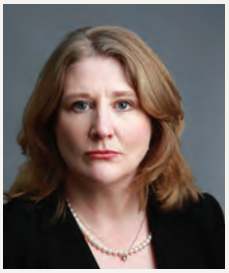
These excellent CPD-accredited conference sessions will be complemented by a social programme including a trade exhibition, drinks reception, and our gala dinner on Saturday, which promises to be a terrific night.

Bookings can be made online at www.lawlibrary.ie/LawsandEffect.

Please contact Aoife Kinnarney, Tel: 01-817 5166 or email events@lawlibrary.ie, with any queries.

Clíona Kimber SC

David Conlan Smyth SC



Helen Callanan SC

Leona O'Callaghan

Sean Gillane SC

As justice requires

Claire Loftus, Director of Public Prosecutions, talks to *The Bar Review* about the challenges of dealing with the digital age, improving services for victims, and moving with the times.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Director of Public Prosecutions (DPP) Claire Loftus refers to her career in criminal law as a "natural progression from an accidental start". A brief period of post-qualification experience in private practice ended when she took a post in the Chief State Solicitor's office in 1993 and, apart from a period working on the Finlay Tribunal into the infection of the blood supply with hepatitis C, she remained there in the Criminal division until 2001, when she was appointed as the State's first Chief Prosecution Solicitor within the DPP's office. In 2009 she became Head of the Directing Division, and two years later she was appointed DPP. Coming from a long line of public servants, including her father, who was a public sector solicitor, she values the opportunity to offer public service: "It's a huge privilege to have this job – it's been an honour. I also find the area very interesting and professionally satisfying. Obviously there are many very tragic dimensions to it; an awful lot of it is generated from the misfortune of victims. But at the end of the day our objective is to prosecute on behalf of the people of Ireland, present the case and hopefully ensure that justice is served both in favour of the victim and the accused".

Time to trial

One of the most significant challenges facing the DPP's office is the length of time it can take for a case to come to trial. While the relevant courts and their Presidents are working to address this (seven Central Criminal Courts are sitting at the moment, a court sits almost continuously in Munster at Central Criminal Court level, and great efforts are also being made at Circuit Court level), delays persist in some areas – for example the current waiting period in the Dublin Circuit Criminal Court stands at 17 months. The Director points out that this is partly attributable to a number of exceptionally long trials recently, such as the banking trials, but she is very conscious of the impact of such delays on all concerned. Her view is that a pre-trial hearing process would have a significant impact: "If we could take all, or a lot of, admissibility arguments out of the trial itself, if we could get pretrial rulings in relation to admissibility of evidence or various other things, that would make trials more efficient. Court time would be used less, and issues would crystallise sooner, including in relation to disclosure. The volume of disclosure in criminal cases is growing all the time, partly because of the growth of social media. There are also issues in relation to material and records held by third parties. We have worked hard over the last several years to streamline our disclosure processes to try to ensure that we have all the relevant material well before the trial. However, we cannot disclose material to the defence until we have it ourselves, and we cannot deal with supplementary requests for disclosure from the defence until we receive them.

"This is what I mean about crystallising issues – if we had proper pre-trial case management for every case, all parties would have to engage sooner and the defence could set out what further disclosure material they feel is relevant. Where records relate to victims, perhaps very vulnerable victims, there can be particular challenges. Vulnerable victims who have suffered trauma sometimes engage with a number of services, whether social services, or medical or psychological support. It can be very difficult to ascertain after many years the full extent of access to such services. Those most vulnerable often have had their lives extensively documented as a result. In such cases our disclosure obligations are more onerous and greater sensitivity must be shown when seeking informed consent to the release of such information. "A pre-trial process would be in ease of juries, but also provide greater certainty for the victim and witnesses, who are often left waiting for days or even weeks while legal argument goes on. It would be a much less traumatic process".

Pride

In the seven-and-a-half years since her appointment, a number of highlights stand out for the Director: "I was appointed during the downturn and like the rest of the civil service the office experienced severe cuts. I am proud of how the staff in my office responded to the challenges this presented. I'm very proud of how we responded to the banking cases in terms of dealing with their scale, and developing new techniques to manage all of the consequences, like handling huge amounts of disclosure, electronic presentation of evidence, all of that. And I'm proud of the very dedicated staff working on those cases and, may I say, very dedicated counsel. I'm also proud of the work we've done in responding to victims' needs, particularly around giving reasons in every case where requested.

"In terms of significant developments, what comes to mind is the 2015 Supreme Court case of *JC* dealing with the exclusionary rule. That has made a big difference because JC can be deployed in cases in a legal argument about admissibility, where previously the case might not even have been directed for prosecution if we thought that evidence may have been inadmissible because of some error or other insurmountable problem. I think it's fair to say our exclusionary rule is probably still the strictest rule in the common law world, but what it does do is rebalance the right of the community and society to prosecute and to see justice done, with the right of an accused to have a fair trial. It was a very significant milestone in my time".

A criminal procedures bill containing a pre-trial provision, which was first published in 2015, has been given priority by Government: "I've been saying since I was appointed that this was the most important thing, in my view, that would help the system to work more smoothly. I think in everybody's interests, but particularly victims' interests, it would make an awful lot of sense".

Deluge of documents

The Director has spoken on numerous occasions about the impact that processing huge volumes of digital evidence has on her office. This was most strikingly evident in the banking trials, just one of which produced over 800,000 documents. While technology can of course make processes more efficient, there's no doubt that it's adding to the workload in preparing cases, but they are working on solutions: "In terms of digital evidence, the case law is developing now so that we have some ground rules. We've just rolled out an e-disclosure pilot, which means that both our barristers and defence practitioners can access the entire disclosure on a case electronically, through an encrypted portal. This is a huge step in the right direction, and has been very well received by defence solicitors. There's also a criminal justice hub, a project being developed at Department of Justice level to streamline information and have better information sharing (within data protection rules, obviously). We're looking all the time at new ways of working, and developing expertise on the digital side of things, such as cybercrime. We have to stay ahead of the curve".

Hard borders

The increase in digital material has also contributed to an increase in the need to request evidence from abroad under mutual legal assistance. The Director feels that some development of the law in relation to how digital evidence is viewed would be helpful here. The Law Reform Commission has made recommendations, and the Director is waiting to see what is proposed in light of these: "It might reduce, for example, the number of mutual legal assistance requests that we need to go abroad for". Another border issue with the potential to create significant problems is, of course, Brexit. As we go to press, there is still no clarity as to whether the UK's departure from the EU will be a hard or soft one, but the Director's office is doing what it can to prepare for "all eventualities": "There is a Bill going through at the moment [now signed into law] to deal with a possible alternative procedure in place of European Arrest Warrants, which is the most important thing from our point of view because about 80% of our extradition requests go to the UK".

Supporting victims

The Criminal Justice (Victims of Crime) Act 2017 transposed the EU Victims' Directive into Irish law. While the DPP's office has been working for some time to improve the levels of liaison with victims, the Act has undoubtedly raised awareness among the public of their rights in relation to requesting reasons for decisions not to prosecute and reviews of those decisions, and this has naturally led to an increase in such requests: "We always gave reviews of our decisions not to prosecute requested by the victim; there were certain limited exceptions but that's been there for a very long time. We were doing things like pre-trial meetings with victims and liaison with the Gardaí, meeting the various victim support groups – all of that was going on for many years before the Directive. But the Directive and the Act have raised awareness. They've meant that we now give reasons in all cases, rather than just fatal cases, subject again to some limited exceptions that are provided for, and we're getting a huge number of requests for reasons every year. Likewise with reviews, we've had about 650 requests for reviews since the Directive came into effect in 2015. That's on a caseload of about 9,000 cases a year, and we would not prosecute around 40%. It's not a huge number, but it shows that there is an awareness out there and that the process is working".

She praises her office's Victims' Liaison Unit: "They have done massive work in providing training to the Gardaí, liaising with the Gardaí about their important role in being the frontline communicators with victims, their obligations in terms of carrying out assessments on victims to see if they're vulnerable or require particular measures, and have carried on the task of liaising with the various victim support organisations and other Government agencies".

It remains the role of the DPP's office to maintain a balance between the victim's rights and the needs of the justice system as a whole: "We take the victim's views into account; that view may not be determinative, and we make that clear to them. A complainant may not be aware of all of the factors surrounding a decision, but they certainly have that right to be heard, both in court and by us in terms of our decision making". It's clear that while these changes have placed increased demand on the DPP's office, it's something that she is personally supportive of: "We have some very good people in that area who over the last number of years have really developed our processes. My mission in terms of the Act is to make sure that we have consistency of approach. Everybody understands what their obligations are so it's a question of making sure that wherever the victim is, they get the same service and the same special measures in the courts that they might get if they were in the CCJ, for example".

Reform

Along with its own ongoing efforts to reform and streamline its operations, the DPP's office is of course impacted by reforms in other areas of the justice system, and one of the most significant is the process currently underway as a result of the recommendations of the Commission on the Future of Policing. One in particular could be game changing: the proposal that An Garda Síochána would step back from presenting cases in court and also withdraw from making prosecution decisions. The Government has decided to accept this recommendation in principle and the Director is watching developments closely: "There are inspectors and superintendents appearing in every district court around the country and managing the prosecutions in their district. And then there is the decision-making that's currently done by the Gardaí. If you consider that there are over 200,000 district court summonses issued in the name of the DPP every year, it gives you a sense of the volume. The implications of this require careful consideration, to understand the scale of what would be involved in any change to the current system, how it would be implemented, including a cost–benefit analysis, the question of whether it is necessary in each and every instance". She sees it in the context of ongoing review of a system that never sits still: "I can see that 20 years after the whole of the prosecution system was looked at by a working group, arising out of which a number of changes were implemented, there is certainly merit in looking at it again".

Resources

All of these changes require resources, from staff and training to technology: "Over the last couple of years we've received extra staff for things like the development of the Victims' Liaison Unit, and for more capacity in the area of international work, particularly European Arrest Warrants, extradition and mutual legal assistance. But there are constant pressures, pressures of courts and additional courts sitting at various levels. We're very demand led. We try to plan and project but at the end of the day we can't turn work away".

Issues have also arisen in recent times regarding fees for counsel, as barristers seek to have the cuts made in line with the Financial Emergency Measures in the Public Interest (FEMPI) Act unwound: "We've been saying for many years that the fees we pay to counsel are very good value for money. They were very good value for money before the downturn. We've been liaising with Department of Public Expenditure and Reform (DPER), and The Bar of Ireland would have been involved in this as well, in terms of their case to unwind some of those FEMPI cuts. We have supported the Bar's request that an extra 10% cut outside of the FEMPI process should be reversed. We have told the DPER that we accept that the Bar has, as far as prosecution counsel are concerned, certainly been flexible, and they have taken on additional types of work, such as greater obligations to victims. Cases have also become more complex on a number of fronts. We feel that they have done what is required in order to unwind those cuts. But ultimately it's a matter for Government. "I can't emphasise enough the great service we get from our counsel. We have about 180 counsel on our panels, across all of the different types of work that they do for us. We get a very good service across the country".

The court of public opinion

From the DPP's point of view, the process does not always end with a verdict. If the Director feels that a sentence is unduly lenient, there is a process to follow: "The sentence given by the court is a matter for the courts. I've said before that I recognise that trial judges are the ones who see the accused in court and are hearing all of the evidence, the mitigation, and all of the material that's presented during the sentencing process. My only role is to assess whether the sentence, from a legal standpoint, is unduly lenient. We have averaged over the last number of years approximately 50 reviews for undue leniency a year, on total indictment numbers of about 3,500 or thereabouts".

Sentencing is only one area where the DPP's office comes under scrutiny. Public understanding of how the different arms of the justice system operate can be limited, and high-profile or controversial criminal cases are inevitably judged by the court of public opinion. Like all those in similar positions, the Director is aware of a responsibility to maintain public confidence in her office: "We've worked very hard to promote our independence, or at least publicise our independence, in order to foster confidence in the fact that we take our decisions without fear or favour. We publicise what we do as much as we can: we have a website and we publish our Annual Report, and information booklets for victims and witnesses, and I speak occasionally. But getting decisions right, and prosecuting or not prosecuting as justice requires, is the biggest confidence-building measure. The first DPP, Eamonn Barnes, used to talk about the double duty of the job, that not only did you prosecute the people who should be prosecuted, but that you very definitely didn't prosecute people where there wasn't enough evidence, that you didn't give in to perception or pressure. I hope that people accept that that is what we do". Although the Director had no initial ambition to work in the area of criminal law, it quickly became a labour of love: "I couldn't imagine at this stage how my career wouldn't have been devoted to crime. You get to deal with the most novel and technical points of law and interesting policy issues, and obviously very traumatic cases in many instances. But there is no end of variety in criminal law. It's a very satisfying area to work in".

A number of high-profile cases have shed light on reforms required around the admission of documentary evidence in white-collar criminal trials.[1]

Navigating the documentary minefield

Sinéad McGrath BL

During the period between 2014 and 2018, a number of large-scale criminal prosecutions commenced at the Dublin Circuit Criminal Court in respect of activities at the former Anglo Irish Bank plc. These prosecutions involved senior banking executives charged with offences including conspiracy to defraud contrary to the common law and false accounting under section 10 of the Criminal Justice (Theft and Fraud) Offences Act 2001. In *The People (Director of Public Prosecutions) v John Bowe, William McAteer, Denis Casey and Peter Fitzpatrick*,[2] and *The People (Director of Public Prosecutions) v David Drumm*,[3] it was the prosecution case that there was an agreement between the accused to engage in a series of back-to-back transactions between Anglo Irish Bank plc and Irish Life and Permanent plc at Anglo's financial year end in September 2008, in an amount of €7.2 billion. The prosecution alleged that the purpose of the transactions was solely to deceive the market (potential and actual investors, depositors and lenders) that Anglo Irish Bank plc had received 'customer deposits' to that amount, when in fact money was simply transferred by Anglo to Irish Life and Permanent, and then deposited back from Irish Life and Permanent to Anglo 'on behalf of Irish Life Assurance', a corporate subsidiary of Irish Life and Permanent. It was alleged that the series of transactions in this manner, totalling €7.2 billion, had no commercial substance and was designed purely to deceive the market into believing that the state of health of Anglo Irish Bank plc at that time was better than it actually was.

These circular transactions were multi-jurisdictional, part-electronic, part-paper and, in the words of one of the accused, went through "many hands". Over 800,000 documentary exhibits were uplifted by the Garda National Economic Crime Bureau (GNECB; formerly the GBFI), together with in excess of 39,000 telephone recordings at Anglo alone. This volume of material contributed to the extended nature of the trials, both running for over 80 days. There were also extensive *voir dire* hearings on multiple legal issues ranging from the frontline collection of the evidence under Section 52 of the Criminal Justice (Theft and Fraud) Offences Act, 2001, to the admissibility of same under the Criminal Evidence Act 1992 and the Bankers' Books Evidence Acts 1879-1989.

The section 52 orders

The GNECB made 18 applications to the District Court between 2010 and 2013 for orders pursuant to section 52 of the Criminal Justice (Theft and Fraud) Offences Act, 2001. Such orders provide for the seizure of evidential material in respect of an offence under that Act, which is punishable by five years or more in prison. One of the most significant legal arguments arose, unsurprisingly, as regards the scope of the orders and whether the evidence was unlawfully and/or unconstitutionally seized by the GNECB.

There was, in the first instance, a simple *ultra vires* argument, namely, whether the audio and electronic material seized was outside the plain terms of the orders. This argument highlights the importance of the drafting of orders and warrants for large-scale electronic seizures. The language used, whether it is 'document', 'record', 'computer record' or 'storage media', is central when the matter comes to trial. It is also important to identify the period covered by the order or warrant given the risk that the material seized may fall outside that timeframe.

This *ultra vires* argument was augmented in the trial of Mr Drumm in light of the judgment of the Supreme Court in the *Competition and Consumer Protection*

Commission v CRH Plc, Irish Cement Limited and Lynch[4] concerning a complaint that the large-scale electronic material seized was in breach of a third party's constitutional right to privacy under Article 40.3 of the Constitution and/or in breach of the right to respect for private life under Article 8 of the European Convention on Human Rights. In *The People (Director of Public Prosecutions) v David Drumm*, the trial court heard evidence as regards the use of the electronic data-mining tool called ClearWell, used by the GNECB to 'tag' pertinent material and disregard irrelevant material. The trial judge was satisfied that there was no breach of Mr Drumm's right to privacy and that the search orders were proportionate. Therefore, the process followed by search agents with regard to any privileged and/or personal or private material is central in relation to large-scale seizures.

Admissibility issues

The material seized at Anglo Irish Bank plc comprised a mixture of real and inadmissible hearsay evidence. The broad categories of material were as follows:

(i) documents in hard copy format handed over by individual witnesses when making statements or handed over by a designated person at Anglo, including originals, copies and computer printouts;
(ii) disks and hard drives handed over by a designated person at Anglo containing thousands of documents, including email data, taken from the computer systems at Anglo by an IT team; and,
(iii) audio data handed over by a designated person at Anglo, using encrypted hard drives and CDs, containing downloaded audio data taken from multiple telephone lines (both internal calls and calls between internal and external lines).

Real evidence

In the United States case of the *State of Louisiana v Armstead*,[5] the court referred to two categories of electronically generated records: (a) those generated solely by the electronic operation and mechanical pulses of the computer; and, (b) computer-stored human-inputted statements.

The position taken by the prosecution during the trials was that the extensive audio data was real evidence. This evidence was authenticated by the Head of Technical Services at Anglo Irish Bank, who was responsible for the maintenance and operation of the voice recording systems in the dealing rooms at Anglo, and further gave evidence in relation to the extraction of each individual call from the audio data bank. An examination of the electronic documentary data[6] indicated that some of this data, including certain bank statements and trading data, was also automatically generated material falling within the category of real evidence. The cases of *The People (Director of Public Prosecutions) v Murphy*[7] (telephone records established by reference to cell mast information) and *The People (Director of Public Prosecutions) v Meehan*[8] (a printout of telephone traffic between mobile phones),[9] assist in identifying real electronic documentary data. In both *Murphy* and *Meehan*, the Court of Criminal Appeal was of the view that the English cases on real evidence had to be "read through the lens" of *R. v Cochrane*[10] (a case involving the admissibility of computerised records) and that "authoritative evidence" was required to prove the function and operation of the relevant computer system (called "foundation testimony"). The purpose of this foundation testimony is: (a) to clarify what side of the divide the proposed evidence is on (real or hearsay); and, (b) to authenticate same.

However, Mr Justice McKechnie clarified in *The People (Director of Public Prosecutions) v A. McD*[11] that CCTV footage was "so ubiquitous" that no evidence as to the ordinary function of a CCTV camera was required. It is clear from his judgment that "authoritative evidence" remains central in relation to "other devices", as the finder of fact will require evidence to establish how the information was inputted given the "possibility" of hearsay evidence.[12]

In respect of the real electronic documentary exhibits in the back-to back prosecutions, the authoritative evidence was provided by extensive statements from experienced IT personnel who were working in Anglo Irish Bank in 2008.

The language used, whether it is 'document', 'record', 'computer record' or 'storage media', is central when the matter comes to trial. It is also important to identify the period covered by the order or warrant given the risk that the material seized may fall outside that timeframe.

Hearsay evidence

As noted above, over 800,000 documents were uplifted during the Anglo investigations and this material contained extensive hearsay evidence. In the Court of Appeal's judgment in *The People (Director of Public Prosecutions) v O'Mahony and Daly*,[13] the Court outlined categories of such hearsay evidence as including:

(i) paper bank account records – originals or copies – including statements of account, correspondence, intra-bank memos, signatory lists;
(ii) electronic bank records – printouts or screenshots – including statements of account on the core banking system, transaction records, customer names and addresses;
(iii) emails – printouts or copies – and email attachments – including routine internal emails re: customer transactions, communications to and from clients of the business;
(iv) paper documents or electronic documents created in the context of investigations; and,
(v) court orders.

The admissibility of this material is facilitated by section 5 of the Criminal Evidence Act, 1992, which provides that "information contained in a document shall be admissible in any criminal proceedings as evidence of any fact therein of which direct oral evidence would be admissible" where certain conditions are satisfied. These conditions include that the information was compiled "in the ordinary course of business" (a business record) and was supplied by a person who had personal knowledge of the matters dealt with. Section 6 of the Criminal Evidence Act 1992 provides that proof of compliance with these conditions can be given by way of a certificate signed by a person occupying a position in relation to the management of the business in the course of which the information was compiled, or who is otherwise in a position to give the certificate. The preparation of such certificates can be a complex exercise, it being necessary to identify the "compiler" and "supplier" of the information in the relevant document. It must also be certified that the information was not supplied by an accused in the trial, who is not compellable. These requirements provide ample opportunity for challenge and can significantly extend the duration of a white-collar criminal trial.

The Commission has recommended a single technology-neutral definition of 'document' with a view to addressing the modern paperless business environment. This would eliminate legal arguments as to whether a screen shot, a record or a printout is a 'document' within the meaning of the Criminal Evidence Act, 1992.

It is open to an accused to object to the admissibility of the hearsay material under the section 5 process by way of the service of a notice under section 7 (2) of the Criminal Evidence Act 1992. Where such a notice has been served, the court shall receive oral evidence "of any matter stated or specified in the certificate".[14] In the case of *The People (Director of Public Prosecutions) v O'Mahony and Daly*[15] the Court of Appeal confirmed that this was a mandatory requirement where an objection had been made and that the trial court must hear oral evidence as to whether "the statutory pre-conditions to any valid reliance on s. 5(1) existed".[16] The accused in both back-to-back prosecutions served an objection under these provisions and extensive oral evidence was required as regards the admissibility of several hundred documents.

It is further open to an accused to object to the admission of the business records under the Criminal Evidence Act 1992 on the grounds of fairness. Section 8 states that "information or any part thereof" that is admissible in evidence by virtue of section 5 "shall not be admitted if the court is of the opinion that in the interests of justice" the information or that part ought not to be admitted. In making this decision, the court shall have regard to all of the circumstances of the evidence, including any risk that its admission or exclusion will result in unfairness to the accused. The Court must also have regard to whether there is a "reasonable inference" that the information is reliable or authentic.

This raises the issue as to whether, where evidence has been printed from a computer, it is also necessary to have "foundation evidence" statements as to the reliability and authenticity of the actual computer system (the "foundation testimony" discussed in the context of real evidence above). However, in the context of business records, it is the certification of the statutory preconditions (personal knowledge and routine compiling in the course of the business) that lends reliability or authenticity to the documents in question. The certifier vouches for the documents as a self-authenticating class of documents. Furthermore, the Law Reform Commission argues against imposing a "separate evidential regime" with a "higher foundation requirement" for electronic documentary evidence, as such a regime would create enormous costs and delays in legal proceedings.[17]

In light of the fact that the hearsay material at issue in both trials constituted banking records, affidavits were prepared in accordance with the Bankers' Books Evidence Acts 1879-1989. This regime renders a copy of any entry in a bankers' book *prima facie* evidence in all legal proceedings[18] (defined to include civil and criminal proceedings),[19] subject to formal proof, provided by an officer or partner of the bank, who can testify as to three preconditions:

(i) the book[20] must have been one of the ordinary books of the bank when the entry was made;
(ii) the entry must have been made in the usual and ordinary course of business of the bank; and,
(iii) the book must have been in the custody and control of the bank.[21]

The foregoing evidence of proof can be given orally or by affidavit and must be given by a partner or officer of the bank.[22] Furthermore, the evidence shall not be admitted unless "some person" (who does not have to be a partner or officer) gives evidence that the "copy has been examined with the original copy".[23] Mr Justice Cregan in *ACC Bank Plc. v Byrne*[24] specifically addressed the use of computerised banking records under this regime.

Conclusion

Following an investigation spanning almost eight years and trials of over several months, four high-profile banking executives were convicted of conspiracy to defraud contrary to the common law. Mr Bowe, Mr McAteer and Mr Casey have served their sentences, ranging from two years to three years and six months. When sentenced on June 20, 2018, the presiding judge imposed a sentence of six years' imprisonment in respect of Mr Drumm, whose behaviour she described a "grossly reprehensible".

Therefore, the process followed by search agents with regard to any privileged and/or personal or private material is central in relation to large-scale seizures.

Why did it take so long and what, if any, lessons have been learned? These cases illustrate the need for reform in two important respects. In the first instance, the recommendations of the Law Reform Commission[25] for the reform of the admissibility process for business records must be implemented. The Commission has recommended a single technology-neutral definition of 'document' with a view to addressing the modern paperless business environment. This would eliminate legal arguments as to whether a screen shot, a record or a printout is a 'document' within the meaning of the Criminal Evidence Act, 1992. The Commission has also significantly proposed the application of a presumption applying to the admissibility of business records. The presumption, as noted by the Commission, would make the section 6 certificate procedure redundant[26] and would work in the following way:

"In this case, establishing the basic fact under s. 5 (1) of the 1992 Act that the record is a properly constituted business record (i.e., was compiled in the ordinary course of business and supplied by a person with personal knowledge) will render it presumptively admissible.

This presumption may be rebutted where the party challenging the admission of the business record can prove that it is inadmissible by virtue of any of the further provisions of s.5 of the 1992 Act, including that it was generated in anticipation of litigation. The evidential burden will shift to the party challenging the admission of business records to prove that they are inadmissible by virtue of any of the named conditions".

This presumption, in the Commission's view, would address the "overly exacting demands" on the adducing party in the current statutory regime.[27]

In conclusion, these trials highlight the urgent need for "preliminary trial hearings" as outlined in the Criminal Procedure Bill 2015 (submitted to Government for approval in June 2015). This Bill provides (at s.2) that the trial court may, upon its own motion or that of the parties, conduct a preliminary hearing on, *inter alia*, whether certain material ought to be admitted in evidence. This proposed provision would have a dramatic impact on the running of financial fraud trials and, importantly, would assist to eliminate extensive *voir dire* hearings where juries remain waiting in the wings for days and sometimes weeks. This proposed legislation forms part of the current Programme for Government and is now well overdue.

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LEGAL UPDATE

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Bills initiated in Dáil Éireann during the period January 28, 2019, to February 28, 2019

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

Civil Registration Bill 2019 – Bill 12/2019

European Parliament Elections (Amendment) Bill 2019 – Bill 9/2019

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Plain Language Bill 2019 – Bill 7/2019 [pmb] – Deputy Noel Rock

Regulated Professions (Health and Social Care) (Amendment) Bill 2019 – Bill 13/2019

Regulation of Private Security Firms Bill 2019 – Bill 8/2019 [pmb] – Deputy Donnchadh Ó Laoghaire

Retention of Records Bill 2019 – Bill 16/2019

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Criminal Justice (Public Order) (Amendment) Bill 2019 – Bill 17/2019 [pmb] – Senator Diarmuid Wilson, Senator Lorraine Clifford-Lee and Senator Robbie Gallagher

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Signing away your life

Google has fallen foul of the French data protection watchdog, and the case has implications for how data protection cases are managed throughout the EU.

Conor O'Higgins BL

Introduction

Near the end of January of this year, France's national data protection agency, Commission Nationale de l'Informatique et des Libertés (the CNIL), fined Google €50 million for breaching principles of processing lying at the heart of the General Data Protection Regulation (GDPR). Aside from the size of the fine imposed, which has rightly drawn significant attention, the decision is important because it underlines and clarifies what has been stated in the European Data Protection Board's (EDPB) guidelines concerning the application of the "one stop shop" mechanism and how to identify a "lead supervisory authority". In effect, the CNIL held that it had jurisdiction to deal with the matter, notwithstanding the argument from Google that Ireland was the appropriate forum.

Most importantly in this author's view, the decision signals the inadequacy of old standards of transparency, and for obtaining consent for processing, adopted by the major companies that extract and track the data of many millions of users within the EU.[1]

The complaints against Google

The investigation by the CNIL was precipitated by complaints received from two separate data privacy interest groups: None of Your Business, founded by Max Schrems; and, the French association La Quadrature du Net. Together they represent almost 10,000 individuals.[2] Both complaints concerned the processing of personal data gathered from French-based users of Google's Android mobile operating system. The data in question is gathered when the users create their Google account – a necessary step in the configuration of an Android phone for those who do not have such an account already.

The lead authority issue

Before dealing with the substance of the complaints, the CNIL addressed Google's preliminary point that it did not have the competency to carry out its investigation and that the complaints should be dealt with by the Irish Data Protection Commissioner.

Article 56 of the GDPR provides for the appointment of a "lead supervisory authority" where there is cross-border processing by a controller or processor. This has been referred to as the "one stop shop" mechanism, the purpose of which is to ensure that national supervisory authorities co-operate with one another in order to achieve consistent application of the GDPR throughout the EU.[3]

Cross-border processing is defined at Article 4(23) of the GDPR as being either processing that:

(a) "…takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State."

or

(b) "…takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State."

Google submitted that, as a group with multiple establishments within the EU, it falls into the former category of data controller engaged in cross-border processing. Article 56 states that for the purpose of identifying the lead authority of this type of cross-border processor, it is essential to work out where its "main establishment" in the EU is located. According to Article 4(16), the main establishment of a data controller is the member state where its central administration is located, unless the decision on the "purposes and means of processing", as well as the power to have that decision implemented, rests with another EU establishment of that controller.

The EDPB has published guidelines on the identification and appointment of lead authorities, which are well worth reading in full.[4] For the purpose of this article, it is sufficient to point out that it is a crucial premise of the one stop shop that the identification of a lead authority is based on objective criteria. Controllers and processors must not be allowed to 'forum shop' – for example by naming a particular establishment as the central administration in circumstances where, in reality, it has no real say in deciding the purpose and means of processing.[5]

This was an issue in Google's case. After engaging in the formal stages of consultation with various other supervisory authorities, the CNIL decided that it was the correct authority to hear the complaints. In so doing, it rejected Google's assertion that its main establishment for the purpose of determining the lead authority is in Dublin, where Google Ireland Ltd employs over 3,600 people.

The CNIL found that Dublin's activities and decision-making power did not concern the specific processing at issue in the proceedings, namely processing related to personalised advertising and geolocation. It also pointed out that Google's statement that it is in the process of transferring decision-making power relating to personalised advertising and geolocation processing to Dublin was inconsistent with its stance that such power already resided there at the time when the processing complained of occurred.[6]

The CNIL decided that the true place where the relevant decision-making power rested was in Mountain View, California, the headquarters of Google LLC. The significance of this finding was that it led the CNIL to conclude that no cross-border processing, as defined by the GDPR, had occurred at all. This ruled out the use of the one stop shop mechanism and the consequent designation of a lead authority. Google LLC, as a controller based outside the EU, offering goods or services to individuals within it, was therefore "subject to the control of all European supervisory authorities".[7]

Thus, the CNIL did not perform the role of lead authority co-ordinating an investigation into processing relating to the data of subjects in different parts of the EU. Rather, its role was limited to that of supervisory authority dealing with the complaints relating to French data subjects.

Both complaints concerned the processing of personal data gathered from French-based users of Google's Android mobile operating system. The data in question is gathered when the users create their Google account – a necessary step in the configuration of an Android phone for those who do not have such an account already.

Lack of transparency

None of Your Business alleged that Google was in breach of its transparency and information obligations under Articles 12 and 13 of the GDPR. Specifically, it appears to have claimed that users were likely to be unaware, due to the way that Google's information was presented and described, that their data would be processed for the purposes of personalised advertising and geolocation. Article 12 of the GDPR states:

"The controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 and 34 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language…"

Article 13 obliges the controller, at the time of collection of the data in question, to provide the data subject with particular information including, *inter alia*, the identity and contact details of the controller and the intended purposes of the processing of the data, as well as the legal basis for the processing, and the recipients or categories of recipients of the personal data. Google defended its compliance with the transparency requirements of the GDPR, arguing that its Confidentiality Rules and Conditions of Use document provided its users with a good initial overview of the nature of the processing. More detailed information was accessible to these users in an email containing clickable links to settings tools offering them the opportunity to alter their privacy settings relating to important information concerning, for example, their location history and web-based activity.[8]

This argument was not accepted. First of all, the CNIL found that the company was in breach of the Article 12 accessibility requirement, a key component of transparency. It did so on the basis that the information that Google was required to provide under Article 13 of the Regulation was excessively scattered throughout multiple documents.

The CNIL gave precise examples of flaws in the architecture of the information provided by Google. It was especially critical of the use of links guiding the user to further information, finding that this particular layout meant that in order to understand properly what was being agreed to, the user had to cross-check and compare various documents.[9] Furthermore, the CNIL's investigation showed that five actions were needed to access information relating to personalised advertising processing and six in relation to geolocation processing. The supervisory authority observed that, overall, the presentation of the information was "devoid of any intuitive character".[10]

Google was also found to be breaching the transparency principle because the information contained in its online consent documentation was not "clear and comprehensible", as required by Article 12. In particular, the CNIL was of the view that the actual consequences of the processing were not apparent to users. This failure was in part down to the company's less than crystal clear way of describing the purpose of some of its processing. Explanations that can be translated as "to offer personalised services in terms of content and advertisements" and "to provide and develop services" were too generic, leading it to conclude that users could be caught off guard as to what they were agreeing to.[11]

The CNIL described the nature of the processing under investigation as "massive and intrusive". It did so because of the very large amount of user data processed, which was extracted from Android phones directly, from a variety of Google services such as Gmail and YouTube, and from activity occurring on third-party sites. It also did so because of the sensitive nature of the information, which, after being subjected to analysis, had the potential to reveal intimate details relating to the opinions, lifestyles, tastes and activities of users.[12] This made Google's failure to provide clear and comprehensible consent information all the more serious.

Lack of a lawful ground for processing

La Quadrature du Net's complaint was that the consent that Google relied on to justify the processing of its users' information for personalised advertising was invalid. If a controller is to avail of consent as its lawful ground for processing, that consent must be "free, specific, informed and unambiguous".[13] This is supported by Recital 32 of the GDPR, which states that consent must be given by a "…clear affirmative act…" and Recital 43 that:

"… Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations…".

According to Article 4(16), the main establishment of a data controller is the member state where its central administration is located, unless the decision on the "purposes and means of processing", as well as the power to have that decision implemented, rests with another EU establishment of that controller.

For reasons that are similar to those that gave rise to the finding of lack of transparency, the CNIL held that users did not have enough information to give truly informed consent. It concluded also that the consent was not specific or unambiguous, because of layout and design choices that are explained in detail in the decision.[14]

A particular shortcoming that the CNIL focused on concerned the problems faced by those Android users who wished to agree to some forms of processing and not to others. This was described as a lack of "specificity".

It is important to understand, as regards the lack of specificity of consent, that the CNIL did not find that Google was getting Android users to agree by one act to a range of different types of processing operations – something of a cardinal sin under the GDPR. The problem, rather, lay in the fact that, while users were actually allowed to choose what types of processing they found acceptable, it was too easy for them to complete the agreement process without becoming aware of this possibility. To find out that they could customise their consent in this way, users had to delve into the agreement by clicking on buttons. The CNIL found that this obscured the various options available and amounted to an infringement of Article 12.[15]

According to the CNIL, this flaw was compounded by the fact that a user that actually did so delve into the agreement was presented with a list of pre-ticked boxes representing the different kinds of processing operations. Because of this design feature, if a user moved on without taking any further action, they agreed to all the processing suggested by Google. This amounted to a straightforward breach of the requirement that for the consent of a user to be valid, it must be by way of a "clear affirmative act".[16]

The sanction

Having been found to be in breach, Google argued, first of all, that an administrative fine was not the appropriate remedy. It also argued, in the alternative, that the €50 million fine, suggested by the Rapporteur on the case and proposed in the CNIL's draft decision, was disproportionate.

Google was unsuccessful on both these counts. The CNIL observed that Articles 6, 12 and 13 of the GDPR concern fundamental guarantees that enable people to maintain control over their own data. Failing to observe them amounted to major infringements outlined in Article 83(5), which must be punished severely. The core goal of strengthening the rights of individuals demanded that a fine be imposed, especially in light of the fact that the infringements concerned the rights of millions of users of the Android system and because Google was making enormous profits from the accumulation and use of the data.[17]

Bearing all this in mind, one could ask whether the size of the fine amounts to a significant deterrent, given that €50 million represents a mere drop in the ocean for Google. Certainly, the fine could conceivably have been higher given that the maximum penalty in such cases is 4% of global annual turnover and Google's vast revenues were reported to be approximately $110 billion in 2017.[18]

Such criticism may be off the mark, however. Despite the large number of people affected, the breaches in question seem to have affected a minority of Android users in France, which clearly had an impact on the size of the fine. The major importance of the decision lies in the identification of the infringements by the CNIL and the fact that it is inevitable that unless Google moves promptly to fix them, there will be further complaints brought against it in France and indeed in other countries before other authorities. A key aim of the GDPR is to have a consistently high level of data protection throughout the European Union. In order to ensure this, Recital 11 states that the level of protection should be "equivalent" across all member states. Furthermore, the co-operation mechanism that is set out in Articles 63-67 requires, inter alia, national supervisory authorities to co-operate with one another "with a view to ensuring the consistency of application and enforcement of this Regulation".[19] This, coupled with the fact that Article 83 demands that a supervisory authority have regard to a controller's previous infringements when setting an administrative fine, means that any further breaches by Google of the same or a similar kind are likely to be treated more harshly.

Further consequences of the Google decision

This case is part of a clear trend that has seen regulatory bodies take an increasing interest in the collection of data by major controllers. To illustrate this, shortly after the CNIL delivered its decision, the German competition regulator gave a written ruling in a complaint brought against Facebook that is of potentially huge significance. It determined, among other things, that the company was abusing its market dominance in the area of social media by offering its service to users only on condition that they agreed to the collection of data gathered from other Facebook-owned platforms, such as WhatsApp

and Instagram, as well as from third-party websites that avail of the company's free 'business tools'. These tools include integrated 'like' and 'share' buttons, but Facebook's tracking appears to occur regardless of their being clicked on by service users.[20]

The real issue as regards identifying a controller's lead authority is who has decision-making power.

Returning to the Google decision, aside from the size of the fine, it begins the vital process of setting a standard for terms of service agreements and privacy policies that major data controllers will have to adhere to. The problems identified by the CNIL with the information provided to Android's users will be familiar to anyone who has come across online consent documents. These have long been criticised for their complexity and impenetrability, which has undoubtedly led to epidemic-level click fatigue and users giving their consent to processing without much or any thought. This problem is well illustrated by reports of a recent experiment conducted by Canadian and American academics, which found that three-quarters of over 500 college students surveyed did not read a service agreement when signing up to a fictitious social network. This is not to say that the minority that did peruse the document were much the wiser. Nobody who took part gave it more than one minute of their time. Possibly unwisely, all of the subjects of the experiment, readers and non-readers alike, ended up agreeing to terms of service that included giving the social network their future first-born child.[21]

As has been seen, the CNIL disapproved of the use of ambiguous terms by Google that did not accurately portray the real purpose of the processing. In her recent book *The Age of Surveillance Capitalism*, the well-known academic and author Shoshanna Zuboff argued that the major companies who pioneered the extraction and analysis of their users' data for commercial gain in the early 2000s, especially Google, became masters in deploying euphemism and jargon in order to obscure the real means and purpose of their processing.[22]

This assertion would no doubt be vigorously contested by the companies themselves. Whether this vagueness of language was deliberate or not, the decision by the CNIL indicates that documents must now describe the processing precisely and comprehensibly. Explaining the extraction of telling behavioural data in generic terms such as, for example, for the purpose of 'improving services', will no longer meet the standard required.

The challenges faced by data controllers and processors as regards their privacy policies and terms of service agreements are not to be underestimated. It will not be a straightforward task for them to strike the right balance between, on the one hand, providing adequate information to users and, on the other, designing the presentation of important documentation in a way that is intuitive and understandable. This is likely to be an area where there is much development over the coming years, and is something that goes far beyond the scope of this article.

Finally, the CNIL's decision that it, and not the Irish Data Protection Commissioner, was the sole competent supervisory authority, underlines what has been stated already in the EDPB's guidelines on lead authorities. Even so, it is a timely reminder that names and titles within related groups of companies are not what matter. The real issue as regards identifying a controller's lead authority is who has decision-making power.

What is possibly most notable about the procedural aspect of the case was the finding that the one stop shop procedure did not apply to the specific processing in question because of Google LLC's location outside the EU. Google has said that it is transferring this decision-making power to Dublin in the near future. Until it does, however, each individual national supervisory authority will have responsibility for investigating and ruling on any similar complaints relating to the rights of data subjects within its territory. It is by no means unlikely that such complaints will come before other national supervisory authorities.

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11. *Ibid*, p9, para. 8.
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16. *Ibid*, p13, para. 6 and 7.
17. *Ibid*, p14.
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Back to basics! *RAS Medical*, discovered documents and cross-examination

A recent Supreme Court judgment has emphasised the need for clarity regarding the status of documents that are to be relied upon in court.

Sarah Cooney BL

Introduction

Is it ever appropriate for a court to reach a finding of fact contrary to the sworn testimony of a witness based merely upon documents that have not been put to the witness in cross-examination? This is the question the Supreme Court very recently considered in *RAS Medical Limited trading as Park West Clinic v Royal College of Surgeons in Ireland* [2019] IESC 4. In a significant reminder to practitioners, the Supreme Court brings us back to first principles as to how discovered documents can be used in all proceedings, but in particular those which are, *prima facie*, likely to be heard on affidavit. The judgment deals not only with the proper status of discovered documents in forming part of the evidence in any case, but also sets out in detail the appropriate procedure to resolve conflicts of fact. In a unanimous judgment (Clarke C.J., O'Donnell J., MacMenamin J., Dunne J., and Finlay Geoghegan J.), the Chief Justice also took the opportunity to criticise the drafting practice where affidavits stray beyond setting out the facts and engage in argumentative assertions that are more appropriate for legal submissions.

Facts

The case concerned a challenge to the refusal of RCSI to accredit, for continuing professional development (CPD) purposes, a one-day event in plastic surgery run by RAS involving an exposition of three live surgeries. Upon receipt of RAS's application for accreditation, RCSI sought additional information, which included a request for a name of a consultant registered on the Irish Medical Council specialist division who supported the planned event.

The information provided by RAS revealed that none of the participants were on the specialist register. RCSI then issued a decision not to accredit the event on the basis that the chief organiser of the event was not on the specialist register in plastic surgery.

This prompted RAS to request the guidelines upon which the reasoning for the decision was based. RCSI furnished RAS with guidelines that had been updated to include the specialist registration requirements. These were not the published guidelines in being at the time of the application, which did not refer to the requirement for the chief organiser to be on the specialist register.

High Court

Judicial review proceedings issued in which the primary complaint made by RAS was that RCSI had not followed the published guidelines in being at the time of application and that RCSI retrospectively imposed the new guidelines after the event.[1] Discovery of documents was obtained, which included the relevant RCSI committee minutes, and internal emails between RCSI committee members discussing draft responses to RAS and the wording of the new guidelines. RAS relied on these documents by exhibiting them in their affidavit to support their claim that RCSI had retrospectively imposed the new guidelines rather than applying the old guidelines. No issued was raised in the High Court over the admissibility of these discovered documents.

Noonan J. dismissed RAS's claim on the basis that guidelines are not rules, and that RCSI had not relied on the new guidelines. Noonan J. held that the uncontroverted evidence from RCSI was that it was considered best practice by the Irish Medical Council and any professional body operating under its designation that surgery be performed or supervised by a medical practitioner on the specialist register.[2] The Court held that the essential requirement was the involvement of a person on the specialist register, a requirement that RAS understood but had not complied with.[3]

Court of Appeal

The main question on appeal was whether RCSI's committee arrived at its decision to refuse accreditation in breach of fair procedures.[4] RCSI raised the admissibility of the discovery documents as a preliminary issue. It argued that the discovery documents "were not actually evidence because they were not formally proved before the High Court".[5] RAS argued that they were, as they were exhibited to an affidavit of Mr Salman's (director of RAS). RAS argued that it would not have been useful for it to serve a notice to cross-examine because the documents were not referred to in RCSI's affidavits, so as to avoid being challenged or cross-examined about them. RAS also objected on the basis that the issue had not been raised in the High Court. Ryan P. for the three-judge court (with Peart J. and Irvine J.) held as follows:

"In my view the discovered documents were admissible in evidence on the application and on this appeal. They were discovered for the purpose of this judicial review application by RCSI, the deciding body that was in exclusive possession of almost all of the relevant materials for the decision on the application. Privilege was not claimed in respect of the documents in question. There is no question about the authenticity of the documents. The authors are available and were available to swear affidavits explaining or commenting on the contents. The documents are exhibited in the affidavit of Dr Salman on behalf of the applicant RAS. They were referred to and relied upon in the application for the High Court and in the submissions and arguments in this court by counsel for RAS. It was open to RCSI to comment, explain or dismiss the material or any part of that as it chose, and it decided, as it was entitled to do, to ignore the material. The documents are manifestly relevant beyond any dispute and they go far towards explaining the process of consideration of the application and the adoption of the new Guidelines. They are the records of the persons involved in the decision making process…

"… I simply do not understand how a court could consider this case without reference to this material since it is actually referred to in Dr Salman's affidavit and in the submissions made on his and his company's behalf. The fact that one party decides to ignore the material is rather undermined by the argument of the other party that is expressly based on the contents of the material. Just how a court would be able to un-know the information that is provided is difficult to see.

"It would appear that RCSI contemplates that in order to meet the objection it would be necessary for the applicant to apply to court to have the case heard on oral evidence simply for the purpose of proving the discovery documents that were produced by the respondent. That would be an absurdly inappropriate and clumsy procedure and not consistent with the interest of justice. In all the circumstances, it seems to me quite clear that this material must be looked at. The RCSI and Professor Tierney cannot quarantine documents that are central to the case simply by not referring to them".[6]

The Court of Appeal found resoundingly in favour of RAS by reference to the contents of the discovered documents in assessing the procedures adopted by RCSI's committee. The Court held that RCSI had relied on the new guidelines in refusing the accreditation as the committee was "evidently of the view that it needed to change the guidelines in order to impose this new requirement and indeed to refuse the application".[7]

Erratum

In Issue 1 of Volume 24, in our article 'Laws in Common' (p23), we stated that in the case of *Minister for Justice v O'Connor*, [2017] IESC 21, the plaintiff had been given legal aid under the non-statutory scheme applicable to European Arrest Warrant (EAW) cases. This was inaccurate. The plaintiff did not seek and, therefore, was not granted legal aid. However, in reaching its conclusion, the Supreme Court noted that legal aid is available generally to EAW respondents through the non-statutory scheme. We are happy to correct the error.

Supreme Court

The decision on the admissibility and use of the discovery documents as evidence prompted the question posed at the outset of this article to be certified for appeal to the Supreme Court. The Court paused in its consideration of the arguments advanced by the parties to re-emphasise the rules of evidence.

"It is, quite frankly, inappropriate for either party to place documents before a judge without either the documents being proved in the normal way or a clear agreement being reached as to the basis on which the documents are being presented.

The status of discovered documents

The first fundamental principle is that "factual issues in all court proceedings are determined on the basis of evidence properly before the court".[8] This applies equally to sworn oral and affidavit evidence, documentary evidence, and other forms of evidence such as physical objects. This means that they "must be properly established in an appropriate way before reliance can be placed on same in determining the facts".[9] There can be some legitimate qualification of this principle, such as that facts may be formally agreed, forgoing the need for their proof. There should be clarity at the hearing at first instance regarding the status of proposed evidence, and where a party wishes to challenge the admissibility of any evidence, "it is incumbent on the party who wishes to challenge the admissibility of the evidence concerned to raise the issue at an appropriate time".[10]

In respect of affidavit evidence, the Court stated that:

"Slightly different considerations apply, for obvious reasons, in a case where the evidence is tendered by affidavit. In such a case all of the evidence will be placed before the court in the form of copies of the relevant documentation (whether that be the affidavits themselves or documents exhibited to those affidavits). While there may occasionally be applications made in advance of the hearing of proceedings to be conducted on affidavit in which it is sought that the court should rule that certain contents of one or more affidavits ought not to be properly regarded as evidence before the court, the more normal course of events is to make submissions at the hearing to the effect that certain evidence, whether to be found in the body of an affidavit or in documents exhibited in the affidavit, is either inadmissible or cannot be taken to be evidence of a certain state of affairs. The latter comment is of particular relevance in relation to documents which may, in some circumstances, be admissible to establish the existence of the document concerned but not to establish the truth of the contents."[11]

The Court acknowledged the merits in parties agreeing to waive the necessity for formal proof of certain matters so as to reduce time in litigation. In that regard, "a court can, and in many cases should, punish a party on costs for unnecessarily and unreasonably declining to agree evidence in circumstances where there was no real basis for contesting the testimony concerned…That requirement does not, it should be said, provide an excuse for those challenging public law measure to ignore the rules of evidence".[12] The use of a notice to admit facts was referenced as an example of a procedure that the court can and should use to prevent unreasonable refusal to agree facts. Clarke C.J. also referred to the *Bula/Fyffes* model,[13] "whereby parties commonly agree that discovered documents can be placed before the judge without formal proof and, frequently, also agree that the documents concerned can be taken to represent *prima facie* evidence of the truth of the contents of the documents in question. In that simplest form, the party admitting the documents retains the right to question the interpretation placed on them, but questions of proof no longer remain in the case".[14] However, the Supreme Court emphasised that before adopting this model there needs to "be clarity about the party or parties against whom evidence contained in discovered documents can be deployed".[15] The Court stressed that before departing from the normal rules of evidence there must be clarity:

"It is, quite frankly, inappropriate for either party to place documents before a judge without either the documents being proved in the normal way or a clear agreement being reached as to the basis on which the documents are being presented".

Clarke C.J. continued:

"A document which is exhibited is, *prima facie*, evidence. In such a case it is not merely a question of discovered documents being handed to the judge on some basis which, for the reasons which I have identified, ought to be made absolutely clear. Rather, the document concerned is itself a piece of evidence exhibited in an affidavit which may properly be considered by the judge unless there is some legitimate basis for suggesting that the document is not admissible or is admissible only for limited purposes.

"That being said it is particularly important to emphasise that the mere fact that a document is exhibited in an affidavit does not, in and of itself, turn that document into admissible evidence. As already noted, discovered documents are not evidence of anything unless properly placed before the court and proved in the ordinary way. In those circumstances it was incorrect for RAS to seek to have the documents discovered by RCSI placed in evidence before the Court simply by their being exhibited in an affidavit of Dr Salman. The fact that this shortcut was attempted by RAS is one of the reasons for the difficulties which have emerged in this case. The affidavit in question did not turn those documents into evidence properly before the Court. If the proper course of action had been adopted and if the question of an agreement to admit the documents had been fully pursued, then one of two consequences would have flown. Either agreement would have been reached (including agreement on the basis on which the documents were to be admitted whether on the *Bula/Fyffes* basis or otherwise) or it would not have proved possible to reach agreement. In the latter case it would have been necessary for RAS to use one of the procedures available to have the contents of the documents properly established but it could have done so in the knowledge that a court

which came to the view that RCSI had acted unreasonably in failing to provide agreement not only could, but should, have penalised RCSI significantly in costs for what would, in those circumstances, have been found to be its unreasonable actions. It was the very fact that neither of those courses of action were adopted that led in the first place to the lack of clarity about the status of the documents both before the High Court and the Court of Appeal".[16]

On this first limb, Clarke C.J. held that it was too late for RCSI to raise the admissibility of the discovered documents for the first time in the Court of Appeal, and therefore, that Court was entitled to have regard to them. The Court then went on to discuss the second issue arising, which was the proper means by which factual disputes should be resolved.

The resolution of factual disputes

Where a party seeks to challenge the credibility or reliability of an opponent's evidence, the onus is on that party to cross-examine the witness and put the basis of those matters to that person. In Clarke C.J.'s view:

"…It is an unfair procedure to suggest in argument that a witness's evidence should not be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned. A party which presents evidence which goes unchallenged is entitled to assume that the evidence concerned is not contested. However, there may, of course, be legitimate debate about whether the evidence, even if accepted so far as it goes, is sufficient or appropriate to establish the facts necessary to resolve the case in favour of the party tendering the evidence in question……

"…… where reliance is placed on evidence to be found either in affidavits, in documents exhibited in affidavits, or in documents which are presented by agreement to the court, then a more difficult situation arises where it is suggested that there is a conflict of evidence whose resolution is necessary to the proper determination of the proceedings. Just as it is inappropriate to argue in a trial conducted on oral evidence that the evidence of a witness should not be accepted, either on grounds of lack of credibility or unreliability, without having given that witness a fair opportunity to answer any issues arising in that context, so also is it impermissible to ask a decider of fact (such as the trial judge in this case) to determine contested questions of fact on the basis of affidavit evidence or documentation alone".[17]

Clarke C.J. continued that:

"…If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact".[18]

Applying the foregoing, the Court held that it was not open to RAS to claim that the decision was based on the new guidelines without seeking to challenge the accuracy of the contents of RCSI's affidavit, whether by serving a notice to cross-examine or other means.[19] It was held that the Court of Appeal fell into error in rejecting the RCSI affidavit evidence and instead forming its own interpretation on the RCSI internal documentation. The Court also determined that RCSI was entitled to reject the application on the basis of the original criteria.

Conclusion

A number of important of reminders have emerged from this case. The Supreme Court has made it clear that firstly, there should be absolute clarity between the parties about the status of documents that are sought to be relied upon in court and this should be made clear to the trial judge. Secondly, it is not appropriate for a party to seek to put in evidence discovered documents simply by exhibiting them in an affidavit sworn by a person who is not in a position to prove the authenticity of the document. They should be proved in accordance with the normal rules of evidence subject to the relevant exceptions. Thirdly, it is not appropriate for a court to reject sworn affidavit evidence over other sworn evidence or documentation without giving the deponent in question an opportunity to answer why the sworn evidence is not credible or reliable. The onus is on the party who claims that sworn affidavit evidence should not be accepted, to ask the court to adopt the appropriate procedure.[20]

References

1. [2016] IEHC 198, at 22. Judgment of Noonan J.
2. [2016] IEHC 198, at 28.
3. [2016] IEHC 198, at 30.
4. [2017] IECA 228, at 16. Judgment of Ryan P.
5. [2017] IECA 228, at 12.
6. [2017] IECA 228 at 13-16.
7. [2017] IECA 228 at 68.
8. [2019] IESC 4, at 6.1.
9. [2019] IESC 4, at 6.2.
10. [2019] IESC 4, at 6.5.
11. [2019] IESC 4, at 6.6.
12. [2019] IESC 4, at 6.9.
13. *Bula Limited v Tara Mines Limited* [1997] IEHC 202 and *Fyffes Plc v DCC Plc* [2005] IEHC 477.
14. [2019] IESC 4, at 6.12.
15. [2019] IESC 4, at 6.13.
16. [2019] IESC 4, at 6.16-6.18
17. [2019] IESC 4, at 7.2-7.4.
18. [2019] IESC 4, at 7.6.
19. [2019] IESC 4, at 8.3.
20. [2019] IESC 4, at 10.4.

Data processor or controller?

Miriam Reilly SC
Chair, GDPR Working Group

The Council of The Bar of Ireland has put a range of measures in place to assist members in complying with the provisions of the General Data Protection Regulation (GDPR). A number of new technologies and services were introduced as part of the membership package, including: Office 365 and OneDrive for Business; the maintenance of an encryption database whereby member encrypted devices are registered; availability of multifactor authentication; GDPR CPD awareness sessions; and, a GDPR Guidance Note.

Status as controller or processor

Since the inception of the GDPR, a common query that has been the subject of discussion – and sometimes a source of some confusion – between barristers and solicitors, is that relating to the status of a barrister as a "controller" or "processor" of personal data. This status is important to define and understand, as it dictates the nature and extent of a barrister's obligations under the GDPR. Barristers are either controllers, joint controllers or processors in respect of the data received from clients. In basic terms, a controller exercises control over personal data, determining both the "purpose" of the processing and the "means" of the processing: the why and the how. A processor processes personal data on behalf of a controller. Where two parties are each controllers of the same personal data, they may be regarded as either independent controllers or joint controllers of that data.

Joint controllership arises where two or more controllers jointly determine the purposes and means of processing personal data.[1] Where solicitors and barristers act as joint controllers of personal data, it is required that both should determine their respective responsibilities by means of an arrangement between them, and the essence of any such arrangement must be made available to the data subject for the purpose of compliance with their obligations under the GDPR.[2]

A barrister may receive instructions in a number of different ways, including from a solicitor in contentious or non-contentious matters, directly from clients where direct professional access is involved, and/or from agencies of the State, e.g., the Director of Public Prosecutions (DPP), the State Claims Agency, or the Chief State Solicitor's Office (CSSO).

Lack of clarity

It appears that there is a lack of clarity within the legal profession as to the status of barristers. For the purposes of the GDPR, the status of a barrister relates to the level of control and independence exercised by a barrister over data, which will vary, depending on the nature of the instructions. Anecdotally, we are aware that some members are being asked by their instructing solicitors to enter into data processing agreements whereby the solicitor is described as the controller and the barrister as the processor. Likewise, the DPP and the State Claims Agency treat barristers as processors and have invited barristers retained on those panels to enter into such data processing agreements.

It is not for the Council of The Bar of Ireland to decide on behalf of members whether they are controllers, joint controllers or processors. However, the Council recognises that the status of members must be clarified and an approach agreed among the legal profession generally. To this end, a joint protocol in relation to data sharing is in the process of being agreed with the Law Society of Ireland, and will be made available to members in due course.

Independent

Whether a barrister is a controller or a processor of personal data is a question of fact. As such, each barrister must individually determine their status in conjunction with their instructing solicitor prior to sharing personal data. In respect of client-supplied personal data, the solicitor-client relationship will dictate whether the solicitor is processing such personal data as a controller or as a processor, and consequently will dictate the basis on which the solicitor may disclose personal data to the barrister retained.

In general, the Law Society and The Bar of Ireland are of the view that solicitors and barristers act as independent controllers when they work together (e.g., in litigation) and when they process personal data in performing their respective professional roles. In such circumstances, the solicitor and barrister must take individual responsibility for ensuring that rights and obligations under the GDPR are respected, and a written data processing agreement between them will not be required. Indeed, such a written data processing agreement could conflict with the independence of counsel in any given case.

However, situations may arise where a barrister acts as a processor on the solicitor's behalf. For example, counsel who are instructed by the DPP are deemed to be processors, and the DPP made arrangements in 2018 to put a written data processing agreement in place with each barrister on the DPP panels. Where such scenarios arise, a written data processing agreement, which incorporates the requirements of Article 28 of the GDPR, will be necessary.

Further information is set out for members in The Bar of Ireland GDPR Guidance Note, available at: www.lawlibrary.ie/media/lawlibrary/media/Secure/Member-GDPR-Guidance-Note_2.pdf. It is of the utmost importance that every member is familiar with their obligations and responsibilities to protect the personal data of the persons for whom and on whose behalf they are retained to act.

Reference

1. Art 26(1) GDPR.
2. Art 26(2) GDPR.

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