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The Law Library

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By Lynn O'Sullivan

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For the good of members

The Council of The Bar of Ireland has taken a number of decisions recently in support of members.

I have just returned from our annual conference, 'Laws & Effect', which took place in Laois on May 25. The event was attended by 150 members of the profession and of the judiciary. My sincere thanks to all our speakers who prepared papers, and to all who attended. The topics selected provoked interesting debate and discussion among delegates. This year, a decision was taken to invite a plaintiff and a victim of sexual violence to address the conference and share their experiences of going through the court process. Both Vicky Phelan and Leona O'Callaghan kindly accepted the invitation and shared their perspectives and experience in their quest to seek justice.

As a profession, it is important that we are open to hearing from and listening to the people that we seek to represent in court. We need to be ever mindful that the court process is unfamiliar to most clients, who may be intimidated by the setting and the surroundings. It is healthy that we facilitate opportunities for the profession to debate the different perspectives held by different sections and members of the Bar.

LSRA levy

At its meeting in May, the Council made a significant decision on behalf of members of the Law Library as to how the Legal Services Regulatory Authority (LSRA) levy will be recouped from members. Dara Hayes BL, Chairman of the LSRA Committee of the Council, has provided a detailed summary of the background to the LSRA levy and a more detailed analysis of the Council decision, which you can read under the 'Closing Argument' section at the back of this edition of *The Bar Review*. I urge all members to familiarise themselves with this decision.

In summary, as it is the Council that is required to collect and pay the levy to the LSRA on behalf of each member of the Law Library, the Council, following a consultation among its Committees, decided that it should pay the levy on behalf of members from the financial reserves of The Bar of Ireland for 2018 and 2019. Over the last few years, The Bar of Ireland has been building a financial reserve in order to protect and support members in respect of the anticipated additional cost because of the establishment of the LSRA. This is a significant decision, and one that is of enormous benefit to members. The estimated cost of that decision is forecast to be in the region of €750,000 for the years 2018 and 2019. Thereafter, The Bar of Ireland will be required to recoup the levy from the membership. While it is a significant cost to the organisation to proceed in this manner, the Council aims to ensure that all decisions taken on behalf of members have the primary objective and effect of supporting our members. From 2020 onwards, members will be levied with the cost and I urge you to read Dara Hayes' article, which will give you greater insight into the reasons for the Council decision and the likely quantum of the levy.

Membership survey

Another significant decision taken by the Council was to launch a membership survey to assess the general well-being of the membership across six key strands: (i) peer-to-peer support; (ii) workload; (iii) attitudes towards the profession; (iv) stress levels; (v) health and well-being; and, (vi) bullying, discrimination and sexual harassment.

General well-being is a common concern that is uniting all bar associations across the world. The International Bar Association (IBA) conducted the largest ever global survey on bullying and sexual harassment in the legal profession and launched its report in May 2019. Nearly 7,000 individuals from 135 countries responded to the survey, from across the spectrum of legal workplaces: law firms; in house; barristers' chambers; government; and, the judiciary. The IBA report provides a succinct analysis of the survey data, to raise awareness about the nature, extent and impact of the problem, and inform the development of solutions. You can read the IBA Report at www.ibanet.org/bullying-and-sexual-harassment.aspx.

It is timely that the Irish Bar has taken a decision to undertake its own internal survey, which will touch on some of the issues addressed by the IBA. It is hoped that these findings will help the Council to better understand the nature and prevalence of issues impacting on the psychological health and performance of the profession, and to identify what interventions and resources might be needed in response. I urge all members to take the time to participate in the survey.

Finally, at the time of writing, the results from the European Parliament and Local Elections are just coming through. Congratulations to all those members of the Bar who had the commitment (and courage) to put their names forward for election.

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

Informing and reforming

A key aspect of the financing of the new Legal Services Regulatory Authority is the imposition of a levy on all lawyers to fund the administrative and disciplinary costs. In this edition, we explain how the levy will be imposed and what amounts are likely to be payable by members of the Law Library in the years ahead.

Against a background of calls for a radical overhaul in relation to personal injuries claims, we examine some technical but very important changes to the relevant legislation, particularly in relation to notification periods. Our writer also examines the recent proposals for the establishment of a Judicial Council to create guidelines for the levels of awards for general damages.

In the wake of the recession, many credit institutions have sold off their loan portfolios to investment funds, often pejoratively referred to as 'vulture funds'. When these funds seek to get judgment against the debtors, legal issues are frequently raised regarding the nature of the assignment. We examine the proofs required and assess the defences in such cases.

Our interview is an exclusive with the (relatively) new Secretary General in the Department of Justice. After 10 months in the job, Aidan O'Driscoll is keen to explain the radical restructuring of the Department and how optimistic he is in relation to reform of An Garda Síochána.

Eilis Brennan SC
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Exploring a post-Brexit Europe

From left: Seamus Woulfe SC, Attorney General; Micheál P. O'Higgins SC, Chairman, Council of The Bar of Ireland; Gerard Hogan, Advocate General; and, Paul McGarry SC, Chairperson, EUBA.

On Friday, April 5, the EU Bar Association (EUBA) hosted a conference discussing commercial dispute resolution in Europe after Brexit. Attendees included members of the Law Library, judges, and solicitors.

The Advocate General, Gerard Hogan, opened the first session, discussing 'Protecting the Common Law in the Post-Brexit EU'. The following session discussed the topic of 'Post-Brexit Commercial Dispute Resolution in the EU' with Ms Justice Caroline Costello, Chairperson, Court of Appeal, the Attorney General, Seamus Woulfe SC, Ulrike Willoughby, Presiding Judge, Chamber for International Commercial Disputes, Frankfurt, Emilie Vasseur, Darrois Villey, Paris, Jacques Bouyssou, Alerion, Paris, and Duco Oranje, President of the Netherlands Commercial Court of Appeal.

New Arbitration Ireland website

Arbitration Ireland has launched a new website – www.arbitrationireland.com – to assist in its aim to promote awareness of Ireland as a venue and seat for international arbitration, and increase the profile of Irish arbitrators and practitioners among the international arbitration community. The website was launched at an event at William Fry in Dublin on Thursday, May 30.

The new website contains a wealth of information about the skilled personnel and world-class facilities available to those who wish to use Ireland as a venue for arbitration, including a complete database of Arbitration Ireland members. For further information, or to become a member of Arbitration Ireland, please contact Rose Fisher, Executive Director, at rfisher@arbitrationireland.com, or 01-817 5102.

Constructing law

Back row (from left): Martin Waldron BL; Jonathan FitzGerald BL; John McDonagh SC; Claire Cummins BL; Barra McCabe BL; Anita Finucane BL; and, Deirdre Ni Fhloinn BL. Front row (from left): Seamus Woulfe SC, Attorney General; Mr Justice Frank Clarke, Chief Justice of Ireland; Sir Declan Morgan, Lord Chief Justice of Northern Ireland; and, John Trainor SC, Chairperson, CBA.

The Construction Bar Association (CBA) hosted its seventh major conference on Friday March 29, attended by members of the Law Library, solicitors and other guests. Panel one discussed 'Judicial co-operation after Brexit' with the Attorney General, Seamus Woulfe SC, Mr Justice Frank Clarke, Chief Justice of Ireland, and Sir Declan Morgan, Lord Chief Justice of Northern Ireland. Panel two discussed 'Construction dispute resolution' with John McDonagh SC, Colm Ó h'Oisin SC, Gerard Meehan BL, and Anthony Hussey. Panel three discussed 'Recent developments in construction law' with Mr Justice David Barniville (panel Chairperson), Eileen Barrington SC, Richard Stowe, and Kelley Smith BL.

Line-up announced for Hardiman Lectures

The speakers for the 2019 Hardiman Lecture Series have been announced and the line-up includes an array of judges and legal practitioners speaking on subjects from significant historical legal events right up to modern day litigation practices. The series commences on Thursday, June 20, with former Attorney General Paul Gallagher SC delivering a lecture on the life and legal cases of the Liberator, Daniel O'Connell.

On Tuesday, June 25, the Attorney General, Séamus Woulfe SC, will speak about his role. Other lectures will include: 'The Iran Hostage Crisis: 444 Days that ruined a Presidency' from Mr Justice Peter Charleton, Judge of the Supreme Court; the trial and conduct of personal injuries litigation from Ms Justice Bronagh O'Hanlon, Judge of the High Court; the role and responsibility of the State in litigation from Ms Justice Deirdre Murphy; the trial of Roger Casement from Mr Justice Dónal O'Donnell; and, 'The Art of Advocacy' from Michael Collins SC.

The venue for most lectures is Court 2 off the Round Hall in the Four Courts, and lectures will commence at 4.15pm. The exception to this is Mr Justice Dónal O'Donnell's lecture, which will take place at the Bar Room of The Honorable Society of King's Inns, Henrietta Street, at 4.30pm. One CPD point is available per lecture, and lectures are open to all judges and court staff.

The Hardiman Lecture Series was named in honour of the late Mr Justice Adrian Hardiman in 2016 following his sudden passing. Mr Justice Hardiman was a participant each year on the lecture series from its inception in 2013. The Lecture Series forms a key element of the Chief Justice's Summer Internship Programme for Law Students.

Further information on the Lecture Series is available from Patrick Conboy, Executive Legal Officer to the Chief Justice, at PatrickConboy@courts.ie or 01-888 6776.

Bar and Law Society agree joint protocol on GDPR

The commencement of the General Data Protection Regulation (GDPR) gave rise to member queries in relation to how barristers and their instructing solicitors could ensure that client data was processed in a compliant manner. It was agreed that in order to work together effectively, solicitors and barristers need to share data (including personal data as defined under the GDPR) with each other so that they can provide legal services and/or advice to clients. The Law Society and The Bar of Ireland support the accurate, secure and confidential sharing of data (including personal data) between their members where such sharing is necessary for the provision of legal services. Furthermore, the Law Society and The Bar of Ireland acknowledge that the sharing of such data between their members should be in accordance with the law, as well as their members' respective regulatory obligations, common law and equitable duties.

A joint protocol has now been developed to underscore the importance of client data integrity and confidentiality, and has been agreed between the two organisations. The protocol will be available to all members via *In Brief*, on the members' section of the website, and will be widely circulated in printed form for members' convenience.

Cork Bar on Daffodil Day

From left: Deirdre O'Callaghan BL; Mary Crowley, Office Manager, Cork Court Office; Nicola McMahon, Irish Cancer Society; Joanna Ralston BL; Deirdre O'Mahony, County Registrar; Eoghan O'Sullivan, Breakthrough Cancer Research; and, Judge Mary Dorgan.

The barristers from the Cork Bar, organised by Joanna Ralston BL, held a coffee morning at the Courthouse in Washington Street, Cork, on March 19 as part of Daffodil Day. The event was in memory of their dear colleague and friend Jane Anne Rothwell BL, who passed away in October 2018, and in memory of all loved ones and friends lost to cancer. A total of €7,500 was raised from the event. The two charities to benefit were the Irish Cancer Society and Breakthrough Cancer Research, which is a Cork-based cancer research project.

A formal presentation of the cheques to the charities took place on Tuesday, May 28, at the Courthouse, Washington Street, where each charity was presented with a cheque for €3,750.

Laws & Effect

Almost 150 members of the Law Library and the judiciary gathered in the Heritage Hotel, Killenard, Co. Laois, on May 25 for a conference that looked at the court experience from the perspective of plaintiffs, victims, and professionals.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Opening the proceedings, Chairman of the Council of The Bar of Ireland Micheál P. O'Higgins SC welcomed the inclusion of two keynote speakers who represented the victim's and the plaintiff's experience of accessing justice in Ireland. He said that having understanding of and empathy with clients is fundamental to the profession, and to upholding citizens' right under the Constitution to seek justice through the courts.

Right to redress

The first session of the conference, 'Right to redress', looked at the civil courts, and was chaired by Mr Justice George Birmingham, President of the Court of Appeal. The keynote speaker, Vicky Phelan, came to prominence when her refusal to sign a non-disclosure agreement regarding her case against the HSE and a US laboratory precipitated the CervicalCheck scandal. Vicky spoke eloquently about her experience as a plaintiff. She acknowledged that her experience of the legal profession had been very positive, but that perhaps there was a lack of understanding of how "terrifying" the experience of court could be for plaintiffs, their families and supporters. Simple things like allowing people to see the courtroom in advance, or use of photographs or video, would prepare plaintiffs for the layout of the court. Vicky also spoke about accessibility issues, particularly in medical negligence cases such as her own; where plaintiffs might have mobility issues, or might be in pain, something as simple as a cushion can make a tremendous difference.

She discussed the language used in court, describing it as a "dance where the plaintiff is on stage and everyone but them knows the moves". Preparation in advance regarding the nature of questioning, and some explanation of the terminology, would be helpful.

She praised her legal team: "They listened, heard what I had to say, and helped me to navigate through my story", and pointed out that offering more support will lead to better plaintiffs, who are better equipped to give evidence.

Former Attorney General John Rogers SC echoed Vicky's comments about the layout of the courts, etc., saying that members of the Bar are conscious of the issues that impact on plaintiffs "but perhaps not conscious enough". He said that consultations with clients are the secret to a successful case. He also raised the issue of judicial appointments, saying that the proposed new regime may well be unconstitutional.

Former Attorney General John Rogers SC echoed Vicky's comments about the layout of the courts, etc., saying that members of the Bar are conscious of the issues that impact on plaintiffs "but perhaps not conscious enough".

Denis McCullough SC tackled the thorny subject of lump sum versus periodic payment awards in cases of catastrophic, life-altering injuries. Legislation now provides for periodic payment orders (PPOs) in cases involving State defendants; however, opposition from the insurance industry means that this has yet to be extended to non-State cases. He outlined the apparent advantages of PPOs for plaintiffs, but said that there was a serious difficulty inherent in the use of the Consumer Price Index (CPI) for indexation of payments, as the CPI does not keep pace with the costs incurred by such plaintiffs. He concluded that as things stand, legal professionals may advise against PPOs in cases where they are likely to lead to substantial losses for a plaintiff, and hoped that the Government, when it next reviews the legislation, will provide better indexation.

The final speaker of the session was Eileen Barrington SC, who discussed alternatives to the traditional model of medical negligence litigation. She discussed the recommendations of Mr Justice Meenan in the wake of the CervicalCheck scandal.

Clockwise from top left: Almost 150 people attended this year's conference at the Heritage Hotel, Killenard. Chairman, Council of The Bar of Ireland, Micheál P. O'Higgins, with keynote speakers Leona O'Callaghan (centre), and Vicky Phelan. From left: Clíona Kimber SC; Anne Conlon BL; Caoimhe Ruigrok BL; and, Christina O'Byrne BL.

Mr Justice Meenan has recommended the establishment of a tribunal. This would allow for more private and informal hearings, but according to the heads of bill published in April, cases would be determined in the same manner as in the High Court, and thus would still have an adversarial element. Eileen discussed the other suggestions arising from Judge Meenan's report, such as ex-gratia payments, and the establishment of an expert group to review the law on tort.

Serving justice

In the second session, chaired by Ms Justice Isobel Kennedy of the Court of Appeal, the spotlight was on criminal law, and keynote speaker Leona O'Callaghan had some challenging points to make. Leona is a survivor of rape and sexual abuse, who forfeited her anonymity when her attacker was convicted so that he could be named. Leona spoke about her experience of the justice system, describing it as "one of the hardest things I've ever done". In often harrowing detail, she told of multiple suicide attempts as she struggled to deal with the legal process, and of the horrendous toll on her family, her marriage and her life. She accepted absolutely the principle of the right to a fair trial, but urged those present to use their expertise to "come together to make a change" to reduce the delays and adjournments that further traumatise victims.

Caroline Biggs SC spoke on changes to the way vulnerable witnesses and victims are treated. On the issue of cross-examination, she said that while this is "vital" to discover the truth, defence lawyers are not in a position to engage in a "free for all". Reference to the previous sexual history of the victim is now restricted, and victims are entitled to legal representation if their sexual history is used in court. She offered her own views on the system, saying that she believed the process to be flawed, but with the capacity to evolve, especially when people come forward to demand change.

In his presentation, 'Daggers and balance', Sean Gillane SC made reference to recent high-profile cases around the world, in particular the Belfast rape trial, in discussing the unprecedented focus on sexual crimes and the criminal trials arising from them. He talked about the worrying tendency to frame the discussion around 'taking sides', criticising members of the profession for defending those accused of such crimes. He said that legitimate questions are now being asked, and in Ireland, the O'Malley report is an attempt to answer those questions. Sean said it will incorporate specialist training for the profession, as well as supports for witnesses and victims, and measures around delays, pre-trial hearings, and cross-examination. He said that criminal law is rarely looked at thematically except in times of crisis, and there is now an opportunity to "do something different". He cautioned that: "If we take the position that the position of victims can only be improved by worsening the position of the accused, then that is the wrong position".

The final speaker of the day was Charles Mac Creanor QC, who spoke on 'Social media, a fair trial and the Gillen Review'. He spoke about the far-reaching impact of digital and social media, describing it as "a challenge to us all". The duties of disclosure and investigation are core principles of justice, but disclosure must be fair, and not include irrelevant or spurious material. He described the Gillen Review of law, procedure and practice in relation to alleged serious sexual offences in Northern Ireland as a "very important body of work", which must be resourced by a strong political system. He said that criminal justice systems are constantly evolving, and that training and enforcement should mean that experiences such as those described by Leona O'Callaghan do not happen.

Breakout sessions

A number of breakout sessions took place as part of the conference, hosted by several of the Professional Bar Associations.

The disclosure dilemma

Jane McGowan BL of the Criminal Bar Association addressed issues around disclosure of evidence to accused persons in criminal cases, in the particular context of recent collapses of multiple trials in the UK as a result of failures in the disclosure process. She discussed Section 19A of the Criminal Evidence Act, 1992, and the issues surrounding disclosure to the accused of counselling records in sexual offence cases, and the EU Directive on the Right to Information in Criminal Proceedings (20012/13/EU), which establishes these rights. She offered an analysis of Section 19A, saying that it was unnecessarily narrow in its drafting. With regard to the Directive, she highlighted a number of provisions that were likely to have a direct effect on cases here.

In concluding, she said that the enormous increases in the volume of disclosure brought about by technological advances require significant additional resources for the entire legal system: "The only way to protect the system for the benefit of accused and victim, is to resource it," she said. "Disclosure is a dilemma, and I believe crisis is coming."

Privacy and the law

Clíona Kimber SC, Chairperson of the Employment Bar Association, presented on 'Data protection and privacy at work – how to litigate for effective remedies for breach post GDPR'. She commenced by saying that clients are concerned about losses of protection of data and that there are now powerful tools for dealing with breaches of privacy. Clíona cited a recent libel case in Ireland, which included a separate €50,000 award specifically for loss of privacy. She also referenced the case taken by the UK royal, Prince Harry, against photographers who had taken photographs through the windows of his home using telephoto lenses from a helicopter flying over the premises. There are, of course, more mundane but equally upsetting examples including privacy in medical and financial matters of private individuals.

The relevant legislation is the Data Protection Act 2018 (and specifically Section 117 (1)). The bulk of rights granted under the GDPR are not in the Act, but the Act refers to the GDPR, including all of its protections. According to Clíona, *Gulati vs Mirror Group* in the UK (involving the illegal hacking of voicemail messages) is very good for working out damages.

The Dublin system

On behalf of the EU Bar Association, David Conlan Smyth SC delivered a presentation on the Dublin System, describing it as the most controversial current issue in EU law, existing as it does in the context of the migrant crises in Greece and Italy, the rise of anti-immigration political parties, and attempts by the EU to reform the system to move its emphasis from a principle of responsibility to one of solidarity. The current proposals (Dublin IV), according to Mr Conlan Smyth, propose to centralise the asylum application process, and allocate numbers of migrants to EU countries in accordance with population and GDP. Unsurprisingly, this has met with strong opposition in Eastern Europe, and has led to a significant standoff in the EU. He critiqued the Dublin IV proposals on a number of fronts, suggesting that elements of the proposals may breach international law. He also raised the issue of Brexit, saying that while compliance with international law would mean that the UK is still regarded as a "safe nation", if the UK were to make changes to its laws upon exit from the EU, that could change.

Prohibition made public

Helen Callanan SC of the Professional, Regulatory and Disciplinary Bar Association (PRDBA) addressed the topic 'Even Homer nods – but whither the victim?' She covered many aspects of regulatory matters, including the possible effects of both the Judicial Council Bill 2017 and the Judicial Appointments Commission Bill 2017, over which many in the legal profession hold reservations, including potential conflict with the Constitution.

Helen gave a particularly good insight into new information from the Central Bank of Ireland on its regulatory activities. She credited the information to a presentation to the recent PRDBA Conference by Seána Cunningham, Director of Enforcement and Anti-Money Laundering at the Central Bank. In that presentation, members learned that the Central Bank is operating a policy of a 30% reduction in penalties for co-operation with its investigations. The Central Bank frequently sees a lack of co-operation – along with repeated requests to extend deadlines – during investigations. The Central Bank has adopted the policy of a 30% reduction to demonstrate that efficient co-operation is an efficient use of company resources.

It is also significant that the Central Bank recently exercised its right to publish a prohibition notice for the first time. Helen also noted that in 2018, the Central Bank levied a total of €7m in fines.

Inventing a 21st century civil service

As Secretary General of the Department of Justice and Equality, Aidan O'Driscoll is presiding over the most significant restructuring of a Government Department in the history of the State. He spoke to *The Bar Review* about this, and about the other work his Department is undertaking.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

With a background in economics and policy analysis, rather than in law, Aidan O'Driscoll has been on a steep learning curve since moving from the Department of Agriculture (where he was also Secretary General) to Justice and Equality last summer, but he's enjoying the process: "It's an enormous change, particularly in terms of subject matter, but I've very good and enthusiastic teachers among the staff here".

Radical change

The focus for his first year is leading a major programme of change in the Department, inspired by the report of the Effectiveness and Renewal Group. It's hard to overstate the significance of this process, which Aidan refers to as a "transformation", as it seeks to completely reorganise how the Department does its job: "Traditionally, Irish Government departments are built around a divisional model based on subject matter. We are transitioning to a functional model based on what we actually do as civil servants. We have now established two executive pillars: one focused on criminal justice, and the other on civil justice and equality (including immigration). I have two outstanding deputy Secretaries General – Oonagh McPhillips in Criminal Justice and Oonagh Buckley in Civil Justice and Equality – leading these two pillars. Then in the middle, as it were, there is the Corporate pillar, and we are going to create a new transparency function".

Instead of the traditional subject-based model, the pillars will be organised around a broader suite of functions: policy; legislation; governance; and, operations and service delivery. Aidan explains: "If you take the policy area, for a number of years we have committed ourselves to be more evidence based in our policy work, and also to be more joined up, in other words not to see the issue within a very narrow frame. But this has been very difficult to do in a subject-based model, where you are looking at it in the narrow frame of the subject for which you are responsible. The people in this unit, their responsibility will be for all criminal justice policy, so when they are looking at a policy issue, whether cybercrime or drugs policy, they will look at it in the broader frame. They will be policy specialists".

Diving in

Aidan O'Driscoll has spent most of his career in the civil service, mainly in the Department of Agriculture, but also in the Department of Finance, and for a time in the Irish Embassy in Rome. With a background in economics and policy analysis, he worked in Africa in the development area for eight years. Immediately prior to taking on his current role, Aidan was Secretary General of the Department of Agriculture, Food and the Marine.

Aidan is a keen cyclist, and cycles to work in St Stephen's Green every day ("I find it a huge benefit and I'm a strong believer that we're going to turn back into a cycling city, as we were in the past and as the Dutch are today"). He tries to fit some hillwalking into his busy life, and enjoys scubadiving, which he learned to do in Africa, when he goes on holiday. He's recently begun to use Twitter, and is trying not to spend too much time there!

The same is true for the other functions. Justice produces far more legislation than any other Government department, with 11 bills currently with the Oireachtas, 10 more in the priority list for the summer session, and a further 24 behind those. The legislative experts in the Department will now be able to devote themselves to this process, thus making the best use of their specialist skills. The governance function covers the 25-plus agencies that fall within the ambit of the Department, from An Garda Síochána to the Film Classification Office. Some of these are largely independent of the Department (such as the Garda Síochána Ombudsman Commission), while others, like the probation and prison services, work more closely with it. Operations and service delivery covers the areas where services are delivered directly to the public, the most obvious example of which would be immigration. Aidan says the gains from this reorganisation will be significant: "We will be a much more resilient organisation because there's not just one person who knows everything about the issue".

Transparency and timelines

One of the central functions, spanning both pillars, is transparency: "For many years now the civil service has, rightly in my view, been under pressure to be more open and transparent. I think we've moved an enormous amount in the last 10 or 20 years, but we haven't moved enough. This function will help us to proactively get our message out there about what we are doing, why we are doing it, and interacting with all our customers, stakeholders, and those who are interested in our work. We now live in a world of 24-hour media cycles, and a very demanding, and sometimes somewhat aggressive, public discourse. It's not that we will enter an aggressive public discourse, but we must become much better at explaining ourselves, while embracing the accountability that goes with it".

He doesn't underestimate the challenges involved: "The civil service has been doing it the other way for a hundred years, so it is genuinely an enormous change and it does have huge risks attached to it. We will make mistakes, but I hope people, even those who are maybe a little skeptical, will see the genuine intent and purpose behind this, and will be supportive of us as we go forward and try to implement it".

He finds the process personally very invigorating: "What we're doing here is reinventing the civil service for the 21st century in Ireland. It gives me a huge sense of purpose and energy. I really and truly believe very strongly in the mission of the civil service, and this is a once in a multi-lifetime opportunity to shape the future of that service". The process is being closely watched by other departments as a potential template for reform across the civil service, and the timeline is tight. The Group's first report was submitted to the Minister in June 2018, and the structural reform is due to be completed by October of this year. Aidan is happy with progress so far, and confident that targets will be met: "So far we're on schedule. However, the truth is that the next few months are going to be the toughest in terms of implementation. So I'm not congratulating us just yet. I am confident that we will do this in or around the time we have said".

Minding the day to day

While the business of managing a major transformation within the Department progresses, day-to-day work continues, and Aidan is keen to draw attention to a number of projects the Department has either initiated, or is centrally involved in. One of the most important is the reform of policing arising from the report of the Commission on the Future of Policing in Ireland (CoFPI) (panel), but there are many others. As mentioned previously, the Department's legislative agenda is extensive, ranging from legislation on the judiciary to land conveyancing and the gender pay gap. In keeping with its second major remit, the Department also has a strong equality agenda, with strategies on women and girls, migrant integration, and a Traveller and Roma strategy all being implemented. The work on LGBTI+ issues is something Aidan is particularly proud of, and he is delighted that in this year's Pride parade, An Garda Síochána will march in uniform for the first time, and that the civil service will also take part formally as a group for the first time. A new LGBTI+ Strategy will be launched shortly by the Department. After a high-profile campaign on domestic violence, the Department has just launched an advertising campaign on sexual harassment and sexual violence. Featuring a range of scenarios, with voiceover from focus groups discussing the ads, Aidan is keen to see how the 'No Excuses' campaign is received: "This is very subtle stuff – we're not beating people over the head with a conclusion. It also shows another side [to what we're doing]. This is still criminal justice. This is still about prevention of harm, about protecting the vulnerable, but in a completely new way".

Immigration is, of course, a major focus of the Department. On the one hand, this encompasses the rising numbers of passengers coming through our airports, all of

whom hand their passport to a Department of Justice official for inspection. It's a growing responsibility, but a positive one in terms of tourism and economic growth. The Irish Naturalisation and Immigration Service (INIS) of the Department is also responsible for processing over 250,000 applications annually for visas, registration of non-EEA nationals, residence permissions and citizenship.

On the other side is the often controversial issue of international protection and refugees. Although the numbers in relation to the Irish population as a whole are relatively small, there has been an increase in the number of asylum seekers in recent years. Aidan points out that this is an area where an inter-agency approach is vital, but says that in Justice they view issues around immigration, and indeed the vital process of integration, as positive. Even in the area of direct provision, where he agrees that more needs to be done, particularly in terms of reducing the amount of time people spend in the system, he feels that much of the negative reporting has been misdirected: "We have to develop new and better ways of dealing with issues in the direct provision system, and that will be a very important area of work over the coming years. However, the experience of the Department with regard to migrant accommodation centres, and this is absolutely consistent, is there can be unease at first, but once it's up and running, Irish people are welcoming. The kind of people who articulate racist or extremely hostile views are not the mainstream".

Brexit

Like everyone else, the Department has put a tremendous amount of work into preparing for Brexit, and while the recent confirmation of the Common Travel Area eases some concerns, there are many uncertainties yet to be faced: "There are a lot of criminal justice issues thrown up by Brexit, and family law issues in the civil justice area. There are also data sharing issues that weren't there previously. We worked very hard to prepare ourselves for the no deal back in April/May, and we had a whole plan ready to go. In fact we had a minute-by-minute plan for the hours just before and after Brexit, as to what the Minister had to sign, what letters I had to sign to my British opposite number. If we do move to a deal in the future, the bad news is that's only the beginning of the process. Then we have the negotiations on the new arrangements, and we will have a very deep interest in those and will be very deeply involved".

Building the evidence

All of these projects, and indeed the transformation of the Department as a whole, rely on a rigorous approach to data management and evidence, and this is something Aidan feels very strongly about: "I was trained as a policy analyst so this is something I believe in passionately. What we are doing is specifically designed to facilitate that, particularly in the policy and governance functions, to develop the evidence base we need to give really good, evidence-supported policy advice to our ministers and to the political system. At the end of the day we live in a democracy and it's our ministers and the Oireachtas who decide policy, not civil servants. But we have to give the absolutely best policy advice we can, and to me that means stacking up the evidence. For example, we have the crime statistics, but we also have the attitudes to crime survey. So we know both what the level of crime is, but also what people think the level of crime is, and what their attitude to that is. We have now commenced a series of carefully focused research projects to inform further policy work".

Aidan stepped into his role at a time when the Department had seen significant controversy, and public and political criticism. Managing public perceptions is a necessary part of the job, and one he accepts, but he feels that the work of transformation will help to change attitudes: "I think this department has taken quite a pummeling in the past few years, and I have great admiration for my colleagues who were here then and who kept the ship sailing because that was difficult. We're now in a new space. We have a big story to tell. The civil service has often taken a lot of criticism, although surveys still show a very high level of trust in the civil service, which I take great heart at. But that's no longer enough. We have to be able to explain ourselves to the public and the political system. We have to get better at that".

He is proud of his Department, and of what it stands for: "The vision of this Department is for a safe, fair and inclusive Ireland. We want people in this country to be safe. To feel they're being treated fairly and inclusively. We want them to be treated in that way and also to feel they're being treated in that way. In reinventing the civil service for the 21st century I hope we're reinventing it in a way that engages in a new way with the political system also. That the civil service, by being the best it can be in support of our democracy, makes that democracy stronger".

Policing reform

The reform of policing arising from the CoFPI report is being managed through a multi-department structure chaired by the Department of the Taoiseach, and Aidan says that it encompasses a much broader view than has heretofore been the case: "It underpins a conception of policing that is much broader than just criminal justice, but recognises that a lot of people who get tangled up in the criminal justice system are in fact very vulnerable. The CoFPI report talks about having a focus on prevention of harm and a strong inter-agency approach based on human rights. I'm new to this but this seems to me a new and really important way of looking at what we do. We've talked about joined-up government, whole of government approaches, but this is on a grand scale around a very important issue".

One concrete example of this is the Joint Agency Response to Crime (JARC) programme, through which different agencies – the Guards, the Probation Service, the Department of Justice and Equality, social services, and so on – work together to identify groups of people who were involved in high levels of crime but who were suitable, or who were thought to have potential, to go in a different direction, and concentrating resources on them. Aidan says the results so far have been striking: "You're concentrating on people who were involved in high levels of crime, so it has an actual impact on crime levels".

Aidan is working closely with Garda Commissioner, Drew Harris, in all of this; indeed, they were appointed on the same day: "I think Drew Harris is doing a tremendous job. I'm glad to say we get on extremely well, as do our senior teams. An implementation plan has been produced [for the reform process]. It's very specific. It's time bound. I am very optimistic that that process will work through on time and on budget".

Personal injuries update

Practitioners should be aware of the changes and possible changes coming to personal injuries case law in Ireland.

Stephen Healy BL

Introduction

The recent changes sweeping across the Irish personal injuries regime certainly pose food for thought. Practitioners need to be aware of a recent reduction in the notification period for personal injuries claims, as well as other changes affecting practice and procedure. This article also highlights amendments to legislation and recent developments in case law.

Reform

The formation of the Personal Injuries Commission (PIC) and the recent publication of the 'Second and Final Report of the Personal Injuries Commission' are indicative of the recent focus in the area. The former President of the High Court, Mr Justice Nicholas Kearns, chairs the Commission. One of the key recommendations of the PIC is the establishment of a Judicial Council by the Minister for Justice and Equality.

The PIC recommends that the Judicial Council will create guidelines for the levels of awards for general damages in personal injuries cases. It is proposed that this should done by taking account of recent jurisprudence of the Court of Appeal, the results of the PIC benchmarking process, and the Whiplash Associated Disorder Scale (WAD) established by the Quebec Task Force. The PIC acknowledges that changes to the Personal Injuries Assessment Board Act, 2003 (the "2003 Act") and the Civil Liability Courts Act, 2004 (the "2004 Act") will be necessary to facilitate the proposed changes. The Judicial Council Bill, 2017 (the "2017 Bill") creates the Judicial Council and legislates for its powers, which are not limited to personal injuries matters. At the time of writing, the Bill had completed Seanad Éireann, third stage.

The PIC has recommended that the Law Reform Commission is best placed to analyse whether constitutionally sound legalisation can be developed for the capping of general damages in personal injuries cases. The PIC suggested the Law Reform Commission undertake this task aided by research data provided by the PIC. Perhaps one of the most significant findings of the PIC is the conclusion that an entirely 'care not cash' regime for soft tissue injuries is incompatible with EU law. This conclusion was greatly influenced by the decision of the Court of Justice of the European Union (CJEU) in *Petillo and Petillo v Unipol Assicurazioni*.[1] Notwithstanding this, it is submitted, such a regime could place even more pressure on Irish hospitals that have been struggling with patient numbers for many years. One would expect a first class health system to be in place, even if a care not cash type system was compatible with EU law.

The PIC recommendations, which include improved claims information being made available, faster treatment for soft tissue cases to improve patient outcomes, and reductions in the cost of claims, are likely to find broad support. The introduction of more robust fraud prevention measures at industry level, coupled with the introduction of a Garda fraud prevention unit, is also likely to be welcomed, if implemented in a balanced way.

Stricter rules for PIAB applications

Some recent changes have been introduced, which largely affect Personal Injuries Assessment Board (PIAB) applications through two pieces of legislation. The Central Bank (National Claims Information Database) Act, 2018 (the "2018 Act") came into force on January 28, 2019, through SI No. 2 of 2019. Section 13(2) of the 2018 Act amends Section 8(1) of the 2004 Act. The amendment reduces the notification period for personal injuries from two months from when the cause of action accrued, to just one month, or presumably one month from the date of knowledge of latent personal injuries. The courts have approached the previous two-month notification period with some degree of flexibility. How the courts might approach an even shorter period of notification is hard to say in the absence of new case law. Importantly, the amendment removes the old wording "or as soon as practicable thereafter" from the old Section 8(1)(a). Further, Section 8(1)(b) replaces "the Court hearing the action may" to "the Court hearing the action shall". The new section should be treated with caution until there is a definitive judgment on the construction of the section. However, the new wording appears likely to lead to a stricter interpretation of the notification period by the courts.

Section 13(3) of the 2018 Act inserts a new Section 14(4)(a) into the 2004 Act, which provides that a court can draw inferences where a party fails to comply with the obligations under Section 14, i.e., the necessity for swearing and filing affidavits of verification. The section also gives the court powers to impose costs orders for non-compliance with Section 14. The courts had previously dealt with non-compliance with Section 14 in different ways. Some judges or county registrars would strike out motions where the applicant failed to comply with Section 14 of the Act. This might occur when a plaintiff brought a motion for judgement in default of defence but failed to comply with Section 14. The defendant would raise the defect and the court would strike out the motion in many cases. In other cases, the court might instruct the plaintiff to file the affidavit of verification without delay. These changes will mean that solicitors will need to be cognisant of the risk of attracting costs orders, or worse, for non-compliance with Section 14.

Some other key changes have been introduced through the Personal Injuries Assessment Board (Amendment) Act, 2019 (the "2019 Act") to the 2003 Act. Section 2 amends Section 13 of the 2003 Act and essentially provides that an application will only be considered complete when the application fee has been received with a report from a medical practitioner. Only on receipt of the application fee and the medical report will a respondent receive a notice of the claim from the PIAB. Importantly, Section 7 of the 2019 Act amends Section 50 of the 2003 Act and clarifies that the statute of limitations starts running for other respondents when they have been added to the claim. The six months additional time after an authorisation issues for the newly added respondents is added when calculating the time of reckoning for the statute of limitations. This clarification is certainly welcome as it has led to uncertainty in the past.

The 2019 Act introduces new measures to combat non co-operation with the PIAB process. Section 8 of the 2019 Act inserts new provisions into the 2003 Act under 51(C), which provide that a court can make costs orders against either claimants or respondents who have not co-operated with the assessment or an assessors' request. The provisions include potential costs orders for failure to provide additional information, failure to engage with experts or failure of a claimant to attend a medical examination(s). Section 9 of the 2019 Act inserts a new paragraph (ba) to paragraph (b) of Section 54 of the 2003 Act providing that the Book of Quantum must be reviewed at least every three years and a revised Book of Quantum is to be published. This could effectively mean that a review may be carried out in 2019 and a revised Book of Quantum published. This provision is likely to ultimately be replaced, if the proposed Judicial Council takes over the setting of general damages, as envisaged by the 2017 Bill, which is presently before the Oireachtas.

The rise of differential costs orders

Differential costs orders may be on the increase. The orders are provided pursuant to Section 17(5) of the Courts Act, 1981 (as substituted by Section 14 of the Courts Act, 1991) (hereinafter referred to as "Section 17(5)"). The purpose of the legislation is to allow the appropriate costs to be levied, based on the ultimate jurisdiction at the conclusion of a hearing. With some personal injuries cases, it can be difficult to determine jurisdiction, depending on how injuries progress, the uncertainty of loss of earnings into the future, and/or the necessity for medical procedures as part of the recovery and rehabilitation process.

Although there is the option to transfer proceedings from the Circuit Court to the High Court or to remit from the High Court to the Circuit Court, some cases settle or are decided very close to the monetary jurisdiction. The last recalibration of monetary jurisdiction was through the Courts and Civil Law (Miscellaneous Provisions) Act, 2013 (the "2013 Act"), which raised the monetary jurisdiction of the District Court to €15,000 and of the Circuit Court to €60,000 for personal injuries cases, with the High Court having no set limit in legislation. The new limits came into force through SI No. 566 of 2013 on February 3, 2014.

The power contained under Section 17(5) allows the court to measure the cost differential and make an order reducing the costs order of the higher court to what the court deems is appropriate. Judges of the High Court have been sympathetic to the difficulties which can arise and have been reluctant to exercise this discretion, especially in borderline cases. However, recent jurisprudence from the Court of Appeal makes it clear that practitioners must exercise an abundance of caution when considering jurisdiction.

Two associated cases – *Moin v Sicika* and *O'Malley v McEvoy*[2] – proceeded on a full liability basis with no discounts for contributory negligence. In the *Moin v Sicika* case, the plaintiff was awarded €41,305 and in *O'Malley v McEvoy,* the plaintiff was awarded €34,808. In *O'Malley v McEvoy,* the High Court judge awarded costs at the Circuit Court scale with a certificate for senior counsel, but refused to make a differential cost order pursuant to Section 17(5) when the application was made by the defendant. In that case, open correspondence was sent to the plaintiff's solicitors some 15 months before judgment was delivered warning that the defendant would be seeking a differential costs order.

In *Moin v Sicika,* the same application was made pursuant to Section 17(5) to the High Court judge and evidence was also adduced by the defendant that open correspondence had been sent to the plaintiff's solicitor warning them that a differential costs order would be sought. In *Moin v Sicika,* the trial judge heard the submissions from both sides and enquired if Section 17(5) was mandatory. The trial judge was informed that Section 17(5) was a discretionary power and, on that basis, the trial judge awarded costs on the Circuit Court scale with a certificate for senior counsel.

Where possible, proceedings should be monitored and remitted to a lower court if it becomes apparent that the value of the case is materially below the High Court jurisdiction.

Both cases were appealed to the Court of Appeal, which considered the operation and purpose of Section 17(5). The appellant submitted that while the trial judge had discretion to make a differential cost order, the trial judge must take account of all the circumstances when exercising that discretion and must have regard to the intention of the legislature and the purpose of the legislation. Peart J. (delivering the judgment of the Court) stated: "These are both cases in which the plaintiff did not just narrowly fail to achieve an award of damages within the €60,000 jurisdiction of the Circuit Court, but failed by a considerable margin".[3] Peart J. also considered *O'Connor v Bus Átha Cliath.*[4] In that Supreme Court decision, Murray J. (as he then was) noted that just because a trial judge found the plaintiff's claim to be in the lower court, that of itself would not be grounds for making an order pursuant to Section 17(5). Murray J. noted that the nature of things is that a plaintiff would see their own injuries as more serious than a judge or defendant, and stated: "There must also be a margin of appreciation allowed as to the level of damages which might be awarded in each particular case. That is why matters come to an independent judge".[5]

Hardiman J. stated that the clear legislative purpose of Section 17(5) was "to provide a strong incentive to the institution of proceedings, generally, in the lowest court having jurisdiction to make the award appropriate to them".[6] He went on to say:

"In my view the sole fact which triggers the discretion is that the plaintiff was awarded a sum, in the High Court, that a lower court would have the power to award. This fact alone does not, of course, require the Court to make an order under Section 17(5). For example, where the award is very close to the limit of the jurisdiction of the lower court or where there has been some unpredictable development during the trial which had an effect in reduction of the ostensible value of the claim".[7]

In *Moin v Sicika* and *O'Malley v McEvoy,* having reviewed the authorities and the legislation, Peart J. set out the obligations of the trial judge as follows:

"In my view, it is incumbent upon a trial judge in circumstances where an award is significantly within the jurisdiction of the lower Court to make a Differential Costs Order unless there are good reasons for not doing so. The trial judge must have regard to the clear legislative purpose, and have regard to all the circumstances of the case at hand which are relevant to the exercise of his/her discretion".[8]

In both cases, the Court of Appeal determined that a differential costs order should have been made.

Conclusion

It now remains to be seen how the courts will interpret and implement these reforms. Practitioners will also need to give careful consideration when drafting proceedings in terms of jurisdiction. Where possible, proceedings should be monitored and remitted to a lower court if it becomes apparent that the value of the case is materially below the High Court jurisdiction.

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Acquittal – Dangerous driving causing death – Direction – Applicant seeking to appeal against the acquittal of the respondent by direction of the trial judge – Whether the direction was wrong in law – [2019] IECA 91 – 28/02/2019

DPP v D.P.

Sentencing – Aggravated burglary – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2018] IECA 409 – 03/12/2018

DPP v Doyle

Conviction – Sexual assault – Discharge jury – Appellant seeking to appeal against conviction – Whether the trial judge fell into error in failing to discharge the jury when requested to do so – [2019] IECA 73 – 07/03/2019

DPP v E.I.

Sentencing – Possession of controlled drugs with intent to supply – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019 IECA 64 – 05/03/2019

DPP v Fawzi

Sentencing – Robbery – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 75 – 14/01/2019

DPP v Forde

Sentencing – Possession of a controlled drug to a value in excess of €13,000 for supply – Undue leniency – Applicant seeking a review of sentence – Whether the sentence was unduly lenient – [2018] IECA 407 – 15/10/2018

DPP v Geraghty

Sentencing – Conspiracy to possess a controlled drug for the purpose of selling or supplying it to another – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2018] IECA 411 – 04/12/2018

DPP v Higgins

Sentencing – Defilement of a child under the age of seventeen – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 72 – 07/03/2019

DPP v Hoban

Sentencing – Robbery – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 56 - 26/02/2019

DPP v Hughes

Sentencing – Forgery – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 51 – 25/02/2019

DPP v Jones

Sentencing – Rape – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 53 – 26/02/2019

DPP v K.A.

Sentencing – Arson – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2018] IECA 412 – 14/12/2018

DPP v Kelly

Sentencing – Possession of stolen property – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 47 – 21/02/2019

DPP v Kilian

Conviction – Murder – Admissibility of evidence – Appellant seeking to appeal against conviction – Whether the trial judge erred in law in ruling evidence admissible – [2019] IECA 76 – 14/03/2019

DPP v Krauze

Sentencing – Rape – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 65 – 01/03/2019

DPP v Lukaszewicz

Conviction – Sexual assault – Corroboration warning – Appellant seeking to appeal against conviction – Whether or not a corroboration warning should have been given – [2019] IECA 92 – 26/03/2019

DPP v M. (Orse J.) D.

Sentencing – Drug offence – Severity of sentence – Appellant seeking to appeal against sentence – [2019] IECA 66 – 04/03/2019

DPP v Malecki

Sentencing – Possession of cannabis – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 67 – 25/01/2019

DPP v McGrath

Consultative case stated – Prosecution – Speeding – District Court judge seeking to state a case – Whether the District Court judge had a residual discretion to dismiss the prosecution for speeding where he was satisfied that the accused did not receive actual notice of the fixed charge penalty notice – [2019] IEHC 174 – 25/03/2019

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DPP v Murphy

Sentencing – Dangerous driving causing death and serious injury – Undue leniency – Applicant seeking a review of sentence – Whether the sentence was unduly lenient – [2018] IECA 255 – 31/07/2018

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Sentencing – Welfare of animals – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2015] IECA 371 – 24/07/2015

DPP v O'Brien

Sentencing – Robbery – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 79 – 25/03/2019

DPP v O'Driscoll

Sentencing – Theft – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 55 – 25/02/2019

DPP v O'Keefe

Sentencing – Drug offences – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 50 – 25/02/2019

DPP v O'Mahoney

Sentencing – Drug offences – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 41 – 18/02/2019

DPP v Osagie

Sentencing – Drug offence – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – [2019] IECA 40 – 28/02/2019

DPP v Petrauskas

Conviction – Assault causing serious harm – Prejudicial evidence – Appellant seeking to appeal against conviction – Whether the trial judge erred in admitting prejudicial evidence before the jury – [2019] IECA 74 – 08/03/2019

DPP v Power

Sentencing – Sexual assault – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – [2019] IECA 52 - 26/02/2019

DPP v Salim

Conviction – Drug offences – Search warrant – Appellant seeking to appeal against conviction – Whether the search warrant issued by the District Court was invalid – [2019] IECA 93 – 28/03/2019

DPP v Theaddus

Acquittal – Robbery – Evidence – Applicant seeking to appeal against an acquittal – Whether the trial judge was wrong in law to direct an acquittal – [2018] IECA 405 – 07/12/2018

DPP v Wilson

Criminal proceedings – Sexual offences – Delay – Applicant seeking to restrain the further prosecution of criminal proceedings pending against him – Whether there was a real risk that the trial would be unfair by reason of delay – [2019] IEHC 107 – 01/03/2019

H.S. v DPP

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Hill v DPP

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Martin v Monaghan County Council
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Discovery – Fraud – Beneficial ownership – Plaintiffs seeking discovery – Whether discovery should be permitted – [2019] IEHC 166 – 05/03/2019
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Disclosure – Financial information – Point of law – Appellant seeking to appeal to the High Court on a point of law – Whether a clear error of law was established – [2019] IEHC 195 – 03/04/2019
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EMPLOYMENT LAW

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EUROPEAN ARREST WARRANT

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European arrest warrant – Surrender – European Arrest Warrant Act 2003 s. 16 – Applicant seeking the surrender of the respondent in accordance with the provisions of the European Arrest Warrant Act 2003 – Whether the respondent's surrender was prohibited under s. 16 of the European Arrest Warrant Act 2003 – [2019] IEHC 126 – 04/03/2019
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EXTRADITION LAW

Extradition – European Arrest Warrant Act 2003 – Abuse of Process – Applicant seeking an order surrendering the respondent pursuant to a European arrest warrant – Whether circumstances existed to prevent the court ordering the surrender of the defendant – [2019] IEHC 119 – 01/03/2019
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Abouheikal v The Minister for Justice and Equality

Asylum and immigration – Sibling of UK citizen – Deportation order – Application for judicial review – [2018] IEHC 781 – 18/12/2018

Akhtar v The Minister for Justice and Equality

Immigration – Section 4 permission to remain – Executive discretion – Applicant seeking leave to appeal – Whether a person whose permission to remain has expired and was previously granted under s. 4 of the Immigration Act 2004 can apply to remain in the State – [2019] IEHC 132 – 05/03/2019

Bundhooa v The Minister for Justice and Equality

Deportation order – Certiorari – Art. 3 of the European Convention on Human Rights – Applicant seeking certiorari of deportation order – Whether the deportation decision of the respondent was vitiated because of the failure to apply the law to the facts when considering the possible interference with art. 3 of the European Convention on Human Rights – [2019] IEHC 144 – 01/03/2019

E.T. (Ethiopia) v The Minister for Justice and Equality

Asylum and immigration – Chinese nationals – Deportation orders – Application for judicial review – S 5 Illegal Immigrants (Trafficking) Act 2000 – [2018] IEHC 780 – 18/12/2018

Lin (a minor) v The Minister for Justice and Equality, and anor

Asylum and immigration – Chinese nationals – Deportation orders – Application for judicial review – S 5 Illegal Immigrants (Trafficking) Act 2000 – Leave to appeal – [2019] IEHC 73 – 11/02/2019

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M.Z.A. (Pakistan) v The Minister for Justice and Equality

Immigration and asylum – Subsidiary protection – Certiorari – Applicant seeking an order of certiorari quashing the decision of the respondent – Whether the applicant was eligible for subsidiary protection – [2019] IEHC 125 – 15/02/2019

M.Z. (Pakistan) v The International Protection Appeals Tribunal

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Injunction – Misfeasance in public office – National Vetting Bureau (Children and Vulnerable Persons) Act 2012 s. 19 – Plaintiff seeking a permanent injunction restraining the defendant from making a notification to the National Vetting Bureau – Whether the decision to make the proposed notification amounted to misfeasance in public office – [2019] IEHC 102 - 26/02/2019

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M.P. v Teaching Council of Ireland

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Marine Hotel (Sutton) Ltd v Morris

Injunction – Breach of privacy – Public disclosure – Appellant seeking to challenge the decision of the Committee on Procedure and Privileges of Dáil Éireann – Whether the challenge would amount to an indirect or collateral challenge to utterances made in the Dáil – [2019] IESC 12 – 05/03/2019

O'Brien v Clerk of Dáil Éireann

INSOLVENCY

Secured debt – Protective certificate – Personal Insolvency Acts 2012-2015 – Kenmare Property Finance DAC seeking an order to set aside an order previously made by the court – Whether the debt of the debtor to Kenmare was a secured debt for the purposes of the Personal Insolvency Acts 2012-2015 – [2019] IEHC 87 – 18/02/2019

Re Patrick Halpin (a debtor)

Personal insolvency – Preliminary issue – Personal Insolvency Act 2012 – Personal insolvency practitioner seeking to rely on the provisions of s. 111A of the Personal Insolvency Act 2012 for the purposes of an application under s. 115A of the 2012 Act – Whether the practitioner was entitled to rely on the provisions of s. 111A – [2019] IEHC 96 – 25/02/2019

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JUDICIAL REVIEW

Subsidiary protection – Credibility – Judicial review – Refusal – Application for leave to appeal – [2019] IEHC 123 – 25/02/2019

A.A.L. (Nigeria) v The International Protection Appeals Tribunal No.2

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Ajk v The Minister for Defence

Judicial review – Points of law of exceptional public importance – Development – Applicants seeking a certificate that the High Court's decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal on specified points of law – Whether the provisions of the EIA Directive and/or the Habitats Directive apply to a project lawfully commenced as exempted development prior to the latest dates for transposition of those Directives – [2018] IEHC 808 – 07/12/2018

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Judicial review – Enlargement of time – Monetary property – Applicant seeking a declaration that his monies were unlawfully seized by the respondent – Whether the applicant had established any basis to secure an enlargement of time to maintain the judicial review proceedings – [2019] IEHC 104 – 14/02/2019

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Deportation order – Judicial review – Refoulement – Applicant seeking judicial review – Whether the respondent's reliance, when considering refoulement, on the International Protection Appeals Tribunal's rejection of the credibility of the applicant's claim was irrational – [2019] IEHC 78 – 12/02/2019

D.S. (Zimbabwe) v The Minister for Justice and Equality

Judicial review – Employment – Prison officers – Applications for promotion – Award of marks in respect of Higher Certificate in Custodial Care – Appeal against refusal of leave – [2019] IECA 26 – 06/02/2019

Dunne and ors v The Irish Prison Service

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Judicial review – Permission to reside in the State – Family member – Applicant seeking judicial review of a decision

made on behalf of the respondent to refuse permission to a child to reside in the State as a family member of the applicant – Whether the respondent failed in her statutory duty to decide the identity of the child or her relationship to the applicant, or both – [2019] IEHC 98

G.J. v The Minister for Justice and Equality

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Grant v The County Registrar from the County of Laois

Judicial review – Prison law – Discovery – Applicant seeking discovery of documents in a judicial review proceedings – Whether the court should order the respondents to provide discovery of a category of documents to the applicant – [2019] IEHC 113 – 22/02/2019

Greene v The Director of Oberstown Children's Detention Centre

Judicial review – Asylum, immigration and nationality – Naturalisation – Applicant seeking judicial review of decision not to amend her certificate of naturalisation with the correct date of birth, and judicial review of proposal to revoke naturalisation – Whether error on the part of the applicant could give rise to an amendment of the certificate of naturalisation and whether there could be judicial review of a mere proposal – [2019] IEHC 47 – 04/02/2019

Habte v The Minister for Justice and Equality; Habte v The Minister for Justice and Equality

Judicial review – Removal and exclusion from the State – Reference to the Court of Justice of the European Union – Applicants seeking to challenge the first applicant's removal and exclusion from the State – Whether a reference to the Court of Justice of the European Union was appropriate – [2019] IEHC 178 – 15/03/2019

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Lavery v Judge Denis McLoughlin

Judicial review – Order of certiorari – Conviction – Applicant seeking leave to apply for judicial review – Whether the applicant's conviction ought to be quashed – [2019] IEHC 202 – 03/04/2019

Manning v A Judge of the Circuit Court

Activation programme – Dismissal – Judicial review – Appellant seeking an order quashing a decision to dismiss her from an activation programme operated on behalf of the respondent – Whether the trial judge erred in law and fact by applying the wrong test or standard in determining that the impugned decision was a private law dispute – [2019] IECA 22 – 19/02/2019

Martin v The Minister for Social Protection

Joinder – Judicial review – Standards in Public Office Act 2001 – Proposed notice party seeking to be joined as a notice party to the applicant's proceedings – Whether the proposed notice party would be directly affected by the outcome of the applicant's proceedings – [2019] IEHC 128 – 01/03/2019

McElvaney v Standards in Public Office Commission

Subsidiary protection – Sexuality – Judicial review – Refusal – Application for leave to appeal – [2019] IEHC 146 – 25/02/2019

M.E.O (Nigeria) v A.G. and ors

Judicial review – Disability allowance – Statutory scheme – Appellant seeking judicial review – Whether the appropriate remedy in this case was judicial review in the High Court – [2019] IECA 25 – 06/02/2019

Petecel v Minister for Social Protection

Judicial review – Education law – De novo appeal – Applicant seeking an order quashing the decision of the Appeal Committee confirming his expulsion from secondary school – Whether the Appeal Committee had properly reviewed the case and reached their own decision without relying on the decision of the school board – [2017] IEHC 847 – 30/06/2017

S.C. (a minor) v Secretary General of the Department of Education and Skills

Judicial review – Neglect of animals – Ex parte proceedings – Applicant's right to defend proceedings – Whether the proceedings had been adjourned by the applicant – [2018] IEHC 737 – 13/12/2018

Sfar v Judge Brennan

Judicial review – Employment permit – Stamp 4 immigration permission – Applicant seeking an order of certiorari quashing the decision of the respondent – Whether the applicant, as the holder of a stamp 4 immigration permission, was thereby precluded from applying for, or receiving, an employment permit – [2018] IEHC 810 – 21/12/2018

Singh v The Minister for Business, Enterprise and Innovation

Judicial review – Residence card – Permitted family member – Applicant seeking judicial review of a decision by the respondent – Whether the respondent breached the applicant's entitlement to fair procedures – [2019] IEHC 155 – 19/03/2019

Straczek v The Minister for Justice and Equality

Judicial review – Jurisdiction – Amendment of licence – Applicant seeking judicial review – Whether it was lawful for the respondent to amend a waste water discharge licence by way of a technical amendment – [2019] IEHC 81 – 15/02/2019

Sweetman v Environmental Protection Agency

Judicial review – Contempt of court – Fair procedures – Appellant seeking judicial review – Whether the appellant was entitled to have a separate hearing – [2019] IESC 14 – 25/02/2019

Tracey v District Judge McCarthy

Judicial review – Discovery – Proportionality – Applicant seeking discovery of a number of categories of documents – Whether the discovery sought was necessary to allow the applicant to pursue its application for judicial review – [2019] IEHC 153 – 12/03/2019

Word Perfect Translation Services Ltd v Minister for Public Expenditure and Reform

LANDLORD AND TENANT

Possession – Demised premises – Statutory lease – Plaintiff seeking possession of part of the premises that was rented to the defendant – Whether the plaintiff was entitled to possession of the premises – [2019] IEHC 192 – 28/03/2019

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LEGAL PROFESSION

Sanction – Misconduct – Mitigation – Applicant seeking to have the name of the respondent struck off the Roll of Solicitors – Whether the sanction was proportionate – [2019] IEHC 177 – 19/03/2019

Law Society of Ireland v D'Alton

MEDICAL LAW

Judicial review – Medical and healthcare law – Medical Practitioners Act 2007 – Applicant seeking to challenge decision of respondent to proceed with a fitness to practice inquiry – Whether the respondent acted ultra vires in considering allegations that went beyond the scope of the complaint considered by the Professional Practices Committee – [2019] IEHC 106 –19/02/2019

B.M. v Fitness to Practice Committee of the Medical Council

Primary medical certificate – Statutory scheme – Certiorari – Appellants seeking orders of certiorari – Whether the power conferred upon respondent to make regulations had been exercised invalidly – [2019] IECA 61 – 25/02/2019

Lennon v Disabled Drivers Medical Board of Appeal; Reeves v Disabled Drivers Medical Board of Appeal

Medical practitioner – In camera – Medical Practitioners Act 2007 s. 76 – Intended applicant requesting the High Court to conduct its intended application under s. 76 of the Medical Practitioners Act 2007 in camera – Whether this was a case in which an in camera hearing was warranted – [2019] IEHC 109 – 01/03/2019

Medical Council v Anonymous

Tort – Negligence – Medical and healthcare law – Plaintiff seeking damages for the alleged negligence of the defendant in her care and advice – Whether a reasonably prudent general practitioner exercising ordinary care would have acted as the defendant did in the circumstances – [2019] IEHC 105 – 28/02/2019

Rossiter v Donlon

MORTGAGE

Inhibitions – Folios – Judgment mortgage – Whether the inhibitions were lodged for the purpose of defeating the due enforcement process – [2019] IEHC 103 – 26/02/2019

ACC Loan Management Ltd v Fryday

Summary summons – Mortgage loan – Grounds of defence – Plaintiff seeking to recover monies pursuant to a mortgage loan granted to the defendants – Whether the first defendant had made out a prima facie case for the defence of the proceedings – [2019] IEHC 169 – 15/03/2019

Bank of Ireland Mortgage Bank v Neary

Order of inspection – Possession – Unregistered lands – Plaintiff seeking an order of inspection – Whether the mortgage deed, upon which an application for possession was grounded, sufficiently identified which lands were the subject of the mortgage – [2019] IEHC 108 – 01/03/2019

Carlisle Mortgages Ltd v Heagney

NEGLIGENCE

Negligence – Direction – Non-suit – Appellant seeking to appeal against High Court order – Whether the trial judge was in error in acceding to the respondent's application for a non-suit at the conclusion of the appellant's case – [2019] IECA 82 – 21/03/2019

Burke v Mullally

Negligence – Breach of duty – Reasonable cause of action – Defendant seeking the dismissal of the proceedings – Whether the proceedings disclosed no reasonable cause of action and/or were bound to fail – [2018] IEHC 811 – 13/12/2018

Cranney v Motor Insurers Bureau of Ireland

Accident at work – Negligence – Liability of defendant – Plaintiff seeking damages for an injury that occurred while unloading a mattress from a lorry – Whether the defendants had failed in their duty to provide adequate training – [2018] IEHC 218 – 20/04/2018

Homan v Etmar Ltd

PERSONAL INJURIES

Assessment of damages – Assault – Personal injury – Plaintiff seeking damages for personal injury – Whether the defendant's assault caused the injuries suffered by the plaintiff – [2019] IEHC 115 – 01/03/2019

Bowes v McSherry

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Appointment of receiver – Deed of charge – Deed of appointment – Plaintiffs seeking to appeal against appointment of receiver – Whether the appointment of the receiver had been made in accordance with Clause 9.1 of the deed of charge – [2019] IESC 20 – 28/03/2019
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Pecuniary bequest – Moral duty – Proportionality – Appellants seeking to appeal against the judgment and orders of the High Court – Whether the testatrix had failed in her moral duty within the meaning of s. 117 of the Succession Act 1965 to make proper provision for the respondent in accordance with her means – [2019] IECA 58 - 28/02/2019
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Unicredit Global Leasing Export gmbh v Business Aviation Ltd

Bills initiated in Dáil Éireann during the period February 28, 2019, to May 2, 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 Liability and Courts (Amendment) Bill 2019 – Bill 32/2019 [pmb] – Deputy Michael McGrath
Courts (Establishment and Constitution) (Amendment) Bill 2019 – Bill 24/2019
Credit Union (Amendment) Bill 2019 – Bill 22/2019 [pmb] – Deputy Michael McGrath
Criminal Justice (Conspiracy to Murder) Bill 2019 – Bill 29/2019 [pmb] – Deputy Jim O'Callaghan
Domestic Violence (Amendment) Bill 2019 – Bill 33/2019 [pmb] – Senator Jim O'Callaghan
Gender Pay Gap Information Bill 2019 – Bill 30/2019
Parental Bereavement Leave (Amendment) Bill 2019 – Bill 23/2019 [pmb] – Deputy Anne Rabbitte
Pensionable Age Task Force Bill 2019 – Bill 27/2019 [pmb] – Deputy John Brady
Prohibition of Bogus Self Employment Bill 2019 – Bill 26/2019 [pmb] – Deputy Willie O'Dea
Regulation of Tenderers Bill 2019 – Bill 21/2019 [pmb] – Deputy Jonathan O'Brien
Road Traffic (All Terraine Vehicle and Scrambler Motor-Cycle) (Amendment) Bill 2019 – Bill 31/2019 [pmb] – Deputy John Curran and Deputy John Lahart

Bills initiated in Seanad Éireann during the period February 28, 2019, to May 2, 2019

Civil Liability (Capping of General Damages) Bill 2019 – Bill 20/2019 [pmb] – Senator Kieran O'Donnell, Senator Paudie Coffey, Senator Frank Feighan, Senator Michelle Mulherin, Senator Paul Coghlan, Senator Joe O'Reilly, Senator Martin Conway, Senator Maria Byrne, Senator Jerry Buttimer, Senator James Reilly, Senator Paddy Burke, Senator Gabrielle McFadden, Senator Ray Butler, Senator Maura Hopkins, Senator John O'Mahony, Senator Tim Lombard, Senator Neale Richmond, and Senator Anthony Lawlor
Gaming and Lotteries (Amendment) Bill 2019 – Bill 28/2019
Health (Exemption of Charges for Involuntary Psychiatric Patients) (Amendment) Bill 2019 – Bill 18/2019 [pmb] – Senator Máire Devine, Senator Fintan Warfield, Senator Paul Gavan, Senator Niall Ó Donnghaile, Senator Rose Conway-Walsh, and Senator Pádraig MacLochlainn
Land and Conveyancing Law Reform (Amendment) Bill 2019 – Bill 19/2019
Public Authorities and Utility Undertakings (Contract Preparation and Award Criteria) Bill 2019 – Bill 24/2019 [pmb] – Senator Lynn Ruane, Senator Colette Kelleher, Senator John Dolan, Senator Frances Black, and Senator Alice-Mary Higgins

Progress of Bill and Bills amended in Dáil Éireann during the period February 28, 2019, to May 2, 2019

Civil Registration Bill 2019 – Bill 12/2019 – Report Stage – Passed by Dáil Éireann
Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Bill 2019 – Bill 14/2019 – Passed by Dáil Éireann – Passed by both Houses of the Oireachtas – Enacted on March 17, 2019

For up-to-date information please check the following websites:

Bills and legislation
http://www.oireachtas.ie/parliament/
http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Supreme Court determinations – leave to appeal granted

Published on Courts.ie – February 28, 2019, to May 2, 2019
A.W.K. v The Minister for Justice and Equality and ors [2019] IESCDET 76 – Leave to appeal from the High Court granted on the 02/04/2019 – (Clarke C.J., Dunne J., O'Malley J.)
Director of Public Prosecutions v Eadon [2019] IESCDET 84 – Leave to appeal from the Court of Appeal granted on the 16/04/2019 – (Clarke C.J., McKechnie J., Finlay Geoghegan J.)

For up-to-date information please check the Courts website
http://www.courts.ie/Judgments.nsf/FrmDeterminations?OpenForm&l=en

Say hello and wave goodbye

What issues arise in debt recovery in the wake of loan assignment?

Keith Rooney BL

In the last number of years, there has been a marked increase in credit institutions selling loan portfolios to investment funds, sometimes colloquially referred to as 'vulture funds'. The right to legally assign a debt or chose-in-action is nothing new, having been recognised in statute for over 140 years, reflecting the reality that they are assets capable of assignment either for value or otherwise.[1]

However, when an assignee such as a fund seeks to exercise these newly acquired rights, they are often challenged in court as to their entitlement to do so. This has inevitably led to a succession of attempted defences in debt claims focusing upon the assignment itself rather than any substantive issues between the parties. It is important to remember, from the outset, that the assignment of a debt does not affect the rights of the debtor. They retain all the legal and contractual rights they had prior to the assignment. It has become a common refrain for certain commentators to assert that the assignment of a debt to a fund is inherently a negative outcome for the debtor. However, to date, there appears to be no evidence to substantiate that suggestion.

The image portrayed by these commentators of the avaricious fund coming to enforce a debt may explain the frequency with which the assignment itself becomes the focus of a debtor's defence. This is particularly so where the facts do not allow for a substantive defence, and so technical legal objections are all that remain. To that end, it is necessary to consider what are the required proofs an assignee must put before a court when seeking to enforce acquired rights. Can those documents be redacted and, if so, to what extent? In conclusion, can a challenge to a deed of assignment, even if successful, actually assist a borrower?

Proof of assignment – the statutory position

The starting point for any discussion on this topic must be the Supreme Court of Judicature (Ireland) Act, 1877 ("the 1877 Act") and, in particular, s.28(6), which states:

"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in

action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor[…]".

The four applicable conditions required for compliance with s.28(6) were succinctly stated by Edwards J. in *Waldron v Herring* as:[2]

- the assignment must be for a debt or other legal chose in action;
- there must be "absolute assignment", meaning that the assignor must not retain an interest in the subject matter of the assignment; thus, assignment of part of a debt, assignment by way of charge, and conditional assignments are not covered by s.28(6) of the Judicature Act;
- the assignment must be in writing by the assignor; and,
- the debtor must be given express notice in writing of the assignment. A statutory assignment does not need valuable consideration (i.e., any form of payment) to be valid; the assignee can then sue the debtor in their own name, without joining the assignor as a party to the action.

The proofs required to satisfy a court of an assignee's right to sue are therefore quite clear and can, in essence, be broken down into two headings: notice of the assignment; and, the assignment itself.

When a bank sells a loan portfolio to a fund, both the assignor and the assignee generally write to the borrowers to inform them of the sale. The bank's letter – or 'Goodbye Letter' – acknowledges the assignment, while the fund's letter – or 'Hello Letter' – confirms this from the other side.

Notice of assignment

When a bank sells a loan portfolio to a fund, both the assignor and the assignee generally write to the borrowers to inform them of the sale. The bank's letter – or 'Goodbye Letter' – acknowledges the assignment, while the fund's letter – or 'Hello Letter' – confirms this from the other side. Either, or indeed both, of these letters can constitute the written notice for the purposes of the 1877 Act.

Where either a 'Hello Letter' or a 'Goodbye Letter' have been sent to the debtor, they then become bound as a matter of law to treat the debt as having been assigned. In *AIB v Thompson*, the court considered the effect of a deed of assignment itself. In order to acquire the right to sue, the court held, "evidence must be shown that the obligor was formally and in writing notified of the assignment".[3]

Baker J. then went on to consider the effect that a notice of assignment had on the obliging debtor:

"A debtor with notice of absolute assignment is entitled, and indeed bound, to treat the debt as transferred to the assignee. Payment by the debtor to the assignor will, therefore, not give him a good discharge and he will remain liable to pay the debt again".[4]

From the date of the notice as opposed to the date of the assignment, the borrower is obliged as a matter of law to treat the debt as belonging to the fund. The 1877 Act does not require them to be furnished with a copy of the assignment. Once the borrower has been informed of the assignment, the notice is sufficient to bind them.

If the borrower is unsure to whom they must pay their debt, s.28(6) allows for the debtor to "[…] call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees".[5] So, if the borrower is sued by a fund but believes the debt is due to their original bank, or to some other party, their option is not to challenge the fund's right to sue directly, but rather to call upon their original lender to either confirm they no longer have a claim upon the debt or, alternatively, to interplead in the fund's claim. Where, however, both the original lender and the fund have already confirmed the assignment by means of the 'Hello' and 'Goodbye' letters, this approach is effectively closed to the borrower, as no other person makes such a claim to the debt.

Where no notification has been provided to the borrower, this does not affect the assignment. The assignment simply remains actionable in equity until notice is given, if given at all. How an assignee proceeds in the absence of notice was considered by Atkinson J. in *Holt v Heatherfield Trust Limited and anor*:[6]

"Absence of notice does not affect the efficacy of the transaction as between the assignor and assignee. Until notice be given the assignment is an equitable assignment, but it is an assignment which requires nothing more from the assignor to become a legal assignment. The assignee may himself give notice at any time before action brought, and further than that, even before notice, he may sue in his own name provided that he makes the assignor a party to the action, as plaintiff if he consents, and as defendant if he does not consent".[7]

Even this rule, however, is not immutable. As Mance L.J. noted in *Raiffeisen Zentralbank Osterreichag v Five Star Trading LLC* [2001] 3 All E.R. 257:

"There is a rule of practice that the assignor should be joined but that rule will not be insisted upon where there is no need, in particular if there is no need of a separate claim by the assignor".[8]

This precise exception was relied upon in this jurisdiction by Baker J. in *AIB Mortgage Bank v Thompson*, where the court held in the plaintiff's favour despite the assignor, AIB plc, not being joined to the proceedings and no valid notice under s.28(6) having been given. The court's rationale was that AIB plc simply could not pursue the defendant following the assignment as it was absolute in its terms and, as such, there was no legal or practical reason why they needed to be joined.

Therefore, the primary issue for consideration in a deed of assignment is whether or not it is absolute in its terms. For that, we must look at the deed giving effect to the assignment.

The assignment

The first three limbs of the test in *Waldron v Herring* make clear that to give effect to a legal assignment, the contract must do nothing more than be in writing under the assignor's hand and, crucially, be absolute in its terms.

Since assignments will almost invariably be affected by deeds of transfer, there is little scope to challenge them on the ground that they are not in writing. However, a court must be satisfied that the assignment is absolute, and that no rights remain with the assignor as against the debtor. In practice, this is usually disposed of by a single express condition in the deed that the assignment is intended to be absolute.[9]

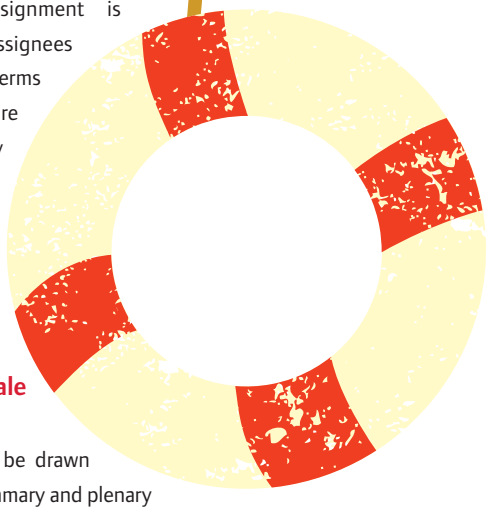
In *English v Promontoria (Aran) Limited (No.2)*,[10] the plaintiff, Mr English, brought proceedings specifically to challenge the transfer of his loans from Ulster Bank to the defendant and, by extension, the appointment of a receiver. The ability of the debtor to challenge the deeds assigning his debt was considered by Murphy J.:

"There may well be frailties, defects or deficiencies in the arrangements between Promontoria in its various guises and the various Ulster Bank entities but that is not a matter of concern to the plaintiff. If any such issues exist, they lie between the parties to the deeds. […] [The plaintiff's] only entitlement, as stated in the Court's earlier judgment, is to have it established that Promontoria (Aran) Limited have acquired Ulster Bank Ireland Limited's interest in his loans and mortgage […]."[11]

In practical terms, the only issue for the court in considering a deed of assignment is whether or not the assignment is absolute. That is a matter for the assignee. The debtor can go no further than to place the assignee on proof of that fact. If the court is satisfied with that element, there is arguably nothing else to consider, save for notice of the assignment itself.

In practical terms, the only issue for the court in considering a deed of assignment is whether or not the assignment is absolute. That is a matter for the assignee.

However, the court must often make this determination while facing page after page of blanked out text, both in the body of the assignment and, to a far greater degree, in the schedules. In the absence of a full understanding of the contract, how then is the court to be satisfied that the assignment is absolute? Conversely, assignees will often argue that the terms blanked out are confidential, commercially sensitive, irrelevant, or relate to the information of third parties. How should the court then treat these redactions?



Redacting the loan sale deed

First, a distinction must be drawn between redactions in summary and plenary hearings. In a summary context, the courts have consistently held that redactions are permissible, as the burden for the plaintiff is simply to make out a *prima facie* case of their entitlement to judgment.[12] Noonan J., rejecting an argument that the loan sale deeds must be unredacted in a summary proceeding, summarised the position by stating that:

"It is by now well settled that in claims of this nature involving loan portfolio sales, it is established and accepted that plaintiffs are entitled to redact documents for reasons of commercial sensitivity and privacy rights of third parties […]".[13]

The court made it clear that redactions must be determined with regard to the specifics of the case pleaded.

For plenary proceedings, the decision in *Courtney v OCM Emru Debtco DAC*[14] provides the most recent consideration of the law on redactions. Haughton J., in the context of an application for inspection, ordered the removal of large portions of redactions made by the assignee to the loan sale deed and deed of transfer. In doing so, the court made it clear that redactions must be determined with regard to the specifics of the case pleaded. In *Courtney*, the plaintiff's claim related directly to the terms of the deeds of assignment as well as to duties she alleged NAMA had taken on by its conduct prior to the loan sale to the defendant.

While *Courtney* very much turns on its facts, Haughton J. does express a more broadly applicable view on "client-led" redactions. The court is unequivocal in its disapproval of this practice. Redactions should be based upon valid legal considerations and not the views of clients. A comparison is drawn within the judgment to claims of privilege being made in discovery. It is not, the court suggested, sufficient to claim confidentiality or commercial sensitivity *simpliciter*, but rather an explanation as to why it is being claimed should also be forthcoming. Thus, when redactions are called for, it will be necessary to

give specific detail as to why each element of the contract is redacted. A general plea of commercial sensitivity will be insufficient, and lawyers should now be advising in the process of redacting documents so that all clauses relevant to the case being argued are before the court.

Two further helpful principles can be taken from *Courtney*. Firstly, redactions are both permissible and indeed necessary in certain circumstances.[15] Secondly, the burden falls on the party seeking the lifting of redactions to show the relevance of those sections, and only then will the burden shift to the other party to justify the redactions made. In *IBRC v Halpin,*[16] the court expanded upon the burden facing a party seeking inspection:

"He must present some concrete argument that can lead the court to order the unredaction. In his argument today, the defendant can only say that he does not know what is contained in the redaction but would like to see so as to consider whether it might be relevant or helpful. This, in my view, is not sufficient. In the context of discovery, it would classically be considered a "fishing expedition". In discovery procedures, this is never allowed. In these proceedings, it cannot be allowed either".

Ultimately then, a challenge to the assignment of a debt is a road to nowhere. Even if successful, it does nothing more than sound the claim in equity, thus gaining the debtor nothing.

It is only once this threshold has been overcome that the redactions must be justified. However, once their justification is at issue, a claim of redaction for commercial sensitivity may no longer be accepted without reference to an objective prejudice that would follow from the inspection. Where the court can mitigate that prejudice by means of orders and undertakings, then it will likely lean towards inspection. In light of *Courtney*, therefore, assignees should be prepared to robustly defend any redactions they wish to make.

Conclusions

Assignment of debt is a normal commercial process that does not affect the rights or obligations of a debtor.

While the identity of the party to whom they owe their obligations may have changed, nothing else is altered by the assignment. The deeds of assignment and the notices that are required by the 1877 Act are legal technicalities that do not alter the underlying contractual position. Aside from the notice required, none of the documents necessary to prove the assignment are legitimately subject to challenge from a borrower. The borrower was not a party to the assignment and therefore can do nothing more than put the assignee to proof.

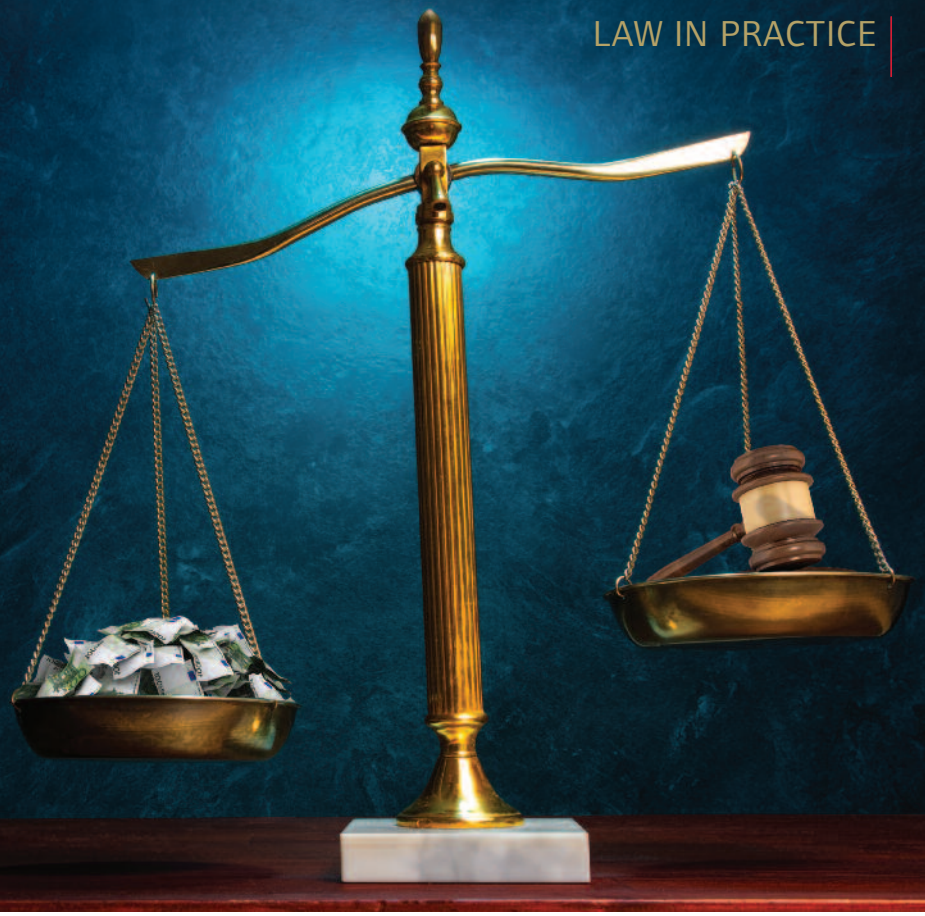
Nevertheless, it has become increasingly common to see defences based upon a challenge to the assignment of the debtor's loans. This is not the fertile source of defences it may appear to be. While this point has generated a large volume of litigation, it has generated no tangible results. There are numerous cases where, at an interlocutory stage, an assignment has not been proven to the court's satisfaction. However, there are no reported decisions to date in Ireland where an assignment has been set aside or invalidated. Indeed, in *English*, the Court was satisfied to reverse its initial decision once the required proofs were forthcoming. The reason for this is obvious – the assignment is not an issue for the debtor, but simply a technical proof for the court. The debtor is affected by it, but they have no role to play within it. Even if there were some defect in the legal basis for the transfer, it would simply reduce it to an equitable assignment. This, as we have seen, is still actionable by joining the assignor to the proceedings. Indeed, the court can dispense with the requirement to join the assignor if there is no practical reason why they should be joined.

Ultimately then, a challenge to the assignment of a debt is a road to nowhere. Even if successful, it does nothing more than sound the claim in equity, thus gaining the debtor nothing. While the formal proof of assignment must be before the court, any defects therein, to quote Murphy J., are a matter for the assignee and the assignor. The debtor, for all of that, simply remains bound to pay the debt.

References

1. See: *AIB v Thompson* [2017] IEHC 515 at paragraph 15.
2. [2013] 3 I.R. 323.
3. [2017] IEHC 515 at paragraph 15.
4. [2017] IEHC 515 at paragraph 16.
5. The only decision reported in this jurisdiction that seems to touch on the point was by way of judicial review of the jurisdiction of a Circuit Court judge in *State (Murphy) v Judge Deale* [1964] IR 40.
6. [1942] 2 KB 1.
7. [1942] 2 KB 1 at page 4.
8. Cited with approval by Baker J. in *AIB v Thompson* [2017] IEHC 515.
9. McGovern J. was satisfied as to the effect of such a term in *Vesta Mortgages v Devine* [2014] IEHC 109 at paragraph 7.
10. [2017] IEHC 322.
11. *Supra* at paragraph 60.
12. *Ulster Bank Ireland Limited v Danny O'Brien and ors* [2015] IESC 96.
13. *Launceston Property Finance DAC v Walls* [2018] IEHC 610.
14. [2019] IEHC 160.
15. For example, information relating to third parties.
16. Hedigan J. Unreported, High Court, November 3, 2015.

Funding justice?



What are the identified disadvantages of permitting litigation funding or the assignment of causes of action?

Paul Gardiner SC

There is currently significant debate going on in legal circles as to the perceived need for Ireland to abandon its ban on the funding by third parties of litigation, and to replace it with a more international-looking regime, which is permissive of both the outright assignment of causes of action to unconnected third parties, and the funding of litigation where the wronged party (the plaintiff, or claimant in arbitration) remains party to the litigation.

The purpose of this article is not to identify the supposed advantages of the availability – and permissibility – of third-party funding of litigation. On the contrary, its purpose is simply to identify, without comment, the evils that have heretofore underpinned, and which continue to underpin, the outlawing of same – through the continued vitality of the law on maintenance and champerty and the associated outlawing of the assignment of a bare cause of action.

These topics have most recently been considered by the Supreme Court in *SPV OSUS v HSBC Institutional Trust Services Ireland Limited*,[1] which followed, both temporally and in the result, the decision of the Court one year earlier in *Persona Digital Telephony Limited v Minister for Public Enterprise*.[2]

It is proposed principally to present in some detail what was said in *SPV OSUS* by O'Donnell J. (with whom the other members of the Court agreed), about the disadvantages presented by permitting litigation funding. In doing so below, I have broken into perhaps more manageable subparagraphs the findings of the Court, which each bear close analysis.

It is beyond the scope of this article to attempt to delve into what might be perceived to be the somewhat inconsistent approach of the law to the assignment of bank loans (an issue considered in a separate article in this edition of *The Bar Review*); the apparent acceptance that shareholders of a company may be able to stay on the right side of the public policy line; and, the acceptance of the principle of no foal no fee arrangements made between plaintiffs and their lawyers. Such analysis is for another day.[3]

It was stressed that the plaintiff required the funding in order to have access to the courts.

The differences between *SPV OSUS* and *Persona*

These cases came before the Supreme Court in entirely different circumstances and therefore presented different issues for the Court.

In *Persona*, the plaintiff had sought directions from the High Court as to the legality of the funding position that it proposed for the prosecution of its litigation. It was stressed that the plaintiff required the funding in order to have access to the courts. Having failed to obtain the blessing of the High Court for the funding,[4] Persona was permitted to bring a 'leapfrog' appeal to the Supreme Court,[5] which duly upheld the High Court decision that the funding agreement was contrary to public policy.

In contrast, in *SPV OSUS*, the plaintiff (hereafter "SPV") did not rely on a right of access to the courts. SPV had expressly pleaded the assignment to it of the cause of action it pursued against the defendant ("HSBC") on foot of that pleaded assignment. HSBC raised as a defence to the action that the assignment was contrary to public policy. HSBC then brought a motion seeking to dismiss the claim as bound to fail.

Ultimately, in *SPV OSUS*, the Supreme Court found (as had the High Court and Court of Appeal) that the assignment of the cause of action from Optimal Strategic ["OSUS"] to SPV – which initially was a wholly owned subsidiary of Optimal Strategic – amounted to trafficking in litigation, which was not permitted. SPV's claim – which relied on the assignment, which was void – was thus bound to fail, and was dismissed.

The commoditisation of litigation

Clarke C.J. in *SPV OSUS* observed that there was an increasing problem with access to justice. However, he stated:

"… there are compelling reasons for considering that any significant change of the law in either of these areas should take place in the context of an attempt to establish a properly regulated scheme or structure which would ensure that the potential benefits of liberalisation are not outweighed by any disadvantages which might flow from an entirely unregulated commoditisation of litigation".[6]

It was this "commoditisation of litigation" that mostly exercised the Supreme Court in the course of argument in *SPV OSUS*. The fact that SPV had specifically pleaded the assignment to it of the right of action brought a focus to the issue that did not present in *Persona*.

Before considering the abuses said to present from permitting litigation funding, it is worth recalling what the differences are between maintenance, champerty, and assignment.

What is maintenance and champerty?

Before considering the abuses said to present from permitting litigation funding, it is worth recalling what the differences are between maintenance, champerty, and assignment. As O'Donnell J. stated in *SPV OSUS*:

"… maintenance is the supporting of an action (normally by paying the costs) in which the maintainer has no legitimate interest. Champerty is a 'more obnoxious' form of maintenance, in that it involves an agreement to support litigation in which the party providing the support has no legitimate interest in return for some division of the spoils".[7]

Unlike maintenance or champerty – where the original plaintiff remains in the action – an assignment of an action removes the plaintiff from the action entirely.[8]

What are the perceived abuses?

O'Donnell J. considered the evils identified in the various cases.[9] The learned judge noted that the abuses/dangers recognised by Costello J. in *Fraser v Buckle*[10] (an heir locator case) were:

- payments to witnesses;
- suppression of evidence; and,
- inflaming of damages.

He considered *Simpson v Norfolk and Norwich University Hospital NHS Trust*,[11] where the court held that the assignment of a personal injury cause of action against a hospital (from an infected patient to the widow of an infected patient who died of the infection) offended public policy in England, despite the abolition of the crimes and torts of champerty and maintenance, on the following grounds:

"… the conduct of the proceedings, including aspects such as a willingness to resort to mediation and a readiness to compromise, where appropriate, is entirely in the hands of the assignee and is liable to be distorted by considerations that have little, if anything, to do with the merits of the claim itself".

Thus, some further objectionable incidents of third-party funding may be:

- unwillingness to resort to mediation; and,
- unwillingness to compromise.

O'Donnell J. observed that in *Persona*, the Court had found that the commoditisation of litigation was itself objectionable. He went on, later in the *SPV* judgment, to hold as follows:[12]

"The idea of the administration of justice carries with it, normally at least, the belief that the resolution of disputes should be the business of the parties themselves, and should be brought to the Court because there is no other way of resolving it. Litigation is not a desirable activity in itself, although preferable to the alternative. The administration of justice is a public service which is justified by the necessity of providing a method of fair resolution of disputes between parties. In civil cases, it involves the awarding of remedies by way of compensation for a wrong to the person who has been determined to have suffered that wrong. Indeed this can be seen perhaps as a performance of the State's obligation to vindicate the rights of the citizen in the case of injustice done. The intervention of third parties, unless justified, distorts that pattern and the process".

Thus, it would appear that a further objectionable feature of litigation funding is the "distortion of the pattern and the process", or perhaps this simply describes its effect. The learned judge continued:[13]

"Champerty has always been regarded as more obnoxious than maintenance, because it involves not merely the involvement in the proceedings of a third party, but also the possibility that the party will recover some proportion of any award of damages if the claim is successful. The law has always viewed this with suspicion, primarily because it necessarily involves depriving a successful plaintiff of the full amount calculated by the Court as necessary to compensate him or her in the circumstances for a wrong he or she has suffered, and for which it is the function of the administration of justice to provide a remedy. However, the law considers it suspect because the third party funder recovers a portion of the award not as damages for an injury done or for a

right breached, but rather as a profit in a commercial transaction, by definition at the expense of the wronged plaintiff. There may be cases where it might be said that this is preferable to no recovery at all, but as the extract from the (dissenting) judgment of Heydon J. illustrates[14] … third-party profit is regarded in principle at least as offensive to the common law unless justified, and, even when capable of justification unless controlled and regulated".

Therefore, some further objectionable features are:

- involvement of the third party in the process;
- depriving the plaintiff of his/her full compensation; and,
- the potential profit to be earned by the funder.

Assignment

Moving then to assignment, O'Donnell J. reiterated the objections to the distortion of the system, but added to the list of objectionable features, the removal entirely of the plaintiff from the process. He stated:[15]

"… an assignment offends in at least two ways against important values of the system. First, the litigation loses its character as one brought between parties to vindicate their rights to seek to recover compensation for wrongs done. The original, wronged plaintiff, is removed from the proceedings and their claim converted into a conduit for financial recovery by the assignee. Furthermore, the structure of the transaction envisages (and in most cases will be driven by) the prospect of a profit being made by the assignee, with the assignor recovering less, on this hypothesis, than they are properly entitled to as a matter of justice".

Justification of assignments

O'Donnell J. then grappled with the fact that the courts have previously recognised some assignments as valid:[16]

"It may be true that the term "trafficking" is merely a description applied to a transaction of which the speaker disapproves, but in this context that disapproval stems from the belief that the subject matter of the trading, whether children, drugs, adults, body parts or litigation, is a matter which should not properly be the subject of commercial transaction…

The importance of the decision in the House of Lords (in *Trendtex*)[17] was to recognise that, while an assignment of a claim is presumptively undesirable and at risk of invalidity, there could be a legitimate justification for such an assignment of which the decided cases were only illustrations. Thus debts, although enforceable by action, have always been regarded as assignable even if in some cases when contested they can give rise to contentious litigation.[18] Other assignments ancillary to bona fide transactions, particularly in relation to property, have also been regarded as legitimate. Assignments to parties with a pre-existing legitimate interest in the transaction giving rise to the claim (such as the provision of a letter of credit by Credit Suisse to the cement

suppliers and the funding of the shipments and demurrage), or even the prior involvement as a shareholder in the company, or the fact that the shareholders and the assignee had been shareholders in the assignor at the time of the transaction giving rise to the claim (see *Massai Aviation Services v Attorney General of the Bahamas* …), can all be seen as examples of legitimate interest justifying the assignment of a right to litigate. However, the commercial trading of a claim to an unconnected third party with the possibility of profit (e.g., the potential assignment by Credit Suisse to an anonymous third party)[19] was not legitimate and was, and remains, unenforceable".

In this regard, O'Donnell J. reiterated the principle that the potential profit garnered by the funder/assignee was an evil to be avoided.

The list

It is perhaps worth recapping then the list of obnoxious features presented by permitting the practice of third-party funding of litigation and/or the outright assignment of the bare right to litigate. Most of the factors appear to be present in either of the two scenarios:

- payments to witnesses – both;
- suppression of evidence – both;
- inflaming of damages – both;
- unwillingness to resort to mediation – both;
- unwillingness to compromise – both;
- deprivation of the plaintiff of his/her full compensation – both;
- removal of the plaintiff from the process – assignment only; and,
- the potential for profit to be garnered by the funder/assignee – both.

In summary, these factors constitute a "distortion of the pattern and process" of the administration of justice.

"The cultural differences between the common law system in the United States, and that in some other common law jurisdictions in this regard is perhaps also reflected in the prevalence of contingency fees in the United States, which were up until relatively recently regarded as absolutely impermissible in other common law jurisdictions."

The features of the administration of justice

O'Donnell J. then considered the question of whether the public policy continued to have vitality. Before doing so, he identified that other jurisdictions have a different view. He said:[20]

"The cultural differences between the common law system in the United States, and that in some other common law jurisdictions in this regard is perhaps also reflected in the prevalence of contingency fees in the United States, which were up until relatively recently regarded as absolutely impermissible in other common law jurisdictions, as illustrated by the condemnation of the practice in the decision of the Court of Appeal in *Trendtex* … As I understand it, since the significant restriction of legal aid in the United Kingdom, it has been permitted to seek a significant uplift in fees when a successful claim has been brought on a "no foal, no fee" basis or to enter a conditional fee agreement, but a simple percentage contingency, and moreover one taken from the successful plaintiff, remains improper, certainly in this jurisdiction. However, to US lawyers, and indeed their clients, the contingency fee system facilitates access to justice and, moreover, serves to align the interest of lawyer and client, since it incentivises the lawyer to maximise recovery for the client (and thereby the lawyer)".

He then considered the perceived advantages of a more flexible rule in this jurisdiction:

"By the same token, it might be argued that the assignment of a cause of action simply recognises commercial realities and promotes efficiency. A potential plaintiff, who, although wronged, may also be unwilling to engage in long running and expensive litigation, might very well consider that the assignment of a claim at the outset to a party with greater resources and appetite for litigation, even if at a substantial discount for potential recovery, is still to be preferred to a prolonged, uncertain and costly action, in which he may possibly fail to recover anything at all from the claim. On this view, the objections of other common law systems to out-and-out assignments of a right to litigate may seem like doomed Victorian priggishness which cannot survive in the face of modern commercial reality.

93. We should consider this objection seriously, because if it has merit (even if not hitherto expressly articulated) it would not only explain the development of the law in this area towards the greater tolerance of funding by third parties and assignments of claims, but would also suggest that such developments should be encouraged and accelerated. **In my view, however, the objections of the common law to the commodification of litigation retain force and vitality.** Commercialisation of an activity is justified in principle on the basis that it maximises efficiency. Claims which might not have been advanced will be advanced. Claims which might not have justified the risks involved may be bundled together and advanced. … However, the common law in this and other jurisdictions had not traditionally regarded litigation as a social good to be encouraged. It is not necessary to regard litigation as a positive evil … to consider that it is an activity which society should not encourage. The **considerable costs**, both financial and in resource terms, which the community incurs **in providing a court system is not justified** on the basis of **facilitating** a commercial activity, but rather because it is **necessary** for the administration of justice.[21] This, at its core, involves the resolution of disputes between citizens and others because those parties consider that they have been wronged, and have no other method of vindicating their rights. It would be foolish not to

recognise that the practice of law is a business, but the administration of justice is not. Commercial considerations can and should have a significant impact on litigation, whether relatively minor claims in the District Court or massive litigation in the High Court".

O'Donnell J. then went on to emphasise that the commoditisation of claims may not always serve the interests of justice:[22]

"However, **the justification for the courts** and the system of litigation in this and other jurisdictions **is not** the stimulation of **economic activity**: rather, **it is** the **administration of justice**, however imperfect, inefficient and frustrating that may be on occasions.[23] If so, in my view, the public policy which views with suspicion the acquisition of claims by unconnected third parties and their pursuit in order to recover profits remains valid, as indeed the case law demonstrates. It is inevitable that, if it is possible to freely assign claims in a market, it must also be possible to make collateral agreements in relation to the giving of evidence to support such claims, since otherwise it would not be possible to maintain the value of the claim which has been traded. Yet the concept of witnesses entering into agreements in relation to the evidence which they are to give on oath is plainly undesirable. Furthermore, the distance that is created between the nominal plaintiff and the factual controversies giving rise to the dispute is capable of causing difficulties, both for the plaintiff in marshalling evidence, and for the defendant in seeking to compel discovery in respect of the original transaction. Depending on the circumstances of each case, these difficulties may either hinder or help individual plaintiffs, but neither outcome is inherently desirable from the point of view of the administration of justice and seeking the truth. Commoditisation of claims runs counter therefore to important interests in the administration of justice. Therefore, while there may be choses in action that can be properly assigned, and of which assignment should be encouraged (for example, in the case of commercial debts), the general suspicion and antipathy of the common law to the trading in claims remains, in my judgment, well founded".

There is a problem which requires to be addressed, but … by far the best way of attempting to provide solutions is by means of legislation.

Conclusion

Although with expressed reluctance, the courts continue to be wary about fashioning a policy that would permit the funding of litigation by unconnected third parties. There are many arguments that may be made either way in respect of the matters identified by the Supreme Court in its recent judgments. Perhaps it is best to conclude with the words of Clarke C.J. in *SPV OSUS*, where he stressed that if such practices are to be permitted in future, then this should be achieved by way of legislative change, after due consideration of all the competing interests:

"There is a problem which requires to be addressed, but … by far the best way of attempting to provide solutions is by means of legislation. … It is at least arguable that permitting entirely unregulated third-party funding, as was at issue in *Persona*, or the unregulated assignment of causes of action, as is at issue in this case, as a means of solving the problem of access to justice runs the real risk of creating more problems than it solves".[24]

The debate is likely to rage on.

References

1. [2018] IESC 44 – hereafter *HPV OSUS*.
2. [2017] IESC 27 – hereafter *Persona*.
3. Neither do I consider the much under-considered situation where the defence of an action is funded by a third party, which is equally likely to fall foul of current public policy in Irish law.
4. Donnelly J., April 20, 2016 [2016] IEHC 187.
5. [2016] 7 JIC 2517.
6. Paragraph 2.4 of the judgment, reiterating what the Chief Justice had said in *Persona*.
7. Paragraph 83 of the judgment. Effectively repeated in paragraph 88.
8. O'Donnell J. at paragraph 84.
9. The learned judge also noted that any such champertous agreements are treated as void on the basis that the risk alone of such abuse was enough. It mattered not whether the abuse was likely in the facts presented.
10. [1994] 1 I.R.
11. [2012] QB 640.
12. Paragraph 87.
13. Paragraph 88.
14. In *Jeffrey & Katauskas pty Ltd v SST Consulting pty Ltd* [2009] HCA 43 (High Court of Australia).
15. Paragraph 89.
16. Paragraph 90. Earlier in the judgment, the learned judge had considered the several English cases where assignments had been held to be valid – because of their connection to an underlying transaction. The judge also carefully analysed the Court of Appeal and the House of Lords judgments in *Trendtex*, together with subsequent cases in the UK and other common law courts that had considered *Trendtex*.
17. [1980] 1 Q.B. 629 (C.A.). [1982] AC 679 [HL].
18. The Judicature Act specifically identifies debts and choses in action as assignable. But note *Laurent v. Sale* [1963] 1 WLR 825, where an assignment of a debt was said to infringe public policy.
19. In *Trendtex*
20. Paragraph 92.
21. The emphasis is mine.
22. Paragraph 93.
23. My emphasis.
24. Paragraph 2.2.

When the levy breaks

The February edition of The Bar Review provided members with information on progress in implementing the Legal Services Regulation Act 2015. Since the publication of that update, further developments have taken place that are of significant importance for members.

Dara Hayes BL, Chairman, LSRA Committee

Council to absorb LSRA levy

Part 7 of the Legal Services Regulation Act, 2015, provides for the imposition of a levy on lawyers practising within the State. The levy will fund the Legal Services Regulatory Authority's (LSRA) administrative and disciplinary costs. It is payable by every practitioner, other than those in the full-time employment of the State. The levy comes in two parts. The administrative costs are simply divided equally between each lawyer. Some 10% of the disciplinary costs are payable by solicitors and 10% by barristers. The 10% payable by barristers is divided proportionately between those who are members of the Law Library and those who are not. The remaining 80% is split between the three groups in proportion to the claims made against each group. The Council of The Bar of Ireland made submissions, at the draft stage, that attributing the initial 20% of costs equally between barristers and solicitors was inequitable given the significant disparity in size between the two branches. These submissions were not accepted but the Council will continue to make representations in this regard whenever appropriate.

The Bar of Ireland will be levied in respect of each member of the Law Library. In effect, the role of The Bar of Ireland is as the LSRA's collection agent. Those barristers who are not members of the Law Library will be individually liable for the levy.

The Authority has indicated that the levy for 2018 will be €100. It has projected that the 2019 levy will be €250 in respect of each member. The LSRA's disciplinary mechanisms will commence later this year and those costs will form part of the 2019 levy. The projected levy is predicated on a similar number of complaints being made to the LSRA about members of the Law Library as have been made in recent years to the Professional Conduct Tribunal.

Several years ago the Council took the sensible decision to build a financial reserve to protect against the costs that would arise from the establishment of the LSRA. That reserve, built with members' money, will allow The Bar of Ireland to discharge the levies for 2018 and 2019 without having to recoup the money from members. In a valuable benefit to members, we will not be asked to pay until the 2020 levy becomes due in April 2021.

The 2020 levy will incorporate a full year's disciplinary costs. No projection has been given but, based on the levies for 2018 and 2019, it seems likely that the levy for 2020 and beyond will fall somewhere between €400 and €500 per member per annum. The Bar Council is aware that, for very many members, this will constitute a significant additional sum on top of the other outgoings necessitated by our practices.

It is important to say that this is not a levy imposed by The Bar of Ireland, nor does The Bar of Ireland have any role in fixing its quantum. The levy is payable by all barristers whether or not members of the Law Library.

The Act does not make any differentiation between the Inner and Outer Bars, nor between the Young Bar and those members of longer standing. Having sought the views of the LSRA, Finance, Library and Young Bar Committees, the Council decided, after much discussion, that it will have to recoup the levy in full from each member commencing with the 2020 levy (payable in April 2021). The levy is payable as a result of being on the Roll of Practising Barristers and not as an incident of membership of the Law Library.

Introduction of LSRA PII regulations

The LSRA will commence regulations in June 2019 regarding professional indemnity insurance (PII). The Council instructed our insurance brokers, AON, to ensure that our Group Scheme is fully compliant with those regulations. While the Council can provide this confirmation in respect of our own group policy, any member whose policy is sourced elsewhere must verify compliance with the LSRA regulations themselves.

Consultations

The Council has been invited to make submissions in response to two consultations initiated by the LSRA. They relate to regulations on advertising, and to the education and training of legal practitioners. If members have views on either issue, the Council would like to hear from them. Alternatively, members may wish to make their own submissions to the LSRA.

Commencement of codes

Finally, at the time of writing, the LSRA is expected to commence its Code of Practice for Practising Barristers in June 2019. Contemporaneously, The Bar of Ireland will commence our 2016 Code of Conduct. All members will receive a copy of both codes from the Council and information sessions will take place. The commencement of the LSRA Code of Practice and the 2016 Code of Conduct for The Bar of Ireland will not create substantial change to the way in which barristers who are members of the Law Library operate but, nonetheless, all members are encouraged to take the opportunity to familiarise themselves with the new Codes.

JLT

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