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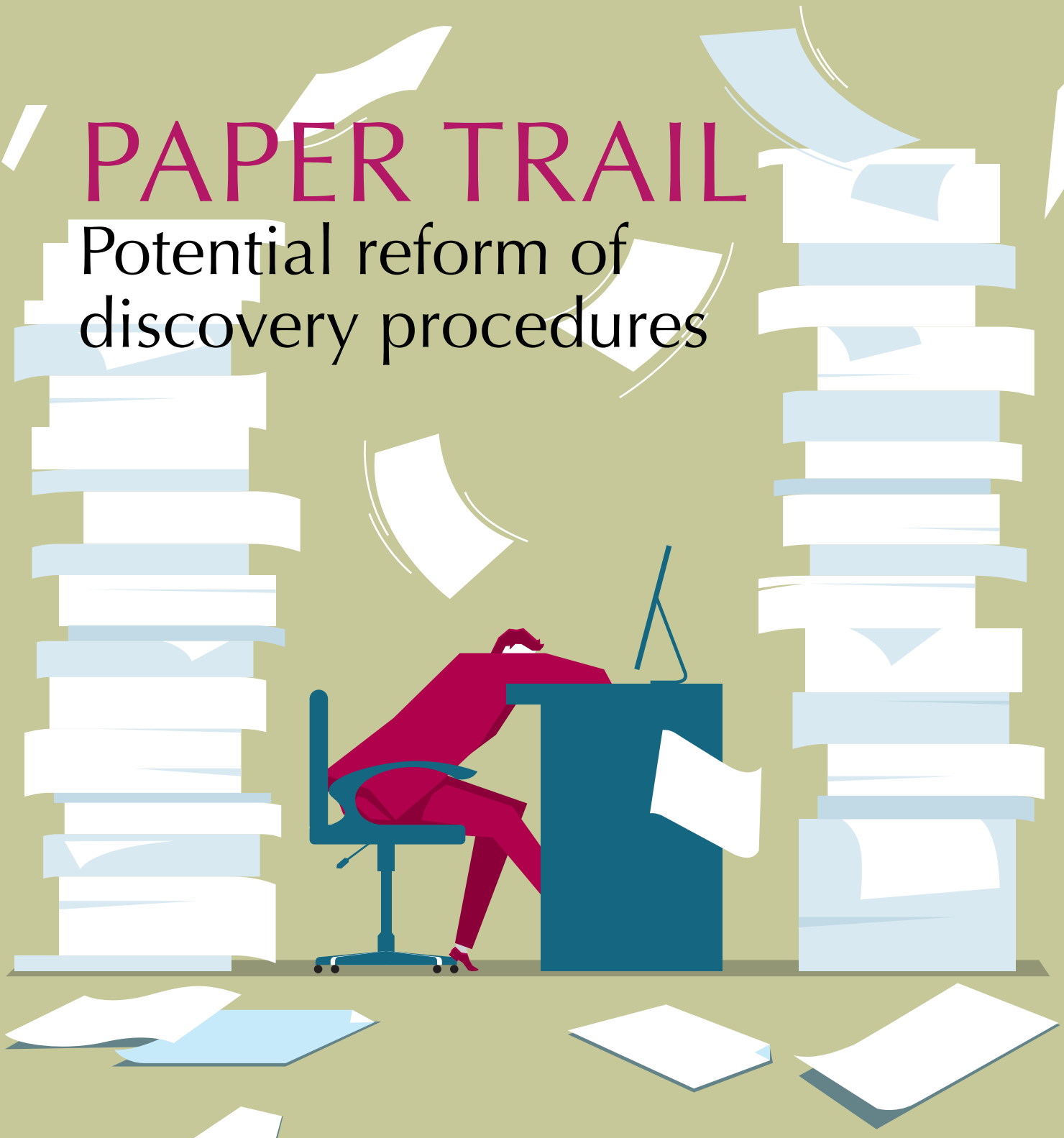

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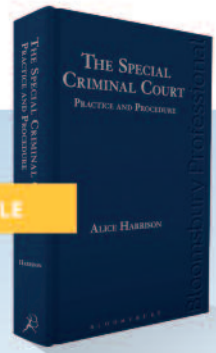

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The Bar Review
The Bar of Ireland
Distillery Building
145-151 Church Street
Dublin DO7 WDX8

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

PUBLISHERS

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

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

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

www.lawlibrary.ie

Papers and editorial items should be addressed to:
Rose Fisher at: rfisher@lawlibrary.ie

Increasing our international profile

The Council of The Bar of Ireland is working closely with Government and stakeholders to explore the opportunities for the legal system in Ireland arising from Brexit.

Since the last edition of *The Bar Review*, the Council of The Bar of Ireland has met on two occasions and there have been many meetings of the various permanent and non-permanent committees. One area of work that has been underway over the last year is an initiative led by the Bar to increase the market for international legal services in Ireland.

The background to this initiative arose from a request from the Department of Justice and Equality in November 2016 to assess the impact of Brexit on the legal sector in Ireland. After March 2019, Ireland will be the only English-speaking common law jurisdiction fully integrated into the European legal order. This gives rise to opportunities, not just for the attraction of financial and other service industries into Ireland, but also to increase the market for legal services in Ireland. In particular, there is now a unique opportunity to encourage international companies to incorporate Irish law as the governing law of contracts, and to designate Ireland as the forum for the resolution of any disputes in relation to those contracts, whether by way of litigation or arbitration.

Over the past 12 months, The Bar of Ireland, together with the wider legal community, has worked with the Department of Justice and IDA Ireland to formulate a detailed proposal on opportunities to increase the market for international legal services in Ireland, which has also received the support of the judiciary at the highest level.

The Minister for Justice, Charlie Flanagan TD, has confirmed that he intends to formally launch the strategy to increase the market for international legal services in Ireland before Christmas, with a series of other events due to take place in the New Year, and a major conference in Dublin in early March 2018. Representatives of the Council will continue to work closely with the Minister and his Department to ensure that the actions set out in the strategy come to fruition.

Ongoing work

I recently had occasion to discuss a number of issues with the Minister, including the implementation of the Legal Services Regulation Act, 2015. Much of the Act remains uncommenced, although discussions are ongoing with the Authority about a range of issues. We have also been seeking clarity on the timescale for the commencement of Part 10 of the Act (Legal Costs). It has been confirmed that there is a project plan in place between the Department, the Courts Service and the Taxing Master's Office, and it is expected that the new office of the Legal Costs Adjudicator will be up and running by July 2018.

We are about to commence the formal negotiations in relation to professional fees for criminal work. This is long overdue and The Bar of Ireland has been pushing the Department of Public Expenditure and Reform for many months to get this process underway. We are grateful for the support of Minister Donohoe in that regard.

Elsewhere in this edition are some comments on the planned reform of civil justice and the committee chaired by the President of the High Court. There is a connection between the project to promote Irish law, the expansion in the economy, and the need for a modern and efficient court system. As Ireland has the lowest number of judges per capita in the OECD, we will continue to press for greater resourcing of our courts.

As this is the last edition of *The Bar Review* in 2017, I would like to take the opportunity to wish all members a happy Christmas and a prosperous New Year.

Paul McGarry SC
Chairman,
Council of The Bar of Ireland

Resolution and reform

This edition of *The Bar Review* looks at a number of ways in which our legal system is changing, and further proposals for reform.

The trend towards various different forms of alternative dispute resolution continues, and in this edition we take a look at the recently enacted, but not yet commenced, Mediation Act 2017. This legislation provides a statutory basis for the mediation process and provides some innovations to encourage the use of mediation alongside the litigation process.

Procedures for discovery are also in the spotlight. The Commercial Litigation Association of Ireland has formed a committee to examine what changes could be made to the Rules of Court to reduce the time and costs involved in making discovery. It is hoped that a wide-ranging discussion on how such procedures can be streamlined and simplified will form the basis of a proposed set of amendments to the existing Rules of Court.

The collapse of Setanta Insurance has caused major headaches for former policyholders. We look at the issues surrounding the satisfaction of claims involving those insured by Setanta, and the ethical issues that arise for practitioners dealing with those personal injury claims.

A few months into his new post, Chief Justice Frank Clarke shares with us his vision for the further modernisation of the courts and for improved access to justice for all. As the baton passes, it is a fitting time to celebrate the distinguished career of his predecessor, Mrs Justice Susan Denham, and to thank her for so many years of selfless public service.

Happy Christmas to all.

Eilis Brennan BL
Editor
ebrennan@lawlibrary.ie

Law and Women programme

December 2017 marks the conclusion of the second year of the Law and Women: Promoting Equality mentoring programme. This initiative is spearheaded by Mary Rose Gearty SC and Maura Butler of the Irish Women Lawyers Association (IWLA), and jointly co-ordinated by The Bar of Ireland and The Law Society. The programme is underpinned by the grounding principle of promoting equality through mutual support, confidentiality and collegiality. Mentors and mentees completed training in January 2017 and 24 mentoring pairs were matched through a careful selection process. 2017 mentors were both male and female, with mentees female only. Mentoring conversations were held one hour per month over 12 months.

There was early positive feedback as to the value of the training and group conversations. One of the mentors spoke about their experience: "My mentee was remarkably focused. She used the time exceptionally well. She always came with a clear list of issues, challenges and priorities – we got straight to work. She would also update me briefly on changes and improvements she had made in her practice. It felt very productive and practical. It was really impressive. For me the training at the outset is the most critical component: it is essential".

One of the mentees praised the programme: "My mentor was genuinely interested in me. She focused on areas I hadn't considered before, making interesting observations about my enthusiasm, motivation and skills. She was insightful, encouraging – and challenging! I learned a lot more than I had expected to. I feel much clearer and confident in my career direction, and in my judgement of situational issues, both what is acceptable and not. She is so busy – I felt privileged that she gave me so much regular time. It has been a fantastic experience".

The programme will be more formally evaluated, with impacts measured, in early 2018.

Progress in the 2017 programme

Once again, what is interesting from the initial feedback this year is the acknowledgement of the clear value and learning that was mutually experienced. Mentors expressed how useful it felt to:

- be supportive through actively sharing experiences and insights, acknowledging vulnerabilities and making practical suggestions; and,
- have the opportunity to stay in touch, to be encouraging, and real, about the realities of navigating the many roles that women have to successfully accommodate in modern professional legal practice.

Some of the mentees' highlights were:

- the experience of being both encouraged and challenged in a trusted, safe space; and,
- the practical prompts and clear direction that an objective eye and ear can give.

The realisation was also mutually voiced that while a mentor's achievements and career success are evident, rather than a 'grand master plan' being in place, ultimate success is a personal experience. It is the result of the continuing juggle of hard work, home/personal priorities and continuous effort.

"Accessing support is part of taking good care of oneself – maintaining focus and energy!" A useful reminder. More details of Law and Women: Promoting Equality can be obtained from sdepaor@lawlibrary.ie.

Hannah Carney, Executive Coach and Independent Training Consultant to the Law and Women: Promoting Equality mentoring programme.

Find a Barrister app

To coincide with European Lawyers Day on October 25, the theme of which was 'E-volving lawyers: how digital transformation can enrich the relationship between the citizen and the lawyer', The Bar of Ireland released our new app giving users instant access to The Bar of Ireland's member directory, and making connecting with barristers easier than ever.

As artificial intelligence, algorithms and social media discourse are just a few of the new realities that the legal system has had to adapt to, The Bar of Ireland has been working hard to develop new ways for barristers to communicate, learn and work in this new era of on-demand access to information. As an evolving profession, The Bar of Ireland believes in increased accessibility of the legal system in the digital age. Innovative technologies like this app have the potential to fundamentally change how lawyers work and integrate into society. The 'Find a Barrister' app has been developed to be as user friendly as possible and allows users to easily identify barristers by areas of practice, specialisation, circuits and additional languages. The new app is available for android and iPhone and can be downloaded free from the Google Play store and Apple App Store.

Thank you from JLT

Donal Coyne, Director of JLT Financial Planning, the operator of The Bar of Ireland Retirement Trust Scheme, has expressed his thanks to all those new and existing members who called in to meet the JLT pension team as part of the recent tax deadline pension clinics.

Donal said: "We met or corresponded with well over 200 members, and we hope all of them benefitted from their meetings with us. We shall be writing directly to all members as normal early in the first quarter, enclosing their twice-yearly valuation statement. Naturally we are also available on a year-round basis to meet any member of the Law Library".

LEFT:
Pictured with Regina Doherty TD, Minister for Employment and Social Protection (third from left), are founding members of the Employment Bar Association (from left): Tom Mallon BL; Alex White SC; Mr Justice Seamus Noonan; Marguerite Bolger SC; and, Peter Ward SC.

BELOW:
At the EBA Employment Law Conference 2017 were (from left): Paul McGarry SC, Chairman of the Council of The Bar of Ireland; Regina Doherty TD, Minister for Employment and Social Protection; and, Cathy Maguire BL, Chair of the Employment Bar Association.

EBA Conference

The Employment Bar Association (EBA) held its second annual conference on Friday, November 10. Papers on cutting-edge topics were delivered by leading senior and junior counsel who are recognised experts in employment law. The highly successful conference provided comprehensive updates on the law of age discrimination, whistleblowing, and recent case law on co-employment. It also gave an overview of the law of compensation, sick leave, bullying and harassment, and fair procedures in employment investigations. Given the highly topical nature of the content, there was significant media coverage, with appearances by EBA members on RTÉ *Drivetime*, *The Late Debate* and Raidió na Gaeltachta, in addition to an article in *The Irish Times*.

A voice for the voiceless

On October 26, The Bar of Ireland was delighted to present its Human Rights Award to Catherine Corless in recognition of her tireless work to uncover the facts around the burial site at the Tuam Mother and Baby Home in Co. Galway.

From left: Thomas Creed SC, Chair of The Bar of Ireland's Human Rights Committee; recipient of The Bar of Ireland Human Rights Award 2017 Catherine Corless; and, Paul McGarry SC, Chairman of the Council of The Bar of Ireland.

Chairman of the Council of The Bar of Ireland, Paul McGarry SC, explained that the Award is an initiative of The Bar of Ireland Human Rights Committee, which recognises outstanding contributions to the cause of human rights. He praised Catherine's research, advocacy and courage in shining a light on a dark period in Irish history.

Thomas Creed SC, Chair of the Human Rights Committee, said that human rights campaigns by their nature are many and varied, and the question is often asked: what can one person do?

"Catherine Corless is a perfect example of what one person can do if determined," he said.

He outlined the extraordinary work Catherine has done to uncover the facts about the Tuam home. This included purchasing individual death certificates – at a cost of over €3,000 – for each of the 796 children who died in the home during the period of its operation from 1925 until 1961. Her belief that the children were buried in an unofficial site near septic tanks was vindicated when investigations by the Commission of Investigation into Mother and Baby Homes – itself established as a result of her work – uncovered a large number of human remains on the site.

The investigation continues, as does Catherine's work. She has now become a voice for survivors of mother and baby homes around the country. Thomas Creed said: "The Human Rights Committee of The Bar of Ireland has no doubt that these revelations would remain hidden if not for Catherine Corless' meticulous work. She has done both survivors and society as a whole a service".

Accepting the Award, Catherine Corless thanked The Bar of Ireland, and said that this award was important because it brought more attention to the issue, and helped to encourage more survivors to come forward and tell their stories. Several survivors of the Tuam home were in the audience, and she spoke of her admiration for them: "They are wonderful people".

She expressed a wish that the Commission's report, which it is hoped will be published shortly, will lead at the very least to an acknowledgement of what happened, an apology to the victims, and a plan to deal with the bodies in Tuam in a dignified and respectful manner: "I just wanted the children to be remembered".

Catherine Corless with her husband Aidan (front row, second left) and survivors of the Tuam Mother and Baby home. Front row (from left): Peter Mulryan; Carmel Larkin; and, Walter Francis. Back row (from left): John Egan; Tom Ward; Michael Flaherty; and, PJ Haverty.

Tribute to former Chief Justice Susan Denham

This is an edited version of the speech given by Mr Justice Donal O'Donnell on the occasion of Mrs Justice Denham's retirement in July 2017.

On Tuesday, July 27, 1971, the then Chief Justice, Cearbhall Ó Dálaigh, called 21 young barristers to the Bar. Who among the newly minted barristers, their families and friends would have predicted that two of the just three women who were called that day would become judges of the Supreme Court: Susan Denham and Mary Laffoy? Both took silk in October 1987, along with a fresh-faced counsel from Cork, Liam McKechnie. Sixty-five years after the foundation of the State, Mary and Susan were the fourth and fifth women to be called to the inner bar. When, in 1991, Susan Denham was appointed to the High Court, she became only the second female High Court judge in Irish history. The following year, in 1992, she became the first woman appointed to the Supreme Court and, in 2011, the first female Chief Justice. This year she retired after 26 years as a judge, 25 of them in the Supreme Court, making her the third longest-serving judge in the history of the court, after James Murnaghan and Brian Walsh. This puts her in a kind of Mount Rushmore category on the Court. There have been 63 judges of the Supreme Court, which means that Susan Denham has sat with more than half of the judges of that Court.

Loyalty

Susan Denham's career has been characterised by simplicity, a suspicion of adornment, a dislike of fuss, and an insistence on being clear, straightforward, direct, and approachable. Shortly after she was appointed to the High Court, she suggested that the judges meet for lunch, and when promoted to the Supreme Court, she suggested the same. I imagine that this proposal was met in the same way as nearly any proposal for change within the judiciary is received: "What's wrong with what we have done up until now? I like the same ham and cheese sandwich in my room". But within a very short time, not only is it accepted, but we also, almost pathetically, find ourselves looking forward to our Thursday lunches.

> *A theory attributed to a famous economist and social scientist, Albert Hirschman, is that the human response to businesses and even societies facing difficulties could be reduced to three words: exit, loyalty and voice.*

I do not know if this is one of those important legal traditions or simply a quirk of psychology, but the Chief Justice always sat in the same place at the head

of the table, and when she came into the room, it was difficult to shake off the feeling of being in a classroom when the headmistress arrived. Every Thursday for the last six years she arrived with a blue folder, always containing a list of things to be done, invitations to be answered, issues to be dealt with and, more frighteningly, the judgments awaited, the promises faithfully made and faithlessly broken. Everything on that list was eventually addressed and ticked off. It was pointed out to me that if you sat in the same area of the Law Library as Susan, you would have noticed that almost from her first day as a barrister, she would come in, sit down, open a notebook, and work her way methodically through a list of items until everything was ticked off, and only then go home.

A theory attributed to a famous economist and social scientist, Albert Hirschman, is that the human response to businesses and even societies facing difficulties could be reduced to three words: exit, loyalty and voice. One option is to leave – exit, and the other is to stay and participate – voice, and the choice a person makes is largely dependent on loyalty. Susan Denham's career has been characterised by loyalty to the country, to the administration of justice, and perhaps most of all to the institution that is the Supreme Court. She has never willingly chosen the option of exit and for 25 years she has stayed, struggled, contributed and added her distinctive voice, and we, as a Court, a country, and a people are much the better for it.

Breaking the mould of culture and tradition

Susan Gageby was born almost 72 years ago at the end of the Emergency, the daughter of a young member of the Irish Army, Douglas Gageby, who was to go on to become perhaps the pre-eminent newspaper editor of modern times. Her mother was Dorothy Mary Lester, the daughter of Seán Lester, who was a very distinguished diplomat in the early years of the State, and who went on to become the first and only Irish Secretary General of the League of Nations. Susan's career brought her through Alexandra College and to Trinity College, which may seem a case of so far, so predictable. Up until that time, the professional courses in Trinity College Dublin were directed outwards and away from Ireland towards training lawyers for the English market and what were described as the former colonies. It would not have been surprising therefore if her career path led to exit from Ireland, or at least from the mainstream of Irish life. But having toyed with the idea of medical studies, and rather more successfully with a young medical student, Brian Denham, whom she was later to marry, Susan Gageby chose the better path, and studied law.

She was called to the Bar in 1971, but took the then unusual step of going to New York to pursue postgraduate studies at Columbia University. Columbia, like its sister college Barnard was, even in 1971, single gender, although the postgraduate schools were co-educational. When Susan returned to Ireland, she commenced practice at the Irish Bar, which was then almost exclusively male. I have heard Susan describe how as a young woman she had been the only woman in a crowded courtroom. For every young woman who takes the first faltering steps in a courtroom, it must be an enormous comfort to know that you can never be alone, because Susan Denham has gone before you as junior counsel, senior counsel, judge and Chief Justice. But it is characteristic of her sense of fairness that she was quick to add that she had not experienced any hostility or prejudice from either the judges or her new colleagues. She also added something more striking – that she felt more uncomfortable because of her religion than because of her gender. Belief is a personal thing, and I think what Susan was referring to here was culture and tradition. It is important to remember that in addition to her other groundbreaking achievements, she was the first person to come from the Protestant tradition to become Chief Justice of Ireland since 1922.

Susan Denham has a certain steeliness. Where I come from, we are advised not to confuse niceness and decency with softness. Steeliness is a high compliment. In many ways, that is where Susan comes from too, at least in spirit. The Lester and Gageby families both have deep roots in Northern Ireland – in Carrickfergus and in Belfast. The names Seán Lester and Douglas Gageby still have substantial resonance, but I have it on the authority of one of the male members of the family that both sides of the family were run on distinctly matriarchal lines. There was a strong tradition of nonconformist Protestant support for Home Rule prior to 1912, and as the Gageby family will remind you, it was on Cave Hill and not in Bodenstown or Killala that Wolfe Tone took his oath to unite Catholic, Protestant and dissenter. But after 1922, that tradition found itself out of sympathy with the developments in Northern Ireland, and excluded from an official authorised version of Irishness that was being propagated in the Republic. Once again, this was a point at which exit and the finding of another life elsewhere, or just the quiet life here, was a possibility. But much of Susan's career can be seen as an exercise, not just in loyalty, but in a determination to be loyal to a broader and more generous image of Irishness.

Extraordinary contribution

There is simply insufficient space in this tribute to detail Susan Denham's contribution to the modernisation of the courts (both in terms of infrastructure and procedures) and the judiciary, but suffice to say, there is probably no reform in the past 25 years that did not start with a Denham report. Sir Christopher Wren's epitaph on St Paul's could be applied to her contribution: *Si monumentum requiras, circumspice*.

The job of assessing Susan's contribution to Irish jurisprudence is for others. For me, a few cases stand out. In her early days as a member of the Supreme Court, when her colleagues were on average 20 years older, she announced herself by dissenting in two cases. In *AG (SPUC) v Open Door Counselling (No.2)* in 1994, she alone of the Supreme Court considered that the Court could review and set aside an injunction ordered by it. In *AG v Hamilton (No. 2)* in 1993, she was the only member of the Court to hold that where members of the Oireachtas had made statements to a tribunal repeating allegations made in the Dáil, they could be cross-examined on those statements and required to answer without any breach of Article 15 of the privilege under Article 15.12. In each case, her judgment was clear, straightforward and, speaking as one of the disappointed counsel in one of the cases, persuasive.

In the heartwrenching case *In re a Ward of Court* (withholding medical treatment) in 1995, she gave an important judgment asserting the right to dignity. Dignity is a concept that is much debated in academic circles, but few realise that the Irish Constitution in 1937 was the first constitution in the world to make specific reference in its preamble to the concept of the dignity of the human person. It is entirely characteristic that when Susan Denham returned to this theme in a public lecture, she sought to trace the roots of the concept to the civilised traditions of Brehon Law, which made it an offence to shame

For every young woman who takes the first faltering steps in a courtroom, it must be an enormous comfort to know that you can never be alone, because Susan Denham has gone before you as junior counsel, senior counsel, judge and Chief Justice. But it is characteristic of her sense of fairness that she was quick to add that she had not experienced any hostility or prejudice from either the judges or her new colleagues.

a person, to satirise them, to publicise a physical blemish, to make fun of a disfigurement, coin an offensive nickname that sticks, or even repeat a satire composed by a poet in a distant place.

In *Maguire v Ardagh* in 2002, she took obvious pride in tracing the distinctive indigenous tradition of Irish law and the deliberate act of nation-making that the first generation after independence engaged upon, a generation that included her grandfather, Seán Lester. This led her to the conclusion that Ireland in 1922 and 1937 had taken steps on a journey on a road less travelled by other countries with a common law legal system. She quoted the famous Robert Frost poem, and said that Ireland had taken the road less travelled in 1937. But it is also worth saying that Susan Denham took a road not just less travelled: she took a road that, until that time, had not been travelled at all.

Time for a new role

Susan was a quiet, calm, polite but firm chairperson. She rarely showed irritation and almost never anger. Only very dedicated Denham watchers would have noticed that on some days the hair band was pushed much further back on the head and that the hand rustled impatiently in her envelope of pens and paperclips. Any aspirant actor at the Gaiety School of Acting could have learnt from her quiet gestures – the wealth of feeling that could be conveyed in the act of putting down a pen.

We will miss all these things.

But some topics could successfully deflect even Susan Denham from her list of tasks. First and foremost there is family. No one could doubt the enormous pride she has in her family or the real sacrifice in family time that has been involved in her judicial career. Susan is also enthusiastic about what can be described generally as 'equine matters', particularly Connemara ponies. Her ideal moment is to see a young family member on a pony jumping a makeshift fence in a field in the west of Ireland. And such are the capacious skills and multitasking nature of the Supreme Court bench that we have among our members people with substantial conversational capacity on equine matters. There were some initial difficulties in translation as Connemara, Clifden and the RDS had to engage with Leopardstown, Kilbeggan and Ballinrobe, and there was an opportunity for some amusing misunderstanding about the meaning to be attributed to the word "pony". For John Hewitt, horses were embodied in some way in his sense of Irishness, a sense of freedom that was unconstrained by tradition or politics. In one of his great poems, he talked of "the King's horses going about the King's business, not mine".

That metaphor can be turned around to capture much of Susan's career. For many years now she has been minding the State's horses, a serious woman concerned with certain duties and now, at last, she can turn to her own. Susan always arrived early to work, but few know that before that early start, she has already spent the morning working with her horses. I have never been entirely comfortable though with her evident view that cleaning stables and dealing with high-spirited, headstrong creatures was the ideal preparation for a day in the Supreme Court.

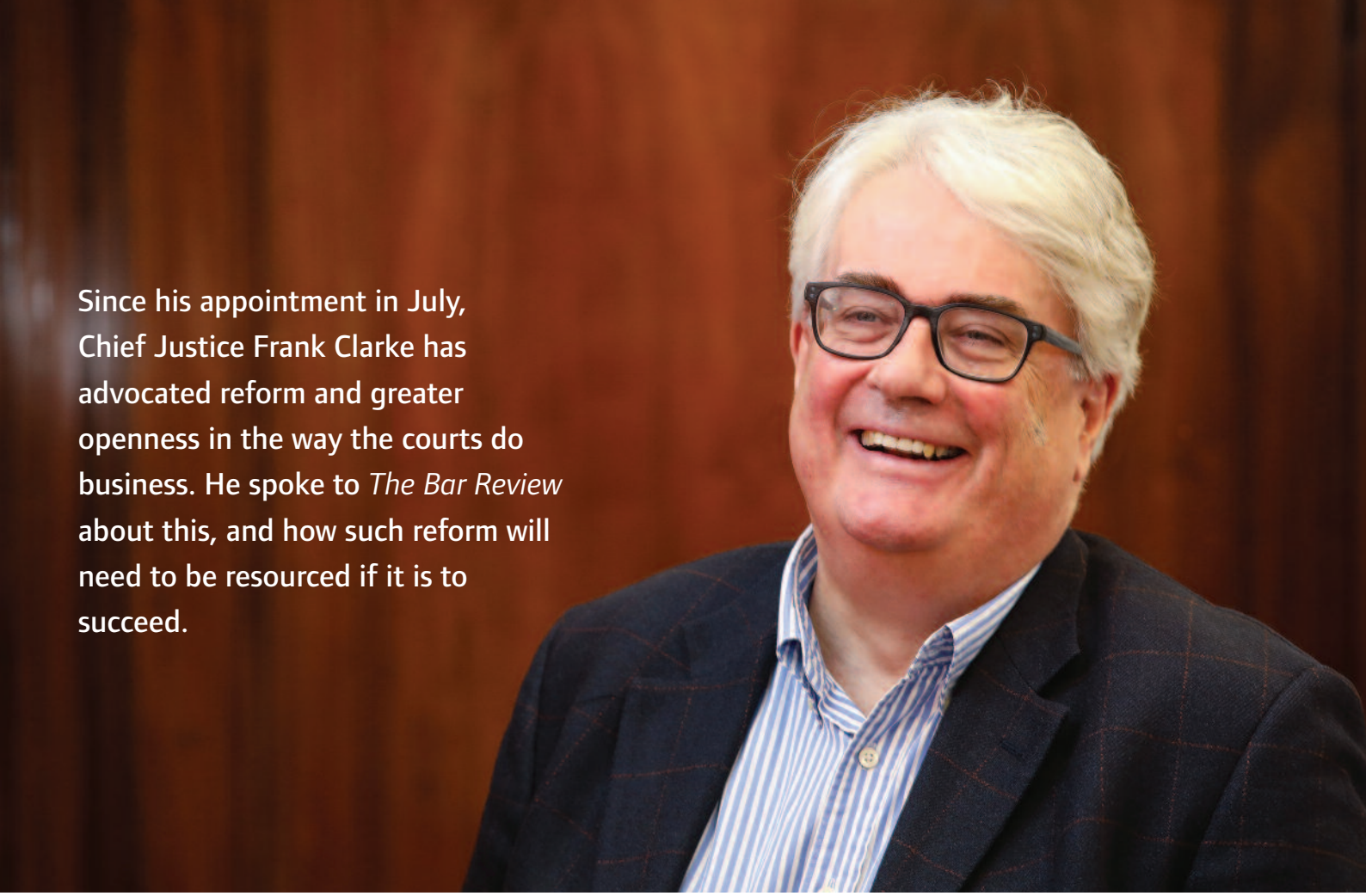
In some sense, it does a disservice to Susan Denham to describe her as the first of this, or the only that, or pioneering in this or that role. I suspect that the highest praise that Susan Denham would value is that she was the 35th Judge of the Supreme Court and the 11th Chief Justice of this State, that she lived up to the highest standards of those positions and added her distinctive voice to our law.

When junior counsel were called to the Bar, Susan advised them "to be courageous, exercise integrity, self-awareness and courtesy in your work and dealings with people". Perhaps there is no better tribute than to say that she lived up to and embodied her own advice.

Immediately after his retirement at the youthful age of 90, Oliver Wendell Holmes gave a speech that contained both advice and a metaphor which might be interesting to our own relatively youthful retiree: "the work is done, but just as one says that, the answer comes, the race is over, but the work is never done while the power to work remains".

I do not doubt that there is more work to be done. The ranks of the dignified, the considerate, the kind and the thoughtful are always in need of recruits. But after 25 years it is time to say some very short sentences:

"Good luck. Take care. Don't be a stranger. And most of all: thank you."



Since his appointment in July, Chief Justice Frank Clarke has advocated reform and greater openness in the way the courts do business. He spoke to *The Bar Review* about this, and how such reform will need to be resourced if it is to succeed.

Justice for all

Chief Justice Frank Clarke talks about the late 1960s, when he did his Leaving Certificate, as "a time of widening horizons". With the introduction of free secondary education in 1967, and third-level grants in 1968, it was an optimistic time, and so being the first person in his family to go to university didn't faze the Walkinstown native: "Perhaps I was naïve but I was never aware of a difference because of my background".

While clear that university was the place for him, the career that would result was by no means certain, and he completed a degree in maths and economics at UCD before an interest in politics and debating led him, through the college debating societies, to an interest in law, which eventually took him to King's Inns.

The Chief Justice has retained an interest in legal education, holding positions at King's Inns, Griffith College, Trinity College Dublin and University College Cork. He is, of course, aware that many young people still face considerable barriers in trying to access a legal career, particularly at the Bar, and supports any measures to increase accessibility: "I'm very happy to see measures like the Bar's Transition Year Programme and the Denham Fellowship, but there is always more that can be done".

Ann-Marie Hardiman
Managing Editor at Think Media Ltd

For the Chief Justice, the key is to try to replicate the supports that young people from more privileged backgrounds might have in making their career choices: "A young person in a fee-paying school wouldn't need much help to meet someone who can advise them on a legal career".

He has been involved in the 'Pathways to law' initiative of the Trinity Access Programme, which was set up to do just that: "We found that people going through the Access Programme were not choosing certain paths, such as law or medicine, so it was decided to have specific pathways to encourage people who perhaps mightn't have thought it was something they would be able to do, and it has been successful".

Access to justice

Chief Justice Clarke has spoken about his priorities for his tenure, and access to justice has been a particular theme. He feels there has been a consensus for some time in the profession that reforms are needed: "The bit the judiciary has control over are court procedures, so attempting to streamline and make easier the way in which court proceedings operate is the thing we can contribute. Justice Kelly's working group [the review group, headed by President of the High Court Mr Justice Peter Kelly, to recommend reforms in the administration of civil justice] will be a very important part of that".

There are certain areas where he feels strongly that reform is needed, for example in the area of discovery: "In certain types of cases, documentary disclosure has become a monster in terms of its burden on the parties, both financially and in other ways".

Of course, discovery can be a crucial element of a case, so reform needs to be proportionate and appropriate: "It's easier to state the problem than to find a solution. This needs careful consideration, and Justice Kelly's committee is going to look at this, which I very much welcome".

There are also proposed reforms around more routine matters, such as the management of the procedural and administrative parts of cases. In other

countries, these tasks are carried out by properly qualified staff, such as masters or legal officers, making better use of judicial skills by freeing judges to run cases.

Chief Justice Clarke's second priority is indeed around the back-up given to judges in their work, such as greater access to researchers (in Ireland, judges have far fewer researchers than their colleagues in other jurisdictions). He sees the two issues as connected: "There are better procedures and better ways of doing things we could implement if we had that kind of back-up; the two are different sides of the same coin".

These things may seem straightforward, but the challenge is to identify the differing needs of various sections of the Courts Service and the judiciary, and then to figure out how to resource the necessary reforms: "It will take about six months to put a plan together. We need to identify what judges need to be able to do their job more effectively, and to present that plan to Government during the next Budgetary round. Reforms would probably be introduced over a number of years, but we need to set out a detailed plan, make a convincing case for the ways in which we think it will make things better, and cost it".

Another area where Chief Justice Clarke feels there is significant scope for improvement is in the use of information technology, which he says is far behind where it needs to be as a result of funding cuts during the recession. The first reform in this area is a pilot project to place the process of application for leave to appeal to the Court of Appeal entirely online, which will hopefully be in place in about a year's time.

Public engagement

The Chief Justice also supports greater public engagement by judges, but feels these interactions must fall within certain parameters: "There are limits – the primary job of a judge is to decide a case and I don't think they should be in the public domain explaining why they've decided that case that way. But it's important that the public understands how the courts work. Even if people do understand the system, there may be criticisms, and some may be legitimate. But if the public don't have a proper understanding of how the courts work, and why the people in them think they should work that way, then there may be criticisms that are not justified. Judges need to engage, not on our primary job, but on why the system works the way it does, perhaps to demystify it to a certain extent".

In the week in which our interview took place, a significant and historic step in this process of demystification took place with the first ever televisation of a Supreme Court judgment in Ireland. Chief Justice Clarke is pleased with the reception it got: "It's a baby step, and we plan to televise more judgments. The Supreme Court is a good place to start, dealing as it does with issues of public importance. If we're happy with the way it works we would hope to move on to having the actual argument filmed in due course".

In the same week, a high-profile case, heavily reported in the media, raised the issue of sentencing, specifically the perception of undue leniency. This certainly falls within the discussion of public understanding of the justice system, but Chief Justice Clarke acknowledges that it may not be possible to educate the public on the subtleties of particular cases, and that judges may not be the best people to do this: "The better course might be if legal or criminological experts got more traction in being able to explain to the public at least what the process is trying to do".

"The primary job of a judge is to decide a case and I don't think they should be in the public domain explaining why they've decided that case that way."

When discussions of sentencing arise, they are often accompanied by calls for more guidelines on sentencing for judges. Chief Justice Clarke is personally in favour of sentencing guidelines, if they are properly resourced: "The UK Sentencing Council has a budget in the order of €1.5m. You might say that the UK is a big country, but we would have broadly the same types of cases, so the same number of guidelines would be needed, and they would need to be constantly revised to reflect new legislation, new offences, or changes in sentencing".

Any guidelines should leave significant discretion to the judge in the case, but might provide a framework into which sentencing can fit: "People can then see why a particular sentence was [imposed] in that particular position. I think that would help judges and help public understanding, but only if it's done properly".

Judges

One area where issues around the resourcing of the Courts System are particularly visible is in the Court of Appeal. Its establishment in 2014 was, of course, meant to facilitate the aforementioned focus of the Supreme Court on matters of greater public import, and while Chief Justice Clarke feels this is

Behind the veil

Part of the public's ongoing fascination with the Supreme Court lies in the fact that very little is known about the way it goes about its business. Chief Justice Clarke points out that it's no secret but no one ever asks!

"The model in Ireland, and in the UK as far as I know, is that the most junior judge makes the first contribution, followed by their colleagues in ascending order of seniority [in the US, interestingly, it's the opposite]. Then there may be a free discussion. If there is broad consensus, then someone volunteers or is 'volunteered' [by the Chief Justice] to write the judgment. The judgment is circulated by email and judges make suggested amendments as appropriate until a consensus around the text that will be delivered is reached. Obviously if someone doesn't agree there may be a dissent, but they are dealt with on an ad hoc basis".

It's a challenging process at times, but satisfying for all that: "An engagement like that improves the quality of judgments. When someone you know and respect takes a different view, you have to accommodate why you don't agree with that in your own judgment. I think that process of interaction, in the cases where there may be different views, is very useful to the final judgments".

broadly the case, the shortfall in appointments to the appellate court has created a backlog: "The Court of Appeal is clearly unable with its current numbers to deal with its caseload. Justice Sean Ryan [President of the Court of Appeal] said that with their current numbers they could handle about 320 civil cases a year, and they're getting 600. That's not sustainable. I'm hoping that the Supreme Court will sit in the first two weeks in December to deal with Court of Appeal return cases [the legislation allows for such transfers], but this is not a long-term solution – we need more judges".

Not all proposed reforms have been welcomed, and the issue of judicial appointments has been a source of no little controversy. Chief Justice Clarke has added his voice to the concerns of his colleagues on the bench that the proposed new process will not attract the best candidates at a time when more judges are so badly needed: "There is a general perception that we haven't attracted as many leading practitioners in the last while as might have been the case in the past, but I think that we're getting to a stage of getting leading practitioners back. It's important to point out that you don't have to have been the best barrister in Ireland to be the best judge. But you want your share of the best – those who want to be judges and would be suitable – and we need to encourage that. One of the concerns about any appointment system is: is it likely to attract the best? It's fair to say that the judiciary is not convinced that the current proposal will improve that likelihood".

The long-awaited Judicial Council Bill is another step in this process of reform. While public discussions have focused on its disciplinary function, Chief Justice Clarke would like to see more emphasis on the issue of training for judges, which is a key element of the legislation: "There are often areas where it isn't clear what the right thing to do is. I'm not talking about how to decide a case but, for example, when should a judge withdraw from a case. Having better support and training at that level is a way to reduce the need for a disciplinary process, so I would see the two as connected but of equal importance, and I think it is unfortunate that most of the public emphasis has been on the disciplinary side and not enough on the support side".

Of course, yet again it all comes down to resources. The Chief Justice has been involved in a number of international judges' organisations throughout his time on the bench, and says that funding for such supports in Ireland falls far short of the norm. He praises the system in Scotland, where he received training when he was appointed to the High Court, as an example of the type of system that might work here. In Scotland, a sheriff (broadly equivalent to a Circuit Court judge) is seconded for a three-year period to run the training, which raises the issue of resources again: "That's another judge who is being paid a judge's salary but who is not hearing cases".

As regards disciplinary cases, he feels that debates around keeping findings against judges private originate in a lack of understanding of the differences between the judiciary and other professions: "Some of the commentary has focused on asking why shouldn't the rules for judges be the same as any other regulated profession. There is insufficient recognition of the fact that you have a readymade group of people that have lost their case before a judge, and there needs to be some care exercised in how you practically operate a disciplinary system in that way. That being said, I can see the case whereby if someone is, after a proper process, found to be guilty of something serious, that may need to be made public".

Brexit

There has been much discussion of the legal implications of the UK's decision to leave the European Union. Chief Justice Clarke feels strongly that as the major common law country in the EU post Brexit, Ireland needs to be represented on relevant internal committees, where up to now the UK has been active: "We're going to have to have a person at the table to voice the common law position, and even in resources terms, if there is to be an Irish judge on a lot of committees where perhaps in the past there was a UK judge, that means that judge isn't going to be at home".

Deeper involvement at a European level is likely to increase opportunities for Ireland's legal profession to benefit from Brexit, something the Chief Justice feels is a realistic aspiration, if the work is done to support it. He also points out that litigation arising from Brexit is likely to be quite complex, and will be demanding on the resources of the Courts Service, in particular the Commercial Court: "The Irish Commercial Court has a very good reputation because successive presidents of the High Court have allocated judicial resources to it. If it gets more work because of Brexit, it isn't going to be able to maintain that reputation unless more judges are allocated".

Eclectic taste and robust debate

Chief Justice Clarke is married to Dr Jacqueline Hayden, who teaches in the Department of Political Science in TCD, and admits that their household is often home to "robust debate". His son has followed him into law, and is a barrister in his fifth year, while his daughter works as a carer in the Royal Hospital in Donnybrook.

His love of sports, particularly horseracing, is well known, and he still stewards at race meetings when he can ("It's nice to do something that you like that's different from the day job"). He credits this love of all things sporting to his father, and he's passing it on to his own son, as they share a love, and season ticket, for Leinster Rugby.

He's also a big music fan with very eclectic tastes, from classical to rock, and enjoys getting to concerts when he can. He recently saw the Red Hot Chilli Peppers (again with his son) and enjoys being introduced to his son's tastes, while passing on his own favourites.

LEGAL UPDATE

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[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.

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Comptroller and Auditor General (Accountability of Recipients of Public Funds) (Amendment) Bill 2017 – Bill 119/2017 [pmb] – Deputy David Cullinane and Deputy Mary Lou McDonald
Contempt of Court Bill 2017 – Bill 117/2017 [pmb] – Deputy Josepha Madigan
Criminal Justice (Corruption Offences) Bill 2017 – Bill 122/2017
Finance Bill 2017 – Bill 115/2017
Maternity Protection (Local Government Members) Bill 2017 – Bill 121/2017 [pmb] – Deputy Anne Rabbitte
Mental Health Parity Bill 2017 – Bill 112/2017 [pmb] – Deputy James Browne
Planning and Development (Strategic Infrastructure) (Amendment) Bill 2017 – Bill 120/2017 [pmb] – Deputy Anne Rabbitte
Vacant Housing Refurbishment Bill 2017 – Bill 113/2017 [pmb] – Deputy Barry Cowen
Water Services Bill 2017 – Bill 111/2017

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Civil Law (Costs in Probate Matters) Bill 2017 – Bill 118/2017 [pmb] – Senator Michael McDowell, Senator Billy Lawless, Senator Victor Boyhan and Senator Brian Ó Domhnaill
Landlord and Tenant (Ground Rents) (Amendment) Bill 2017 – Bill 116/2017 [pmb] – Senator Robbie Gallagher, Senator Catherine Ardagh and Senator Keith Swanick
National Asset Management Agency (Amendment) Bill 2017 – Bill 114/2017 [pmb] – Senator Rose Conway-Walsh, Senator Paul Gavan and Senator Padraig Mac Lochlainn

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Legal Metrology (Measuring Instruments) Bill – Bill 81/2017 – Committee stage
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Water Services Bill 2017 – Bill 111/2017 – Committee stage

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

Bills and legislation – https://beta.oireachtas.ie/en/bills/
Government Legislation Programme updated Autumn 2017 – http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

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The Mediation Act

This new act provides innovations to encourage mediation to exist alongside litigation but has elements which undermine mediation's confidentiality.

William Martin Smith BL

The recently enacted but not yet commenced Mediation Act 2017 forms part of a context of ongoing reform and modernisation of litigation in Ireland. The overall thrust of the Act is to provide for a defined mediation process, which can exist alongside court litigation, without impacting either the voluntary nature of mediation or the parties' right to return to, or commence, court proceedings.

Mediation is utilised in its own right as a standalone means of dispute resolution as well as alongside legal proceedings. Currently, mediation does not prevent a litigant from initiating proceedings and does not impede a litigant's right of access to the courts. Nothing in the Mediation Act fetters this important right.

The interplay between court and mediation is regulated by Order 56B of the Rules of the Superior Courts and in Order 49B of the District Court Rules.[1] The Act now provides for the process,[2] broadly similar to that provided in the rules of court, through which the parties (or indeed the court, of its own volition) can apply to the court to seek an order inviting the other party to mediate. The Act also provides for the adjournment of proceedings to facilitate the mediation process.[3] Just as before, a court cannot direct the parties to mediate.

Scope of the Mediation Act 2017

The Act allows parties to a dispute broad discretion as to how the terms of a particular mediation are drafted. The definitions of "mediator" and "mediation" are widely defined under the Act.[4] Moreover, the Act is drafted so as to specifically exclude certain areas or types of dispute (rather than to proscribe the types of dispute which are included in the application of the Act). Those excluded areas include: arbitrations; disputes which fall under the function of the Workplace Relations Commission; certain specified applications and proceedings under taxation legislation; judicial reviews; proceedings against the State in respect of the infringement of fundamental rights and freedoms; proceedings under the Domestic Violence Acts, 1996 to 2011; and, proceedings under the Child Care Acts, 1991 to 2015.[5]

Mediation

Section 6(1) sets out in legislation the principle that participation in mediation shall be voluntary at all times. Section 6 goes on to permit a party to mediation to withdraw from it at any time, and to be accompanied and assisted in the mediation by a person, including a legal adviser, who is not a party.[6] Depending on the context, this person could include another professional adviser or a friend or family member. Another important aspect of mediation, again enshrined in the Act, is that it is for the parties themselves, rather than the mediator or the court, to decide the outcome.[7] A mediator can explore areas of dispute and agreement with the parties and can assist in helping the parties agree a resolution. According to section 8(3), it is not for the mediator to make proposals to the parties to resolve the dispute, but the mediator can do so if requested.[8] It is not for the mediator to dictate a decision to the parties. This principle is protected by section 6(9) of the Act.

Section 7 sets out the basis on which the parties can agree to mediate their dispute and defines what an "agreement to mediate" should contain. This document should be prepared and signed by the parties and the proposed mediator, and should include: details of the manner in which the mediation should be conducted and the manner in which fees and costs of the mediation should be paid; the place and time of the mediation; a statement as to the confidential nature of the mediation; the right of each party to seek legal advice; and, the manner in which the mediation shall be terminated. This is an important document as it frames the terms of the mediation as agreed by the parties.

Currently, mediation does not prevent a litigant from initiating proceedings and does not impede a litigant's right of access to the courts. Nothing in the Mediation Act fetters this important right.

The mediator

The legislation does not provide a process for the appointment of a mediator in cases where the parties encounter difficulty in agreeing on the identity of a mediator. It must be borne in mind that mediation and the agreement to mediate is, and remains, voluntary. It is not for the legislation or the courts to impose a decision as to the identity of the mediator. Indeed, if the parties cannot take this first step together, it is perhaps a warning that the respective positions may be too deeply entrenched to foster a successful outcome to mediation. Different bodies will appoint a mediator, and the Chairman of the Council of The Bar of Ireland can, if called upon, do so. The Bar of Ireland maintains a register of qualified mediators for this purpose.

Once a mediator is agreed, the parties, with the mediator, will draft and sign terms of agreement to mediate under section 7. Section 8(1)(a) requires a mediator to make reasonable enquiry so as to satisfy him or herself that he or she is not conflicted. The requirement to avoid conflicts of interest is an ongoing one throughout the mediation process, and if such a conflict does arise, the mediator shall notify the parties and cease to act unless the parties consent otherwise.[9]

It is important to note the contents of sections 8(3) and 8(4), which provide that, unless requested to do so by the parties, the mediator shall not make proposals to the parties. It is for the parties themselves to determine the outcome and if proposals are suggested by the mediator, at the request of the parties, the parties remain free to reject such proposals. The mediator should facilitate the process, led by the parties, rather than determining the outcome. If a mediator suggests proposals without the parties having so requested, any settlement reached and signed may be open to subsequent challenge by one or more of the parties.

The mediator shall act expeditiously and with impartiality, and ensure that the parties are aware of their right to obtain independent legal or other advice prior to the signing of any mediation settlement.[10]

Section 10(2)(e) contemplates the potential for redress against a mediator by way of civil claims and/or complaints to professional bodies for negligence or misconduct. Mediators must bear in mind that the Act does not provide any statutory limitation of liability in respect of damage or loss arising from negligence or other breach of duty or wrongdoing in the mediation process.

However, the Act does not provide any barrier to a mediator limiting or excluding liability for negligence or otherwise in the terms of the agreement to mediate.
A code of practice is to be published by the Minster for Justice and Equality under section 9(1), which will set standards for the conduct of mediation. Various mediation bodies already have their own codes of conduct, which will have to be observed with reference to the code published under the Mediation Act and the Act itself.

Statute of limitations

The Act has a significant impact on statutory limitation periods, which should be borne in mind by practitioners. Section 18 of the Mediation Act provides for a process similar to that provided for in the Personal Injuries Assessment Board Act 2003, whereby:

"in reckoning a period of time for the purposes of a limitation period specified by the statutes of limitation,[11] the period beginning on the day on which an agreement to mediate is signed and ending on the day which is 30 days after either- (a) a mediation settlement is signed by the parties and the mediator, or (b) the mediation is terminated, whichever first occurs, shall be disregarded".[12]

A number of points arise from this section. First, the periods of time during which the parties are seeking consent of the other side to mediate, approving the identity of the mediator, and engaging the mediator are all periods during which time continues to run. These processes can sometimes take a number of weeks, so care must be taken to ensure that a limitation period does not expire during this time. An unscrupulous litigant may use this process to run out the clock on an unwary (or unadvised) adversary. Time does not cease running until the agreement to mediate (defined in section 7 and described earlier in this article) is signed by the parties and the mediator. It is not possible for one party to unilaterally act so as to cause the suspension of time under the statutes of limitation. It is also therefore important, when acting as a mediator, that the agreement is signed without delay, as the date the mediator and the parties, sign the agreement is necessary for the time to stop.
The second point is that time will begin running 30 days after one of two defined events: the signing of settlement terms by the mediator and the parties; or, the termination of the mediation. The former event is clear but the latter may, depending on the circumstances and form of the mediation, be less exact. This is despite the requirement in section 18(2), which provides that a mediator shall inform the parties of the date on which the mediation ends.
The date on which the mediation is terminated may provide a degree of uncertainty regarding the cessation of the suspension of time. For example, the circumstances contemplated in sections 6(6) and 6(7), whereby the mediator can withdraw from acting in the mediation at any time, could present a degree of ambiguity in the operation of section 18(1). If a mediator withdraws and does not inform the parties that the mediation has ended, or the date of such ending, there could be ambiguity concerning the date on which such termination occurred. Section 18(2) obliges the mediator to state the date when the mediation ends but is silent as to whether the termination, for the purposes of section 18(1), is necessarily dependent on this notice being provided by the mediator. The issue gives rise to the potential for a degree of uncertainty in the Act, and circumstances thrown up by real life situations may test the suspension of time provided for in the Act. For that reason, litigants and practitioners are advised to take care. Mediation may be voluntary but compliance with limitation periods is not.
A final point to note is that, while time may be suspended, the parties' right to litigate is not, and nothing in the Act prevents access to the courts, whether by way of issuing proceedings or by seeking interlocutory relief, and mediating at the same time.

Confidentiality

In keeping with the confidential nature of mediation, section 10(1) states that all communications, records and notes relating to the mediation shall be confidential and not disclosed in any proceedings before a court or otherwise. Section 10(2) provides for exceptions to this rule, including situations where disclosure is necessary to enforce a mediation settlement, or to prevent injury to a party, is required by law, or where it is necessary to prevent or reveal the commission of a crime. A further exception is in circumstances involving a claim of negligence or misconduct of the mediator in the course of the mediation.[13]
The exceptions to the confidentiality of the mediation process contained in section 10(2) are widely drafted. It is not stated at whose instigation the communications might be disclosed, to which body or court such an application would be made, the nature or severity of the injury, crime or threat which would require the disclosure, or the identity of the "law" which might require the disclosure of the communications.
An important saver, for the purposes of litigation, is contained in section 10(3), which states that documentation otherwise discoverable shall not become privileged or otherwise inadmissible in court proceedings simply due to its use in the course of mediation.
There is a conflict in the Act between the confidentiality protected by section 10 and the requirement for a mediator's report to court in circumstances where the court has invited the parties to mediate under section 16. Section 17 provides that where a mediation has not taken place, the mediator's report shall include a statement of the reasons why it did not, and if it did, a statement as to whether a settlement has been reached and the terms of the settlement.
It is difficult to say how the conflict in these sections can be resolved. It is submitted that the terms of settlement, where section 16 has been invoked by the court, would seem to be excluded from the confidentiality protection enshrined in section 10(1), but the Act does not explicitly say so. A significant benefit and attraction of the mediation process is the privacy it affords participants. The Act does not provide for any confidentiality in the manner in which the section 17(1) report is presented to the court. A party to mediation who agrees what they think are confidential terms may be dismayed to see those terms reported in open court.

Costs

One concrete example of how the confidential nature of the mediation process may be curtailed is set out in section 21. Where the court has referred a matter to mediation under section 16, it may have regard to any unreasonable refusal or failure by a party to consider using mediation or to attend mediation, in the awarding of costs in proceedings. While this threat will certainly soften attitudes towards mediation, it is an erosion of the voluntary nature of mediation, albeit one already broadly present in the courts system in the form of Order 99 Rule

1B of the Rules of the Superior Courts. It should also be borne in mind that the threat to parties in section 21 should not operate so as to force agreement, as the section is limited in its application to the refusal or failure to consider mediation or to attend for mediation.

Enforceability of mediation agreements

Mediation is a voluntary process. However, the parties may agree, under section 11(1), when a mediation settlement has been agreed and whether that agreement is to be enforceable. The interplay between section 11(1) and section 11(2) provides that a mediation settlement shall have the effect of a contract between the parties, unless it is expressly stated to have no legal force until incorporated into a formal legal agreement.

Under section 11(3), the court may enforce a mediation settlement on the application of a party or parties to the mediation, unless satisfied that the settlement does not adequately protect the rights of the parties, or is not based on full and mutual disclosure of assets, is contrary to public policy, or if a party has been unduly influenced in reaching the settlement. This section is somewhat at odds with the parties' right to agree whether a settlement is to be enforceable or not, as set out in sections 11(1) and 11(2). Moreover, this section states that it is without prejudice to sections 8 and 8A of the Family Law (Maintenance of Spouses and Children) Act 1976, but this section on its express terms appears to have a general application to all mediated settlements. While one might expect this to arise in special cases, for example in settlements involving children, the section is not worded to be limited to special cases. It is difficult to see how sections 11(1) to (3) will operate in tandem if section 11(3) is not confined in application to the Family Law (Maintenance of Spouses and Children) Act 1976. How this conflict is interpreted by the courts remains to be seen.

Obligations of solicitors and barristers

The Act, in section 14, sets out a number of requirements relating to mediation to be met by solicitors (and barristers, under section 15, where and when permitted to issue proceedings on behalf of a client not represented by a solicitor) prior to issuing proceedings. Section 14(1) requires a solicitor, prior to issuing proceedings for that client, to advise the client to consider mediation to resolve the dispute at issue, to provide information on the mediation process and names and addresses of mediators, to advise on the benefits and advantages of mediation, and to advise that mediation is voluntary. The solicitor is also required to advise that mediation may not be appropriate where the safety of the client or their children is at risk.[14]

Solicitors are also obliged to inform their clients, prior to issuing proceedings, of the confidentiality of the mediation process and the enforceability of mediation settlements contained in sections 10 and 11, respectively.[15]

Once proceedings do issue, under section 14(3) the proceedings must be accompanied by a statutory declaration, made by the solicitor, that the requirements of section 14(1) have been complied with, and if no such declaration is made, a court shall adjourn proceedings for so long as necessary as to allow compliance with section 14(1) and to provide the declaration under section 14(2). The requirement to comply with sections 14(1) and 14(2) may delay the issuing of proceedings, but in cases where time is of the essence in issuing proceedings, the Act is kind in that it does not act so as to bar or fetter the issuing of proceedings, but simply provides for the adjourning of the proceedings as long as is reasonably necessary to ensure compliance with section 14 (or 15 as the case may be).

Section 14 does not apply to proceedings or applications under sections 6A, 11 or 11B of the Guardianship of Infants Act 1964, section 2 of the Judicial Separation and Family Law Reform Act 1989, or section 5 of the Family Law (Divorce) Act 1996.

If the provisions of the Legal Services Regulation Act 2015, which permit barristers to take instructions directly from and to issue proceedings directly on behalf of clients, are commenced, barristers will be under the same obligations as solicitors are, under section 15(2) of the Act.

Conclusion

The purpose of the Mediation Act 2017 is to promote mediation as a form of dispute resolution. The Act does not rewrite the rules on mediation to do so, but it does provide some innovations, which can encourage mediation to exist alongside litigation. However, the Act is not perfect and there are areas which may cause confusion for parties involved in mediation. Moreover, there are elements of the Act which undermine the confidential nature of mediation. Provided parties to mediations and their advisers are aware of the provisions of the Act, submitting to mediation need not hold any unexpected surprises.

References

1. Order 67, Rule 16 of the Circuit Court Rules provides for the use of the practice and procedure of the High Court in instances where no rule is provided by the Circuit Court Rules.
2. In section 16.
3. Section 19.
4. Section 2, interpretation: "mediation" means a confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute. "Mediator" means a person appointed under an agreement to mediate to assist the parties to the agreement to reach a mutually acceptable agreement to resolve the dispute that is the subject of the agreement.
5. Section 3(2).
6. Section 6(4).
7. Section 6(9).
8. Section 8(4).
9. Section 8(2)(a).
10. Sections 8(2)(c) and 8(2)(d).
11. This is defined in section 1(2) of the Statute of Limitations Amendment Act 2000.
12. Section 18(1) of the Act.
13. Section 10(2)(e).
14. Section 14(1)(d).
15. Section 14(1)(e).

Potential reform of discovery procedures

The Commercial Litigation Association of Ireland has produced a discussion document with the aim of beginning to address the issues around discovery.[1]

Andrew Fitzpatrick SC

The Bar of Ireland's current initiative in promoting the legal services sector in Ireland in light of Brexit[2] will inevitably lead those doing business in the EU to consider whether the Irish civil justice system provides an efficient and reasonably cost-effective forum for resolving commercial disputes. More importantly, as practitioners, we have to ask ourselves whether the Rules of the Superior Courts as currently framed provide a practical means of access to the courts for all of those who seek to protect their rights.

In a recent speech to mark the commencement of the Michaelmas Court Term, the Chief Justice, Mr Justice Clarke, remarked "that at least some aspects of our civil procedural model are beyond their sell-by dates",[3] and in a related interview given on RTÉ Radio One,[4] he referred in some detail to concerns that the costs involved in the discovery process were preventing ordinary litigants from being able to vindicate their rights in court. (See pages 157-159 of this edition for an interview with the Chief Justice.)

As colleagues will be aware, the President of the High Court, Mr Justice Kelly, has been appointed to chair a working group on reviewing and reforming the administration of civil justice in the State, and in a speech earlier this year at the Four Jurisdictions Conference in Dublin,[5] he also referred to the problems that the costs and time involved in making discovery have caused in the administration of justice: "Delay and cost are the two great obstructions to the administration of a fair and expeditious system of civil justice. The greatest contributor to both is discovery".

With these concerns in mind, the Commercial Litigation Association of Ireland (CLAI) earlier this year formed a sub-committee[6] for the purpose of considering what changes could be made to the Rules of the Superior Courts (the Rules) to reduce the time and costs involved in making discovery. The sub-committee has recently produced a discussion document, which, after further discussion, it is hoped will form the basis of a proposed set of amendments to Order 31, Rule 12 of the Rules, which will be submitted both to Mr Justice Kelly's working group and also to the Rules Committee. In framing the discussion document, the sub-committee has sought to identify both what are the main drivers of the costs and delay that arise in the discovery process, and also possible solutions to address these.

Electronically stored information

The most commonly cited reason why making discovery can be an extremely costly and time-consuming process is the fact that so much of the material that parties are required to discover does not comprise documents in a physical, hard copy format, and more frequently comprises electronically stored information (ESI), which is stored in a variety of mediums and devices and may, in many cases, be held by several different custodians, situated in different locations.

There is no doubt that as technology has advanced, and as we have over time made more use of not only computers but of personal devices such as smartphones and tablets to communicate and store information, the quantity of what the law regards as documentary material has grown exponentially. Given that this trend is hardly likely to lessen as time goes on, there is a limit to the extent to which the Rules can be amended to include detailed procedures dealing with how ESI is to be dealt with in discovery. It would be unhelpful if changes that are made to the Rules to cater for ESI were rendered obsolete soon afterwards.

However, amendments can be made to include some procedures in the Rules that should remain capable of being applied irrespective of how technology changes over time. For example, as has recently been proposed in the UK,[7] the Rules could be amended so as to require parties to discuss and seek to agree upon limiting the scope of searches of ESI by, for example, agreeing to limit searches to particular date ranges of documents, particular custodians, specific document repositories or geographical locations. Similarly, the Rules could require the parties to use technology-assisted review processes in making discovery unless the technology in question was not reliable, efficient or cost effective.

The basis of the obligation to make discovery: categories of documents

Aside from making provision for how ESI is to be reviewed and discovered, the discussion document envisages that more fundamental changes could be made to the basis of the parties' respective obligations to make discovery.

The requirement that parties should seek discovery of "precise categories of documents", and explain their reasons for so doing, was introduced by an amendment to the Rules in 1999,[8] and in 2009[9] a further amendment was made, which required the parties to specify each category of document into which each document being discovered falls. The changes were introduced following comments made by the Supreme Court in *Brooks Thomas Ltd v Impac Limited*,[10] which noted "the trend in modern times to seek discovery in almost every case",[11] but as Judge Kelly noted in his speech to the Four Jurisdictions Conference, "this fairly significant change to the Rules did not achieve much success".

The sub-committee has identified that because of the way in which litigation practices have developed since the amendments to the Rules were originally made, requiring parties to make discovery of categories of documents is now a driver of costs and of delay in litigation. The requirement to seek discovery of categories of documents leads to disputes about the wording of those categories of documents, and such disputes frequently have to be resolved by way of a motion for discovery. This increases the legal costs involved and, because of the time it can take to get a hearing date for a motion, the litigation as a whole is delayed.

Even when the parties have reached agreement on the wording of the categories to be discovered, those categories are usually phrased in quite broad terms. This leads to high volumes of documents being discovered, which are only of tangential relevance to the material issues in the case but which must nonetheless be reviewed, redacted and discovered because they technically fall within the wording of one or more of the categories of documents.

Finally, the obligation to specify each category of documents into which each document being discovered falls requires that document reviewers must not only determine whether the documents relate to the matters at issue in the case, but must also consider which of the many categories of documents each individual document falls within. This requirement lengthens and therefore increases the costs of the document review process. Moreover, as technology platforms cannot easily cope with disparate categories, it makes it harder to save costs through the use of technology-assisted review. A possible solution to this particular problem, which the discussion document suggests should be considered, would involve introducing in every case at specific points in the proceedings an obligation to make a form of general discovery of a number of predetermined categories of document, which meet the threshold of discoverability.

The threshold for discoverability: a retreat from *Peruvian Guano*

Under Order 31, Rule 12 in its current form, the primary test of discoverability is that a document must be relevant to the matters at issue in the proceedings. As is well known, the definition of relevance was drawn in particularly wide terms by Brett L.J. in *Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company*,[12] where he held that a document will be relevant where it is reasonable to suppose that it contains information which may either directly or indirectly enable the party seeking discovery either to advance his own case or damage his opponent's case, or it is a document which may fairly lead him to a train of enquiry which may have either of those two consequences.

The effect of the *Peruvian Guano* test is that a document will require to be discovered not only where it is directly relevant to an issue in the case, but also where it is indirectly relevant to that issue or where its relevance may not be immediately obvious but it may lead the party on a train of enquiry which may lead to it being relevant. This has obvious consequences for the time and costs of making discovery because it increases the number of documents which have to be reviewed and which ultimately have to be discovered.

The *Peruvian Guano* test has long since ceased to be the basis of the test for discoverability of documents in most common law jurisdictions. It was removed from the basic obligation to make discovery in the UK in 1999[13] and was instead replaced with an obligation to make "standard disclosure", which in effect requires a party to disclose only documents on which he relies, and documents which support or adversely affect his own case or the case of another party.[14] This model was in turn followed in Australia[15] and in New Zealand,[16] and while it has recently been supplemented as part of the Jackson Reforms to Civil Procedure,[17] most litigation in the UK tends to proceed on the basis of standard disclosure. While it might on one level be tempting to adopt the standard disclosure model for use in this

jurisdiction, there are at least two reasons for sounding a note of caution in that regard. Firstly, while the objective in introducing standard disclosure was to reduce the costs of making discovery, it seems that the proposal did not actually have the desired effect. In *Nichia Corporation v Argos Limited*,[18] Jacob L.J. observed that:

"Following the Woolf reforms, and notwithstanding their changes, practitioners … carried on much as they did before. The cost of patent and large commercial actions did not reduce: if anything it went up."[19]

Secondly, the experience of some members of the sub-committee in dealing with UK lawyers is that documents which are in fact relevant to the issues in a case are excluded because they do not fall within the strict confines of any of the specific categories of standard disclosure. The possibility that this would be a risk was highlighted by Judge Kelly in his speech to the Four Jurisdictions Conference: "It would be possible, I believe, for a highly material document to exist, which would be outside standard disclosure but within *Peruvian Guano*".

A possible solution to this particular problem could be that as part of the aforementioned general obligation to make discovery of predetermined categories of documents at particular stages, the party making discovery would be obliged to make discovery not only of documents on which he intends to rely, or which support or adversely affect the case of a party to the litigation, but also to make discovery of documents which are "material" to the issues in the case. In order to avoid the concept of materiality being confused or overlapped with *Peruvian Guano* relevance, the term could be defined so as to expressly exclude "train of inquiry" documents, and to include only documents which are directly relevant to the issues in a case.

Alternatives to discovery

There will be many cases where the costs of ordering a party to make discovery of all documents relevant to a particular issue could safely be avoided if the party was instead ordered to answer interrogatories dealing with that issue, or to deliver a sworn affidavit/précis of evidence that deals with a particular point. There may even be cases where it is not necessary to have discovery at all. It seems sensible that any amendments which are to be made to the Rules would allow parties to apply for directions to be made as to how the case should be brought to trial, either without discovery, or with limited discovery dealing with some issues and alternative procedures to deal with others.

Summary

The key objective of the CLAI sub-committee's discussion document on possible reforms to the Rules to reduce the time and costs of making discovery is to generate what we feel is a much-needed discussion among practitioners as to what specific measures can be taken to change the Rules so as to ensure that discovery is no longer "the monster" (to use the term Clarke J. adopted in *Thema International Fund plc v HSBC International Trust Services*)[20] it has become. Given the extent of the obstacles that the discovery process in its current form is capable of posing to the prompt and reasonably cheap disposal of litigation, it seems necessary to consider wide-ranging solutions that will require fundamental changes to the Rules. These changes may include the elimination of the requirement to seek and make discovery of categories of documents, and to instead require that predetermined categories of documents are discovered at specific points in time. Similarly, the changes may involve the removal of the *Peruvian Guano* test of relevance and its replacement with an obligation to make discovery of documents that are "material", i.e., directly relevant to the issues in a case. It does seem sensible that any changes to the Rules should include provision for directions to be made to allow for cases to proceed without discovery, or with limited discovery on certain issues, with alternative procedures to be adopted instead of discovery (e.g., delivery of interrogatories, affidavits, précis of evidence) to deal with other issues. An essential part of any changes to the Rules must be to introduce procedures designed to make the discovery of ESI more efficient and to encourage the use of technology-assisted review methodology. The CLAI discussion document is available at www.clai.ie and colleagues are encouraged to review it and to submit their comments via the website.

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4. Interview with the Chief Justice, Mr Justice Frank Clarke, on *The Marian Finucane Show*, RTÉ Radio One, September 30, 2017.
5. Four Jurisdictions Conference, Dublin, May 5-7, 2017.
6. Comprising also Brian Murray SC, Jonathan Newman SC, Helen Kilroy (McCann FitzGerald), Karyn Harty (McCann FitzGerald), Eileen Roberts (A&L Goodbody), Lisa Broderick (DAC Beachcroft) and Richard Willis (Arthur Cox).
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9. S.I. No. 93 of 2009: Rules of the Superior Courts (Discovery) 2009.
10. [1999] 1 I.L.R.M. 171.
11. ibid., at p. 178.
12. (1882) 11 Q.B.D. 55 (hereafter referred to as '*Peruvian Guano*').
13. As proposed by Lord Woolf in his report on reforming the Rules of Civil Procedure entitled 'Access to Justice: Interim Report', 1995, Ch. 3.
14. CPR, Rule 31.5.
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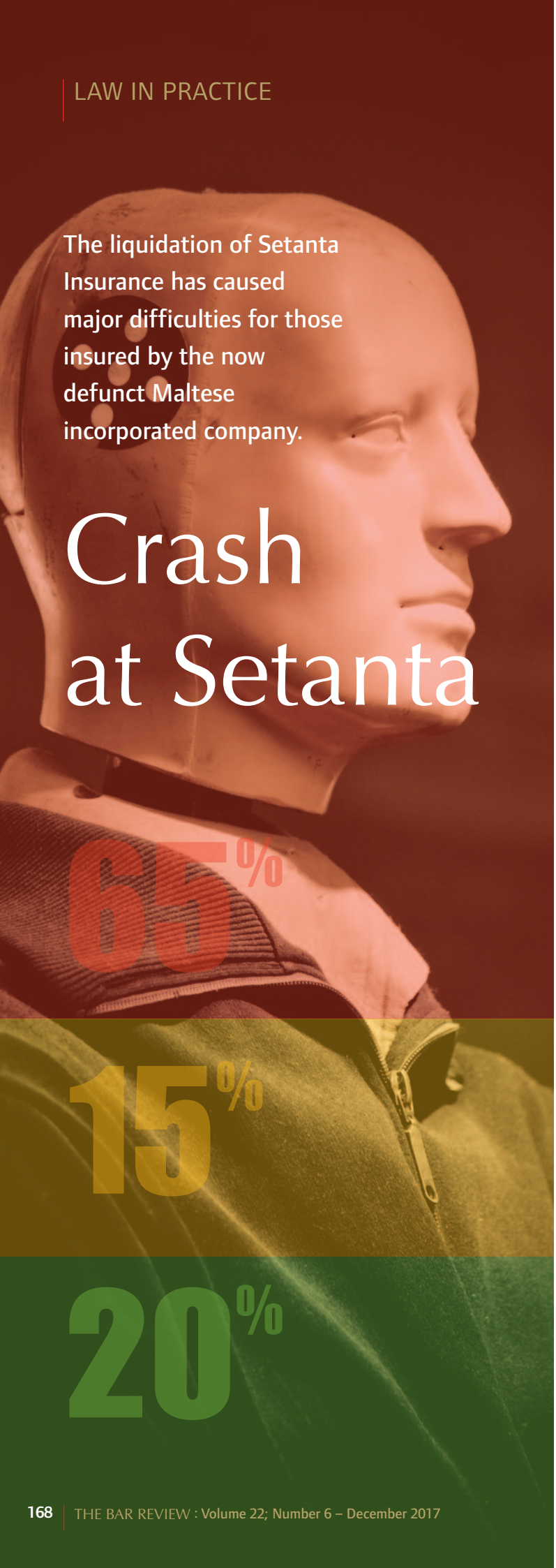


The liquidation of Setanta Insurance has caused major difficulties for those insured by the now defunct Maltese incorporated company.

Crash at Setanta

Edward S. Walsh SC
Sheila Reidy BL

Introduction

This article explores the financial risks now faced by Setanta Insurance policyholders, as well as the practical and ethical issues arising for lawyers involved in personal injuries claims.

Setanta Company Limited (Setanta) is a Maltese incorporated company that operated as an insurance provider exclusively in Ireland, and at the height of its business had issued some 75,000 policies to Irish customers. Setanta was regulated under the laws of Malta and not by the Central Bank, but was authorised to provide cross-border insurance services under the rules of the single market. The company was placed into voluntary liquidation in Malta in April 2014, which is being carried out under Maltese law. This liquidation has given rise to significant difficulties for former policyholders.

These policyholders had, in good faith, obtained a policy of insurance issued by a regulated entity (Setanta), had fully complied with their obligations under the terms of the road traffic legislation, and had obtained the necessary policies of compulsory insurance. However, in spite of such compliance, these policyholders now find themselves at serious financial risk.

The available information suggests that approximately 1,750 claims remain outstanding as against these previous Setanta policyholders. The overall potential value of the outstanding claims, as of June 30, 2017, is estimated at €105.9-112.9 million. The liquidator advised the Oireachtas Finance Committee on April 1, 2015, that he expected the liquidation to realise assets sufficient to cover just 30% of the claims. As the liquidation has progressed, the position has deteriorated. The liquidator now estimates that he will not be able to meet more than 22% of claims.

Legal proceedings

In the initial aftermath of the liquidation, an issue arose as to whether or not the Motor Insurers' Bureau of Ireland (MIBI) was required to satisfy judgments obtained against a former Setanta policyholder. Such was the argument put forth by the Law Society of Ireland in proceedings entitled *The Law Society of Ireland v Motor Insurers' Bureau of Ireland*.[1] The MIBI challenged this assertion and contended that such claims should be addressed to the Insurance Compensation Fund (ICF), which was established under statute to make payments to policyholders where an Irish or EU authorised insurer went into liquidation and where High Court approval had been received for such payments. The fund is required to meet third-party claims up to a limit of 65%, or up to a maximum ceiling of €825,000 per claimant.

While the Law Society succeeded in its argument before the High Court, and in turn before the Court of Appeal, the matter was ultimately determined by the Supreme Court, which found in favour of the MIBI. The central issue that the Supreme Court was required to determine was whether the MIBI Agreements extended to cover liability for claims against drivers whose insurer

had become insolvent. The Court, in the course of a detailed and considered judgment, ultimately found that the Agreements did not extend so far as to require the MIBI to satisfy judgments obtained in respect of an insolvent insurer. The responsibility therefore falls to the ICF.

Operation of the ICF

The Courts Service website notice dated November 30, 2016, identifies the circumstances in which the ICF will operate in the context of the Setanta liquidation. Of note, under the heading legal costs, it is specifically provided that:

"legal costs which may be awarded to a claimant under a court order, Injuries Board order to pay, settlement agreement or taxed order for costs which fall to be paid under a policy of insurance issued by Setanta shall also be covered by the ICF. Legal costs are considered together with damages to be paid to a claimant from the ICF when applying the maximum limit".

By way of clarification, it is then stated:

"For example, if a claimant was awarded damages of €70,000 and legal costs of €30,000 and both amounts were outstanding at the time Setanta went into liquidation, the maximum amount the claimant could be paid by the ICF is €65,000, that is, 65% of €100,000".

Thus, if one takes a claimant who has a modest claim where damages of €50,000 are awarded, and costs are taxed at a figure of €25,000, the total liability against the named defendant will amount to €75,000. The ICF is responsible for 65%, or €48,750, thus leaving a shortfall of €26,250. Assuming that the liquidation process results in a 20% distribution, the injured party/claimant will receive an additional €15,000, thus leaving an outstanding liability of €11,250, for which the named defendant, the former policyholder, is personally liable. Even a modest sum of that nature will result in serious financial hardship, and obviously that hardship will escalate with cases of a more significant nature.

To take a more extreme example, for an injured person who has sustained serious injuries, and whose case has a potential value of €2,000,000 and costs of an additional €400,000, the ICF will discharge a total of €825,000, leaving a liability of €1,575,000. Assuming a 20% distribution from the liquidation, that sum reduces by a further €480,000 but leaves a deficit of €975,000.

The Department of Finance has explored the issue of introducing more certainty to the structure of the compensation framework. This is proposed in the form of the Insurance (Amendment) Bill 2017. The Bill intends to deal with certain proposals made in the Review of the Framework for Motor Insurance Compensation in Ireland Report, endorsed by the Government in 2016, with a view to addressing the lacunae which were highlighted by the failure of Setanta. It is proposed to increase the level of ICF coverage from 65% to 100% for personal injuries, and €1,225,000 per claim for property, but as matters stand, it is not intended that such legislation will have retrospective effect.

Claims handling

The unfortunate Setanta scenario now involves numerous parties to litigation, each with its own interests, which are not necessarily *ad idem*. Inevitably there is a conflict between those interests, particularly those retained to act in the defence of the claims.

Currently, there are three potential sources of instructions to those so retained:

a) the liquidator;

b) the ICF; and,

c) the policyholder.

Prior to its liquidation, Setanta, through its claims handling department, engaged panels of solicitors to whom instructions were furnished, to represent the interests of the policyholder. In turn, the solicitor retained a barrister if so required. In the usual way, the insurer therefore assumed full control of the handling of the action pursuant to the usual policy terms in addition to the principles of indemnity and subrogation.

In the aftermath of his appointment, the liquidator appears to have engaged the services of a firm of solicitors to represent his own interests, and thereafter continued with the previous method of handling claims on behalf of a named defendant. It is the liquidator who has the legal authority to represent Setanta and, as such, it is he who has apparently continued to "issue" instructions.

Indeed the liquidator, in a public statement, has emphasised that he "is most anxious that urgent efforts are now made to bring as many of the outstanding Setanta claims to a conclusion as soon as is practicable..." and thus "encourages *claimants* and their solicitors to make contact with the firms of solicitors that have been instructed by Setanta to *handle the defence* of these claims in order to make arrangements to set up settlement meetings in respect of all cases where liability is not being contested".[2]

The difficulty is that in issuing these instructions, the liquidator is clearly aware that the available assets in the liquidation are insufficient and where, as the liquidation has progressed, the available assets have reduced from 30% to 22%. We know that the ICF will satisfy 65% of the claim, comprising both damages and costs, to a maximum of €825,000. In all cases, inevitably, there will be a shortfall. The extent of the shortfall depends on what assets are ultimately available to the liquidator, but obviously if litigation proves more protracted or expensive, the assets diminish further. The existence of this exposure thus inevitably begs the question as to the level of involvement such a named defendant, i.e., the former policyholder, has had in the proceedings. It remains unclear as to what actual interaction there has been as between the liquidator and/or his representatives and the individual policyholders, but there is an obvious potential for a conflict of interest, which should be of concern to any practitioner.

The Code of Conduct of the Bar of Ireland

Clause 3.1 of the Code of Conduct of The Bar of Ireland provides that: "Barristers have a duty to uphold the interests of their clients without regard to their own interests or any consequences to themselves or any other person".

Clause 3.16 provides: "In cases involving several parties, barristers on receiving instructions for more than one of such parties should consider whether or not any conflict arises as between the individual interests of each of the clients and they shall advise their solicitor as to whether any of the clients should be separately advised and represented by a barrister or solicitor".

Currently, in Setanta cases the instructions come to counsel from the panel of solicitors engaged by Setanta and whose involvement has been continued by the liquidator operating through his own firm of solicitors. The instructions as issued relate to how the claim is to be dealt with on behalf of a named defendant.

Of concern is the fact that it is this named defendant (the former insured) who is the person who faces a personal liability and whom, it is submitted, must be viewed as the "client". It is he/she who is ultimately responsible in law for satisfying any judgment or order that remains unsatisfied, and whose property, assets and/or earnings are thus liable to a process of legal execution. This is by no means a mere theoretical or academic concern as it is understood that judgments which were previously obtained as against Setanta insured which remain unsatisfied in part, are the subject of legal process.

It would seem therefore that pursuant to the Code of Conduct, and as a matter of legal obligation and, indeed, common sense, it is the person who has the personal exposure to whom the primary duty of care is owed by counsel, notwithstanding the providence of counsel's initial instructions.

These policyholders had, in good faith, obtained a policy of insurance issued by a regulated entity, fully complied with their obligations and had obtained the necessary policies of compulsory insurance. However, in spite of such compliance, these policyholders now find themselves at serious financial risk.

Thus, if a former policyholder is satisfied, having had the benefit of full independent legal advice, to allow the liquidator of Setanta and/or his appointed agent to process the claims on his/her behalf, then subject to full informed consent to such process, no issue arises. The real issue, however, is to what extent a defendant and former Setanta insured, who is now the client, is aware of their exposure to personal liability in respect of the claim.

It remains a matter of concern that in many instances the defendant/former insured has, in reality, had no input in relation to the issuing of instructions to solicitors who are on record for and on their behalf, and has had no input in relation to how the claim is to be handled. It follows that as the claims progress, "decisions" may be taken which will have a direct adverse financial consequence for such an individual, who may not understand the serious consequences or financial liability to which they may be exposed, and of which they may not have been fully alerted or advised.

The Court's view

The precarious position of the policyholder was referred to by Ryan P. in the Court of Appeal, who made the following observation:

"The point of view of the Setanta-insured driver was not represented before the learned trial judge. One of the significant shortcomings of the judgment is its failure to fully consider the position from the perspective of a Setanta policyholder, and also for that matter, a court failed to take into consideration the conditions laid down in Clause 3 of the 2009 Agreement as a pre-condition to the Motor Insurers' Bureau of Ireland's liability. Secondly, the court failed to consider the position of a Setanta policyholder where judgment is obtained, registered and potentially enforced against him/her. Certainly the court failed to consider the fact that a Setanta policyholder, and indeed all motor policyholders, would have contributed to the fund, but on the basis of the judgment no benefit arises to those policyholders".[3]

Ryan P. expressed concern in the course of his judgment as to the position of the policyholder if the MIBI were to pursue a remedy against them on foot of judgment assigned in favour of the MIBI.[4] Ryan P. observed that if the MIBI were to pursue such remedy against the driver, and succeed, the result would be very unsatisfactory and even unjust:

"The intent is that the Motor Insurers' Bureau of Ireland will then pursue the uninsured driver if it is believed that there is any prospect of recovering some significant amount from him. Obviously, the Motor Insurers' Bureau of Ireland is not going to waste costs by suing a person who has nothing. Clause 3.11 is in principle inconsistent with the moral or legal innocence which is the case with the driver who was insured with Setanta before it became insolvent. I do not think it makes any sense to criticise the driver who got his insurance from that company on the basis that he should have known that it was offered to him at too small a cost. Neither could one justify imposing on that driver the same liabilities for the full amount of the claim as are visited on the person who drives uninsured and causes injury?"

The Supreme Court in the course of its judgment stated the following:

"In the case of an insolvent insurer, the driver is not at fault for the inability of the insurance policy to provide cover for the award fully or perhaps at all, by reason of the insolvency of the insurer. However, if the Agreement applies to such a case, the plaintiff must have obtained judgment against that defendant and Clause 3.11 allows the Motor Insurers' Bureau of Ireland to seek cover of the total matter of the judgment and costs from that person if they have means or will then be at risk of losing their assets, including considerably their home. It is accepted that this is an unjust outcome which the parties could hardly have intended."[5]

"Given that one of the principles of compulsory insurance is to indeed protect drivers from the costs of compensation which might otherwise be ruinous, it might be expected that if it was intended that there should be a recovery from the Motor Insurers' Bureau of Ireland rather than the ICF, then the parties to the Agreement would have objected to the apparent injustice of treating a person who has complied with the obligation to obtain insurance (but where the insurer becomes insolvent after the accident) in the same way as a person who, for example, has not obtained insurance or has left the scene of an accident. If we are to approach the provisions of one clause as a product of careful legal drafting, then once again the question arises: if the parties intended the Agreement to extend to such cases, why is there no reference to this situation, and why should it be assumed that the parties intended to leave an apparently unfair outcome in place? If the parties had a view of the possibility of insuring insolvency, why address the possible injustice to the plaintiff but not to the corresponding defendant?".

While both the Court of Appeal and the Supreme Court were concerned as to the possibility of an injustice, the unfortunate position with the operation of the ICF is that drivers, who as described by Ryan P. are both morally and legally innocent, now face a personal liability that could have catastrophic and ruinous effects in larger claims.

Conclusion

In those circumstances, there can be but one primary interest that must be protected and that is the interest of the named defendant. If the defendant is satisfied to proceed and allow the claim to be handled by solicitors who have been engaged by the liquidator of Setanta, no difficulty arises. Unless, however, the defendant is satisfied to allow such an approach, then the potential for a conflict of interest clearly arises. There is, accordingly, a duty on the part of counsel to ensure that the interests of "the client" are protected. To do so, one needs to ensure that such an individual has been properly advised and notified of the claim being pursued against them, and is satisfied as to how, by whom and in what manner the claim is to be handled.

It is unclear what contact and/or communication has been had by the liquidator with the former policyholders/named defendants. The absence of a clear defined protocol is to be regretted. The Setanta website, through which the liquidator has communicated to policyholders, does not appear to provide any guidance on the issue. The only advice given to such policyholders is to ensure that they obtain alternative cover immediately.

The invidious position of the named defendant is likely to be the subject of serious and significant controversy in the coming months and years, when the full extent of the implications of the insolvency of Setanta is realised. That situation will bring hardship, not only on persons who have been injured as a result of involvement in motor accidents, but also on the part of law-abiding citizens who had innocently and in good faith obtained a policy of insurance at what appeared to be a competitive rate, but which simply was not fit for purpose by reason of insufficient assets. The entity issuing that insurance was a regulated entity and, in those circumstances, one would strongly argue that the State or the EU must assume ultimate responsibility, but that may be a subject for future debate.

References

1. 2017 IESC 31.
2. Emphasis added.
3. Paragraph 50.
4. Pursuant to Clause 3.11 of the 2009 MIBI Agreement.
5. Paragraphs 37 and 38.

Reforming the courts

It is to be hoped that efforts to reform the civil justice system here will be fully implemented and properly resourced.

Paul McGarry SC

The recent establishment of a committee to report on the reform of civil justice is a timely one. With High Court President Peter Kelly in the chair, that committee has been tasked with reporting by the middle of 2019. A huge number of areas are crying out for reform.

Other jurisdictions have undertaken extensive programmes of court reform. Some of these have been successful, others less so. The ongoing reforms in England and Wales look like an example of the latter. In Northern Ireland, the Gillen Report, published in 2017, runs to 400 pages. It is so wide ranging that it risks being confined to a shelf in an administrator's office. The estimated cost of implementing the vast array of proposals there is greater than €100 million.

It is clear that any proposals to reform our system need to be reasonable, proportionate and affordable. The terms of reference for the review include some obvious chestnuts, including: the need to ensure timely hearings; the removal of obsolete or over-complex rules of procedure; a review of discovery; the use of electronic methods of communication; and, the extent to which court documents should be available or accessible on the internet.

The committee will not examine issues relating to criminal or family law. Similarly, issues with regard to legal costs are of limited relevance, having regard to the detailed provisions on costs adjudication in the Legal Services Regulation Act, 2015.

Solutions

All interest groups, The Bar of Ireland included, have been given a couple of months to identify problems that might be resolved. The committee will favour changes that can be brought about through the revision of court rules, as opposed to primary legislation, although this may in some instances not be possible.

Some issues are surely capable of resolution. For example, our judges spend an inordinate amount of time dealing with administrative and interlocutory issues. Northern Ireland has 10 High Court judges and six full-time Masters. The latter deal with all interlocutory and procedural issues, freeing up the judges for substantive decision making.

Discovery has rightly been identified as an area that needs reform, at least to the extent that it slows down litigation at all levels.

The committee will also look at the judicial review process, which presently operates as a drain on judicial time. It is less clear how this issue can be resolved, having regard to the essential role of the courts in holding the executive to account under the Constitution.

The Council of The Bar of Ireland will shortly invite members to identify other areas that the committee might examine. We believe, for example, that it is essential to introduce case management and other pre-trial engagement to areas other than commercial and competition cases. The High Court also needs to have specialist judges to deal with complex cases, not just those relating to intellectual property and strategic infrastructure.

The total number of High Court judges has remained at the same level since before the recession. The situation is the same in the Circuit Court, despite an effective doubling of workload with the recent jurisdiction increase. The new(ish) Court of Appeal urgently needs more judges to address a backlog.

More judges needed

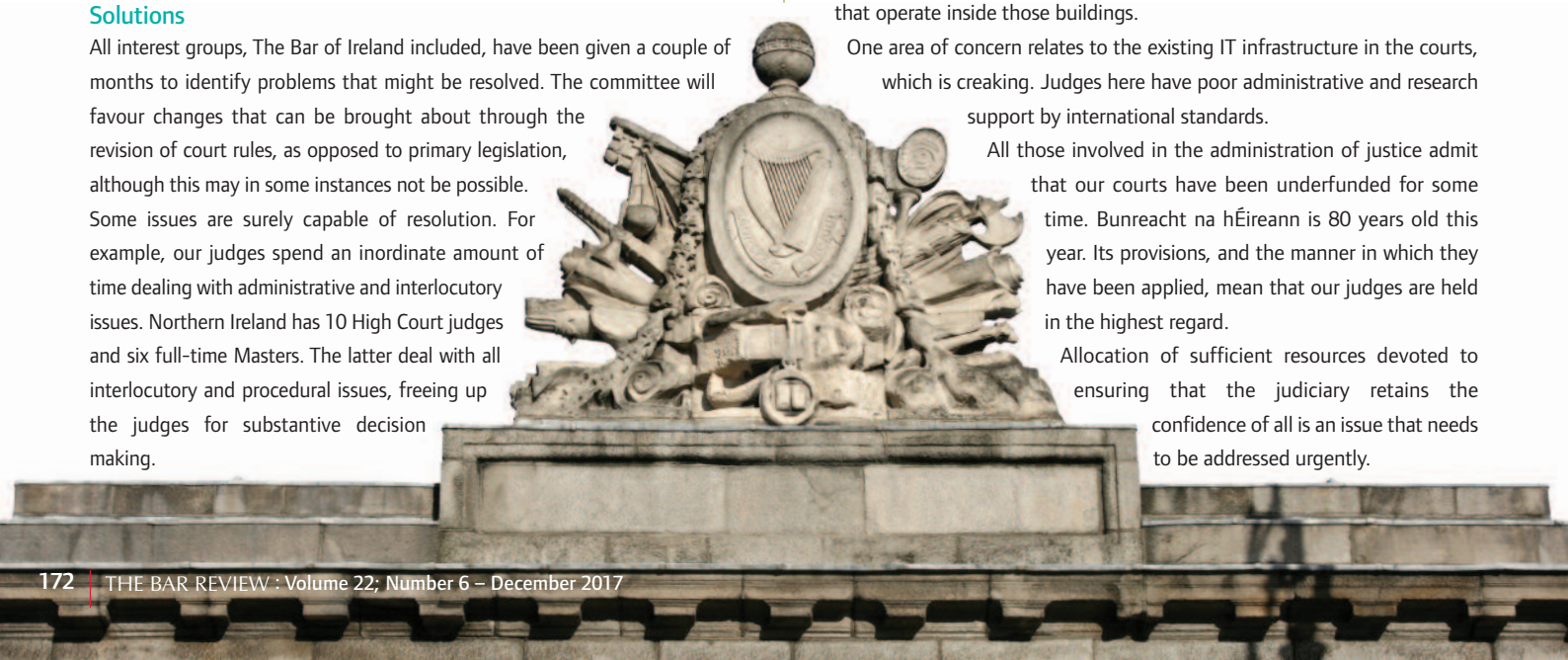
Ireland remains at the bottom of the OECD league in terms of judicial posts. It is true that comparison with some civil law systems is difficult, but all other systems (including the three on our immediate doorstep) have significantly higher numbers of judges per capita. An expanding economy will always require a greater commitment to the judiciary. In addition, the departure of the UK from the EU creates potential opportunities for Irish lawyers, and issues for Irish law that judges will be required to determine.

Judicial posts is not the only issue. Resources available to the courts have also been depleted. For many years, there has been a programme to upgrade physical court infrastructure (i.e., courthouses) around the country. Although this is laudable, it should not be done at the expense of the human resources that operate inside those buildings.

One area of concern relates to the existing IT infrastructure in the courts, which is creaking. Judges here have poor administrative and research support by international standards.

All those involved in the administration of justice admit that our courts have been underfunded for some time. Bunreacht na hÉireann is 80 years old this year. Its provisions, and the manner in which they have been applied, mean that our judges are held in the highest regard.

Allocation of sufficient resources devoted to ensuring that the judiciary retains the confidence of all is an issue that needs to be addressed urgently.



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