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REVIEW
Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

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a new framework for State tenders

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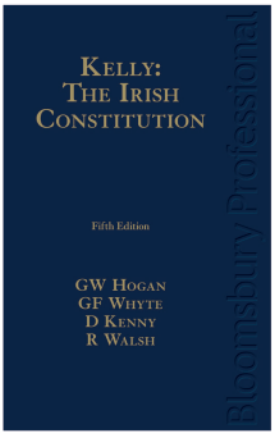

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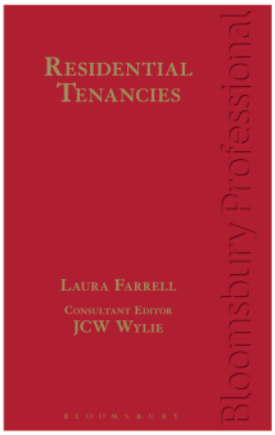

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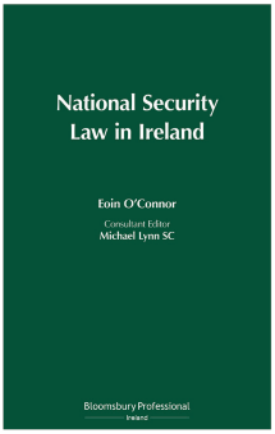

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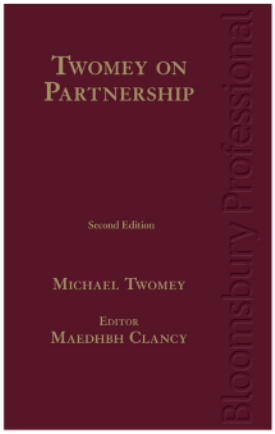

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A busy start to the year

Recent work of the Council and committee members has included representations to the Minister for Justice, and continuing preparations for Brexit.

I wish to acknowledge the great work undertaken by all involved in the establishment of the Roll of Practising Barristers. It is a credit to members and the staff of The Bar of Ireland who successfully ensured that there was excellent compliance by members of the Law Library to meet the deadline of December 29, 2018. This edition of *The Bar Review* contains a detailed article on the activities of the Legal Services Regulatory Authority (LSRA) since it came into being in October 2016.

Volunteer contributions

I would like to give you some idea of the amount of voluntary work done by colleagues and members of the Bar Council.

The recent edition of *Barometer* (January 2019) referenced the fact that over 50 Council and Committee meetings took place between September and December 2018. The business of the Council and its Committees sees hundreds of volunteer hours being invested in advocating for improvements in a wide variety of ways for and on behalf of the profession. We try to keep members up to date with these efforts through our various communication channels – *In Brief*, *Barometer* and *The Bar Review*.

Since I took over as Chairman, a number of colleagues have contacted me offering to do voluntary work for the Council. This is really appreciated. It is as a result of the generous support and time commitment of members that the Council is able to do its work and achieve progress in the specific projects that we undertake. If you would like to get involved, either by participating on a Committee or by helping out on a particular project, please don't hesitate to contact me or any Council member.

Meeting with the Minister

I had the privilege of leading a delegation of The Bar of Ireland to meet with the Minister for Justice and Equality, Charlie Flanagan TD, in January. A wide-ranging discussion took place with the Minister in relation to professional fees. On the criminal side, a process was completed in July 2018 between the Director of Public Prosecutions (DPP) and The Bar of Ireland, and the DPP has formally confirmed support for the restoration of professional fee cuts to the Department of Public Expenditure and Reform (DPER). However, despite several exchanges of correspondence with the DPER, we have failed to get a commitment to advance any increase in the professional fee rates. The Public Service Pay and Pensions Act 2017 provides for the repeal of the Financial Emergency Measures in the Public Interest Act 2009 and arrangements have already been put in place to restore the remuneration of public and civil servants. We highlighted that fee levels for barristers who practise in crime were at 2002 levels and that there was a lack of fairness in the approach taken to date. The Minister acknowledged the fact that arrangements have already been put in place to restore the remuneration of public and civil servants, noting the incremental approach over three years. It is hoped that concerns expressed by the Bar will be conveyed to the DPER. The Bar of Ireland will continue in its activities to lobby for the restoration of cuts that were applied to professional fees for those who provide services to the State, both on the criminal and civil side.

Preparing for Brexit

I was particularly pleased to see the recent decision of Government, and in particular the support of the Minister for Justice and Equality, to back the Promotion of Irish Law initiative. This is an important development that will ensure Ireland continues to be strongly positioned to provide first-rate legal services to domestic and international clients in the event that Brexit proceeds. The next immediate step is to establish an implementation group within a matter of weeks. An article setting out a summary of this initiative is also contained in this edition of *The Bar Review* and my thanks to those who have worked tirelessly over the last 18 months to bring this project to fruition. If Brexit proceeds, it will be one of the few positive opportunities that will arise.

Over the next few weeks and months, I intend to take the opportunity to visit members who practise primarily on Circuit and look forward to meeting with members outside Dublin, to provide an update on the work underway at both Council and Committee level, and to receive their feedback on the services and support we provide for all members of the Law Library.

Lastly, thank you to all members who took the time to respond to our recent survey on court security and threats arising from litigation. Such feedback is an invaluable source of data and information that assists in the decision making of the Council. The take-up in the survey was excellent.

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

Fascinating times for legal professionals

In this, our first edition of 2019, we turn our focus on the Legal Services Regulatory Authority (LSRA) and how it will impact on the regulation of legal services. We meet with Chief Executive Brian Doherty, a qualified barrister who has held senior roles at the Police Ombudsman for Northern Ireland and the Garda Síochána Ombudsman Commission, and he gives us an exclusive insight into the priorities of the LSRA over the coming year.

Thanks to the stellar work of a Bar Council Working Group, a model has now been developed so that barristers can now form consortia in order to bid for State legal work. This is a significant development that will potentially open up avenues of work that were previously shut off to the independent referral bar. Our writer explains the basics of tendering as consortia for State work in a manner that complies with the Bar Code of Conduct.

As Brexit (hard or soft) looms closer, we reflect on how the absence of the United Kingdom will affect the fabric of the common law within the European Union. The Advocate General of the EU Court of Justice, Gerard Hogan, examines the development of EU law as it straddles the civil and common law legal systems. He reflects on how EU law will develop in a Union where the UK is no longer present to thwart the more significant inroads on the common law.

Elsewhere, we revisit social media and court trials. No doubt, this is an issue we will return to in the coming year.

Eilis Brennan SC
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Important update on notice to serve obligations

An article in December's edition of *The Bar Review* discussed Section 8 of the Civil Liability and Courts Act 2004, which places an obligation on plaintiffs to serve a notice in writing on a wrongdoer or alleged wrongdoer within two months from the date of the cause of action, failing which a court may draw such inference as appears proper or make appropriate costs orders if the interests of justice so require.

Section 13 of the Central Bank (National Claims Information Database) Act 2018 has amended Section 8 by reducing the period within which a plaintiff must notify a wrongdoer/alleged wrongdoer to a period one month from the date of the cause of action.

The Central Bank (National Claims Information Database) Act 2018 came into operation on January 28, 2019, pursuant to S.I. No. 2 of 2019, Central Bank (National Claims Information Database) Act 2018 (Commencement) Order 2019.

Bar appearance at Oireachtas committee

The Council of The Bar of Ireland was invited to appear before the Joint Committee on Justice and Equality in Leinster House on January 16, 2019, to share its observations on the General Scheme of the European Convention on Human Rights (Compensation for Delays in Court Proceedings) Bill.

At present, Ireland is in violation of its obligations under Article 13 of the European Convention on Human Rights because the law does not provide an effective remedy for a litigant who encounters delays in court proceedings. In order to bring Ireland back into compliance with its international obligations, steps need to be taken to introduce an effective and accessible remedy whereby a litigant can seek compensation for delays or put an end to future delays in proceedings.

The proposal as set out in the Bill is to establish a statutory body to determine compensation claims outside of formal court structures.

Micheál P. O'Higgins SC, Chairman, Conor Dignam SC and David Perry BL appeared before the Joint Committee and submitted observations on behalf of the Council.

The Council is of the view that the assessor model envisaged by the Bill does not represent the appropriate way to bring Ireland back into compliance with Article 13. It was suggested that the optimal way of providing an effective remedy for breaches of the Article 6 right to a hearing within a reasonable time is to introduce a new provision into the European Convention on Human Rights Act 2003, modelled on the existing s. 3A, which already allows litigants to take a number of specific claims before the Irish courts in relation to alleged violations of Convention rights. Such an approach would involve minimal public expenditure, and ensure the fair and effective determination of delay in compensation claims within existing court structures.

The Council further noted that the introduction of a specific statutory remedy to provide compensation should be seen as only part of the necessary solution. It is imperative that efforts are made to ensure that the court system is properly resourced, so as to minimise delays for litigants, and to therefore avoid the necessity for litigants to resort to compensation proceedings altogether.

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

VAS hosts charities event

The Voluntary Assistance Scheme (VAS) of The Bar of Ireland held a joint event with the Charities Regulator on the recently launched Charities Governance Code in the Gaffney Room on January 17.

The Gaffney Room was fully booked, with a large audience also simultaneously watching the event online. Informative presentations were given by Jonathan Miller BL and Micheál D. O'Connell SC from the Law Library, and by Tom Malone and Sarah Mongey from the Charities Regulator.

The presentations were intended to support charities and guide them towards complying with their legal duties, and excellent feedback has been received from the charities present.

From left: Jonathan Miller BL; Sonja O'Connor BL, Co-ordinator, Voluntary Assistance Scheme of The Bar of Ireland; Tom Malone, Assistant Director of Regulation, Charities Regulator; and, Sarah Mongey, Research & Policy Officer, Charities Regulator.

Micheál D. O'Connell SC addressing the room at the Charities Governance Code and the Duties of Charity Trustees Event, which took place in the Gaffney Room in January.

Update on the implementation of the Legal Services Regulation Act 2015

The Legal Services Regulation Act was signed into law on December 30, 2015, and the Legal Services Regulatory Authority (LSRA) was established on October 1, 2016.


Ciara Murphy
Chief Executive,
The Bar of Ireland
Dara Hayes BL

The Legal Services Regulation Act 2015 is:

"an Act to provide for the regulation of the provision of legal services, to provide for the establishment of the legal services regulatory authority, to provide for the establishment of the legal practitioners disciplinary tribunal to make determinations as to misconduct by legal practitioners, to provide for new structures in which legal practitioners may provide services together or with others, to provide for the establishment of a roll of practising barristers, to provide for reform of the law relating to the charging of costs by legal practitioners and the system of the assessment of costs relating to the provision of legal services, to provide for the manner of appointment of persons to be senior counsel, to provide for matters relating to clinical negligence actions, and to provide for related matters".

Throughout 2018, the Authority has been working towards establishing itself as an operational regulatory body. In April 2018 it published its First Strategic Plan, 2018-2020, which sets out a clear timeline on how it intends to become a fully resourced and operational, independent and effective regulatory authority. A copy of the LSRA First Strategic Plan, 2018-2020 is available on the Authority's website.

Consultations

In general, the functions of the Authority are to regulate the provision of legal services by legal practitioners, and to ensure the maintenance and improvement of standards in the provision of such services in the State. Since its establishment, the Authority has been engaged in conducting a series of consultations, including: a consultation on legal partnerships; a consultation on multidisciplinary practices; a consultation on direct access to barristers and barristers holding client monies; a consultation on a review of the operation of the Act; a consultation on the education and training of legal practitioners in the State; a consultation on a draft code of practice for practising barristers; and, a consultation on professional indemnity insurance regulations. The Bar of Ireland has been proactive in responding to each of these consultations and engaging with the Authority to represent the interests of the profession. The Act sets out specific timelines relating to each of these consultations, and therefore the Authority was obliged to focus its resources towards that workstream over the last three years. On foot of these consultations, there have been a number of recent and impending developments of relevance and interest to members of The Bar of Ireland.

Roll of Practising Barristers

Previously, by virtue of their call to the Bar, barristers appeared in the courts of Ireland by right and not by invitation or licence. Now, to exercise that right, barristers must be entered on the Roll of Practising Barristers established by the Act. On June 29, 2018, the Minister for Justice and Equality commenced the relevant sections under Part 9 of the Act relating to the establishment and maintenance of the Roll of Practising Barristers. Under section 133(1) of the Act, the Authority is required to set up and maintain the Roll of Practising Barristers and, within six months of the commencement date, to enter on the Roll the name of every person who is, on the commencement date, a practising barrister. Barristers were required to apply to the Authority for inclusion on the Roll in advance of December 29, 2018. This process was greatly assisted by the supply to members of pre-populated application forms by the administration of The Bar of Ireland. Following a co-operative effort between the Authority and The Bar of Ireland, there was excellent compliance by members of the Law Library. Under section 136 of the Act, it will be an offence for a qualified barrister to provide legal services as a barrister when his or her name is not on the Roll of Practising Barristers. It has been indicated to The Bar of Ireland that the Minister for Justice and Equality will commence this section at the end of January 2019. Responsibility for the roll of solicitors remains with the Law Society of Ireland. An analysis of the LSRA Roll of Practising Barristers has revealed the following statistics:

Category	Number
Members of the Law Library	2,098
Non-members of the Law Library	338
Total number on the Roll	2,436

Of the 338 'Non-members of the Law Library', 153 are barristers in the full-time service of the State. The remainder include barristers in the employ of the private sector, those who may primarily practise abroad, in-house barristers, and retired barristers who are volunteering their services but are still required to be on the Roll. During the course of establishing the Roll of Practising Barrister, a query arose in relation to the inclusion, where appropriate, of the suffix 'SC' on the Roll. The title of Senior Counsel is a patent of precedence granted by the Government to members of the Bar who have demonstrated exceptional ability as an advocate and who have the character and skills expected of a member of the Inner Bar. In doing so, the Government is recognising the desirability of maintaining, in the public interest, an Inner Bar that can provide a wide range of specialist advice and advocacy, and can do so with an exceptional level of skill and expertise. Following representations made by the Council, the LSRA has confirmed their intention to draft and issue the necessary regulations to prescribe additional information to be included on the Roll that will include the suffix 'SC' where appropriate to indicate that a barrister has been granted a patent of precedence by Government.

It was essential that the Authority established the Roll of Practising Barristers so that it can proceed to commence Part 6 of the 2015 Act relating to the receipt and investigation of complaints. According to the Authority's Strategic Plan, it intends to have a fully functioning complaints system in place during Quarter 2 (April to June) of 2019.

To do so, it plans to have introduced: regulations regarding complaints; guidelines for resolution of complaints by mediation or informal means; an information campaign to inform the public and the professions of the new complaints regime; establishment of the review committees; establishment of the Complaints Committee; and, establishment of the Legal Services Disciplinary Tribunal.

Code of Practice for Practising Barristers

In September 2018, the Authority issued a draft Code of Practice for Practising Barristers for consultation. Following this consultation, the Authority intends to finalise and commence its Code, which will apply to all practising barristers before March 2019. This new Code will apply to all practising barristers, whether members of the Law Library or not. The draft LSRA Code is similar in a significant degree to the Code of Conduct of The Bar of Ireland. It will not create substantial change to the way in which barristers who are members of the Law Library operate. Nonetheless, members should familiarise themselves with the LSRA Code when it is published. The Code of Conduct of The Bar of Ireland will continue in operation and members of the Law Library will continue to be bound by it.

It should be noted that the 2016 Code of Conduct for The Bar of Ireland has not yet been commenced and the 2014 Code of Conduct continues to operate for the time being. In 2016 The Bar of Ireland adopted a new Code of Conduct to take into account the various changes envisioned by the 2015 Act. It has yet to be commenced because the principal changes have yet to be given legislative effect. These are, firstly, the requirements that will be imposed by section 215 on withdrawing from a civil or criminal case where a client is in custody and, secondly, the new provisions, under section 218, in relation to advertising. The Council has made representations in this regard but there is currently no indication as to when the Minister is likely to commence the relevant sections.

Professional indemnity insurance regulations

The Authority completed a consultation in respect of professional indemnity insurance (PII) regulations in December 2018, and intends to commence those regulations in the first quarter of 2019, making it mandatory for all practising barristers to have a PII policy in place with a minimum level of indemnity cover, along with a range of other minimum terms and conditions. This, of course, has been a longstanding obligation on members of the Law Library. The new regulations will ensure that all practising barristers are adequately insured.

The Bar of Ireland has a Group Professional Indemnity Insurance Scheme in place for members of the Law Library. While it is not compulsory for members to acquire their insurance through that group scheme, it is a requirement of membership of the Law Library to provide evidence of a PII policy to The Bar of Ireland Regulation Department on an annual basis. The Group Scheme meets the requirements set out in the LSRA regulations and has a number of other benefits including:

- market-leading policy wording;
- no member of the Law Library is refused access to the scheme; and,
- run-off cover at a flat rate and free run-off cover for the estate in the event of unexpected death.

The Scheme has worked very well over the years and represents good value for our members. The existing Bar of Ireland Group Scheme will comply with the new regulations. Should members have sourced their own PII, they should ascertain, through their insurer, that their policy will be in compliance with the regulations.

Levy on the professions

It is not yet clear to The Bar of Ireland the extent of the levy that will be imposed on members of the Law Library, which will be collected and retained by the Authority to meet the costs it incurs in carrying out its functions. Part 7 of the Act provides for the imposition of a levy on the Law Society, The Bar of Ireland and non-members of the Law Library who are practising barristers, to cover the expenses of the Authority and the Disciplinary Tribunal. Section 95(2) provides that:

"At the end of each financial year, the Authority shall, with the consent of the Minister, determine for the purposes of this section-

(a) the operating costs and administrative expenses that are properly incurred in that financial year by the Authority in the performance of its functions under this Act (in this section referred to as "approved expenses of the Authority"), and

(b) the operating costs and administrative expenses incurred in that financial year by the Disciplinary Tribunal in the performance of its functions under this Act (in this section referred to as "expenses of the Disciplinary Tribunal")".

There is a complex formula set out in the Act to calculate the levy that will be imposed on the Law Society, The Bar of Ireland and non-members of the Law Library who are practising barristers. A levy will not be applied in respect of a legal practitioner who is in the full-time service of the State. There is ongoing interaction between representatives of The Bar of Ireland and the Authority to ensure that Part 7 of the Act is properly and fairly applied, but it is not yet clear at what stage this Part of the Act will be commenced, how any expenditure to date will be recouped, and what the quantum of the levy in respect of each member of the Law Library will be.

Legal partnerships and limited liability partnerships

The Authority intends to give effect to the regulations enabling the establishment of legal partnerships and limited liability partnerships in early 2019. Section 2(1) of the Legal Services Regulation Act 2015 defines a "legal partnership" as "a partnership formed under the law of the State by written agreement, by two or more legal practitioners, at least one of whom is a practising barrister, for the purpose of providing legal services". Legal practitioner is also defined in the Act, as "a person who is a practising solicitor or a practising barrister", where "solicitor" can also mean a firm of solicitors.

The Law Library is a body of practising barristers who are independent referral barristers. Membership of the Law Library is incompatible with participation in legal or limited liability partnerships. Consequently, the details of how legal partnerships and limited liability partnerships are to be regulated is of limited concern to the Council. The LSRA invited the Council to participate in a consultation on the regulations that will apply to legal partnerships and limited liability partnerships. In an earlier consultation process, the Council gave its views on partnerships to the Authority. In this latest consultation the Council referred to our submissions and expressed its willingness to discuss any issues should the Authority desire.

Education and training of legal practitioners

Of particular interest to The Bar of Ireland is the recent report commissioned by the LSRA that was published in relation to the education and training of legal practitioners in the State. While this report was wide ranging in reviewing the training and education to qualify as a barrister or a solicitor, the primary interest of The Bar of Ireland is in relation to the master/pupil relationship and continuing professional development (CPD). The LSRA report states that the guidelines around pupillage

could be better developed:

"7.6.4 In terms of the practical stage of training, although the Bar defines the skills it expects trainee barristers to acquire during pupillage, the guidelines around these could be better developed into a more useful competence statement".

Concerning CPD in particular, the LSRA report states:

"7.7.5 In terms of CPD, whilst both solicitors and barristers were content with the quality of CPD on offer from the Law Society and Bar respectively, the absence of any assurance around the quality and purpose of courses provided by others (or of the relation of the number of hours required to any meaningful yardstick of competence) caused concern. The absence of meaningful systems of CPD in both the solicitors' and barristers' profession contrasts with the submission made by ACCA on the treatment of CPD in the accountancy profession".

Fostering excellence and enhancing the performance of members of the Law Library through best in practice in education and training is one of the key goals highlighted in our Strategic Plan, 2018-2021, which includes, but is not limited to, the following:

a. undertake a training needs analysis to develop and enhance a quality-assured core CPD curriculum for members of the Law Library;
b. expand education and training offering through partnerships with established and accredited providers for specific practice areas;
c. support and grow the Advanced Advocacy Training Programme;
d. improve the practice management programme with a focus on career stage-specific content; and,
e. enhance the New Practitioners' Programme in practice management to increase standardisation of the pupillage experience and practical advice on how to establish in practice.

The Education & Training Committee is currently considering the contents of the LSRA report on the education and training of legal practitioners in the State with a view to taking on board some of the reasonable and constructive criticisms that were made.

Legal costs

Part 10 of the Legal Services Regulation Act 2015 sets out an improved structure for the manner in which legal costs will be adjudicated through the Office of the Legal Costs Adjudicator. Part 10 of the Act is completely outside of the control of the LSRA and is wholly a matter for the Department of Justice and Equality in conjunction with the Courts Service. As was the case when the Act was before the Oireachtas as a Bill, the Council continues to lend its full support for this enhanced mechanism to address legal costs that will benefit both those who obtain legal services in the State and the legal practitioners concerned. Delays in the taxation process are a frequent complaint and do nothing to assist the development of the market for legal services here. They also result in uncertainty for clients and lawyers alike.

There is frustration with the slow pace of implementation of this part of the legislation, and the Council has urged that the commencement of Part 10 of the Act should occur in as expeditious a manner as is possible. Furthermore, the Council considers that the appropriate resources, both in terms of legal costs adjudicators and support staff, need to be provided so that the commencement of Part 10 of the Act results in a more efficient and expeditious resolution of legal costs disputes into the future. In November 2018, some movement towards the commencement of Part 10 was evident where advertisements to fill the posts of legal costs adjudicators were published. Indications are that the new costs regime will be in place by June 2019; however, it remains to be seen if that timeline will be met.

Conclusion

Despite the existence of the LSRA since October 2016, the vast majority of members of the Law Library will have had little interaction with the new Authority to date. The slow pace of implementation of the Act has meant that its impact in the market for legal services, whatever that may be, has yet to be seen. The approach of the Authority has been to ensure that it is properly equipped to deliver on its remit when each section of the Act has been commenced. This is an appropriate approach, and while the slow pace of implementation has been a source of frustration, it is through no fault of the Authority itself that it has not been provided with the resources necessary to hasten its ability to fulfil its function as an independent and effective regulatory authority.

Brexit and the Bar

The Bar of Ireland continues to collaborate with Government and all legal stakeholders to promote Ireland as a leading centre globally for international legal services.

Patrick Leonard SC

On January 4, 2018, the Minister for Justice and Equality, Charlie Flanagan TD, announced that the Government had agreed to support the joint initiative of The Bar of Ireland, the Law Society and the wider legal community in promoting Ireland as a leading centre globally for international legal services.

By way of background, in November 2016, the then Minister Frances Fitzgerald TD asked The Bar of Ireland to carry out work on the implications for the legal sector in Ireland in the wake of the UK departure from the EU.

In early 2017, having researched the UK legal services market, and the factors that lead parties to choose English law or jurisdiction, we considered that Brexit presented a significant opportunity for Ireland as a European common law legal jurisdiction. Indeed, France, Germany, the Netherlands, and Belgium have also identified opportunities in this area and have moved to establish English language commercial courts. During 2017, The Bar of Ireland consulted with the judiciary, the Law Society, the IDA and the Departments of An Taoiseach, Justice, Foreign Affairs and Trade, and Finance. We met with representatives of the leading law firms in Ireland, the Commercial Litigation Association of Ireland, and Arbitration Ireland. In January 2018, the project received formal support from the Department of Justice and together with the Law Society, the Dublin Solicitors Bar Association, and leading solicitors' firms, we prepared a detailed strategy paper for submission to Government. That paper is entitled 'Promoting Ireland as a leading centre globally for international legal services' and is available for review by members on The Bar of Ireland website: https://www.lawlibrary.ie/media/lawlibrary/media/Secure/Promoting-Ireland-as-a-leading-centre-globally-for-international-legal-services.pdf.

Proposal

Our joint proposal aims to assist the Government in minimising the impact on trade and the economy following Brexit and is part of the broad response of stakeholders in Ireland to Brexit. In the proposal, we identify the potential for growth in the Irish legal services sector by selling Ireland and Irish law as a preferred jurisdiction and/or governing law for international businesses, transactions and disputes that might otherwise have chosen English law or jurisdictions. If successfully implemented, this strategy will create further employment in the sector, including additional work for members of the Bar. Since publication, we have continued to engage with relevant stakeholders, such as the Departments of Justice, and Business Enterprise and Innovation. We believe that the Government can promote Irish-based legal services on the basis of our pro-business, English-speaking, common law justice system, the Irish judiciary's international record of integrity, fairness and impartiality, and the extensive experience and expertise of the Irish legal sector. However, in order to maximise the opportunity for Ireland, our proposal identified that it is not sufficient to simply promote Ireland's existing offering. It is also necessary for Government to demonstrate its commitment to reform and modernise the existing courts and legal system, and to commit the additional financial and other resources required to ensure that Ireland's judiciary, courts service and legal system continue to meet the needs of domestic and international business.

Scope for success

Over many years, the UK's Government, judiciary, the Bar of England and Wales, and the UK solicitors' profession have worked together to promote England and Wales as a place to conduct legal business. In the period 2005-2015 the UK legal sector grew by 3.3% per year to a total of £27.7bn. The United Kingdom is believed to account for 20% of European Union legal services fee revenue. This success story is as a direct result of the UK Government's focused support over many years for its legal sector, and there is significant scope to replicate this type of success in Ireland. Following Brexit, Ireland will become the largest common law jurisdiction in the EU. Due to its procedural effectiveness and certainty, the common law is the preferred governing law for a high proportion of global cross-border commercial contracts. As England will no longer be part of the European Union, this clearly presents Ireland with an opportunity. In addition, post Brexit, recognition and enforcement of English judgments across the EU remains unclear, again giving Ireland an opportunity.

Whereas the Bar recognises that much of this work is either transactional or advisory in nature, and may be carried out by solicitors, our research indicates that a key factor in litigants choosing the English courts, or London as a seat for arbitration, is the fact that the contracts in question are subject to English law. If international parties routinely choose Irish law to govern their commercial contracts, there will inevitably be more litigation and arbitration in Ireland. By way of example, 66% of cases before the London Commercial Court involve a foreign party, and as much as 50% of the cases involve no English party at all.

At present, the Government has decided to establish an implementation group in order to develop this strategy. We look forward to participating in that group and to actively promoting this initiative. In our proposal, we identify the need to:

1. Recognise and communicate internationally the considerable existing advantages of Irish law, the Irish legal system and the Irish courts.
2. Communicate the commitment of Government to continue its policy of making changes to our legal infrastructure (including laws and regulations) to support and develop business.
3. Promote the use of Irish legal services internationally.
4. Promote Ireland as a centre for international dispute resolution (including arbitration), which, uniquely, enjoys EU access while also applying a familiar common law legal system.
5. Increase awareness within the international business and legal community as to reasons why it may be appropriate to select Irish law or the Irish courts as the forum to resolve disputes or undertake legal transactions in Ireland.

6. Through Government and State agencies, lead the way in promoting the use of Irish law and Irish legal services in contracts and transactions.

Over time, with proper implementation, we believe that it will be possible to 'sell' the benefits of Irish legal services to the international business community. Already, some financial institutions are beginning to use Irish law in place of English law. The International Swaps and Derivatives Association (ISDA) has published Irish and French law versions of its master documentation for use by European clients. These developments demonstrate the real potential of this proposal.

Fit for purpose

In order to properly leverage the opportunities that are there, the Government, and legal professions, need to work together to ensure that our system is responsive to the needs of our clients. By way of example, we have suggested the need to:

1. Research the expectations of international clients in respect of the Irish legal system.
2. Continuously review court procedures in order to make dispute resolution cheaper, faster and more predictable.
3. Ensure the allocation of sufficient judicial and other resources to provide for effective and proactive case management.
4. Increase the use of technology in the courts.

In addition, we need to co-ordinate with the law schools in order to ensure that continued education in international trade law and European Union law is provided at all levels of legal education. The recent Government announcement of the increase in the number of judges in the Court of Appeal from 10 to 16, the work of the Civil Justice Review being carried out by Mr Justice Peter Kelly, and the introduction of e-filing in the Supreme Court demonstrate that work is already underway to improve our courts system. While participating in the implementation group, we must also work hard to ensure that members can take full advantage of the opportunities that will arise in the future. Work is required to ensure that appropriate structures are put in place to allow barristers to give advice to international clients and international law firms, whether on issues of European Union law, trade law, or commercial contracts. Similarly, the Bar needs to consider how best we can promote ourselves both to domestic and international lawyers. One practical example of this will be seen in a conference organised by the Bar and its EU Bar Association on April 5 next in Dublin. In addition, the Bar will now join with the Government, and the other members of the legal community, in the promotion of Irish law and Irish legal services. The market in UK legal services is very large, and if a relatively small amount of work moves to Ireland, it can have a large effect in our market. Over time, we can build this market, while ensuring that we maintain the long and friendly relationship we all have with the UK legal profession. We wish to maintain our good relationship with the English Bar, and our colleagues in the solicitors' firms have deep relationships with their colleagues in England. Where legal work is leaving the UK for regulatory or other reasons, Ireland is an obvious and familiar choice of jurisdiction for our friends and colleagues in London. If there is to be any new legal hub in Europe, Dublin is an obvious contender, and the Bar will work now to make that sure this happens.

On good authority

LSRA CEO Dr Brian Doherty talks to *The Bar Review* about a very busy year in the Authority, and the tasks ahead.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Brian Doherty has had quite a busy year and a quarter in the Legal Services Regulatory Authority (LSRA). The Legal Services Regulation Act 2015 set out an onerous list of statutory deadlines for the fledgling Authority to meet, and it's Brian's job as CEO to steer that process. Since taking on the role in September 2017, he and his small team of 12 staff have completed reports on legal partnerships and multidisciplinary practices, a report under Section 120 of the Act into various matters relating to barristers, and a report on education and training in the legal profession. They've also set up the Roll of Practising Barristers, and are working on the development of frameworks for legal partnerships and limited liability partnerships, new regulations on personal indemnity insurance, a code of practice for barristers, and on the Authority's complaints function, which will be operational later this year.

Setting up a brand new body like the LSRA is a pretty daunting task, with the professions, the public, and the Government, in particular the Departments of Justice and Public Expenditure and Reform, watching avidly to see how things progress. A former barrister who moved from practice to spend 17 years working first for the Police Ombudsman for Northern Ireland and then the Garda Síochána Ombudsman Commission, Brian brings a wealth of experience to his role. But why would anyone want to take on such a task?

"I'd done 17 years in policing, and thought I could do some good in a different regulatory sphere. It is a challenge, but the most interesting time periods in both the Police Ombudsman and the Garda Ombudsman were the first couple of years when we were getting set up and everything was new. As well as that, putting together and motivating a team of people was one of the things I enjoyed most, trying to inspire a culture of independence, with proportionate investigations, and proper care for both the complainant and those that were being investigated, keeping in mind their welfare. The idea of doing that again from scratch was of great interest".

A former barrister who moved from practice to spend 17 years working first for the Police Ombudsman for Northern Ireland and then the Garda Síochána Ombudsman Commission, Brian brings a wealth of experience to his role. But why would anyone want to take on such a task?

Uphill task

Because of the strictures contained in the Act, not least of which is the requirement that the LSRA will remain an independent body, all of the Authority's work has been done while Brian and his team try to formulate what

their longer-term resourcing and funding needs will be: "There was a series of statutory deadlines that we had to meet, so even as we were trying to define what size the Authority should be, and trying to build things like the IT infrastructure and good governance, we've had to work to hit these deadlines. For reasons of independence the Department of Justice couldn't just open us up a building and hand us 30 staff; we've had to start small and grow. As well as that, because ultimately we are to be funded by a levy on the professions, we're very mindful of spending. We have been defining what our staffing needs are, and we will be requesting sanction from the Department of Public Expenditure and Reform, as is envisaged in the Act, before we go to full recruitment".

There are also plans for some staff to transfer from the Law Society, and that process is underway.

It's still unclear exactly how the levy on the professions will operate, but Brian is anxious to emphasise a strong focus on financial oversight: "To date we've been receiving advances in funding from the Government, obviously in anticipation of the levy being implemented. We've been living within those means, so it's not a culture of spending. We've been very careful to make sure we're spending only what is necessary".

Barristers might wonder whether such funding is best spent on, for example, a disciplinary function, when the professions have their own disciplinary processes. Brian clarifies: "We will take over quite a bit of that function. For example, the Law Society will stop taking complaints in relation to the areas covered by the Act: inadequate service; excessive fees; and, misconduct. The LSRA will be the independent investigator. However, the Act and the section related to complaints actively promotes and puts on a statutory footing that there should be efforts to informally resolve complaints and promote mediation and informal resolution, and encourages the legal practitioner to engage with those efforts. It encourages a proportionality built within the Act itself, that where possible most things can be resolved, but still allows for misconduct to be directed appropriately".

The complaints function will be operational from July of this year, and the Authority is currently working to ensure that resources such as staff and IT infrastructure will be in place to meet this challenging deadline.

On a Roll

One of the most significant projects the Authority has undertaken is the establishment of the Roll of Practising Barristers, and this has now been completed with, according to Brian, great liaison and engagement from The Bar of Ireland. The Roll does not just include barristers who are members of the Law Library, and Brian is confident that it is now a comprehensive document: "We've done a huge amount of work to publicise it and to publicise people's obligations in relation to it. We intend to publish the Roll on our website, and hopefully, if there is anyone that should be on it that's not on it, that would serve as an incentive. It will be a criminal offence to provide legal services as a barrister when you're not on the Roll, so that should be another very clear incentive".

The Roll will not be a static document: "People will come off it and come on it again. As well as that under the Act we can enhance the Roll. We can issue regulations and include additional information. Our goal was really to establish the Roll first and then to examine whether it should be enhanced at a later date. We're pleased at the moment with the numbers. We are aware that there may be one or two people that we still need to reach and efforts are continuing".

Another issue of significant interest to the professions has been the Authority's work on education and training. With the assistance of consultants from outside the State, the LSRA completed its Section 34 report on education and training in September; this contains 14 proposals for change, which Brian describes as a "huge commitment" and "far reaching". The Authority feels that further consultation is needed, and plans a symposium during 2019. They've also received a number of informal submissions on the report since its publication, which Brian welcomes: "It's been a healthy process and very informative. And the fact that people have made unsolicited submissions post the publication of the report shows you the level of interest. Education is very personal. It's a big investment that takes you away from home and family life. There's a financial commitment and it's something people take very seriously and have a very strong viewpoint on".

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No authority is an island

Brian is very happy with the engagement from the professions so far, and is mindful of the Authority's obligations in this: "I've had some very productive engagement with professional bodies and we've engaged in such a way that respects the independence of the Authority. In our strategic plan we listed a set of values and we included in those that the Authority would be transparent and accountable. One thing I'm very keen to do as Chief Executive Officer, and hopefully the Roll of Practising Barristers was one of the first steps in this, was to try and provide as much information as possible, that will assist people in fulfilling their obligations".

He makes the point that independence does not and should not preclude engagement and collaboration: "Independence does not require that you live in isolation, or that you act forever in secret. The idea should be that we provide enough information for the consumer to understand their rights and how the system is going to work, and also for the legal practitioner that might receive a complaint, so that they can approach it in the appropriate way".

Engagement with the Department of Justice has also been positive overall, he says: "There are always issues in which not everyone can be 100% aligned, but I find that we're able to work through those in a reasoned way. The Act itself has some challenges in its drafting and it's been important that both ourselves and the Department have an understanding of what each other's interpretation is".

Brian draws on his experience in the Police Ombudsman for Northern Ireland to come to a very clear interpretation of independence in these circumstances: "Independence was the cornerstone of that. But it wasn't a nebulous construct.

Guitar man

Dr Brian Doherty was called to the Bar in 1996, and initially practised in Belfast. He joined the Office of the Police Ombudsman for Northern Ireland when it was set up in 2000 as one of the first civilian investigators, working on allegations of misconduct against the then RUC, later the PSNI. In 2007 he moved to the Garda Síochána Ombudsman Commission as a senior investigating officer, and had progressed to the role of acting deputy director of investigations by the time he returned to the Northern Ireland Police Ombudsman in 2014 to run the Current Investigations Directorate. He remained in this role until September 2017, when he returned to Dublin to take up the post of LSRA CEO.

Brian is married to Kathryn, and they live in Rush in north Co. Dublin with their two daughters, Tess (10) and Maeve (6). An active member of the Rush Tidy Towns Committee, weekends are often spent with his daughters taking part in the Rush beach clean. Brian's also a keen musician, with a collection of electric and acoustic guitars, and is teaching himself to play piano.

It was independence through independent evidence gathering, independent decision making and independent reporting. You kept going back to those principal tenets. I'm very proud of the work that we did, and I've taken it wherever I went".

Engagement with the public is also part of the Authority's remit, particularly in relation to the complaints function, but this is in very early stages: "The profile of the Authority itself will rise over the coming year. We're doing some work at the moment, to decide what that should look like. We're meeting shortly to look at very simple things like how the Authority is branded".

He's confident, based on public interaction with the Authority so far, that they can meet the public service remit: "I'm very encouraged by the public consultation we did for the section on education and training: we had 38 submissions from organisations and I think there were 730 different pieces of evidence ultimately gathered. So the profile is starting to rise, but it's more useful for us to to review when the complaints function starts, so that those people who may need the service provided by the LSRA know about it and can access it".

Challenges

So what have been the biggest challenges facing the Authority in this first year as a fully operational entity?

"One of the strengths of the Act is that it demands that we do a lot. That's a challenge. It's also a strength because it gives a broad remit to the LSRA, which means that when it's fully established, the LSRA will have a real relevance. But that's a challenge".

While the Authority has met all of the statutory deadlines set by the Act thus far, it's definitely a case of 'a lot done, a lot more to do': "Sitting in 2019 and mapping out what we have to achieve could be considered daunting and it's certainly a challenge to achieve everything within the year. There are more deadlines within the Act, and some of them are annual. So that drives forward constant momentum to try and achieve".

Recruiting staff to make all of this happen is likely to be a challenge too: "The LSRA exists within the legal services market in Ireland, so some of the same things that are impacting upon that market, for example recruitment of lawyers, impact on us. And we've got to go to the Department of Public Expenditure and Reform for sanction for the level of remuneration; others in the marketplace are not restrained in such a fashion".

> *"The profile of the Authority itself will rise over the coming year. We're doing some work at the moment, to decide what that should look like. We're meeting shortly to look at very simple things like how the Authority is branded".*

There have been frustrations too: "The biggest frustration for me has been a perception that seems to have grown that we're not as active as we actually are, that we're not producing anything. People think that because the Act commenced in 2015, that by now we're four years old. But the actual Authority itself wasn't established until October 2016, and I didn't start until September 2017".

He sees this period of establishment as a positive though: "It's an exciting time, those periods of time trying to build the team – it's great fun".

Working with his team has been one of the most positive aspects of the past year: "Despite some challenging deadlines – we had staff working on New Year's Eve to ensure the Roll was as up to date as possible within the calendar year – they've just been superb".

He's also been particularly happy with his interactions with solicitors and barristers: "There has been a real debate about the emergence of the Authority, but very little by way of resistance. Some people do come at it from a different viewpoint, but for most, when you talk them through it and explain what we're here to do, there have been a lot of very positive, welcoming comments".

"We're all working at this, so I want to try and bust the myth that we're this huge organisation that isn't producing anything – we're a very small organisation that's been doing a lot".

Garrett Cooney SC

Garrett Cooney was born in Longford Town in 1935. He was educated at Castleknock College, University College Dublin, where he studied history and politics, and the King's Inns. He was called to the Bar in 1960.

Garrett practised initially on the Midlands Circuit where he developed a thriving junior practice, embracing all the vagaries of life on the Circuit at that time. He became a senior counsel in 1977 and initially practised predominantly in the area of personal injury law. He went on to develop a high-profile defamation practice, and for a decade or more was probably the leading practitioner in that area. At the same time, Garrett appeared in a number of significant constitutional cases, including the Hanafin challenge to the divorce referendum and the Norris challenge to the law criminalising homosexuality. Late in his career, he was engaged in a number of high-profile commercial cases.

A sense of security

Clients of Garrett Cooney felt secure in his representation. It was not because he sailed them for calm waters. On the contrary, every obstacle to the pursuit of their claims was confronted and, where possible, eliminated. The journey could be stormy. Their sense of security came rather from Garrett's work ethic, his meticulous preparation, his willingness to listen at consultation, the obvious respect and perhaps fear he instilled in the opposition and, most of all, his performance in court. He was very articulate in a way that one might not notice because his language was usually simple and accurate, leaving little room for others to obfuscate. He had a wonderful deep voice, which he could modulate from warm to threatening, and sometimes beyond. The fact that he was also thoughtful and skilful in the deployment of his command of facts and language made him one of the finest examiners of witnesses and a powerful advocate before both judge and jury. Allied to all of this, Garrett often brought with him a deep conviction in the righteousness of his client's case. If Garrett Cooney had a fault as a barrister, it might be that he was occasionally too committed. Not many clients complain of their barrister being too committed.

All the ways that are good

Away from work, Garrett was many things. He was old fashioned in all the ways that are good. Possessed of impeccable manners, he observed the small formalities so as to put others at their ease. He was instinctively and lavishly generous. Political correctness was anathema to him and he would not hesitate to call out the phoney. But he was also a very modern man in the range and contemporary nature of his interests.

He was an avid reader. He nurtured and developed his interest in history and politics, and was extremely knowledgeable of current affairs, both nationally and internationally. He had a good interest in the arts and in most sports, but particularly rugby. Most striking perhaps was his continuing interest in people. At different stages of his life, he made new friends and rarely lost an old one.

Garrett enjoyed few things more than a fine lunch. He was a wonderful conversationalist. One of his most endearing features was that he could be teased and might not notice for just a little while. When he did, he would throw back his head and his shoulders would shake with laughter. He railed against the smoking ban, which he saw as a grotesque interference with personal freedom. More annoying still was the docile nature of his fellow smokers and their refusal to revolt. In Paris for a rugby match, a well-compensated *maître d'* might be persuaded to a liberal view and Garrett would solemnly pronounce "Liberté, Égalité, Fumé".

Joys of retirement

One might have thought that retirement would be challenging for Garrett but not so. He mastered the internet and discovered the facility of Freedom of Information. Those who he perceived were abusing power were tormented. NAMA and the Personal Injuries Assessment Board (PIAB) were particular focuses of his attention. He rekindled old friendships, particularly with our colleague Paddy McEntee. In the very recent past, they would go on outings around the city. Only a very unwise waiter would give them anything other than the best attention.

Garrett was a devout man who usually prayed alone. He did not boast of, nor was he ashamed of, his religious beliefs. He was a reflective man who would occasionally express regret about events in the past. He did so humbly and sincerely, never with the object of being persuaded that he had no cause for regret.

Garrett believed firmly in the institution of the family. He could admire other families and had a deep love of his own. His appreciation of his wife Sheila's many accomplishments, both personal and professional, was just a part of their love. His sons Garrett, Stephen and Kevin meant everything to him. If nothing else, he has so obviously taught them his wonderful manners.

If we measure the worth of a man by the affection in which he was held, then Garrett Cooney was the best of men. Some say that when a great man passes, God is merely making room for someone special. If that be true, then the next generation has much to anticipate.

Michael Cush SC

Trials and the media

Practice Direction SC18 seeks to limit the use of electronic recording devices in the courts, but more must be done to prevent the potentially damaging effects of electronic communications on the administration of justice.

Paul O'Higgins SC

In the last edition of *The Bar Review*, I wrote a short piece referring to Practice Direction SC18 on the use of cameras and electronic devices in court. At the end, I referred to some questions that the Practice Direction brought to mind. These related mainly to issues of the legal basis for the exercise by courts of the powers set out in SC18. Delighted to have gotten the burden off my back, I remarked casually to the Editor how much I had to leave out and how little justice I could do the topic in 600 words. The result was an invitation to expand. With the Christmas break in prospect I foolishly agreed. The stick that I made to beat myself with has been a distant and sometimes a very proximate blight on my high spirits since then.

When 'launching' the practice direction at a seminar for journalists in November, the Chief Justice contemplated the possibility that statutory reinforcement might be needed. Here I look at one or two reasons why this may indeed be so.

Ghoulish temptation

Recent events have further underlined the need for the Practice Direction. The ghoulish sharing of photographs of Jackie Griffin, killed in a car accident on the M50, underscores the extent to which ordinary human decency disappears for so many people under the temptation to attract attention or to create sensation on social media. It is fairly clear that many behave on the internet in ways in which they would be very unlikely to behave in the non-virtual world. It is difficult, for example, to imagine that 'Lying Eyes' Sharon Collins, convicted of attempted murder in 2008, would have behaved as she did were there not an element of unreality given to her behaviour because it was online. In the case of many, their relationship with the internet causes them to deal with situations as though they were part of a computer game, rather than engaging with the real world. A combination of an expectation of anonymity and an opportunity to wield easy power seems an irresistible temptation to many.

When 'launching' the practice direction at a seminar for journalists in November, the Chief Justice contemplated the possibility that statutory reinforcement might be needed.

Essentials of the Practice Direction

For ease of reference I will briefly recap the essentials of the Practice Direction. Unlike many such directions, it is addressed at paragraph 1 to parties, legal practitioners, jurors and all others involved in or attending at any proceedings, and not just to the practitioners.

Paragraph 2 provides: "the conduct of proceedings before the court is subject to the control of the judge or judges presiding in the proceedings concerned". This indicates that the actual foundation for the exercise of the powers and the making of the restrictions referred to, is the individual jurisdiction of the judge or judges in the courts to which the Practice Direction relates. This is a matter of importance since Irish practice directions, unlike practice directions in England and Wales, have no statutory foundation. They are not laws in the proper sense. What SC18 does and is intended to do is to give prior notification to those attending court for any purpose, of a regime which can be taken to apply by way of "order" of each judge before whom proceedings take place.

The Practice Direction is signed by the Chief Justice and the Presidents of the other courts. It has application in each according to the inherent jurisdiction of the superior courts and the statutory jurisdiction of the lower courts to regulate the conduct of proceedings and to deal with contempt in the face of the court.

Paragraph 6 prohibits photographs and transmission by video or television of court proceedings except by permission of the President of the relevant court. This indicates the strictness and the formality of the prohibition. Manifestly, an individual judge is not entitled to allow the relevant photography without consulting with their President. For sound recording, the permission of the trial judge is sufficient.

Paragraph 7 provides that while any person may take written notes of court proceedings, no person other than the Courts Service (or a person acting on its behalf) may make a recording of proceedings before a court by means of an electronic device without seeking and receiving permission from the judge or judges presiding in the proceedings.

Live texts

Paragraph 8 deals with live texts from court. It restricts them to practising lawyers with bona fide business in the court concerned, and to professional journalists and professional legal commentators for the purpose of recording the proceedings. The legal profession may only text when they have bona fide business in the court. No one else may text without express permission.

Paragraph 13 provides for "enforcement", including temporary surrender of electronic devices and surrender of recorded material thereon.

While the Practice Direction prescribes the position of the courts, paragraph 15 contains a critical caveat. It provides that the preceding provisions are without prejudice to relevant existing statutory provisions, rules of court and "powers exercisable by a court under its inherent jurisdiction or otherwise by law". Thus the law of contempt of court, in particular, is closely intertwined with the Practice Direction itself.

The ghoulish sharing of photographs of Jackie Griffin, killed in a car accident on the M50, underscores the extent to which ordinary human decency disappears for so many people under the temptation to attract attention or to create sensation on social media.

Codified by statute?

In my previous article, I commented that the law in the UK had long been codified by statute. This is not strictly true. The common law offence of contempt was kept alive and remains so today. It was clarified and modified in certain respects by the Contempt of Court Act 1981 to accord with perceived obligations under the European Court of Human Rights in the wake of *Sunday Times v United Kingdom*.[1] In this case, it was held that a finding of contempt by the House of Lords against *The Sunday Times* would be contrary to the provisions of Article 10 of the European Convention on Human Rights. The public interest in free discussion of the "thalidomide issue" meant that a conviction for pre judgment would breach the Convention. The Act was intended to be a temporary measure but remains in place today, largely unmodified. In fact, the law of contempt of court has survived fairly robustly in the 40 years since then.

What the 1981 Act did was prohibit generally by s.9, without the leave of the court, the use of any instrument for recording sound. It was already a statutory offence in England, by s.41 of the Criminal Justice Act 1925, though punishable by fine only, to take a photograph in court. In practice, the enforcement of s.41 itself seems largely redundant. Not only is the fine prescribed a relatively trifling one, but the necessity to prosecute the case in a conventional way undermines its usefulness, since the consequences of a breach are not sufficiently immediate. However, the fact that the act of taking a photograph is criminal in itself has buttressed the capacity of the courts to find the behaviour a contempt as well. The cases of *R. v Vincent D*[2] and *HM Solicitor General v Cox and Parker-Stokes*,[3] in particular, shed light on the approach in the neighbouring jurisdiction.

In *Vincent D*, the Court of Appeal upheld a 12-month sentence given for contempt of court when the brother of an accused took photographs in Liverpool Crown Court and in a canteen in the Courts building. The Court emphasised that although the photographs taken did not have an actual effect on the proceedings and were of very poor quality, the need to ensure that jurors, witnesses and others could play their part in court confident that they would not be photographed (with its implications for their safety and security) fully justified the sentence imposed. It posited circumstances in which security might be less of an issue than in the particular case. The Court observed at paragraph 18:

"In some cases the 'clang of the prison gates' will be enough. In other cases, for instance where a foreign tourist has inadvertently taken a photograph, perhaps in ignorance of English law, then it may be that imprisonment is not appropriate and that a fine would be the correct sentence".

Cox looked extensively at the *actus reus* and *mens rea* of the offence of contempt. A divisional court of the High Court, which included the Lord Chief Justice, again emphasised the threat that the danger of photography presented to the administration of justice generally. The Court observed at paragraph 23 of its judgment:

"The taking and subsequent publication of the photographs on Facebook, in our view, each constitute the *actus reus* of contempt. First, illegal photography will in general interfere with the proper administration of justice through the fact that it defies the criminal law relating to the administrating of justice. Second, the statutory prohibition on photography in court is also a reflection of the serious risk to the administration of justice necessarily inherent in photography…".

The Court at paragraphs 69 and 70 addressed the necessary *mens rea* of contempt. Was it necessary to intend to interfere with the administration of justice? The court found that it was not. It is sufficient *mens rea*: "that the acts must be deliberate and in breach of the criminal law or a court order of which the person knows…". Otherwise: "the ignorant and foolish, who are unaware of the law or who read prohibitory notices but do not understand their purpose and do not realise the risks…could not be dealt with at all for contempt in the face of the court".

A weakness

Another case which illustrates the potential difficulties that may arise from a lack of legislation is *Dobson v Hastings*.[4] Here a journalist who acquired court permission after written application on affidavit to inspect an official receiver's report, inspected it and took notes when it was left in her presence by an official.

Despite a phone call from the Registrar of Companies, her editor formed the belief that it was a matter of ethical balance rather than legal restraint. He published. The rules were not widely known and did not provide a sanction for breach. The law of contempt was the only resort. It was held by Nicholls V-C that the necessary intent to interfere with the court's process was not established. Because the breach of the rule carried no sanction in itself, the court was powerless to protect its process. Clearly SC18 has the same weakness. SC18 deals with but one aspect of the cumulative threat posed by electronic communication. 'Research' by jurors and the almost unlimited availability of information, be it true or false, pose other risks to the administration of justice, which could not even have been contemplated only 25 years ago. As mentioned by the Chief Justice in November last, the Law Reform Commission is reviewing the whole area.

It is hard to avoid the conclusion that a comprehensive statutory response may well be required to bring greater order in the area. It would be foolish to assume that we perceive the full extent of the social media threat. Anyone who watched *Brexit: The Uncivil War* might reflect, for example, on the possibility of targeting jury panels, either to select or to influence in ways that could profoundly affect the outcome of cases. We are still in our infancy in adapting as a society, in law as elsewhere, to the implications of the communications revolution.

Reference

1. (1979) 2 EHRR 245.
2. [2004] EWCA 1271.
3. [2016] EWHC 1241.
4. [1992] Ch 394.

LEGAL UPDATE

THE BAR OF IRELAND
The Law Library

The Bar Review, journal of The Bar of Ireland

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A directory of legislation, articles and acquisitions received in the Law Library from November 16, 2018, to January 17, 2019. Judgment information supplied by Justis Publishing Ltd. Edited by Vanessa Curley and Clare O'Dwyer, Law Library, Four Courts.

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Barrister-led consortia: a new framework for State tenders

The State Tenders Working Group of The Bar of Ireland has developed a consortium model to enable barristers to tender for State contracts.



Liam O'Connell BL
Caoimhe Ruigrok BL
Niamh Hyland SC

In April 2017, the Council of The Bar of Ireland established the State Tenders Working Group to give consideration to issues concerning the Bar and the procurement by State bodies of legal services. Its task was to identify and analyse the methods by which State bodies procure legal services. It was also asked to consider any impediments to members of the Bar wishing to compete for legal services contracts, and to make recommendations to the Council on initiatives to enhance the pool of work available to the Bar.

This article will set out some of the findings of the Working Group and will focus in particular on the model that has been identified by the Working Group, and supported by the Council. This model allows barristers, along with solicitors, to tender as a consortium, thus permitting them to compete for State work for which they were previously precluded from tendering.

Issues

Over the course of its work the Working Group reviewed in excess of 137 requests for tenders (RFTs) for the provision of legal services by contracting authorities that were published during the period 2008-2017. The RFTs were published on the platform used to publicise tenders, etenders.gov.ie. This is used by the Office of Government Procurement (OGP) and other State bodies to publicise their tenders.

On foot of its findings, the Working Group considered that if barristers were able to come together for the purpose of submitting a bid as a consortium, this would strengthen their position in a tendering process.

From this analysis, it became apparent that among the obstacles faced by members of the independent referral bar seeking to submit bids for legal services work was the framing of RFTs in ways that excluded barristers. Among the most frequent issues encountered having the effect of

excluding barristers were:

- tenders that expressly permitted that only solicitors could submit tenders;
- minimum turnover thresholds that were unlikely to be met by any individual barrister;
- minimum insurance cover requirements that were in excess of the professional indemnity insurance cover ordinarily put in place by individual barristers; and,
- requirements that the bidder have available to it a range of professionals of different levels of experience.

The effect of this exclusion was viewed by the Working Group as negative from the Bar's perspective insofar as it closed off, or at the very least limited access to, a large pool of State work that could be performed by barristers if given the opportunity. From the contracting authority's point of view, it meant that it was choosing from a smaller pool of legal professionals and thus competition was being inhibited. Moreover, where particular lots were unattractive to those capable of tendering, the number of providers available to contracting authorities was further reduced.

On foot of its findings, the Working Group considered that if barristers were able to come together for the purpose of submitting a bid as a consortium, this would strengthen their position in a tendering process. Consequently, the Working Group made a number of recommendations to the Council of The Bar of Ireland, including that the Council issue an information document on the formation of consortia with solicitors and how to achieve this in a manner compatible with the Code of Conduct.

While barristers in this jurisdiction may not traditionally form consortia, consortium bidding is not a novel concept in the context of public procurement, and is regularly used by small and medium-sized enterprises (SMEs) to compete with larger bidders.

Consortium bidding

Arising from the Working Group's report to the Council, it was charged with developing a proposed consortium model to be used by barristers. On foot of this, the Working Group has identified a model through which barristers may submit a joint bid as part of a barrister-led consortium, in conjunction with an external solicitor or solicitors, in response to an RFT.

While barristers in this jurisdiction may not traditionally form consortia, consortium bidding is not a novel concept in the context of public procurement, and is regularly used by small and medium-sized enterprises (SMEs) to compete with larger bidders. The standard form RFT published on the OGP platform contains express provision for tendering by consortia. A prime contractor who will have overall responsibility for performance of the contract will always be required, but there is an explicit entitlement to use sub-contractors and consortium members. The members of the Working Group were conscious of the need to ensure that what resulted would be consistent with the fundamental principles underpinning the independent referral bar. Barristers working together collectively on particular matters is not unusual. There have been previous instances of barristers working collectively on State projects as a consortium, for example in the case of the Banking Inquiry, where barristers provided services under a consortium model. What is essential in any model is that there is no partnership between participating members, and that members continue to compete with one another as usual outside the scope of the consortium's work.

The Working Group also consulted with the OGP, which is responsible for many of the legal services tenders, and is working with the OGP to ensure that the barriers identified above will be removed when contracting authorities are tendering for legal services in the future.

Model contracts – Heads of Terms and Consortium Agreement

The Working Group has prepared template Heads of Terms and Consortium Agreement, which have been drafted with a view to guiding members on how they might form a consortium and ensure compliance with the Code of Conduct of The Bar of Ireland. Those template agreements are available to members of the Law Library on the State Work Support Hub in the Members' Section of the Law Library website.

It is envisaged that in the proposed model, the prime contractor will be a solicitor. This is for two principal reasons. First, there will always be certain services required by the contracting authority that only solicitors can provide. Second, it will be necessary for members to receive instructions through the solicitors concerned from the contracting authority.

There are a number of key aspects to the model necessary to ensure compliance with the Code of Conduct and avoid the creation of a legal partnership as understood by the Legal Services Regulation Act, 2015, or a partnership as understood by the Partnership Act, 1890.

Firstly, a Heads of Terms will be executed by a group of barristers and a solicitor; this will establish the framework within which the consortium may come into existence should a bid be successful. The solicitor party to the Heads of Terms, being the prime contractor, will submit the bid to the contracting authority on behalf of the putative consortium. All members of the putative consortium will continue to compete with one another in all other aspects of practice as usual.

The parties to the Heads of Terms will be responsible for providing what information is necessary for the solicitor to submit a compliant bid to the contracting authority.

In the event that the bid submitted is successful, the barristers and solicitors can at that juncture execute a consortium agreement whereupon the Heads of Terms will terminate. The Consortium Agreement will subsist for a term ending upon the expiry of the Framework Agreement in respect of which the consortium has been formed or, where the Framework Agreement has expired but work continues on foot of a contract awarded under the Framework Agreement, at the end of that contract, whichever is later.

The Consortium Agreement will govern the internal relations within the consortium, including matters such as the allocation of work, the submission and payment of fee notes for work completed, accountability for the punctuality and quality of work, and professional indemnity insurance requirements.

The current framework agreement governing the provision of legal services to the public sector (excluding central government) will expire in August 2019. It was estimated that pursuant to that framework alone, €160m in legal services would be procured. Thereafter, a new framework will be established to replace the expired agreement. The development of the concept of barrister-led consortia presents members with a new opportunity to compete for inclusion on the next framework agreement where this was previously impossible. However, certain legal services tenders will not be on the framework and therefore, even before August 2019 there will continue to be legal services tenders of interest to members.

It is hoped that the introduction of this model will therefore contribute to enlarging the work available to members of the Law Library.

What is essential in any model is that there is no partnership between participating members, and that members continue to compete with one another as usual outside the scope of the consortium's work.

Competition considerations

In view of the nature of the independent referral bar, those submitting bids as consortia must be vigilant to ensure that they at all times remain compliant with governing competition law rules.

Consortium bidding by SMEs is permissible under competition law provided that certain conditions are met, namely that the bid is compliant with competition law and that co-operation between consortium members, who are otherwise in competition with one another, does not lead to collusion beyond the scope of the bid or otherwise have an anti-competitive effect.

In December 2014, the Competition and Consumer Protection Commission (CCPC) published a guide for SMEs on consortium bidding, which sets out the factors that should be considered when determining whether or not a bid is compliant with competition law rules. In summary, these are that:

1. None of the consortium members could fulfil the requirements of the tender competition or the contract on their own.
2. No subset of the consortium members could together fulfil the requirements of the tender competition or the contract.
3. Only the minimum amount of information strictly necessary for the formulation of the joint bid and the performance of the contract (if awarded) is shared between the consortium members and is restricted to relevant staff on a 'need to know' basis.
4. The consortium members ensure that they compete vigorously as normal in all other contexts.

Even if these conditions cannot be met, the consortium may still be permissible under section 4 of the Competition Act, 2002 (as amended) (CA 2002) provided it enhances competition rather than restricts it. The guide sets out the conditions that are relevant to this evaluation.

Next steps

What action should members wishing to bid for legal services work take? The followng should serve as a guide:

- identify a group of barristers whom you wish to work with;
- consider whether you wish to focus on a particular practice area or cover various practice areas, and form your group accordingly;
- find a solicitor or solicitors your group would be happy to work with;
- put together a Heads of Terms agreement that will identify the basis upon which you will tender as a group, including the way in which you will divide work;
- consult the model agreements on the State Work Support Hub on The Bar of Ireland website;
- consider retaining external procurement consultants who will assist you in submitting a bid, including identifying relevant experience of all members of the consortium;
- sign up to etenders.ie, which will automatically notify you every time a relevant tender is published;
- identify a tender you wish to tender for;
- prepare your bid;
- submit your bid;
- await result!; and,
- if you are successful, sign up to the Consortium Agreement that will govern the basis upon which you contract with each other in carrying out your work for the contracting authority.

Remember that the time limits for submitting bids are often very short, offering a number of weeks to submit a bid, so it is therefore necessary to put together a consortium and be ready to submit a bid. Much of what is required can be prepared well in advance of the publication of the RFT and then adapted to suit a particular tender.

Don't be discouraged if you don't win the initial competitions you enter. Tendering for legal services is very competitive and there are many firms of solicitors with considerable tendering experience, and in some instances a dedicated employee, actively competing for this valuable work. But barristers have a great deal to offer, not least our flexible cost structure and skill set.

Conclusion

The proposed consortium model, which barristers may now use to bid for legal services contracts, poses challenges and will require considerable investment of time by those members who seek to form consortia.

However, it is hoped that this initiative will lead to an advancement of the position of the Bar by affording barristers the ability to compete for additional contracts.

The Working Group wishes to extend its thanks to Anne Lannon and her team in the Office of Government Procurement, and McDowell Purcell Solicitors, for their assistance in this initiative.

Laws in common?

What is the future of the common law within the European Union after Brexit?*

Judge Gerard Hogan
Advocate General of the Court of Justice of the EU

Present position

Despite the increasing influence and reach of European Union law, it is still, broadly speaking, true to say that the last 60 or so years of the new legal order has not changed the fabric of the 28 legal systems: they remain recognisably either common law or civil law jurisdictions. How does one define these terms? Some generalisation is, of course, necessary, but a common law system is generally regarded as one in which there is little statutory regulation of key areas of private law,[1] and which is case law and precedent oriented. A civil law system, on the other hand, is code based and is one in which, in particular, the substantive rules regarding the application of private law are contained in codified form. One may additionally say that the civil law systems are all to one degree or another influenced by Roman law, specifically the Justinian codes, whereas, with the exception of particular areas of the law such as probate, areas of commercial law (*lex mercatoria*) and the law relating to prescription,[2] the common law otherwise betrays few Roman law influences.

It is nonetheless probably true to say that there is more of an overlap between the two systems than is generally realised. Some modern statutes in the realm of private law have code-like qualities: the Succession Act 1965 and the Occupiers Liability Act 1995 come to mind. The key point here is that it is the actual words of the statute that are the starting point for the court, and that earlier court decisions serve principally to illustrate the application of the statutory rule. At the same time, the civil law jurisdictions have taken on more of the characteristics of the common law, with greater attention being paid to earlier court decisions and according them a form of *de facto* precedential status, even if the civilian systems do not recognise a system of precedent as such.

Respect for the essential fabric of the different systems of law is reflected in the key doctrine of the Court of Justice, namely, that of national procedural autonomy, subject only to the twin principles of equality and effectiveness. There have, admittedly, been some inroads to date into the fabric of the common law and (to a lesser extent) civil law principles in specific areas of law. But could all of this change after Brexit if a major state – which is naturally a traditional guardian of the common law heritage – were to leave the EU, so that far more changes might be on the way?

Some inroads to date

There have, admittedly, been some inroads to date into the fabric of the common law, and some examples may be given of past and likely future changes.

First, some of the biggest changes have been in the sphere of private international law via the abolition of the *forum conveniens* doctrine[3] and the anti-suit injunction[4] as being inconsistent with the Brussels Regulation system. Second, there is a clear distaste for discretionary time limits as being inconsistent with legal certainty.[5] You might well think that the changes to date have been relatively modest. But other significant changes may be on the horizon. One possible change is a rule to ensure that juries deliver reasons for their decisions. It is true that the pressure in this regard may be thought to have ebbed in the light of the European Court of Human Rights decision in *Lhermitte v Belgium*.[6] That case raised the question of whether it was the duty of a jury to give reasons for its decisions under Article

6(1) of the European Convention on Human Rights. The Court concluded that the jury did not have to give such reasons since a finding as to the accused's guilt "necessarily implied that the jury found that she had been responsible for her actions at the material time. The applicant cannot therefore maintain that she was unable to understand the jury's position on this matter".[7] The facts of *Lhermitte* were, however, tragically straightforward: the accused had murdered her five children and she had, in any event, admitted her actions and confessed to the crime. Other future cases may require a more nuanced response.

Other changes are likely to be brought about in the realm of consumer protection and contract law by the increasingly important Unfair Contract Terms Directive, Directive 93/13 EEC. In the context of mortgage deeds, the Court of Justice has already held, for example, in *Verein fur Konsumentneinformation*[8] that the unfairness of a mortgage term "may result from a formulation that does not comply with the requirement of being drafted in plain and intelligible language set out in Article 5" of that Directive. A host of other similar cases arising from this Directive are currently pending before the Court of Justice. The potential here for reshaping key aspects of the common law of contract is clearly quite considerable.

Commission v Ireland

In many ways, the differences between the civil law and common law systems is, perhaps, as much one of cultural attitudes as anything else. In this context, the approach of the Court of Justice of the European Union (CJEU) in *Commission v Ireland*[9] is quite revealing. Here the objection was to the provisions of Ord. 84A, r. 4, which governed the time limits for challenges to public procurement decisions. This prescribed a time limit of three months, but also imposed a separate obligation on the challenger to move promptly. It was said that this enabled the High Court to dismiss proceedings that were otherwise brought within time by reason of the failure to move promptly.

This case does reveal, however, the civilian distaste for the discretionary features of the common law, especially where the application of these discretionary features is simply governed by the previous case law and is not directly based on a written text. This is well explained in Advocate General Kokott's opinion:

"Ireland further objects that its national law *is a common law system. It says that in such a system not only statutory provisions but also decisions of the courts are determinative*. Tenderers and candidates should obtain legal advice if necessary.

On this point, it must be observed that a directive leaves it to the national authorities to choose the form and methods for achieving the desired result… The transposition of a directive into national law therefore does not necessarily require the adoption of express and specific legal provisions, and a general legal context may also suffice in this respect. What matters, however, is that with such a method of proceeding the full application of the directive actually is ensured with sufficient clarity and precision.

If the position in national law derives from the interplay of statutory provisions and 'judge-made' law, that must not take place at the expense of the clarity and precision of the provisions and rules concerned. That applies all the more where a directive is intended to confer rights on the individual and an unclear or complex legal position with respect to limitation periods could lead to the loss of rights, in the present case, the loss of the right to review of decisions taken by contracting authorities. Foreign tenderers and candidates in particular could be deterred from seeking public contracts in Ireland by a complex and non-transparent legal situation.

……It is not compatible with those requirements for a national court to apply the limitation period laid down by law for the right to apply for review, in this case Order 84A(4) of the RSC, by going beyond its wording and applying it by analogy also to the review of decisions for which the legislature has not prescribed such a limitation period. The legal position is thereby made less transparent. The tenderers and candidates affected run the risk, in view of the preclusive effect of the limitation period, of losing their right to the review of certain decisions. The objective laid down in Article 1(1) of Directive 89/665 of effective review of the decisions of contracting authorities is thereby undermined". (italics added)

This is, I think, a clear instance of where civilian values – with a preference for legal certainty and for rules to be written down – in essence trumped the common law method where key principles emerge and are developed from the case law. This development, however, is not something that we should necessarily fear – rather we have, I suggest, much to learn from such an approach. On the other hand, the great attraction of the common law – especially in the sphere of contract and commercial law – is that it is flexible, fact based and develops only incrementally. This has the merit that it works in practice and avoids the multiple abstractions that have long since been thought to be one of the chief weaknesses of the German Civil Code (BGB) even from the outset.

At all events, the legal certainty/written rule leitmotifs of *Commission v Ireland* may indeed be contrasted with the subsequent approach taken by the Supreme Court in two cases, *Minister for Justice v Olsson*[10] and *Minister for Justice v O'Connor*,[11] in respect of the right to legal aid in European Arrest Warrant (EAW) cases. Article 11(2) of the EAW Framework Decision provides that the accused is entitled to legal aid in accordance with national law. As it happens, there was no national "law" (in the sense of an actual enactment by the Oireachtas) providing for such legal aid in EAW cases, but the evidence was that such assistance was automatically and routinely provided as a matter of practice under a non-statutory scheme. In *O'Connor*, the plaintiff – who had in fact been given legal aid under the non-statutory scheme – nonetheless maintained that Ireland had failed to transpose the Framework Decision properly.

The virtual automaticity attending the grant of legal aid, coupled with the fact that the plaintiff had in fact been accorded legal aid, was sufficient to dispose of the argument. The judgments of the High Court, Court of Appeal (by a majority) and seven-judge Supreme Court reflect perhaps the traditional and practical approach of the common law, which was to reflect an impatience with purely theoretical arguments of this kind where it was clear – or so they thought – that the accused person could have suffered no prejudice as a result.[12] One might equally say in response that a civil law lawyer might object that the putative foreign accused facing an EAW charge would not be able to find anything written down in law guaranteeing the right to legal aid in such cases. But for a clear majority of the Irish judiciary, the fact that such a right was always afforded in practice was in itself sufficient, and the objection based on the absence of national law (in the sense of legislation) was regarded in the circumstances as a purely theoretical objection.

But could all of this change after Brexit? The case of the draft Common European Sales Law

There is clear evidence that the presence of the United Kingdom served to thwart ambitious plans to bring about significant changes in the fabric of the

common law. A good example here is supplied by the European Commission proposal for a Common European Sales Law (CESL) (2010-2012).[13] This was a proposal for what was described as an "optional" European Contract Law (but, it might be asked, optional for whom?). The Commission had described the proposal as 'Esperanto' in style, but not everyone agreed with this characterisation. The British Government rather pointedly responded by saying:

"It may be difficult to quantify but it is clear that a 29th regime[14] of contract law would "belong to no one in particular" and would not reflect any particular legal or cultural heritage. Indeed a fundamental first question for the authors of such an instrument might be whether to base it more on the common law perspective, which is currently probably the most commercially attractive approach, or the civil law position, which may be more familiar to EU citizens. The 'Esperanto' approach must at least raise the possibility that it will feel comfortable and familiar to no one and consequently will be rarely used".

The City of London additionally cried foul and asserted that there was little evidence of an 'Esperanto' approach. It objected to this proposal as a form of civil law take-over of the common law of contract, which, of course, was and is one of the City of London's big attractions as a major world financial and legal centre.

Three fundamental conflicts with the common law from CESL

Quite apart from the fact that to suspicious eyes, the CESL proposal at least looked like a version of civil law code, there were at least three individual provisions with implications for substantive contract law. First, CESL Article 69 envisaged that pre-contractual statements might be incorporated into the terms of the contract, with obvious implications for the survival of the parol evidence rule. Second, CESL Article 89 provided for a duty on parties to enter into negotiations where the performance of their obligations under the contract became "excessively onerous". This reflected provisions of the BGB, which were introduced after the hyper-inflation of the 1920s,[15] but which, if adopted, could nonetheless play havoc with the common law rules as to frustration and party autonomy in business-to-business transactions.

The other major proposed change was contained in CESL Article 2, which provided simply that: "Each party has a duty to act in accordance with good faith and fair dealing". CESL Article 2 reflected similar key provisions in civilian codes, e.g., Article 1134(3) of the French *Code Civil*, Article 2 of the Swiss Civil Code and Article 242 of the BGB. There are, at least, also shades of this in Article 3(1) of the Unfair Contract Terms Directive:

"A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer".

The British Government was not, however, enamoured of this CESL proposal either:

"….Respondents raised considerable concerns about this [duty to act in good faith] provision, in particular that:

a. it is uncertain and unpredictable in its effect, given the width of the concept. Little guidance is, however, given on how it should apply. This is likely to lead to divergent interpretations in 27 Member States and one respondent at least thought that it would be impossible for the Court of Justice of the EU to comprehensively define it so as to control that divergence;

b. despite the assertion of the principle of freedom of contract in Article 1, Article 2 undermines the contractual agreement of the parties, making reliance upon what has been agreed and the remedies they otherwise have unpredictable;

c. it imports considerable scope for argument between the parties about whether each acted in good faith, which benefits neither".

There are, of course, different views as to whether any such general duty of good faith is currently part of our contract law. While the idea of a general duty of good faith in contract law was rejected by my colleagues[16] in the Court of Appeal in *Flynn v Breccia*,[17] I nonetheless stated in a concurring judgment:

"If one looks further into our general law one can find instances of specific doctrines and concepts which correspond to civilian concepts of good faith: the rule against a self-induced frustration of a contract, the equitable doctrines of unconscionability, fraud on a power and the principle that he or she who comes to equity must come with clean hands are all in their own way at least potential examples of this. The fact that the Irish courts have not yet recognised such a general principle may over time be seen as simply reflecting the common law's preference for incremental, step-by-step change through the case law, coupled with a distaste for reliance on overarching general principles which are not deeply rooted in the continuous, historical fabric of the case law, rather than an objection per se to the substance of such a principle".[18]

The Court of Appeal subsequently had to deal with this very same point in *Morrissey v IBRC*.[19] Here the argument was that as the IBRC had overcharged the amount of interest due on a loan of some €33m, it had thereby acted otherwise than in good faith, so that in turn it had forfeited the right to collect the sum which had been lent. Dealing with this point, the Court took the view that *Flynn v Breccia* amounted to a:

"….tacit recognition that specific doctrines developed in common law jurisdictions – ranging from the "clean hands" doctrine, estoppel, constructive notice to fraud upon a power – are but particular instances of legal principles that in civilian jurisdictions have been subsumed into the wider and over-arching principle of good faith.

"One thing, however, is clear. Even if our common law system were to recognise a general over-arching principle of good faith, such a principle would simply operate in aid of the general law of contract by precluding conduct which was overbearing, oppressive, abusive, unconscionable or unfair, in much the same way as equity has leavened the rigours of the common law. It would not, however, authorise the courts to undermine the very substance of the rights and obligations of the parties to the contract in reliance on such a general principle of good faith. Yet such would be the case if the courts were to hold that a creditor were to be deprived of his right to demand repayment under contract of that which was *lawfully due*. Naturally, I stress these latter words because the creditor has no right to recover that which is not properly due, such as the sums which were overcharged in the present case".

Perhaps *Morrissey* is therefore an example of how the introduction of a general principle of good faith would not be quite as novel or dangerous as some

judges (and others) might fear. But irrespective of whether the common law already recognises a doctrine of good faith or whether such has been introduced in a consumer context by Article 3(1) of the Unfair Contract Terms Directive, there is no doubt but that a proposal along those lines would represent a major cultural shift in our entire private law because it would require courts to rely on overarching general principles embodied in a statutory provision, which principles were not themselves deeply rooted in the continuous, historical fabric of the case law.

Potential impact on the common law within the EU after Brexit

And so we return to the question of the potential impact on the common law within the European Union after Brexit. It is hard to avoid the conclusion that Ireland (and, to some extent, Cyprus and Malta) will *de facto* be isolated. Certainly, if the United Kingdom leaves, it will no longer be around to block potentially far-reaching developments such as any proposed CESL 2. A wider question is what will happen to EU contributions to the common law (such as proportionality, duty to give reasons, effective remedy, legitimate expectations) in the UK after Brexit? Will the common law systems in Europe be pulled apart in opposite directions with one (or, if you prefer, three) small common law states within the EU and one giant state (and the home of common law) without?

There is, of course, the prospect that without the United Kingdom, there will be further proposals for the Europeanisation of commercial and contract law emanating from the Commission, so that in future, perhaps, a new CESL will effectively create an EU-codified contract law supervised by the CJEU. If that were to happen, would a tort version of CESL be far behind? In these circumstances, would Ireland over time cease to be a common law country in any true sense of that term? Or would it perhaps become the inverse of Louisiana, which is arguably an island of civil law that is vulnerable to being overwhelmed by the presence of 49 other common law states? And would the UK continue to be cut off from such potentially far-reaching changes at EU law affecting the fabric of the common law?

Irrespective of the form Brexit may take, these are the enduring and complex questions, which in this article I have but too lightly explored. We will be obliged to confront these issues in the coming years.

**This is a version of an address given to the EU Bar Association in Distillery Building, Dublin 7, on November 23, 2018. My thoughts on this issue were first stirred by hearing two scintillating papers given by Conleth Bradley SC and Dr Catherine Donnelly BL at a meeting of the Society of Legal Scholars in University College Dublin. I am indebted to both of them.*

Reference

1. Although this is changing: see Binchy, Tort Law in Ireland – A Half Century Review, *Irish Jurist* 2016; 56: 198, 200-201. While the law of tort has been generally thought of as a (virtually) pure common law domain, it is nonetheless striking that even here, there have been significant inroads into the common law by the enactment of legislation. Examples include the Civil Liability Act 1961, the Occupiers Liability Act 1995 and the Defamation Act 2009. While one might say that these items of legislation have had the effect of largely codifying the law (and modernising it in the process), the fact that the Oireachtas has legislated to replace particular common law rules is significant, because it means that what heretofore would have been regarded as a standard common law tort problem, then becomes essentially either one of statutory interpretation (see, e.g., *Speedie v Sunday Newspapers Ltd* [2017] IECA 15) or the application of a general principle set out in the legislation to the facts of the case (see, e.g., *Byrne v Ardenheath Co. Ltd* [2017] IECA 293). A comparative lawyer would probably say that these examples show that there has been a small shift in the direction of a quasi-civil law approach in these discrete areas of private law.
2. See the discussion of this in *Zopitar Ltd. v Jacob* [2017] IECA 183, [2018] 1 I.R. 657, 675-679.
3. See, e.g., Case C-28102 *Owusu v Jackson* [2005] ECR I -1383.
4. Case C-159/02 *Turner v Grovit* [2004] E.C.R. I-3578.
5. See, e.g., Case C-458/08 *Commission v Ireland* [2010] ECR I-859.
6. [2016] ECHR 1060.
7. *Lhermitte v Belgium* [2016] ECHRR 1060 (GC).
8. Case C-326/14 EU:C: 2915: 782.
9. Case C-458/08 [2010] ECR I-859.
10. [2011] 1 IR 384.
11. [2017] IESC 21.
12. I should record that I found myself as the sole dissentient in the Court of Appeal ([2015] IECA 227), saying:

    "Judged from the perspective of national constitutional law, it is all too plain that the only method whereby the Scheme could be established in accordance with law in this State is where the Oireachtas enacted legislation for this purpose in accordance with Article 15.2.1 and Article 20 of the Constitution. It is true that Dáil Éireann has voted supply by means of a financial resolution and this appropriation doubtless appears as a line item in the annual Appropriation Acts. But the Scheme nonetheless lacks the quality of publicly accessible and generally applicable legal principles, standards and rules which are the hallmark of a public general Act enacted by the Oireachtas.

    "The fact that Article 20 of the Constitution proscribes the method whereby legislation is to be enacted – or, for that matter, amended – is not something which can be blithely ignored. The deliberative process involved in the entire parliamentary system was plainly regarded by the drafters of the Constitution as an essential pre-requisite in a democracy to the legitimacy of legislation. The extra-statutory nature of the Scheme is not, of course, illegal and nor does it render it in any way unlawful as a matter of domestic constitutional law. It is nonetheless not one provided "in accordance with national law" in the sense in which that term is used in Article 11(2) of the Framework Decision".

    This approach may reflect the more civilian approach as reflected in the opinion of Advocate General Kokott in *Commission v Ireland*.
13. *Procedure File of Regulation on Common European Sales Law 2011/0284* (COD).
14. i.e., 28 Member States plus Scots law.
15. Article 138 and Article 157 of the BGB, respectively.
16. Finlay Geoghegan and Peart J.J.
17. [2017] IECA 74, [2017] 1 I.L.R.M. 369.
18. [2017] 1 I.L.R.M. 369, 402.
19. [2017] IECA 162.

Safe spaces

Recent events have highlighted the need for better security measures in the courts to protect those who work in and use them from threats and aggression.

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

The incident that occurred before Christmas in the Family Circuit Court in Phoenix House in Dublin sent shockwaves through all those whose daily place of work is in the courts throughout Ireland. Regrettably, this was not the first time such a serious incident had occurred. In June 2017, my predecessor Paul McGarry SC highlighted the very serious concerns of The Bar of Ireland regarding the security of practitioners while carrying out their professional role on behalf of clients in the facilities that are overseen and managed by the Courts Service.

In fairness to the Courts Service, they responded swiftly to the incident that took place in December 2018 and practitioners who frequent the family law courts in Phoenix House will be aware of the new measures that have been put in place since January 2019 to address the security concerns, including security screening at the entrance along with a number of G4S security personnel present while the Courts are sitting.

Unfortunately, the prevalence of aggression, threats and violence towards barristers in the course of their professional work has been steadily increasing. Of the 460 barristers who responded to a survey undertaken by the Council in January 2019 on security in the courts, 53.4% said that they had experienced aggression, threats or violence in a court setting or as a result of court proceedings, whether in person or on social media, via text or otherwise. Such experiences mainly occurred in cases relating to family law (44%), criminal law (36%), debt/repossession (32%) and child care (12%). Less than 7% of those who have experienced acts of aggression, threats or violence reported such incidents to the authorities in the Courts Service.

Members were invited to suggest measures that could be adopted by the Courts Service to mitigate against the risk of aggression, threats or violence in court settings. A total of 330 members put forward a range of ideas for consideration. The overwhelming majority, 81% of respondents, said that an increased Garda presence in all court buildings is essential to act as a deterrent against any violent, aggressive or threatening behaviour. The introduction of security screening at the entrance to all courthouses and the installation of panic buttons throughout the courthouses was also recommended. Feedback from the survey also referenced the lack of facilities available in the courts, in particular inadequate consultation facilities, and the absence of a restaurant facility for members of the public in the Four Courts. There is now no public venue on site for clients to take time out from what are often stressful circumstances.

Separately, a difficulty has arisen in criminal cases where a client may sack their legal team and proceed as a lay litigant, and assume the place of counsel in the seating normally reserved for counsel.

It is completely unacceptable that barristers, judges or indeed any other users of the courts should suffer personal attack or threats as a result of playing their part in the administration of justice. Intimidation and aggression such as this represents an attack on the primacy of the rule of law.

Representatives of The Bar of Ireland had the opportunity to raise many of these concerns directly with the Minister for Justice and Equality, Charlie Flanagan TD, at a meeting in late January 2019. At that meeting, it was emphasised that the security issue that occurred in Phoenix House is at risk of reoccurring in Dolphin House in Dublin and in any number of courthouses on Circuit at any time in the future, as the new measures that have been implemented in Phoenix House have not been replicated across all court buildings.

While the Bar acknowledges that in order to address security in all courthouses there is a resource implication in terms of Garda presence and the provision of screening infrastructure, the safety and security of all users of the courts, including judges, barristers, solicitors, staff of the Courts Service and members of the public needs to be prioritised and the appropriate level of resources should be provided.

The Minister acknowledged the changed environment in which members are working, in particular the sometimes aggressive behaviour of litigants in a stressful adversarial setting, and confirmed that he was committed to ensuring the safety and security of all users of the courts. He undertook to raise the issue with the Garda Commissioner in relation to Garda resources in courthouses, and also asked for the results of the member survey.

The Bar of Ireland will continue to actively engage with the Courts Service in relation to security in courthouses to ensure that members of the Law Library are in a position to carry out their professional role without fear or threat of such serious incidents reoccurring.

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