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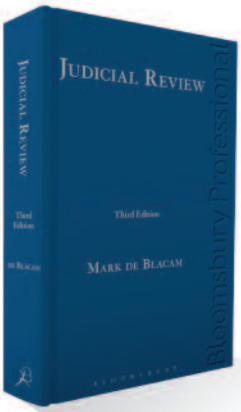

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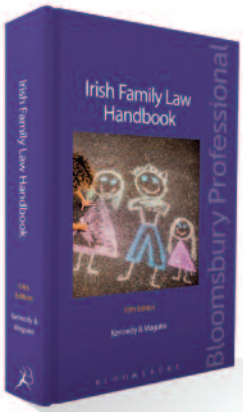

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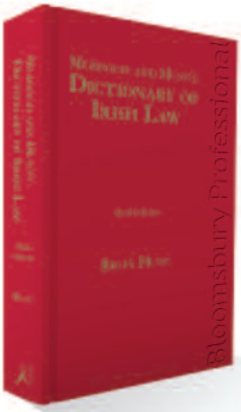

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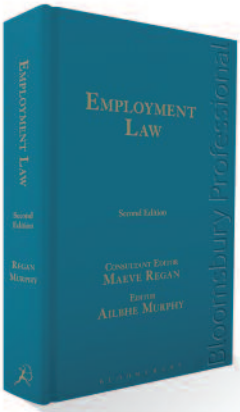

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The Bar Review
The Bar of Ireland
Distillery Building
145-151 Church Street
Dublin DO7 WDX8

Direct: +353 (0)1 817 5166
Fax: +353 (0)1 817 5150
Email: rfisher@lawlibrary.ie
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Editorial: Ann-Marie Hardiman
Paul O'Grady
Colm Quinn
Design: Tony Byrne
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Commercial matters and news items relating to *The Bar Review* should be addressed to:

Paul O'Grady
The Bar Review
Think Media Ltd
The Malthouse,
537 NCR, Dublin DO1 R5X8

Tel: +353 (0)1 856 1166
Fax: +353 (0)1 856 1169
Email: paul@thinkmedia.ie
Web: www.thinkmedia.ie

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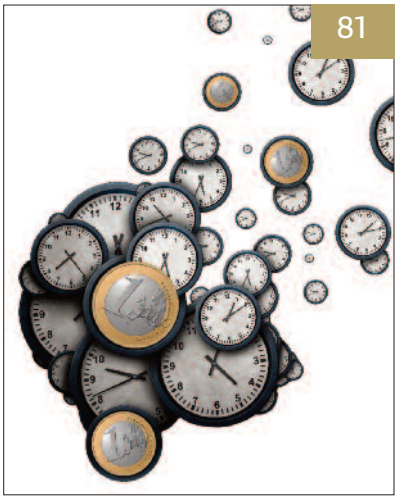


Papers and editorial items should be addressed to:
Rose Fisher at: rfisher@lawlibrary.ie

Reports and consultations

Developments at home and abroad require the Bar's close attention.

LSRA

On May 3, 2017, The Legal Services Regulatory Authority (LSRA) published two reports:

1. Legal Partnerships: this report is the result of a public consultation on the regulation, monitoring and operation of 'legal partnerships' carried out by the Authority as required under section 118 of the Legal Services Regulation Act. It also set out the proposed approach that the Authority intends to take and makes recommendations as to the regulation, monitoring and operation of legal partnerships, following the responses received from consultees. Of note is the recommendation to seek more time to develop both an appropriate strategy around the introduction of such structures and also the resources to support that strategy. Further consultations are likely in that regard.
2. Multi-Disciplinary Practices: this report was prepared on foot of the requirements of section 119 (1) and (2), LSRA 2015, and is an initial report on the establishment, regulation, monitoring, operation and impact of multidisciplinary practices (MDPs) in the State. A public consultation on MDPs commenced on May 2, 2017, and a working group of the Council is preparing a submission in that regard.

A third consultation also commenced in April in respect of certain matters relating to barristers. Submissions have been invited in respect of the client monies' restriction and restrictions on a barrister receiving instructions in a contentious matter directly from a person who is not a solicitor. Again, a working group of the Council of The Bar of Ireland is preparing a detailed submission in response to this consultation, to be submitted in early June 2017. Members are encouraged to read both the submissions made by the Council in response to the consultations and the reports published by the Authority, which are available on its website. A sincere thanks to the members of the LSRA Committee and working groups, who continue to invest many hours in the production of these high-quality submissions, which have received numerous compliments.

Father of the Bar

Colleagues may be aware that Paul Callan SC recently retired from practice and consequently relinquished his role as 'Father of the Bar', which he occupied for many years. I wrote to Paul on behalf of the Council to thank him for his commitment and collegiality over the 60 years of his membership. His reputation as a fearless advocate for individual rights and contribution to the development of the legal profession deserve to be acknowledged. In responding, Paul has passed on his wish to his successor that he would have every success and enjoyment in that role. The mantle now passes to our esteemed colleague Ronnie Robins SC, a member for 55 years, since June 1962. Ronnie has for many years given his time and energy to assist the Council, in particular on its Professional Practices Committee. I know that he is delighted to have attained Fatherhood after such a long wait.

Professional indemnity insurance compliance

Sincere thanks are due to the overwhelming majority of members who supplied a copy of their professional indemnity insurance compliance certificate to the Regulation Department. The co-operation of members with the new approach that had to be taken is very much appreciated.

Four Jurisdictions Conference

The Four Jurisdictions Conference took place in Dublin over the weekend of May 5-7, 2017. Owing to the hard work of Judge Mary Finlay Geoghegan and a team of volunteers, ably supported by Rose Fisher, Events Manager, the event was a roaring success, and has resulted in the creation of new friendships with colleagues throughout the four jurisdictions. The Conference is a fantastic annual event and I look forward to attending in 2018.

Brexit – an opportunity to expand the market for legal services in Ireland

The Bar of Ireland has had numerous engagements with Government departments and agencies, politicians and the legal community to work towards an increased trade in legal services from Ireland to the international sector. Following Brexit, Ireland will be the only English-speaking common law jurisdiction fully integrated into the European legal order. This will help to attract financial and other service industries into Ireland and will provide an opportunity to increase the market for legal services in Ireland. In particular, it will encourage international companies:

- to incorporate Irish law as the governing law of contracts, in place of English law;
- to designate Ireland as the forum for the resolution of any disputes in relation to those contracts, whether by way of litigation or arbitration; and,
- to use Irish lawyers to advise on European law.

If Irish law can become the proper law of international contracts, it will inevitably increase the volume of work done by legal service providers in Ireland, including by increasing the volume of litigation and arbitration in Ireland. Considerable work is required by all stakeholders to take advantage of the opportunity to increase trade of legal services to the international sector.

Paul McGarry SC
Chairman,
Council of The Bar of Ireland

Limits to access

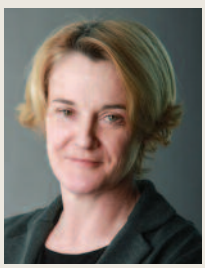
This edition focuses on determining how certain provisions might facilitate or impede both civil and criminal cases.

After the heady days of the Celtic Tiger and the savage recession that followed, the Irish courts are still grappling with the actions for debt recovery that are the inevitable result of boom to bust. Recent media speculation suggests that many lenders and vulture funds are only now beginning to bring debt recovery proceedings and that such litigation may peak in the Irish courts in 2017. Given that it is now almost nine years since the collapse of Lehmann Brothers and the Irish State guarantee to banks, the Statute of Limitations is now a key issue in any action for loan recovery and may provide a basis for resisting an order for judgment. In this edition, we analyse when the Statute starts to run in different types of debt recovery actions and we explain the ramifications of recent judgments in the area.

In criminal law, we note the recent enactment of a long-awaited provision aimed at creating a protocol for the disclosure of counselling records of victims in prosecutions for sexual offences. The disclosure of such records raises many complex issues surrounding the balance between the right to a fair trial and the right of access to confidential counselling. Our article on this yet to be commenced provision suggests that it may contain anomalies and may lead to lengthy litigation to determine how it is to be applied in practice.

It is also timely to look at the operation of the Supreme Court post the 33rd amendment to the Constitution and the extent to which appeals can now be taken to that Court. Our writer teases out the situations where a litigant may be restricted in seeking leave to appeal to the Court of Appeal but might still be able to avail of an appeal to the Supreme Court. This analysis contrasts the test for an appeal to either court and is particularly relevant in the field of immigration and planning law.

Finally, our closing argument laments the failure to implement a fully functioning costs system under the Legal Services Regulation Act. Hopefully, we will soon have much needed action in this area.



Eilis Brennan BL
Editor
ebrennan@lawlibrary.ie

Guests from New York

On Thursday and Friday, April 20 and 21, The Bar of Ireland hosted over 100 delegates for the New York State Bar Association (NYSBA) International Section Spring Meeting 2017. The conference was chaired by Neil A. Quartaro, International Section Chair, Watson Farley & Williams LLP, Paul McGarry SC, Ireland Co-Chair, Chairman of the Council of The Bar of Ireland, and Edward K. Lenci, US Co-Chair (NYSBA), Hinshaw & Culbertson LLP.

Proceedings opened with a meeting in the Dublin Dispute Resolution Centre between The Hon. Mrs Justice Susan Denham, Chief Justice of Ireland, Neil A. Quartaro, Chair, New York State Bar Association International Section, Claire Gutekunst, President, New York State Bar Association, and Paul McGarry SC, Chairman, the Council of The Bar of Ireland. This was followed by two plenary sessions entitled:

1. Searching for a common language: a comparison of some regulatory and ethical issues in Ireland, the United Kingdom, and the United States.

2. 'View from the Bench': Perspectives on judging.

Day one ended with delegates being treated to a wonderful evening of traditional Irish music in The Sheds Bar.

Day two adopted a twin-track approach with a variety of panel sessions taking place throughout the day, including: the impact of recent EU decisions applying the 'EU state aid provisions' to tax treatment of European and multinational companies; changes in privacy regulation and the potential role of the Irish privacy office as the designated EU regulator for US companies; practice of law in Ireland and New York and the merits of both as centres for dispute resolution; and, the impact of Brexit on attorneys, their practices and their clients: where are the likely winners?

The event concluded with a Gala Dinner in The Honorable Society of King's Inns.

From left: Mr Justice Robin Knowles CBE, High Court of England and Wales; Paul McGarry SC, Chairman, Council of The Bar of Ireland; Claire Gutekunst, President, New York State Bar Association; Mrs Justice Susan Denham, Chief Justice of Ireland; Loretta A. Preska, Immediate Past Chief Judge of the US District Court for the Southern District; and, Neil A. Quartaro, Chair, New York State Bar Association International Section.

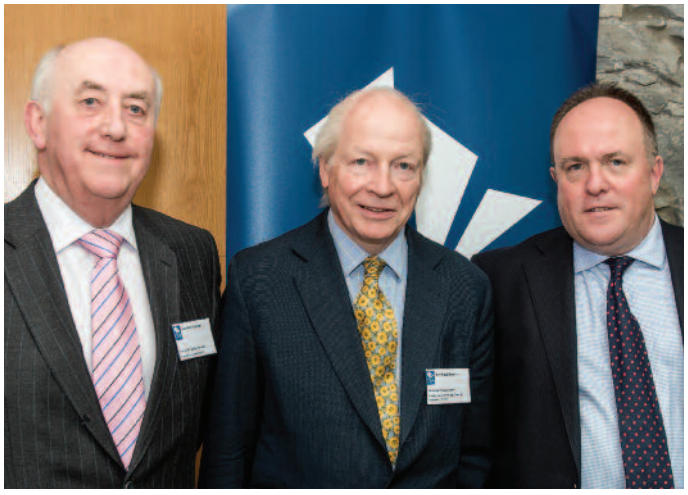
Focus on construction law

The Construction Bar Association (CBA) held its fifth major open conference event on Friday, April 28. Three panels of leading construction law practitioners delivered papers on a broad range of topics, including the resolution of construction disputes, and issues arising from recent developments in the area of construction procurement, planning law and the Public Works Contracts.

The CBA was delighted to also welcome two eminent keynote speakers: Sir Antony Edwards-Stuart, former Judge of the High Court of England and Wales and former Judge in Charge of the Technology and Construction Court, and the Hon. Mr Justice Peter Kelly, President of the High Court, who together addressed the operation of the Technology and Construction Court.

The event was well attended and enjoyed by an audience of over 100, comprising solicitors, barristers, construction professionals, contractors, and construction dispute resolution practitioners, all commending the array of topics that were covered and the excellent quality of papers delivered.

From left: Catherine Donnelly BL; Neil Steen SC; Senan Allen SC; and, Gerard Meehan BL.



From left: Mr Justice Peter Kelly, President of the High Court; Sir Antony Edwards-Stuart, former Judge of the High Court of England and Wales and former Judge in Charge of the Technology and Construction Court; and, Mark Sanfey SC, Chairman of the CBA.

Advanced Advocacy

A one-day faculty training session took place on Saturday, April 8, involving six visiting faculty (including two judges from England), 18 faculty members and nine first-year volunteers. There were two main sessions covering witness handling and case analysis.

Both the new and the existing faculty members were trained in the Hampel Advocacy Method by the six highly-experienced and enthusiastic tutors. The latest advocacy course took place in the CCJ on Thursday and Friday, April 20 and 21, with 27 participants, 16 faculty and 15 first-year volunteers.

This course was aimed at members in years 2 to 7, and thanks to Aon's continuing sponsorship of the advocacy programme, the fee is kept low at €50. It is a testament to its success that several participants were previously first-year volunteers.

Survey of members on circuit

A total of 536 members responded to the recent survey undertaken to ascertain the views of members who practise on circuit in relation to their membership of the Law Library and the challenges they encounter in practice.

This was a response rate of 47%. Areas for improvement in Bar Room facilities were highlighted, as well as feedback from each circuit in relation to court sittings and listings.

A series of meetings with members around the country is underway to share the feedback from the survey and set out the actions that will now be undertaken to address the concerns raised by members.

Presentation to Seanad Brexit Committee

On May 4, 2017, Chairman, Council of the Bar of Ireland, Paul McGarry SC, addressed the Seanad Special Select Committee on the UK's withdrawal from the European Union, outlining potential implications for civil justice issues from hard and soft Brexit scenarios.

In a session of the Seanad Select Committee that focused on the implications for the Irish economy that may arise from Brexit, he pointed to the opportunities for Ireland in the area of legal services, but also to the challenges that are likely to arise in the area of civil law given the deep economic and personal ties Ireland has with the United Kingdom. Given that the treaties, regulations and directives of the European Union determine civil justice in so many diverse areas, the departure of the UK from the EU will have wide-raging implications for Ireland.

In particular, the Chairman detailed areas of concern under the following headings: civil jurisdiction and the recognition and enforcement of foreign judgements; financial services and insurance; and, insolvency. The full submission by The Bar of Ireland to the Seanad Special Select Committee on the UK's withdrawal from the European Union is available on www.lawlibrary.ie.

Four Jurisdictions Conference

The Bar of Ireland hosted the Four Jurisdictions Conference in Dublin from May 5-7, 2017. The Bar of Ireland welcomed members of The Bar of Northern Ireland, Faculty of Advocates, The Bar of England and Wales, The Middle Temple and their judiciary for a weekend of networking and discussion.

The weekend's events commenced with a welcome reception and dinner hosted by Paul McGarry SC, Chairman, Council of The Bar of Ireland, in the Kildare Street and University Club.

On Saturday, proceedings opened with 110 delegates attending the Dublin Dispute Resolution Centre for a conference addressing four key areas:

1. Free movement within the four jurisdictions post Brexit: can or will free movement or the common travel area survive?
2. Stress-induced psychological injuries in the workplace: when is an employer liable?
3. Divergence of systems: discovery vs disclosure – burdens and benefits – how do we strike a fair balance?
4. Freedom of expression – no longer an unbending individual freedom?

The Four Jurisdictions Conference welcomes delegates from Ireland, Northern Ireland, and England and Wales.

Following the conference, delegates and guests attend a reception and dinner hosted by Chief Justice Mrs Justice Susan Denham in The Honorable Society of King's Inns. The weekend's events concluded on a beautiful day at the National Museum of Ireland Collins Barracks. Delegates enjoyed an illuminating lecture by Mr Justice Donal O'Donnell on 'The *Asgard* and the 1914 Howth Gun Running', followed with access to the *Asgard* exhibition.

Special thanks to the chairs, speakers, delegates and Young Bar organising committee for making this year's Four Jurisdictions Conference a huge success.

From left: Angela Grahame QC, Vice Dean, Faculty of Advocates; Lord Justice David Bean; Marguerite Bolger SC; and, Frank O'Donoghue QC.

From left: James Mure QC; Mark Mulholland QC; Lord John Dyson (England and Wales); and, Mr Justice Peter Kelly.

Bloomsbury winners

Bloomsbury Professional had reasons to be cheerful at the recent AIB Private Banking Irish Law Awards 2017. Sandra Mulvey, General Manager (Ireland), Bloomsbury Professional, accepted the Legal Book of the Year Award on behalf of Dr Thomas B Courtney, author of *The Law of Companies*, 4th Edition.

Sandra Mulvey, General Manager (Ireland), Bloomsbury Professional, accepted the Legal Book of the Year Award on behalf of Dr Thomas B. Courtney.

Meanwhile, Mr Justice Ronan Keane, who is a Bloomsbury author, was the recipient of the Lifetime Achievement Award. Mr Justice Keane was presented with his Award by Julie Brennan, Managing Director of the Institute of Legal Research & Standards.

Julie Brennan, Managing Director of the Institute of Legal Research & Standards, presents Mr Justice Ronan Keane with his Lifetime Achievement Award.

Volunteer with VAS

The Voluntary Assistance Scheme continues its work providing *pro bono* legal assistance to those who need it, and the Scheme needs your help.

Libby Charlton BL

It has been an eventful year since I became the Co-ordinator of the Voluntary Assistance Scheme (VAS). As always, there are several branches of the VAS that run concurrently.

Requests for assistance

The first branch and the everyday work of the VAS is considering requests that we receive from charities, NGOs and civic organisations seeking *pro bono* assistance for themselves and their clients. On a daily basis, the VAS facilitates *pro bono* advice on issues as diverse as corporate governance, landlord and tenant law, employment law and probate. As always, the organisations that benefited were most grateful and impressed with the barristers who so willingly and selflessly offered the benefit of their knowledge and expertise. Since my inaugural article in the July 2016 *The Bar Review*, the VAS is providing or has provided assistance in over 40 matters. It is such a great honour to witness the generosity and kindness of our colleagues.

Publicising the VAS

The second branch is the ever-present need of the VAS to publicise its existence and resources to those who could benefit most from it, but are unaware of it. To that end, Shirley Coulter of the Communications and Policy Division of the Bar and members of the VAS committee, in addition to myself, will once again be attending The Wheel's Annual Conference & Expo in the Conference Centre in Croke Park on June 28, 2017. This is Ireland's largest annual gathering for community, voluntary and charity organisations. Last May, the VAS exhibited a stand where we informed over 50 charities of the resources available to them through the VAS and formed lasting connections with them. Indeed, many of these same charities and NGOs took part in the advocacy training offered by esteemed colleagues through the VAS.

Speaking for Ourselves

This creates a stylish segue into the third branch of the Scheme. In the past, the VAS has co-ordinated and facilitated the 'Speaking for Ourselves' advocacy workshop for charities. This is where The Bar of Ireland provides *pro bono* oral and written advocacy training to charities and NGOs, and exceptionally talented barristers run workshops for their chosen representatives on all the elements of effective advocacy. We will be hosting the event again in 2017, and hope to host more similar, though perhaps not identical, events in the near future.

The VAS needs you!

The fourth and final branch of the current workload is to update and improve the current barrister database. Barristers email vas@lawlibrary.ie daily expressing their wish to assist, but we can never have enough to call upon. In my previous article, I implored my junior colleagues to get in touch. You did in your droves and we are most grateful. I would now ask our more senior colleagues, senior juniors and senior counsel to put their names forward, so that charities, NGOs and civic organisations can benefit from their profound knowledge and extensive experience. As you read, many of you will resist the urge to contact me today as you are tied up with the obligations of your practice and fear that you cannot assist immediately upon request. Fear not, we understand, but it would still be of huge service to know that we may call upon you, and any specialist knowledge that you possess, when there are fewer demands on you in the future. So, paraphrasing absolutely nothing at all, the VAS has done a lot, but has an awful lot more left to do.

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- There is no fee to submit a claim to the ADR Process
- If necessary, McCann FitzGerald will collect the claimant's medical records where written authorisation has been provided
- Evaluators are senior counsel or retired Superior Court judges
- A €25,000 payment in respect of the claimant's legal costs, outlay and VAT will be paid within 28 days of settlement of claims within the ADR Process. This is without prejudice to a claimant's right in the circumstances of a case to seek higher costs and outlay through negotiation or taxation

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For further information, or to discuss settlement of any eligible claim, please contact McCann FitzGerald (DFH/RJB) on 01 829 0000 or email *hipadr@mccannfitzgerald.com*

Big data

It is vital that members familiarise themselves with their responsibilities under the EU General Data Protection Regulation.

John Kane, IT Director

There are three things that every member of the Law Library needs to know about the new EU General Data Protection Regulation (GDPR):

- it is happening, effective May 25, 2018;
- it will affect every member; and,
- it will radically alter how you obtain, process and manage information.

Let's look at the 'why', 'when' and 'what' of this much-discussed new Regulation.

Why?

Consistency of data protection directives across the Union has been lacking. The advent of the internet, and the way in which EU citizens are marketed to from within and from outside member states, has necessitated a fresh look at how the data of individuals is managed and what protections are required for that data.

The new Regulation gives new rights to data subjects (those whose data you hold), and it clearly calls out the role of data controllers and data processors (see panel). It allows for data access requests by data subjects and places an accountability on data controllers for the manner in which they collect, process and store data.

The regulation applies to all data of an identified or identifiable natural person, such as name, location, physiological, genetic, mental, economic, cultural or social identity. The Regulation also identifies special categories of information to which an increased level of protection is afforded. Examples of these categories are health, criminal convictions, racial, political or religious data.

When?

The Regulation is active from May 25, 2018, and as it is a Regulation it is enforceable across the entire EU. Interestingly, despite the Brexit situation, the UK government has indicated that the GDPR will apply. A lead-in period of two years was put in place when the final text of the Regulation was agreed. This was to afford all organisations the time to understand the obligations required of them under the new Regulation and to implement the necessary changes to ensure compliance.

What?

As an indication, the existing data protection acts, including amendments, total 90 pages. The new GDPR is 260 pages long, and the additional elements are significant. For members of the Law Library, the most significant aspect of this Regulation is that it applies equally to sole traders and multinational corporations. So, if you have read this far, please continue to find out what measures you can take to avoid interaction with the Office of the Data Protection Commissioner (ODPC).

Pressing matters

There are a number of more immediate and interesting challenges for members:

Data controller/data processor

Members may well be either or both controller and processor. Both have clearly defined responsibilities under the Regulation, and members would be well served to study these carefully. A good approach to this entire issue would be to consciously change your mindset about the data you have today. Consider yourself as the custodian rather than the owner of all personal data you have today, and treat it accordingly.

Data processing

Every data subject has rights and their data needs to be processed only in accordance with the purpose for which it was provided. Ask yourself what the purpose is for which you use that data and what is your legal basis for processing that data. Consent is a valid reason, but consent can be withdrawn. If you need to pass some or all data to a third party, do you have permission to onward share that data? Similarly, if you are in receipt of third-party data from others, have they obtained the permissions appropriate to its transfer to you and for your use?

Breach notification

If personal data held by you is lost or stolen, then the ODPC must be informed within 72 hours of this breach. Every data subject whose data was lost/stolen needs

Glossary of data terms

Data subject

The data subject is a living individual to whom personal data relates.

Data processor

The data processor is any person (other than an employee of the data controller) who processes data on behalf of the data controller.

From: http://www.opt-4.co.uk/dictionary/SubjectAccessRequest.asp

Data controller

A data controller is the individual or the legal person who controls and is responsible for the keeping and use of personal information on a computer or in structured manual files.

From: www.dataprotection.ie

to be informed as to the loss. This is a major overhead before the inevitable reputational damage is considered.

Administrative fines

In the event of a breach, the ODPC can impose administrative fines. This is significant as previously there was no mechanism for the ODPC to levy fines. As the ODPC budget will never be adequate, expect any opportunity to levy administrative fines to be enthusiastically embraced.

Right to compensation

In addition to administrative fines, data subjects can now sue for compensation for material and non-material damages.

Data retention and the right to be forgotten

The new Regulation is onerous in the rights it confers on data subjects to be forgotten. However, it is also pragmatic and allows for the inevitable conflicts that will occur, such as the six-year Revenue Commissioners retention rule. The issue of a data retention policy is very interesting, and members will need to balance their policies here as appropriate to their activities. The more data you hold, electronically or on paper, the bigger the challenge to secure it and afford it the protection the ODPC may deem appropriate. Regardless, you should have a data retention policy so that you can prove to the ODPC, if required, that you consciously decided on a policy and the reasoning behind that policy.

Office 365

The Regulation calls on member bodies, such as ourselves, to develop a framework for members to assist with their compliance. The Bar Of Ireland is investing to ensure that we meet this requirement. First, and let's be very clear here, the organisation alone cannot make you compliant. Compliance activity is your own direct responsibility. However, there are many ways we can help, and our GDPR framework brings these together as a benefit of membership.

We have chosen a technology platform to provide enhanced security and encryption services to members in line with the requirements of the GDPR for encrypted data as best practice. Our migration to Office 365 email and cloud storage will extend our encryption and security capability.

This is particularly important, as breach notification to the ODPC is not required in the event that an encrypted device is lost/stolen. To further enhance this service, we are offering a database to record which devices members have encrypted, and these can be periodically checked and recorded in case the information needs to be verified.

Encrypted cloud storage is being provided to members. This can also be used as a collaboration and file-sharing tool, and details will follow once we have completed the migration of our email accounts.

From October next, the facility to encrypt attachments to outgoing emails will be available. This will further protect the integrity of the information in your client communications and ensure that the information can only be viewed by the intended recipient.

Start now – today

Carefully examine the data you hold and see which categories it falls into. Consider if you have valid grounds to process the data you have in light of how you came to have that data. Adopt or develop a privacy notice as appropriate to your own operations. It is important that you should review all contracts with third parties who process data on your behalf to ensure that you are giving them the permission they require to fulfil their role, and that they are able to provide you with the information you need to satisfy yourself that the processes and procedures they employ to protect your data are compliant with the new Regulation.

In members' interests

Any non-compliance in this space is publicly reported, and reputational damage can be avoided by ensuring that data is properly obtained, processed and stored.

The Bar of Ireland Code of Conduct calls for client communications to be encrypted. There are guidelines on encryption in the IT part of the members' section on our website. All members should have their computers encrypted as a basic risk management measure.

Finally, and not for the scare value, the extent of the administrative fines that can be imposed are very significant – up to 4% of global turnover or €20m depending on the breach. The EU is sending a message that privacy is important and should be built into all data processing that we undertake.

The Bar of Ireland is taking the GDPR and the entire issue of cybersecurity very seriously. We have one cyber identity, lawlibrary.ie, and we work continuously to protect that for the good of all members.

If this article has brought up any issues that you wish to discuss further, please contact the IT helpdesk directly. For a wider view of the GDPR and how it will impact your business, please look at the recorded CPD session that was delivered on January 19, 2017, which is available on the CPD section of the members' website.

Doing the right thing

European Ombudsman Emily O'Reilly spoke to *The Bar Review* about her work, the rule of law in the EU, and the role of the Ombudsman's office.

Ann-Marie Hardiman
Managing Editor at Think Media Ltd

After 20 years in journalism, including as the first female political correspondent for an Irish daily newspaper, Emily O'Reilly was a familiar face and voice in the Irish media, but in 2003 she exchanged this role for the post of Ombudsman and Information Commissioner, a position she held until 2013, when she was elected European Ombudsman by the European Parliament. Leaving journalism wasn't easy: "I loved it, loved writing, and when the position [of Ombudsman] was offered, it took a while to decide to take it".

But as a self-confessed "political nerd", the role, which also included being an *ex-officio* member of the Standards in Public Office Commission, the Referendum Commission, the Constituency Review Commission and the Commission for Public Service Appointments, was a fantastic opportunity to do something new, and to step into a public service role. She sees specific parallels between her current and former roles: "People often use the analogy of 'poacher turned gamekeeper', but while I'm not able to be as outspoken as I might have been, I've found as Ombudsman that you are, to some extent, in the same space as you are as a journalist: between the people and the administration".

Whatever about journalistic objectivity, the Ombudsman might be said to be the ultimate objective position: "That is your strongest power. I'm not a judge. No one has to do what I recommend (although overwhelmingly they do). The power of the office comes from its independence, but you also have to constantly demonstrate that independence, not just to the people who are complaining to you but also to the institutions that you are investigating".

The French use the term *médiateur/médiatrice* for Ombudsman, but Emily feels this doesn't adequately describe the role: "I don't see myself as a mediator in the sense that whatever's fine with people is fine with me if they both agree. You're looking at a set of principles, at the law and so on, and you're giving a decision that equates with the best practice in relation to good administration, not one that either side is going to fully like. But I think once the institutions think that you're giving them a fair shake, that you're not automatically cleaving to the complainant's side of things, then that copper-fastens your independence and makes it easier to get recommendations across the line".

Move to Europe

In 2013, the opportunity arose to stand for election to the European position, which she admits was "terrifying at the time". The role would also mean moving to Strasbourg, and Emily openly admits that as a mother of five relatively young children, it was a very difficult proposition: "I think that women in general find it more difficult to compartmentalise the different elements of their lives than men do. In the end, it was my husband who said I should stop looking at it in terms of negatives for the family and look at the positives instead".

With significant reform of the Irish Ombudsman's office during her tenure, as well as amendments to freedom of information legislation, Emily felt she had accomplished a lot, and the idea of a move to Europe was very attractive, despite the family and professional concerns, so she "plunged in": "I campaigned in a very Irish way, by meeting people, talking to them and asking them for support. I met about 80 MEPs over the course of a few months".

The rule of law

It only takes a brief glance at the website for the European Ombudsman's office to see the large number of staff who have legal training. While Emily is in favour of having a diverse staff, with a range of experience and skills, she acknowledges the importance of the law both to her office and in the overall EU context: "Most of the investigative team here have law degrees. The EU generally places a high premium on law, which is understandable, as to try and keep 28 (shortly to be 27) countries together, the rule of law is very important. And obviously, when you're going head to head with the legal services of the Commission or some of the other big agencies, you have to have good skilled, trained people there".

She points out, however, the importance of preserving the distinction between being a lawyer and being an ombudsman: "The law is an important part of good administration but it's just one part. Just because an act is not illegal doesn't mean it's not wrong in terms of administration. It can sometimes be a bit of a struggle to look at cases not as strictly legal, but to look at other issues. How was the person treated? How are people treated in similar circumstances? There are lots of things that can constitute maladministration that could never be litigated".

For Emily, the primary principle underpinning the role is fairness: "I see the role of Ombudsman as balancing out the power imbalance between a complainant and the institution. We lend our knowledge, expertise and status to the complainant so that when they, through us, argue their case with the institution, they are empowered to do so".

Well served

How citizens are treated in their interactions with the legal profession/courts is undoubtedly a benchmark of fairness and accountability in any society, and Emily's sense of the Irish system is largely positive: "I think that generally the Irish people are well served by the courts. I've never heard any significant debate about their independence or rulings. I know there's an issue about judicial appointments at the moment, and I understand that, but I've never had any sense that there was a political judiciary in the sense of making party political decisions, and I think that would be the generally held view".

She expresses disappointment that the long-mooted legal services ombudsman never came to pass. Having seen the office operating in other jurisdictions, she feels it would offer an "independent, accessible, free, impartial" option for those who might have an issue with the legal profession: "People still find the costs of going to court prohibitive, and that is a denial of justice. You also hear frustrations about the length of time it takes. The legal service generally is held in high respect but I think people do sometimes have frustrations".

The service, if it were properly audited over a period of time, would be a way to find out exactly what types of issues are arising, and how well services are working. It would also be helpful to legal professionals, she says, enabling them to look at their practices, and reform if necessary. She points out that in Sweden (where, interestingly, the office of ombudsman originates), the Ombudsman supervises the courts and judges, not in terms of their decisions, but in terms of procedures. While she admits that she and her European colleagues are sometimes quite envious of this, it's not something that would work in every jurisdiction.

She also welcomes the apparent fast-tracking of the Judicial Council Bill, which she feels will be a valuable addition to the legal system in Ireland.

The worst of times?

Our conversation took place prior to the final round in the French presidential election, which saw Emmanuel Macron comfortably defeat Marine Le Pen. However, the unprecedented nature of that election, along with other significant events in Europe such as Brexit, seem to have brought to the surface a deep-seated unhappiness with, even mistrust of, EU institutions and of the European project as a whole. While the clearly pro-European nature of the French result will no doubt have eased tensions in Brussels and Strasbourg, these larger issues remain to be addressed, and Emily says EU officials must tread carefully when addressing them: "We all have 'skin in the game' – we're all here and employed, so we have to be careful that our comments are independent. I think a lot of the criticism the EU gets is sometimes because of misunderstanding or lack of knowledge of how it actually works. When people talk about the faceless bureaucrats in Brussels making the laws and imposing them on us, they forget that the Commission proposes legislation but the co-legislators are the Parliament and the Councils made up of the heads of state and all of our domestic ministers. These drive the overall strategic vision at any time".

The path to Europe

Emily O'Reilly was voted European Ombudsman in 2013. She was re-elected in 2014 for a term of five years. She served as Irish Ombudsman and Information Commissioner from 2003 to 2013. Prior to this, Emily was a journalist and author whose roles included many years as a political correspondent with prominent print and broadcast media. She is a graduate of University College Dublin and Trinity College Dublin, and was the recipient of a Niemann Fellowship in Journalism at Harvard University. A native of Tullamore, Co Offaly, she is married with five children.

The European Ombudsman

The European Ombudsman is an independent and impartial body that holds the EU administration to account. The Ombudsman investigates complaints about maladministration in EU institutions, bodies, offices, and agencies. Only the Court of Justice of the European Union, acting in its judicial capacity, falls outside the Ombudsman's mandate. The Ombudsman may find maladministration if an institution fails to respect fundamental rights, legal rules or principles, or the principles of good administration.

She understands the frustrations, particularly as they have been portrayed in discussions around Brexit: "The EU is complex. When you're trying to knit together so many different people, cultures, legal systems, languages, it's going to be complicated, and when things are complex, and they feel distant, people sometimes feel stupid if they don't understand them, and then they get angry with the people who make them feel stupid".

She says member states each have a role to play in offering a genuine answer to those who feel angry and disenfranchised. Many younger EU citizens in particular take things like freedom to travel and study across the EU, or the many social benefits of membership, for granted. Yet a narrative can all too easily arise where positive developments are credited to national governments and negative ones to "bold Brussels". Emily acknowledges that Ireland has been quite good at crediting the EU for its good works, but says she understands the same isn't true of the UK, and this was a likely contributing factor in the Brexit result – people in areas of Britain that had benefited enormously from EU financial aid simply didn't know about it. She emphasises, however, that it's not about being in "a constant state of gratitude": "The EU doesn't tell its own story well enough. I don't think the EU can stand and say defensively 'we're right and the Brits are wrong'. There's a caricature of the EU that is portrayed in the British media, and when you come back with what many people see as boring facts and the *Mail* is trumpeting something far more enticing and passionate, it's difficult. The dramatic story that begins with the Second World War – that's ancient history. A new story has to be told".

She does feel, however, that for all the upheaval, there has been an unlikely positive effect: "It has 'sexed up' the EU. People are now putting names to institutions, and they see dramas being played out. I'm not suggesting they do it long term because it's destabilising and debilitating, but it has engendered a lot more debate and interest in the EU and at some level that has to be positive. It also gives us an opportunity to really look at this project again".

Storytellers

Emily sees the Ombudsman's office as having an important role to play in telling this new story. Her office has been working on transparency in Brexit, and in other areas, such as trade negotiations: "I've tried to make the office more useful, more relevant, and give it more impact, and I think that has happened in a number of areas. I worked on an investigation into the transparency of the TTIP [Transatlantic Trade and Investment Partnership] negotiations. My work and also the input of Parliament and various members of civil society transformed the Commission's policy. The old days of doing deals behind closed doors are gone, so they transformed their communications policy and put transparency as one of the key elements. That is also manifesting itself in Brexit".

In addition, she is particularly proud of another project that highlights the excellent work done in the EU institutions: "I started an awards initiative for EU institutions to share good practice. We recently had our first ever European Ombudsman Awards for good administration. We had 90 entries, and the winner was an initiative by the Health DG and the Commission, with 24 member states, setting up reference networks across the EU to pool expertise in relation to rare diseases. This is a great example of good collaborative work. Another project was by the Environmental DG in Poland working to improve the pollution levels in the Polish region of Malopolska where levels were 20 times higher than in the city of London".

She feels that highlighting these projects is crucial to encourage better understanding of how the EU works, and how it can work: "It's about displaying good administration, and showing how collaboration gets better results".

She admits that her job has its disappointments too, and mentions a case where her office investigated a complaint that secret meetings were taking place between the Commission and a tobacco industry lobbyist: "Our investigation found that while the meetings were in fact not held in secret, details of them were not proactively published. I made a decision that this didn't conform with the UN Convention on Tobacco Control, which the EU is a signatory and supporter of. I said that every meeting should be proactively disclosed but they disagreed. That was disappointing from both a transparency and a public health point of view. But it's one out of many cases. The vast majority of my recommendations are accepted".

Bound by law

We return at the end of our conversation to the law, and its relationship to the citizen. Emily feels that her role is to step into the grey area between what is legal and what is right: "That's the value of an ombudsman".

So what makes a good ombudsman? According to Emily, it takes "a certain sensibility", coupled with a mixture of instinct and experience. She analogises it to what she calls the "visceral sense of fairness" that children have: "You will hear a child say 'but that's not fair', and if you ask them why they could probably articulate it to a point but not completely. A good ombudsman knows when something isn't fair. I like to read a complaint, get a sense of it and then see if I can support my visceral sense that this is wrong. Sometimes I can, sometimes I can't. But when you're doing it that way, getting a sense of it intuitively, then I think that's the best way to work".

Ultimately, what many people want is to be listened to: "The stress is relieved simply because someone has heard you, and treated you as an individual. Even if the outcome isn't what you would have wanted, you know that you got your point across. That is a function of this office".

LEGAL UPDATE

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The Law Library

The Bar Review, journal of The Bar of Ireland

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ADMINISTRATIVE LAW

Administrative and constitutional law – Grant of injunction against publication – Publication on floor of House – Considered *Callely v Moylan and ors* [2014] 4 IR 112, Distinguished *In re Haughey* [1971] IR 217, Distinguished *Maguire v Ardagh* [2002] 1 IR 385 – (Ní Raifeartaigh J. – 31/03/2017)
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European Communities (control of organisms harmful to plants and plant products) (amendment) regulations 2017 – SI 79/2017
Greyhound industry (racing) (amendment) regulations, 2017 – SI 101/2017

BANKING

Banking and finance – Representation in court proceedings – Exceptional circumstances – Appellant seeking to challenge the rule expressed in *Battle v Irish Art Promotion Centre Ltd* [1968] IR 252 that a company can only be represented in court proceedings by a solicitor or duly-instructed counsel – Whether the rule in Battle applied to the presenting circumstances in the case – Applied *Battle and anor v Irish Art Promotion Centre Ltd* [1968] IR 252 – (Ryan P., McKechnie J., Hogan J. – 02/03/2017) – [2017] IECA 77
Allied Irish Banks Plc v Aqua Fresh Fish Ltd

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CHILDREN

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Children (Amendment) Act 2015 (section 32(5)) order 2017 – SI 108/2017
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Statutory instruments

Communications Regulation (Postal Services) (Amendment) Act 2017 (commencement) order 2017 – SI 119/2017

COMPANY LAW

Company – Shareholding – Compulsory purchase of shareholding – Applied *Davie v Magistrates of Edinburgh* [1953] SC 34, Applied *James Elliott Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 269 – (Denham C.J., O'Donnell Donal J., Clarke J., MacMenamin J., Dunne J., Charleton J., O'Malley Iseult J. – 27/02/2017) – [2017] IESC 14
Donegal Investment Group plc v Danbywiske, Wilson

Shareholdings – Shareholders agreement – Implied terms – Appellants seeking to vacate order of the High Court – Whether there was an implied term in a shareholders agreement – Applied *Analog Devices B.V. v Zurich Insurance Company* [2005] 1 IR 274, Applied *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 – (Finlay Geoghegan J., Peart J., Hogan J. – 08/03/2017) – [2017] IECA 74
Flynn v Breccia

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Constitution – Art. 40.4.2 of the Constitution – Asylum, immigration and nationality – Referred to *B.F.O. v Governor of Dóchas Centre* [2005] 2 IR 1, Referred to *CA v Governor of Cloverhill Prison* [2017] IEHC 48, Referred to *Ryan v Governor of Midlands Prison* [2014] IESC 54 – (Keane J. – 01/03/2017) – [2017] IEHC 121
Hu v Governor of Mountjoy Prison

Constitution – Gross indecency – Error in law – Applied *A v Governor of Arbour Hill Prison* [2006] 4 IR 88, Applied *PM v DPP* [2006] 3 IR 172 – (Birmingham J., Mahon J., Edwards J. – 07/02/2017) – [2017] IECA 82
PP v Judges of the Circuit Court

Detention – Constitutionality – Statutory provision – Referred to *Damache v DPP and ors* [Supreme Court] [2012] 2 JIC 2306, Referred to *People (Attorney-General) v O'Callaghan* [1966] IR 501, Referred to *Redmond v Ireland* [2015] IESC 98 – (Birmingham J., Sheehan J., Edwards J. – 31/01/2017) – [2017] IECA 81
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Articles

Fitzgerald, G. Protecting the little guy. *Law Society Gazette* 2017 (April): 4

CONTEMPT OF COURT

Contempt of court – Proportionality – Unlawful imprisonment – Appellants seeking to appeal against High Court judgment and order – Whether decision of the Circuit Court judge to imprison the respondent for two weeks for contempt of court was reasonable, proportionate and lawful – (Birmingham J., Mahon J., Edwards J. – 23/03/2017) – [2017] IECA 106
Walsh v Minister for Justice and Equality

CONTRACT

Unfair procedures – Breach of contractual terms – Fair procedures – Considered *Becker v Board Of Management of St Dominics Secondary School Cabra and ors* [2006] IEHC 130, Referred to *Rowland v An Post* [2011] IEHC 272 – (O'Donnell Donal J., Clarke J., MacMenamin J. – 27/03/2017) – [2017] IESC 20
Rowland v An Post

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Klohn v An Bord Pleanála

Costs – Injunction – Special circumstances – Applied *Cork County Council v Shackleton and anor* [2007] IEHC 334, Applied *McAleenan v AIG (Europe) Ltd* [2013] 3 IR 202, Applied *Totalise plc v Motley Fool Ltd* [2002] 1 WLR 1233 – (Finlay Geoghegan J., Hogan J., Faherty J. – 24/03/2017) – [2017] IECA 96
Sony Music Entertainment (Ireland) Ltd v UPC Communications Ireland Ltd

COURTS

Statutory instruments

District Court (judges' robes) rules 2017 – SI 77/2017
District Court (order 40A) rules 2017 – SI 102/2017

CRIMINAL LAW

Acquittal by direction – Blackmail – Exclusion of evidence – Referred to *DPP v C.C.* [2016] 6 JIC 1413 – (Birmingham J., Sheehan J., Mahon J. – 09/03/2017) – [2017] IECA 84
DPP v R.McC

Conviction – Assault – Delay – Applied *DPP v Cronin* (No. 2) [2006] 4 IR 329, Applied *DPP v O'Regan* [2007] 3 IR 805 – (Sheehan J., Mahon J., Edwards J. – 09/03/2017) – [2017] IECA 92
Director of Military Prosecutions v Donohoe

Conviction – Assault – Self-defence – Applied *DPP v O'Reilly* [2004] IECCA 27, *Referred to DPP v Cronin* (No. 2) [2006] 4 IR 329 – (Birmingham J., Mahon J., Edwards J. – 03/03/2017) – [2017] IECA 72
DPP v Brannigan

Conviction – Causing serious harm – Jury warning – Applied *Dental Board v O'Callaghan* [1969] IR 181, Distinguished *DPP v Quinn* [2015] 12 JIC 1807 – (Sheehan J., Mahon J., Edwards J. – 20/03/2017) – [2017] IECA 89
DPP v O'Reilly

Conviction – False imprisonment – Failure to discharge jury – Appellant seeking to appeal against conviction – Whether trial judge erred in law in failing to discharge the jury when requested by the defence following the evidence of a prosecution witness – Referred to *D. v DPP* [1994] 2 IR 465, Referred to *Dawson and Dawson v Irish Brokers Association* [1998] IESC 39, Referred to *DPP v Keogh* [1998] 4 IR 416 – (Mahon J., Edwards J., Hedigan J. – 30/03/2017) – [2017] IECA 108
DPP v Coughlan Ryan

Conviction – Indecent assault – Error in law – Applied *R v Valentine* [1996] 2 CrAppR 213 – (Birmingham J., Sheehan J., Edwards J. – 21/02/2017) – [2017] IECA 43
DPP v G.C.

Conviction – Indecent assault – Error in law – Appellant seeking to appeal against conviction – Whether trial judge erred in law – Applied *DPP v M* [2015] IECA 65, Applied *R v Galbraith* [1981] 1 WLR 1039 – (Birmingham J., Mahon J., Edwards J. – 30/01/2017) – [2017] IECA 73
DPP v S.T.

Conviction – Possession of stolen property – Admissibility of evidence – (Birmingham J., Sheehan J., Mahon J. – 20/03/2017) – [2017] IECA 88
DPP v Power

Conviction – Rape – Admissibility – (Birmingham J., Mahon J., Edwards J. – 03/03/2017) – [2017] IECA 68
DPP v Murray

Conviction – Rape – Consent – (Birmingham J., Sheehan J., Mahon J. – 10/02/2017) – [2017] IECA 42
DPP v P.G.

Conviction – Rape – Extension – Applicant seeking an order allowing the time within which to appeal his conviction and sentence to be enlarged – Whether injustice might result as a result of an unmeritorious extension being allowed – (Birmingham J., Sheehan J., Mahon J. – 03/03/2017) – [2017] IECA 71
DPP v P.C.

Conviction – Sexual assault – Unsafe verdict – Applied *DPP v Cronin* [2003] 3 IR 377, Applied *DPP v Cronin* (No. 2) [2006] 4 IR 329 – (Sheehan J., Mahon J., Edwards J. – 20/02/2017) – [2017] IECA 44
DPP v Awode

Conviction – Sexual offences – Inconsistent verdicts – Considered *DPP v K* (B) [2000] 2 IR 199, Considered *DPP v Shannon* [2016] 7 JIC 2908, Considered *R v Christou* (George) [1997] AC 117 – (Birmingham J., Mahon J., Edwards J. – 23/03/2017) – [2017] IECA 98
DPP v D. McG

Recognisance – Independent surety – Judicial review – Applied *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, Applied *State (Holland) v Kennedy* [1977] IR 193 – (Finlay Geoghegan J., Hogan J., Hedigan J. – 03/03/2017) – [2017] IECA 65
Croake v District Judge Michael Coughlan

Sentencing – Aggravated burglary – Proportionality – Applied *DPP v Mahoney* [2016] 2 JIC 0402, Referred to *R v Brewster (Alex Edward) and ors* [1998] 1 CrAppR 220 – (Birmingham J., Edwards J., Hedigan J. – 02/03/2017) – [2017] IECA 85
DPP v Kinsella

Sentencing – Assault – Manifestly excessive sentence – (Peart J., Mahon J., Hedigan J. – 28/03/2017) – [2017] IECA 100
DPP v O'Dea

Sentencing – Burglary – Undue leniency – Applied *DPP v (Christopher) Byrne* [1995] 1 ILRM 279, Applied *DPP v McCormack* [2000] 4 JIC 1801 – (Birmingham J., Mahon J., Edwards J. – 27/02/2017) – [2017] IECA 59
DPP v Culhane

Sentencing – Burglary – Undue leniency – Applied *DPP v Murray* [2012] 2 IR 477, Applied *R v Rebecca Saw and ors* [2009] 2 All ER 1138 – (Birmingham J., Mahon J., Hedigan J. – 02/03/2017) – [2017] IECA 60
DPP v Doherty

Sentencing – Causing serious harm – Undue leniency – Applied *Regina v Zamagias* [2002] NSWCCA 17 – (Birmingham J., Mahon J., Edwards J. – 23/03/2017) – [2017] IECA 97
DPP v Byrne

Sentencing – Dangerous driving causing death – Rehabilitation – Referred to *DPP v O'Rourke* [2016] 10 JIC 2401 – (Birmingham J., Sheehan J., Mahon J. – 06/02/2017) – [2017] IECA 58
DPP v Cadden

Sentencing – Dangerous driving causing death – Undue leniency – Applied *DPP v Stronge* [2011] IECCA 79, Applied *DPP v O'Rourke* [2016] 10 JIC 2401 – (Sheehan J., Mahon J., Edwards J. – 23/02/2017) – [2017] IECA 40
DPP v Coleman

Sentencing – Dangerous driving causing injury – Undue leniency – Applied *DPP v McCormack* [2000] 4 JIC 1801, Applied *DPP v Stronge* [2011] IECCA 79 – (Birmingham J., Sheehan J., Mahon J. – 06/02/2017) – [2017] IECA 31
DPP v Eric Ryan Jnr

Sentencing – Drug offences – Severity of sentence – (Birmingham J., Sheehan J., Mahon J. – 10/02/2017) – [2017] IECA 38
DPP v Lelakowski

Sentencing – Firearms offences – Undue leniency – (Birmingham J., Mahon J., Edwards J. – 20/02/2017) – [2017] IECA 41
DPP v Freyne

Sentencing – Knowingly or wilfully delivering an incorrect return in connection with Value Added Tax – Undue leniency – Considered *DPP v Campbell* [2014] IECA 15, Referred to *DPP v Molloy* [2016] 7 JIC 2809, Considered *Paul Begley v DPP* [2013] 2 IR 188 – (Birmingham J., Mahon J., Edwards J. – 20/03/2017) – [2017] IECA 90
DPP v Slattery

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Adult Safeguarding Bill 2017 – Bill 44/2017 [pmb] – Senator Colette Kelleher, Senator Lorraine Clifford-Lee, Senator Frances Black, Senator Alice-Mary Higgins, Senator Jerry Buttimer, Senator Victor Boyhan, Senator John P. Dolan, Senator Lynn Ruane, Senator Ivana Bacik and Senator Marie-Louise O'Donnell
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Courts (No. 2) Bill 2016 – Bill 120/2016 – Committee Stage
Criminal Justice Bill 2016
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For up-to-date information please check the following websites:

Bills and legislation – http://www.oireachtas.ie/parliament/
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A new protocol for disclosure of counselling records in sex offence cases

Rather than enact a draft bill from the Law Reform Commission on the disclosure of counselling records, the Oireachtas has taken action that will lead to lengthy and costly legal debates.

James Dwyer BL

Introduction

The legislature has enacted a new provision aimed at creating a protocol for the disclosure of counselling records in prosecutions for sexual offences. Unfortunately, this yet to be commenced provision contains some anomalies and may lead to lengthy litigation to tease out how it is to be applied in practice.

As such, it is a missed opportunity to address the very real difficulties that arise in balancing the rights of an accused to a fair trial with the privacy rights of a complainant.

In civil proceedings, there are elaborate procedures in place for securing discovery from non-parties to litigation. In 2001, the Supreme Court held that non-party discovery was not available to a litigant in criminal proceedings.[1] More than a decade ago, the Supreme Court described the lack of a protocol for non-party disclosure in criminal cases as "a considerable anomaly".[2]

In the absence of a statutory code, the Director of Public Prosecutions (DPP) has engaged with various agencies, both public and private, for the purpose of developing protocols for the disclosure of evidence to the defence, via the DPP, of relevance to the prosecution.

This approach has had some success as a stopgap in the absence of legislation. However, it is not without difficulties, in particular where evidence is in the hands of people (such as individual therapists) with whom no protocol exists. In December 2014, the Law Reform Commission published a detailed report entitled 'Disclosure and Discovery in Criminal Cases'.[3]

The report was created following submissions received from a broad array of contributors and includes a detailed analysis of the various issues involved and the competing interests at stake. Appended to the report is a draft bill, which comprises an admirable attempt at introducing a comprehensive statutory framework for disclosure, and addresses a range of conflicting rights.

Rather than simply enact the draft bill as proposed, the Oireachtas in February 2017 promulgated s.39 of the Criminal Law (Sexual Offences) Act 2017, which inserts a new s.19A into the Criminal Evidence Act 1992. This creates a protocol for the disclosure of counselling records in sexual cases in the hands of non-parties. The section has yet to be commenced.

"A counselling record is defined as: 'any record, or part of a record, made by any means, by a competent person in connection with the provision of counselling to a person in respect of whom a sexual offence is alleged to have been committed ('the complainant'), which the prosecutor has had sight of, or about which the prosecutor has knowledge, and in relation to which there is a reasonable expectation of privacy'."

The scope of the section

Firstly, the section provides that it is only applicable to prosecutions for

sexual offences.[4] Sexual offences are defined in s.19A(1) as offences in the schedule to the Sex Offenders Act 2001, which describes the array of offences of a sexual nature including rape, sexual assault, possession of child pornography, defilement and child exploitation.

The section is limited in its scope to counselling records. 'Counselling' is defined in s.19A(1) as "listening to and giving verbal or other support or encouragement to a person, or advising or providing therapy or other treatment to a person (whether or not for remuneration)". This broad definition is capable of capturing a range of situations outside the formal therapeutic environment of counselling.

A 'counselling record' is defined as follows:

"any record, or part of a record, made by any means, by a competent person in connection with the provision of counselling to a person in respect of whom a sexual offence is alleged to have been committed ('the complainant'), which the prosecutor has had sight of, or about which the prosecutor has knowledge, and in relation to which there is a reasonable expectation of privacy".[5]

'Competent person' is defined as "a person who has undertaken training or study or has experience relevant to the process of counselling". So while a broad definition is given to counselling, only records created by a competent person fall within the section. So if a family member provides counselling to a complainant, any notes he or she makes would not fall within the ambit of the section, unless they have relevant experience or have undertaken relevant training.

S.19A(2) provides that in criminal proceedings for a sexual offence, the prosecutor shall inform the accused of the existence of a counselling record. However, they cannot disclose it to the defendant without the leave of the court. 'Court' is defined (in s.19A(1)) as the Circuit Criminal Court or the Central Criminal Court. S.19A(2) describes criminal proceedings for a sexual offence in general and does not limit the section's applicability to criminal proceedings before the Circuit Criminal Court or Central Criminal Court.

This provides for an anomalous situation where in summary proceedings for a sexual offence before the District Court (or the Special Criminal Court) there is now not only no mechanism for disclosure of counselling records but rather a statutory prohibition on their disclosure, with no power in the trial court to order otherwise. This has the potential to offend Article 38 of the Constitution. It is conceivable that a remedy could be fashioned, whereby a disclosure hearing takes place before the Circuit Criminal Court or Central Criminal Court where an accused is to be tried before the District Court.

Under s.19A(3), an accused, having been notified of the existence of counselling records, can then make an application to the court (presumably this would be the court before which he or she is to be tried) for an order disclosing the records to him or her.

The procedure for a disclosure hearing

Under s.19A(3), an accused, having been notified of the existence of counselling records, can then make an application to the court (presumably this would be the court before which he or she is to be tried) for an order disclosing the records to him or her. The application must be in writing and set out the reasons for the request, including reasons why the material might be relevant to an issue at trial. S.19A(4) provides that the application must be made within a prescribed period and be on notice to the person who retains the record (usually the counsellor), the complainant, the prosecutor "and any other person to whom the accused believes the counselling record relates".

S.19A(5) provides that the application can be made by the prosecutor in the absence of a defence application where the prosecutor believes it is in the interests of justice that the record be disclosed. In such circumstances, the prosecutor can make an application to the court. S.19A(6) provides that the application must be made within a prescribed period and be on notice to the person who retains the record, the complainant, the accused "and any other person to whom the accused believes the counselling record relates".

Under s.19A(7), the court can further order that the disclosure application can be made on notice to any other person to whom, in the opinion of the court, the application relates. The court will then conduct a hearing under s.19A(8) to determine whether the counselling record should be disclosed to the defendant. At the hearing, the record itself must be produced to the court by the person holding it.

Under s.19A(9), the person holding the record, the counsellor and any other person to whom the record relates, is entitled to appear and be heard on the application. S.19A(16) extends the legal aid scheme under the Civil Legal Aid Act 1995 to include a solicitor or barrister appearing for a witness or a complainant in a disclosure hearing.

Under s.19A(14), the hearing must take place in advance of the trial. A disclosure hearing can take place after a trial has begun, but only on the application of the defence and only where the court determines that it is in the interests of justice.

Section 19A(10) sets out a number of factors that the court must take into account when considering whether to direct that disclosure of the record should be made to the defendant as follows:

"(a) the extent to which the record is necessary for the accused to defend the charges against him;
(b) the probative value of the record;
(c) the reasonable expectation of privacy with respect to the record;
(d) the potential prejudice to the right to privacy of any person to whom the record relates;
(e) the public interest in encouraging the reporting of sexual offences;
(f) the public interest in encouraging complainants of sexual offences to seek counselling;
(g) the effect of the determination on the integrity of the trial process; and,
(h) the likelihood that disclosing, or requiring the disclosure of, the record will cause harm to the complainant including the nature and extent of that harm".

The section implies that an accused person has an input into such a hearing. There is no provision for the defendant's lawyers having sight of the records in advance of the hearing.[6] Furthermore, there is no provision for the appointment of special counsel to advocate from the position of the defendant, as is provided for in other jurisdictions.[7] It seems therefore that the function of defence counsel is limited to making submissions that a record should be disclosed, without knowing what it contains.

Under s.19A(11), the court may order the disclosure of the record to the defendant where it is in the interests of justice to do so (having considered the factors set out in subsection (10)). Furthermore, the court is obliged to order the disclosure where not to do so would create a real risk of the defendant receiving an unfair trial.

S.19(12) provides that the court may direct that conditions be placed on disclosure made under subsection (11) where it is "in the interests of justice and to protect the right to privacy of any person to whom the counselling record relates". Conditions that may be placed on the disclosure order can include the following:

"(i) that a part of the content of the counselling record be redacted;

(ii) that a copy of the counselling record and not the original be disclosed;
(iii) that the accused and any legal representative for the accused not disclose the content of the counselling record to any person without leave of the court;
(iv) that the counselling record be viewed only at the offices of the court;
(v) that no copies, or only a limited number of copies, of the counselling record, be made;
(vi) that information concerning the address, telephone number or place of employment of any person named in the counselling record be redacted from the record;
(vii) that the counselling record be returned to the person who owns or controls the said record; and,
(viii) that the counselling record is used solely for the purposes of the criminal proceedings for which the record has been disclosed".

The layout and scope of the section demonstrate that it is modelled on the Canadian Criminal Code but somewhat watered down, no doubt, to allay concerns that the Canadian Code had the potential to offend Article 38 of the Constitution.

S.19A(13) imposes a statutory duty on the court to give reasons for making a disclosure order or for declining to do so. Under s.19A(17), the section is said not to apply where a complainant expressly waives his or her right without leave of the court. The subsection is curiously phrased and refers to a complainant's "right to non-disclosure". This is presumably intended to refer to a complainant's right to object to a disclosure order being made by the court. There is no provision for the court inquiring into the capacity of a complainant to exercise such a waiver having regard to his or her age, mental capacity or vulnerability. There is also a reference in s.19A(17) (and in s.19A(16) in relation to legal aid) to a "witness" as well as the complainant. The subsection refers to the witness (as well as the complainant) being able to waive a "right to non-disclosure". "Witness" is not defined in the section but presumably has a meaning that is distinct from "complainant". S.19A(1) makes it clear that it is only the counselling records of complainants to which the section relates. The counselling records of other witnesses (either for the prosecution or defence) are not covered by the section. The reference to a witness having a "right to non-disclosure" is therefore entirely unclear. There is no provision in the section for an appeal by a defendant against the refusal to make a disclosure order or the making of a limited disclosure order. There is further no provision made for an appeal by a prosecutor against the making of a disclosure order, or the making of a disclosure in terms that are too wide in the view of the prosecutor.

Conclusion

The layout and scope of the section demonstrate that it is modelled on the Canadian Criminal Code but somewhat watered down, no doubt, to allay concerns that the Canadian Code had the potential to offend Article 38 of the Constitution.[8] The Canadian legislation (among others) was given careful consideration by the Law Reform Commission in its report, which appended a carefully-considered draft bill, which was inexplicably not adopted by the Oireachtas. The section therefore represents a missed opportunity for real legislative reform. Given the many difficulties in its wording, the section is likely to result in lengthy and costly litigation to tease out its meaning, if it survives constitutional scrutiny.

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7. An approach rejected by the Supreme Court in *People (DPP) v Kelly* [2006] IESC 20 [2006] 3 I.R. 115.
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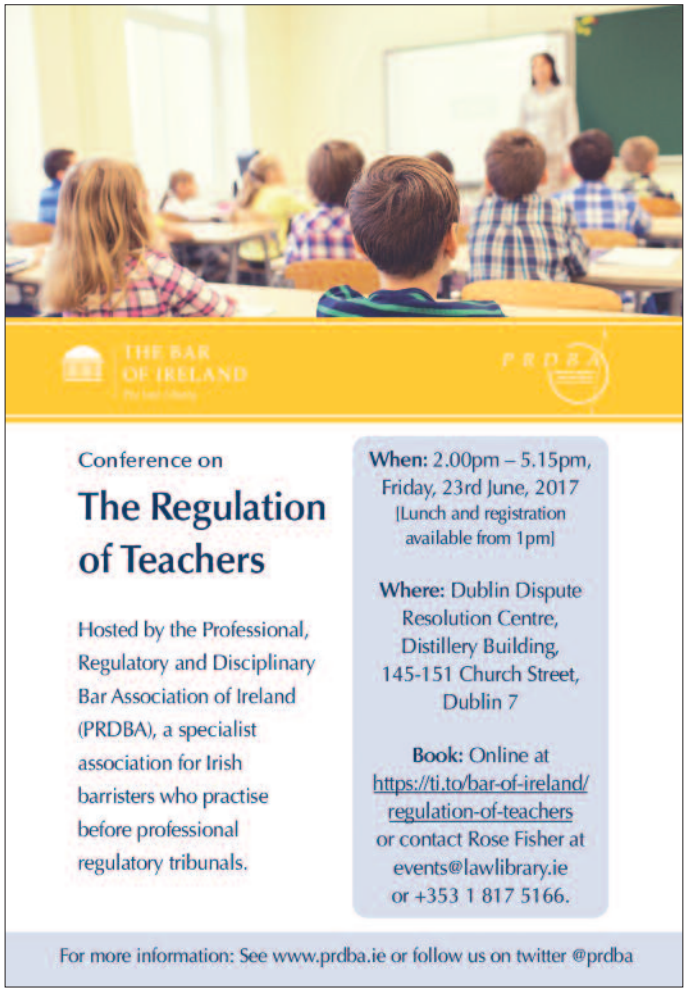

The impressive reach of a 'leapfrog' appeal

The 33rd amendment to the Constitution has given rise to an important, if unintended, safety net in cases heretofore subject to statutory restrictions on the right of appeal to the Supreme Court.

Shannon Michael Haynes BL*

"… [T]he new constitutional architecture does not permit for the exclusion (as opposed to the regulation) of an appeal to this Court whether from the Court of Appeal or direct from the High Court".

Introduction

Most judicial review applications are governed by Order 84 of the Rules of the Superior Courts.[1] Under Order 84, the application for leave is made on an *ex parte* basis within three months of the impugned decision. The threshold, for the purpose of obtaining leave, is a low one: the applicant need only show that there are 'arguable grounds' for contending that the decision is invalid.[2] So far as appeals are concerned, whether the appeal is from the refusal of leave or the dismissal of the substantive application, there is an unrestricted right to go from the High Court to the Court of Appeal.[3]

However, the Oireachtas has imposed some significant restrictions on certain types of review applications affecting decisions in the public domain. Probably the most important areas affected by statutory restrictions are planning and environmental cases,[4] and asylum and immigration cases.[5] However, restrictions also feature in decisions concerning public procurement, intellectual property, European arrest warrants, Oireachtas inquiries, and National Asset

Management Agency acquisitions, to name but a few.[6]

The statutory restrictions take many forms. The time limit in which to bring the application is often abridged; the test for leave is elevated from arguability to 'substantial grounds'; and, the leave application is sometimes required to be made on notice to the other party. One of the most important of the restrictions concerns the right of appeal. Instead of an unrestricted right, the party intent on an appeal may find that his or her right is curtailed by the requirement that he or she obtain a certificate from the High Court, certifying both that the case raises a point of law of public importance and that the appeal is in the public interest.

The constitutionality of this kind of restriction on the right of appeal was examined in *Re Illegal Immigrants (Trafficking) Bill 1999*.[7] This concerned s.5 of the Bill, which foreclosed any further appeal in asylum cases unless a certificate was forthcoming from the High Court. Having referred to Art. 34.4.3° of the Constitution (as it then stood), which allowed for appeals "with such exceptions and subject to such regulations as may be prescribed by law", the Supreme Court approved a statement from its American counterpart,[8] according to which:

"… [W]e are not at liberty to enquire into the motives of the legislature. We can only examine into its powers under the Constitution; and the power to make exceptions to the appellate jurisdiction of this Court is given by express words".[9]

The 33rd constitutional amendment

Our appellate system has been profoundly affected by the 33rd constitutional amendment, providing in 2014 for the establishment of the Court of Appeal. This new court has been interposed between the High Court and Supreme Court, and appeals, which formerly lay to the Supreme Court, now lie to the Court of Appeal.

Thus Art. 34.4.1° of the Constitution provides that the Court of Appeal "save as otherwise provided by this Article" and "with such exceptions and subject to such regulations as may be prescribed by law" is to "have appellate jurisdiction from all decisions of the High Court…"

So far as the Supreme Court is concerned, its appellate jurisdiction is set out in Art. 34.5. Appeals lie to it from the Court of Appeal, according to Art. 34.5.3°, "if the Supreme Court is satisfied that –

(i) the decision involves a matter of general public importance, or
(ii) in the interests of justice it is necessary that there be an appeal to the Supreme Court".

The 'leapfrog' appeal

As already noted, Art. 34 provides for appeals from the High Court to the Court of Appeal "save as otherwise provided by this Article".

This saver relates to the so-called 'leapfrog' appeal, whereby the appellant can leapfrog the Court of Appeal and appeal from the High Court directly to the Supreme Court. This kind of appeal is provided for in Art. 34.5.4°, which states that:

"Notwithstanding section 4.1° hereof, the Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the High Court, if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors:

(i) the decision involves a matter of general public importance;
(ii) the interests of justice".

"… [W]e are not at liberty to enquire into the motives of the legislature. We can only examine into its powers under the Constitution; and the power to make exceptions to the appellate jurisdiction of this Court is given by express words".

No "exceptions" on access to the Supreme Court

Under the former Art. 34.4.3°, appeals lay to the Supreme Court "with such exceptions and subject to such regulations as may be prescribed by law". Because the Constitution allowed for "exceptions" to the right of appeal, the legislature – as the Supreme Court made clear in *Re Illegal Immigrants (Trafficking) Bill 1999* – could exclude an appeal in the absence of an appropriate certificate from the High Court.

At this point, it is important to note the wording in the new constitutional provisions. Whereas the former Art. 34.4.3° allowed for "exceptions … prescribed by law" to the right of appeal, the new provisions in Article 34.5.3° and 4° provide for appeals subject only to "such regulations as may be prescribed by law". Under these provisions, the Court's jurisdiction can be regulated, but it cannot be excluded.

The absence of "exceptions" to the appellate mechanism was noted by the Supreme Court in *Grace v Bord Pleanála*,[10] which arose out of an appeal under s.50A(7) of the Planning and Development Act 2000 as amended. In its determination of February 26, 2016, the Court said:

"… [T]he new constitutional architecture does not permit for the exclusion (as opposed to the regulation) of an appeal to this Court whether from the Court of Appeal or direct from the High Court".

Access notwithstanding statutory restrictions

How does "the new constitutional architecture" affect appeals subject to statutory restrictions? Before the 33rd amendment, an unsuccessful party in a planning or immigration case had to seek a certificate from the High Court in order to advance to the Supreme Court, and if refused the certificate, he or she had nowhere else to go. It is now clear, however, that the disappointed appellant may, notwithstanding the refusal of a certificate, still resort to the leapfrog appeal to the Supreme Court pursuant to Art. 34.5.4°.

In *OMR v Minister for Justice*,[11] an application to leapfrog into the Supreme Court was made in the context of judicial review proceedings in an asylum case, which were subject to the statutory restriction in the form

of s.5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000 as amended. The Supreme Court noted that s.5(6)(a)[12] when read in conjunction with the Court of Appeal Act 2014 provides that:

"The determination of the High Court … shall be final and no appeal shall lie from the decision of the High Court to the Court of Appeal … except with the leave of the High Court …"

Even though the High Court refused a certificate to appeal and s.5, if read in isolation, might suggest this to be "final", the Supreme Court nonetheless confirmed that it is possible for an applicant to seek leave to appeal to it direct from the High Court without seeking a certificate, or indeed even if such a certificate has been applied for and refused by the High Court.
The situation has been left in no doubt since the judgment in the *Grace* case. Clarke and O'Malley J.J. confirmed that:

"[A]ny measure which prevents (rather than regulates) the exercise by this Court of its entitlement, under the 33rd Amendment, to consider whether a case meets that constitutional threshold must be considered to be an impermissible exclusion of the right of appeal to this Court".[13]

Abusing the leapfrog

The Court in *OMR* was clearly aware of the potential for the leapfrog facility to be well used, perhaps even overused. With this in mind, it expressed the view that, before the leapfrog application is made, it is "highly desirable" that a certificate for an appeal be sought in the High Court. If it is refused, the fact that an appeal to the Court of Appeal has been foreclosed will then be a "weighty consideration" favouring a conclusion that there are exceptional circumstances warranting the appeal, assuming the Supreme Court otherwise considers that a point of general public importance has been raised or that it is in the interests of justice that an appeal be brought.[14]

Comparing the tests

It was also observed in *OMR* that, as a matter of practicality, there is very little difference between a point of law of exceptional public importance (the statutory certificate test) on the one hand, and a matter of general public importance (the test for an appeal under Art. 34.5.3° and 4°) on the other. The Court felt that there must be few cases of public importance that pass one test and fail the other.[15] In *Grace*, Clarke and O'Malley J.J. expressed the view that the statutory certificate test is "undoubtedly somewhat higher" than the constitutional threshold.[16] Whatever about the level of public importance required by the two tests, it is also important to recall that the test imposed by statutory restrictions also invariably requires, not just public importance in the point, but also a public interest in the appeal. In contrast, the constitutional test under Art. 34.5.4° is disjunctive and so it could be enough that it is necessary in "the interests of justice" that there be an appeal to the Supreme Court. Arguably, the High Court simply getting it wrong to the point of some unfairness could be sufficient for this purpose. If the High Court fell into significant error (such as might satisfy the interests of justice limb of the test) and then foreclosed the possibility of an appeal (thereby affording a weighty consideration in favour of there being exceptional circumstances), the door to the Supreme Court might open.

On the other hand, it is also important to remember that the "constitutional architecture" plainly indicates that the usual course, where a litigant is dissatisfied with a High Court decision, is to appeal to the Court of Appeal. While the leapfrog is available where the decision "involves a matter of general public importance" and/or "in the interests of justice", the Supreme Court must also be "satisfied that there are exceptional circumstances warranting a direct appeal to it". This requirement of "exceptional circumstances" puts the bar at a very high level.

"[A]ny measure which prevents (rather than regulates) the exercise by this Court of its entitlement, under the 33rd Amendment, to consider whether a case meets that constitutional threshold must be considered to be an impermissible exclusion of the right of appeal to this Court".

Appeals in the future

The right to appeal represents a fundamental thread in the fabric of fair procedures and access to justice. Just like any other court, the High Court will not always get it right. That is why we have a Court of Appeal and a Supreme Court.[17] The hierarchy of the superior courts has changed fundamentally since the 33rd amendment to the Constitution. Moving from a two-tier to a three-tier system should of itself increase the availability of a remedy by way of appeal. Moreover, the fact that there are now two appellate courts, and not just one, makes it more difficult to justify depriving the dissatisfied litigant of one unrestricted appeal. Nevertheless, various statutory provisions restricting the right remain in place. So long as we retain these restrictions (and there is no reason to believe that we will not) it is always going to be difficult for the dissatisfied litigant to appeal, whether directly to the Court of Appeal or by way of leapfrog to the Supreme Court. But having said that, it is at least arguable that if he or she succeeds in getting his or her appeal to the Court of Appeal, there may be an easier passage from there to the Supreme Court (because if the litigant has satisfied the statutory test for a certificate to get into the Court of Appeal, it should follow that he or she would also satisfy the less onerous constitutional test under Art. 34.5.3°).
Does this defeat the purpose of there being an intermediate appeal court in the first place?

Some suggestions

In the light of our "new constitutional architecture", there is scope to revisit the approach to statutory restrictions. Thought could be given to removing such restrictions altogether since the Constitution now provides its own restrictions. Alternatively, the statutory test for a certificate could be reformulated so that it is consistent with, if not lower than, the constitutional test. If an appeal to the Court of Appeal instead of the Supreme Court is to be pursued in all but exceptional circumstances, then it is illogical that the statutory certificate test (to get into the Court of Appeal) should be more

onerous than the constitutional one (to get into the Supreme Court). The certificate procedure should at the very least be taken out of the hands of the High Court and vested in the Court of Appeal, even on a papers-only basis.

The Oireachtas may legitimately seek to restrict the new (and possibly unintended)[18] right to petition to the Supreme Court in all of the above-mentioned cases heretofore subject to statutory restrictions on the right of appeal. However, any effort to restore the pre-33rd amendment status quo – whereby no case could leave the High Court without that Court's permission – can only be achieved by way of a referendum. The Court in *OMR* pointed out that no regulations, as permitted by Art. 34, have been prescribed by law to date, but that could change. However, it is hard to imagine how the Oireachtas might seek to restrict the right to petition the Supreme Court over and above what the Court has already put in place in the form of the Practice Direction SC16 ('Conduct of proceedings in Supreme Court') issued on October 29, 2014. The onerous threshold to satisfy is already set out by the Constitution. The Practice Direction restricts leapfrog appeals insofar as it: imposes a time limit (but provides a facility to extend time); limits the application to a papers-only determination (unless the Court otherwise directs); and, prescribes the form that the application must take, the information that must be included and how it is to be presented. There is also provision for leapfrog applicants to face the risk of a further costs order if refused relief by the Supreme Court. Despite these (only to be expected) procedural requirements, the fact remains that the 33rd amendment has an important practical effect when it comes to appeals in statutory judicial reviews. The door that was once firmly closed by the High Court may now in exceptional cases be opened by the Supreme Court.

**My sincere thanks to Mark de Blacam SC for giving generously of his time to discuss, comment on and proofread this article in its draft form. It should go without saying that all errors are my own.*

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4. Planning and Development Act 2000, s.50A as inserted by s.32 of the Planning and Development (Amendment) Act 2010.
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7. [2000] 2 IR 360.
8. *In McArdle* (7) Wall. 506 [1869].
9. [2000] 2 IR 360 at p. 400. It is also interesting to reflect on how things have moved on since the Supreme Court's judgment in 2000. Notwithstanding the fact that the Court upheld the constitutionality of the 14-day limit-limit, this was later increased to 28 days and the procedure for seeking leave of notice was abandoned.
10. [2016] IESCDET 29 (per Clarke, MacMenamin and Dunne J.J.). In a determination in a further 's.50A planning' case, *Carroll v An Bord Pleanāla* [2017] IESCDET 15 (per O'Donnell, McKechnie, Dunne J.J.), the Supreme Court granted leave in respect of both the substantive judgment and the judgment refusing a certificate by the High Court.
11. *OMR v Minister for Justice* [2017] IESCDET 14 (per O'Donnell, McKechnie and Dunne J.J.).
12. The determination erroneously cites s.5(3)(a), which is the original provision in its un-amended form.
13. *Grace v Bórd Pleanāla* [2017] IESC 10 (per O'Donnell, Clarke, MacMenamin, Laffoy, Dunne, Charleton and O'Malley J.J.). While the point does not appear to have arisen in either *Grace* or *OMR*, any reference to the Supreme Court is only to be construed as a reference to the Court of Appeal unless the context otherwise appears. However, if either the s.50A planning provision or the s.5(6)(a) asylum provision was to be read in a way that maintains the reference to the Supreme Court, it would clearly constitute an unconstitutional exclusion of the Supreme Court's jurisdiction.
14. *OMR v Minister for Justice* [2017] IESCDET 14, at para. 5(vi). In *Grace v Bórd Pleanāla* [2017] IESC 10, at para. 3.9, Clarke and O'Malley J.J. also encouraged High Court judges to have regard to the fact that a leapfrog appeal might be open before refusing a certificate.
15. *OMR v Minister for Justice* [2017] IESCDET 14, at para. 5(vi).
16. *Grace v Bórd Pleanāla* [2017] IESC 10, at paras. 3.6 and 3.9.
17. It was a questionable policy in the first place to put the application for a certificate to appeal into the hands of the trial judge, without at least providing for a limited form of appeal on the discrete issue of a certificate to the Court above. As Fennelly J. observed in *AB v Minister for Justice* [2002] 1 IR 296, at p. 325: "… [T]his court has been correctly vigilant in its interpretation of this important constitutional guarantee of access to the court, whose establishment is mandated by the Constitution as the final appellate court. This is not to preserve some institutional prerogative of the court itself, but to protect the constitutional rights of litigants to bring an appeal against judicial decisions affecting them. The notion that a double degree of jurisdiction is an important part of the normal judicial system is widespread in modern legal systems. It is not necessarily a fundamentally guaranteed right … It is, however recognised throughout the legal structure of this State…"
18. The Court in *OMR* noted, at para. 4, that the right to apply for a leapfrog appeal in the absence of a certificate in a case subject to statutory restriction on appeals "may not have been something specifically contemplated by the amendment to the Constitution". However, the Court in the *Grace* judgment, at para. 3.4, considered the absence of any reference in Art. 34.5.4° to the legislature's ability to make exceptions to the appellate jurisdiction to be a "deliberate omission".

Limitation periods in debt recovery claims

The Statute of Limitations is now a key issue in debt recovery proceedings.

Hugh McDowell BL

Introduction

Although the best part of a decade has passed since the economic downturn, recent media speculation suggests that debt recovery proceedings in the Irish courts may peak in 2017. Many lenders and vulture funds are only now beginning to bring debt recovery proceedings in respect of loans that have been non-performing since the crash. In such cases, the Statute of Limitations may provide a strong basis for resisting an order for judgment or for possession being made. It is therefore important that practitioners are aware of issues specific to the limitation periods for debt contracts, recent judgments in the area, and proposals for reform.

The Statute of Limitations 1957

Section 11 of the Statute of Limitations 1957 provides for a limitation period of six years for actions founded on contract (including a contract for debt), with the period running from the date upon which the cause of action accrues.

Where a right of action to recover a contract debt accrues, and the debtor acknowledges the debt in writing, the right of action will be deemed to have accrued from the date of acknowledgement. The acknowledgment must be made in writing, signed by the debtor or his agent.[1]

Similarly, if a debtor makes a payment in respect of a debt for which the cause of action has accrued, the cause of action will be deemed to accrue from the date of that payment.[2]

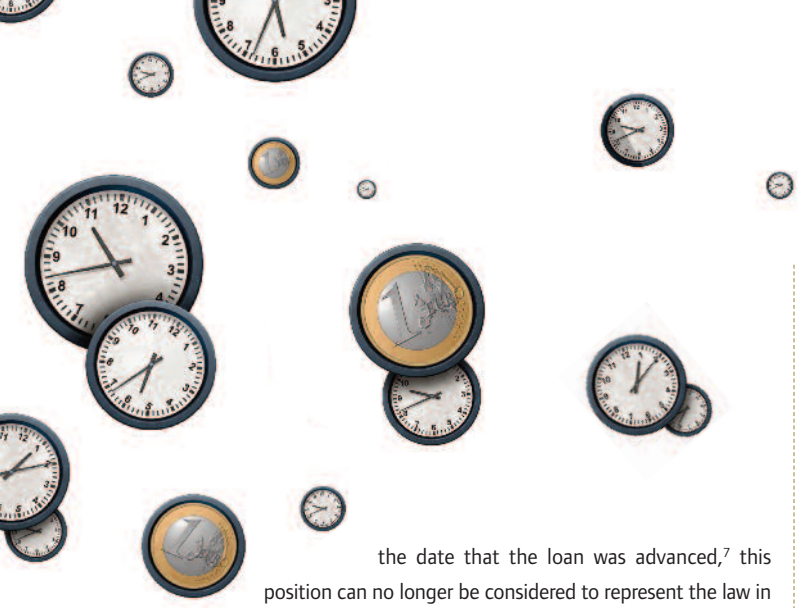
When does the cause of action accrue?

It is a fundamental principle of law that a cause of action will accrue to a lender from the point at which it has a legally enforceable claim against a borrower. This most authoritative statement to this effect, endorsed recently by the English High Court,[3] is found in *Reeves v Butcher* [1891] 2 QB 509:

"This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held … that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought".[4]

The "earliest time at which an action could be brought" is a matter of contractual construction.[5] In respect of a simple term loan, in which a date for repayment of the principal sum plus interest is stipulated in the loan agreement, the limitation period for recovery of the debt will generally run from that repayment date. Furthermore, if a date for repayment is set out in the loan agreement, there is generally no obligation on the lender to make a further demand for repayment. The monies will automatically fall due when the date arrives.[6]

However, many term loans will involve periodic repayments, and the consequences of such a repayment schedule for the commencement of a limitation period is a matter of interpretation. It may be the case that all monies outstanding under the loan agreement automatically become due and owing on the occurrence of a particular event, such as a missed payment, or it may be that a missed payment gives the lender a contractual right to issue a letter of demand for all sums outstanding. In respect of demand loans, the law is that the cause of action accrues from the point at which a demand letter issues by the creditor (subject to any terms or conditions to the contrary contained in the loan agreement). Whereas it was previously thought that a limitation period on a demand facility ran from



the date that the loan was advanced,[7] this position can no longer be considered to represent the law in light of recent judgments.[8] That the accrual of a cause of action will depend on the contractual terms of the loan was made clear by Clarke J. in the recent Supreme Court decision of *Irish Life plc v Dunne* [2015] IESC 46:

"The first port of call for determining whether those monies had become due is to identify the terms of the contract between the lender and the borrower as to when the entire principal sum can be said to fall due. Terms in that regard can, and do in practice, differ. It may be that, on a proper interpretation of the contractual documents in one case, a demand for payment following some form of default may be necessary. It might, however, be the case that, in other circumstances and in the light of the terms contained in a particular mortgage deed, the full sum may become due without demand in certain, specified circumstances".[9]

In *First Southern Bank Limited v Maher* [1990] 2 I.R. 477, the defendant and her late husband issued a promissory note to the plaintiff for the sum of £12,745.53, repayable by 21 instalments of £606.93 each. The promissory note was secured by a charge over certain lands owned by the borrower in Co. Tipperary. The promissory note further provided that, in the event of default for a period of one month from its due date in payment of any of the instalments, the whole of the sum outstanding under the promissory note would become immediately due and payable together with interest thereon. After the loan was advanced, no repayments were ever paid by the defendant or her late husband.

In determining that the limitation period ran from 30 days after the first missed payment, rather than from the date upon which demand was made on foot of that missed payment, Barron J. held:

"The security was in place notwithstanding that no demand may have been made. There is nothing in the deed to suggest that such security could not be enforced until the demand was made. The document could have provided that notwithstanding the terms of the particular transactions under which monies became recoverable, no proceedings could be brought to raise the security until a demand had been made…Here no such demand was necessary, the money became due and payable once there was default for a period of one month".[10]

A similar conclusion was reached more recently by Baker J. in *AIB v Pollock* [2016] IEHC 581, where the repayment clause in a loan agreement stated that the facility

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was "[o]n demand and at the pleasure of the Bank, subject to clearance in full by way of refinance or otherwise by 30/09/2009". Having reviewed the authorities, Baker J. dismissed the plaintiff's argument that the limitation period only ran from the point at which it issued a letter of demand, and held:

"I do not consider that the absence from the express repayment provisions that repayment be made immediately upon the happening of identified events leads to the conclusion that payment was therefore not due on September 30, 2009. The express words are clear, and identify a date for repayment, and the inclusion of the word "immediately" or of a similar word, could have added nothing to the sense of the clause because the date was identified by day, month, and year. Payment became due on that date without demand, and, to borrow the language of Clarke J. in *Irish Life & Permanent plc v Dunne*, the right to take action on foot of a failure to pay on the agreed date happened automatically".[11]

These decisions indicate that Irish courts will have little hesitation finding that a limitation period will run from the point at which a substantive breach of the loan's terms takes place, rather than from when the lender issues a letter of demand in consequence of that breach. However, the terms of each loan must be considered on their individual merits, and the wording construed accordingly.

Accrual of cause of action for guarantees

Unless expressly provided for otherwise, a cause of action accrues against a guarantor on the date of the principal debtor's default.[12] However, where a guarantee states that a guarantor is only liable once demand is made on him or her, the limitation period commences at the point of demand (rather than the date upon which the guarantee was entered).[13]

While emphasising that guarantees must be interpreted in accordance with their specific terms, Canny notes that some English decisions have created certain principles of broad application.[14] Generally speaking, no cause of action arises against a guarantor until a demand is made.[15] However, a contract of guarantee which states that the guarantor is a 'principal debtor' (or 'primary obligor') has the effect of removing the requirement for a formal demand of the guarantor.[16]

Death of a borrower[17]

Many loan contracts will contain a standard term that all outstanding monies become immediately repayable on the death of the borrower. However, if no such term exists, what is the effect of the death of a borrower on a contract debt's limitation period?

Section 9(2) of the Civil Liability Act 1961 states that where a cause of action has accrued against a deceased person within his or her lifetime, the limitation period in respect of that cause of action is either six years from its accrual or two years from the date of death (whichever is sooner).[18]

The current position under Irish law is that, where a right of action does not accrue automatically under a loan agreement, and no letter of demand has issued prior to the borrower's death, the provisions of Section 9(2) of the 1961 Act do not apply because no cause of action existed at the date of death. In *Bank of Ireland v O'Keeffe* [1987] I.R. 47, Barron J. held:

"Section 9, s-s. 2 (b) relates to a cause of action which has survived against the estate of a deceased person…Accordingly, for s. 9, s-s. 2 (b) to apply in the present case it will be necessary to show that the cause of action on foot of which the plaintiff is proceeding was one which subsisted at the date of death of the defendant's husband…

It seems to me that similarly in the present case no cause of action existed whereby the plaintiff could sue either the deceased or his estate until demand had been made. Since this demand was not made until after the death of the deceased, it follows that there was no cause of action subsisting against him at the date of death. Accordingly, the defence fails".[19]

The decision in O'Keeffe was endorsed more recently by McGovern J. in *Bank of Ireland v Stafford* [2013] IEHC] 546. There, the events of default set out in the loan agreement included the death of the borrower. The question before the High Court was whether any claim for the debt had survived against the estate of the deceased, within the meaning of the 1961 Act. Following the decision of Barron J. in *O'Keeffe*, McGovern J. held:

"The demand for payment was made after the deceased's death and was not a claim subsisting at his death or one that survived against the deceased's estate within the meaning of the 1961 Act. The monies did not fall due and were not repayable at any time prior to the deceased's death".[20]

The question that arises is whether the decisions in *O'Keeffe* and *Stafford* have the potential to create precisely the type of uncertainty that limitation periods are specifically designed to avoid. The position at Irish law appears to be that if the debtor under a demand loan facility dies, and at the time of death his creditor has not issued a demand letter (and assuming the death of the borrower is not contemplated by the terms and conditions of the loan), no limitation period begins to run within which the lender must institute proceedings in order to recover the outstanding sum due. Rather, it would appear that the lender could, theoretically, wait for an indefinite period before serving a demand letter on the estate of the deceased, and only at that point would a limitation period begin to run (though equitable doctrines such as estoppel and delay might defeat the lender's claim).

Limitation periods for interest payments

Generally, once recovery of a principal sum becomes statute-barred, an action for the arrears of interest will also be barred. This was the case in *Elder v Northcott* [1930] 2 Ch. 422, in which the plaintiffs issued proceedings on November 1, 1928, for the recovery of a principal sum and arrears of interest thereon. At hearing, the plaintiffs accepted that the recovery of the principal sum had become statute-barred on June 30, 1926, and abandoned their claim to the arrears of interest that had accrued after that date. However, the plaintiffs maintained their claim for the arrears of interest that had accrued between November 1, 1922 (being six years prior to the issuing of the writ), and June 30, 1926, on the basis that at each half-year during that period a cause of action accrued in respect of each half-year's payment of interest.

Accepting the submission that interest is a 'mere accessory' to the principal sum (rather than an independent contract to pay), Clauson J. held that:

"…since the claim to the principal is barred by lapse of time, the claim to the interest on it is barred also, and accordingly the plaintiffs cannot succeed in the

claim so ingeniously put forward for interest between the dates I have mentioned…"[21]

The *Elder* decision subsequently was referred to, albeit in passing, by the Supreme Court of the Irish Free State,[22] and the position set out by Clauson J. has recently been held to represent the law by the English Court of Appeal in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814.

Part payment and acknowledgement

As stated above, Sections 56 and 65 of the Statute of Limitations 1957 provide that an acknowledgement of the debt by the debtor to the creditor, or the making of any payment in respect of the debt, has the effect of re-setting the six-year limitation period (even in cases where a debt has become statute-barred). These statutory provisions are examined in detail in Chapter 7 of the second edition of Canny's *Limitation of Actions*, and readers are advised to consult that text for a comprehensive analysis of the necessary ingredients of acknowledgements and part payments. However, one particular point of interest for legal practitioners, which merits mention here, is the interpretation of the statutory provision requiring that an acknowledgment be "in writing and signed by the person making the acknowledgement".[23] The reliance of modern commercial transactions on technology, and in particular on email correspondence, raises the question as to what constitutes a signature for the purpose of the Statute of Limitations. This is an issue that has received limited treatment by the courts to date, but is likely to be the subject of litigation in the future.

Canny cites the English Court of Appeal decision of *Good Challenger Navegante SA v Metalexportimport SA* [2003] EWCA Civ 1668 as the most recent judicial pronouncement on the subject, in which it was held that a typed name at the bottom of a telex was sufficient for the purposes of an acknowledgment. The Court of Appeal approved the following passage from Mr Michael Crane QC, sitting as a deputy judge of the commercial court:

"Thus in the case of a formal contract which prints the names of the parties and leaves a space under each name for the parties to write their names, the document will not have been signed by a party until he writes in his name in the space provided. Conversely, with a telex, where there is no such facility, the typed name of the sender at the end of the telex not only identifies the maker but leads to the inference that he has approved its contents: the typed name, therefore, constitutes his signature. Thus in my judgment each of the telexes relied on by the Claimant was signed by the sender typing in its name, or his name, at the foot of the document".[24]

It is submitted that not only would the reasoning of the *Good Challenger Navegante* decision be adopted in this jurisdiction, but that the scope of that reasoning would be sufficiently broad to capture other forms of electronic communications (most obviously, emails). In substance, there is no distinction between a name typed at the bottom of a fax, telex, email or even a text message, and in circumstances where so much correspondence between commercial debtors and creditors takes place electronically, it would seem particularly unfair to insist that only a signature in wet ink would satisfy the requirements of Section 58.

The Statute of Limitations Bill 2017

The Statute of Limitations Bill 2017, recently introduced in the Dáil by Mick Wallace TD, proposes to reduce the limitation period for contract debts from six years to two years. Mr Wallace has argued that a limitation period of six years puts borrowers at disadvantage and potentially amounts to a breach of Article 6 of the European Convention on Human Rights.

However, it is difficult to see how a shorter limitation period of two years would be advantageous to borrowers. A shorter limitation period would have the effect of prompting banks and funds to commence legal proceedings against borrowers at the earliest opportunity so as to protect their position and ensure that their claims do not become statute-barred. The advantage of a six-year limitation period is that it affords lenders sufficient time and space to seek to come to an alternative arrangement with borrowers who are in arrears, without having to initiate proceedings.

References

1. Section 56, Statute of Limitations 1957.
2. Section 65, Statute of Limitations 1957.
3. *Cape Distribution Limited v Cape Intermediate Holdings Plc* [2016] EWHC 1786 (QB), par. 103.
4. [1891] 2 QB 509, 511.
5. Canny, *Limitation of Actions (2nd ed.)*, Round Hall, 2016, p. 188; *AIB v. Pollock* [2016] IEHC 581, par. 25.
6. Donnelly, *The Law of Credit and Security (2nd ed.)*, Round Hall, 2016, p. 235; *AIB v Pollock* [2016] IEHC 581, par. 33.
7. Described as "a rule of some antiquity" by Canny, p. 188.
8. E.g., *AIB . Pollock* [2016] IEHC 581. In England and Wales the old common law rule was replaced by Section 6 of the Limitation Act 1980.
9. [2015] IESC 46, par 6.6.
10. [1990] 2 I.R. 477, 480.
11. [2016] IEHC 581, par. 42.
12. Breslin, *Banking Law (3rd ed.)*, Round Hall, 2016, par. 14.43.
13. *Cripps (RA & Son) Ltd v Wickenden* [1973] 2 All E.R. 606.
14. Canny, *Limitation of Actions (2nd ed.)*, Round Hall, 2016, p. 190.
15. *Bradford Old Bank Ltd v Sutcliffe* [1918] 2 K.B. 833.
16. *MS Fashions v BCCI* [1993] Ch. 425.
17. See generally, Murphy, 'Enforcing from the Grave: An Analysis of the Law Relating to Deceased Borrowers from a Creditor's Perspective'. *Commercial Law Practitioner* 2015; 22 (9): 228.
18. However, the rules in relation to acknowledgement and part-payment, discussed above, continue to apply and can give rise to a fresh six-year limitation period against the deceased's estate.
19. [1987] I.R. 47, 49-50.
20. [2013] IEHC 546, par 14.
21. [1930] 2 Ch. 422, 430.
22. *Gore Hickman v Assurance Alliance Company Limited* [1936] I.R. 721.
23. Section 58, Statute of Limitations 1957.
24. [2003] EWHC 10 (Comm), par. 61.

While frustrating delays remain in the establishment of a new system for legal costs adjudication, a new Practice Direction offers some assistance.

Action needed now for system of legal costs

Paul McGarry SC

Each month brings new developments in the area of legal costs. The Bar has always favoured the introduction of a new system for the resolution of disputes about costs. This was an uncontroversial part of the Legal Services Regulation Bill when it was originally introduced. It provided essentially for the replacement of the Taxing Master(s) with a new system of legal costs adjudication.

We repeatedly called for the enactment of those provisions quickly, even if other parts of legislation required more time and debate. It came as no surprise that the text of that part of the Legal Services Regulation Act 2015 was essentially the same as that proposed when the Bill was published four years earlier.

A further 18 months has passed, and we are no nearer to having the new costs provisions commenced. This is a bit embarrassing, given that the migration to a new adjudication structure is not dependent upon the delays that have encumbered the establishment of the Legal Services Regulatory Authority (LSRA).

Problems with the system persist. The time taken to conclude a taxation could extend to 18 months or two years in 2015 and 2016. There have been a plethora of parallel disputes by way of taxation reviews in recent times and in high-profile cases. The decision of the Court of Appeal in *Sheehan v Corr* was recently the subject of an appeal hearing before the Supreme Court, and judgment is anticipated shortly. The Bar was permitted to intervene as an *Amicus Curiae* and made submissions in that appeal on the unique position of barristers in the context of costs.

Good news

It is not all bad news, however. The Government recently appointed a new Taxing Master, and early indications are that this has had the effect of speeding up the system. In addition, the President of the High Court issued a recent Practice Direction, which came into effect on April 24. This provides for the payment on account of costs by order of the Court. The text is worth noting:

"In view of long delays in the taxation of costs, the attention of practitioners is drawn to the provisions of Order 99, rule 1B (5).

"I direct that in all cases where there is no dispute as to the liability for the payment of costs and in any other case which a judge thinks appropriate, an order may be made directing payment of a reasonable sum on account of costs within such period as may be specified by the judge pending the taxation of such costs.

"Such orders may be made on an undertaking being given by the solicitor for the successful party that, in the event of taxation realising a smaller sum than that directed to be paid on account, such overpayment will be repaid".

It is intended that orders of this type will be straightforward and dealt with at the conclusion of the hearing. Agreement of the paying party is not necessary. There can be no question of lengthy disputes about the quantum of the interim award. In large cases, it may be prudent to obtain a rough estimate from a costs accountant as to the range of outcomes at taxation, but this should be seen as giving rise to an additional layer of cost. Of course, solicitors for the beneficiary of the costs award should take care to ensure that they pitch the interim costs request at an appropriate and reasonable level.

The benefits of such an approach are obvious. Cashflow issues arising from the delays in resolution of taxation disputes are alleviated. It is likely that paying parties (especially institutional parties) will be encouraged to resolve the entire costs issue at an earlier stage.

What many people don't realise is that the taxation system is an inherent part of the original proceedings.

This means that many parties that have expended sums of money in order to prosecute (or defend) a claim must wait until the costs issues are resolved before they can be reimbursed. This applies equally to funded commercial disputes and 'no-win no-fee' cases where the plaintiff has had to incur (even small) outlays.

Delays in the resolution of costs are therefore a further delay in the resolution of the proceedings, are clearly not in the interests of litigants, and paint the justice system in a bad light.

It is to be hoped that these recent developments will improve matters significantly, but the real game changer will be the commencement of Part X of the LSRA 2015, and the establishment of the Office of the Legal Costs Adjudicator.

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