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THE BAR REVIEW

VOLUME 28 / NUMBER 4 / OCTOBER 2023

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BLOOMSBURY PROFESSIONAL IRELAND'S AUTUMN 2023 NEW RELEASES

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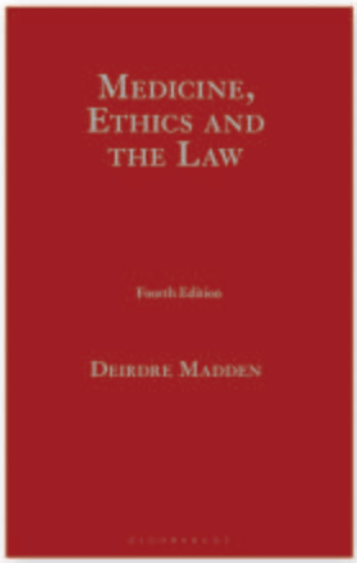
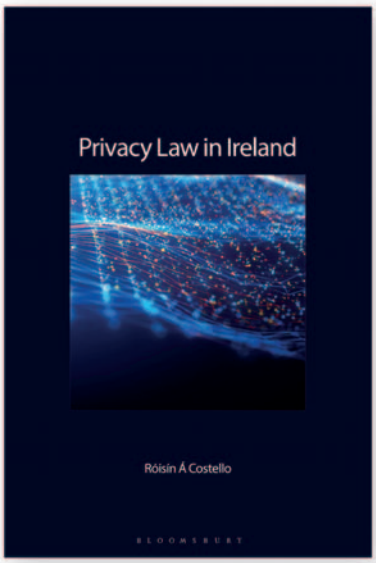


Medicine, Ethics and the Law, 4th edition

By Deirdre Madden

This title explores the key issues of patient-centred care, respect for autonomy and human dignity, the protection of human rights, and the appropriate role of law in healthcare.

Pub Date: Sep 2023
ISBN: 9781526524140
Hardback Price: €225
eBook Price: €198.65



Privacy Law in Ireland

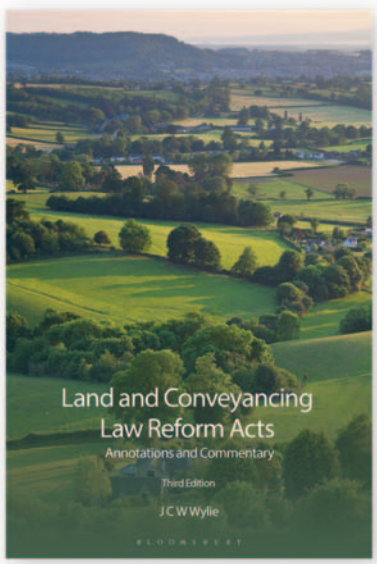
By Róisín Á Costello

Ronan Lupton (Consultant Editor)

Provides an analysis of the origins, current sources, and character of privacy law in Ireland with a particular focus on how to navigate privacy claims and balance privacy with other interests before the Irish courts.

Pub Date: Aug 2023
ISBN: 9781526524485
Hardback Price: €185
eBook Price: €163.33

COMING SOON

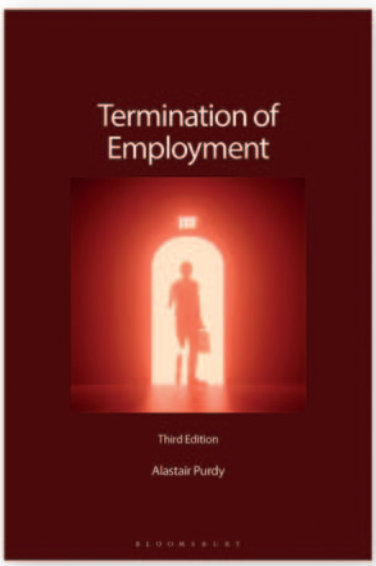


Land and Conveyancing Law Reform Acts: Annotations and Commentary, 3rd edition

By J.C.W. Wylie

This title remains the indispensable guide to the key legislation governing Irish property law, written by the leading authority in this area of law. This third edition incorporates the amendments to the 2009 Act brought in by the Land and Conveyancing Law Reform Act 2021 and other related legislation.

Pub Date: Oct 2023 | **ISBN:** 9781526527660
Paperback Price: €215 | **eBook Price:** €189.82



Termination of Employment, 3rd edition

By Alastair Purdy

This title clearly explains the legal aspects of employment termination, dealing with the notice that must be given, the forms that need to be filled out, the various options open to claimants and the penalties for non-compliance.

Pub Date: Oct 2023
ISBN: 9781526524508
Paperback Price: €195
eBook: €172.16

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OCTOBER 2023

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EMBRACING CHANGE

In a changing world, the Council of The Bar of Ireland is working hard to ensure that the independent referral Bar continues to meet the needs of its members and of society.

Sara Phelan SC
Senior Counsel, Barrister – Member of the Inner Bar
Chair of the Council of The Bar of Ireland

As we welcome the beginning of yet another legal year, I am reminded of the cycle of life and the need to embrace change if we, as a profession, are to successfully evolve and flourish into the 21st century and beyond. My first Chair's message last October reflected on the values espoused by the independent referral Bar and noted that it is by adherence to our core and enduring value of independence, and related and equally important values such as integrity, duty to the court, professionalism, and collegiality, that we will manage to set ourselves apart and continue to make ourselves relevant to the consumers of our services.

> **"If the rate of change on the outside exceeds the rate of change on the inside, the end is near."**
>
> *Jack Welch, CEO (former) General Electric*

Meeting members' needs

As the world as we know it continues to change, so too must the Bar in order to reflect the needs of its members, our clients and society as a whole. One of the articles in this edition considers the results of the Diversity, Inclusion and Working Lives Survey of members in June 2023 and it is clear that members not only require, but also deserve, change – to enhance their working lives, and improve their financial, physical and mental well-being.

Bearing this in mind, and in addition to the survey, the 2022/23 Bar Council engaged Hannah Carney and Associates (HCA) to assist in liaising with members and garnering their views on the challenges facing the existing business model of the Bar, which is a solo self-employed library model.

HCA facilitated a number of member workshops, and the resultant report was made available to all members in advance of the AGM in July. Following on from this, a motion was passed at the AGM, which invited the incoming Bar Council to continue deliberations on the business model of the

independent referral Bar and to proffer options to mitigate the challenges faced by the profession. So, as we begin our new legal year, the Bar Council will continue to engage with these challenges, which include 'right sizing' the Bar, administrative assistance with fee invoicing and fee recovery, improving support structures for new entrants, and reviewing our property portfolio so as to best utilise resources for the benefit of members.

The pace of change

The need to change and progress is not the sole preserve of the Bar.; for example, the bullet-like speed of technological developments in the last 12 months cannot be ignored. The manner in which we approach these developments, our commitment to environmental, social and governance (ESG) principles, and the application of sustainability goals will certainly shape the Bar of the future and we should not be found lacking in this regard.

In embracing change, let us strive to be as relevant in the future as we have been in the past, so that the independent referral Bar may remain at the forefront of our justice system in terms of upholding the rule of law, to ensure the protection of all members of society, but particularly those – including the vulnerable and disadvantaged – who may not find their voice without our independence and expertise.

Welcome and thanks

Might I also take this opportunity to welcome our newest colleagues as they embark on a novel and exciting chapter of their professional and personal lives. I would also like to note my sincere thanks to all those 2022/23 Bar Council members and Committee members whose term came to an end in September. Without their unfailing commitment, the Bar Council simply could not continue its work.

And lastly (but by no means least) let me say how much I look forward to working with a newly elected Bar Council, eight members of which are joining for the first time. Alongside the input of the various Committees, we will face into the forthcoming year with a renewed and shared optimism and commitment to the best interests of our fellow members.

NEW DEVELOPMENTS

This edition of *The Bar Review* looks at the history of barristers, while articles focus on new legislation, and developing areas of law.

Helen Murray BL
Editor
The Bar Review

Summer holidays may be a distant memory, but as the leaves fall and the nights draw in, *The Bar Review* extends a warm welcome to everyone, and particularly to the new members of The Bar of the Ireland.

When the sun was still shining, we interviewed Niamh Howlin, author and Associate Professor in UCD, on her new book, *Barristers in Ireland: An Evolving Profession since 1921*. While the Bar has faced challenges in recent weeks, Niamh discusses the various difficulties the Bar successfully navigated during the 20th century.

Jane Barron BL has written a comprehensive guide and analysis of the law surrounding co-habiting couples. In recent years marriage rates have been in decline and consequently, there has been an increase in family law proceedings dealing with unmarried couples.

Cathy Smith SC and Aoife Farrelly BL examine the impact of mediation in personal injuries proceedings in advance of the commencement of the third phase of the Personal Injuries Resolution Board Act, 2022.

Gordon Walsh BL has written an excellent article on shadow banking. He sets out a straightforward examination of who shadow banks are, what they do, and the attempts that have been made internationally to regulate them. If this is an area that has caused confusion in the past, this article will set you straight. Finally, Wendy Mallon Doyle BL puts the spotlight on the Family Courts Bill, 2022.

Specialist Bar Association news

Planning, Environmental and Local Government Bar Association

On June 28, the Planning, Environmental and Local Government Bar Association (PELGBA) was delighted to host Gregory Jones KC of FTB Chambers, Inner Temple, London, who gave a talk entitled 'Habitats Directive – screening opinions – jurisdictional gateways?'.

The 2023 PELGBA Annual Conference took place on July 7. The conference was expertly chaired by Mr Justice Richard Humphreys, who was joined by speakers Catherine Donnelly SC, Jarlath Fitzsimons SC, Dermot Flanagan SC, Eamon Galligan SC, Mema Byrne BL and Margaret Heavey BL. Some of the topics covered included: environmental assessments; judicial review under the new planning bill; and, recent developments in compulsory acquisition and compensation law.

The conference was well attended by barristers, solicitors, environmental NGOs and representatives from local government.

Immigration, Asylum and Citizenship Bar Association

On June 27, the Immigration, Asylum and Citizenship Bar Association (IACBA) held a seminar on the recent Supreme Court decision of *Middlecamp v Minister for Justice* [2023] IESC 2 and its implications. The speakers were Sharon Dillon Lyons BL and Shannon Hayes BL, and the event was chaired by Ms Justice Niamh Hyland. The IACBA ran its Bumper Extravaganza event on July 11, and on the agenda for the day was an opening address from Attorney General Rossa Fanning SC, a recap of superior court cases provided by IACBA bursary winner Arlene Walsh Wallace BL, and a conversation with author and journalist Sally Hayden. Sally is an award-winning journalist and photographer currently focused on migration, conflict and humanitarian crises. In conversation with Mathew Holmes BL, Sally discussed her award-winning book *My Fourth Time, We Drowned*, which includes dozens of first-hand narratives of the migrant crisis happening across north Africa. The book particularly sheds light on those incarcerated in Libyan detention centres as a direct result of European policy. Following this informative afternoon of talks, the IACBA held an end-of-year bbq for members.

Financial Services Bar Association

In July, the Financial Services Bar Association (FSBA) ran a CPD event on recent jurisprudence concerning *Bank of Ireland v O'Malley* [2019] IESC 84 and the statutory procedure for the admission into evidence of "business records". The briefing was expertly chaired by Patrick O'Reilly SC and the speakers were Ms Justice Eileen Roberts, Roland Rowan BL and Brendan Savage BL.

Corporate and Insolvency Bar Association

On July 19, the Corporate and Insolvency Bar Association (CIBA) continued its series of breakfast briefings with a talk by Arthur Cunningham BL on the topic of 'Mareva Injunctions and Insolvency Proceedings'.

Tax Bar Association

The Tax Bar Association continued its breakfast briefing series on July 11. Committee member Alison Keirse BL discussed the High Court decision in *Quigley v Revenue & TAC* [2023] IEHC 244 with regard to the rights of the defence/procedural safeguards, and domestic concepts of fair procedures in the tax context.

Irish Criminal Bar Association

The Irish Criminal Bar Association (ICBA) in-person conference took place on July 1 at the Radisson Blu in Athlone. This was the ICBA's first conference since the onset of the Covid-19 pandemic, and the event was well attended by colleagues from all across the country. The conference speakers were Garnet Orange SC, Maurice Coffey SC, Fergal Kavanagh SC, Kate Egan BL, Caroline Lathan BL, and Simon Donagh BL. Delegates were addressed on a wide range of recent developments in criminal law including the increasing use of mobile phone evidence, and emerging jurisprudence on ineffective assistance of counsel. The event was chaired by Mr Justice Dara Hayes of the Circuit Court. The conference was followed by a drinks reception and gala dinner at the hotel. The ICBA also held its AGM that evening, where Simon Donagh BL was elected as the new Chairperson.

New ICBA Chairperson Simon Donagh BL speaking at the Association's conference in July.

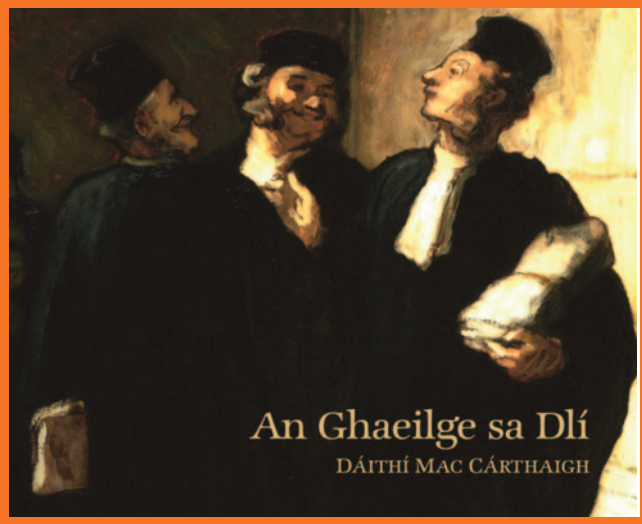
Sports Law Bar Association

On July 11, the Sports Law Bar Association (SLBA) was delighted to host Prof. Jack Anderson of the University of Melbourne, who gave a seminar on 'New Consensus, Legacy Problems: Concussion Litigation'. Prof. Anderson has published extensively in the area of sports law, including most recently, with Thorpe *et al.*, *Sports Law* (4th ed., OUP 2022). He is currently acting Special Counsel (Integrity Regulation) at Racing Victoria and was formerly a Court of Arbitration for Sport (CAS) arbitrator. The seminar focused on multiple class actions brought by former AFL players (Aussie Rules) seeking compensation for abstract chronic neurological trauma. The presentation assessed the substance of such actions, comparing them to those that occurred previously in the US and ongoing actions in the UK and Ireland, and asked whether litigation is the optimal means of resolving the medical, regulatory, and legal concerns of not only the players involved, but regarding how the game is played.

Professional, Regulatory and Disciplinary Bar Association

On June 28, the Professional, Regulatory and Disciplinary Bar Association (PRDBA) continued its series of joint events and partnered with Mason Hayes & Curran for an afternoon seminar. PRDBA members Shelley Horan BL and Eogan Cole BL were joined in the speaker line-up by Aoiffe Moran, Partner in Mason Hayes & Curran's Public, Regulatory & Investigations team. The speakers discussed the following topics, respectively: recent developments around expert evidence in regulatory proceedings; the exclusionary rule in fitness to practice proceedings; and, the regulation of accountancy. Members of the Law Library were joined in the audience by solicitors and clients of Mason Hayes & Curran. Following the event a reception was held for all attendees in the Distillery Building of the Bar of Ireland.

Cumann Barra na Gaeilge



Ar an Aoine 30 Meitheamh, thug Dáithí Mac Cárthaigh BL seimineár ar an abhár 'An Ghaeilge sa Dlí 1998-2023 – 25 Bliain ag Fás'. Rinne sé achoimre ar fhorbairt na Gaeilge i ndlí na hÉireann thar na blianta: Acht na dTeanga Oifigiúla 2003, Acht Craolacháin 2009, agus An tAcht Oideachais (Ardteistiméireacht 2021) a chur san áireamh.

Media, Internet and Data Protection Bar Association

The inaugural Media, Internet and Data Protection Bar Association (MIDBA) Annual Conference took place on June 23 in the packed Atrium of the Distillery Building. The schedule of panel discussions and presentations considered some of the prominent issues of the last 12 months pertaining to media, data protection and internet law. Among the topics discussed were: the regulation of online harm; recent CJEU decisions pertaining to the GDPR; proposed changes to the Defamation Act 2009; and, privacy in the internet age. Leading practitioners from the barrister and solicitor professions were joined on the panels by representatives from Meta, Tiktok and Digital Rights Ireland. The conference attracted a diverse audience from across the legal sector and beyond, and the MIDBA committee looks forward to many more successful annual conferences to come.

SBAs for excellence and networks

New term, new goals: now is the ideal time to consider joining one of our 17 Specialist Bar Associations (SBAs)!

Each SBA serves as a dynamic platform to engage, share and enhance your specialist knowledge and expertise. The suite of offerings includes a programme of continuing professional development (CPD), conferences, and the opportunity to develop a network of equally engaged colleagues.

Playing a vital role in fostering a sense of community and collaboration at the Bar, the SBAs also encourage a culture of knowledge sharing and mentorship, with experienced barristers sharing the platform with those looking to find a footing in a particular area of practice.

Increasingly, SBAs are taking on an external role: providing submissions; engaging with stakeholders on a number of practice-related issues; and, offering a valuable networking opportunity with solicitors and others in the professional services sector.

With the support of the Council, each SBA is overseen by a committee, which serves as an important liaison across the Law Library.

The Bar of Ireland's SBAs are inviting members to renew membership, or to join, via their respective websites at https://www.lawlibrary.ie/legal-services/sba/.

Increased District Court fees

On August 23, 2023, the Minister for Justice, Helen McEntee TD, signed SI 418/2023, giving effect to the new costs schedule in the District Court. Changes came into effect on August 25. Under the new schedule, brief fees for barristers will increase by approximately 5% and, for the first time, fees for drafting will also be introduced.

These changes were originally proposed in Bar of Ireland submissions in 2019 and 2022. Members may access the fee schedule online by searching District Court (Costs) Rules 2023. Eoin Martin BL is The Bar of Ireland's representative on the District Court Rules Committee.

Tax and pension advice

As the tax deadlines of October 31 and November 16 (for those filing via the Revenue Online Service (ROS)) approach, Mercer will have representatives available to meet with members of The Bar of Ireland Retirement Trust Scheme to process pension contribution cheques and answer any queries in relation to the Scheme. Your pension team will be at the following locations:

- Criminal Courts of Justice, Parkgate Street;
- Church Street Building, 158/159 Church Street;
- Distillery Building, 145/151 Church Street; and,
- Law Library, Four Courts, Dublin 7.

Confirmation of exact times and dates for each location will be advised in due course via a written communication to all members at their address together with a notice on the online members' portal. We will also liaise with the Law Library member services team.

New to the Bar

On Tuesday, September 26, 2023, The Bar of Ireland welcomed 79 new practitioners.

The new members – the class of 2023 – comprise 41 (52%) women and 38 (48%) men, with an average age of 36 in the 2023 new member class. The members come directly from The Honourable Society of King's Inns, and represent a mix of students directly from university, and students who are commencing following a career in other industries and sectors.

Under the Bar's Equality Action Plan, all incoming members will be further surveyed on demographic and well-being issues, so that the Bar can continue to refine its offering to meet the expectations and needs of future barristers.

We look forward to their contribution to the Law Library and invite all members to give them a warm and collegiate welcome!

Sara Phelan SC, Chair, Council of The Bar of Ireland, addresses the new members of the Bar.

#FairisFair – criminal barristers withdraw services

On Tuesday, October 3, 2023, which was the first full day of the new legal year, members practising in criminal law participated in a one-day withdrawal of professional services in protest at the ongoing Government inertia with respect to fee restoration.

The action is the culmination of countless attempts by the Council of The Bar of Ireland over several years to engage with Government on the restoration of professional fees. Members across the country stood in solidarity across 13 courthouses where criminal matters were listed to be heard, including approximately 170 members at the Criminal Courts of Justice in Dublin, and courthouses in Sligo, Castlebar, Monaghan, Dundalk, Longford, Trim, Wexford, Waterford, Nenagh, Limerick, Cork, and Naas.

The demonstration garnered regional and national attention and widespread media coverage, highlighting the unfairness and inequity in the professional fees paid to criminal barristers, and the urgent need for the Government to act now to preserve the rule of law in Ireland. #FairisFair.

The Council will continue to assess the position following the outcome of Budget 2024.

Members of the criminal Bar withdrew their services on October 3 in protest at Government inaction on fee restoration.

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The role of the pensions trustee

Donal O'Flaherty, FTS Director and Trustee Representative for The Bar of Ireland Retirement Trust Scheme, sets out how the Scheme is managed to ensure that retirement benefits as set out in the Scheme's Trust Deed & Rules are delivered to members.

Freedom Trust Services Limited (FTS) acts as Trustee to The Bar of Ireland Retirement Trust Scheme. FTS is a corporate professional trustee. At a basic level, the core duty of any Trustee has two aspects: the first is to ensure that a Trust is administered in accordance with the Trust Deed & Rules; and, the second is to protect members' interests and act in their best interests at all times.

However, the duties of a Trustee of a Retirement Trust Pension Scheme are much broader and in this article I elaborate on the role of the Trustee of your Scheme and the safeguards in place to protect your investments in the Scheme.

The Bar of Ireland Retirement Trust, like occupational pension schemes, is regulated by the Pensions Authority and the Revenue Commissioners. Trustees must ensure that all schemes are administered in accordance with current legislation and regulations. Specifically, this involves checking that: all contributions are received and invested in accordance with statutory timelines; members receive prescribed information on at least an annual basis (Bar of Ireland members receive benefit statements twice yearly) regarding their investments; and, benefits are paid and taxes deducted in accordance with Revenue rules.

Governance

Once compliance is assured, the next hurdle to overcome is good governance. Guidance on good governance is provided by the Pensions Authority through its Trustee Handbook and a Code of Practice. These documents set out the minimum levels of governance expected, and include:

- putting documented policies and procedures in place;
- ensuring that Trustees and Key Function Holders are 'fit and proper';
- ensuring that contracts are in place with all third-party service providers, such as administrators and investment managers;
- guidance on the frequency and conduct of Trustee meetings and the recording of decisions;
- specifying the minimum expected level of monitoring of investment performance and administration service to Trustees and Scheme members; and,
- expectations on communication with members.

While statutory compliance and good governance are essential, good trusteeship also involves following industry best practice. As FTS is a large professional Trustee, we oversee the governance of many schemes and can compare the performance of different administrators and investment managers. This allows us to make good evidence-based decisions on the selection of providers and investment funds, taking into account the risk profile of the Scheme membership.

We also work closely with the Pension Scheme Committee of the Council of The Bar of Ireland to ensure that Scheme members' interests are fully understood and considered in the decision-making process.

In conclusion, acting as a pension scheme Trustee carries a significant responsibility, which requires expertise, experience, and a good understanding of the regulatory environment, combined with an appreciation of the position of Scheme members who are not experts in the area. In FTS, we take this responsibility very seriously and apply a robust approach to trusteeship to ensure that the best interests of all members of The Bar of Ireland Retirement Trust are protected at all times.

Freedom Trust Services Limited (FTS) is a subsidiary of Marsh McLennan, a large US quoted financial services firm. It is a sister company of Mercer Ireland, which is the Registered Administrator of the Scheme. As this relationship could give rise to a potential conflict of Interest, a Conflict of Interest Policy is maintained by the Trustee. FTS holds professional indemnity insurance as protection against any claims taken against the Trustee.

Donal O'Flaherty is FTS Director and Trustee Representative for The Bar of Ireland Retirement Trust Scheme. He is a qualified actuary with over 35 years' industry experience, and holds a professional Trustee qualification.

A PROFESSION IN PROGRESS

Molly Eastman,
Policy & Public Affairs Officer, The Bar of Ireland.

Data from the Bar of Ireland's latest Diversity, Inclusion and Working Lives Survey indicates some key areas of focus for Council to consider.

In June 2023, a survey was circulated to the membership by the Library Committee, in partnership with the Equality and Resilience Committee, to assist in better understanding ways in which issues of diversity and inclusion can be addressed for members of The Bar of Ireland.

The survey represents one of the actions within the Bar's 2022 Equality Action Plan, with the purpose of gaining a greater insight into the complexion and dynamics of the membership and, as a result, the supports and services required to meet members' needs. The survey reveals a spectrum of diverse backgrounds and realities among our members, and highlights areas where the Bar can continue to support the mental and financial well-being of its members, while supporting an environment focused on promoting diversity, equality and inclusion.

Further, this survey follows the Balance at the Bar Survey Report, which evaluated research on member work–life balance in October 2019. While both surveys focus on similar themes to improve general workplace wellness, the Diversity, Inclusion and Working Lives Survey illustrates progress the Bar has made over the past four years in supporting members' work–life balance. This can be seen in the increased number of personal self-care and stress management continuing professional development (CPD) courses, the establishment of the Dignity at Work Protocol, and The Bar of Ireland's first Equality Action Plan.

Survey findings

The survey garnered a response rate of 12% and, of the responses received, slightly more than half were from male barristers, with 43% being from female barristers, and with 50% of respondents being at the Bar longer than 11 years (**Figure 1**).

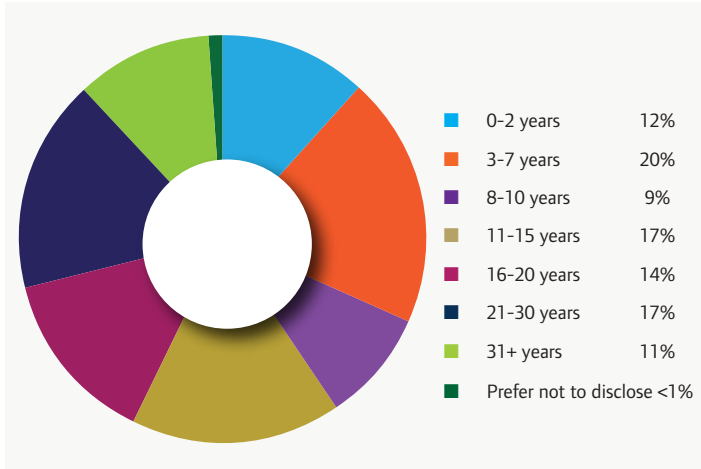

FIGURE 1: Respondents' years at the Bar.

Results of the survey presented three key areas of consideration to assist in future planning and development of diversity and inclusion within The Bar of Ireland, and for the barrister profession:

- fees, finance and income;
- mental and physical well-being; and,
- access and supports.

Fees, finance and income

A significant theme arising from survey respondents revolved around concerns relating to income, financial instability and payment of fees. Barristers face unique

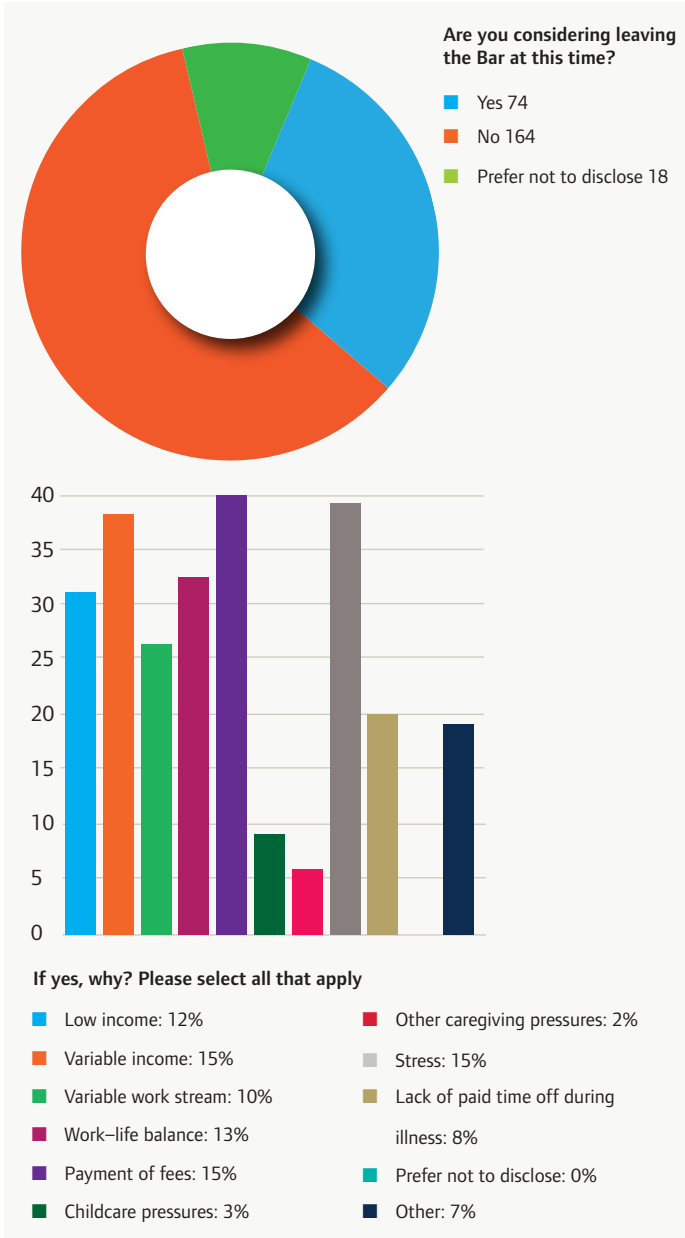

FIGURE 2: Reasons why members' might consider leaving the Bar.

financial challenges due to inconsistent casework, inconsistent payment with lack of clarity as to when fees will be paid, and business expenses related to self-employment. Financial stressors can detrimentally impact on members' personal and professional well-being, and on their feeling of security in the profession and the sustainability of continuing in practice.

According to respondents, variable workstream, income and payment of fees were listed among the top five challenges to being self-employed. These factors were also among the top reasons to consider leaving The Bar (**Figures 2** and **3**).

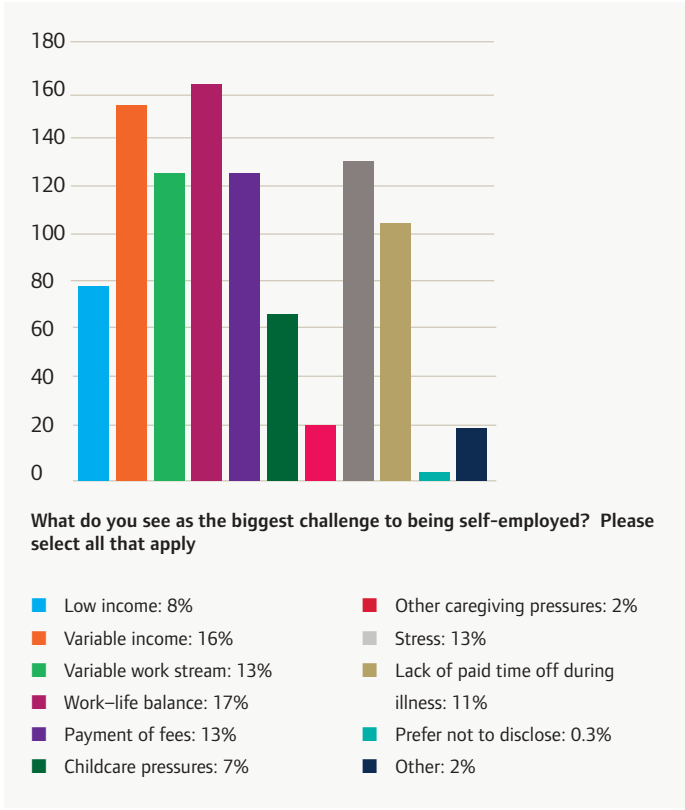

FIGURE 3: Challenges to being self-employed, according to respondents.

When given the opportunity to elaborate, members specified "constant fighting for payment while trying to keep up with other financial obligations", and "lack of certainty" as reasons to leave the Bar, and "difficulty finding paying work" and "not getting paid for the work we are doing" as barriers to being self-employed.

In order to accentuate the positive aspects of being in practice at the independent referral Bar, it is necessary to address, insofar as is possible, these negative realities. The Bar of Ireland has taken significant action in recent years to provide financial tools and assistance to its members, and endeavours to support members in optimising the 'business end' of their practice.

Over the past 12 months, the Practice Management & Fee Recovery Service has seen a continued growth in the number of members engaging the fee recovery service, with €1.2 million recovered in overdue fee notes for members over the past three years, and 219 fee notes being actively pursued, with a value of €2.3 million.

In addition, a new practice management programme to support barristers in developing their business acumen has been developed to cover essentials relevant to establishing a viable and sustainable practice at The Bar, such as cashflow management, billing, fee collection and retirement planning.

Mental and physical well-being

While a career in self-employment can be seen as one of the most rewarding aspects of the barrister profession, it can also contribute to a significant level of stress and feelings of isolation. The demanding nature of the profession, coupled with the uncertainty that comes with self-employment, emphasises the need for effective mental health supports and stress relief strategies. Of the members who participated in the survey, work–life balance and stress were listed as two of the biggest challenges to being self-employed. These were also listed as the top reasons to consider leaving the Bar. The largest cohort of respondents reporting the challenges of work–life balance and stress are those who have been at the Bar for the least amount of time (10 years or less – 40%). This is followed by those who have been members for 11-20 years (31%), 21-30 years (17%), and 31+ years (11%). This clearly indicates that more needs to be done to ensure that younger members who are experiencing physical and mental difficulties are provided with tools to seek and receive assistance.

Following extensive work in recent years, the Bar has introduced various measures to help support members' mental health and workplace wellness. Personal Professional Development and Practice Management is a competency domain within CPD at The Bar, and focuses on improving members' proficiency in personal areas such as:

- managing mental health;
- resilience and self-care in a barrister's legal practice;
- sleep deprivation;
- grief; and,
- recognising and resolving warning signs of stress and overwhelm.

Supports

The majority of respondents (65%) did not indicate living with physical or mental conditions such as chronic, psychological, emotional or neurodivergent conditions. However, out of those requiring specific supports to

assist with a disability, 81% indicated that those supports are not currently available at the Bar. Some of the suggested supports included reference to technology and physical improvements to The Bar of Ireland services.

In January 2023, support was garnered with the Disability Legal Network and the Law Society's Human Rights Committee to build engagement and seek commitment from the Courts Service to address various accessibility issues across the courts in a more strategic manner. The issue remains a significant project of focus, and will be a key agenda item for the Equality and Resilience Committee in the coming legal year.

In addition, an audit of our physical estate is underway in partnership with Access Earth, to assess the suitability and modifications required to ensure that those with physical and sensory needs are accommodated. The Council has also approved pursuing accreditation with ASIAM, Ireland's National Autism Charity, over the course of 2023/24. By obtaining accreditation, the Bar can tap into the power of neurodiversity among its members, and can boost overall workplace wellness by encouraging members to be more comfortable to be themselves at work. Further, obtaining accreditation and autism-friendly communication strategies will ultimately make the Bar more accessible to the public and increase overall trust in the profession.

Entry and access to the profession

Enhancing access to the profession remains a significant objective of the Equality and Resilience Committee and the Bar as a whole. Unsurprisingly, 96% of respondents' cultural and ethnic identity was indicated as Irish, with the remaining responses indicating "other" and "prefer to not disclose".

When asked about members' educational background, responses illustrated a diverse background and journey to The Bar:

- 26% indicated that they obtained a scholarship or grant to attend third-level education;
- 75% do not have relatives who are legal professionals;
- one-third (33%) are the first generation in their family to attend third-level education; and,
- the majority did not attend private secondary schools (56%) (**Figure 4**).

The responses above highlight the importance of educational outreach. Members with diverse educational, social and ethnic backgrounds are crucial to the profession, as they ensure just and accurate representation of the Irish general public, ultimately safeguarding the integrity and trust in the legal system, and the relevance of the Bar to the society it serves.

Beginning this year, we will survey new practitioners joining the Bar with a similar set of diversity and inclusion queries, so that we have a real-time picture of the profession as it evolves and develops.

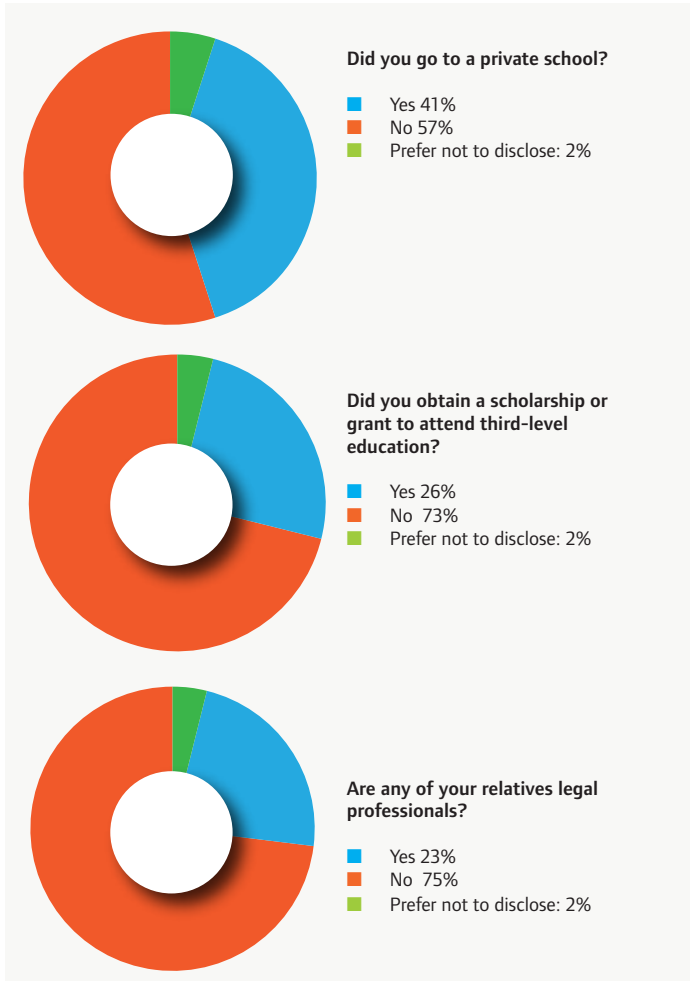

FIGURE 4: Members' educational and social background.

The Council is exploring, with the Honorable Society of King's Inns, how to engage better with third-level institutions in attracting the best talent to the Bar, as well as creating better pathways for underrepresented, disadvantaged and minority groups to access the profession.

Conclusion

Key themes raised around finance, mental and physical well-being, supports, and access are interlinked, and will remain areas of focus and improvement in the coming legal year and beyond. It is crucial that the Bar continues to be proactive in providing and promoting the various supports to all members, particularly those who are most in need.

The real value in this survey will emerge over time as subsequent results track progress and the effectiveness of our responses. Work is ongoing, and the Committee will continue to welcome suggestions on ways The Bar of Ireland can continue to promote the values of diversity, equity, and inclusion on behalf of all its members.

CHARTING THE EVOLUTION OF A PROFESSION

NIAMH HOWLIN spoke to *The Bar Review* about her new book, *Barristers in Ireland: An Evolving Profession since 1921*.

Ann-Marie Hardiman,
Managing Editor, Think Media

Niamh Howlin's fascination with legal history began while taking a module in the subject as part of her BCL at UCD, where she was taught by the legendary Prof. Nial Osborough. A PhD under Prof. Osborough followed, looking at juries in Ireland in the 19th century. This led her to an academic career, which began at Queen's University Belfast, before she returned to UCD as a lecturer in 2013. She is now an Associate Professor at the Sutherland School of Law in UCD. She has published extensively on the 19th century Irish jury system, and on other aspects of criminal justice history, but her latest book moves the focus to the 20th century, and to the Bar and barristers in Ireland.

A period of transformation

The idea to write *Barristers in Ireland: An Evolving Profession since 1921*, which has just been published by Four Courts Press, came about when Niamh was approached by James O'Reilly SC, Chair of the King's Inns Library Committee, who asked if she would be interested in writing a 20th century history of the Bar. Having just published a book on 19th century juries, Niamh was thinking about what her next project might be, so says the timing was perfect, and that once she started looking into the topic, and saw the wealth of information that was available, she was hooked. The first task was to set a time period for the book, and Niamh explains why she chose 1921-1999: "1921 was the first time that women were called to the Bar, and it was also the first call since partition, so it was the first time that there were separate calls in Dublin and Belfast. This seemed like a really transitional time for the profession. The 1990s was another transformative period. There were changes to professional regulation, and there was a huge expansion of the physical space for the profession with the developments on Church Street. Gender balance was starting to tip. There were a lot of technological advances around then; people were starting to be able to access online legal sources and databases, and it changed the way that people worked and interacted with the Law Library. And I think practice generally was changing. With the Celtic Tiger, with the arrival of big multinationals, with the big growth in the law firms, all of a sudden litigation became much more complex. Cases were bigger and longer, and people were working in very different ways".

The book draws on a combination of archival material, memoirs, and interviews with barristers who practised during this period to tell the story of both the Bar itself, and the men and women who worked in it. From the beginning, Niamh was keen to have as much personal testimony as possible: "There's such a strong oral tradition at the Bar. People love to tell stories, and they are generally brilliant storytellers. I wanted to capture some of those stories, but at the same time, I didn't want to just focus on stories about individuals. I wanted to see if we could put all of that together, to come up with a more collective story of the Bar. I interviewed 29 people from fairly different backgrounds. I guaranteed anonymity, that they could speak freely, and they really did speak freely, I must say. And it wasn't everything that could be put into a book at the end!"

Niamh also had access to minutes from meetings of the Bar Council and the Benchers, and a huge amount of material from the National Archives. She says both the Bar and King's Inns have been incredibly supportive of the project, and particularly mentions David Nolan SC, who provided access to the Bar's photographic archive.

The Council of The Bar of Ireland also kindly allowed her to use Emma Stroud's portrait of Frances Kyle and Averil Deverell, the first women called to the Bar, as the book's cover image.

Unique profession

The book is a fascinating and detailed account, in part of what it was like to be a barrister, and in part of the institution itself. A number of themes emerged that Niamh found particularly interesting, and sometimes surprising, one of which was the extent to which barristers occupied roles in many different areas of society, from the civil service (including the British colonial service) to the arts: "We all know that there have been high-profile politicians, presidents and so on, who've been barristers, but it was eye opening for me to see how many barristers were senior civil servants. In the Department of Foreign Affairs or the Department of justice, they were very involved in things like foreign policy and that was something I wouldn't have expected. And then, apart from roles within the State, there were barristers in every walk of life: in business, in commerce, in sport, in religious orders, and loads in the arts and broadcasting".

This seems to be unique to the profession: "I can't think of another profession that's had such an impact on the design of the State, the running of the institutions of the State, implementation of policy. I don't think there's any other profession quite like it".

The human side

Another unexpected theme arose in the main from the interviews, which show a very human side of the Bar, with participants speaking openly about the vulnerability and stress at the heart of many aspects of the profession. Some of these issues were very much of their time, but some are still part and parcel of the profession today: "All of them said they had ultimately enjoyed it, but nearly all of them said that it was stressful. They were full of anxiety at different times, and there were certain stresses that came up again and again. One cause of stress that was talked about quite a lot was the way that judges in the mid-20th century dealt with barristers. People talked about feeling very scared and intimidated by judges, that certain judges had a reputation for being bullies or being very hard on counsel. All of the interviewees who talked about that said it petered out towards the end of the century and that kind of behaviour wouldn't be accepted any longer. I think it's fairly safe to say that a judge in 2023 wouldn't act like that towards counsel in court".

The uncertainty of a career at the Bar was also a common theme: "Even the people who had reached the height of the profession, people who we perceive as being really successful, said they would wake up and wonder where the next case was going to come from. And they said that mostly never left them, all through their careers. People talked a lot about working long hours, 60- or 80-hour weeks being a norm. And when I asked people about work–life balance, which is obviously a modern phrase and a modern concept, people just said there was no such thing".

Niamh's interviewees also spoke of the loneliness of the profession: "The paradox is you're surrounded by colleagues all day in a shared workspace, but on the other hand, everyone's in competition. So this whole idea of the need to portray success and confidence, while at the same time possibly not feeling it: that came up quite a bit. People said that they depended on colleagues quite a lot for support, but that they wouldn't necessarily open up about things that were worrying them. I think a lot of that was unspoken a lot of the time".

The Bar also emerges as a place where tradition matters, where unwritten rules and protocols are cherished and guarded, and where the responsibility to pass these on to junior colleagues is taken very seriously. Niamh feels that these traditions may have arisen as a response to that very paradox of camaraderie and competition: "When you've got all these sole practitioners, all these individuals, it is important to create some sense of cohesion, some sense of a professional identity. It was a big part of devilling. There was a really steep learning curve, not just in terms of legal procedure and the content of the law, but there was a lot of social learning that had to happen. It was important for people to feel that they were part of something and this was an opportunity to learn how to be a barrister".

Evolution

One of the aims of the book was to chart the evolution of the Bar during the 20th century, and there's no doubt that in many ways the profession changed hugely during this period: "If we were to look at the Bar in 1921 and the Bar in 1999,

Resolving historic injustices

Niamh's work as a legal historian has taken her down some fascinating paths, including being asked to prepare reports into two historic miscarriages of justice, which contributed to the granting of rare presidential pardons in both cases. In 2017, she was asked by the Attorney General's office to give an opinion on the case of Myles Joyce, who was hanged in 1882, having been found guilty of involvement in the Maamtrasna murders. This was followed by a second case, that of John Twiss, hanged in 1895 for the murder of John Donovan in Kerry: "I was delighted to be asked because sometimes, as a legal historian, we don't always get to have the kind of impact that some other legal scholars will have".

The pardon for Myles Joyce was granted in 2018, and for John Twiss in 2021: "It's very rewarding to feel that you might have contributed something. The families and descendants of people in these cases have carried these stories with them and carried the hurt with them for generations. It's lovely to see something being done to reflect that".

they're two completely different entities. In 1922 the Law Library was destroyed and people had to work at Dublin Castle for a few years and then they came back to the new Law Library in the Four Courts. By the end of the 20th century, the Bar had developed these top-of-the-range facilities on Church Street. It was a much more professional operation".

The people who make up the Bar had also changed: "The Bar by the end of the period would have been more diverse in terms of its make-up. There were women, there were more people who hadn't been privately educated".

She notes the huge changes in the nature of legal practice as well: "Circuit practice changed quite a bit. The types of cases people were doing changed; some areas of law sort of petered out. In the '20s and '30s, a lot of barristers were kept going by things like workman's compensation cases, whereas by the 1990s, there were the beginnings of big commercial litigation, there was tribunal work. Things like devilling and applying to take silk have also become a lot more formalised over the years".

Moving into the next century

Alongside all of these extraordinary changes, what's often striking is how many issues remain the same. The traditions of the Bar remain strong, and the sense of collegiality and camaraderie, while no doubt affected by the Covid-19 pandemic, are still very much valued by the profession. However, the difficulties in establishing a career during the early years, the stress of wondering where the next case will come from, and indeed whether one will be paid for it, also remain. Niamh's husband is a barrister, so she has some insight into the career in its 21st-century manifestation, and she feels positive about how the profession is changing and what the future might hold: "It's certainly been evident to me over recent years that there has been a hugely increased focus on issues like diversity and well-being, and diversity has moved beyond 'will we let the women in?' towards more intersectional diversity. Certainly as an academic who's involved in the teaching of undergraduate law students, those are positive things, and they would chime a lot with what universities are trying to do as well".

There is a note of caution too: "Some people who were interviewed said that in their opinion, it is much harder in the 21st century to get established as a barrister. They said that their experience had been that it didn't take long to get established; there were fewer barristers, and it was less competitive. A lot of them said that they worried for the future of the profession and for the new entrants".

Niamh says that she very much enjoyed writing the book. She found researching the archives fascinating, and says that the interviews were a lot of fun: "Some people I visited in their homes and they would show me around or they'd show me their memorabilia, old photos, things like that. I really enjoyed getting to talk to people; it's not something that you usually get to do when you're doing legal history research because usually the subjects of the research are no longer with us. I also very much enjoyed putting together the images for the book".

Due to the nature of the book, there are many ways in which it cannot be a comprehensive history: "Because there have been so many people at the Bar over that 80-year period, and every single one of them has had a very different experience, it was hard to feel that I had captured a universal experience of the Bar. I'm sure that there will be people who will look at this book and say, 'they never mentioned X', or 'she didn't talk about Y'. That's something I have to accept, that there will always be another angle or another story that couldn't make it into the book. But it is nice to think that maybe people who were in practice will read it and they'll remember some of the stories and they'll tell their own stories, and that it would lead to some nice conversations and reminiscences. It would be lovely to think that this would be a prompt for further conversations".

What's next?

In her spare time, Niamh likes to read, and has recently taken up swimming. She also enjoys spending time with her family: husband Robert Fitzpatrick SC, and two children, Louise (11) and Neasa (9).

She's already begun work on her next project, an edited collection of essays to mark the centenary of the Courts of Justice Act 1924: "The Act was the legislation that set up the Supreme Court, the High Court, the Circuit and the District in accordance with the 1922 Constitution, so we're going to mark the centenary. We're going to have a conference in Dublin Castle on April 12, and the book will be produced by the Irish Legal History Society towards the end of 2024".

LEGAL
UPDATE
VOLUME 28 / NUMBER 4 / OCTOBER 2023

A directory of legislation, articles and acquisitions received in the Law Library from May 6, 2023, to September 1, 2023.
Judgment information supplied by Vlex Justis Ltd.
Edited by Vanessa Curley, Susan Downes and Clare O'Dwyer, Law Library, Four Courts.

AGRICULTURE

Statutory instruments

Avian influenza (biosecurity measures) regulations 2022 (revocation) regulations 2023 – SI 272/2023

Veterinary Medicinal Products, Medicated Feed and Fertilisers Regulation Act 2023 (part 3) (commencement) order 2023 – SI 377/2023National fertiliser database regulations 2023 – SI 378/2023

ANIMALS

Statutory instruments

Greyhound racing (prohibited substances) regulations 2023 – SI 212/2023

Import and export of animals and animal products (animal health certificates) regulations 2021 (amendment) regulations 2022 – SI 259/2023

Animal health (identification and tracing) regulations 2023 – SI 290/2023

ARBITRATION

Library acquisitions

Webster, T.H. *Handbook of UNCITRAL Arbitration (4th ed.)*. London: Sweet & Maxwell, 2023 – N398.8

Articles

Fahy, C. The role of the standing conciliator. *Construction, Engineering and Energy Law Journal* 2023; 1: 11-25

Hallissey, M. Look to ADR. *Law Society Gazette* 2023; July: 50-51

Hughes, P. Establishing and ascertaining damages for bond call following an adjudicator's decision. *Construction, Engineering and Energy Law Journal* 2023; 1: 5-10

ASSISTED DECISION-MAKING

Articles

Hynes, Á. Transition from wardship to assisted decision-making – a new era for legal capacity in Ireland. *Irish Journal of Family Law* 2023; 26 (1): 1-2

Statutory instruments

Assisted Decision-Making (Capacity) Act 2015 (commencement) order 2023 – SI 192/2023

Assisted Decision-Making (Capacity) Act 2015 (commencement) (no. 2) order 2023 – SI 193/2023

Assisted Decision-Making (Capacity) (Amendment) Act 2022 (commencement) (no. 2) order 2023 – SI 194/2023

Assisted Decision-Making (Capacity) (Amendment) Act 2022 (commencement) (no. 3) order 2023 – SI 195/2023

Circuit Court Rules (Assisted Decision-Making (Capacity) Act 2015) 2023 – SI 201/2023

Assisted Decision-Making (Capacity) Act 2015 (fees) regulations 2023 – SI 202/2023

Assisted Decision-Making (Capacity) Act 2015 (payment of certain expenses and remuneration to decision-making representatives) regulations 2023 – SI 203/2023

Assisted Decision-Making (Capacity) Act 2015 (prescribed classes of healthcare professionals) regulations 2023 – SI 204/2023

Assisted Decision-Making (Capacity) Act 2015 (section 10(4)) regulations 2023 – SI 205/2023

Assisted Decision-Making (Capacity) Act 2015 (inspection of registers and receipt of copies of documents) regulations 2023 – SI 206/2023

Rules of the Superior Courts (Assisted Decision-Making (Capacity) Act 2015) 2023 – SI 261/2023

AVIATION

Statutory instruments

Air Navigation and Transport Act 2022 (vesting day) order 2023 – SI 218/2023

Air Navigation and Transport Act 2022 (dissolution day) order 2023 – SI 219/2023

Air Navigation and Transport Act 2022 (commencement) Order 2023 – SI 220/2023

BANKING

Summary judgment – Leave to issue execution – Delay – Moving party seeking leave to issue execution – Whether the moving party had met the threshold for the grant of leave to issue execution – 16/08/2023 – [2023] IEHC 503

ACC Bank Plc v Sweeney

Abuse of process – Frivolous and vexatious proceedings – *Res judicata* – Defendants seeking to strike out the plaintiffs' proceedings – Whether the plaintiffs' proceedings constituted an abuse of process – 14/07/2023 – [2023] IEHC 428

Allen and another v Bank of Ireland Group Plc and others

Banking and Finance – Appeal of refused application for summary judgement in liquidated amount – Rent of property – Evaluating assertion of agreements for rent reduction – Wills and probate – 17/05/2023 – [2023] IECA 119

Egerton and Tighe v Edgeform Metals Ltd and Boylan

Articles

Lefeuvre, E., Dr, McCarthy, J., Dr. An emergency of banking and of law: the resolution of Anglo-Irish Bank. *Irish Judicial Studies Journal* 2023; 1: 1-25

Statutory instruments

Central Bank Reform Act 2010 (procedures governing the conduct of investigations) regulations 2023 – SI 190/2023

Central Bank Act 1942 (section 32D) (national claims information database levy) regulations 2023 – SI 348/2023

Central Bank (Individual Accountability Framework) Act 2023 (commencement of certain provisions) (no. 2) order 2023 – SI 349/2023

Central Bank Act 1942 (section 32D) (certain financial vehicles dedicated levy) (amendment) regulations 2023 – SI 351/2023

BUILDING LAW

Articles

Ó Lionáird, C., Gormley, C. Performance bonds in construction – the ascertainment conundrum. *Construction, Engineering and Energy Law Journal* 2023; 1: 26-31

CHARITY

Articles

Breen, O.B., Quinn, P. Unconscious philanthropy? Funding for good causes through the Irish national lottery. *Irish Jurist* 2023; 69: 105-134

CHILDREN

Articles

O'Sullivan, K., Dr. Child maintenance review group report: a critique and call for reform. *Irish Journal of Family Law* 2023; 26 (2): 37-44

Statutory instruments

Child Care Act 1991 (early years services) (amendment) regulations 2023 – SI 387/2023

CIVIL LIABILITY

Articles

Nutley, M. Statute barred. *The Bar Review* 2023; 28 (2): 62-67

COMMERCIAL LAW

Library acquisitions

Armstrong, D., Hyde, D., Thomas, S. *Blockchain and Cryptocurrency: International Legal and Regulatory Challenges*. Haywards Heath: Bloomsbury Professional, 2022 – eBook edition available on Bloomsbury Professional through Barrister's Desktop – L157.2

Thompson, R., Sinclair, N. *Sinclair on Warranties and Indemnities on Share and Asset Sales (12th ed.)*. London: Sweet & Maxwell, 2023 – N282.4

COMMUNICATIONS

Statutory instruments

Communications (Retention of Data) (Amendment) Act 2022 (commencement) order 2023 – SI 287/2023

Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (commencement) (no. 2) order 2023 – SI 299/2023

Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 (regulatory provisions) regulations 2023 – SI 304/2023

Communications (retention of data) (data security) regulations 2023 – SI 352/2023

Communications (Retention of Data) (Amendment) Act 2022 (commencement) (no. 2) order 2023 – SI 390/2023
Wireless Telegraphy Act 1972 (prohibition of sale, letting on hire, manufacture, and importation of wireless telegraphy interference apparatus) (amendment) order 2023 – SI 296/2023

COMPANY LAW

Disqualification – Duration – Mitigation – Applicant seeking the imposition of a disqualification order upon the first respondent – Whether the period of disqualification to be imposed on the first respondent ought to be reduced – 10/07/2023 – [2023] IEHC 392
Irish Gold and Silver Bullion Ltd

Library acquisitions

French, D. *Mayson, French and Ryan on Company Law (38th ed.)*. Oxford: Oxford University Press, 2023 – N261

Articles

Breen, R., Dr. The interaction between the director's duty to creditors and reckless trading. *Commercial Law Practitioner* 2023; 30 (6): 114-122
McPartland, A. The amendments to the restriction of company directors' regime under the Companies (Corporate Enforcement Authority) Act 2021. *Irish Jurist* 2023; 69: 61-79
Quinn, J. The new duty to company creditors: a statutory step too far? *Irish Jurist* 2023; 69: 180-195

Statutory instruments

Companies (Corporate Enforcement Authority) Act 2021 (section 35) (commencement) order 2023 – SI 292/2023
Companies Act 2014 (section 897) order 2023 – SI 293/2023
Companies Act 2014 (fees) regulations 2023 – SI 294/2023
Companies Act 2014 (forms) regulations 2023 – SI 295/2023

COMPETITION LAW

Library acquisitions

Dekeyser, K. *Regulation 1/2003 and EU Antitrust Enforcement: A Systematic Guide*. The Netherlands: Kluwer Law International, 2022 – W110.4

Articles

McCarthy, A. Dawn of justice. *Law Society Gazette* 2023; July: 55
Ntemuse, E. EU competition regulation in digital markets: if it ain't broke. Fix it? *Trinity College Law Review* 2023; 26 (1): 137-154

CONFLICT OF LAWS

Library acquisitions

McKibbin, S., Kennedy, A. *The Common Law Jurisprudence of the Conflict of Laws*. Oxford: Hart Publishing, 2023 – C2000

CONSTITUTIONAL AND ADMINISTRATIVE LAW

Suspension – Unconstitutionality – Seanad Electoral (University Members) Act 1937 ss. 6 and 7 – Parties making submissions on the length of any period of suspension of a declaration of invalidity of ss. 6 and 7 of the Seanad Electoral (University Members) Act 1937 – Whether a single, relatively lengthy period of suspension was required – 26/07/2023 – [2023] IESC 18
Heneghan v The Minister for Housing, Planning and Local Government and others

Library acquisitions

Barber, N.W. *The United Kingdom Constitution: An Introduction*. Oxford: Oxford University Press, 2021 – M31

Articles

Cahillane, L. Defining the administration of justice in Ireland after the Zalewski decision. *Irish Jurist* 2023; 69: 164-179
Gilligan, D. Waiver and the constitution. *Irish Jurist* 2023; 69: 80-104
Hardiman, A.-M. A sense of balance. *The Bar Review* 2023; 28 (2): 49-51

CONTRACT

Library acquisitions

Enonchong, N. *Duress, Undue Influence and Unconscionable Dealing (4th ed.)*. London: Sweet & Maxwell, 2023 – N15.6
Tolhurst, G.J., Peden, E. *Furmston and Tolhurst on Contract Formation (3rd ed.)*. Oxford: Oxford University Press, 2023 – N13

Articles

Harris, L. Frustration in crisis: how the Spanish doctrine of *rebus sic stantibus* can inform a post-pandemic reexamination of English contract law's approach to hardship. *Trinity College Law Review* 2023; 26 (1): 38-59

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Johnson, H. *A Guide to Trade Mark Law and Practice in Ireland (2nd ed.)*. Haywards Heath: Bloomsbury Professional, 2023 – N114.2.C5

COSTS

Costs – Protective costs order – Abuse of process – Defendants seeking their costs from the plaintiffs – Whether the defendants were entirely successful in resisting the plaintiffs' application for a protective costs order – 12/07/2023 – [2023] IEHC 400
Browne and others v An Taoiseach and others (No. 3)
Legal costs – Adjudication – Party and party costs awards – Refusal of stay – Appeal against – 31/07/2023 – [2023] IECA 197
Dowling and ors v Minister for Finance
Costs – Licensing – Case stated – Appellant seeking to set aside costs order – Whether there was an event as against the appellant in respect of which costs should be awarded – 24/07/2023 – [2023] IECA 184
In the Application of Galfer Filling Station Ltd
Judicial review – Costs – Leave to execute – Respondent seeking leave to issue execution of costs order – Whether the applicant had suffered any specific prejudice as a result of the delay on the part of the respondent in seeking to execute upon the order for costs made in her favour – 28/07/2023 – [2023] IEHC 461
Gaultier v The Companies Acts
Summary judgment – Liabilities – Entitlement to offset – Appellant appealing from a decision ordering that the respondent should recover a sum from the appellant together with the costs of the proceedings – Whether the trial judge erred in failing to offset the overpayments made by him against the sums that were otherwise due by him to the respondent – 12/07/2023 – [2023] IECA 178
Harrahill v Doyle
Costs – Judicial review – Adjudication of costs – Applicant seeking costs from the notice party – Whether the notice party had any responsibility for the decision which gave rise to the application for judicial review – 07/07/2023 – [2023] IEHC 391
Kenny v Legal Costs Adjudicator

COURTS

Acts

Courts Act 2023 – Act 12/2023 – Signed on May 19, 2023

Statutory instruments

District Court (days and hours) (August sittings) order 2023 – SI 365/2023
Courts and Civil Law (Miscellaneous Provisions) Act 2023 (commencement) order 2023 – SI 389/2023

CRIMINAL LAW

Conviction – Sexual assault – Newly discovered evidence – Appellant seeking to appeal against conviction – Whether the conviction of the appellant was unsafe and the trial was unfair by reason of newly discovered evidence – 11/07/2023 – [2023] IECA 205
DPP v A.M.
Sentencing – Oral rape – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – 10/07/2023 – [2023] IECA 204
DPP v A.W.
Sentencing – Coercive control – Undue leniency – Applicant seeking review of sentences – Whether sentences were unduly lenient – 21/07/2023 – [2023] IECA 211
DPP v Boles
Sentencing – Sexual assault – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – 06/07/2023 – [2023] IECA 203
DPP v D.H.
Case stated – Point of law – Conviction – Defendant seeking to appeal against conviction – Whether the trial judge was bound by a Supreme Court decision to the effect that a statement that was not duly completed was not admissible – 07/07/2023 – [2023] IECA 174
DPP (at the suit of Garda Robert O'Grady) v Hodgins
Sentencing – Causing serious harm – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – 25/07/2023 – [2023] IECA 215
DPP v M.B.
Sentencing – Sea Fisheries Maritime Jurisdiction Act 2006 s. 14 – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – 25/07/2023 – [2023] IECA 214
DPP v Meijvogel
Sentencing – Safety, Health and Welfare at Work Act 1989 s. 10 – Undue leniency – Applicant seeking review of sentence – Whether sentence was unduly lenient – 28/07/2023 – [2023] IECA 217
DPP v Palfinger Ireland Ltd
Conviction – Murder – Admission of evidence – Appellant seeking a retrial – Whether the Supreme Court could rule on whether evidence should be excluded or admitted – 28/07/2023 – [2023] IESC 20
DPP v Quirke
Sentencing – Criminal damage – Severity of sentence – Appellant seeking to appeal against sentence – Whether sentence was unduly severe – 24/07/2023 – [2023] IECA 213
DPP v Stokes
Judicial review – Prosecution – Disclosure – Appellant appealing against an order staying the prosecution of charges against the respondent unless the complainant disclosed specified information and material – Whether the respondent had discharged the onus of proving that necessary material had been withheld from him to such an extent as would give rise to a real risk of an unfair trial – 12/07/2023 – [2023] IECA 179
W.C. v DPP

Library acquisitions

Millington, T., Sutherland Williams, M., Hopmeier, Michael. *Millington and Sutherland Williams on the Proceeds of Crime (6th ed.)*. Oxford: Oxford University Press, 2023 – M594.7
Ring, S., Gleeson, K., Stevenson, K. *Child Sexual Abuse Reported by Adult Survivors: Legal Responses in England and Wales, Ireland and Australia*. Abingdon: Routledge, 2022 – M544.7.008

Ryan, A. *Towards a System of European Criminal Justice: The Problem of Admissibility of Evidence*. United Kingdom: Routledge, 2016 – M500.E95

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Bills and legislation

http://www.oireachtas.ie/parliament/

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REDRESS FOR COHABITANTS

The law relating to redress for cohabitants on the ending of a relationship is complicated, but will affect more and more persons as the number of unmarried couples increases.

Jane Barron BL

The concept of family life has changed dramatically in Ireland in recent times and this change is particularly evident in the number of couples who choose not to get married.

According to Central Statistics Office profiling of households and families in the 2016 census: "While there were 1,218,370 families in the State on Census Night, 862,721 of these were families with children, an increase of 28,455 since 2011. The number of married couples with children increased by 1.7% to 568,317, while the number of cohabiting couples with children increased by 25.4% to 75,587". This statistic shows that the number of cohabiting couples (or at least those with children) has significantly increased as against those who are married. The legal remedies in the case of a breakdown of a cohabiting couple's relationship are therefore of increasing significance.

In circumstances where marriage is protected in the Constitution, the rights for non-married cohabitants are restricted to a redress scheme. Part 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 (the Cohabitation Act) gives certain cohabitants a right to apply to court for relief after the breakdown of their relationship. Part 15 came into effect on January 1, 2011.[1] In 2006 the Law Reform Commission published its 'Report of the Rights and Duties of Cohabitants'[2] following on from its consultation paper in 2004, which made recommendations for reform of the law concerning cohabitants. The Report emphasises that its recommendations are not an alternative to public registration systems (marriage or civil partnership), but deal with a different situation, i.e., cohabitants who chose for whatever reason not to publicly register their relationship. The report recommended the enactment of a "safety net" redress system for "qualified cohabitants" who could apply to court for financial relief at the end of a relationship but only if they can show that they had become "economically dependent".[3] The Commission recommended that in such an application a court could make a property adjustment order, a compensatory maintenance order, or a pension adjustment order. Further, the report proposed that for couples who do not register their relationship (by way of marriage or civil partnership), most entitlements will not be

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In the case of a death, the proceedings must be instituted within six months of a grant of representation.

automatic and will only apply where various "qualifying criteria" have been met, including the requirement that a cohabitant shows that he or she is "economically dependent".

In Part 15 of the 2010 Act, the redress scheme was introduced for "qualified cohabitants". This is activated on the termination of the relationship whether by way of break-up or on death. As such, there are no automatic rights or entitlements for cohabitants. In accordance with section 195, a limitation period is prescribed such that an application for redress must be instituted within two years of the time that the relationship between the cohabitants ends, whether through death or otherwise. In the case of a death, the proceedings must be instituted within six months of a grant of representation. "Qualified cohabitants" may make claims for the following types of relief:

(a) a property adjustment order (section 174);
(b) a compensatory maintenance order (section 175); and,
(c) a pension adjustment order (section 187).

After a cohabitant's death it is also possible for a qualified cohabitant to claim provision from the estate of the deceased cohabitant (section 194).

A property adjustment order can provide for the transfer of property or the settlement of property on the other cohabitant or for the benefit of that cohabitant. There is no provision for a sale of property. A compensatory maintenance order includes lump sum and periodic maintenance, and enables the court to direct security for maintenance and/or an attachment of earnings order.

Before making a property adjustment order under section 174 of the 2010 Act, the court must have regard to whether in all the circumstances it would be practical for the financial needs of the qualified cohabitant to be met by a compensatory maintenance order or a pension adjustment order. This is in contrast to divorce, where under section 17(23)((b) of the Family Law (Divorce) Act, 1996, the court has to have regard to the question of whether proper provision can be made by way of making orders for maintenance, property adjustment, financial compensation and other ancillary orders before turning to pensions.

Who can claim relief?

Section 172(1) defines a "cohabitant" as "one of two adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other".

Section 172(2) provides that:

"Whether or not two adults are cohabitants, the court shall take into account all the circumstances of the relationship and shall have regard to the following:

(a) the duration of the relationship,
(b) the basis on which the couple live together,
(c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances,
(d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisitions of personal property,
(e) whether there are one or more dependent children,
(f) whether one of the adults cares for and supports the children of the other, and
(g) the degree to which the adults present themselves to others as a couple".

Section 172(5) defines a "qualified cohabitant" as

"an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period of –

(a) two years or more, in the case where they are parents of one or more dependent children, and
(b) five years or more, in any other case".

Once one is a qualified cohabitant and the relationship ends, an application can be made for redress in respect of an economically dependent qualified cohabitant. Pursuant to section 173(2), in order to do so, one must satisfy the court that:

(a) he or she is financially dependent on the other cohabitant; and
(b) the financial dependence arises from the relationship or the ending of the relationship.

The court may grant relief pursuant to sections 174, 175 and 187, subject to being satisfied that it is just and equitable to do so having regard to the circumstances set out in section 173(3):

(a) the financial circumstances, needs and obligations of each qualified cohabitant existing as at the date of the application or which are likely to arise in the future;
(b) subject to subsection (5), the rights and entitlements of any spouse or former spouse;
(c) the rights and entitlements of any civil partner or former civil partner;
(d) the rights and entitlements of any dependent child or of any child of a previous relationship of either cohabitant;
(e) the duration of the parties' relationship, the basis on which the parties entered into the relationship and the degree of commitment of the parties to one another;
(f) the contributions that each of the cohabitants made or is likely to make in the foreseeable future to the welfare of the cohabitants or either of them including any contribution made by either of them to the income, earning capacity or property and financial resources of the other;
(g) any contributions made by either of them in looking after the home;
(h) the effect on the earning capacity of each of the cohabitants of the responsibilities assumed by each of them during the period they lived together as a couple and the degree to which the future earning capacity of a qualified cohabitant is impaired by reason of that qualified cohabitant having relinquished or foregone the opportunity of remunerative activity in order to look after the home;
(i) any physical or mental disability of the qualified cohabitant; and,
(j) the conduct of each of the cohabitants, if the conduct is such that, in the opinion of the court, it would be unjust to disregard it.

These circumstances are similar to the equivalent provisions in section 20 of the Family Law (Divorce) Act 1996, which provide the factors to be taken into account when granting ancillary relief in a divorce but, interestingly and importantly, exclude considerations of: (a) the standard of living enjoyed by the family before their separation; and, (b) the accommodation needs of the parties.

Relief from the estate of a deceased cohabitant

After the death of a cohabitant, a qualified cohabitant may apply for provision out of the deceased's estate. The application for provision must be made no later than six months after representation is first granted. However, if the relationship ended two or more years prior to the death of the deceased then the applicant "shall not apply" for an order under the section unless they meet the conditions contained in section 194(2):

"(a) was in receipt of periodical payments from the deceased, whether under an order made under section 175 or pursuant to a cohabitant's agreement or otherwise,
(b) had, not later than two years after that relationship ended, made an application for an order under section 174, 175 or 187 and either
(i) the proceedings were pending at the time of the death, or
(ii) any such order made by the court had yet to be executed, or
(c) had, not later than two years after the relationship ended, made an application for an order under section 174, 175 or 187, the order was made, an application under section 173(6) was subsequently made in respect of that order and either –
(i) the proceedings in respect of the application were pending at the time of the death, or
(ii) any such order made by the court under section 173(6) in favour of the qualified cohabitant who is the applicant under this section had not yet been executed".

There is a further limitation in section 173(7) that provides for the making of a blocking order:

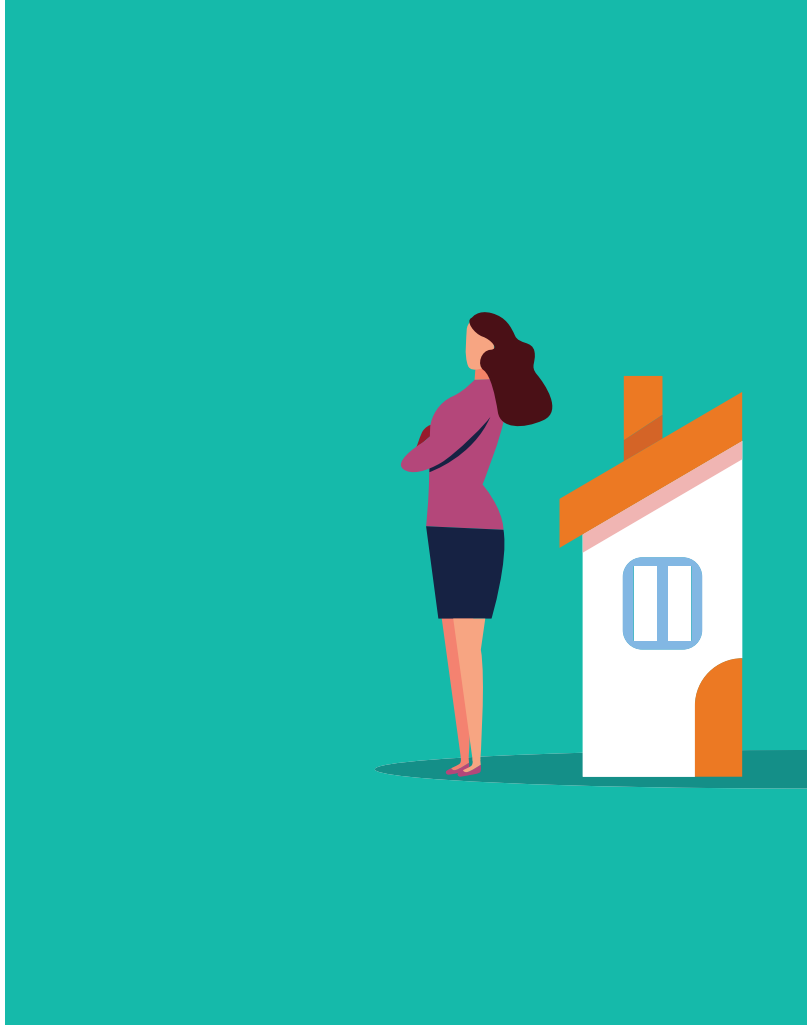
"Where the court makes an order under section 174, 175(1) or 187 in favour of a qualified cohabitant, the court may in the same proceedings or at any later date, on the application of either of the qualified cohabitants concerned, order that either or both of them shall not, on the death of the other, be entitled to apply for an order under section 194".

This order shall not take effect until the orders referred to have been executed (section 173(8)).

The right of a cohabitant to apply pursuant to section 194 can be waived by agreement under section 202 of the Act. The provision that may be made for an applicant under section 194(1) is that which "the court considers appropriate having regard to the rights of any other person having an interest in the matter, if the court is satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased for any reason other than conduct by the applicant, that, in the opinion of the court, it would in all the circumstances be unjust to disregard".[4] In considering whether to make an order the Court:

"shall have regard to all the circumstances of the case, including:

(a) an order made under section 173(6), 174, 175, or 187 in favour of the applicant,
(b) a devise or bequest made by the deceased in favour of the applicant,



> The issue of financial dependence only applies where the relationship ended before the death of the deceased.

(c) the interests of the beneficiaries of the estate, and
(d) the factors set out in section 173(3)".

Furthermore, the court shall not make an order for provision out of the estate of the deceased where the relationship ended before the death of the deceased unless the court is: (a) satisfied that the applicant is financially dependent on the deceased within the meaning of section 173(2); or, (b) if the applicant has married or entered into a registered civil partnership.[5]
The issue of financial dependence only applies where the relationship ended before the death of the deceased.

Relevant decisions

Qualifying period

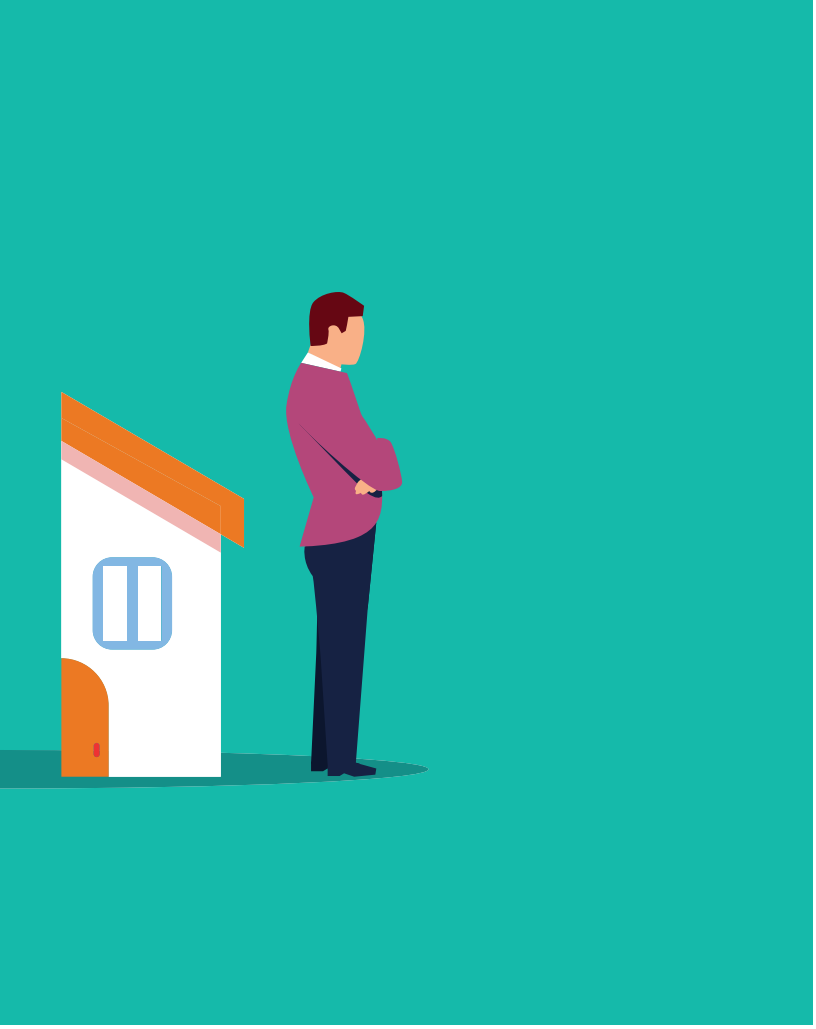
The qualifying period is strictly interpreted as held in the case of *M.W. v D.C.*[6] The parties must be residing together for the entire relevant period. Therefore, if a relationship breaks down and the parties subsequently reconcile, the period of reconciliation will not be taken into account if it is shorter than the prescribed time period. This could also have an effect on the limitation period, although as Ms Justice Finlay Geoghegan recognised, if the separation is short and the parties reconcile then the parties may still come within the statutory time limit. Again, this contrasts with the provisions in the Family Law (Divorce) Act, 1996, where to be eligible for a divorce, the parties must have been living apart for a period of, or periods of, at least two out of the three years prior to the issue of proceedings. This allows the parties to, *inter alia*, attempt a reconciliation.

Living together as a couple

M.W. v D.C.[7] also considered whether "living together as a couple" required the parties to physically live in the same property throughout the period. Ms Justice Finlay Geoghegan, giving judgment in the Court of Appeal, referred to the debate before the Court as to the concept of living "together as a couple" and stated:
"Examples were given of persons in an intimate and committed relationship living together as a couple and holding themselves out as a couple but where either work demands of one or other or ill health and hospitalisation require the couples to physically live in different places or even different countries for periods of time. I conclude that the legal concept of living together as a couple for the purposes of s. 172 does not require two persons to live physically at all times in the same shared premises. Hence, notwithstanding that a couple may not be physically living day by day in the same residence, during the two-year period immediately prior to the end of the relationship, s. 172 envisages that a court may decide on all the relevant facts that they nonetheless continued to live together as a couple during that period".[8]

Mr Justice Binchy in the case of *X.Y. v Z.W.*[9] also considered the issue of the qualifying period and held against the applicant, finding that the parties had not lived together for the requisite period immediately before the relationship ended. He considered the case of *Re Watson (Deceased)*,[10] in which Lord Neuberger said at p. 883:

"However, in my judgment, when considering whether two people are living together as husband and wife, it would be wrong to conclude that they do so simply because their relationship is one which a husband and wife could have. If the test were as wide as that, then, bearing in mind the enormous variety of relationships that can exist between husband and wife, virtually every relationship between a man and a woman living in the same household would fall within section 1(1A). It seems to me that, when considering the question, the court should ask itself whether, in the opinion of a reasonable person with normal perceptions, it could be said that the two people in question were living together



as husband and wife; but, when considering that question, one should not ignore the multifarious nature of marital relationships".

At paragraph 101, Mr Justice Binchy stated:

" …. the relationship … would best be described as a ten/eleven year relationship with intermittent breaks. For most of the period, the parties were indeed in an intimate and committed relationship, and lived together. But to qualify for relief under the Act of 2010, it is an essential requirement that they must have lived together continuously in such an intimate and committed relationship for the period of five years prior to the date on which the relationship ended. While it is clear from *M.W.* that it is not necessary for the parties to a relationship to spend every day and night during this five-year period under the same roof in order to qualify as cohabitants and to be eligible to obtain relief under the Act of 2010, it is equally clear that the relationship itself must endure throughout that period, and that if the parties are apart during the period, the reason or reasons that they are apart should not flow from a breakdown in the relationship, but from other factors unconnected to the relationship, such as work or ill health".[11]

> A couple may not be physically living day by day in the same residence, during the two-year period immediately prior to the end of the relationship.

Intimate and committed

This issue was considered by Ms Justice Baker in *D.C. v D.R.*[12] She had to decide if the applicant and the deceased were cohabitants within the meaning of section 172(1). At paragraph 77, she began to consider what constitutes cohabitation. At paragraph 79 she stated:

"A relationship must be or have been sexually intimate, and this is implicit from s. 172 (3) which provides that a relationship does not cease to be an intimate relationship for the purposes of determining whether a person is a qualified cohabitant merely on account of the fact that it is no longer sexual in nature. The requirement that the relationship be a committed one remains, and the couple must be residing together".[13]

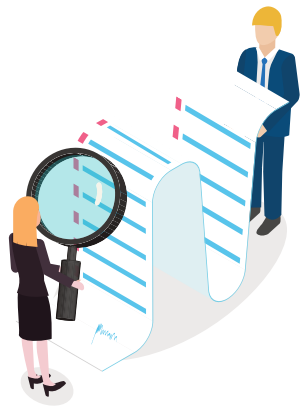
At paragraph 95 she considered the basis of cohabitation:

"As to the statutory test of the "basis" in which a couple live together, found in 172(2)(b) this is a broad test and encompasses much more than financial or property arrangements which are specifically dealt with in subs. (c) and (d) of s. 172 (2), … The basis of a relationship involves a number of interconnected elements such as the degree of shared activities that persons enjoy, such as shared meals, especially evening meals and breakfast, shared activities, shared division of household chores and shared holidays".[14]

At paragraph 107 she stated:

"The scheme of the Act envisages the court looking at the seven identified factors in s. 172(2) not as conclusive as to the nature of the relationship but as indicative of that relationship and how it is to be properly characterised. I consider that the test requires the court to determine whether a reasonable person who knew the couple would have regarded them as living together in a committed and intimate relationship, and that the individual and many factors in how they are perceived must be taken into account".[15]

The decision in *D.C. v D.R.* was applied in the case of *G.R. v Regan*.[16] In that case at paragraph 36 Mr Justice Allen considered that "the overarching requirement of the Act of 2010 is that the relationship must be 'intimate



and committed'". Having found that the applicant was a qualified cohabitant, the court went on to determine the provision that should be made. At paragraph 67 he stated:

"As I have observed, the discretion of the court imports a degree of objectivity, but I do not understand that discretion to extend to writing for the deceased what might be objectively thought to be a reasonable will. Just as Part 15 of the Act of 2010 is not based on a moral duty to make proper provision for a surviving cohabitant, neither does it incorporate the notion of a just and prudent cohabitant. Nevertheless, I believe that the court is entitled to take into account the closeness, or otherwise, of the relationship between the deceased and those entitled on intestacy and whether there was any financial dependence on the deceased".[17]

The question of whether the period of cohabitation prior to the Act coming into force could be counted was considered in the case of *C.D. v B.B.* [2021] IEHC 684 where Ms Justice Stack found that the applicant could rely on periods prior to the commencing of the Act for the purpose of bringing herself within the definition of a "qualified cohabitant".

Bringing a case for relief after the ending of a relationship is no easy matter – the first issue is to have the proceedings issued within the statutory time limit.

Bringing a case for relief after the ending of a relationship is no easy matter – the first issue is to have the proceedings issued within the statutory time limit. Part 15 of the Act is complicated and it is important to have clear instructions with a detailed and comprehensive attendance on the client to ensure that the applicant is a qualified cohabitant and is financially dependent arising out of the relationship or the ending of the relationship. This should include a history of the relationship, to include all dates and full information regarding finance and financial arrangements. The evidence to be given at the hearing will be detailed and most likely challenged. One should also consider the other options, for example whether it is appropriate to bring proceedings under the Land and Conveyancing Law Reform Act, 2009 if there is property, or pursuant to the Family Law Act, 1995 if the parties were engaged. In practice, many cases start in the Circuit Court with a civil bill seeking a variety of reliefs, including those under the 2010 Act, the Family Law Act, 1995 and, if there are dependent children, the Family Law (Maintenance of Spouses and Children) 1976 Act.

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5. Section 194(5) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
6 [2017] IECA 255.
7 *Ibid*.
8. [2017] IECA 255 para 29.
9. [2019] IEHC 257.
10. [1999] 1 F.L.R. 878.
11. [2019] IEHC 257 para 101.
12. [2015] IEHC 309.
13. [2015] IEHC 309 para 79.
14. [2015] IEHC 309 para 95.
15. [2015] IEHC 309 para 107.
16. [2020] IEHC 89.
17. [2020] IEHC 89 para 36.

INTERMEDIARY REGULATION:

AN IRISH SOLUTION TO A GLOBAL SHADOW BANKING PROBLEM

Gordon Walsh BL

The regulation of so-called 'shadow banks' is an ongoing challenge for legislators both at national and EU level.

The Central Bank is acutely aware of the risks posed by shadow banks operating in this jurisdiction.

How would one address a potential €10 trillion contagion in the global financial market? This is the question financial regulators are asking as they debate how to properly regulate the shadow banking sector. This article will explain: i) the concept of shadow banks; ii) how they differ from traditional banking institutions; iii) the steps taken to regulate these entities in the name of consumer protection; and, iv) what can be gleaned from these efforts as European/national regulators start tackling the shadow banking problem more broadly.

The pros and cons of shadow banks

Addressing the question in its most straightforward form, the Central Bank of Ireland's Consumer Hub defines shadow banking as "…bank-like activities (mainly lending) that take place outside the traditional banking sector".[1] The sector is also described as "non-bank financial intermediation" or "market-based finance". Such entities can include special purpose entities, hedge funds and cryptocurrency firms. One might ask why any borrower would engage with such an entity over a traditional pillar bank or established lender. Zoltan Pozsar (senior advisor at the US Treasury Department's Office of Financial Research) *et al.* considered shadow banks to have certain competitive advantages over traditional lenders, in that they provide credit for more high-risk ventures outside regulatory limitations.[2] The Central Bank also notes that this form of investment can lead to a more diverse financial system (the recent proliferation of alternative currencies being an obvious example).

While increased competition and diversification in the financial market are certainly worthy objectives, it is important to note Pozsar's conclusion that shadow banks were a major contributing factor to the 2008 financial crisis. Notwithstanding extensive EU regulation of the financial market on this side of the Atlantic, the risks posed by shadow banks are similarly serious, and have had dramatic results. A recent article in the *Financial Times* states that shadow banks hosted in this jurisdiction and in Luxembourg hold approximately €10 trillion in assets.[3] The Governor of the Bank of England has stated that the negative impact of then Prime Minister Liz Truss's "mini-budget" was amplified by a resultant spate of rapid bond selling in the shadow banking sector of the bond market.[4] The selling pressure on long-dated bonds had increased to cover cash demands connected to the market's lack of faith in the Government's fiscal policy. This caused bond prices to plummet. The impact was so severe that a £65bn bond-buying programme was required to avert sustained economic crisis and the complete collapse of pension funds that managed £1 trillion in consumers' retirement funds.

A characteristic feature of shadow banks is that they are either capable of operating outside the regulatory perimeter altogether or, if some of their activities fall within that perimeter, they are not regulated in the same way pillar banks are. Their opacity and potential difficulties around their effective regulation were highlighted by the Vice-President of the European Central Bank (ECB), Luis de Guindos, during a recent interview with the *Sunday Business Post*.[5] He considered these "non-banks" the soft spot in the financial system, and that the risk they pose in terms of liquidity, interest duration, credit and leverage could threaten overall financial stability. The Central Bank is also acutely aware of the risks posed by shadow banks operating in this jurisdiction, given their recent introduction of a macroprudential policy framework for Irish property funds.[6]

Consumer issues

If these entities pose such a risk to the financial market itself, follow-up questions arise

regarding the dangers they pose to consumers. Similar concerns were recently expressed by the Minister for Finance, who stated that there should be an obligation upon the pillar banks to facilitate borrowers who wish to transfer their mortgage back from a non-bank that has purchased it.[7]

There has been substantial debate over the years regarding the differences for borrowers between having a mainstream bank and a private equity fund as their mortgagee. On the one hand, it is argued that funds are more aggressive in trying to recover debts and in seeking repossession orders before the courts. On the other hand, legal and financial practitioners may find it is easier to attain a compromise with a fund than with the borrower's original mortgagee. This opinion is informed by the fact that the fund will often have purchased the loan for a fraction of its full value, and is therefore less concerned with recouping the apparent loss recorded by reference to the face value of the loan.

There is little to be gained in a personality contest between the various lenders operating in the Irish market. A more interesting conversation arises regarding the legal implications for a borrower when their mortgage is sold to a non-bank. By their very nature, non-banks are unregulated/under-regulated, and are therefore not bound by the same standards that apply to a pillar bank. Furthermore, a shadow bank operating as an investment fund has a very different funding model from a bank or building society. It would therefore appear that the sale of a mortgage from a regulated lender to an unregulated lender has profound consequences for the mortgagor in question.

Government response

The Oireachtas has taken steps to prevent these consequences from being visited upon distressed borrowers. The Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (the 2015 Act) amended the Central Banks Acts (the Acts) at various points to introduce the concept of credit servicing.[8] An extensive definition is provided for the concept of "credit servicing", but it essentially boils down to actions taken in the day-to-day administration and management of a loan. Where a credit servicing firm is involved in the administration of a loan, it is the firm that deals directly with the borrower.

The central provision is s. 5 of the 2015 Act, which inserts s. 34G of the Central Bank Act 1997 (the 1997 Act). The section states that a credit servicing firm shall not take or fail to take any action that would constitute a prescribed contravention if that action/failure to act were committed by a retail credit firm. Similarly, the person who holds legal title to the credit is proscribed from instructing a credit servicing firm to take or fail to take any action that would constitute a prescribed contravention if that action/failure to act were committed by a retail credit firm. It is a criminal offence for the person holding legal title to give such an instruction.

A "retail credit firm" is defined in the 1997 Act as (subject to certain listed exceptions) a person whose business consists wholly or partly of directly/indirectly providing credit or entering into consumer hire/hire-purchase agreements. A "prescribed contravention" is defined in the Central Bank Act 1942 (the 1942 Act) as a contravention of the Acts' designated enactments/statutory instruments or any code/direction/condition /requirement/obligation given thereunder.

At para. 20 of his judgment in *Launceston Property Finance Limited v Burke,*[9] McKechnie J. neatly summarised the practical effect of these provisions:

"The Oireachtas, in enacting the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (the 2015 Act), amended, *inter alia*, Part V of the 1997 Act. It did so in order to ensure that borrowers who had a 'regulated loan' which was acquired by an 'unregulated body' would continue to have the protection of various consumer codes and statutory provisions. The effect of the amendment so created, as applying to this case, is that Launceston Property, as an unregulated body, must use an agent or an intermediary which is regulated by the Central Bank…"

In effect, the 2015 Act requires an unregulated lender to introduce a regulated middle layer of loan management between itself and the borrower. This buffer between consumer and non-bank thereby protects the customer from any adverse consequences they would otherwise be exposed to if their loan were simply transferred to an unregulated entity. The High Court has relied upon the 2015 Act, as interpreted in *Launceston*, in a series of judgments to reject regulatory status arguments raised by borrowers.[10]

European perspective

The *Launceston* decision and the authorities based thereon demonstrate how the Oireachtas has handled the proliferation of Irish loan portfolios across the global financial market. Following the economic collapse that followed the 2008 financial crisis, the Irish financial market sought to buttress itself by expanding the number of financial entities handling Irish debt beyond just the remaining pillar banks. The 2015 Act allows for this diversification in the market to prevent

It would therefore appear that the sale of a mortgage from a regulated lender to an unregulated lender has profound consequences.

the accumulation of bad debt in the pillar banks without diluting the essential protections that safeguard the Irish consumer from unregulated practices. The question therefore becomes what lessons can be taken from this approach when seeking to properly regulate the broader financial market, something that has been attracting more direct EU attention in recent years.

Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union state that the ECB must be consulted on all draft legislative measures that come within its competence. Various entities of the Irish State have sought the ECB's opinion over the years. The ECB's opinion in respect of the Consumer Protection on the Sale of Loan Books Bill 2014 (now the 2015 Act) was sought by the Department of Finance and was delivered on September 12, 2014.[11] It concluded that "[t]he ECB welcomes the measures to be introduced by the draft law, as they aim to strengthen consumer protection and thereby contribute to preserving confidence in the marketplace".

The ECB's opinion on proposed regulatory developments in the Irish financial market has not always been positive, nor has the Oireachtas always heeded the ECB's advice. In 2019, An Taoiseach and the Chairman of the Oireachtas Joint Committee on Finance, Public Expenditure and Reform sought the ECB's opinion on a proposed law that would prohibit lenders from selling housing loans without the relevant borrower's consent.[12] The ECB expressed a number of concerns with the proposed Bill, including that it would limit the effectiveness of monetary policy measures and could result in increased interest rates. That Bill was not progressed and lapsed the following year.

By contrast, the ECB made significant criticisms about the lack of workability and certainty contained in the provisions of the Land and Conveyancing Law Reform (Amendment) Bill 2019.[13] The Bill sought to amend the Land and Conveyancing Law Reform (Amendment) Act 2013 and introduce a list of matters for the court to consider when deciding whether to make or refuse to make an order for possession. Notwithstanding the serious concerns expressed by the ECB, the Oireachtas passed the Bill largely unchanged. Indeed, the Seanad debates record that the ECB's opinion was given short shrift on grounds that the Bill's perceived benefits to ease the homelessness/repossessions crisis should take priority.[14]

Given the differing policy perspectives between the European authorities and the national legislature on the issue of financial regulation, it is all the more significant when there are similarities in approach at the domestic and European level. On December 8, 2021, the official text for Directive EU/2021/2167 on credit servicers and credit purchasers and amending Directives 2008/48/EC and 2014/17/EU (also known as the Credit Servicers Directive) was published. Recital 4 of the Directive records its intention to "…create the appropriate environment for credit institutions to deal with non-performing loans on their balance sheets and…reduce the risk of future non-performing loan accumulation". Article 2 records that the Directive does not apply to credit servicing activities carried out by a credit institution established in the European Union. The natural deduction to be drawn from these provisions is that the Directive's aim (at least in part) is to regulate shadow banks that purchase non-performing loans that have accumulated in traditional credit institutions.

Assuming this is so, there would appear to be a high degree of mechanical similarity between the regime introduced in this jurisdiction under the 2015 Act and the one introduced at European level under the Directive. Both regimes operate on the concept of a credit servicer who is responsible for dealing with the borrower and enforcing the creditor's entitlements. The credit servicer cannot carry out any such activity without an authorisation from a member state. Article 5 contains a set of requirements that the credit servicer must satisfy before they can attain an authorisation. The obligations placed upon the credit servicer include duties to act fairly towards borrowers and have in place systems through which they can effectively manage their debt (not dissimilar to the Consumer Protection Code and Code of Conduct on Mortgage Arrears, which apply in this jurisdiction).

Future developments

A detailed analysis of how Ireland's current domestic regime differs from the regime envisaged by the Directive, and the degree of legislative change required for transposition purposes, is outside the scope of this article. The Minister for Finance concluded a consultation process regarding the Directive's transposition in the early months of this year, the outcome of which was published by the Department of Finance's Banking Division in June 2023.[15] The transposing legislative instruments will likely be published shortly, if they have not already been published between the time of writing and the time of publication of this article (the deadline for transposing the Directive is December 29, 2023). The practical consequences of transposition will become clearer at that stage. Speaking from the current remove, it appears that debt enforcement will become more complicated into the future, given the Minister's decision to retain the current legislative framework for loans that fall outside the scope of the Directive. This means that creditors will have to tailor their approach to

enforcement depending on whether the loan comes within the scope of the new European regime or not.

If the protections afforded to borrowers are lower under the European regime than they are under the domestic regime (as some practitioners have theorised),[16] *Launceston* may have to be revisited and expanded upon. The underlying premise of the *Launceston* decision is that the appointment of a licenced intermediary serves to maintain the borrower's regulatory protections and therefore maintain the new mortgagee's entitlement to enforce the loan. If a borrower's loan is sold through a sale that takes the loan out of the domestic regime and into the European regime where the borrower's protections are lower (thereby non-consensually stripping the borrower of certain entitlements that were baked into the loan agreement itself when they drew it down in the first instance), does that raise grounds upon which a borrower could contest the validity of the sale and/or the entitlement to enforce the debt? It is impossible to say for certain pending publication of the transposing legislation and the completion of the first loan book sales under the new system.

It may be that shadow banks are now a recognised part of the global financial system and are effectively embedded into the economic establishment. Or it may be that global regulators have simply accepted shadow banks as an inescapable reality of contemporary finance, which has to be regulated for the overall health of the system. Either way, the central problem is that the benefits that flow from a shadow bank's unregulated status have to be reconciled with fundamental market principles such as consumer protection and monetary stability. The Oireachtas resolved this difficulty by fashioning a solution that focuses on those entities which intermediate between the funders and the market, and the EU appears to be following suit. Whether this also proves the solution for the shadow banking problem more generally (in particular the proper regulation of cryptocurrency markets, which the EU is now actively pursuing)[17] is something that will only become clear with time.

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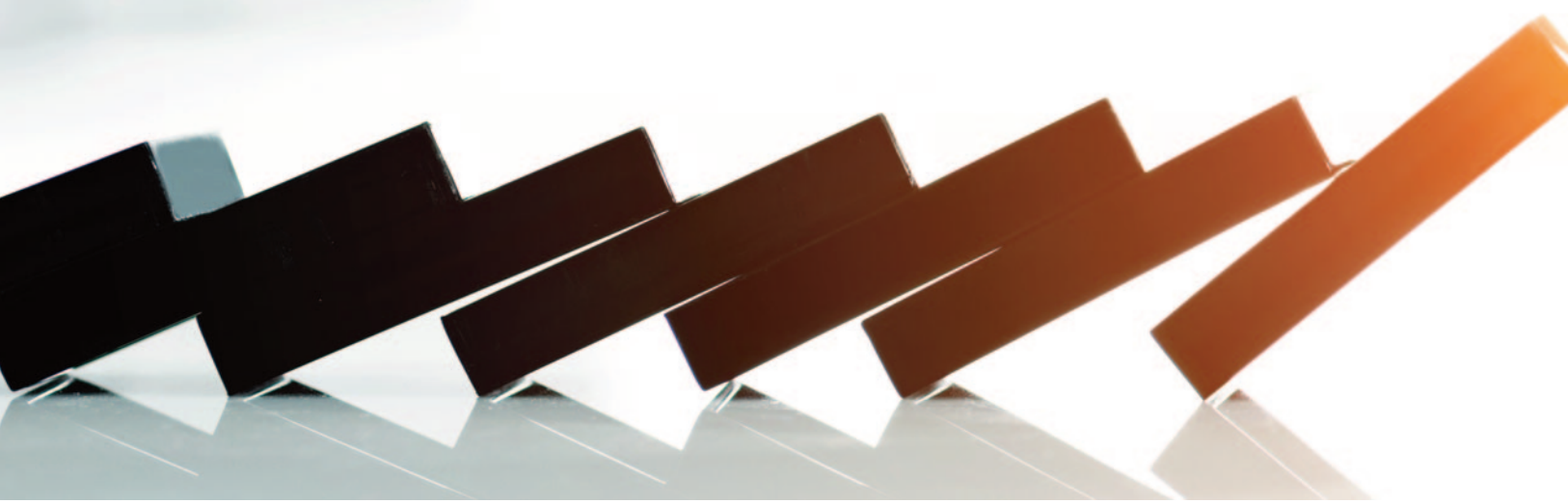
MEDIATING
PERSONAL INJURIES DISPUTES

The use of mediation in personal injuries disputes is now well established; however, the Personal Injuries Resolution Board Act, 2022 is likely to significantly impact on this process.



Cathy Smith SC Aoife Farrelly BL

> A mediated agreement that is entered into with mutual provisions of confidentiality has a value that a judgment from court is unlikely to provide.

Mediation is a well-established and valuable tool in the resolution of myriad forms of dispute. Traditionally, personal injuries claims were not routinely included in the types of dispute where mediation played a role. However, that will change fundamentally due to the provisions of the Personal Injuries Resolution Board Act, 2022 (PIRB Act).[1] While the third and final phase of the 2022 Act has yet to be commenced, it is worthwhile to consider the impact of increased mediation on the resolution of personal injury claims.[2] This article will assess the role that mediation can play in the resolution of disputes involving personal injuries, and outline the role of lawyers in that process.[3]

Disputes suitable for mediation

In order to explain why mediation has been deemed suitable for particular types of dispute, we must first consider some of its characteristics, often referred to as 'The Golden Rules of Mediation'. A non-exhaustive list of these includes:

1. Confidentiality – in both the process and the discussions between the mediator and the parties.
2. Without prejudice – the entire process is without prejudice to the parties' respective positions in the dispute.
3. Voluntary – mediation only occurs if the parties are willing to engage in it. They are asked to do so on a *bona fide* basis with a view to resolving the dispute between them. The

mediation is led by the parties and any resolution is reached by agreement rather than being imposed upon the parties by a decision-maker.

4. Facilitative and non-adversarial process – the parties are not obliged to prove their case, or to test or challenge the other's case. No decision is made as to which party is right or wrong.
5. Finality – if a binding mediated agreement is reached between the parties, it should bring the dispute and litigation to an end. Uncertainty is removed.

Mediation has routinely been utilised over the years in commercial disputes, workplace and employment disputes, and family and community disputes. What is it about mediation that works in these particular areas? When one considers the golden rules of mediation, it is not difficult to identify which of these rules make mediation attractive to parties. Confidentiality is very often the key factor. The issues that may need to be ventilated in litigation might be commercially or personally sensitive. A mediated agreement that is entered into with mutual provisions of confidentiality has a value that a judgment from court is unlikely to provide. Further, recognising the potentially damaging effect of adversarial litigation also explains why mediation is the preferred option for disputes in which relationships are at stake. In workplace and employment disputes, parties may wish to continue working together. Similarly in commercial matters, parties may wish to continue to trade together, notwithstanding being in dispute on a particular transaction at that time.

Mediation in personal injuries disputes and the need for representation

Mediation in personal injuries disputes is not new, and during the Covid-19 pandemic it gained popularity at a time of limited court access. Mediation was an option worth attempting for some people – both in person and online. For many, it proved successful in reaching resolution. Personal injuries mediation has survived beyond those unique pandemic circumstances to a point where it is now regularly utilised. Given the slow start, why has personal injuries mediation expanded its reach post Covid? Posed another way, why would a party to a personal injuries dispute choose mediation, rather than litigation? The answer to this differs depending on whether one considers the question from the plaintiff or the defendant perspective. From the plaintiff's perspective, it can mean that matters are resolved earlier, quicker, and without the need to prove one's case in court. The defendant's perspective is likely to mirror these benefits but also to engage with a fundamental defence issue: cost. Mediation can result in significantly reduced legal costs. The reason for this is that there is no requirement for large numbers of witnesses – including expert witnesses – to attend court and give evidence. If mediation is attempted at an early stage in the proceedings, lengthy and expensive discovery processes can also be avoided. There are no appeals and finality is achieved.

The reduction of costs is positive from a public policy perspective, but this does not mean that legal costs are not an essential investment in a mediation process. Mediation only works if it is done properly. There are two main metrics to apply when assessing whether mediation has worked:

1. A mediated agreement has been reached between the parties.
2. The mediated agreement is binding and enforceable.

Reaching a mediated agreement in itself is not enough. The mediation will fail if the mediated agreement cannot be enforced by the parties. In a dispute that involves underlying legal issues, as in a personal injuries dispute, mediation is unlikely to be successful unless the parties are properly legally advised and the mediator is aware of the legal issues at stake.

While mediation is voluntary, confidential and without prejudice, the entire point of mediation is that it will hopefully result in the parties reaching a mediated agreement in which their agreed resolution is reduced to writing. The mediated agreement then becomes binding on the parties, if it complies with the necessary contractual requirements. A party, and in particular a plaintiff, who does not have adequate legal advice available, is at risk of entering into a mediated agreement that is contrary to their interests. This might arise in the context of a plaintiff who has no clear understanding of the quantum of their personal injuries claim, incorporating both general damages to date and into the future, and special damages. Signing a mediated agreement where a

The entire process is designed to assist the court in making its decision and, if necessary, arriving at an appropriate assessment of damages.

plaintiff has not been apprised of these matters, and has not been independently legally advised, could result in the plaintiff seeking to set aside the mediated agreement at a later stage.

A defendant who engages in mediation makes a significant investment. This investment is one of both cost and time. Ordinarily the defendant will have agreed to pay the mediator's fee, and will discharge the costs for the mediation facilities. In addition, solicitors and counsel will be instructed on behalf of the defendant, who will prepare in advance for the mediation and attend the mediation. There is also the time cost invested by a defendant being present at a mediation hearing and any pre-mediation meetings. It is a complete waste of a defendant's time and money if a plaintiff seeks to rescind a mediated agreement on the basis that they were not independently legally advised, prior to entering into it. Accordingly, it is not in either party's interests to enter into a mediation that is not properly resourced. This is a concern in light of the proposed mediation process under the PIRB Act, 2022, which is addressed below.

When to mediate a personal injuries dispute

Mediation can take place prior to proceedings issuing, either entirely at the parties' own volition or pursuant to the statutory provisions under both the Mediation Act, 2017 and the PIRB Act, 2022. It can also come about after proceedings have issued and prior to the matter proceeding to trial. Again, this can arise at the parties' own volition. It might take place following an invitation from the court, or as a pre-condition to listing the case for hearing in accordance with High Court Practice Direction HC76 (if the proceedings relate to bullying and harassment in the workplace).

Mediation pre litigation

1. The parties are entitled at any time, of their own volition, to attempt mediation and to invite the other party to engage in mediation.
2. The PIRB Act, 2022 includes the option of seeking mediation prior to assessment of a claim.
3. Prior to issuing personal injuries proceedings, solicitors are obliged, under Part 3 of the Mediation Act, 2017,[4] to advise their clients about the option of attempting mediation rather than litigation.

Mediation during litigation

1. Similarly, the parties are entitled at any time, of their own volition, to attempt mediation, and to invite the other party to engage in mediation.
2. Mediation might be suggested pursuant to an invitation from the court, in accordance with the provisions of the Mediation Act, 2017.
3. Mediation might be explored prior to setting down a claim seeking damages for personal injuries arising out of bullying and harassment in the workplace. This arises in the context of compliance with High Court Practice Direction HC76.
4. Attendance at a mediation conference pursuant to a direction from the Court under s.15 of the Civil Liability and Courts Act, 2004.

Pre-litigation mediation

Part 3 of the Mediation Act, 2017 provides that a practising solicitor, prior to issuing proceedings on behalf of a client, shall advise the client to consider mediation as a means of attempting to resolve the dispute. There are also obligations whereby the solicitor is required to provide mediation-related information to the client, as prescribed under Part 3.

While it is laudable from a public policy perspective to encourage parties to resolve disputes prior to issuing proceedings, in the context of personal injuries claims in particular, this appears problematic. Realistically, is a defendant going to accept a proposal to mediate a dispute in which they have yet to receive a fully pleaded claim? The litigation process pertaining to personal injuries in particular, is one in which the plaintiff's solicitor and counsel consider the evidence that is available to prove the claim that has been made. This inevitably engages with expert and non-expert witnesses. Expert witnesses may be necessary for the purposes of establishing liability on the part of the defendant (very often engineering experts) and medical experts provide their expertise on the nature and causation of a plaintiff's injury together with treatment and prognosis. The entire process is designed to assist the court in making its decision and, if necessary, arriving at an appropriate assessment of damages, having regard to the evidence that is available to it.

When one considers the time period it takes to reach an evidential position in a personal injuries case, such that liability and quantum can properly be assessed, and accordingly appropriate advice provided to plaintiffs and

defendants, it is very unlikely that a plaintiff who first attempts mediation, would have the opportunity to do this, and not fall foul of the statute of limitations. Inevitably, the suggestion of pre-litigation mediation is one that could put a party who is genuinely committed to resolving their dispute by mediation at a litigious disadvantage if the mediation, through no fault of the parties, does not succeed. It is this that makes Part 3 of the Mediation Act, 2017 somewhat aspirational, in the context of personal injuries disputes.

However, this does not mean that there are not some personal injuries disputes where mediation might be the better option prior to the issuing of proceedings. In particular, claims involving historical sexual abuse as against religious orders, particularly where the abuse is not disputed, or where a criminal process has concluded in which the guilt of an abuser has been established, may be appropriate for mediation. Such claims are inevitably deeply traumatic and damaging for the parties. Hearings are lengthy and expensive. In those circumstances, pre-litigation mediation ought to perhaps be given consideration by plaintiffs and defendants. The same difficulty is likely to arise for plaintiffs who have concerns pertaining to the statute of limitations. If parties have a *bona fide* intent to engage in mediation, a defendant could provide an undertaking not to raise a statute point, in the event that mediation is not successful.

Court-directed mediation

The idea that parties might be directed to engage in mediation, conceptually at least, is inconsistent with one of the golden rules of mediation – namely that it is a voluntary process. Irrespective of whether parties are voluntarily engaging in mediation or doing so at the direction of the court, it remains the case that parties are free to enter into a mediated agreement or not to do so, as they wish. In that regard, court-directed or court-encouraged mediation does not interfere with the outcome to mediation insofar as it remains voluntary. However, forcing parties to mediate in the first place could not be said to be voluntary.

This issue has caused some controversy in England and Wales, since the decision of the Court of Appeal in *Halsey v Milton Keynes General NHS Trust*,[5] where the Court held that it was not only a breach of the voluntary principle that is central to mediation but, more fundamentally, that it was a breach of Article 6 of the European Convention on Human Rights (the right to a fair trial) to compel parties to mediate. This decision has been subject to some criticism over the years, being viewed as a barrier to mediation.

In 2021, Sir Geoffrey Vos, UK Master of the Rolls, sought an opinion on compulsory alternative dispute resolution (ADR) from the UK Civil Justice Council (CJC), which he chairs. The CJC has a statutory duty to review the civil justice system and make recommendations for the courts. It published its report on July 12, 2021, in which it confirmed that the view of the CJC was that compulsion to use ADR is lawful and should be encouraged. Sir Geoffrey Vos commented at the time: "As I have said before, ADR should no longer be viewed as 'alternative' but as an integral part of the dispute resolution process; that process should focus on 'resolution' rather than 'dispute'".[6]

In Ireland, mediation remains a voluntary matter for the parties. However, Section 15 of the Civil Liability and Courts Act, 2004 provides that the court may direct that the parties to an action meet to discuss and attempt to settle the action. The "penalty" for not complying with Section 15 does not however inhibit the right of a party to proceed with their action. Rather the "penalty" is addressed as a costs issue under Section 16. This is also the case in the context of the costs provisions in s.169(1)(g) of the Legal Services Regulation Act, 2015.

The role of mediation in this jurisdiction was given careful consideration by Mr Justice Kelly in his Court of Appeal judgment in *Ryan v Walls*.[7] He outlined his views, arising in particular from his experience as the judge presiding over the commercial list of the High Court, as to the value of mediation as a voluntary process, stating that: "My own experience in dealing with the Commercial Court rules for in excess of ten years leads me to conclude that any element of compulsion attendant upon a reference to mediation will certainly not enhance its prospects of success". Having expressed that view, he then noted that the legislature, in enacting Section 15 of the Civil Liability and Courts Act, 2004, had in fact introduced compulsory mediation. Ultimately, on the facts in the case, Kelly J. disagreed with the decision of the High Court in which mediation had been directed under s.15 in circumstances where the court found that there had been "no realistic attempt at settlement on a face-to-face basis, discovery has been completed in its entirety, and the case is on the threshold of a hearing".[8]

It is interesting to observe that the genesis of mediation in Ireland from a statutory perspective is, in effect, court-directed, facilitated negotiation, rather than voluntary mediation. Notwithstanding the reference to a "mediation conference", the language used in the 2004 Act is not traditional mediation language. The mediator is not even so named. Instead, the Act of 2004 refers to the "chairperson" of the meeting and not the mediator. This perhaps in part explains how personal injuries mediation is often conducted in Ireland, by way of facilitated negotiations resulting in settlements rather than mediation in the strict sense of the word. This is not a criticism of how it has evolved and developed but perhaps an acknowledgment that it has developed in the manner envisaged by the 2004 Act. This is not in line, however, with what is

intended by the legislature in the 2017 or the 2022 Acts, where mediation is expressly defined as " a confidential, facilitative, and voluntary process in which parties to a relevant claim, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the relevant claim".[9]

Mediation under the Personal Injuries Resolution Board Act, 2022

The soon-to-be-commenced mediation-related provisions of the PIRB Act are the most significant development in the context of personal injuries mediation. These are due to be commenced before the end of 2023 and the Injuries Board has commenced its recruitment process for mediators and support staff for its new service. Section 11 of the PIRB Act amends the principal act to provide that, in addition to a claimant making an application to the Board for an assessment of their claim, they will now also have the option of applying for resolution of their relevant claim by way of mediation under Chapter 1A.

Representation

PIRB mediation will facilitate parties being represented by a legal advisor or obtaining independent legal advice if they so wish. Reference to "a legal advisor" suggests that perhaps only a solicitor is envisaged as a legal advisor. The entitlement to obtain independent legal advice is more open ended and accordingly could well include counsel instructed by the party's solicitor. However, the Act is silent on how this legal advice (or the mediation) is to be paid for.

Psychological injury

An interesting extension of the Board's powers to assess psychological injuries brings with it further considerations for PIRB mediation.[10] This is because psychological injuries are common in workplace and employment disputes, which have for this reason predominantly been required to come before the courts. In circumstances where the Personal Injuries Guidelines include guidelines on such injuries, not only can the Board now proceed to assess such claims (if liability is not in dispute), but parties might seek to mediate them. While liability is more often than not in dispute in such cases, they often settle due to the complex and lengthy nature of such proceedings, which in contrast have not traditionally attracted significant general damages. Costs usually greatly exceed damages in such cases. It may well be that the extension of the Board's powers will see a reduction in such proceedings in court. However, it is questionable whether the type of mediation that is to be provided by the Board could ever achieve a resolution for such disputes. These cases are complex in terms of both the law and the facts. Plaintiffs who have suffered psychological injury are often vulnerable, and there is the added factor of an ongoing employment relationship to manage, together with the individual relationships within that workplace.

According to the Board's recruitment campaign, mediators will conduct up to three mediations per day and "most mediations will be done via telephone or online". One of the essential skills sought for mediators is "shuttle mediation". It is difficult to imagine how, for example, a workplace mediation could ever be conducted within the framework envisaged by the Board. It is also questionable as to how such mediation could ever be party-led mediation (another golden rule of mediation) as opposed to Board-led mediation, driven apparently by efficiency factors. It is questionable as to whether this model will work for anything other than the most straightforward claims. Of course, it is also difficult to see why mediation might be required for such straightforward claims. In theory the Board's assessment process ought to be appropriate for such claims.

Conclusion

It is no longer debatable as to whether personal injuries disputes are suitable for mediation. This is now well established in practice and is due to evolve further when the third phase of the PIRB Act is commenced before the end of the year. It remains to be seen whether the form of mediation envisaged by the Board is a form that is suited to such disputes.

References

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2. Department of Enterprise, Trade and Employment. Minister Calleary announces the date for commencement of the second phase of the Personal Injuries Resolution Board Act 2022. Available from: https://enterprise.gov.ie/en/news-and-events/department-news/2023/may/minister-calleary-announces-the-date-for-commencement-of-the-second-phase-of-the-personal-injuries-resolution-board-act-2022.html#:~:text=Dara%20Calleary%20TD%20Minister%20of,effect%20from%204%20September%202023.
3. It is important to note that the provisions of the 2022 Act regarding mediation – Sections 3(a), Sections 4-6, Sections 8-10, *inter alia* – have yet to be commenced.
4. Section 14 of the Mediation Act, 2017.
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JERRY (JEREMIAH) HEALY SC

It was with great sadness that we learned of the death of our esteemed friend and colleague Jerry (Jeremiah) Healy SC on December 7, 2021.

A proud Corkonian, Jerry was initially educated through Irish at Coláiste Chríost Rí, and finished his secondary schooling at St Coleman's Diocesan College in Fermoy. When only 16 years of age he sat his Leaving Certificate. He gained admission to University College Cork and commenced his studies for a BA in Irish and Mathematics.

In 1974 he married a fellow UCC graduate, Dr Rosemarie Manning. After a brief spell teaching, he returned to UCC but this time to pursue a law degree. It was obvious that Jerry was very comfortable in an academic environment and had a great intellectual capacity. This was evidenced by the fact that while studying for his BCL, he managed to combine his studies with some extracurricular work tutoring Irish for Seán Ó Tuama, then Professor of Irish Literature at UCC, and also as a researcher for friend and future colleague Dermot Gleeson SC.

Jerry was an excellent student, securing a first-class honours degree; he was also awarded a scholarship to pursue postgraduate legal studies at Cambridge. On his return to Ireland he attended the King's Inns and was called to the Bar in 1980.

Dedication to justice

A consummate barrister who excelled in his field, as a junior counsel in Cork Jerry quickly established a solid professional reputation. His dedication to the pursuit of justice was unwavering, and his mastery of the law and oratory skills were evident to all as he practised in the courthouses of Cork and Kerry. He was admitted to the Inner Bar in 1995. On taking silk, he, Rosemarie and family moved to Dublin. In 1997 he was appointed counsel for the Tribunals of Inquiry (Evidence) Acts 1921 and 1979 (No.2) Order 1997, better known as the Moriarty Tribunal, whose remit was to examine certain payments to politicians.

Jerry Healy was not only an exceptional advocate and formidable barrister, but also a guiding light for those of us who sought his wisdom and guidance. He exhibited a tenacity that inspired respect from peers and opponents alike. Beyond his remarkable legal acumen, he was a warm and approachable colleague, who has left an indelible mark on members of the Law Library.

A man of many talents

Jerry was multi-talented. He possessed the rare ability to balance the demands of his profession with many other interests. In his youth he was an accomplished athlete: a middle-distance runner at interprovincial and national level. He was a sports enthusiast, who liked nothing more than to watch a hurling match or ride out with the Duhallow Hunt in North Cork. He was always intellectually curious and read widely in diverse areas: history, philosophy, literature. His gardens in Offaly were planted with old native trees and shrubs, the Latin names of which stayed with him until the end. That intellectual curiosity stood him well as an advocate, and his interrogation of a legal point was broad reaching and informed. As a senior counsel he was demanding but respectful of his junior colleague whose opinion he always sought. One colleague tells of long discussion into the early hours on the finer points of Hague Convention jurisprudence, Jerry's mind tripping lightly over the complex concepts, books and case law open everywhere, ideas spilling out, even as the rest of the room longed for sleep. That difficult case was fought to the bitter end by Jerry who showed true dedication, knowing, as he did, that the fees would be negligible. That colleague describes the case as one of the best illustrations of the search for justice by a barrister committed to the rule of law and the best interests of a young child.

Guardian of Irish heritage

A true visionary, he sought to make a tangible impact on his surroundings by immersing himself in the preservation of Ireland's historical landmarks, most recently securing the future of Russborough House and the Beit collection. Together with the late Knight of Glin, he was regarded as an authority on Irish eighteenth-century buildings.

One of his most remarkable achievements was the meticulous restoration of Ballybrittan Castle, which he and Rosemarie purchased in 1997. Recognising its immense cultural significance, he poured his heart and soul into the project. Through his efforts, the castle was returned to its former glory and was filled with modern art and fine Georgian and Irish furniture. Ballybrittan Castle, however, was by no means a museum. He was a fabulous raconteur who loved to entertain and host friends in the Castle. Many of us were fortunate enough to experience the magic of his hospitality at Ballybrittan. He had an unparalleled talent at creating an ambiance that will live long in the memories of those who knew him.

Sadly, illness struck in 2021, and he faced this trial as I am sure he would have faced any challenge – with grace and courage. He embraced each day with an infectious positivity. During his last few months, he was cared for at home in Ballybrittan by Rosemarie who selflessly looked after him, providing comfort and care with a steadfast devotion that touched all of us who had the privilege of witnessing it. Jerry departed us on December 7, 2021, and said farewell to family, friends and colleagues at his requiem mass at St Peter's Church, Rhode, Co. Offaly. In keeping with his love for the Irish language, Ceol an Afrinn by Seán Ó Riada was played. He is buried in a hillside graveyard overlooking the lake and oratory at Gougane Barra; he returned to his native Cork to finally rest in a majestic setting befitting a great man.

Never was the sean-fhocail 'ní bheidh a leithéid arís ann' so true as when we remember our friend Jerry Healy. Ar dheis Dé go raibh a anam uasal.

TD

THE FAMILY COURTS BILL 2022

Family law practitioners have expressed concern regarding the role of the District Court under the new Family Courts Bill 2022.

Wendy Mallon-Doyle BL

The long-awaited Family Courts Bill 2022 (the Bill) was published on December 1, 2022, and is currently before the Seanad. This Bill provides us with the opportunity to address the shortcomings of our family justice system and to provide a fit-for-purpose Family Courts system, which protects and progresses the constitutional and human rights of children and families. The Bill aims to bring efficiency, fairness and modernity to the Family Courts system.

The Bill effects two primary changes. First, it establishes a tripartite Family Courts system in Ireland, with concurrent jurisdiction between what will be known as the Family District Court, Family Circuit Court and Family High Court. Each of these will be staffed with specially trained and/or tempered Family Court judges. The second, and perhaps most concerning, is the proposed transfer of a significant amount of family law proceedings from the High and Circuit Courts to the Family District Court, with the Bill explicitly restricting the right to initiate proceedings in the Family High Court to instances where there is "a special reason to do so". The monetary jurisdiction of the District Court is to be extended to proceedings where the value of the land is up to €1m and unlimited in cases of consent divorces, effectively removing the Circuit Court as a court of first instance.

The role of the District Court

By moving adjudication from the higher courts to the District Court – the court that even before this Bill was the most under-resourced – there is growing concern that this Bill will effectively reduce the amount of time and consideration parties receive in the determination of their rights. The already overburdened District Court has, and retains under the Bill, sole jurisdiction over sensitive childcare and domestic violence matters. These matters concern the two groups with discrete constitutionally entrenched rights under Articles 41 and 42A of the Constitution. Given the high constitutional value placed upon the interests of families and children, it is vital that adjudication upon their interests continues to be given the time and energy required. Unfortunately, it is impossible to imagine that the proposed increase in jurisdiction won't exacerbate existing delays.

The District Court was established to act expeditiously, not with the view that it would carry out the type of hearings or analysis required in Circuit Court family law cases. The constitutional requirement to ensure proper provision in such cases often necessitates consideration of complex financial and property issues, all of which significantly impact upon the lives of the parties involved. It is a view shared by many family law practitioners that the District Court is not the appropriate forum for these types of proceedings.

The requirement to ensure proper provision remains when ruling a consent divorce, and thus the possibility of a judge being required to carry out lengthy consideration of financial documents cannot be ruled out, particularly in circumstances where parties opt to represent themselves. Or, the agreement could fall apart on the steps of the District Court only to have to be transferred to a higher court. Therefore, granting the District Court unlimited jurisdiction to rule on consent divorces may not be so straightforward and could, in reality, lead to increased delays and costs.

Mixed response to inclusion of ADR

Another important element of the Bill is Section 8, which provides a set of core principles to which the Court, legal practitioners and parties must have regard. These principles include encouraging parties to actively engage in alternative dispute resolution (ADR) prior to entry into family law proceedings.

The move towards ADR has seen mixed responses from practitioners. The aims of reducing time, costs and the adversarial nature of proceedings are shared; however, it may not be appropriate in all cases. Clarity is needed on the place of party consent, and regard must be had to the constitutional right of access to the courts.

In the main, the Bill marks a significant development in Irish family law and sets a welcome intention to assist in the development of a modernised Irish Family Courts system with the well-being of children and families at its heart. However, it is suspected that the proposed jurisdictional changes will do more to congest the adjudication of family law matters than to relieve the capacity constraints within the system. Fine tuning on this and other areas of the Bill is urgently required.

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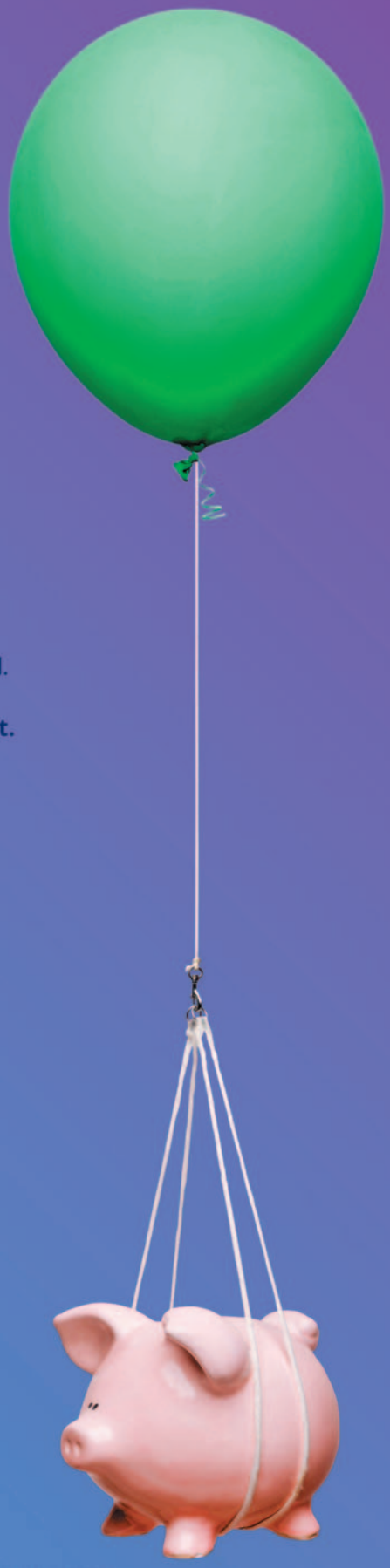

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