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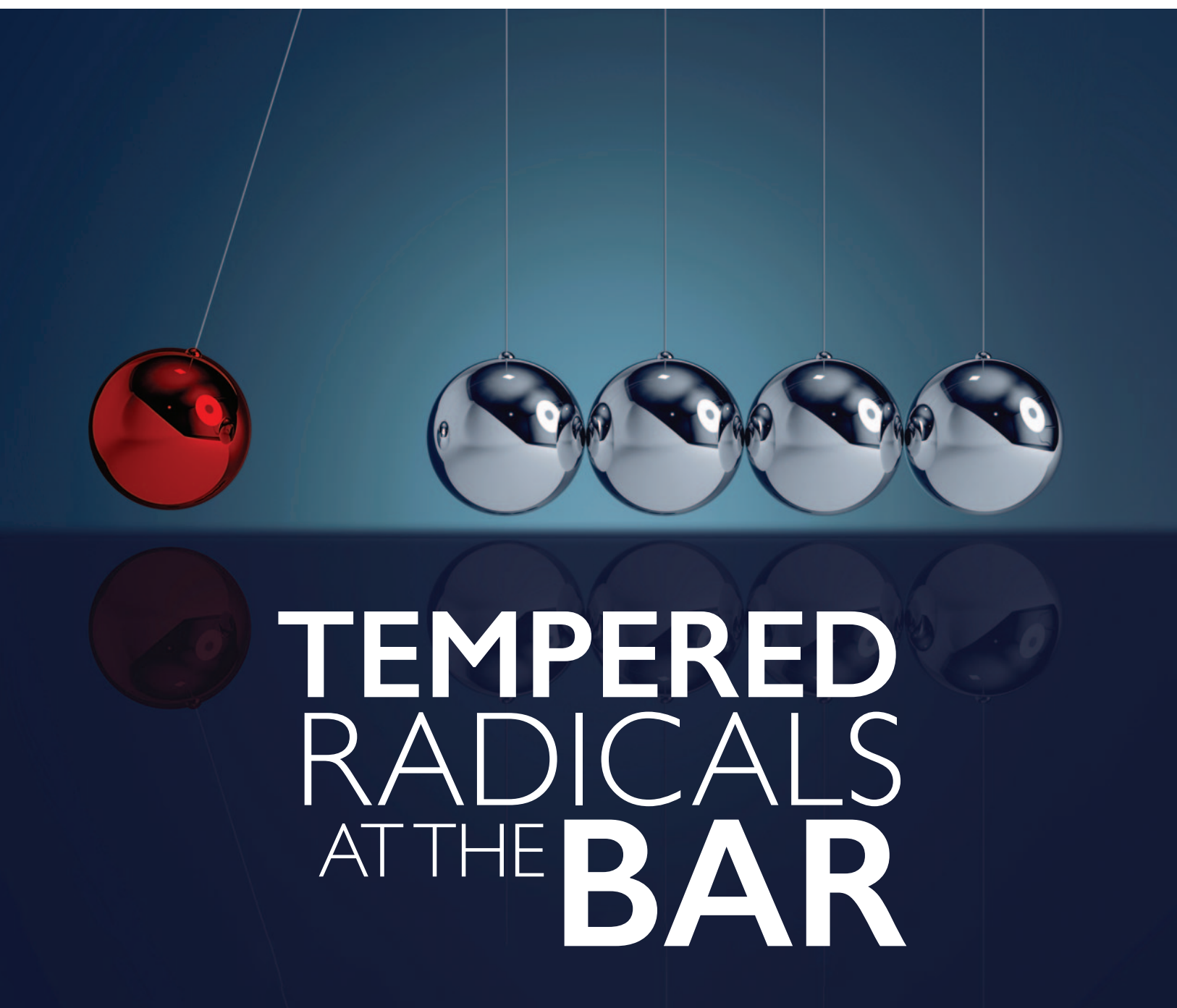
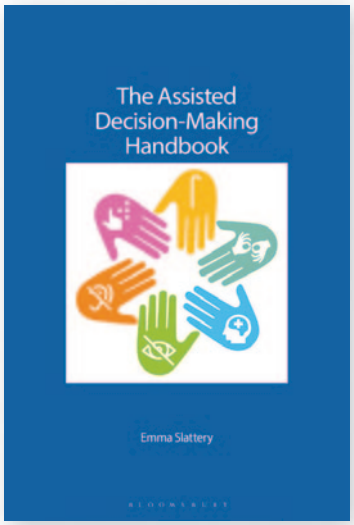
THE BAR REVIEW

VOLUME 29 / NUMBER 2 / APRIL 2024



TEMPERED RADICALS AT THE BAR

BLOOMSBURY PROFESSIONAL IRELAND'S SPRING 2024 PUBLISHING HIGHLIGHTS



The Assisted Decision-Making Handbook

By Emma Slattery

Brings together all of the relevant information providing practitioners with an indispensable one-stop resource to the Assisted Decision-Making (Capacity) Act 2015 (as amended) in Ireland.

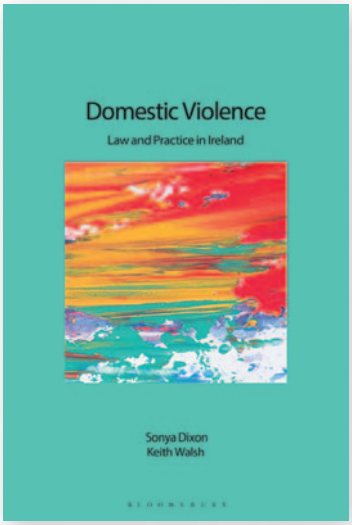
Pub Date: Apr 2024 | **ISBN:** 9781526525437
Paperback Price: €195 | **eBook Price:** €172.16

Irish Family Law Handbook, 7th edition

By Deirdre Kennedy and Elizabeth Maguire

A must-have title for any family law practitioner, *Irish Family Law Handbook* is a convenient source of reference for the most up-to date consolidated and annotated family law legislation.

Pub date: Feb 2024 | **ISBN:** 9781526525703
Paperback Price: €215 | **eBook Price:** €189.82

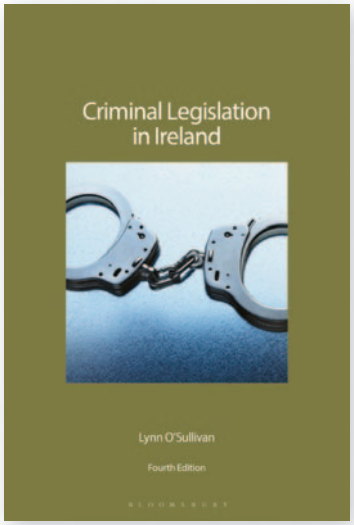


Domestic Violence: Law and Practice in Ireland

By Sonya Dixon and Keith Walsh

A practical and easily digestible explanation of recent case law and changes to this area, such as the protections now available to victims of domestic violence including giving evidence by live television link.

Pub Date: Feb 2024 | **ISBN:** 9781526522399
Paperback Price: €185 | **eBook Price:** €163.33

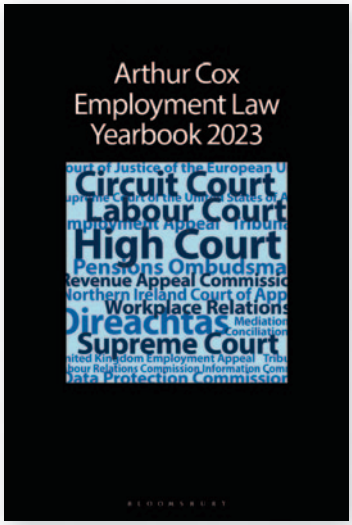


Criminal Legislation in Ireland, 4th edition

By Lynn O'Sullivan

Consolidates the most important and frequently-used pieces of criminal legislation and facilitates easy reference to legislation for criminal practitioners and students alike.

Pub Date: Apr 2024 | **ISBN:** 9781526529183
Paperback Price: €205 | **eBook:** €180.99



Arthur Cox Employment Law Yearbook 2023

The 2023 edition of this long-trusted resource covers developments in employment law, equality, industrial relations, pensions, taxation relating to employment and data protection law.

Pub Date: Apr 2024 | **ISBN:** 9781526527981
Paperback Price: €99 | **eBook Price:** €87.40

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CONTENTS

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

Direct: +353 (0)1 817 5025
Fax: +353 (0)1 817 5150
Email: molly.eastman@lawlibrary.ie
Web: www.lawlibrary.ie

PUBLISHERS
Published on behalf of The Bar of Ireland by Think Media Ltd
Editorial: Ann-Marie Hardiman
Paul O'Grady
Colm Quinn

Design: Rebecca Bohan
Tony Byrne
Meliosa Fitzgibbon

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Calum Petit

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

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WORLD BAR CONFERENCE, MAY 15-17, 2024

The World Bar Conference will bring members of independent referral Bars from across the globe to Ireland for a fantastic programme of speakers and discussions.

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

Preparations are well underway for the World Bar Conference (WBC), which is being hosted by The Bar of Ireland and The Bar of Northern Ireland from May 15-17. The WBC is organised by the International Council for Advocates and Barristers (ICAB), an organisation established in 2002 as a forum for members of independent referral Bars around the world.

The WBC commences with a reception in the Royal Courts of Justice in Belfast on the evening of Wednesday, May 15, and the guest speaker will be Naomi Long MLA, Minister for Justice in the newly formed Northern Ireland Executive.

A full schedule of keynote addresses and panel discussions will take place over the two days, in the Titanic Hotel, Belfast on Thursday, May 16, and in Dublin Castle on Friday, May 17. The topics featuring on both days are those at the forefront of current legal debate and attendees will earn a full 10 CPD points over the two days. Each session will consist of keynote speakers, followed by a panel discussion.

Navigating the Crossroads

Following a welcome address by The Rt Hon. Dame Siobhan Keegan, Lady Chief Justice of Northern Ireland, Mr Justice David Scoffield, High Court Judge, Northern Ireland, and Joanna Cherry KC MP, Member of Parliament, Edinburgh South-west, will give keynote addresses on 'How legal systems can navigate conflicts between communication norms, cultural diversity, and human rights in the digital age'.

Rule of Law Under Fire

The second discussion in Belfast will look at 'How we respond and hold those responsible to account when statehood collapses'. In a session chaired by Peter Coll KC from the Bar of Northern Ireland, the key contributors will be: The Rt Hon. Victoria Prentis KC MP, Attorney General for England & Wales; Blinne Ní Ghrálaigh KC, Matrix Chambers; and, Prof. Fionnuala Ní Aoláin KC, Hon. Prof. of Law, Queen's University Belfast.

AI Unleashed

To discuss what is definitely one of the hottest legal topics at the moment, Emma Wright, Partner at Harbottle & Lewis, Uwais Iqbal, founder, Simplexico, and Prof. David Leslie, of the Alan

Turing Institute, are the keynote speakers addressing the questions of 'How can the law keep pace with technological innovation and application, and to what extent will the integrity of our legal systems be strengthened or weakened by their adoption?'

Law in the Era of the Climate Crisis

Following a welcome address in Dublin on Friday morning by Mr Justice Donal O'Donnell, Chief Justice of Ireland, Sarah Mead, Climate Litigation Network, and Catherine Higham, Grantham Research Institute on Climate Change and the Environment, will share 'Global insights on how we balance the rights and interests of the many amidst the urgency'.

Humanity on the Move

This session will ask if 'our international courts and bodies are up to the mark and what reforms should now be considered', and the keynote speakers are Gillian Triggs, Office of the UNHCR, The Rt Hon. Lord Ben Stephens, Justice of the Supreme Court, United Kingdom, and Caoilfhionn Gallagher KC, Doughty Street Chambers.

An Independent Bar and an Independent Judiciary

Last, but very much not least, Mr Justice David Barniville, President of the High Court of Ireland, chairs a roundtable discussion featuring Chief Justices from a number of jurisdictions, on 'the nature of their roles and work, and how an independent Bar can contribute to facing contemporary issues'.

Gala Dinner

A Gala Dinner will be held on Friday evening in the Crypts in Christchurch Cathedral, and we are honoured to have Helen McEntee TD, Minister for Justice, to deliver a closing address.

All in all, we are promised two very stimulating days of discussion and debate, not to mention networking opportunities galore, and members are encouraged to register at: https://www.worldbar2024.com/.

BARRISTERS AND SOCIAL CHANGE

The role of barristers in changing society is just one topic covered in this edition.

Helen Murray BL
Editor
The Bar Review

In this edition, Diane Duggan BL explores how legal practitioners can be instrumental in bringing about change to society. The concept of 'tempered radicals' is explored – essentially the idea that an individual's unique background and the culture of where they work can produce a dual identity, which, when harnessed in the right way, can lead to important social change. This is a thought-provoking article; if you are having an existential dilemma, this piece will assuage your concerns and reassure that our work is meaningful.

Ireland's new regime for screening foreign direct investment (FDI) is the subject of an article by Donogh Hardiman BL and Méabh Smyth BL. This article provides a comprehensive overview of the new Screening of Third Country Transactions Act 2023, and the ramifications for Ireland.

Catherine Dunne BL examines Building Regulations and quality control in the construction industry, and what happens when there are issues with compliance.

Incredibly, another referendum is on the horizon. Jonathan Newman SC provides a clear explanation of the Unified Patent Court Agreement and what it can achieve for member states. This is essential reading for all members, not just those practising in EU law and intellectual property.

Finally, our interview in this edition is with Uwais Iqbal, an expert in the uses and potential of AI in legal services. Uwais will be speaking at the World Bar Conference in May, and a report from that major event will feature in the next edition.

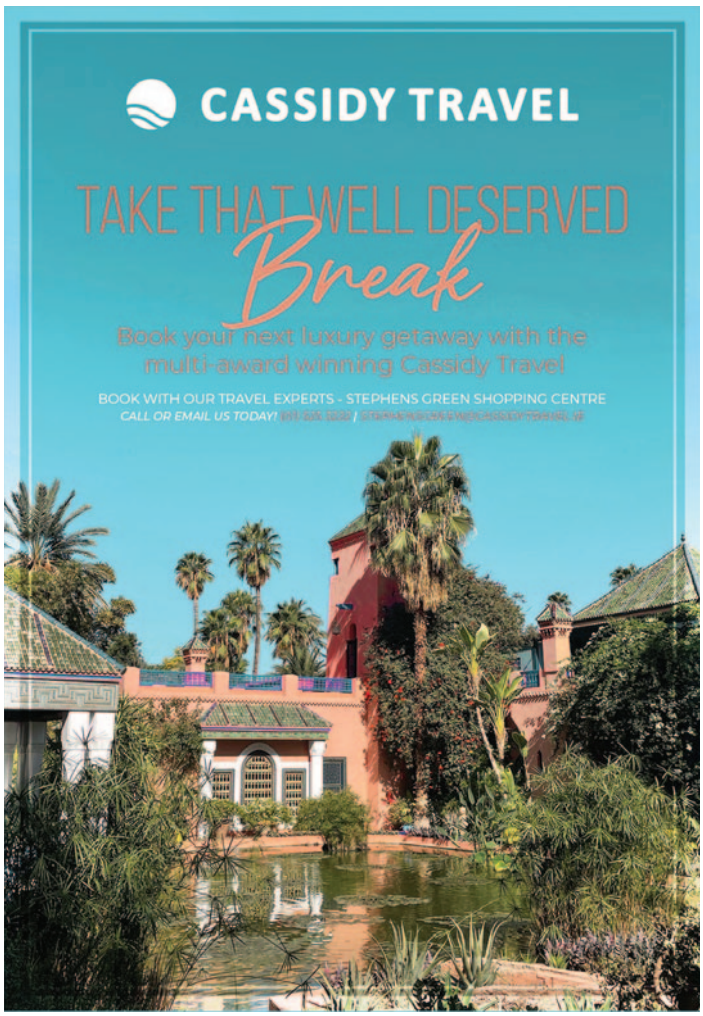
Specialist Bar Association news

Joint IACBA and IILA event

The Immigration, Asylum and Citizenship Bar Association (IACBA) held a joint event with the Irish Immigration Lawyers Association (IILA) titled 'Facing the Horizon – Navigating Ongoing and Future Challenges in International Protection and Immigration Law' on Friday, March 1. The unexpected snow didn't deter delegates from attending this illuminating event both online and in person.

Members were joined on the day by Ms Justice Mary Faherty, who chaired the event. Panellists discussed topics such as: judicial review and children's rights; national security and deportation; procedural rights and material reception conditions; new safe country designations; and, procedural changes for international protection applicants. This event was a great way for our colleagues in The Bar of Ireland to network with solicitors working in the field, and brought to mind significant challenges being faced in the current legal climate.

From left: David Leonard BL; Katie Mannion, solicitor for the Irish Refugee Council; Siobhan Clabby BL; Sunniva McDonagh SC; Michael Conlan SC, Chair, IACBA; Ms Justice Mary Faherty; Carol Sinnott, IILA; and, Tom Coughlan, Chair, IILA.



MIDBA – Not Love, Actually

From left: Claire Hogan BL; Paul O'Higgins SC; Idriss Kechida, Global Head of Privacy, Match Group; and, Michael O'Doherty BL (speaking).

The Media, Internet and Data Protection Bar Association (MIDBA) held a fitting seminar in the Gaffney Room on Valentine's Day on love scams and what actions barristers can take when faced with such a case. The seminar was chaired by Michael O'Doherty BL, who was also the first speaker, followed by Idriss Kechida, Global Head of Match Group, and Paul O'Higgins SC. Michael covered topics such as the wide variety of scams people can fall victim to online, whether the apps can be held liable, and the legal processes faced when attempting to find justice. Idriss spoke on the efforts his company is making to protect users while abiding by GDPR laws.

FSBA Annual Conference 2024

The Financial Services Bar Association (FSBA) Annual Conference was held in the Dublin Dispute Resolution Centre on February 15. Chair John Breslin SC welcomed attendees to the event and introductory remarks were made by Attorney General Rossa Fanning SC. The conference consisted of three panels of barristers, solicitors and experts working in financial services. The first panel, moderated by Úna Tighe SC, covered consumer claims and consumer protection. The second was on anti-money laundering and the criminal, civil and regulatory liability, moderated by John Breslin SC. Criminal enforcement of financial services law was the subject of the third panel, which was moderated by Remy Farrell SC. Each discussion was followed by a spirited Q&A, with conversation continuing into the drinks reception at the Sheds after the conference.

From left: Patrick O'Reilly SC (speaking); Úna Tighe SC; Colm Kincaid, Director of Consumer Protection, Central Bank of Ireland; and, Mike Hawthorne, Partner, Pinsent Masons (London).

PELGBA Planning Conference

The Planning, Environmental and Local Government Bar Association (PELGBA) held a hybrid conference on February 2, titled 'New Bill, New Dawn?' This conference was open to Law Library members, solicitors, and any other members who would be interacting with the forthcoming Act and list. There was significant interest in this event, with 360 attendees signing up to attend.

Mr Justice David Holland expertly chaired the event, while contributors Eamon Galligan SC, Tom Flynn SC, Oisin Collins SC, Aoife Carroll BL, and Christopher Hughes BL examined key provisions of the Planning and Development Bill 2023, which was published by the Government in November 2023.

Discussion began with how the Bill proposes to consolidate existing legislation and introduce significant changes to the planning system in Ireland. Speakers analysed key elements of the published Bill, including any changes that had been introduced since the previous draft Bill published earlier in 2023. They also highlighted proposed changes to the area of plans and policies, development control, enforcement, judicial review and costs.

From left: Christopher Hughes BL; Margaret Heavey BL; Eamon Galligan SC; and, Mr Justice David Holland (speaking).

This event offered a unique opportunity to network with various attendees across the litigation field.

Construction Bar Association Tech Talk

The Construction Bar Association (CBA) held a discussion titled 'Is AI the new toolkit for construction disputes?' on Thursday, February 22. The event was chaired by James Burke BL, and discussed the role of AI in construction disputes and how it can assist. It also considered whether AI is a tool to be taken seriously or if it is another fad.

Led by speakers Stephen Dowling SC and Eimear McCann of Trialview, delegates were taken through the key elements of AI, detailing how it works and the role it can play in document-heavy areas of law. Both speakers have considerable knowledge in litigation, and their ideas and innovation were well received.

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Running the gauntlet

The Sports Law Bar Association (SLBA) will host its first joint sports law CPD between the Bar of Ireland and the Bar of Northern Ireland at 4.30pm on Friday, April 26, at the Inns of Court, Chichester Street, Belfast. The title of the event is 'Running the Gauntlet: Lawyers at Sports Disciplinary Hearings: An Athlete's Perspective', and the panellist are: Elizabeth Colvin, Olympian and solicitor; Paddy Barnes, Olympian and Irish Athletic Boxing Association (IABA) Ulster Club Development Officer; and, Conor Sally, Cathaoirleach, Omagh St Enda's GAA Club, and solicitor.

The joint CPD will take place as an informal fireside chat with the three panellists, chaired by Emma Davey BL. The panellists will explore their experiences in sport and insights into the difficulties faced by athletes when involved in disciplinary and/or legal issues during their careers. The purpose of the event is to understand how lawyers can better represent and advise athletes during such vulnerable times.

We are very pleased to announce that the Attorney General of Northern Ireland, Dame Brenda King, has kindly agreed to open the joint CPD and the Attorney General of Ireland, Mr Rossa Fanning SC, will bring the event to a close.

This will be a free hybrid CPD open to both barristers and solicitors from across the island of Ireland. Book your tickets here:
https://ti.to/BarofIreland/slba-26april_sdf.

The CPD will be followed by a drinks reception in the Inns of Court.

Young Bar Committee and PRDBA

The Young Bar Committee and Professional, Regulatory and Disciplinary Bar Association (PRDBA) held an event on February 6 titled 'Building Your Practice – Disciplinary Complaints in the Regulated Professions'. It was aimed at members of the junior Bar and was a fantastic opportunity for them to get practical advice and insights into this area. Procedures regarding the Medical Council, Nursing and Midwifery Board, Dental Council and others were reviewed. Colm O'Neill BL spoke on 'The Lifecycle of a Fitness to Practice Complaint'. During a fireside chat, speakers Mariana Verdes BL, Hugh McDowell BL, Nathan Reilly BL, and Caoimhe Daly BL discussed how to build a practice in this field.

Upcoming – TIBA Annual Conference 2024

The Tort and Insurance Bar Association (TIBA) Annual Conference will be held on April 27 in ATU Letterfrack, Co. Galway with a dinner following in Renvyle Hotel. Confirmed speakers so far are: Ms Justice Mary Rose Gearty; Ms Justice Mary Faherty; Rossa Fanning SC, Attorney General; Sara Phelan SC, Chair, Council of The Bar of Ireland; Jeremy Maher SC; Eoin McCullough SC; Martin Canny BL; and, Mark Tottenham BL.

An EU law perspective on tax litigation

The Tax Bar Association (TBA) held a joint event with the Irish Society of European Law (ISEL) on January 24. This was open for attendance by Law Library members, solicitors, tax advisors and those in in-house settings. The event was chaired expertly by Grainne Duggan BL. Speaking at the event was Catherine Donnelly SC. Discussion centred around tax litigation from an EU perspective, taking into account key and recent EU case law and the application in the CJEU and national court fora. This was very well attended and was a valuable opportunity to network within various areas in this litigious field.

Valuable tax insights

Ensuring that you pay the minimum required taxes is crucial, says Nick Charalambous, Managing Director with Alpha Wealth. The company says it offers valuable insights to maximise tax benefits in Ireland. Firstly, Nick emphasises leveraging your pension contributions, highlighting the tax boost where €60 becomes €100, offering a substantial 66% uplift initially, with tax-free growth within the pension. Secondly, Nick suggests exploring the Employment Investment Incentive Scheme (EIIS), enabling up to 50% tax back over several years by investing in select Irish companies. Thirdly, he recommends utilising the Gift Allowance Scheme for children, allowing tax-free gifting of up to €3,000 per parent annually. Lastly, Nick advises utilising the Revenue Online System (ROS) to claim various expenses like medical costs and rent relief, potentially yielding significant returns with minimal effort, up to four years retrospectively. By implementing these strategies, the company says individuals can reduce their tax burden effectively while optimising financial gains.

Look into Law 2024

The Bar of Ireland's Transition Year programme, Look into Law, welcomed 100 students from 100 schools, including 27 DEIS schools and spanning 24 counties, from February 26-29. Originally introduced in 2015, this was the ninth year of Look into Law, which has continuously evolved to accommodate students from across the country and aims to offer Transition Year students a thorough understanding of the legal system, court proceedings, and the responsibilities of barristers.

From left: Eva Quinn, Ashton School; Katie Rice, Colaiste an Chraoibhin; and, Lucy Quinlan, Regina Mundi College. All travelled from Cork to attend Look into Law.

Eabha Cullen from St Kevin's Community College, Wicklow (left) and Shona Cussen from St Angela's Ursuline School, Waterford, put their legal knowledge to the test.

Inspiring inclusion

The Bar of Ireland held its ninth International Women's Day (IWD) dinner on March 7, 2024, at The Honorable Society of King's Inns. The keynote speaker at the event was activist and sports journalist Joanne O'Riordan, who shared her journey of overcoming adversity and her advocacy for people with disabilities. To mark IWD 2024, the Bar embraced this year's global theme of 'Inspire Inclusion', which emphasises the importance of diversity and empowerment in all aspects of society, and the crucial role inclusion plays in achieving gender equality.

From left: Katie Nagle BL and Niamh Harnett BL enjoying a complimentary coffee in the Dock on International Women's Day.

From left: Tracy Ennis Faherty BL; Joanne O'Riordan, activist and sports journalist; and, Sara Phelan SC, Chair, Council of The Bar of Ireland.

THE INTERNATIONAL COUNCIL OF ADVOCATES AND BARRISTERS

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World Bar Conference 2024

Our profession's response to global challenges

MAY 15-17, 2024

Our rules-based legal order – both at the national and international levels – continues to face disruption from a variety of factors, including advances in technology, geopolitical instability, and environmental issues.

What value do barristers and advocates bring in the face of such challenges? Can our shared legal and ethical compass guide us through these periods of change?

The Bar of Ireland and The Bar of Northern Ireland are honoured to invite you to the World Bar Conference 2024, where the response to key global challenges will be considered by the collective insights and experiences of recognised experts, in discussion with independent referral Bars from across the globe.

10 CPD POINTS

The conference represents over 10 CLE/CPD points in just two days.

AN UNMATCHED LINE-UP OF KEYNOTE SPEAKERS

Navigating the Crossroads: Cancel Culture, Free Speech and the Right to Offend

How can legal systems navigate conflicts between communication norms, cultural diversity, and human rights in the digital age?

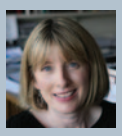
- **The Hon. Mr Justice David Scoffield**
- **Joanna Cherry KC MP**


Rule of Law Under Fire: Existing in an Age of Conflict

When statehood collapses, how do we respond and hold those responsible to account?

- **The Rt Hon. Victoria Prentis KC MP**
- **Blinne Ní Ghrálaigh KC**
- **Prof. Fionnuala Ní Aoláin**





AI Unleashed: Tomorrow's Legal Landscape and the New Normal?

How can the law keep pace with technological innovation and application? And to what extent will the integrity of our legal systems be strengthened or weakened by their adoption?

- **Emma Wright, Harbottle & Lewis**
- **Uwais Iqbal, Founder, Simplexico**
- **Prof. David Leslie, Alan Turing Institute**



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The conference schedule has been carefully designed to ensure that attendees get the best of both Belfast and Dublin.

This is an excellent professional development and networking opportunity at which practitioners will have the chance to meet and collaborate with barristers and advocates from across the globe.

Evening Welcome Reception
The Bar of Northern Ireland, Belfast city centre
Includes tour of the Great Hall, Royal Courts of Justice
Wednesday, May 15

Conference
Titanic Hotel, Belfast Thursday, May 16

Traditional Irish Night and Drinks Reception
The Sheds, Distillery Building, Dublin city centre Thursday, May 16

Conference
Dublin Castle, Dublin city centre Friday, May 17

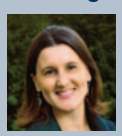
Gala Dinner
Christ Church Cathedral, Dublin city centre Friday, May 17

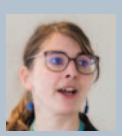
BOOK YOUR PLACE

Tickets are limited and early booking is essential.
View the full line-up and conference details at: WORLDBAR2024.COM

Law in the Era of the Climate Crisis: Unearthing the Legal Challenges
Sharing global insights on how we balance the rights and interests of the many amidst the urgency can help shape the response of our legal systems.

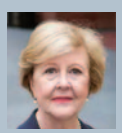
- **Sarah Mead, Climate Litigation Network**
- **Catherine Higham, Grantham Research Institute on Climate Change and the Environment**



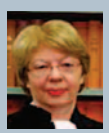


Humanity on the Move: Legal Frontiers in Migration and Human Rights
Are our international courts and bodies up to the mark? What reforms should now be considered?

- **Gillian Triggs, Office of the UNHCR**
- **The Rt Hon. Lord Ben Stephens, UK Supreme Court**
- **Caoilfhionn Gallagher KC**



An Independent Bar and an Independent Judiciary: Perspectives from Chief Justices in ICAB Jurisdictions
A roundtable discussion featuring Chief Justices from a number of jurisdictions on the nature of their roles and work, and how an independent Bar can contribute to facing contemporary issues.



- **The Hon. Raymond Zondo (South Africa)**
- **The Hon. Ms Justice Elizabeth Dunne (Ireland)**
- **The Hon. Dame Susan Glazebrook (New Zealand)**
- **The Rt Hon. Lord Carloway (Scotland)**
- **The Rt Hon. The Baroness Sue Carr (England & Wales)**
- **The Rt Hon. Dame Siobhan Keegan (Northern Ireland)**
- **The Hon. Justice Mark Livesey (Australia)**

View all panellists and speakers at: WORLDBAR2024.COM.

Communications consultations

The Bar of Ireland Marketing Team hit the road to Limerick and Galway on February 19 and 20 to provide one-to-one communications assistance and photographs for 27 members of the Bar. Over the two days, the team spoke with barristers about the importance of brand presence and staying active online, in addition to consulting members on profile updates, business card design, LinkedIn management and profile photos.

Demand for communications consultations continues, with over 186 bookings completed since September 2022. Members interested in a one-to-one communications consultation can book in online using the Microsoft booking form on the member website.

Marketing Manager Andrew Bradley (above left), and Web & Digital Officer Cathy Glynn welcomed barristers in Limerick Courthouse in February, providing one-to-one communications assistance and photography for members.

RETROGRADE OR REAL REFORM?

While the proposed Family Courts Bill has laudable objectives, there are serious concerns that its provisions will in fact significantly increase the difficulties faced by litigants.

Sara Phelan SC Deirdre Browne BL

> "If there is to be a unified family law jurisdiction, as we strongly believe there should be, it must at this time be established at Circuit level."

Aiming to reshape the family justice system and improve its foundation by enhancing efficiency, accessibility and user-friendliness, the Family Courts Bill promises to place families at the centre of legal proceedings while fostering the use of specialised supports and emphasising alternative dispute resolution mechanisms. Unfortunately, close scrutiny reveals a disconnect between the provisions of the Bill and its laudable objectives. It is difficult to ascertain how the current proposal to move work from the Circuit Court to the District Court will improve the experience of, or outcomes for, family law litigants.

Unclear rationale: reallocation of divorce, judicial separation and cohabitation applications to District Court

The Bill envisages a significantly expanded role for the District Court in family law matters. In the matter of contested cases, Pt 8 of the Bill confers jurisdiction on the District Court in divorce, judicial separation, cohabitants disputes, and other cases that involve land having a market value of up to €1m. This will capture a significant number of cases for separation and divorce, particularly outside Dublin.

The rationale for assigning complex multi-issue cases to the District Court, typically characterised as a court of summary jurisdiction, is not clear. The District Court is already

> The involvement of a court that is not equipped to implement its orders cannot be in the interest of family law cases.

overworked and overstretched, resulting in litigants experiencing substantial delay in getting heard in a Court the hallmark of which should be a speedy hearing of a single-issue family law matter.

The background

Prior to the publication of the Bill, many issues had been identified as needing to be addressed in the conduct of family law proceedings. Allocation of jurisdiction was not one of them. For example, concerns raised during the course of Oireachtas hearings in 2019 revolved around the volume of cases in the District Court, and the manner, places, and times that sittings in the District and Circuit Court take place, as well as issues around specialist training, case management and the *in camera* rule.[1]

The distribution of family law cases between the different courts has been clear and had not given rise to any calls for change. In its 2019 report on reform of the family law system, the Oireachtas Joint Committee on Justice and Equality endorsed the continuing relevance of the recommendations for structural and legal reform made by the Law Reform Commission in its 1996 report.[2] This concluded that a unified family courts system drawing on the resources of both the District Court and Circuit Court would work well, but noted that:

"On balance, we believe that our provisional recommendation in favour of a Circuit-level Family Court is correct. We do not believe that remedies such as divorce, annulment or judicial separation should be made available at the level of a court of summary jurisdiction. Therefore, if there is to be a unified family law jurisdiction, as we strongly believe there should be, it must at this time be established at Circuit level".

Case progression

The case progression process that underpins the effective case management of contested cases in the Circuit Court is dealt with by the County Registrar and there is no equivalent infrastructure in the District Court. The machinery of the Circuit Court anticipates and provides for the interim and interlocutory hearings required to bring a contested case to resolution. How or why, or even if, the existing Circuit Court infrastructure could be recreated at District Court level is not clear. Pre-legislative scrutiny of the Family Courts Bill was waived and there has been no impact assessment.

Consents

The Bill itself and recent media commentary draw an artificial distinction between contested cases and consent cases.

In consent cases, s.69 provides that the Family District Court has unlimited monetary jurisdiction where agreement is reached by the parties to family law proceedings. While the proposal appears superficially attractive, it does not stand up to scrutiny. As with all litigation, family law cases tend to settle once the case has travelled through the system so that its true parameters are revealed, once relevant matters have been thoroughly investigated and, importantly in a family law context, once parties have been required to make full disclosure of their respective means. This is achieved through the infrastructure of the case progression procedure. In the majority of cases, the prospect of a consent cannot be anticipated and if the proceedings commence in the Circuit Court, there is no advantage to having them transferred to be ruled in the District Court: to do so is simply to engage a further layer of complication and cost.

Moreover, while a case may be ruled on consent, this may not be its final outing. The multi-faceted nature of the order emanating on separation or divorce, or on conclusion of a cohabitants case, regularly gives rise to difficulties in implementation (e.g., a property does not sell, anticipated funds are not forthcoming, arrangements for children run into unexpected problems) requiring the re-entry of the case and court intervention to bring matters to a conclusion. The involvement of a court that is not equipped to implement its orders cannot be in the interest of the orderly management of family law cases.

In cases of true consent where separating couples have agreed all terms between them or simply want a divorce, there is no advantage to transplanting what can be achieved quickly and efficiently in the Circuit Court to the District Court.

The family home issue: a potential for a two-tier family justice system

An unintended consequence of the change in jurisdiction is the real potential for this Bill to create a two-tier family justice system. Under the Bill as it is currently drafted, individuals owning land (which might generally include a family home) with a market value of up to €1m will be automatically assigned to the District Court with attendant summary jurisdiction, regardless of the complexity of their issues.

For land, including family homes, with a market value over €1m, the proceedings will be heard in the Circuit Court, a court that has the infrastructure already in place to allocate time to ensure that parties are fully heard, ensuring in-depth consideration of family law cases (**Table 1**).

The consequence of the arbitrary €1m jurisdiction will mean that families of a particular socioeconomic class will benefit from a more in-depth consideration of their cases, ultimately creating a disadvantaged, divided system.

Table 1: Implications of the €1m jurisdiction.

Land incl. family home value	Jurisdiction
Less than €1,000,000	**District Court:** A Court of summary jurisdiction
More than €1,000,000	**Circuit Court:** A Court with well-established infrastructure to have cases managed and fully heard to ensure high-quality justice

Complexity: the nature of divorce and judicial separation

Divorce, judicial separation and cohabitation applications can present challenging and complex legal and factual scenarios. As well as addressing the breakdown in relations, where the parties have not been able to resolve their differences, the courts must disentangle economic and welfare interests, and adjudicate on what is in the best interests of dependent children.

The misnomer of saving costs

Proponents of the Bill will argue that it is cost-effective and will achieve a reduction in legal costs, but this is highly unlikely to be realised and could result in the opposite effect.

If a case commenced in the District Court is to be transferred to the Circuit Court by reason of complexity or otherwise (or where "special circumstances" exist that would make it more appropriate for the proceedings to be dealt with in the Family Circuit Court, according to the Bill), this will lead to delay (and thereby increased costs), when it would have been preferable to have such cases commenced in the Circuit Court to begin with.

Further, legal fees are calculated on the basis of the time and complexity of the issues involved and thus, the costs to litigants will not be reduced by simply reassigning cases to the District Court.

Additional concerns

It is important to note that concerns are not limited to the ones raised above. Section 68 restricts an applicant from commencing family law proceedings in the High Court unless there is a "special reason" to do so. The impetus for the restriction is unclear and, it is submitted, unnecessary, particularly in circumstances where written judgments emanating from the High Court are critical for precedent and the development of the law in a common law jurisdiction.

Further, additional concerns arise in the areas of joint applications and risks of undue influence, and the adequacy of its articulation of the constitutional rights of children. The redivision of the proposed court system into geographical areas untethered from existing structures is also problematic.

Conclusion: what are we asking of the Oireachtas and Government?

It must be stressed that the proposal to reorganise court jurisdiction creates a significant threat to families and ensuring their access to justice. We strongly urge Government to:

1. Meet with us: the Bill is currently at Third Stage before the Seanad with no indication of when it will move to Committee Stage. We have communicated with all Oireachtas members, including Government, and are seeking to engage and articulate the issues raised above.
2. Pause: this Bill is ambitious and important, and getting it right will have a transformative impact on citizens' experience of our justice system. Getting it wrong means stress and cost, and a societal cost, as the ripple effect is felt across families and communities.
3. Amend and resource: the Bill needs to be amended to ensure that, at a minimum, contested proceedings are retained in the Circuit Court, whose judges possess vast experience in such matters. A wider discussion on court resourcing and its implications for access to real and workable justice is one the Bar is keen to engage in.

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MORE THAN A FLASH IN THE RAM

Uwais Iqbal is one of the speakers at the World Bar Conference, which is being held on these shores from May 15-17, and here talks about AI and how it is more than just the latest tech trend.

Colm Quinn
Senior Journalist, Think Media Ltd

> "We're seeing this emerging field around how machines can manipulate language and how AI can be used in the legal context more specifically".

Everyone is talking about artificial intelligence (AI), no matter what industry they work in, says Uwais Iqbal: "Everybody wants it, but nobody's really quite sure about how to do it the right way".

AI is here, and its impact is real and major, but it will not solve every problem or replace lawyers. These are some points that Uwais would like lawyers to know. He is an AI practitioner and worked in a number of legal tech start-ups before founding his own company, Simplexico, which offers AI education, design and implementation in the legal services industry. He will be speaking at the World Bar Conference during the Belfast day of the Conference on Thursday, May 16. His talk will be part of the afternoon session on the topic of 'AI Unleashed: Tomorrow's Legal Landscape and the New Normal?'

AI is here to stay

AI has been in development for many years, but seemed to explode onto the scene when ChatGPT started making (and writing) headlines in late 2022/early 2023. Even with all the attention, Uwais says there are many people who are still not really aware of what the technology is: "I don't think anybody has meaningfully gone through an education about what AI is and how to think about it, and how to conceptually understand how it fits in with the bigger picture

of what's happening. A lot of what I'm going to be speaking about at the World Bar Conference will be trying to level set and give people an introductory account of AI so that at least conceptually, they can understand what the technology is, why it's so impactful, and some of the different areas where it can be useful in the legal industry".

Uwais wants delegates to leave his talk feeling comfortable about thinking and talking about AI. Some may think generative AI is just the latest 'next big thing', and that the agendas of conferences will be filled with something else in 12 to 24 months' time, but Uwais believes it is more than a fad: "We think generative AI is something a bit more significant than that for a couple of reasons. I think the first one is that with generative AI, it's the first time language has become computationally malleable. If you think about finance and the financial industry, it operates in numbers, and machines could always manipulate numbers. So there was always a big synergy in terms of how computers could be used in finance. I think now with generative AI, in particular with large language models, we have that same ability to manipulate text as they do in finance with numbers. So I think we're seeing this emerging field around how machines can manipulate language and how AI can be used in the legal context more specifically".

The legal industry contains a plethora of textual data, says Uwais, and AI's potential to be useful in this area is enormous: "Prior to generative AI, the types of things lawyers did on a day-to-day basis had a very small overlap with the types of things machines were good at mimicking or imitating. Machines or AI could already do very basic things around extracting data or labelling data, which meant the potential application of AI in legal was very, very restricted. It was more about data structuring, data management, and things like that. But now with generative AI, what's happened is that the overlap with the types of things machines can do on a day-to-day basis and the types of things legal professionals do on a day-to-day basis is much, much larger".

Some examples could include summaries, drafts, simplifying information, etc., but it's far from being able to do everything a lawyer does, says Uwais: "I think the question is getting the right interaction in place so that we're not thinking about replacing lawyers, but we're more thinking about how our lawyers can work with machines".

In the courtroom, there is potential for AI to be used for transcription, for example. Uwais also notes that there are AI legal research tools that would allow barristers to find cases with precedent to their own cases much faster.

The hot from the hype

There's a lot of hype around AI, which leads to differing (and sometimes unrealistic) expectations of what it can do. It's important to remember that all AIs are more akin to Microsoft than Merlin. Setting realistic expectations around where the technology is and what it can do is one of the biggest challenges Uwais faces in his work. Another issue is that the standard of quality for the legal industry is exceptionally high, and the outputs of AI systems right now are nowhere near good enough yet. That is not to say it is not yet useful to lawyers, says Uwais: "As opposed to automating what a lawyer does, think about how it could be more of a copilot or a GPS piece of navigation kit, that helps somebody get to their desired outcome much faster or with better quality and with better precision".

AI systems are based on data and one aspect of legal data is that it is often confidential and extremely sensitive: "There's usually lots of obligations and constraints and restrictions which come around legal data or data which is used in a legal context. So that makes it a bit more tricky in terms of how AI can be applied to that data. So there's a lot more thought that has to go into maintaining data privacy, maintaining some of those restrictions and maintaining compliance because it's highly regulated".

From conception to misconception

Uwais says that the biggest misconception around AI is that it will solve all your problems. He explains that it will only solve very specific problems, and the more specific people can be about a problem, the more likely it is that AI will offer a solution.

Uwais sees two AI narratives emerging: "One is this competition narrative, where it's either you have machines or you have humans. And I think the 'will AI replace lawyers?' headline drives to that narrative of wanting to replace lawyers with machines".

The other narrative is a collaborative one, he says: "Where AI systems, just like technology systems, digital systems, we use them in collaboration in terms of working practice, both in our personal lives and in our professional lives".

Uwais explains that AI and automation are not synonymous: "Usually when people think about AI, they jump to automation. And automation usually means replacing a human with a machine, if you think about industrial automation and things like that. Automation is one way AI can be applied, but there are other interesting ways that AI can be applied. You can use AI, for example, to accelerate outcomes. You can use AI to provide assurance. You can use AI to provide assistance. So there's different methods and techniques of how AI can be applied".

Automation is not what anybody wants from the legal industry. Uwais says you still want people to have the final say: "So it's more thinking about how AI can be used in those other fashions of acceleration, of assurance, of assistance and things like that".

The wheels of justice turn slow, but it feels at times like we're struggling to keep the wheels on AI development. So how can the legal industry and the law keep up with a technology that is developing at a blistering pace? Uwais says that the important thing is dialogue, and that there are two sides to the AI world: "There's the policymakers, the regulators, and the legislators who are thinking about the

Simplexico and spare time

Uwais holds an BSc and an MSc in Physics from Imperial College London, and worked previously in machine learning for Eigen Technologies, and as a data scientist with Thomson Reuters and ThoughtRiver. AI throws up many big questions, and Uwais is not afraid of these, having completed a Master's in Philosophy from King's College London, and another in Islamic Studies from SOAS University of London.

Uwais' business Simplexico (simplexico.ai) is involved with AI education, design and implementation in the legal services industry. He decided to start the company because he felt he had something different to offer: "I built up maybe six or seven years of experience actually building, designing, and delivering these AI systems in the legal industry. At some point, I was frustrated with the state of play. There was a lot of focus on product, and I thought there's an opportunity to do something around a services business or a consultancy for AI and legal. I jumped ship, as you do when you're frustrated with things, thinking we could do things differently. And then I set up Simplexico, thinking about how we can do AI consulting and AI services for legal. And I think the timing was really fortunate because I started the company in August of 2022, and then ChatGPT and generative AI kicked off in November, December time".

Uwais says he has had to do a lot of thinking about how the company works with customers and the type of work it wants to do. Simplexico now focuses on three main areas, one of which is AI education: "We do a lot of work around educating the industry around AI, going into firms, running training sessions, running programmes, doing a lot of advocacy".

The second area of focus is design work in terms of identifying use cases. The third area is bespoke implementation, building bespoke use cases for the practice of law or for legal workflows.

Uwais is busy building his business so may need someone to create an AI to make some spare time for him. But when he does get a free moment, he enjoys going to the gym and catching up on some reading. He has also recently finished a Master's in Philosophy.

technology and its impact on society. And then there's the other side where there's the technologists or the practitioners who are busy building away on the technology or building away on the applications using the technology. Usually the two worlds don't interact that much or speak to each other that much, which is a problem".

Uwais believes space should be created for dialogue and communication: "So that policymakers and regulators and legislators can communicate with practitioners so that there is that dialogue and there is that flow of information, and there are things which are kept in mind in terms of how this technology can be used in a sensible and responsible way".

Regulation is emerging, with the recent EU AI Act trying to take control of the area, and the UK likely to legislate soon also. Regulation is something that AI companies are going to have to be much more aware of in the future, says Uwais.

Time to wake up

Whether your dreams of AI are filled with doom or excitement, Uwais says it is time to wake up to the fact that it is here: "If you go to ChatGPT or if you go to Microsoft Copilot or if you go to Google Gemini or Claude from Anthropic, and you use these models today, you can immediately see how impressive the technology already is. And who's to say where it will end up in the next 12 months or the next 24 months or the next three to five years?"

When it comes to the legal industry, Uwais asks: "On the one hand, how do we find the right application areas for the technology so that we can still maintain the quality of service around legal advice and the delivery of legal services, but also thinking about adopting and integrating this technology in responsible and sustainable and sensible ways?"

> "We do not want a situation where governments and other bodies are retrospectively trying to manage AI once the genie is out of the bottle."

Education is also crucial, says Uwais. People need to be technically competent in using AI tools and intelligence-enabled software, so that they can use them sensibly and responsibly: "Then I think there's also something bigger to think about where AI is impacting every sector of society. What does the future of AI and legal look like? And how do we make sure that the conversations we have today or the questions we ask today and the collaborations we think about and explore, set us up for the best future for AI in the legal industry?"

Uwais says we do not want a situation where governments and other bodies are retrospectively trying to manage AI once the genie is out of the bottle: "It's still the early days with AI and legal. So there is still the opportunity to have those conversations and think about those questions. And I think I would encourage delegates at the conference to think about those questions and engage in those conversations because that dialogue is unfolding at the moment around AI legal".

LEGAL UPDATE

VOLUME 29 / NUMBER 2 / APRIL 2024

A directory of legislation, articles and acquisitions received in the Law Library from January 12, 2024, to March 7, 2024
Judgment information supplied by Vlex Justis Ltd.
Edited by Vanessa Curley, Susan Downes & Clare O'Dwyer, Law Library, Four Courts.

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Forty-first Amendment of the Constitution (Agreement on a Unified Patent Court) Bill 2024 – Bill 7/2024
Health (Miscellaneous Provisions) Bill 2024 – Bill 5/2024
Prohibition of Fossil Fuel Advertising Bill 2024 – Bill 14/2024 [pmb] – Deputy Paul Murphy, Deputy Mick Barry, Deputy Gino Kenny, Deputy Bríd Smith, and Deputy Richard Boyd Barrett
Protection of Employees (Trade Union Subscriptions) Bill 2024 – Bill 6/2024 [pmb] – Joan Collins
Residential Tenancies (Amendment) Bill 2024 – Bill 8/2024 [pmb] – Deputy Mairéad Farrell and Deputy Eoin Ó Broin
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Finance (State Guarantees, International Financial Institution Funds and Miscellaneous Provisions) Bill 2023 – Bill 66/2023 – Committee Stage
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Local Government (Mayor of Limerick) and Miscellaneous Provisions Bill 2023 – Bill 63/2023 – Committee Stage – Report Stage
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For up to date information please check the following websites:
Bills and legislation
http://www.oireachtas.ie/parliament/
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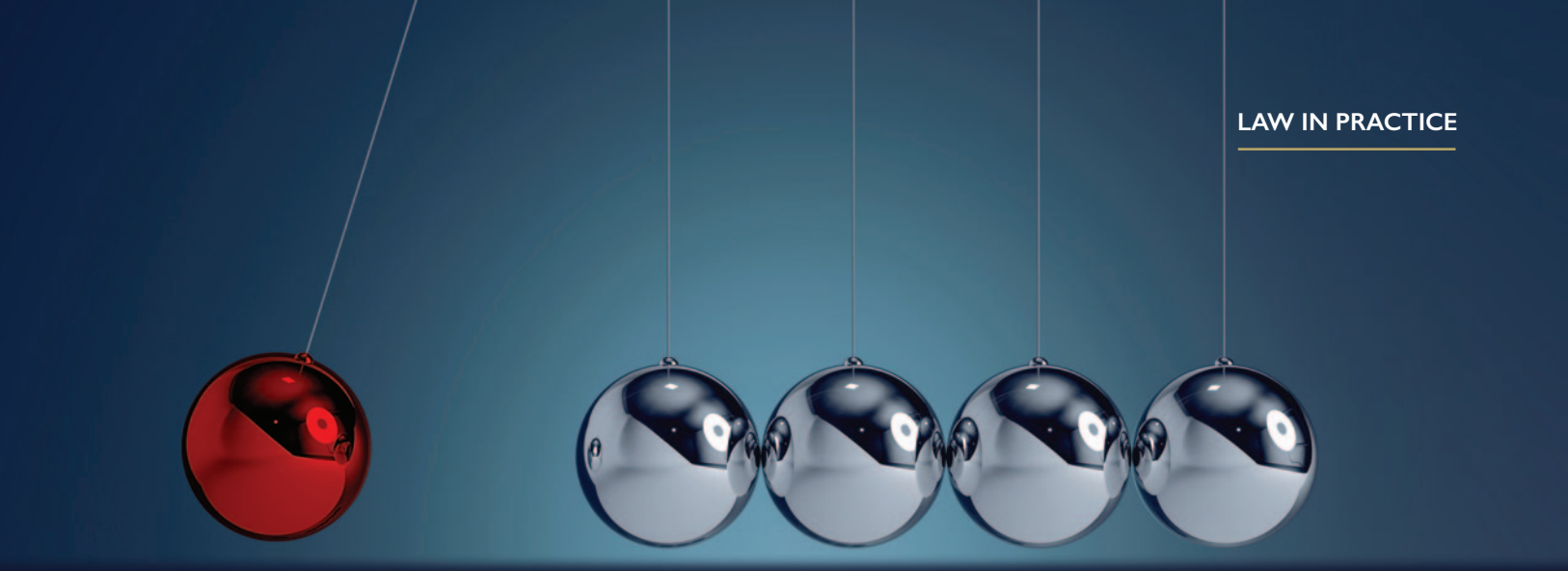

TEMPERED RADICALS AT THE BAR

What impact can barristers have beyond the courtroom?

Diane Duggan BL[1]

> 'Institutional work' is an area of research found within sociology and management scholarship, which looks at human activity and its impact on systems or institutions.

What value can barristers bring to social change? As legal practitioners, can we, and should we, examine the impact of our work beyond the simple tally of court judgments? In this article, I propose to look at the question through the lens of sociology and management theory, and by reference to a recent change in the law brought about by a collaborative effort of *pro bono* barristers, an NGO and politicians.

'Tempered radicals' is a concept coined in 1995 by two management academics named Meyerson and Scully.[2] They produced a seminal paper about individuals who face particular challenges and opportunities within organisations where the culture of the organisation and their own unique backgrounds gives them a form of dual identity. This 'outsider within' status allows them to identify and utilise opportunities for progressive change. The paper was written at a time when higher ranking representation from less typical groups (such as

women and ethnic minorities) became more prevalent across industries and it applies today just as much to the Bar as anywhere else.

The concept of 'institutional work' can be a useful lens through which to consider the question of social change. Institutional work is defined as "the purposive action of individuals and organisations aimed at creating, maintaining and disrupting institutions".[3] It is an area of research found within sociology and management scholarship, which looks at human activity and its impact on systems or institutions. The case study in question here involved cross-sectoral input of NGOs, politicians, and a pivotal role by barristers.

The case study

In 2011, the Ana Liffey Drug Project announced a new strategy to address the problem of drug addiction in Dublin. They, along with Merchants Quay and other addiction charities, advocated for the implementation of medically supervised injection facilities (SIFs) in Ireland. They believed that a health-led approach to drug addiction would succeed where decades of punitive interventions had failed. A central and radical part of their proposal involved the supervised injection of controlled drugs, the mere possession of which was a criminal offence. Ana Liffey approached the Bar's *pro bono* scheme, the Voluntary Assistance Scheme (VAS) in 2014, whereupon a legislative drafting group was formed of junior and senior counsel with expertise in medical law, criminal law, licensing and legislative drafting. Over the course of a year, a stand-alone piece of legislation was drafted and presented to the then drugs Minister Aodhán Ó Riordáin in June 2015. By December 2015, the proposal was approved by cabinet and in May 2017, the President signed it into law. It was subsequent to this that resistance to the social change emerged, in the form of objections from a local primary school, which challenged the grant of planning permission for the initial SIF at Merchants Quay. From an institutional work perspective, an interesting dilemma arose: where does the greater social value lie when the interests of two societal groups conflict? Was it with the primary school or the people experiencing drug addiction? The question to be determined by the High Court, however, was not engaged with social value – it simply related to the technical aspects of planning laws and judicial review processes (of course more detailed analysis could examine the social value principles that underpin planning laws – if constitutional rights were at stake, this might have been otherwise). As it was, the matter was remitted to An Bord Pleanála and permission was ultimately granted. It is hoped that the first SIF will finally open later in 2024.

The case study that was conducted involved interviews with NGO personnel, former civil servants, every drugs minister from 2011 to 2020, and barristers who drafted the legislation. Media reports, Dáil debates and court judgments were examined. Qualitative analysis of these datasets elicited very interesting findings, particularly for the Bar.

> Certain laws may have little or no effect on society at a broad level, but those that do can provide a fascinating study.

All interviewees pointed to the exceptionally persuasive arguments made by Ana Liffey. Their position was well researched and evidence based, even ultimately convincing reluctant civil servants. More than their argument, however, was the manner in which they networked, quietly persuading numerous politicians at every level of the validity of their cause, over a sustained period of time; they played the 'long game'. After 2015, when the VAS had handed over the draft legislation, numerous ministers mentioned in interview that Ana Liffey had the weight of the Bar behind it and this was pivotal. It was highly unusual to bring ready-made legislation to policy debates, but this made the argument much more straightforward. "Having an eminent sort of entity handing you a piece of legislation that debunks a lot of the talk about it's, you know, potentially unconstitutional or in any way problematic," was the comment of one drugs minister.[4] The legislation that passed was almost identical to that drafted by the VAS. To transform strategic policy into an Act of the Oireachtas when the policy was not contained in any programme for government was an enormous achievement for an NGO. The NGOs and politicians all pointed to the legitimating effect of the Bar, and the weight the Bar brought to this entire process in bringing about the successful change.

Changing the law

The law is not noted for its dynamism or capacity to change, although this has often been one of its strengths. For laws to be effective and durable, stability and consistency is critical. Societies are governed by laws that affect everyone's lives. Changes in law can bring about fundamental changes to the way society operates. If laws are the rules that society chooses to be governed by, any impetus for change is worth examining. Certain laws may have little or no effect on society at a broad level, but those that do can provide a fascinating study. If we think of legal systems as institutions, then attempts to disrupt laws or create new laws fall squarely within the domain of institutional work.

Any exercise in dissecting the processes around law and social change needs to have regard to a number of important factors. The structures of legal services and the jurisprudential doctrines of the judiciary matter. Laws can be determined both by individual cases and broader legislative change; thus, the legislature and political motivations matter. Some aspects of these will be examined further here.

Activism and social change

Activism is a term that frequently springs to mind when considering social change. In institutional work, those involved in creating or disrupting institutions are considered to be 'activists'; thus, organisations such as NGOs would be described as activists. It is a term that has had use in legal scholarship and it can have important implications both for the judiciary and for legal practitioners. 'Judicial activism' can be a loaded term with multiple meanings, from tendencies to deviate from precedent to more bold assertions that personal preferences and policy positions of judges come into play.

Then there is the legislature. Elected representatives have a broad range of ambitions for society. Arguably, of necessity, the healthiest democracies have politicians with the widest possible range of views, where consensus or assent can sometimes lead to dangerous stagnation. Public interest groups, trade unions and sectoral representatives all strive to finesse the art of influencing politicians' views and, ultimately, the laws that are made.

US public interest lawyer Prof. Tom Stoddard wrote in 1997[5] that the creation of laws has at least five goals:

1. To create new rights and remedies.
2. To alter the conduct of the government.
3. To alter the conduct of citizens and private entities.
4. To express a new moral ideal or standard.
5. To change cultural attitudes and standards.

He argues that the first three are more traditional roles of law, but the last two are representative of efforts to do more with law than simply make rules; they strive to bring about social change. Many examples of such social changes came about in the 1950s, 60s and 70s in both the US and Ireland. Stoddard points to the influence of the US civil rights movement to bring about the significant results in cases such as *Brown v Board of Education*[6] and *Roe v Wade*.[7] These changes emerged from the courts. However, he states that the expression of new moral ideals or change in cultural attitudes or standards tended to emerge from the legislature as opposed to the courts, and asserts that there has been no greater example of this in American law than the Civil Rights Act of 1964. He highlighted how this Act did more than introduce a new set of rules and remedies, but "the Act brought into being a whole new model of conduct that, consciously and deliberately, overturned doctrines embedded in American culture – and more widely speaking, European culture – for several centuries".[8]

The need for social change will often arise before us, as practitioners, particularly in cases involving an alleged infringement of a constitutional right. Sometimes the remedy and its ensuing judgment will instigate a change in society, or alternatively, albeit rarely, prompt the legislature into action in the creation of new laws. The nuances of where, how and if such enduring change can occur is interesting.

The jurisprudential era that Stoddard refers to above was defined by champions of natural law, eschewing the legal positivism of earlier decades. The civil rights era jurisprudence struck a chord in the Irish courts – that moral standards were inherent in individuals and were not created by society or the courts (whereas earlier legal positivism located the existence and content of laws on social facts and not merits). O'Donnell C.J.[9] (writing extrajudicially on constitutional interpretation in Irish courts over the last 80 years) highlighted the parallels between the US Warren court and the Irish judgments of Walsh J. and Ó Dálaigh C.J. at that time.[10] This natural law era gave rise to the development of unenumerated rights in Ireland, and ultimately gave rise to huge strides in social change and progress in Irish life. O'Donnell C.J. suggested that the narrative that emerged at this time was that the courts and indeed the judiciary were the drivers of progressive change. Whether the courts should be the drivers of social change is not clear, however, and he emphasised the need for critical examination of processes as opposed to outcomes. He cautioned that there was perhaps a need for more rigorous contemporary analysis at the time,[11] but the tendency was to assess a case on its outcome as opposed to its process.

The outcomes were welcomed, but the process in hindsight raises some questions regarding subjectivity of the courts, pointing to comments made by some such as Kenny J. that the courts were akin to the legislature in their law-making power, but did not have to face an opposition,[12] and further comments by Walsh J. that courts needed to be attuned to shifts in public opinion.[13] O'Donnell C.J. posits that being attuned to shifts in public opinion is the role of other organs of state and not the courts. Such comments and the jurisprudence of the time could certainly be described as judicial activism and even a form of judicial innovation, which will often be necessary. However, O'Donnell C.J.'s central theme is that such subjectivity may one day be harmful:

"The monsters that might come are not simply the prospect that a court will become colonised by idealogues who will impose results which we dislike, but rather, and perhaps more dangerously, that it will come to be generally accepted in Ireland, that if there is no better guide to a court's decision than the subjective views of the judge, then the imposition of views by a judicial decision is a permissible process".[14]

As lawyers, we are alive to where and how social change can come about. Adherence to the separation of powers and the principles of commutative and distributive justice, dictate that broader societal change will happen at legislative level, but legislative action can often be triggered by the courts. Stoddard reminds us that legislatures cannot always be trusted and judicial law making should not be ruled out entirely. Legislative law making is not to say that lawyers cannot play an active part in such change, as the example of Ana Liffey demonstrates.

> The cab rank rule that requires us to not take a view and to remain objective was instrumental in bringing about hugely significant social change.

Tempered radicals

Being aware of our professional obligations is central to our work. However, each barrister's own identity and human nature will have an impact on how they work. Where each of us feature in the hierarchy of the Bar and the courts influences this. Institutional work has much to say about how critical the position and role of actors within organisations is. In many walks of life, people might work in one area but come from backgrounds or groups that are very much at odds with their work, or simply don't overlap with their work, resulting in a form of dual identity. Meyerson and Scully's paper regarding this concept struck a significant chord: one might feel like one doesn't quite fit in or have the same background as others in one's profession, but this can be a valuable asset as one navigates one's way to more senior levels where one can have unique impact. This juxtaposition of identities can cause a certain ambivalence, but the writers emphasise that this ambivalence is a virtue and the greatest strengths of both aspects of a 'dual identity' can be harnessed. Effectively, individuals can bring the principles and interests of their backgrounds or 'one identity' into the realm of the other in order to bring about change. But by being sensitive to their own working environment and their place in the hierarchy, they will have expert knowledge in how best to introduce and pitch the change. Furthermore, the ongoing long-term nature of such dual identities allows the person to develop strategies to best realise their interests and goals over time. This concept recognises the enormous value that a multiplicity of identities can bring to a process of change or evolution that organisations or institutions require in order to be sustainable. It applies to the law as much as any other institution.

Activism and lawyers

The cab rank rule, which ensures that barristers will accept work in any case once they have capacity to do so and it is within their area of expertise,[15] is one of the most fundamental principles governing how barristers work. It ensures right of access to legal representation regardless of any alleged action. The really interesting thing about the cab rank rule is how it contrasts with so many other devices that feature in social change. Institutional work (defined earlier) and social movement theory,[16] would point to the role of narratives, framing and logics, whereby there is an appeal to personal values in order to become part of the movement.[17] The cab rank rule requires none of this; on the contrary, it requires a solid detachment in the deployment of one's legal expertise. The rule came under threat in England last year when a group of lawyers declared that they would no longer subscribe to it if it required them to prosecute climate activists.[18] Subsequently, the four jurisdictions of Ireland, Northern Ireland, Scotland, and England & Wales issued a joint statement vehemently defending the rule, emphasising that "it is for judges and juries to decide and to judge, and that passing judgment is not the role of advocates".[19] Barristers can never refuse work for personal views or beliefs about the client or the matter at hand. Non-lawyers might ask where is the line between personal values and a willingness to accept instructions for any side, to defend to the best of their ability? The response is that an outcome might happen to be one we are personally aligned with, which can be pleasing, but it is not the point or the function of our role.

Jurisdictions without an independent referral Bar have not had the benefit of the cab rank rule, and the line between the personal interests of lawyers and their cases was far less obvious. The notion of 'movement lawyering' is something that has developed over decades in the US. There had been a tendency in US courts in the 1960s to push through societal change in what became known as 'legal liberalism'. Scott L. Cummings, Professor of Law at UCLA, describes how this presented itself as "activist courts and lawyers pursuing political reform through law",[20] and was understandably controversial. He goes on to outline how this has since evolved into a concept of 'movement liberalism', which better preserves the integrity of the legal system by allowing social movements to lead the charge on social change, and lawyers can assist the process but do not drive it, nor do the courts. Thus the modern concept of 'movement lawyering' recognises the vital role lawyers can play in social change, but critically, they are just one part of an integrative approach, which draws on many facets of society. The scope for lawyers to play an active role in social change remains, but it is part of a much wider picture of strategic, long-term efforts towards sustainable change. This modern concept is precisely the model we have at work in Ireland. Furthermore, it is the cab rank rule that enhances the effectiveness of this model.

The Ana Liffey case study is an example of how the independent referral Bar, of all the groups involved in bringing about the change, had the greatest degree of detachment, and this ultimately served to enhance the status of the Bar's involvement. The cab rank rule that requires us to not take a view and to remain objective was instrumental in bringing about hugely significant social change.

The concept of tempered radicals described earlier illustrates a tension that can exist for those who are engaged in their profession but bring a diversity of life experience to it. Nobody can claim that personal life experience will not and must not inform our professional roles. We can observe the cab rank rule

> In a world where more innovative approaches to social problems are required, we at the Bar have a significant role to play.

and simultaneously engage in work with other groups that strives to bring about socially desirable results. It is within this tension that *pro bono* schemes such as the VAS are vital. The VAS is a link between the Bar and NGOs. It assigns barristers to assist NGOs in their causes (which will often be about some form of social change) on the basis of the cab rank rule, and neither the VAS, nor the Bar, take a view on whatever the cause of the NGO may be.

Conclusion

Scholars of social change and institutional work are becoming increasingly aware of the greater impact that cross-sectoral groups working together towards a common objective can have. There will be few examples as tangible here as the first SIF opening in Ireland later this year. A key feature of that initiative's success lay in the range of actors from a wide variety of experiences and expertise. In an era where calls to action and mobilisation for change can so often be reactionary and confrontational, the innovative approach of tempered radicals from cross-sectoral groups in the name of broad-spectrum change can be uniquely effective.

As sole traders, it can be easy to underestimate our impact as a collective, as a profession. In a world where more innovative approaches to social problems are required, we at the Bar have a significant role to play. There is huge potential to utilise our skills in addressing the challenges of the 21st century, and this potential goes beyond the courtroom.

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A NEW REGIME FOR FDI SCREENING

The Screening of Third Country Transactions Act 2023 is expected to be commenced later this year.

Donogh Hardiman BL

Méabh Smyth BL

> The Regulation creates a co-operation mechanism between EU member states and the European Commission with regard to FDI screening.

The Screening of Third Country Transactions Act 2023 (the Act) was enacted on October 31, 2023, and is expected to be commenced by the end of Q2 2024. The Act creates, for the first time in Ireland, a statutory screening process applicable to foreign direct investment (FDI) based on considerations relating to the security or public order of the State. Ireland is one of the last European Union (EU) member states to introduce such a screening process. This has been widely interpreted as a measure of the Irish authorities' appreciation for the particular importance of FDI to Ireland's economy and their reluctance to take any step that might be perceived as restraining such investment.

These policy considerations are reflected in the tone set by the Department of Enterprise, Trade and Employment (the Department) (which has primary responsibility for the operation of the Act) in its draft document 'Inward Investment Screening – Guidance for Stakeholders and Investors', published in February 2024 (the Draft Guidance), for example, where it states:

"Foreign investment remains key to Ireland's economic growth and development. It is anticipated that only a small number of investments, mergers or transactions might pose a risk to our security and public order and so, the investment screening mechanism must be proportionate and tailored to these risks, without undermining Ireland's attractiveness to inward FDI more generally".[1]

FDI screening in the EU context – permitted and encouraged but not (yet) compelled

Given this reluctance, it is not surprising that the impetus behind the Act's introduction is of EU rather than domestic Irish origin. Regulation (EU) 2019/452 establishing a framework for the screening of FDIs into the Union (the Regulation) has been applicable since October 11, 2020. However, this is not an instance of Ireland implementing (as arises with Directives) or complying with (as more typically arises with Regulations) EU law. Rather it is, in principle at least, an instance of Ireland voluntarily introducing a national law measure that has been permitted under EU law.

FDI screening by EU member states potentially engages both EU and member state competences. To the extent that such screening relates to non-EU states, it falls (by operation of Article 207(1) of the Treaty on the Functioning of the European Union (TFEU)) within the common commercial policy, an area in respect of which the EU has exclusive competence pursuant to Article 3(1)(e) of the TFEU.[2] However, to the extent that such screening is based on considerations of the national security of the member state in question, these considerations are within the exclusive competence of the member state as recognised, *inter alia,* in Article 4 of the Treaty on European Union (TEU) and Article 346 TFEU.

Accordingly, the effect of the Regulation is to permit member states to adopt screening legislation in respect of FDI originating outside of the EU (extra-EU FDI) and to prohibit such investments or to make them subject to conditions where a member state considers it necessary on grounds of security or public order. The Regulation further creates a co-operation mechanism between EU member states and the European Commission with regard to FDI screening. This mechanism involves, *inter alia*, an obligation on the member state screening an investment to notify the European Commission and all other member states in that regard,[3] and the possibility for other member states to provide comments[4] and for the European Commission to provide an opinion[5] to the screening member state. While the screening member state is to give "due consideration" to any such comments or opinion, the final decision remains a matter for the member state.[6]

As of February 28, 2024, 22 EU member states had notified screening mechanisms to the European Commission pursuant to a reporting obligation provided for in Article 3(7) of the Regulation. Ireland, together with Bulgaria, Croatia, Cyprus and Greece, had not yet reported any such mechanism as having been adopted.

On January 24, 2024, the European Commission proposed (the Proposal) the repeal of the Regulation and its replacement with a new regulation (the Proposed Regulation). The Proposed Regulation would have the effect, *inter alia,* of compelling EU member states to operate screening mechanisms at least in respect of FDI affecting certain key areas. In this regard, the adoption of the Act might be interpreted as an instance of Ireland availing of a closing window of opportunity to voluntarily adopt a system of FDI screening before being compelled to do so.

A dichotomy in the EU mindset in respect of FDI screening?

In certain respects, the issue of FDI screening involves a tension between two competing impulses on the part of the EU institutions. On the one hand, in respect of FDI between EU member states (intra-EU FDI), there is the traditional impulse towards free movement and market integration, which is inherently sceptical of national measures likely to hinder intra-EU cross-border activity. On the other hand, there is the increasing concern to protect the integrity of the single market from actions directed from outside of the EU.

This latter impulse was voiced by then European Commission President Jean-Claude Juncker in his 'State of the Union' address on September 13, 2017, in which he addressed the European Commission's then plans in respect of FDI screening:

"We are not naïve free traders. Europe must always defend its strategic interests … If a foreign, state-owned, company wants to purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen in transparency, with scrutiny and debate. It is a political responsibility to know what is going on in our own backyard so that we can protect our collective security if needed".

Leaving aside the political and policy imperatives at play, the legal distinctions between FDI screening of intra-EU FDI as opposed to extra-EU FDI is a recurring theme in the limited case law of the Court of Justice of the European Union (CJEU) in this area. More specifically, the CJEU has highlighted that to the extent that FDI screening is applied to intra-EU FDI, any restrictions must be grounded on the traditional exceptions to the EU's free movement rules. This may result in greater limitations on member states with regard to the FDI screening they can apply to intra-EU FDI in comparison with extra-EU FDI.

In *Eglise de Scientologie*,[7] the CJEU considered that a French requirement for prior authorisation in respect of an investment by a UK affiliate of the Church of Scientology amounted to a restriction on the free movement of capital.[8] The CJEU found that such restrictions could be justified on grounds of public policy and public security "only if there is a genuine and sufficiently serious threat to a fundamental interest of society".[9] However, the CJEU found the

> "It is a political responsibility to know what is going on in our own backyard so that we can protect our collective security if needed."

French system to be excessively vague as to the circumstances in which such prior authorisation was required in circumstances where "prior authorisation is required for every direct foreign investment which is 'such as to represent a threat to public policy [and] public security', without any more detailed definition".[10] The requirement that any derogation in respect of the free movement of capital is to be "interpreted strictly" was subsequently emphasised by the CJEU in *Commission v Spain*.[11]

The question of the precise distinction between intra-EU FDI and extra-EU FDI (and the related question of when the free movement rules are engaged) was considered by the CJEU in the more recent case of *Xella Magyarország*.[12] There, the Hungarian authorities blocked the acquisition of a Hungarian company (the Target), which operated a gravel, sand and clay quarry, by another Hungarian company (Xella). Xella was directly owned by a German company which, in turn, was owned by a Luxembourg company which, in turn, was indirectly owned by a Bermudan entity, which was the ultimate parent company of the Lone Star funds, which were controlled by an Irish national, John Grayken.

The decision of the Hungarian authorities to block the transaction was predicated on the transaction being an instance of extra-EU FDI since the Target would come into the ownership of a company indirectly owned by a Bermudan company and that would pose a risk to the security of supply of raw materials to the construction sector in Hungary. However, the CJEU concluded that this was, in fact, an instance of intra-EU FDI since Xella was a Hungarian company, notwithstanding the fact that it was indirectly controlled by a Bermudan company. Accordingly, the CJEU determined that the free movement rules applied and concluded that the threat that the Hungarian authorities believed to be posed to the security of supply of raw materials for construction neither related to an objective concerning a "fundamental interest of society" nor gave rise to a "genuine and sufficiently serious threat" so as to justify a derogation from the free movement principles.[13]

Insofar as *Xella Magyarország* emphasises the narrow legal parameters in which member states operate when screening intra-EU FDI, it did not break new ground. However, the clarification that investments originating outside the EU, but made directly through an existing EU company (so-called indirect FDI), will be treated as intra-EU FDI (and thus subject to the free movement rules) introduces an additional element of legal risk for the operation of member state screening mechanisms, particularly those which seek to regulate such indirect FDI in the same way as extra-EU FDI (as is the case with the Act). This issue has not gone unnoticed by the European Commission, which in the Proposed Regulation has proposed that such indirect FDI would be covered.

Mandatory notification

The Act provides for the mandatory notification of a transaction to the Minister for Enterprise, Trade and Employment (the Minister) where each of four cumulative criteria (the Notification Criteria) are met (a Notifiable Transaction). Mandatory notification applies to investments that meet all of the criteria set out in s.9(1)(a)-(d) of the Act.

First, a "third country undertaking" (or a person connected with such an undertaking) must:

(i) acquire control of an asset or undertaking in the State; or,
(ii) change the percentage of shares or voting rights it holds in an undertaking in the State: (a) from 25% or less to more than 25%; or,
(b) from 50% or less to more than 50%.

A "third country" for the purposes of the Act is a State or territory outside of the EU, EEA and Switzerland, and therefore includes the US and UK (including Northern Ireland). A "third country undertaking" for the purposes of the Act is an undertaking that is:

(i) constituted or otherwise governed by the laws of a third country;
(ii) controlled by at least one director, partner, member or other person, that is:
(a) an undertaking that is constituted or otherwise governed by the laws of a third country; or,
(b) a third country national; or,
(iii) a third country national.

Given that the definition of third country does not capture other EU member states, it appears clear that intra-EU FDI was not intended to be captured by the Notification Criteria. However, as an Irish- (or other EU-) registered company controlled by a person or entity in a third country comes within the definition of a "third country undertaking", instances of indirect FDI may be captured.

Second, the cumulative value of the transaction (and each transaction between the parties to the transaction) in the period of 12 months before the date of the transaction, must be equal to or greater than €2m, or such amount as prescribed by the Minister pursuant to s.9(2). This is a low threshold, particularly given the interpretation by the Department in the Draft Guidance that it includes "any international dimension that might include assets or undertakings not included in the State".[14] On this basis, a transaction in which the total consideration is €2m or more would meet the threshold regardless of how little of that consideration related to assets or undertakings in the State. While this threshold can be altered by the Minister, as of yet there is no indication that this will be done.

Third, the same undertaking cannot, directly or indirectly, control all the parties to the transaction. As such, intra-group transactions are not required to be notified.

Fourth, the transaction must relate to, or impact upon, one or more of the following areas (the in-scope areas): critical infrastructure; critical technologies; supply of critical inputs; access to sensitive information; or, the freedom and pluralism of the media. These criteria are taken directly from the Regulation and have been incorporated into the Act without any refinement or limitation beyond that provided for in the Regulation.[15]

The potential breadth of these in-scope areas is a cause for potential concern. The experience in other EU member states suggests that coupling a mandatory notification obligation with broad in-scope areas can result in over-notification. At a recent conference, it was suggested that, across those EU member states that have adopted FDI screening mechanisms, as many as 80% of notifications are ultimately considered by national authorities to be unnecessary.[16] However, the Draft Guidance is of some assistance in this regard. Each of the in-scope areas is addressed and guidance provided as to what is intended to come within the in-scope area in question.

Criminal sanctions are available in the case of Notifiable Transactions that are not notified.[17]

> Parties to a Notifiable Transaction are required to submit a notification to the Minister at least 10 days prior to the completion of the transaction.

The notification procedure

Parties to a Notifiable Transaction are required to submit a notification to the Minister at least 10 days prior to the completion of the transaction.[18] Responsibility for notification rests with all parties to a relevant transaction. However, all parties will be deemed compliant with this notification obligation when one party makes the necessary notification with the agreement of the other parties.

The Minister is to issue a notice (a Screening Notice) "as soon as practicable after commencing a review".[19] Once a Screening Notice is issued, the transaction may not be completed until a decision (a Screening Decision) is made.[20] The Minister will review the transaction to determine "whether or not the transaction affects, or would be likely to affect, the security or public order of the State".[21]

The Minister must make a Screening Decision within 90 days from notification (or up to 135 days from the date of the notification if the Minster decides to extend the review period).[22] However, this timeline can be suspended by the issuing of a notice requiring further information.[23]

The uncertainty as to when, precisely, following the receipt of the notification, a Screening Notice will be issued may frustrate parties seeking to identify precise timelines for the notification process. However, there is a potential upside to this vagueness, as it will afford the Minister an opportunity to consider, before a Screening Notice is issued at all, whether the notified transaction requires to be reviewed. In its Draft Guidance, the Department states that: "For notifications received that are determined not to fall within the scope of the mandatory regime, the Department will issue a letter to the parties confirming that mandatory notification does not apply".[24] Accordingly, it seems that the Department will seek to rapidly sift out those notified transactions that do not, in its view, meet the Notification Criteria. However, the Department has not said that it will seek to issue Screening Decisions rapidly in respect of Notifiable Transactions that will clearly not affect the security or public order of the State.

The Minister's "call in" power

Despite such transactions not having been notified, the Minister may decide to review: (a) a Notifiable Transaction that has not been notified; or, (b) a Non-Notifiable Transaction (i.e., a transaction that does not meet the Notification Criteria) where, *inter alia*, he has reasonable grounds for believing that the transaction affects, or would be likely to affect, the security or public order of the State.[25] In the case of Non-Notifiable Transactions, this power is, in principle, not limited to transactions involving third countries.

In the case of Notifiable Transactions that have not been notified, the Minister shall not commence a review after five years from completion or six months from the Minister first becoming aware of the transaction.[26] In the case of Non-Notifiable Transactions, the Minister shall not commence a review more than 15 months after completion.[27]

> By EU standards, Ireland has come relatively late (and certainly reluctantly) to FDI screening.

Transactions predating the coming into operation of the Act

The Minister can review any transaction (regardless of whether it would have been notifiable) that is completed within 15 months of the Act coming into operation.[28] Where a Notifiable Transaction is completed no later than 10 days after the Act coming into effect, a notification is required and can be made within 30 days of the completion of the transaction.[29]

Screening decisions

Screening decisions in respect of non-completed transactions will either: permit the transaction to proceed; permit the transaction to proceed subject to conditions; or, prohibit the transaction proceeding.[30] In respect of completed transactions, the Minister may impose a wide range of requirements, including requiring that divestments be made.

Appeals

Parties to a transaction may appeal a screening decision to an independent adjudicator to be appointed from a panel formed by the Minister. The adjudicator's decision may be appealed to the High Court on a point of law, while both the Minister's screening decision and the adjudicator's decision may be judicially reviewable.

Conclusion

By EU standards, Ireland has come relatively late (and certainly reluctantly) to FDI screening. As with any substantial new administrative process, a degree of trial and error and learning-by-doing will be inevitable. The commitment of the Department (and the Government more generally) to ensure that Ireland retains an 'FDI-friendly' climate is not in doubt.

The Department's commitment in the Draft Guidelines to rapidly sift out those notified transactions that do not, in its view, meet the Notification Criteria is very welcome in this regard, and may well avoid the worst extremes of the phenomenon of over-notification seen in other EU member states. It is hoped that the Department will, in time, also develop a mechanism for issuing screening decisions swiftly in respect of Notifiable Transactions that clearly do not affect the security or public order of the State.

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24. Draft Guidance, page 28.
25. Section 12(1)(b).
26. Section 12(2)(a).
27. Section 12(2)(b).
28. Section 12(2)(c).
29. Section 11(4).
30. Section 18.

BUILDING REGULATIONS, CONTROL COMPLIANCE AND JUDICIAL REVIEW

The Building Control (Amendment) Regulations 2014 were introduced in response to the discovery of serious defects in Celtic Tiger-era developments, and represented a significant change to the building control regime in Ireland.

Catherine Dunne BL

> Regulations arrived at a time when concerns were arising from high-profile industry cases, ranging from contractor insolvencies to defects and fire safety breaches.

The Building Control (Amendment) Regulations of 2014 (BC(A)R) became effective on March 1, 2014, and concern developments for which Commencement Notices were lodged with building control authorities on or after that date. BC(A)R arrived at a time when concerns were arising from high-profile industry cases, ranging from contractor insolvencies to defects and fire safety breaches, including the highly publicised Priory Hall development. Many of these cases were attributed to below-standard adherence to building control across the board, from design to supply of materials and work practices. A more robust building control regime was needed, in addition to increased levels of accountability for professionals and contracts, from the outset to the completion of construction works. BC(A)R was introduced to strengthen the previous arrangements, in the form of statutory certification of design and construction, lodgement of compliance documentation, mandatory inspections during construction, and registration of a series of certificates.[1]

This paper will provide practitioners with an overview of the BC(A)R legal landscape and the current scope for claims arising from the regulations. The role currently played by

> A building may not be opened, used or occupied until a Completion Certificate is filed and registered by the BCA on the Part IV Register.

Building Control Authorities (BCAs) pursuant to BC(A)R will be examined. Finally, the judicial review proceedings in *Coreet Ltd v Meath County Council and ors*[2] will be considered, in which an order of *certiorari* was sought in respect of the local BCA's refusal to register a Certificate of Compliance in respect of an apartment block that was otherwise ready to be occupied.

Legislative background

Historically, building control and fire safety legislation has tended to follow as a response to building disasters and failures. The Great Fire of London, which occurred in 1666, began in a bakery on Pudding Lane and raged for four days, ultimately leading to the introduction of building regulation in the UK with the Rebuilding Acts in 1667. Before the Great Fire, London was comprised of a mass of timber-framed buildings and thereafter, the city's buildings were rebuilt on their original plots using brick and stone. In 1981, the tragic fire in the Stardust nightclub in Artane, Co. Dublin, led to the introduction of the Fire Services Act, which was followed by the Building Control Act 1990.

The design and construction of buildings is now regulated under the Building Control Acts 1990 to 2014, which provide for the making of Building Regulations and Building Control Regulations. BC(A)R was introduced[3] in 2014 to amend the pre-existing legislation[4] in response to mistakes made in developments constructed during the Celtic Tiger period, including the aforementioned Priory Hall and Longboat Quay. Set out in 12 parts (classified as Parts A to M), BC(A)R represented one of the most significant changes to the Building Control Code since the 1990 Act, by strengthening the existing provisions in relation to notifications, compliance and registration of buildings.

Roles and responsibilities

The primary legal responsibility for compliance with the requirements of the Building Regulations rests at all times with the owner of the building or works, and with any Builder or designer engaged by the owner. It must be noted that contractual obligations are separate and distinct from the statutory obligations under BC(A)R. All new buildings, and existing buildings that undergo an extension, a material alteration or a material change of use must be designed and constructed in accordance with BC(A)R. BC(A)R requires the submission to the BCA, via the online Building Control Management System (BCMS), of statutory notices of commencement and completion, accompanied by certification of design and construction, lodgement of compliance documentation, proposed inspection regimes and evidence of inspections during the construction phase, and validation and registration of certificates. Roles are assigned to various parties by BC(A)R, including Owners, Designers, Builders, Assigned Certifiers and Ancillary Certifiers.

Design Certifier

The Design Certifier completes and signs the statutory Certificate of Compliance (Design) at the Commencement Notice stage, and thereafter may become an Ancillary Certifier for any design changes, deferred elements or variations that take place in regard to their design. Where subcontractors and other design specialists are involved in the works, the Assigned Certifier and the contractor will require Ancillary Certificates from these parties in respect of the specific works they have undertaken. A suite of Ancillary Certificates was developed in response to BC(A)R and complemented by the related Code of Practice for Inspecting and Certifying Buildings and Work. The format of these Ancillary Certificates has been agreed between the various professional bodies and the Construction Industry Federation.

Assigned Certifier

The Assigned Certifier must be a construction professional[5] and is required to devise an inspection plan, co-ordinate inspections in tandem with other members of the professional design team (Ancillary Certifiers) and certify the compliance of the building or works with the Building Regulations by way of collating certification, inspection records, and the submission of appropriate documentation to show compliance on completion. Assigned Certifiers may also seek performance declarations from material suppliers to demonstrate that the materials used are in compliance with the Construction Products Regulation.

Both the Assigned Certifier and the main contractor must sign the Completion Certificate, in which they each certify that the building complies with the Building Regulations, albeit that their certificates are not identical in their terms. A building may not be opened, used or occupied until a Completion Certificate is filed and registered by the BCA on the Part IV Register.[6] The Completion Certificate produced jointly by the Assigned Certifier and the main contractor stands as an imperative milestone, which must be addressed prior to the handover of a project under BC(A)R.

Contractor

BC(A)R also requires the owner of the property to appoint a competent contractor. Competency is a strict pre-registration requirement and is generally

satisfied where the contractor is registered on the Construction Industry Register of Ireland. The Government, on the request of the Minister for Housing, Local Government and Heritage, has recently appointed the Construction Industry Federation (CIF) as the registration body to regulate providers of building works under the Regulation of Providers of Building Works Act 2022. The new Statutory Register will be known as CIRI and the current voluntary CIRI register will be renamed and known as the Voluntary Construction Register (VCR). It is envisaged that it will be mandatory for Builders to join the Statutory Register from 2025.[7]

Certification process

A significant change brought about by BC(A)R was the introduction of a statutory certification process. Prior to the commencement of any project falling within the scope of BC(A)R, a Commencement Notice, or a seven-day notice, must be filed. This Notice must be accompanied by a valid application for a Fire Safety Certificate and a seven-day notice statutory declaration. Commencement Notices must be received by the relevant BCA not less than 14 days and not more than 28 days before the Builder wishes to commence work on site. The Commencement Notice shall be accompanied by such plans, calculations, specifications and particulars as are necessary to outline how the proposed works or building will comply with the requirements of the Second Schedule to the Building Regulations relevant to the works.[8]

Where works on non-domestic buildings and apartment blocks are commenced or completed without the necessary fire safety certification, a Regularisation Certificate can be granted by the BCA. This issue was central to the judicial review proceedings commenced in *Coreet*, which will be addressed later in this article.

The following certificates and notices in the appropriate forms are set out in the Second Schedule to BC(A)R:

- a Certificate of Compliance (Design Certifier);
- a Notice of Assignment of Person to Inspect and Certify Works (Assigned Certifier);
- a Certificate of Compliance (Undertaking by Assigned Certifier);
- a Notice of Assignment of Builder; and,
- a Certificate of Compliance on Completion (Undertaking by Builder).

Reasonable skill, care and diligence

The Certificate of Compliance on Completion requires the signatures of both the Builder and the Assigned Certifier. The Assigned Certifier confirms that the inspection plan drawn up under the Code of Practice has been followed, and that reasonable skill, care and diligence has been exercised. Where a consultant can demonstrate that he or she acted in accordance with the usual practice and professional standards in place at the time the service was carried out, he or she will have a defence to a claim in negligence. Therefore, the Assigned Certifier does not guarantee the achievement of a particular result.

Separately, the Builder or contractor certifies that it has exercised reasonable skill, care and diligence and that the building has been constructed in accordance with the plans, specifications and ancillary certifications already uploaded to the BCMS and as certified in the Certificate of Compliance for Design. The Builder or contractor is similarly certifying to the standard required of an architect or other appropriate professional, thereby imposing a 'reasonable skill and care' obligation as opposed to an absolute obligation to achieve a particular standard of work. It must be noted that contractual obligations are distinct and in addition to the obligations under BC(A)R.

Code of Practice for Inspecting and Certifying Buildings and Works

BC(A)R introduced a Code of Practice for Inspecting and Certifying Buildings and Works, which was amended in September 2016.[9] Parties involved in a BC(A)R project must be able to demonstrate compliance with this Code of Practice. Compliance with the Code is not mandatory but it has a statutory footing, such that inspection and certification carried out in accordance with the Code will be regarded as prima facie evidence of compliance with the requirements of the Regulations.

Option to 'opt out'

An 'opt-out' is available from the application of the BC(A)R regime for one-off houses and domestic extensions. This option came into force on September 1, 2015, and recognised that BC(A)R can result in increased professional fees for consumers. This 'opt-out' allows owners to withdraw from the statutory certification process required by BC(A)R. However, the building must still comply with all 12 parts of the Building Regulations. Certificates may still be required by investors and solicitors where, for example, the construction is financed or is going to be placed on the market.

Enforcement

A failure to comply with the requirements of the Building Control Regulations is an offence that can be prosecuted. Enforcement proceedings may be taken by the BCA against the owner or occupier of the building, or any other person who carried out the works. Civil proceedings can also be taken against any or all parties involved in the construction for a failure to properly discharge any of the obligations under BC(A)R. The basis of any such claim could be granted in breach of contract, breach of common law, and breach of statutory duty. Additionally, the Builder or contractor would almost always have a contractual obligation to comply with all statutory regulations affecting the works. It is

> A failure to comply with the requirements of the Building Control Regulations is an offence that can be prosecuted.

therefore imperative that parties involved in a BC(A)R project identify and understand the level of their responsibility at the outset of the construction process. Where BC(A)R is not properly adhered to, the BCA will not validate and register the Certificate of Compliance on Completion. Where a building is not added to the Register, it cannot be opened, used or occupied. This is a no-win situation for all current and prospective parties.

Building control involvement under BC(A)R

Building control is the means by which the administration and enforcement of the Building Regulations is carried out by BCAs in accordance with the Building Control Acts 1990 and 2007. The Building Control Act 1990 designated local authorities as BCAs, and provided for the making of Building Regulations and Building Control Regulations. BCAs are empowered to ensure compliance with BC(A)R by means of regulatory processes, inspection, oversight and enforcement. The compliance documentation in respect of the commencement and completion of works to which BC(A)R applies is to be submitted to the relevant BCA by way of the electronic BCMS.

The BCMS was established by BC(A)R as the preferred means of electronic building control administration. The BCMS operates as a publicly accessed system of validation of receipt of the correct documentation, rather than an actual inspection of the documentation. It must be noted that BCAs are empowered to inspect documentation for up to seven years following registration. The BCMS allows property owners, Builders, developers, architects and engineers to submit notifications, applications and compliance certificates digitally. All projects must be registered on the platform.

It is important to note that where a Certificate of Compliance on Completion or a Commencement Notice is submitted to a BCA, s.6(4) of the 1990 Act clearly asserts that the BCA is not under any duty to ensure that the relevant works or building complies with the Building Regulations, is free from defect or that the Certificate of Compliance is true and accurate.

BCAs have the power under s.11(3) of the Building Control Acts 1990-2014 to request information, examine and scrutinise proposals, carry out inspections, issue enforcement notices and, where necessary, prosecute owners and/or Builders who fail to comply with statutory requirements.

Currently, it appears that Building Control has a 'hands-off' role in the application of BC(A)R; it simply considers the documentation submitted to the BCMS for the purposes of certification, which is largely similar to the previous 'tick the box' exercise engaged in during the pre-BC(A)R era. Designers and Builders can sign off on their own buildings, a practice that would not be deemed permissible in many other jurisdictions.

Scope for judicial review

Although it can be argued that the BCAs could have a more involved role in the application of BC(A)R, they can still have a significant impact on the completion of a project. This was evident in the recently settled proceedings in *Coreet v Meath County Council and ors*,[10] which concerned the purpose and effect of a Certificate of Regularisation under BC(A)R.

The plaintiff developer (Coreet) claimed that the first defendant (the BCA for the purposes of BC(A)R) refused to issue compliance documentation in respect of a block of newly built social housing in Co. Meath that was otherwise ready for occupation. Coreet acknowledged it was in default by its failure to submit the required seven-day notice to the BCA the week before it commenced works at the site. The seven-day Commencement Notice was submitted, in default of the prescribed time limits, to Meath County Council on October 21, 2020. The Notice was returned as invalid on October 27, 2020, in circumstances where the works on the development land had already started. Coreet was informed that the works had to halt in order to regularise its position. Coreet claimed that it was informed by the BCA that it could submit a Certificate of Compliance on Completion if it first obtained a Regularisation Certificate for works completed to date. The works were halted temporarily while a Regularisation Certificate was obtained and lodged with the BCA. Coreet claims it was subsequently informed that the BCA could not grant the Regularisation Certificate until all works on the apartment block were completed. The Certificate of Regularisation was later granted on April 5, 2022.

It was submitted by Coreet that at a follow-up meeting with representatives of the BCA in May 2022, it was informed that there was no mechanism to register the apartment block on the BCMS because of its earlier delay in respect of the seven-day Commencement Notice. The plaintiff claimed it was informed that there was no route to bypassing this requirement, and as such, the only way to achieve validation would be to fully demolish the completed building, clear the site and start again on foot of a new Commencement Notice. It was submitted on behalf of Coreet that the BCA accepted that Block D was designed and constructed in accordance with all applicable statutory obligations and standards, with the exception of the late seven-day Commencement Notice and accompanying plans.

An order of *certiorari* was sought in respect of the Council's decision on the grounds that it was disproportionate and that the Commencement Notice was valid, albeit late, at the date of the ruling on September 21, 2022. In the alternative, the applicant sought orders striking down BC(A)R as unconstitutional and *ultra vires* of the Building Control Act 1990.

In its application to have the proceedings fast-tracked into the Commercial division of the High Court, the applicant cited reasons such as the contract for sale of the 24 apartments to housing body Tuath, the demand for housing supply, and the fact that the apartments were ready for immediate occupation by residents selected from the social housing list. According to court filings, the cost of buying and developing the land was in the region of €4.5m, with construction costs amounting to €3.4m. The filings also confirmed that the purchase price for Tuath exceeded €5.3m and the apartments were being paid for, to a large extent, by public funds from the Housing Finance Agency. Block D was part of a wider Strategic Housing Development for 250 dwellings and a creche at the Bryanstown site, where planning permission had been obtained in June 2019.

One of the narrower points contended by the BCA was that in the statutory forms set out at the Second Schedule to BC(A)R, there is only a reference to a seven-day notice in the context of a Certificate of Compliance on Completion. This form does not, as it should, reference a Certificate of Regularisation. When a party comes to certify compliance, they should be able to certify in relation to either a seven-day notice or, where a seven-day notice was not originally submitted, a Certificate of Regularisation. Although this omission appears to be no more than an oversight on the part of the statutory draftsperson, it has resulted in a slight misalignment between the substantive provisions of the Regulations and the contents of the forms in the Second Schedule. This is likely to be addressed by amendment in due course.

These proceedings were ultimately settled and there is no prospect of knowing how exactly this matter was resolved. The Commercial Court heard that the local authority had agreed to register the particulars of the Certificate of Compliance on the register it maintains under BC(A)R. It can be argued that given the timeline in the factual matrix of the *Coreet* case, the BCA ought to have been aware that the construction works were proceeding despite the failure of Coreet to lodge the seven-day Commencement Notice in a timely manner. If the BCA believed that the works could not legally be certified, one might say it was incumbent on it to intervene and stop the works. This rings true of this article's earlier observations in respect of the 'hands-off' approach employed by Building Control in the practical application of BC(A)R.

The inception of these proceedings serves to highlight the powers of BCAs to stringently enforce BC(A)R. This case serves as a warning to developers, architects and engineers to be aware from the commencement of works that compliance with the Regulations is of utmost importance.

Conclusion

BC(A)R has had a considerable effect on the way building design and construction are both managed and executed in Ireland. The post-BC(A)R roadmap provides a clear audit trail of responsibility in respect of the various certifiers. The creation of the publicly accessed BCMS register under BC(A)R gives visibility to those responsible for compliance with the regulations. It is no longer simply about getting the job done; with BC(A)R, parties now have to show how it's done.

However, concerns have been identified regarding the lack of an independent form of building inspection and control. The establishment of a statutory regime for building inspection would serve to provide a consistent approach to BC(A)R compliance and ensure the early identification of building defects.

References

1. Explanatory note for SI 9 – introduction of BC(A)R.
2. High Court Record No. 2022/887 JR.
3. SI 9/2014.
4. BC(A)R introduced amendments to the Building Control Act 1990 as amended by the Building Control Act 2007, and the Building Control Regulations 1997 as amended by the Building Control (Amendment) Regulations 2000, the Building Control (Amendment) Regulations 2004 and the Building Control (Amendment) Regulations 2009.
5. Either an architect or a building surveyor under the 2007 Act, or a Chartered Engineer for the purposes of the Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969.
6. Paragraph 20F(1), Building Control Regulations 1997 Revised Acts.
7. Department of Housing, Local Government and Heritage. Legislation requiring providers of building services to register with Construction Industry Register Ireland published. January 12, 2022. Available from: https://www.gov.ie/en/press-release/971b7-legislation-requiring-providers-of-building-services-to-register-with-construction-industry-register-ireland published/#:~:text=The%20Bill%20aims%20to%20benefit,plan%20for%20housing%20to%202030.
8. These include: general arrangement drawings, including plans, sections and elevations; a schedule of such plans, calculations, specifications and particulars as are currently designed or as are to be prepared at a later date; the completion of an online assessment, via the BCMS, of the proposed approach to compliance with the requirements of the Second Schedule to the Building Regulations; and, the preliminary Inspection Plan prepared by the Assigned Certifier.
9. Regulation 20G(1) Building Control (Amendment) Regulations 2014.
10. High Court Record No. 2022/887 JR.

THE EU UNIFIED PATENT COURT REFERENDUM

This June, a referendum will be held on the Unified Patent Court Agreement.

Jonathan Newman SC

Subject to the 41st Amendment of the Constitution Bill being approved, on June 7, 2024, the people will be asked whether Ireland should ratify the Unified Patent Court (UPC) Agreement. This is actually our second "patent" referendum – who could forget the Community Patent Convention referendum (passed overwhelmingly) back in 1992?

What is the Unified Patent Court?

The new EU Court is part of a package of measures to greatly reduce the costs to innovators of obtaining patents, enforcing patents, and clearing invalid patents out of the way.

Patents are critical for facilitating research because they involve the grant of a 20-year monopoly for new inventions in return for the publication now of the new technology's details. Prior to June 1, 2023, bundles of national patents were granted by the European Patent Office (EPO) on a per-country basis, and disputes were individually litigated before the national courts of the EU.

As a result, if an Irish business wanted to launch a product and was subject to an unjustified claim that it had violated a patent, that business would potentially have to defend itself before a multitude of member states' courts. Since June 1, 2023, the EU Unitary Patent Regulation has allowed an innovator to get just one patent covering 25 EU member states.

The related UPC Agreement creates a unitary system whereby a patent dispute can be heard before just one court system, with judgments taking effect in all participating member states. That is why Ireland's ratification requires a referendum.

How does it work?

The first instance element of the new court system is divided between local (national) seats and a central division, which itself is currently divided between Paris, Munich and (now) Milan (taking London's "Life Sciences" spot post Brexit). There is a Court of Appeal in Luxembourg. The new Court is subject to the primacy of EU law (including the Charter) – the preliminary reference system under Art. 267 of the Treaty on the Functioning of the European Union (TFEU) applies.

Since June 1, 2023, the Court has been hearing cases in its local and central locations concerning violations of patents and the revocation of invalid patents, with panels of judges drawn from participating states only. About 270 cases have been filed – the bulk before the German court of first instance – with about half of these being heard in German and a slightly smaller number in English.

While the Court's procedural rules are a combination of civil and common law systems (they were drawn up with significant UK input prior to Brexit), it is concerning to note that the developing case law on the grant of interlocutory injunctions is much closer to the civil law approach: unlike in Ireland and the US, there is much more emphasis on assessment of the validity of the patent, and little discussion of irreparable harm.

Why does Irish participation matter?

Without Irish participation in the Court, Irish innovators can apply for the new patents covering the EU, and can commence proceedings before the UPC regarding patents covering all participating member states, but there is no local Irish seat of the Court for them to go to and Ireland has no role or influence in the Court.

For example, a business developing and making artificial heart valves in Galway for sale throughout the EU may be the subject of an injunction granted by a local UPC court sitting in Germany prohibiting sale throughout all the UPC states, in reality shutting down that operation in Galway. This means that the new EU Court is currently making decisions massively affecting Irish innovators, Irish production lines and ultimately Irish jobs, but without any Irish judges, any hearings in Ireland, or any other form of input by Ireland into the practice and operation of the new Court.

And what about the poor lawyers? I like to think that a system that enhances access to justice by streamlining patent disputes will ultimately lead to more work for everyone, including before an Irish seat of the new Court.

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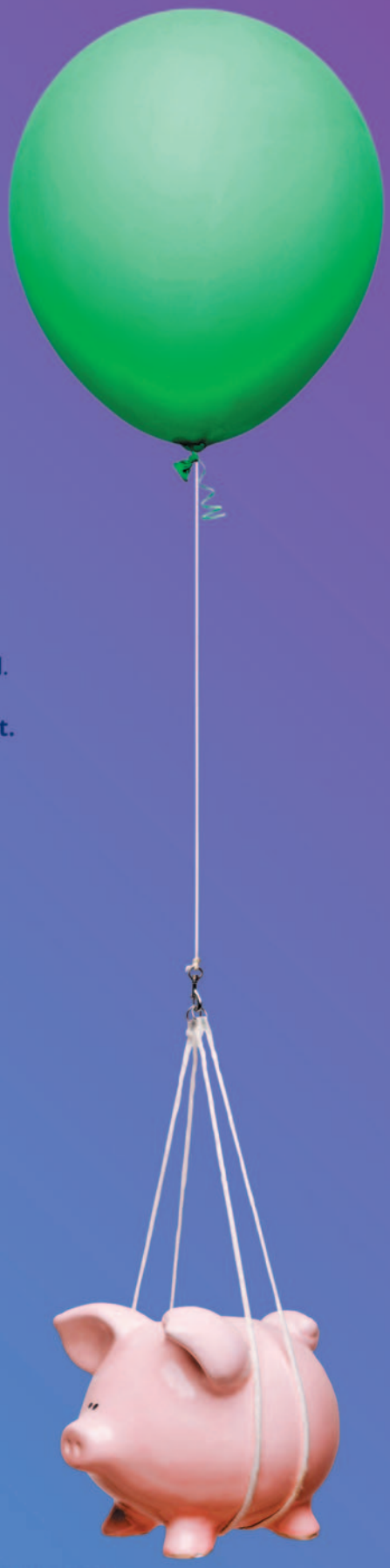

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