PROFESSIONAL NEGLIGENCE LAWYERS' ASSOCIATION

PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

IRELAND - ONLINE CONFERENCE

Circumnavigation
Professional Negligence, Legal Innovation and Market Update

May 2021

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Circumnavigation

Professional Negligence, Legal Innovation and Market Update

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3 mins **Larry Fenelon (Chair) – Co Founder and Partner – Leman Solicitors**

Introduction

https://leman.ie/theteam/larry-fenelon/

42 mins **The Hon. Mr. Justice Anthony Barr - Judge of the High Court**

Introductory Address

https://en.wikipedia.org/wiki/Anthony_Barr_(judge)

35 mins **John Trainor SC**

Liability of Construction Professionals

https://www.lawlibrary.ie/members/John-Trainor/277.aspx

16 mins **Ben Patten QC – 4 New Square Chambers**

Tortious Duties to Third Parties – Goodbye to the Threefold Test

https://www.4newsquare.com/barristers/ben-patten-qc/

25 mins **Stephen McCullough BL**

Delay and want of prosecution (effects of Covid-19)

https://www.lawlibrary.ie/members/Stephen-McCullough/1257.aspx

27 mins **Ciaran Murphy BL - TrialView**

TrialView and Developments in Electronic Litigation

https://www.trialview.com/

https://www.lawlibrary.ie/members/Ciar%C3%A1n-Murphy/6849.aspx

15 mins **Karl Manweiler - LexTech**

How legal technology will improve your prospects of successfully defending EL/PL claims

https://leman.ie/theteam/karl-manweiler/

42 mins **Stephen O'Connor – Leman Solicitors**

Professional Negligence Update

https://leman.ie/theteam/stephen-noel-oconnor/

68 mins **Brian O'Connell - O'Connell Mahon Architects**

Briefing of an Expert

https://www.oconnellmahon.ie/

32 mins **Aidan Brady - ReSure Corporate Brokers**

Market update

https://ie.linkedin.com/in/aidan-brady-67872b26

5 mins **Katy Manley – President – PNLA/Manley Turnbull Solicitors**

Conference Closing Remarks

https://www.pnla.org.uk/members/mrs-katherine-susan-manley-13521/

Total talk time - 6 hrs 10 mins

1 hr - Conference Pack Review
1 hr 30 mins - Questions & Answers via WhatsApp Group and Zoom Wrap Party
Total CPD - 7 hours 40 mins

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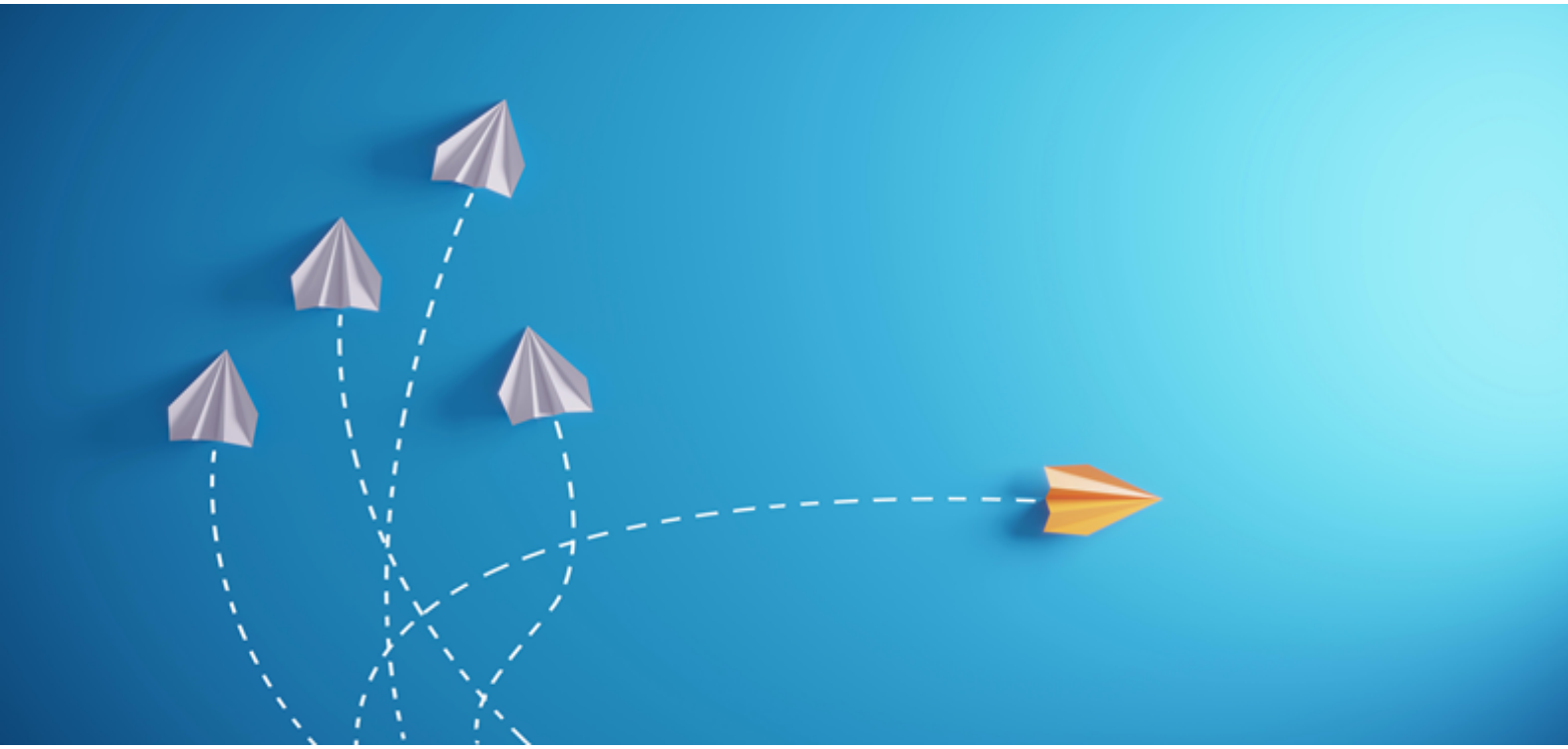

Circumnavigation

PROFESSIONAL NEGLIGENCE,
LEGAL INNOVATION
AND MARKET UPDATE

Larry Fenelon
Chair
Co Founder and Partner
Leman Solicitors

Introduction

3 mins

Larry Fenelon

Co Founder and Partner

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Larry co-founded Leman Solicitors LLP in 2007, was managing partner to 2018 during which the firm grew to 45 employees, €5.5m turnover and became synonymous with innovation.

Larry founded LexTech in 2018, a legal technology company that digitally transforms, automates and data captures legal, regulatory and compliance processes for businesses in a variety of industries. Larry is a director of LexTech.

He is Head of the Litigation and Dispute Resolution department in Leman Solicitors and practices primarily in commercial, property and construction disputes.

He is an experienced arbitrator and fellow and past committee member of the Chartered Institute of Arbitrators and past chair of the Law Society's Arbitration and Mediation committee. Larry is a CEDR accredited commercial mediator since 2005.

He is an active member of the RDS Enterprise Committee and its 2030 Vision Series and Entrepreneurs Club initiatives and is a member of the Institute of Directors.

Larry will graduate from University of Oxford in a postgraduate diploma in strategy and innovation this year.

https://leman.ie/theteam/larry-fenelon/

The Hon. Mr. Justice Anthony Barr
Judge of the High Court

Introductory Address

42 mins

The Hon. Mr. Justice Anthony Barr

Judge of the High Court

Mr. Justice Anthony Barr graduated from University College Dublin with a Bachelor of Civil Law Degree in 1983. He attended the King's Inns and became a barrister in 1985. He became a Senior Counsel in 2004. He was Counsel for the Morris Tribunal between 2002 and 2008.

Mr. Justice Barr was a Fellow of the Chartered Institute of Arbitrators and was the vice chairman of the Irish Branch in 2013. He was then appointed to the High Court in July 2013. He has adjudicated on some of the most high-profile matters that have been before the Irish Courts across a wide variety of areas, including those related to medical negligence, personal injuries and judicial review. Additionally, he is a CEDR qualified mediator since 2008.

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Notes: -

John Trainor SC

Liability of Construction Professionals

35 mins

John Trainor SC

E: john@jtrainorsc.ie

John graduated from University College Dublin (UCD) with a Bachelor of Civil Law Degree in 1978. He attended the King's Inns and was called to the Bar in 1980. He became Senior Counsel in 1996. He is a qualified arbitrator, mediator and adjudicator.

John specialises in the fields of commercial law, construction law, non-jury and chancery actions, and in arbitrations, particularly in the field of construction law. John has acted in many Court actions concerning construction contracts, defective building works claims, as well as in the field of construction professional negligence claims.

Additionally, John has worked on numerous Superior Court level commercial disputes concerning breach of contract, as well as in medical and legal professional negligence cases.

https://www.lawlibrary.ie/members/John-Trainor/277.aspx

Recent Cases from the Irish Supreme Court and the TCC of relevance to Construction Professionals.

1. Introduction

1.1 An important aspect of the life of a busy lawyer is to keep track of recent developments in the law. This paper will advise readers of six recent cases from the Irish Supreme Court and the UK Technology and Construction Court which contain relevant and important statements relating to the law of negligence and limitations which may be potentially applicable to construction professionals.

1.2 The sources reviewed from which these six cases have been chosen were all recent decisions of the Technology and Construction Court in the UK and of the Irish Supreme Court in the period January 2020 to date.

1.3 The first two cases reviewed are **Morrissey v HSE & Ors**[1], and **UCC/NUI v ESB**, both landmark decisions of the Irish Supreme Court. In **Morrissey**, the Court provided important re-statements on the legal principles applicable to professional negligence in Irish law, on vicarious liability, and considered, for the first time in Irish law, the concept of a non-delegable duty of care. Both cases also contain important statements on how the courts in Ireland are to apply well established principles of liability to new scenarios. In **UCC/NUI v ESB**, the Court recognised a special position of control as an exception to the principle that a party is generally not under a duty of care to take steps to prevent harm to others from acts for which he or she is not responsible.

1.4 The next three cases reviewed are from the TCC[2] and provide important examples of the type of factual and legal analysis which courts undertake to ascertain whether a duty of care arises, as a result of a contract to provide professional services, to prevent economic loss to third parties, and, if so, the extent of that duty.

1.5 The final case reviewed is **Cantrell & Ors v Allied Irish Banks & Ors**[3]**,** where the Irish Supreme Court revisited the issue as to when time commences to run in cases of negligence causing economic loss, and raised the possibility that Irish law, to the extent that it does not include a discoverability requirement in such cases, may be contrary to the constitution.

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[1] 19 March 2020

[2] **RSK Environment Ltd. V Hexagon Housing Association Ltd** [2020] EWHC 2049 (TCC); **Multiplex Construction Europe Ltd. V Bathgate Realisations Civil Engineering Ltd. (formerly Dunne Building & Civil Engineering Ltd.)(In Administration) & Ors** [2021] EWHC 590 (TCC); **Rushbond Plc v J & S Design Partnership LLP** [2020] EWHC 1982 (TCC)

[3] 13 July 2020

2. (i) Morrissey v HSE, Quest Diagnostics Inc and Medlab Pathology Ltd.

2.1 In **Morrissey v HSE** the Plaintiff, Mrs. Morrissey, was terminally ill from cervical cancer. She had undergone screening in accordance with Cervical Check, the national cervical screening programme, run by the HSE, in August 2009 and August 2012 and in both instances her smear test was reported as negative. However, in May 2014, she had suffered symptomatic bleeding and was referred by her GP for further testing which disclosed the existence of cervical cancer. Following this diagnosis, her 2009 and 2012 smears were audited, and it was reported that the original results in respect of both tests were incorrect. By 2015, the results of the audit had been communicated to Cervical Check, but the results were not disclosed to Mrs. Morrissey until mid-2018 when she herself made enquiries as to whether there had been an error in the case. She sued the HSE and the two laboratories who had examined the samples taken in 2009, in the US by Quest Diagnostic Inc., and 2012 by MedLab Pathology Ltd. in Dublin. The action was brought by both Mrs. and Mr. Morrissey and the High Court (Cross J)[4] gave judgment against all three Defendants in the sum of circa €2.15M and an additional sum of €10K in nominal damages against the HSE only in respect of its failure to notify Mrs. Morrissey in 2015 of the results of the audits of her earlier smear tests.

2.2 The Defendants brought a leapfrog appeal to the Supreme Court who heard the case as a matter of public importance.

2.3 The case received particular attention because the High Court Judge had found that the cytoscreeners had been required to assess the sample slides using a standard of *"absolute confidence"*, i.e., if there was any doubt in the mind of the screener as to whether the slide was normal, the screener should classify it as negative. The cytoscreeners were required to firstly review the slides for sample adequacy (i.e. the slides were required to contain a minimum number of cells for review), and thereafter for abnormalities, to be categorised in accordance with applicable standards[5]. In the High Court, it was held that the evidence of all relevant experts was that in the event of any ambiguity, the labs ought to have reported the cells as abnormal.

2.4 The Court noted that cervical screening is not infallible, eg (i) actual abnormal cells may not be located in the sample, and (ii) there was room for genuine and non-negligent differences of opinion as to whether particular cells were abnormal or not. The High Court Judge had applied the classical test for medical negligence established in **Dunne v National Maternity Hospital,** i.e., inter alia, whether the medical practitioner has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care, noting that, if the allegation of negligence is based on an assertion that the Defendant had deviated from a general and approved practice, that would not suffice unless it was also proven that the course taken was one which no medical practitioner of like specialisation and

[4] In a Judgment delivered 3 May 2019 [2019] IEHC 268

[5] Using either the Bethesda System of classification or the British Society for Clinical Cytology CIN terminology.

skill would have followed had he been taking the ordinary care required from a person of his qualifications. In particular, the High Court judge followed the decision of the English Court of Appeal in **Penney Palmer and Cannon v East Kent Health Authority**[6] where Lord Woolf MR had stated, in relation to the questions to be addressed in relation to the negligence of a medical screener, that the UK equivalent to **Dunne v The National Maternity Hospital**[7] had no application where what the Judge was required to do was make findings of fact, even where such facts were the subject of conflicting expert evidence. The High Court Judge held that the questions of fact to be decided by him on the balance of probabilities required him to determine:-

(i) What was to be seen on each slide,

(ii) Whether a reasonably competent screener at the relevant time could have failed to see what was on the slide; and

(iii) Whether a reasonably competent screener, in the light of what he or she should have observed, should have treated the slide as negative.

He held that questions (ii) and (iii) and any tests as to adequacy (of the sample) were to be decided in the light of *"absolute confidence"* and thereafter the test for negligence was to be as stated in **Dunne**.

2.5 The factual and expert evidence in relation to the adequacy of the slides and their examination at the trial had been complicated, inter alia, by reason of the fact that the experts called by the cytoscreeners had appeared to be influenced by guidelines issued by the American Society of Cytopathology which the High Court Judge found had been prepared in an attempt to limit litigation and to provide a robust defence for cytoscreeners accused of negligence in the American Courts[8].

2.6 Ultimately, the Judge concluded that abnormal cell features were visible on the 2009 slide and that a reasonably competent screener should have so concluded. Although a later review of the MedLab slide from 2012 had shown that the result ought to have been concluded as abnormal, MedLab was held not to be negligent on this issue since the cells later found to be abnormal were not easily distinguishable from other normal cells and thus, a screener exercising reasonable care could have failed to have identified them as abnormal. However, the High Court Judge also concluded that the false negative on the 2012 slide was by reason of the fact that the cell count was *"very scanty"*, and that, since the *"absolute confidence"* test also applied in the context of the slides adequacy, MedLab was negligent for failure to test the slide for adequacy. Thus, both the laboratories were negligent and the HSE was found to be vicariously liable for such negligence.

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[6] [2000] Lords Rep Med 41
[7] **Bolam v Friern Hospital Management Committee** [1957] 1 WLR 582
[8] See the Judgment of Clarke J in the Supreme Court at Para. 5.10

2.7 The case is of importance because of the possible misunderstanding of the significance of the standard of *"absolute confidence"* referred to by the High Court. The Supreme Court (per the Judgment of Clarke CJ) took the opportunity to restate the relevant principles of law applicable in the context of professional negligence on the part of medical practitioners, and it is clear that the Court had in mind that such principles would apply more broadly.

2.8 At Section 6 of the judgment of the Court (*"The Proper Approach"*), Clarke CJ, having referred to the *"Dunne Principles"* noted that it was important to have regard to the term *"standard of care"*. He stated as follows:-

> *"As the Trial Judge pointed out, that term has a precise legal meaning and represents, at the level of principle, the legal duty which applies in any particular circumstance. However, given that, in clinical negligence cases, a Court is dealing with "care" in a medical sense, the phrase "standard of care" might at least colloquially be used to define the appropriate standard by reference to which the approach of a relevant professional to a particular problem should be assessed".*

To avoid confusion between the term *"standard of care"* in its precise legal meaning and its meaning in a clinical setting, Clarke CJ thereafter used the term *"standard of approach"* to mean the standard which, in practice, had been shown to be required of a particular professional in particular circumstances.

2.9 Thereafter, Clarke CJ stated, in an important clarification of the **Dunne** principles which can be seen as applicable to all cases of professional negligence, as follows:-

> *"6.5 In any event, it is important to start by indicating that, while the principles identified by Finlay CJ in **Dunne** are expressly related to negligence against medical practitioners, they mirror the test applied across the board in cases involving allegations of professional negligence…*
>
> *6.6 Thus, the starting point in any professional negligence case requires the identification of the standard of approach which would have been applied by a professional of the appropriate standing or skill as the person against whom the allegation of negligence is made. Accepted practice is highly relevant, although departure from normal practice may be found not to give rise to negligence where an equivalent professional might reasonably have followed such a course of action while exercising reasonable skill. Likewise, following normal practice may not absolve a professional from a claim in negligence if it can be shown that there was an inherent defect in the practice which should have been obvious to professionals of the type in question. Finally, it is emphasised that the question will not come down to one of a Judge deciding which of two or more possible courses of action might have been considered, often with the benefit of hindsight, to have been preferable, but rather whether the course of action actually adopted was consistent with the exercise of the ordinary care which could reasonably be expected of a professional of the type under consideration.*

*6.7 In my view, the various aspects of the **Dunne** test identified by Finlay CJ can be reduced to one overarching principle with a number of subsidiary considerations which impact on the application of that overarching principle in particular circumstances. The overarching principle is to be found in point (1): the standard of approach of a medical professional is to apply a standard appropriate to a person of equal specialist or general status acting with ordinary care. A failure to act in that way will amount to negligence.*

6.8 Each of the other points made by Finlay CJ derive from that overall obligation. Thus, even if the medical practitioner concerned deviated from what might have been established to be a general and approved practice, the practitioner concerned will not be found to be negligent unless it can also be shown that no practitioner of equal status exercising ordinary skill might not also have deviated in the same way. This represents point (2) of the matters identified by Finlay CJ and can be seen to represent the application of the overarching principle to circumstances where the relevant practitioner has, in fact, deviated from an established practice.

6.9 A similar comment can be made in respect of point (3). Here, Finlay CJ makes clear that following an accepted practice may not absolve a practitioner from negligence if it can be demonstrated that there were inherent defects in the practice which ought to have been obvious to a professional giving the matter due consideration. This, again, can be seen to derive from the overarching principle, for a professional cannot be said to have applied the required standard of approach, being to exercise the ordinary skill which would be appropriate to a person of the status in question, if it can also be shown that any such person ought to have realised that the relevant practice had an inherent defect.

*6.10 In addition, a similar observation can be applied to points (4) and (5) as identified by Finlay CJ in Dunne. Where there are two or more schools of thought as to what course of action should be adopted in particular circumstances, it is clearly the case that a professional exercising reasonable care may adopt one of them even though there may be others who would take a different course. These principles, in effect, represent what might be called the **Bolam** element of the **Dunne** test and can also be seen to derive from the overarching principle.*

*6.11 Finally, it is important to note that Finlay CJ went on, at p.109 of his judgment in **Dunne**, to note that the relevant principles "apply in identical fashion to questions of diagnosis" as well as to questions of treatment. There was no argument put forward on this appeal that different principles would apply in the case of screening."*

2.10 As Clarke CJ acknowledged[9], no issue arose in **Morrissey** concerning the adoption of a common practice which had inherent defects which ought to have been obvious, nor

[9] At Para. 6.12 of his judgment.

was there any issue concerning two schools of respectable thought or of an acceptable deviation from a common and established practice. Ultimately, the issue came down to the question as to what would an ordinary competent professional of the type and skill of the individual concerned had done and did the professional sued meet that standard.

2.11 As there was no dispute that the applicable standard was one of *"absolute confidence"*, according to the expert witnesses called on all sides, there was therefore no dispute that that was the appropriate *"standard of approach"* by reference to which the review of the slides required to be assessed on the facts. With regard to this issue, Clarke CJ stated as follows[10]:-

> *"6.13 Next, it must be emphasised that the question of the standard of approach which should be applied by an ordinarily competent professional is ultimately a matter of fact. It requires expert evidence as to how professionals of the type in question would generally go about their work in a way in which they would have dealt with the case in question…*
>
> *6.14 It follows that, in a case such as this, a court has no role in imposing a standard of approach on a professional. Rather, it is the standards of the profession itself, as demonstrated by the evidence, which impose the standard required"*.

2.12 **Morrissey** is of particular importance, since the Supreme Court (Clarke CJ at Para. 6.15) felt it important to emphasise the above factors so as to ensure there was no misunderstanding about the Court's role in such cases. It is notable that the Court felt that some public commentary on the decision of the High Court appeared to have ignored the fact that the role of the Court was as above described.

3. UCC/NUI v ESB

3.1 This case resulted from very severe flooding which occurred in Cork on 19 and 20 November 2009 caused principally by the fact that the River Lee broke its banks, subjecting many nearby properties to significant damage, including UCC where the Campus was severely damaged. UCC claimed that the ESB was negligent or guilty of nuisance in the way it handled its upriver dams at Inniscarra and Carrigadrohid, thus causing or contributing to at least a significant part of the flooding. The ESB denied that it was guilty of negligence or nuisance and pleaded that, if it was liable, UCC should be also be held partly liable for contributory negligence and should have its damages reduced.

3.2 In the High Court, UCC succeeded but the High Court Judge (Barrett J) also held UCC guilty of contributory negligence measured at 40%. Both sides appealed to the Court of Appeal which allowed the appeal of the ESB on the issue of liability but also concluded that UCC should not have been found guilty of contributory negligence. Both sides

[10] Para. 6.13

appealed to the Supreme Court which decided to initially consider only the issue of ESB liability.

3.3 The Lee Hydroelectric Scheme had been approved in 1949 under the Electricity Supply (Amendment) Act 1945 and had been built between 1952 and 1957. The Inniscarra Dam was located approximately 14km upstream of Cork City and the Carrigadrohid Dam was located a further 13km upstream. While the normal operation of the Lee Stations was run from the Hydro Control centre in Wicklow, the management of water levels and flood management were dealt with from the control room at Inniscarra under the Hydrometric Officer's instruction. The operational rules of the Lee Scheme were contained in the Lee Regulations, first published in 1969, which provided for the operation of the Lee Dams both in normal conditions and in flood events. The Lee Regulations contained detailed provisions as to how discharges from the dams were to be managed during floods.

3.4 The evidence established that the storm in Cork in November 2009 and the resulting rainfall in the Lee catchment area was the worst in the history of the Lee Dams. As the water levels rose, the ESB controllers allowed the flow of the river though the Lee Dams to increase by degrees, but ultimately very substantially, in accordance with the protocols for such situations. Ultimately, discharges of more than 500 M3/s occurred until the storm abated, and the water levels fell. This resulted in severe flooding downstream, causing significant damage to the properties of UCC and others. The outfall though the system at the critical times on 19 and 20 November did not exceed the inflow. However, UCC argued that, in the days and weeks leading up to the critical events at the time, the ESB had negligently left less scope or capacity in their reservoir system for water than should have been the case. On this basis, it was argued that at least the worst problems of the flooding could have been prevented or alleviated had the reservoir system been capable of absorbing a greater volume of water on the occasion in question. UCC argued that the ESB owed a duty of care to UCC and other downstream occupiers to avoid unnecessary flooding. UCC argued that the ESB should have anticipated the heavy inflows of water that the storm would bring and should have endeavoured to ensure that it had sufficient space to accommodate the flood waters in the reservoirs when they arrived.

3.5 The ESB acknowledged that it had a duty of care to downstream occupiers but only in respect of the risk of dam failure and in respect of the risk of flooding caused by the discharge of water in greater quantities than that which entered the dam systems. It argued that, while it had endeavoured to reduce flooding in a manner consistent with this primary obligation, it was not legally bound to do so and therefore did not owe a duty of care to the downstream occupiers to avoid unnecessary flooding.

3.6 Barrett J. held that the ESB was liable in negligence and nuisance in regard to both flooding and warnings. The Judge rejected the ESB's reliance on a significant number of US Dam cases which applied the principle of *"do not worsen nature"* i.e., that, provided the dam operators did not take any steps to worsen what might otherwise have been the case had the dams not been present, liability should not arise.

3.7 The judgment of the Barrett J was very detailed and ran to over 500 pages. Ultimately the question turned on the extent of the common law duty of care, in negligence, and the obligation of a party to take steps to prevent injury to others, where the underlying source of the injury was not occasioned by himself. The relevant principles were acknowledged as having been correctly stated in the UK Supreme Court decision of **Robinson v Chief Constable of West Yorkshire Police**[11] as follows:-

> *"In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that level of danger, or (iv) A's status creates an obligation to protect B from that danger".*

3.8 UCC submitted that the ESB had met three of these categories, in that it had assumed a responsibility to protect the downstream property owners from the risk of flooding, it had a special level of control over the source of the danger which was the river, and it had a status which created an obligation to protect downstream property owners from danger.

3.9 In the Supreme Court, three Judgments were delivered. The first was a joint judgment of Clarke CJ and McMenamin J. Mr. Justice Charlton J delivered a concurring judgment. Dunne J agreed with both the joint judgment and the judgment of Charlton J. Mr. Justice O'Donnell J delivered a dissenting judgement.

3.10 The majority judgments concluded that the ESB was, on the facts and the law, guilty of negligence. In those circumstances, it was unnecessary to decide certain other issues arising in the case. The two key facts, as were found by the High Court and on the evidence, were that a different management regime on the Lee Dams by the ESB would have reduced flooding downstream, including that which occurred at UCC, and that, in the light of the conditions which applied in the immediate run up to the flooding and the light of relevant weather forecast, the ESB was negligent in not operating a different management of the Lee Dams. While it was clear on the evidence that, at no relevant stage, was the amount of water exiting the Lee Dams greater than the amount entering those dams, so that it could not be said that the management of the dams had made things worse, on the facts, the management of the dams might be said to have failed to make things better.

3.11 The central issue facing the Supreme Court, therefore, turned on whether the legal obligation of the ESB extended, in all the circumstances of the case, to an obligation to manage the dams, in at least some circumstances, in a manner designed to improve conditions downstream. As the judgments noted, it had long been established that the circumstances in which a party might be found guilty of negligence because of a breach of the obligation not to do harm are more widespread than the very limited circumstances in which a party can be found guilty of negligence for failing to confer benefit. The issue, therefore, centred on whether the circumstances of this case came within one of the

[11] [2018] AC 736 at Para. 34

relatively limited types of situation where the law imposes a duty to confer a benefit. For the reasons analysed in the majority judgments it was concluded that the ESB, which had a special level of control over the danger (even though not one of its own making), did, subject to limitations set out in the judgments, owe such a duty of care. It was also concluded that the ESB was in breach of that duty of care.

3.12 In their joint judgment, the Clarke CJ and McMenamin J set out their principal conclusions which were to the effect that the approach, recently identified in more recent UK caselaw, which analysed liability on the basis of a *"do no harm"* approach, was to be preferred to the more traditional consideration which had differentiated between acts of commission or acts of omission, and that there could be exceptions to the *"do no harm"* rule such that a duty of care may arise in limited circumstances, to confer a benefit. The joint judgment continued as follows at Para. 16.3:-

> *"We consider that one such exception arises where a party is in a special position of control enabling them to prevent harm being caused by a danger independently arising. While we consider that the special level of control in question does not necessarily have to arise from the existence of a legal power, we are satisfied that it must be substantial and not tangential. We also suggest that it must be shown that there is a reasonable relationship between any burden which would arise from imposing such a duty of care and the potential benefits to those who may be saved from the danger in question. In addition, we are satisfied that it is necessary to ensure that it is possible to define the duty of care in question with a sufficient, but not absolute, level of precision so as to avoid imposing a burden which is impermissibly vague and imprecise"*.

3.13 Applying these principles to the circumstances of the case, the Court concluded (i) that the ESB did owe a duty of care to the landowners and occupiers downstream of the Lee Dams by reason of the fact that the ESB did have a special and substantial level of control which would have enabled it to prevent or reduce harm arising from a flood danger, (ii) that duty could have been complied with in November 2009 without placing a disproportionate burden on the ESB, and (iii) the duty concerned could be specified with reasonable clarity so as not to impose an impermissibly vague obligation on the ESB.

3.14 The Court's conclusion as to the special position of the ESB in the circumstances may have profound implications of other parties in a similar position. It can be immediately seen that there can be many circumstances in which a party, in a similar position to the ESB, in all sorts of circumstances, could find themselves subjected to similar duty of care eg. would Iarnród Éireann, by reason of its control of the railway gates adjacent to the Aviva Stadium, be required to exercise a similar duty of care in the event of a potential crowd crushing incident ? No doubt there are many other circumstances.

4. Evolution of the Duty of Care – General Principles, Vicarious Liability and Non-Delegation

4.1 Both **Morrissey** and the **UCC v ESB** cases contain important statements by the Supreme Court as to how the common law might be permitted to develop in Ireland so as to apply to novel or difficult scenarios.

4.2 In **Morrissey**, one issue concerned the circumstances in which the HSE might be found to be vicariously liable for the negligence of the laboratories. The HSE had argued that its statutory role was simply to arrange to a competent cervical screening programme and that this duty had been complied with through, inter alia, the contracting of competent laboratories to screen and report on the smear samples. Thus, its duty was solely an organisational one. The HSE accepted that a hospital could be said to owe a non-delegable duty to provide its patients with skilful treatment and could be liable in negligence for the acts of all those who administered treatment regardless as to whether they were employees or engaged as independent contractors.

4.3 However, the HSE argued that the service provided by the Cervical Check Programme was not akin to a hospital service and that persons who took part in the screening programme were not comparable to patients in the care of the hospital. Counsel for the Morrisseys submitted that a non-delegable duty of care arose in the circumstances of this case by reason of the HSE's relationship with the women, both under statute and at Common Law, participating in the Cervical Screening Programme. In finding for the Morrissey's on the issue of vicarious liability, the High Court judge applied the principles identified in **Woodland v Essex County Council,** a Decision of the UK Supreme Court, which had specified 5 separate criteria to establish the existence of a non-delegable duty of care, namely, in summary, (i) the plaintiff must be in a position of vulnerability and dependent on the protection of the defendant against the risk of injury; (ii) the existence of an antecedent relationship between the plaintiff and the defendant independent of the negligent act (a) which places the plaintiff in the actual custody charge or care of the defendant and (b) from which it is possible to impute the assumption by the defendant of a positive duty to protect the plaintiff from harm; (iii) the plaintiff has no control over how the defendant chooses to perform those obligations, i.e. whether personally or through employees or third parties; (iv) the defendant has delegated to a third party some function which is an integral part of a positive duty assumed towards the plaintiff and the third party is exercising the defendant's custody or care of the plaintiff and the element of control that goes with it; and (v) the third party has been negligent in the performance of the very function assumed by the defendant and delegated by the defendant to him. The Morrissey's had contended, and the Trial Judge had accepted, that the facts of their case satisfied these 5 requirements.

4.4 In the Supreme Court, there was a dispute between the parties as to whether the key component in the relevant test centred around the legal relationship between the parties or on the degree of control which one party exercised over the way in which the other carried out its tasks. In reviewing the law, the Supreme Court noted that:-

"12.2 It may be said that where difficult or novel issues arise concerning the application of well-established concepts in common law to particular circumstances, it may be useful to identify what the fundamental principle or purpose behind the law concerned may be, for that may give valuable guidance as to how the practical rules regarding the application of the relevant aspect of the common law might be applied in such circumstances".

4.5 The Court went on to note that there could be areas where it might be difficult to discern any overarching but consistent fundamental principle and where, in some areas, the caselaw may have grown up as part of an attempt to deal with a range of different circumstances, and where the proper approach to the evolution of a law may have been to avoid over-radical developments, but to extend the parameters of the established caselaw to novel or evolving areas in a manner which was at least analogous to the way in which the existing case law developed. The Court then went on at Para. 12.3 to state as follows:-

> *"The former might be described as a "back to first principles" model. The latter might be described as an "evolution by analogy" approach. In my view, the former approach is preferable should it prove possible to discern, with any real degree of clarity, what the underlying principles are. However, the latter approach may be more appropriate where it is not really possible to identify a coherent underlying basis which informs all of the existing case law".*

4.6 In **Robinson,** the UK Supreme Court had provided, in the view of Clarke CJ at Para. 12.6, "*cogent reasoning"* as to why the *"evolution by analogy"* approach might be appropriate in many circumstances not confined to the narrow question of the determination of the existence of the duty of care at issue in that case. There was, in his view, a "*strong argument*" for the view that the law of vicarious liability might be more properly dealt with under the *"evolution by analogy"* approach.

4.7 Ultimately, the Supreme Court considered that the key question that required to be addressed[12] was:-

> *"... whether the level of engagement by one party with the way in which the other party is to carry out the task entrusted to it is sufficient to include that there is a real extent to which it can be said that the contracted party is closely integrated into the activities of the employer, not just in respect of the ends to be achieved but as to the manner in which those ends are to be pursued".*

4.8 On the facts, the Supreme Court ultimately concluded that, taking a broad view of the relations between the HSE and the Laboratories, both the relationship between those parties (i.e. that of independent contractors), and the level of control exercised by the HSE, was such that it could not give rise to vicarious liability.

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[12] Para. 12.18

4.9 However, the issue of whether the HSE could be found to be primarily liable for the negligence of the Laboratories depended upon whether or not any duty of care owed by the HSE to Mrs. Robinson was a *"non-delegable duty"* of the sort characterised by the UK Supreme Court in **Woodland v Essex County Council**. The Supreme Court, noting that it did not appear that it had ever been asked to fully consider either the question of whether the principle of a non-delegable duty of care applied in Irish law, and if so, whether the criteria for determining that a non-delegable duty arose were the same as those identified in the United Kingdom case law, stated as follows at Para. 13.15:-

> *"It is appropriate to refer back to the overall analysis set out in the section of this judgment concerning vicarious liability which suggests that a court should be informed by any underlying principle, if there be one, but should also, to the extent that it is not possible to identify any underlying principle, adopt an incremental approach".*

4.10 While the Supreme Court considered that there was potentially at least one underlying principle behind the concept of a non-delegable duty, i.e. the particular relationship between the parties,[13] it appeared to the Court that the incremental approach by analogy provided the best assistance to the Court in attempting to map out the parameters of the circumstances giving rise to such a duty. Ultimately, the Court concluded[14] that it was appropriate to characterise the HSE *"... as the party who has undertaken responsibility for the Scheme, irrespective of whether actual screening, or indeed other elements of the Scheme, were to be performed by others"*. On that basis, the Supreme Court concluded that the HSE were, prima facie, primarily liable and there were no circumstances which would lead to the view that the HSE had divested itself of responsibility for that element of the programme involving the assessment of the slides by screeners. Accordingly, the HSE was primarily liable to the Morrisseys.

4.11 In **UCC v ESB,** which had been argued in the Supreme Court before the Supreme Court subsequently gave its judgment in the Morrissey case, the Supreme Court referred back to its statements in **Morrissey** as to how the Court should approach the evolution of the common law and its application to new or evolving circumstances. The Court, at Paras. 8.5 et seq, re-stated its observations in **Morrissey** about the necessity to first identify whether there were any fundamental guiding principles to be found in the existing law, and, if so, that such principles should inform how the law in the area in question should be applied in new or evolving circumstances. Where it was not possible to discern any overarching or consistent fundamental principle, the incremental approach should be adopted *"... by making appropriate analogies with the position already identified in similar situations"*[15]. The joint judgment of Clarke CJ and McMenamin J thereafter continued at Para. 8.9 as follows:-

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[13] Para. 13.18
[14] Para. 13.23
[15] See Para. 8.6

"We would add one further observation. The two approaches are not necessarily mutually exclusive. There may be situations where it is possible to identify at least some level of very broad general principle behind the existing caselaw, but where the application of such broad principle would, of itself, be insufficient to give any acceptable level of clarity as to how the law should be determined in new or evolving cases. In such a situation the Court should have regard to, and operate in a manner consistent with, any such principle for overall guidance, but may also have to consider the "evolution analogy" approach for a more detailed evaluation for the precise boundaries of any evolution".

4.12 There can be little doubt that the above statements of the Supreme Court as to how the common law should be applied to new and evolving situations will be cited in many future cases where previous precedent as to the existence of a duty of care is not available.

5. Cases from the TCC

5.1 Three interesting cases in which judgments were delivered by the TCC in 2020, and where the TCC had to consider whether a duty of care was owed to the Claimant and, if so, the ambit of that duty, are worthy of note..

(i) RSK Environment Ltd. v Hexagon Housing Association Ltd.[16]

5.2 In this case, the defendant, Hexagon Housing Association Ltd., was contemplating the possible purchase of a house at Plumstead, London, for the purposes of procuring the construction of residential housing thereon. It proposed to engage a company called Skillcrown as main contractor. Skillcrown engaged RSK, the plaintiff, to undertake a geotechnical investigation of the site. RSK submitted terms and conditions with its quotation to Skillcrown under which, inter alia, it undertook to use reasonable skill in the survey, but which also included a clause limiting its liability to damages. Skillcrown purported to accept RKS's proposals, and its terms and conditions *"for the client below"*, namely Hexagon. RSK undertook the survey and published a report in which the client was identified as both Skillcrown and Hexagon. The report had acknowledged the use of reasonable care and asserted that it had been prepared under a contract with Skillcrown.

5.3 Hexagon subsequently bought the site and engaged Skillcrown to design and build housing thereon. Practical Completion was reached in November 2015 but in May 2016 the site suffered a ground collapse, due to voids associated with chalk mines, damaging the houses. Extensive remedial stabilisation works had to be undertaken. In October 2017, Hexagon intimated an intention to claim against RSK based on the existence of a common law duty of care. RSK replied by contending that any duty of care was subject to its terms and conditions. Hexagon responded that, as its case was based upon a common law duty of care, RSK's terms and conditions were not applicable.

[16] [2020] EWHC 2049, 30 July 2020, Mrs. Justice O'Farrell.

5.4 RSK issued Part 8 proceedings to seek a declaration from the Court that any duty of care was prescribed by its terms and conditions. For the purposes of the Part 8 proceedings, the Court was asked to proceed on the assumptions (i) that there was no contract, and (ii) a duty of care was owed. The Court was asked to determine whether any duty of care would be limited by the terms and conditions. Hexagon, in its defence, argued that the case was not suitable for Part 8 proceedings as it involved disputed issues of fact, and contended that, on the law, a limitation of liability clause would not bind a third party.

5.5 In commencing her review of the applicable legal principles, O'Farrell J stated at Para. 31 as follows:-

> *"It is common ground that where there are concurrent duties of care at common law and in contract, the contractual obligations will usually define the scope of the tortious duty, unless there is evidence that the party owing the obligations undertook some additional task for which an extended assumption of responsibility may be inferred. In cases concerning concurrent duties, the tortious duty may be limited or excluded where it would be inconsistent with the applicable contract".*

5.6 Noting thereafter that, in this case, the Court was asked to assume that there was no contract between RSK and Hexagon, the Court was required to assume that there was no concurrent duty of care in contract and tort for the purposes of the claim. Thereafter, the Court reviewed a series of cases commencing with **Leigh and Sillavan Ltd. v Aliakmon Shipping Co. Ltd.** in 1986[17] and concluded as follows at Para. 43:-

> *"The above cases were concerned with the question whether there was any duty of care based on an assumption of responsibility. But that question necessarily involves a determination of the nature and scope of any duty of care. A bare finding that a party owes another a duty of care is meaningless in the absence of a finding as to the nature and scope of such duty. In a commercial context, the nature and extent of the common law duty of care will be framed by the contractual nexus or lack of contractual nexus between the parties, together with the wider factual and contractual arrangements, including any stated limitations or exclusions from liability. The cases all served to emphasise the importance of the factual matrix when considering whether any common law duty of care arises, including the nature and scope of any such duty."*

5.7 On the facts, the Court noted that the contractual matrix was in dispute and therefore the Court did not have before it the evidence needed to resolve that dispute. Notwithstanding the basis upon which the Court had been asked to hear the case, the Court concluded that it was unable to determine these issues in a vacuum and *"... certainly cannot determine these issues without proper findings as to the existence of any contract between the parties, the terms and conditions of any such contract, and the proper construction of*

[17] [1986] AC 785 (HL). The cases reviewed included **Pacific Associates v Baxter** [1990] QB 993 (CA), **White v Jones** [1995] 2 AC 2067 (HL), **Killick v PwC** [2001] PNLR 1, **Riyad Bank v Ahli United Bank (UK) Plc** [2006] EWCA Civ. 780, **Customs and Excise Commissioners v Barclays Bank** [2006] UK HL 28, **Galliford Try Infrastructure Ltd v Mott MacDonald Ltd** [2008] EWHC 1570 (TCC) and **Arrowhead Capital Finance Ltd. v KPMG LLP** [2002] EWHC 1801

such terms". In the circumstances, the Court found the claim not suitable for determination by way of Part 8 proceedings.

5.8 The case is of note for the Court's conclusion. RSK's claim had depended upon the proposition that, even where there was no direct contract between A and B, the nature and scope of A's common law duty of care to B may be determined by the terms of A's professional retainer with C[18]. However, where the contractual matrix was in dispute, the Court found itself unable to resolve the issue posed to it. Accordingly, until the Court made findings on the contractual matrix and the nature of the contractual relations between the parties, it was simply unable to make findings as to the nature and scope of the concurrent common law duty which would arise.

(ii) Multiplex Construction Europe Ltd. v Bathgate Realisations Civil Engineering Ltd. (formerly Dunne Building & Civil Engineering Ltd.) (in Administration), BRM Construction LLC and Argo Global Syndicate 1200[19]

5.9 In this case, the Claimant, Multiplex, was the main contractor for a development at 100, Bishopsgate, London, a campus of three large buildings around a public space, including a 40 storey tower. The first defendant (Dunne) was a sub-contractor engaged by Multiplex to undertake the design and construction of the concrete package involving structure and sub-structure, including the concrete core for the 40 storey tower which was to be built using a slipform rig. A slipform rig is a complex specially designed structure comprising constantly moving temporary formwork which enables the concrete core of a multi-storey building to be built rapidly.

5.10 Multiplex engaged Dunne under the terms of a JCT Design and Build Sub-Contract, (2005 Edition) under which Dunne was required to have its temporary works designs (including in respect of the slipform rig) checked by a third party independent design checker.

5.11 The second defendant, BRM, was a specialist design and engineering consultancy engaged to design the slipform rig for Dunne. BRM was based in Dubai and was uninsured.

5.12 The third defendant was engaged by Dunne as its independent third party professional design checker. RMP went into liquidation in 2018 and its Insurers, Argo, were joined to the proceedings by Multiplex under the Third Party (Rights against Insurers) Act, 2010.

5.13 RMP's terms and conditions excluded any liability to third parties, and its independent design checker fee to Dunne was only £3,978. However, on the facts, the Court concluded that RMP's usual terms and conditions had not, in fact, been properly incorporated into its contract with Dunne.

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[18] Judgment, Para. 32
[19] [2021] EWHC 590, 16 March 2021

5.14 RMP had issued two Certificates. The first, dated 25 January 2016, had included *"Notes/Observations"* which had been deleted by Dunne when it passed RMP's Design Check Certificate to Multiplex. This Certificate was given a *"Status B"* (i.e. a *"qualified acceptance"*) by Multiplex. On further review of the design, RMP provided an updated Certificate dated 4 February 2016, but this was not sent by Dunne to Multiplex until June 2006, by which time the slipform rig had been in use for some months. In addition, the rig constructed by Dunne had been modified in the meantime through the introduction of 49 additional jacks.

5.15 Dunne subsequently went into administration and Multiplex engaged a replacement contractor to complete the development who investigated Dunne's works and the slipform rig and concluded that both were deficient. As a result, the project was delayed, thereby giving rise to a claim for £12M. RMP's insurance, limited to £5M, comprised the extent of Multiplex's effective remedy.

5.16 Certain preliminary issues were tried including as to whether a duty of care was owed by RMP to Multiplex. Noting that the preliminary issues encompassed *"classic duty of care issues arising on a complex construction project"*[20], Fraser J approached the issue from a consideration of first principles. Noting the previous statements of Akenhead J in **Galliford Try Infrastructure Ltd. v Mott MacDonald Ltd.**[21] to the effect that, in determining whether a duty of care was owed in the construction context, it was necessary for the party seeking to establish a duty of care to establish that the duty related to the kind of loss which it had suffered, and that one must then determine the scope of any duty of care, Fraser J stated as follows:-

> *"I respectfully agree. The issue should not be approached considering whether RMP owed any duty; it should be determined by reference to whether RMP had a duty of care relating to the kind of loss which Multiplex has suffered, and which it seeks to recover in proceedings".*

5.17 Thereafter, Fraser J referred to the dicta of Lord Hoffman in **South Australia Asset Management Corp v York Montague Ltd.**[22], to the effect that a duty of care:-

> *"... does now however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contract or tort or under statute) must do more than prove that the defendant has failed to comply. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered".*

5.18 Noting that the foregoing was the approach that should be adopted in resolving this preliminary issue, Fraser J stated as follows at Para. 119:-

> *"This is therefore well-established law. It is not sufficient for Multiplex simply to demonstrate that RMP did owe a duty of care, or some ill-defined duty of care.*

[20] Para. 12
[21] [2008] EWHC 1570
[22] [1996] UK HL 10

Multiplex must demonstrate that any duty that was owed to it by RMP is sufficient to encompass the kind of losses which it claims in these proceedings. The type of damage suffered by Multiplex in this case is economic loss. It is with that in mind that one must approach consideration of whether RMP owed Multiplex the duty of care alleged. It cannot be considered in the abstract."

5.19 Fraser J thereafter commenced the analysis of the authorities by referring to the three different tests for the finding of a duty of care, i.e. the assumption of responsibility test, the 3-part test; and the incremental test, noting:-

"As expressed by Lord Bingham at [4], in ***Customs and Excise Commissioners v Barclays Bank plc*** *[2006] UKHL 28… the first step is to ask if there is an assumption of responsibility. It is only if the answer to that is "No" that further consideration is called for. On any analysis, one ought only in the rarest of cases to find that a different answer is thrown up by each of the tests; and this is not likely to be such a rare case. Lord Mance at [86] in the same case stated that all approaches would often lead to the same result, though this was not necessarily so. Application of any of the tests is likely, in my judgment in the majority of cases, to lead to the same answer."*

5.20 Having thereafter referred to the law[23], Fraser J ultimately concluded[24] that RMP did not assume responsibility to Multiplex for the statements in the certificates, whether as the main principal contractor or as the temporary works consultant, and identified 15 specific features which led him to this conclusion, including inter alia that Dunne had full design responsibility for the sub-contract works to Multiplex, including responsibility for the design of the temporary works; thus, this was not a "*liability gap"* case, and there had been no direct contractual link between RMP and Multiplex. The relationship between Dunne and RMP sat *"entirely separate"* from the contractual matrix between Multiplex and Dunne and to find an assumption of responsibility on the part of RMP would *"... short circuit the contractual relations"*. Fraser J found himself reinforced to his conclusion that RMP did not, on an objective test, assume responsibility to Multiplex by considering the very modest level of the fee, though this was not a determinative factor since, in many of the precedent cases, no fee at all had been charged, such as in **Hedley Byrne** itself[25].

5.21 This case, therefore, provides a further example of the extent to which a close examination of the contractual matrix can either lead, or not lead, to a conclusion in

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[23] **i.e. Hedley Byrne & Co. v Heller & Partners Ltd**. [1964] AC 465, **Henderson v Merrett Syndicates Ltd.** [1994] UK HL5, **Simaan v Pilkington Glass (No. 2)** [1988] QB 748, **White v Jones** [1995] UK HL5, **Williams v Natural Life Health Foods Ltd.**[1998] UK HL17, **Marc Rich & Co. AG v Bishop Rock Marine Co. Ltd. (The *"Nicholas H"*)** [1995] UK HL4, **Custom & Excise Commissioners v Barclays Bank Plc** [2006] UK HL, **Riyad Bank v Ahli United Bank (UK) Plc** [2006] EWHC Civ. 780, **Galliford Try Infrastructure Ltd. v Mott MacDonald Ltd.** [2008] EWHC 1570, **Arrowhead Capital Finance Ltd (in liquidation) v KPMG** [2012] EWHC 1801, **Burgess v Lejonvarn** [2017] EWHC Civ.254 and **Hunt v Optima (Cambridge) Ltd.** [2014] EWCA Civ. 714.

[24] Para. 172.

[25] Judgment, Para. 175.

favour of the existence of a duty of care owed by a construction professional to a third party in respect of economic loss.

(iii) Rushbond Plc v J & S Design Partnership LLP[26]

5.22 In this case, the Claimant was the owner of an unoccupied cinema in the centre of Leeds known as *"The Majestic"*. The premises suffered extensive fire damage in 2014. An Architect employed by the Defendant, accompanied by a Structural Engineer and a Quantity Surveyor, carried out an inspection of the property on behalf of a potential purchaser. The Claimant contended that the Architect had left the access door unlocked for a period of about 1 hour whilst they were inside the building, during which period, one or more intruders were able to gain access to the property through the unlocked door and, once inside, started a fire. Damages of £6.5m were claimed in respect of the fire damage. The Defendant subsequently applied to the Court for an order directing that the claim be struck out by reason of the Statement of Case having disclosed no reasonable grounds for bringing the claim. The Court was not invited to determine any issues of fact for the purposes of the application and proceeded on the basis that there had been no direct dealings between the Claimant and the Defendant, that the Claimant had entrusted the keys of the property to letting agents, that the letting agents had given the keys to a representative of the Defendant but did not accompany him on his visit or instruct him that the door should be locked or monitored during his visit, that during the visit of the Architect, the side door was unlocked and the alarm system deactivated, and that when the Architect left the building he locked the side door and reactivated the alarm.

5.23 Noting the legal principles stated by the Supreme Court in **Michael v Chief Constable of South Wales Police[27]**, and **Robinson v Chief Constable of West Yorkshire[28]**, O'Farrell J noted[29] as follows:-

> *"The general rule is that the common law does not impose liability for negligence in relation to pure omissions, including loss arising through the criminal actions of a third party".*

5.24 Noting, that there were circumstances where a duty of care might be owed, the Court concluded[30] that, in order to be satisfied that the claim was bound to fail, the Court had to consider two issues: (i) whether, as the Claimant contended, this was not a pure omissions case, because the Defendant had created the danger and/or played a causative part in the train of events that led to the risk of damage, or (ii) if it was an omissions case, whether the Defendant assumed a positive responsibility to safeguard the Claimant's property from harm under the **Hedley Byrne** principle. On these issues, O'Farrell J concluded as follows:-

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[26] [2020] EWHC 1982 (TCC), Judgment delivered 24 July 2020.
[27] [2015] UK SC 2
[28] [2018] UK SC 4
[29] Para. 56
[30] Para. 38

"39. On analysis of the assumed facts, the harm suffered was fire damage to the Claimant's property. That harm was not caused by the Defendant but by a third party unconnected with the Defendant. The danger causing the damage was fire. The Defendant did not create the source of the fire or provide the means by which the fire started by leaving the door unlocked, the Defendant increased the risk that an intruder might gain entry into the building. Locking the door would have prevented the third party from causing the damage. Failing to lock the door amounted to a failure to prevent that harm… Mr. Jeffrey's failure to lock the door during his inspection inside the property may have been the occasion for the third party to gain access to the building but it did not provide the means by which the third party could start a fire and it was not causative of the fire. It follows that this case is a pure omissions case.

40. The assumed facts of this case do not give rise to the imposition of an assumption of responsibility on the basis of which a duty of care might be owed. Relationships in which a duty to take positive action to safeguard the property of another have been found typically to include contractual or quasi-contractual arrangements… None of the legally significant features of the earlier authorities in which the courts have found an assumption of responsibility exists in this case. In a commercial context, it is difficult to conceive of circumstances giving rise to an assumption of responsibility where there are no dealings between the parties. As Mr. Sinclair put it, there were no exchanges between the parties in this case which crossed the line".

5.25 With regard to the Claimant's contention that the Defendants possession of the key amounted to a special level of control over the source of the danger which gave rise to an assumption of responsibility, O'Farrell J continued as follows at Para. 41:-

"However, the Defendant in this case did not hold itself out as having any special skill or expertise in safeguarding property. The Defendant was not a fire or security expert, was not a letting or management agent for the property, and was not entrusted with possession of the property during construction works. Mere possession of the keys during an inspection of the property was not sufficient to give the Defendant responsibility for safeguarding the property from fire damage. The absence of any dealings between the Claimant and the Defendant preclude any finding of reliance by the Claimant on the Defendant, or any finding that reliance was objectively reasonable."

5.26 Even though liability was not ultimately imposed, this case highlights the risks that can arise for professional persons where property owners give them keys to their properties.

5.27 The **Rushbond** case is also interesting when contrasted with the Irish Supreme Court decision in **UCC v ESB** where, notwithstanding that it might be argued that the latter was a pure omissions case, the Irish Supreme Court held the ESB liable. It might be wondered whether the same result would have been reached in the ESB case had it been brought in the United Kingdom where the determining factor would have required the Courts to ask the question as to whether the ESB had assumed a positive responsibility

to safeguard UCC's property from harm, a question that might be thought likely to yield the answer *"No"* in that jurisdiction.

6. Limitations

6.1 Finally, in **Cantrell v Allied Irish Banks Plc & Others**[31], the Irish Supreme Court delivered an important judgment on the issue of limitations in the context of actions for economic loss.

6.2 The Plaintiffs in these conjoined actions complained that AIB had sold property investments in a number of leveraged property vehicles known as Belfry 2, 3, 4, 5, and 6 in 2003 onwards on the basis that they were safe investments. The Belfry Funds each purchased substantial property portfolios in the UK using leveraged finance. Initially the Funds performed very well, but in 2008 the Funds reported to their investors that the nett asset value of their investments had fallen back, though they still exceeded the value of the initial investment. By the following year, however, largely as a result of the effect of loan-to-value covenants, the investors in all of the Funds, at different dates, were advised that their investments had reduced to nil. The investors coalesced under a group known as the *"Belfry Action Group"* and all commenced litigation against the Bank, the individual Belfry Fund Companies, and a number of others. A number of test cases were identified, and most proceedings were commenced on 6 August 2014, with one of the test cases having been commenced on 26 May 2015. The Bank's starting position was that, if the causes of action had accrued before August 2018, they were all prima facie statute barred unless the date of accrual of the cause of action had been delayed pursuant to S.71(1)(b) of the Statute of Limitations 1957 by reason of fraudulent concealment on the part of the Respondents, not alleged in these cases.

6.3 The Plaintiffs' claims were based on breach of contract, breach of fiduciary duty, negligence and negligent misstatement relating to the terms of the initial perspective and the advice given with regard to the relevant investment (*"the mis-selling claims)*, claims in negligent and negligent misstatement relating specifically to the loan-to-value covenants (which covenants became breached when the properties reduced in value, thereby entitling the lenders to enforce their security) and a claim in negligence in relation to the management of the property investments by reference to the choice of the properties, or the degree to which the properties were traded and sold.

6.4 The High Court Judge (Haughton J) found that the claims of breach of contract and breach of fiduciary duty were statute barred, taking the view that the causes of action accrued when the investment was made or, in respect of the LTV claims, when the respective loans were obtained on terms including an LTV covenant, or when there was alleged mis-management of the investments, all of which occurred before August 2008. The Plaintiffs argued, however, that their claims in negligence required proof of loss, and that it was only when each Fund fell into negative territory that their relative causes of action accrued (it being noted that the point at which each Fund fell into negative territory

[31] 10 December 2020

was different). The Plaintiffs contended that, while their investments were successful and profitable (even if the initial high levels of profitability decreased), no damage was suffered and no cause of action accrued until such time as the value of their initial investments dropped below par.

6.5 Much of the argument in the High Court had concerned the interpretation to be given to the Supreme Court's then relatively recent decision in **Gallagher v ACC Bond Plc**[32]**.** In that case, the Plaintiff had invested €500K in a fixed term investment known as Solid World Bond 4. The Bond was to have run for 5 years and 11 months and was capital guaranteed. The Plaintiff purchased his investment from ACC Bank and the investment was to be funded by borrowing from ACC itself. The investment failed to generate sufficient return as to pay the interest on the loan and the Plaintiff and many others sued. Although the High Court held that the claim was not statute barred, the Supreme Court held otherwise. On one reading, **Gallagher** had appeared to establish a general principle applicable to negligence claims in respect of investments: namely, that damage would normally occur when the investment was made. The **Cantrell** plaintiffs argued however that **Gallagher** was a case decided on its own particular facts and only applied when, as a matter of probability, it could be said, at the point of purchase of the investment, that the burdens of the investment outweighed its benefits such that damage could be said to have occurred at the point of sale and a cause of action accrued at that stage. In consequence, the Supreme Court in **Cantrell** was required to review **Gallagher** and the related case law.

6.6 The decision in **Gallagher**, at the time, was significant for the fact that the Supreme Court (per the Judgment of Fennelly J) undertook an extensive review of all of the then pre-existing jurisprudence, particularly in the UK, in relation to the accrual of causes of action said to arise from negligence or misrepresentation in connection with the underlying transaction that gave rise to the investment or acquisition of the asset in question. That caselaw was complex and not always consistent and drew distinctions between what were described as *"no transaction cases"* and *"flawed transaction cases"*, between *"contingent risk"* and *"contingent liability"*, and between *"present damage"* and *"future contingent loss"*.

6.7 In undertaking his examination of the legal issues, O'Donnell J, in his judgment in **Cantrell**, at Para. 102 et seq. concluded that it was easier and perhaps more useful *"to seek to describe the position"* rather than to seek a single all-encompassing rule. He stated, at Para. 109 as follows:-

> *"The loss and damage which completes a tort of negligence is loss and damage capable of being sued for. There is something more than a little troubling about a definition of damage that is so far removed from reality. Most litigants are not led to commence proceedings by the identification of negligence or breach of contract. Instead, it is only when individuals or businesses suffer actual damage that the question arises whether that can be attributed to the wrongful act of another person who could be required to pay compensation"*.

[32] [2012] IESC 35

6.8 Importantly, O'Donnell J concluded that it was impossible to assess the caselaw of England and Wales on the date of accrual of causes of action in negligence without taking account of the impact of the change in the limitation regime with the introduction of the UK 1986 Act, which had introduced a discoverability test with a long-stop provision. In **Hegarty v O'Loughran**[33], the Supreme Court (McCarthy J) had held that a cause of action in negligence for personal injuries accrued, and thus could be subject to time running for limitations purposes, as soon as a wrongful act had caused person injury beyond that which could be regarded as negligible, even where that injury was unknown to and could not be discovered by the sufferer. The decision in **Hegarty** drew a legislative response by way of the Statute of Limitations (Amendment) Act, 1991, which extended the limitation period in relation to actions claiming damages for personal injuries to 3 years after the accrual of the cause of action or the date of knowledge (as defined) if later. That Act did not, however, deal with cases of latent damage to property or financial loss, a fact later confirmed in **Tuohy v Courtney**[34]**.** In **Tuohy**, Finlay CJ, writing for the Court, acknowledged that a person whose claim was barred in circumstances such as those arising in that case could be said to suffer a severe apparent injustice and would be entitled to reasonably entertain a major sense of grievance. However that grievance was not sufficient to displace the right of the Oireachtas to balance constitutional rights and duties, including the protection of a Defendant's right in his property to be protected from unjust and burdensome claims, and to protect the public interest from the avoidance of stale or delayed claims.

6.9 The UK 1986 Act, which had introduced a discoverability test with a long stop provision, had not solely been confined to personal injuries claims, and O'Donnell J (at Para. 110) in **Cantrell** noted that it was *"... possible to speculate that the"* [UK] *"caselaw would not have developed in the same way if the discoverability test had not been introduced in 1986."* Thus, he felt it was necessary to *"exercise caution"* in considering the application of the jurisprudence developed in England and Wales in a context where no such legislative change had been made.

6.10 Thereafter, O'Donnell J undertook a careful and full analysis of **Gallagher**. Significantly, neither of the parties before the Court had sought to argue that the decision in **Gallagher** should be revisited, but both had put forward contrasting interpretations of the judgment with the Appellants suggesting that the outcome of **Gallagher** was, if anything, an exception rather than the rule and that, properly understood, the case should lead to the rejection of a contention that the cause of action accrued on the date of investment but had rather accrued on a later date when, it was argued, loss could be said to have occurred.

6.11 In the High Court, Haughton J had identified 5 respects in which he considered the facts in **Gallagher** could be distinguished from the present case. The Court of Appeal analysed those distinctions and concluded that they did not provide a basis for distinguishing **Gallagher**.

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[33] [1990] 1 IR 148
[34] [1994] 3 IR 3

6.12 Importantly, before undertaking his own assessment of the issues, O'Donnell J referred to **Brandley v Deane**, the well-known and recent decision of the Supreme Court to the effect that the cause of action in a latent physical damage case accrued when the damage was manifest in the sense of damage capable of being discovered and capable of being proved, even if there was no reasonable or realistic prospect of it being discovered or proved in fact. The Appellants in **Cantrell** relied on **Brandley v Deane** in support of their argument that damage, to be actionable, must not just be manifest, but must be manifest to the Plaintiff. Thus, the High Court Judge was wrong, they contended, in finding that damage occurred when the accounts for each of the Belfry Fund vehicles for each year were approved. They argued that damage only became manifest to the Plaintiff when the accounts and the resultant Net Asset Values were communicated to the Plaintiffs by letter subsequently. By reason of his findings, the High Court Judge found that the mis-selling claims in respect of Belfry's 4, 5 and 6 (though not 2 and 3) were statute barred.

6.13 In particular, O'Donnell J noted the comments of McKechnie J in **Brandley v Deane** about the need for legislative review of the limitations period and, in particular, the desirability of the introduction of a discoverability test. McKechnie J had referred to the fact that he could see no reason why, given this legislative silence, during which the voices and concerns of judges seemed "*to matter little*" , *"... in an appropriate case, the type of "root and branch" re-assessment of judicial deference in the face of ongoing legislative enaction as mentioned by McCarthy J at pg. 164 in **Hegarty v O'Loughran** should not take place"*.

6.14 On the facts, O'Donnell J concluded that the cause of action accrued when the Plaintiffs suffered damage, i.e. when it became clear that the NAV of their investments had fallen below par. That occurred when the accounts were finalised and it had not been contended that, were the Court to so conclude, the claims in respect of Belfry's 2 and 3 would not otherwise be in time. In concluding that the cause of action only accrued when damage, in this sense was suffered, O'Donnell J stated at Para. 132 as follows:-

> *"It is clear that the decision in **Gallagher** requires the Courts to adopt a pragmatic approach in which the identification of damage for accrual of a cause of action must proceed on an incremental basis and that damage for the accrual of a cause of action must bear a close relationship to the lay person's understanding of that term. That is real actual damage, which a person would consider commencing proceedings for. The decision in **Gallagher** must be understood in this light."*

6.15 In **Gallagher** the value of the investment when bought was circa €500K, but Mr. Gallagher and others who had acquired it in borrow-to-invest transactions were in effect, paying in the region of €541K for it. Thus, if Mr. Gallagher had sought to sell his entire investment (including his interest obligations) at the time, he would not have got the equivalent of €541K. Thus, on the balance of probabilities, he had suffered a loss at the point in time at which he entered into his investment. In **Cantrell**, on the other hand, the *"... distinctive and unusual feature"* was that, at the time of the making of the investment,

and for some considerable time thereafter, the investments were more valuable than the original sum invested, even if to that figure was added something for interest (on the basis that they were *"borrow-to-invest"* products).

6.16 Importantly, O'Donnell J held that the date of accrual was not the date upon which the accounts were notified to the individual investors, as that would have introduced a considerable element of subjectivity into the question of the accrual of the cause of action which the approach in **Brandley** was intended to avoid.

6.17 While O'Donnell J noted that it would, in theory, have been possible to have identified more precisely the point at which the value of the investment dropped earlier than the date at which the accounts were subsequently approved or the date of the year end of those accounts, no issue had been taken on this point and no evidence had been adduced to show, in the cases of Belfry 2 and 3, that that precise point could be said to have been reached more than 6 years prior to the commencement of the proceedings.

6.18 One of the most intriguing points referred to in the Judgment appear at Paras. 146 onwards (*"Concluding Observations"*) where O'Donnell J repeated the earlier comments of McKechnie J that reform of the law was urgently required. The Court noted at Para. 151 that:-

> *"Finally, I consider that there may be merit to McKechnie J's view that* ***Tuohy v Courtney*** *may be open for re-consideration. At a minimum, it may be worth looking again at the question of whether it is correct that a Statute of Limitations is to be seen as a balancing of constitutional rights and, even if so, whether the appropriate test is whether the hardship necessarily created is "so undue and so unreasonable in regard to the proper objectives of the legislation as to make it constitutionally flawed".*

6.19 While noting that a six year period of limitation is a *"... more than generous period for the commencement of actions which can reasonably be brought by Plaintiffs with means of knowledge"*, and it would indeed be possible to envisage shorter periods which would not offend the Constitution, O'Donnell J continued as follows:-

> *"It might be thought, however, that the precise issue which now arises for consideration is what justification rooted in the Constitution can be advanced for the absence of a discoverability provision in cases of financial loss or property damage, particularly when it is provided for in cases of personal injury and defective products".*

6.20 The foregoing comments of O'Donnell J are stark and clear and appear to reflect the agreed thinking of the Supreme Court to the effect that, in the absence of the legislative introduction of a discoverability provision, the Court would be willing to entertain proceedings in which the constitutionality of the provisions of the Statute of Limitations 1957 might be challenged or impugned by reason of the manifest injustice and illogicality in maintaining legislation which fails to provide for discoverability provision in the case

of financial loss and property damage. How the Court might ultimately conclude on this issue will be a matter for speculation in due course.

6.21 But it is clear that the patience of the Supreme Court in relation to the absence of legislation on the discoverability issue has worn very thin indeed. The message to the Oireachtas is clear: act soon or risk future judicial impairment of the Statute of Limitations on this issue. Such impairment could include the striking down of the most fundamental parts of the Statute in relation to the accrual of causes of action in negligence. It is difficult to conceive of a more clear statement of judicial intent in this regard.

7. Concluding Remarks

7.1 It may be observed that the common law is like a baton in a relay race, passing sequentially from one generation of judges to the next. Each brings the baton further down the track. In this way, the common law is constantly in a process of development.

7.2 Like a glacier moving down a mountain, its evolution can be slow. To those watching it closely, it can seem never to change. But in truth, it is in a constant state of evolution. A careful consideration of the **Morrissey**, **ESB** and **Cantrell** cases, in particular, demonstrates how the common law is evolving in the area of negligence and limitations.

7.3 It is clear that the current Irish Supreme Court is alive both to the need to develop the common law, but to do so in a way that consciously applies well established and acknowledged principles, united by the need to remedy injustice wherever it can properly do so. The TCC cases are also worthy of regular review to see how the application of the common law duty of care is developing in that jurisdiction, in particular with regard to the liability of construction professionals.

7.4 The above cases are examples of how the law is constantly evolving. Those involved with professional negligence would do well to take care to be constantly up to date with such developments as one does not know when law, taken for granted and accepted as dogma, may once more be on the move.

JOHN TRAINOR S.C

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Tortious Duties to Third Parties – Goodbye to the Threefold Test

16 mins

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Ben Patten QC's expertise lies in a range of commercial work, including construction disputes, professional liability claims, commercial litigation and insurance and reinsurance disputes.

Described as "calm under pressure and always willing to stick his neck out on a case" he acts for both claimants and defendants in the TCC, Commercial and Mercantile Courts, Queen's Bench Division, Chancery Division and Arbitrations. He also appears in the Court of Appeal and in expert determinations, mediations and other ADR hearings.

Chambers and Partners has described Ben as greatly respected for his effective manner in court, "he has a very nice way of presenting an argument which appeals to judges hugely," and his 'good commercial instincts'. 'Peers are impressed by his skills as an advocate generally, and particularly note his strength in solicitor negligence cases' as well as the "incredibly calm," "persuasive" approach he demonstrates in his construction and professional indemnity work for a client base of developers, contractors and insurers. Previous editions says of him "You can throw anything his way and he will deal with it." "He has a mild and gentle manner with clients, but is determined and clear in his advice. He is also very effective as an advocate, as he's calm but good at focusing on the right issues and directing judges' attention to them." "Technically he's one of the best around. He is also highly responsive." Ben is also rated as a leading Silk by the Legal 500.

Ben has also been described in the Directories as being "really at the top of his game", "a top performer who has a very concise and effective drafting, advisory and advocacy style" and "a star of the future". In 2009, the year before he took Silk, he was awarded Chambers and Partners Professional Negligence Junior of the Year.

A team player, Ben's style is to roll up his sleeves and get involved. He has considerable experience of very substantial commercial litigation, including group actions and the larger TCC cases. He is relaxed and approachable, whilst at the same time being businesslike and tenacious in pursuing the best outcome for the client. He has a keen sense of the client's commercial interests and can cut through the complexities of a difficult case to get to the heart of the issues.

Ben is the author of "*Professional Negligence in Construction*" [Spon] 2003, a co-editor of the Construction Professionals Chapter in "*Jackson & Powell*" and a co-editor of the Solicitors' Chapter in the *Professional Negligence and Liability Looseleaf*. He is also a frequent lecturer and author of legal articles. Ben is a member of TECBAR, COMBAR, the Professional Negligence Bar Association and the London Common Law & Commercial Bar Association. He has also been called to the Bar in the Republic of Ireland and Northern Ireland and has acted as an arbitrator.

Privacy Policy

Click here for a **Privacy Policy** for Ben Patten QC.

Areas of Expertise

Construction & Engineering

"Eloquent and bright, very good in conference with clients." – *Legal 500, 2020*

"A legal heavyweight, exceptionally bright and very impressive." "He has a superb combination of construction and professional negligence expertise. He is exceptionally good, so easy to get on with, hard-working and dedicated." "Very detail-oriented and a superb cross-examiner." – *Chambers & Partners, 2020*

"Gets to speed quickly with the papers and excellent at drafting submissions." – *Legal 500, 2019*

"Great to work with, very good with clients and commercially astute." "He's thorough and has a good cross-examination style." – *Chambers & Partners, 2019*

Recognised as a Leading Construction Silk by both the Legal 500 and Chambers & Partners. Ben has very considerable experience in construction and engineering disputes. He has appeared in a wide range of cases in the TCC, Arbitrations, Adjudications and the Court of Appeal. He has been described in Chambers and Partners as being greatly respected by clients for being *'"very easy to engage with and always provides sound commercial advice," "he is amazingly calm under pressure, which gives the entire team confidence,"* and for having a*"way of presenting an argument which appeals to judges hugely,"* and *"incredibly calm," "persuasive"* approach; *"a top performer who has a very concise and effective drafting, advisory and advocacy style*"; *"technically he's one of the best around. He is also highly responsive*", *"he is efficient, very clever and knows his stuff." "He has the trust of judges: he never makes a bad point or overblows a submission."*

Recent and current cases include:

- Acting for certificating architects in a claim brought by a number of purchasers.
- Acting for the employers of an auction mart in a dispute with the developer.
- Acting for architects and project managers in relation to a claim in respect of the renovation and development of civic premises.
- Acting for the Claimant in the groundbreaking vicarious liability case of *Biffa Waste Services Ltd. v Maschinenfabrik Ernst Hese Gmbh*, both at first instance in front of Mr Justice Ramsey and in the Court of Appeal (late 2008). The case is now the leading authority on the application of the control test for borrowed employees and of the extent of the application of the "extra hazardous acts" rule in *Honeywill v Stein & Larkin*.
- Acting for the defendant architects in the appeal to the Court of Appeal in *Hunt v Optima*, an appeal from Mr Justice Akenhead, which is the leading authority on duties arising from professional consultants' certificates.
- Acting for specialist contractors against whom a substantial claim was made arising out of a fire on the Isle of Wight.
- Acting for employers in respect of a biogas installation in a claim against the contractor.
- Acting for a firm of contractors in a multi-party dispute concerning piling and ground improvement works for a superstore in Kent.
- Acting for consultants in respect of a claim concerning stone cladding to a building in the City of London.
- Acting for a firm of contractors on a dispute concerning variations, extensions of time and loss and expense claims in relation to a residential development in Kensington.
- Acting for a firm of contractors in relation to a dispute over delays to a large development at Southbank London arising from a diesel spillage.
- Acting for a demolition contractor in relation to an inter-related series of adjudications and part 8 disputes concerning contractual interpretation.
- Acting for PI insurers of engineers on a large construction project in Ireland (essentially construction of bridges).
- Acting for UK design and build contractors in adjudication proceedings concerned with plant producing car parts (the issues are engineering).

Recent and current international cases include

- Acting for US contractors in a dispute concerning the construction of a gas pipeline in Nigeria.
- Acting for a Qatari developer in a dispute concerning a mixed use development in Doha.
- Acting for an international construction consultancy group in a dispute over project monitoring in the Caucuses.
- Acting for a Dubai based contractor in a dispute in the Dubai World Tribunal.
- Acting for US engineers in an arbitration concerned with a production plant in Germany where the critical issues concern tooling and engineering.

PFI and related fields

Experience in PFI and related areas:

- Acting for a large contractor in a dispute with a hospital trust
- Acting for a trust in relation to a schools project covering a number of schools
- Acting for the provider of services transporting detainees to secure facilities, courts and hospitals
- Acting for a provider of supplies and other services to a local authority
- Acting for a national housebuilder in respect of expert determination concerning a joint venture
- Acting for a health trust in relation to a dispute with a supplier of outsourced services

Professional Liability

“Excellent judgement and very easy to deal with.” – *Legal 500, 2020*

“He is very good at distilling the detail when there are reams of information to dig through, to move the case forward successfully.” “He is excellent: quick, confident and approachable. He has the ability to make complicated elements very simple.” – *Chambers & Partners, 2020*

“He is very forensic and takes points in a measured but persuasive way. Clients really respect and trust him.” “He’s a very clear advocate and an extremely courteous opponent, and you can tell the judge has real confidence in him.” – *Chambers & Partners, 2020*

“He has an encyclopaedic knowledge of the subject matter, coupled with a fantastic advocacy style. Like a university professor when he needs to be, but then a street fighter when that’s appropriate. Watching his advocacy was a masterclass.” “He is excellent on detail and provides good, practical advice.” – *Chambers & Partners, 2019*

“He provides strong and decisive advice” – *Legal 500, 2019*

Accountants, Auditors & Actuaries

Ben has acted in many claims against accountants and auditors, including claims for negligent audit work, negligent preparation, review and audit of management accounts and negligent advice (including negligent tax advice, both corporate and personal).

Recent and current work includes:

- Acting for a claimant who was given incorrect advice over CGT and the benefits of moving his tax arrangements offshore.
- Acting for claimants against a firm of tax advisers, accountants and auditors concerning tax advice on corporate acquisitions with subsequent auditing advice and Inland Revenue investigations and action.
- Acting for claimants in a dispute with their former accountants concerning the taxation treatment of restaurant tips and the financial structures which might have been put in place so as to minimise the exposure of the business to national insurance contributions.
- Acting for accountants in a claim brought against them by former clients concerning advice in relation to foreign currency loans and the purchase of property bonds.
- Acting for claimants in a dispute with their former accountants concerning advice given in relation to a share sale transaction

and in particular the true and fair treatment of certain profits.
- Acting for auditors in a dispute with former clients concerning their failure to uncover fraudulent transactions undertaken by a former employee.
- Acting for a firm of solicitors against accountants in contribution proceedings in the context of a claim by former clients arising out of a share sale transaction.
- Acting for tax advisers concerning advice in relation to film finance schemes.

Construction Professionals

"He has been very impressive." "He is good on paper, very concise and clear." – Chambers & Partners 2019 – Professional Negligence: Technology & Construction

"A real stalwart in the field. What Ben doesn't know about professional negligence isn't worth knowing." "A very clever, fast and impressive advocate. He is very crisp and develops a good rapport with the judge. He's three jumps ahead." – Chambers & Partners 2018 – Professional Negligence: Technology & Construction

Ben has very extensive experience of acting both for and against architects, engineers, quantity surveyors and project managers. He also has experience of acting for specialist construction concerns such as demolition contractors and contractors carrying out asbestos works where "professional liability" issues often arise. He appears regularly in cases involving construction professionals in the TCC and in Arbitrations. He has considerable experience of construction professional indemnity insurance issues and contribution disputes.

Recent and current cases include:

- Acting for the defendant architect in the appeal to the Court of Appeal in *Hunt v Optima*, a case concerning professional consultant's certificates
- Acting for the design and build contractor of a superstore where substantial settlement was alleged to have been caused by inappropriate vibro-replacement treatment.
- Acting for engineers in relation to their design review and checking obligations concerning soil nailed walls in a railway embankment.
- Acting for a claimant in a dispute with former project managers concerning advice in relation to letters of intent and contractual remedies.
- Acting for engineers in relation to a dispute concerning soil stabilization works in a transport infrastructure project.
- Acting for a project manager in relation to a dispute concerning advice concerning planning on a residential development.
- Acting for a claimant in a dispute with a multi-disciplinary practice of architects, surveyors and project managers in respect of the construction of a health centre.
- Acting for an architect in a dispute over the design and construction of an airport terminal.
- Acting for a claimant against M&E engineers in relation to the design of a heating and ventilation system.
- Acting for a firm of project managers sued in respect of the project management of restaurant fitting out works in central London.
- Acting for engineers in relation to a claim arising out of frozen ground affecting the construction of buildings erected on the site of a former cold storage unit.
- Acting for a lender in a claim against a project monitor.Acting for consultants in respect of a claim concerning stone cladding to a building in the City of London.
- Acting for specialist architects in relation to a claim concerning the restoration of a grade II* listed building and ancient monument.

Insurance Brokers & Agents

Ben regularly acts both for and against Insurance Brokers in relation to disputes arising out of coverage difficulties.

Recent and current cases include:

- Acting for insurance brokers in a dispute with former clients arising out of a fire at warehouse premises where there was

insufficient public liability and business interruption cover.

- Acting for insurance brokers in a dispute with former clients arising out of a fire at commercial premises where the insurer avoided on the basis of non-disclosure.
- Acting for a construction contractor in a dispute with insurance brokers over the suitability of design liability insurance as a result of a decision by insurers that the contractor's policy did not respond to damage arising out of certain design defects.
- Acting for insurance brokers in a dispute with a construction contractor concerning policy advice arising in the context of a claim by an injured employee of a sub-contractor.
- Acting for insurance brokers in relation to a dispute with former clients arising out of coverage issues in respect of a claim relating to consultancy services provided to M&E contractors working on a hospital project in Belfast.

Lawyers

Ben has extensive experience of appearing both for and against claimants and defendants in cases involving barristers and solicitors. He has acted in some of the largest and most important disputes concerning lawyers in recent years, including the *TAG* litigation and the *Levicom* case. He recently successfully defended Eversheds in a multi-million pound claim brought by Newcastle Airport, winning both at first instance and in the Court of Appeal. He has covered most aspects of lawyer's negligence including claims arising from commercial, corporate and property transactions, claims arising from mortgage work and other aspects of lending transactions and claims arising from litigation. He has particular experience in disputes arising from, and difficulties arising in relation to, solicitors' professional indemnity insurance *and is experienced in dealing with dishonesty issues*. He is a *a co-editor of the solicitors chapter in the Professional Negligence and Liability Looseleaf.*

Recent and current cases include:

- *Newcastle Airport v Eversheds*
- *Levicom v Linklaters*
- Acting for a firm of solicitors alleged to have given inaccurate advice to a US based engineering consultancy, said to have resulted in a multi-million pound loss
- Acting for a firm of solicitors where the partner was issued with a witness summons to give evidence about client confidential matters in *Young v Young*
- Acting for solicitors in a dispute with former clients and a barrister concerning advice in relation to an appeal against a Customs and Excise ruling on alcohol.
- Acting for a barrister on a wasted costs application.
- Acting for the former partners of a firm of solicitors where a rogue partner was engaged in multiple mortgage fraud.
- Acting for a firm of solicitors involved in a dispute with former clients arising out of commercial litigation in relation to a complex web of business interests.
- Acting for claimants against their former solicitors in relation to advice concerning the purchase and development of a large block of land.
- Acting for a lender in relation to a dispute with a solicitor concerning a fraudulent commercial loan.
- Acting for a solicitor in a claim brought by shareholders in a company which was one part of a corporate joint venture advised by the solicitor.
- Acting for claimants in a dispute with their former solicitors concerning the disposal of substantial overseas business.
- Acting for a firm of solicitors jointly sued with Leading and Junior Counsel in respect of commercial litigation which was allegedly mishandled.
- Acting for solicitors in a dispute with clients about the alleged misappropriation of client funds.
- Acting for solicitors in a dispute over funding and alleged champerty and maintenance.
- Acting for a firm of solicitors sued by a company in respect of the losses sustained by reason of contracts drawn up by the solicitors on the instructions of one of the directors, which instructions were alleged to be unauthorised.
- Acting for a firm of solicitors, sued along with two other firms, in respect of alleged negligence in the conduct of substantial property transactions which were themselves said to be fraudulent transactions.
- Acting for solicitors in relation to alleged negligent advice concerning international litigation and arbitration in different jurisdictions and specifically freezing orders.

Surveyors & Valuers

Ben frequently acts both for and against surveyors and valuers in cases concerning all aspects of property valuation and particularly in cases relating to commercial lending and mortgage fraud.

Recent and current cases include:

- Acting for lending institutions alleging fraud on the part of a valuer.
- A number of actions for substantial lending institutions against different surveyors alleging negligent valuation in respect of both commercial and residential loans.
- Acting for a firm of valuers which contained a “rogue” partner who was involved in a series of fraudulent transactions which led to a number of commercial lending institutions suffering considerable losses.
- Acting or claimants in relation to the allegedly negligent valuation of a development site.
- Acting for a firm of planning consultants in proceedings brought against valuers and planning consultants relating to the acquisition and development of waterside properties.
- Acting for claimants in a dispute with a valuer over the purchase of property suffering from subsidence.
- Acting for a commercial lender in a dispute with a firm of surveyors concerning the valuation of packages of flats for a “buy to let” club.
- Acting for a lender in relation to overvaluation of “buy to let” portfolios.
- Acting for property consultants in a claim concerning allegedly negligent advice on future values.

Financial Services Professionals

- Acting for financial advisers in relation to investment advice given to two trusts, including investment advice concerning investment in Hedge Fund products, and claims brought by those trusts and/or the beneficiaries of the trusts.
- Acting for financial advisers in relation to investment advice concerning pension schemes and permissible investments.
- Acting for the insurers of a large Irish financial advisers concerning policy coverage and potential claims.
- Acting for claimants in a claim against mortgage brokers.

Commercial Dispute Resolution

Ben has substantial experience of commercial litigation in the Commercial Court, the Mercantile Courts and in arbitrations. He has being involved in a number of share sale warranty disputes, sale of goods disputes, disputes concerning licensing agreements and disputes concerning employment and restraint of trade.

Recent and current cases include:

- Acting for a printing concern in seeking injunctive relief against ex employees seeking to contact former clients whilst working with a competitor.
- Acting for a group of aviation companies facing debt claims arising out of service agreements and pension scheme arrangements pre-dating a share sale agreement.
- Acting for one of the joint venture partners in property joint venture in a dispute concerning the allocation of certain profits and losses.
- Acting for an engineering concern in relation to a dispute as to the meaning and effects of contracts between itself and a Swiss and a French concern in relation to the carrying out of certain works at a power station in the UK.
- Acting for the purchaser of a heating and electricity generating system in a dispute with the vendors of the system.
- Acting for solicitors in contribution proceedings against a bank in relation to losses sustained by their mutual clients.
- Acting for the leaseholder of a substantial office block in central London in respect of a delapidations claim.
- Acting for the contractor on a n expert determination in relation to a large government contract for services.
- Acting for the vendors of a construction business in relation to a share sale warranty claim.

Insurance & Reinsurance

Ben is frequently involved in insurance disputes, both in the Commercial and Mercantile Courts and in arbitrations. Many of these disputes arise out of other areas of his practice and in particular he is experienced in disputes concerning Contractors All Risks policies and Professional Indemnity policies.

Recent and current cases include:

- A claim by an employer contemplating proceedings under the Third Party (Rights Against Insurers) Act, for information concerning the contents and claims record of a contractor's policy of insurance.
- An action by insurers against former assureds seeking declarations that the policy was avoided on grounds of fraud.
- A dispute between insurers as to which policy responded to a loss where the assured had claimed against both.
- A dispute between the designer of specialist TV and Film set staging and its public liability insurer on liability for claims by third parties arising out of the collapse of one of its structures.
- A dispute between a construction contractor and its CAR insurer concerning whether losses arising from claims made by the employees of a sub-contractor were covered by the policy.
- Acting for the insurer of a financial services provider in respect of a policy dispute.
- Acting for the insurer of engineers under a professional indemnity policy concerning coverage issues.
- Acting for consulting engineers on policy issues arising out of allegedly defective design in respect of two water treatment plants.
- Acting for professional indemnity insurers in respect of coverage disputes concerning allegedly fraudulent solicitors.
- Acting for CAR insurers in relation to coverage issues arising out of notification and "one claim" disputes.

Property Damage

Ben has extensive experience in property damage cases

- Acting for the claimant in *Biffa Waste Services Ltd and Anor v Maschinenfabrik Ernst Hese GmbH* both at first instance in front of Mr Justice Ramsey and in the Court of Appeal (late 2008). The case is now the leading authority on the application of the control test for borrowed employees and of the extent of the application of the "extra hazardous acts" rule in *Honeywill v Stein & Larkin*
- Acting for specialist contractors against whom a substantial claim was made arising out of a fire on the Isle of Wight.

- Acting for an electrical sub-contractor in a very substantial multi-party case involving a fire at a retail park in Warrington
- Acting for a contractor in relation to asbestos contamination in industrial premises in Kent
- Acting for the CAR insurers of a major contractor in relation to flood damage at a hotel in Mayfair
- Acting for brokers in relation to a dispute over PL coverage in relation to damage to specialist pipework in an intensive care unit in Belfast

International Arbitration

Ben's main expertise lies in construction law and in particular in large construction projects with spin off financial claims. These include: gas pipelines; airport terminal buildings; office developments; airport runways; roads and bridges. He has experience in many different forms of construction contract and most commonly encountered construction issues, including: delay and disruption; variations; defects; certification and partnering. He is also experienced in issues concerning funding arrangements, guarantees and bonds.

Current and recent cases

National Infrastructure Development Co v BNP Paribas

In this case, which is one of a number actions taken by NIDCO to enforce standby letters of credit, Ben acted for the corporate construction arm of Trinidad and Tobago to enforce on-demand bonds to the value of nearly US$59 million. The defendant bank claimed (unsuccessfully) that it was not require to pay by reason of a Brazilian injunction. The case citation is [2016] EWHC 2508 (Comm).

S v H

This is a dispute between a US based turnkey manufacturer of specialist plant and a Swiss company concerning the design, installation and construction of a manufacturing plant in Germany. The legal issues concern contractual obligations, including responsibility for regulatory delays. The value of the claim is still being ascertained but the contract value is in excess of US$60m. The arbitration is conducted under ICC auspices (the law of the Contract is Swiss law). Ben acts for the US concern.

N v F

This was a very substantial dispute concerning a development project in Moscow. Ben acted as one of two leading counsel for one of the parties. The issues concern fraud, breach of fiduciary duty, contractual interpretation, causation and valuation. The claim was put at more than US$500m.

U v A

A series of disputes (some of which were referred to the LCIA) concerning a series of projects and related financial arrangements concerning the development of 8 tower blocks and a separate residential project in Doha, Qatar. The total quantum of the claims exceeded US$100m. Ben acted for the Qatari developer. There were three sets of related proceedings taking place in London and Doha. The Qatari and LCIA proceedings raised issues of contractual construction, bilateral obligations and commercial fraud. Proceedings before the Commercial Court concerned funding arrangements and claims by lenders against the developer. The issues in that claim concerned (1) forum; (2) proper law; (3) issues of agency and authority under Qatari law (4) compromise and ratification and (5) frustration/impossibility. The claim was for repayment of debt obligations in excess of $US35m.

T v N

Ben was engaged in a series of disputes (one of which has been litigated in the Dubai World Tribunal at the DIFC) between a Cypriot contractor and the developer of the Palm in Dubai. The issues concerned extension of time and claims for loss and expense. The value of the claims was very substantial.

E v A

Ben acted for an international construction consultancy concerning loans made to the developer of a mixed use development in Armenia. The allegations concerned project management and monitoring (in particular, alleged failure to detect mismanagement on the part of the developer and to identify likely cost overrun). The value of this LCIA claim was alleged to be in the region of US $25m. In addition to technical issues relating to the project, the issues of law concern the proper extent of a monitoring consultant's duties and the role of contributory fault by the lender.

W v W

This was a dispute concerning the construction of a gas pipeline through Nigeria and other West African states. The contractor's contract was terminated for alleged non-performance, although the contractor contended that the employer had failed to pay its contractual entitlements. The legal issues concerned the true construction of termination clauses, limitation on liability clauses and liquidated and ascertained damages clauses. More general issues concerned delays, extensions of time and defects. There were substantial practical issues concerning discovery from the parties' different manifestations in a number of different jurisdictions. Approximate claim value $120m. Ben acted for the contractor.

SG v KT

This was a dispute brought by a UK dependency against a firm of architects over the design, project management and contract administration of a project to construct a new airport terminal building. Legal issues concerned conflicts of law and jurisdiction between the law of the dependency and the law of the reference and issues over enforcement of interim awards. The more general issue in the case concerned alleged design defects, design coordination between different members of the design team, inspection of contractors' works, delay and reporting of cost overruns. Approximate claim value £15m. Ben acted for the architect.

C v P

This was a dispute concerning the adequacy of the design and construction of the concrete framework for a combined office and residential development in Dublin, Republic of Ireland. The legal issues concerned the proper interpretation of the contract as to the priority of contract documents and the meaning of the variations clauses. General issues concerned design responsibility, defects, extensions of time and loss and expense payments. Approximate claim value €6m. Ben acted for the contractor.

I v C

This is a dispute between an African construction company and a US based design and build contractor concerning the construction of two power generating plants in Liberia. The legal issues concerned alleged misrepresentation, the true meaning of the contract, causes of delay and entitlement to repudiate. The value of the claim was said to be just under US$10m. The arbitration is conducted under ICC auspices. Ben acts for the design and build contractor.

Ben acts as an arbitrator and mediator in construction disputes. He recently acted in a mediation between four parties in relation to a construction project in Northern Ireland.

Mediation

Ben is an accredited mediator and has mediated a range of disputes including:

- a dispute between a design and build contractor and its project architect;
- a dispute between a company and its former solicitors;
- a dispute between a contractor, its sub-contractors and its CAR insurers;
- a dispute between an employer and a design and build contractor;
- a dispute between two religious groups over the property of an unincorporated association.

In addition to mediation, Ben has acted as a conciliator under forms of contract made in the Republic of Ireland and Northern Ireland. He has a very "hands on" approach to mediation and likes to engage with the parties both before and (if appropriate) after the day of the mediation so as to ensure that the parties have the maximum prospect of achieving benefit out of the mediation.

Qualifications & Memberships

B.A. (Oxon) (First Class) Dip Law (City), Called to the Irish Bar in 1998, Called to the Bar of Northern Ireland 2014

Insights

Certainty in Certification – [2014] 9 JIBFL 620B

The decision of the Privy Council in Fairfield Sentry v Migani is of considerable importance to funds which employ certification mechanisms. It will also be of note in relation to instruments employing market-based triggers, for example convertible loan notes. Here we discuss the implications of the decision for certification and those responsible for issuing such certificates.

Jackson & Powell, Professional Liability [2017], co-editor of Chapter 9, Construction Professionals

Professional Negligence and Liability, co-editor Chapter 9, Solicitors

PNLA
Professional Negligence
Lawyers Association

Notes: -

Stephen McCullough BL

Delay and want of prosecution (effects of Covid-19)

25 mins

Stephen McCullough BL

E: stephenmccullough@lawlibrary.ie

Stephen McCullough graduated from University College Dublin with a Bachelor of Civil Law degree in 1996. Stephen qualified as Junior Counsel in 1998.

Stephen has worked on numerous high-profile matters within Ireland, including acting as Junior Counsel on the Moriarty Tribunal. Stephen's areas of practice are Commercial/Chancery and General Practice. He specialises in Banking / Finance & Securities, Medical Law, Professional Negligence and Defamation

https://www.lawlibrary.ie/members/Stephen-McCullough/1257.aspx

APPLICATIONS TO DISMISS FOR DELAY AND WANT OF PROSECUTION - SOME RECENT TRENDS AND THE POSSIBLE EFFECTS OF COVID-19

Stephen McCullough BL

Introduction

Over the course of the past fifteen years, it has been possible to identify a stricter approach towards delay by parties in conducting litigation in the decisions handed down by the Irish courts. This has meant that periods of delay in prosecuting claims by plaintiffs that might previously have been tolerated or excused by the courts have in recent times more frequently resulted in successful applications to strike proceedings out for want of prosecution. It is intended in this paper to look at some of the principles from recent Irish case law, particularly as those principles relate to professional negligence litigation, and then to ask what, if any, effect the current disruption to society, commerce and the legal system as a result of the Covid-19 pandemic may have when considering delays in litigation in future applications to dismiss.

The Genesis of a Stricter Approach

The movement by the courts in recent times towards a stricter view of delay in litigation has been rooted in a combined focus on both Irish constitutional considerations and guidance received from the European Court of Human Rights in relation to the obligations on Irish courts under the Convention.

The constitutional imperative to bring to an end a culture of delay in litigation so as to ensure the effective administration of justice and basic fairness of procedures has been emphasised in a number of judgments dealing with delay. The relevant constitutional provisions are contained in Article 34.1, which requires the courts to administer justice, and Article 40.3.2, which guarantees the citizen the right to protect their good name. In ***Millerick v Minister for Finance***[1], the Court of Appeal (Irvine J.) stated as follows:

[1] [2016] IECA 206

"*[R]ecent decisions of the Superior Courts emphasise the constitutional imperative to bring to an end the all too long standing culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of procedures. These decisions have emphasised the constitutional provisions contained in Article 34.1 which require the courts to administer justice. This constitutional obligation presupposes that the court itself will strive to ensure that litigation is conducted in a timely fashion. In particular, in* Quinn v Faulkner t/a Faulkner's Garage and Another *[2011] IEHC 103 Hogan J., at para. 29, criticized the court's prior tolerance to inactivity on the part of litigants when he stated:-*

> *"'While as Charleton J. pointed out in* Kelly v Doyle *[2010] IEHC 396 it would be wrong for the Court to strike out proceedings because of judicial disapproval, it must also be acknowledged that experience has also shown that the courts must also become more pro-active in terms of undue delay, since past judicial practices which had tolerated such inactivity on the part of litigants and which led to a culture of almost "*endless indulgence*" towards such delays led in turn to a situation where inordinate delay was all too common: see, e.g., the comments of Hardiman J. in* Gilroy v Flynn *[2004] IESC 98, [2005] 1 ILRM 290*, *and those of Clarke J. in* Rodenhuis and Verloop BV v HDS Energy Ltd *[2010] IEHC 465.*'"

As regards considerations under the European Convention on Human Rights, Article 6.1 of the Convention provides that in the determination of his or her civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time. In ***McMullen v Ireland***[2]*,* the European Court of Human Rights gave the following guidance as to what might be considered reasonable in terms of the duration of proceedings in the context of Article 6.1 of the Convention:

(i) Legal proceedings for determination of civil rights and obligations should be resolved within a reasonable time.

(ii) Reasonableness is to be assessed by reference to the circumstances of the case, its complexity, the conduct of the applicant and of the relevant authorities and the importance of what is at stake.

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[2] ECHR 422 97/98 29th July 2004

(iii) The State is obliged to organise its legal system to comply with the reasonable time requirement of Article 6.

In ***Gilroy v. Flynn***[3], the Supreme Court (Hardiman J.), noting the guidance then recently given by the European Court of Human Rights in *McMullen*, stated:

> *"[T]he courts have become ever more conscious of the unfairness and increased possibility of injustice which attached to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued ....[F]ollowing such cases as McMullan v. Ireland [ECHR422 97/98 29th July 2004] and the European Convention on Human Rights Act 2003 , the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time."*

In ***Stephens v. Paul Flynn Ltd.*** [4], Clarke summarised the applicable principles in ***Primor plc v Stokes Kennedy Crowley***[5], which remains the leading authority on applications to dismiss for want of prosecution, but also noted the recent move towards a stricter view of delay as identified in cases such as *Gilroy* as follows:

> "*Having considered the matter I am satisfied that the two central tests remain the same. The court should therefore: -*
>
> > *1. Ascertain whether the delay in question is inordinate and inexcusable; and*
> > *2. If it is so established the court must decide where the balance of justice lies.*
>
> *However it seems to me that for the reasons set out by the Supreme Court in Gilroy the calibration of the weight to be attached to various factors in the assessment of the balance of justice and, indeed, the length of time which might be considered to give rise to an inordinate delay or the matters which might go to excuse such delay are issues which may need to be significantly*

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[3] [2004] IESC 98

[4] *Stephens v. Paul Flynn Ltd.* [2008] 4 IR 31

[5] *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459

reassessed and adjusted in the light of the conditions now prevailing. Delay which would have been tolerated may now be regarded as inordinate. Excuses which sufficed may no longer be accepted. The balance of justice may be tilted in favour of imposing greater obligations of expedition and against requiring the same level of prejudice as heretofore."

Recent Pre-pandemic Case Law – *Pugh & Anor v PGM Financial Services & Ors*

The shift in attitude identified in cases such as *Stephens, Quinn v Faulkner* and *Millerick* has meant that there have been a number of recent decisions where proceedings have been struck out as a result of periods of delay which might in previous years have been more readily tolerated by the court[6].

The decision of Sanfey J. in ***Pugh & Anor v PGM Financial Services & Ors***[7] provides some useful guidance in the context of litigation involving professional negligence. In that case, the plaintiffs sued a number of defendants in connection with losses they had incurred on a property investment fund, which they said was due *inter alia* to negligent investment advice provided by the first and second defendants. The investment fund was a closed fund such that while the plaintiffs invested their money in 2008, the fund did not mature until 2014 and there was no access to the funds during the period of investment.

After proceedings issued in 2014, the first and second named defendants were able to identify three periods of delay by the plaintiffs in progressing the proceedings which the court held amounted cumulatively to 29 months. The applicants argued that this period of delay was inordinate particularly in circumstances where they claimed that there had also been delay in initiating the proceedings, such that it was case involving a "*late start*." Indeed, a statute of limitations defence had been pleaded on the basis of *Gallagher v ACC Bank plc*[8], such that it was alleged by the

[6] See for example *Maxwell v Irish Life Assurance plc* [2018] IEHC 111, where the combined effect of two separate periods of 22 months and two years was considered inordinate delay and *The Governor and Company of Bank of Ireland v Wilson* [2020] IEHC 646 where the claim was struck out over a delay of three years and two months.

[7] [2020] IEHC 49

[8] [2012] 2 IR 620

first and second defendants that the cause of action accrued at the time the money was invested in 2008 and that the proceedings were statute barred at the time they were issued in 2014, following the maturity of the investment. The plaintiffs strongly contested this view stating that there was no delay in initiating the proceedings as they could not have known properly of their loss until after the investment matured.

While the statute of limitations question was not before the court on the application being considered, nonetheless Sanfey J did consider that it was a "*late start*" case for the purposes of considering any delay. That being so, he was satisfied that a post-commencement cumulated delay of 29 months was inordinate when by reason of the late start it was particularly incumbent on the plaintiffs to progress the matter with expedition. Indeed, the Judge considered that a delay of approximately 17 months in replying to particulars, where there was an onus on the plaintiffs to expedite the proceedings, was inordinate in itself.

The plaintiffs pointed to the fact that there had initially been a total of seven defendants in the proceedings and identified a number of difficulties and delays that they had encountered in dealing with those other defendants as explaining the delay as regards their dealings with the first and second defendants. While accepting that some of the delays encountered when dealing with other defendants were not the plaintiffs' fault, nonetheless the Judge took the view that if the plaintiffs were experiencing such difficulties they should have informed the first and second defendants of that fact and should not have left them in the dark. Again the Judge placed emphasis on the fact that he considered it a "*late start*" case. Overall, the Judge did not believe that the delay could be excused.

Turning then to the balance of justice between the parties, the Court considered that the case would require oral evidence in relation to the advice that had been given to the plaintiffs in advance of their investment in 2008, some twelve years previously. While there was no "*very specific prejudice*" such as the unavailability of a witness, and as such the Court considered the prejudice to fall into the "*moderate*" category, the Court had regard to jurisprudence suggesting that even marginal prejudice might justify the dismissal of proceedings. Notably, the Court was also persuaded by the submissions on behalf of the first and second defendants that they suffered not insignificant prejudice by virtue of allegations of professional negligence and fraud being made against them in the proceedings. The Judge was of the view that they

were all the more entitled to expect expedition from the plaintiffs given the nature of the allegations.

Finally, the Court considered the conduct of the first and second defendants themselves against whom two periods of delay were alleged by the plaintiffs, firstly in entering an appearance but secondly, and more significantly, an undisputed delay in filing a defence, which had followed a motion in default of defence by the plaintiffs. Nonetheless, the Court had regard to the analysis of Irvine J in the Court of Appeal decision in *Millerick* and considered whether the delay in filing the defence could reasonably have been considered by the plaintiffs to amount to acquiescence in the overall delay. The Court was satisfied that there was no acquiescence by the first and second defendants, and noted that there was a significant period of delay of 17 moths by the plaintiffs after the delivery of the defence. As such, Judge Sanfey concluded that the balance of justice lay in favour of acceding to the first and second named defendants application to dismiss the plaintiffs' proceedings.

The decision in *Pugh v PGM Financial Services Ltd* is therefore interesting in a number of respects. Firstly, it confirms the significance that pre-commencement delay, or a "*late start*" to proceedings, can have on a Court's consideration of a party's conduct post-commencement. What might otherwise be considered relatively modest periods of delay or inactivity will be considered more serious if there has also been a late start. The consideration by Sanfey J of whether it was in fact a late start is also interesting having regard to the fact that this case gave rise to similar considerations in relation to the statute of limitations as arose in *Gallagher v ACC* and in the *Belfry* litigation.

Secondly, in the context of professional negligence proceedings, it confirms that proceedings in which serious allegations are made against professional persons should be progressed with expedition as the making of those allegations can in themselves amount to prejudice against a professional defendant.

Thirdly, in cases involving multiple defendants with separate representation the fact that a plaintiff may encounter difficulties and delays in relation to some of the defendants will not necessarily excuse any consequent delays in dealings with the other defendants, particularly if the plaintiff does not expressly notify the other defendants of the difficulties he or she is experiencing.

What Effect might Covid-19 have on the Future Cases

The decision in *Pugh v PGM Financial Services Ltd* provides a useful illustration of the stricter approach to delay that the Courts have been prepared to take in recent years. That decision was delivered in late January 2020, very shortly before the Covid-19 pandemic swept across Europe and Ireland. The question now arises whether and to what extent the unavoidable impact of the pandemic may have on applications to strike out on grounds of delay in the future. For example, will plaintiffs be able to rely on the pandemic as providing an excuse for delays.

In reality, it remains to be seen precisely what effect that pandemic will have on any potential arguments or submissions that might be raised in the context of applications to dismiss as few, if any, applications involving delay on which the pandemic would have any significant delay have yet been brought or determined.

However, reliance by litigants on the pandemic as providing a blanket excuse for general delay in proceedings is very unlikely to find favour with the Courts. In truth, while the pandemic has caused delays in obtaining trial dates, particularly in civil trials involving witnesses, it remains possible to progress litigation in most other ways, e.g. by exchanging pleadings, issuing interlocutory motions, exchanging expert reports in preparation for trial, completing discovery. While certain technical steps, including for example arranging inspections or site visits, may become more difficult or delayed because of additional pandemic precautions, a litigant will not be permitted to simply sit on his or her hands without taking any steps at all. There should be no reason why a litigant cannot take all steps necessary to have a case ready for trial by the time pandemic restrictions are lifted.

Similarly, if a case cannot be brought to trial by reason of the pandemic restrictions, that fact alone will not provide a defendant with an opportunity to seek to strike out the proceedings for delay, when that delay is attributable to the restrictions rather than any inactivity on the part of the plaintiff.

Nonetheless, it is likely that future applications to strike out for want of prosecution will be brought in respect of periods of alleged litigation delay that might in part pre-date but also include the period of the pandemic and perhaps also a period after the pandemic. If that is so, a well prepared litigant would be advised to have kept records of the various restrictions that applied to litigation during the various different levels of

lockdown, and will, for example, have retained copies of the various practice directions that have been issued by the Courts, so that he or she can counter any arguments that might be relied on by a plaintiff seeking to attribute delay to Covid-19 restrictions.

While there have not yet been many significant judgments in relation to the effect of the Covid-19 pandemic on litigation, there have been two decisions on one particular potential effect. In ***ER Travel Ltd v Dublin Airport Authority Plc***[9]*,* the High Court had made an order in February 2020 that the plaintiff pay security for costs of €170,000. When the security for costs were not paid by the plaintiff, the defendant brought an application seeking to dismiss the plaintiff's claim for want of prosecution. In response, the plaintiff argued that it could not make the payment at the current time as its business had been devastated by the effects of the pandemic and the restrictions on tourism and travel. Barrett J was ultimately willing to accept that the pandemic constituted what he called "Exceptional Circumstances Presenting" and was prepared to adjourn the matter to the middle of the following year to allow the trading performance of the plaintiff to improve.

This is an illustration of an alternative way in which the effects of the pandemic may become relevant when parties to litigation are seeking to explain possible delay, i.e. that due to the sever financial effects of the pandemic on peoples businesses and livelihoods, litigants may find themselves in situations where they are unable to fund litigation, at least temporarily until trading conditions improve after lockdowns and other restrictions have been lifted. In other words, while it might still be possible during the pandemic to progress litigation to a significant degree at least up until the point that proceedings are ready for trial, it may be that litigants will be unable to do so due to financial constraints brought about by the pandemic.

A recent Australian case in the area of clinical negligence further illustrates the point. In the case of ***Cohen v Sacks***[10], the Supreme Court of New South Wales considered an application by the plaintiffs to adjourn an upcoming trial date in a case involving allegations of clinical negligence against the defendants arising from the birth of the plaintiffs' child. The plaintiffs submitted that due to the collapse in both of their

[9] [2020] IEHC 629

[10] [2021] NSWSC 88

businesses as a result of pandemic lockdown measures, they were not in a position to fund the conduct of the trial at this time, and sought an adjournment to allow their businesses to recover. The defendants argued *inter alia* that in circumstances where the plaintiffs' allegations were made against a medical professional and were causing ongoing reputational damage that there should be no adjournment. The Court had sympathy with both arguments but ultimately acceded to the plaintiffs' application, effectively accepting that the effect of the pandemic on their finances had hindered their ability to run the trial. The plaintiffs were however liable to pay the costs thrown away by the defendants.

Therefore, it remains to be seen what arguments might be made in future cases in relation to any periods of delay in litigation which occur during the course the pandemic. While it is doubtful that plaintiffs who have delayed will receive any blanket credit simply by reason of the existence of the pandemic, if the litigant can identify specific and credible reasons why the pandemic may have hindered their ability to progress litigation, including possibly the fact that they were unable to fund litigation due to the impact on their financial circumstances, those arguments may find favour on a case by case basis.

Ciaran Murphy BL
TrialView

TrialView and Developments in Electronic Litigation

27 mins

Ciaran Murphy BL
TrialView
E: stephenmccullough@lawlibrary.ie

Ciarán Murphy graduated from University College Dublin with a Bachelor's Degree in Business and Law in 2013. Ciaran qualified as a Junior Counsel in 2015. His Areas of Practice include Tort & Personal Injury Law, Commercial/Chancery, General Practice and General Common Law. Since September 2018, he has also acted as Consultant/User Support at TrialView.

TrialView is a secure platform that enables lawyers to manage and present court documents from their laptop or tablet to any other device. Built by lawyers for lawyers, it allows you to present documents with extraordinary efficiency. TrialView also enables document-led hearings to be conducted remotely.

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TRIALVIEW®

Information Sheet

TrialView is a virtual-hearing platform that facilitates remote hearings, bundling and electronic presentation of evidence

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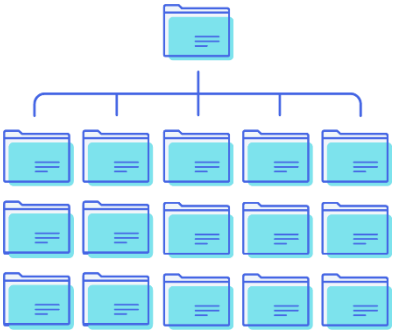


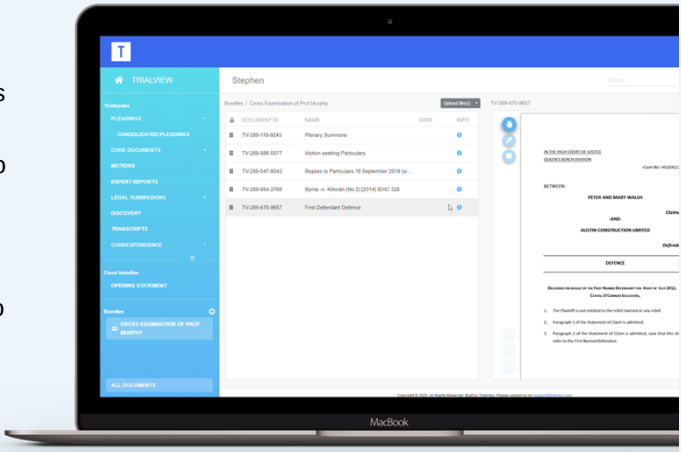
TAILORED PLATFORM

Most video conferencing tools are not tailored for litigation and dispute resolution. Modern litigation requires a platform that allows courts, arbitrators and statutory tribunals conduct their hearings remotely whilst maintaining in-situ practices, including preparation of and presentation of documentary evidence.

EVIDENCE PREPARATION

With TrialView legal professionals can prepare for trial by uploading all hearing material into a dedicated data room for their case.

Documents can be organised into TrialBooks & Bundles and users can create notes & annotate material.

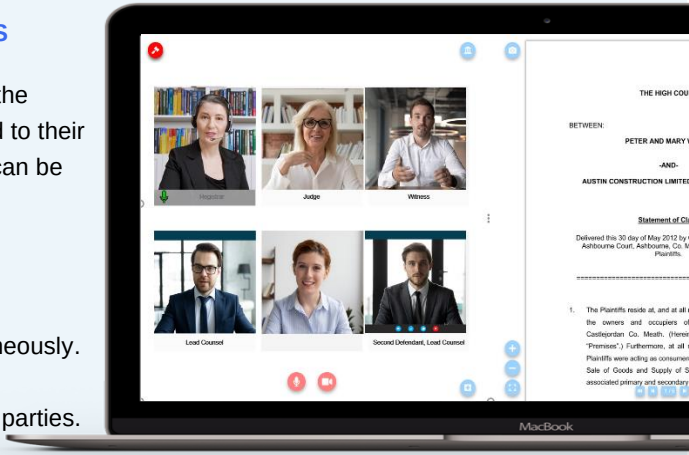


INTEGRATED VIDEO TOOLS

Optional bespoke video room for the hearing. Participants are allocated to their virtual seat. Multiple participants can be pinned and viewed at same time, facilitating witness actions.

Documents and evidence can be presented and annotated simultaneously.

Private video break out rooms for parties.



APPROVED BY THE COURTS & TRIBUNALS

In 2020 the Law Society and Commercial Litigation Association asked the Commercial Court to approve TrialView. Following successful pilots in June 2020 it was approved by the High Court as the only platform for remote witness hearings. The Court of Appeal have also approved TrialView as a system for bundling and presentation of documents. It is also used by a wide range of professional regulatory bodies.

WHAT THE PRACTITIONERS ARE SAYING

"..it was of great assistance to the parties and certainly cut down the trial time substantially".

Paul Gallagher (Attorney General) on the use of TrialView in a highly sensitive test action involving the Irish department of Health

"TrialView provided an excellent service. For a technophobe like me TrialView provided an easy to use trial platform in a complex multi-party arbitration, from the pre hearing support to the day of trial itself. Not only was the platform first rate but the support team were on hand to deal with any requests efficiently and timeously. I have already recommended them to a QC I have on another matter."

Ian Corbett, Partner and head of global construction group, Kennedys London.

TrialView is a real winner, and I would not hesitate to recommend it to a colleague…Witness availability will become a thing of the past using TrialView.

Dermot McEvoy, Litigation Partner, Eversheds-Sutherland.

"I have worked with a number of platforms and Trialview is quite simply the leading virtual litigation platform out there bar none".

JP McDowell, Partner, Fieldfisher

"The Kennedys London team found Trial View to be intuitive and easy to use in a complex multi-party arbitration. The pre hearing support provided by the Trial View team was outstanding as was the support on the day which meant that the hearing proceeded smoothly. The team were polite, helpful and always responded to requests for help rapidly and effectively. I would definitely use the platform again."

Caitlin Gallagher, Senior Associate, Kennedys London.

"…TrialView set up a virtual courtroom which could be accessed by the other members of the respective legal teams… clients and witnesses. Attendees could see and hear the Judge, counsel speaking, the witness and see the documents referred to.

11 witnesses gave evidence, 3 of whom did so remotely and were at all times visible on monitors in the court and in the virtual rooms.

All of the relevant documents were uploaded onto the TrialView platform in advance of the trial.. Given the Covid restrictions in place the case could not have proceeded without TrialView and it worked without a hitch.

Gavin Simons, Commercial Litigation Partner, Amoss Solicitors.

"… I can attest fully to the high functionality of TrialView in very testing conditions. The product is great but the service levels and support throughout were equally impressive."

Barry Cahir, Commercial Litigation Partner, Beauchamps Solicitors.

".. we were very impressed with Trialview. It's a really good system and is very well supported by the TrialView team".

Brian Quigley, Litigation Partner, McCann Fitzgerald Solicitors.

WHAT THE JUDGES ARE SAYING

"…I was hugely impressed by it".

The President of the High Court, Ms Justice Mary Irvine.

"…it…worked extremely well……

[T]he system [was] perfectly adequate from a judge's perspective in terms of being able to see the face of the witness clearly as the witness is being asked questions of counsel. One can also get a gallery view so one can see more than one face at a time"

I also want to thank TrialView…for the exceptional way [it] managed to bring up every single document, no matter how many documents were referred to by counsel."

Mr Justice Denis McDonald (Judge of the Commercial Court) on the use of TrialView for the FBD Litigation in the Commercial Court

"…I found the experience satisfactory and straightforward to use".

Mr Justice Garrett Simons (Judge of the High Court) about the use of TrialView during the Quinn v IBRC litigation involving over 150,000 trial documents In one of the State's largest banking disputes.

Karl Manweiler
LexTech

How legal technology will improve your prospects of successfully defending EL/PL claims

15 mins

LexTech

STREAMLINING LEGAL & REGULATION WITH TECHNOLOGY

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Karl is Managing Director of LexTech. A consummate technology professional, Karl brings value at all stages of the consultancy process. He is particularly experienced at eliciting and defining client requirements, leading teams, managing transformation projects, and delivering change. Karl has a deep understanding of technology and how it best serves an organisation. Karl brings over 20 years of technology and consultancy experience and still remains passionate about simplifying the complex and delivering successful projects.

Karl holds both academic and professional qualifications in law, technology, audit, and project management.

Karl has advised and managed several multinational enterprises on their technology strategy and digital transformation projects.

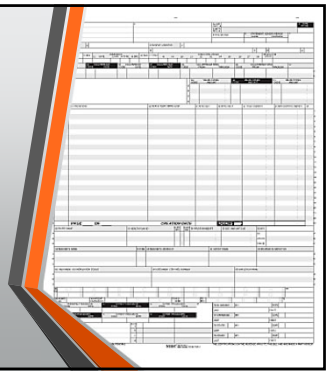
https://leman.ie/theteam/karl-manweiler/

How legal technology will improve your prospects of successfully defending EL/PL claims

LexTech

STREAMLINING LEGAL & REGULATION WITH TECHNOLOGY

Current Incident Solution

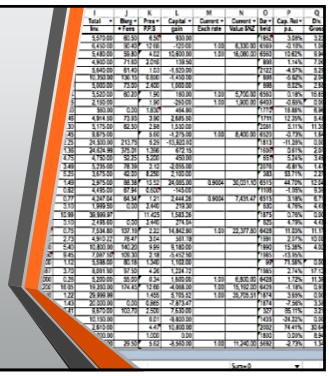


Spreadsheets

SINGLE USER

POINT OF FAILURE

REPLICATE DOCUMENTS



Insurance

PREMIUM GOING UP

EXCESS €50K - €200K

ZERO INTELLIGENCE ON INCIDENTS

INSURERS SETTLING CLAIMS

Solicitors Letter

MISSING INCIDENT REPORT

= NO DEFENCE

= SETTLE

= HIGHER PREMIUM

Live Data Capture

- ✓ Where?
- ✓ When?
- ✓ Who?
- ✓ What?
- ✓ How?
- ✓ Photo?
- ✓ Visual?
- ✓ CCTV?

DIGITISATION IS THE ANSWER

App records live data and media including audio, video and photos

Features

LIVE DATA CAPTURE

MANDATORY QUESTIONS BASED ON INCIDENT TYPE

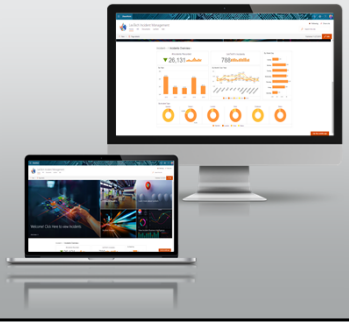
MULTILINGUAL

MULTIMEDIA
AUDIO, VIDEO, PHOTO & CCTV

SIGNATURE AND LOCATION PIN

Platform

- Features
  - Live Incidents
  - Email Notification and Alerts
  - Info Sharing
  - Business Intelligence



Technology

MICROSOFT
(NO LICENCE COST*)

CLOUD
DOESN'T BREAK

SECURE
(2FA, PIN CODE)

DIFFERENT LEVELS
OF ACCESS

WORKS OFFLINE

Mitigation + Prevention

Live Information
- Defendable

Business Intelligence - Prevention

= Reduced Premium
= Increased Defend Rate

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Stephen Noel O'Connor
Leman Solicitors

Professional Negligence Update

42 mins

Stephen Noel O'Connor

Senior Associate

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Stephen is a Senior Associate on Leman Solicitors' Litigation and Dispute Resolution Team.

He has extensive experience in litigation and dispute resolution generally and has advised numerous clients in claims determined by the High Court, the Commercial Division of the High Court, the Court of Appeal and the Supreme Court or otherwise dealt with through mediation or arbitration. He has particular expertise in professional negligence defence litigation, acting for professional indemnity insurers and their insureds in a diverse range of claim types. Stephen also regularly acts on behalf of Insurers and their Insureds in relation to cyber matters.

Stephen regularly advises corporate clients and shareholders in contractual and financial services disputes involving banking, pensions, insurance, funds and debt recovery and enforcement.

https://leman.ie/theteam/stephen-noel-oconnor/

Professional Negligence Update

Stephen O'Connor

Leman Solicitors

Updates and recent cases

- Statute of Limitations
- Expert Evidence
- Strike Out of for want of prosecution / Delay
- Concurrent Liability and Settlement
- Personal Injury Guidelines

Statute of Limitations

- Cantrell v AIB and Ors : [2020] IESCDET 69
- High Ct held mismanagement element of the claim was statute barred
- The Court of Appeal found in favour of the defendants, and this was appealed further to the Supreme Court
- The Supreme Court overturned the Court of Appeal decision

- Date of accrual for negligence claims is "inherently unsatisfactory"
- Held that the mis-selling claims only accrued when the investments first fell below parity
- In such cases (financial mis-selling), limitation period only begins to run when the risk caused a loss in value of said financial product
- SC called for legislative reform in the area

Expert Evidence

- Loomes Practising as Thomas Loomes and Company Solicitors v Rippington & Ors [2020] IEHC 237
  - Claim by a firm of solicitors to recover professional legal fees from the defendants
  - Counterclaim alleged services provided were "not up to a professional standard"
  - Held that it was a well-established principle that it is an abuse of the process of the court to bring professional negligence proceedings without first ascertaining that there are reasonable grounds for doing so
  - Applies to defence of action as well bringing proceedings

- Whearty v. Lanigan Practising as Poe Kiely Hogan Lanigan Solicitors [2020] IEHC 443
  - plaintiff issued proceedings claiming €25 million in damages alleging professional negligence
  - defendant brought an application to strike out the plaintiff's proceedings on the grounds that they disclose no reasonable cause of action etc
  - Plaintiff confirmed he did not have advice or report from an expert in support of his claims
  - Court provided 6 weeks to obtain expert report – Defendant produced its own which was supportive of advice provided
  - Claim was struck out on the basis that allowing an unsupported professional negligence claim to continue would be an abuse of process

Strike Out / Delay

- McGuinness v. Wilkie and Flanagan Solicitors [2020] IECA 111
  - The High Court struck out the Plaintiff's claim of professional negligence against a firm of Solicitors for want of prosecution
  - Plaintiff appealed
  - Held that Plaintiff was guilty of pre-commencement delay of 5/6 years, "with no adequate explanation", and therefore the delay was inordinate and inexcusable.
  - Balance of Justice: witnesses had died or were no longer available (actual prejudice)
  - Court further noted the effect the claim had on the firm's reputation and insurance premium, which it considered a matter of further prejudice

- Start Mortgages DAC v. Mc Namara [2020] IEHC 187
  - The Hight Court dismissed the Plaintiff's proceedings for want of prosecution
  - Plaintiff accepted that the delay in progressing the claim was inordinate and inexcusable, but argued that the balance of justice lay in the matter proceeding
  - Balance of Justice: held that it would not give weight to the argument that the Plaintiff could allegedly issue a "hypothetical" set of fresh proceedings
  - *"evidence before the Court that he has suffered adverse consequences to his health and wellbeing by reason of the delay …. In addition, it is self-evident that as the applicant is in the business of property development, he cannot but have found himself constrained in expanding his business by reason of a poor credit rating arising solely as a result of … these proceedings"*

Contrast

- Ulster Bank Ireland Limited v. Sutton [2020] IEHC 426
  - High Court held that a seven year period of delay was not inexcusable, and refused the defendant's application
  - Court noted that between 2017 and 2019, there were "90 items of communication between the parties", and therefore while no formal steps had taken place, the proceedings were active
  - Court held that the delay was excusable
  - Balance of justice lay in allowing the claim to proceed

- Reilly v. Campbell Catering Ltd [2020] IECA 222
  - High Court struck out the personal injuries proceedings
  - Appealed
  - Plaintiff's solicitors had written to solicitors for the accident locus in 2017, asking them to confirm that any other relevant parties might have potential liability to the Plaintiff
  - That correspondence was unanswered
  - In January 2019 the new Defendant was identified (the defendant that made the application) and joined to the proceedings within 2 months
  - Balance of Justice: Court was unimpressed with the Defendant's "evidence" of prejudice, noting that, *"a bare assertion that the respondent "will encounter significant difficulty in identifying, retrieving and accessing the relevant records of cleaning schedules, staff rotas and other documentation that would be necessary to defend the plaintiff's claim" is no more than a self-serving prediction made without any effort having been undertaken to identify, retrieve or access the relevant records."*
- Conclusion – contrast decisions are clearly contrasted on the facts from previous decisions

Concurrent Liability and Settlement

- Complex – primer for further reading
- Ulster Bank DAC & Ors v McDonagh & Ors [2020] IEHC 185
- Defender Limited v HSBC France [2020] IESC 37

Personal Injury Guidelines

- Active from 24 April 2021
- District and Circuit Courts will need to adapt quickly to deal with an inevitable increase in the number of personal injuries cases falling under their jurisdiction
- Guidelines will undoubtedly play a much more significant role in personal injuries litigation than the Book of Quantum has to date

Thank you.

PNLA
Professional Negligence
Lawyers Association

Brian O'Connell
O'Connell Mahon Architects

Briefing of an Expert

68 mins

Brian O’Connell B Arch, BL, MUBC, FRIAI, RIBA
Consultant
O’Connell Mahon Architects

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- Qualified as Bachelor of Architecture: First Hons (NUI) in 1968; Barrister at Law First Hons (Kings Inns) 1979
- Master Urban and Building Conservation (NUI) 2011
- Member of the Royal Institute of the Architects of Ireland (1970) Member of the Royal Institute of British Architects (1976)
- Fellow of the Royal Institute of the Architects of Ireland (1987) President of the Royal Institute of Architects of Ireland (1990-1991) Architect in private practice since 1974
- Chairman European Commission GAIPEC International Sub-Committee on Liability in the European Construction Industry 1992-199
- Occasional Lecturer to NUI and University of Ulster
- Arbitrator-Conciliator (RIAI); Mediator (MFI) Adjudicator (C.I. Arb).
- Responsibility for executed individual projects up to the value of €100 million.

Briefing the Architectural Expert

The Architect

There is probably still no better a definition of the Architect, than that of the Roman author Vitruvius: *he who is theoretic as well as practical, is therefore doubly armed; able not only to prove the propriety of his design, but equally to carry it into execution.* In modern times this wide architectural remit, while essentially correct, lays off certain specialisations to others, either in parallel with, or within the architectural remit. Nowadays an *Architect* is a statutorily registered person,, usually a member of the Royal Institute of Architects of Ireland (RIAI).

Scope of Expertise

While the expertise of the Architect may lie in any particular area in terms of qualification and/or experience, it will normally relate to the accepted good practice in the design and procurement of buildings, the basis of which is reflected in the standards issues by the professional institutions and referenced by National or International Standards. Qualification backed by experience in the process of building design and procurement is normally seen as the basis upon which an architect qualifies to give expert evidence.

Particular Expertise

An Architect may in any given case have particular expertise in any aspect of the architectural process, based on experience either within established areas of professional competence or in other matters to a greater or lesser degree associated with, or ancillary to the building process. Clearly this expertise ought to add wight to any opinion in such a matter, and will be identified accordingly.

Limit on Expertise

Th Architect, while traditionally leading the process of building procurements and realization as agent of the Employer, does not undertake to develop what are seen as special areas, usually and including structural design, services design, and cost management, but either engages consultants by way of subcontract to address these aspects of the process, or seeks to have these aspects of the process delegated by the Employer to competent specialists whose input is to be directed and coordinated by the Architect as leader of a design team so constituted. In this traditional process the Architect orchestrates the whole of the outcome. The architect's expertise, excluding the development of these specialist areas, ranges to the whole of the design process from inception to completion.

Design Team Appointments

It is normal for the Architect to advise on the scope of the architectural service appropriate in any case, and to advise the specialist appointments which may be required. A letter confirming appointment and incorporating standard conditions such as the RIAI Schedule A Services, is fairly normal. Sometimes a *course of trading* is the basis for appointment, and less common,

a bespoke contract of appointment. The Terms of Appointment will always be critical in assessing the adequacy of an architectural service to be read in the context of design team appointments, in assessing any concurrent responsibility which may attach to design team members.

Design

Design of works is normally distinguished from execution of works. Design is seen as the definition of outcomes execution is seen as the process of achieving the outcomes defined. Definition of building design outcome is usually in the form of a set of drawings describing the physical structure to be achieved as an outcome in a conventional diagrammatic language, with a written specification which describes the process and quality of the outcome to be achieved. It is normally practice that design is detailed to the extent to which it is bespoke, and where not detailed is left to the Contractor as the party who executes the design to apply a normal standard.

Execution of the Works

Execution of the works to achieve the design outcome is usually undertaken by a Main or General Contractor, through whom specialist areas of the works are subcontracted. The General Contractor's undertaking is normally to procure the outcome to a proper workmanlike standard by use of good quality materials, in accordance with the design drawings, specification and relevant regulations. The Building Contract and Regulatory Certificates , and all ancillary documents will be critical to any review of the General Contractor's performance, and that of any subordinate parties to the process.

Tendering

Tendering, is the process which identifies the Contractor to be appointed, and is also the process by which the cost of the works is established, either by a competitive process or by negotiation. Tenders are invited from Contractors of proven competence, to whom a Bill of Quantities prepared by a design team Quantity Surveyor, is issued. This Bill may or may not be adopted as a Contract Document depending on the Form of Contract adopted. The Architect usually recommends a list of Contractors to tender to the Employer, who adds or otherwise to the list. Tender assessment is usually undertaken by the Quantity Surveyor on behalf of the design team. Tender list recommendations are *bona fide* and, where made in adequate information are seen as facilitative recommendations only.

Contract

The Specification on the advice of the Architect, will include the Form of Contract to be executed, and the Contractor shall have priced his tender accordingly. The Architect will have advised on an appropriate form. In the Standard Private Forms issued by RIAI, the Architect will be appointed as Contact Administrator and will manage the procurement process throughout as agent of the Employer. There are many variations on these Forms, and bespoke forms for particular projects have become more common. Public Procurement now amounts to a separate, but parallel process to private forms. The primary duties of the Architect in the normal course will be:

- To direct the contractor in interpretating the Contract.
- To monitor the works by periodic inspection for general compliance with the design intent.
- To certify payments for works free from patent defects, and to instruct the remediation of defective work.
- To extend time where required by virtue of the Conditions of Contract.
- To value variations to the works and to include such valuations in certified payments accordingly
- To approve shop drawings (these are provided in areas where technical design passes to the Contractor – approval is as to general outcome and is not approval of technical content).
- Where confirmed by the appointment, to act as Assigned Certifier in respect of Building Regulations.
- To see that statutory requirements regarding safety and health, certification of the adequacy of systems and all tests specified are completed.
- To accept the works as fit for occupation.
- To close out and discharge the Main Contractor by Final Certification of an agreed Final Account at the end of the Retention Period.
- To issue Opinions on Compliance with Planning and Building Regulations.

Architect: Single Point Contract

The Architect in the traditional process is a single point of contact between the Employer, the other members of the design team, and the Contractor. The Architect is the only person (apart from the Employer as principal, save in matters of valuation and the extension of time limited by implied conditions), who can direct the Contractor. On this basis the Architect is a participant in all transactions within the contract process, although he may rely on the other members of the design team advice in matters delegated by the Employer to them, and in which the Architect professes no expertise.

When things go wrong

Experience shows that things go wrong within the procurement process for many reasons. As, in the traditional framework, the Architect sits at the centre of the web, almost all lines of communication and direction, pass through his station. On this basis, as concurrent responsibilities tend to attract concurrent liabilities, the Architect's position in the allocation of responsibility tends to arise in most cases relating to building or design failures; and usually brings the Architect within the relevant chains of causation to some degree. In my experience the Architectural Expert brief is usually to advise an opinion on the role and responsibility of the Architect where loss to the Employer arises or where the Contractor seeks additional payment to the sums certified by the Architect; the position is to be assessed from the standpoint of the normal average competent architect faced with the circumstances of the case in real time, taking all material factors into account.

The Expert Architect's Report

The Expert Architect is to give an opinion based on the facts advised, expressed in the record, or established on inspection. Objectivity and full review of the sources available are the are the foundation of such a report, in which the quality of such sources is directly proportional to the quality of the Report.

The Brief to the Expert Architect

The Brief as the scope of the questions to be addressed within the competence of the expert is central to the role of the Expert Architect.

The letter of instruction will be critical as the foundation of the Report and must set the scope of the Report by a clear instruction in the matters referred. Some prior consultation to tailor the scope to the relevance of the expertise is advisable.

Presentation of a large quantity of unclassified documents in wholly inappropriate and inefficient. In my experience the best briefs are those in which the outlines of process adopted in the particular case in building procurement has been established, and the key documents identified in the chronological sequence of the project, and grouped in categories. Introduction is generally synopsis including identification of the parties and a description of the damage suffered or claimed, the relevant events and dates and parties. This is followed by a description which grounds relations between the parties, supported by documents of appointment and instruction followed by a schedule of documents in categories which elaborate this relationships through its progression:

- this schedule as a first category of documents will include all relevant appointments and full contract documents, and ancillary documents demonstrating the progress of the respective agreements.

- A second category of documents will be structured records of the process, such as site minutes, design team minutes, directions instructions and certificated.

- A third category of documents will be correspondence, which in my view should be processed in date order eliminating repetition, save where essential, such as correspondence covering instructions or determinations, or procedural matters in the preceeding category.

A source document and brief structured in this way, enables a focused review and continual cross referencing throughout the preparation of an Expert Report, and discourages an early opinion which can prejudice the thought process as the expert fits into the circumstances from which the matter must be viewed.

Fact and Opinion

It seems to me that the Expert in arriving at an independent view, must form and express a clear view of facts relating to each head of damage claimed or to be claimed, which are either

advised or established by himself on inspection on the one hand: and the derivative opinion which will form the basis of his report. This process of evaluation therefore involves giving evidence of fact, including that ascertained on inspection or investigation by the Expert, or on his behalf: and facts advised by the party for whom he acts. I think that it is important that the Expert should be advised to distinguish these categories in the Report, as the facts advised to the Expert yet to be proved by others give the Expert Opinion in this matter a tentative value: whereas the facts established by the Expert, and offered as direct evidence must have a greater probative value an objective scale. I think it important in briefing the Expert to advise that the language of the Report reflects the role of assisting the decision of others on an advisory basis rather than suggesting substitution of the decision itself. I think this is best done by the Expert considering and referring to the evidence on which any aspects of the Opinion is grounded as *advised* or *established;* and by clearly expressing the Opinion as the derived from either established or to be proven facts accordingly, and as such expressing the opinion as tentative or confirmed depending on the classification of the source as advised and so to be proven by others or confirmed by the expert as evidence of fact..

The Expert Conference

As it now a required practice for Experts to confer, and as Experts meet alone for this purpose, it is important to set clear limits, as experience shows that Expert conferences are easily confused with settlement meetings. In my experience Expert Conference is best achieved where there is a pre-agreement between the Experts that only the matters of technical fact will be reviewed to cover damage causation and responsibilities and costs; but not to engage in a discussion on liability as such. I have found it best to limit recording to nett agreement and disagreement on a scheduled of express agreed issues. In this I see the agreement to disagree on clearly expressed issues a process of crystallization of the residual matters in dispute. I think, however, that it is equally important as the process proceeds, that the disagreements between experts be processed with a view to reducing these to a minimum. I suggest that briefing in this area is sensitive and that great care is needed to avoid "*instructing"* experts or, equally counterproductive, to limiting the benefit of this part of the process by over narrow instructions.

Changing Role of the Expert in Building Disputes

It appears that with statutory Mediation; and a statutory right to Adjudication, that the role of the Expert is undergoing change. In my experience building dispute cases now rarely go to Court or Arbitration, and it is now unusual for an Expert to reach the stage of cross-examination within these tribunals as the process by which the quality of Expert evidence was routinely tested. In recent times Experts have been used in a process of reaching a fair and workable settlement in support of a process of negotiation: this may be the future roles of the Expert witness. I would say that irrespective of this apparent change in direction, the briefing of an Architectural Expert witness remains the same, as the objective is to advise a fair and impartial view of the performance of the parties to loss in an objective assessment of the roles of each of the participants to the design and construction process as seen from the standpoint of the Architect, where in the traditional model, the Architect acts as both composer and conductor of the orchestration by which the project is conceived and realised.

The Scott Schedule

A design / construction dispute trends to be complex due to its being the synthesis of many parallel activities with various participants with varying roles on responsibilities. As a result, it is difficult to express such a dispute where it is made up of its several separate parts for the purposes of assessment and determination: the Scott Schedule, properly used, is of assistance in this. Scott was an English Official Referee in the 1920's who developed a schedule format in which each head of claim was summarized by reference to its essence and valued in a plaintiff's vertical columns to the left hand side of the page, and further columns across the page required each defendant to reply giving the essential response and valuation on each of the plaintiffs' claims accordingly, leaving blank decisions and value columns for the tribunal to the right had side. In my experience this format has worked well at all stages of the process, especially at and following the Expert conferral stage, when the document can be formulated as an agreed basis which crystallizes the dispute in shorthand form, easily reviewed and revised as negotiation progresses. I suggest that briefing of the plaintiff's Expert should encompass reduction of the dispute to a Scott Schedule format at the appropriate stage in the dispute process usually following Expert conferral.

Summary

Briefing of the Architectural Expert requires confirmation that the matter in dispute, or the causation and process, are wholly within his competence. In the ordinary course a Registered Architect with experience in the project type, will be furnished with the required competence, and, all other things being equal and assuming no conflict, will be briefed by being given a summary of the damages and circumstances in which they arose. Assuming a variant on the normal process of procurement, the Expert will be given access to the source documents which define the procurement process and its execution, and access to the relevant building. On the basis of the direct evidence of fact, advised evidence of others, the evidence of the sources, and evidence derived from engagement with the party represented, the Expert will form and formulate an opinion based on the advised facts, the established facts and the documentary sources, and will express an opinion based on the context as seen from the position of an architect of average skill and comparable experience and standing to the Architect appointed in respect of the works in dispute. The Report will centre on the responsibility of the appointed Architect, and all others with responsibility as seen from the standpoint of the architect. Expert conferral will take place and some adjustment may follow: ideally the Expert Conferral should result in a Scott Schedule which summarises the factual matrix with reference to damage, quantum, causation and the positions of the parties in response on damage, causation cost and responsibility.

I think it important that the Expert, when being briefed, is advised to limit his opinions to express circumstances, and to make it clear that where these circumstances are advised or are otherwise tentative, that the opinion is provisional and subject to review if the informing factual matrix changes.

On one last point, based on experience, I suggest that all engagement between the Expert and the Party Represented be conducted solely through the Solicitor to avoid the natural tendency for the Party Represented to expect the Expert to act as an advocate in their cause

in pressing their opinions and views on the Expert as a person whom they have retained, often failing to understand that seeking to bias the Expert is wholly counterproductive to their interest in the long-run.

In my view the brief to the Expert, in recognising this obligation, must be complete and set out the Experts instructions clearly setting limits on the scope of the issues to be addressed within the Report, with a fully coordinated body of documentary evidence, and access to the relevant works, and parties, coordinated and managed through the Solicitor necessary to achieve.

A useful definition of the Experts function and perhaps a motto for experts is: one who translates complexity into an informed objective, and intelligible form for the Court to assist the Court or Tribunal in reaching its decision.

Any dilemma for the Expert is effectively resolved by the Direction that the Expert owes a first duty to the Court, and must offer evidence under oath and, not to mislead the Court or Tribunal as to the objectivity and integrity of the evidence of opinion so offered.

Brian O'Connell FRIAI
March 2021

Aidan Brady
ReSure Corporate Brokers

Market update

32 mins

Aidan Brady Dip IoD, CIP

Managing Director

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Aidan Brady has overall responsibility for the strategy, culture and direction of ReSure. In heading up the office, he draws on his 20+ years' experience in the insurance industry. He brings a wealth of knowledge, passion, drive and expertise, gained most recently as Board Member and Head of Office at a global broker.

Aidan has a Business Degree, is CIP qualified and completed his Chartered Directorship with the IoD in 2018.

ReSure is one of the fastest growing Corporate Brokers in Ireland offering a fresh approach to broking.

REVIEW OF SOLICITORS PII 2020

AIDAN BRADY, BA, CIP, DIP IOD,
MANAGING DIRECTOR

THE KEY ELEMENTS

- Professional Indemnity Overview
- What is causing the Hard Market?
- Impact of Covid – 19
- The Backdrop to Solicitors 2020
- The Market 2020 vs 2019
- The 5 Year Picture
- The Markets Available
- Excess PII Market – Compounding the Problem
- Cyber – Evolving Risks
- The Role of ARP in 2020
- Relevance of SPF, ROF & ARP to the PI Market.
- The aspects that affects Premiums
- Insurers Risk Guide.
- Influencing Insurers.
- Claims.
- Optimism for the Future.
- Recommendations to Improve the Market.

PROFESSIONAL INDEMNITY OVERVIEW

- All insurances are cyclical in nature.
- We are currently experiencing a **HARD MARKET**.
- Premiums are increasing after a period of stability.
- Capacity is reduced - resulting in higher premiums and restrictions applied across PI markets.
- Some sectors, such as construction have seen premiums rise in excess of 100% and changes to T&C's including aggregate limits instead of any one claim.
- Thankfully, solicitors PI, although affected, has not been to the same extent as of yet.
- **How did we get here?**

WHAT IS CAUSING THE HARD MARKET?

LLOYDS

- Thematic review in 2018 - 6 year review showed PI was the second worst performing line in Lloyds. **Claims exceeding Premium.**
- 'A renewed focus on profitability'
- 14 syndicates exit PI market-reducing capacity.
- Insurers have not been able to generate profits in the PI market.

GRENFELL DISASTER

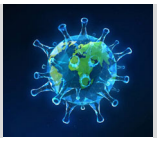
- Construction risks are becoming more complex in general.
- Combustible panels - Actuaries are uncertain as to extent of problem across construction industry.

ReSure Corporate Brokers

WHAT IS CAUSING THE HARD MARKET?

COVID - 19

- Will it lead to a Recession / Depression once the Government supports stop?
- PI Claims increase in Recession / Depression.
- WFH – will this lead to future claims and uncertainty?
- WFH supervision risk / network weakness.



CLAIMS

- Legal sector is historically one of highest risk professions for PII claims ('human error')
- Complex nature of advice.
- Greater Potential to cause financial Loss.
- Antiquated CRM systems and controls can cause losses.

ReSure Corporate Brokers

COVID 19

COVID-19

- PI insurance premiums were steadily rising prior to Covid-19, but it certainly hasn't helped.
- Insurers are more cautious as they wait to see what fall out arises from Covid-19 with many believing a recession is inevitable.
- As previously outlined, claims rise in a recession which affects insurers appetite to write risk.

OTHER FACTORS ASSOCIATED WITH COVID

- **Your Staff -** (Dealing with change, Work/Life balance, More screen work, Reduced human contact) Remote working makes managing all of these issues harder. Reduced access to people means that issues can be hidden or go unaddressed.
- **Legal Service Delivery -** (caused by lockdown and social distancing) no face-to-face meetings.
- **Support Infrastructure -** Maintaining supervision remotely, Keep on auditing and appraising.
- **Confidentiality** - Working remotely on various networks.
- **Risk Culture** - Ensuring the replication of office environment when remote working

**You will have noticed the Covid Questionnaire requirement for 2020 with is trying to allay some of these concerns.*

ReSure Corporate Brokers

COVID 19

- The additional challenges presented by remote working and disruption to business caused by COVID-19 could cause increased number of professional negligence claims against Solicitors.
- Therefore, firms should be ready to demonstrate to their professional indemnity insurers that they have assessed these additional risks and have a clear plan in place to mitigate the risks.
- Post Covid world and ensuing threat of recession has resulted in cautious approach from participating insurers.

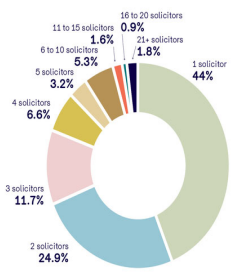
THE BACKDROP TO SOLICITORS 2020

- Unlike the UK, claims activity is at an acceptable level, which is back to traditional losses -not Financial Institutions led. However, despite this, there are fundamental problems.
- Unrated insurers exited the market since 2017 - **UK General, Elite** and **CBL** *(administration)*
- Law Society - monitoring participating insurers and want 'A' rated insurers.
- **AXIS** exited market in 2019. Another blow to market and in particular Sole Practices.
- Capacity was not replaced, albeit no insurers exited prior to 2020.
- QBE decided not to renew firms with fee income below €500K - 'Late in the day' decision which led to the scramble to find a new provider.
- Not enough insurers to drive competition - particularly in the Sole Practice market.
- Excess markets also badly affected by price increases in the two years prior.
- Reducing fee income for most firms arising from Covid 19.
- The disruption in the market as all underwriters were working remotely due to Covid-19.

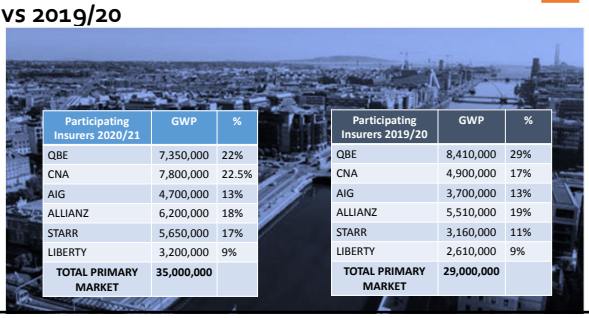
SOLICITORS MARKET IRELAND

FIRMS BY NUMBER OF SOLICITORS

Solicitors	Firms	%
1 solicitor	877	44.0%
2 solicitors	495	24.9%
3 solicitors	233	11.7%
4 solicitors	131	6.6%
5 solicitors	65	3.2%
6 to 10 solicitors	105	5.3%
11 to 15 solicitors	32	1.6%
16 to 20 solicitors	18	0.9%
21+ solicitors	35	1.8%
Total	1,991	100%



THE SOLICITORS MARKET IN 2020/21 VS 2019/20



Participating Insurers 2020/21	GWP	%
QBE	7,350,000	22%
CNA	7,800,000	22.5%
AIG	4,700,000	13%
ALLIANZ	6,200,000	18%
STARR	5,650,000	17%
LIBERTY	3,200,000	9%
TOTAL PRIMARY MARKET	**35,000,000**	

Participating Insurers 2019/20	GWP	%
QBE	8,410,000	29%
CNA	4,900,000	17%
AIG	3,700,000	13%
ALLIANZ	5,510,000	19%
STARR	3,160,000	11%
LIBERTY	2,610,000	9%
TOTAL PRIMARY MARKET	**29,000,000**	

2020 TRENDS

- Primary premium grew **by 20%** to €35m gross written premium.
- QBE exited market for firms below €500k.
- QBE dropped market share.
- CNA, Starr provided capacity to these firms.
- Allianz, AIG and Liberty - stable market share %
- Hardest hit - sole practices with any claims activity
- Capacity - for sole practices and scramble for cover caused great distress.

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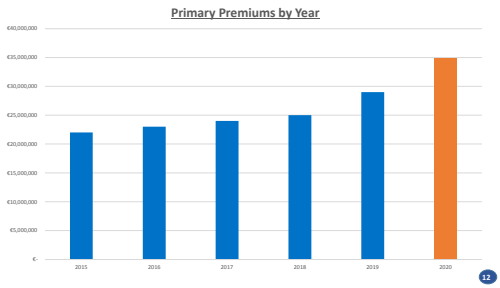
11

THE 5 YEAR PICTURE



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THE 5 YEAR PICTURE EXPLAINED

- Premium have risen for 3 consecutive years.
- Coincides with the exit of Unrated Markets and AXIS.
- Premium back to post financial crisis.
- Premiums would have been affected by rising fee incomes - circa 10% PA since 2016.
- Figures do not reflect the reduction in fees due to Covid. (This will show in 2021)
- Potentially good opportunity for New Entrants to come into market.
- 2020 increases in premium at a time when revenues reduced.

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TAKING A CLOSER LOOK AT MARKETS AVAILABLE

Participating Insurers	Sole Practices	2 Partners Plus Firms
QBE	>500k ONLY	YES
CNA	YES	YES
AIG	NO	YES
ALLIANZ	YES – only above €250k	YES
STARR	YES	YES
AVIVA	NO	YES
LIBERTY	NO	YES
MARKETS AVAILABLE	3	7

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EXCESS PII MARKET – COMPOUNDING THE PROBLEM

- Premium have risen for 3 consecutive years.
- Premiums are circa 50% up over 3 years.
- 50% increase on first layer of €3.5m in excess of Primary.
- Layers above €5m were costing €1000- €1500 per million now priced at €2,000 +. Increase in excess of 50% in 2 years.
- Why?
- Again its **CAPACITY**- We need more insurers entering space. Competition is lacking and insurers are content with existing share.

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AVAILABLE EXCESS MARKETS

Participating Insurers	Primary	Excess Layer €1.5M-€5M	Excess Layer €5M +
QBE	Yes	No	No
CNA	Yes	Yes (€1M Max Capacity)	No
AIG	Yes	Yes	Yes
Allianz	Yes	No	No
Starr	Yes	No	No
Aviva	Yes	Tbc	Tbc
Liberty	Yes	Yes	Yes
Zurich	No	Yes	Yes
Chubb	No	No	Yes
Newline	No	Yes	Yes
ARB Chaucer	No	No	Yes
Axa XL	No	No	Yes
Total	**7**	**4**	**8**

CYBER - EVOLVING RISKS

- The 2020/2021 CPF recognises the increasing risk around cybersecurity, with new specific questions relation to cyber frauds.
- With increasing number of solicitors and staff working remotely as a result of the pandemic, the risk of cyber, IT and GDPR breaches increases, as do general claims arising from reduced supervision of staff, limited IT services and the general constraints of remote working.
- Cybercrime can work its way into your firm through;
  - Ransomware
  - Phishing emails that request a direct response
  - Phishing emails that include malware
  - Email Spoofing

As PII is a huge cost to your business I would encourage every Firm to seek a stand alone Cyber Insurance Policy

CYBER – PROFESSIONAL INDEMNITY VS CYBER POLICY

Theft of clients money	**Emergency Response**	**Data Restoration**
PI – Covered / Cyber - Covered	PI – Not Covered / Cyber - Covered	PI – Not Covered / Cyber - Covered
Loss of Firms Money	**24 Hour Response**	**Ranomsomware**
PI - Not Covered / Cyber - Covered	PI - Not Covered / Cyber - Covered	PI - Not Covered / Cyber - Covered
Regulator Fines	**Reputational Damage**	**Legal Expenses / PR**
PI – Not Covered / Cyber - Covered	PI – Not Covered / Cyber - Covered	PI – Not Covered / Cyber - Covered

THE ROLE OF ARP IN 2020 (ASSIGNED RISK POOL)

- 2020 increased activity due to capacity issues outlined.
- In average year one or two firms enter ARP.
- In 2020 there was **surge in firms entering.**
- 10 firms entered in 2020.
- Circa 40 firms still looking for cover.
- ARP manager shocked at Standard of firms entering ARP - i.e. they should be placed in open market.
- Distressing time for all firms involved and is the greatest indicator of the 'Hard Market'

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WHAT COVER WILL THESE FIRMS RECEIVE?

•An annual aggregate limit of indemnity of €1.5 million (not each and every as is the case in the market)

•Exclusion of all claims by financial institutions.

•Self-Insured excess for each and every clam is €5,500.00 multiplied by the number of Principals in the firm.

•No Retrospective Cover *(i.e. cover can only commence from the date of application to the ARP not any date prior)*

•New entrants to the ARP may only remain in the ARP for a maximum of 12 months.

•Start-up firms are not eligible for entry to the ARP.

•Premiums in the ARP are generally higher than that in the market and are calculated in accordance with pre-defined criteria as set by the PII Committee of the Law Society.

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RELEVANCE OF SPF, ROF, ARP TO THE PI MARKET IN IRELAND (Special Purpose Fund, Run Off Fund & Assigned Risk Pool)

- The SPF was established in 2012 and consists of two elements;
  1. The Assigned Risk Pool (ARP)
  2. The Run Off Fund (ROF)
- The SPF Manager has a responsibility to manage both funds but each are separate entities.
- Since 2012 the claims incurred and paid amounts to approx. €12M. What this translates to for insurers is that if you have 10% market share then you must contribute €1.2M towards claims.
- Participating insurers are responsible for their portion based on their market share. To me, this highlights the main complexities in providing capacity in the Irish Market.
- In 2020, 2 key developments added to ROF:
  - Cover now offered for 6 year period, effective 1st Dec 2020 (Previously, no limit)
  - Effective 1st Dec 2020 any firm who does not meeting the eligibility requirements will pay a premium.
- Current prevailing conditions such as Covid have insurers taking a more cautious approach to underwriting risk and the SPF future performance brings uncertainty.

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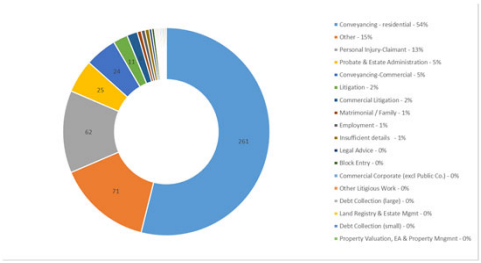
CURRENT TRENDS ASSOCIATED WITH SPF

Claims data is confidential to each individual broker and insurer and is not openly available in the market, but I did want to demonstrate the claims categories so we are examining the SPF.

60% = Conveyancing

Residential & Commercial Conveyancing generates more negligence claims, at more cost, than any other work area.



WHAT ARE THE MAIN ASPECTS THAT AFFECT YOUR PREMIUM?

- Amount of partners
- Revenue
- Types of legal work undertaken
- Claims
- Number of offices
- Ratio between partners and fee earners

INSURERS RISK GUIDE

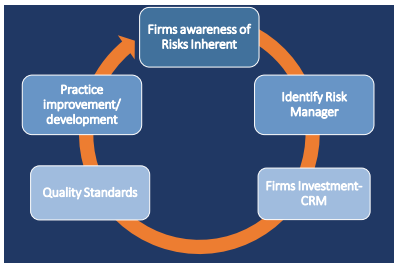
•**Very High Risk** - Conveyancing, Commercial Work (public and non public companies).

•**High Risk** - Commercial Litigation, Estate Agency, Financial Advice, Intellectual Property, Probate, Trusts and Wills, Tax Planning.

•**Medium Risk** - Defendant Litigation, Employment, Matrimonial, Personal Injury, Town Planning.

•**Low Risk** - Adjudication, Agency, Children Work, Criminal, Expert Witness, Immigration, Officers and Appointments.

WHAT CAN WE DO TO INFLUENCE INSURERS?



WHAT CAN WE DO TO INFLUENCE INSURERS?

- Presentation is more important than you might think. The underwriter is assessing the professionalism and quality of your firm and if the information is badly presented, it may influence their judgement and the premium they offer or they may even decline to quote.
- Demonstrate awareness of the Risks inherent in your firm.
- Identify individuals who manage **risk**.
- Show investments in case management systems.
- What internal reviews are conducted to check for red flags?
- What external review processes have you in place - quality standards?
- Continuous progress in RM standards.
- Claims - what have you done to prevent reoccurrence?

CLAIMS

- When a genuine error is made which leads to a claim against your firm insurers will seek reassurances that the error is **not an inherent issue** that will result in multiple claims across the firm.
- Take time to explain the background and more importantly, the risk management procedures, or additional supervisory processes have been introduced to mitigate against similar problems occurring in the future.
- Insurers will often look favourably on a firm that has prior claims provided they understand the risk and took measures to control it going forward.
- Go to great lengths to demonstrate that you have carried out a full case review or that a partner is supervising work more closely or any other corrective action that may be necessary giving underwriters the necessary comfort.

OPTIMISM FOR THE FUTURE

- Claims experiences are at acceptable level vs premiums.
- ARP and RoF are operating at all time low in terms of claims paid.
- Free run off cover for retiring solicitors. Insurers do not like providing run off cover which may attract new entrants.
- Attractive market for new entrants - Aviva.
- Brokers actively looking to bring in new markets and they will come!

RECOMMENDATIONS TO IMPROVE MARKET

- Offer 2 renewal dates/ options a year.
- Law society and insurer need to agree MTC by end of Q1.
- Proposal forms issued 5-6 months prior to renewal.
- Early renewal option- say 3 months before policy expires.
- ARP- given insurer option- participating insurers have to contribute.
- Charge all firms entering the ROF.
- Mandatory Cyber insurance.

ABOUT ReSure

ReSure is one of the fastest growing Corporate General Insurance Brokers operating in the Irish & UK market. Our goal is to forge partnerships with our clients and build a relationship where trust is at the core, whilst providing the necessary peace of mind through access to reliable insurance markets. We pride ourselves on our exceptional customer service and professional approach; and we believe strongly that with the experience our team has acquired in the global insurance broking environment, combined with our local business knowledge, we have a unique blend of qualities to offer clients. We specialize in the following areas;

- ❑ Waste Industry
- ❑ Restructuring Industry
- ❑ Solicitors Professional Indemnity
- ❑ Real Estate

Our team have been placing Solicitors in the market since 2007 and have built a loyal client base over the years.

We are proud to represent many of Irelands leading companies, including The Beauparc Group, Grant Thornton, Deloitte and Bannon to name but a few. We have 30+ agencies with all the main A rated markets in Ireland and the UK.

THE TEAM

Aidan Brady
Managing Director

Aidan has overall responsibility for the strategy, culture and direction of ReSure. In heading up the office, he draws on his 20+ years' experience in the insurance industry. He brings a wealth of knowledge, passion, drive and expertise, gained most recently as Board Member and Head of Office at global broker Lockton. Aidan has a Business Degree, is CIP qualified and completed his Chartered Directorship with the IOD in 2018. Aidan's focus is to ensure clients receive an unrivalled service and he is determined to create a truly unique insurance brokerage.

Andrew Lougheed
Account Executive

Andrew works as an account executive at ReSure. He has a keen eye for detail and a commitment to providing the highest level of service to his clients. Having joined Resure in September 2020, Andrew is looking forward to the challenge of growing the business with the team. He has a business degree and is CIP qualified. He also previously worked for 7 years with a global broker.

Daniel Ralph
Account Executive

Daniel is an experienced account manager at ReSure and is dedicated to providing the necessary support and expertise to clients. Daniel is CIP qualified with 5+ years' experience in the industry. He has knowledge across all insurance sectors.

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THANK YOU

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Katy Manley
President – PNLA/Manley Turnbull Solicitors

"Conference Closing Remarks"
5 mins

Total talk times - 6 hrs 10 mins

Questions and discussion via
PNLA WhatsApp +44 7930251578

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