



**PROFESSIONAL NEGLIGENCE AND
LIABILITY UPDATE**

DUBLIN CONFERENCE

6th June 2024

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

DUBLIN CONFERENCE

Thursday 6th June 2024

- 0830-0900 Registration and Refreshments
- 0900–0910 *“Introduction”*
Harry Fehily – Managing Partner - Holmes Solicitors - PNLA Ireland Representative
- 0910–0930 *“Keynote Address”*
Michael Peart - (Chairman) - Mediator, Arbitrator, and former Judge at the Court of Appeal
- 0930–1000 *“20 years on: Some observations on the success of the Commercial Court”*
Mark Connaughton SC
- 1000-1010 *Questions and discussion*
- 1010-1040 *“Jurisdiction comparison England & Wales - Developments covering the statute of limitations, professionals' duty of care to third parties and proximity”*
Andrew Butler KC – Tanfield Chambers
- 1040–1050 *Questions and discussion*
- 1050-1105 Refreshments
- 1105-1135 *“General Update on Professional Negligence”*
James Burke BL
- 1135-1145 *Questions and discussion*
- 1145-1215 *“Trends in the Architectural profession and the Construction sector in general”*
Donal Friel FRIAI - Friel Architects
- 1215-1225 *Questions and discussion*
- 1225-1255 *“How Artificial Intelligence may start to Impact upon Professional Practice Risks and Claims”*
Harry Fehily & Michael Murphy - Holmes Solicitors
- 1255-1300 *Questions and discussion*
- 1300-1400 Lunch
- 1400-1430 *“Effectively Navigating The Legal Costs Adjudication Process”*
Daragh O’Sullivan - Managing Partner - Lowes Legal Costs Accountants
- 1430-1435 *Questions and discussion*
- 1435-1505 *“The value of a second look - a 24-year journey through the highs and lows of Tax Cases.”*
Denis Herlihy - Managing Director - Interpath Advisory (Ireland)
- 1505-1510 *Questions and discussion*
- 1510-1525 Refreshments
- 1525-1555 *“An Overview of the Risks in Broker’s Negligence Claims”*
Kieran McHugh ACII - Expert Witness in Insurance Disputes
- 1555-1600 *Questions and discussion*
- 1600-1630 *“Mediation – tips and traps”*
Helen Kilroy – Partner - McCann FitzGerald LLP
- 1630-1640 *Questions and discussion / Chair’s Closing remarks*
- 1640-1645 *Thank you from Katy Manley – PNLA President/BPE Solicitors*

6hrs 30mins CPD Available

**PROFESSIONAL NEGLIGENCE AND LIABILITY
DUBLIN CONFERENCE
Stephens Green Club, 9 St Stephen's Green, Dublin
6th June 2024
ATTENDEES (1 of 3)**

| | | |
|----------------------------|--|-----------|
| Michael Peart | Chairman - Mediator and Arbitrator | Dublin |
| Edward Aczel | PNLA | London |
| Fiona Beirne | Davies Group Limited | Dublin |
| Sorcha Blessing | Holmes | Dublin |
| James Burke BL | | Dublin |
| Andrew Butler KC | Tanfield Chambers | Edinburgh |
| Martin Canny | Barrister | Dublin |
| Chris Carlyle | Horwich Farrelly Ireland LLP | Dublin |
| Joice Carthy | Augustus Cullen Law LLP | Dublin |
| Niamh Casey | Berkshire Hathaway Specialty Insurance | Dublin |
| Victor Clarke | Clarke Jeffers LLP | Dublin |
| Richard Coakley | AXA xl | Dublin |
| Mark Connaughton SC | | Dublin |
| Martina Connolly | Leeson Claims Services Ireland (LCSI) | Dublin |
| Deirdre Courtney | Augustus Cullen Law LLP | Dublin |
| Michael Cronin | Aon Ireland Limited | Dublin |
| Helen Crudden | Accelerant | Dublin |
| Brian Durcan | Good & Murray Smith LLP | Dublin |
| Chantal Feeney | Comyn Kelleher Tobin LLP | Cork |
| Harry Fehily | Holmes | Dublin |
| Donal Friel FRIAI | Friel Architects | Dublin |
| Sarah Grace | Aviva | Dublin |

| | | |
|-----------------------------|--|------------|
| Mark Healy | Holmes | Dublin |
| Denis Herlihy | Interpath Advisory | Dublin |
| Bill Holohan SC | Holohan Law | Dublin |
| Ed Kelly | Holmes | Dublin |
| Emma Kelly | Beale & Co | Dublin |
| Tadhg Kelly | Temple Legal Protection Ltd | Dublin |
| Peter Kiely | T J Hegarty LLP | Cork |
| Helen Kilroy | McCann Fitzgerald | Dublin |
| Rory Knight | Lavelle Partners | Dublin |
| Ciaran Leavy | Lavelle Partners | Dublin |
| Niamh Loughran | Beale & Co | Dublin |
| April Lynch | Leeson Claims Services Ireland (LCSI) | Dublin |
| Katy Manley | PNLA & BPE Solicitors LLP | Cheltenham |
| Jayne Mannion | Berkshire Hathaway Specialty Insurance | Dublin |
| Sinead McBreen | Zurich Insurance plc | Dublin |
| Catherine McConville | AIG Europe S.A. | Dublin |
| Jacki McDonagh | Berkshire Hathaway Specialty Insurance | Dublin |
| Anne McGill | QBE | Dublin |
| Kieran McHugh ACII | | Dublin |
| Heather McIlveen | McLarens | Dublin |
| Cormac McNamara | Everest | Dublin |
| Keira-Eva Mooney | AIG Europe S.A. | Dublin |
| Michael Murphy | Holmes | Dublin |
| Michael Murphy | Holmes | Dublin |
| Shane Neville | LK Shields Solicitors LLP | Dublin |
| Dearbhla NiGhríofa, | AIG Europe S.A. | Dublin |

| | | |
|--------------------------|--|---------|
| David Niven | Penningtons Manches Cooper LLP | London |
| Jennifer Nolan | Holmes | Dublin |
| Tara Nolan | Kent Carty Solicitors LLP | Dublin |
| Killian O'Reilly | Fieldfisher LLP | Dublin |
| Louise O'Reilly | DAC Beachcroft Dublin | Dublin |
| Daragh O'Sullivan | Lowe Legal Costs Accountants | Dublin |
| Niamh Quirke | Quirke Solicitors | Co Cork |
| Gary Raethorne | Zurich Insurance plc | Dublin |
| Ciaran Reddin | Berkshire Hathaway Specialty Insurance | Dublin |
| James Roddy | Matheson LLP | Dublin |
| Lorraine Rowland | Hiscox SA | Dublin |
| Sinead Ryan | Corrigan & Corrigan | Dublin |
| Marguite Seymour | Holmes | Dublin |
| Aoife Skehan | Leeson Claims Services Ireland (LCSI) | Dublin |
| Mark Smith | AIG Europe S.A. | Dublin |
| Lydia Stanley | Zurich Insurance plc | Dublin |
| Grace Toher | Comyn Kelleher Tobin LLP | Cork |
| David Woolard | Everest | Dublin |



In association with



HOLMES



Harry Fehily
Managing Partner - Holmes Solicitors
PNLA Ireland Representative

“Introduction”



HOLMES

HARRY FEHILY

Managing Partner

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Harry Fehily is the Managing Partner of Holmes. He has a broad range of experience having worked supporting clients across multiple practice areas. He is an experienced Commercial Litigation Solicitor and a CEDR (Centre for Effective Dispute Resolution) Accredited Mediator.

Having extensive experience of advising clients across a range of contentious and non-contentious matters, Harry practices with an emphasis on commercial litigation and financial lines claims, including professional negligence litigation, cyber claims and claims against directors and officers. He also has extensive experience of resolving property related disputes and shareholders' disputes. He practices extensively in the Commercial Court (a commercial division of the High Court) and is vastly experienced in dealing with cases in this venue.

His work involves dealing with high profile contentious disputes concerning public and private bodies. Harry advises on public administrative law as it relates to State bodies, disputes and investigations concerning public bodies, judicial review, employment law disputes (particularly as they impact on the board and chief executives of companies), contentious issues as they impact on environmental law, procurement, planning law and health and safety law.

He has developed considerable experience in the area of construction law.

With extensive experience in insolvency and corporate recovery, Harry represents liquidators, receivers and examiners. He has been involved in high profile examinerships. Having developed a particular expertise in assisting both the company itself entering into the examinership process, he also provides advice to creditors of the company entering into examinership.

Harry practises in the area of dispute resolution and has been involved in many mediations. He is an accredited mediator through CEDR (Centre for Effective Dispute Resolution) in London.

Professional Activities

- Professional Activities
- Chairman of University of Limerick Foundation
- Member of Professional Negligence Lawyers Association (PNLA)
- Member of Forum of Insurance Lawyers (FOIL)
- Member of the Law Society of Ireland's Guidance and Ethics Committee's Panel to assist solicitors in difficulty with the Law Society
- Member of International Lawyer's Network
- Past President of Limerick Chamber of Commerce
- Special advisor to Mid-Western Hospitals Trust
- Member of International Board of Kemmy Business School
- Former chairman of University of Limerick Concert Hall
- Founding Member of Irish Society of Insolvency Practitioners
- Member of the Law Society of Ireland.



Michael Peart
Mediator, Arbitrator, and
former Judge at the Court of
Appeal

“Chairs' Keynote Address”

MICHAEL PEART

Mediator, Arbitrator

Former Judge at the Court of Appeal



Michael Peart was appointed a High Court Judge in 2002.

He was the first Solicitor appointed to the High Court. He presided over cases in the High Court involving criminal law, judicial review, personal injuries, immigration law and commercial law.

Peart became a Judge of the Court of Appeal in October 2014 upon its establishment. In the Court of Appeal, he delivered judgments on appeals involving defamation, judicial review, land law, criminal law, discovery, and professional misconduct. He chaired a committee to reform legal education of solicitors in Ireland through the Law Society of Ireland, which presented its findings in 2018.

After retiring from the bench, he has set up his own practice as a highly experienced arbitrator and mediator.



Mark Connaughton
SC

"20 years on: Some observations on the success of the Commercial Court"



MARK CONNAUGHTON SC
MEMBER OF THE INNER BAR
mconnaughton@lawlibrary.ie

Barrister:

- Called to the Bar 1989
- Called to the Inner Bar 2002

Qualifications:

- CEDR Accredited Mediator
- Accredited Advocacy Trainer (IATC)

Practice Areas:

- Commercial/Chancery
- General Common Law
- General Practice



Andrew Butler KC
Tanfield Chambers

*“Jurisdiction comparison England & Wales -
Developments covering the statute of limitations,
professionals' duty of care to third parties and
proximity”*



Andrew Butler KC

Year of call Silk
1993 2018

Andrew Butler KC *'Incredibly impressive on the detail – commercial in his approach, with superb drafting skills. He gets on very well with clients. Robust and calls it as he sees it – he doesn't sit on the fence but gives clear, definitive and reasoned advice.'* – Legal 500 2022.

Andrew Butler KC is Joint Head of Chambers, and took silk in 2018. He practises in the areas of Property and Business & Commercial, and is Head of Chambers' Business & Commercial Group. While he accepts instructions across the full spectrum of commercial and property work, he particularly specialises in development disputes and professional negligence matters, with company law issues also forming an increasing part of his caseload.

Andrew is a qualified mediator and a member of both the Chartered Institute of Arbitrators and the London Court of International Arbitration. He is an adjudicator on the panel of the Professional Negligence Bar Association. He was appointed Queen's Counsel in 2018 and his silk practice has gone from strength to strength, involving an appearance in the Supreme Court, and regular appearances in the Court of Appeal, as well as the Commercial and Business and Property Courts.

Andrew was short-listed for Barrister of the Year in the Lawyer Awards 2020.

Real Property

Andrew's background is in Real Property and the majority of his practice is in professional negligence and commercial claims with a property element.

In the former context, he has undertaken claims against architects, surveyors, insurance brokers and solicitors, among other professionals (see, further, "Professional Negligence" below).

In the latter context, he undertakes cases in a variety of fields, including a recent Supreme Court case involving estate agency fees (*Devani v Wells* [2019] 2 WLR 617). In 2022, he has undertaken High Court trials in matters as diverse as landlord consent to assignment (*Gabb v Farrokhzad* [2022] EWHC 212, see link to news article [here](#)) and liability for a devastating fire at an oil processing plant in Essex (*Smith v Howard* [2022] EWHC 562 (TCC)). Of Andrew's performance in securing victory in the latter case, his instructing solicitor commented: "The result of course turned on cross-examination, where hits were scored on both sides. Perceived [sc. expert] bias proved to be the bigger hit. Not all silks would have been so effective."

Andrew routinely undertakes advisory work on real estate disputes and developments; recent examples include the viability of the redevelopment of a major UK shopping centre and two disputes concerning prime residential real estate in the Bahamas.

Commercial Disputes

Andrew undertakes purely commercial work, often with an international element. A particular example is the long-running case of *UCP v Nectrus* (reported on quantum at [2020] PNLR 9), in which Andrew (despite only being instructed shortly before a 12-day Commercial Court trial) successfully defended the majority of a multi-million pound claim made against a Cypriot entity in relation to a property venture in India. The case has attracted interest in particular in relation to a reflective loss case advanced by Andrew; while this was rejected by the trial judge and the Court of Appeal in *Nectrus*, it has recently been confirmed by the Privy Council in a different case (*Primeo v Bank of Bermuda*) that the defence was sound and that *Nectrus* is wrongly decided in this respect. An application to re-open the appeal in *Nectrus* has been successful [2022] EWCA Civ 949.

Other recent commercial cases undertaken by Andrew include *Auty v Duru*, a high value s.994 petition concerning a Turkish cosmetics group, *Quantum Advisory Ltd. v Quantum Actuarial LLP* [2022] 1 All ER (Comm) 473, a leading Court of Appeal authority on covenants in restraint of trade, and *TBD Owen Hollands v Simons* [2021] 1 WLR 992, an important Court of Appeal decision on search orders and common interest privilege.

Professional Negligence

As set out in the Real Property section, much of Andrew's work both within and beyond the field of property

related disputes has a professional negligence element and he acts in claims against all manner of professionals including insurance brokers, solicitors and architects. Aside from *UCP v Nectrus* (see "Commercial Disputes" above and reported at [2020] PNLR 9), recent and/or ongoing cases include:

- a claim against an Employer's Agent about the allegedly negligent drafting of a Liquidated and Ascertained Damages Clause in a major construction contract.
- a claim against a tax adviser/company law specialist arising out of errors in the establishment of a family trust fund.
- a claim against a barrister arising out of the Court of Appeal's decision in the residential forfeiture case of *Gibbs v Lakeside Development Ltd* [2019] 4 WLR 6.
- a claim against a solicitor arising out of the drafting of an SPA (involving a novel point under s.14A Limitation Act 1980).

Andrew is frequently called upon to talk about negligence issues and lectured on the RIBA CPD programme for many years. He is a member of the PNLA and PNBA, and also sits on the adjudication panel of the latter.

Mediation

Andrew is a trained mediator and has ample experience of the mediation process, both as advocate and mediator.

Awards

- Lawyer Monthly, Business Barrister of the Year (2015)

Qualifications

- FCI Arb
- MA (Oxon)
- BA

Memberships

- Chartered Institute of Arbitrators
- Commercial Bar Association
- Professional Negligence Bar Association
- Property Bar Association



Limitation – A Mad Hatter’s Tea Party

Andrew Butler KC

TANFIELD

1

Smith v Cunningham [2023] IESC 13

- P and wife buy property on 12 July 2006 on strength of certificate wrongly attesting that property constructed in accordance with terms of planning permission
- In May 2008, P agrees terms of sale
- On 10 June 2008, Council states that it is planning to take enforcement action in respect of non-compliance
- In October 2008, sale falls through as a result of non-compliance – property market then crashes
- Proceedings issued on 26 May 2014

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2

Smith v Cunningham [2023] IESC 13



- High Court holds that damage only occurred on rescission of contract for sale
- Court of Appeal allows appeal on basis that defect and damage are one and the same and loss therefore suffered in 2006
- Supreme Court agrees with Court of Appeal

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3

Smith v Cunningham [2023] IESC 13

"From the moment the sale closed, the plaintiff and his wife were the owners of a property which was of diminished value, and which would remain at that diminished value unless and until the planning position was regularised. The 'defect', as the fourth defendant submits, did not need to progress in any fashion as it remained the same threat to the value of the property until corrected. That injury was on any version 'manifest' in the sense in which McKechnie J. used that term – the fact that the property had not been constructed in accordance with the relevant permission would have been evident from matching the terms of the planning permission against the development as it had been constructed."

Per Murray J at para.78



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4

s.14A Limitation Act 1980



- (1) This section applies to any action for damages for negligence...where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

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s.14A Limitation Act 1980



- (4) [The period within which a claim must be brought] is either—
 - (a) six years from the date on which the cause of action accrued; or
 - (b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.

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6

s.14A Limitation Act 1980

- (5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.



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7

s.14A Limitation Act 1980

- (5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.



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8

s.14A Limitation Act 1980

- (5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.



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9

s.14A Limitation Act 1980



- (6) In subsection (5) above “the knowledge required for bringing an action for damages in respect of the relevant damage” means knowledge both—
 - (a) of the material facts about the damage in respect of which damages are claimed; and
 - (b) of the other facts relevant to the current action mentioned in subsection (8) below.

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s.14A Limitation Act 1980



- (6) In subsection (5) above “the knowledge required for bringing an action for damages in respect of the relevant damage” means knowledge both—
 - (a) of the **material facts** about the damage in respect of which damages are claimed; and
 - (b) of the other facts relevant to the current action mentioned in subsection (8) below.

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s.14A Limitation Act 1980



- (6) In subsection (5) above “the knowledge required for bringing an action for damages in respect of the relevant damage” means knowledge both—
 - (a) of the material facts about the damage in respect of which damages are claimed; and
 - (b) of the **other facts** relevant to the current action mentioned in subsection (8) below.

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s.14A Limitation Act 1980

- (7) For the purposes of subsection (6)(a) above, the **material facts** about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.



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s.14A Limitation Act 1980

- (7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to **consider it sufficiently serious** to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.



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14

s.14A Limitation Act 1980

- (8) The **other facts** referred to in subsection (6)(b) above are—
 - (a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
 - (b) the identity of the defendant; and
 - (c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.



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s.14A Limitation Act 1980

- (9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.



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s.14A Limitation Act 1980



- (10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—
 - (a) from facts observable or ascertainable by him; or
 - (b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;
 but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

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17

Striking Cases



- *Dobbie –v- Medway HA* [1994] 1 WLR 1234
- *Graaigard –v- Aldridge & Brownlee* [2005] PNLR 19

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18

Thank you

Andrew Butler KC

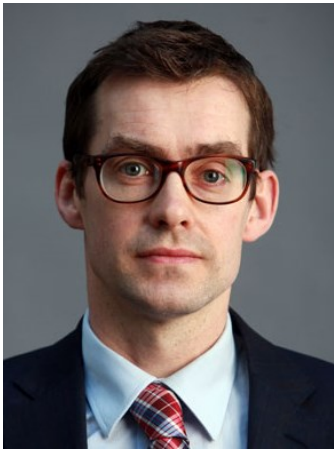


TANFIELD



James Burke BL

***“General Update on Professional
Negligence”***



JAMES BURKE BL

jburke@lawlibrary.ie

Barrister:

- Called to the Bar 2005

Qualifications:

- BCL (Law & French)
- Chartered Tax Advisor (CTA)
- Advanced Diploma Public Procurement Law

Practice Areas:

- Commercial
- Chancery
- General Common Law
- Tort
- Personal Injury Law

Specialisation:

- Construction
- Defamation
- Medical
- Professional Negligence
- Public Procurement
- Tax Law

Unless Orders, Calderbank Letters and Losses in Professional Negligence¹

A. Introduction

1. This paper considers some of the important aspects of professional negligence claims. Unless orders are relatively new and practitioners are still only getting to grips with the idea of an ‘unless order’ but when one is the subject of such an order matters come into sharp focus. Unless orders have made the task of drafting a defence more onerous and time sensitive, gone are the days of looking for a period of time from the court to draft a defence and taking twice as long with no real consequences!
2. While ‘unless orders’ make matters time sensitive, Calderbank letters bring the issue of costs into sharp focus. They are an essential tool in attempting to reduce the exposure to costs which can often be more than the claim.
3. Finally the paper will look at losses in professional negligence which itself is a crucial area in professional negligence.

B. Unless Orders

4. In November 2021, changes to default judgment applications under the Rules of the Superior Courts came into force. Under the amended rules, judgment in default of defence, or judgment to dismiss the proceedings for failure to deliver a statement of claim, will be granted on the first return date, except where the justice of the case requires an extension of time. Where such an extension is granted, the court will make an “unless order”. An unless order means that unless the statement of claim or defence is delivered within the extended period, the action will stand dismissed without any further application to the court.
5. The applicable principle in relation to the operation of unless orders is set out in Order 27, Rule 15(2) of the Rules of the Superior Courts:

¹ With special thanks to Catherine Dunne BL.

“Any judgment by default, whether under this Order or any other Order of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit, if the Court is satisfied that at the time of the default special circumstances (to be recited in the order) existed which explain and justify the failure, and any necessary consequential order may be made where an action has been set down under rule 9.”

6. Where judgment is obtained by default, it may be set aside if special circumstances exist. This paper will examine the recent decisions of the Superior Courts which considered the application of such special circumstances.
7. In *De Souza v. Liffey Meats & Ors* [2023] IEHC 402, Mr. Justice Ferriter set aside judgment in default of defence obtained on foot of an unless order due to the very personal circumstances experienced by counsel during the period in which the defence was to be delivered. The court was satisfied that special circumstances existed in the case to set aside the judgment.
8. The plaintiff had issued personal injuries proceedings against the defendants alleging negligence in various aspects of his employment. The case involved three distinct issues. In January 2022, the defendants’ solicitor briefed counsel to draft a defence. The draft defence was delivered within two weeks, in addition to a draft discovery request and a request for a consultation with the clients.
9. In February 2022, the plaintiff’s solicitor requested a defence within 28 days, to which the defendants’ solicitor replied that a draft defence had been received from counsel and would be delivered as soon as the clients’ approval had been obtained. A consultation took place later that month and the defendants’ counsel furnished an updated draft defence on the same day. Counsel advised that the defence was not to be delivered until further instructions and an engineering report were obtained.

10. In March 2022, the plaintiff issued a motion for judgment in default of defence. This motion was listed for May 2022, by which time the engineer's report had been obtained and furnished to counsel. The week before the default motion, a legal executive for the defendants' solicitor corresponded with a trainee solicitor in the plaintiff solicitor's firm. The legal executive requested that the motion be struck out since a draft defence was in hand and awaiting final confirmation. The trainee responded that they would allow an extension of eight weeks for the defence with an order for the plaintiff's costs.
11. This proposal was agreed to by the legal executive. The next day, the trainee followed up with the legal executive and outlined that there were new court rules, referred to at para. 1 above, in relation to default of appearance and defence motions. As such, counsel had advised that a "*unless type order*" had to be made. The legal executive was asked to consent to an unless order allowing ten weeks for the delivery of the defence.
12. The legal executive consented to that order, which required a defence to be delivered by 31 July 2022. Unfortunately, it appears that the legal executive did not appreciate that they were consenting to an order for judgment unless the defence was delivered within 10 weeks. The legal executive neglected to inform the solicitor about the unless order.
13. When the order was delivered to the defendants' solicitor, he did not consider the terms as he was not informed that an unless order was made. A further conversation was had with counsel in June in relation to the finalisation of the defence. Two reminders were sent to counsel in September 2022. The defendants' solicitor only became aware of the unless order when the plaintiff's solicitor contacted him on 20 September 2022 outlining that the defence had not been delivered and therefore judgment had been obtained against the defendants.
14. The defendants issued a motion to set aside the judgment. The primary reasons offered for the application were:

- a. That the defendants' legal executive had inadvertently consented to the unless order without understanding the implications and
 - b. That counsel had difficult personal circumstances between May and September 2022 (Counsel's mother was very ill and passed away in July 2022. His father's health was also a difficulty and minimised his engagement with his practice).
15. This motion was opposed by the plaintiff, who stated that the reasons offered did not reach the threshold of "*special circumstances*" required to set aside judgment pursuant to O27 R15(2).
16. Ferriter J. outlined that the date on which the "*special circumstances*" were required to crystallise was 31 July 2022, being the date that the defence was due for delivery. The court was required to assess the meaning of "*special circumstances*" under Order 27.
17. The court made reference to *Murphy v. HSE [2021] IECA 3*, which dealt with analogous provisions for special circumstances for the renewal of a summons. In that case, the court outlined that there was no "*hard and fast rule*" as to what special circumstances might be. While the test for special circumstances was higher than the standard of "*good reason*", this did not mean that extraordinary circumstances were required.
18. Ferriter J. also referred to *McGuinn v. Commissioner of An Garda Síochána [2011] IESC 33* in which the Supreme Court held that the appellant had established special circumstances to set aside judgment where the defendant's solicitor was completely unaware that a motion for judgment had not been struck out as agreed but had instead been adjourned. The solicitor was also told that the matter had been struck out.
19. In considering whether special circumstances existed in *De Souza*, Ferriter J. took account of the facts that an employee of the defendants' solicitor held out that they

had authority to agree to the unless order, a copy of the unless order was sent to the solicitor and he never properly acquainted himself with the terms of the order.

20. The court held that the defendants' solicitor's failure to acquaint himself with the unless order would not of itself amount to a special circumstance:

"If a solicitor chooses to delegate agreements in relation to important procedural matters such as the terms of orders for judgments in default (including unless orders) to a non-legally qualified staff member (or, indeed, to any staff member qualified or not), he cannot escape the consequences of that by saying that his staff member did not understand the consequences of the terms agreed or that he was not aware of the terms agreed".

21. Ferriter J. observed that if the only issue in the case had been the inadvertence of the solicitor, the court would not have accepted the existence of special circumstances. However, the court noted the extreme personal difficulties of counsel in the case, which contributed significantly to the defence not being ready. The court accepted that the solicitor did not press him for the defence and that counsel was not in a position to attend to his practice in the same manner between May and July 2022. The court also remarked that counsel had acted with *"considerable alacrity"* in drafted defences in the case prior to the difficulties. The court had little doubt that but for the personal circumstances of counsel, a defence would have been delivered within the required period.

22. As Ferriter J. was satisfied that special circumstances existed as to why the defence was not delivered on time, the court turned to address the balance of justice. It was outlined that the defendants' solicitor had acted quickly once the mistake was identified, the plaintiff knew the defendants intended to fully defend the case, the defendants had an arguable defence and that the proceedings had a degree of complexity.

23. The court could not see any prejudice to the plaintiff in setting aside judgment. However, a condition of the order was that the defendants should pay the

plaintiff's costs of the default motion and the motion seeking the setting aside of judgment.

24. In another recent case of *Costern Unlimited Company v. Fenton* [2023] IEHC 552, Costern issued a motion seeking judgment in default of defence against the defendant, Ms. Fenton. On 8 May 2023, an unless order was made on consent, extending the time for the delivery and filing of Ms. Fenton's defence to 5 June 2023. As 5 June 2023 was a bank holiday, the due date defaulted to the next working date, 6 June 2023. The effect of the unless order meant that if Ms. Fenton did not deliver and file the defence by 6 June, Costern was entitled to judgment against her. The defence was not delivered or filed in accordance with the unless order. Consequently, Costern was entitled to enter judgment against Ms. Fenton.
25. The plaintiff received a copy of the defence by email on 8 June 2023, and it was filed in the Central Office on 9 June 2023. On 20 June 2023, Costern served a notice of trial.
26. In early July 2023, the Defendant issued an application to extend the time to file her defence. This application was treated by the court as an application to set aside the default judgment. Ms. Fenton's primary argument was that her solicitors placed the defence in the DX (document exchange) on Friday 2 June 2023, and erroneously believed that it would be delivered by the date provided in the unless order of 8 May 2023.
27. Mr. Justice O'Donnell referred to Order 27 Rule 15(2) as set out above. In considering the meaning of "*special circumstances*", the court endorsed the decision of Mr. Justice Ferriter in *De Souza v. Liffey Meats* [2023] IEHC 402 ("*De Souza*") and summarised the relevant principles as follows:
 - a. The question of special circumstances is to be treated not just at the date at which the order was made, but at the date of judgment by default; in effect when the unless order crystallises. This is because it is only when the

judgment crystallises under the unless order that there is a “*failure*” to “*deliver*”.

- b. What amounts to special circumstances must be decided on the facts of a particular case. However, the test is “*generally accepted [as being] a higher test than that of good reason*”. In other words, some fact or circumstance “*beyond the ordinary or the usual needs to be present*”.
- c. The court must be satisfied that there are special circumstances before it considers justification issues such as prejudice and the interests of justice.
- d. “*In the preponderance of cases*”, inadvertence or inattention on the part of a solicitor will rarely constitute special circumstances.

28. In *Costern*, the Court distinguished the case from that of *O’Brien v. McMahon* [2023] IEHC 393 on the basis of the different factual circumstances arising and the fact specific analysis required in these applications. In *O’Brien*, Mr. Justice O’Moore found that there was no reason for the defendants not to have delivered a defence or to have attempted to defend a motion for judgment in default of defence. Separately, there was an issue in those proceedings in relation to the viability of the proposed defence.

29. O’Donnell J. found that the reasonable belief on the part of the defendant’s solicitor that the defence had been delivered to the plaintiff’s solicitor through the DX, and in accordance with the terms of the unless order, amounted to special circumstances.

30. In respect of the delay in filing the defence in the Central Office, the court was not persuaded by the defendant’s solicitor’s arguments of a lack of familiarity with the Rules of the Superior Courts. O’Donnell J remarked that if that reason had been offered on its own, it would not have amounted to special circumstances. However, the court considered that Order 27 Rule 15(2) does not require it to be satisfied that special circumstances exist independently for the failure to deliver the defence and its filing in the Central Office. This was particularly the case as the filing requirements are an administrative provision allowing the Central office to

deal with applications resulting from a default. In respect of justification, O'Donnell J. remarked that the defendant moved quickly to set aside the default judgment, and the defence was received by the defendants in a matter of days after the date specified in the unless order. It therefore followed that there was no specific prejudice in setting the default judgment aside.

31. Order 27, Rule 15(2) of the RSC requires the court to recite the special circumstances in its order. The court in *Costern* set aside the judgment on the basis that reasonable efforts were made to comply with the unless order and there was a reasonable belief by Ms. Fenton's solicitor that the defence would be so delivered.
32. The key takeaway from *Costern* is that if an unless order is not complied with, the party in default should promptly move to set aside any consequent default judgment and must not delay in delivering the pleading.
33. In the subsequent case of *McGoohan v. The Department of Transport, Sports and Tourism [2023] IEHC 758*, an application to reinstate proceedings that had been struck out on foot of an unless order was heard by Mr. Justice Jackson. The series of events relevant to the application commenced in December 2020, when the defendants issued a motion seeking three reliefs:
 - a. Directions in relation to the plaintiff's default of her obligations pursuant to O39, R46 RSC;
 - b. An Order directing the Plaintiff's compliance with her obligations pursuant to Order 39, R46 RSC "to exchange" with the defendants her schedule of witnesses intended to be called at the hearing of the action, Statement of Special Damages together with vouchers and Schedule of Expert Reports to be relied upon at the hearing of the action;
 - c. An Order striking out the Plaintiff's claim for failing to comply with O39, R46 RSC.
34. This application was dealt with by consent on 22 March 2021 before Mr. Justice Heslin. The Order allowed the Plaintiff four weeks to exchange the documentation

referred to. Jackson J. noted that prior to the motion being dealt with by consent, the plaintiff had furnished certain documentation to the defendant, being a Schedule without any accompanying vouching materials. Jackson J. observed that whatever remained to be done, the order of Heslin J. was made on consent. However, there was no compliance by either party with the exchange order of 22 March 2021.

35. In June 2021, the Defendants issued two motions – the first sought to compel replies to particulars and had a return date of 1 November 2021. This motion was dealt with by consent - the replies were provided prior to the return date but subsequent to the issuing of the motion and consequently, the motion was struck out with costs to the Defendants. The second motion was returnable to 11 November 2021 and sought a strike out of the Plaintiff's proceedings for failure to comply with the order of Heslin J. of 22 March 2021. The order made in consequence of this motion erroneously records that counsel for the Plaintiff was present at the hearing, which both parties accepted was not the case. This motion resulted in an unless order being granted by Ms. Justice Egan on 15 November 2021. Four additional weeks were provided for compliance with the order of Heslin J., failing which the Plaintiff's case would be struck out.

36. Jackson J. noted that the outcome of the plaintiff's application for reinstatement of the proceedings was one of considerable detriment if the proceedings were to remain struck out. However, the court noted the following:

- a. There was non-compliance with the order of Heslin J. in March 2021;
- b. Correspondence between March 2021 and the issuing of the motions in June 2021 appeared to have been ignored by the plaintiff;
- c. The two motions which issued in June 2021 were served on the Plaintiff's solicitors' Letterkenny offices by registered post and one appeared to have been ignored by a member of staff in that office. The court also noted that it remained unclear as to why service was effected on the Letterkenny office,

in view of the Dublin address of the plaintiff's solicitors' firm featuring on the Personal Injuries Special Summons;

- d. The plaintiff submitted that the unless order of Egan J. of 15 November 2021 was notified by email to the plaintiff's solicitor on 17 December 2021 in response to the Plaintiff's email saying that she would be seeking a hearing a date. The defendants submits that the order of Egan J. was served via email on 23 November 2021, a submission which was supported by an exhibit to the defendant's solicitor's affidavit.

37. Jackson J. noted that judgment had been obtained by the defendants in their favour by way of a dismissal of the proceedings in circumstances of the Plaintiff's default in complying with an unless order. The court considered the dicta of O'Donnell J. and Ferriter J. in *Costern* and *Da Souza* respectively, which deal with the 'special circumstances' test as discussed above.

38. Jackson J. distinguished the present case from Mr. Justice O'Moore's decision in *O'Brien and Others v. McMahon*, mentioned above, where it was held that using Covid 19 challenges in a vague, non-specific way as an excuse will not be sufficient to reach the standard required for special circumstances to exist. Jackson J. noted that it must be remembered that the date upon which the default judgment had been granted in *O'Brien* was 6 March 2023, far from the period of intense civic restriction to the pandemic. Such civic restrictions were in place at the time of the unless order made in the present case and the curtailments in operation in respect of motions at that time were accepted by both sides at the hearing.

39. Jackson J. concluded that special circumstances were in existence and on that basis, formed the view that the interests of justice were such to justify the reinstatement of the plaintiff's proceedings. The court relied on the dictum of Heslin J. in *May v. Barrett and Another* [2023] IEHC 322:

"Taking everything into account, I also take the view that, were the entire claim of the plaintiff to stand dismissed without being reinstated in any respect, it would be

a disproportionate response by this Court to the plaintiff's conduct, which I have no hesitation in saying has been substandard. However, it seems to me that that conduct can more appropriately and more justly be dealt with by means of appropriate costs orders."²

40. Jackson J. noted that the special circumstances to be recited on the order were as follows:

- a. The fact that the motion concerned was not served on the address recited in the Personal Injuries Special Summons;
- b. The fact that the original order of 22 March 2021 placed obligations on both of the parties, referencing an exchange of documents and neither would appear to have complied with the order within the permitted timeframe;
- c. The acknowledged procedural restrictions which were in operation at the time of making of the unless order herein and at surrounding times.

41. In the case of *Harrington v. Green Way Properties Ltd [2022] IECA 55* the Plaintiff, Mr Harrington, was a farmer claiming to have a "legal right and a legal claim" over certain lands earmarked for 200 residential units in Oranmore, Co. Galway. He asserted an entitlement to remain on and to occupy the lands under a lease and claimed the defendants and/or their agents unlawfully entered the site, removing his property and livestock. He initiated proceedings in August 2021 against Greenway Properties and its associated companies, Greenway Real Estate Holdings Ltd and Limbal Ltd, in addition to a company providing security on the lands, You're Secure Solutions Ltd. The directors of each entity were also joined to the proceedings. The plaintiff sought various reliefs including an order preventing the defendants from building any houses on the lands until his alleged leasing contact had expired. The defendants denied all of his claims and submitted there was no merit to his case, which was delaying a significant commercial project.

42. Upon application by the defendants, the proceedings were entered into the High Court's fast-track commercial list on 1 November 2021, with conditions attached

² [2023] IEHC 322 at para 58.

regarding the filing of a statement of claim by the Plaintiff within a specified period. The defendants subsequently issued a motion to dismiss the proceedings on account of the Plaintiff's failure to comply with the filing directions. McDonald J made a further order on 6 December 2021 that unless the Plaintiff delivered a statement of claim within ten days of the posting of that order, the proceedings would stand dismissed (the "unless order"). The statement of claim was not delivered, and the dismissal clause in the "unless order" took force on 20 December 2021.

43. The Plaintiff appealed to the Court of Appeal against two of the orders made by McDonald J: the order of 1 November 2021, entering the matter into the commercial list, and the order of 20 December 2021, when the "unless order" of 6 December 2021 took effect. The plaintiff did not appeal the order made on 6 December 2021. At the directions hearing in respect of the plaintiff's appeals, the defendants maintained that the fact that the unless order had not been appealed and that, as a consequence, the proceedings stood dismissed meant that both of the appeals before the court were effectively moot. The plaintiff disagreed with this assertion and confirmed that he was not appealing the order of 6 December 2021.

44. Mr. Justice Barniville stated that the plaintiff's decision to appeal only the orders of 1 November 2021, entering the matter into the commercial list, and 20 December 2021, when the "unless order" of 6 December 2021 took effect, created an "insurmountable problem" for the appeals. The plaintiff's failure to appeal the "unless order" of 6 December was "fatal" to his case:

"His failure to comply with the terms of the unless order and to deliver a statement of claim within the required period or to appeal from that order and to obtain a stay on the order means that the order has taken effect and that the proceedings were dismissed on foot of it".

[...]

*“it is not possible to maintain an appeal in proceedings which have been dismissed on foot of an unless order without appealing that order”.*³

45. The court noted that the orders with which the appeals were concerned could all be described as “*case management type orders*” including the unless order of 6 December 2021 requiring the statement of claim to be delivered and the effect of the failure to comply with that unless order then being confirmed by the court in the order of 20 December 2021. Barniville P. stated that the court “*should be slow to interfere with orders of that kind but can do so if satisfied that there was a clear error of law involved or an incorrect exercise of discretion which led to an injustice to the plaintiff*”.⁴
46. The default position remains that failure to comply with a direction of the court within a period specified in an unless order will result in a plaintiff having liberty to enter judgment or the dismissal of the proceedings. However, these judgments offer insight into the special circumstances (often human factors) that may arise and result in default of an unless order, for which there are stark consequences.

C. Calderbank Letters

47. Defendants’ insurers have always been on the back foot in relation to attempting to achieve timely and cost effective settlements, in circumstances where it is more financially beneficial for plaintiffs’ solicitors not to engage in negotiations until the parties appear at the steps of the courtroom. However, the use of a Calderbank letter can financially penalise a plaintiff for adopting this course of action and accordingly, the Calderbank letter is a significant tool for defendants.
48. A Calderbank letter is a letter written by one party, generally the defendant, to the plaintiff, making an offer to resolve the litigation. The letter must:
- i. Carry the heading “*Without Prejudice Save as to Costs*”.
 - ii. Contain a specific offer to the plaintiff in settlement of the plaintiff’s claim in respect of both general and special damages;

³ [2022] IECA 55 at 44 and 45.

⁴ Ibid at 63.

- iii. State that the defendant also offers to pay the plaintiff's reasonable costs and expenses on a party basis up until the date of acceptance of the offer;
- iv. Confirm that if costs cannot be agreed between the plaintiff and defendant, they will be referred to taxation;
- v. Contain a specific date before which the plaintiff must accept the offer;
- vi. Must state that although the offer is made without prejudice to the issue of costs, the right to refer to the correspondence on any issue of costs which may subsequently arise is reserved; and
- vii. Make clear the consequences of not accepting the offer.

49. Initially, Calderbank offers were used only in matrimonial proceedings and take their name from a 1975 case of *Calderbank v Calderbank* [1975] 3 All ER 333, but they are now more common in general litigation. They are becoming more commonly used because the courts have demonstrated a willingness to impose costs penalties on plaintiffs who do not accept reasonable offers or refuse outright to engage in negotiations. The more frequently that costs penalties are imposed against the plaintiff, the more often Calderbank offers will be taken seriously. An offer which puts the plaintiff on risk of the proceedings, even if it represents 90 per cent of the plaintiff's legal advisors' view of the value of the claim is likely to provoke a resolution or alternatively an indication from the plaintiff's solicitors that a small increase in the offer will resolve the claim.

50. Section 17 of the Civil Liability and Courts Act 2004 states that a formal offer must be made during the course of proceedings. However, Calderbank letters were essentially excluded from use in personal injury claims until the enactment of section 169(1) of the Legal Services Regulations Act 2015 ("the 2015 Act") which came into effect on 7 October 2019.

51. Rule 3(1) of Order 99 of the RSC states the following:

“The High Court, in considering the awarding of the costs of any action or step in any proceedings, and the Supreme Court and Court of Appeal in considering the awarding of the costs of any appeal or step in any appeal, in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the 2015 Act, where applicable”.

52. Section 169(1) of the 2015 Act states the following:

“A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including –

[...]

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer”.

53. A Calderbank letter is not subject to any time limits and can be made at any stage in the proceedings, even during the hearing of a case. In those circumstances, even if a party is out of time to make a Section 17 offer or notice of tender offer, it is now the case that any offer made in writing, including a Calderbank offer, must be taken into account by the trial judge when considering the question of costs at the conclusion of the proceedings.

54. The case of *Higgins v. The Irish Aviation Authority* [2020] IECA 277 concerned an Aer Lingus pilot who was awarded a sum of €387,000 in defamation proceedings. This award was appealed by Aer Lingus and was subsequently reduced to €76,500 by the Court of Appeal. A Calderbank letter was served by the appellant on 14 April 2020, wherein it was proposed that the respondent retain €100,001 of the damages in his favour, that he would retain the benefit of the order for costs made

in the High Court and that the parties would each bear their own costs of the appeal. The offer was open for acceptance until 21 April 2020, with the appeal being listed for hearing on 28 April.

55. Mr. Justice Murray stated that:

“if a defendant to proceedings wishes to put their opponent on risk of costs where they appeal against the quantum of an award made against them they have it in their power to make an offer that reflects the damages likely to be awarded to the plaintiff. If they do this at the same time as they lodge their appeal, they avoid having to pay their opponent’s costs. If they do so (as happened here) at a later stage when additional costs have been incurred, they should offer to pay their opponent’s costs up to that point for the offer to be effective.

The respondent was presented by the appellant with an offer which it refused, and in resisting the appeal (and incurring consequent costs) it obtained a better award than the appellant had tendered. However, [the appellant] failed in critical parts of the appeal (both in not holding the quantum awarded by the jury and in not having the matter remitted to the High Court for a new hearing before a jury). He could have protected his costs by making his own offer or counter-offer but failed to do so. In those circumstances, making no order as to costs appears to me to be the option that most fairly distributes the cost burden of the appeal”⁵.

56. Murray J. also noted that although the phrase “costs follow the event” appears in the marginal note of section 169 of the 2015 Act, it does not feature in the section itself and has been purged completely from Order 99 of the RSC. This observation perhaps reflects a slight shift away from the general rule that “costs follow the event” in the 2015 Act.

⁵ [2020] IECA 277 at paras 28 and 29.

57. The court emphasised the “*decisive importance*” of Calderbank offers under section 169 but concluded that the Calderbank offer in this case was less than effective, taking into consideration the late stage at which it was made and the fact that it was not accompanied by an offer to pay costs incurred up to that date.

58. In the case of *Shannon v. O’Sullivan* [2016] IECA 105, the Court of Appeal endorsed the use of Calderbank letters where the plaintiffs failed to obtain an award greater than the Calderbank offer. Mr and Mrs Shannon were awarded €90,000 and €130,000 respectively for general damages in the High Court. The Court of Appeal reduced the general damages of each Plaintiff’s claim to €40,000 and €65,000 respectively. The Defendant had served Calderbank letters offering €42,000 and €72,000 respectively and therefore neither plaintiff beat the Calderbank offer. At the conclusion of the appeal, the appellants relied upon the Calderbank letters in support of applications to affix the plaintiffs with all of the costs subsequent to the latest date for acceptance of the Calderbank offers.

59. Ms. Justice Irvine concluded that:

“harsh and all as it is on the plaintiffs it would not be just or fair to the defendants who made such offers, which had they been accepted would have protected the plaintiffs from the risk of incurring costs on this appeal, to be affixed with paying their own costs in respect of two appeals which they considered were unwarranted having regard to the offers which they made”⁶

60. Accordingly, the court awarded the costs of the appeals to the defendant and directed that those costs be set off against the award of costs made in the plaintiffs’ favour in the High Court.

61. Certain points should be borne in mind when making Calderbank offers:

⁶ [2016] IECA 105 at 17.

- (i) It will be for the Defendant to petition the court that the Calderbank offer was such that it ought to displace the principle that costs follow the event, and it will be for the Court to determine the extent to which that principle should be displaced.
- (ii) The Court will scrutinise the date of the offer. Once liability and quantum investigations are concluded, the earlier the offer is made in the litigation process, the better, in order to minimise costs and increase the potential costs burden on the plaintiff, should they fail to beat the amount offered.
- (iii) The offer should include a clear time limit so that the plaintiff can clearly understand how long the offer remains open. The plaintiff should be afforded sufficient time to consider the offer carefully and take advice. An offer that remains open for 24 hours without good reason will likely not be looked upon as favourably as an offer remaining open for 21 days.
- (iv) The plaintiff should be advised of the defendant's intention to refer to the letter at the conclusion of proceedings in order to fix the plaintiff with the costs of defending these proceedings, to include all reserved costs or costs in respect of discovery.
- (v) The court will also look closely at the circumstances of the offer and it will likely consider, for example, whether it was made with or without an admission of liability, and if the latter, the extent to which that position was reasonable.

62. Given the broad wording of section 169(1) of the 2015 Act, which permits the court to consider both the nature and circumstances of the case, and the conduct of the parties, it is arguable that a plaintiff may struggle to avoid a costs penalty should they unreasonably reject a Calderbank offer and proceed to only marginally exceed it at trial.

D. Losses in Professional Negligence

The UK Approach

63. Defining the scope of a professional adviser's duty of care to their client is critical to the success of clients and advisors alike. This challenge has frequented the courts

in the UK for many years before the seminal decision of the House of Lords in *South Australia Management Corp v. York Montague Ltd (SAAMCO)* [1996] UKHL 10. The so-called 'SAAMCO principle' or "scope of duty principle" states that in order to recover damages for the consequences of negligent advice, a claimant must prove that its loss was the reasonably foreseeable consequence of that advice. However, this alone is not sufficient. The crucial element which must be demonstrated in every case is that the damage suffered by the claimant falls within the scope of the adviser's duty, being damage that the adviser was obliged to take care to prevent. The adviser is not liable in damages in respect of losses that fall outside the scope of their duty of care. Essentially, a professional adviser owes their client a duty to take reasonable care in carrying out the adviser's activities, but that does not mean the duty extends to every kind of harm that the claimant may suffer as a result of a breach of that duty.

64. The SAAMCO case involved a claim against a valuer who negligently overestimated the value of a property, leading to significant financial loss for the claimant when the borrower defaulted. The court had to decide whether the valuer was liable for all losses resulting from the transaction or just the specific losses directly linked to the inaccurate valuation.
65. Initially, the High Court found the valuer liable for all the claimant's losses, including those resulting from the default. The reasoning provided was that the negligent valuation had led to the transaction and the subsequent losses.
66. The Court of Appeal reversed this decision, distinguishing between 'no transaction cases', where the transaction wouldn't have occurred without the negligent advice and 'successful transaction cases', where the transaction would have proceeded but on different terms. The court concluded that advisers are only liable for the specific consequences of their negligence, not all losses flowing from the transaction.

67. The House of Lords further clarified this approach, shifting focus from the measure of damages to the claimant's cause of action. Lord Hoffman introduced the "mountaineer's knee" analogy to explain the principle. In this analogy, a mountaineer, reassured by a doctor's negligent advice, undertakes a climb and suffers an unrelated injury. While the injury is a foreseeable result of the climb, the doctor's duty did not cover such outcomes, underscoring the principle that advisers are not liable for all consequences of their advice. on the scope of the adviser's duty.

68. The UK Supreme Court recently revisited the principle in three rulings: *BPE Solicitors and another v. Hughes-Holland* [2017] UKSC 21, *Manchester Building Society v. Grant Thornton UK LLP* [2021] UKSC 20 and *Khan v. Meadows* [2021] UKSC 21

69. In *BPE Solicitors*, Mr. Gabriel lent £200,000 to Mr. Little for the development of a disused heating tower on an airfield. The building, owned by a company controlled by Mr. Little, was to be transferred to a special purpose vehicle (SPV) for the development, funded by the £200,000. BPE Solicitors (BPE), acting for Mr. Gabriel, inadvertently confirmed his misunderstanding of the arrangement by using a template from a prior failed transaction. The project failed, resulting in Mr. Gabriel losing his entire investment. Initially, the High Court awarded damages against BPE, covering Mr. Gabriel's entire loss⁷. However, the Court of Appeal later reduced these damages to nil, attributing the loss to Mr. Gabriel's commercial misjudgements⁸.

70. The Supreme Court dismissed the appeal, clarifying the application of the SAAMCO principle, which, it observed, has often been misunderstood. It noted that the SAAMCO principle is not about legal causation; rather, it focuses on the scope of the duty. In SAAMCO, the claimant lenders' entire loss was attributable

⁷ [2012] EWHC 1193

⁸ [2013] EWCA Civ 1513

to their decision to enter into the transaction, applying the “but for” test. The essential point is determining the scope of the duty owed. The valuer in SAAMCO was only responsible for the lender having inadequate security, while the lender was responsible for deciding whether to lend.

71. The court defended the SAAMCO counterfactual as a tool distinguishing between losses resulting from the defendant’s wrong and losses from the decision to enter the transaction. It noted that although the counterfactual can be mathematically imprecise, such precision is not always attainable in the law of damages. The Supreme Court rejected the strict distinction between information and advice cases. Instead, it emphasised the adviser’s role in guiding the decision-making process versus contributing part of the material for the client’s decision. In the latter, responsibility for the decision is the client’s alone.

72. In the case of *BPE Solicitors*, BPE did not assume responsibility for Mr. Gabriel’s decision to lend money. Their role was limited to drafting the facility agreement and the charge. They were unaware of the project’s specifics or Mr. Little’s financial status. BPE confirmed Mr. Gabriel’s assumption about one factor in his project assessment, and he would have lost his money regardless, as the expenditure did not enhance the property value. Thus, the loss was due to Mr. Gabriel’s commercial misjudgements, not BPE’s actions.

73. The Supreme Court’s decision in *BPE Solicitors* was initially thought to be the definitive UK authority on the scope of duty and recoverable damages in professional negligence cases. However, the UK Supreme Court recently addressed the issues of causation, loss, and damage in negligence cases in the combined judgments of *Manchester Building Society v. Grant Thornton UK LLP* [2021] UKSC 20 and *Khan v. Meadows* [2021] UKSC 21. These cases clarified the approach for assessing these elements.

74. In *Khan*, Ms. Meadows visited her GP practice to determine if she was a carrier of the hereditary disease haemophilia. The practice only tested for the presence of haemophilia and not for the haemophilia gene. At a follow-up appointment with Dr. Khan, she was incorrectly informed that the blood tests were normal. Consequently, Ms. Meadows believed any child she might have would not have haemophilia. Several years later, she gave birth to a child who not only had haemophilia but was also autistic. The child's autism, unrelated to haemophilia, significantly complicated the management of the haemophilia.
75. Dr. Khan admitted negligence and liability for the haemophilia-related costs but denied responsibility for costs associated with the child's autism. The Supreme Court ruled that Dr. Khan was not liable for these additional costs.
76. In *Manchester Building Society (MBS) v Grant Thornton*, MBS sued its auditor, Grant Thornton, over incorrect advice regarding the accounting treatment of interest rate swaps for its lifetime mortgage portfolio. Due to the flawed advice, MBS had to close out the swaps, resulting in a significant mark-to-market loss of £32.7 million.
77. Grant Thornton acknowledged the advice was negligent but disputed liability for the claimed losses. While causation was established, the High Court found that Grant Thornton had not assumed responsibility for MBS's position in the swaps, attributing the loss instead to market forces. The Court of Appeal upheld this view but focused on whether the advice constituted an information case or advice case, ultimately categorising it as an information case and limiting Grant Thornton's responsibility.
78. The Supreme Court, however, overturned this decision. It argued against rigidly distinguishing between information cases and advice cases, as such labels often blur the reality of professional advisory roles. The Court emphasised focusing on the purpose served by the duty of care assumed by the adviser.
79. In this context, MBS had sought and received advice from Grant Thornton on whether it could use hedge accounting for its business model. Following this

advice, MBS implemented the business model, entered into further swap transactions, and consequently faced losses when hedge accounting proved unfeasible. The Court concluded that these losses fell within the scope of the duty of care assumed by Grant Thornton.

The Irish Approach

80. In Ireland, SAAMCO was considered and applied by Mr. Justice Clarke (as he then was) in *ACC Bank plc v. Johnston p/a Brian Johnson & Co Solicitors* [2011] IEHC 376. In that case, damages, which had been found to be recoverable on a “no transaction” basis, were limited on foot of that analysis.
81. The various criteria for the establishment of a duty of care were considered by the Irish courts in the case of *Whelan v. AIB* [2014] IESC 3. The case concerned a loan of €25m advanced for the purchase of investment property; the deal, which initially seemed very attractive, subsequently turned into what O’Donnell J. (as he then was) described as ‘*a disaster*’.
82. The bank secured a judgment for the entire amount of the loan against the plaintiffs, who then brought proceedings against two firms of solicitors who had given advice in relation to the transaction. One of the firms, LK Shields, had been retained only in relation to part of the deal (a co-ownership agreement) and had not been instructed by the clients that their understanding was that the loan was advanced on a non-recourse basis, and that this was a pre-condition to the clients for the taking out of the loan.
83. The High Court found, with regard to the duty of care of LK Shields, that there was indeed proximity between the parties, and that it was reasonably foreseeable that the plaintiffs would suffer loss if the advice was incorrect, but that it was not just and reasonable that a duty of care should be imposed. The court’s view was based in part because the firm had been retained on a limited retainer and fee, quite late in the transaction, with regard to a co-ownership agreement only.

84. The Supreme Court, however, disagreed, citing the caselaw since *Hedley Byrne v. Heller & Partners* [1964] AC 465 to the effect that a professional person may be liable for advice whether or not there is a contract or retainer with the person to whom the advice is given, and emphasising the importance of the context in which a professional person provides advice. In the court's view, it was clearly reasonably foreseeable that the clients might suffer loss if the firm's advice was incorrect. In this case, although it was outside the terms of the firm's retainer, the firm had advised the clients of its view that the facility letter for the making of the loan was issued on the basis that the bank's only recourse in the event of default would be to the land itself, and not to the borrowers individually.
85. In the *Whelan v AIB* decision, the Supreme Court, having found that the defendant law firm owed a duty of care, went on to find that the firm had been in breach of this duty due to the advice given by a solicitor in the firm to the plaintiffs to the effect that the facility letter for their loan was to be issued on the basis that recourse under the agreement was limited to the secured property and not to the borrowers personally.
86. The Supreme Court decision in *Whelan* provides a good example of the role of causation in establishing liability for negligence. Although, as noted above, the court had accepted the plaintiffs' arguments that the firm owed a duty of care, and that they had been in breach of that duty.
87. However, the court went on to find that the breach had not caused the plaintiffs' loss, on the basis that the evidence before the court supported the law firm's argument that the plaintiffs had not relied on the advice in question, and that the advice had not, therefore, caused the loss. The court found that, even though the advice was incorrect, no reliance was placed the error, and the loss was in fact caused by the collapse in the value of the secured property.⁹

⁹ [2014] IESC 3, at para. 79.

88. In the case of *AIB plc v. Seamus Maguire & Co Solicitors* [2016] IESC 57, the Supreme Court addressed how to measure damages when a solicitor breaches an undertaking to secure a first charge over a property. The ruling determined that damages should reflect the value of the lost security at the time of the breach, not at a later date when the security might have been enforced.
89. In this case, an assistant solicitor provided an undertaking to the bank to secure a property with a loan; however, the funds were misused. The bank only became aware of the breach some 18 months later. As an initial point, this was not a “no transaction” case. Rather, AIB sought the full €3million on the basis that the court allegedly had an inherent jurisdiction – as part of its function in regulating solicitors as officers of the Court – to award not merely compensatory damages for breach of a professional undertaking, but also punitive damages. It was argued that the full €3million amount of the loan advanced should thus be repaid by the defendant solicitors in light of the relevant solicitor's fraud, not just the loss of the security which AIB should have had.
90. The High Court accepted the submissions of AIB and gave judgment for the full amount of the loan, based on:
- (i) an acceptance that it had an inherent jurisdiction to award not merely compensatory, but also punitive, damages for a solicitor's breach of undertaking; and
 - (ii) the fact that the assistant solicitor had acted fraudulently in the present case, thereby justifying not just a compensatory, but rather a punitive, award.
91. The Supreme Court, however, allowed the appeal and directed that the revised damages award should be based on the value of the lost security, as opposed to the full value of the loan advanced. In determining the appropriate level of compensatory damages in the present case, the Court stated that:

“... the first port of call in relation to the assessment of damages which arise from the loss of an asset is to consider the value of the asset lost at the time of the wrongdoing which gave rise to the loss [i.e. June 2007 when the breach of undertaking occurred]. In this case the asset lost was the security which should have been in place over Moongate. ... Immediately after [the breach of undertaking] ... occurred AIB had suffered a loss equivalent to the loss in the value of the security at that time.” (Emphasis added)

92. The Court also referenced the fact that:

“... AIB was deprived of the opportunity of considering how best to protect its position by the fact that the breach of undertaking was concealed from them for a period of 18 months ... [This] lends weight to the view that it would not be appropriate, in all the circumstances of this case, to depart from the default position of assessing damages as of the time of the wrongdoing.” (Emphasis added)

93. On that basis it was not correct to assess the value of AIB’s loss by reference to the lost security’s value at the time it might otherwise have sought to enforce it i.e. €650,000 in January 2009 (post-market fall). Rather the Court remitted the matter back to the High Court to assess the value of the security as at the date of the breach of undertaking in June 2007.

94. In the case of *Rosbeg Partners v. LK Shields (a Firm)* [2018] IESC 23, the Supreme Court dramatically reduced the level of damages awarded to a plaintiff from €11million to €5.2million. Delivering the court’s unanimous judgment, Mr. Justice O’Donnell (as he then was) held:

“It may be true that the loss of the plaintiff followed from the defendant’s negligence, but that does not mean that it was caused by it, in fact, or more importantly in law. The butterfly may beat its wings and cause an earthquake on the other side of the world, but this is not the principle on which loss is to be recoverable in law”.

95. In 1994, Rosbeg Partners ('Rosbeg') purchased commercial property in an industrial estate in Dublin 12. LK Shields ('LKS') acted as Rosbeg's solicitors for the transaction. However, LKS failed to register a part of the property (Lot 3) in the Land Registry. This failure did not affect Rosbeg's title over the land, but registration was necessary for any future sale of the land to complete.
96. In 2006, Rosbeg decided to sell Lot 3 and received a verbal offer of €6.5 million from the owner of an adjoining plot of land. Rosbeg rejected this offer. In September 2007, the adjoining owner increased the offer to €10 million, subject to contract.
97. Around that time, the parties became aware of LKS's failure to register Lot 3. LKS remedied this failure, and the land was finally registered by October 2008. However, due to the downward spiral of property prices in 2008, the value of the property was dramatically reduced. As a result, the offer to Rosbeg was ultimately reduced to €6 million by October 2008.
98. Rosbeg initiated proceedings in the High Court seeking damages for the loss it suffered, which it claimed was caused by LKS's failure to register the property. The issue of LKS's negligence was not contested in the High Court; rather, the main issue was the calculation of the damages due to Rosbeg.
99. By the time the action was heard in the High Court, the value of the property had plummeted to €1.5 million. The High Court found that Rosbeg had decided to sell the property for €10 million in 2007 and would have sold it at this time if the title had been registered. Rosbeg lost out on this opportunity because of LKS's negligence in failing to register the title.
100. The High Court awarded Rosbeg €11.5 million, which included €8.5 million (the difference in the value of the property between the date of the agreement to sell and the date of the trial) as well as damages for increased Capital Gains Tax

(CGT) and additional interest due to the bank which had financed the purchase of the property by Rosbeg in 1994. The High Court award was upheld by the Court of Appeal.

101. The matter came before the Supreme Court. The Supreme Court considered Rosbeg's argument that LKS's negligence directly caused it to suffer loss. However, it held that even though the loss followed from the negligence, it did not mean that the negligence was the direct cause of it. Justice O'Donnell commented:

"It is a lot easier to make profits on paper than in real life, and particularly when the exercise is being carried out in retrospect."

102. The Court identified two other causes which led to Rosbeg's loss: the collapse of the property market and the decision not to sell in October 2008. By October 2008, LKS had remedied the registration issue, and Rosbeg had an option to sell Lot 3 at €6 million.

103. The Court held that €4 million was a more appropriate award of damages in respect of the fall in value of the property. This was the difference between the offers as they stood in October 2007 and October 2008. LKS ought not to be punished for the fall in property values between October 2008 (when it registered the property) and the High Court hearing. The total award made by the Supreme Court was €5.2 million, which included CGT and interest.

E. Conclusion

104. The three issues addressed in this paper are essential when dealing with a claim for professional negligence. While an 'unless order' helps to focus the mind, the Calderbank letter and the assessment of losses are important matters to consider in achieving an appropriate resolution to a professional negligence claim.

James Burke BL

3 June 2024



Donal Friel FRIAI
Friel Architects

*“Trends in the Architectural profession
and the Construction sector in general”*



Donal Friel FRIAI

E: dfriel@friearchitects.ie

Donal Graduated from DIT (now TU Dublin) School of Architecture in 1977.

Following a period post-graduation in the UK and France, has worked in Ireland with several major architectural and multi-disciplinary practices.

Established his own consultancy in 2008. Responsible for the design delivery of significant civic and public sector projects such as Croke Park, Fingal County Hall and the National Maritime College of Ireland, in addition to masterplans for third level institutions such as UCC.

Donal is a former Council member of the RIAI and served as a Director and Honorary Treasurer of the Institute from 2017 – 2020. He continues to serve on several RIAI Committees. Has acted as an expert witness in construction disputes since 2008

<http://friearchitects.ie/>



TRENDS IN THE ARCHITECTURAL PROFESSION
&
IN THE CONSTRUCTION SECTOR IN GENERAL

Donal Friel FRIAI
June 2024

1





*“If I would have asked people what they wanted,
they would have said faster horses.”*

Attributed to Henry Ford

2





CONTEXT
Change, Outlaws, Black Swans & more....



CONSTRUCTION
Onwards & upwards....



ARCHITECTURE
A Profession in flux....



TRENDS & CONSEQUENCES
Gazing into the Crystal Ball....

3





CONTEXT

Change, Outlaws, Black Swans & more....



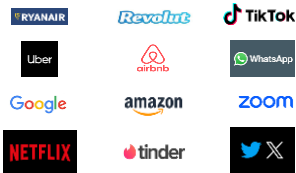
- The Digital Environment / Artificial Intelligence
- 4IR – The Fourth Industrial Revolution
- The Global Economy
- The Environment
- Events, Dear Boy, Events

4



CONTEXT

Change, Outlaws, Black Swans & more....



5



CONSTRUCTION

Onwards and Upwards....



OVERVIEW

- Value of the Irish Construction Sector - €40bn
- Employment- 160,000
- Emissions – 37% of total national emissions (23% operational & the balance embodied)
- Waste generated – 9m tonnes (85% soil and stone)

6



CONSTRUCTION

Onwards and Upwards...



Sisk €1,740m



Winthrop €1,033m



Cairn Homes PLC €666m



Bodgit & Scarper €0.1m

7

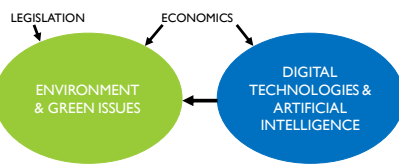


CONSTRUCTION

Onwards and Upwards...



PRESSURES



8



CONSTRUCTION

Onwards and Upwards...



THE STATUTORY & CONTRACTUAL ENVIRONMENT



- Planning Acts & Regulations
- Building Regulations
- Building Control Regulations
- Health & Safety Legislation
- Utilities Regulations & Bye Laws
- Codes of Practice / Eurocodes
- Construction Products Legislation
- Professional Registration
- Public Procurement Regulations
- Building Contracts / Professional Appointments
- Consumer Protection Legislation

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CONSTRUCTION

Onwards and Upwards....



MODERN METHODS OF CONSTRUCTION



TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRMIA JUNE 2024

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CONSTRUCTION

Onwards and Upwards....



VOLUMETRIC CONSTRUCTION



TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRMIA JUNE 2024

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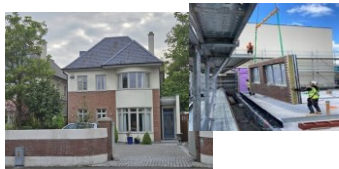


CONSTRUCTION

Onwards and Upwards....



PANELISED CONSTRUCTION



TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRMIA JUNE 2024

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CONSTRUCTION

Onwards and Upwards...

CARS 2024



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CONSTRUCTION

Onwards and Upwards...

CARS 2024



HOMES 2030?



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CONSTRUCTION

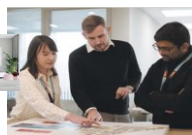
Onwards and Upwards...



SIMILARITIES



Digital interface &



Showroom sales



18



CONSTRUCTION

Onwards and Upwards...



SIMILARITIES



The end product



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CONSTRUCTION

Onwards and Upwards...



WHAT MAY HAVE CHANGED



- Developer is a Franchisee of a Global Brand
- Developer responsible for Sales, Permits & Infrastructure
- One Stop Shop for House & Apartment Procurement
- Off-Site / Modular / Volumetric Approach
- Greater Digital Dependence
- Environmentally Friendly - Lean / No Waste Process
- Superior Construction Standards – Low Risk
- After Sales Service



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CONSTRUCTION

Onwards and Upwards...

REMEDIAL WORKS – THE 'PRIORY HALL' SYNDROME



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CONSTRUCTION

Onwards and Upwards....



REMEDIAL WORKS – THE 'PRIORY HALL' SYNDROME



TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRMIAI JUNE 2024

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CONSTRUCTION

Onwards and Upwards....



REMEDIAL WORKS – ISSUES

- Scoping and Identification of Defects
- Unforeseens
- Complexity
- Scope Risks
- Prioritization of Remedial Works
- Cost/Benefit Analysis
- Original Standard v Upgrade
- Statutory Compliance & Certification

TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRMIAI JUNE 2024

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CONSTRUCTION

Onwards and Upwards....



RECYCLING OF BUILDINGS AND COMPONENTS



TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRMIAI JUNE 2024

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ARCHITECTURE

A Profession in Flux...



THE ARCHITECT..



TRENDS IN THE ARCHITECTURAL PROFESSION IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRIBA JUNE 2024

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ARCHITECTURE

A Profession in Flux...



THE GRAND BARGAIN UNDER PRESSURE...

"In return for access to their extraordinary knowledge in matters of great human importance, society has granted the professions a mandate for social control in their field of specialization, a high degree of autonomy in their practice, and a licence to determine who shall assume the mantle of professional authority"

Donald Schon (via Susskind)

TRENDS IN THE ARCHITECTURAL PROFESSION IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRIBA JUNE 2024

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ARCHITECTURE

A Profession in Flux...



THE GRAND BARGAIN UNDER PRESSURE...

- Liberalization and Competition
- Move from a Bespoke Service
- Bypassed "Gatekeepers"
- Demystification
- More Options for Clients – Online Self-help, Mass Customization
- Ongoing Technological Transformations
- Requirements for New Skillsets in Communication & in Data
- Reconfiguration of Work – some Specialisms become routine
- New Labour Models – Para-professionals and New Specialisms

TRENDS IN THE ARCHITECTURAL PROFESSION IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRIBA JUNE 2024

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ARCHITECTURE

A Profession in Flux....



BUILDING INFORMATION MODELLING (BIM)



TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRMIA JUNE 2024

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TRENDS & CONSEQUENCES

Gazing into the crystal ball....



MMC - CONSTRUCTION CONSEQUENCES

- Rise in Design / Manufacture / Build Contracts
- Superior Quality Control, Lower Design & Construction Risk, and Leaner Greener Buildings
- Consolidation of Standards & Type Approvals
- Greater Consumer Access
- Faster Construction
- Cost savings?
- Deskilling?

TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRMIA JUNE 2024

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TRENDS & CONSEQUENCES

Gazing into the crystal ball....



REFURBISHMENT - CONSTRUCTION CONSEQUENCES

- Increased Design & Construction Risk
- Greener Buildings
- Issues with Building Regulations Compliance

TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FRMIA JUNE 2024

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TRENDS & CONSEQUENCES

Gazing into the crystal ball,....



SOME CONSEQUENCES FOR ARCHITECTS

- Consolidation of Practices into a Limited Number of Larger Groups
- Rise of the Multi-Disciplinary Practice
- Increase in Number of Very Small Practices
- Continued Rise of the Specialists
- Rise of the Star Architect (Influencer?)
- Rise of the Para-Architect (Parkitekt?)

TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FR&A JUNE 2024

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TRENDS & CONSEQUENCES

Gazing into the crystal ball,....



DEMISE OF THE ORGANIC EXPERT WITNESS?



TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FR&A JUNE 2024

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Thank You



TRENDS IN THE ARCHITECTURAL PROFESSION & IN THE CONSTRUCTION SECTOR IN GENERAL DONAL FRIEL FR&A JUNE 2024

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**Harry Fehily & Michael Murphy
Holmes Solicitors**

***“How Artificial Intelligence may start to Impact upon
Professional Practice Risks and Claims”***



HOLMES

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Harry Fehily is the Managing Partner of Holmes. He has a broad range of experience having worked supporting clients across multiple practice areas. He is an experienced Commercial Litigation Solicitor and a CEDR (Centre for Effective Dispute Resolution) Accredited Mediator.

Having extensive experience of advising clients across a range of contentious and non-contentious matters, Harry practices with an emphasis on commercial litigation and financial lines claims, including professional negligence litigation, cyber claims and claims against directors and officers. He also has extensive experience of resolving property related disputes and shareholders' disputes. He practices extensively in the Commercial Court (a commercial division of the High Court) and is vastly experienced in dealing with cases in this venue.

His work involves dealing with high profile contentious disputes concerning public and private bodies. Harry advises on public administrative law as it relates to State bodies, disputes and investigations concerning public bodies, judicial review, employment law disputes (particularly as they impact on the board and chief executives of companies), contentious issues as they impact on environmental law, procurement, planning law and health and safety law.

He has developed considerable experience in the area of construction law.

With extensive experience in insolvency and corporate recovery, Harry represents liquidators, receivers and examiners. He has been involved in high profile examinerships. Having developed a particular expertise in assisting both the company itself entering into the examinership process, he also provides advice to creditors of the company entering into examinership.

Harry practises in the area of dispute resolution and has been involved in many mediations. He is an accredited mediator through CEDR (Centre for Effective Dispute Resolution) in London.

Professional Activities

- Professional Activities
- Chairman of University of Limerick Foundation
- Member of Professional Negligence Lawyers Association (PNLA)
- Member of Forum of Insurance Lawyers (FOIL)
- Member of the Law Society of Ireland's Guidance and Ethics Committee's Panel to assist solicitors in difficulty with the Law Society
- Member of International Lawyer's Network
- Past President of Limerick Chamber of Commerce
- Special advisor to Mid-Western Hospitals Trust
- Member of International Board of Kemmy Business School
- Former chairman of University of Limerick Concert Hall
- Founding Member of Irish Society of Insolvency Practitioners
- Member of the Law Society of Ireland.



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Michael Murphy, Partner, joined the firm in 2009 and specialises in professional negligence litigation and dispute resolution. He leads our Healthcare, Pharma and LifeScience group.

Practising in the non-jury area, Michael works with particular emphasis on professional indemnity, having experience in negligence cases involving architects, engineers, solicitors, barristers and insurance brokers, as well as claims against directors and officers. He has considerable experience of assessing liability and quantum issues, including the 'no transaction' principle. He advises insurers on coverage matters, particularly for regulated professions, advising on the solicitors' Minimum Terms and Conditions, surveyors' RICS Minimum Terms and accountants' CARB Minimum Approved Policy Wording. Specialising in delivering efficient services and, where necessary, innovative solutions, Michael applies these skills to challenging financial lines claims.

Michael also deals with personal injuries litigation in relation to both public liability and employers' liability claims. With significant expertise in advising clients on complex liability and quantum issues in such cases, he also frequently resolves cases without the input of counsel where appropriate. In both the non-jury and personal injury spheres he has experience in dealing with litigation against construction companies, private companies and health service providers.

Having significant experience in commercial litigation, Michael handles commercial disputes, personal injury actions in the Circuit and Superior Courts, alternative dispute resolution (including mediation and arbitration) and cases before the Commercial Court. He has dealt with judicial review cases and injunctions and has also dealt with cyber claims, including the misappropriation of significant sums of money from professionals by cyber criminals. Michael achieves excellent results, such as the recovery of a substantial amount which was frozen in the bank of another EU Member State. He also advises on the GDPR, including compliance strategies, risk minimisation and litigation arising from data breaches.

Michael acts for international and domestic insurance companies, loss adjusters, financial institutions, statutory bodies, construction companies, SME's, large corporates and private clients.

Recent Work Highlights

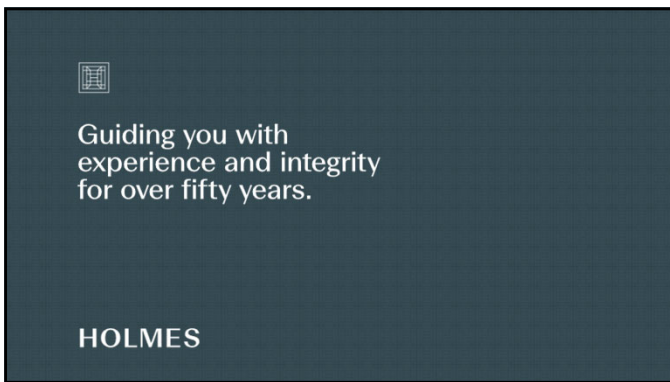
- Advising upon indemnity and dealing with an arbitration and resolution of a claim involving an architect who was sued cumulatively for €23m arising out of allegedly negligent investment advice provided to two members of one of Ireland's most popular rock bands
- Defending seven sets of related High Court professional negligence proceedings against a firm of accountants arising from a dispute as to whether loans taken out by investors were recourse to property only or full recover. The 'real' exposure for our client was in excess of €2m but a settlement was brokered for a net €200,000 'all in' by agreeing to purchase the residue of the loan with the new charge holder in an innovative solution that saved the insurers over €2m in liability that would otherwise have crystallised
- Acted on behalf of an engineer and his insurers in the resolution of an extremely challenging construction claim. Involving one of Ireland's largest dairy food produce manufacturers, the claims was against the contractor and engineer that provided allegedly negligent construction services. By having the dispute between the defendants submitted for adjudication, following an unsuccessful mediation, we resolved the claim with the contractor agreeing to deal with 50% of the claim – having been unwilling to even discharge their own costs at the mediation several months earlier
- Resolved an extremely complicated claim that involved a medical negligence component insofar as a cannula had been retained in the plaintiff's arm following a surgical procedure which resulted in physical and psychological sequelae arising
- Successfully resolved a cyber claim in which €300,000 was misappropriated by an Eastern European cybercriminal from an Irish firm of solicitors. The potential liability of the bank which facilitated the transaction was explored as well as the scope for holding the external IT contractors responsible for the loss. Through swift intervention, it proved possible to have the funds frozen in the Latvian bank and, with the assistance of a local firm of solicitors, the funds were successfully recovered in full following a court action, leaving the firm at no loss
- Compromised a claim arising from a road traffic accident in which the physical and psychological trauma of the accident caused the plaintiff to experience a severe recurrence of her previously dormant fibromyalgia condition leading to the onset of chronic pain

Professional Activities

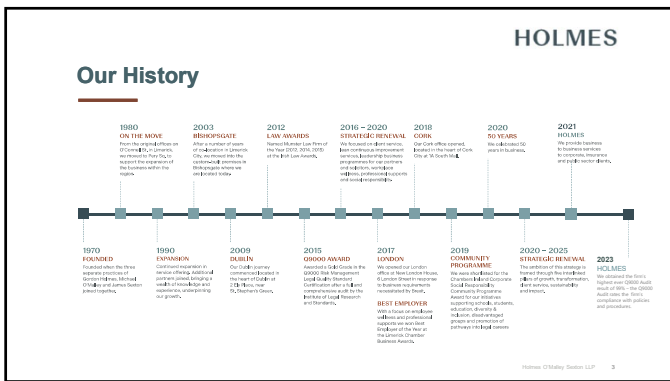
- Member of Forum of Insurance Lawyers (FOIL)
- Member of Professional Negligence Lawyers Association (PNLA)
- Delivers tutorials to PPC1 students on civil litigation, Law Society of Ireland, Blackhall Place
- Leading industry speaker at national and international conferences upon a diverse array of topics including professional negligence, commercial litigation, insurance, data protection and cyber security risks
- Member of the Law Society of Ireland.



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2



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Today's Agenda

| | | | | |
|---|--|-------------------------------------|-------------------------------|--|
| 01 | 02 | 03 | 04 | 05 |
| What is Artificial Intelligence ('AI')? | Use (and Misuse) of AI by Global Law Firms | Early Uses of AI by Irish Law Firms | Regulation & Governance of AI | AI & the Legal Profession: Proper Risk Assessments |

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01

What is Artificial Intelligence ('AI')?

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Definition of Artificial Intelligence

AI is a collective term for **computer systems that can sense their environment, think, learn, and take action in response to what they're sensing and their objectives**. In other words, it is the **science of making machines that can think like humans and to recognise patterns, make decisions and judge like humans**.

There is also a distinction between weak or **narrow AI** (task specific AI such as Alexa) and **strong** or Artificial General Intelligence or Artificial Super Intelligence, a theoretical form of AI where the machines are **self aware** with the ability to **solve problems** and plan for the future.

AI is an umbrella term that encompasses a wide variety of technologies, including **machine learning, deep learning, and natural language processing (NLP)**. The term itself was coined in 1956 but Alan Turing, the British mathematician, provided arguably the earliest public lecture to mention computer intelligence in London in 1947

AI is also considered **big business** according to PwC: *'AI could contribute up to \$15.7 trillion to the global economy in 2030, more than the current output of China and India combined'* (PwC). A particularly popular type of AI is **generative AI** which is capable of creating original content.

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Every Day Examples of Artificial Intelligence

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The Dichotomy of how Artificial Intelligence is Presented in the Media and Popular Culture...

Five ways AI might destroy the world:
'Everyone on Earth could fall over dead in the same second'

Five ways AI could improve the world:
'We can cure all diseases, stabilise our climate, halt poverty'

The Observer
Artificial intelligence: 7 reasons why

AI promises incredible benefits, but also terrible risks. It's not luddism to rein it in
Sonia Sodha

Safeguards are vital even if artificial technology helps combat climate change

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Use of AI by EU Enterprises as at 2023

Source: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Use_of_artificial_intelligence_in_enterprises#--text-Compared%20with%202022%2C%20the%20use_of%20large%20enterprises%20used%20AI

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How have EU Companies, Citizens Embraced AI?

- In a 2023 European Commission survey, **8% of EU enterprises** reported using artificial intelligence technologies
- In the same survey, **30.4% of large EU enterprises** confirmed that they were using artificial intelligence technologies
- In 2023, AI was used the most by enterprises in the **information and communication sector** reflecting that sector's data reliance
- In a recent **Office for National Statistics Opinions and Lifestyle Survey in May 2023** survey, 72% of adults could give at least a partial explanation of AI
- 5% of adults surveyed reported using AI a lot, 45% a little and **50% not at all** in the preceding month – however, did adults fully appreciate AI exposure?
- The rationale for wanting to use AI for businesses was improving **cybersecurity** (35%) and creating **efficiencies** (35%)

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Forbes' Top AI Statistics for 2024

AI market size is expected to reach \$407 billion by 2027
 The AI market is projected to reach a staggering \$407 billion by 2027, experiencing substantial growth from its estimated \$86.6 billion revenue in 2022.^[1]

AI will have an estimated 21% net increase on the United States GDP by 2030
 AI is expected to contribute a significant 21% net increase to the United States GDP by 2030, showcasing its impact on economic growth.^[2]

Over 75% of consumers are concerned about misinformation from AI
 Our in-house survey on AI consumer sentiment shows AI is anticipated to add a substantial 21% net boost to the United States GDP by 2030, indicating its influence on economic growth.

ChatGPT had 1 million users within the first five days of being available
 ChatGPT's remarkable adoption rate is evident as it garnered 1 million users within the first five days of its release.^[3]

One in 10 cars will be self-driving by 2030
 It is expected that 10% of vehicles will be driverless by 2030, as the global market of self-driving cars is forecasted to increase from 20.3 million in 2021 to 62.4 million.^[4]

64% of businesses expect AI to increase productivity
 A significant 64% of businesses believe that artificial intelligence will help increase their overall productivity, as revealed in a Forbes Advisor survey. This demonstrates the growing confidence in AI's potential to transform business operations.

Forbes

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Forbes' AI Adoption Statistics for 2024

Half of U.S. mobile users use voice search every day
 Voice search is on the rise, with 50% of U.S. mobile users using it daily, according to UpCity. This trend showcases the growing prevalence of AI-powered voice assistants in everyday life.^[1]

AI is expected to see an annual growth rate of 37.3% from 2023 to 2030
 AI continues to revolutionize various industries, with an expected annual growth rate of 37.3% between 2023 and 2030, as reported by Grand View Research. This rapid growth emphasizes the increasing impact of AI technologies in the coming years.^[2]

A quarter of companies are adopting AI because of labor shortages
 As labor shortages become a pressing concern, 25% of companies are turning to AI adoption to address this issue, according to an IBM report. AI helps businesses optimize operations and compensate for the lack of human resources.^[3]

Chinese companies have had the highest adoption rate of AI
 China leads in AI adoption, with 58% of companies deploying AI and 30% considering integration. In comparison, the United States has a lower adoption rate, with 25% of companies using AI and 43% exploring its potential applications.^[4]

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Forbes' AI Adoption Statistics for 2024 HOLMES

More than half believe AI will improve written content
 Over half of respondents, 54%, believe that AI can improve written content, suggesting that AI-driven solutions such as ChatGPT have the potential to enhance text quality, creativity and efficiency in various content creation contexts.¹³

Most Popular AI Uses in 2024
 The most popular AI uses include responding to messages, answering financial questions, planning travel itineraries and crafting social media posts as its versatility transforms everyday tasks.¹³

Most Common Way Consumers Plan to Use Artificial Intelligence

| | |
|--|-----|
| Respond to people via text or email (e.g. friends, colleagues, etc.) | 45% |
| Answer financial questions | 32% |
| Plan a travel itinerary | 28% |
| Craft an email | 25% |
| Prep for a job interview | 22% |
| Write a social media post | 22% |
| Summarize complex or lengthy copy | 17% |

Source: Forbes Advisor + Indeed | **Forbes** ADVISOR

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02
 Global Use (and Misuse) of AI by Law Firms

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The UK Law Society's Assessment of Artificial Intelligence

Future Worlds 2050
 FW2050

Images of the Future Worlds Facing the Legal Profession 2020-2030

- Reinvesting value chains:** what is the new value chain and the role of legal products and services in that value chain? Who will control and accredit which parts of the automated processes that are developing through partnerships with non-legal / technology delivery companies...
- Accreditation and augmentation:** How does AI truly become a co-worker in the legal profession? Will AI ever be capable of replacing lawyers in knowledge-intensive roles, particularly with regard to human factors of empathy and insight in gauging clients' needs?
- Shoring up defences:** at the extreme end, there is potential for lawyers to use the law to halt AI advances but, more properly, to ensure necessary regulation and accountability audits.
- Friend or foe?** There is increasing innovation in how legal services are provided – how do legal service providers manage new AI collaborative partnerships and balance potential issues of conflict avoidance whilst promoting effective collaboration?

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UK Law Society Report Continued..



Images of the Future Worlds Facing the Legal Profession 2020-2030

FW Future Worlds 2050 FW2050

- The Law Society suggested that artificial intelligence could halve the number of lawyers within three decades. *"Only the high value, complex or newest areas of law will need human input. Humans may also be needed in relationship management with larger clients."*
- It states: *"Lawyers remaining within the profession must work alongside technology — and [will be] required to take performance-enhancing medication in order to optimise their own productivity and effectiveness."*
- Mr Ahadi said that *"there will also be disputes over the inappropriate use of artificial intelligence"* but that *"these developments could benefit consumers significantly. A lot of people want the legal profession and services to be demystified. This could help."*

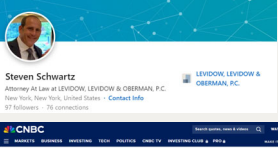
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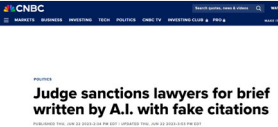
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Meet Steven Schwarz, Attorney at Law

- This is the cautionary tale of the American lawyer who used AI to prepare submissions to NY Federal Court
 - Schwarz represented Roberto Mala against Colombian airline Avianca in a personal injury case filed in New York state court in summer 2020
- These submissions included six 'fake' cases invented by ChatGPT which were cited in a legal brief, the data ChatGPT drew on to provide answers to questions was equal to "a million feet of bookspace" in a library.
- Mr. Schwarz was not familiar with AI or research websites and misunderstood ChatGPT as being an internet search engine when preparing the brief.



Steven Schwarz
Attorney At Law at LEVDOW, LEVDOW & OBERMAN, P.C.
New York, New York, United States · Contact Info
97 followers · 76 connections



Judge sanctions lawyers for brief written by A.I. with fake citations

PUBLISHED THU, JUN 20 2023 10:38 PM EDT · UPDATED THU, JUN 22 2023 10:38 PM EDT

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DLA Piper's Adoption of AI into their Legal Processes: 'Iron Man, not Terminator'



Best Use of Artificial Intelligence, Law Firm: DLA Piper

GSA

"Once you understand that lawyers are dealers in information, it is easy to see that AI can enhance every stage of their work" said Bennett Borden, Partner and Chief Data Scientist at DLA Piper.

February 09, 2024 at 02:47 PM

7 minute read

Awards

 [Stephanie Wilkins](#)

Bennett B. Borden of DLA Piper. Courtesy photo

➤ One of DLA Piper's themes is that AI innovation is like Iron Man, not the Terminator. They aren't replacing lawyers, they are making them "better, faster and stronger" (to quote The Bionic Man). They have also suggested that this involves reviewing the billable hour cost model in favour of a more outcome oriented approach.

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04

Regulation & Governance of AI

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The Irish Government's Approach to Artificial Intelligence

Ireland's National AI Strategy was published in July 2021 and aims to 'benefit our economy and society, through a people-centred, ethical approach to its development, adoption and use'. The Strategy had the following to say on the Irish AI legal framework in place at that time:

'Various pieces of legislation already apply to the development and use of AI today, and much of Ireland's existing legal framework should be sufficient to provide for the smooth deployment of AI. However, some legal gaps may require additional regulation and work is ongoing across Government to examine and address legal gaps for AI. At EU level development of a horizontal European regulatory framework for AI is underway' (i.e. the AI Act).

In an August 2023 Progress Report, it was noted that 'there will be many unpredictable challenges for Government arising from the ongoing evolution of AI. Given the rapid pace of change in the sector, particularly since the public launch of generative AI models, there is a need to ensure that the rollout of AI tools is safe, secure, human-centric and ethical; and that there is suitable, independent and balanced expert advice available to Government'.

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The EU's Approach to Artificial Intelligence

In keeping with its Digital Strategy, last month, the Council of the EU approved a ground-breaking law aiming to harmonise rules on artificial intelligence, the AI Act. The flagship legislation follows a 'risk-based' approach, which means the higher the risk to cause harm to society, the stricter the rules.

It is the first of its kind in the world and can set a global standard for AI regulation. The Irish Government adopted the AI Act last month. The obligations under the Act will be phased in over a period of 36 months with key obligations within 24 months.

The new law aims to foster the development and uptake of safe and trustworthy AI systems across the EU's single market by both private and public actors. At the same time, it aims to ensure respect of fundamental rights of EU citizens and stimulate investment and innovation on AI in Europe. Fines for infringement are set at a percentage of the offending company's global annual turnover.


Big Tech execs say Europe's new AI law could harm innovation

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THE LONDON GAZETTE Home Top Stories In-depth Magazine Gallery



Knowing me, knowing you

The conclusion of negotiations between the EU Council and Parliament on the content of the Artificial Intelligence Act means that AI has hit the mainstream. Labhnois Ni Fhaoilain and Dr Andrew Hines ask what's the name of the game?

As a solicitor in practice, not advising on the area, what do you need to know? For a solicitor's practice, is there a need to know about the AI Act?

Similar to the GDPR, the answer is likely 'yes', where law firms become deployers of AI systems. Solicitors should bear in mind that they may not even be aware that AI has been integrated into the systems they use.

When assessing your firm's obligations, the first question to ask is whether the use-case is prohibited. If so, then that is the end of the matter, as the AI system cannot be used.

Next, does your AI system fall within the high-risk category? If yes, you must pause and ask whether what is being done also poses a significant risk of harm to health, safety, or fundamental rights. The area of employment is specifically referred to in Annex III (high risk), with use-cases.

For example, the use of AI in employment-related systems or tools, whether for filtering CVs at recruitment or analysing billable-hour trends for promotion, could fall within the scope of the act.

If AI systems are being deployed, there is an obligation to ensure that staff and others dealing with the operation and use of AI on their behalf have a sufficient level of AI literacy.

Of course, legal professionals will be aware that, while their use of AI in the legal practice may be in compliance with the AI Act, the use may breach the Solicitor's Guide to Professional Conduct or may give rise to professional negligence.

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The UK and US Government's Approach to Artificial Intelligence

The UK has adopted a **pro-innovation approach** to AI regulation and has spoken in a recent August 2023 policy paper about wanting to become an 'AI superpower' in a post-Brexit world, claiming that by rushing to legislate too early, they claim that they would risk placing undue burdens on businesses.

A meeting of global leaders took place at Bletchley Park in November 2023 to address potential risks of AI and cooperation on AI safety, leading to the **Bletchley Declaration** being signed by **28 countries** including the US, the UK and China.

The US government has pressed for countries to work together to tackle threats posed by emerging AI technologies. US Vice-President Kamala Harris has pioneered a new initiative to advance the safe and responsible use of AI in November 2023 in recognition of the US's ethical and moral obligations as a world leader.

The preceding month, October 2023, President Biden signed an **Executive Order** which **establishes new standards for AI safety and security**, seeks to protect Americans' privacy, advance equity and civil rights and promote innovation and competition. The United States AI Safety Institute is also due to be established.

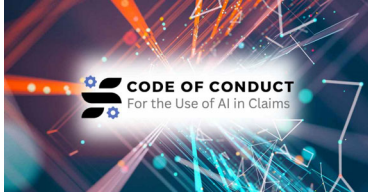


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InsurTech World

AI code of conduct for the insurance claims and supply chain industry launched



CODE OF CONDUCT
For the Use of AI in Claims



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05

AI & the Legal Profession: Proper Risk Assessments

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What are the potential risks of using AI for Law Firms?

- **Bias and ethical issues** which are inherent within AI systems; any AI model is only as good as the data it learns from.
- **Intellectual property and copyright issues:** does copyright exist in works created by AI, who owns the copyright? Use by AI of copyrighted works and data also presents a further challenge.
- **Data privacy:** potential unauthorised disclosure of client data contrary to GDPR
- **Cybersecurity** concerns
- **Inaccurate** answers or **misinformation** being provided by AI
- **Junior staff members** not developing essential early **critical learning skills** or not being properly supervised
- Lack of proper understanding / training / **governance**

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What are the potential risks of using AI for Law Firms?

- *'In 2022, the SRA warned that Artificial Intelligence (AI) will make **phishing contacts** and other false communications **more credible**, and some threat actors now impersonate individuals by telephone and email.'*
- *'The recent advent of generative AI (deep learning models which generate high quality text) has the potential to transform the legal sector by **increasing efficiency and reducing costs** for professional firms when undertaking **legal research, drafting contractual clauses and giving legal advice**.'*
- *'However, these benefits also introduce significant risks to the profession, particularly whilst AI tools remain in their infancy. Those risks are magnified when lawyers seek to rely upon open AI platforms that have **extracted data from multiple unverified sources**. Firms that fail to introduce appropriate **safeguards** that include human oversight to authenticate the AI-generated content can expect an **increased exposure to PI claims**'*

Kennedys, UK Professional liability report 2023: trends and future risks.
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Generative AI as a Legal Research Tool...

- > The **ABA Profile of the Legal Profession 2022** (Legal Technology) outlined the following results to its survey in the US:
 - > On average the typical lawyer spends **21%** of their time conducting **legal research**;
 - > **10%** of lawyers said their law firms use **AI-based technology tools**;
 - > Law firms with 100 lawyers or more that figure is higher at **19%**;
 - > **17%** think AI tools will become **mainstream** in the legal profession in the next **3 years**.
- > The best way to avoid becoming another AI lawyer cautionary tale is to recognise that AI tends to be best deployed for the purpose of **summarising good quality content** inputted in large sets,
- > However, when it comes to **drafting**, any written legal content generated must be reviewed and verified for accuracy by way of **suitably experienced human oversight / intervention**.
- > In short, AI is **not a silver bullet but can help to deliver efficiencies** where properly approached.

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Generative AI as a Legal Research Tool...

- > Killian Flood has made the following helpful comparison as to the best means of deploying generative AI as a legal research tool:

*'I think the best way to conceptualise generative AI is to view it as an **autopilot** on a plane. While pilots directly perform the take-off and landing of all flights, the autopilot is in control for most of the flight time (albeit under constant monitoring from the pilots). In the same way, where generative AI might do most of the **heavy lifting** in terms of document generation, lawyers will still be **essential** to the entire process, particularly on the front and back ends.'*



- > In other jurisdictions, lawyers have an **explicit ethical obligation** to understand any technology they are using in order to be able to provide a competent service to a client – and this is also arguably the case in Ireland. Coupled with the incoming obligations under the AI Act and it is clear that AI is **not an area for lawyers to 'dabble' in** – instead, they need to be **clear-minded, strategic and thorough** in deploying AI.

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Ironically, ignoring AI may make things worse...

It will soon be negligent not to use AI, Master of the Rolls predicts

5 March 2024
Posted by Legal Futures

The day is coming, and soon, when professionals and others will be legally on the hook for not using generative artificial intelligence (GenAI), the Master of the Rolls said yesterday.

Sir Geoffrey Vos KC also suggested that GenAI use more likely to be used directly by consumers, rather than just by the lawyers who advise them.

Wrapping up the last of a series of LambethUK events on GenAI – his one entitled 'Roadmap to 2037' – he said an earlier event had been challenging 'to think of the day when there will be liability, legal liability, not for using AI, but for failing to use AI to protect the interests of the people we serve.'

'I think that is undoubtedly a day that's coming soon. When an accountant can use an AI tool to spot fraud in a major corporate situation and fails to do so, surely there might be liability. The same for employee liability to protect employees and in every other field you can possibly imagine.'



Sir Geoffrey Vos KC
Master of the Rolls and Vice-Chancellor of the High Court

Looking to the future impact of AI on legal services, Sir Geoffrey Vos contrasted an earlier panel debate where one speaker talked about it **empowering workers who were not lawyers** by giving them real-time access to legal and regulatory assistance, and another thought it would be more about law firms and the way they did business.

"For my part, I think one would cut to the chase and find that real clients are going to be using AI... People cannot afford lawyers. People need their legal problems dealt with and they will use whatever they can get."

This was in line with Sir Geoffrey Vos' oft-stated vision for a digital justice system: "It is to give people access to justice for their small legal problems for which they cannot any longer always get a lawyer and point them in the right direction."

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Where might liability rest for defective AI? Nobody really knows for sure yet...

| Nature or cause of damage | If so, who is liable? |
|--|---------------------------------|
| Was damage caused when in use and were the instructions followed? Was the AI system provided with any general or specific limitations and were they communicated to the purchaser? | User or owner? |
| Was the damage caused while the AI system was still learning? | Developer or data provider? |
| Was the AI system provided with open source software? | Programmer? |
| Can the damage be traced back to the design or production of the AI system, or was there an error in the implementation by its user? | Designer, manufacturer or user? |

The difficulty for any solicitor who engages with AI where problems arise for the clients is that the solicitor will potentially face a **difficult challenge** trying to **fully avoid liability** by arguing that the fault should instead rest with the AI company – the **terms and conditions** for contracts with AI collaborative partners are likely to be **tested** as the systems evolve and difficulties arise in practice...

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Good Governance: What Insurers will want to know when assessing risk...

- > What kind of **risk management** is being employed by the firm and how is it monitored / reviewed / updated, particularly as AI evolves?
- > Are there appropriate **safeguard policies** in place which have been properly reviewed and brought to the attention of all staff?
- > How is the **human oversight factor** maintained if AI is being deployed to ensure that there will not be an over-reliance on AI or a misunderstanding as to the extent of AI's role?
- > What **mitigation strategies** does the firm have in place in the event of AI giving rise to an unanticipated difficulty and how often are those strategies reviewed and updated?
- > How are **junior staff** in particular educated on the deployment of AI?

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Good Governance: How to formulate effective, 'living' policies...

- > The UK Government has established a **national strategy for managing AI and a framework to guide and inform the responsible development of AI**. This strategy is underpinned by five principles which Irish law firms could equally use as a starting point when developing their own bespoke policies:
- > Law firms should select systems that meet their firms' needs which are **safe, secure and robust** – it is essential that they should have been tested prior to deployment with clear rules around the use of systems such as ChatGPT enforced by rigorous training
- > In rolling out systems, firms need to **prioritise transparency and ensure that clients will be informed** as to when AI will be used to handle their matter, how it will work and the impact it will have upon them – some clients may object to the deployment of AI.
- > In keeping with firms' GDPR obligations, **personal data should be processed fairly** when an AI system is being introduced with client confidentiality protected, a subsisting fiduciary obligation for law firms in any event. Fairness also means testing outcomes for bias.
- > Firms must be **accountable** and maintain appropriate **governance** to guard against the prospect of misinformation being perpetrated by an AI system. Finally, there should be a mechanism to allow for any decision made by AI to be **contested**, such as through a law firm's complaint handling mechanism.

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Potential Solutions – A Work in Progress...


- It will be essential for lawyers to carefully and thoroughly **fact check output** created using generative AI and, in particular, to verify the accuracy of references to case law and legislation;
- **Court rules** should be introduced requiring lawyers and judges to declare use of AI generated content in terms of maintaining a 'full disclosure' approach;
- Legal regulators should consider the provision of **tailored training** to solicitors and barristers on the effective and responsible use of generative AI
- **Guidance** such as the Solicitor's Guide to Professional Conduct should be updated to take account of the risks created by the use and deployment of AI
- Practitioners should look to use AI Models trained on **closed sets of trusted data** to increase reliability of such models.

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Questions & Discussion



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Daragh O’Sullivan
Managing Partner
Lowes Legal Costs Accountants

***“Effectively Navigating
The Legal Costs Adjudication Process”***



LOWES
LEGAL COSTS
ACCOUNTANTS

Daragh O'Sullivan
Managing Partner
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Daragh is a fellow of the Institute of Chartered Certified Accountants and a Legal Costs Accountant.

He advises his clients on all aspects of legal costs, from client engagement letters to recovery or opposition of costs claims, and has extensive experience in negotiation, mediation and advocating for his clients before the Legal Costs Adjudicator.

<https://lowes.ie/>



1

About

- 50+ years of experience in our Market
- 90% of our Business is Repeat Business
- 12 Legal Costs Accountants on our team
- 600+ No. of clients we have worked with

2

Legal Costs

An overview of the current system of legal costs:-

- Legal Services Regulation Act 2015
- Developments:
 - Inflation in Costs
 - Tenders in Costs
 - Section D Costs

3

Legal Services Regulation Act, 2015

- The introduction of the Part 10 of the Legal Services Regulation Act, 2015 is entitled "Legal Costs"
- S.I. No. 502/2019 - Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No. 2) Order 2019
- Contains what could be described, with some notable exceptions, as a consolidation of existing statutory provisions relating to the charging of legal costs, the recovery of legal costs and the adjudication of legal costs.
- To date, these matters have been governed by a confection of statutory enactments going back 170 years or so. Grafted on these provisions is Order 99 of the Rules of the Superior Courts, 1986 (SI No. 15 of 1986), itself amended on numerous occasions over the years.

4

Name Change

- Section 139(1) of the 2015 Act provides that the Office heretofore known as the Taxing Master's Office shall be known as the Office of the Legal Costs Adjudicators.
- Pursuant to section 140 of the 2015 Act, the Chief Legal Costs Adjudicator is under an obligation to ensure that a register of determinations is established and maintained in relation to applications for adjudication of legal costs under Part 10.

5

Methodology used for assessing costs

Firstly, an application under Section of the 2015 Act...
Schedule 1, referred to in Section 155(1) of the 2015 Act provides as follows:

The following principles in adjudicating on a bill of costs pursuant to an application pursuant to section 154

- a) that the costs have been reasonably incurred, and
- b) that the costs are reasonable in amount.

In determining whether the costs are reasonable, where applicable:

- a) the complexity and novelty of the issues
- b) the skill or specialised knowledge
- c) the time and labour;
- d) the urgency attached;
- e) the place and circumstances;
- f) the number, importance and complexity of the documents;
- g) the values involved;
- h) whether or not there is an agreement to limit the liability of the legal practitioner pursuant to section 46;
- i) research or investigative work;
- j) the use and costs of expert witnesses or other expertise engaged by the legal practitioner and whether such costs were necessary and reasonable.

6

Inflation in Legal Costs

Year Inflation/Deflation

- 2012 Costs reduced 30%-35%.
- 2013-2017 Remained largely unchanged.
- 2018 Increased by 10%
- 2019 Increased by 10%
- 2020 Increased by 15%
- 2021 Increased by 20%
- 2022 Increased by 15%
- 2023 Increased by 10%
- 2024 ?

From reporting on the costs, the average costs of a claimant on 850 cases, 2022 versus 2023, reduced from €25,666 to €25,098 per matter or -2%1. So, clearly there are other important factors affecting costs other than inflation.



7

TENDER in High Court matters

Order 99 Rule 57.(1) In any application for adjudication of costs initiated under this Order by a person in whose favour the order to pay costs has been made or by a legal practitioner, the person who is the subject of the order to pay costs or, as the case may be, the client, may within 21 days of the service upon him of the application, or at any later time by leave of a Legal Costs Adjudicator, upon notice to the party obliged to pay costs or, as the case may be, the legal practitioner concerned, pay into Court a sum of money in satisfaction of the claim for costs (in this Part, a "judgement in satisfaction of costs").

In 2023, based on cases for tender acceptance rate, this amounted to a savings of €450k approx.

8

NEW! Section D in Bill of Costs

For all work done arranging to take up Final Order in the matter post settlement.

Preparing detailed Bill of Costs and preparing papers for adjudication and arranging to lodge Bill of Costs and serving Notice of Adjudication.

Attending adjudication, arranging to complete vouching and completion of Certificate of Adjudication.

Arranging to discharge all specials and further engaging with the Plaintiff in relation to the damages cheque received and finalising matters.

9



Denis Herlihy
Managing Director
Interpath Advisory (Ireland)

*"The value of a second look
- a 24-year journey through the highs
and lows of Tax Cases."*



interpath

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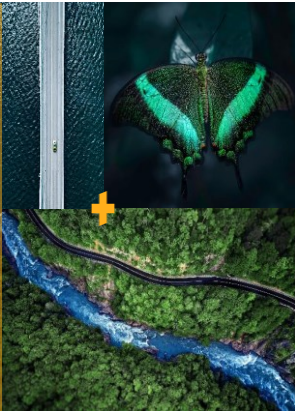
Denis Herlihy who was formerly Managing Partner at BDO Limerick.

With more than 30 years' experience in supporting clients with tax services, he is one of the most respected professionals in the Irish tax advisory market. Denis is a Fellow of the Irish Taxation Institute and former council member. He is co-author of the Bloomsbury Tax Guide and is editor of the leading annual commentary on the Finance Act in Ireland, The Professional's Guide.

<https://interpath.com/media-hub/articles/interpath-launches-tax-practice-in-ireland-with-denis-herlihy-appointment/>

The Value of a Second Look – a 24 Year Journey Through The Highs and Lows of Tax Cases

Denis Herlihy
6 June 2024



1

1. Background

- ✓ 1st Case some 20+ years ago was a case in the horseracing industry.
 - Forensic Element
 - Each case has complexity
- ✓ Tax Cases are Different
- ✓ More than one Tenable view
- ✓ Seek specialist advise

2

2. Professional Negligence

- ✓ Breach of Contract
- ✓ Breach of Fiduciary Duty
- ✓ Standard of Care
- ✓ Reference to:
 - "Ordinary skilled man exercising and professing to have that special skill"

3

3. Contract – Letter of Engagement

- ✓ **Specific Terms**
 - Limitation of Liability
 - Need for second opinion – opinion of counsel
 - Limitations of scope
 - More than one taxable view
 - Stay in Scope
 - Revert to client

- ✓ Never engage with a client without a letter of engagement

4

4. Fiduciary Duty

- ✓ Duty of skill and care
- ✓ Duty of confidentiality
- ✓ Loyalty
- ✓ Special Trust
- ✓ Equitable remedies may be claimed by the plaintiff. In the event of breach of fiduciary duty

5

5. Limitations on Extent of Professional Liability

- ✓ Good letter of Engagement
- ✓ Exclusion Clauses
- ✓ Cap on Liability
- ✓ Limitations of Scope
- ✓ Indemnity Clauses

6

6. Common Defences



- One or more of the elements of negligence was not present
- Reasonable standard of work
- Actions of the professional did not cause the damage
- Duty of care did not extend to the professional
- Always worth a very close look
- Be careful of a liability arising in "TORT"

7

7. Partial Defence



- Contributory Negligence**
 - Not submitting details to the professional on time
 - Just and equitable – apportionment of fault
 - Duty on the plaintiff to mitigate loss
 - Mitigation of loss – question of fact

8

8. Time Limits



- 6 Years – Contract

- 6 Years – Tort – when cause of action accrues

9

9. Resolution Fora

- ✓ Courts
- ✓ Circuit Court
- ✓ High Court
- ✓ Commercial Court
- ✓ Mediation
- ✓ Arbitration

10

10. Calculating Quantum

- ✓ Can be very difficult
- ✓ Is the tax itself a loss?
- ✓ Is the settlement taxable?
- ✓ Insurance Companies
- ✓ Getting more difficult

11

11. Update on Case Law

- ✓ Revenue Commissioners v Derral Tobin [2024] IHC198 [19 April 2024]
- ✓ "Full and True disclosure of all material facts" in making a tax return
- ✓ TAC found in favour of Tobin
- ✓ Tobin got a firm "single payment scheme" SPS
- ✓ He had incorporated a company
- ✓ Assessment was made more than 4 years (out of time)

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12. Update on Case Law - Continued

- The tax appeals commission concluded the omission of the SPS Entitlement did not amount to a default in the disclosure of material facts
- The High Court found in favour of the Revenue Commissioners on appeal

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13. Update on Case Law - Continued

- Interestingly, Revenue relied on the Australian case law
- The legislative scheme should be understood therefore as imposing a premium on the accuracy of the information
- Equate "full and true" with "accurate and correct and puts significant onus on taxpayers"
- Consistent with self assessment system.
- Tobin lost the case – protection for taxpayers is limited

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14. Example 1

```
graph TD; S1((Shareholder (1))) --> HC[Hold Co]; S2((Shareholder (2))) --> HC; HC -- 100% --> TC[Trade Co]; TC -- €750,000 --> HC;
```

Trade Co Pays €750,000 dividend to Hold Co

Scope to have it ignored as a dividend for purposes

Election must be made 9 months after the year end

Two Cases

1st Case

- Agent is not aware of the rule to elect
- Advises the taxpayer to pay an onward dividend to shareholders
- Tax liability for Holdco €120,000
- No tenable defence

2nd Case

- Agent argues it's a mistake
- Wants to correct the return
- Revenue says no
- Tax Case goes to Tax Appeals Commission
- Taxpayer Loses

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15. Example 2

Brother 1, Brother 2

Co A

Brother 1, Brother 2

Co B

Co A bought Co B

Brother 1, Brother 2

Co A

Co B

- Brother 1 + 2 were paid for their shares in Co B by CO A
- Revenue at a very late time assessed to income tax rather than capital gains tax
- Raised the assessment under schedule D instead of schedule F
- Settled in favour of the taxpayer at Nil

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16. Key Messages

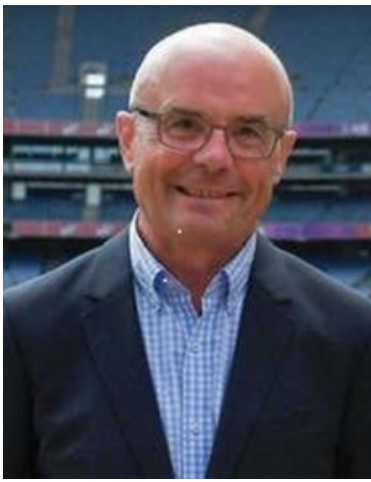
- Tax Cases are always worth investigation
- More than one tenable view
- Quick Settlement where there is little prospect of success
- Practitioners
 - Know your limitations
 - Seek Specialist/Expert Advice

17



Kieran McHugh ACII
Expert Witness in Insurance
Disputes

*“An Overview of the Risks in Broker’s
Negligence Claims”*



KIERAN MCHUGH ACII
Expert Witness in Insurance Disputes
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Kieran is an independent consultant, who previously held senior positions within the insurance industry including:

- CEO of Lockton Ireland
- Marsh Ireland 1986 to 2005 (various roles, including Deputy CEO)

Kieran is a Chartered Insurance Broker and a Fellow of Chartered Insurance Institute.

He is a non-executive director of Lockton Insurance Brokers (Ireland) Limited, Arkema Insurance and Inscecom.

He is on the General Insurance Committee of Brokers Ireland.








PROFESSIONAL INDEMNITY CLAIMS AGAINST INSURANCE BROKERS

KIERAN MCHUGH ACII, CHARTERED INSURANCE BROKER
6 JUNE 2024

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INTRODUCTION

-  43 year career as a broker – 5 years as expert witness
-  Change in Insurers' attitude to claims over my career
-  Commercial Union - now AVIVA - "We won't make a drama out of a crisis" – clip <https://youtu.be/gC8uakXTt5s?si=DbaAaAgOjupD3c> 
-  "We promise to pay"

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CHANGE POST 9/11

- Gradual change in attitude but post 9/11 – paradigm shift
- Hardest market of my career
- Loyalty to Broker and Insurer from Insured evaporated
- Increased competition – price focused
- Solicitors in Ireland and UK – collapse of SMDF in Ireland and SIF in UK



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BROKERS IN FIRING LINE



- A declined claim for client
- Notification for Broker to PI Insurer
- Poacher turned Gamekeeper
- There but for the grace of God...

4

FLASH POINTS FOR BROKERS

- Policy transferred from Insurer A to Insurer B at renewal
- When one or more Brokers competing for an account: Price wins!
- Under insurance on property and business interruption policies
- Correct advice on calculating sums to be insured
- Construction inflation – Aviva survey €39bn
<https://www.irishtimes.com/business/2024/05/17/irish-homeowners-have-39bn-underinsurance-problem-aviva/>
- Construction inflation – 23% (2019 to 2023) Banking and Payments Federation
- Compliance requirements



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RECENT DEVELOPMENTS

- Response of Insurers to Covid in ROI and UK
- Consumer Insurance Contracts Act 2021
- Utmost good faith – more insured friendly
- Misrepresentation – Fraudulent, Negligent or Innocent (Remedies)
- Guidance for courts for other Insureds
- Emergence of MGAs as a force in the market place

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SUMMARY



Brokers cannot prevent someone making a claim against them but can avoid giving them a reason to do so



Communicate, Communicate, Communicate



Acknowledge instruction, Act on instruction, Confirm action



Keep adequate records – written, spoken, email, WhatsApp, meetings

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ANY QUESTIONS???

THANK YOU!

KIERAN MCHUGH ACII, CHARTERED INSURANCE BROKER – 6 JUNE 2024

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Helen Kilroy
Partner
McCann FitzGerald LLP

“Mediation – tips and traps”



Helen Kilroy

Partner

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Helen has 30 years' experience in the field of commercial litigation, effectively managing complex and commercially sensitive and critical disputes to meet clients' overall objectives. She has wide ranging experience in corporate disputes, advising boards on their duties including boards created by statute, prosecuting and defending shareholder claims and breach of warranty claims.

She has comparable experience handling insurance disputes, in particular coverage and professional negligence claims and property disputes. She also advises on partnership disputes, planning disputes, compulsory purchases and statutory investigations and enforcement.

Helen is an accredited CEDR mediator (Centre for Effective Dispute Resolution, London) and has very significant experience in mediating commercial disputes covering a broad range of subject matter. She is the former Group Head and was also a Council member and a past Chairperson of the Irish Commercial Mediation Association. She is a member of the Irish Sports Council's Disciplinary Appeals Board and the Law Society ADR Committee. Helen also lectures on the Law Society Professional Practice course.

Key highlights include advising:

- Ballymun Regeneration Limited, Depfa Bank, Coca Cola Hellenic, McDonalds Restaurants of Ireland and private individuals in a wide range of specific performance and breach of contract claims on property contracts, joint ventures, compulsory acquisitions and related judicial reviews.
- Bord na Móna, Dairygold, Ervia, FL Partners, Pepper, Topaz and Unicare Pharmacies in breach of contract claims arising from the sale or acquisition of a business.
- Ervia, Irish Water and various insurers in construction cases concerning allegations of negligent design, negligent advice, over certification, change of scope and/or defective work.
- IBRC, Investec, Galway Clinic, Kingspan, National Standards Authority of Ireland, National Asset Management Agency, Road Safety Authority and Ulster Bank in specific performance and breach of contract claims.

PNLA Dublin Conference 6 June 2024

Mediation
Tips and Traps when mediating professional negligence claims

Helen Kilroy



MCCANN FITZGERALD

mccannfitzgerald.com

MCCANN FITZGERALD LLP

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Introduction & Overview

- My background and mediation experience as an advisor and mediator
- Your experience? Show of hands determines what slides we skip
- Mediating negligence claims what really matters? Case examples on:
 - Choice of mediator?
 - Preparations?
 - Attendees?
 - Shape of process – before the day and on the day?
 - Tone of engagement?
 - Ways to break the impasse?

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What is Mediation ?

- The Act defines **Mediation** as:

“a confidential, facilitative and voluntary process in which parties to a dispute, with the assistance of a mediator, attempt to reach a mutually acceptable agreement to resolve the dispute”
- Defines **Mediator** as:

“a person appointed under an agreement to mediate to assist the parties to the agreement to reach a mutually acceptable agreement to resolve dispute the subject of the agreement” (Section 2)



Member 27 of 2017

Mediation Act 2017

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How does it compare to Litigation (or Arbitration)?


| LITIGATION (& ARBITRATION) | MEDIATION |
|----------------------------|------------------------|
| Adjudicative | Consensual |
| Adversarial | Facilitative |
| Lawyer-Centred | Client-Centred |
| Win or Lose | Flexibility of Options |
| Binding decisions | Can be Either |
| Retrospective | Forward Looking |
| Long Processes | Shorter Process |
| High Cost | Lower Cost |
| Lack of Control | Retain Control |
| Public (Private) | Private & Confidential |

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Statutory obligation to advise clients about the process



- Prior to issuing proceedings for client **'practising solicitors'** (or barristers) **are obliged to advise client to consider mediation** and advise/provide:
 - Information on process and service providers
 - Advantages of resolving disputes otherwise than in proceedings and benefits of mediation
 - Explain confidentiality provisions and enforceability of mediation settlements
 - Explain statutory declaration requirements (*Sections 14-15*)



Number 27 of 2017

Mediation Act 2017

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What themes do we see in the case law?

- 2015 – recognition of the benefits of the process and creation of a checklist of factors to consider before a court will order parties to consider mediation (*Atlantic*)
- 2022 – endorsement of the process where the cost of litigation is prohibitive and a win in the litigation would be pyrrhic (*Campbell*)
- 2022/3 – whether it was reasonable to refuse to mediate is fact dependent (*IEGP*)
- 2022 - how you conduct litigation may have adverse cost consequences including failure to deploy mediation (*Mascarenhas*)
- 2022 – recognition of the way the process operates and a reluctance to set aside the 'deal' as recorded by the parties in a mediated settlement agreement (*Cullen*)
- 2023 – information gleaned in mediation not a barrier to a late tender/lodgement (*Feeley*)

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Mediating Negligence Claims – What really matters?

- Choice of mediator?
- Preparations?
- Attendees?
- Shape of the process – before the day and on the day?
- Tone of engagement?
- Ways to break the impasse?

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Choice of Mediator and gaining the parties' trust

- Subject matter experience versus process experience?
 - Capacity to understand liability and causation issues
- Suggest three names or not?
 - A good fit for both parties and capacity to manage different 'needs' of individual v. institution
- Pre-process or in-process private meetings to establish relationships?
 - Capacity to manage process concerns/cultural issues

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Preparations are critical

- Focus on liability, causation, quantum and how best to convey for case type
 - Pleadings or summaries or confidential briefings?
 - Expert reports and conferral ?
 - Vouching
- Private risk analysis – understand the BATNA & WATNA
- Private consideration of possible solutions and what is needed
 - Cash – apology – other supports?

21 May 2024 | Mediation - What is it and why does it matter?

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Who should attend?

- Client
 - Decision maker with authority to settle
 - People originally involved in the dispute? (might be Yes or No)
- Trusted Advisors
 - In house counsel, external solicitor, barristers, accountant?
 - Experts?
- Third parties
 - Insurers? Always best if present
 - Spouse/friend? (can be very helpful in plaintiff room)

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Shape of the process – before the day and on the day

- Mediator sets the ground rules and agenda
 - Mediator should explain each step
 - Respectful engagement – no interruptions
 - Active listening by parties
 - Identify issues in first call/in papers/in private meetings
 - How to work through them – managing expectations

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Getting the mood right can be a challenge....



Judith sensed that the mediation would take more time than the half-day that it had been scheduled for.

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Tone of Engagement - Mediator provides empathy & assistance

- Initial engagement key in gaining trust
 - Active listening
 - Affirming and acknowledging
 - Summarising, paraphrasing, reflecting and reframing
 - Body language
- If the Mediator asks you to engage with the other side in a certain way or on an issue there is generally a good reason for the request

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Ways to Break the Impasse – Mediator’s Risk Analysis

- Clients tolerate a mediator’s challenges, don’t block it
- Help the Mediator to explore your client’s BATNA/WATNA
 - Legal & evidential burden – liability, causation, quantum
 - Financial burden of case/loss of case
 - Timing of outcome
 - Time management burden

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Possible conclusions?

- Success is generally driven by good preparation and lack of preparation often impacts insurers’ readiness to settle (i.e. under reserving issue)
- Understanding the elements of the claim and conveying them is key
- Getting the tone of the process and day right (for both sides) matters
- Managing expectations is critical and taking a considered and pragmatic approach where there are liability, causation and quantum issues makes a difference
- Q&A

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Q&A

Chairman's Closing Remarks



Katy Manley LLB
PNLA President/BPE Solicitors

“Thank you”



Katy Manley LLB PNLA President Consultant – BPE Solicitors

Katy Manley trained in London and qualified as a solicitor in 1989 moving to the west country in 1991.

She was made an equity partner in a leading Bristol practice in 1995 becoming Head of the Professional Negligence team. She remained with this firm until the launch of Manley Turnbull in 2006 which, until closure in 2022, specialised in professional negligence claims.

Katy is a founder member and President of the Professional Negligence Lawyers Association ('PNLA') launched in 2004. With the management team, Katy has been responsible for arranging seminars and events, lobbying Government and consultation with regulatory and other bodies. Through the PNLA seminars Katy has developed a very strong network of relationships with members of the Bar, experts and solicitors throughout the UK and Ireland with an identity of interest in this niche practice area.

Katy is one of the leading names for claimant professional negligence work and is known not only for her practice but also for publishing articles and lecturing on the subject.

Publications: Strategy & Tactics Chapter 4 – Simpson: Professional Negligence & Liability loose leaf



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Total CPD – 6 hours 30 mins

To complete your feedback form please go to

<https://www.pnla.org.uk/event/pnla-conference-dublin-professional-negligence-liability-update-6-june-2024/>