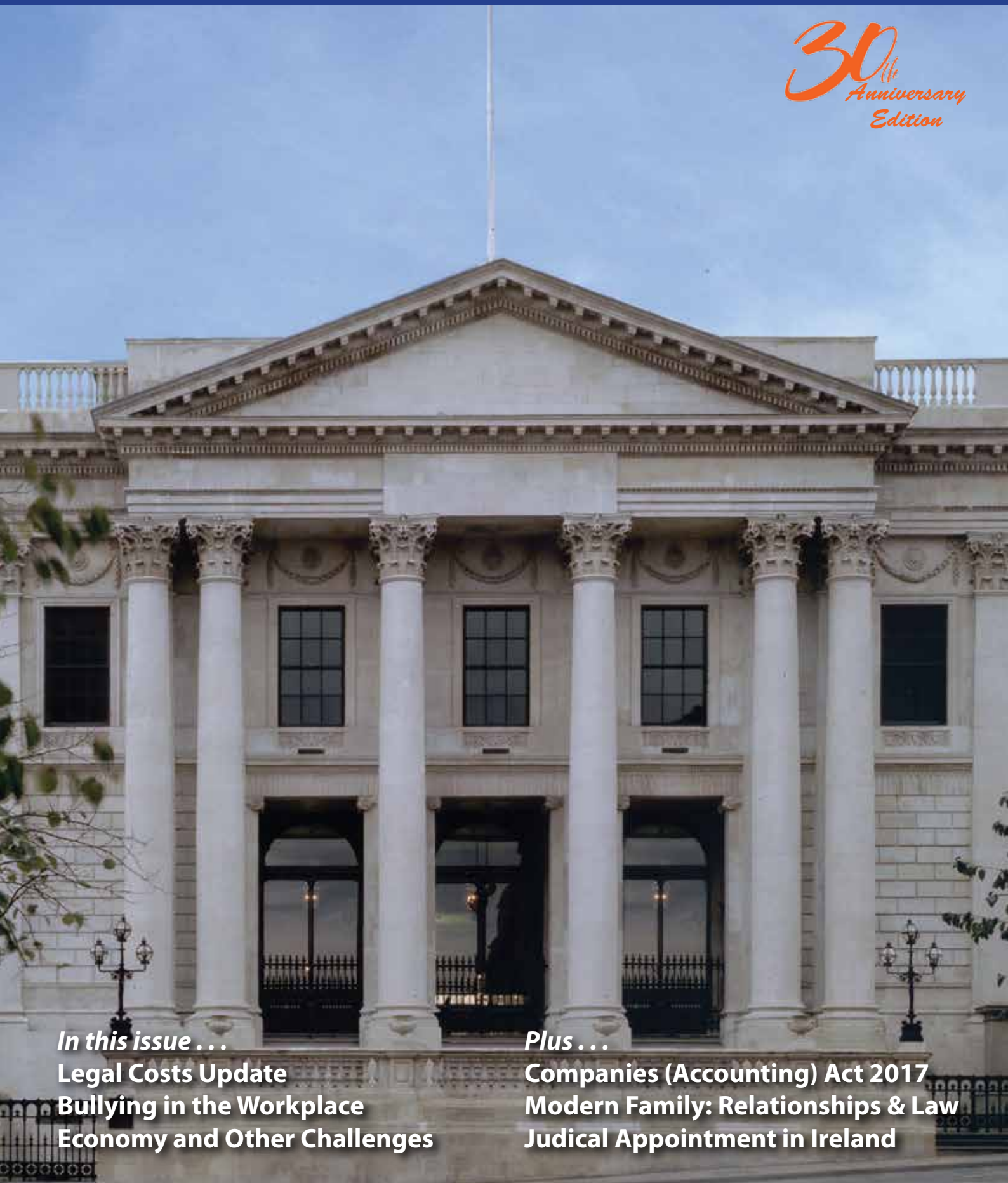
The Brief

The Official Journal of the Irish Institute of Legal Executives

iiLEX

2017

30th Anniversary Edition



In this issue . . .

Legal Costs Update
Bullying in the Workplace
Economy and Other Challenges

Plus . . .

Companies (Accounting) Act 2017
Modern Family: Relationships & Law
Judical Appointment in Ireland

The Brief 2017

Contents

AIB PRIVATE BANKING IRISH LAW AWARDS 2017

"The Irish Institute of Legal Executives - (IILEX) is featured among the sponsors of the annual AIB Private Banking Irish Law Awards".

Legal Disclaimer

The Brief adopts an independent and inquiring approach towards the law and the legal profession. It is published for the benefit of members of the Irish Institute of Legal Executives and therefore aims to keep them properly informed of developments in the law and legal practice.

As part of this objective, The Brief will act as an authoritative source of information on Institute activities and policies. From time to time The Brief may cover controversial issues. The editorial team shall have the final decision on matters of editorial policy or content but always strive to preserve and to enhance the good name of the Irish Institute of Legal Executives and its members.

The views expressed should be taken as those of the author only unless it is specifically indicated that the Irish Institute of Legal Executives has given its endorsement. Neither The Brief nor The Irish Institute of Legal Executives accept liability to any party for any error, omission or mis-statement by any contributor in any material published herein.

The appearance of an advertisement in this publication does not necessarily indicate approval by IILEX for the product or service advertised.

EDITORIAL TEAM

We the Editorial team hereby extend many thanks to all of those who contributed articles as well as photographs for this 30th Anniversary Edition of the Official Journal of IILEX – "The Brief".

Your contribution and interest in being involved is much appreciated and makes all of the difference towards the production of a quality publication. All of our members and others should really enjoy reading the many interesting features and viewing the various exciting photographs kindly supplied by you,

If you have any social or current events coming up in the near future that you would like to see advertised or written about on the IILEX Website, or further more, maybe for inclusion in the next Edition of "The Brief", then please feel free to send information, photographs and other images to the following address:-

The Irish Institute of Legal Executives.
22/24 Lower Mount Street, Dublin 2 DX No, 15,
Telephone: - (01) 890 4278 Email - info@iilex.ie

Congratulations and well done all.

Mary O'Dwyer, FIILEX
Director of PR/Communications
Editor

Front Cover Picture: City Hall Dublin (formally the Royal Exchange).
Permission for use of Image Courtesy of Dublin City Council

Printed by Andy Mullen Print - 087 681 2739

President's Address

Greetings to all,

It is indeed a great honour and privilege to be appointed President of the Irish Institute of Legal Executives and having represented the Munster Branch over the years I am very proud to also be the first member from Cork to be appointed President of IILEx. I intend to fulfil this position to the best of my ability thus honouring and continuing the Trojan work of my predecessors.

In an effort to move the Institute forward it is important that we have a greater connection between members and the Legal Profession, in this regard we are encouraging members to provide us with your input. All suggestions are very welcome as it is only by listening to and working with our members that we will continue to grow. I would encourage more members to become involved in Regional Councils. These Councils are a great way of meeting fellow colleagues, networking, exchanging ideas, problems and solutions. Please note that we can be contacted for assistance/help/information/sharing of ideas at info@iilex.ie

During the coming year we have some very interesting projects planned – we are in the process of updating our website, Facebook page and LinkedIn so stay tuned!!

This year 2017 we will be celebrating 30 years, this is truly amazing and with continued support and commitment we will be around for another 30 plus years. I am pleased to report that our membership numbers have maintained a steady increase over the last year and I would like to take this opportunity to thank you for your continued support and look forward to meeting/seeing you during the year 2017.

Deirdre Littrean-Butler
President
Irish Institute of Legal Executives

You need us for direction

We need you for strength and resources

Irish Institute of Legal Executives Company Limited by Guarantee

Soliciting Former Clients & Competing With Former Employer

INTRODUCTION

The issue of restrictive covenants is one of the most fraught areas of employment law and subject to continuing legal development in the courts. Employers who fail to protect their business against competition by former staff risk serious loss and damage. When an employee departs, everything from the client base to financial information to research and development is up for grabs. This problem affects every type of business in Ireland from large multi-nationals to professional practices to the SME sector. And, often, it is too late to close the stable door after the horse has bolted. As such, businesses must prepare in advance by having well written contractual non-solicitation and non-competition clauses. In the absence of doing so, the courts may be reluctant to intervene. This Article, therefore, will examine how the established principles that apply to the enforcement of non-solicitation and non-compete clauses today are evolving, particularly in light of a number of recent cases in in Ireland and England.

ESTABLISHED PRINCIPLES

In Ireland, while existing employees are restricted from damaging the property interests of their employer, there is no automatic or common law restriction on former employees canvassing or soliciting business being done or previously done by the former employer. Restrictions on soliciting the business of a former employer may only apply where:

(i) The employer can show that protected trade secrets have been violated: Faccenda Chicken v Fowler [1986] IRLR 69;

or

(ii) Where there is a direct and specific contractual restriction against soliciting clients and customers of the employer.

In Ireland, in terms of contractual restrictions, it is well established that the following three criteria are examined by the courts[1]:

(1) Subject of the Clause;

(2) Duration of the Clause;

(3) Geographic Extent of the Clause.

(1) The Subject of the Clause:

In the first place, non-solicitation clauses must reflect the specific needs of each particular business. An employer must know what he or she is trying to protect and why. Former employees can be restricted from soliciting both the clients and staff of a former employer. However, an employer seeking to enforce a non-solicitation clause must justify the restriction by showing that the restriction is actually needed to protect a legitimate business interest.

(2) The Duration of the Clause:

This is another vital consideration. The courts will not enforce a non-solicitation clause for an unreasonable duration of time. What is reasonable depends on the facts of each case. The duration of the clause must be sufficient to allow an employer to take steps to protect his or her business from the former employee. The threat that a former employee poses to the business is important. The higher the threat to the business, the longer the period of non-solicitation that may be imposed. The normal duration is between 6 to 12 months.

(3) The Geographic Extent of the Clause:

Again, this must be considered reasonable in order to be enforceable. If a non-solicitation clause is drafted over too broad a geographic area, it may be invalid in its entirety. Again, the employer must be able to justify why he or she is seeking to restrict a former employee from trading within a particular area.

IMPORTANT CASES

However, despite the above principles, it can still be difficult to precisely define "solicitation" or "to solicit". In restricting solicitation, a clause should precisely include not just where a former employee seeks to induce customers of his former employer but also where those customers themselves decide, without any proactive inducement, to work with the former employee. It should restrict the former employee from taking that work. However, it would still have to be shown that the employer had a propriety interest in those customers. Where there is an argument, that customers were brought to the former employer by virtue of the personal connection to the former employee, then such an open-ended non-solicitation restriction may be open to challenge.

In Wallace Bogan & Co v Cove [1997] IRLR 453, the three defendants were solicitors who left the plaintiff firm, each giving four weeks notice of termination and informing the plaintiffs that they intended setting up together on their own account. They were then placed on "garden leave" for the notice period by the plaintiff. After leaving the employment of the plaintiffs, the defendants wrote to the clients with whom they had dealings while they worked for the plaintiff informing them of the establishment of the new firm, the type of work undertaken and offering to act for them if they wished. A number of clients left the plaintiff and transferred their cases to the new firm. The contracts under which the defendants had been employed did not contain any express covenants restricting their dealings with clients after termination. The plaintiffs sought to get such undertakings in writing after the defendants had given notice but the defendants refused to give them. The plaintiff sought an injunction in the London High Court to prevent the defendants from canvassing or soliciting their clients. This was granted but was overturned in the Court of Appeal which held:

> *"In the absence of an express covenant, there is no general restriction on ex-employees canvassing or doing business with customers of their former employers. This rule applies to solicitors as much as to any other trade or profession. In the eye of the law, all are equal. Although when canvassing their former employer's clients, solicitors are taking advantage of a professional connection with those clients, that difference is no different in principle from the trade connection that, for instance, milk roundsmen may acquire with the employer's customers. Clients and customers alike represent the employer's goodwill which the employer is entitled to protect by an express covenant in reasonable restraint of trade but which is not protected for them by an implied term if they do not bother to extract an express covenant forbidding solicitation after employment has ended. In the present case, there was no express covenant restricting the defendant solicitors' dealings with former clients after their employment terminated. Therefore, after leaving the plaintiffs and together setting up a new firm they were not in breach of any contractual obligation in writing to the plaintiffs and canvassing their business."*

[1] *John Orr Limited v. John Orr [1987] ILRM 702*

RECENT IRISH CASE LAW

While the above case of Wallace Bogan confirms the importance of having non-solicitation clauses in the contract, the courts will not simply accept these at face value and will still require evidence that they are required to protect a legitimate business or property interest of an employer. The Irish case of Levinwick Limited v Hollingsworth [2014] IEHC 333 conform this. Here, McGovern J. in the High Court highlighted that, even where there is a specific restraint of trade clause in a contract prohibiting solicitation, there is still no guarantee that the employer will be protected.

In this case, the plaintiff ("employer") owned and operated a pharmacy in Celbridge in County Kildare. The defendant ("employee") was a former employee (Pharmacist) who left in March 2013 when he took up employment with another pharmacy in Celbridge in January 2014. His former employer claimed that the employee was in breach of non-compete/solicitation clause in his Employment Contract. The former employee had agreed in his contract not to work within a 2-mile radius of his employer in Celbridge for a period of 24 months following the end of his employment contract. The employer sought a Court Order enforcing the terms of contract.

What is interesting are the grounds upon which the parties fought the injunction application. McGovern J confirmed that a non-solicitation clause in a contract, even if reasonable, is not, in itself enough. The employer also had to show that he or she was seeking to protect some legitimate interest of the business that was being threatened by the former employee. In this case, however, the employer was not able to produce any concrete evidence to show which, if any, of his customers had actually followed the former employee to his new Pharmacy. Instead, the employer simply said that the former employee had been the "face" of the pharmacy and his business had suffered a reduction when customers had moved with the former employee to the new pharmacy. On the other hand, the employee argued that the employer had overstated the extent of his personal relationship with its customers. McGovern J strongly agreed that the actual role of the former employee in employer's business was crucial in terms of whether solicitation had occurred, particularly where that role gives the former employee personal knowledge of, and influence over, customers of the employer. In this case, however, the High Court found that the evidence of the employer fell some way short of showing the former employee was the "face of the business". The employer's pharmacy had employed other pharmacists and the defendant also had an administrative role which meant that he spent significant time in a back office away from the customers. Also, while there had been a drop in business at employer's pharmacy since the employee's departure, the Court found that this was less to do with any poaching of customers by the former employee but attributable in large part to other factors, such as the fact that 3 other pharmacies had been set up in the town subsequently. As such, notwithstanding, the restraint of trade clause in the contract, the High Court refused to enforce it because the employer was not able to provide evidence of how the business of the employer was being damaged by the conduct of his former employee.

RECENT ENGLISH CASE LAW

It is clear in the above case of Levinwick that the profile of the former employee within the business is a relevant consideration in deciding whether a business interest of the employer is threatened by their departure. However, in the internet age, the profile of an employee may not depend solely on direct contact with clients but also on their social media profile. As such, the recent English case of Sean Hanna Ltd v Barber [2015] EWHC 3113 (QB) has raised further interesting issues in this regard. Here, an interim injunction was granted preventing a hair stylist, who was in breach of a covenant in his employment contract, from working within a half-mile radius of his former employer. However, the court also found that it would be unduly restrictive on his right to carry out his trade to prevent him from also advertising his new business via social media. The defendant had been employed by the claimant for six years. His contract contained a restrictive covenant which prevented him from working within a half-mile of the claimant's salon for a six-month period after the end of his employment and from inducing any of his former customers to use his services at the expense of the claimant for the same period. After his employment ended, he rented space at the premises of another salon and carried on business there. He then advertised via social media and in a local magazine. Although he accepted that he was in breach of the area covenant, he argued that he was not in breach of the inducement covenant. He claimed that he had no intention of putting clients under any pressure to leave the claimant's services. On the other hand, the employer had argued that there was a seriously arguable case that continuing to advertise on social media was likely to cause his clients to leave it. The court held that, although there was a seriously arguable issue to be tried as regards both covenants, the balance of convenience in respect of the inducement clause favoured the former employee. The court also concluded that injunctive relief would be ineffective in any event in respect of that clause, because the evidence was that a number of clients had already left the claimant and the injunction would come too late. The findings of the court in this regard are important as they suggest that, in the age of social media, an employer must act very quickly to protect their position.

CONCLUSION

From the above analysis, it is clear that the enforcement of restrictive covenants is far from simple. An employer cannot simply rely on the contractual terms but must also satisfy the court that a legitimate property or business interest is being threatened by the conduct of the former employee. In this regard, while recent case law in Ireland and England suggests that the courts are willing to look at the profile of a former employee within the business, including their social media profile, employers must act very quickly if they wish to rely on social media activity as the basis of their claim. In short, while the general principles of restrictive covenants may be well established, they are constantly subject to change, not least as a result of the development in information technology and communications, and the law in this area must be kept under close review in the coming years.

John Eardly, BL, Programme Director,
Faculty of Law, Griffith College, Dublin.

BIOGRAPHY

John Eardly is Programme Director of the LLB (Hons) in Irish Law and BA in Law and Business in the Faculty of Law of Griffith College Ireland. He is a barrister whose experience in general practice includes employment and industrial relations law, chancery/injunctions, immigration/refugee law, judicial reviews, tort and contract. He is also a widely published author and guest speaker at many Professional Practice Conferences. In 2003, he was part of a team of authors published by the Law Society of Ireland in their ground-breaking book, "DIscrimination Law in Ireland" which focused on the fast developing area of human rights and equality law in Ireland. In 2002, he wrote one of the seminal and leading publications on employment rights in Ireland, "Bullying and Stress At Work. Employers and Employees: A Guide." John was also Editor of the Employment Law Review Ireland from 2005. He has extensive experience of teaching and lecturing at both student and professional practice level, including the Law School of the Law Society of Ireland and the Honorable Society of the King's Inns as well as professional practice training for legal practitioners at the Irish Centre for Commercial Law Studies and the Bar Council of Ireland.

Commissioner For Oaths Appointments in 2016/17

CONGRATULATIONS TO: **Patrick J. Courtney, Member of IILEX**
Michael Sweeney, Member of IILEX
Fiona Porter, Member of IILEX
Aoife Cahalane, Member of IILEX

On being appointed as Commissioner for Oaths, by the Supreme Court in 2016/17

HOW TO BECOME A COMMISSIONER FOR OATHS

This is open to **Legal Executives** by Application to the Supreme Court.

- Apply by Petition to the Chief Justice.
- You must verify the Petition by an Affidavit, accompanied by Certificate of Fitness signed by six members of the legal profession and by six local businesses.
- You must have Documents stamped and filed in the Office of the Supreme Court.
- You must also obtain a Barrister to move your Application on the date of Hearing.

This process takes persistence and determination but it is so worthwhile. It is a wonderful honour to have and of value, in terms of respect and status is enormous. It is very useful in connecting with local businesses and further your legal career. ***Information can be obtained from the Supreme Court Office at 01-8886568 or email supremecourt@courts.ie or if you require help you can also contact the Institute at info@iilex.ie***

Deborah Walsh FIILEX (Vice-President of IILEX)
COMMISSIONER FOR OATHS

The Irish Institute Of Legal Executives Talk

The Council Chamber City Hall, Dame Street, Dublin 2

The Institute was very proud to host a Talk in City Hall on the 15th November 2016

The Speakers on this occasion were:

MRS DIANE BURLEIGH – PATRON OF IILEX AND FORMER CEO OF CILEX UK

MR. SHANE O'DONNELL – LEGAL TAX ACCOUNTANT from FLYNN O'DONNELL

Mrs. Burleigh spoke on the possible implications of Brexit and how Legal Executives continue to flourish in England and Wales. Legal Executives continue to be made Partners, Judges and their powers to practice law is increasing year on year.

Mr. O'Donnell spoke on the current situation with regard to the taxation of costs and how this is impacting on legal firms in the negotiation of costs generally.

Left to right: Shane O'Donnell, Partner Flynn & O'Donnell Legal Tax Accountants, Veronica Duffy Vice-President of IILEX and Diane Burleigh OBE Patron of IILEX and former CEO CILEX U.K.

Legal Costs Update

By Shane O'Donnell Legal Tax Accountant

As most practitioners will be aware, it has been an interesting (albeit frustrating and broadly speaking unsatisfactory) period in terms of the assessment of legal costs in this jurisdiction. However, there have been a number of very welcome developments in the costs sphere over the last number of weeks. To give a brief update, practitioners should be aware of the following:

Interim Costs Payment Practice Direction 71 relating to payment on account of costs pending taxation- No doubt this practice direction from the President of the High Court The Hon. Mr. Justice Peter Kelly at the end of last term has not gone unnoticed and undiscussed since it issued. This practice direction came into effect on Monday 24th April 2017.

I feel it is a very positive development primarily in so far as it is an opportunity for firms to improve cash flow, which can only be welcomed with open arms. For far too long the majority of paying parties have been only too willing to exploit a crippled taxation system, paralysed by the impossible demands to substantiate all legal fees by reference to hourly records. It should also go some distance to easing the pressure to discharge expert witnesses and Counsel's fees in a timely fashion – very often this aspect becomes most onerous.

The perception (made famous by the now retired president of the High Court's pronouncement in Bourbon around the time of the economic meltdown, with the Troika lurking in the background) that legal costs were at an unsustainably high level, became the mantra over the last number of years. The Sheehan case and its onerous and impractical requirements meant that firms faced a further hurdle justifying fees where the benefit of the doubt, as to work that obviously was necessary and carried out but not contemporaneously recorded. The result was that in many ways we had no way to breach an impasse where a paying party made an offer that was significantly less than the matter would have traditionally tax at.

Comparator cases that had settled or taxed recently will be invaluable when seeking agreement or directions on part payments. In most circumstances, I envisage same can be agreed directly with the paying party without the need for a formal hearing. It effectively means that principles and standing up for what we believe to be fair fees is no longer prohibitive, costly and overly restrictive on cash flow. These payments on accounts will take the pressure off and we can now pursue taxations or mediations to validate our valuations going forward with the vast bulk of costs already in the bank.

Where firms really need to exercise caution is in respect of disbursements / experts witnesses and Counsel. It will be of huge assistance in keeping all of these individuals happy by securing and paying out the majority of their fees at a much earlier stage but it is imperative that a proper and appropriate part payment is considered / agreed that is satisfactory and equitable to both sides. Clawing back fees once paid out, as you no doubt appreciate, will be almost impossible. If not done correctly, it will cause huge headaches and will jeopardise important and longstanding relationships between your firm and your various legal / medical / liability service providers. The fact that solicitors must provide undertakings to repay any shortfall once the fees have been taxed or ascertained cannot and should not be overlooked. Breaching undertakings given in terms of securing interim costs payments would be a disaster for firms who need less costs headaches as opposed to more.

New Taxing Master Appointment - You may or may not be aware that we have a new Taxing Master – Mr. Paul Behan. While the entire legal costs landscape is changing significantly (as evidenced by the above), his appointment can only be welcomed with open arms as we badly needed a second, competent Taxing Master. He has been out of the business for the last number of years but was a very well respected and experienced Costs Accountant prior to retiring. The fact that he has been out of the business for the entire Sheehan v Corr necessity for time debacle certainly doesn't hurt either. So far he has indicated a willingness to get on with business and get cases heard and determined expeditiously. His initial rulings are broadly indicative that his valuations will broadly be in line with Master O'Neill but the fact that we are now no longer dealing with piecemeal taxations and delays getting judgements / certificates, business should return to normal on taxation after a frustrating few years.

Necessity for Billing based on Time / Sheehan v Corr – The Supreme Court in its recent decision has completely overturned the Court of Appeal direction with regards to Time and the Taxing Master must evaluate each individual time entry that makes up the instruction fee. It found that there is no requirement in law that a Solicitor or a Barrister must keep contemporaneous time. 'While it is commented that time is of course useful in explaining how fees were arrived at and charged, the Court of Appeal was wrong to find, by implication, that such a requirement exists'.

Mediation / Alternative Dispute Resolution – As a consequence of the aforementioned problems encountered on taxation this area has really gained some traction of late. Any alternative method in bringing a resolution to cases must be embraced and I have generally found the mediation process to be a great success. The problem remains that the vast majority of paying parties are not incentivised to engage with a non-binding process and I have found that its usefulness is limited to cases that bring a certain complexity or consideration that formal taxation cannot address satisfactorily. Another attractive aspect to mediation can be the saving to the paying party in terms of court duty. There is a significant difference between 8% on a bill that taxes at €1million (€80k court duty) and a mediators fee of circa €5,000 - €10,000.

Companies (Accounting) Act 2017

The Companies (Accounting) Bill 2016 was passed by the Irish legislature and is expected to be signed into law as the Companies (Accounting) Act 2017 (the "Act") in the coming days. Running to over 100 sections, the Act represents the most significant update to the Companies Act 2014 (the "Companies Act") since it came into operation almost two years ago.

The main purpose of the Act is to transpose EU Directive 2013/34/EU (the "Accounting Directive") into Irish law but it also seeks to address certain anomalies which were identified in the Companies Act.

The key measures in the Act are outlined below.

ACCOUNTING CHANGES

The bulk of the Act is concerned with amending Part 6 of the Companies Act and its related schedules, which collectively govern financial statements, annual returns and audits of Irish companies. The most important changes in this area affect smaller companies in the form of more relaxed accounting and disclosure regimes for entities falling below certain thresholds.

A new concept of 'micro company' has been introduced which must satisfy at least two of the following three requirements:

TURNOVER NOT EXCEEDING €700,000

Balance sheet total not exceeding €350,000

Average number of employees not exceeding 10

Micro companies can avail of minimal form financial statements, are exempt from disclosing directors' remuneration and are not obliged to prepare or file a directors' report. The Act allows qualifying companies to opt into the micro company's regime for financial years commencing on or after 1 January 2015. Certain types of company cannot be micro companies: holding companies that prepare group financial statements, subsidiaries included in the consolidated financial statements of higher holding undertakings, investment undertakings and financial holding undertakings.

The qualifying thresholds for both small and medium companies have been raised under the Act. Medium companies must now file full financial statements, including turnover figures.

There are new disclosure requirements for companies (other than micro companies) in relation to payments to third parties for making available the services of any person as a director of the company or its subsidiary undertakings, or otherwise in connection with the management of the company's affairs or any of its subsidiary undertakings.

NON-FILING STRUCTURES

The Act curtails so-called 'non-filing structures' which allowed unlimited companies, whose ownership was structured in a particular way, not to publicly file their accounts while effectively maintaining the limited liability of their ultimate owners. Under the new measures, Irish registered unlimited companies which have a (direct or indirect) limited liability holding company will have to file accounts. In terms of applicable financial reporting periods, it was previously expected that the rule change would come into effect for financial periods beginning on or after 1 January 2016. However, it is now expected that the relevant periods will be financial years commencing on or after 1 January 2017. Unlimited companies with limited liability subsidiaries will come within the filing regime for financial years commencing on or after 1 January 2022.

EXPANDED BRANCH DEFINITION

The Companies Act defined an "external company" to mean a non-Irish body corporate (EEA or non-EEA) whose members' liability in respect of that body corporate was limited. The Act contains a new expanded definition of "EEA company" and "non-EEA company". The definition now includes a non-Irish undertaking whose members' liability in respect of such undertaking is unlimited and which is a subsidiary undertaking of a body corporate whose members have limited liability.

UNLIMITED COMPANY NAMES

The Companies Act introduced a new requirement that, from 1 December 2016, the registered name of all unlimited companies must end in "unlimited company" or "UC" (or the Irish equivalent). In practice, this involved changes to company stationery, websites, seals and registrations. The Companies Act, however, gave the Minister for Jobs, Enterprise and Innovation the statutory power to exempt, in special circumstances, an unlimited company from the obligation to use the "unlimited company" suffix. Certain unlimited companies obtained such exemptions where the name change would have resulted in significant cost and business disruption. Once the relevant provisions of the Act are commenced, this exemption will no longer be available to unlimited companies although this will not affect the validity of exemptions already granted.

DEBT SECURITIES ISSUED BEFORE 1 JUNE 2015

Some uncertainty existed as to the continued validity of debt securities lawfully issued before the coming into force of the Companies Act by then existing private companies which became LTDs (the new model private company) under the new regime. The Act addresses this uncertainty by expressly providing that Companies Act restrictions on LTDs having such securities admitted to trading or listed only apply to securities issued post-1 June 2015.

MERGER RELIEF

The Companies Act (section 72) facilitates mergers by providing that any premium on shares issued as consideration for a 90% or greater interest in another company will not be subject to the general rule requiring that premium be transferred to a share premium account. As worded, merger relief was only available where the company being acquired in the merger is Irish. Under the Act, a new definition of "company" is introduced for these purposes, extending merger relief to all bodies corporate acquired in a merger, including a foreign company.

COMPANIES INVOLVED IN EXTRACTIVE INDUSTRIES AND LOGGING

New country by country reporting obligations have been introduced which will apply to large companies and public interest entities involved in oil and gas exploration or extraction, and logging in primary forests. Disclosable payments are widely defined and include production entitlements, taxes levied on income, production or profits, and royalties. Payments of less than €100,000 need not be disclosed in the payment report but no manipulation of amounts is permitted to avoid reporting. The board of directors of the company must approve the payment report which must then be signed on behalf of the board.

NEW DEFINITION OF "CREDIT INSTITUTION"

The Companies Act provides that an LTD "shall not carry on the activity of a credit institution or an insurance undertaking", meaning that those companies are among the types that cannot avail of the new model company regime. The term "credit institution" was vaguely defined and was open to the interpretation that it included group treasury companies and companies engaged in intra-group lending. The new definition restricts the ambit of the term to what was originally intended by narrowing the wording to: "a company or undertaking engaged in the business of accepting deposits or other repayable funds from the public and granting credit for its own account".

- See more at: http://www.matheson.com/news-and-insights/article/companies-accounting-act-2017#sthash.C1fvhhWR.dpuf

Lorraine Lally BL
Barrister at Law
Mediator
Twitter: @lorraine_lally

Conferring at Griffith College Cork 2016

Appearing in the photograph are Councillor Kenneth O'Flynn F.F., Deputy Lord Mayor of Cork, Diarmuid Hegarty, President of Griffith College, Deirdre Butler, President of IILEX, Karen Sutton, Head of the Law Faculty with DLSP Graduates and academic staff of Griffith College.

Picture by kind permission Lafayette Photography

The Conferring Ceremony of Graduates of Griffith College Cork 2016 took place on Thursday 24th November in the Honan Chapel of Griffith College Campus, Wellington Road, Cork.

This auspicious occasion was celebrated by Graduates along with their families and friends, representatives of the validating bodies as well as Griffith College Staff and local elected representatives.

Awards being conferred were for the following courses:

LAW:
Diploma in Legal Studies and Practice (QQI) and LLB (Hons) in Irish Law (QQI)

BUSINESS:
BA (Hons) in Accounting and Finance (QQI); BA (Hons) in Business Studies (QQI); BA in Business Studies (QQI); Diploma in Business Management (ICM); Diploma in Human Resource Management (ICM); Diploma in Marketing Management (ICM); Diploma and Certificate in Online Marketing and Digital Strategy (ICM); Certificate in SME Management (QQI).

COMPUTING:
Higher Diploma in Science and Computing (QQI)
Higher Diploma in Science and Web Development (QQI)

JOURNALISM & MEDIA:
BA in Journalism (QQI)
Diploma in Digital Communications for Enterprise (QQI)

CENTRE FOR PROMOTING ACADEMIC EXCELLENCE:
Certificate in Training and Education (QQI)

Once again this year, the entire Ceremony was memorable and very professionally organised. A warm thank you to Professor Diarmuid Hegarty President of Griffith College and Griffith College staff for the very kind invitation and hospitality extended to Directors of the Irish Institute of Legal Executives. As always, it is indeed an honour and pleasure to share this special occasion with Graduates, families and friends and staff alike.

I would like to take this opportunity on behalf of the Irish Institute of Legal Executives to extend best wishes for every success to graduates for the future ahead and continuing success to Griffith College.

Deirdre Butler MIILEx
President
Irish Institute of Legal Executives

Griffith College Dublin
Graduation and Conferring Ceremony 2016

Diploma in Legal Studies and Practice - (QQI) HETAC Level 7 (Special Purpose Award) -2 016

Picture by kind permission Lafayette Photography

President Diarmuid Hegarty, Griffith College, Frank Crummey' FIILEx (Hon.Life Member of IILEX) as well as other academic staff and DLSP Graduates of Griffith College

The Conferring Ceremony of graduates of the Diploma in Legal Studies and Practice - (QQI) HETAC Level 7 (Special Purpose Award) took place at the Conference Centre in Griffith College Dublin on 10 November 2016. This Course is delivered by Griffith College Professional Law School and run in conjunction with the Irish Institute of Legal Executives (IILEX).

Directors' of the Irish Institute of Legal Executives were delighted and honoured to receive the kind invitation of Professor Diarmuid Hegarty, President of Griffith College to attend at this event.

A total of 33 students graduated with a Diplomas in Legal Studies and Practice - (QQI) HETAC Level 7 (Special Purpose Award) as well as a total of 7 students who graduated with Certificates in Legal Studies (QQ1). Students were formally presented with their respective parchments by the President of Griffith College, Professor Diarmuid Hegarty who congratulated each on their great achievements as well as wishing them every success and happiness in their new lives ahead.

Roisin O'Grady was presented with the Frank Crummey Perpetual Cup as an award for her great achievement as best student of the year 2016 in the Diploma in Legal Studies and Practice (QQI) HETAC Level 7 - (Special Purpose Award)

Students who were not in attendance on the day were conferred in absentia.

The Irish Institute of Legal Executives – (IILEX) were again delighted to learn of the high number of students graduating and thus acknowledging the sustained interest in the pursuance of both the Diploma in Legal Studies and Practice (QQ1) HETAC Level 7 (Special Purpose Award) as well as the Certificate in Legal Studies (QQ1). The latter Certificate Course is conducted solely by Griffith College.

For many graduates, the Diploma in Legal Studies and Practice (QQ1) HETAC Level 7 (Special Purpose Award) has been recognised as a pathway leading to future legal studies such as the much subscribed LLB (Hons.) in Irish Law as well as various Post-Graduate Courses in the legal discipline also conducted by Griffith College.

Once again, the entire Conferring Ceremony was a very professional and a truly memorable event and to be present at such was very deeply appreciated by all. Compliments are extended to all staff including staff of the Examinations' Office of Griffith College- (GCD) who per usual worked very diligently and professionally displaying an enormous duty -of -care in organising the logistics in relation to putting in place this entire event. Well done all.

Many thanks to Professor Diarmuid Hegarty, President of Griffith College for the very kind invitation and hospitality extended on this occasion to Directors' of the Irish Institute of Legal Executives. - (IILEX).

Mary O' O'Dwyer FIILEx
Director of PR/Communications- -IILEX
Editor of the Brief

Best Legal Executive of the Year 2016 Roisin O'Grady receiving the Frank Crummey Cup from Griffith College President Diarmuid Hegarty.

Bullying in the Workplace

Derek Walsh (pictured), litigation solicitor at Keating Connolly Sellors, writes on bullying and the law after giving a recent in-house seminar on bullying in schools and the workplace.

Bullying is defined in paragraph 5 of the Industrial Relations Act 1990 (Code of Practice detailing Procedures for Addressing Bullying in the Workplace), as follows:

"Workplace Bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work."

Once off or isolated incidents will not be described as bullying. However, when the behaviour is systematic and ongoing it may be described as bullying.

Bullying in the workplace can take different forms, such as:

- Social exclusion and isolation
- Damaging someone's reputation by gossip or rumours
- Intimidation
- Aggressive or obscene language
- Repeated requests with impossible tasks or targets

Under section 8 of the Health and Safety Act 2005, your employer is required to "prevent any improper conduct or behaviour likely to put the safety, health and welfare of employees at risk." Your duty, as an employee, is not to engage in improper behaviour which would endanger the health, safety and welfare of yourself or the other employees.

HEALTH & SAFETY AUTHORITY & WORKPLACE BULLYING PROCEDURES

The Health and Safety Authority works to ensure that workplace bullying is not tolerated and that employers have procedures for dealing with bullying at work. Your employer must take reasonable steps to prevent bullying in the workplace. There should be an anti-bullying policy and established procedures for dealing with complaints of bullying. Your employer should deal with such complaints immediately. The Workplace Relations Commission has a Code of Practice detailing Procedures for Addressing Bullying in the Workplace.

Your employer's policy on bullying should clearly set out what will happen when a formal complaint is made, how the complaint will be investigated and who will carry out the investigation, taking into account issues of confidentiality and the rights of both parties.

REDRESS

Employees can make a complaint under employment equality or Health and Safety Legislation to the Workplace Relations Commission. If the bullying becomes unbearable and you are forced to leave your job, you may be entitled to claim constructive dismissal under the "Unfair Dismissals Act 1977-2007". If the bullying and harassment at work is so great that it causes your health (physical or psychological) to suffer or be affected, you may also be entitled to bring a claim in negligence for compensation for personal injury.

LEADING IRISH CASE LAW

One of the leading Irish cases concerning bullying and harassment at work is Quigley v Complex Tooling and Moulding. The case illustrates the difficulties faced by a plaintiff in proving a case of personal injury against an employer and the problems a plaintiff can have proving causation. The Supreme Court ruled that the plaintiff had been subjected to bullying. The Court accepted the submission that bullying must be repeated, inappropriate and undermine the dignity if the employee at work. However, on the causation side, the Court disallowed his claim. The Court held that on the medical evidence submitted he had not proven that his illness was linked to the bullying.

Derek Walsh
is a litigationsolicitor
at Keating Connolly Sellors.

Sellors

Caught on Camera

Gillian Moore, Legal Executive of the Year

Former Presidents of IILEX Veronica Duffy and Patrick J. Courtney

Miriam O'Callaghan & Stephen Keogh at the Irish Law Awards

IILEX AGM 2017

Roisin O'Grady with Diarmuid Hegarty

30th AGM at Imperial Hotel

Mary Foley at Open House

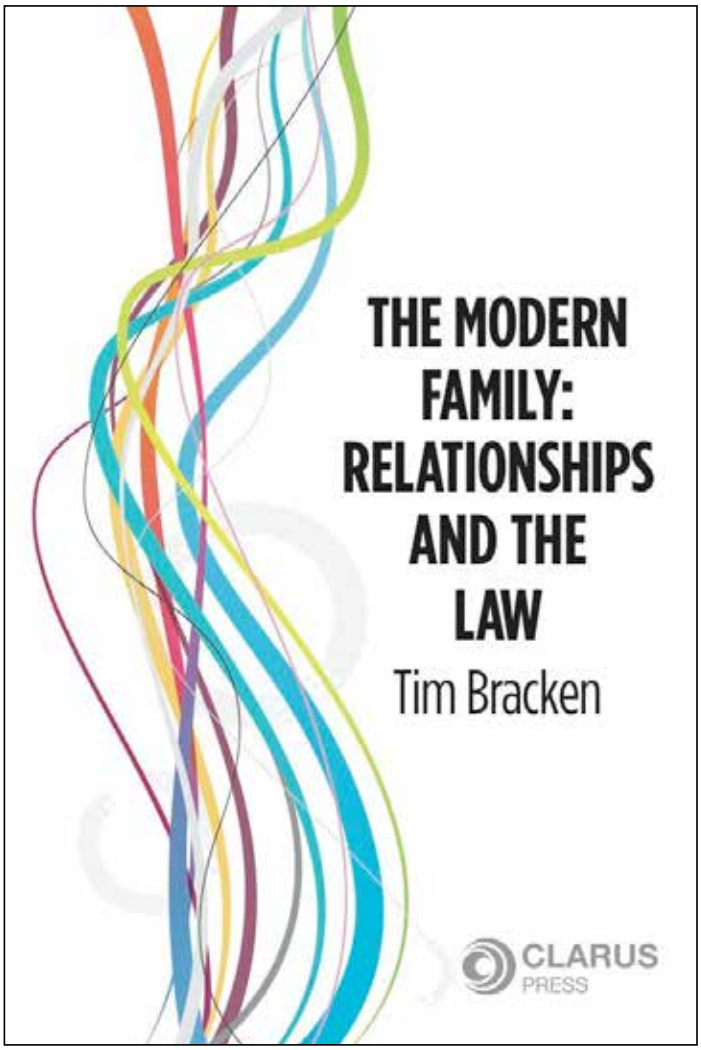
GCD Group

The Modern Family: Relationships and the Law,

by Tim Bracken

Published by Clarus Press

'Legislative change in Ireland is usually a slow and protracted affair but societal changes in what we term 'the family' have led to big changes in the law' noted Keelin Shanley on RTE Radio. Barrister and regular contributor to RTE Radio's Today programme Tim Bracken has written a guide called The Modern Family: Relationships and the Law and he joined Keelin Shanley from the RTE Radio Cork studio.



Tim is a well known voice on Irish radio and answers listeners questions in a clear and concise way that is bang up to date. He explains that it was from this he decided to compile the book mainly because people wanted to know the ins and outs of basic legal questions on private social legislation.

This is a new book which sets out and explains the law relating to all families and relationships between its different members. It is interesting to consider how complex the modern family can be, and look at the reality from the idealised version of the family, the definition of the family in Ireland and how it has changed enormously, and the ground breaking legislation that has redefined what constitutes family. The modern family consists of a lot of permutations which were not heretofore considered.

The Marriage Act 2015, recognised full legal marriage between two persons of the same sex. The Children and Family Relationships Act 2015, gives full legal recognition to children born as a result of donor assisted human reproduction (IVF) and their parents who may not be the biological parents. The Gender Recognition Act 2015, recognises a marriage of a transgendered person. The Civil Partnership and Certain Rights of Cohabitants Act 2010, recognises persons who live as a couple, with or without children, who are not married. Formerly these persons acquired little of no legal rights.

In this book, chapters on Marriage and Civil Partnerships set out how to enter such relationships, the rights and obligations of each party with the legal relationship with children, taxation and what happens when the relationship breaks down. A chapter dealing with Cohabitants explains the legal rights and obligations which arise once a cohabitation is established

Other chapters cover Children, donors and legal parents, Succession, as well as a new innovative ground breaking concept in Irish law, Assisted/Joint Decision Making and Advance Healthcare Directives which give persons control over future medical treatment where they lose capacity. As well as a chapter on court procedures, Tim finishes finally with frequently asked questions!

It is interesting to mention as Tim said during the programme, that the subject is also important from the point of view that Ireland is ahead of the rest of Europe in legislation.

Tim Bracken B.L. from Cork City is a practising barrister who specialises in the areas of probate and succession. He is also co-author of the recently published "The Probate Handbook".

References - programme website - RTE.ie and publisher Clarus Press.

Mary Foley reviewed the programme for The Brief.

Legal Executive of the Year Awarded to Limerick's Gillian Moore of Keating Connolly Sellors

At this year's AIB Private Banking Irish Law Awards 2017, Gillian Moore of Keating Connolly Sellors Solicitors received the Legal Executive of the Year in Ireland award. Gillian was one of eight finalists in the category. The Irish Law awards are now in their sixth year and they aim to identify, honour, and publicise outstanding achievements, while also recognising those who have dedicated their lives to serving in the legal profession.

Gillian Moore has been working at Keating Connolly Sellors since 2000, holds an LLB degree from the University of Limerick and is a full member of the Irish Institute of Legal Executives. Gillian was appointed legal executive in 2014; she initially worked in the litigation department and subsequently moved into the property department within the firm.

Speaking about her success, Gillian Moore, said; "I was delighted to receive the award for Legal Executive of the Year at the recent law awards. It is a great personal achievement on a national platform. The award is highly valued by the firm and its value was expressed to me by the number of acknowledgements I received from numerous clients and well-wishers. It is a true honour for both me and Keating Connolly Sellors overall."

"My work at Sellors is varied and fast-paced and involves dealing with residential sales for private clients and lending institutions and each day presents new challenges. I enjoy working in such a great legal firm and being part of a growing property team. To gain recognition for my work on a national level is an added bonus and I would like to thank the partners at Keating Connolly Sellors for the nominations and the judges and the Irish Law Awards for my award." continued Ms. Moore.

Stephen Keogh, Managing Partner at Keating Connolly Sellors said; "This is an absolutely fantastic achievement and it is a clear acknowledgement of all the hard work that Gillian has undertaken for the firm. Gillian provides a first-class service to her clients and this award is a testament to her dedication and expertise. At Sellors, Gillian is part of a forward-thinking, dynamic team of professionals and we wish her continued success."

The 2017 AIB Private Banking Awards were held on Friday 12 May, at the Clayton Hotel, Burlington Road, Dublin 4 and hosted by RTE's Miriam O'Callaghan.

GILLIAN MOORE – PROFILE

Gillian Moore is a legal executive at Keating Connolly Sellors. She holds an LLB from the University of Limerick and has vast experience in the areas of distressed sales and residential conveyancing.

During her employment with Connolly Sellors Geraghty (prior to the merger), Gillian was provided with a number of opportunities, which allowed her to develop and expand her knowledge of legal services. Under the guidance of a senior partner, Gillian worked in the conveyancing department providing legal services associated with residential building developments and commercial developments.

2009 saw an opportunity arise to join the defence litigation department. Initially, the role was to provide litigation support in relation to High and Circuit Court matter. Over time, Gillian became instrumental in providing a best in class service offering to one of Ireland's largest insurance companies. Gillian worked under the guidance of Joseph Murphy, senior litigation partner. Whilst working with Mr Murphy Gillian absorbed a wealth of knowledge and experience which stood to Gillian later on in her career.

In April 2015, Connolly Sellors Geraghty merged with Keating and Keogh to form Keating Connolly Sellors. Gillian was offered the opportunity to work within the property department and continues to work within this area at the firm.

Legal Executive of the Year Gillian Moore

The Process of Judicial Appointment in Ireland

Mary O'Shea, Solicitor

The word "process" is defined in the English Oxford Dictionary as being "a series of actions or steps taken in order to achieve a particular end".

Any analysis of a process must be an examination of the success or otherwise in achieving the end.

I believe that the end which we strive to achieve is the establishment of a judicial appointment process is that it is fair, transparent and credible and results in the selection of the most suitable candidate.

In the Articles listed below the Constitution lays down the parameters within which the process must operate.

THE CONSTITUTION

Article 15.2 provides that the sole and exclusive power of making law vests in the Oireachtas.

Article 28.2 provides that the executive power of the State is exercised by or on the authority of the Government.

Article 34.1 provides that justice must be administered in Courts established by law by judges appointed in the manner prescribed in the Constitution.

Article 35.2 provides that all judges shall be independent in the exercise of their judicial functions and subject only to the Constitution and the law and

Article 35.4.1 requires that once appointed a judge is required to make a Declaration in the following terms "In the presence of Almighty God I do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (or as the case may be) without fear or favour, affection or ill will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me."

These articles in effect enshrine the doctrine of the separation of powers into our Constitution.

The manner in which judges are appointed is a crucial issue relating to the independence of the judiciary and to the upholding of the rule of law. It is not the only relevant issue in ensuring that judges may make decisions free from external influences but it is vital to provide confidence in the system. The public must be satisfied that the process of appointment ensures that the most suitable person is appointed.

THE PROCESS IN IRELAND

The process of judicial appointment in Ireland is a function of Government exercised in accordance with the Constitution. Article 35 of the Constitution provides that judges of Courts established pursuant to Article 34 shall be appointed by the President. However, Article 13.9 provides that this power of the President is exercised only on the advice of the Government.

The minimum qualifications and experience necessary for appointment are laid down by statute and vary in accordance with the Court to which the appointment is to be made. Qualification as a practising barrister and or a practising solicitor is always required.

Section 13 of the Courts and Courts Officers Act 1995 (the Act) delegated the function of identifying persons that are suitable for appointment to judicial office to the Judicial Appointments Advisory Board (JAAB). The JAAB is not an appointing body but is rather a recommending body with limited functions. The definition of "Judicial office" is limited and does not include promotions from one Court to another and neither is the Government obliged to select from the list of applicants provided to it by the JAAB. The fact that appointments may be made independent of the JAAB is evidenced by the fact that in 2003 the Government appointed Mr Justice Sean Ryan to the High Court without consulting the JAAB. These limitations mean that the JAAB has no role in a significant number of appointments where the Government retains this function to be exercised at its discretion.

THE JABB

JAAB membership is comprised of the Chief Justice as Chair and the Presidents of the High Court, the Court of Appeal, the Circuit Court, the District Court and the Attorney General, a practising barrister nominated by the Bar Council, a practising solicitor nominated by the Law Society and not more than three persons nominated by the Minister for Justice and Equality (the Minister).

The predominance of legal and judicial representation on the JAAB is undesirable as it may lead to lay members deferring to legal and judicial members. The gender balance of the Board is fairly even but it has not always been so and is due in part to the fact that the Chief justice and the President of the District Court and the Attorney General are all female. All members are white and there is no ethnic diversity. There is a danger that Board homogeneity may mitigate against the recognition of the importance of diversity in the appointments process which in turn may militate against the selection of the best person for the job.

THE PROCEDURES OF THE JAAB

The procedures to be followed by the JAAB in selecting persons for recommendation to the Minister are laid down in the Courts and Courts Officers Act 1995.

Section 14 gives the JAAB an absolute discretion in the manner in which it carries out its functions it provides that the JAAB may

adopt such procedures as it thinks fit to carry out its functions and may inter alia;

- advertise for applications
- require completion of application forms
- consult persons concerning the suitability of applicants
- invite persons identified by the JAAB to submit their names for consideration
- arrange for interviews and
- do such things as it considers necessary to enable it to discharge its functions.

Section 16 obliges the JAAB to submit at least seven names to the Minister for consideration. Those named must in the opinion of the JAAB have displayed in their practice a degree of competence and probity appropriate to and consistent with the appointment concerned, be suitable on grounds of character and temperament and be otherwise suitable.

No guidance whatsoever is provided on the criteria to be taken into account by the JAAB in assessing the suitability of an applicant.

The language used in section 16 is permissive and vague. Words such as "character" "temperament" and "otherwise suitable" are all very subjective criteria. Dermot Feenan in his Article on Judicial appointments in Ireland Comparative Perspective (2008) 2 JSI p 46 points out that the risk associated with vague criteria, is a real danger of admitting bias.

The JAAB requires the completion of an application form where applicants must show "why they consider themselves suitable".

Applications must be accompanied by photographs.

JAAB has never exercised its power to interview a candidate.

This means that the assessment as to suitability is, made entirely on the basis of a written application form, soundings made to other persons and on the basis of references submitted. There is no way of knowing how applicants satisfy the criteria in section 16. The criteria are satisfied if the JAAB is of the opinion that they are.

The JAAB itself most recently in Chapter 4 of its annual report for 2015 acknowledged that it had not to date exercised its power to interview applicants. It pointed out that there are serious practical obstacles to the JAAB in conducting interviews and went on to state that generally the JAAB has sufficient information, which is provided by applicants themselves, to carry out its functions in each case.

The JAAB stressed that its role was to submit names of persons who are suitable for appointment rather than decide who should be appointed.

The inadequacies in the procedures adopted in carrying out the assessment to decide on suitability appear to be ignored. The JAAB instead expresses confidence in itself to know best which applicants are suitable.

In the 2015 Annual report the JAAB did acknowledge a weakness in its procedures in relation to the assessment of applicants on medical grounds. It expressed a concern that it had no power to have applicants medically assessed (whilst emphasising that it was not practical to expect the JAAB to arrange for medical examinations) and it recommended that it should be mandatory for any person whom the Minister proposes to recommend to the President for appointment to undergo a medical assessment prior to appointment. This is a sensible suggestion and is in line with best practice in relation to appointments in both the public and the private sector.

Feedback is not given to applicants and an applicant is never notified of success or otherwise. This fact is most unhelpful and emphasises the lack of transparency and accountability in the process.

The JAAB has established a set of rules for discharging its functions and the current rules are attached to Chapter 5 of the 2015 Annual Report. These rules are silent on the criteria used by JAAB members in making their decisions.

This lack of openness is compounded by the fact that no information is published on the method by which the Government selects the successful candidate from those recommended by the JAAB. Jennifer Carroll MacNeill, in The Politics of Judicial Selection in Ireland (Four Courts Press 2016) P132 provides an insight into the selection procedure and concludes that the decision is made by the Minister for Justice, the Taoiseach and the Attorney General.

The all Party Oireachtas Committee on the Constitution 4th Progress Report chaired by the late Brian Lenihan TD at P8 examined the method of appointment of judges in Ireland. The ideal in appointing judges was stated to be impartiality of all nominees and the determination to protect the independence of the judiciary.

The committee analysed the appointment of judges in Ireland by comparing it with practices in other common law countries.

The Committee took the view that the JAAB was working well and that the system should be retained. It felt that the Government had sufficient non-patrician advice from the JAAB and, as the executive of the elected representatives of the people, should retain the final decision. It went on to state that as the judicial candidates were already shortlisted by the JAAB strictly on merit that the government cannot be open to criticism in appointing only its own supporters rather than the suitably qualified person it chooses from the list.

The Report examined other aspects of the judiciary such conduct and security of tenure and the aspect of judicial appointments was the only one in respect of which no recommendations for reform were made.

The only conclusion to be drawn is that at the time there was no interest in or appetite for reform.

THE NEED FOR REFORM.

Paul Bartholomew conducted a study of Irish Judges in 1969. The study was undertaken to indicate the type of person who was a judge. The results of the survey were published in Bartholomew The Irish Judiciary 1971 (Dublin: I.P.A). Bartholomew conducted personal interviews with sitting and retired judges of all the Courts. He concluded that "A judicial appointment does not just happen. It is the finest and most desirable appointment that a Government can make." He found that judicial selection was tightly controlled by three individuals the Taoiseach, Attorney General and the Minister for Justice. No formal vote was taken at Cabinet Meetings, and nobody was appointed against the wishes of the Taoiseach. The President was not consulted but is told the name and makes the appointment.

In 2004 Carroll undertook a more limited study to update Bartholomew and asked then sitting members of the High Court and Supreme Court (appointed pre and post JAAB) why in their opinion they had been appointed and the role played by JAAB. Carroll Mc Neill remarks that what is remarkable is the strong convergence of views in their understanding of the essential features of the judicial appointments process pre and post 1995. The key finding was that there was no fundamental change in the way appointments were made or in the way government works in relation to such appointments.

Brian Cowen TD was part of a Ministerial subcommittee which led to the establishment of the JAAB. He advised against the establishment of the JAAB claiming that the establishment of the JAAB had nothing to do with meaningful judicial reform but was rather a short term political solution to a problem that had gone away noting that as a practitioner in the Courts, he anticipated "many problems in the event that these sections are agreed".

The JAAB was established not because of any desire for reform but rather as a political solution to a political problem that arose because of a disagreement between the members of the then coalition Government concerning judicial appointments.

The only conclusion to be reached is that the establishment of the JAAB does not appear to have made any significant improvement to the process of judicial appointment. Indeed, it may be argued that it has in fact hindered the process by making it more difficult for applicants who now have two hurdles to cross; being known by members of the JAAB and by the Government.

Carroll Mac Neill has come to the conclusion, based on her research, that the real determinate in judicial selection in Ireland is a personal or professional connection to the relevant decision maker. She submits that the problem for Government is the quality of information submitted to it by the JAAB and the problem for the JAAB is the lack of institutional support to enable a more rigorous assessment process.

She concluded that the JAAB has veered too far away from its statutory design. The quality of analysis of judicial candidates provided to Government for selection falls short of what Governments should have in making the selection. A lack of resources is partly to blame.

It is difficult to disagree with this analysis.

The Government launched a public consultation on a review of procedures for appointing judges in December 2013. The consultation sought submissions on eligibility, the need for the protection of judicial independence, the role of the JAAB and for the first time submissions were sought on the need for equality and diversity.

The Minister for Justice made reference to Judicial Appointments at the Law Society Annual Conference in 2013 wherein he said that "Having observed the JAAB system in action it is very much of its time and we could do better. The JAAB operate under the legislative framework they were given There is scope for a more transparent and accountable system which could promote more diversity in our judiciary".

Following the consultation, the Programme for Government in 2016 included an objective to replace the JAAB with a selection process that was fair, transparent and credible and the Government published the Scheme of Judicial Appointments and Commission Bill in December 2016.

THE SCHEME OF JUDICIAL APPOINTMENTS AND COMMISSION BILL 2016

The Government Bill proposes the establishment of a Judicial Appointments Commission with a lay chair and a lay majority having the dual role of (a) selecting persons for recommendation by the Government for judicial appointment and (b) preparing of codes of practice dealing with the selection process. All members of the Commission are to be appointed by the Public Appointments Service.

(a) The selection process

Three names only to be nominated for each vacancy and two additional names for each additional vacancy. The reduction to three names is to be welcomed as it limits the discretion of the Government in selection and minimises the opportunity for political patronage.

The role of the Commission is expanded to all appointments and the eligibility criteria are altered by permitting an examination of circumstances where academics may be eligible for judicial appointment so long as they have been a solicitor or a barrister. In this regard, it is worth noting that Baroness Hale in the House of Lords was an academic prior to appointment.

Importantly the Commission will be stand alone with its own Director and be properly resourced.

The guiding principles to apply in the judicial selection process is listed as independence, merit and gender balance. Diversity within the population as a whole to greatest extent possible is listed as being desirable and the necessity of applying best international practice to the greatest extent possible is the final principle listed.

It is disappointing that the achievement of diversity has been listed as being desirable rather than being an objective. It is appreciated that Ireland, because of its population, will always have a limited number of diverse applicants for judicial appointments but in order to ensure public confidence in the judiciary I believe that it is important that it is representative of the community as a whole.

(b) Preparation of codes of practice

Head 10 of the Bill deals with establishing codes of practice for researching and devising best practice in relation to the selection process. This task will be undertaken by a subcommittee and the codes must be approved by the Minister prior to adaption.

The reforms proposed by the Bill are to be welcomed. In particular the fact that the Public Appointments Service (PAS) has been given a role in selecting the membership of the Commission. The PAS has been central to a number of recent reforms such as the development of an independent, centralised, application and shortlisting process for appointments to State Boards.

PAS has also played a role in selecting the membership of the Independent Policing Authority, an independent body with a lay majority and a lay chair which makes appointments to some of the most sensitive positions in the country.

The experience and expertise available in the Public Appointments Service would be well deployed in assisting the Commission in interviewing applicants for judicial appointment.

The fact that the Commission will be stand alone with its own Director and be properly resourced gives confidence.

Both the Law Society and the Bar Council have made submissions to the Joint Committee on Justice and Equality on the Bill.

The Law Society welcomes the proposal that the new Commission is to be chaired by a layperson. On the other hand, the Bar Council believes that the proposal is not feasible. The Bar Council does not believe that any case has been made for the extension of eligibility for appointment to be made to legal academics.

The Law Society in its submission noted that judges of the High Court and the Supreme Court are overwhelmingly Dublin based and lived in Dublin prior to appointment, it submitted that the increased appointment of solicitors, who practice in every county of the State, would greatly enhance the geographical diversity of the judiciary.

The Government's controversial Judicial Appointments Commission Bill passed the second stage in the Dáil recently with support from Sinn Féin and left-wing TDs.

The bill is now likely to be approved by the Oireachtas in the autumn.

The next step for the legislation is for it to be examined by the Oireachtas select committee on justice and equality.

The Economy And Other Challenges For Irish Workplaces In 2017

by Patrick Walshe of Philip Lee Solicitors

There are many challenges, economic and otherwise, ahead for Irish employers in 2017 and beyond. This paper looks at some of them.

It is unlikely that we are going to see significant legislative changes in the immediate future – in some ways, we are already at "peak regulation" and there aren't many aspects of the employer-employee relationship that require further legislative intervention by the State. For that reason, challenges for employers in the immediate future are mainly likely to arise in discrete areas.

The same is largely true of claims before the Workplace Relations Commission – claims have now returned to their traditional low point after an increase caused by the economic collapse in 2007-2011, and there are less than 3,000 initiated annually. This means that in a workforce of over 2 million people, most employers are unlikely to encounter an employment tribunal claim in practice. That is very good news.

There are five main areas that employers should keep an eye on in 2017 and beyond and this paper examines each of these.

WHISTLEBLOWING

Whistleblowing has been the subject of considerable media and political attention in Ireland in recent years. There have been a number of high profile cases involving whistleblowers and the government believed it was necessary to put comprehensive whistleblowing legislation in place.

The result was the Protected Disclosures Act, 2014. Employers should handle with care. With its passing, the government can hardly be criticised for an insufficient response. If anything, as far as an employer is concerned, it may go too far. The implications for employers can be seen in the first statutory injunctions granted in 2016.

The legislation's main purpose is to protect workers and it prohibits penalisation of any kind (including dismissal, harassment, failure to promote etc) where an employee makes a "protected disclosure".

Normally, a protected disclosure arises where an employee forms a "reasonable belief" that information that comes to their attention in the course of their work "tends to show one or more relevant wrongdoings". The information must come to their attention in the course of their work – information learned outside of the workplace is not covered.

The range of "relevant wrongdoings" could not be wider – it runs from the possibility of crimes being committed to damage to the environment. All an employee has to do to be protected is form a "reasonable belief" that "relevant wrongdoing" occurred. It may be quite difficult in practice to prove that a belief was unreasonable. Also, the worker's motivation is irrelevant and an employee could, for example, act from malice or dislike of their employer. However, as long as they have this "reasonable belief", they cannot be punished for disclosure.

Another notable feature of the Act is that there is a presumption in favour of a disclosure being protected. The Act actually stipulates that in any proceedings, it shall be presumed that a disclosure is protected until the contrary is proved. This puts quite a heavy burden on employers – if they are accused of penalising a worker and face court proceedings, they will have to prove that the disclosure was not protected.

On the subject of proceedings, the Act adds two extremely powerful weapons to an employee's arsenal:

- The first of these is the power to seek a circuit court injunction restraining dismissal. Once a Judge forms a belief that there are "substantial grounds" that an employee has been terminated for making a protected disclosure, that Judge must grant an injunction restraining dismissal. This in itself is a novel remedy in Irish employment law.
- Separately, an employee who is penalised can bring a complaint to an Adjudication Officer in the Workplace Relations Commission and can be awarded damages up to a threshold of 5 years' remuneration. This is also a significant departure from the norm in employment law cases – in normal course, an employee's damages for dismissal are capped at two year's salary.

In 2016, the first two injunctions were granted in the circuit court. It is now clear that the courts are prepared to readily grant injunctions where employees allege that they have been penalised as a result of making a disclosure. Among other things, the first cases have demonstrated that:

- The courts will be flexible when it comes to an interpretation of "substantial grounds" and even if an employer adduces evidence that the dismissal was unrelated to the protected disclosure, the courts are likely to err on the side of caution (ie, grant the injunction).
- The underlying nature of the disclosure can be comparatively trivial – a complaint about such things as the state of workplace facilities will be accepted.
- A disclosure made after termination but during the notice period will be accepted.

It is clear that the intention of the legislation is to allow an employee to make a protected disclosure and then be utterly protected in their dealings with their employer. A leading employment law barrister recently described the legislation as providing "spectacular protection for employees" in the course of a case.

That is no exaggeration. Nobody is going to argue that genuine whistleblowers should be without a remedy. However, there must be a concern that these "spectacular protections" could be the subject of abuse by disgruntled employees. Such an employee will enjoy a great deal of protection in employment law. Their disclosures will be presumed to be true and an employer faces the difficult task of convincing a court (or the WRC) that a belief was "unreasonable". That may not be at all easy.

AU PAIRS AND INTERNS

The Workplace Relation's Commission decision in 2016 to award over €9,000 to a Spanish au pair generated a lot of attention.

The case involved an au pair who apparently worked at least 30 and sometimes 60 hours of work each week between August 2014 and January 2015. She was paid less than the minimum wage, was not given adequate rest breaks, did not have an annual leave entitlement and was required to work on public holidays.

She claimed on multiple grounds, which cumulatively added up to the award of €9,000. The family in question accepted the ruling and have compensated the au pair. However, the decision created a great deal of disquiet about the status of au pairs. There seems to have been a perception (one that was rudely shattered) that individuals providing services of value were not actually employees.

Not every Irish family employs an au pair, but many Irish workplaces benefit from the services of interns. Interns and au pairs share a lot of similarities – they are often considered to be a "third category" of worker but the reality is that there are only two categories in Irish law – the employed and the non-employed. If someone is providing services of value to you, they are an employee.

For families with au pairs, lessons have to be learned. It is entirely possible that workplaces with interns will have to grapple with a similar lesson at some point in the future. The status of interns has been a perennial issue in employment law for many years. There has not yet been a groundswell of claims by interns asserting employment law rights – but there could be.

Someone who works for you is almost inevitably going to be deemed to be your employee and will benefit from the following rights:

1. An employee is entitled to be paid the minimum wage – at the moment, this is €9.25 an hour.

2. An employee can't be expected to work more than 48 hours on average each week.
3. An employee is entitled to regular daily rest breaks and days off.
4. They are also entitled to at least 20 days paid leave for every year worked (and they have a pro rata entitlement where they only work part of the year). Employers are expected to maintain records of hours worked and holidays taken etc.
5. All employees are entitled to a written statement of terms and conditions of employment. The statement needs to cover core aspects of the relationship – including things like the rate of pay and working hours. If you haven't provided this, again you're at risk of a claim.
6. All employees are entitled to minimum notice periods - this ranges from 1 to 8 weeks depending on length of service.
7. An employee is entitled to enhanced rights once they have 52 weeks of continuous employment. That means that their dismissal is automatically deemed to be unfair and you'll have to prove otherwise.
8. You're responsible for the health and safety of your employees and if they are exposed to any danger in the workplace, you'll be responsible. This goes beyond physical risks – if an individual is stressed or harassed, there's the potential for a claim to exist too.

A genuine intern – someone who is in the workplace to observe and learn – is unlikely to be considered an employee. However, once that individual starts providing services of value, the door is opened and the potential for an employment claim exists if they aren't afforded their rights.

THE GIG ECONOMY AND EMPLOYMENT LAW

It is likely that the "gig economy" will be a challenge for employers in certain sectors in the immediate future. The "gig economy" is the subject of various different definitions but one good assessment that it is "a labour market categorised by the prevalence of short–term contracts or free-lance work, as opposed to permanent jobs".

In other words, the gig economy involves individuals working on discrete contracts, typically in service industries including taxis, food delivery, cleaning and others. The gig economy is categorised by technology innovation – where individuals are contracted to carry out work through apps or websites.

As far as employers are concerned, one major advantage of the gig economy is that frequently no employment relationship exists, in theory at least. However, it is not at all clear that employment law has kept pace with developments in technology and these issues are beginning to come to a head, particularly in the UK.

This can be very clearly seen from the recent Uber decision handed down by the UK's Employment Appeals Tribunal. In that decision, Uber sought to categorise drivers using its app as independent contractors; the Employment Tribunal disagreed and ruled that they were "workers" which meant, among other things, that they were entitled to holiday pay, sick pay and the minimum wage.

If this decision is upheld on appeal, approximately 30,000 Uber drivers' status will change from independent contractor to worker overnight.

The Uber challenge is not the only one in the pipeline, by far. Also in the UK, individuals working with Deliveroo have indicated they are going to pursue similar claims and it is quite clear that the issue of employment status for workers within the gig economy is not going to go away. In fact, it is entirely likely that this issue will become increasing difficult to grapple with.

As far as Ireland is concerned, we have yet to see movement by gig economy workers of the kind now occurring in the UK. However, Irish employers should not be complacent. It is true that English employment law diverges from Ireland - "employee" and "worker" are separate categories in the UK and the threshold for establishing that you are a "worker" is lower.

That said, the Deliveroo challenge referred to above will involve individuals working with Deliveroo arguing that they are full employees. If they succeed, there is a direct precedent for the Irish tribunals to potentially adopt. That could well have a significant effect on employment law in the gig economy in Ireland.

These are not trivial issues; it is estimated that up to 5 million people work in the UK's gig economy alone. While the numbers are likely to be smaller, Irish society has adopted technology platforms in identical fashion and we could well see similar developments here.

RETIREMENT

The question of retirement is likely to be a vexed issue for employers in 2017 and beyond. As of 2016, the **Equality (Miscellaneous Provisions) Act 2015** is in effect. This brings some clarity to the law around retirement in Ireland. The legislation provides that it is not discriminatory to fix a retirement age. However:

(a) This must be objectively and reasonably justified by a legitimate aim, and
(b) The means of achieving that legitimate aim must be appropriate and necessary.

This change does not mean that having a fixed retirement age is necessarily discriminatory. It simply means that employers must be in a position to justify having a fixed retirement age in the event of a claim for age discrimination.

It is entirely likely that claims for age discrimination (currently at a low level) are going to dramatically increase in the coming years.

The best way for employers to insulate against such a claim is to have in place a retirement policy that sets out the employer's position as far as retirement is concerned.

Separately, 65 is still largely the default retirement age in Ireland. Employers aren't obliged to have a retirement age at all, but if they are considering imposing one, they should consider bringing their fixed retirement age in line with the age of eligibility for the state pension (currently 66). The state pension age is due to increase to 67 in 2021 and to 68 in 2028.

On a practical level, there's less of a chance of a claim if an employee's income stream is not disrupted (i.e., they no longer have a salary, but they get the State Pension straight away).

The courts have considered a number of different justifications for having a retirement age at all. Obviously every different business will have a different set of justifications. However, there is some authority to suggest that a court may look more favourably on a retirement age that matches a State Pension age – because, again, the employee won't be without an income.

Employers should keep the question of retirement age on the radar as it is very likely that this issue will continue to create difficulties in the years to come. Having a written policy won't automatically mean that your retirement age will be upheld – but it's going to be much more difficult to apply one without a written policy.

BREXIT

The prospect of Brexit obviously carries with it some significant potential implications for the Irish economy. That is obviously a worrying prospect and could have indirect effect on the employer–employee relationship. Sadly, redundancies, lay-offs and salary cuts were all hallmarks of the last recession.

A separate question, though, is the potential underlying effect of Brexit on employment law here. Irish employees are unlikely to be directly affected by Brexit although Irish employers may encounter some issues. Employer issues are most likely to arise where either (a) the employer has an office in the UK as well as in Ireland and/or (b) the employer employs UK nationals in either country. Those issues will arise if the UK leaves the EU and EEA without any kind of deal being agreed.

Most obviously, if no deal is reached in relation to regular travel to and from the UK, individuals based in either country may encounter difficulties if they are regularly required to visit the other. That may make running a business more complicated.

Separately, it has been suggested in some quarters that the advent of Brexit could lead to a "two tiered" employment system where the Irish employees of a business based in both countries would enjoy more favourable terms and conditions of employment then their counterparts in the UK.

That possibility has been mooted in circumstances where the UK decides to repeal workers' rights originating in EU legislation. If this comes to pass, the impact on current UK workers may be less serious than has been suggested. Anyone with an existing contract of employment is likely to have many of the rights originating

from EU legislation incorporated into their terms and conditions of employment already. That is because the contract of employment will usually distil statutory rights directly into the contract of employment.

To take a simple example, if a piece of legislation prescribes a minimum wage and an employee's contract of employment reflects that, the mere fact that the legislation is repealed does not automatically mean that the employee loses the right to payment at the old rate (it might be different if contracts of employment specified that "the rate of pay is as set out in the Minimum Wage Act" but very few employment contracts utilise such a cumbersome wording).

That said, there is definitively a prospect that if the UK starts to repeal EU–inspired employment legislation en masse, new employees entering the jobs market in the UK may well benefit from less protective terms and conditions of employment and that could certainly be a concern in the future.

For the most part, though, there is likely to be little or no significant direct impact upon Irish employment law as a result of Brexit. That is not to say, of course, that the exit of the UK from the EU and the EEA is not a worrying problem for Irish employers and employees alike.

Patrick Walshe
PARTNER
Employment law specialist

+353 (0) 1 237 3700
pwalshe@philiplee.ie

Philip Lee Solicitors, 7/8 Wilton Terrace Dublin 2
(Dublin, Brussels and San Francisco)

Celebratory Photographs of IILEX over the past 30 years

30 years ago! Fellows of the Irish Institute of Legal Executives (then called Telecom Eireann Solicitors Office) after receiving their parchments with Dr. Eamonn G. Hall, former Company Solicitor and the late Mr. Harry Hill, former Master of the High Court.

Fellows at the 21st Anniversary Dinner: Joseph Menton, Patricia Chapman, Veronica Duffy, Maria Kielty, Pauline Rogers and Frank Crummey

Ian Ashley-Smith First Legal Executive Judge England & Wales.

Frank Crummey, Founding Fellow and his wife Evelyn.

Gillian O'Reilly, Former President & Fiona Kelly. Former Administrator

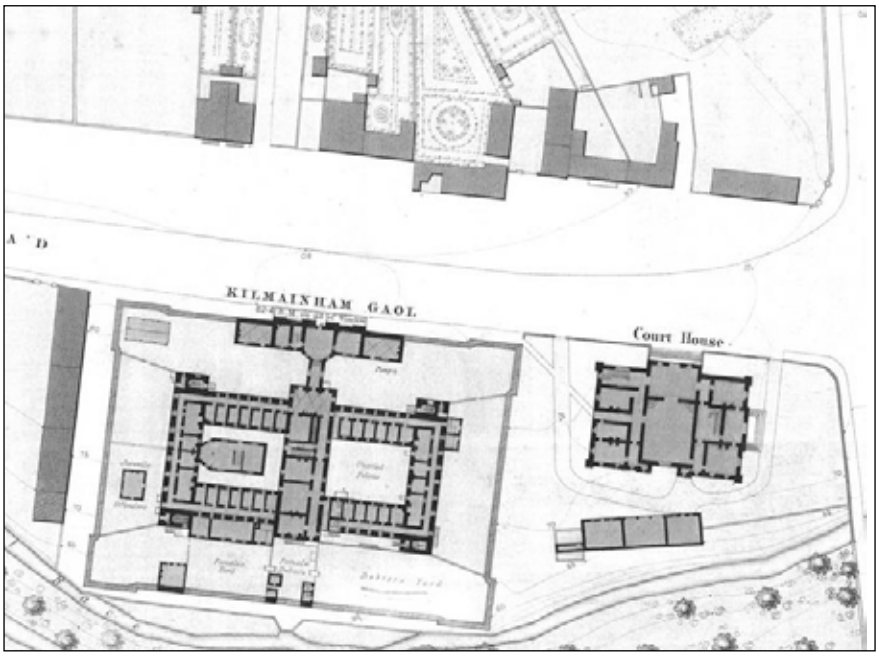
Kilmainham Courthouse
A Brief Look Inside !

Kilmainham Gaol Courthouse

The Irish Architecture Foundation in 2016 marked the 11th OPEN HOUSE DUBLIN, the longest-running Irish event, from 14th to 16th Oct. Open House Dublin's 2016 theme was The Presence of the Past. In the commemorative year of revolution leading to Irish independence, Open House Dublin revealed how the development of our cityscape conveys the changing social, political and cultural priorities of Dublin, throughout history and into the future. Highlights and first time buildings included the Magazine Fort at Phoenix Park, Kilmainham Courthouse, and GPO.

A NEO-CLASSICAL SESSIONS HOUSE DESIGNED BY WILLIAM FARRELL (d.1851)

The former Kilmainham courthouse was opened in 1820 and served the district until its final closure in 2008. The imposing granite building replaced an earlier courthouse whose most infamous chairman was Judge John (Bully) Egan, a noted dueller who may well have offered his nickname to the nearby Bully's Acre, a well known spot to settle 'affairs of honour' in addition to being a free burial ground. The building is now part of the Kilmainham Gaol complex.



An extract from the Ordnance Survey published in 1847 showing the original layout of Kilmainham Gaol with two "U"-shaped wings enclosing courtyards on either side of a central block. The entrance block, which included accommodations for the gaolers, fronts directly onto Inchicore Road.

This neo-Classical "sessions house" at Kilmainham, Dublin, was designed by William Farrell and opened in 1820. It replaced an older structure and is sited next to the gaol. Closed in 2008, the courthouse was given to the Office of Public Works in 2013 in an official ceremony that saw the keys handed over by Mrs. Susan Denham, Chief Justice of Ireland. Following a sensitive restoration, the courthouse reopened on Wednesday, 30th March 2016, as the new visitor centre for Kilmainham Gaol giving visitors an experience of trial by jury before moving on to serve their sentence in the adjacent prison.

The centrepiece of the restored courthouse is the double-height galleried courtroom with its timber panelled fittings dating from 1865. Visitors will also see a recently uncovered flight of granite steps leading to holding cells in the basement and a decorative plasterwork ceiling rose overhead painted in Wedgwood blue and white.

Visitors are free to roam the surrounding corridors where incised graffiti prepares the eye for the wealth of drawings, etchings and inscriptions on the walls of the adjacent prison.

Kilmainham Courthouse opened in 1820, replacing a much older courthouse that probably stood beside Old Kilmainham Gaol (most likely in Mount Brown, Old Kilmainham). It served as a courthouse until 2008 (with a break between 1910 and 1924), but over the years it had many other uses. Between 1820 and 1910 it was A Sessions House where the Petty Sessions were held, and between 1820 and 1898 it fulfilled many of the functions of a county hall, serving as the seat of local government and as a polling station for parliamentary and other elections. In the twentieth century the building was used simultaneously as a District Court, a Family Law Court and the headquarters of Dublin County Library.

LEGAL MUSEUM

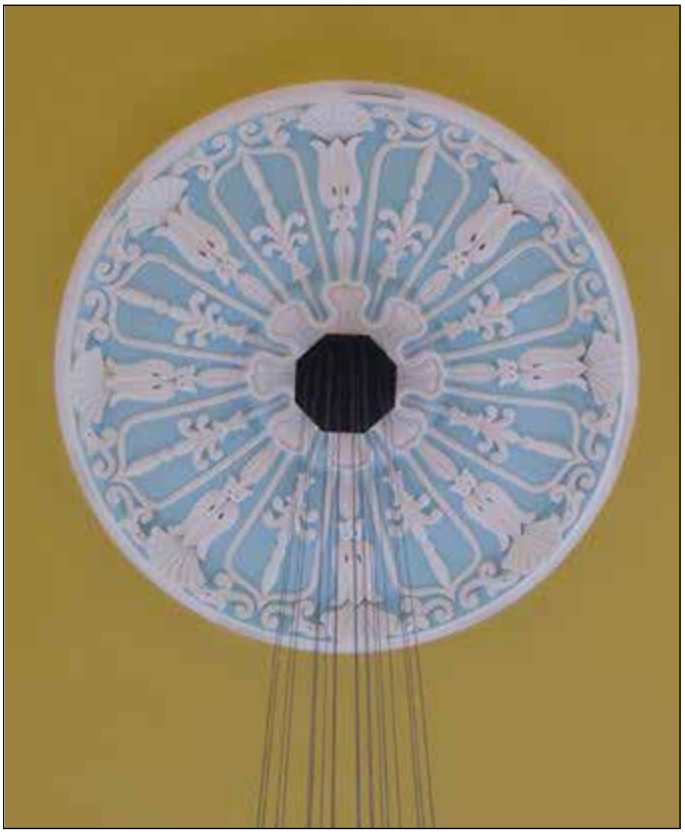
Built in 1820 to replace an older structure, the courthouse sited next to the former gaol is now a legal museum.

Kilmainham Gaol is now one of the most popular heritage attractions in the state, attracting over 310,000 visitors a year. As 2016 approached, work was undertaken to enhance and expand the facilities of the Gaol.

Kilmainham Gaol Courthouse.

This included the renovation of the adjacent 19th Century courthouse. This building was adapted to provide ancillary curatorial, exhibition, research, and welfare facilities. This is to deal with the expected increase in visitors to this historic location. In addition, the recently reopened Irish Museum of Modern Art, located in the grounds of the Royal Hospital, Kilmainham, attracts over 400,000 visitors each year from Ireland and abroad.

Sensitive restoration work has been carried out on the courthouse, included sourcing missing stone pieces from a County Clare stone quarry nearest to original for restoration, The team, Architect: OPW Architects & Mahoney Architecture. Client: OPW. Engineers: Malachy Walsh & Partners. Quantity Surveyors: Leonard & Williams QS. Dublin City Council's City Architects' office works on issues affecting the city's buildings and public spaces and about designing to improve them.



Restored Ceiling Rose and new light fitting .

With this in mind, the aim of this project has been to improve the pedestrian experience connecting these popular attractions. Measures were introduced to reduce and calm traffic along the Inchicore Road, allowing the pavement in front of the Gaol to be expanded and upgraded to create a new pedestrian plaza. This new public space provides appropriate outdoor facilities for both visitors and residents of the area and also provides a link to the grounds of IMMA.

This work builds on previous plans for the area which received approval in 2008. However these plans were reassessed to comply with the requirements of the Design Manual for Urban Roads and Streets. The revised plans also included the provision of 40 Dublin Bikes for this space. The scheme addressed issues such as the design of street furniture, the lighting of both street and buildings, and the retention of existing trees on Inchicore Road.

The newly restored Courthouse and upstairs cafe in these amazing surroundings have open access to the public and recommended visiting to be of interest to legal eagles!

Recently uncovered flight of granite steps leading to holding cells in the basement.

BIBLIOGRAPHY:

Irish Architecture Foundation-Open House Dublin.

Royal Institute of the Architects of Ireland RIAI.

Buildings of Ireland, National Inventory of Architectural Heritage.

Liberties Dublin.

Archiseek.

Photo credits:
Irish Architecture Foundation Open House Dublin.and Office of Public Works.

Mary Foley visited Kilmainham Courthouse for The Brief ! is a Fellow of Irish Institute of Legal Executives IILEX and volunteer Tour Guide for Irish Architecture Foundation, Open House Dublin.

MY DIPLOMA IN LEGAL STUDIES AND PRACTICE PREPARED ME FOR:

JUMP AHEAD

GRIFFITH COLLEGE

VISIT WWW.GRIFFITH.IE/LAW