

Civil litigation in Ireland: a new era

Mary Purtill , Head of
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The Civil Liability and Courts Act, 2004 was signed by the President in July and its main provisions came into operation on 20 September 2004. The remaining sections of the Act will not come into force until 31 March 2005.

The Act introduces wide-ranging reforms in the conduct of civil litigation, the overall aim of which is to streamline procedures and reduce costs associated with bringing cases before the courts. Coupled with the introduction of the Personal Injuries Assessment Board, the new Act represents the Government's legislative response to the "compensation culture".

The following is a glossary of the key changes introduced by the Act:

Reduction of statutory limitation period to 2 years

From 31 March 2005, a cause of action occurring before the commencement of the Act must be brought either 2 years from the date of commencement of the Act or 3 years from the date of the cause of action, whichever occurs first.

Letter of claim

A plaintiff must serve a notice in writing on the proposed defendant detailing the nature of the wrong alleged to have been committed within 2 months from the date of the cause of action or as soon as practicable thereafter.

Where this does not occur, a judge hearing the action may draw such inferences as appear proper or penalise the plaintiff on costs.

Proceedings

Personal Injuries Summons (which will replace the current Plenary Summons, Civil Bill and Civil Summons) must set out the following:

Plaintiff's name, address, occupation, PPS number
Defendant's name, address and occupation
Specific particulars of claim
Specific particulars of negligence
Details of Special Damages

Non-compliance may lead to the action being stayed or dismissed upon application to the court.

Request for further information

The plaintiff must provide details of:

- any personal injuries action in which a court made an award, or which was withdrawn or settled
- particulars of injuries/treatment relevant to the action and details of medical practitioners.
- details of earnings.

Defence

The defendant must specify what allegations it does and does not require proof of, why the claim is denied and why contributory negligence is pleaded, if this is the case.

Verifying affidavit

The plaintiff must swear an affidavit verifying allegations or assertions contained in pleadings.

The defendant must swear an affidavit where it makes allegations or assertions against another party to an action.

The affidavit, in each instance, must be lodged in court within 21 days of service of the pleading.

It is an offence to make a statement that is false or misleading in any material respect in an affidavit.

This section may also have a retrospective effect. In respect of proceedings brought before the commencement of the Act, this provision applies where a party to an action requires a sworn affidavit. An affidavit cannot be requested any later than 21 days before the date of trial.

Mediation conference

Where a party to an action so requests, the court may direct that a settlement meeting take place, at a time and place agreed by the parties or as ordered by the court.

A chairperson shall be appointed by agreement of the parties or by the court.

All notes, communications, records etc are confidential.

The court directs who pays the costs of the conference.

The Chairperson reports outcome of settlement meeting to the court.

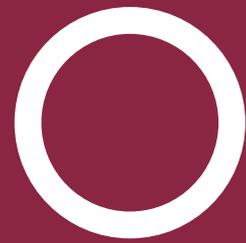
Failure by a party to comply with a direction may result in an award of costs against that party.

Formal offers

Each party must serve a notice in writing of an offer of terms of settlement after a date yet to be prescribed.

A copy of the formal offer must be lodged in court after the expiration of a period yet to be prescribed.

If the defendant is not prepared to pay any sum in settlement, the plaintiff must be given notice in writing.



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continued on page 3

Bullying at work

The Minister for Labour Affairs has established an expert advisory group on bullying in the workplace. The Task Force will build on the work of the Anti-Bullying Taskforce and examine preventative means and measures for identifying bullying at an early stage. The Advisory Group, which was established in August 2004, is due to report to the Minister by the end of November.

Legal costs

A group to examine the costs of conducting civil litigation has been established by the Minister for Justice, Equality and Law Reform. The group will examine the current level of legal fees and costs and their calculation and will also consider whether a scale of costs for solicitors and barristers should be made by way of regulation. The group are expected to report by the end of April 2005.

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The regulation of financial intermediaries

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The Central Bank and Financial Services Authority of Ireland Act, 2004 introduced a framework for regulation of the financial services sector in Ireland and established the Irish Financial Services Regulatory Authority, which is responsible for enforcing the legislation. The Act, which is detailed and wide in its scope, covers both investment and mortgage intermediaries. Intermediaries operate by selling and advising on products produced by banks, building societies, other credit institutions or insurance companies.

Investment intermediaries

The Investment Intermediaries Act, 1995 (the "1995 Act") regulates businesses that provide financial services to their clients. The Act attempted to regulate an industry which was previously very wide in its scope, and included door to door salesmen as well as established brokering institutions.

The 1995 Act, as amended, applies to the following business categories:

Investment business firms

To fall within this category a firm must either:

- provide investment business services, ie receive and transmit orders for investment instruments; or
- give investment advice, ie advice on the purchasing, selling, underwriting etc of investment instruments.

Stockbrokers, who fall within this category, were entirely unregulated before the 1995 Act was introduced.

Investment product intermediaries

These are investment business firms such as tied agents or brokers that receive and transmit orders in relation to, for example, bonds listed on a stock exchange, tracker bonds, insurance policies or investment business firms who act as a deposit agent or a deposit broker. There is a further sub-set of this category known as 'restricted activity investment product intermediaries' who have certain characteristics which differentiate them ie they can receive orders for investment instruments from a third party and transmit them directly to the product producer but they cannot hold any client funds.

Insurance intermediaries

Insurance intermediaries assist third parties to take up insurance or provide advice on insurance ie insurance brokers.

The 1995 Act specifically excludes a number of categories from its remit including persons who provide advice to their group companies, credit institutions, An Post and solicitors.

IFSRA

The Central Bank and Financial Services Authority of Ireland Act, 2004 set up the Irish Financial Services Regulatory Authority (IFSRA) which now acts as a regulator of insurance and investment intermediaries.

Together, these acts broadly define the objectives of regulation of investment intermediaries. The legislation establishes the framework within which IFSRA must work when authorising and supervising investment firms; criteria for authorisation; the ability to impose conditions and requirements on firms; the powers available to IFSRA officers when inspecting firms and the ability to issue directions.

The IFSRA maintains a Register of Investment Product Intermediaries which provides the status of each intermediary and a list of product producers from whom it holds an appointment. A product producer will usually be a bank, building society or insurance company, which may sell its own products either directly or through intermediaries. Common examples of such intermediaries would be insurance brokers and stockbrokers.

Investment and insurance intermediaries are divided into two categories. If, as a consumer, you are dealing with either category of intermediary you should be aware of the following differences:

Multi-agency intermediaries

A multi-agency intermediary is an investment business firm that may receive and transmit orders for investment instruments and provide advice on investment instruments only to product producers from whom it holds an appointment in writing.

Authorised advisors

An authorised advisor is an investment business firm that can provide investment advice on investment instruments without the necessity to hold a letter of appointment. In addition it can receive and transmit orders to product producers from whom it holds a letter of appointment. An authorised advisor is obliged to recommend the most suitable investment product available in the market, regardless of whether or not it holds an appointment from the relevant product producer.

IFSRA and the Central Bank have produced Codes of Conduct and practice for both categories of intermediary. The Codes deal with consumer supervisory issues and set out a complaints procedure system. An investment intermediary will also be required to submit financial information and any additional

Civil litigation in Ireland: a new era (Cont'd)

As with lodgements and tender offers, a judge will be informed of a formal offer after he/she has delivered judgement.

The rules in relation to lodgements and tender offers remain.

Pre-trial hearings

The court may direct a pre-trial hearing to determine the matters in dispute.

Expert evidence

The court may appoint an 'approved person' to investigate and give expert evidence on such matters as the court directs.

Book of Quantum

In assessing damages the court shall have regard to the Personal Injuries Assessment Board Book of Quantum. Further, the Minister may, by regulation, prescribe actuarial rates and a discount rate in respect of future financial loss.

False evidence & fraudulent actions

It is an offence to give false or misleading evidence. This applies to cases after the commencement date of the Act and those pending.

It is an offence to give false or misleading information to a solicitor, a person acting on behalf of a solicitor or an expert engaged by either the plaintiff or defendant.

Under Section 26 the court shall dismiss an action where a plaintiff has given false or misleading evidence or has sworn a false or misleading affidavit, unless for reasons which the court has to state in its decision, the dismissal of the action would result in injustice being done.

Offences

On indictment, a fine not exceeding €100,000 or a maximum of 10 years imprisonment or both.

On summary conviction, a fine not exceeding €3,000 or a maximum of 12 months imprisonment or both.

Collateral benefits

Section 50 of the 1961 Act is amended to allow account to be taken of any charitable gift made to the plaintiff by the defendant in consequence of the death of the deceased. The defendant must set out in writing when making the gift that if the plaintiff recovers damages the defendant will apply to have the award reduced by an amount equal to the amount of the gift or as appropriate.

Similar provision is made for actions for personal injuries not resulting in death and also for the deduction of payments made to employees by way of remuneration.

This provision does not apply to causes of action accruing before the commencement of the Act.

Witnesses

Under Section 54 (1) the court may direct that a witness does not attend the trial until he or she is called to give evidence.

The court may also give directions that the said witness does not communicate with other witnesses who are to give evidence or receive information which might influence him or her giving evidence.

Conclusion

Many of the provisions of the Act are geared towards tightening up the current procedures. They are intended to narrow the issues between the parties and to discourage fraudulent or exaggerated claims. It remains to be seen how the punitive measures contained in the Act are put into practice.

Disability Bill

The Department of Justice, Equality and Law Reform published the Disability Bill on 21 September 2004. The Bill provides a framework for assessing people with disabilities and the drawing up of individual service plans which will be monitored by the proposed Health Information Quality Authority. Assessments for housing, social assistance and training will be provided through the new statute-based liaison officers in health boards and the new advocacy service in Comhairle. Complaints and appeals will be dealt with through an appeals mechanism via a complaints officer in each health board.

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News from the Leeds Office: Commonhold and leasehold reform

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Property developers in England and Wales are now able to base new developments on a commonhold (as opposed to a leasehold) structure.

The commonhold legal structure, which was introduced in England and Wales on 27 September 2004, is similar to arrangements found in other jurisdictions, in particular North America, where commonhold has been in operation for many years.

Commonhold property

In commonhold structures the property in a development is owned by a Commonhold Association, which owns and manages the common parts of a development. The Association is made up of members who are owners of freehold units within the development. A Commonhold Community Statement sets out the rules governing the development and the Association's rules and Community Statement are prescribed by the Commonhold and Leasehold Reform Act, 2002 and supplemented by the Commonhold Regulations 2004.

Management of a commonhold development

The community statement kicks in from the sale of the first units in the development. It provides that the Commonhold Association will be responsible for managing the development (which may be done through professional managing agents). The Commonhold Association will be a company limited by guarantee and registered at the Companies Registry. Only owners of freehold units can be members.

The board of the Commonhold Association has a duty to enforce the obligations set out in the Community Statement. This includes the making of an annual commonhold assessment (akin to a service charge). Unit holders have the right to give their views upon the assessment to

the Commonhold Association.

Disputes must be resolved through conciliation and mediation with access to a Commonhold Ombudsman.

Importantly for investors, the Commonhold Association can make no restriction upon the disposition of a unit in the development, whether by way of sale or mortgage. Any debts owed to the Commonhold Association at the time of the transfer become the responsibility of the new owner of the unit.

Under commonhold, it is not possible to grant a long lease of units at a premium. However, it is possible to lease units on an ordinary short term tenancy in the usual way and so this provision should not impact on investors.

Advantages for investors

Investors should consider carefully the advantages of the commonhold structure:

- Mortgage lenders may view commonhold as an attractive option from a valuation point of view because there is no term of years under a lease which reduces over a period of time. Valuation is straightforward as the unit will be held as a freehold in the same way as, for example, a standard freehold detached house.
- The common parts of the development cannot be transferred to a commercial company interested in maximising profits on the management of the development. Whilst professional managing agents will be used, they will be employed by the Commonhold Association itself, so their fees will be subject to more scrutiny than may often be the case under leasehold arrangements.
- The provisions of the Commonhold Community Statement are prescribed by the Commonhold Regulations 2004. This reduces the risk for investors as their investment

property is subject to standard terms without signing up to any unduly onerous legal conditions.

- Unlike some leasehold developments there will be no fetters upon the sale or mortgage of units in a commonhold development. Such constraints in leasehold arrangements can sometimes hold up a sale or mortgage and increase sale or mortgage costs.

The future

The future for commonhold is undoubtedly full of potential and presents considerable advantages for investors and lenders alike. In recent years a number of statutes have been passed which have increased the accountability of freeholders in managing large blocks but the costs and time spent in operating such legislation can be high, both for tenants and landlords.

Under the commonhold system, the owners of units within the block have a vested interest in its management and the terms of the management are standardised. The potential for conflict is therefore reduced.

The potential advantages for lenders are clear in that valuation issues are simplified. The Council of Mortgage Lenders in England and Wales is currently considering amendments to their Lenders Handbook which governs the instructions they provide to solicitors in respect of residential conveyancing transactions. Once the amendments have been made to the guidance set out in the Handbook, the way is open for volume lending on commonhold to take place.

We have yet to see the release of large-scale commonhold developments but once this happens (and professionals and investors become more familiar with the regime) it is likely that it will prove to be an attractive investment proposition.

The regulation of financial intermediaries (Cont'd)

information that may be required by IFSRA. IFSRA will carry out on-site inspections which consist of an examination of financial books and records, operations, procedures and controls designed to establish whether a firm is operating in accordance with the requirements imposed by IFSRA.

Mortgage broker services

Mortgages intermediaries are regulated separately under the Consumer Credit Act,

1995. A mortgage intermediary is a person, other than a mortgage lender or credit institution, who in return for a commission or payment arranges or offers to arrange the provision of a housing loan by a mortgage lender.

A mortgage intermediary must hold an authorisation granted by IFSRA and hold a letter of appointment in writing from each undertaking for which he is an intermediary.

The future

Intermediaries are playing an increasingly important role in a financial services market which is becoming more tightly regulated. Their role is gaining even more importance given the trend towards branch closures by banks and their outsourcing of the selling function to intermediaries and brokers.