

THE WRIT

THE LAW SOCIETY
OF NORTHERN IRELAND



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OF NORTHERN IRELAND

ISSUE 236 Spring 2021



Trade Agreements ¹

Protocol

Co-operation

Restrictions

THIS ISSUE

The road ahead after Brexit

Brexit and the NI Protocol

Professor Katy Hayward examines the constitutional position

The Bridge to Adequacy

Fiona Donnelly outlines provisions for adequate data protection

Brexit and Immigration Law

Brian Moss explores the Settlement Scheme, employing migrant workers and the new Scheme for British National (overseas) passport holders



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I very much hope that this may be one of the last issues of **The Writ** to mention the Coronavirus pandemic. While the pandemic may not be over, I believe there are grounds for at least cautious optimism that there is at long last light at the end of the very dark tunnel. A practical example of this is that I expect Law Society House to reopen before the Summer. More news on that will follow in an E-former nearer the time.

As Members will know, the Society has been surveying law firms to help us to better understand the impact of the pandemic on the legal services sector of the economy. You can read about the most recent survey in this issue. The main message appears to be that firms have in many instances adjusted their cost base and are now seeing encouraging levels of business activity other than in areas of legal work which are reliant on a throughput of court cases where the recovery is more patchy.

In this issue you can also read about Brexit. No, it hasn't gone away! The outworking of the UK withdrawal from the EU is covered in several articles in this issue. You can also read about the Memorandum of Understanding the Society has entered into with the Law Society of Ireland in order to secure continuity of cross-border legal practice in the post-Brexit environment.

I would also draw your attention to an interesting report on the activities of Lisburn Solicitors Association. We have an active network of local Associations and we hope to feature new articles about them in future issues of **The Writ**.

David A Lavery CB
Chief Executive

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President's Message

If I cast my mind back to the start of last year, I certainly did not imagine then that it would still be my responsibility, more than a year later, to pen this message to you. It is a privilege to be able to do so and I am very grateful to the Society's Council for taking the rather unusual step last November of re-electing me to serve a second term as President. At that time a distinguished Past President jokingly remarked that he would remember my first year in office chiefly because it marked the demise of the sandwich lunch which traditionally preceded Council meetings. This has always been viewed as an important way for Council members to get to know one another and to promote a sense of collegiality between them. The same applied to the many Committee meetings which used to take place over lunchtime in Law Society House on an almost daily basis. Admittedly, there was always the added consideration that a hungry Council or Committee member is not necessarily a productive one, so the provision of a modest lunch did involve a degree of self-interest on the Society's part. Sadly, the pandemic has largely put paid to any such opportunities for social interaction for the time being. However, I hope that, as Mark Twain might have said, reports of the death of the communal sandwich lunch are an exaggeration and that it will revive as soon as circumstances permit.

The Society's Council and Committees may not be meeting in person at present but business is very much continuing as usual. Space constraints preclude me from giving you a detailed account of all the Society's activities so far this year, so I will mention just a couple of highlights.

Work on the new Resolution Centre has proceeded smoothly on the second floor of Law Society House and is now largely complete. Audio visual equipment is currently being installed and furniture is about to be delivered. A recent walk-through revealed that this new facility looks even better in reality than it did on the design drawings. I have

no doubt that members and their clients will find it an excellent venue for their meetings, consultations, mediations and other events and I encourage you all to make full use of it.

The Centre should be ready for use after Easter, when a 'soft launch,' largely confined to the Society's own activities, is planned. This will give an opportunity to iron out any 'teething' problems before the facilities are made fully available for members' use from September onwards.

Members will be pleased to learn that the sale of the Society's controlling shareholding in Law Society (NI) Financial Advice Limited was completed on 1 March. The sale allows the Society not only to withdraw from a highly regulated business sector which carries significant financial and reputational risk but also to recover its total investment in the company and to realise a significant profit for the benefit of the Society. Just a few short years ago, such a favourable outcome would have been unthinkable. The sale was the culmination of a lengthy review process led by our Past President James Cooper and the Chief Executive, David Lavery, assisted by a panel of senior members of the profession. James and David, with invaluable support from Chris Houston, the Society's Finance Director, put a colossal amount of time and effort into negotiating the terms of sale and the profession is deeply indebted to them. I would also like to pay tribute to another Past President, Rory McShane, who, as a Chair of the Board of Directors of the company, demonstrated huge commitment to and belief in the company and helped to steer it through some very troubled waters to a safe haven.

As the transition phase of the UK-EU Withdrawal Agreement expired at the end of 2020, we must all now begin to adjust to life in a post-Brexit era and it should come as no real surprise that this is the theme of this edition of **The Writ**. I hope you will enjoy the wealth of informative and entertaining material which it contains.

Rowan White
President



Memorandum of Understanding on Practice Rights with the Law Society of Ireland



David A Lavery CB
Chief Executive

The United Kingdom's withdrawal from the European Union will impact on many aspects of our daily lives, both personal and professional. As lawyers, we are no longer able to rely on the Lawyers Directive to facilitate cross-border legal practice within Europe. This has an immediate and obvious impact for Solicitors in Northern Ireland who have a cross-border aspect to their practice.



For many practitioners, uninterrupted cross-border practice is a vital part of their daily business. In light of this, and also in recognition of the long-standing arrangements on reciprocal recognition of qualification and admission rights, it has been an important objective for the Law Society of Northern Ireland to preserve the continuation of North-South practice in the post-Brexit context.

Following initial discussions with the Law Society of Ireland in Autumn 2019, the concept was developed into a Memorandum of Understanding ('MOU') on Cross-Border Practice. The MOU operates as a Mutual Recognition Agreement and supports the

continuation of cross-border legal practice on the Island of Ireland.

The MOU is drafted to give assurance to the profession that both Societies expect reciprocal recognition to continue so that the ability to practice on the island is not impacted. The MOU represents the shared understandings and common purposes of our respective legislative and regulatory provisions in relation to solicitors practising in both jurisdictions.

In the MOU the two Societies reaffirm their commitment to facilitate seamless mutual recognition, admission and practice of Ireland and Northern Ireland solicitors as between the two jurisdictions. The provision of legal services by a solicitor of a client's choosing on each side of the border is a fundamental pillar of legal practice on the Island of Ireland and contributes to the betterment of our respective economies.

The full text of the MOU can be [accessed here](#) Members will be required to login to download.

Practising Certificate Application Process 2021 – an update



Chris Houston
Head of Finance

Part II of the Solicitors (NI) Order 1976 ("the Order") requires an application by a solicitor for a practising certificate "in such form and in accordance with such requirements, and shall be accompanied by a fee of such amount as may be prescribed."

The application process was until 2020 a paper-based one with members completing a physical form and providing a copy of their PI insurance certificate along with their payment, often by cheque, which was then sent to the Society.

However, the Society responded to the impact of the coronavirus pandemic during 2020 with a number of initiatives. Initially there was a 50% refund of the 2020 practising certificate fee to members in practice, followed by a £100 reduction in the fee for 2021 and the Society then embarked on a process to digitise the practising certificate application procedure in order to increase the efficiency of the process for members, which, for the first time, provided enhanced digital payment options and a digital practicing certificate.

The new online process went live in time for the 2021 renewal process and the Society is pleased to report on its success. Three payment options were offered to the members;

- Bank transfer;
- Credit/debit card; or
- Direct debit in quarterly instalments

with the large majority of members opting to make payment by bank transfer.

Applications for renewal could either be submitted by the Society's website or by email. Practically all applications were submitted via the website, and feedback from members has been highly encouraging. This is also borne out by the statistics as 97% of applications were received by the closing date.

The Society is also pleased to report that voluntary contributions to the Solicitors' Benevolent Association fund which were made as part of the online application process are in line with recent years.

Membership Survey



Paul O'Connor
Head of Communications

In **May 2020** and **November 2020**, the Law Society of Northern Ireland engaged **Cognisense**, a professional research and marketing company to undertake a survey of solicitor firms in Northern Ireland.

The purpose of the two surveys was to establish the ongoing impact of the Covid-19 pandemic on solicitor firms and to identify ways in which the Society could support its members moving forward.

The survey was delivered via electronic methodology both in May 2020 and November 2020.

Over **1000** principals from **470** solicitor firms were sent the secure confidential survey on both occasions with one response required per firm.

- A total of **317** responses were received to the **May 2020** survey.
- A total of **236** responses were received to the **November 2020** survey.

The Society is pleased to provide members with the comparative findings of both surveys below.



Furlough of staff

81% ↓ 42%

- In May 2020, **81%** stated that they had furloughed between 1 and 10 employees.
- This figure decreased significantly to **42%** in November 2020.

39% ↑ 62%

- There were corresponding significant increases in the number of solicitors who were **not** on Furlough in November 2020 from **39% - 62%**

- There were fewer significant changes in the number of **"Secretarial/Support Staff"** on furlough between May 2020 and Nov/Dec 2020.

12% ↑ 31%

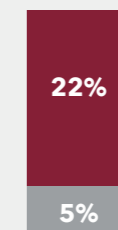
- However Member firms with 2-3 staff on furlough increased significantly from **12%** to **31%** over this time.

76% ↑ 90%

- There were corresponding (though not as marked) increases in the number of **Paralegals** who were **not** on Furlough in November 2020 from 76% to 90%.

- **6%** of member firms had **1 trainee** on Furlough in November 2020.

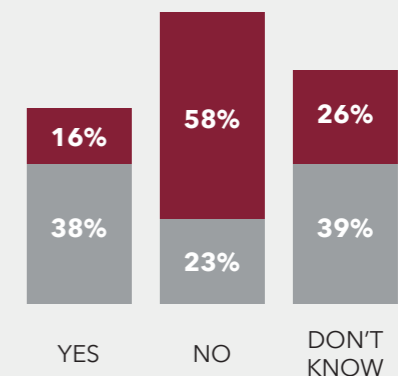
Redundancies



- In May 2020, **5%** of respondents stated that they had made redundancies.
- In November/December 2020, the number stating that they had made redundancies has increased significantly to **22%**.
- Within this **Secretarial/Support Staff** featured most significantly here (77 positions made redundant).

■ November/December 2020 ■ May 2020

Future redundancies



- In May 2020 almost 2 in 5 (**38%**) claimed that they were likely to make further redundancies, with a similar proportion (**39%**) who "don't know". Under a quarter (**23%**) stated they would not be taking such steps.
- These percentages have reduced significantly in November 2020 with **58%** stating that there would be no further redundancies.

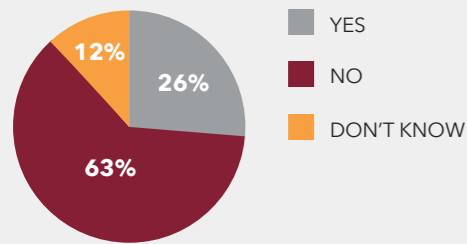
■ November/December 2020 ■ May 2020

Impact on salaries and working hours

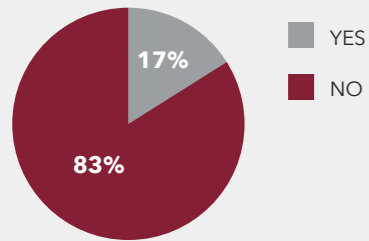
66%
30%

- In May 2020, respondents stating that they were likely to reduce working hours or salaries dominated here (66%). Circa a quarter (24%) stated that they didn't know, with 1 in 10 suggesting they would not do so.
- In November 2020, the number stating that they would reduce working hours and salaries has reduced significantly from 66% to 30%.

Impact on trainees



- In May 2020, 26% of member firms stated that they would take on trainee solicitors, almost two thirds stated that they would not and 12% did not know.

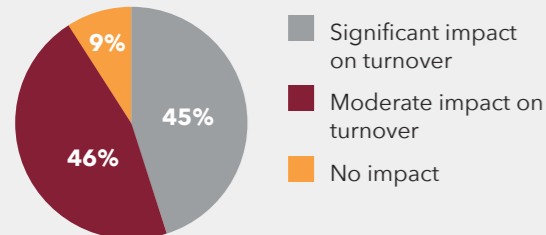


- In November/December 2020, 17% of member firms stated that they had taken on trainee solicitors. The vast majority of these took on one trainee.

Recruitment of new staff within 6 months

- The vast majority of respondents (71%) stated that they were not anticipating recruiting any new staff in the next six months.

Impact on Turnover



Comparing Jan/Nov 2020 figures we can see:

- 91% of member firms indicated that the Covid-19 pandemic had had an impact on the turnover of their firm.
- Within this, 45% stated that the impact had been significant.
- 95% of member firms had experienced up to 50% decrease in turnover. Within this, the highest was 31% of firms with a 21% - 30% decrease in turnover.

Impact on areas of business

Areas of work undertaken by firms.

Comparing Jan/Nov 2020 figures we can see:

- Civil litigation (92%/92%)
- Wills, Probate & Estates (89%/86%)
- Residential Conveyancing (87%/83%)

These were the top three areas of work for member firms.

- Employment Law (41%/35%)
- Corporate and Business Law (35%/28%)
- Judicial Review (35%/27%)

These were the areas of work with the lowest engagement figures.

May 2020

- There were decreases in many areas of work with Residential Conveyancing having the highest 'decrease' (97%).
- Employment Law has the highest 'increased' response (21%).
- Family Law (26%), Debt Recovery and Insolvency (29%) and Judicial Review (30%) have somewhat higher 'no change' responses.

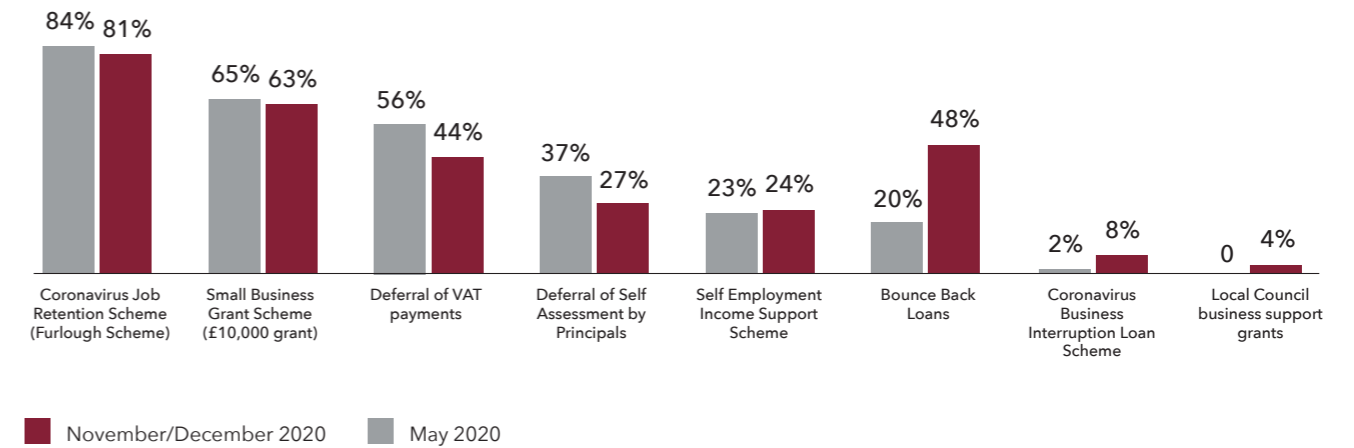
Nov/Dec 2020

- In general, we can see improvement across many areas of work. Residential Conveyancing has gained considerable ground since May and has increased to (51%).
- Family Law, Employment Law, Debt Recovery (etc.) have all seen reasonably strong increases.
- Judicial Review has increased its 'no change' status.
- For some others such as Criminal Law, the strong decrease has halted to be replaced by a stronger 'no change' status.

Business Support measures

Comparing Jan/Nov figures -

- Many firms benefited from the stated business support measures
- The C-19 Job Retention Scheme has the highest uptake (84%/81%)
- Small Business Grant Scheme (65%/63%) coming next on the list, followed by Deferral of VAT (56%/44%)
- Deferral of Self-Assessment by Principals (37%/27%)
- Self-Employment Income Support Scheme (23%/24%)
- Bounce Back Loans (20%/48%)
- Coronavirus Business Interruption Loan Scheme (2%/8%)
- The November research also included Local Council business support grants which 4% of member firms had taken up.



Changes in firms' business practice



- Videoconferencing, Working from Home, Flexible working hours for staff and Social Media were all utilised by member firms to different degrees.
- Of these Videoconferencing was the most likely to be retained followed by Working from Home and Flexible working hours.

- Social Media was the least used but retention was a close match to current usage.
- Videoconferencing (84%) and face to face office meetings (83%) are the most favoured meeting forums.
- Conference voice calls are favoured by 61% and client venue face to face meetings by 25%.
- Two thirds stated that there were areas of business which could not be carried out remotely or through working from home.



In-house client complaints

- 6% of member firms stated that they had received an in-house client complaint since 1st September 2020 relating to the adequacy of service provided by their firm.
- The total number of complaints received amounted to 19, of which 13 were COVID-19 related.

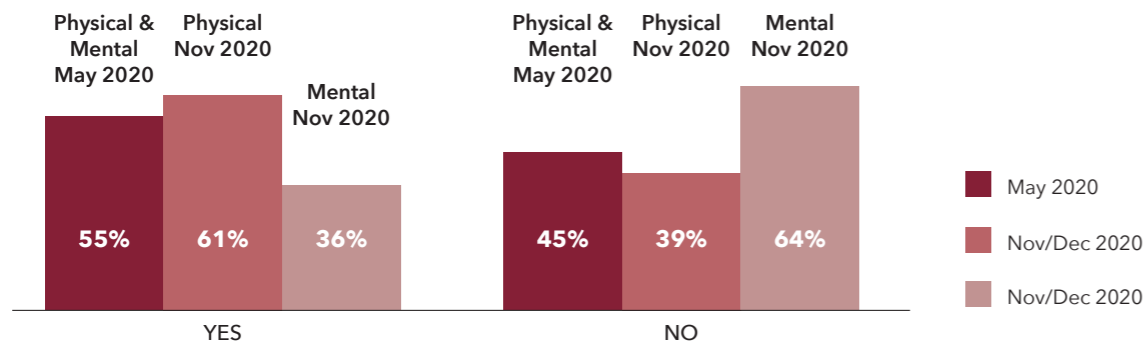


Mental health and well being

- There was approximately a **50/50** ratio between those who state that they have and those who state that they have not taken steps to improve the physical and mental wellbeing of their employees.
- In November 2020, where discrete responses on physical and mental wellbeing were included, there was a significantly higher proportion of member firms who had taken steps to improve the physical wellbeing when compared with the mental well being of their employees.

Approaching **1 in 10** member firms stated that they had used on-line resources to support the physical and mental wellbeing of themselves or members of their firm during the pandemic

Have you taken any steps to improve the physical and mental wellbeing of yourself or your employees during the pandemic?



Law Society Support measures

Those who had accessed the Library online publications

1. Folio was the most accessed publication (**45%**)
 2. Journal of Elder Law and Capacity (**26%**)
 3. Child and Family Law Update was used by 1 in 5 (**20%**).
- **81%** of member firms had used the on-line provision of CPD and **97%** of those who had used it, found it helpful.
 - **74%** of member firms stated that the Law Society's Covid-19 communications had been **"good"** to date.
 - **22%** rated communications as **"average"**
 - **3%** as **"poor"**.

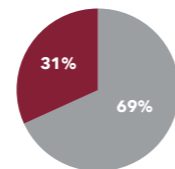
Planning for the future

- **86%** of member firms had a contingency plan in place to cope with coronavirus outbreaks in their offices or if a member of their firm were to receive a notification from track and trace and needed to self-isolate.

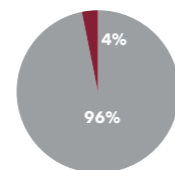
Full Membership Survey results can be accessed [here](#)

Looking ahead

- There was a **50/50** split in terms of whether member firms were more or less optimistic as to the prospects for their Firms in the next six months when compared with the start of the last six months.
- A third of member firms expected their turnover to remain the same. 1 in 4 (**22%**) expected an increase and **44%** expected a decrease in turnover.



- **69%** of member firms stated that they were content to attend court venues to conduct business in person.



- **96%** of member firms stated that they were content to attend court venues to conduct business via virtual attendance e.g. *SightLink*

Lay Observer for Northern Ireland Annual Report



John Mackell
Head of Professional Conduct

The Lay Observer for Northern Ireland, Mrs. Marian Cree, has recently published her annual report for 2019/20.

Mrs. Cree in her role as Lay Observer (LO) is required to undertake a number of functions including the following:

- Provision of commentary on the Law Society's complaints process, procedures, the quality of the service provided and the outcomes from the work of the Client Complaints Committee (CCC);
- Examination of individual allegations about the way the Society has treated a particular complaint in accordance with the Solicitors (NI) Order 1976;
- Publication of an annual report to the Lord Chief Justice, the Northern Ireland Executive through the Department of Finance and the Council of the Law Society on the nature of complaints to the Society and how they are dealt with.

The link below provides access to the latest report. Members are encouraged to take time to review the outcomes of the report and the commentary provided by the Lay Observer. I have outlined some of the key findings of the report below;

- **Complaint Numbers** – The LO records that in 2019/20 the Society received 350 categorised complaints from eighty-six complainants. This is a decrease from 450 categorised complaints derived from one hundred and one complainants in 2018/19. The LO notes this decrease as a positive trend.

- **Outcomes** – The CCC during 2019/20 concluded 70 complaint investigations. Thirty-two complaints were upheld in part or completely. Twenty-seven of the upheld complaints carried a form of warning/reprimand. The LO describes these outcomes as evidence of the Society continuing to take a *sterner approach* in the area of complaints. The LO further describes the outcomes as *extremely positive* whilst demonstrating the Society's *commitment to maintaining standards and executing their powers as the Regulator for the sector*.

- **Complaint Trends for CPD** – The LO notes that Conveyancing remains the practice area which attracts the highest number of complaints albeit 2019/20 did record a downward trend in the number of Conveyancing complaints received. The LO commends the Society's approach in identifying trends to inform our CPD programme. The Chair of the Society's Conveyancing Committee delivered two complaint seminars in 2019/20. We also provided standalone complaint events for Family and Probate. This year we are introducing a seminar in Litigation complaints to address an increase in this particular practice area.

- **LO Referrals** – In 2019/20 the LO dealt with and provided written reports on fifteen referrals from complainants dissatisfied with the Society's treatment of their complaint. This compares to twenty-two in 2018/19. The LO did not uphold any of the fifteen complaint referrals received from complainants during 2019/20.

- **In-house Complaints** – The LO does highlight a concerning issue regarding the number of complaints where the solicitor has failed to properly consider the client's complaint under their in-house procedures. Effective in-house communication and complaint management is a substantive topic within our CPD seminars this year. It also figures prominently in the Society's complaints seminar to IPLS trainees. Members are directed to the Client Communication Practice Regulations 2008 for assistance on considering and responding to in-house complaints.

The LO concludes her report by listing a number of proactive measures introduced by the Society within the last year with specific reference to the Society's online complaints portal which enhances accessibility to the complaint process. The LO acknowledges the Regulatory Notices provided through the CCC and circulated to the membership on topics including in-house complaint management and the provision of client care and costs information. The LO references the independent external ISO audit which following assessment of the complaints procedures within the Society did not identify any non-conformities and certification was successfully maintained.

The final summary of the report outlines the LO's view that the Society in the preceding year has demonstrated a willingness to continue to improve our complaints processes for all concerned along with a desire to make the process more transparent and customer focused. The LO describes her report as *presenting another 12-month period which has seen a continued positive trend in how complaints are registered and handled by the Society*.

The 2019/20 Annual Report can be accessed [here](#)



BRIDGE OVER TROUBLED WATERS

Family Law Four Jurisdictions Conference

Saturday 30th January 2021



Suzanne Rice
Chair, Family Law Committee



Ann McMahon
Secretary, Family Law Committee

January 2021 saw the return of the Annual Family Law Four Jurisdictions Conference to Belfast as hosts for the event. Despite a world pandemic the event was planned and delivered during the customary last weekend in January.

The Belfast Joint Organising Committee, comprising a small number of representatives from the Law Society and Family Bar Association, commenced planning for the event in February 2020. Venues for the Friday evening welcoming reception, the Saturday Conference and evening gala were provisionally booked. By mid-2020, as the pace of the pandemic increased across

all jurisdictions and beyond, it became abundantly clear that the usual arrangements for the Conference could not be delivered. So, rather than postpone the event, the Committee agreed that as family practitioners would appreciate the 'normality' of the Four Jurisdictions taking place as usual at the end of January, that a virtual Conference was the way to go. This change of direction for

the Conference required the application of different approaches to planning, timetabling and delivery. With regular meetings and exchanging ideas, the Conference was outlined by the Committee. Guest speakers from sister-jurisdictions were secured along with a well-being expert from the Judicial College of Victoria to focus on 'lawyer stress'.

The 2021 Conference theme was "a bridge over troubled waters" to symbolise and focus on family practitioners' approach to Brexit and the pandemic. Bookings opened on the Law Society's GoTo Webinar platform. The booking capacity for GoTo was increased from 500 to 1000 due to the anticipated interest that the event would have. The Committee, alert to succession issues for the Four Jurisdictions Conference not only targeted the regular Conference attendees, but also reached out to younger family practitioners in the anticipation that they would become repeat attendees to the event. Each year the Four Jurisdictions is hosted by a different jurisdiction in rotation and attracts approximately 150 – 200 delegates. Belfast 2021 received 817 registrations with 615 logging in on the day which was a remarkable achievement for the Organising Committee, given that the event took place on a Saturday morning. Delegates comprised of solicitors, barristers

and members of the Judiciary and hailed from all parts of the four participating jurisdictions, central Europe and Australia. The programme was timetabled to perfection and ended on time 3 and a half hours after the opening, with delegate numbers only falling below 500, 10 minutes before the closing.

The Conference was opened at 9.30am by Mrs Justice Keegan. Delegates then heard words of welcome from the Justice Minister Naomi Long MLA followed by words of encouragement from Lady/Baroness Hale whom most would describe as the conference patron. The three main speakers addressed areas of legal challenge to overcome jurisdictional issues post Brexit and also how to recognise and improve mental health and wellbeing. The latter speaker, Carly Schrever, joined the Conference live from Australia and provided a very thorough presentation on the stressors of legal work.

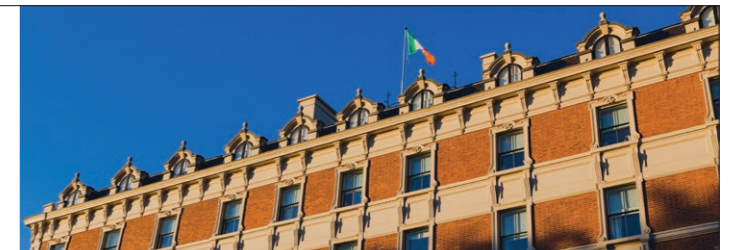
The usual 'regionals' slot was maintained in the programme, with participants from Republic of Ireland, Scotland, England, Wales and Northern Ireland taking 10 minutes each to present on an interesting case from their jurisdiction in the last 12 months, or indeed something more-light hearted but within the general theme of the Conference. The blend

of academic debate and real-life experiences resonated with all delegates in reflecting on the significant challenges 2020 has brought to family law and how practitioners have managed. In the words of Lady/Baroness Hale inspiring hope to us - "this time will pass".

The Organising Committee met for a de-brief the week after the Conference. All were delighted at the success of the conference and the huge number of complimentary emails received following the event. The unprecedented number of attendees at the conference may well change the face of the annual Four Jurisdictions Conference for years to come. Although everyone is hopeful of a return to a face-to-face event soon, perhaps a hybrid mix of delivery may be the way forward.

The Committee were grateful to Tilneys Financial Planning Limited for providing sponsorship for the event and also organising a virtual Friday evening get-together for delegates, and a short presentation for attendees by one of their financial planners.

2022 Four Jurisdictions will be hosted by Dublin, with the Shelbourne Hotel being at the centre of the Conference.



Dear Colleagues,

First of all, huge congratulations to Belfast on a simply superb conference. It was so informative, innovative and, above all in these challenging times, enjoyable!

But as we look forward to the ending of lockdown and current restrictions, may we invite you to ...

SAVE THE DATE

FOUR JURISDICTIONS FAMILY LAW CONFERENCE 2022*

DUBLIN

28th – 30th January 2022

Shelbourne Hotel, St. Stephen's Green, Dublin

**Subject always to Covid-19 regulations*

Conference topics (provisional) include:

- Arbitration and Family Law
- Parental Rejection and high conflict parental disputes
- The Brexit Interview

As well as a full range of social events and surprises ...

Further information to follow in due course and we will have a dedicated section for conference updates on our website – www.familylawyers.ie

For further information (or conference correspondence) email: fourjurisdictionsdublin2022@gmail.com

Looking forward to continuing the conversation in Dublin!

Nuala E Jackson SC,
Chair, FLA

Alan Finnerty, Solicitor
Vice Chair, FLA

Brexit and the Northern Ireland Protocol – the EU/UK trading landscape



Rowan White
President

All of us will be well aware by now that the EU-UK Trade and Co-operation Agreement, and the Northern Ireland Protocol which forms part of it, took effect at the start of this year.

The concept behind the Protocol is that Northern Ireland remains part of the EU Single Market for goods while also remaining part of the UK's domestic market. The Protocol is intended to mitigate the risk that goods originating in GB could enter the EU single market via Northern Ireland without appropriate regulatory checks. This has given rise to many practical difficulties, and matters have been exacerbated by a lack of preparedness – or perhaps an unwillingness to adapt – on the part of some GB traders who supply customers in Northern Ireland.

Impact of the Protocol to date

By way of mitigation measures, the EU and UK have agreed to some 'grace periods' to give traders time to adjust. For example, supermarkets and other food retailers have been given three months, expiring at the end of March 2021, to adapt to the requirements of new sanitary and phyto-sanitary checks. Nevertheless, there have been many supply-chain problems, and complaints of empty supermarket shelves have been widely reported. Hauliers have had to fill out complex and lengthy new paperwork and some have reportedly been turned back at ports when

their documentation for even one item is incomplete or otherwise incorrect.

Some products are prohibited from entering NI at all under single market rules. For example, sausages and other chilled meats are on the banned list but have been granted a specific six-month grace period and can be imported from GB until June.

Some horticultural products are also banned and others which are not banned need a plant health certificate. However, soil is on the banned list, as it can carry pests and diseases, so garden centres are finding that they can no longer obtain plants from GB suppliers and are having to turn to Ireland or elsewhere in the EU for supplies.

One of Belfast's best known delicatessens, which normally stocks 200 cheeses, 60 of them from GB, reported recently that it can now only source 2 or 3 of them. No more "Stinking Bishop" for the time being?

On a happier note, the Wine Society, which had had to suspend deliveries to Northern Ireland for several weeks because of difficulties with its carriers, has been able to resume supplies (albeit on a restricted basis) – much to the relief of its thirsty customers here.

These slightly facetious comments are intended to help make a serious point; namely, that many GB based suppliers have paused or indeed permanently ceased supplying into Northern Ireland on the basis that the relatively small market here does not justify the additional hassle and cost involved. All of this has resulted in a significant degree of disruption, both to consumers and to local traders, most of whom are SMEs and ill-placed to cope with added bureaucracy and costs. The UK Government asserts that this disruption is in the nature of "teething troubles." Many others suspect that it is structural in nature and therefore likely to be permanent.

The first of the agreed grace periods is due to expire at the end of March 2021, even though many of the underlying difficulties remain unresolved. The UK Government has sought, but not yet obtained, the EU's agreement to extend

these periods and, at the time of writing, had just announced that it will unilaterally impose its own extensions until October 2021. This has been met with accusations of bad faith and threats of legal action.

Article 16

For its part, the EU sparked a furore at the end of January when it unilaterally invoked Article 16 of the Protocol and announced that it would impose economic controls on vaccines leaving the EU. This might have led to new checks along the border between Ireland and Northern Ireland in order to prevent EU-produced vaccines from being shipped to the UK. Article 16 is a provision which allows either the EU or UK to suspend the operation of any part of the Protocol that causes "economic, societal or environmental difficulties" and was intended as a remedy of last resort. Within a few hours, the EU branded its decision a "mistake" and reversed it, following an outcry from the British and Irish Governments and virtually all the political parties in both parts of the island.

These unilateral actions, coming so soon after the implementation of the Protocol, mark an inauspicious start and do not augur well for the future. All other considerations apart, the apparent readiness of both parties to breach their respective obligations is deeply troubling from a rule of law perspective.

Reasons to be cheerful?

On a more positive note, some larger businesses, especially manufacturers, appear to have been able to gear up in preparation for the Protocol and are not only undaunted by it but see opportunities to use it to expand their markets. Northern Ireland will find itself in a unique regulatory position in the new EU/UK trading landscape. Northern Ireland businesses will have unfettered access into the UK internal market while at the same time remaining in the EU single market for goods – so they will face fewer regulatory hurdles to export into both the EU and British markets. In theory, Northern Ireland should be a good place for exporters to base themselves in the post-Brexit era. Early indications suggest that not only locally based businesses but also GB companies have

realised this and are positioning themselves to take advantage.

So far as we as a profession are concerned, the complexity of the Protocol, and the loss of EU Judicial Co-Operation measures in criminal, civil and family law (including the European Arrest Warrant), will undoubtedly generate an increased demand for legal advice. If local and GB based companies do upsize or relocate here to seek out new opportunities within the EU, that should also see an increase in traditional areas of work such as commercial, corporate, employment, immigration and property.

I remarked in the Autumn 2020 edition of *The Writ* on the profession's ability to cope well with change. As we near the end of the first quarter of 2021, it seems that quality will continue to be required since change will almost certainly remain one of the few constants in our lives.

[This article is based on a talk which Rowan White gave as part of a briefing by the three UK Law Society Presidents, organised by the UK Law Societies' Joint Brussels Office, on 10 February 2021.]



Brexit and the NI Protocol: a change in constitutional relations?



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Changing Europe' think-tank

Thirteen pages and 19 Articles, including seven annexes, constitute the legal foundation for a sea change (no pun intended). The UK-EU Withdrawal Agreement, incorporating the Protocol on Ireland/Northern Ireland, transforms all three strands of the 1998 Agreement. This is in part because of Brexit itself, and in part because of the near-extraordinary implications of the Protocol.

Most obviously, the British-Irish relationship is no longer that of 'partners in the European Union'. The two states are not heading towards 'ever closer union' but into period of growing distance, if not mild estrangement. The good news that came on Christmas Eve 2020 of the Trade and Cooperation Agreement was primarily that, after months of mutual frustration, the UK and EU had managed to get something over the line. Beyond that, the substance of the deal was disappointing to most. It certainly does little to keep Britain and Ireland in close orbit. The Protocol itself also alters the conditions for British-Irish relations, whilst offering little to shore them up. Indeed, it exacerbates the Brexit disruption to east-west relations in the creation of a customs and regulatory border down the Irish Sea. Although they have some potential for future expansion and innovation,

the institutions of Strand Three have no power to mitigate this new east-west divide.

The reason the United Kingdom left the EU ten months later than originally planned is because of the out-workings of the shared UK and EU commitment to 'avoid a hard border on the island of Ireland'. More particularly, it was because of the difficulty in matching this commitment to the EU's insistence on protecting the integrity of its single market. And, even more precisely, it was because of the impossibility of meeting this objective at the same time as fulfilling the UK government's objective of leaving the EU single market and customs union. Impossible, that is, without changing the parameters; in this case, that meant shifting the border line at which the EU's single market and customs code would be enforced.

The Withdrawal Agreement means that Northern Ireland is now outwith the European Union, and the process of dis-integration from the EU will follow. It is inevitable that this will affect North-South cooperation. The Protocol charges the UK-EU Joint Committee with 'keeping under constant review the extent to which the implementation and application of this Protocol maintains the necessary conditions for North-South cooperation' (Article 11ii). However, (with the exception of the Single Electricity Market) there is no accompanying Annex or even explanatory memorandum on how the conditions 'necessary' for North-South cooperation will be measured, let alone maintained.

Central to it all, Strand One is also affected by the change of legal landscape. Northern Ireland now follows devolved legislation, UK legislation (in reserved matters), retained EU legislation (through the Protocol), and amended EU legislation. The latter includes regulations made by UK government ministers. The EU Withdrawal Act (2018) and EU Withdrawal Agreement Act (2020) granted powers to ministers of the UK government to make regulations in devolved areas of competence by way of statutory instrument (SI), where they intersect with EU law. In August 2020, the First Minister and deputy First Minister informed the Assembly that around a hundred potential SIs were to be made by UK Ministers to facilitate a smooth EU

exit in matters that were within NI devolved competence. In order to have some minimal scrutiny, relevant departmental committees in the Assembly attempted to consider in each case whether the proposed approach was necessary and whether a SI was the correct instrument to meet the challenge. However they were often inhibited in this task by both a lack of information and severely limited time to consider it. As a consequence, a considerable amount of secondary legislation applies now in Northern Ireland, to be implemented by devolved authorities, without its legislature having had any proper exploration of its potential impacts and implications.

Feeble instruments and procedures for scrutiny is not only an intra-UK concern. The Protocol is a UK-EU Agreement and, for all its many drafts, neither side proved to be particularly considerate of the devolved status of Northern Ireland and its need (let alone right) to a seat at the table. This is perhaps due to the fact that (non-coincidentally) its legislature and executive were in abeyance during the withdrawal negotiations. But we should not underestimate the significance of the Protocol for Strand One. Northern Ireland is dynamically aligned to a substantive portion of the EU acquis. This means that its statute book will have to adjust as the legal instruments incorporated into the Protocol are updated and amended at EU level. The EU is to inform the UK of such proposals through the Joint Consultative Working Group (which currently appears to exist in name only). How Northern Ireland officials and elected representatives can scrutinise these and inform the UK's response to them, let alone the process by which they will be incorporated into NI law, is still to be seen.

UK authorities are responsible for implementing the provisions of EU law that apply to Northern Ireland through the Protocol (Art 12ii). The EU Withdrawal Agreement Act (2020) states that a UK Minister or a devolved authority, including a Northern Ireland Executive Minister, 'either acting alone or jointly', may make regulations to give effect to the Protocol. (Sections 21 and 22). In correspondence (6 January 2021) to the Committee for the Executive Office, Chancellor of the Duchy of Lancaster, Michael Gove, said in respect of the Withdrawal Agreement that,



"Much of the legislation that will apply to Northern Ireland falls under the exclusive competence of its institutions, and it is important that oversight of devolved policy responsibilities continues to rest primarily with the Assembly."

What this means in practice is unclear. Also unclear is the matter of what will happen if NI Ministers are unwilling or unable to make regulations necessary to implement the Protocol, or if the Assembly chooses either to annul or not to approve any such regulations that are made. The potential for Stormont/Westminster tensions is evident. Lest we forget, the Assembly did not give its consent to the EU Withdrawal Act [it was not sitting], to the EU Withdrawal Agreement Act [which it unanimously rejected], to the UK Internal Market Act [it was not given the opportunity], nor to the EU (Future Relationship) Act [it was not asked].

All of this points to momentous adjustment for post-Protocol Northern Ireland. This is compounded by the fact that the two parties responsible for negotiating and managing it appear to interpret it very differently. To some degree, this is to be expected. The Protocol represents a set of compromises which neither side wanted to have to make. The UK conceded that the rules required by a hard Brexit would not be possible to enforce at the Irish land border. It thus allowed for an Irish Sea border; this makes the UK internal market rather lopsided, with unfettered access in one direction only. The EU conceded that the four freedoms of its internal market could, after all, be separated, and that free movement of goods could be granted to a

non-member region. In so doing it had to allow for the integrity of its internal market to be in the hands of non-EU authorities. Both sides had to cover the concessions in 2019 by making use of the fact that much was still to be determined by the UK-EU Joint Committee overseeing the Withdrawal Agreement. But the Joint Committee became increasingly mired by UK-EU mutual distrust. And we are long past seeing the benefits of 'constructive ambiguity'.

The UK government places so much confidence in its exclusive responsibility for operationalising the Protocol (notwithstanding the presence of EU observers) that it assumes the enforcement of the rules is, to all intents and purposes, in its bailiwick and thus ultimately subject to what it thinks best. Its unilateral decisions (announced on 3 March) to extend grace periods and, indeed, shelve some pre-existing Sanitary and Phytosanitary (SPS) rules can be seen as giving itself an unofficial period of transition (after having refused to extend the official one in 2020). They are technical and temporary measures, the argument goes, simply to relieve some of the pressure. However, the question of what comes next remains paramount and unanswered. The EU promised neither flexibility nor mitigations once the deal was done. Even the grace periods jointly agreed in December 2020 were never written into EU law; and they rested on UK unilateral declarations to align with necessary EU regulations. As such, they were markers of trust and good faith. Both qualities are gone. Within three months, the EU decided it to take legal proceedings against the UK for a second time over the Protocol. The UK's unilateral action has infringed the Withdrawal Agreement, it claims, both in letter and in

spirit. Where this leaves Northern Ireland can only be a more tenuous position. Just as commonplace reference to 'post-Agreement Northern Ireland' recognises that the 1998 document marked a turning point, so post-Protocol Northern Ireland will be very different to what came before. As we have seen, its legal environment has changed – both in terms of the legislation that will apply, and in the ways such legislation comes to apply in Northern Ireland. The challenge for policymakers in Northern Ireland has become more complicated. They will increasingly have to consider the possible implications of legislation coming from the UK and EU for its devolved competence, for North-South, and East-West integration and cooperation. And, even where they have no means of shaping the legislation itself, NI policymakers will have to seek to manage its consequences.

Yet in other ways, many fundamental principles and conditions have not changed at all. The 1998 Agreement provides for the NI Assembly to 'protect the rights and interests of all sides of the community'. Legislation applying in Northern Ireland must be compliant with the European Convention on Human Rights. 'All of the institutional and constitutional arrangements' in effect across all three strands are 'interlocking and interdependent'. And the British and Irish governments must still wish 'to develop still further the unique relationship between their peoples and the close co-operation between their countries'. To manage the sea change that is marked by the UK-EU Withdrawal Agreement and its Protocol on Ireland/Northern Ireland, we might steadfastly hope that Northern Ireland will remain – first and foremost – post-Agreement.

The Bridge to Adequacy



Fiona Donnelly
Solicitor

In terms of GDPR we are on the bridge to adequacy. What we have come to know and love as the GDPR is of course an EU Regulation and as such no longer applies to the UK. In practice there is, for now, little change to the core data protection principles rights and obligations as the GDPR has been incorporated into UK data protection law as the United Kingdom General Data Protection Regulation (UK GDPR).

Data processed before 01 January 2021 will be subject to the GDPR as it stood on 31 December 2020. From 01 January transfers of personal data are covered by a bridging clause which allows full data flow under this bridge between the EEA and the UK. This solution is likely to be applicable until the end of June on the commitment of the UK not to change the current data protection regime.

Then an Adequacy Decision is required. Adequacy Decisions are how the EU determines if a non-EU country has an adequate level of data protection. They are unilateral decisions taken by the European Commission after an assessment of a country's data protection framework. 'Data adequacy' is the status granted by the European Commission to countries outside the EEA whose level of personal data protection is judged to be essentially equivalent to the EU's. Once a third country has received a positive adequacy decision, personal data can flow from the EEA to that country without any further safeguard. Examples are the Adequacy Decisions received by New Zealand and Switzerland.

The European Commission makes a proposal for the adoption of an adequacy decision and seeks the opinion of the European

Data Protection Board, then an approval from representatives of EU countries and it can then be adopted by the European Commission.

At any time, the European Parliament and the Council may request the European Commission to maintain, amend or withdraw the adequacy decision on the grounds that its act exceeds the implementing powers provided for in the regulation.

On 19 February 2021, the Commission launched the procedure for the adoption of two adequacy decisions for transfers of personal data to the United Kingdom, under the General Data Protection Regulation (GDPR) and the Law Enforcement Directive (LED) respectively.

The draft Adequacy Decisions are now with the European Data Protection Board. The GDPR draft reads:

"The Commission considers that the UK GDPR and the DPA 2018 ensure a level of protection for personal data transferred from the European Union that is essentially equivalent to the one guaranteed by Regulation (EU) 2016/679."

The decision highlights areas of importance which are likely to be relevant in the ongoing monitoring of any Adequacy Decision that is made.

It specifically mentions that the oversight mechanisms and redress avenues enable infringements to be identified and punished in practice and offer legal remedies to the data subject to obtain access to personal data and the rectification or erasure of such data. It also confirms that any interference with the fundamental rights of the individuals whose personal data are transferred from the European Union to the United Kingdom by United Kingdom public authorities for public interest purposes, in particular law enforcement and national security purposes, will be limited to what is strictly necessary to achieve the legitimate objective in question, and that effective legal protection against such interference exists.

It refers to both the UK's domestic regime and its international commitments, particularly its adherence to the European Convention of

Human Rights and submission to the jurisdiction of the European Court of Human Rights.

It notes that continued adherence to such international obligations is therefore a particularly important element of the assessment on which this Decision is based. The draft Adequacy Decision provides for continuous monitoring of the application of the legal framework upon which the decision is based, including the conditions under which onward transfers are carried out, with a view to assessing whether the United Kingdom continues to ensure an adequate level of protection.

Therefore, we have almost crossed but, when on the other side, various matters can come into play which will be of relevance to EU monitoring. One example of this is the UK National data Strategy which seeks to invest heavily in digital technology and press forward with its interconnected pillars of data foundations (data systems), data skills (investment in data talent), data availability (co-ordinated accessibility to data), and responsible data (protection of data but to allow for innovation and research). Data technology and the use of AI are likely to be huge growth areas and areas where lowering of safeguards may not be tolerated in an EU context. The National Data Strategy states a determination to seek positive adequacy decisions from the EU, under both the General Data Protection Regulation (GDPR) and the Law Enforcement Directive (LED), before the end of the transition period. However, it also highlights a culture of risk aversion and privacy and security concerns as potential barriers to data availability.

Trade negotiations with the US and what they say about data protection will be relevant especially in relation to electronic data as will the investigative powers of US authorities. The effectiveness of the UK regulator will always be of interest to the European Commission as will the UK Investigative Powers in the context of the ECHR.

So the law on GDPR is largely the same for now but practitioners need to look out for the final Adequacy Decisions, keep an eye on the National Data Strategy and how it seeks to shape data sharing and note the minor changes in the UKGDPR which are helpfully highlighted in this link:

<https://www.gov.uk/government/publications/data-protection-law-eu-exit>

Brexit - is taxing

Looking at the VAT implications for your business



Angela Keery
Tax Director,
Baker Tilly Mooney Moore

As professional service providers in Northern Ireland, we haven't had to face some of the biggest Brexit tax changes around Tariffs, Customs Declarations and checks on goods for example. However, there are many other tax implications for our businesses and for our clients.

We all know that how businesses in Northern Ireland now trade with Great Britain and the EU is set out in the Northern Ireland Protocol, and that one of the biggest challenges in the NI Protocol, was around VAT.

The main issue is that Northern Ireland remains in the EU single market regarding goods and has to apply EU VAT rules to goods. However, Northern Ireland is still part of the UK and has to apply UK rules to services.

This had led to very peculiar VAT positions for some businesses on the movement of goods, such as those businesses moving goods from Great Britain, through Northern Ireland to the EU.

Thankfully the position regarding VAT on services is clearer. UK businesses (including Northern Ireland businesses) providing services to overseas customers should find getting the correct UK VAT treatment more straightforward. The "general rule" is that professional services (such as legal and consultancy services) billed to customers outside of the UK post 01 January 2021 will be outside the scope of UK VAT (on the basis that the supply is made where the customer is based), this is regardless of whether the client is a business or a consumer. It is important to note that there are a number of services to which the general rule regarding the place of supply do not apply – such as Transport, Hire of Transport, Events, Intermediaries and Land and Property Services. If the service that you are providing falls under these categories you need to review the specific rules to determine whether the service you have provided is deemed to have been supplied in the UK or elsewhere as VAT will be accounted for where the service is deemed to have been supplied.

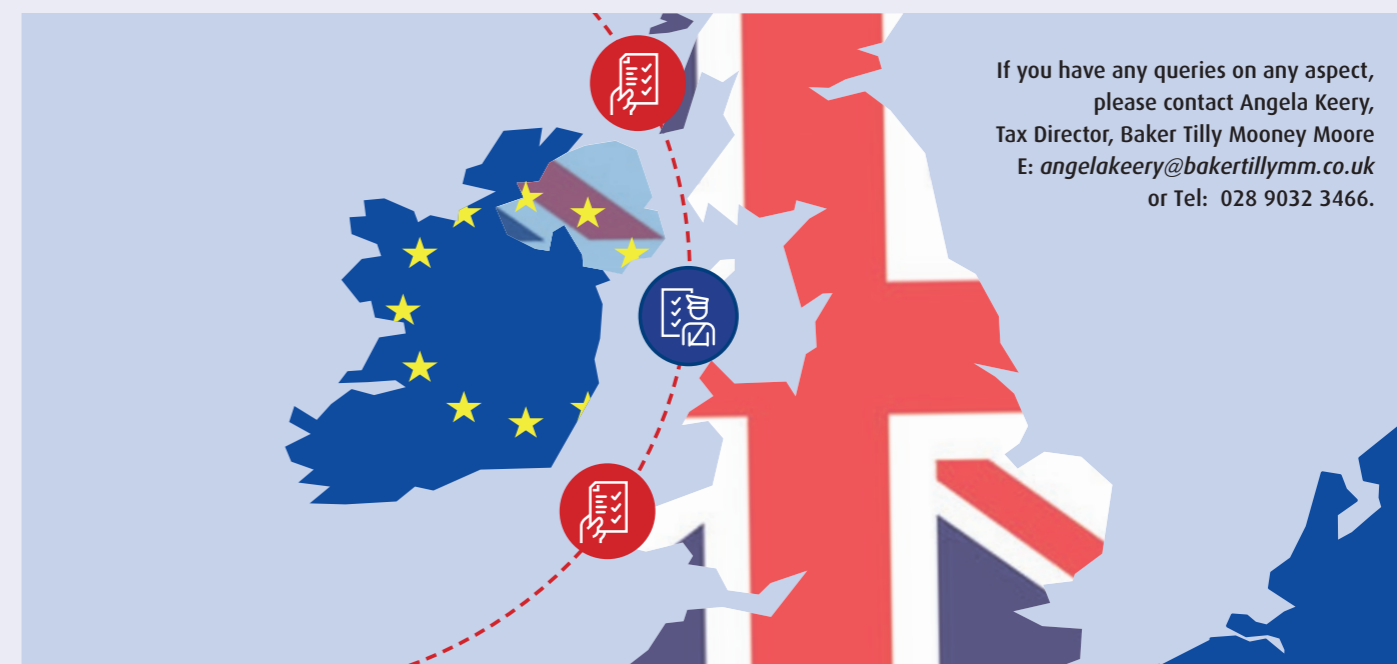
Of these services, the area that you are most likely to come across are land related services, such as conveyancing and drawing up of contracts of sale or leases, including title

searches and other due diligence on a specific property. In these cases the place of supply of those services (and therefore where the VAT should be accounted for) is where the land itself is located, irrespective of where you or your customer belongs.

UK businesses are no longer required to complete an EC Sales List when supplying services to businesses located in the EU (although NI businesses will still have to complete an EC sales list relating to the sale of goods to the EU).

Whilst the UK VAT position is relatively clear, you will need to ensure that the service you provide outside the UK does not give rise to a liability to register for VAT in the country in which it is deemed to have been supplied. You may need to contact the Foreign Tax Authority in each jurisdiction for clarification.

Unfortunately, more VAT changes will come into force in the coming months. The next fundamental set of changes in the EU occurs on 1 July 2021 with the extension of the VAT one-stop shop for all services to consumers. Where services are supplied to EU consumers by a UK business, a VAT registration will be required in one of the EU member states and the business will then need to account for VAT to the EU using that single VAT return, but charging VAT at the rate applicable in the member state of the customer. Further information will be published nearer to the implementation date.



BREXIT AND IMMIGRATION LAW



Brian Moss, Worthingtons
Secretary, Immigration
Practitioners Group

Few matters are as strongly linked to Brexit as immigration policy. Immigration law is one of the fastest moving and fluid areas of law, but even accounting for that, some of the recent changes ushered into this area as the UK's departure from the EU has taken effect, have been truly monumental.

Three of those areas are worthy of a closer look, even for those who do not practice in this area.

(1) The EU Settlement Scheme

The EU Settlement Scheme opened in March 2019 and will close to most new applications on 30 June 2021. The Scheme was part of a commitment by the then Theresa May-led Westminster government, to provide a ready means by which citizens from other EU countries, currently living in the UK, could continue to live in the UK after Brexit, when freedom of movement would come to an end. It is thought that there are around 3 million nationals from other EU countries living in

the UK. Under the Scheme, an EEA (European Economic Area) national (and their family members, even if non-EEA) can apply for 'pre-settled' status if they have been living in the UK for less than 5 years and 'settled' status if they have been living in the UK for 5 years or more. Applications for both types of status are free. Settled status is equivalent to permanent residence or 'indefinite leave to remain' as it was historically known under UK immigration law. For those granted 'pre-settled' status, they are able to apply for settled status after 5 years of living in the UK with pre-settled status.

As of the end of August 2020, a family member of a 'person of Northern Ireland' has been able to apply for settled or pre-settled status under the EU Settlement Scheme. This has been a welcome change for many non-EEA family members of British/Irish citizens living in Northern Ireland, since it has enabled them to circumvent the complex requirements of the Immigration Rules and avoid the costly fees and NHS surcharge (in most cases a 2.5 year visa costs upwards of £3,000 to apply for now, in application fees and healthcare surcharges, alone). To qualify as a 'person of Northern Ireland', a person must have been born in Northern Ireland to British/Irish parents. As many immigration lawyers in Northern Ireland will know, the only means by which non-EEA family members could apply under the (previously applicable) EEA Regulations, was if the person of Northern Ireland was willing to give up (renounce) their British citizenship. Many did so, solely for the purpose of accessing a cost effective and convenient means by which their loved ones could live here with them. This was the case ever since the ECJ decision in the McCarthy case (*Shirley McCarthy v The Secretary of State for the Home Department [2011] (Case C-434/09)*).

That was, until a local lady called Emma DeSouza, brought a more recent case to challenge that position, which led to the change referred to above.

Since the UK's departure from the EU on 31 December 2020, any EU citizens and their family members (apart from Irish citizens) will have to apply for a visa, if they wish to come to live and work in the UK. They will be in the same position as a citizen of any other country in this regard.

That said, the EU Settlement Scheme is still receiving applications from those EU citizens who were living in the UK prior to the 31 December 2020. It is also open to applications from 'joining family members' - so long as these are close family members (spouse, long-term partner, child, parent) and not (apart from in certain circumstances) 'extended family members' (which includes sisters, brothers, uncles, aunts, nephews and nieces) of EEA nationals (and relevant persons of Northern Ireland) who have been living in the UK from before 31 December 2020.

However, following 30 June 2021 when the Scheme is meant to close to most new applications, it is very much 'watch this space' to see what the UK government will do next.

(2) Employing Migrant Workers After Brexit

If you are in business, there may be many reasons why you would seek to, or even need to, employ a person from overseas, particularly in the globalised economy in which we all now live. This could be for any number of purposes, including:

- For a job requiring specialist skill (for example, technical or language skills) that is not available in the local labour market;

- To fill vacancies for jobs in a designated 'shortage occupation'. This has been applied to nursing care in recent years in Northern Ireland, and there have been a number of visas granted to overseas nurses;
- To facilitate secondments or transfers from an overseas branch of the same company. US and other foreign companies operating in Northern Ireland will be familiar in particular with seeking overseas staff for this purpose;
- To fill temporary vacancies requiring a pre-existing skill set, or to fill unskilled or low-skilled vacancies due to labour shortages.

The UK government had promised that, following Brexit, the UK would move entirely to a points-based system of immigration control. Of course, the UK already operated a points-based system for migrants coming to the UK from outside of the EU. This has been in place since 2008. Under the (now previous) points-based system, there were five tiers:

- Tier 1** Highly-skilled individuals, entrepreneurs and high net-worth individuals
- Tier 2** Skilled workers in a shortage occupation who have a job offer
- Tier 3** Low skilled workers for temporary labour shortages (although this tier has never been used because of the strong labour supply from EU/EEA countries)
- Tier 4** Students
- Tier 5** Youth mobility and temporary workers: people allowed to work in the UK for a limited period of time to satisfy primarily non-economic objectives.

As its name implies, migrant workers are required to score a certain number of points under the system in order to obtain permission to enter, or remain, in the UK and the points criteria differed for each tier.

The above tier system saw considerable overhaul at the back end of 2020, with a series of new routes - notably a new skilled worker visa, replacing the traditional 'tier 2' route.

The important change here is that businesses in Northern Ireland seeking to employ EU nationals must now be more careful to ensure that such nationals have the right to work

in the UK and this includes the possibility that such a worker may now need to be 'sponsored' by the business, in order for the requisite visa to be made available. This 'sponsorship' will require the business to have a licence from the UK Home Office, to sponsor the worker in question.

This is very important for businesses to realise as only those employers who are registered with and licensed by the Home Office are permitted to issue Certificates of Sponsorship (CoS) to a named individual, who must then apply for permission to enter the UK. The employer must have undertaken a strict verification exercise in order to issue a CoS.

(3) The New Route for British National (Overseas) Passport Holders

Lastly, a brand new visa scheme to allow British National (Overseas) passport holders to come to the UK to live (or to continue living in the UK), opened on Sunday 31 January 2021. It is thought that around 300,000 people will apply to this scheme, at least in the first instance. The visas are open to all British National (Overseas) passport holders and to (certain of) their dependent relatives.

The British national (overseas) passport is peculiar to certain Hong Kongers. Many hold the passport in question. Someone who was an overseas territories citizen by connection with Hong Kong was able to register as a British national (overseas) before 1 July 1997. Those who did not register as British nationals (overseas) and had no other nationality or citizenship on 30 June 1997 became British national (overseas) citizens on 1 July 1997.

There is a route for settlement under the scheme after 5 years of living in the UK on the new visa. Once such a person has been living in the UK with permanent residence (settlement) for 12 months or more, they can then apply for British citizenship.

To say that the new scheme has caused some diplomatic controversy, is something of an understatement. A Chinese Ministry of Foreign Affairs spokesperson is reported as

having labelled the scheme a 'violation of China's sovereignty' and 'a gross interference in Hong Kong and China's internal affairs'. China also announced that it would stop recognising the BNO passport as of 31 January 2021, the very date that the new scheme was introduced by the UK government.

In UK immigration terms, this new scheme is very generous. For example, the financial requirement to be met for the visa to be granted is, in the case of a person who has been living in the UK for more than 1 year, met automatically. If the applicant has been living in the UK for less than 12 months at the date of the application, or is applying for entry clearance to come to the UK, the decision maker must be satisfied (amongst other things) that the applicant can adequately maintain and accommodate themselves without recourse to public funds for at least 6 months. These requirements are considerably less onerous than those which are imposed under other parts of the Immigration Rules, for example, for a spouse/partner visa under Appendix FM, the applicant (or their partner) must demonstrate a gross annual income (from specified sources) of £18,600 in order to meet the financial requirement in that part of the rules.

It is quite obvious that there are political reasons behind the introduction of this new scheme for British national (overseas) passport holders, perhaps more closely related to the relatively recent political tensions in Hong Kong, than to Brexit, but at the same time this new scheme does seem to provide a straightforward means for the UK to attract talented migrants from outside the EU, over the short to medium term.



How did your behavioural biases affect your wealth in 2020?



John Baxter
Law Society (NI)
Financial Advice Ltd

2020 saw the worst Bear Market (a stockmarket fall of over 20%) since the Credit Crunch in 2008.

Some people might feel 2020 was an incredibly difficult year for their long-term investments in things like pensions, ISAs and other investment wrappers. It certainly felt difficult 'in the moment' because we were being bombarded from pretty much every quarter with bad news affecting our wealth – Stock Markets plummeting, highest Government debt level since the Second World War, predictions of deep and prolonged recessions etc.

But it is the actions you took as a result of this 'news' that will have affected your wealth. Those of you who are already working with us or who will have heard us speak on the subject will have heard us say things like 'the only time not to get off a rollercoaster that is too scary for you is part way through'!

The UK Stockmarket was down c.25% at various points throughout 2020 but has

recovered somewhat to a fall of less than 10%. Those of us with a more globally spread portfolio have fared better with markets showing a positive return from the period 1st of January 2020 to March 2021. If you removed your money from the stockmarket through choice in the face of such an onslaught of negative market sentiment it is likely you will have crystallised your loss. If this was in part due to your behavioural biases in the midst of the uncertainty caused by the global pandemic you are not alone. Cash holdings in the UK swelled by nearly £80 billion in the first half of 2020. With cash accounts currently offering such low-interest rates, it is estimated that UK households have missed out on £38 billion in potential investment returns.

Wanting to move out of a volatile stockmarket to the perceived safety of cash is a natural and indeed predictable reaction. Bear markets are however nothing new and you should develop a strategy to protect yourself against the behavioural biases that could threaten your wealth during future bear markets. Research from Vanguard shows there were 13 in the last 120 years so you could argue we should be expecting them. Part of our role for clients is to prepare them financially AND emotionally for market downturns.

A good number of you will have heard of Black Monday and associate it with stockmarket losses. It is true the world's biggest stockmarket – the US S&P 500 – fell nearly 35% in October 1987, most of it on Monday the 19th of October hence the moniker. But did you know that if you just tuned out the noise throughout the year and compared the market on the 1st of January 1987 with the 31st of December 1987 you would actually have been UP 2%!

The people that 'lose' money in a bear market are those who cash in and an awful lot of that happened in 2020. Oxford Risk suggests that these behavioural biases could be hurting investors by an average of 1.5% to 2% a year over time.

There is something you can do about it. Our guide to behavioural biases and how they impact on your finances can be found here <https://lawsoc-nifa.org/files/behavioural-biases-guide.pdf> or you can request a copy from findingtruewealth@lsnifa.com.

From a financial planning perspective, the starting point should be a long term financial plan. This starts with you identifying your future financial goals and aspirations. You then plot how far towards these objectives your current planning will get you. This gives you a context for making financial decisions from the outset and it should be reviewed on a regular basis.

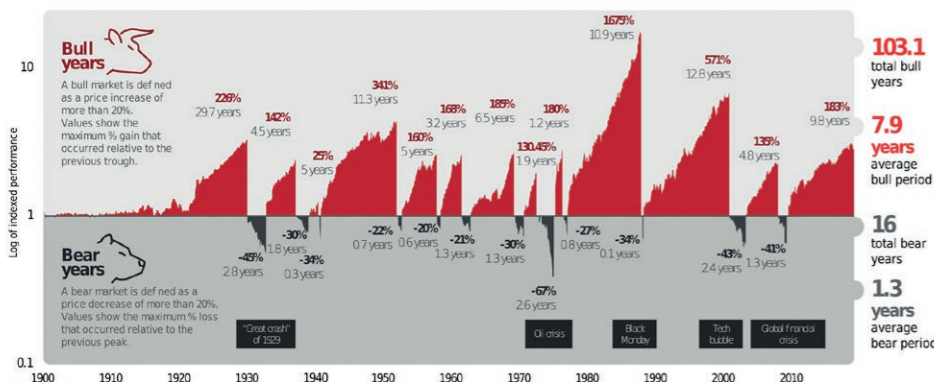
In practical terms clients will often conceptualise their wealth in three pots;

- The **Security Pot** for shorter term objectives and needs such as cashflow, emergency fund or upcoming one off expenditures.
- The **Wealth Pot** for medium to longer term objectives particularly securing their financial independence from work at some point.
- The **Surplus Pot** for excess money that is to be given away, speculated with, spent on luxuries. Or, if neglected(!), donated to the local authority or HMRC!

Having a financial plan and someone in your corner who you trust to help you with difficult financial decisions can seriously help you protect your wealth. Don't let your behavioural biases negatively affect your financial future in 2021 and beyond.

For more information on this subject or any other areas you would like help on please call us on 028 9023 0696 or email findingtruewealth@lsnifa.com.

Please note: The article is for general information only and does not constitute advice. The value of your investment can go down as well as up and you may not get back the full amount you invested. Past performance is not a reliable indicator of future performance.



Computer says "yes"



Mark Taggart
DWF

By now most readers will have had more day-to-day experience of working from home than they ever expected, but since it appears that it will be some time yet before "the new normal" begins, it may be useful to look at e-signatures and contract formation via computer.

Whether by temperament or training lawyers often tend to favour the tried and trusted over the new and different. As our business becomes more and more commercial that is beginning to change, but I suspect the majority of us are still most comfortable in the mainstream market rather than mixing with the innovators and early adopters. In March 2020, however, all of us were thrust into immediate and necessary innovation in our ways of working. 'Catapulted' is the word that comes to mind, admitting a range of mental imagery from the graceful arc of some to the flailing of others who for various reasons found it harder to adapt. In either case, any forward motion was not entirely voluntary.

Very quickly, however, the profession began using IT solutions such as Microsoft Teams and Zoom on a regular basis. That really highlights the point about the typical lawyer's place on the diffusion of innovation Bell curve. Teams was launched in 2017 and Zoom in 2013, yet it took a pandemic to get most of us to recognise their value to our working lives. The

technology hasn't changed, but maybe our enforced exposure to it will have changed our attitude to technology and other disruptive influences on how we practise.

Innovations which took root long before video conferencing included, of course, email and the internet. Quickly it became possible, and then commonplace, for people to communicate with each other, and even enter into binding agreements, using a range of electronic devices. Common Law had always been flexible about how a party could indicate their acceptance of a contract, and the law is similarly flexible when considering electronic forms of assent. The wet ink signature, making an 'X' or applying a stamp have therefore been joined by using a stylus on a screen, clicking "I accept" and other forms of electronic signature.

When discussing any legal issue a lawyer is duty-bound to start with a definition. So, what is an electronic signature? It is "data in electronic form which is attached or logically associated with other data in electronic form, and which is used by the signatory to sign" (s.7(2) of the Electronic Communications Act 2000). Although the UK's law in this area has derived from EU Directives, there is no sign of a Brexit-related change of course.

Save where the contrary is provided for in legislation, contractual arrangements or case law (e.g. Wills) an electronic signature is capable of being used to execute a document. It is admissible in legal proceedings, for example to prove or disprove the identity of a signatory or the signatory's intention to authenticate a document. As with wet ink signatures, courts will assess objectively the signatory's intention to authenticate the document and also check that they have complied with any applicable formalities (which we won't cover here).

The fact that a bundle of data can be regarded as a signature, and therefore can commit us to a contract, means we must be aware of the possibility that binding obligations can be created in a form which historically would not have been recognised.

To date, courts have held that an automatically included email address was not a signature¹, but the inclusion of a bank's name in a SWIFT message was² (although the bank in

that case admitted its intention to be bound). An automatically generated email footer was held to be a signature for the purpose of s.2 LP(MP)A 1989³. An email chain has been held to be a single document satisfying the Statute of Frauds⁴.

We all need to be aware of the potential import of the bundles of data we send and receive, and to ensure that where it is intended this data will provide evidence of an intention to enter into a contract, we retain such additional information as a court may require in order to determine that any signatories intended to enter into the agreement. Where we don't intend to enter into contract our communications must make that clear (by, for example, being marked "subject to contract").

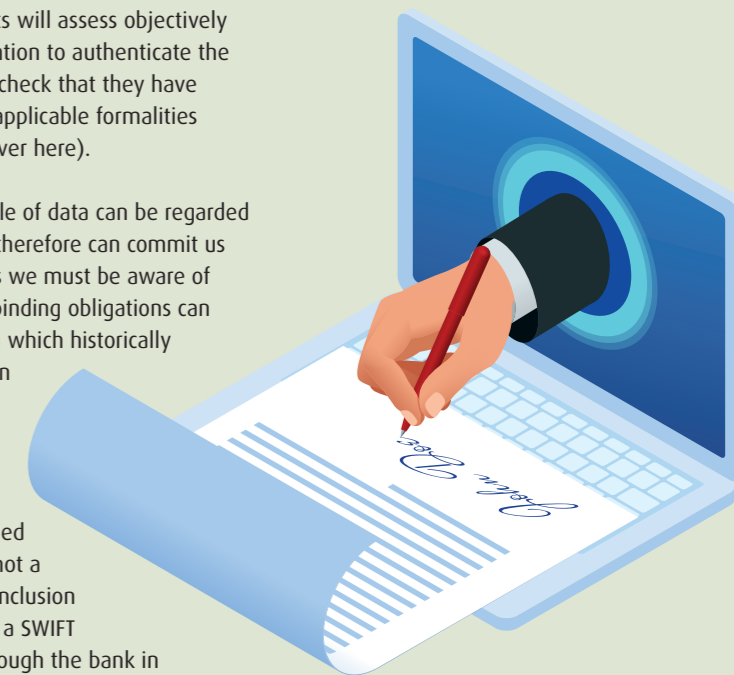
At a time when email is the predominant form of communication and we are dissociated from the familiar rhythms and contours of office life, it is all the more important that we do not fall into the trap of treating emails with an inappropriate degree of informality, firing off a quick response rather than giving proper consideration to the content and significance of our correspondence.

¹ *J Ferreira Fernandes SA v Mehta* [2006] EWHC 813 (Ch)

² *WS Tankship II BV v Kwangju Bank Ltd* [2011] EQHC 3103 (Comm)

³ *Neocleous v Rees* [2019] 2463 (Ch)

⁴ *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265





FCA Supreme Court Case on Business Interruption Insurance



Nuala McMahon
LSNI Intern

The effects of the Covid-19 pandemic, its associated restrictions and numerous lockdowns have created uncertainty and instability for many businesses. The judgment handed down by the Supreme Court on 15th January 2021 in the case of 'The Financial Conduct Authority v Arch Insurance (UK) Ltd and others' [2021] UKSC1 therefore brings much needed clarity for policyholders across the UK in relation to business interruption insurance.

Business interruption insurance typically covers the loss of profits and other expenses as a result of damages to property, for example, following a flood or fire. However, some policies go further and provide additional cover for matters such as notifiable disease, closure of premises and denial of access. Issues surrounding business interruption insurance quickly came to light when restrictions were implemented by the Government to reduce the spread of Covid-19 in March 2020. Despite these enforced restrictions and the fact that Covid-19 was declared as a 'notifiable disease' on 5th March 2020 by the UK Government, many insurance companies disputed liability and refused to make pay outs to policyholders, causing disappointment and further hardship for businesses, who were already suffering impacts and losses arising from Covid-19.

A test case was subsequently brought by the Financial Conduct Authority (FCA), the

aim of which was to provide clarity on the interpretation of contractual provisions contained within policies and other causation issues in the context of Covid-19. The case, in which the FCA represented the interests of policyholders, considered 21 different sample policy wordings from 8 different insurers. The High Court handed down their judgment in September 2020, finding in favour of the FCA on the majority of key issues. Both the FCA and Insurers appealed against certain aspects of the High Court judgment, bypassing the Court of Appeal under the "leapfrog procedure" due to the significance and urgency of the issues. The Supreme Court subsequently ruled largely in favour of policyholders and unanimously dismissed the Insurers' appeals.

The issues considered within the appeal can be categorised into six main areas, which are outlined below:

1. Disease Clauses

Disease clauses generally provide cover for losses arising from the existence of a notifiable disease at or within a specified distance of the business premises. The High Court held that cover would be provided for losses resulting from Covid-19 provided that there had been an "occurrence" of the disease within the specified geographical radius (typically 25 miles) of the insured premises. The Supreme Court however adapted a narrower approach in identifying the insured peril or trigger, and accepted the Insurers' arguments that each case of Covid-19 was a separate occurrence and that such clauses only apply to cases within the specified radius. However, due to their findings on causation, the Supreme Court held that cover is available under disease clauses.

2. Prevention of access and hybrid clauses

Prevention of access clauses generally provide cover for business interruption losses resulting from the hindrance or denial of access to the premises due to restrictions imposed by a public authority. Hybrid clauses tend to combine the main elements of the disease and prevention of access clauses. The Supreme Court rejected the interpretation of the High Court that requirements would only be satisfied by a measure expressed in mandatory terms, which have legal force, as too narrow. Instead, the Supreme Court held that an instruction given by a public authority would be sufficient if it is in mandatory and clear terms and indicates that compliance is necessary.

In relation to the inability to use business premises, the High Court found that inability rather than hindrance had to be established. The Supreme Court agreed that inability of use must be established, but held that this would be satisfied where the premises is unable to be used for a discrete business activity, or if a discrete area of the premises is unable to be used for its business activities. In this respect, the Supreme Court judgment is more favourable to policyholders as these clauses will be triggered more readily.

3. Trends clauses

Trends clauses generally provide for business interruption losses to be quantified by reference to what the performance of the business would have been had the insured peril not occurred. The Supreme Court held that these clauses should not be construed so as to take away or reduce cover provided. It also held that the trends and circumstances for which the clauses require adjustments to be made must not include circumstances arising out of the same underlying or originating cause as the insured peril. Therefore, the only adjustments that can be made are in respect of trends or circumstances unrelated to Covid-19.

4. Pre-trigger losses

In respect of pre-trigger losses, the Supreme Court rejected the approach of the High Court which permitted adjustments to be made under the trends clauses to reflect a measurable downturn in the turnover of a business due to Covid-19 before the insured peril was triggered. The effect of the Supreme Court's ruling means that insurers will not be able to reduce payments by taking account of losses resulting from Covid-19 that a business suffered before the trigger event.

5. Causation

The key question in respect of causation was whether the business interruption losses as a result of health measures in response to Covid-19 were, in law, caused by cases of the disease that occurred within the specified radius of the insured premises. The Supreme Court determined that relevant measures were taken in response to information about all cases of Covid-19 in the UK as a whole, and that all individual cases were effective "proximate" causes of

those measures. Consequently, it is sufficient for a policyholder to show that at the time of any Government measure introduced, there was at least one case of Covid-19 within the geographical area covered by the clause. In reaching its determination, the Supreme Court explained why the "but for" test of causation is sometimes inadequate, which confirms at the highest level that the "but for" test is not always determinative in deciding questions of proximate causation. It does remain a relevant test, but will be inappropriate where it results in a narrowing or removal of cover in circumstances where that cannot have been the intention of the parties.

6. The Orient Express case

The Supreme Court overruled the Orient Express case.¹ This case concerned a claim for business interruption losses arising from hurricane damage to a hotel in New Orleans, and had been heavily relied upon by the Insurers in support of their arguments given its long-standing authority in the insurance arena. The overruling of this case will have wider implications for insurance law and it is interesting to note that Lord Leggatt and Lord Hamblen who gave the main judgment in the Supreme Court case had both been involved in the *Orient Express* case, who now conclude that the case had been wrongly decided.

Conclusion

In conclusion, both the initiative of the FCA in bringing this test case forward and the speed at which clarity has been provided through use of the "leapfrog" procedure will be welcomed by policyholders facing disputes on insurance matters. Whilst the High Court judgment provided increased clarity for policyholders, the Supreme Court judgment gives authoritative guidance on the clauses contained within policies to both insurers and policyholders. The judgment and subsequent guidance undoubtedly provide favourable news for policyholders and may offer a lifeline for survival for many businesses. The FCA have confirmed that they will be working with insurers so that they move quickly to pay out valid claims. The ability of policyholders to recover losses obtained due to the coronavirus crisis is particularly positive given the ongoing restrictions associated with the pandemic and the bleak economic climate in which businesses are currently operating.

¹ *Orient Express Hotels v Assicurazioni Generali* [2010] EWHC 1186 (Com); [2012] Lloyd's Rep IR 531

Liquor Licensing and Covid-19: consent to alterations



**Christopher Bullock
O'Reilly Stewart**

The Covid-19 pandemic has been fraught with difficulties for business owners, but the hospitality sector has perhaps suffered the greatest casualties. The reasons are obvious – in a time where social distancing measures are imperative, the once simple act of dining out for a meal or meeting friends for a drink is an impossibility. As we endure another lockdown, it is disheartening to see so many hospitality businesses struggle to survive this pandemic, knowing well that many venues will never reopen their doors.

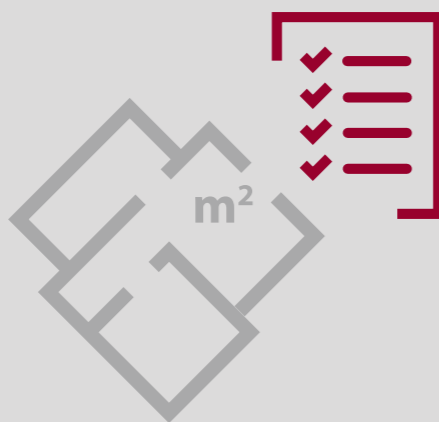
The Government have placed specific Covid restrictions on the hospitality sector, which have caused a great deal of confusion and frustration. After the initial period of total closure in the first lockdown, hospitality businesses were required to navigate unclear rules around serving food and having outdoor seating in order to open for business, until being forced to close once again. The oscillating nature of the Covid restrictions has given rise to various questions concerning liquor licensing and the scope of our existing licensing laws during a pandemic.

Many business owners in the hospitality sector have felt it necessary to carry out works to their premises which allow maximum capacity under social distancing restrictions. As a result, the pandemic has created a surge in liquor licensing applications to allow businesses to adapt to the restrictions and to give themselves the best chance of surviving when they are permitted to reopen. Our firm has been involved in some interesting examples, such as applications for beer gardens, both at ground level and rooftop areas, to allow businesses to increase capacity and to permit outdoor drinking under the restrictions, as well as applications for the conversion of

storage space into additional seating areas. The priority for hospitality clients is to think of new ways to increase capacity and to allow more customers to visit premises whilst remaining compliant with the social distancing requirements imposed by the Government.

In light of these new problems faced by licensed premises, practitioners are now considering the most suitable method of court application to achieve their clients' aims; primarily whether they should make a 'new grant' or 'consent to alterations' application. Our experience tells us that the question of which application is more appropriate will depend not only on the nature of the proposals, but also the court in which the application will be heard, as to date the judiciary have not adopted a consistent approach on this matter.

In 2017, His Honour Judge Devlin, having faced the same recurring issue, provided his views on the matter, namely, in which circumstances a 'consent to alterations' is not appropriate and a 'new grant' is. In summary, His Honour outlined that, if the works require planning approval and include construction of any kind beyond the existing curtilage of the licensed premises, then an application for a new licence is required rather than an alterations order. While it is commonly understood that any alterations increasing the licensed footprint by less than 15% can come within the parameters of an alterations application, His Honour further highlighted that the percentage increase in the licensed footprint acts primarily as a guide, because if the percentage increase is only 10%, but it involves a new structure or building, then an application for a new licence must be brought. It is therefore clear that the percentage increase will not be the determinative factor when making an application.



Nonetheless, other judges have taken a different approach, whereby they have granted alterations orders that involve construction beyond the existing curtilage of the licensed premises so long as the increase is under 15%. It remains clear that when lodging an application to make changes to a licensed premises, there is no uniform approach, and it will essentially be a matter of working to a particular judge's preference.

It is worth noting that the Law Society, in its response to the draft Liquor Licensing Amendment Bill currently going through Stormont, have suggested that clarity on this very question is set out in the new legislation.

Until such times as further clarity is provided by way of legislative reform or otherwise, practitioners should carefully consider the nature and basis of the application, specifically the nature of the changes being made to the premises, whether they are material and whether they would require planning permission, the latter point obviously requiring input from your client's architect or construction professional.

Practitioners should also assess whether an application for a 'provisional grant' and 'final grant' are appropriate in certain licensing applications where premises are being changed or extended in light of the pandemic. Many hospitality clients who are carrying out straightforward works, such as the creation of a new beer garden to the exterior of the property, may only need to consider an application for a new grant, as they can trade unhindered in their existing premises (subject to Covid restrictions), create their beer garden and then apply to court for the new grant. However, clients who seek to carry out major works that are essentially an 'overhaul' of the premises and that temporarily prevent trade will likely need to obtain a provisional grant before carrying out any works, followed by a final grant once the works are complete.

It is our experience that during this time of difficulty, the courts have been receptive and accommodating to liquor licensing applications on the whole, which affords hospitality businesses a better chance of survival. However, at the time of writing, it appears that it will still be some time before we can head to the pubs once again.

The importance of Independent Custody Visitors: their role in protecting the rights of detainees and improving the conditions in detention



John Wadham
Human Rights Advisor
to the Northern Ireland
Policing Board

Volunteers make unannounced visits to police stations to check on the rights, entitlements, wellbeing, and dignity of detainees held in police custody, sending their report on each visit to the Policing Board. The Independent Custody Visiting Scheme helps the Northern Ireland Policing Board (the Board) to deliver independent oversight of policing to try to ensure the PSNI are meeting their human rights responsibilities.

Overview of the Independent Custody Visiting Scheme

The Police (NI) Act 2000 requires the Board to create and run a custody visiting system. The Independent Custody Visitors (ICVs), are volunteers from the local community who make unannounced visits to PSNI custody suites across Northern Ireland. The purpose of these visits, which can take place at any time of the day or night, is to observe, comment and report on how people who are being held in custody are being looked after by the police. The ICVs send their reports to the Board but are expected to provide immediate feedback to the custody sergeant and to raise issues that have been found.

The Visitors and the Visits

There are currently 30 ICVs carrying out this role, and each one is allocated to a team covering the area where they live.

The ICVs try to speak in private to all those held in custody when they visit. They also

ask for consent from the detainee to see their custody record which provides more information on their rights, treatment, and health and wellbeing.

Each year, the Board publishes a report on the number of visits made and the issues that have been raised or addressed through the Scheme and last year over 500 hundred visits were made.

Terrorism Detainees

Visits are also made to those held under the Terrorism Act (TACT). These visits are undertaken by more experienced visitors who have had extra training. Visitors can also observe interviews with TACT detainees via CCTV, however the detainee must give consent for this. The number of TACT detainees who agree to talk to Custody Visitors is, unfortunately, quite low and we have been working to try to address this, including ensuring that the visitors introduce themselves to the detainee. It is understandable that those detained under TACT are likely to be suspicious of anyone in a police station wanting to speak to them or ask them questions. We hope that the lawyers who represent them will be able explain the importance of the ICVs role and the fact that the scheme is designed to improve their conditions and protect their rights. We would welcome the opportunity to meet with solicitors to discuss this scheme and, particularly, the problems of low take up by TACT detainees.

ICVs in the UK and Part of the United Nations Independent Protection System

The Northern Ireland ICV Scheme is a member of the Independent Custody Visiting Association which leads and supports Custody Visiting Schemes across the UK. This includes participation in: the National Experts Forum which brings together Scheme Managers from all regions to share learning practice and resources; and the TACT Network, which is an informal forum allowing Scheme Managers to share practice, learning and expertise and discuss contemporary issues on TACT custody visiting with the Independent Reviewer of Terrorism Legislation.

The Scheme is also a member of the National Preventive Mechanism (NPM) set up to strengthen the protection of people in detention through independent monitoring. The NPM was set up to comply with the UK's human rights obligations to the United Nations after signing and ratifying the Optional Protocol to the Convention Against Torture. This obligation requires every place of detention in the UK to be subject to some kind of independent but formal visiting and monitoring system. Being a member of the NPM enables ICVs to discuss issues and share good practice which has been particularly beneficial during the pandemic.

Custody Visiting during the Pandemic

Custody Suites operate within a challenging environment and there is no doubt that these challenges increased for all involved when the pandemic was declared last March. Due to the risks involved, the Board initially suspended the Custody Visiting Scheme but this was quickly reinstated.

The Board assessed the overall police response to Covid through the publication of a Human Rights Thematic which was critical of PSNI's response to the Black Lives Matter demonstrations in June and the introduction of Spit and Bite Guards. However, in relation to custody, the evidence indicates that, across this first period of the pandemic emergency, the PSNI's performance was generally positive. In particular, those consulted pointed to the PSNI's response to vulnerable people, its innovative collaborative working with other partners and its management of its custody suites as being a particularly positive experience. Since the resumption of the Scheme last May face to face custody visiting has continued and additional PPE has been made available for ICVs across all suites.

For more information on the Scheme please email:
custodyvisiting@nipolicingboard.org.uk



A new decade and a new approach to the Bill of Rights debate



Shania Kirk
LSNI Intern

The creation of a Bill of Rights for Northern Ireland is an ambitious and demanding objective of the Good Friday Agreement (GFA). The Bill of Rights commitment appears alongside the Establishment of Shared Democratic Institutions in Strand One and again under the heading of ‘Rights, Safeguards and Equality of Opportunity’. In the past 22 years, the Agreement has repaired and rebuilt NI society in a manner which has had an overwhelmingly positive impact on the lives of its citizens. However, thus far, it has had to do so without the aid of a Bill of Rights which is tailored to the peculiarities of our society.

The New Decade, New Approach agreement (NDNA) makes a renewed commitment to fulfilling this key objective of the GFA through the establishment of an Ad-Hoc Assembly Committee;

‘To consider the creation of a Bill of Rights that is faithful to the stated intention of the 1998 Agreement in that it contains rights supplementary to those contained in the European Convention on Human Rights (which are currently applicable) and “that reflect the particular circumstances of Northern Ireland”; as well as reflecting the principles of mutual respect for the identity and ethos of both communities and parity of esteem.’ (para. 28)

This commitment is set out in more detail in Annex E. As the committee moves forward with more in-depth debates on the nature and purpose of the Bill, I would like to consider the significance of each aspect of the NDNA commitment to the new Bill of Rights debate.

1. ‘The Panel should initially seek to advise the Ad-Hoc Committee on what constitutes our “particular circumstances”’

In recognising that the Bill of Rights will be a specialised bill of rights for Northern Ireland which will operate in tandem with the European Convention of Human Rights (ECHR), the NDNA commitment appears to be trying to move beyond the disagreement over whether the bill should be ‘maximalist’ or ‘minimalist’ in nature. In Bill of Rights discussions prior to 2008, a ‘maximalist’ approach was generally preferred by Nationalists. Maximalists take the view that the Bill should cover a wider spectrum of

entitlements and should therefore include social, economic, cultural and linguistic rights in addition to civil and political rights. In previous debates, key figures in the NIHRC argued that if these rights were not included in the bill they would be left with ‘second class status’ and this could result in the more ambitious aspirations of the GFA, such as integrated education and shared housing being overlooked.

Contrastingly, unionists tended to favour a ‘minimalist’ approach wherein human rights are supposed to protect only the most fundamental civil and political liberties. Since it is now agreed that the bill will build on ECHR rights, this would mean

that it would simply seek to add NI-specific protections aimed at holding the power-sharing arrangements in place. In the earlier debates, Brice Dickson was a key advocate of the minimalist approach. Advocates of the minimalist approach argued that the NIHRC overreached by seeking to include hard and fast socio-economic rights, such as the right to truth for victims of the troubles, the right to cultural languages (Irish and Ulster-Scots) and the right to integrated education. It was feared that the inclusion of these rights would alienate some unionists. Indeed, the dispute over the inclusion of socio-economic rights eventually contributed to the Bill of Rights project being brought to a standstill.

The briefing paper on defining ‘particular circumstances’ published by the Assembly’s Research and Information Service avoids the use of the terms ‘maximalist’ and ‘minimalist’ and begins by setting out ‘broader interpretations’ and the arguments for limitations. It goes on to list social and economic rights as one the battle lines between these two interpretations which emerged in previous debates. However, it is not yet clear whether the focus on the ‘particular circumstances of NI’ will prove to be a more productive way of framing the debate or a mere translation of the old dispute into an equally unproductive disagreement over the definition of ‘particular circumstances’.

The NDNA prescribes some possibility for relief when it specifies the goal of the bill of rights as upholding ‘the principles of mutual respect for the identity and ethos of both communities and parity of esteem.’ It is also perhaps significant that this clause arises in the section entitled ‘Rights, language and identity’. This new agreement therefore suggests that the parties are more open to the prospect of including social, cultural and linguistic rights than in previous debates. It is foreseeable that bill may seek to build upon the Article 10 Right to Freedom of Expression and Article 14 Prohibition on Discrimination, tailoring these protections to meet the needs of all communities in NI. Perhaps, closest we can get to consensus is that the

circumstances of NI are indeed ‘particular’ and this in itself is sufficient motivation for creating a Bill of Rights.

2. ‘...drawing upon, but not bound by, previous work on a Bill of Rights’

The NDNA commitment intends for the Committee to revisit the former project in a new political climate rather than starting again from a blank canvas. The committee must strike a balance between recognising the value of work that has already been done whilst finding ways to re-conceptualize and move beyond disagreements which led to the failure of previous negotiations and draft bills.

There is cause for optimism here. A number of prospective rights which would likely attract a high level of support have already been formulated by the Bill of Rights Forum in the past e.g. the right to freedom from sectarian harassment. Furthermore, there is now relative consensus on certain issues which were previously contentious. For example, the inclusion of specific protections for women’s rights was previously an area of disagreement. However, the recent passing of the Domestic Abuse Bill suggests there is now a much greater recognition of the importance of legislation protecting women from abuse and discrimination. Environmental issues are another example of cross-cutting interests which have emerged in recent years.

3. ‘...and should review and make recommendations on how the UK’s withdrawal from the EU may impact on our “particular circumstances”.’

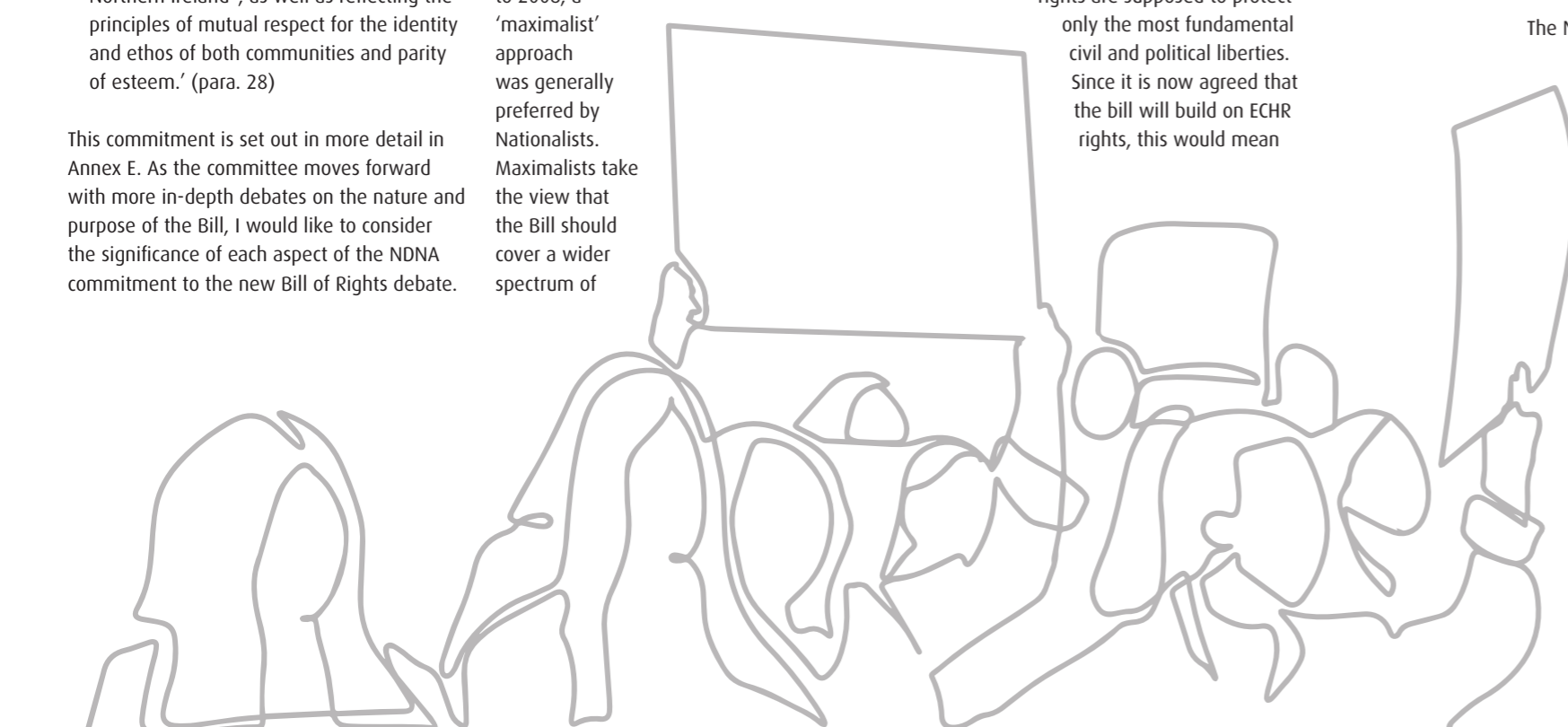
Based on the evidence that has been heard by the Committee thus far, two perspectives have emerged on this point. The first is that the Bill of Rights should aim to pick up the slack left behind after Brexit due to the loss of the EU Charter and other rights protections arising from EU policies. Further, in light of the recent independent review of the Human Rights Act and the independent administrative law review, it is not inconceivable that the NI Bill of Rights may one day be required to ensure the strength and enforceability of current ECHR rights remains unaltered. There also is also a potential for the Bill of Rights to address the

dissatisfaction with the decision in the de Souza case by encouraging further discussion on the freedom to choose political aspirations and national identity.

The second perspective is that the objective should be to create a Bill of Rights which is as close as possible to what was envisaged by the GFA. The focus would therefore be holding in place the peace settlement whilst facilitating the transition to a more ‘normal’ society. Advocates of this approach readily admit that the resulting Bill may, in parts, be largely symbolic owing to the already extensive human rights protections in place in NI under the Human Rights Act, but argue that this does not make it any less important to the peace building process. Ideally, the Bill could be used as a starting point for negotiations on potential strategies for promoting mixed housing and shared education. Further integration of the two communities in these areas would benefit future generations and pave the way to full implementation of the GFA.

Both perspectives highlight the wealth of potential surrounding the NI Bill of Rights project. However, there are significant obstacles which have yet to be addressed. When giving evidence to the Committee on the 8th October, Professor Tom Haden highlighted that the Bill of Rights has to be passed by the British government and therefore it may be unrealistic to attempt to create better rights protections for people in Northern Ireland than in the rest of the UK. Professor Hadden also highlighted that the Bill of Rights project requires significant co-operation between the UK and Ireland as the Bill will have to be read across in the Republic of Ireland. He suggested that the British-Irish Agreement could provide a guiding text that discussions about the Bill could work towards.

In light of the recent political tensions stirred up by Brexit and the British government’s apparent determination to find fault with the current system of rights protections across the UK, there is an increasingly urgent need for progress on the NI Bill of Rights. The resulting Bill could hold in place rights which are central to the maintenance of peace in Northern Ireland regardless of any future change to the Human Rights Act or to our constitutional status concerning membership of the UK, Ireland or the EU.



Reform of the Rehabilitation of Offenders regime



Les Allamby
Chief Commissioner,
Northern Ireland Human
Rights Commission

This article explores two issues which illustrate the value of strategic litigation leading to legal reform. Both will be of interest to practitioners particularly those practicing in criminal law.

Rehabilitation of Offenders challenge

The NI Human Rights Commission has been granted leave to judicially review the Rehabilitation of Offenders (NI) Order 1978, in particular the provision that any sentence of over 30 months following conviction can never be spent and must be declared to employers, insurers and many others. The challenge is based on the current law being contrary to Article 8 of the Convention (the right to private and family life). In particular, the absence of any review or other arrangements to look at the specific circumstances of a case will come under particular scrutiny. The case will be heard on 6 May 2021.

Following reform in England and Wales and Scotland convictions of over four years must be declared throughout the rest of an individual's life. A White Paper entitled 'A Smarter Approach to Sentencing' issued by the Ministry of Justice for England and Wales last year has proposed a rehabilitation period of the length of the sentence plus seven years for those imprisoned for more than four years.



This apply to basic checks only. Moreover, those convicted of serious sexual, violent and terrorist offences will also be excluded from such provision. In practice, there is a sting in the tail inasmuch as it appears the offences covered will be widely drawn and therefore capture large numbers in its net.

Nonetheless, the proposals recognise the value of encouraging rehabilitation and facilitating employment opportunities for ex-offenders.

In the Commission's case, 40 years ago, the applicant was convicted of arson and sentenced to five years in prison and has had a clean record since, yet the need to disclose has impaired chances of employment and affected obtaining business and other insurance. The application is supported by evidence from NIACRO and Unlock with examples of how the current law continues to impact on job prospects and access to training, accommodation, insurance and travel alongside research on the value of a rehabilitation approach.

The JR has already had one result in that the Department for Justice in NI has published a consultation document on reform in January 2021, though, its proposals are unlikely

to assist the applicant. The consultation document does not set out any concrete proposals, instead it asks broad based questions designed to canvass whether there is an appetite for reform, and if so, what kind of approach should be taken. For example, on the question of drawing a line at sentences of 30 months beyond which convictions can never be spent it asks whether to go for a lower threshold, remain unchanged, increase the period to four years or dispense with an upper limit and adopt a proposal similar to that outlined in the England & Wales White Paper.

If any changes are made to rehabilitation periods then it will be the first time it has been done since the introduction of the original law in 1978.

Retention of Biometric Material

A second area where significant reform is being proposed is in the retention of biometric material. The Commission settled a case in the High Court in 2018 for an applicant who intervened as a peacemaker in a neighbourhood dispute outside his home. All three people were arrested and DNA and fingerprints taken. Subsequently, it was accepted that the applicant was seeking to

calm matters and no action was taken against him. Nonetheless, the applicant discovered his biometric material was being retained because he had a previous conviction 17 years earlier for a minor assault resulting in a fine, a case where no DNA or fingerprints had been retained. The grounds for settlement included destroying the applicant's DNA and fingerprints and an agreement that the PSNI would produce and publish a policy on retention including review procedures in line with legislation passed but never commenced under the Criminal Justice Act (NI) 2013. This legislation was in itself, designed to deal with an earlier successful challenge in the ECtHR in *S and Marper v UK* case nos 30562/04 and 30566/04 (2008).

Events were overtaken by a judgment in the ECtHR in *Gaughran v UK* application No 45245/15 13 Feb 2020, a Northern Irish case taken by Fitzsimons and Mallon (solicitors). In *Gaughran*, the applicant was convicted of driving with excess alcohol, fined £50 and banned from driving for a year. While the applicant's DNA sample was destroyed seven years after the offence, his DNA profile, fingerprints and photograph were being held indefinitely. The ECtHR ruled that indefinite retention was contrary to Article 8 of the Convention. In particular, the Court

held that the indiscriminate nature of the powers of retention was disproportionate where retaining such biometric material indefinitely without reference to the seriousness of the offence, the need for indefinite retention and in the absence of any meaningful possibility of review. As a result, the provisions failed to strike a fair balance between competing public and private interests.

Following the judgment, a consultation document was issued by the DoJ in July 2020. The Department proposed three bands of maximum periods of retention, namely 75 years for all convictions associated with terrorism, serious violence and sexual offences, 50 years for convictions for recordable offences that do not fall within the serious category and 25 years for two or more non-serious convictions aged under 18 (not including a custodial sentence of more than 5 years where retention for 50 years will apply). Other proposals included providing for a review process within secondary legislation, retention periods of 12 months for offences left on the books and further powers for a new biometric Commissioner for NI – something also previously legislated for but never introduced.

The consultation process has led to some further amelioration. Nonetheless, the Commission remains doubtful that the 75/50/25 years proposals as currently formulated fully addresses the issues raised in *Gaughran*, given the breadth of sentences covered in the bands and the maximum thresholds of 25 years for children and 50 years for adult convictions. While the full details of any review procedure and its scope has yet to be finalised it is difficult to see how it will overcome the concerns raised in *Gaughran*.

Striking the right balance in Article 8 terms is important, otherwise the matter may again end up before the courts. All of this is important as in October 2019, PSNI held the DNA profiles of 180,000 individuals and almost a quarter of a million people's fingerprints. Applying the arrangements under the Commission's case before *Gaughran* would have led to around a third of the fingerprints retained being destroyed. Putting the basis of retention of biometric material on a modern statutory footing with proper review and oversight arrangements is welcome providing it is fully human rights compliant. Moreover, having a public debate on the retention of such material as part of a wider debate about privacy in a digital age is even more important still.

THE UK LAW SOCIETIES'
JOINT BRUSSELS OFFICEThe Hague Judgments Convention:
Simplified circulation of judgments in civil
and commercial matters after all?

Professor Marta Pertegás



in civil and commercial matters for the benefit of “rule-based multilateral trade and investment, and mobility”, a significant number of Contracting States is indeed essential.

Secondly, the entry into force of the Convention may ensure a stronger position for courts in international dispute resolution, in times where commercial law practitioners may welcome a realistic alternative to arbitration. Whether the pendulum may swing back towards court litigation remains however to be seen. International mediation in civil and commercial matters may prevail in dispute settlement strategies, given the increasing focus on mediation as preferred dispute resolution method in diverse areas of civil and commercial law, and also thanks to the entry into force of the Singapore Convention on Mediation in September 2020.

In any event, the 2019 Judgments Convention is on the radar of the dispute settlement sections of big law firms and influential practitioners. It is a welcome precedent that judges and practitioners (through “umbrella organisations” such

as the International Bar Association, the International Chamber of Commerce, the International Law Association or the International Association of Judges) played an important role as Observers during the negotiations of the 2019 Judgments Convention. Their influential work should continue: law professionals should keep encouraging their authorities in charge of ratification. It is important to note in this regard that the 2019 Judgments Convention is an “open” Convention to all States and may thus also be acceded to by the more than 100 States that are not HCCH Members yet. This Convention can thus one day be as widely ratified as the 1958 New York Convention on Arbitral Awards.

While the 2005 Choice of Court Convention took ten years to enter into force, some optimistic commentators estimate that the 2019 Judgments Convention could already enter into force in 2022. Let us formulate the wish that the United Kingdom and the EU move towards ratification at a similar path. This would provide both sides of the Channel with more legal certainty and foreseeability in the recognition and enforcement scheme applicable to most civil and commercial judgments. Admittedly, this is a meagre consolation after decades of free circulation of judgments but it is certainly a solid building block for a solid judicial cooperation in post-Brexit times.



The successful conclusion of this Convention under the auspices of the Hague Conference on Private International Law (“the HCCH”) undoubtedly marked a crucial milestone in the area of international dispute settlement in civil and commercial matters. In the specific context of the post-Brexit legal landscape, the expected ratification of the Hague Judgments Convention by both the European Union and the United Kingdom may offer a basic, yet welcome, common scheme for the mutual recognition of judgments in civil and commercial matters across the Channel if the parties decide not to use the Lugano Convention and, as the number of Contracting States grow bigger, as a significant international standard for the private international law global community.

This brief contribution sketches the relevance of this new international treaty for legal practice.

Firstly, and stating the obvious, it will not be until the new Convention enters into force that its relevance for private practice becomes measurable. There is reported work about the ratification of the Convention in several jurisdictions: Uruguay and Ukraine signed the Convention on 2 July 2019 and 4 March 2020, respectively and may well be the two first States to ratify the Convention. As the Convention, in accordance with Art. 28(1), only requires two Contracting States for its entry into force, it is reasonable to expect a speedy entry into force within foreseeable time. Furthermore, impact assessment work is ongoing in several jurisdictions, such as the European Union or Brazil. For a Convention that aspires to establish minimum international standards for the global circulation of judgments

Lisburn
Solicitors
Association

Shauna McLaughlin
Reid & Co Solicitors,
Secretary, Lisburn
Solicitors Association

The Lisburn Solicitors Association has always prided itself in being a hub for members- we look out for each other and this has never been more important when we found ourselves in the middle of the dreaded C word!



Pre-Covid we would have had annual dinners which were the highlight of the year and were attended by most of our local members and Judiciary, our last annual dinner being in February 2020. During these dinners we celebrated the achievements and personal milestones of our members during the year and of course had our infamous quiz, where the competitive spirit of our many characters always made for great entertainment and fun! We frequently kept in touch with one another through our AGMs, tea mornings, lunches and of course found time to catch up at Court in between our busy caseloads.

One of the biggest challenges that cemented our Association occurred a few years ago when the news broke that plans were afoot to close Lisburn Court and that court business would be moved to other Courthouses. The Association through its valued members rallied together along with other agencies and stakeholders to battle for Lisburn Court to remain open and the decision was thankfully reversed. This would have indeed been a blow for not only local practitioners but would have also had a detrimental impact on Access to Justice for the most vulnerable members of the greater Lisburn community.

Post-Covid, we went digital and despite not being able to be there for each other in person, it could be said that we have never been more cohesive. WhatsApp groups were quickly established that served as a digital hub for those needing advice, to bounce ideas off colleagues, to share a joke and of course to share what we were all up to! It certainly made the transition to working from home easier when a message about a colleague becoming a parent, grandparent, celebrating a birthday or getting the vaccine came through. The Lisburn Family Solicitors Association especially came into their own and were able to have a few virtual coffee catch ups.

Our Association has many functions and has adapted to be a vital line of communication to ensure the effective dissemination of important information from the NI CTs and the Law Society. We are extremely grateful for the fantastic Court staff that we have in Lisburn that have always been so accommodating and helpful and have made the transition to Sightlink hearings more bearable. The good relationship that our members have with the local Courts in both Lisburn and Craigavon has been vital in ensuring that effective Access to Justice has been available to the public when most needed throughout the pandemic.

As an Association we would like to use this opportunity to thank all of our local Judges but especially DJ Watters, HHJ McCormick and HHJ Lynch for their outstanding leadership in steering cases through pandemics and lockdowns for the best interests of all and their patience with members suffering from the inevitable technical difficulties that arise from remote hearings and dodgy internet signals!

We recently had an extremely productive zoom meeting with the Law Society. It was great to hear first-hand from our Chief Executive and President on all the work that the Law Society has been doing recently for the profession, especially in terms of representations that were made to the Legal Services Agency for interim payments, which helped firms massively in managing cashflow through the first lockdown and to Land Registry to ensure conveyancing transactions could get back up and running. We also discussed other issues that were relevant to our local members.

Our AGM occurred via zoom on the 22nd February and we have big plans for going forward in terms of arranging CPD (in the future) for our members and continuing further virtual get-togethers including an upcoming quiz, until we are all able to safely meet again. It has been a privilege to be Secretary to the Association alongside our chair Philip Thompson and treasurer Peter Prenter for the last year and I wish the incoming Secretary and Committee all the best for this incoming year.

If any firms in the greater Lisburn area are interested in joining our mailing list, please contact us and we would be more than happy to add your details.

Irish Rule of Law International's Work in Tanzania



IRISH RULE OF LAW INTERNATIONAL

With the support of the Law Society of Northern Ireland, Irish Rule of Law International (IRLI) in September 2020 launched a project with our Tanzanian partners the Children's Dignity Forum ("CDF") on investigating and prosecuting child sex abuse ("CSA") in Tanzania. The programme aims to enable access to justice to victims of CSA through a two-pronged cross-jurisdictional approach: i) capacity-building of criminal justice actors – including social welfare officers and medical personnel- in Tanzania in responding to CSA matters ; and ii) cooperation in the form of institutional and information exchanges with criminal justice actors in Ireland and Northern Ireland.

The programme seeks to build on the lessons learnt by Irish and Northern Irish criminal justice actors through responding to historical cases of institutional CSA. It is envisaged that the programme will have a long-lasting sustainable impact, and that it will serve as a vehicle for Tanzanian criminal justice actors to respond to crimes involving vulnerable victims more generally.

Despite the obstacles of the Covid-19 pandemic, the project has managed to achieve a number of key milestones. The project, which has in the main taken place in the Mpwapwa district of Tanzania, has seen dozens of criminal justice actors – from magistrates to police prosecutors and investigators - trained on general child justice issues and relevant juvenile court procedural rules. Medical officers have also been trained on guidelines for tending to victims of CSA. Police desks, as well as medical personnel in hospitals, have also been informed of the psychosocial facilities provided by social welfare officers that are available to CSA victims. To date, the programme has

facilitated the provision of such services to over 60 women and children.

In order to understand the reason behind the under-reporting of CSA crimes, the programme has further organised community-sensitisation sessions that have reached over 500 people in rural villages in the district. Throughout the sessions, trainers have informed participants of mechanisms for redress, as well as support services available to victims, and emphasised the role of the communities to report such cases to authorities.

We would actively encourage those interested in the work of IRLI to visit our new website at www.irishruleoflaw.ie and follow us on our LinkedIn, Facebook and Instagram pages. If you require any information on IRLI or our work please contact us on info@irishruleoflaw.ie

James Douglas
IRLI Director of Programmes



Obituary - Lord Kerr of Tonaghmore



Senior judge who served as Lord Chief Justice of Northern Ireland and a justice of the supreme court of the United Kingdom

Brian Kerr, Lord Kerr of Tonaghmore, who has died aged 72 after a short illness, was an energetic courtroom interrogator who became an ardent defender of the individual citizen's human rights. The longest serving justice on the UK supreme court and a former Lord Chief Justice of Northern Ireland, he was a progressive figure whose rulings advanced the rights of women and children and resolved controversies from the Troubles.

Along with supreme court colleagues, he found against the government in both Brexit-related challenges – over Article 50 triggering the UK's departure from the EU in 2017 and the prorogation of parliament the following year. Of the prorogation case, he later told the Guardian: "The government's position ought to be strongly tested ... It was an intensely interesting case. I failed to resist the temptation to ask questions."

He was most proud of the court's 2018 ruling that eventually led on to the decriminalisation of abortion in Northern Ireland. With other justices, he concluded that the Northern Ireland assembly's law on abortion was incompatible with human rights.

Last year he handed down the decision that the official investigation into the 1989 killing of the Belfast lawyer Pat Finucane – who was murdered by loyalist gunmen under the direction of a British army agent – failed to meet the required human rights standards.

Kerr and his fellow judges were criticised by some legal commentators for their ruling earlier this year that the Sinn Féin leader Gerry Adams had been illegally interned at the start of the Troubles because the then Secretary of State, Willie Whitelaw, had not personally signed the authorisation.

According to Lady (Brenda) Hale of Richmond, the court's former president and his longtime colleague, Kerr had "not seemed particularly radical" when Lord Chief Justice of Northern Ireland but proved himself to be "an excellent lawyer prepared to use his legal skills creatively to advance the law when it needed to advance". Kerr resisted suggestions from other justices he might become president or deputy president of the supreme court.

Among lawyers and staff in the supreme court building in Westminster, Kerr was renowned for his impish humour and warm-hearted informality – although he preferred to keep his room at an unusually cool temperature. Colleagues remembered him inviting the television presenter Sandi Toksvig to lunch and serving home-made strawberry ice-cream.

Lord (John) Reed of Allermuir, the current president of the court, said Kerr had been "more determined than most to correct injustice where he saw it," which led him to be described as the "conscience of the court".

He wrote more numerous dissenting judgments, demonstrating his determination to ensure that minority judicial views were also heard. Brice Dickson, an emeritus law professor at Queen's University Belfast,

calculated that Kerr sat in no fewer than 283 cases during his time on the Supreme Court, delivering his own separate judgment in 112 of them. Kerr, he observed, "seemed to grow more and more liberal as he climbed the judicial ladder".

Lord (Nicholas) Wilson of Culworth, another contemporary, said Kerr "seemed to operate on a presumption, rebutted only in rare circumstances, that, in a dispute between the citizen and the state, the law, if properly analysed, would be found to be on the side of the citizen". In one case Kerr told Sir James Eadie, the government's chief advocate, that: "You have not yet persuaded me." To which Eadie replied: "But I fear, my lord, that I have never persuaded you of anything."

Brian Kerr was born and brought up in Lurgan, County Armagh. His father, James, qualified as a solicitor but did not practise, and worked as a bicycle salesman; he died when his son was 10. His mother, Kathleen (nee Murray), was a teacher.

Educated at St Colman's college in Newry, County Down, Brian had ambitions to attend Oxford University but was never entered for the exam because, he later explained, "my school felt that that was a slightly ridiculous aspiration".

At Queen's University Belfast, he read law. He was called to the bar in 1970. That year he married Gillian Widdowson, and they had two sons.

He began his legal career as the Troubles were intensifying, working through the years of bombings and sectarian assassinations. He took silk in 1983 and five years later became senior crown counsel, which resulted in him representing the crown in significant terrorist prosecutions and other cases.

In 1993, he was made a high court judge. Between 2004 and 2009, he served as lord chief justice of Northern Ireland. He recalled police protection officers driving him everywhere and living in his garden "365 days a year".

The IRA had targeted and killed Northern Ireland judges, murdering Lord Justice Maurice Gibson in a roadside bomb in 1987. Of the security, Kerr said: "I'm not going to suggest it wasn't intrusive in family life. You adjust to it."

In 2009, he became a law lord and months later transferred, along with other members of the appellate committee of the House of Lords, to form the UK's supreme court. The court traditionally has one justice from Northern Ireland and two from Scotland; the rest are from England and Wales.

Tom Hickman, a professor at University College London, saw Kerr as the most no-nonsense judge on the supreme court until his retirement at the end of September. He always felt Kerr could see "straight through the legal and factual web spun by counsel and he could see exactly what the real issue was in the case".

He is survived by Gillian and his two sons, John and Patrick, both barristers.

Brian Francis Kerr, Lord Kerr of Tonaghmore, lawyer and judge, born 22 February 1948; died 1 December 2020.

This obituary by Owen Bowcott first appeared in The Guardian on 16 December 2020 and is reproduced here by permission.

Obituary - David Brewster

David Robert Brewster, born 10th January 1964 was one of three adopted children (twin sisters Elinor and Janet being the others) of Alison and Harry Brewster, late of Magilligan Parish in Limavady. He was schooled at Limavady Grammar school, before turning down an offer to study law at Cambridge, and thereafter commencing at Queen's University Belfast in September 1982. Whilst at Queen's University David became very active in the Young Unionist Party, which ultimately led him to executive of the Official Unionist Party. He was seen by many as the natural successor for the Parliamentary seat of East Londonderry. He was an active member and elder in Magilligan Presbyterian Church as well as his local Orange Order Lodge, the Black Preceptory and the Apprentice Boys, holding high office in those organisations.

Once qualified from Queen's University David commenced his training with Martin King French and Ingram in Limavady. Having completed same, he moved to Lockhart's Solicitors in Antrim in 1988. D.R. Brewster Solicitors opened its doors at 1 Main Street Limavady in 1992, where his firm was regularly referred to as "Doctor Brewsters". By 1995 the local population realised he was not in fact a doctor and he moved premises to number 19 Main Street, Limavady where he practiced until his untimely death on 20th January this year.

David's practice was very much a traditional "country solicitor's" practice, representing his clients with a personal touch and a level of care he felt that some larger organisations perhaps could not provide. He took great pride in being a man of Limavady and to represent the people of that area, whether it be in contentious or non-contentious business. A disproportionate amount of his time was spent acting for numerous bodies and organisations from the area on a pro bono basis. He acted in a number of high profile criminal cases as well as the ground breaking case of *XY -v- FACEBOOK*.

David's other great passion was football, whether it be at Highbury or with his beloved Limavady United, where he held the post of Vice-Chairman for a number of years. Famously he cheekily suggested that Carlos Tevez be sent from Manchester City to Limavady on loan, a joke which ended up in most of the country's media. David's sense of humour, honed by his love of radio 4 humour; Douglas Adams and Monty Python was known to all who spent time with him – even once announcing the members of the (small) crowd to the teams at a Limavady United home game.

A published author on his favourite topics of the Orange Order, and football he was man of many talents. He will be sorely missed by all who knew him.

Neale Matthews



Revised Anti-Money Laundering (AML) Guidance for the Legal Sector published



Brian Carson
Committee Secretary

In January this year, new revised Anti-Money Laundering Guidance for the Legal Sector was published by the Legal Sector Affinity Group (LSAG).

The revised Guidance is available to members in the Members Services area of the Society's website [here](#).

The revised Guidance is the **main** Anti-Money Laundering/Counter-Terrorist Financing (AML/CTF) guidance for the UK legal sector and will support members in complying with their obligations under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (Amended) (the Money Laundering Regulations).

Background:

The Legal Sector Affinity Group (LSAG) comprises all of the legal sector professional body AML/CTF supervisory authorities named in the Money Laundering Regulations, including the Society.

The Society has contributed to the review and drafting of the revised Guidance by LSAG.

Status:

At this stage Part 1 of the revised Guidance has been published in draft form pending approval by HM Treasury and so may be subject to change. Once approved by HM Treasury, it will be published in final form.

Part 1 applies generally to all legal professionals. Part 2 of the revised Guidance will follow and include guidance for particular sectors such as Barristers/Advocates, Trust or Company Service Providers (TCSPs) and Notaries.

Why has the Guidance been reviewed and revised?

The previous AML Guidance for the Legal Sector was issued by LSAG in March 2018 after the coming into force of the [Money Laundering, Terrorist Financing and Transfer of Funds \(Information on the Payer\) Regulations 2017](#).

TRAINEE SOLICITORS SET FOR INTERNATIONAL COMPETITION

Two Trainee Solicitors from the Institute of Professional Legal Studies are celebrating after winning the national heat of the Client Consultation Competition.

The competition which is organised by the Law Society of Northern Ireland and held annually, provides an opportunity for law students to participate in mock client solicitor interviews.

The theme for this year's regional and international competition is Human Rights as they affect Women and Children. The scenario for the regional competition focused on Human Trafficking.

This year's competition was hosted virtually with teams from the undergraduate Schools of Law from Ulster University at Jordanstown and

Ulster University at Magee and the Institute of Professional Legal Studies taking part in the competition.

Ben Lowry and Casey Oosthuizen represented the School of Law, Ulster University, Jordanstown coached by Jason Elliott.

Jay Murphy and Robbie Sinclair represented the School of Law, Ulster University Magee, coached by Mairead McCusker.

Each team was assessed on a range of skills sets including how they conducted a client interview, built rapport with the client and analysed and assessed their specific needs.

This year's winning team were trainee solicitors Robert Bellingham and Rebecca Lucas from the Institute of Professional

Legal Studies who were coached by Ruth Craig and Stuart Harper. Robert is a trainee with Tughans. Rebecca is a trainee with McQueenie Boyle

Robert and Rebecca will now represent Northern Ireland at the international Brown and Mosten International Client Consultation Competition.

The prestigious competition will be hosted "virtually" by the Hillary Rodham Clinton School of Law at Swansea University, Wales from 6- 10 April 2021.

The Society wishes Robert and Rebecca every success in the international competition.

Thank you to Colin Mitchell, MTB and Niall Hargan, Carson McDowell for judging the competition.



The revised Guidance addresses subsequent amendments to the 2017 Regulations including those implemented by:

- [The Money Laundering and Terrorist Financing \(Amendment\) Regulations 2019](#)¹
- [The Money Laundering and Terrorist Financing \(Amendment\) \(EU Exit\) Regulations 2020](#)

LSAG has also taken this opportunity to do a comprehensive review of the content and update all of the previous AML Guidance (March 2018) taking into account, the increasing prominence and complexity of AML/CTF risk, issues and challenges in the legal sector. The review considered relevant reports and guidance issued in the intervening period such as the Financial Action Task Force (FATF) [Risk-Based Approach Guidance for Legal Professionals](#).

Publication of the revised Guidance also follows publication of the [National Risk Assessment of Money Laundering and Terrorist Financing 2020 \(NRA\)](#) - available here by HM Treasury in December 2020.

What is the purpose of the revised Guidance?

The revised Guidance is aimed at members and to support members' implementation of a risk-based approach to identifying and assessing the risks of money laundering and terrorist financing to which their businesses are subject and to mitigate and manage effectively those risks identified.

It intends to provide practical information for members and their firms on how to meet their obligations under the Money Laundering Regulations, to aid their compliance and to effectively protect against money laundering and terrorist financing risks.

The revised Guidance also aims to communicate supervisors' expectations for those they supervise.

The revised Guidance cannot cover every eventuality nor be regarded as a definitive statement of the law and is not legal advice. The authors do not accept any legal responsibility or liability for anything done in reliance on it.



Supervisors will take into account whether a legal professional has complied with the Guidance when undertaking their role as the statutory regulator and as a supervisory authority for the purposes of the Money Laundering Regulations and you may be asked to justify any decision to deviate from it.

What are the key changes?

Members will see in the revised Guidance a change in emphasis to include setting out supervisory expectations as well as helping members understand their responsibilities.

Chapter 3 of the revised Guidance sets out High-Level Compliance Principles. These compliance principles are the key areas to address when trying to ensure members and their firms are compliant with the Money Laundering Regulations. The revised Guidance states:

The [Money Laundering] Regulations set out the requirements which must be adhered to. These, in addition to the compliance principles..., should be viewed as the 'building blocks' for creating robust AML policies, controls and procedures.

The relevant principles are reiterated at the beginning of each subsequent section of the revised Guidance, giving in-depth, practical advice in order to support members in embedding good AML policies, controls and procedures within your business.

The principles cover all the key AML considerations:

- AML Governance
- Practice/firm wide risk assessment
- Client/matter level risk assessment
- AML Policies, Controls and Procedures
- Client Due Diligence
- Suspicious Activity Reporting
- Technology
- Training of relevant employees and agents

- Firms' internal controls
- Record keeping

Other key changes in the revised Guidance include:

- Revised and expanded Risk Assessment section. This addresses the both need for a practice/firm wide risk assessment and client/level matter risk assessment.
- Expanded guidance on understanding and evidencing source of funds and source of wealth including the link between client due diligence and risk assessment.
- Revised and expanded AML Governance and Internal Controls sections.
- A new section on technology – expanding on the requirement for firms to consider and understand the purposes and basis on which they are using AML-related technology (along with its underlying functionality) in order to use it effectively to mitigate risk.
- Updated Training section.
- Revised and updated Legal Professional Privilege section with new Legal Professional Privilege /Suspicious Activity Reporting decision-making template.
- Discrepancy reporting to Companies House and other relevant registries following the new duty/obligations introduced in January 2020.

For ease of navigation of the revised Guidance, a more granular contents section with embedded links to relevant sections has been prepared.

Next steps:

Members should familiarise themselves with the content of the revised Guidance and are encouraged to review and renew their AML/CTF policies, controls and procedures to ensure their compliance with the requirements of the Money Laundering Regulations and to mitigate the risks of money laundering and terrorist financing to which their firms may be subject.

¹ (LSAG had previously issued a summary of [key changes](#) to the Regulations to assist firms comply with the new requirements – this has been incorporated into the revised Guidance).



PRACTICE DIRECTION 6/2011 (REVISED MARCH 2021)

COURT OF JUDICATURE OF NORTHERN IRELAND
COURT OF APPEAL (CIVIL AND CRIMINAL DIVISIONS)
CHANCERY DIVISION
QUEEN'S BENCH DIVISION
FAMILY DIVISION

Introduction

1. This Practice Direction has been reissued to include minor amendments, reflective of current practice. It takes effect from 29th January 2021, applying to all cases, subject to specific case management orders and rules of court in individual cases.
2. This Practice Direction dates from 2011 and was last amended with effect from 8th January 2016 (by PD 01/2016). It is hereby updated to include minor amendments to reflect recent and current practice. It takes into account other Practice Directions and Practice Notes of the Divisions and Lists of the Court of Judicature.
3. This Practice Direction is to be read and applied in conjunction with PD 01/2020/REV1 (the Remote Hearings Practice Direction). It also operates in tandem with and without prejudice to the Judicial Review Practice Direction 3/2018 and the Queen's Bench Division (Commercial) 'Commercial Hub' Practice Direction 1/2019.
4. The consolidated amended and updated version is annexed. The minor amendments hereby effected are identifiable in Annex H.

Dated this 22 day of January 2021

SIGNED:

Sir Declan Morgan, Lord Chief Justice of Northern Ireland

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The full Practice Direction can be accessed by clicking [here](#)



From the Courts - abstracts of some recent case law

Below please find headnotes and links to the full text of selected judgments from the High Court and Court of Appeal.

Please note that these headnotes are for guidance only.

ADMINISTRATION OF JUSTICE

CHRISTIE GIBNEY V MP COLEMAN LIMITED

Appeal against order of split hearings to determine liability and quantum. – 0.33 RCJ and overriding objective. – plaintiff employed by the defendant and fell whilst at work sustaining catastrophic injuries. – HELD that appeal against order dismissed in Northern Ireland
HIGH COURT
20 NOVEMBER 2020
MCFARLAND J

CRIMINAL LAW

R V OWEN CORRIGAN

Application by the prosecution for leave to appeal a decision to stay criminal proceedings on one count of unlawful wounding as an abuse of process on the basis that the defendant could not receive a fair trial by reason of delay and failures in the investigation. – HELD that the trial judge’s decision was wrong in law in that it took into account the absence of photographs, exhibits, forensic examination and an examination of the

scene, none of which were required and it was contrary to principle. – ruling reversed and fresh trial ordered in the Crown Court
COURT OF APPEAL
2 NOVEMBER 2020
MORGAN LCJ, MCBRIDE J, HUDDLESTON J

R v DH

Appeal against conviction of 10 counts of rape and 9 counts of indecent assault in respect of one complainant and one charge of perverting the course of justice. – appellant acquitted on 4 counts of indecent assault, 2 counts of rape, 1 count of common indecency and 1 count of gross indecency. – whether inconsistency in the verdicts, whether more guidance was needed on consent, whether the appellant’s case on motive had been put to the jury and whether there had been confusion on certain specimen counts. – appellant was the uncle of the complainant. – legal principles on inconsistent verdicts burden upon the appellant to show verdicts cannot stand. – consent. – motive. – HELD that appeal allowed on direction count only
COURT OF APPEAL
27 NOVEMBER 2020

MORGAN LCJ, MAGUIRE J, MCALINDEN J

R V SHAUN McCAUGHEY

Appeal against conviction and sentence. – appellant convicted of wounding two injured parties. – procedural issue on single judge involvement. – treatment of the prosecution of scheduled offences. – criminal procedure. – delay and application to extend time. – HELD that the Court constituted by a panel of two judges in accordance with the Criminal Appeal (NI) Act 1980, is competent to decide all aspects of the appeal and to exercise all of its powers notwithstanding the absence of any decision on leave to appeal by a single judge. – application to extend time refused
COURT OF APPEAL
18 AUGUST 2020
MORGAN LCJ, MCCLOSKEY LJ

IN THE MATTER OF AN APPLICATION BY DEBORAH MCGUINNESS FOR JUDICIAL REVIEW (NO.3)

Appeal against decision dismissing the appellant’s claim that the Sentence Review Commissioners (“the

Commissioners”) did not have power to entertain a further application for a declaration of eligibility for release pursuant to s. 3 Northern Ireland (Sentences) Act 1998 (“the Act”) in circumstances where the prisoner (Michael Stone) had been released on licence and that licence had been revoked. – statutory interpretation. – jurisdiction of the Commissioners under the Act. – HELD that appeal dismissed
COURT OF APPEAL
6 NOVEMBER 2020
MORGAN LCJ, TREACY LJ, COLTON J

R V MORGAN AND OTHERS

Sentencing. – defendants face a number of counts including relating to belonging to a proscribed organisation, providing weapons, preparation of terrorist attacks, conspiracy and collecting information likely to be of use in terrorist attacks. – whether deduction of sentence due to restrictions placed whilst in custody due to Covid-19. – dangerousness. – aggravating and mitigating factors
CROWN COURT
13 NOVEMBER 2020
COLTON J

EDUCATION

IN THE MATTER OF AN APPLICATION BY JR94 FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Application by a minor acting through his mother and next friend in relation to his educational provision. – application for leave to apply for judicial review of a decision by the Education Authority (“the EA”) to discontinue home tuition for the applicant and the continuing decision by the EA to refuse to provide home tuition pending the final determination of the

appeal. – application to grant interim relief since the Special Educational Needs Tribunal does not have jurisdiction to do so. – whether the decision of the EA not to continue with home tuition is unlawful or amounts to irrationality. – HELD that application for judicial review dismissed
HIGH COURT
3 DECEMBER 2019
KEEGAN J

EVIDENCE

R V KEVIN MCLAUGHLIN

Appeal against conviction for possession of explosive substances in suspicious circumstances, possession of firearm and ammunition. – trial judge rejected the application of No Case to Answer because he considered that on one possible view of the evidence presented, a jury, properly directed, could be satisfied of the Appellant’s guilt to the requisite criminal standard. – HELD that the trial judge erred in law in refusing the application for a direction of no case to answer and appeal allowed
COURT OF APPEAL
30 NOVEMBER 2020
STEPHENS LJ, TREACY LJ, HUDDLESTON J

FAMILY LAW

MC V RB

Appeal against decision of Judge who found the appellant guilty of contempt of court by failing to comply with the terms of an Interim Contact Order (“the Order”) in respect of her daughter and sentenced her to one month’s imprisonment suspended for one year. – appellant did not make the child available for contact since she considered the child at risk. – whether basis for the mother’s concerns or welfare risk to the child if the terms of the Order

were followed. – HELD that appeal dismissed
COURT OF APPEAL
21 OCTOBER 2019
MORGAN LCJ, TREACY LJ, HUDDLESTON J

ANTHONY QUINN V MADONNA QUINN

Division of matrimonial capital assets. – appeal against decision of Judge and Master. – whether procedural irregularity in the proceedings. – whether finding incongruent with the evidence. – whether award of child maintenance was unjust and unfair. – whether the Judge erred in fact and law. – whether the appellant had a fair hearing given the presence of the McKenzie Friend. – HELD that 12 grounds of appeal are dismissed, one is resolved by varying the Order of Court and one succeeds
COURT OF APPEAL
22 JULY 2020
MCCLOSKEY J, MCALINDEN J

JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY LARNE CHEMISTS LIMITED, DOHERTY’S PHARMACY LIMITED AND B&D ASSOCIATES LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Pharmaceutical appeal. – application for leave to apply for judicial review of a decision of the National Appeal Panel (“the Panel”) refusing an appeal by Doherty’s Pharmacy Limited against the decision of the Health and Social Care Board approving a minor relocation of premises. – whether the Panel decision should be quashed on the grounds that it misapplied the law, failed to consider material considerations, relied on material error of fact, gave inadequate reasons, failed to conduct a legally necessary enquiry and that the decision was irrational. – whether the premises offered the same pharmaceutical services. – impact on the pharmaceutical services of the notice party on other pharmacists in the neighbourhood.

– HELD that the Panel failed to discharge its duty to give adequate reasons. – appeal succeeds on the issue of the same pharmaceutical services only
HIGH COURT
LARKIN J
9 NOVEMBER 2020

SUCCESSION LAW

THERESA MCGARRY V KEVIN MURPHY AS THE PERSONAL REPRESENTATIVE OF BRIGID GILHOOLY (DECEASED)

Plaintiff challenges the validity of the Will of the deceased on the grounds that the testatrix lacked testamentary capacity, that the Will was obtained by the undue influence of the defendant and that the Will is a forgery. – whether the Will was properly executed. – disputed Will is the second Will drawn up by the testatrix, which contained a number of differences from the first Will. – plaintiff seeks a pronouncement from the Court against the validity of the disputed Will; that the Court sets aside the grant of probate and assent and issues a grant of letters of administration of the estate of the testatrix to the plaintiff. – test for testamentary capacity. – burden and standard of proof. – evidence of capacity. – applicability of the Golden Rule. – undue influence. – Judge noted that the solicitor involved in drawing up the Will did not make any professional assessment of the testatrix’s capacity, nor did he ascertain the changes being made in the second will and the reason for them. – HELD that on the balance of probabilities the testatrix had testamentary capacity at the relevant time based on medical notes and records, that there was no evidence of undue influence and the Court is not satisfied that the Will is a forgery. – application to set aside the Will refused
HIGH COURT
6 NOVEMBER 2020
MCBRIDE J

action
mental
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THE **LAW SOCIETY**
OF NORTHERN IRELAND



Belfast City Marathon Relay Challenge 2021

19 September 2021

**Calling all Legal firms
to submit a relay team(s)
in aid of AMH.**

- All legal firms will compete against each other for 1st 2nd & 3rd prize
- A prize will also be awarded to "Best Fundraising Firm"

Run, walk or relay to help Action Mental Health continue to deliver mental health and well-being services across Northern Ireland.

Sign up today at

www.belfastcitymarathon.com
and email

fundraising@amh.org.uk
to receive your fundraising pack
and running vest/T shirt.

Final entry 27th August 2021.

Event details

- **Date:** Sunday 19 September 2021
- **Registration fee:**
£120 per team (late entries £140)
- **Location:** Belfast
- **Minimum age:** 18
- **Minimum fundraising:**
Raise what you can through our
group fundraising page below,
linking your own firm page
[https://www.justgiving.com/
campaign/lawsocietyNI](https://www.justgiving.com/campaign/lawsocietyNI)

#SmashTheStigmaOfMentalHealth

