

# Ireland

## Mason Hayes & Curran

Louis Mooney and Declan Black

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### 1. THE BASIS OF CIVIL FRAUD OBLIGATIONS UNDER IRISH LAW

Civil fraud obligations have principally developed through the evolution of cases in the common law. This corpus of jurisprudence is supplemented by legislation in specific areas.

As a general note, modern English and Commonwealth authority is of persuasive influence in interpreting the position in Ireland.

### 2. THE MAIN ELEMENTS OF CAUSE OF ACTION IN IRELAND BASED ON CIVIL FRAUD

The assertion of fraud is a component of a variety of causes of action in tort, contract and equity. A claim based on fraud can also serve to remove the legal validity of the conduct or contract involved and permit a claim for damages.

#### Deceit

The tort of deceit, sometimes known as fraud or fraudulent misrepresentation, is the most common tortious claim in cases of civil fraud. Deceit arises in circumstances where the defendant causes the plaintiff loss through misleading the plaintiff by means of a fraud (ie with dishonest intent). It is concerned with the right of the deceived party to recover damages from the fraudulent person who instigated the deception, with a view to putting the innocent party as close as is possible into the position he would have occupied had the deceit not occurred.

The main elements in the cause of action in deceit are: (i) an untrue representation of fact; (ii) fraud of the representor (the party making the representation); (iii) the representor's intent to induce reliance on the untrue representation; (iv) actual reliance by the representee (the party receiving the representation); (v) damage caused to the representee by such reliance. Considering each of these in turn:

(i) *an untrue representation of fact*. The untrue representation may be written or oral, and may be express or implied by conduct. To be actionable, the representation must be of a factual nature. An indication of opinion or personal intention will not usually constitute a representation as to its substance, although it can constitute a representation of the fact that the representor holds that opinion or intention at the time, which may suffice, depending on the circumstances of the case.

An omission to disclose relevant information will not ordinarily constitute a representation. The exceptions to this are where:

- the non-disclosure renders other statements misleading; or
- the law recognises that the relationship between the parties belongs to a category which requires disclosure. Such relationships include fiduciary relationships (a special relationship of trust and confidence, eg between trustee and beneficiary, and which can ground a separate cause of action (see below, Breach of fiduciary duty) or transactions which are *uberrimae fidei* (required to be in utmost good faith).

There is a particular statutory rule for statements concerning the creditworthiness of another person. Fraudulent misrepresentations provided to enable another party to obtain credit are only enforceable if they are provided in writing and signed (*section 6, Statute of Frauds Amendment Act 1828*). This avoids the situation whereby the representor would effectively become a guarantor of any credit advanced through making a fraudulent misrepresentation.

(ii) *fraud of the party making the representation*. The classic definition of fraud for the purposes of deceit is that '*fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false*' (per Lord Hershall in *Derry v Peake (1889) 14 App Cas 337*). Therefore an honest belief in the truth of the representation relieves a defendant of liability, although there may be liability in a separate cause of action, for negligent misstatement under the principles stemming from *Hedley Byrne v Heller [1964] AC 465* (see below, Other forms of tortious liability).

(iii) *intent to induce reliance*. The representor must intend for the representee to rely on the representation in the way that the representee actually does. The test for intent is what can objectively be inferred from the circumstances.

It is possible that the plaintiff is not the immediate recipient of the representation. However, so long as the plaintiff belongs to the class of persons to whom the representor intended the representation to pass, he is not deprived of sufficient standing to bring a claim.

(iv) *actual reliance by the representee*. There must be a correlation between the representation, the intended reliance and actual reliance by the plaintiff. The representation need not be the only reason for the plaintiff's conduct, but it must materially influence the plaintiff. In terms of proof, actual reliance will generally be inferred from the circumstances: if the plaintiff acts in a manner on the basis of the representation that one would ordinarily expect given all the circumstances, this will suffice.

The law is less certain in relation to situations where the plaintiff is deceived, but in the circumstances ought not to have been. The cases on this point are slightly inconsistent, but the best view is that the scale of the plaintiff's negligence is what creates any deficit in reliance: that is, mere negligence on the plaintiff's part in failing to discover the falsity should not defeat the cause of action, but recklessness or wilful disregard for the truth should. In any event, the plaintiff's negligence may be considered after liability has been established at the quantum stage to reduce the damages the plaintiff is entitled to recover to reflect the extent to which he is responsible for the predicament he finds himself in.

(v) *Damage caused to the innocent party by such reliance*. There must be actual loss such as economic loss, personal injury or property damage. This

requirement is not fulfilled by embarrassment or hurt to feelings. In practice, the majority of cases involve the innocent party entering a commercial transaction on the basis that there is a good prospect of economic success when in fact such prospects are uncertain or entirely illusory.

### **Conspiracy**

Conspiracy is a common law tort which sometimes comes before the courts in the context of civil fraud. The preferred legal analysis recognises two forms of conspiracy, which can be termed '*simple conspiracy*' and '*unlawful means conspiracy*'.

'*Simple conspiracy*' occurs in circumstances where two or more people act together with the predominant purpose of damaging the economic interests of another, without justification. Therefore where there is a valid justification, such as increasing market share (which by definition will require reduction in a rival's market share), there will be no basis for an action for conspiracy (eg *Tru-Value Ltd v Switzer & Co*, High Court, 10 March 1972). For obvious reasons, such a claim is rarely successfully made out.

However, regardless of whether there is a predominant intention to injure the plaintiff's interests, if unlawful means were used in pursuit of the agreement or joint enterprise which damage the plaintiff's economic interests, the second form of conspiracy, '*unlawful means conspiracy*', may apply. Such a conspiracy is concerned with the agreement of two or more people to do an unlawful act, or to do a lawful act by unlawful means. An unlawful act in this context extends beyond the criminal law and includes an agreement to commit a tort or procure a breach of contract. An example of unlawful means conspiracy would be price fixing between two parties to the intended commercial detriment of a third party.

Both types of conspiracy claim require proof of actual damage to be actionable.

### **Other forms of tortious liability**

There can be liability in the absence of fraud, under the heading of the tort of negligent misstatement, which arises out of the English *Hedley Byrne* line of cases. This arises in cases where:

- the representor makes a negligent (therefore non-fraudulent) misrepresentation;
- the representor intends that this be relied upon; and
- it is in fact relied upon, to the representee's actual detriment.

This tort usually requires that a '*special relationship*' exists between the representor and representee, which may possibly be fulfilled where the representor holds himself out as holding a special knowledge or skill and the representee relies on this (eg a solicitor client relationship, a bank's representations in relation to a customer company, or an auctioneer in relation to a property). There are advantages to the plaintiff in framing his case in terms of fraudulent misrepresentation/deceit. Such advantages extend to the extent of loss that can be recovered, lifting the corporate veil, the impact of delay, and exceptions to failure to comply with the statute of

limitations (see sections 6 and 7).

There is also a statutory right to damages in cases of innocent misrepresentation under section 45(1) of the Sale of Goods and Supply of Services Act 1980. This section provides that where a party enters a contract in reliance on a misrepresentation, he can bring a claim for damages even if the representation was innocently made, if the representor cannot prove that he had reasonable grounds to believe it and did believe it at the time it was made.

### **Breach of fiduciary duty**

Claims of civil fraud involving certain relationships can be brought as claims for breach of fiduciary duty.

The distinguishing obligation of a fiduciary is the obligation of loyalty. This core duty has several consequences, for example, a fiduciary:

- must act in good faith;
- must not make a profit out of his trust;
- must not place himself in a position where his duty and his interest may conflict;
- may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

This duty to act in good faith means that actions taken in bad faith are generally actionable as a breach of fiduciary duty. Common examples of fiduciary relationships are the relationships between trustee and beneficiary, agent and principal, director and company, and between partners in a partnership. However, categories are not set and can depend on the circumstances of the case. So, for example, whilst employees do not generally owe a fiduciary duty to their employer, where the employee has been placed in a particular position of privilege and trust, a fiduciary relationship may arise: see the *English case of IG Index v Colley [2013] EWHC 478 (QB)*.

Any claim based on an allegation of a breach of fiduciary duty will have five constituent parts: (i) proof of the existence of the duty; (ii) proof that it was owed to the plaintiff; (iii) breach of that duty; (iv) causation; and (v) injury or loss.

This type of claim is generally more difficult to assert than ordinary negligence claims, as it will require proof of subjective intention. This means demonstrating that the defendant consciously did something that was wrong, or that shows some form of disloyalty or infidelity. Mere inadvertence will not suffice.

### **Breach of contract**

A fraudulent breach of contract can be actionable as a simple breach and is often coupled with a claim in tort for deceit and/or conspiracy, and a claim for aggravated or exemplary damages.

A contractual claim based on fraud has significant overlap with deceit. However as an action in contract, it is more concerned with disentangling transactions affected by the fraud, and so can carry important consequences for rights of ownership of property conveyed or assigned in fraudulent circumstances. Therefore, in a contractual claim, rescission can be ordered, whereby the contract is rendered void *ab initio* (from the outset), and title is

returned to the original owner. This arises where a misrepresentation was such that it induced the representee to enter a contract. As an equitable remedy, rescission is subject to the court's discretion, which will involve a consideration of the plaintiff's behaviour and the broader justice of the case (see section 3).

### **3. REMEDIES AVAILABLE UNDER IRISH LAW IN RELATION TO CIVIL FRAUD**

A plaintiff who establishes fraud may be entitled to a number of reliefs including damages, restitution, rescission of a contract, an account of profits, specific performance and declaratory relief.

#### **Damages**

This is where the law orders the defendant to pay money to compensate the plaintiff for harm caused or loss suffered. The principle of restoration in original condition (*restitutio in integrum*) can provide effective redress where the plaintiff has suffered only pecuniary loss.

The underlying function of damages in tortious and contractual claims differs, so it is important to identify the precise cause of action relied upon. In tortious claims such as deceit, damages are aimed at putting the plaintiff in the position, as far as is possible, that he would have occupied had the tort not occurred. A contractual claim based on breach of a contractual term is aimed at putting the plaintiff in the position he would have occupied if the term was properly adhered to (ie where the (fraudulent) representation became a term of the contract). In tortious claims the plaintiff may seek punitive or exemplary damages, which are additional damages aimed at punishing or making an example of the defendant, where conduct is so particularly egregious as to warrant additional censure. Punitive damages are generally regarded as inappropriate in contractual claims.

#### **Restitution**

Restitution, as an accompanying remedy to rescission (see below, Rescission), in the sense of the restoration to the innocent party of benefits conferred under the contract, may be used where a contract has been performed in whole or in part by the innocent party, but has been rescinded *ab initio*. The other aspect of this is that the innocent party must also return what has been transferred under the contract that has been rescinded.

#### **Specific performance**

In some situations where representations become terms of a contract, the innocent party may seek an order to have the contract specifically performed according to such terms. By way of example, this remedy could be sought to enforce a contract for the sale of land, if this is possible. To obtain such an order, the plaintiff must demonstrate that damages are inappropriate as a remedy. Specific performance is a discretionary remedy so the court will bear in mind the broader justice of the case before granting it, including the plaintiff's conduct and any delays. Similarly, pre-existing third party rights may frustrate any such remedy.

## Rescission

The term rescission is used in a number of contexts with different meanings in both judgments and texts. Therefore it is important to be clear about what is meant in each instance. Generally speaking, rescission is a contractual and equitable remedy aimed at undoing the effects of the transaction, and can be coupled with restitutionary remedies (see above).

One concept often referred to as rescission, but perhaps better referred to as '*termination of the contract*', is where one party breaches a contract in a way that goes to the root of the contract and as a result the innocent party becomes entitled to elect to treat the contract as repudiated by that party. If the innocent party so elects, he will be relieved of the performance of further contractual obligations and sue for damages. The contract is effectively terminated from that point (void *in futuro*). This remedy may be available where a misrepresentation became a term of the contract, and that term is breached. This is not a form of court-ordered declaratory relief: the innocent party generally need only take reasonable steps to inform the party in breach of the innocent party's election to terminate.

The other form of rescission is rescission *ab initio*. This occurs where, because of some inherent cause of invalidity in the contract (such as it having been induced by a fraudulent misrepresentation), the contract is treated as voidable *ab initio*, ie the contract is treated as valid, unless and until rescission is ordered by the court. If rescission is then ordered by the court (not any of the parties), the contract is then retrospectively invalidated from its inception. The court may set aside a transaction:

- if the transaction has been entered into on the basis of an express fraudulent misrepresentation; or
- in circumstances where there has been silence where the law requires disclosure; or
- if the transaction is otherwise unconscionable.

However this remedy is subject to a number of limitations. First, the restoration of the parties to their original positions must be possible, or at least, substantially possible. Second, rescission *ab initio* is an equitable remedy and so discretionary, and will involve a consideration of the broader justice of the case, including the plaintiff's conduct. The court may refuse to grant the remedy, despite the presence of the basic requirements, if it feels it inappropriate or unnecessary in that context. Third, a contract will not be rescinded where this will prejudice the rights of bona fide third party purchasers for value without notice of the fraud: such innocent third parties who acquire title will be entitled to have such title respected (see section 6.4). Fourth, if the innocent party obtains full knowledge of the facts and existence of the misrepresentation and is aware of his right to rescind, then any indication of his intent to proceed with the contract, whether express or by conduct, may be held as an affirmation of the contract. Such affirmation serves to cure the defect caused by the misrepresentation and validate the contract.

## Declaratory relief

The court can grant declaratory relief as to a declaration of:

- rescission *ab initio*; or

- as to rights of ownership of property; or
- that A holds certain property on constructive trust for B.

A constructive trust may arise where a fiduciary breaches his duty, because of the equitable principle that he cannot profit from such breach. As such, any profit that he does make will be held in trust for the benefit of the other party, known as a constructive trust. So, for example, where a fiduciary has accepted a secret commission or bribe, he will have to account to his principal. In circumstances where the defendant has disposed of the trust property, the plaintiff may be able to use the process of tracing to identify and impose a proprietary claim on the proceeds of the trust property. This process can be an advantage in conferring priority in the event of the third party representee's insolvency, as well as attaching claims to assets even as they change form. The process may be defeated by a bona fide third party purchaser for value without notice (see section 6.4).

### Combinations of remedies

A plaintiff will simultaneously be able to secure remedies that are justified by the underlying causes of action advanced, so long as the remedies are not inconsistent or do not involve double recovery. So a plaintiff may secure damages on the tort measure for deceit and *ab initio* rescission of a contract he was induced to enter into by a misrepresentation, to include restitutionary damages (if they, on the facts, vary from the tortious measure), so long as he does not recover twice.

## 4. DAMAGES; BASIS OF CALCULATION

### Claims in tort

Where the (civil) fraud results in a claim in tort, such as deceit, the tortious measure of damages applies. The primary purpose of this measure is to put the plaintiff in the position he would have occupied had the fraudulent misrepresentation not been made. This is opposed to the general contractual measure of damages which is to put the plaintiff into the position he would have occupied had the representation been true (often referred to as the '*expectation*' loss). The objective of a claim in tort is to undo the wrong, rather than to fulfil (improperly) agreed expectations.

The rules of remoteness ordinarily restrict a plaintiff to recovering for loss which is reasonably foreseeable in tort cases. However, exceptionally, the test for remoteness in the tort of deceit is broader, in that it extends to direct consequences and so captures a wider universe of loss: '*as far as the tort of fraud or deceit is concerned it is well settled that the measure of damages is based on the actual damage directly flowing from the fraudulent inducement, and that the award may . . . include consequential damages representing what was reasonably and necessarily expended as a result of acting on the inducement*' (per Henchy J in *Northern Bank Finance Corp v Charlton* [1979] IR 149).

Many civil frauds will lead to the purchase of some form of property. In such cases, the normal measure of loss in tort will be the difference between the price paid for the property and the actual market value of the property at the time of purchase, as opposed to the value the property was represented to

be. Additional losses, such as a subsequent fall in the value of the property, are not generally recoverable under this head, unless it could be shown that the plaintiff would not have entered the transaction at all had he been informed of the true position.

A further head of damages in tort is punitive or exemplary damages. These go beyond the objective of compensation, but rather are focussed on censuring the defendant because of the particularly egregious nature of the tort committed. One circumstance where this applies is where the defendant had committed the tort with the intention of making a profit, even allowing for having to pay compensation. Such damages may apply in civil fraud cases, given their intentional nature and that the defendant usually aims to improperly secure financial gain (see section 7.4).

### **Claims in contract**

In circumstances where pre-contractual false representations become terms of the contract and therefore underpin a claim for breach of contract, the plaintiff may be entitled to damages. Generally speaking, the measure of damages in contract is to place the party in the position it would have occupied had the breach not occurred; the underlying notion is fulfilling the expectation created by the defendant's promise. Therefore the plaintiff is to be placed in the position he would have been if the defendant's statement was true.

This may sometimes be calculated as the difference between the value of what the claimant received and the value he would have received if the statement had been true. Where it is possible to cure the defect (to bring it up to the standard represented by the defendant's promise), this may be calculated by reference to the cost of cure.

### **Claims in equity: breach of fiduciary duty**

Where an unlawful profit has been made, the plaintiff will be entitled to an account of the profits made by the defendant in breach of his fiduciary obligations, or to damages for the loss suffered by the plaintiff. If the plaintiff elects for damages, these are aimed at making good a loss in fact suffered and which, using hindsight and common sense, can be seen to have been caused by the breach.

## **5. AVAILABLE INTERIM RELIEF**

The courts have a wide discretion to grant pre-trial remedies, the most usual of which would be an injunction, ie an order from the court commanding a party to cease certain behaviour or requiring the party to do something. An injunction will be aimed at preserving the *status quo* pending full judicial resolution or settlement.

Mandatory injunctions which may be useful in the context of civil fraud include the following:

- *Mareva injunction*. This is a freezing order, restraining a party's use of assets where it can be demonstrated that there is a real risk of dissipation of those assets in an effort to frustrate any potential judgment. The very fact of the fraud will be useful evidence, in relation to the defendant's

honesty and intentions regarding their assets;

- *Anton Pillar order*. This is an order allowing a plaintiff to enter the premises of another party to inspect and remove evidence prior to trial where a strong likelihood has been established that important material may be destroyed or removed, something that may be a risk in fraud cases; and
- *A Norwich Pharmacal order* with a gagging order. This is an order as against a (usually innocent) third party facilitator to disclose the identity of the actual wrongdoer. The gagging order prevents that innocent third party from tipping off the wrongdoer as to the possibility he is suspected. It may be aimed at a bank or internet service provider disclosing details of an account holder.

In summary, if persuaded that there has been fraudulent conduct, the Irish courts will be inventive in designing provisional and protective relief to deliver a practical remedy for the injured party.

In making such orders the court will be mindful of ensuring all parties' rights are protected given that the issues at dispute are not fully ventilated and remain unresolved. Therefore such orders are usually made on terms and/or coupled with undertakings from the party seeking the order to make good losses if that party is ultimately unsuccessful at trial.

Other orders which can be made prior to a trial include orders for non-party discovery, the taking of evidence on commission, the provision of interrogatories (answering closed questions on oath) or directing the trial of a preliminary issue.

## **6. BARS TO RELIEF FOR CIVIL FRAUD**

### **6.1 Delay**

Laches applies where the plaintiff has delayed unreasonably long such that the other party suffers detriment by the delay. It can be relevant where a plaintiff claims remedies which are usually or exclusively sought under the courts' equitable jurisdiction, such as rescission, specific performance, injunctions, etc. The effect of laches generally operates to bar such a remedy, even if no statutory period of limitation applies. It may arise in circumstances, for example, where the plaintiff delays a number of years without good reason before bringing his claim, and in the meantime the defendant has spent the benefit or invested in and improved the benefit afforded to him under the transaction the subject of the claim.

### **6.2 (Lack of) good faith**

In deceit, there must be actual reliance by the plaintiff on the misrepresentation (see section 2, Deceit). An absence of good faith by the plaintiff in this regard will therefore be fatal to any claim. Where the plaintiff ought to have known the representation was false, but apparently did not, this may:

- undermine the reliance so that a claim is defeated;
- result in a reduction in any damages awarded to reflect the plaintiff's own culpability.

### **6.3 Applicable limitation periods**

Generally speaking, claims in tort, contract and equity have six-year limitation periods. In fraud cases this period will usually run from the date that the plaintiff has discovered the fraud or could with reasonable diligence have discovered it (see section 7.3).

### **6.4 Position of good faith purchaser for value without notice (innocent third parties)**

Such a purchaser will generally take good title of property, which defeats any claims against it, whether brought through the process of tracing or otherwise. An exception to this is where the buyer's good faith is in issue arising from the circumstances of the sale, eg he failed to make enquiries a reasonably diligent buyer would make. There is also authority that holds that where property is transferred to a rogue who subsequently cannot be found, it is possible to effect rescission simply by informing the police of the fraud in the hope that the property can be recovered. This can have the effect of preventing good title being passed on to an innocent third party transferee (*Car v Caldwell* [1965] 1 QB 525).

## **7. ASPECTS OF PLEADING FRAUD IN IRELAND**

### **7.1 Lifting the corporate veil**

The courts will not permit a company to be used for a fraudulent purpose. An officer of a company such as a director can be held personally liable, without limitation, for all or part of the debts of the company, where it appears that, while he was an officer, he was knowingly party to the carrying on of the business in a reckless manner (*Companies Act 1963* as amended by the *Companies Act 1990*). Furthermore, any person, whether an officer or not, can be made liable if he was knowingly a party to the carrying on of any business of the company with the intent to defraud its creditors or any fraudulent purpose.

### **7.2 Settlements/exclusion clauses**

If a settlement/exclusion clause has been induced through fraud it will be invalid (*Pearson v Dublin Corporation* [1907] AC 351). If the claim is for civil fraud, but there is no suggestion that the settlement/exclusion clause itself has been procured through fraud, that clause itself could possibly remain effective to exclude liability. This is subject to the general principle that an exclusion clause cannot exclude liability for a contracting party's own fraud. At a slightly higher level of abstraction, whether a party can exclude liability for the fraud of his agent is an issue the Irish courts have not yet clarified. In considering any of these issues, an Irish court would most likely consider the surrounding factors of the case, including whether the parties had entered an unconscionable bargain. This may occur where one party, as a consequence of facing unfairly strong bargaining power, did not exercise true free will. The uncertainty engendered by such a test is self-evident, and the precise parallels have not been judicially explored in detail.

### **7.3 Extension of limitation**

Where either a right of action is based on or has been concealed by fraud, the period of limitation does not begin to run until the plaintiff has discovered

the fraud or could with reasonable diligence have discovered it (see section 6.3).

#### **7.4 Punitive damages**

The plaintiff may in tortious claims seek punitive or exemplary damages where the conduct of the defendant is so particularly egregious as to warrant additional censure (see section 3, Damages). In addition, the test for remoteness for what can be recovered is wider in cases of fraud in tort than ordinary tort cases. The defendant will be liable for losses which are ‘*the direct consequences*’ of the tortious act, rather than the usual measure of those losses that are ‘*reasonably foreseeable*’.

#### **7.5 Standard of proof**

In theory, the Irish courts have expressly rejected the contention that a higher standard of proof than the ordinary civil standard of the balance of probabilities applies in civil fraud cases (*Banco Ambrosiano SPA v Ansbacher & Co Ltd [1987] ILRM 669*).

However, given the seriousness of a fraud allegation in the context of civil proceedings, the courts have stated that the standard is to be applied with a degree of flexibility, and serious allegations such as fraud (which cast a greater aspersion on the defendant than allegations of negligence) need to be proved more clearly than other claims. The practical effect of this is that more or better proof will often be required for allegations of fraud to be successfully made out than other civil claims. Similarly, the more serious the fraud alleged, the more proof will be required. However the standard of proof to be met is, like other civil claims, on the balance of probabilities.

#### **7.6 Lawyers’ duties when pleading fraud**

Pleading fraud should not be undertaken lightly. Owing to the seriousness of the plea, allegations of fraud must be fully pleaded in written and oral submissions with precise details on the nature of the fraud and how it is alleged to have occurred. If a party fails to plead fraud with sufficient detail, the court has an inherent jurisdiction to strike out the relevant part of the claim. Furthermore, the Bar Council’s Code of Conduct prohibits a barrister from pleading fraud without explicit instructions to that effect.

### **8. BASIC REQUIREMENTS IN RELATION TO ISSUING PROCEEDINGS; APPLYING FOR INJUNCTIVE OR INTERIM RELIEF; OR SERVING PROCEEDINGS ABROAD**

#### **Issuing proceedings**

Proceedings are commenced by the issue from a court office of different formats of legal document:

- an originating writ of summons (of varying types) used for most cases such as the recovery of damages in tort (including personal injury), contract, debt recovery and special summons in particular claims such as mortgage suits;
- a petition which applies to certain prescribed claims such as the winding up of a limited liability company under the provisions of the Companies

- Acts or for judicial separation or divorce; or
- an originating notice of motion used in limited cases usually for statutory applications by certain public bodies, such as government ministers or local authorities.

The paperwork at this point is very limited: a summons (claim form) need not contain all the relevant details of the claim, and listing the causes of action and the remedies sought will generally suffice. Usually the proceedings are deemed to commence (and the limitation period stops) from the time the relevant document issues from the court office, not the time the document is served on the defendant. Therefore a claim can be issued swiftly.

Once a claim has been formally commenced by the issuing of the initiating documentation, this documentation must be served on the defendant. The defendant is then usually required to enter an Appearance within eight days. An Appearance simply acknowledges the claim and indicates an intention to defend it. However, if jurisdictional arguments are to be advanced, it is critical to raise any jurisdictional issues at this stage by entering an appearance '*under protest*'. The plaintiff then provides the details of the claim in the Statement of Claim, which according to the Court Rules is to be delivered 21 days after the defendant has entered an Appearance, although the practice of the Master of the High Court is generally to allow more time than this.

### **Applying for injunctive or interim relief**

Interim relief can be granted *ex parte* (on the application of only one party to the proceedings) in circumstances of particular urgency. This relief can be sought at short notice, simply by explaining the urgency to the Central (Courts) Office and arranging with it to appear before an available judge and asking to be heard. The paperwork required is:

- a plenary summons (claim form); and
- a grounding affidavit sworn by the applicant containing all the information necessary to meet the criteria for the granting of an injunction.

In the context of an *ex parte* injunction, because only one party has been heard, it will only last a short period (a matter of days), until a hearing can be arranged (the 'return date') at which the other side can be heard.

In a case of international civil fraud, a plaintiff may seek a *Mareva* (freezing) order to prohibit the transfer of assets, typically from bank accounts, pending resolution of the dispute in circumstances where there is a risk of dissipation of the assets (see section 5). Such relief will often be sought *ex parte*, since informing the respondent of the intention to seek a freezing order may encourage the dissipation of the assets and so provoke the precise behaviour the injunction is aimed at preventing.

In circumstances where there is not immediate urgency but which cannot await a trial date, an interlocutory injunction should be applied for. Such an injunction can be granted at a hearing which the other party or parties have been put on notice of, and so they will have the opportunity to make submissions. The paperwork required is:

- the originating summons (see above) (such as plenary summons or civil bill ie claim form);

- a notice of motion; and
- a grounding affidavit settling out the basis for the injunction application.

These are served on the respondent(s), who will have the opportunity to file a replying affidavit. This process can take anything from a number of weeks to a number of months and, depending on the complexity of the issue and the number of affidavits sought to be filed, it may run into a number of years. Any injunction granted will generally last until a full trial of the matter. Often the granting of an interlocutory injunction will, in practical terms, be determinative of the dispute, because it may provide a framework in which the matter is settled, before a trial date which may be some way away.

### **Serving proceedings abroad**

The service of High Court summonses in the EU Member States is governed by Council Regulation (EC) 1348/2000 on the service in the Member States of judicial and extra-judicial documents in civil or commercial matters (the Service Regulation). The Service Regulation has direct effect and the rules of the various Irish courts have been amended to provide for service of originating documents in accordance with it.

Each Member State must designate public officers, authorities or persons as *'transmitting agencies'* and *'receiving agencies'* (Article 2, Service Regulation). The *'transmitting agency'* transmits the documents to be served in another state, and the *'receiving agency'* is designated to receive such documents and arrange for their service. In Ireland, the County Registrars carry out these roles.

To serve proceedings abroad, the (Irish) transmitting agency, the appropriate County Registrar, accepts the documents for service from the plaintiff and sends them to the receiving agency in the EU Member State where the defendant is to be served using the standard form (which is annexed to the Service Regulation). The standard request form must be completed in a language acceptable to the receiving member state (in Ireland this is Irish and English). The documents for service must be in the official language of the Member State in which it is to be served or a language of the Member State where the document originated and is understood by the addressee, otherwise the addressee can refuse to accept service (Article 8, Service Regulation).

When the receiving agency has served the document, it issues a certificate of completion (in the form annexed to the Service Regulation) coupled with a copy of the documents served to the transmitting agency. If it is not possible to effect service within one month of receipt, the receiving agency must inform the transmitting agency by means of the standard certificate, also annexed to the Service Regulation.

Service of documents in countries that are parties to the Hague Convention 1965 (the Hague Convention), other than the EU Member States, is provided for by Order 11E of the Rules of the Superior Courts. As of October 2013 there were 68 contracting states to the Hague Convention. The Hague Convention requires that each contracting country set up a central receiving authority that can receive requests for service of documents within that country. In Ireland that is the Master of the High Court. Only designated judicial officers

can make requests for the service of documents. In Ireland this includes the Master of the High Court, practising solicitors, county registrars and District Court clerks.

Therefore, the plaintiff's solicitor can seek to effect service of proceedings in one of the contracting states either through the Master of the High Court or by forwarding the stipulated documentation directly to the central authority for the country in which the defendant is to be served. It is also possible to effect service through diplomatic or consular agents. After service is effected, the central authority in that country will provide a certificate of service in the prescribed form.

Service under the Service Regulation and the Hague Convention can take from a couple of weeks to a number of months depending on how quickly the addressee/prospective defendant can be contacted.

Service of documents in countries that are not subject to the Service Regulation or the Hague Convention will generally depend on that individual country's rules of service.

## **9. PROCEDURE AND REQUIREMENTS FOR ENFORCING INTERIM INJUNCTIONS FROM ABROAD IN IRELAND**

There are different processes depending on whether the country from which the injunction emanates is an EU and/or EFTA Member State or is outside of these groups.

### **EU or EFTA Member States**

If the injunction emanates from an EU Member State, Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Judgments Regulation) applies. The Lugano Convention applies between EU Member States and the EFTA States (Switzerland, Norway and Iceland, but not Liechtenstein). The Judgments Regulation and Lugano Convention generally have similar or identical provisions, and so where reference is made here to the Judgments Regulation only, it should be assumed that reference is also being made to the corresponding article in the Lugano Convention.

The Judgments Regulation applies to civil and commercial matters except revenue, customs and excise matters, and so will generally encompass claims based on civil, but not criminal, fraud.

The Judgments Regulation provides for a simplified process for the mutual recognition and enforcement of judgments from fellow Member States with the objective of obtaining the free movement of judgments within the EU. In this context, '*judgment*' is given a wide interpretation and extends to most judicial orders, including interlocutory orders and injunctions. However it is important to note that an *ex parte* order is not a '*judgment*' for the purposes of the Judgments Regulation (*Denilauer v SNC Couchet Freres Case 125/79 [1980] ECR 1553*). It is a judgment if the order was capable of being subject to contested proceedings at or before the date of the recognition hearing in the other Member State (*Fairfield Sentry Limited (in Liquidation) and others v Citco Bank NV, Stichting Shell Pensioenfond and Atlanta Business Inc. (High Court, 28*

February 2012, unreported) [2012] IEHC 81).

A judgment must be recognised before it can be enforced. Member State judgments are automatically recognised, with no special procedure being required (*Article 33*). There are circumstances in which a judgment given in another Member State is not recognised, including where (*Article 34*):

- recognition of the foreign judgment would be manifestly contrary to public policy of the Member State in which recognition is sought;
- a foreign judgment was given in default in circumstances where the defendant was not served with the document issuing proceedings in sufficient time and in such a manner as to enable him to arrange for his defence;
- the judgment of which recognition is sought is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought; and
- the judgment of which recognition is sought is irreconcilable with an earlier judgment given in another Member State or in a third state involving the same cause of action and between the same parties.

A judgment will not be recognised if it conflicts with the provisions in the Judgments Regulation in relation to insurance contracts, consumer contracts and exclusive jurisdiction (*Article 35*). Also, recognition may be stayed if the underlying judgment is under appeal (*Article 37*). A judgment given in a Member State and enforceable in that state shall be enforced in another Member State (*Article 38*).

The broad procedure for obtaining an order of enforcement is set out in the Judgments Regulation itself. The detailed steps are specified in Order 42 A of the Rules of the Superior Courts, which was inserted to give effect to the Judgments Regulation. This provides that the application is made *ex parte*: the party against whom enforcement is sought is not entitled to make any submissions at this stage in the process.

In terms of procedure, it is primarily a verification process. The documentary formalities of the application for a declaration of enforceability include (*Article 53, Judgments Regulation*):

- an affidavit exhibiting an appropriately verified copy of the judgment/order with any translations required by the Irish court; and
- a standard form certificate of authority from the court which made the judgment.

The foreign judgment is to be declared enforceable by the Irish court on completion of these procedural formalities (*Article 41*).

If the Irish court orders the declaration of enforceability, it is then served on the party against whom enforcement is sought. This may be the first occasion upon which the respondent will be aware of the application in Ireland.

There is a right of appeal against the decision on the application for a declaration of enforceability (*Article 43*). That appeal must be lodged with the (Irish) High Court. The procedure for the appeal is governed by national law. There is a time limit for an appeal against a declaration of enforceability:

- one month from the service of the declaration of enforceability; or

- two months in circumstances where the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration for enforceability is given.

The grounds upon which a national court hearing an appeal under Article 43 may refuse or revoke a declaration of enforceability are limited to the grounds specified in Articles 34 and 35 of the Judgments Regulation.

Execution of the order is by the mechanisms ordinarily available in Irish domestic law for executing any Irish order.

### **Non-EU and non-EFTA states**

Domestic rules of Irish common law apply in respect of injunctions emanating from other countries. There is no automatic recognition of such judgments or orders.

The common law is concerned with liquidated sums and so the recognition and enforcement of interim injunctions is not facilitated by the common law. Therefore it would be necessary to commence proceedings before the Irish courts in which the foreign judgment or order forms the basis of the action. If the foreign judgment or order is entitled to recognition as *res judicata* (the controversy is regarded as already adjudicated by a competent court) this will speed up the process. This may be unlikely given that the foreign court itself will not have reached a final and conclusive decision. However the interim order may be used as evidence underlying the fresh claim in Ireland justifying an injunction, meaning that in practice, the injunction may well be enforced, albeit as a new injunction based on fresh proceedings, with the concomitant delay that entails.

The usual procedure is to issue a summary summons seeking an Irish judgment in terms of the foreign judgment. The party against whom the foreign judgment is sought to be enforced will be on notice of the proceedings when it is served with the summons (claim form). The process is relatively speedy. However, the proceedings are likely to be adjourned to plenary (full adversarial) hearing (and so significantly delayed) if the defendant establishes arguable grounds upon which the Irish court should decline to recognise and enforce the judgment.

Such grounds are unlikely to involve a re-investigation of the substance of the case. Rather they will be concerned with whether:

- the foreign judgment is final and conclusive;
- it was obtained from a court of competent jurisdiction;
- there are public policy concerns;
- the judgment was obtained by fraud; or
- the principles of natural justice were observed in the foreign court reaching the judgment.

