Litigation & Dispute Resolution

Fifth Edition

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Ireland

Megan Hooper & Audrey Byrne
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Introduction

Ireland is an EU Member State and has a common law legal system underpinned by a written Constitution. It has an independent and efficient Courts system, with its judiciary having wide experience, including significant experience of complex, high-value commercial litigation.

Efficiency of process

The Irish Courts strive for efficiency, and case law in the last several years demonstrates that emphasis is placed on the obligation of the parties and of the Courts themselves to ensure that litigation is processed in a timely manner.

The establishment of the Commercial Court in 2004, the Competition Court in 2005 and the Court of Appeal in 2014 have each resulted in the introduction of rules and practice directions whose aim is to streamline litigation and ensure efficiency. The Commercial Court and the Court of Appeal have had the most significant impact. Each of these Courts has specially assigned judges who employ case management procedures, as is also the case with Courts hearing judicial review proceedings, family law proceedings and statutory appeals.

The Commercial Court

Since its establishment in 2004, the Commercial Court, a fast-track division of the High Court, has been the primary forum for the determination of substantial commercial disputes in Ireland. Its introduction has dramatically reduced timelines for disposing of commercial disputes, with many cases being concluded within weeks or a few months. The Court is extremely well run and efficient, given the emphasis it places on compliance by parties with the procedures and timelines it sets for the conduct of litigation in the Court. The case management strategies used in the Commercial Court have proved so successful that similar strategies will be introduced to other High Court proceedings – with the exception of personal injuries claims – under new Court Rules, beginning 1 October 2016.

Features of the Commercial Court include that:

- cases are admitted to the Court on application − there is no automatic right of entry;
- the application for entry should be made early in the proceedings;
- cases should normally involve a claim valued at €1m or more; and
- admissible cases include those concerning:
  - interpretation of business documents or contracts;
  - international trade in, or transport of, goods;

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- exploitation of fuels or natural resources;
- banking and financial services, insurance and reinsurance;
- agency;
- purchase and sale of commodities;
- operation of markets and exchanges;
- professional negligence (with certain exceptions);
- arbitration;
- intellectual property;
- statutory appeals from, or judicial reviews of, regulatory decisions; and
- claims involving registration of international interests in mobile equipment assets under the Cape Town Convention (the registry for which is in Ireland).

Court of Appeal

The Court of Appeal, established in 2014, is helping to reduce timelines for new appeals from the Commercial Court and the wider High Court. It is also helping to address the backlog of appeals to the Supreme Court which had developed before its establishment.

Integrity of process

Ireland has a written Constitution which is superior to all other law, other than that of the European Union as it properly applies. The right to fair procedures enjoys constitutional status in Ireland. Principles of natural justice are well-recognised constitutional rights, with the effect being that constitutional protection is given to the requirement for basic fairness of procedures.

The Constitution regulates the structures and functions of the principal organs of government by means of the separation of powers between the legislature, the executive and the judiciary. The judiciary are independent of the other arms of State and the impartiality of the members of the Irish judiciary is widely accepted.

The European Convention on Human Rights was incorporated into domestic Irish law in 2003. Convention rights can now be relied on directly as against an "organ of the State" before the Irish Courts.

Privilege and disclosure

Discovery

Disclosure is known as discovery in Ireland. Discovery must be explicitly sought between the parties, but if not given voluntarily, an order may be sought from the Court.

A party seeking discovery is required to first seek it voluntarily in correspondence and must describe the categories of documents sought. Specific reasons must also be given as to why each category of documents has been sought. These reasons must demonstrate that the documents sought are relevant and necessary to the proceedings at hand. However, while *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co* (1882) 11 QBD 55 remains law in Ireland, a discovery order may be limited or modified on the grounds of proportionality.

Where the documents sought include electronically stored information (ESI), the requesting party must specify whether it seeks the production of ESI in searchable form and if so, whether it seeks the provision of inspection and searching facilities using any technology owned or operated by the requested party. The Irish Courts are amenable to the use of

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technology-assisted review, by reference to the Sedona Conference Principles, including the predictive coding of electronic data, as held by the Court of Appeal in the case of *IBRC and anor v. Sean Quinn & ors* (unreported, Court of Appeal, Finlay Geoghegan J, 26 February 2016).

Once made, a discovery order requires the filing of a sworn affidavit within a specified time limit by the party making discovery. This affidavit must list all relevant documents coming within the categories of discovery including documents which are privileged. This is notwithstanding that a party will later be entitled to refuse inspection of any privileged documents appearing in that list.

The Court rules allow discovery against non-parties to an action if the Court is satisfied that that party has relevant documents or information. There is no provision in the rules for pre-action discovery, but *Norwich Pharmacal* relief has been granted on occasion by the High Court and the availability of the relief in appropriate cases has been confirmed by Supreme Court *dicta*. *Norwich Pharmacal* relief was recently ordered by the High Court against a blogging website, requiring it to disclose the identity of an anonymous blogger who allegedly defamed the plaintiffs (*Petroceltic International plc & ors v. Aut O'Mattic A8C Ireland Ltd & anor*, unreported, 8 September 2015, Baker J).

Privilege

Different classes of privilege can be asserted in the context of discovery and most regulatory investigations. Legal professional privilege is the main class of privilege invoked in this respect. The privilege covers "legal advice privilege" and "litigation privilege". Without-prejudice privilege is generally also regarded as falling within its ambit. Documents covered by legal professional privilege are immune from inspection and do not have to be disclosed, although relevant and privileged documents must be listed individually in a schedule to the affidavit of discovery.

There are circumstances in which the Courts will override a claim to legal professional privilege if it can be established that the communications were not legitimate, that they were not properly entitled to the protection, or if the Court is satisfied that the privilege was waived, for example where the privileged material was not kept confidential or was disseminated too widely. It is, however, possible to share privileged material with a third party (e.g. a regulator) in certain controlled circumstances and pursuant to a 'limited waiver agreement' (see *Fyffes v. DCC* [2005] IESC 3). Legal advice privilege attaches to confidential documents created for the purpose of seeking, giving or receiving legal advice. It arises whether or not proceedings are contemplated or in being, and is focused upon communications between a client and its legal advisors, or between its legal advisors. The content of such documents is key, with privilege only attaching to those parts of such documents which are for the purpose of seeking, giving or receiving legal advice. The privilege does not, for example, extend to mere legal assistance, such as administrative tasks carried out by a solicitor on behalf of a client.

Litigation privilege attaches to documents created for the dominant purpose of actual or contemplated litigation. A document may benefit from both litigation privilege and legal advice privilege and the two are not mutually exclusive. Where litigation privilege does attach it is to the entire document, whereas legal advice privilege attaches only to content which qualifies for that protection. A non-lawyer's work product may also be protected by litigation privilege if it was prepared for the dominant purpose of preparing for actual or contemplated litigation.

The privilege is also regarded as having a broader application than in pure litigation, and

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can cover documents created in anticipation of, or appearances before, a Tribunal of Inquiry, where the client's conduct is under examination. The Commercial Court also recently confirmed that litigation privilege can extend to documents created for the dominant purpose of a regulatory or criminal investigation (see *Quinn & ors v. IBRC and anor* [2015] IEHC 315). Without-prejudice privilege can be invoked in relation to documents evidencing the negotiation of terms where litigation is in being or is contemplated. It is not necessary for proceedings to have commenced. Documents which anticipate litigation and touch upon attempts to resolve the issues between the parties are *prima facie* without prejudice and privileged. The rationale behind the privilege is to encourage the settlement of disputes and enable parties to speak frankly.

Common interest privilege is also recognised in Ireland. This arises where a document is already covered by legal professional privilege and is given to another party. Common interest privilege prevents the waiver of privilege in respect of that document if the parties have sufficiently close interests in the advice or litigation. In practice, parties may choose to enter into a common defence agreement to evidence the intention that the privilege should arise.

Executive privilege can be claimed by the State or an arm of State involved in litigation where the disclosure of documents would be against the public interest. Journalistic privilege is also established in Irish jurisprudence.

Costs and funding

Costs

In Ireland costs remain within the discretion of the Court, with the general rule being that costs follow the event. This means that the successful party in an action is usually awarded their costs against the unsuccessful party; however, in complex cases, costs are sometimes apportioned according to the parties' relative success on individual issues. The costs generally awarded are described as "party and party costs", which are not intended to provide a full indemnity. Occasionally, the Court will award the successful party "solicitor and client costs", which are intended to indemnify the successful party against all costs other than those that are unreasonably high or unreasonably incurred. All forms of contentious costs may be assessed by a taxing master.

Legal fees, as between Irish solicitors and their own clients for contentious commercial work, are calculated principally by reference to time expended. Account is also taken of the level of skill committed to a case and other factors, such as urgency. Upon commencing their work, solicitors are obliged to specify in writing to clients the basis of their charges and the Irish Law Society has powers, independent of the taxing masters, to investigate complaints of excessive charges by solicitors and to order repayment of monies advanced. Barristers have traditionally charged lower fees for consultative and drafting work and higher fees for advocacy work. In respect of commercial work, however, this balance is changing.

In practice, civil legal aid is rarely available in Ireland other than in family law disputes.

The Legal Services Regulation Act 2015 has been enacted but is not yet operational. It will introduce significant change to the Irish legal landscape as it, *inter alia*, allows for increased regulation of legal service providers, the introduction of multi-disciplinary practices and the requirement of detailed cost estimates in a manner equivalent to practice in the UK.

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Funding of litigation

The law in Ireland on non-party funding of litigation differs from many other common law jurisdictions. This is because maintenance and champerty are currently impermissible here.

One form of funding which may be acceptable is where a non-party finances litigation where it has a genuine interest in its outcome. An example is where shareholders of a company finance litigation to which the company is a party, as the company is not in a position to do so itself. If the company is successful in the litigation, this may also indirectly benefit those shareholders. However, and notably, the Courts may make costs orders against such funders if the company is unsuccessful in its litigation. If the source of the funding is unknown, the Courts may make disclosure orders to identify those involved.

Recent Irish case law has confirmed the position that, as the torts of maintenance and champerty subsist in this jurisdiction, non-party litigation funding runs contrary to Irish public policy and constitutes an abuse of process. (*Persona Digital Telephony Ltd and Sigma Wireless Networks Ltd v the Minister for Public Enterprise, Ireland, the Attorney General, Michael Lowry and (by order) Denis O'Brien* [2016] IEHC 187.)

Another form of litigation funding that has recently been held to be acceptable in Ireland is after the event (ATE) insurance. The insurance is taken out after the event which has given rise to the litigation. It covers a party's exposure to an opponent's legal costs if the party is unsuccessful in the litigation or arbitration. The premium, which is usually a significant percentage of the claim, is often only payable if the party is successful in the action. In the recent case of *Greenclean Waste Management Ltd v Maurice Leahy p/a Maurice Leahy & Co Solicitors* [2014] IEHC 314, the High Court was asked to consider whether the particular ATE policy before it breached the prohibition on maintenance or champerty. The Court held that it did not. The matter then came before the Court of Appeal who did not revisit this debate and simply noted that ATE insurance has "crept into this jurisdiction".

Security for costs

Security for costs, which involves the Court making an order requiring one side to provide security for the costs of the other side, is a discretionary remedy available in Ireland.

When dealing with an application for security for costs, the Irish Courts will first examine whether the defendant has a *prima facie* defence to the plaintiff's claim, with evidence being required to be adduced. From this point, diverging rules apply. If the plaintiff is a natural person or a corporation outside the ambit of the Companies Act 2014, then the focus is on the residency, rather than impecuniosity, of the plaintiff which, if outside of the EU/Lugano Convention States, could impact the enforceability of any costs order obtained against the plaintiff. On the other hand, if the plaintiff is governed by the Companies Act 2014, then an inability to pay any costs order is the determining factor.

In either case, once the defendant has established the relevant criteria, he has a *prima facie* entitlement to the order unless the plaintiff asserts and demonstrates "special circumstances" justifying a refusal of the order. Such circumstances might include delay by the defendant in bringing the application, which has in turn prejudiced the plaintiff. The plaintiff may argue that the case is one of public importance and should be heard. The most common argument for special circumstances made, however, is that a plaintiff's inability to pay a costs order has been caused by the defendant's wrong, thereby justifying a refusal of the order. The list of "special circumstances" available is not closed; however, the discretion of the Court is not so wide as to defeat the aims of the legislation.

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When security is directed against a plaintiff who is a natural person or falls outside of the Companies Act 2014, it has traditionally been one-third of the defendant's total estimated costs. It appears that recent changes in Irish company law will afford the Court discretion to apply the same convention in relation to cases brought under the Companies Act 2014, although the point is not yet settled. Under previous Irish Companies Act legislation, a plaintiff falling within the terms of that Act was generally required to provide security approximating to the probable real costs of the defendant should he succeed.

Security may also be granted for the costs of substantial pre-trial processes, such as making substantial discovery. Security may also be ordered in stages until it becomes clear whether the case will proceed to full hearing.

The order for security for costs usually provides that the proceedings are stayed pending its provision. Where no security is provided, a defendant may eventually move to have the proceedings struck out.

Security for costs is also available in respect of an appeal, where the rules and practice differ somewhat to those set out above.

Interim relief

The Irish Courts have wide jurisdiction to grant interlocutory injunctive relief in appropriate cases where, as discussed below, damages are not an adequate remedy and where the applicant satisfies the Court that the relief is necessary. In urgent cases, the Court will grant interim relief without the other party being placed on notice. A meaningful undertaking as to damages must be provided and the applicant must make full and frank disclosure of all relevant facts to the Court. If the applicant fails to apprise the Court of all material facts, it is likely that the injunction will be lost and an order for damages made in favour of the other party. Applications are heard in open court as there is a constitutional imperative that justice is done in public.

An interlocutory injunction cannot exist in isolation from substantive proceedings. The applicant for an injunction is required to show that they have a substantive legal, equitable, statutory or constitutional right which is enforceable against the respondent.

The Courts may grant a prohibitory injunction to restrain a party from performing or continuing to perform certain acts. In this regard, the *American Cyanamid v Ethicon Ltd* [1974] AC 396 principles have been fully adopted in Ireland.

A party seeking an injunction must show that there is a fair / *bona fide* / serious question to be tried. The Court will then consider the adequacy of an award of damages to either side should the injunction be granted or refused. In practice, the Court will frequently focus its attention on this consideration. The ability of the other side to discharge an award of damages may also be relevant. The Court will also consider the balance of convenience between the parties, with the matters relevant to determining that varying from case to case. If all other matters are equally balanced, the Court should attempt to preserve the *status quo*. Since the injunction is an equitable remedy over which the Court maintains a general discretion, these are more akin to guidelines than rigid rules. For example, in the context of Mareva injunctions (freezing orders), elements of the guidelines are displaced.

Also, in the case of a mandatory injunction, there are mixed *dicta* from the Courts as to whether the *Campus Oil* principles apply or whether a party must go beyond a demonstration of a fair / *bona fide* / serious question to be tried and instead show a strong, clear case. The fact that a mandatory injunction is sought will also have an impact on the assessment of

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the balance of convenience. The circumstances in which the Courts will grant mandatory injunctions at the interlocutory stage are restricted.

The Irish Courts have adopted a jurisdiction to grant Mareva relief and, in appropriate cases, may grant such relief so as to affect assets outside the jurisdiction. In practice, the making of freezing/Mareva type orders against defendants who are situated outside of the jurisdiction requires the co-operation of the Courts where the defendant resides, whether via the means of an international treaty, EU Regulations or comity. The Irish Courts will make whatever orders deemed appropriate to police a Mareva order, including disclosure orders and the appointment of receivers over personal assets. The latter type of order is made only in exceptional circumstances. A Mareva order does not grant an applicant a proprietary interest or priority right over other creditors in the subject property. It is also open to the defendant to argue to the Court that frozen assets should be released for legitimate purposes.

The Irish Courts will also grant Anton Piller and Bayer orders, although both are granted very sparingly. The former order is also known as a search order and permits the applicant to enter premises to look for evidence of the wrongdoing and to demand information from named people about the whereabouts of assets. The latter order restrains a defendant from leaving the jurisdiction for a defined period and requires the delivery up of his or her travel documents.

Quia timet injunctions to enjoin some apprehended, threatened or imminent wrongful act are available in advance. The Courts may also make interlocutory orders providing for the preservation, custody or sale of property, or the appointment of a receiver.

Enforcement of judgments

The means of enforcing court orders in Ireland are similar to those available in England and include:

- orders of *fieri facias* (writs of execution which are levied upon the goods and chattels of the defendant) and possession orders;
- attachment of debts (garnishee);
- charging orders over land (judgment mortgages);
- appointment of receivers by way of equitable execution;
- examination as to means;
- instalment orders;
- attachment and committal for contempt; and
- charging orders over stocks and shares.

Judgments for debt may be registered in Ireland and, if registered, are then automatically published in trade gazettes. The prospect of such publicity sometimes induces payment.

Under Article 39 of Brussels I Recast, judgments given in other EU member states arising out of proceedings commenced after 10 January 2015, in civil and commercial matters, are enforceable in Ireland without any declaration of enforceability (exequatur) being required.

Apart from Brussels I Recast and the Judgments Conventions, Ireland is not a party to any other Convention or instrument for the recognition and enforcement of foreign judgments. However, the Irish Courts will recognise and enforce such judgments where they accord with common law conflicts-of-laws principles, which for practical purposes may be regarded as identical to those applicable in England. For example, a creditor may take proceedings (usually by summary summons) seeking such relief where he has obtained a contested foreign money judgment which is final and which was given by a Court recognised in Irish law as being of competent jurisdiction. The defences to such a claim for enforcement are

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limited to circumstances where the judgment was obtained by fraud, where enforcement would be contrary to Irish public policy, or where the enforcement of the judgment would constitute the direct or indirect enforcement of a foreign tax or penalty, or of a foreign public law.

Cross-border litigation

Ireland subscribes to established international arrangements applying both within the European Union and outside it for the service abroad of judicial and extra-judicial documents in civil or commercial matters. Both the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters and Council Regulation (EC) No. 1393/2007 (on the service of judicial and extrajudicial documents in civil or commercial matters) and the Hague Service Convention are applicable in Ireland.

Ireland has not implemented the Hague or any other Convention for taking evidence abroad in civil or commercial matters, but is bound by Council Regulation (EC) 1206/2001 on cooperation between the Courts of the EU Member States in the taking of evidence in civil or commercial matters. Order 39 of the Rules of Superior Courts 1986 sets out the relevant provisions in respect of situations where the regulation does/does not apply. The Irish Courts will normally accede as a matter of comity to a request from a Court in a non-EU state to direct a witness resident in Ireland to give evidence before a judge or commissioner relating to the issues before the foreign Court. An Irish Court presented with such a request is not obliged to apply the same level of scrutiny as that adopted by English Courts under the Evidence (Proceedings in Other Jurisdictions) Act 1975 as to the nature of the testimony sought. However, an Irish resident will not be ordered to make discovery in aid of non-EU proceedings. A witness examined under the Irish procedure has the same rights to privilege as a witness under subpoena (summons) at trial in Ireland. He may refuse to answer questions tending to incriminate himself and may refuse to produce documents which are protected by privilege.

The Irish Courts will make orders in aid of proceedings in other jurisdictions where they have jurisdiction to do so, including arbitral proceedings, and where it is necessary to do so in the interests of justice. Careful consideration must be given to the appropriateness of seeking relief in Ireland, as a jurisdictional challenge can cause significant delay.

Recognition of foreign judgments

The law relating to the recognition of foreign judgments is complex and fact-dependent and is beyond the scope of this chapter. As mentioned, Ireland is bound by EU Regulations in terms of the recognition of judgments emanating from other EU Member States. It is possible to secure the recognition of a foreign judgment from a non-treaty/EU Member State, depending on the circumstances. The general rule, however, is that it must be proven that the defendant submitted to the jurisdiction of the foreign Court and that the judgment is final and for a fixed monetary amount. There is inherent jurisdiction to recognise the appointment of a receiver in a non-EU jurisdiction and to provide assistance, having regard to the universality of insolvency proceedings.

International arbitration

Arbitration is frequently employed in Ireland, particularly in insurance, construction and property disputes. A branch of the Chartered Institute of Arbitrators and a national committee of the International Chamber of Commerce are active.

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The substantive law of arbitration is now derived primarily from the Arbitration Act 2010, which incorporates the UNCITRAL Model Law on International Commercial Arbitration as the basis for both international and domestic arbitrations (with very limited exceptions, mainly in the area of industrial relations).

Where parties have entered into a valid arbitration agreement that is capable of being performed and where a dispute within the terms of the arbitration agreement has occurred, the Courts are obliged to stay Court proceedings between those parties under Article 8(1) of the Model Law, though Courts can give interim relief available under the Model Law in aid of proceedings to be determined by arbitration. Arbitration awards are enforceable summarily or by action under section 23 of the 2010 Act.

The 2010 Act expressly gives arbitral tribunals powers to make orders of specific performance and security for costs, in addition to the powers available under the Model Law. It is open to parties to seek to set aside an award to which the 2010 Act applies only on the grounds set out in Article 34 of the Model Law (which broadly are incapacity of a party; invalidity of the arbitration agreement under its proper law; the party seeking set-aside having been deprived of proper notice of the proceedings or an opportunity to present its case; the award dealing with matters (not being severable) outside the terms or scope of the submission to arbitration, or containing decisions on matters beyond the scope of the submission to arbitration; irregularities in the composition of the arbitral tribunal or the arbitral procedure; and the subject-matter of the dispute being incapable of settlement by arbitration under Irish law, or the award conflicting with Irish public policy). The Irish Courts have shown in practice an increasing reluctance to intervene in arbitrations.

Ireland has ratified the Geneva Protocol and Convention of 1923 and 1927, the New York Convention 1958, and the Washington Convention 1965. As a result, foreign awards to which these conventions are applicable may be readily enforced in Ireland under sections 23 and 24 of the 2010 Act, subject to the threshold conditions recognised by those conventions.

Mediation and ADR

The use of ADR procedures, especially mediation, has increased significantly over recent years in most types of litigation, but particularly in commercial cases. This is both because an agreement made in a mediation can be made a rule of Court, and because the Irish Court Rules mean that the Courts can encourage (but cannot impose) mediation by adjourning cases for a specified period to enable parties to consider mediation or other methods of dispute resolution. While the Irish Courts have not as yet imposed costs penalties for unreasonable refusal to mediate, it is one of the factors which the Court can take into account in dealing with costs awards.

In contrast, the Court has the power to direct mediation in personal injury cases. In practice, however, the Court has been reluctant to require the parties to do so. In almost all personal injury cases, the parties will seek to negotiate settlement in advance of trial through their solicitors or counsel.

In contentious family law proceedings there is a legal obligation on solicitors to discuss with their clients the option of engaging in mediation and to provide them with a list of mediators, as an alternative to litigation.

In construction disputes particularly, conciliation and arbitration are more popular forms of dispute resolution.

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In the area of creditor/debtor disputes a judge may, if he or she considers it appropriate, request the creditor and the debtor to seek resolution by mediation, allowing re-entry of the proceedings before the Court if the mediation is unsuccessful.

A draft general scheme of a Mediation Bill was published in March 2012 by the Department of Justice and Equality. The aim of the proposed Bill is to implement recommendations of the Irish Law Reform Commission in the area and to encourage the use of mediation in resolving civil, commercial and family disputes. This draft Bill has attracted international attention because the procedures involved are progressive when compared to other jurisdictions. While there has been delay in the publication of the finalised Bill, the responsible Minister indicated in February 2015 that she was committed to the enactment of the legislation. The Government Legislation Programme for Autumn 2016 notes that drafting on the Bill is continuing, but does not give an estimated publication date for the Bill.

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She has been the lead solicitor advising Irish Bank Resolution Corporation Limited in respect of regulatory and criminal investigations arising from legacy issues and related commercial Court litigation. She has an excellent working knowledge of the financial services industry and internal banking practices and procedures.

Megan has extensive experience of electronic discovery in commercial litigation and regulatory investigations, electronic document management systems and privilege, having lectured extensively in each of these areas.

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Audrey's practice centres on international commercial disputes and investigations, with a focus on fraud and asset tracing. She has unparalleled experience in co-ordinating international litigation and investigations in multiple common law and civil law jurisdictions including the Russian Federation, Ukraine, India, Panama, BVI and Belize, and has travelled extensively to local jurisdictions, where necessary, acting as lead counsel.

Audrey also acts as advisor in the context of investigations and guides clients through the process effectively and discreetly.

Audrey has extensive commercial Court experience and is adept at managing large e-discoveries using the most up-to-date techniques and platforms, ensuring that discovery is delivered cost-effectively and on time.

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