Financial Services Litigation

Contributing editors
Damien Byrne Hill and Ceri Morgan

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GETTING THE DEAL THROUGH

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Damien Byrne Hill and Ceri Morgan
Herbert Smith Freehills LLP

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

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Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
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Fax: +44 20 7229 6910

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Preface

Financial Services Litigation 2018

Third edition

Getting the Deal Through is delighted to publish the third edition of *Financial Services Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria and Ireland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to contributing editors, Damien Byrne Hill and Ceri Morgan of Herbert Smith Freehills LLP, for their continued assistance with this volume.

GETTING THE
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London
July 2018

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Ireland

Claire McLoughlin and Karen Reynolds

Matheson

Nature of claims

1 What are the most common causes of action brought against banks and other financial services providers by their customers?

The most common claims brought against banks and other financial service providers in Ireland relate to the misselling of financial products and mismanagement of investment funds. These types of claims will often involve an allegation that the financial service provider committed the torts of misrepresentation and negligent misstatement. A claim may also be brought in tort for breach of a duty of care.

Other causes of action include claims for breach of contract, breach of fiduciary duties and negligence. Civil liability for misstatements in a prospectus also arises under section 41 of the Investment Funds, Companies and Miscellaneous Provisions Act 2005.

Claims against financial service providers in Ireland have increased in recent years owing to the tracker mortgage scandal whereby it emerged that banks had wrongly refused customers access to tracker mortgages after the economic crash. The Central Bank of Ireland (CBI), which regulates financial services providers in Ireland, identified that more than 30,000 customers have been affected by the tracker mortgage scandal.

Financial service providers in Ireland are subjected to regulatory duties enforced by the CBI. The CBI has set out a number of statutory codes of conduct, including the Code of Conduct on Mortgage Arrears, which set out the requirements that regulated firms must comply with when dealing with consumers in order to ensure the protection of consumers. At present, there is legal uncertainty as to the application of these codes of conduct in private law proceedings. However, section 44 of the Central Bank (Supervision and Enforcement) Act 2013 provides that any failure by a regulated financial service provider to comply with any obligation under financial services legislation is actionable by the customer who suffers loss or damage as a result of such failure.

2 In claims for the misselling of financial products, what types of non-contractual duties have been recognised by the court? In particular is there scope to plead that duties owed by financial institutions to the relevant regulator in your jurisdiction are also owed directly by a financial institution to its customers?

The existence of several non-contractual duties has been argued before the Irish courts; for example, the duty of good faith and fair dealing. However, in *Flynn & Anor v Breccia & Anor* [2017] IECA 74 (*Flynn*) the Court of Appeal upheld the position that Irish contract law does not recognise a general principle of good faith and fair dealing, although there are certain limited categories of contractual relationships that imply such duties, such as partnership agreements.

Similarly, attempts to establish other tortious causes of actions against financial service providers, such as a tort of 'reckless lending', have been dismissed by the Irish courts (see *ICS Building Society v Grant* [2010] IEHC 17). In *Haughey v J&E Davy, Bank of Ireland Mortgage Bank and Bank of Ireland* [2014] IEHC 206 the plaintiff did, however, successfully establish that the bank owed him an advisory duty in tort.

The CBI's Consumer Protection Code 2012 also imposes regulatory duties on financial institutions as to their dealing with consumers, including advisory duties. The duty to advise extends to payment protection insurance, and a prohibition against advising a consumer to carry out an investment or take a loan that is beyond their means or not in their best interest. If the misselling of financial products involved a breach of this advisory duty then the financial institution could be held liable for a regulatory penalty. As noted in question 1, it is uncertain as to the application of these codes of conduct in private litigation; however, a customer who has suffered loss as a result of a financial service provider's failure to comply with any obligations under financial services legislation may bring proceedings.

3 In claims for untrue or misleading statements or omissions in prospectuses, listing particulars and periodic financial disclosures, is there a statutory liability regime?

Section 41 of the Investments Funds, Companies and Miscellaneous Provisions Act 2005 establishes a statutory regime for civil liability arising from untrue statements or omissions in prospectuses. The Act provides for the payment of compensation to those who have acquired securities on the faith of a prospectus that contains an untrue statement or an omission of information required by EU prospectus law to be contained in the prospectus. The statutory regime does not explicitly rule out the possibility for common law claims that might include causes of action arising from misrepresentation. Those persons most likely to find themselves subject to civil liability under the Act include, inter alia:

- the issuer of the prospectus;
- the offeror of securities to which the prospectus relates;
- the guarantor of the issuer of securities to which the prospectus relates;
- every person who is a director of the issuer at the time of the issue of the prospectus; and
- every promoter of the issuer. The Act does not specify jurisdiction.

In *Walsh v Jones Lang LaSalle Ltd* [2017] IEHC 38 the Irish Supreme Court noted that a disclaimer in a prospectus could limit liability for negligent misstatement if it was clear that the reader should take all responsibility to ensure the information was accurate. However, the court did note that an adviser has a duty to make sure the information is reasonably accurate. In *Spencer v Irish Bank Resolution Corporation Ltd* [2015] IEHC 395 the court found that a financial institution could be liable for negligent misstatements in prospectuses or brochures even if they are not legally binding.

4 Is there an implied duty of good faith in contracts concluded between financial institutions and their customers? What is the effect of this duty on financial services litigation?

In *Flynn* the Irish Court of Appeal upheld the position that Irish contract law does not recognise a general principle of good faith and fair dealing, although there are certain limited categories of contractual relationships that imply such duties. See question 2.

However, there is a requirement of good faith within the meaning of the Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Terms Directive), which mandates fair and open dealing by a bank with the result that contractual terms must be expressed fully, clearly, and legibly with suitable prominence given in the contract to any disadvantageous terms. This was highlighted relatively recently in the case of *Allied Irish Banks plc v Peter Counihan & Anor* [2016] IEHC 752 (*Counihan*).

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5 In what circumstances will a financial institution owe fiduciary duties to its customers? What is the effect of such duties on financial services litigation?

A fiduciary relationship will typically arise between an investment adviser and a customer and a breach of that duty will occur where an investment adviser places himself in a conflict of interest position or earns a commission that is secret from the customer. Whether such a fiduciary relationship exists is a question of fact to be determined by examining the specific facts and circumstances of each case.

In *Irish Life & Permanent plc v Financial Services Ombudsman* [2011] IEHC 439 the High Court noted that the banking system is, by its nature, a highly regulated one, which is, or at least, ought to be, based on trust. In *Irish Bank Resolution Corporation Ltd (In Special Liquidation) v Morrissey* [2014] IEHC 527 the court observed that the existence of a commercial relationship governed by a contract between parties of equal status is a strong indicator that a fiduciary relationship does not exist. The decision clarifies that as a general principle, the relationship between a lender and borrower does not involve a fiduciary relationship under Irish law. This is especially so where each party acts in its own commercial interest and the commercial relationship is governed by a written contract. Although the court did not comment definitively on the criteria required to elevate the lender-borrower relationship to that of a fiduciary, it would appear that the interests would need to be closely aligned, that the risks and rewards are shared on a more equal basis, with the borrower actively advising the lender with regard to the use of the loaned moneys. Accordingly, it would appear that a fiduciary relationship between lender and borrower is likely to arise only in very rare cases.

6 How are standard form master agreements for particular financial transactions treated?

The International Swaps and Derivatives Association Inc (ISDA) produces industry standard documentation to facilitate a more efficient and safer derivatives market. ISDA currently offers two governing law options, those of England and the state of New York. However, it has recently been announced that Irish law versions of the standard documentation may soon be made available. One of the reasons for this decision was to provide market participants with a European option post Brexit. If an ISDA agreement is entered into between the parties and they agree to be governed under Irish law, then the Irish courts will have jurisdiction over any proceedings that might arise from the agreement. At present, however, given that the agreements are not governed by Irish law, the Irish courts have not been called upon to consider the interpretation of the standard form and there has not been a significant amount of litigation as a result.

7 Can a financial institution limit or exclude its liability? What statutory protections exist to protect the interests of consumers and private parties?

Under the CBI's Consumer Protection Code, a financial services provider is precluded from seeking to restrict or exclude:
- any legal liability or duty of care owed to a consumer;
- any duty to act with skill, care and diligence that is owed to a consumer in connection with the provision to that consumer of financial services; or
- any liability owed to a consumer for failure to exercise the degree of skill, care and diligence that may reasonable be expected of it in the provision of a financial service.

Recent case law in this area suggests a reluctance of the court to enforce exclusion clauses and limitations of liability against a consumer.

In *McCaughey v IBRC Ltd & Anor* [2013] IESC 17, an exclusion clause that limited liability to acts of fraud only was deemed to be at total variance with the relationship of trust that is to be expected between a bank and a consumer. It was further noted that exclusion clauses should be specifically brought to the attention of the consumer. In *AGM Londis plc v Gorman's Supermarket Ltd* [2014] IEHC 95 it was noted that the court would consider the relative bargaining positions of the parties in the context of upholding an exclusion clause.

The general position is that the enforcement of an exclusion clause will depend upon the consumer's level of knowledge coupled with the efforts of the financial institution to highlight the exclusion clause. Exclusion clauses must be carefully drafted as any ambiguity will be generally determined in favour of the consumer.

For private parties that do not come under the definition of consumer, a less stringent approach is taken. For consumers who sign a standardised form, an exclusion clause may also fall within the European Communities (Unfair Terms in Consumer Contracts) Regulations (Unfair Terms Regulation) (SI 27/1995) and could be found to be void under article 6(1). This was successfully pleaded in *Start Mortgages Ltd v Hanley* [2016] IEHC 320 in relation to a repayment clause in a mortgage.

8 What other restrictions apply to the freedom of financial institutions to contract?

In Ireland, a distinction has been made by the courts between financial institutions levying permissible fees and charges against consumers as a genuine pre-estimate of loss caused by the breach of contract, and punitive penalty clauses that are not a genuine pre-estimate of loss. Any clause that is interpreted by the court to be a penalty clause will be void and unenforceable. The Irish High Court recently upheld this traditional test in *Sheehan v Breccia & Ors and Flynn & anor v Breccia* [2016] IEHC 120. While the Irish High Court considered the recent UK decision in *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67, which diverged from the traditional test, it suggested that it would be a matter for an appellate court to determine whether the *Cavendish* test should be adopted in Ireland in future cases.

The principle of contractual estoppel applies in Ireland and was recently considered in *Counihan*. In this case the parties claimed that the bank should be estopped from enforcing the loan contract because it had made prior representations to the couple that it would not seek to enforce it. While the application was refused on the facts of the particular cases, the decision highlights the option for a remedy of contractual estoppel in financial services litigation in Ireland.

9 What remedies are available in financial services litigation?

The most common remedy for claimants is damages. In equitable claims or claims for misrepresentation, recession or rectification of the contract may be available to the injured party in certain circumstances. Damages can either be:
- nominal;
- contemptuous;
- punitive;
- aggravated; or
- compensatory.

Other remedies that may be available in Ireland include an order for specific performance of the contract, injunctive relief or declaratory relief, depending on the particular circumstances of the case.

10 Have any particular issues arisen in financial services cases in your jurisdiction in relation to limitation defences?

The law regarding limitation periods in Ireland is outlined in the Statute of Limitations 1957 and 1991, the Civil Liability Act 1961 and the Civil Liability and Courts Act 2004. The majority of financial services disputes relate to matters of contract law or tort, where the usual limitation period is six years. This was recently confirmed in *Geoghegan v Financial Services Ombudsman & Ors* [2015] IEHC 217, which clarified that the limitation period for misselling claims, begins to run from the date of the sale of the financial products.

Two Irish cases have recently considered the time from which the clock begins to run for cases of misrepresentation within a financial setting, whether it is when the contract was entered into, or when the loss occurred. In *Gallagher v ACC Bank* [2012] IESC 35 (*Gallagher*), the court found that the limitation period is calculated from when the loss occurred; however, the clock may not begin to run if there is only a mere possibility of loss. On the facts of *Gallagher*, the court noted that there was an immediate loss at the point that the contract was entered into, therefore the clock began to run from that point onwards. It was acknowledged that in scenarios of alleged deviation from investment strategies or mismanagement, the cause of action may occur after the original investment date.

Similarly, in *Cantrell v AIB PLC & Ors* [2017] IEHC 254, the court determined that if the claims arose from negligence or breach of fiduciary duty, the clock would only begin when the tort was complete (ie, when the loss occurred).

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The Financial Services and Pensions Ombudsman Act 2017 extended the time limit for bringing certain financial complaints, specifically relating to long-term financial services. Section 51 of the 2017 Act provides that such complaints against a financial services provider can be made:

- on the later of six years from the date of conduct giving rise to the complaint;
- three years from the earlier of the date on which the person became aware, or ought reasonably to have become aware, of the conduct giving rise to the complaint; or
- within such longer period as the Ombudsman may allow where it appears to him or her that there are reasonable grounds for requiring a longer period and that it would be just and equitable, in all the circumstances, to so extend the period.

Procedure

11 Do you have a specialist court or other arrangements for the hearing of financial services disputes in your jurisdiction? Are there specialist judges for financial cases?

The Commercial Court and Chancery Court typically hear financial services disputes in Ireland. The Commercial Court is a division of the High Court and it deals with various types of business disputes including cases where the value exceeds €1 million or where the dispute concerns intellectual property. There is no automatic right for any case to be admitted to the Commercial List and the court retains the ultimate discretion to admit cases. The Commercial Court is the only division of the High Court where cases are routinely managed by a judge. Once a case has been admitted to the Commercial list, court directions are issued setting out a strict timetable for the exchange of pleadings, discovery and other pre-trial steps.

As a result of the success of the Commercial Court, and in an attempt to increase the cost efficiency of other civil claims, similar statutory rules relating to case management have been introduced to Chancery and Non-Jury actions in the High Court. The new rules introduce changes to a range of areas including witness statements and expert evidence. Under the new rules, each party may offer evidence from one expert only in a particular field of expertise on a particular matter. Also, each party only has 28 days from the date of service of the other side's expert report to raise queries regarding the content of that expert report.

12 Do any specific procedural rules apply to financial services litigation?

Generally speaking, parties are not required to exchange written evidence or statements prior to trial. However, the Commercial Court Rules provide that the parties must serve on each other, written, signed and dated statements of fact witnesses and expert witnesses, setting out the essential elements of their evidence or expert opinion. New rules introduced by the Rules of the Superior Courts (Conduct of Trials) 2016 (SI 254/2016) give judges in other lists of the High Court the power to regulate how expert evidence can be adduced and the duties of expert witnesses. This includes the ability of a party to put written questions concerning the content of an expert report to an expert instructed by another party. These rules also introduce to Ireland the concept of 'hot tubbing'. Hot tubbing is a debate between the experts, where two or more parties intend to call experts who may contradict each other in their reports or statements. Under the new rules, the Court can require the experts to meet privately to discuss their proposed evidence (without the presence of any party or any legal representative).

The Commercial Court and the High Court also have discretion to adjourn a case of its own volition or on the application of the parties for up to 28 days to enable the parties to consider mediation, conciliation and arbitration. Costs sanctions may be imposed for not availing of mediation or conciliation, unless there is a good reason for the refusal.

13 May parties agree to submit financial services disputes to arbitration?

While not widely adopted in Ireland, the parties may agree to submit financial services disputes to arbitration. Where the parties agree to submit to arbitration in the event of a dispute, this will usually be expressed in the contract between them.

14 Must parties initially seek to settle out of court or refer financial services disputes for alternative dispute resolution?

In Ireland, there is no obligation or requirement on the parties to seek to reach a settlement prior to instigating legal proceedings. It is open to a consumer to bring a complaint to the Financial Services and Pensions Ombudsman (FSPO) in the first instance. The FSPO will initially encourage the parties to consider mediation as the default position. Once the FSPO has considered the matter, it issues a finding that is binding on the parties. A finding of the FSPO can be appealed to the High Court.

15 Are there any pre-action considerations specific to financial services litigation that the parties should take into account in your jurisdiction?

There are no specific pre-action considerations for financial service litigation or any other form of litigation in Ireland. However, solicitors usually, as a protective measure in relation to future costs applications, send a warning letter to the defendant before initiating legal action.

If there is more than one potential defendant, an 'O'Byrne letter' is usually sent, which calls on the potential defendants to admit liability and states that if liability is not admitted, each defendant will be sued and the letter will be relied on by the plaintiff in resisting an application for costs by any party found not liable.

16 Does your jurisdiction recognise unilateral jurisdiction clauses?

Unilateral jurisdiction clauses are recognised in Ireland. Regulation (EU) No. 2015/2012 (Recast Brussels Regulation) has addressed the matter of 'torpedo actions'. Previously, if a party, in breach of an exclusive jurisdiction clause, commenced proceedings in the courts of an EU member state other than that chosen by the parties, and the other party brought parallel proceedings in respect of the same cause of action before the chosen court, the chosen court had to wait until the first court determined whether it had jurisdiction. This was often used as a delay tactic. The Recast Brussels Regulation addresses this matter by giving priority to the jurisdiction chosen by the parties. However, this only applies where there is an exclusive jurisdiction clause. The matter has not been clarified in relation to a unilateral jurisdiction clause; these contracts may still be open to 'torpedo actions'.

17 What are the general disclosure obligations for litigants in your jurisdiction? Are banking secrecy, blocking statute or similar regimes applied in your jurisdiction? How does this affect financial services litigation?

There are no disclosure requirements that are specific to financial services litigation. In Ireland disclosure obligations for litigants including those involved in financial services litigation is known as discovery. This is governed by Order 31 of the Rules of the Superior Courts. Discovery can be made either through voluntary requests or a court order. The documents must be relevant and necessary in order to be discoverable.

If the document is privileged, it does not have to be disclosed. There are various types of privilege recognised by Irish law. The most commonly asserted are legal advice privilege and litigation privilege. Legal advice privilege protects confidential communications between lawyer and client that are created for the sole or dominant purpose of giving or seeking legal advice. Litigation privilege is broader, because it protects confidential communications between lawyer and client made for the dominant purpose of use in connection with existing or contemplated litigation. Litigation privilege covers communications between lawyer and client, and between lawyer or client and a third party. Where privilege is claimed, the party must individually list each document in the affidavit of discovery and describe the privilege claims in relation to each document so that the basis for the claim of privilege can be considered and evaluated. Any claim of privilege is open to challenge by the other side.

Regulation (EC) No. 1206/2001 applies to financial services litigation in Ireland. The regulation initiates cooperation between EU member states for disclosure and evidence, it facilitates a direct contract between the courts in member states. This means that a request for information can be made across jurisdictions within the EU through a standardised procedure. The Rules of the Superior Courts (Evidence) 2007 (SI 13/2007) brought the regulation into operation in Ireland.

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Update and trends

See question 26 for the increases in regulatory intervention and enforcement following the financial crisis.

The European Commission's 'New Deal for Consumers' will facilitate class action litigation in Ireland. This is the first time that class action of this kind will be used in Ireland. Following the 2008 global financial crisis and problems such as the tracker mortgage scandal, the need for class action was highlighted by the Irish Law Reform Commission. A proposal for multiple-party action was voted on in the Dail (Irish Parliament) but failed. Multiple party actions will be restricted to qualified entities only (this excludes law firms). It is anticipated that there will be an increase in the work of consumer organisations and independent public bodies as they take on new multiple party actions.

Banking secrecy

An obligation of bank-client confidentiality in Ireland arises from the operation of the common law. The common law implies a duty of confidentiality on a bank in its relationship with its customer, unless the terms of the contract with the customer provide otherwise, or a bank is compelled by law to disclose.

Walsh v National Irish Bank Limited [2008] 2 ILRM 56 reaffirmed the duty of confidentiality between a bank and its customers. The court held that it is an implied term of any contract between a banker and its customer that the banker will not divulge to third parties, without the customer's express or implied consent, the state of the customer's account or the amount of his or her balance, the securities offered and held, the extent and frequency of transactions or any information acquired by the bank during or by reason of its relationship with the customer. This duty though is not absolute, it is qualified in the following circumstances:

- where disclosure was under compulsion of law;
- where there was a duty to the public to disclose;
- where the interests of the bank required disclosure; and
- where the disclosure was made by the express or implied consent of the customer.

18 Must financial institutions disclose confidential client documents during court proceedings? What procedural devices can be used to protect such documents?

Where documents containing confidential information should be disclosed as part of standard disclosure (or pursuant to a disclosure order), financial institutions must disclose the documents in question.

However, there are a number of procedural devices that can be used to protect the information from entering the public domain, for example:

- where the confidential client information is irrelevant to the proceedings, the financial institution can seek to redact the information prior to making disclosure; and
- the parties to the proceedings can enter into a confidentiality 'club' or 'ring'. A confidentiality 'club' or 'ring' is a group of designated individuals who are authorised by a court to view specified confidential material, which has been disclosed in discovery, and is withheld from one or more of the parties to the litigation. The purpose of a confidentiality ring is to facilitate the discovery process in the conduct of litigation while also protecting confidential and, or sensitive information, which might be capable of exploitation by any competitors (*Goode Concrete v CRH* [2017] IEHC 534).

19 May private parties request disclosure of personal data held by financial services institutions?

New Regulation (EU) No. 2016/679, or the General Data Protection Regulation (GDPR), requires any business, including financial services institutions, that operates within the EU to assess how they collect, process and store personal information. Employers now have a shorter timeframe in order to comply with data access requests; these requests must be processed within one month, instead of the previous 40 days. Under GDPR, data controllers will have some grounds for refusing to grant an access request, such as where a request is manifestly unfounded or excessive. However, organisations will need to have clear refusal policies and procedures in place and demonstrate why the request meets these criteria. Private parties also have the right to a broader scope of information under GDPR. Along with the actual personal data requested, data providers, including financial institutions, must now provide details of the following:

- the purposes for processing the data;
- the categories of personal data concerned;
- to whom the data has been or will be disclosed;
- whether the data has been or will be transferred outside of the European Union;
- the period for which the data will be stored, or the criteria to be used to determine retention periods;
- the right to make a complaint to the Data Protection Commissioner;
- the right to request rectification or deletion of the data; and
- whether the individual has been subject to automated decision making.

If an organisation does not comply with a valid access request that has been made, it is open to a data subject to make a complaint to the Data Protection Commissioner.

The Freedom of Information Act 2014 came into effect in October 2014. Under the 2014 Act, a Freedom of Information (FOI) request can be made to all public bodies, unless specifically exempt. The 2014 Act provides that most commercial State bodies are to be fully exempt from an FOI request. The CBI is not exempt and therefore, an FOI request can be made to it. However, certain records held by the CBI are specifically exempt from release under the 2014 Act.

20 What data governance issues are of particular importance to financial disputes in your jurisdiction? What case management techniques have evolved to deal with data issues?

Discovery in Ireland must be in accordance with order 31, rule 12 of the Rules of the Superior Courts. Increasingly, financial services disputes are being litigated in Ireland, resulting in a significant growth in electronic discovery. Financial services disputes routinely involve extensive disclosure exercises. As a result, additional practical considerations have emerged regarding proportionality and reasonable efforts in making discovery. Rules introduced by Rules of the Superior Courts 2009 (Discovery) (SI 93/2009) make provision for parties to seek electronically stored information from one another in searchable form. In addition, a discovery audit file is typically maintained by the parties to record decisions taken in respect of relevance and privilege. The cost of complying with discovery orders can approach 50 per cent of the total cost of the litigation.

In addition to electronic disclosure, the use of technology assisted review and predictive coding was approved by the Irish Commercial Court in *Irish Bank Resolution Corporation Limited & Ors v Sean Quinn & Ors* [2015] IEHC 175.

Interaction with regulatory regime

21 What powers do regulatory authorities have to bring court proceedings in your jurisdiction? In particular, what remedies may they seek?

The regulators have the power to bring court proceedings in Ireland against a person or a company. Such applications are brought under the Central Bank Act 1942 (CBA) and include:

- an injunction restraining conduct in which a regulated financial service provider is engaging or in which a regulated financial service provider appears likely to engage, if the conduct is conduct that is being investigated or is proposed to be investigated;
- recovery as a debt any monetary penalty imposed on a regulated entity following the CBI's Administrative Sanctions Procedure; and
- an appeal following the decision of a CBI inquiry.

22 Are communications between financial institutions and regulators and other regulatory materials subject to any disclosure restrictions or claims of privilege?

The CBA, and subsequent EU directives, have statutorily prohibited the CBI from disclosing an array of confidential documents. That strict confidentiality rule extends to employees or former employees of the Central Bank (including the Financial Regulator's office) who are bound by a professional secrecy obligation from disclosing any confidential information they obtain in the course of their duties. However, where

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the information gathered by the CBI gives rise to a breach in company law, competition law or a suspicion of criminal activity, the CBI has a reporting obligation to refer the matter the relevant authority.

Communications between financial institutions and regulators do not generally attract privilege. However, it is also possible to have 'without prejudice' discussions with the CBI. These do not strictly attract legal privilege; however, it means that if it is made with a genuine attempt to settle proceedings then generally it will not be admissible in court as evidence.

23 May private parties bring court proceedings against financial institutions directly for breaches of regulations?

Section 44 of the Central Bank (Supervision and Enforcement) Act 2013 provides:

> *A failure by a regulated financial service provider to comply with any obligation under financial services legislation is actionable by any customer of the regulated financial service provider who suffers loss or damage as a result of such failure.*

The right of action is not confined to consumers and extends to corporate customers who avail of financial services in the course of business. Causation must be demonstrated, linking the breach with the loss or damage suffered.

24 In a claim by a private party against a financial institution, must the institution disclose complaints made against it by other private parties?

No. Unless a court orders that a party provide discovery of such documents because they are someway relevant to the matters in dispute, otherwise there is no obligation to disclose complaints.

25 Where a financial institution has agreed with a regulator to conduct a business review or redress exercise, may private parties directly enforce the terms of that review or exercise?

In Ireland, the matter of a business review or redress exercise is currently relevant regarding the tracker mortgage scandal. After the tracker mortgage scandal, the CBI required that lenders establish independent appeals panels, specifically to deal with customers who are not satisfied with any aspect of the redress and compensation offers that they receive from lenders. The CBI announced a market wide investigation and set up a dedicated team to deal with the scandal and has initiated proceedings against six lenders involved.

The CBI stated that accepting compensation from lending institutions would not preclude customers from taking legal action. Together with redress and compensation, affected customers will receive a separate payment that they can use to pay for independent advice regarding the adequacy of their lender's offer. Additionally, customers can refer to the Financial Services Ombudsman, who will deal independently with their concerns, or initiate proceedings in the courts.

26 Have changes to the regulatory landscape following the financial crisis impacted financial services litigation?

There has been an increasing trend for regulatory action and intervention, increased oversight, investigations and enforcement in Ireland since the 2008 global financial crisis. The approach of the CBI and FSPO has led to unprecedented regulatory oversight. Investigations by the CBI and FSPO have exposed regulatory failures by financial institutions, which have in turn resulted in a substantial increase in private party litigation. Specific examples of types of claims are the misselling of financial services products (in particular payment protection insurance).

Since the financial crisis, the FSPO Act 2017 extended the time limit for certain financial complaints, specifically long-term financial services. Under the 2017 Act a 'long-term financial service' is defined as a financial service with a duration of five years and one month, or more, and also life assurance policies. Many disputes in relation to the financial crisis would have been statute barred before claimants were aware of their potential cause of action. This extension period facilitates the litigation of potential problems that otherwise would have been statute barred.

27 Is there an independent complaints procedure that customers can use to complain about financial services firms without bringing court claims?

A consumer can bring a claim to the FSPO through their complaints Scheme (FSPO Scheme).

Where a customer has a complaint about a bank or financial institution in Ireland they must first make a complaint to their provider. The provider should deal with the complaint through its complaint handling process. This is called an internal dispute resolution process (IDR process).

If the matter is not resolved a complaint can be made to the FSPO Scheme. A complaint can be made through a complaint form, either online or through post. The FSPO have a dedicated dispute resolution service that emphases the need to deal with complaints informally through mediation and, only where necessary, by investigation and adjudication. The matter may be referred to the courts if it involves complex jurisdictional matters that the FSPO does not have jurisdiction to address. Where the FSPO does have jurisdiction, a legally binding finding is issued to both parties following the investigation and adjudication of a complaint subject only to an appeal by either party to the High Court.

Where the Ombudsman upholds or partly upholds a complaint he or she can direct a financial service provider to pay compensation of up to €26,000 per annum (where the subject of the complaint is an annuity) and €250,000 in respect of all other complaints. He can also direct rectification. Such rectification can be very significant as it can involve putting a person back to a position where they previously were, before the complaint arose. The FSPO directed financial service providers to pay compensation totalling more than €1.5 million to complainants in 2016. This is in addition to any rectification directed. The FSPO has a

Matheson

Claire McLoughlin **claire.mcloughlin@matheson.com**
Karen Reynolds **karen.reynolds@matheson.com**

70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Fax: +353 1 232 3333
dublin@matheson.com

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number of remedies against a service provider to choose from. These include:

- directing the service provider to rectify the conduct complained of;
- directing that it provides reasons or explanations for the conduct complained of;
- changing the conduct;
- directing it to pay compensation up to a maximum of up to €26,000 per year (where the subject of the complaint is an annuity) and €250,000 in respect of all other complaints; or
- taking any other lawful action.

If a matter arises during an investigation by the FSPO that he or she feels should be brought to the attention of the Regulator, he or she will inform the CBI so that appropriate regulatory action may be taken.

28 Is there an extrajudicial process for private individuals to recover lost assets from insolvent financial services firms? What is the limit of compensation that can be awarded without bringing court claims?

The United Kingdom operates under the Financial Services Compensation Scheme 2001 (FSCS) that compensates certain customers if the firm they invest in becomes insolvent. There is no equivalent compensation scheme in Ireland. Several companies, such as Standard Life, operate in Ireland as a branch of their UK parent company, meaning Irish customers are protected by the FSCS.

The Deposit Guarantee Scheme protects deposits made in financial institutions and is authorised by the CBI if the institution cannot pay. The maximum claim under this scheme is €100,000 per person.

The Investors Compensation Scheme protects insolvent investment firm clients. The maximum claim is 90 per cent of an investment, with a cap of €20,000.

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