



Litigation & Dispute Resolution Update

February 2010

Legal professional privilege: what is it?

Legal professional privilege exists to protect from compulsory disclosure confidential communications between a lawyer (solicitor or barrister) and a client in which legal advice is sought or given. Therefore when legal privilege has been established neither party can be compelled to disclose details of this communication. It is important to note that the fact that a party to a communication is a lawyer is not sufficient to establish legal professional privilege. The lawyer must be acting in a professional capacity.

There are two types of privilege:

- Legal advice privilege relates to communications between a lawyer and client. These communications do not have to be made in the context of litigation so long as the communications are legal advice and have the requisite level of confidentiality. On the other hand legal assistance will not be privileged where it is merely advising what the law is, without including advice as to what should be done in a relevant legal context (see *Comment below*).
- Litigation privilege applies only to communications between a client or his lawyer and third parties (such as a witness) for the purpose of litigation. It allows parties to prepare for litigation without the fear of the other party accessing documents prepared for the purpose of obtaining legal advice. To ensure it applies, litigation has to have commenced or is a definite prospect and the relevant document must be prepared for the main purpose of assisting in the actual or contemplated litigation.

Privilege may be waived expressly or by implication. If a document comes into the public domain privilege will be lost. However, it will not be lost if there is limited disclosure for a particular purpose. There is caselaw currently before the courts which may develop this area further.

Comment. Whilst there may be room for argument on the application of the principle to particular circumstances, the main concern must be that the sooner litigation, either threatened or pending is, brought to the attention of your legal advisors, the sooner legal advice privilege will likely be held to apply.

TV broadcasting and making complaints

TV3's controversial disclosure of Brian Lenihan's illness after Christmas brought ethical standards in the media generally into sharp focus. The Broadcasting Act 2009 established the Broadcasting Authority of Ireland (BAI) on 1 October 2009. It is responsible for the licensing of broadcasting services. Any viewer can refer a complaint to the BAI or directly to the relevant broadcaster if they are not happy about broadcasting content under any of the following categories:

1. objectivity and impartiality in news;
2. fairness, objectivity and impartiality in current affairs;
3. anything which may reasonably be regarded as causing harm or offence, or anything being likely to promote, or incite to, crime, or as tending to undermine the authority of the State;
4. privacy of an individual;
5. harmful or offensive material, in particular, programme material in respect of the portrayal of violence and sexual conduct shall be presented with due sensitivity to the convictions or feelings of the audience and with due regard to the impact of such programming on the physical, mental or moral development of children.

The Act provides for the establishment of a Code of Practice by broadcasters for handling complaints.



New test for judicial review – will the floodgates open?

Judicial review is the main way that the courts supervise bodies exercising public functions to ensure that they act lawfully and fairly. Judicial review is primarily concerned with the legality of the decision making process, not the merits of the decision. One of the grounds for challenging a decision of a body exercising a public function is that the decision is *unreasonable*.

The concept of unreasonableness is an exception to the rule that a court, in a judicial review, will generally not review the merits of a decision. Prior to the Supreme Court judgment in this case, it was a generally held view that the test to be applied in determining the reasonableness of an administrative decision was set out by the Supreme Court in *O’Keeffe v An Bord Pleanála* ([1993] 1 IR 39). The courts will intervene to quash the decision of an administrative officer or tribunal on the grounds of unreasonableness or irrationality where:

1. it is fundamentally at variance with reason and commonsense;
2. it is indefensible for being in the teeth of plain reason and commonsense;
3. because the court is satisfied that the decision maker has breached his obligation whereby he must not flagrantly reject or disregard fundamental reason or commonsense in reaching his decision.

Finlay CJ in *O’Keeffe* went on to state that: *“The circumstances under which the court can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare.”*

Facts. The appellant, Abosede Oluwatoyin Meadows, a Nigerian woman, came here in 1999 and applied for refugee status so that she would be allowed to remain in the country. She claimed that if returned to Nigeria she would be forced into a marriage arranged by her father and as a result would be subjected to female genital mutilation. Her application was dealt with in accordance with the procedures then in place and culminated, after an unsuccessful appeal against the initial finding that she should not be recommended for refugee status, in a refusal of that application by the Minister. She sought to impugn the Minister’s decision to deport her on the grounds of the irrationality of that decision.

The Supreme Court in this case had the following question certified to it by the High Court: *“In determining the reasonableness of an administrative decision which affects or concerns constitutional rights or fundamental rights, is it correct to apply the standards set out in O’Keeffe...?”*

Decision. On 21 January 2010 the Supreme Court stated that the courts, in assessing the reasonableness of administrative decisions in cases affecting fundamental rights, are entitled to consider the proportionality of the decision. Fennelly J said the court was not altering the *O’Keeffe* test but explaining the principles “already implicit” in the law.

The principle requires that the effects on, or prejudice to, an individual’s rights by an administrative decision be proportional to the legitimate objective or purpose of that decision. The application of the principle of proportionality is a means of examining whether the decision meets the test of reasonableness. In applying the principle of proportionality the court may also have regard to the degree of discretion conferred on the decision maker.

In his dissenting judgment, Kearns J expressed grave reservations as to the application of the test of proportionality in cases such as the one before the court. He indicated that in his view expanding the criteria for judicial review beyond those stated in *O’Keeffe* would, in the case before the court at least, result in a quite inappropriate encroachment into the decision making functions of the Executive. Kearns J went on to say that:

“If such an expanded view of the role of judges is to extend to all areas of judicial review it will engulf the courts in a greatly increased volume of cases...It will, in my view, render our judicial review system, already struggling in one respect under the vast weight of asylum related court applications, virtually inoperable.”

Comment. It is clear from reading the judgments of the judges in the majority and that of the minority that their views on the possible effect and import of this decision diverge greatly. Clearly, only time will tell whether the effect of this decision will be revolutionary or whether what has occurred is merely a clarification of the principles which implicitly applied already.



Small Claims Court extended to business claims

The aim of the Small Claims Court procedure is to provide an inexpensive, fast and easy way for consumers to resolve disputes. It is an alternative to the court based civil bill procedure. The following types of claims can be dealt with under the procedure:

- Consumer claims such as for faulty goods or bad workmanship. You must have bought the goods or service for private use from someone selling them in the course of business.
- Claims for minor damage to property.
- Claims for the non-return of a rent deposit for certain kinds of rented properties, such as, a holiday home or a flat in a premises where the landlord also lives.

The District Court (Small Claims) Rules 2009 extends the remit of the small claims procedure in the District Court to include certain business claims from 11 January 2010. A business for these purposes means a company, partnership or a sole trader who supplies, sells or purchases goods or services in the ordinary course of a business.

Businesses can now take claims against other businesses in respect of goods or services purchased from someone selling them in the course of business up to the value of €2,000. Currently limited liability companies must have legal representation for court based proceedings so for small claims this is a welcome alternative. However, claims cannot be made in respect of debts, personal injuries or breach of leasing or hire purchase agreements.

The Small Claims Court is a service provided in each District Court office and here is a link to relevant forms which can be filed online: <http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/224D3F40A61421D280256DA6002EB56B?opendocument&l=en>

Protecting journalistic sources: ECHR decision

In December 2009 the European Court of Human Rights (ECHR) confirmed the importance of protecting journalists' sources as part of the media's right to freedom of expression.

Facts. In 2001 journalists at various media companies (four UK newspapers and a news agency) published copies, from an undisclosed source, of a document about the brewer Interbrew's apparent plan to buy a competitor.

Interbrew asked for the copies back and its request was refused. Interbrew obtained a disclosure order, known as a Norwich Pharmacal order, which required the document to be returned. After the House of Lords refused to consider an appeal by the journalists, they took their case to the ECHR against the UK government. They claimed that their right to freedom of expression under Article 10 of the European Convention on Human Rights had been infringed by the order.

Decision. The ECHR stated that as a matter of general principle, the "necessity" of any restriction on freedom of expression must be convincingly established.

Interbrew argued that the order was necessary because the source was acting for a harmful purpose and that the document was not authentic. However, the ECHR held that there was no evidence of the source's purpose and that there was insufficient evidence that the document was not authentic. There were other ways in which Interbrew could have stopped further leaks, for example, injunction proceedings could have been brought against the media to stop the publication of confidential information.

The ECHR therefore found that the public interest in the protection of journalists' sources outweighed the threat of damage through future dissemination of confidential information and obtaining damages for past breaches of confidence.

Case: Financial Times and others v United Kingdom Application no 821/03



Bankruptcy reform

Bankruptcy law governs the recovery of debts where the debtor is an individual rather than a company. The bankruptcy procedure in Ireland is unwieldy, expensive and very heavily court controlled.

In September 2009, the Law Reform Commission produced a consultation paper on Personal Debt Management and Debt Enforcement. It made 122 provisional recommendations for reform including the creation of a new system of personal insolvency law in Ireland. This would consist of a non-court-based debt settlement scheme which would supplement (though not necessarily replace completely) the current court-based scheme. This welcome development, if implemented, would make a radical difference.

In December 2009 Beauchamps Solicitors report on "*Bankruptcy Law in the European Union and Forum Shopping*" was launched. It examines the procedures in relation to bankruptcy in a number of EU member states including Ireland.

See <http://www.beauchamps.ie/downloads/Bankruptcy%20Report.pdf>

Disability and Charity Law Seminar

Beauchamps Solicitors are holding a seminar entitled "Disability and Charity Law" on Saturday, 6th March 2010 in the Conrad Hotel, Dublin. Topics to be covered include:

- Charities Act 2009;
- Disability and the Law;
- The Challenges Facing Disability Organisations in 2010 and Governance;
- Management and Accountability of Charities.

To find out more about this event and to register please visit www.beauchamps.ie/disabilityandcharitylaw

Litigation and Dispute Resolution Department

If you have any queries on the contents of this update or if there are other topics you would like to see us address in future editions please contact any of the litigation and dispute resolution solicitors below.

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