SUBMISSION TO THE REVIEW GROUP ON THE ADMINISTRATION OF CIVIL JUSTICE

Noting that one of the goals set for the Review Group on the Administration of Civil Justice is to identify steps "to achieve more effective outcomes for court users with particular emphasis on vulnerable court users including children and young persons, impecunious litigants who [are] ineligible for civil legal aid and wards of court", I wish to raise for the Group's consideration two points relevant to the position of impecunious litigants ineligible for civil legal aid. An obvious deterrent to the taking of litigation by an impecunious client is the cost of litigation. The points I raise address aspects of this issue.

a) Protective (or pre-emptive) costs orders

A protective costs order is an order granted at a preliminary stage in legal proceedings directing that the applicant should not be held liable for the costs of any other parties to the proceedings (or fixing a limit to such potential liability) in the event that the applicant should eventually lose the case. In *Village Residents' Association Ltd. v. An Bord Pleanála*,[1] Laffoy J. accepted that such an order could be granted pursuant to O.99, r.5 of the Rules of the Superior Courts 1986 which provided that costs could be dealt with by the court at any stage in the proceedings.[2] However, in line with English authority on this type of order,[3] such orders may only be granted where, *inter alia*, the litigation raises public law issues of general public importance where the applicant has no private interest in the outcome of the case – see *Village Residents' Association Ltd. v. An Bord Pleanála*[4] and *Friends of the Curragh Environment Ltd. v. An Bord Pleanála.*[5] This condition is very restrictive and perhaps the Review Group might consider recommending that this jurisdiction be broadened to include cases that raise issues of general public importance even though the litigant might also benefit personally from the outcome of the case. Such a modification would, in particular, enable impecunious litigants to pursue cases concerning the operation of public

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1 [2000] 4 IR 321, [2001] 2 ILRM 22.

2 An amendment to O.99, r.5 subsequently made by the Rules of the Superior Courts (Costs) [S.I. No.12 of 2008] does not affect Laffoy J's reasoning on this point.

3 See *R. v. Lord Chancellor, ex p. CPAG* [1999] 1 WLR 347; [1998] 2 All ER 755 and *R. (Corner House Research) v. Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600.

4 [2000] 4 IR 321, [2001] 2 ILRM 22.

5 [2006] IEHC 243, (14 July 2006) HC. There would appear to be only one instance of a protective costs order being granted by an Irish court. According to media reports, in *Schrems v Data Protection Commissioner*, 15 July 2014, Hogan J granted such an order restricting the plaintiff's liability to costs, should he lose his case, to €10,000.

policy where the outcome of the litigation would have implications not just for the litigant herself.

b) No foal, no fee agreements

The legal profession in Ireland has a long tradition of providing assistance to impecunious litigants bringing arguable cases through “no foal, no fee” agreements whereby the lawyers agree to waive their fees in the event that the litigation is unsuccessful. Such arrangements are particularly important for independent law centres operating in this jurisdiction as they rely heavily on members of the Bar taking cases on this basis. Judicial decisions in the UK, however, raise two concerns about such arrangements.

First, in *Awwad v. Geraghty & Co. Ltd.*,[6] the English Court of Appeal held that a conditional fee[7] was against public policy and contrary to the common law, unless sanctioned by legislation. Admittedly, such judicial references as exist in Irish case law to the “no foal, no fee” system are, in contrast, tolerant of the practice at minimum and, at best, approving. Thus in *C.A. (Costs) v Minister for Justice*[8] MacEochaidh J, viewing a conditional fee arrangement as a means of enabling vulnerable and marginalized people to exercise their constitutional right of access to the courts, refused to award costs against an unsuccessful litigant whose lawyers had acted on a *pro bono* basis while in *McHugh v. Keane,*[9] *Synnott v. Adekoya*[10] and *Dundon v Butler Homes Ltd.*,[11] the High Court entertained actions in which it was accepted, albeit *sub silentio*, that a ‘no foal, no fee’ arrangement was a valid contract.[12] In *Persona Digital Telephony v Minister for Public Enterprise*[13] Denham CJ commented, at para.54, that there was “a long history at the Bar, and amongst solicitors, of taking cases on a “no foal, no fee” basis” and in his judgment Clarke J referred, without disapproval, to this practice. It is also worth noting that insofar as s.68(2) of the Solicitors (Amendment) Act 1994 prohibits the US type contingency fee whereby the successful client pays his or her lawyer a proportion of the damages awarded but remained silent about the 'no foal, no fee' arrangement, this might be taken as a tacit endorsement by the

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6 [2001] QB 570; [2000] 1 All ER 608; [2000] 3 WLR 1041.

7 In the instant case, the solicitor had agreed to charge her normal hourly rate if the client was successful and a lower rate if he was unsuccessful.

8 [2015] IEHC 432, (10 June 2015) HC.

9 High Court, 16 December 1994.

10 [2010] IEHC 26, (29 January 2010) HC.

11 [2017] IEHC 265, (5 May 2017) HC.

12 Though solicitors are generally prohibited from advertising their services on this basis - see art.9 of the Solicitors (Advertising) Regulations 2002 [S.I. No.518 of 2002]].

13 [2017] IESC 17.

Oireachtas of the latter arrangement.[14] All that said, there does not appear to be any authoritative affirmation of the legality of "no foal, no fee" agreements in the Irish context and the *Awwad* decision might be seen as casting a legal shadow over such arrangements.

Second, the decision of a divisional court of the Queen's Bench Division in *British Waterways Board v. Norman*[15] indicates that lawyers who act on a "no foal, no fee" basis cannot, in fact, recover their costs in the event of the case being successful on the ground that their client was never exposed to liability for costs. Media reports indicate that in 2002, the Irish High Court Taxing Master took the same approach when ruling that two bills for costs against a defendant should be taxed as nil because the plaintiff's solicitor had acted on a 'no foal, no fee' basis. Clearly such an approach would render "no foal, no fee" agreements extremely unattractive to lawyers asked to bring speculative actions on behalf of indigent clients. Admittedly in *C.A. (Costs) v Minister for Justice*,[16] MacEochaidh J explicitly rejected the suggestion that a "no foal, no fee" arrangement disentitles a litigant from securing costs from his or her opponent because the litigant has no liability to his or her own lawyers, saying that such a view was not consonant with modern reality and he awarded the applicant 20% of the total costs of the proceedings reflecting the extent of her success in the case.[17] However insofar as the respondents had conceded that the applicant was entitled to this level of costs, this decision is not binding authority for the proposition that lawyers taking a case on a "no foal, no fee" basis are entitled to costs when the action is successful.[18] Specifically in relation to independent law centres regulated by The Solicitors Acts, 1954 to 2002 (Independent Law Centres) Regulations 2006 [S.I. No.103 of 2006], it is worth noting that among the conditions that must be satisified by an organization wishing to be treated as an independent law centre

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14 S.68(2) will be repealed once s.5 of the Legal Services Regulatory Authority Act 2015 is commenced. Section 149(1) of the 2015 Act (not yet commenced) similarly prohibits contingency fees in most cases but makes no reference to "no foal, no fee" agreements.

15 [1993] 26 HLR 232; *The Times*, 11 November 1993.

16 [2015] IEHC 432, (10 June 2015) HC.

17 Though he reduced this sum by 25% to reflect inefficiencies in the applicant's approach to the litigation. He also refused to award costs against the unsuccessful plaintiff in this *pro bono* litigation on the ground that this would cause significant injury to the interests of justice as it would mean that her lawyers would not be paid for the work they had done and that to award costs against an unsuccessful plaintiff in such a case "would have a chilling effect on litigation of this sort and might have the effect of denying vulnerable and marginalized people their constitutional right of access to the courts." (Para.26).

18 MacEochaidh J also refused to award costs against the unsuccessful plaintiff in this *pro bono* litigation on the ground that this would cause significant injury to the interests of justice as it would mean that her lawyers would not be paid for the work they had done and that to award costs against an unsuccessful plaintiff in such a case "would have a chilling effect on litigation of this sort and might have the effect of denying vulnerable and marginalized people their constitutional right of access to the courts." (Para.26).

are that the organization must not “and does not intend to charge legal costs and outlays to a client over and above those legal costs and outlays that are recoverable by the client from another source” - reg.4(3)(c) – and that the organization “applies all legal costs and outlays recovered by an employed solicitor on behalf of a client solely for furthering the charitable purposes of the organization and in particular the provision to clients of legal services” – reg.4(3)(d). These provisions clearly imply that independent law centres may recover costs in pro bono cases. Again, however, as with the issue raised by *Awwad*, there does not appear to be any authoritative statement in Irish law that lawyers acting on a “no foal, no fee” basis are entitled to be paid their fees if the case is successful.

Given the concerns raised by the *Awwad* and *British Waterways* decisions, the Review Group might consider recommending that the legal status of “no foal, no fee” agreements be put beyond all doubt perhaps by means of a declaratory amendment to s.149(1) of the Legal Services Regulatory Authority Act 2015 once that provision has been commenced.

Gerry Whyte,
School of Law,
Trinity College Dublin