



## Litigation Update

### Personal Injuries - April 2017

## Practice Direction - Payment of Costs on Account

### *HC71 - Payment on account of costs pending taxation*

On 28 March 2017 the President of the High Court issued a new practice direction. Due to the long delays in the taxation of costs, the provisions of Order 99, rule 1B (5) have been highlighted by the President. The terms of the direction are as follows:

“I direct that in all cases where there is no dispute as to the liability for the payment of costs and in any other case which a judge thinks appropriate, an order may be made directing payment of a reasonable sum on account of costs within such period as may be specified by the judge pending the taxation of such costs. Such orders may be made on an undertaking being given by the solicitor for the successful party that, in the event of taxation realising a smaller sum than that directed to be paid on account, such overpayment will be repaid. This practice direction shall come into effect on Monday, 24th April, 2017.”

## Discount Rate in Ireland

The Supreme Court in *Russell v The Health Service Executive* (Unreported, Supreme Court Determination, 1 February 2017) [2017] IESCDET 10 has refused to hear an appeal on the discount rate being lowered to 1% from 3%. The precedential value of these

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determinations has been clarified in *Reaney and others v Interlink Ireland Limited (t/a D.P.D)* meaning that this issue is for this case alone and does not set the standard for future cases.

The Court of Appeal examined this issue again in *Walsh v Tesco Ireland Limited* (Unreported, Court of Appeal, 3 March 2017) [2017] IECA 64. The court analysed the RRR in the context of the *Russell* decision. It appears that there is now a variation between 1.5% and 1% depending on the type of losses to be calculated. In light of the decision of the court in *Russell*, the court in *Walsh* held that there are good policy reasons as to why when calculating claims for future pecuniary loss the court should assume a 1.5% RRR on investment income for all categories of future financial loss and a 1% RRR in respect for future care, without requiring the court to hear any evidence from economists or investment analysts. An actuary should suffice.

## UK Ministry of Justice Reduction of Discount Rate to -0.75%

On 27 February 2017 the UK the Ministry *issued reasons* for setting the discount rate at minus 0.75%.

The Association of British Insurers has responded to this decision via *press release* commenting that “[c]utting the discount rate to -0.75% from 2.5% is a crazy decision by Liz Truss. Claims costs will soar, making it inevitable that there will be an increase in motor and liability premiums for millions of drivers and businesses across the UK.” The change is in effect since 20 March 2017. The UK government has launched *a consultation* to consider reform of the discount rate.

The UK High Court has allowed the claimant in *Thompson v Reeve*, who was injured in a road traffic accident in 2008 and suffered subsequent negligent treatment, to withdraw her original Part 36 offer to settle her claim that she made before the new discount rate for personal injury damages was introduced. The judge used his power under CPR 3.10 to rectify an "error of procedure" and accepted her emailed withdrawal one day after the new rate was introduced, despite protests from the defence that they had not accepted in writing that they were willing to accept an emailed withdrawal.

For further discussion on this topic follow this *link*.

## Periodic Payment Orders

The proposed introduction of periodic payment orders (PPOs) under the *Civil Liability (Amendment) Bill 2017* has been further progressed and has passed Final Stage in the Seanad. The amendments tabled by the Minister can be found at the following *link*. The amendments relate to new provisions on open disclosure.

The Bill will now be sent to the Dáil for consideration.

## District Court Rules – Personal Injuries Summons

New rules have been introduced in the District Court by way of the *District Court (Order 40A) Rules 2017 (SI 102 / 2017)* which amend Order 40A rule 5(2) the District Court Rules 1997 (SI 93 / 1997). The rules come into operation on 24 April 2017.

The rules introduce requirements for the contents of a personal injuries summons and require the inclusion of a statement:

- (a) confirming whether or not the proceedings have been authorised by the Personal Injuries Assessment Board,
- (b) specifying the section of the *2003 Act* or the rule made under section 46(3) of the 2003 Act in accordance with which any such authorisation has been issued, and
- (c) citing the date of issue of the authorisation and any reference or record number relating to any such authorisation.

## Status of Supreme Court Determinations

In *Reaney and others v Interlink Ireland Limited (t/a D.P.D)* (Supreme Court Determination, 30 March 2017) [2017] IESCDT 36 in a determination granting leave to appeal in relation to issues of lodgements under O. 22 r. 6 of the Rules of the Superior Courts and Courts Act interest, the Supreme Court gave guidance as to the precedential value of these determinations:

“The Court considers it desirable to point out that a determination of the Court on an application for leave, which is final and conclusive as far as the parties are concerned, is a decision in relation to that application only. The decision is whether the question, or questions, raised, and the facts underpinning them, meet the constitutional criteria for leave to be granted. Save in the rarest of circumstances, it will not be appropriate to rely upon a grant or refusal of leave as having a precedential value in relation to the substantive issues or in the context of different cases. Where leave is granted, any issue canvassed in the application will, in due course, be disposed of in the substantive decision of this Court.”

## Litigation Funding

The current discourse on litigation funding is live in the pending Supreme Court case of *Persona Digital Telephony Ltd v The Minister for Public Enterprise* [2016] IESCDT 106. The Supreme Court reserved judgment in the case on 3 April 2017. We await their decision in the wake of the recent decision in *SPV Optimal Osus Limited v HSBC Institutional Trust Services (Ireland) Limited & Others* (Unreported, Court of Appeal, 2 March 2017) [2017] IECA 56). The Court of Appeal in *Osus* found that the High Court did not have to find that there was an intention on the part of the assignee to engage in the trading of litigation, whether professional or otherwise. It affirmed the decision of

the High Court and it distinguished between the decision in *Greenclean Waste Management Ltd v Leahy (No.2)* (Unreported, High Court, Hogan J, 5 June 2014) [2014] IEHC 314 and (Unreported, Court of Appeal, 8 May 2015) [2015] IECA 97, stating that in *Osus* the plaintiff was not supporting the litigant, but purchasing the right to litigate the claim.

Click [here](#) for further comment.

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