



COVID-19

LITIGATION AND DISPUTE RESOLUTION

COVID-19 and Solicitors' Professional Indemnity Insurance

by **Shane Neville**

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When the financial crisis struck in 2008, a deluge of claims against solicitors followed. Shane Neville considers the likely fallout from the current COVID-19 public-health emergency.

Many Irish law firms effectively closed their offices in March at the beginning of the public-health emergency. While a large number of those solicitors continued to serve their clients' needs from remote locations or with limited numbers in offices, the ability to carry out tasks varied considerably depending on firms' preparedness and infrastructure.

Solicitors have now begun to return to their offices on a staggered basis, returning to a new "socially distanced" normal.

Law firms which have acted carefully and prudently since the Irish economy roared back into life in 2013/2014 are likely to be better placed to ride out what will hopefully be a V-shaped blip in Ireland's economic story. Firms which have not acted as cautiously may face difficulties.

What are the risks?

If the 2008 financial crisis has taught us anything, it is, in the words of Warren Buffett, "you only find out who is swimming naked when the tide goes out". While the potential for claims against solicitors exists at all times, particular attention should be paid to the following at present:

Statute of Limitations

A six-year limitation period applies to most causes of action in Ireland. Much shorter limitation periods apply, however, to personal-injury claims, claims against deceased persons' estates, appeals, judicial-review actions, defamation actions and some other litigation.

For those firms which do not have appropriate IT infrastructure and systems in place, there is a real danger that limitation periods will be missed and that claims will become "statute-barred". We suggest that the most urgent task for solicitors working remotely or for those returning to the office is to review all "plaintiff/claimant" files and to identify the latest date on which proceedings must be issued. Particular care should be taken in relation to claims which need to be submitted to the Injuries Board and claims which require the leave of the court before issuing.

Solicitors should also review all previously issued writs (such as plenary summonses) and ensure that they are served within the required time period, which is normally 12 months from the date of issue.

Undertakings

The landscape in late 2020 is likely to be very different to 2008 when it comes to claims for breach of undertaking. The so-called Celtic Tiger years had seen the proliferation of solicitors' undertakings in both domestic and commercial property and banking transactions. In the years that followed the 2008 financial crisis, the Law Society of Ireland significantly restricted the circumstances in which solicitors can provide

undertakings, meaning that solicitors' undertakings are less likely to cause the same level of hardship for solicitors and their professional indemnity insurers.

However, with a potential tightening of credit and a review of their security, financial institutions are likely to carefully review their existing security. We suggest that solicitors should:

- ensure that all registrations have been processed in the Property Registration Authority;
- chase clients for any outstanding stamp duty or outlays (especially in non-residential transactions, where the stamp duty amounts can be significant);
- pay particular attention to the requirement for corporate borrowers to register security with the Companies Registration Office within strict time limits;
- if acting for purchasers, remind vendors' solicitors to provide any outstanding deeds of discharge/release; and
- deal promptly with any tasks that require signatures or assistance from others to complete.

The above is not an exhaustive list.

Wills

Many clients, particularly elderly persons, contacted their solicitors during the early days of the COVID-19 public-health crisis to make "emergency wills". With elderly and more vulnerable persons likely to be less comfortable with email and video calling, there is a distinct possibility that some of these "emergency wills" were sub-optimal in terms of carrying out deponents' wishes and from a tax-planning perspective. Now that the public-health crisis has eased slightly, solicitors should reconsider all wills prepared during the past few months to:

- ensure validity of execution;
- reconsider taxation implications;
- consider whether spouses or children might challenge the wills due to a failure to make proper provision for them;
- ensure charging clauses have been included;
- consider whether beneficiaries might unintentionally have witnessed wills; and
- ensure that all other requirements have been met.

Again, this is not an exhaustive list.

Conditional Contracts

During the current economic conditions, some financial institutions have withdrawn loan approval or, based on loan-to-value ratios, reduced the amounts they are willing to lend. Solicitors and their clients should ensure that contracts are sufficiently "conditional". Clients who require drawdown of funds from financial institutions before purchasing properties should be advised, where possible, to make their contracts conditional upon receipt of loan funds.

Litigation

Solicitors should tread carefully in the event that they find themselves being persuaded to settle existing claims by plaintiff clients who might be in need of cash now more than previously. Those clients might suffer 'buyer's remorse' in time to come and look to hold their solicitors responsible for settling the claim at an undervalue. It is important that clients make informed decisions.

What if solicitors discover problems?

Professional indemnity insurance is compulsory for solicitors and registered European lawyers practising in Ireland. All firms are required to hold insurance which complies with the Minimum Terms and Conditions of Professional Indemnity Insurance set out in the Solicitors Professional Indemnity Insurance Regulations 2018/2019.

As solicitors' professional indemnity insurance policies are "claims-made" policies, it is especially important for solicitors to notify claims or circumstances within the same policy period as when the claim was first

made or the circumstances were first discovered. While the vast majority of firms' policy periods end on 30 November of each year, some firms hold policies which will end on dates other than 30 November. Solicitors need to ascertain their firms' policy periods and expiration dates. Apart from adopting a prudent approach and notifying all "claims" or "circumstances" as soon as possible and in accordance with their insurance policies, solicitors should diarise all potential notifications (however remote) for consideration at least one month before their policy periods expire.

For more information

Whether you are an insurer or a practising solicitor, if you require legal advice in relation to solicitors' professional indemnity insurance or claims, please contact Shane Neville at sneville@lkshields.ie.

Shane Neville is a member of the Law Society of Ireland's Professional Indemnity Insurance Committee, which adopts regulations for solicitors' professional indemnity insurance in Ireland and minimum terms and conditions applicable to policies provided by participating insurers.

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