

## Appendix 2

### Further information on own Costs in Legal proceedings in Ireland

#### *Ireland's market for legal services generally*

1. Ireland's legal system is highly competitive. There are over 2,210 self-employed barristers<sup>1</sup> and 7,389 solicitors<sup>2</sup> in private practice in 2,377 firms<sup>3</sup> in a country of only 4.5 million. This level of competition compares favourably to many other jurisdictions. The highly competitive environment permits litigants to 'shop around' between solicitor's firms and between barristers in terms of cost, quality, reputation and expertise. It ensures that, at the level of the private client, a litigant has negotiating power in terms of his "*own costs*".
2. With regard to the current economic climate, not only has there always been considerable leeway for prospective litigants to negotiate a reduced fee, but there remains considerable pressure upon providers of legal services in the present market. This is reflected by the fact that the purchasers of the majority of legal services in Ireland (the Irish State, State agencies, and the criminal and civil legal aid schemes) have substantially, and in some cases by over a third, reduced the fees paid to legal practitioners. This downward pressure on the cost of legal services in Ireland has widened throughout the market for legal services.

#### *The transparency of the costs of legal services in Ireland prior to engagement*

3. Ireland's legal system is completely transparent at the point of engagement of legal services.
4. As the price of any legal service will depend on the time and skills required, the documents to be prepared, and other factors, lawyers will rarely be able to offer (or advertise) blanket or indicative fees, save for very basic work (i.e., not litigation). Additionally, the fees proposed to be charged may also vary depending on whether payment is to be received on a staged basis or at the determination of proceedings.
5. However, solicitors are required by statute<sup>4</sup> and barristers are required by rules of professional conduct<sup>5</sup> to provide written estimates of costs at the outset of their engagement

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<sup>1</sup> Bar Council Annual Report 2014-2015.

[http://issuu.com/thinkmedia/docs/barcouncilannualreport\\_web\\_546da5efab9552](http://issuu.com/thinkmedia/docs/barcouncilannualreport_web_546da5efab9552)

<sup>2</sup> Law Society Annual Report 2014.

<https://www.lawsociety.ie/Global/About%20Us/Annual%20Reports/AnnualReport2014.pdf>

<sup>3</sup> Law Society Annual Report 2014.

<https://www.lawsociety.ie/Global/About%20Us/Annual%20Reports/AnnualReport2014.pdf>

<sup>4</sup> Section 68(1) of the Solicitors (Amendment) Act 1994 provides:

*"On the taking of instructions to provide legal services to a client, or as soon as is practicable thereafter, a solicitor shall provide the client with particulars in writing of—*

*(a) the actual charges, or*

*(b) where the provision of particulars of the actual charges is not in the circumstances possible or practicable, an estimate (as near as may be) of the charges, or*

*(c) where the provision of particulars of the actual charges or an estimate of such charges is not in the circumstances possible or practicable, the basis on which the charges are to be made,*

*by that solicitor or his firm for the provision of such legal services and, where those legal services involve contentious business, with particulars in writing of the circumstances in which the client*

for specific legal services. This system permits and encourages negotiation of fees, creates transparency, fosters competition, and guarantees predictability in relation to own legal costs.

6. The estimate of costs of engagement of legal services will be determined on a case by case basis, depending on factors such as the time and skills required, the number of litigants involved in the case, the number and nature of documents to be prepared, the duration and the complexity of the legal proceedings, and the likely number of interlocutory hearings and likely duration of substantive hearing(s).
7. Fees will then be agreed by the lawyer and client. These fees are matters of private contractual relations. The level of fees agreed is a matter for free negotiation between the private client and the legal professional. Clients can impose conditionality, such as fee caps, and require notifications when fees reach certain levels. If a potential client is dissatisfied with the fee proposal (which will comprise a structure of fee items in the applicable case, the level of those fees, and the proposed arrangements as to payment), he can go to a competing lawyer.
8. As a result of the transparency at the point of engagement of legal services, predictable own costs can be shared amongst various litigants. This is particularly important in access to justice matters, as environmental proceedings typically concern not just single individuals. Litigants have the opportunity to bring proceedings together with other members of the public (either as litigants to the same action, or through separate actions heard together, or by combining themselves into a community group or NGO). Consequently, even in circumstances where predicted and negotiated own costs may not be affordable to a particular individual, that individual is not disbarred from combining with other affected persons to access justice through legal representatives.
9. It should be noted that the foregoing is dealing only with the existing legal cost regime which is the subject matter of the Communicant's complaints and is not dealing with the new legal costs regime which is being introduced by the Legal Services Regulation Act 2015. The provisions of that Act have been considered in Communication ACCC/C/2014/113.

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*may be required to pay costs to any other party or parties and the circumstances, if any, in which the client's liability to meet the charges which will be made by the solicitor of that client for those services will not be fully discharged by the amount, if any, of the costs recovered in the contentious business from any other party or parties (or any insurers of such party or parties)."*

<sup>5</sup> Rule 12.6 of the Code of Conduct of the Bar of Ireland provides:

*"On the taking of instructions to provide legal services, or as soon as practicable thereafter, a Barrister shall on request, provide to an instructing solicitor, or the client in the case of access under the Direct Professional Access Scheme, with particulars in writing confirming:-*

- (a) the actual charges, or*
- (b) where the provision of particulars or the actual charges is not in the circumstances possible or practicable, an estimate (as near as may be) of the charges, or*
- (c) where the provision of particulars of the actual charges or an estimate of such charges is not in the circumstances possible or practicable, the basis on which the charges are to be made,*

*The format of any such particulars shall be at the discretion of each barrister."*

## ***Pro bono and conditional fee arrangements by legal practitioners in Ireland***

### *Conditional fee arrangements*

10. The principle of costs following the event permits a conditional fee arrangement.<sup>6</sup> A lawyer will represent a litigant on the basis that, if the litigant wins, an order for costs will be obtained against the other party and the lawyer will be able to recover his or her fees pursuant to that order. If the litigant loses, the lawyers are not entitled to any fee. This is an arrangement to which recourse is regularly had. Consequently, it simply cannot be said that the costs of litigation are prohibitive.
11. This practice is informal but long-established and widespread across both legal professions, with anecdotal evidence from practitioners suggesting that it is an effective and useful means to permit access to justice for litigants of modest means but with legitimate complaints (including from both private citizens and non-governmental organisations).
12. Whilst a matter of discretion for the individual legal practitioner, access to justice through conditional fee assistance is an integral part of the Irish legal system and the basis of work of many practitioners across all fields of litigation.
13. The Report of the Legal Costs Working Group<sup>7</sup> noted that the system has the striking advantage of permitting persons of moderate means to engage legal representatives to vindicate their rights, so long as: (a) in the view of the lawyer, it is a case which can be won (i.e., that there is a reasonable prospect of success, which is also a condition of Ireland's own statutory Legal Aid Scheme), and, (b) the other party is sufficiently well-resourced to cover the eventual costs. In section 50B and Part 2 of the E(MP)A 2011 matters, the Respondent will invariably be an emanation of the State, so the question of adequate resourcing would not arise to discourage lawyers on behalf of an applicant. In its report, the Legal Costs Working Group noted the "*absence of a convincing case of change*" and did not recommend altering this principle.
14. Accordingly, Ireland considers the conditional fee system to be an invaluable part of the overall costs system across the Irish State, and one which has long enabled litigants to access justice.

### ***Pro bono activities***

15. In a 2005 study of voluntary work by barristers (all of whom are self-employed), the Bar Council found that 98% of Irish barristers (then over 1,500, now over 2,300) conducted voluntary work as part of their practice.
16. Moreover, the Bar Council operates a Voluntary Assistance Scheme, of which all Irish barristers and the majority of the largest solicitors firms in the country are members, through which Irish barristers offer free advice to NGOs, charities and other organisations, including the Free Legal Aid Centre and other local community legal services.

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<sup>6</sup> In Ireland, these are typically referred to as "*No-foal, no-fee*" arrangements. As its name suggests, the practice is common in horse-breeding to waive a stud fee if a live foal is not produced.

<sup>7</sup> Report of the Legal Costs Working Group, 07 November 2005  
<<http://www.justice.ie/en/JELR/legalcosts.pdf/Files/legalcosts.pdf>>.