

A recent High Court ruling where an action was dismissed because the Plaintiff made a false affidavit has highlighted the need for the full disclosure of all facts in relation to any case (*Higgins v Caldack Ltd and Quigley*).

Mr. Justice Quirke accepted that the Plaintiff was hard working and likeable, but dismissed the claim because the Plaintiff had sworn a false Affidavit. The evidence before the Court was that the Plaintiff had suffered severe injuries in the course of his employment when his coat sleeve became entangled in the shaft of a tractor. He sued his employer and the owner of the tractor with the employer indemnifying the owner of the tractor against damages and costs.

In defending the claim, the employer denied negligence, alleging that the accident was caused by the Plaintiff's own negligence and also requested the Court to dismiss the claim alleging that the Plaintiff had sworn a Verifying Affidavit, (required under Section 14 of the Civil Liability and Court Acts 2004), which was false and misleading in a material respect and which the Plaintiff was aware of when making the Affidavit.

Mr. Justice Quirke dealt with the issue of liability in the first instance and apportioned liability. He held the Defendant 75% responsible with the Plaintiff 25% guilty of contributory negligence.

Of note is the fact that the Plaintiff had suffered an earlier hand injury, in very similar circumstances and Mr. Justice Quirke commented that "by virtue of the previous accident he had a particular reason to take care for his own safety". This comment implies that a propensity to have accidents may be a factor in deciding contributory negligence.

In relation to the verifying affidavit, Mr. Justice Quirke accepted that the Plaintiff had sworn a false Affidavit, due to the fact that at meetings with the Rehabilitation Consultants involved in the case, he had indicated that his daily activities were largely confined to walking around his land and checking stock. However the Court heard evidence that in the years following the accident, the Plaintiff, was on five occasions, videotaped supervising work on building sites, for a business owned by his brother.

It was adduced in evidence that the Plaintiff had earned in excess of €40,000 for this work which he had neglected to mention in his Verifying Affidavit. Mr. Justice Quirke felt that it was "scarcely credible that he

overlooked these payments" even if, as claimed, he believed that he was obliged to pay some of this money to his brother. He should have disclosed the payments and the concealment of the payments was to accommodate "financial advantage" on his part.

The Plaintiff's claim included a claim for €137,415 for future expenses (accommodation and home help) which Mr. Justice Quirke felt were largely based on false and misleading information. He rejected the pleas of counsel for the Plaintiff that to deprive him of all compensation, due to non-disclosure would be an injustice. Mr. Justice Quirke said that Section 26 of the Civil Liability and Courts Act 2004, requires that when a Verifying Affidavit is false and misleading, a Court must dismiss the action, unless it would result in an injustice. He was of the view that no such injustice was being done in this case and dismissed the claim.

In dealing with the injustice issue, Mr. Justice Quirke gave, as an example of injustice, an adult swearing an Affidavit on behalf of an infant Plaintiff.

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SEE INSIDE FOR ARTICLES ON...

Your Share or Mine?	Page 2
Arbitration or Litigation	Page 3
Insolvency	Page 4
Facebook and Fraud	Page 5
Employment Tribunal	Page 6

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An Illegitimate Springboard to Compete

Helen H. Whelan, Solicitor/Dept. Head,
Corporate/Commercial Law - Dublin.

Two recent decisions of the High Court have considered the right of former employees to compete with their employers. In *Net Affinity Limited – v – Conaghan & Anor* [2011 IEHC 160] Dunne J. granted an injunction to the Plaintiff against the former employee to prevent her from breaching her duty of confidentiality to the Plaintiff under her contract of employment. Injunctive relief was also granted against the new employer to prevent them from soliciting, approaching or dealing with existing clients of the Plaintiff for a period of twelve months.

In *AIB plc & others – v – Diamond & others* [2011 IEHC 505] Clarke J. noted that none of the employment contracts contained a non-compete clause. In these circumstances, there was nothing to prevent an employee giving notice in accordance with the terms of their contract of employment commencing their new employment and seeking to persuade clients of their former employer to transfer their business to their new employer. This type of scheme is not itself in any way unlawful. The scheme may only be unlawful if steps were taken by employees while still employed to further the scheme, for example securing confidential information, approaching existing clients and downloading information to facilitate the transfer of such clients.

In this case, Clarke J noted “the only legitimate purpose of a springboard injunction is to put in place measures designed to redress an improper head start in competition obtained by unlawful activity.” He concluded that AIB was entitled to an injunction to prevent named defendants and the prospective employer from soliciting customers of AIB.

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Your Share or Mine?

Orla McGivern,
Associate, Real Estate and
Banking - Leeds

As a result of a UK Supreme Court decision, unmarried couples who are considering purchasing a property jointly, must think carefully about how they wish to hold the property. The case in question *Jones v Kernott* [2011] UKSC 53 (*on appeal from the Court of Appeal* [2010] EWCA Civ 578) highlights that couples must give consideration to the shares in which they contribute to the purchase of property in order to ensure that their interest is protected, in the event the property is later disposed of and/or the relationship breaks down.

In the absence of an express statement as to how the shares are apportioned, the Courts will infer what they think would have been ‘intended’ by the parties.

Ms. Jones and Mr. Kernott met in 1981. In 1985 they purchased a home together and from that date, Ms. Jones lived there with their two children. The purchase price was £30,000. A deposit of £6,000 was paid solely by Ms. Jones from the sale of her own house, which took place prior to moving in with Mr. Kernott. An extension was built and a loan of £2,000 for this work was taken out jointly, with Mr. Kernott engaging in some of the work on the house. At the time of the joint purchase of the property, neither party entered into an express agreement or declaration as to how their beneficial interests were to be held in the property.

The relationship broke down in 1993 and Mr. Kernott left the property. Ms. Jones continued to live there with the children and the property’s value continued to increase. Mr. Kernott then bought his own property in 1996 and wished to claim a beneficial share in the property he had previously owned with Ms. Jones.

As a result, Ms. Jones made an application to the County Court stating that she owned the entire beneficial interest in the property. At the time of making the application to the Court, the property had been valued at £245,000.

The County Court Judge found that the house was purchased as a family home and there was, therefore, a presumption that both parties intended to share jointly the beneficial ownership of the property. However Ms. Jones asserted that during Mr. Kernott’s absence from the property that this intention

had changed. She had continued to maintain the house whilst he had made little contribution to the financial upkeep of their children or the house. It was also during that this period that the house had increased in value.

On that basis, the Judge found in Ms. Jones’ favour. In applying the rules set down in an earlier case: *Stack v Dowden* [2007], he agreed that the intention to share jointly the beneficial interest had changed. As there was no clear evidence to dispute the change, the Court had to infer what the intention was. The Judge ruled that Mr. Kernott was to receive only a 10% share in the property.

Mr. Kernott appealed the matter to the High Court and claimed that it was wrong for the County Court to ‘infer’ an intention and to allow him only a 10% share in the property. His appeal was dismissed but he continued to pursue the matter and ultimately, the Supreme Court upheld the County Court Judges’ earlier decision.

In reaching the decision, the judgment revisited the case of *Stack v Dowden* and the principle laid down in that case: where a home is bought in joint names there is the presumption that the parties own the property as joint tenants in law and equity. The presumption of joint beneficial ownership, shows an “an emotional and economic commitment to a joint enterprise”.

This presumption can be rebutted when there is evidence that the intention changed. In reviewing the conduct of the parties, the Court has the right to infer such an intention. Even if it is not possible to infer an actual intention as to the shares held in a property, the Court can reach a fair decision by looking at the whole course of dealing between the parties. Lord Wilson found it impossible to infer what the intentions of the parties were but believed that the decision made by the County Court was fair.

This case shows the importance for couples when purchasing a property of seeking legal advice to ensure they enter a Declaration of Trust or similar express agreement to record correctly the shares each contributed to the purchase of the property in order to prevent any difficulties arising in the future.

Arbitration is a type of alternative dispute resolution (ADR). It is a consensual process whereby the parties involved agree to refer their dispute(s) to an arbitrator rather than seeking to resolve the matter through the courts. Although arbitration arises by agreement, normally by the inclusion in a contract of an arbitration clause, there can be circumstances where one party may challenge whether they must submit to arbitration. The Irish courts are very supportive of the arbitration process and will rarely refuse to allow civil proceedings to go to arbitration unless, for example, the opposing party is a consumer and can show that the arbitration clause was not individually negotiated.

The parties can agree on whom they want to be appointed arbitrator or they can have a trusted third party make that decision, such as the Law Society of Ireland or the Chartered Institute of Arbitrators (CIAB) (who appoint arbitrators under the Travel Scheme and the SIMI Scheme which they operate). It is an essential prerequisite that there be no conflict of interest in terms of the arbitrator who is appointed. The parties can also agree the rules/procedures applied to the arbitration, be it the scheme rules of the CIAB or some other professional body.

Once an arbitrator is appointed, normally a procedural meeting takes place to set out the proposed stages of the process and the timeframe in which the procedure is to be

completed. In addition, it is decided whether the process is to be by way of written submission only or by way of oral hearing. The former would be appropriate for an insurance contract policy dispute while the latter would be more appropriate for a dispute involving personal injury. Ultimately the arbitrator will make his award and if appropriate, include a costs award which in effect brings an end to the arbitration process. There are very limited avenues to appeal an award. Essentially an award may only be appealed if there is an error of law on the face of the award.

A comparison table sets out the pros and cons of arbitration over litigation:-

	ARBITRATION	LITIGATION
Forum	Private	Public
Commencement	Consensual	Non-consensual
Evidence	Limited evidentiary process	Rules of evidence apply
Adjudicator	Can be chosen/approved by the parties	Parties have no/limited input
Qualifications of the Arbitrator	Can be an expert in the area under dispute (engineer)	Court appointed judge (lawyer)
Nature of proceedings	Can be informal/flexible	Formal
Use of lawyers/Counsel	Not always	Almost always
Speed	Can be very quick (3 months) No long wait for hearing date	Normally a long drawn process with frequent interlocutory applications Must wait for hearing date to be allocated
Appeals	Very limited/case stated procedure removed	Appeal normally possible
Costs	Each party can agree to bear their own costs whatever the outcome (2010 Act)	Costs normally follow the event, i.e. the successful party has its costs paid by the unsuccessful party

The Arbitration Act 2010

The main purpose of the Arbitration Act 2010 ('the 2010 Act') was to modernise how arbitrations are conducted in this jurisdiction and to standardise the procedures, awards and enforcement avenues that already existed internationally.

The 2010 Act came into force on the 8 June 2010 so its provisions and their application are still quite new and not yet tested. For example, the question of whether the 2010 Act applies retrospectively to all arbitration agreements in existence before the above date or just to arbitration proceedings in train on or after the above date has yet to be resolved. In order to do away with the prior distinction between domestic and international arbitrations, the 2010 Act adopted the United Nations Commission on International Trade Law Model Law ('the Model Law') which is the standard used

internationally. The key changes from the Arbitrations Acts 1954 to 1980 are as follows:-

- Arbitrators have increased powers which include the authority to determine that they have been correctly appointed and to determine their own jurisdiction;
- The parties can agree costs allocation prior to the arbitration proceedings commencing;
- Prior to the 2010 Act, challenges could be raised to the arbitrator's award to the High Court either under its inherent jurisdiction or the case stated procedure. However the 2010 Act strictly limits the possibility of appeal to essentially public policy issues or procedural unfairness;
- Arbitrators have greater powers to make interim awards or security for costs awards; and

- The arbitrator has the power to seek expert assistance to facilitate a determination being made but if this is utilised, each party to the arbitration can insist upon a meeting taking place so that they can also put questions to the arbitrator's selected expert.

The arbitration process is a real alternative to the combative civil litigation process and with the new improvements brought about by the 2010 Act, the appeal of this form of ADR has only been strengthened. However, it is important to bear in mind that given the additional powers allocated to the role of arbitrator, it is essential that proper thought be given at the outset to whom the parties agree to appoint as an arbitrator to the dispute, more so after the 2010 Act and the very limited way an award can be challenged.

The unexpected inclusion for the provision of mortgage debt in the Government's new draft Personal Insolvency Bill (PIB) will come as a huge relief to homeowners in mortgage arrears. However only those who are eligible to fulfil the criteria will be able to avail of the new out of court debt settlement arrangements proposed in the draft Bill.

What does the Bill do?

- The Bill establishes for the first time, three out of court settlement mechanisms that allow borrowers resolve personal debts;
- It radically reduces the period for discharge from bankruptcy from 12 years to 3 years; and
- It provides for the creation of a new independent state funded Insolvency Service whose function it is to facilitate and operate the new non judicial insolvency arrangements and personal insolvency register.

What are the options and who can avail of them?

1. Debt Relief Certificate (DRC):

This option is available to borrowers who are unemployed, possess a net disposable income under €60 per month, have no assets and whose unsecured debts are less than €20,000. Under this mechanism, the

borrower must contact an approved intermediary such as MABS, who will submit an application on their behalf to the Insolvency Service at a small cost. If approved, the borrowers' debts are frozen and written off after one year. Borrowers can only apply for this relief twice in their lifetime and there must be a 6 year gap between each application.

2. Debt Settlement Arrangement (DSA):

This option applies to borrowers with unsecured debt in excess of €20,000. The debts can be personal or business in nature. The objective is to settle the debt within a 5 year period. Under this arrangement, the borrower must contact a personal insolvency trustee who will submit a proposal on their behalf to the Insolvency Service. The trustee must also call a creditors meeting. Provided 65% of the creditors approve the terms of DSA and the borrower pays the settlement, the remainder of the debt will be written off in 5 years.

Creditors are prohibited from issuing recovery or bankruptcy proceedings during the 5 year period. The debtor must also have sufficient funds available to maintain a reasonable standard of living to support themselves and their family. Borrowers can only apply for this relief once every 10 years.

3. Personal Insolvency Arrangement (PIA)

This arrangement applies to borrowers with secured and unsecured debt between €20,000 and €3 million. Again the debt can be personal or business in nature. The objective is to settle the debt within a 6 year period by paying off an agreed amount and the borrower must be insolvent with no prospect of becoming solvent within 5 years. Provided 65% of the creditors approve the terms of PIA and the borrower pays the agreed amount, the remainder of the debt will be written off in 6 years.

Borrowers under this arrangement are afforded specific protections over their home. Creditors are prohibited from issuing enforcement proceedings during the 6 year period. If the borrower reneges on the agreement, they will be liable in full for their debt. A borrower can only avail of a PIA once in their lifetime.

The proposed Bill implements many of the recommendations contained in the Inter-Departmental Working Group on Mortgage Arrears (Keane) Report from October 2011 and is subject to an extensive consultation process.

Avoiding the Pitfalls

Rehana Bakhat, Associate,
Real Estate and Banking - Leeds

Most common tenancy agreements entered into are either an Assured Shorthold Tenancy (AST) or an Assured Tenancy (AT). Both forms of agreement were introduced by the Housing Act 1988 as amended by the Housing Act 1996 with effect from 28 February 1997.

These agreements are used for tenancies granted on or after 15 January 1989. Only a private landlord and tenant can enter into one of these agreements. The property must be let as a separate accommodation, must be the main home and have a non-resident landlord (i.e. not living in the property). Tenancies prior to this date or on a business/holiday let cannot be an AST or AT. All rent tenancies are also excluded, as are certain tenancies where the rent is considered too high or too low.

The tenancy may be for a fixed term or a contractual periodic tenancy that runs indefinitely from one month's rent period to the next. The landlord is allowed to charge a full market rent.

From 28 February 1997, any new tenancy will automatically be an AST unless the landlord gives the tenant a notice which states that the tenancy is not an AST before the beginning of the tenancy, or includes a simple declaration in the tenancy agreement to this effect. Tenancies before this date can

only be an AST if the tenant was informed before the tenancy began, by a Section 20 Notice, that the tenancy was an AST. Otherwise it is an AT.

ASTs allow landlords to let their property for a short period only. The landlord can regain possession of the property six months after the start of the tenancy, provided two months written notice requiring possession is given to the tenant.

An AT cannot be terminated in this way. The tenant has the right to remain in the property unless the landlord can prove to the Court that there are grounds for possession. The landlord does not have automatic right to repossession when the tenancy comes to an end.

For both tenancies during the fixed period, the landlord has a right to possession through a court order, if at least two months or eight weeks rent is overdue or the tenant is causing nuisance or annoyance to others. Banks and other lenders can also obtain possession.

When an AST comes to the end of its fixed term, the landlord can end the tenancy provided the two months' notice has been given, enter a replacement tenancy or do nothing. The replacement tenancy is assumed to be an AST. It can be for a fixed

term or contractual periodic tenancy. If the landlord does nothing, the tenancy is known as a statutory periodic tenancy. It continues on the same terms as the original tenancy until the landlord provides two months notice to terminate the tenancy.

When an AT terminates, the landlord can grant a replacement tenancy or do nothing but does not have an automatic right to possession. Even after expiry of the fixed term, the landlord may only obtain possession if a court order is obtained and certain grounds are proved. If the landlord does nothing, then the tenancy will become a statutory periodic tenancy until the landlord replaces the tenant or gives notice seeking possession of the property on one of the seventeen statutory grounds.

Most landlords use ASTs as these agreements allow them to obtain possession of the property on expiry of the tenancy. If possession proceedings are required, the landlord can rely on an accelerated possession procedure. This is a fast track route with certain criteria and is only applicable to ASTs. Tenants usually prefer the AT agreement, as the landlord cannot automatically regain possession after six months.

In recent months, there have been some high-profile cases of contempt of court against jurors involved in criminal proceedings. In one case, a young man called in sick while on jury service as he wanted to attend the theatre with his mother. In another case, a juror caused a mistrial by attempting to communicate with the Defendant via Facebook. Both jurors were jailed.

The above cases show contempt for the judicial process and the rule of law; but what of the "victimless crime" of personal injury fraud? Insurers will be aware that this issue is particularly acute in road traffic accident cases where such phenomena as "phantom passengers" and "low velocity impacts" frequently rear their heads. Recently there has been Parliamentary discussion on these matters but what current remedies do insurers have?

Even in standard personal injury cases, it is not uncommon for a Claimant to exaggerate his or her symptoms only to be caught out by surveillance evidence and a consequent costs penalty. That said, is it possible to punish such individuals with the force of the criminal law?

For a start, it would be wrong to equate even deliberate exaggeration with criminality. However, if this exaggeration is cast under a statement of truth (for instance in a witness statement), the Court Rules state that this may be punishable by proceedings for contempt of court.

Such proceedings may only be brought by the Attorney General or with the Court's permission. There are a variety of different rules (which are beyond the scope of this article) depending on whether the alleged contempt is committed in the High Court or the County Court.

The burden of proving contempt rests with the insurer making the allegation and proceedings will only go forward if they are deemed to be in the public interest. The practical effect is that only the strongest cases will succeed and there must be sufficient dishonesty on the Claimant's part coupled with an intention to commit fraud for a case to be brought. It must also be said that the Courts are extremely cautious in their approach to insurers' applications for committal for contempt of court.

In *Kirk v Walton* [2009], the Claimant falsely claimed £750,000 alleging that she had sustained serious and long-term disability following a road traffic accident. She eventually accepted £25,000 following the disclosure of video evidence by the insurers and this sum was almost totally absorbed by the insurer's legal costs. The video showed the Claimant driving, walking and carrying shopping in a completely normal manner. The insurers subsequently made an application to have the Claimant committed for contempt of court.

Multiple allegations of dishonesty were made but the Court gave the Claimant "the benefit of the doubt" on the majority of

them on the grounds that Ms. Kirk had a pre-existing condition and that "she was entitled to emphasise those symptoms as long as there was an argument that they had been caused or at least exacerbated by the accident". However they did find that she had falsely claimed state benefits and had signed a statement of truth setting out facts she knew to be untrue. Although a custodial sentence was available, the Court imposed a fine of £2,500. This was the first occasion when contempt of court proceedings were brought solely for the exaggeration of a claim.

More recently in *Nield v Loveday* [2011], the Claimant was found in contempt after he claimed that he had been left virtually immobile following a simple traffic accident. In his witness statement, Mr. Nield stated that he was unable to travel by car to a holiday in Italy and had to be assisted in his wheelchair by airport staff.

Unfortunately for Mr. Nield, he had posted a photograph on his Facebook page showing himself standing by a car at Lake Garda with a caravan in tow. It emerged that he had in fact driven from Wales to his holiday destination. He was found guilty of 10 acts of contempt and was sentenced to nine months in prison.

Successful cases such as these are relatively rare. However, the potential for contempt action remains a potent tool for insurers in the fight against fraud.

Legally using Facebook

Philip Adams, Litigation Executive,
Litigation - Leeds

As of February 2012, Facebook reported that they had 845 million active users. As with e-mail, a Facebook profile is not linked to an address but moves with you. In view of this portability, it is one of the most fluid ways to communicate with somebody irrespective of their location at any particular point in time.

It appears that the High Court agrees as it decided in *AKO Capital LLP & another v TFS Derivatives & others* to allow the Claimants to serve a Claim Form upon one of the defendants via his Facebook profile, as the Claimants had difficulty in locating him and serving the proceedings by the traditional methods.

This is not a 'world first' and follows reported cases of service being granted via Facebook in Australia, New Zealand and Canada. Service via Facebook was also previously authorised in the UK County Courts. This is the first time authorisation to serve via Facebook has been given by the High Court although it follows the 2009 ruling in *Blaney v Persons Unknown* whereby the High Court

allowed a Claimant to serve an injunction against an anonymous Twitter user by sending a direct message containing a link to the injunction.

Whilst traditional methods to serve proceedings are set out within the Civil Procedure Rules, the Court has power under rule 6.15 to authorise service by a method or at a place outside of such traditional methods, if it considers that there is a good reason for doing so.

With this in mind, a party wishing to use Facebook or other social media forms will need to demonstrate to the Court that sufficient attempts have been made to serve the proceedings by one of the more traditional methods. The party wishing to serve documents using such methods will also be required to provide evidence to support the contention that the Facebook profile (or another profile) is controlled by the Defendant. Examples of such evidence may be in the form of identifying other co-Defendants as 'friends' or highlighting e-mail or other personal details that may be shown

on the profile as corresponding with information already known about the Defendant.

Although this decision shows social media is now embraced as being a reliable and portable point of contact, service via such means should be seen as a point of last resort rather than a cheap and easy option.

Service via a social networking site is likely to result in protracted and costly challenges by the receiving party as proving that a recipient can access the site or whether the proceedings have been brought to their attention may prove problematic should such challenges be raised.

Notwithstanding this, the case usefully illustrates that the Courts are willing to include social media as a form of communication in an official capacity. In extending such channels of communication, the options provided for litigants are more plentiful and this can only be a good thing.

Doing it by the book

Ian Steel, Solicitor/Dept. Head,
Employment Law - Leeds

Defending Employment Tribunal and personal injury claims are much easier if accidents at work are investigated or disciplinary action is taken against employees who injure themselves at work after failing to follow Health and Safety requirements. Taking no action can be a costly mistake.

Some of the reasons given for not investigating or taking disciplinary action against employees in these circumstances include:-

- The employee is off sick so there is an incorrect assumption that no action can be taken;
- Concern about discrimination claims being issued if disciplinary action is taken;
- The company is worried about a personal injury claim being issued in revenge for disciplinary action;
- There is a history of the problem taking place in the past so cannot do anything now;
- Not knowing who committed misconduct; and
- There are concerns about the cost and the amount of management time that will be spent defending an employment tribunal claim or personal injury claim.

None of these concerns should prevent action being taken. An employee has three years to issue a personal injury claim so you would have to wait three years before finding out whether the strategy of taking no action has worked. Discrimination claims should be issued within three months of the last act of

discrimination unless an Employment Tribunal considers it "just and equitable" to extend the three month deadline.

The fairness of a dismissal depends on passing four fairly simple tests.

1. Following the ACAS code;
2. Following your own internal written procedures;
3. Passing the test set out in the case of *British Home Stores v Burchell*. In summary, this requires an employer to show that they believed the employee was at fault and that the employer had carried out as much investigation as was reasonable. Furthermore, it was reasonable to conclude that the employee was guilty and the punishment of dismissal fitted the crime of the misconduct alleged; and
4. Showing that you acted reasonably given the size and resources of the company (section 98(4) of the Employment Rights Act 1996).

A bespoke Employee Handbook allied with a Health and Safety manual and forms help defend Employment Tribunal and personal injury claims. An employee bringing a claim for unfair dismissal will struggle when the Employee Handbook states that breaches of Health and Safety are seen as acts of gross misconduct together with documentary evidence that the employee has been inducted in Standard Operating Procedures but has failed to follow them.

Previous similar incidents rarely mean that an employer should not take action. Employment Tribunals receive guidance about not taking into account similar previous cases unless a previous incident and the circumstances are almost identical. Also, an employer who draws a line under previous incidents and states in writing that any future conduct will result in disciplinary action is more likely to persuade an Employment Tribunal that the disciplinary action is fair.

Importantly, courts prefer paper to people. Documentary evidence of what happened at the time is far more credible than a witness trying to defend a claim by having to remember what happened three years previously. Courts know that these witnesses have a vested interest in the way they explain events. In the circumstances, create a paper trail from the outset.

Clear documentation will minimise legal costs and the amount of time managers spend with solicitors dealing with the case. Draft statements can be prepared from the documents that existed at the time. Disclosure of all relevant documentation is required at the outset with personal injury claims.

Employees who see documentary evidence against them are more likely to give up than pursue a claim that is being defended with contemporaneous notes of what happened at the time the incident occurred.

Not worth the paper

Noelle McDonald,
Solicitor/Compliance Officer - Dublin

The UK High Court has recently ruled that it is not essential that the retainer between a solicitor and client is in writing. Fladgate LLP brought a case against a former client in relation to outstanding fees of £63,332 for legal services in relation to corporate restructuring work that the firm had carried out.

One of the main arguments relied on by the former client was that he never signed or agreed the letter of engagement sent to him. Additionally, there was also no evidence to support the finding that a retainer contract had come into existence orally, or that it could be implied by the conduct in the matter.

Mrs. Justice Lang said "the giving of instructions by a client to a solicitor constitutes the solicitor's retainer by that client" and that it was not essential the retainer was in writing, as it could be oral or implied. She ruled that the "giving of a

retainer is equivalent to the making of a contract for the solicitor's employment, and creates the solicitor's right to be paid. In determining whether or not a retainer has come into existence, the general principles of contract law apply."

After hearing the evidence, Judge Lang found a retainer was agreed orally and was implied by the former client's conduct in employing the firm to carry out the work for him.

It is interesting to note at this time, retainers were governed by the Solicitors Code of Conduct 2007, under which the name and status of the person dealing with the matter and the person responsible for overall supervision, as well as information about the cost and complaints procedures, all had to be in writing. However the Code's guidance provided that it was "not envisaged or intended that a breach should invariably render a retainer unenforceable".

Solicitors under the new Outcomes Focused Code of Conduct 2011 are afforded more flexibility to demonstrate compliance as the old prescriptive rules contained in the 2007 Code have been replaced with Outcomes and non-mandatory Indicative Behaviours (IB's).

Outcomes are the mandatory provisions contained in the new Code. They are expressed in language which is intended to demonstrate that when they are achieved, they will benefit and protect both the client and the public. All outcomes are mandatory but not all outcomes will apply to every type of practice and client.

Outcomes are supplemented by Indicative Behaviours (IB's). These are non-mandatory examples of how firms may demonstrate compliance with outcomes and are not to be regarded as a finite list in which to demonstrate compliance.

Dublin office

Pepper Canister House,
Mount Street Crescent, Dublin 2
Telephone 00 353 1 240 1200
Facsimile 00 353 1 240 1210
DX number 109025
Email lex@orourkerei.com
Web www.orourkerei.com

Leeds office

17-19 York Place,
Leeds, LS1 2EX
Telephone 00 44 113 245 7811
Facsimile 00 44 113 245 7879
DX number 26450 Leeds Park Sq
Email lex@orourkerei.co.uk
Web www.orourkerei.com

Belfast office

Forsyth House,
Cromac Square,
Belfast BT2 8LA
Telephone 00 44 28 90 511 281
Facsimile 00 44 28 90 511 201
Email lex@orourkerei.com
Web www.orourkerei.com