Securities Litigation

Contributing editors

Antony Ryan and Philippe Z Selendy

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GETTING THE DEAL THROUGH

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Ireland

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1 Describe the nature and extent of securities litigation in your jurisdiction.

Securities claims in Ireland can be brought either on the basis of common law contract or tort, or on the basis of specific statutory provisions as outlined below. Although securities claims have traditionally been less common in Ireland than in jurisdictions such as the United States, there have been an increasing number of such claims in Ireland over recent years. These include claims arising out of the global financial crisis or related issues. In addition, there is an increasing propensity for securities litigation to be undertaken for strategic reasons in the context of M&A and other corporate disputes.

2 What are the types of securities claim available to investors?

Various securities claims are open to investors under Irish law. Ireland is a common law system and potential claims by investors include common law contractual or tortious causes of action. In addition, Ireland's membership of the European Union (EU) has also led to the introduction of specific rights of action that can be brought by plaintiff investors. Such general common law causes of action include:

- breach of contract;
- misrepresentation;
- negligence;
- negligent misrepresentation;
- negligent misstatement; and
- fraud.

Claims may be pursued concurrently in contract or tort. In addition, certain statutory provisions impose civil liability in particular circumstances. For example, section 610 of the Companies Act 2014 (the 2014 Act) can impose civil liability on a company's directors and officers on its winding up or examinership for fraudulent or reckless trading.

In addition to claims in contract or tort, investors have a right to sue for loss or damage arising from untrue statements or omissions of information required by EU law in prospectuses of publicly traded securities under section 1349 of the 2014 Act. Section 1369 of the 2014 Act (as amended by the Finance (Certain European Union and Intergovernmental Obligations) Act 2016) also provides for civil liability for breaches of Irish market abuse law involving insider trading, unlawful disclosure of inside information and market manipulation in relation to the securities traded on the Main Securities Market, the Enterprise Securities Market and the Global Enterprise Market of the Irish Stock Exchange (ISE).

Shareholders will also have civil claims under section 1147 of the 2014 Act against directors and independent persons for misconduct in the preparation or implementation of a merger of a PLC, or for untrue statements in the draft terms of a merger, the separate explanatory reports prepared by the directors of each merging company, the independent person's report on the draft terms of the merger or the merger financial statement. Similar civil liability arises in relation to the division of PLCs under section 1169 of the 2014 Act. As the merger and division of Irish public limited companies is a rare occurrence, these provisions are rarely invoked.

3 How do claims arising out of securities offerings differ from those based on secondary-market purchases of securities?

The range of claims outlined in question 2 would be available to an investor in an initial offering of publicly traded securities. However, an investor in secondary market purchases may be restricted from making contractual claims against the company in which securities have been issued and may lack standing for other claims, due to the lack of a contractual relationship between the investor and the initial offeror or difficulty in establishing that the initial offeror owed the secondary-market investor a duty of care.

An offeror of securities to which a prospectus relates, including an offeror in a secondary market, is one of the categories of persons who are subject to statutory civil liability for misstatements in, and omissions from, a prospectus, if the securities are acquired on the faith of the prospectus and loss or damage has been suffered by the acquirer.

4 Are there differences in the claims available for publicly traded securities and for privately issued securities?

One of the main differences between publicly and privately traded securities, and therefore a difference between the claims that may arise, is the requirement for the publication of a prospectus. If there is no offer of securities to the public, and no application for admission to trading of securities on an EU-regulated market, then there is no obligation to publish a prospectus. Therefore, claims arising from a privately issued security may be limited to the common law causes of action and statutory fraudulent and reckless trading causes of action listed in question 2.

A publicly traded security could give rise to the additional statutory causes of action under the 2014 Act, as mentioned in question 2.

5 What are the elements of the main types of securities claim?

Statutory causes of action

Section 1349 of the 2014 Act: civil liability for misstatements in prospectus

A plaintiff investor must establish that he or she purchased securities on the faith of the prospectus and suffered loss or damage because there was an untrue statement in the prospectus, or an omission of information required by EU prospectus law from the prospectus.

Section 1369 of the 2014 Act (as amended): civil liability for certain breaches of Irish market abuse law

A plaintiff investor must establish that:

- the defendant contravened a provision of Irish market abuse law relating to insider dealing or unlawful disclosure of inside information;
- the plaintiff, who was not in possession of the relevant information, sustained loss; and
- that loss was due to the difference between the price at which the securities were acquired or disposed of and the price at which they would have been likely to have been acquired or disposed of, if the relevant information had been generally available.

Further, a plaintiff investor will also have a claim under the same section of the 2014 Act (as amended) to be compensated for acquiring or disposing of securities as a result of market manipulation where they

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establish that there was breach of Irish market abuse law. They do not need to establish loss in such circumstances.

Contract claims

Breach of contract

The plaintiff must establish that there has been a breach of a contractual term.

Misrepresentation

A plaintiff investor must establish that there was a misrepresentation of fact that was relied upon by the plaintiff and that induced the plaintiff to enter into the contract.

Tort claims

Negligence

In order to establish negligence, the plaintiff investor must establish that:

- a duty of care was owed to the plaintiff by the defendant;
- a breach of that duty of care occurred;
- the breach of care caused actual loss or damage to the plaintiff; and
- the loss or damage was a reasonably foreseeable result of the defendant's conduct.

Negligent misrepresentation

In order to establish negligent misrepresentation (a variant of general negligence principles), the plaintiff must establish that the defendant:

- failed to exercise due care in making the representation;
- the representation induced the plaintiff to, for example, enter into the particular agreement; and
- the plaintiff suffered damage because of the inaccurate representation.

Negligent misstatement

In order to establish negligent misstatement (another variant of the general negligence principles), the plaintiff investor must establish that:

- there was a special relationship between the plaintiff and the defendant (eg, in *Securities Trust Ltd v Hugh Moore & Alexander Ltd* such a relationship was held to exist between shareholders and the company);
- there was reliance on the misstatement;
- the reliance caused damage or loss to the plaintiff; and
- the reliance was foreseeable and reasonable.

Fraud (deceit)

In order to establish fraud, the plaintiff investor must establish that the defendant knowingly made an untrue representation of fact, or was recklessly careless as to whether the representation was true or false, with the intent to induce reliance, which brought about actual reliance by the plaintiff and which caused damage to the plaintiff owing to his or her reliance.

6 What is the standard for determining whether the offering documents or other statements by defendants are actionable?

The standard for civil liability for section 1349 of the 2014 Act is simply that there either be an untrue statement in, or an omission of information required under EU prospectus law from, the prospectus. The standard in relation to market abuse under section 1369 of the 2014 Act is also simply that market abuse occurred.

The general standard for tortious claims revolving around fraudulent and negligent misrepresentations and negligent misstatements is that a material untruth induced reliance. However, an omission might be actionable if it can be interpreted as an active misrepresentation or where the omission distorts the meaning of a truthful representation given. Similarly, the standard for misrepresentation in contractual claims is one of material misrepresentation, which is subsequently relied upon. Omission will constitute misrepresentation where once truthful, but now false, statements are not corrected by the defendant.

7 What is the standard for determining whether a defendant has a culpable state of mind?

In relation to the statutory civil claims under the 2014 Act, a plaintiff investor does not need to establish the defendant's state of mind; it suffices that the elements of the liability be established. However, liability under the 2014 Act will not arise in relation to untrue statements or omissions where the defendant had reasonable grounds for believing that, and did believe up to the time of the issuing of the securities, the statements were true, or that the matter whose omission caused loss was properly omitted. It should be noted that this is a defence to be proved by the defendant, rather than something the plaintiff needs to establish. See also question 12.

In order to succeed in any of the negligence tortious claims surrounding representations, the plaintiff would need to demonstrate that the defendant had failed to exercise due care as to the statement's truthfulness. To succeed in a fraud claim, it would be necessary to show that the defendant had actual knowledge of the statement's untruth or was reckless in relation to the same, but mere negligence would not be enough.

For a breach of contract claim, the defendant's state of mind would not necessarily be relevant.

8 Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

Reliance is required to sustain a civil claim in relation to misstatements in a prospectus under section 1349 of the 2014 Act. The plaintiff must show that it acquired the securities 'on the faith' of the prospectus. However, reliance need not be established for claims in relation to insider trading or market manipulation claims under section 1369 of the 2014 Act.

Reliance is a key element in establishing a tortious misrepresentation or misstatement and a misrepresentation at contract law.

9 Is proof of causation required? How is causation established?

The statutory, contractual and tortious claims discussed above all require a factual causal link between the untruth, the market abuse, or the misconduct of the defendant and the loss or damage suffered by the plaintiff. The negligence tort claims (general negligence, negligent misrepresentation and negligent misstatement) will also require the legal causation element of reasonable foreseeability. In essence this means that if the defendant made an intentional or careless misrepresentation and that misrepresentation was relied upon causing loss or damage to the plaintiff, civil liability would nevertheless only attach if the defendant could have reasonably foreseen the occurrence of the loss or damage that was suffered by the plaintiff. Such reasonable foreseeability is not a requirement of the statutory civil claims.

10 What elements present special issues in the securities litigation context?

The lack of class action procedures in Ireland could give rise to issues in the context of a number of investors pursuing a securities claim. See question 20 for more details.

In addition, in the event a criminal prosecution arises out of the same factual scenario that gives rise to a civil claim, it is possible that the civil litigation may be stayed by the courts pending the completion of the criminal proceedings due to the risk that the civil litigation could impact on a defendant's constitutional right to a fair trial.

11 What is the relevant limitation period? When does it begin to run? Can it be extended or shortened?

Securities claims in contract or tort must be brought within six years of the date on which the cause of action 'accrues'. In *Gallagher v ACC Bank* [2012] IESC 35, the loss suffered by the plaintiff in investing in a bond was judged to have accrued once the plaintiff made the investment (as opposed to some later point at which losses on the bond actually occurred). Limitation periods can be extended where the parties enter into an agreement whereby it is agreed that the limitation period is not to run, or continue running, during a specified period or until a specified event. Equally, limitation periods can be shortened where the parties have agreed to pursue any claims within a specified period, although the courts will closely examine the efficacy of such agreements.

If the claim relates to fraud, the limitation period will not start to run until the plaintiff discovered, or ought to have discovered, the fraud. Special circumstances also surround plaintiffs judged to be under a disability.

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There is a two-year limitation period for the statutory cause of action relating to insider trading, unlawful disclosure of inside information and market manipulation in section 1369 of the 2014 Act. Interestingly, section 1,349 of the 2014 Act does not provide a limitation period for claims relating to untrue statements and omissions in prospectuses. However, the courts have an inherent jurisdiction to strike out a claim for delay and, therefore, it would be unwise to unduly delay once an investor became aware, or should have become aware, that a cause of action had accrued.

12 What defences present special issues in the securities litigation context?

In relation to untruths and omissions in prospectuses, section 1,350 of the 2014 Act provides a defence where a person can prove he or she had reasonable grounds for believing, and did believe at the time of the issuing of the securities, that the relevant statement was true or that a matter omitted from the prospectus was properly omitted. It also provides for other defences where directors withdraw their consent to being directors and prove that the prospectus was issued without their consent; or where a prospectus was issued without their knowledge or consent and they notified the public of the same; or on becoming aware of the untrue statement or omission, they withdraw their consent and notify the public of the reason for the same before the securities are purchased. Similar defences apply to experts whose statements are used in a prospectus. The 2014 Act does not provide for defences against civil claims where market abuse regulations are contravened. Such claims do, however, have a limitation period, as outlined in question 11.

13 What remedies are available? What is the measure of damages?

An investor will be entitled to compensation for the loss or damage suffered in relation to the statutory breaches under the 2014 Act.

The normal categories of damages will be available to investors in relation to the tort claims. These categories include:

- compensatory damages – the main objective of these types of damages is to compensate the victim for the damage or loss arising as a result of the wrongful act of the defendant;
- aggravated damages – these damages are awarded where the conduct of the defendant has aggravated the wrong done to the plaintiff;
- nominal damages or contemptuous damages – these damages recognise that a right protected under tort law has been infringed but little real injury has resulted; and
- punitive or exemplary damages – these are available in exceptional cases in order to make an example of the defendant's wrongdoing. Such awards are less common (and typically smaller) in Ireland than, say, the United States.

Contractual claims for rescission can also theoretically be awarded in a misrepresentation claim. In a breach of contract claim, damages aim to put the plaintiff in the position he or she would have been in had the contract been performed. The latter can include loss of profit that could have been made had the contract been performed.

Chapter 4 of Part 14 of the 2014 Act provides for the restriction and disqualification of directors in certain instances. In particular, section 842 sets out that, where a promoter or officer of a company has been guilty of any fraud or breach of duty in relation to the company or its members, he or she can be subject to a disqualification order. The period of disqualification is largely at the discretion of the court.

14 What is required to plead the claim adequately and proceed past the initial pleading?

In order to plead any of the claims previously discussed adequately and to proceed past the pleadings stage, the plaintiff should set out the material facts upon which it relies in a statement of claim, which must be delivered to the defendant. There should be sufficient facts alleged in order to demonstrate a reasonable cause of action and that the claim is not frivolous or vexatious. Where a plaintiff intends to offer expert evidence at the trial, it must state so in the statement of claim and specify the field of expertise and the matters on which such evidence will be offered.

The relevant claims in securities litigation are not subject to any heightened requirements to proceed to trial, with the exception of a fraud or misrepresentation claim. Such claims need to be particularised to show the nature of the allegation and how it is alleged to have occurred.

15 What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pretrial resolution?

Several procedural mechanisms and actions can be taken in an attempt to defeat, dispose of or narrow claims at the early stages of proceedings. These include the following.

Notice for particulars

The plaintiff's statement of claim will usually state his or her claim in general terms. In such cases, the defendants can serve a notice for particulars of the plaintiff's claim in order to narrow the claim.

Security for costs

A defendant can apply for security of costs if the plaintiff lives outside the EU or if the plaintiff is a company, regardless of where it is resident. The defendant has to set out that they have a prima facie defence. For more details, see question 26.

Adding third parties

Third parties can be joined by the defendant where they believe that party may be liable for all or part of the loss or damage suffered by the plaintiff. Such an application must be brought as soon as is practicable.

Application to dismiss for failure to disclose a reasonable cause of action

A defendant can bring an application to dismiss where the plaintiff's pleadings fail to disclose a reasonable cause of action, or where the pleadings are judged to be frivolous or vexatious.

Lodgements and Calderbank letters

The defendant can lodge in court a sum of money, offered to the plaintiff in full and final settlement of the plaintiff's claim. If the plaintiff fails or refuses to accept the lodgement but, at trial, fails to obtain an award in excess of the lodgement, the plaintiff will be penalised as to the costs. The plaintiff will have to bear his or her own costs from the date of lodgement onwards and also discharge the defendant's costs from that date onwards.

An alternative to a lodgement is a written offer to the plaintiff on the basis it is without-prejudice except for costs (a *Calderbank* letter). If that offer is rejected and it turns out to have been a reasonable offer given the court's subsequent ruling, the plaintiff may suffer financial consequences in relation to costs (at the court's discretion).

Trial of a preliminary issue

Where a discreet question of law arises which is likely to dispose of the entire action, or result in a substantial saving of time and costs, it is open to either party to seek a trial of a preliminary issue. However, the decision to order a trial of a preliminary issue is at the discretion of the court and the court will also take into consideration the likelihood of an appeal against any decision at the conclusion of the trial of a preliminary issue, or indeed, the court's decision to order a trial of a preliminary issue.

Application to dismiss for want of prosecution

Where the plaintiff has commenced proceedings but subsequently fails to abide by the deadlines set by the Rules of the Superior Courts, the defendant can apply to have the proceedings dismissed. However, such an application is unlikely to succeed absent repeated or egregious delay or prejudice to the defendant's case arising from the delay can be demonstrated.

16 Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

The Irish courts recognise the concept of vicarious liability. Vicarious liability arises when a wrong by a person in the course of his or her

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employment is treated as being done by that person's employer, whether or not it was done with the employer's knowledge or approval.

On the other hand, some torts may be considered to be done by the company itself, and not the individual employee who carried out the act. Such acts can be said to be done under the direction of the board of directors or the shareholders in a general meeting and, in such a situation, the court will look at the actions of those who control the company. However, it has been noted by the Irish courts that those individuals with the 'directing mind and will' may not necessarily be those who had general control and management.

17 What are the special issues in your jurisdiction with respect to securities claims against directors?

The general rule is that directors' duties are owed to the company itself, and not to its shareholders, creditors or employees. However, there have been recent developments in the Irish courts that have extended directors' duties to creditors where the company is insolvent or in the process of insolvency and, by statute, to employees and members. The courts have not yet, however, gone so far as to expand this to shareholders' interests in the value of their shareholdings.

In addition to the usual remedies available to a plaintiff if he or she succeeds in an action under tort or contract, Chapter 4 of Part 14 of the 2014 Act provides for the restriction and disqualification of directors in certain instances.

Section 1349 of the 2014 Act, as discussed above, provides for causes of action for untrue statements in, and omissions from, prospectuses, against the company, the promoters, the directors and any persons who have 'authorised the issue of' the prospectus, among others. There are, however, a number of statutory defences against these provisions, as outlined in question 12.

Section 1351 of the 2014 Act is also relevant for directors in the structured finance context, as it limits liability to certain parties excluding directors. This section only applies to non-equity securities. See question 28 for further information.

Section 1352 of the same Act provides that, where a public offering of securities has been made and the prospectus contains the name of a director of the issuer or the name of an expert who has purportedly made a statement in the prospectus, and that person has not consented to being a director or an expert, or has withdrawn, in writing, his or her consent before the issue of the prospectus, the directors of the issuer (except those without whose knowledge or consent the prospectus was issued) shall be liable to indemnify that person against all damages, costs and expenses to which he or she may be made liable as a result of his or her name having been in the prospectus, or as a result of the inclusion of a statement purporting to be made by him or her, or in defending him or herself against any action or legal proceeding brought against him or her in respect thereof.

18 What are the special issues in your jurisdiction with respect to securities claims against underwriters?

Where a person intends to make an offer of securities to the public, and another person (the 'purchaser') agrees to purchase those securities with the intention of their immediate resale to give effect to that intention of the offeror, at a profit or subject to payment by the offeror to the purchaser of a commission, and binds him or herself to purchase, or procure the purchase of, any of the securities not so resold, that purchaser will be deemed to be an 'underwriter' in accordance with the 2014 Act.

Pursuant to section 1348 (6)–(8) of the 2014 Act, an underwriter is not deemed to be a promoter or a person who has authorised the issue of the prospectus and, therefore, will not fall under section 1349 or 1351 of the 2014 Act.

There is also the potential for liability under Irish common law to arise for underwriters by virtue of being involved in the preparation of a prospectus containing a misrepresentation, or a negligent or fraudulent misstatement.

Separately, section 1357 of the 2014 Act prescribes statutory criminal liability for untrue statements in, and omissions from, a prospectus, which can apply to any person who 'authorised the issue of' the prospectus. Further, section 1348(6) of the 2014 Act provides that nothing in that Chapter shall limit or diminish any liability which any person may incur under the general law; consequently, if it could be shown to the satisfaction of an Irish court that an underwriter had 'authorised the issue' of the prospectus, criminal liability could be established under section 1357, unless a defence based on 'due diligence' could be successfully pleaded.

Section 44 of the Central Bank (Supervision and Enforcement) Act 2013 provides that a failure by a regulated financial service provider (which could include underwriters) to comply with any obligation under financial services legislation is actionable by any customer of the regulated financial service provider who suffers loss or damage as a result of such failure. This is a wide-ranging provision that can be availed of by both consumer and business customers and could conceivably apply in the context of securities litigation but as of yet, no action has been taken pursuant to this section.

19 What are the special issues in your jurisdiction with respect to securities claims against auditors?

An auditor's contract is usually with the company. The auditor's duties are to the shareholders as a body, rather than individually. Third parties (such as shareholders and creditors) generally have no claim in contract against the auditors. However, a third party may claim that circumstances exist that give rise to the auditor owing him or her a duty of care in tort. The third party must prove that:

- a duty of care arose;
- the loss was reasonably foreseeable;
- there was a sufficient degree of proximity between the auditor and the third party; and
- it was reasonable for the third party to rely on the accounts.

Section 1353 of the 2014 Act provides that a prospectus containing a statement from an expert (auditors would be considered experts in this context) shall not be issued unless the expert has given his or her consent in writing for the inclusion of the statement and this consent has not been withdrawn before the publication of the prospectus. It should also be stated in the prospectus that the expert has given such consent. If a prospectus is issued in contravention of this requirement, the issuer and any other person who was knowingly a party to the issue shall be guilty of an offence and liable to a fine.

Section 1352 of the 2014 Act would also be relevant to auditors (see question 17).

Section 235 of the 2014 Act states that, subject to certain limited exceptions, a provision (in the articles of association or in any contract with a company or otherwise) shall be void if it exempts any officer of the company or the auditor from, or indemnifies him or her against, any liability which, by virtue of any rule of law, would otherwise attach to him or her in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the company.

Separately, Ireland is subject to both the financial reporting standards of the applicable financial reporting framework and the accounting requirements under the Company Law Acts. The main financial reporting frameworks in use in Ireland are the International Financial Reporting Standards (as endorsed by the EU), and the Irish and UK Generally Accepted Accounting Principles, promulgated for use in Ireland by Chartered Accountants Ireland. If an auditor fails to meet the required financial reporting standards, the governing body for accountants or auditors can commence an investigation, which could potentially create a cause of action in fraud or professional negligence, or both.

20 In what circumstances does your jurisdiction allow collective proceedings?

Ireland does not have a formal class action procedure. There is, however, a procedure known as a 'representative action' allowing one action to be brought to resolve issues on behalf of different parties with the same interest. However, each claimant must agree to participate before they will be bound by the outcome. There are limitations on this procedure, including the reliefs available. While declaratory relief and injunctive relief might arise from the resolution of common issues, separate claims may still be needed to resolve individual damages claims and to deal with issues that are claimant specific.

There have been a significant number of multi-party claims in Ireland in recent years, including financial services litigation, such as the *Madoff*-related litigation or mis-selling claims against Irish banks. In 2008, the Commercial Court was faced with more than 50

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Madoff-related proceedings. The Court decided to manage four of the actions and stayed the other claims, pending the resolution of the four test cases. A similar approach has been adopted in other large-scale financial services litigation, such as when a large number of mis-selling claims were taken against an Irish bank, ACC.

21 In collective proceedings, are claims opt-in or opt-out?

The Irish procedure is an opt-in procedure. It is not possible to bring an action on behalf of parties without their express mandate.

22 Can damages be determined on a class-wide basis, or must damages be assessed individually?

Each plaintiff needs to prove his or her particular entitlement to damages and this cannot be done collectively.

23 What is the involvement of the court in collective proceedings?

For a group to bring a representative action it must be defined by the same interest requirement and it will require authorisation from each individual member that the named party can act in a representative capacity. There is no specialist judge for representative actions. A representative action will usually be taken in the High Court or the Commercial Court.

New court rules have been promulgated (although not yet commenced) that entitle the Court to make, and the parties to apply for, case management directions. Previously, such case management procedures were only available in specialist lists, such as the Commercial or Competition Lists. The courts are increasingly willing to facilitate such requests, particularly in complex or multi-party litigation. Strict deadlines are imposed when proceedings are case-managed in the Commercial Court.

24 What role do regulators, professional bodies, and other third parties play in collective proceedings?

As Ireland does not have a formal class action procedure, regulators, professional bodies and other third parties would play the same role in collective proceedings that they would play in normal legal proceedings.

In reality, it is unlikely that regulators or professional bodies would want to get involved in private actions, and they would be more likely to take a separate regulatory enforcement action. However, if a criminal prosecution and civil litigation were to arise out of the same factual scenario, it is possible that the civil litigation will not be allowed by the courts to take place before the completion of the criminal proceedings due to the risk that the civil litigation could impact on a defendant's constitutional right to a fair trial.

However, regulators, professional bodies and other third parties could be asked to provide non-party discovery, and this could be quite a significant task for the body if a large number of plaintiffs are involved.

Separately, the Financial Services Ombudsman would be an important way of seeking redress for individual and corporate investors (subject to certain restrictions). The Financial Services Ombudsman is a statutory officer who deals independently with complaints from consumers about their individual dealings with all financial services providers that have not been resolved by the providers. The Ombudsman is, therefore, the arbiter of unresolved disputes and is impartial. The general rule is that you are not entitled to make a complaint to the Ombudsman if the conduct complained about is or has been the subject of legal proceedings. Additionally, if the matter has been decided by the Ombudsman, the courts will generally not allow the decision to be litigated ab initio. However, you do have a statutory right to appeal the decision of the Ombudsman to the High Court.

25 What options are available for plaintiffs to obtain funding for their claims?

Contingency or conditional fee arrangements are not permitted in Ireland, although 'after the event' insurance is permitted. The traditional common law rules on maintenance and champerty prevent third-party funding in cases where the third-party funders have no legitimate concern without just cause or excuse.

A recent Commercial Court decision, *Thema International Fund PLC v HSBC Institutional Trust Services (Ireland) Limited and others* [2011] IEHC 357, confirmed that it is lawful for a party with a legitimate interest in the litigation to fund the litigation of another party. A creditor or shareholder might have such a legitimate interest. This decision also shows that the Irish courts have jurisdiction to award costs orders against third-party funders if the claim is ultimately unsuccessful.

However, in *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187, it was held that the prohibition on an entity funding litigation in which it has no independent or bona fides interest, for a share of the profits remains in place. Therefore, the common law rules against maintenance and champerty still subsist in Irish law. However, this case has been appealed directly to the Supreme Court and a judgment is awaited.

26 Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

In Ireland the general rule in civil litigation is that costs follow the event (ie, the losing party is normally liable to pay the costs of the successful party). Parties will include a claim for their costs in the relevant court documents (eg, in the statement of claim for the plaintiff).

Generally, parties will try to agree costs between themselves. The court can, however, order that costs be taxed by the Office of the Taxing Master in default of agreement and the courts always retain a discretion to amend the level of costs if they feel it is appropriate. In addition, an arbitrator or a party to the action can request that the costs be taxed.

The submission of a lodgement (or in the case of state or semi-state bodies, a tender) has the potential to reduce a successful plaintiff's claim for costs (see question 15).

The court also has authority to order a plaintiff to provide security for costs, upon application by the defendant. The High Court will calculate the sum and it will generally be one-third of the likely costs.

In an application for security for costs against a natural person, the defendant must show that it has a prima facie defence against the claim advanced against it and, generally, that the individual resides outside of the EU. The courts are very hesitant to prevent a plaintiff having recourse to litigation and, if a plaintiff can show that his or her case has a reasonable degree of merit, then the fact that they do not have sufficient funds will usually not prevent them from taking these proceedings.

In order to be successful in an application for security for costs against a company, Irish or otherwise, the defendant must show that he or she has a prima facie defence and that the plaintiff will not be able to meet the defendant's costs if the defendant succeeds at trial.

Security for costs remains a remedy which is discretionary for the courts.

27 Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

Conditions can be imposed on regulated funds by the Central Bank of Ireland, which is designated under statute as the competent authority with responsibility for the authorisation and supervision of investment funds.

The main investment funds in Ireland are UCITS, which are open-ended funds that can be established as unit trusts, common contractual funds, variable or fixed capital companies. Other investment funds that do not require authorisation under the UCITS Directive are alternative investment funds.

Investment funds may be listed on the ISE (eg, hedge funds, exchange traded funds, private equity funds, multi-manager funds, property funds, venture capital funds, emerging market funds, derivative funds and fund of funds). Funds domiciled in Ireland and abroad can be listed on the ISE. In order to have a fund admitted to the ISE it is necessary to appoint a sponsor who will submit the listing particulars for review by the ISE (this process is done in conjunction with the authorisation process by the Central Bank).

The general claims outlined in question 2 would also be applicable in this context.

28 Are there special issues in your country in the structured finance context?

Structured finance is used by a cross-section of the international financial services industry in Ireland. Structured finance vehicles are more

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Update and trends

The most significant legal, and indeed, economic, development for Ireland in the past 12 months has been the passing of the Brexit referendum. While much of the detail regarding the United Kingdom's exit from the European Union remains unknown, the EU has streamlined and facilitated litigation systems in the EU. Post-Brexit, the issuing and serving of proceedings on UK-domiciled defendants and the recognition and enforcement of EU judgments in the UK, and UK judgments in member states, may be more difficult than at present unless there are separate arrangements agreed to address the issue. Longer term, as a common law jurisdiction, the Irish courts have regard to judgments in England and Wales, in determining Irish law on issues. However, Brexit, once implemented, may impact on the regard had to decisions of the English and Welsh courts.

In addition, the Court of Justice of the European Union confirmed in November that the government's recapitalisation of Irish Life & Permanent (ILP), which in effect left ILP in state ownership, was permissible under EU law given the serious disturbance in Ireland's economy and financial system at that time. This judgment effectively brings to an end one of the longest running disputes in Ireland arising from the actions taken by the Irish government in response to the global financial crisis.

More generally in relation to litigation in Ireland, the issue of litigation funding is increasingly in the spotlight following the High Court's decision in *Persona Digital Telephony Ltd v Minister for Public Enterprise,* which held that litigation funding by a professional third party for a share of any profits in the litigation is still prohibited. However, this case has been appealed directly to the Supreme Court and a judgment is awaited.

In terms of legislative developments, the Market Abuse Regulation (EU) No. 596/2014 came into force from July 2016 and extends the scope of EU rules to a greater range of financial instruments. The new legislation introduced offences of attempted insider dealing and market manipulation, explicitly bans the manipulation of benchmarks, such as LIBOR, and aims to reinforce the investigative and sanctioning powers of regulators.

commonly known in Ireland as special purpose vehicles (SPVs). The aircraft-leasing sector, for example, uses SPVs to finance and hold certain types of assets, as does the investment fund sector. The insurance sector also uses SPVs to issue insurance-related debt securities. In 2011, Ireland extended the category of assets that may be held by SPVs to include commodities and plants and machinery, such as aircraft, ships and other chattels.

SPVs are set up in Ireland under section 110 of the Irish Taxes Consolidation Act 1997. SPVs must acquire, hold or manage qualifying financial assets (including bonds, loan receivables, derivatives and carbon offsets) of at least €10 million, be resident in Ireland and carry on no activities other than holding or managing such financial assets. An SPV wishing to avail of the tax treatment under section 110 is currently required to make a once-off notification to the Irish Revenue Commissioners prior to filing its corporation tax return. Recent legislative changes require SPVs to notify the Irish Revenue Commissioners within eight weeks of commencing activities. Transitional measures apply for SPVs that commenced activities prior to 1 January 2017 and have not yet filed the relevant notification. Such SPVs must file the notification within eight weeks of 1 Janury 2017. This notification must contain details regarding the type of transaction, the assets acquired, the originator, any intra-group transactions and the names of any connected parties.

SPV asset types include asset-backed securities, catastrophe bonds, collateralised debt obligations, collateralised loan obligations, commercial mortgage-backed securitisations, asset-backed commercial paper, distressed debt, loan participation notes, medium-term notes, repackaging, residential mortgage-backed securitisations, US life settlements and other structured finance transactions.

The ISE has extensive experience in the listing of specialist debt securities, including SPVs. Securities issued by an Irish SPV may, once the prospectus has been approved by the Irish Central Bank, be accepted throughout the EU for public offers and admission to trading on regulated markets under the EU Prospectus Directive.

The claims and remedies available to structured finance trustees, investors and financial guarantee insurers are the same as those outlined in questions 2 and 13.

Section 1349 of the 2014 Act, as discussed above, would apply here providing for statutory civil liability for misstatements in, and omissions from, the prospectus.

Section 1351 of the same Act is also applicable here. This section applies solely to non-equity securities (ie, debt), and limits the scope of the parties from whom a purchaser can seek compensation for misstatements in the prospectus, as discussed above. The purchaser can only seek compensation from the offeror of the securities, the person who sought admission of the securities to the regulated market or the guarantor (and, in that case, only in circumstances where the misstatement was made or the information was omitted from the prospectus that relates to the guarantor or the guarantee given by the guarantor). No other parties will be liable for compensation.

29 What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

Traditionally, a claim with an international element was governed by the rules of private international law and, therefore, the common law rules under Irish law would apply.

For EU residents, the Brussels I Regulation (Council Regulation 1215/2012) states that jurisdiction is to be exercised by the EU country in which the defendant is domiciled, regardless of nationality although there are exceptions to this rule. Domicile is determined in accordance with the domestic law of the EU country where the matter is brought before the court. In the case of legal persons or firms, domicile is determined by the country where they have their statutory seat, central administration or principal place of business. In the case of trusts, domicile is defined by the court that is considering the case, which applies its own rules of private international law.

The Lugano Convention is a parallel Convention to the Brussels I Regulation, which applies between EU states and European Free Trade Association (EFTA) states.

For non-EU or non-EFTA residents, the Irish courts will apply the common law rules to determine if the Irish courts have sufficient jurisdiction to hear the proceedings.

30 What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

Parties to an investment can provide explicitly in the contract which country or court has jurisdiction should a dispute arise. Further, the parties can agree and provide for in the contract that service of any summons in any such proceeding may be effected at any place within or outside the jurisdiction on any party or person on behalf of any party or in any manner specified or indicated in such contract.

If the contract between the parties does not include a jurisdiction clause, and if the defendant is resident outside the EU or EFTA, the plaintiff must present a good and arguable case that the circumstances of the case fall within one of the permitted circumstances in which proceedings can be served out of the jurisdiction (eg, that the contract was made or the tort was committed in this jurisdiction), in order to obtain the leave of the court to serve the proceedings on the defendant and proceed with the litigation. The Brussels I Regulation applies if the defendant is EU-domiciled, whereas the Lugano Convention applies if the defendant is EFTA-domiciled.

31 How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

The Rome I Convention (Regulation (EC) No. 593/2008) provides that, if the parties cannot come to an agreement as to jurisdiction, the country in which the contract is most closely performed will have jurisdiction. Where the Brussels I Regulation applies, once a court of a member state is seised of the proceedings, no subsequent set of proceedings

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between the parties concerning the same cause of action can be commenced in another member state.

Where a non-EU claim is involved, article 6 of the Hague Convention on Choice of Court Agreements provides that, if parties agree that a court of a contracting state to the Convention has jurisdiction, then the foreign court where proceedings have also been brought shall suspend or dismiss the proceedings. The Convention entered into force on 1 October 2015 in 28 countries (all member states of the European Union (except Denmark) and Mexico) and on 1 October 2016 in Singapore.

Common law rules will apply between Ireland and countries not subject to the Rome I Convention or the Hague Convention. The Irish courts can accept jurisdiction irrespective of the parties' express choice of a foreign jurisdiction if Ireland is the most appropriate forum for the action, having the most real and substantial connection to it (ie, the contract was performed in Ireland and the Irish court has jurisdiction to hear the dispute).

32 What are the requirements in your jurisdiction to enforce foreign-court judgments relating to securities transactions?

Where the foreign-court judgment originates from within the EU, the Brussels I Regulation will apply. An ex parte application grounded on affidavit must be submitted to the Master of the High Court, along with a certificate from the foreign court that granted the judgment certifying that the judgment is enforceable. The same steps are required where the Lugano Convention applies.

For non-EU and non-EFTA originating judgments, the Irish courts rely on the Irish common law rules of enforcement, which permit the enforcement of foreign judgments within certain limits. The court will recognise the foreign judgment if it is satisfied that the papers are in order and that the judgment is one that ought to be recognised and enforced in Ireland. However, there are a number of prerequisites to be met under Irish common law in order for a court to recognise and enforce a foreign judgment. These rules are restrictive in nature and may act as a considerable impediment to having one's foreign judgment recognised by an Irish court.

33 What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

Alternatives to litigation include:

- Mediation – a voluntary, non-binding, private dispute resolution process facilitated by a neutral person (the mediator), which enables the parties to reach a negotiated settlement. A core principle of mediation is that the parties 'control' the outcome, rather than it being imposed upon them. Unless required by contract, parties attend mediation voluntarily. Either party can terminate the mediation at any time.
- Conciliation – very similar to mediation but, whereas mediation is almost always viewed as a facilitative process, conciliation is seen as evaluative on the basis that, if the parties fail to reach agreement, the conciliator will put forward his or her own proposals for the settlement of the dispute in the form of a recommendation.
- Arbitration – a dispute resolution procedure whereby two parties in dispute agree to be bound by a decision of an independent third party (the arbitrator). The role of an arbitrator is similar to that of a judge, but the procedure can be less formal. An arbitrator is usually an expert in his or her own right. Arbitration is private and often relatively informal.

Usually, mediations and conciliations would proceed on a 'without prejudice' basis so that, if unsuccessful, they would not prejudice any parties' rights to then take proceedings forward through the Irish courts. In addition, complaints may be made to the Financial Services Ombudsman by individuals and small businesses with turnovers of less than €3 million against financial service providers. The Financial Services Ombudsman can make awards up to €250,000 and awards are binding on both parties. These awards can, however, be appealed to the High Court by either the financial institution or the consumer who took the complaint.

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