LITIGATION, DISPUTE RESOLUTION AND INVESTIGATIONS
FINANCE

Game-changing reform to modernise a litigant's ability to prove a claim in Court

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Litigants in civil proceedings will benefit from new legislation that reduces the difficulties often caused by the rule against hearsay by providing that 'business records' may now be admissible without oral evidence from the person who created them.

The legislation applies to all civil proceedings, and is a potential 'game-changer', with a particular impact expected to be felt in debt claims and enforcement proceedings brought by loan purchasers.

The Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 provides that, subject to certain safeguards, business records are now presumed admissible in civil proceedings, without the need for a witness to give oral evidence to prove them.

What issue does the Act aim to remedy?

The admission of business records in civil proceedings has been constrained by the rule against hearsay. This rule provides that a statement, other than one made by a person while giving oral evidence in proceedings, is inadmissible as evidence of the truth of any fact asserted. Put simply, the fundamental rule is that such evidence should be given orally and tested by cross-examination.

As a general rule, a party seeking to admit a document in evidence has to call a witness with relevant knowledge of the document to give oral evidence of its contents. While there are statutory and common law exceptions to the rule, they have been accepted as inadequate in many situations, and capable of frustrating modern commercial litigation. For example, banks can rely on a statutory exception to the rule set out in the Bankers' Books Evidence Acts 1879-1959, but this exception is peculiar to banks and cannot be availed of by non-bank lenders taking enforcement action, which has led to great difficulties for some in pursuing debt claims before the courts.

Quite apart from the exceptions, parties can, and often do, agree among themselves not to raise technical objections to the admission of documents. In commercial litigation, it is common practice for parties to admit documents, including business records, on what has become known as a 'Bula/Fyffes' basis – this means that the parties agree to admit certain documents as prima facie evidence of the truth of their contents, although only against the party who created the original of the document in question.

However, parties to litigation do not always have an incentive to cooperate on this issue. Insistence on strict reliance on the rule against hearsay can sometimes operate to provide a party with an unexpected tactical opportunity to have certain documents excluded from evidence, which otherwise might not arise. A knock-on effect of this is that litigation may be prolonged and costs may be increased for all parties involved.

As far back as 1992, legislation was enacted to mitigate the effect of this rule in criminal proceedings. However, despite various calls for reform by the Law Reform Commission, the evidential rules relating to the admission of business records in civil proceedings remained unchanged, leading one judge to remark earlier this year that this gave rise to the "*curious position*" that the rule against hearsay applied more strictly in an application for summary judgment than it did in a prosecution for a serious criminal offence. The Act seeks to remedy this.

What does the Act do?

The Act provides that, subject to compliance with certain requirements, any record compiled in the ordinary course of business is presumed admissible in civil proceedings as evidence of the truth of the facts asserted in that record.

While the Act does not expressly state it applies to proceedings already in being, legislation that affects procedure (as opposed to substantive rights) generally applies to existing cases.

What types of business records are now admissible?

Subject to some limited exceptions, it appears that any document that has been created in the course of a commercial or professional occupation or within a charity or public organisation (inside or outside Ireland) is now presumed admissible. The Act appears to capture the following types of documents that are routinely adduced in evidence:

- Statements of account and transaction records;
- Bank statements and correspondence with borrowers;
- Invoices;
- Business-related emails and attachments, including internal emails;
- Minutes of business meetings/ calls with clients;
- An employee's HR file;
- Medical records compiled by healthcare professionals.

The presumption applies to "any" record compiled in the ordinary course of business. This means it can potentially be applied to a party's own business records, the business records of a party's opposite number, or the business records of a third party not involved in the proceedings.

Helpfully, the Act also provides for the admission of copies of business records, even if the original still exists, subject to the copy being authenticated in a manner approved by the court. This abrogates the original document rule under which the original of any document introduced in evidence had to be produced in court as the best evidence.

When might these business records be presumed admissible?

In order for a business record to be admissible in civil proceedings:

- direct oral evidence of the information contained in the record must be admissible;
- the information contained in the record must have been compiled in the ordinary course of a business;
- the information must have been supplied by a person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with. (It is not necessary to demonstrate that the person who supplied the information is unavailable or unable to give evidence); and
- in the case of information in non-legible form that has been reproduced in permanent legible form, it must have been reproduced in the course of the normal operation of the reproduction system concerned.

What safeguards are in place to prevent abuse of these new provisions?

Some of the safeguards set out in the Act are as follows:

- **Notification requirement:** The person seeking to adduce business records in evidence must notify their opponent of their intention to do so (and provide them with a copy of the relevant business records) twenty-one days before the trial is due to start, thereby giving them an opportunity to object. Objections can be raised up to seven days before the trial is due to start. The time-frames here are potentially problematic, particularly in document-heavy commercial cases.
- **Court discretion to exclude business records in the interests of justice:** The court has discretion to exclude any business record "in the interests of justice". The Act sets out a non-exhaustive list of factors for the court to consider in deciding whether or not to admit business records in evidence. For example, the court can have regard to the reliability and authenticity of the business record in question, and whether its admission or exclusion will result in unfairness to any other party to the proceedings.
- **Weight to be attached to the business record:** It will be for the court to determine the weight to be attached to any admissible business record. A key factor in the court's determination will be the credibility of the person who supplied the information.

PARTICULAR IMPACT ON DEBT CLAIMS AND ENFORCEMENT PROCEEDINGS

There has been considerable focus on how the Act might make it easier for loan purchasers to prove the debts owing to them in enforcement actions.

A loan purchaser may now be able to rely on statements of account and other records from the lender from whom it acquired the loan as proof that the loan was drawn down, and as proof of the amount due. The onus will then be on the borrower to show why those records should not be admitted. This will make enforcement action less arduous for loan purchasers, albeit the court will retain discretion as to the weight to attribute to any such business record.

While the Act is positive for loan purchasers, it is not a panacea, and cannot cure the evidential difficulty that can arise when a loan purchaser has very few, if any, business records available to prove that drawdown took place, and to prove the amount due. This was the issue that the loan purchaser faced in the much-talked about Court of Appeal decision from earlier this year, Promontoria v Burns. It failed to secure summary judgment on the grounds that the evidence adduced was insufficient to prove the debt and amounted to hearsay. It is not entirely clear that, had the Act been in force when this case came before the courts, the result would have been any different, on account of the lack of business records that could be admitted into evidence, regardless of the hearsay issues with those records.

The impact the Act will have on enforcement action by loan purchasers will depend on the evidence available to them in the first place (which will vary from case to case), and the reliability of that evidence. We will be watching with interest to see how these issues play out before the courts.

KEY CONTACTS

LITIGATION, DISPUTE RESOLUTION AND INVESTIGATIONS

Eve Mulconry
Partner
+353 1 920 1155
eve.mulconry@arthurcox.com

Andy Lenny
Partner
+353 1 920 1140
andy.lenny@arthurcox.com

Joanelle O'Cleirigh
Partner
+353 1 920 1650
joanelle.ocleirigh@arthurcox.com

Richard Willis
Partner
+353 1 920 1154
richard.willis@arthurcox.com

Keith Smith
Partner
+353 1 920 1137
keith.smith@arthurcox.com

Gavin Woods
Partner
+353 1 920 1136
gavin.woods@arthurcox.com

Michael Twomey
Partner
+353 1 920 1139
michael.r.twomey@arthurcox.com

Deirdre O'Mahony
Partner
+353 1 920 1058
deirdre.omahony@arthurcox.com

Ryan Ferry
Partner
+353 1 920 1143
ryan.ferry@arthurcox.com

Sinead Reilly
Professional Support Lawyer
+353 1 920 1151
sinead.reilly@arthurcox.com

FINANCE

Orla O'Connor
Partner, Chair of the firm
+353 1 920 1181
orla.oconnor@arthurcox.com

Cormac Kissane
Partner
+353 1 920 1186
cormac.kissane@arthurcox.com

Robert Cain
Partner
+353 1 920 1050
robert.cain@arthurcox.com

Aiden Small
Partner
+353 1 920 1072
aiden.small@arthurcox.com

Darragh Geraghty
Partner
+353 1 920 1045
darragh.geraghty@arthurcox.com

Maedhbh Clancy
Of Counsel
+353 1 920 1225
maedhbh.clancy@arthurcox.com

Sinéad Cantillon
Professional Support Lawyer
+353 1 920 1083
sinead.cantillon@arthurcox.com