

# REVIEW OF THE ADMINISTRATION OF CIVIL JUSTICE REPORT

October 2020

# Review of the Administration of Civil Justice

Chairperson: The Hon. Mr. Justice Peter Kelly, Former President of the High Court

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Dublin 2.

Dear Minister,

Lytton Strachey in his short biography of Florence Nightingale records her worry that the report of the Royal Commission into the health of the army "would like so many other Royal Commissions before and since, turn out to have achieved nothing but the concoction of a very fat blue book on a very high shelf".

Not much has changed since then, as we are all too familiar with reports of various bodies, meticulously prepared and containing valuable recommendations for reform or innovation, which have met the fate identified by Strachey.

In an effort to avoid such a result, the Review Group determined at its first meeting to produce recommendations which would be practical, affordable and capable of implementation with as little fuss as possible.

I am glad to record that, although there were many differences of view expressed by the members of the Review Group on various subjects, it was possible to obtain consensus on all but one topic, namely litigation costs. In the event of the recommendations of the Review Group being accepted, such consensus ought to ensure ease of implementation since all of the relevant interests represented, both governmental and professional, support them.

In a further endeavour to ensure that much needed reforms might be implemented speedily, the Review Group tried to reduce the need to resort to primary legislation as much as possible. It was, of course, unavoidable in some instances such as the recommendations in respect of judicial review and discovery reforms.

Despite my best efforts, consensus was not achieved on recommendations to reduce litigation costs. Hence there are two sets of proposals. The majority proposals in essence recommend the use of non-binding guidelines as to costs levels. The minority recommends prescribing maximum costs levels with suitable safeguards to deal with exceptional circumstances.

Ireland is a high cost jurisdiction in which to conduct litigation. That fact may amount to a denial of justice for individuals and businesses who are deterred from having recourse to the courts for fear of financial ruin. It also has a negative effect on attracting international commercial litigation to what is the only English-speaking exclusively common law jurisdiction in the European Union post Brexit.

Having chaired the sub-group on litigation costs and carefully considered the issues, I am of opinion that the recommendations of the minority are more likely to achieve much needed costs reductions than those of the majority. More radical measures than the introduction of guidelines will be needed to achieve the desired results in my view.

In excess of 90 recommendations are made in the report. Some are more important than others. Some are more far reaching than others. Some will make a bigger impact on how litigation is conducted than others. It is of course a matter for the Government to decide which, if any, of the recommendations it will accept. The recommendations likely to have greatest impact in achieving the matters identified in the Review Group's terms of reference, in my view, are those dealing with discovery, judicial review and litigation costs.

I wish to express my personal thanks to all the members of the Review Group for the time and effort which they put into its work. Particular thanks are due to the joint secretaries, Ms. Nicola Kelly of the Department of Justice and Equality and Ms. Mary Kelly of the Courts Service.

The report contains a rather laconic statement that Mr Noel Rubotham assisted the Review Group on a voluntary basis following his retirement from the Courts Service. That statement does no justice to the enormous amount of work which he voluntarily undertook in order to see the project through to completion. He would not permit the Group to pay tribute to him in the report but I now do so on its behalf and express sincere thanks to him. Anyone who has ever worked with him knows of his encyclopedic knowledge of the law and legal procedure, all of which he brought to bear on this project. His early retirement was a great loss to the Courts Service. The Review Group is grateful that it did not suffer a similar loss.

With these few observations I submit the report of the Review Group.

Yours sincerely,  
Peter Kelly.

30th October 2020.



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# CHAPTER 1

## INTRODUCTION



## 1. The Review Group’s remit

Following a decision of the Government in March 2017, a Group (“the Review Group”) was established to review and reform the administration of civil justice in the State. The Review Group was given the following Terms of Reference:

“to examine the current administration of civil justice in the State with a view to:

- Improving access to justice;
- Reducing the cost of litigation including costs to the State;
- Improving procedures and practices so as to ensure timely hearings;
- The removal of obsolete, unnecessary or over-complex rules of procedure;
- Reviewing the law of discovery;
- Encouraging alternative methods of dispute resolution;
- Reviewing the use of electronic methods of communications including e-litigation;
- Examining the extent to which pleadings and submissions and other court documents should be available or accessible on the internet;
- Identifying steps to achieve more effective outcomes for court users with particular emphasis on vulnerable court users including children and young persons, impecunious litigants who are ineligible for civil legal aid and wards of court.”

Family Law matters were not included in the remit of the Review Group in view of the publicised intention of the Government to bring forward modernising legislation in the form of a Family Courts Bill.

## 2. Membership of the Review Group

The Review Group was chaired by the President of the High Court, The Hon. Mr. Justice Peter Kelly,<sup>1</sup> and its other members were as follows:

The Hon. Mr. Justice Liam McKechnie	Supreme Court
The Hon. Ms. Justice Mary Irvine	Court of Appeal <sup>2</sup>
The Hon. Ms. Justice Leonie Reynolds	High Court
His Honour Judge Francis Comerford	Circuit Court
Judge John Brennan	District Court
Mr. John Shaw	Department of An Taoiseach
Mr. Conan McKenna	Department of Justice and Equality
Mr. John Burke	Department of Public Expenditure & Reform
Mr. Feargal O’Dubhghaill	Office of the Attorney General
Ms. Ciara Murphy	Office of the Chief State Solicitor
Mr. Paul McGarry, SC	General Council of The Bar of Ireland
Mr. Stuart Gilhooly	Law Society of Ireland
Mr. Noel Rubotham	Courts Service.

<sup>1</sup> Mr. Justice Kelly retired from judicial office on the 17<sup>th</sup> June 2020.

<sup>2</sup> Ms. Justice Irvine was appointed to the Supreme Court on the 13<sup>th</sup> May 2019 and succeeded Mr. Justice Kelly as President of the High Court on the 18<sup>th</sup> June 2020.

Mr. McKenna's membership terminated on his retirement in March 2019 and he was replaced by Ms. Oonagh Buckley, Deputy Secretary, Department of Justice and Equality. Mr. Rubotham's membership terminated on his retirement in May 2019 and he was replaced by Mr. Kevin Fidgeon. Mr Rubotham assisted the Review Group in the preparation of the report on a voluntary basis following his retirement from the Courts Service. Ms. Justice Irvine was replaced by Ms. Justice Máire Whelan following Ms. Justice Irvine's appointment to the Supreme Court in May 2019. Mr Liam Gleeson succeeded Mr. John Burke as the representative of the Department of Public Expenditure & Reform on Mr. Burke's assumption of other responsibilities.

Joint secretaries of the Review Group were Ms. Nicola Kelly, Department of Justice and Equality and Ms. Mary Kelly, Courts Service.

The Office of the Attorney General contributed to the work of the Review Group for the duration of its endeavours. The Office informed the Review Group that the Attorney General was not in a position to subscribe to the recommendations or conclusions of the report of the Review Group in case any opinion expressed by him could be perceived as affecting his obligation to provide independent advice to the Government, in particular in the event that any proposals arising from or consequent on the Review Group's report were to come before Government for consideration.

### 3. The Review Group's Working Method

The Review Group has met in plenary session at Green Street Courthouse on a total of 15 occasions. The Review Group considered that its remit could most effectively be addressed by examining, in sub-groups formed for the purpose, the jurisdiction, procedures and operations of -

- the Supreme Court and Court of Appeal – the senior appellate jurisdictions;
- the High Court – the highest first instance jurisdiction; and
- the Circuit Court and District Court – the courts of local and limited jurisdiction.

In addition, the Review Group formed further sub-groups to focus on the remedies of discovery and judicial review, in view of their potential to add significantly to delay and costs in the resolution of civil disputes, and on litigation costs.

The Review Group was concerned that its consideration of the problems and issues falling within its remit, and the solutions it would identify, would be evidence-based and informed by as wide a consultation with court users and practitioners as feasible, by data on caseload and caseflow in the various jurisdictions, and by international surveys and comparisons.

### 4. Public consultation

A website was created for the Review Group at <http://www.civiljusticereview.ie/> to disseminate information on its remit and work.

Through public advertisement and its website the Review Group invited submissions from interested persons or parties, to be sent to a dedicated e-mail address. Submissions were requested, in the overall context of improving access to justice and reducing costs of litigation, to address one or more of five broad topical areas, limited to a maximum of 5,000 words for each area, as follows:

- Improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure;
- Reviewing the law of discovery;
- Encouraging alternative methods of dispute resolution;
- Reviewing the use of electronic methods of communications including e-litigation and possibilities for making court documents (including submissions and pleadings) available or accessible on the internet;



- Achieving more effective outcomes for court users, particularly vulnerable court users.

The initial deadline for furnishing of submissions was fixed as noon on the 16<sup>th</sup> February 2018, and this was subsequently extended to the 30<sup>th</sup> June 2018.

Submissions were received from 97 bodies (from the private and public sectors) and individuals, some of whom furnished more than one submission or furnished a submission jointly with another respondent. A list of the respondents is contained in Appendix 1. It was not practicable to set out exhaustively in the report the content of all submissions made, but an attempt has been made to cite in the relevant chapters those submissions considered most pertinent.

## 5. Research and analysis

The Courts Service provided the Review Group with a set of caseload and caseflow data for the various jurisdictional instances, including data on incoming and completed cases, case clearance rates and average length of proceedings. The Review Group also considered surveys and evaluations of the performance of Ireland's civil justice system undertaken internationally, in particular:

- The biennial reports of the Council of Europe European Commission for the efficiency of justice (CEPEJ) "European judicial systems - Efficiency and quality of justice"
- The annual EU Justice Scoreboard compiled by the Directorate-General for Justice and Consumers (DG-JUST) of the European Commission
- The annual Doing Business reports of the World Bank
- The annual Global Competitiveness reports of the World Economic Forum.

The Review Group also considered the findings and conclusions of a range of civil justice reviews and reports from other jurisdictions.

## 6. Structure of the report

The remaining chapters of this report have been organised as follows:

- Chapter 2 examines significant civil justice reviews conducted internationally;
- Chapter 3 outlines recent civil justice reforms undertaken in Ireland, and seeks to draw conclusions as to the common themes, problems and issues disclosed;
- Chapter 4 provides an overview of the jurisdictional structure of the courts in Ireland;
- Chapter 5 considers the procedural regimes underpinning the conduct of litigation in those jurisdictions, identifying commonalities of approach as well as areas of difference or inconsistency;
- Chapter 6 examines the remedy of discovery and contains recommendations for its replacement;
- Chapter 7 addresses the remedy of judicial review and includes recommendations for its reform;
- Chapter 8 considers multi-party litigation and contains recommendations for a new procedure for the management of multi-party claims;
- Chapter 9 considers the costs of litigation and includes recommendations for a scheme to secure reduction in such costs;
- Chapter 10 examines the court user experience and how this may be enhanced and improved;
- Chapter 11 explores the potential for technology to make the litigation process more efficient;
- Chapter 12 contains a summary of the Review Group's recommendations.
- Appendix 2 contains data on the civil caseload and caseflow of the various jurisdictional tiers of the courts. Appendix 3 contains a scheme of rules to replace the rules on discovery of documents.

## 7. Highlights of the Review Group’s recommendations

The Review Group’s conclusions and recommendations are set out at the end of each of chapter in Chapters 4 to 11 and all are collated in Chapter 12. These encompass over 90 specific recommendations as to positive measures – including amendments to primary and secondary legislation – concerning changes in court procedure and, changes on court practice, improved physical and ICT facilities and new administrative arrangements, in addition to instances where the Review Group decided against proposing particular courses of action. This Section highlights some of the more significant proposals and conclusions.

In the area of procedural reform, in Chapter 5 the Review Group draws attention to various reforms already legislated (e.g. pre-action protocols, case management and the procedure for adducing expert evidence) which need to be embedded in practice and to reforms already recommended in previous reports (e.g. extension of pre-action protocols and various recommendations in the Law Reform Commission’s Report on Consolidation and Reform of the Courts Acts and the report of the Expert Group on Article 13 ECHR) which should be implemented in legislation.

Modifying a recommendation of the last mentioned group, the Review Group recommends the introduction of a procedure for automatic discontinuance of cases – subject to certain exceptions – which, within 30 months of their commencement, have not been notified as ready for trial and in which no steps appearing in the court’s record have been taken within that time to progress the proceedings. Cases automatically discontinued would be open to being reinstated by the court on such terms as it deemed just.

Among the new reforms proposed, the Review Group recommends the appointment of a sufficient number of suitably qualified court officers as Deputy Masters to preside at case management conferences, whether in conjunction with, or as an alternative to, greater involvement by judges in case management.

The Review Group recommends that a single originating document – the claim notice, to include a detailed statement of claim – replace the various types of originating document currently in use in the various first instance jurisdictions. It also recommends that a specific programme of simplification of language and terminology in the rules of court be undertaken by the court rules committees in stages, with priority being assigned to those procedures, and their associated forms, which most frequently impact on potentially vulnerable individuals.

The Review Group recommends the establishment of a specialist list for clinical negligence actions and a dedicated list, as an adjunct to the Commercial Court, to hear and determine intellectual property disputes and disputes concerning technology. It also recommends that the current index applicable to periodic payment orders – the Harmonised Index of Consumer Prices – be replaced with a new index which would take appropriate account of the need to address health care sector inflation relevant to such orders.

The Review Group recommends (in Chapter 6) abolition of the current remedies of discovery, inspection and production of documents and their replacement with a new remedy regulating the entitlement of parties to civil litigation to documents in advance of trial, to be designated “production of documents”. The principles and policies underpinning the new remedy should be provided for in primary legislation and elaborated upon in new rules of court along the lines included at Appendix 3 to this report.

That legislation should provide for the prescribing of a date on which the existing regime should come to an end and mandate the respective court rules committees to replace by that date the existing discovery rules with rules complying with the principles and policies aforementioned.

Those rules of court should be complemented by rules of court specifically obliging parties to plead their case with far greater particularity and precision than has been the case to date.

The Review Group considered (in Chapter 7) the remedy of judicial review and has recommended that primary legislation introduce fresh thresholds for recourse to it. Leave to commence judicial review proceedings should not be granted unless the court is satisfied that there are substantial grounds for

granting judicial review and that the claim has a reasonable prospect of success at trial and save where primary legislation has set less stringent criteria the applicant is able to demonstrate a substantial interest in the subject matter of the decision which is challenged.

Primary legislation should also preclude an entitlement to apply for judicial review for deficiencies such as clerical or typographical errors and unintentional slips or omissions unless the applicant has previously sought rectification of the deficiency from the decision-maker, and has wrongly been refused. The High Court should also be empowered to require an applicant for judicial review to apply to the decision-maker at first instance to rectify the deficiency where satisfied that such recourse would be an adequate alternative to granting judicial review.

The Review Group recommends (in Chapter 8) the introduction by rules of court of a comprehensive multi-party action (“MPA”) procedure in the High Court and the Circuit Court following the model of the Group Litigation Order (“GLO”) procedure in England and Wales. This would require claimants wishing to join in the MPA to institute proceedings individually in pursuit of their claims and enter a register of claimant participants in the MPA.

With respect to litigation costs (Chapter 9), it was not possible to achieve a consensus as to the means by which the Review Group’s mandate to recommend a reduction in levels of litigation costs might be achieved.

A majority of the Group (comprising the representatives of the Supreme Court, Court of Appeal, High Court, Circuit Court, District Court, Bar Council and Law Society) recommended the drawing up of guidelines as to costs levels for the assistance of parties and their representatives, by reference to individual items that could be outlined in a table, with minimal legislative intervention, the function being assigned either to the Legal Costs Adjudicators or the Legal Services Regulatory Authority, with input from the former. The guidelines should be non-binding but intended to improve the certainty and transparency of the adjudicative process.

A minority of the Review Group (consisting of the representatives of the Department of An Taoiseach, the Department of Public Expenditure and Reform, the Department of Justice and Equality and the Courts Service), in a Minority Report, recommended that a table of maximum costs levels for practitioner and client and party and party costs be prescribed by a new Litigation Costs Committee subject to an entitlement to contract out of practitioner and client costs levels prescribed, and a judicial power to derogate from the table in exceptional cases.

Among other costs-related issues, the Review Group favoured the permitting of third party funding of litigation for liquidators, receivers, administrators under the Insurance (No. 2) Act 1983, the Official Assignee or trustees in bankruptcy, to fund proceedings intended to increase the pool of assets available to creditors, on condition that the applicant for funding was satisfied that a reasonable case against a prospective defendant existed and would result in increasing the pool of available assets.

The Review Group did not favour the permitting of contingency fees or relaxing of the current prohibition on linkage of the amount of client costs to the amount recovered. It was concerned that the permitting of contingency fees would tend to encourage speculative litigation and contribute to a “claims culture” and that repeal of the current prohibition on charging costs as a percentage or proportion of the amount recovered would encourage inflated claims for damages.

Having concluded that the conditions on which the courts have made protective costs orders available strike an appropriate balance between the need to facilitate access to justice in cases engaging the public interest and the need to avoid incentivising risk-free litigiousness, the Review Group did not recommend that any change be made by legislation to the existing balance of interests in the area of costs-shifting.

Addressing facilities for court users (in Chapter 10), the Review Group has recommended that the Courts Service revise its Customer Charter for court offices serving the various jurisdictions to provide more

specific measurements as to the performance and actual level of service they may expect from court staff for a wider range of transactions. It should consult court user groups when deciding on the content of its Customer Charter and Customer Service Action Plan, including the transactions for which performance measures are set and the nature of the performance measures, and should track, and report in its Annual Report on compliance with, the performance measures last mentioned.

The arrangements for naming and vetting of suitability of a next friend or guardian *ad litem* to act on behalf of a child in litigation should be standardised and strengthened. Court approval should be required of a settlement of a claim made on behalf of or against a child where no proceedings have been issued; and no settlement, compromise or payment in respect of a claim made on behalf of or against a child should be valid in the absence of court approval.

The special arrangements for adducing of evidence and for admissibility as evidence of statements from children in proceedings concerning a child's welfare and for persons with certain intellectual capacity issues should be extended to all civil proceedings in which a child or such a person may require to give evidence.

The Review group recommends that the Steering Board of the *Abhaile* Mortgage Arrears Resolution Service examine both the concerns expressed by the Law Society concerning the scheme and the potential to improve linkages between *Abhaile*, citizens' information centres nationwide and the Legal Aid Board to ensure that eligible mortgage holders are afforded adequate opportunity to access the services of *Abhaile* or, as appropriate, the Legal Aid Board.

A central on-line information hub should be created through which dedicated legal and practical information is provided for those contemplating bringing proceedings without professional representation; and provision of "drop in" facilities in proximity to court buildings should be established to enable unrepresented litigants to avail of voluntary legal advice services.

The Department of Justice and Equality should establish a Steering Group comprised of the various agencies and bodies concerned to co-ordinate planning by the public sector, voluntary advice sector and branches of the legal profession of measures to facilitate impecunious litigants in need of legal advice and assistance. This should include an examination of the existing information sources for individuals seeking advice or assistance; provide content for and design of a new, dedicated website to assist such individuals; identifying and providing for categories of individual with particular needs; identifying opportunities for co-location of legal advice or assistance services with court buildings, existing and planned; and provision of input to the court rules committees on opportunities for simplification of procedures and language in rules and forms.

With respect to technology and e-Litigation, drawing from submissions received and its own deliberations, the Review Group (in Chapter 11) has set out common expectations of a future e-Litigation model for civil proceedings. While technology – and the potential process improvements it offers – is constantly evolving and expectations of what that model should deliver are likely to change over time, the Courts Service should ensure that its e-Litigation model minimally incorporates or otherwise facilitates the features and functionalities the Review Group has identified.

Data protection requirements in relation to personal data in court records would impose a very significant administrative burden in anonymising of that data were court records to be published on-line. In circumstances where facilities for inspection by the media of court documents are now in place, the Review Group did not consider that this burden would be justified by any perceived benefits which such publication would bring.

The advent of the Covid-19 pandemic has, if anything, underlined the need for and potential of technology in the courtroom to enable various categories of court business to be disposed of without a conventional hearing, while respecting the need for most hearings to be public in nature. The Review Group saw an immediate opportunity, with relatively limited capital expenditure, to promote and encourage e-Litigation through the equipping of a much larger number of courtrooms across all jurisdictions with Wi-Fi and

evidence display hardware to enable the use by practitioners of e-Litigation software to present their cases in court electronically.

The Review Group noted the arrangements established in response to Covid-19 for liaison between the judiciary, the Courts Service and practitioners, and saw such arrangements as playing an important role in:

- (a) evaluating, with the benefit of the experience of remote hearings operated to date, including during the Covid-19 pandemic, the courts' current capacity to facilitate the holding of remote hearings;
- (b) continuing to pilot – through presentations at mock hearings – collaboration by practitioners and judges in the use of electronic presentation software in the courtroom;
- (c) identifying any practical, technical or other difficulties arising and seek their resolution; and
- (d) promoting within the judiciary and the legal profession, respectively, the conduct of paperless hearings.

The Review Group has recommended that the use of video-conferencing for the taking of expert and other evidence be promoted. This will require that the Courts Service increase considerably the number of suitably equipped courtrooms.

## 8. Some words of appreciation

The Review Group wishes to express its grateful appreciation to various individuals who helped it in its deliberations or in the preparation of the report.

Sir John Gillen, PC, formerly a Lord Justice of Appeal in Northern Ireland, who chaired the Civil and Family Justice Review in that jurisdiction, very kindly attended in Dublin at a seminar on the Review Group's work and generously imparted his knowledge and experience to the Review Group.

The Review Group's deliberations were greatly assisted and enhanced by the many issues raised and ideas and suggestions advanced in the submissions, and it wishes to express its grateful appreciation to all those who devoted time to participating in the consultation.

Mr Brendan Savage, B.L., researched and prepared the chapters on jurisdiction, procedure and discovery and, more generally, provided most valuable editorial input in the drafting of the report. Mr. Neal Flynn, B.L., assisted in collating and categorising the submissions made to the Review Group.


The report has benefited greatly from the information provided by management and staff of the Courts Service. In particular, Ms. Helen Priestley, Information Officer in the Courts Service at the time, and Mr. John Whelan of the Information Office provided a most helpful presentation and sets of data on the caseload and caseflow of the various jurisdictions. Mr. Darach Green, then ICT manager, made a detailed presentation to the Review Group on the Courts Service's ICT strategy. Ms. Geraldine Hurley, then Head of the Superior Courts Operations Directorate and Ms. Audrey Leonard, Head of the Strategy and Reform Directorate, provided very informative briefings on the Courts Service's Modernisation Programme, the current status of modernisation projects and its change management methodology.

The Review Group is most grateful to the aforementioned for their assistance to it in its work.

The Review Group also wishes to express its thanks to Ms. Nicola Kelly and Ms. Mary Kelly, its joint secretaries, for the most valued service they have rendered to it.

# CHAPTER 2

## CIVIL JUSTICE REFORM IN COMPARATIVE PERSPECTIVE



## 1. Introduction

Systemic reforms in the area of civil justice have been undertaken in a number of common law and civil law tradition<sup>1</sup> jurisdictions in recent decades.

The common law legal tradition has, by contrast with civil law tradition systems, historically favoured a “party-led” approach both to the preparation for trial of a civil dispute – in identifying the facts relevant to the dispute and the legal issues deriving from those facts – and to the conduct of the trial itself, including the nature and extent of the evidence to be offered, and the extent to which expert witnesses will be relied upon. Although differences in the “local legal culture” between common law jurisdictions may exist, they share similar challenges deriving from the inefficiencies and additional costs which stem from this party-led approach to litigation. As the British Columbia Civil Justice Reform Working Group remarked in a report in 2006, “[t]he problems of excessive cost, complexity and delay in civil justice systems exist throughout the common law world.”<sup>2</sup>

A further feature which distinguishes common law systems from civil law systems<sup>3</sup> is that, due in part at least to the “judge-controlled” procedural approach of the latter systems, a much larger number of judges and support staff are generally deployed in civil law jurisdictions than in their common law counterparts for similar population or caseloads.<sup>4</sup>

Hence, reforms in other common law jurisdictions, and lessons learned from implementation of those reforms, are particularly relevant to this Review, and the Review Group has accordingly focussed most of its attention on them, while taking account, where relevant, of innovations in the civil law community, as well as developments at European level pertinent to both traditions. The content of significant civil reform initiatives in common law jurisdictions will – where appropriate – be considered in this chapter under headings corresponding broadly to the areas of inquiry of the Review Group, viz.: (a) court procedural reform generally; (b) discovery/disclosure; (c) costs; (d) alternative dispute resolution; (e) e-litigation and technology; and (f) facilitating court users.

## 2. England and Wales

### 2.1 The Woolf recommendations

The most significant civil justice reform in recent decades has, undoubtedly, been the wide ranging revision of civil procedure undertaken in England and Wales which derived from the interim and final reports “Access to Justice” of Lord Woolf of 1995 and 1996 respectively, and resulted in the Civil Procedure Act 1997 and the Civil Procedure Rules (“CPR”) of 1998.<sup>5</sup> The Woolf reforms (“Woolf”) are important not only for the fundamental changes they effected in the administration of civil justice in England and Wales, but also for the seminal influence they have exercised on approaches to reform of civil dispute resolution in other jurisdictions since, and hence merit particular attention, as do the further reviews (Jackson and Briggs) which recalibrated or built upon those reforms.

1 Examples of major justice reforms undertaken in civil law tradition jurisdictions are those in Greece and Portugal prompted by the financial crisis of the late 2000s and the reform of France’s judicial map completed in 2012.

2 Report of the Civil Justice Reform Working Group to the Justice Review Task Force, November 2006, at page 81.

3 It should be noted that some jurisdictions amalgamate components of both common law and civil traditions, examples being Cyprus, South Africa, the State of Louisiana and the Province of Canada.

4 The average number of professional judges per 100,000 of population in 2016 for Ireland was 3.5 and for the United Kingdom-England and Wales 3 (the latter figure not accounting, of course, for lay magistrates), compared to an average ratio of 21.5 to 100,000 for Council of Europe member and observer States as a whole. The ratios of support staff to population in the same year were: Ireland, 20.9; UK-England and Wales 27 and Council of Europe average of 68.7: see CEPEJ “European judicial systems Efficiency and quality of justice”, CEPEJ STUDIES No. 26, Tables 3.9 on page 106 and 3.44 on page 160.

5 SI 1998 No. 3132: these replaced the Rules of the Supreme Court and the County Court Rules.

### 2.1.1 Court procedural reform generally

In Chapter 1 of his Interim Report, Lord Woolf enunciated eight basic principles which “should be met by a civil justice system so that it ensures access to justice”, as follows:

1. It should be just in the results it delivers;
2. It should be fair and seen to be so by
  - ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
  - providing every litigant with an adequate opportunity to state his own case and answer his opponent’s;
  - treating like cases alike.
3. Procedures and costs should be proportionate to the nature of the issues involved;
4. It should deal with cases with reasonable speed;
5. It should be understandable to those who use it;
6. It should be responsive to the needs of those who use it;
7. It should provide as much certainty as the nature of particular cases allows; and
8. It should be effective: adequately resourced and organised so as to give effect to the previous principles.

### 2.1.2 An “overriding objective”

Woolf recommended that the new court procedures be governed by an overriding objective – subsequently prescribed by Rule 1.1. CPR – which the court would be required to apply in exercising any power given to it by the CPR or in interpreting any rule in the CPR, viz. that of enabling the court to deal with cases “justly and at proportionate cost.”<sup>6</sup> Dealing with a case justly and at proportionate cost includes, so far as is practicable:

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate—
  - (i) to the amount of money involved;
  - (ii) to the importance of the case;
  - (iii) to the complexity of the issues; and
  - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases;

Rule 1.1 CPR is underpinned by Rule 3.9 CPR, sub-rule (1) of which, as amended, provides:

- “(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
- (a) for litigation to be conducted efficiently and at proportionate cost; and
  - (b) to enforce compliance with rules, practice directions and orders.”

Rule 1.1 CPR was not the first instance of the legislating of a principle or objective guiding the operation of a civil procedural regime.<sup>7</sup> Rule 1 of the US Federal Rules of Civil Procedure for the United States District Courts provides that those rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding”. What

6 The proportionate cost criterion was introduced by way of amendment of the CPR on foot of the recommendations of the Jackson Review referred to later in this chapter.

7 See also Sorabji, “English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis” (Cambridge University Press 2014), pages 108 – 112.



distinguishes Rule 1.1 CPR is the weight it attaches to the impact of delays in individual cases on other litigants in need of access to the courts.

In considering the application of the overriding objective, Lord Woolf stated successively:

“In *Birkett v. James* [1978] A.C. 297 the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers, must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.”<sup>8</sup>

and:

“A judge’s responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Pt 1, to consider the effect of his decision upon litigation generally. An example of the wider approach is that the judges are required to ensure that a case only uses its appropriate share of the resources of the court: CPR r 1.1(2)(e). Proactive management of civil proceedings, which is at the heart of the Civil Procedure Rules, is not only concerned with an individual piece of litigation which is before the court, it is also concerned with litigation as a whole.”<sup>9</sup>

As a leading commentator on civil procedure has observed,

“The overriding objective introduced into English civil procedure the idea that justice involves not just rendering judgments that are correct in fact and in law but also doing so by proportionate use of court and litigant resources and within reasonable time. Justice is therefore a three-dimensional concept in which time and resources play a part alongside the imperative of reaching correct results.”<sup>10</sup>

### 2.1.3 Pre-action protocols

Woolf proposed that pre-action protocols be introduced to regulate the conduct of parties prior to commencement of proceedings, with a view, *inter alia*, to ensuring early disclosure and early consideration of the merits of settlement. There are now no less than sixteen pre-action protocols in England and Wales for different civil dispute categories, as follows:

- Claims for Damages in Relation to the Physical State of Commercial Property at Termination of a Tenancy (the ‘Dilapidations Protocol’)
- Clinical Disputes
- Construction and Engineering Disputes
- Debt Claims
- Media and communications claims
- Disease and Illness Claims
- Housing Conditions Claims (England)
- Housing Disrepair Cases (Wales)
- Judicial Review
- Professional Negligence
- Package Travel Claims
- Personal Injury Claims
- Low Value Personal Injury (Employers’ Liability and Public Liability) Claims
- Low Value Personal Injury Claims in Road Traffic Accidents

8 *Arbuthnot Latham Bank Ltd. and Others v Trafalgar Holdings Ltd. and Others*, [1998] 1 WLR 1426 at 1436 (as MR).

9 *Jones v University of Warwick* [2003] 1 WLR 954 at par. 25 (as LCJ).

10 Zuckerman, “The Revised CPR 3.9: a coded message demanding articulation”, (2013) *Civil Justice Quarterly* 123 at 128.

- Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property and
- Possession Claims by Social Landlords.

#### 2.1.4 Pleadings

All proceedings should be begun by means of a single claim form, to be used for every case, which should: (a) set out a short description of the claim and a succinct statement of the facts relied on; (b) certify that the claimant believes the contents to be true; (c) indicate the remedy claimed; (d) specify any document on which the case depends; and (e) certify the claimant's belief, if claiming money, that (s)he reasonably expects to recover: (i) up to £3,000; (ii) between £3,000 and £10,000; and (iii) over £10,000.<sup>11</sup>

The defence should:

- indicate (i) which parts of the claim the defendant admits, (ii) which parts (s)he denies, (iii) which parts (s)he doubts to be true (and why), (iv) which parts (s)he neither admits nor denies, because (s)he does not know whether they are true, but which (s)he wishes the claimant to prove;
- give the defendant's version of the facts in so far as they differ from those stated in the claim;
- say why the defendant disputes the claimant's entitlement to any, or to a particular, remedy or the value of the claim or assessment of damages; and
- specify any document vital to the defence.<sup>12</sup>

Pleadings (statements of case) should be verified by a statement of truth.<sup>13</sup>

#### 2.1.5 Case management

The new procedural regime should incorporate an obligation on the court actively to manage cases,<sup>14</sup> including:

- encouraging the parties to co-operate with each other in the conduct of the proceedings;
- identifying the issues at an early stage;
- deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
- deciding the order in which issues are to be resolved;
- encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate, and facilitating the use of such procedure;
- helping the parties to settle the whole or part of the case;
- fixing timetables or otherwise controlling the progress of the case;
- considering whether the likely benefits of taking a particular step justify the cost of taking it;
- dealing with as many aspects of the case as it can on the same occasion;
- dealing with the case without the parties needing to attend at court;
- making use of technology; and
- giving directions to ensure that the trial of a case proceeds quickly and efficiently;

11 See Chapter 12 of the Final Report, where it was noted (at para. 12): "There will continue to be specific requirements for particular types of case. In the case of personal injury claims, for example, the claimant will have to provide a statement of any special damages which are claimed and, in the case of appeals, the decision under appeal must be attached."

12 Ibid. At para. 17, it is recommended that "it should still be possible for the claimant to put in a reply without having to seek the leave of the court, provided it is served before any case management conference. However, in fast track cases any reply is not to be taken into account with regard to costs, nor should it defer the timetable. And there should be no further statements of case at all."

13 Part 22 CPR.

14 Rule 1.4 CPR.

Defended cases should be allocated to different case management “tracks”<sup>15</sup> – the small claims track, the fast track and the multi-track – according to various criteria including the value of claim, the remedy sought, the likely complexity of the case and the number of parties.

A new offer to settle procedure (“Part 36 offer”) should be introduced, encompassing money and non-money claims, enabling a claimant to make an offer to settle the claim on a “without prejudice save as to costs” basis.

The approach to expert evidence should be reformed,<sup>16</sup> including:

- (a) the restriction of expert evidence to that which is reasonably required to resolve the proceedings;
- (b) a statement that experts owe an overriding duty to the court in giving evidence;
- (c) a requirement of leave from the court before expert evidence may be relied on; and
- (d) the conferring of a power on the court to direct that expert evidence be given by a single joint expert.

### 2.1.6 Discovery/disclosure

A distinction should be made between “standard disclosure”, viz. disclosure of:

- (1) the parties’ own documents on which they rely in support of their case and
- (2) adverse documents of which a party is aware and which to a material extent adversely affect that party’s case or support another party’s case; and “extra disclosure”, viz. disclosure of
- (3) documents which do not fall within categories (1) or (2) but are part of the ‘story’ or background, including documents which, though relevant, may not be necessary for the fair disposal of the case and
- (4) documents which may lead to a train of inquiry enabling a party to advance his/her own case or damage that of his/her opponent,

fast track cases being normally limited to standard disclosure, while extra disclosure would be allowable in multi-track cases by court order only.

Extra disclosure would only be permissible where the court is satisfied not only that it was necessary to do justice but that the cost of such disclosure would not be disproportionate to the benefit and that a party’s ability to continue the litigation would not be impaired by an order for specific disclosure against him/her.

### 2.1.7 Costs

A series of proposals were made to reduce or contain costs including-

- a requirement that the court, in making an order for costs, should pay greater regard to the manner in which the successful party has conducted the proceedings and the outcome of individual issues
- the court should have power to deal with the question of costs even where all other issues have been resolved without litigation
- where one of the parties is unable to afford a particular procedure, the court, if it decides that that procedure is to be followed, should be entitled to make its order conditional upon the other side meeting the difference in the costs of the weaker party, whatever the outcome
- the court should be able to order payment of interim costs in cases where the opponent has substantially greater resources and where there is a reasonable likelihood that the weaker party will be entitled to costs at the end of the case
- benchmark costs should be established by the court with the assistance of user groups, for multi-track proceedings with a limited and fairly constant procedure
- the new standard basis of taxation should be based on the principle that the amount allowed should be what is “reasonable to both parties to the taxation”. The indemnity basis should remain as it is.

15 Part 26 CPR.

16 Part 35 CPR.

### 2.1.8 Alternative dispute resolution

It has been observed that

“[a] fundamental premise of the Final Report [of Woolf] was that court proceedings should be issued as a last resort, that all cases should be settled as soon as possible, and that ADR should be tried before and after the issue of court proceedings in order to achieve early settlement.”<sup>17</sup>

As seen above, a key object of the pre-action protocols introduced was to promote engagement by the parties with each other prior to any proceedings being instituted with a view to enabling them to assess the value of settling the claim, and the active duty imposed on the court by the CPR included encouraging the parties to use an alternative dispute resolution procedure if the court considered that appropriate and facilitating the use of such procedure and helping the parties to settle the whole or part of the case.<sup>18</sup> Rule 26.4(2) CPR enabled the court on the application of a party or its own initiative to stay proceedings for a month, subject to extension, to enable the parties to seek to settle the case. The conduct of parties before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol, are to be taken into account by the court when awarding costs.<sup>19</sup>

### 2.1.9 e-Litigation and technology<sup>20</sup>

Recommendations under this heading included the following -

- IT should be given a major role in supporting the management of caseload generally and allocation of all resources involved (e.g. courtrooms, judges and witnesses for example) and the management and progress of individual cases, from inception through to final disposal
- Judges should be fully equipped with appropriate IT and there should be more comprehensive in-house training and technical support to encourage substantial uptake amongst judicial users
- More widespread use should be made of litigation support technologies (document indexing, full text retrieval and document image processing) within the legal profession to assist with the management of document loads in preparation for trials; and, more specifically, to help cope with discovery
- Telephone and video conferencing facilities should be piloted with a view to helping procedural judges (in particular) with case management
- Video recording and viewing facilities should be introduced in appropriate centres to assist with the presentation of expert evidence, the replay of pre-recorded statements and the examination of expert witnesses
- Guidance for the public on court and legal matters should be provided with support from dedicated kiosk and web-based technology
- Allegedly excessive costs officially levied for permission to reproduce primary legal source materials especially statutes in electronic form should be addressed
- The implications of the proposed Private Finance Initiative (PFI) procurement scheme for IT for the courts should be evaluated
- The provision of IT in the civil justice system should be co-ordinated, involving all the key bodies, such as the Judicial Studies Board, who are affected and involved.

### 2.1.10 Facilitating court users

In his Interim Report, Lord Woolf noted the increasing number of litigants in person<sup>21</sup> coming to court and urged that they should cease to be seen as problems for the system and that the court should instead adopt a pro-active role in providing information and advice for them. The key needs of litigants in person

17 Genn, “What Is Civil Justice For? Reform, ADR, and Access to Justice”, Yale Journal of Law & the Humanities Volume 24, Issue 1, page 397 at 401.

18 Rule 1.4 (2)(e) and (f) CPR.

19 Rule 44.2 CPR.

20 See Chapter 13 of the Interim Report and Chapter 21 of the Final Report.

21 i.e. persons conducting litigation without professional legal representation. A litigant in person is variously described as a “personal litigant”, a “lay litigant” and a “self-represented litigant”. Save where directly quoting another source, the term “litigant in person” will be used in this report.

were identified as: (a) a system which is understandable and responsive to their needs; (b) information and advice on different ways of resolving problems; (c) information and advice as to how to make a claim and how to respond to a claim, as a defendant; and (d) advice and assistance on preparing and presenting their case.

Lord Woolf also identified a need for education about the legal system more broadly and information on ADR options. Leaflets and forms explaining the court system and library facilities should be available to litigants in person, who should have access to a court library. Greater use of new technology should be made, including “kiosks” and other IT facilities, and the physical layout of courts should be improved. Lord Woolf also identified the particular needs of certain types of defendant (debtors, tenants and mortgage borrowers) and recommended extending and giving greater funding to duty advice schemes.

### 2.1.11 The Woolf recommendations appraised

The benefits as well as the detrimental effects of Woolf were summarised by Lord Justice Jackson in his preliminary report as part of his “Review of Civil Litigation Costs”, undertaken some ten years after their implementation:

“...Those reforms have brought huge benefits to civil litigants. Far more cases are settled before issue. Those cases which are contested proceed far more swiftly from issue to trial. We no longer have the repeated tragedy (for such it was) of meritorious claims being “struck out for want of prosecution”. The case management function, which the court has assumed following the Woolf reforms, prevents cases from being parked indefinitely, whilst the parties or their lawyers attend to other matters. The creation of “tracks” for cases ensures that each type of case receives an appropriate allocation of resources and degree of attention from the court. The “fast track” ensures that lower value cases are brought to trial with expedition and that the trial costs (although not the pre-trial costs) of such cases are fixed. The procedure for offers contained in CPR Part 36, including claimants’ offers (one of Lord Woolf’s many innovations) has by common consent been a considerable success.”<sup>22</sup>

Lord Justice Jackson noted that, notwithstanding the success generally of the Woolf reforms, the costs of litigating had continued to rise, due in no small part to the introduction of conditional fee agreements (“CFAs”)<sup>23</sup> and the effects of the Access to Justice Act 1999 in rendering the success fee recoverable from the other party. However, he concluded that aside from these factors:

“...it must be accepted that some of the cost increases since 1999 do appear to be consequential upon the Woolf reforms. Pre-action protocols and the requirements of the CPR have led to “front loading” of costs. Also the detailed requirements of the CPR and the case management orders of courts cause parties to incur costs which would not have been incurred pre-April 1999. Where cases settle between issue and trial (and the vast majority of cases do so settle) the costs of achieving settlement are sometimes higher than before. I say “sometimes” because the Woolf reforms promote earlier settlements and thus in some cases they achieve an overall cost saving. Furthermore, settlements based upon a fuller understanding by parties of their opponents’ cases are more likely to be fair.”<sup>24</sup>

A more critical evaluation of Woolf has been offered by Professor Hazel Genn:

“Although the intention of the civil justice reforms was to reduce delay, complexity and cost in the civil justice system, the evidence suggests that some of the key objectives have not been met. While there have undoubtedly been some positive gains from the introduction of the reforms, it seems that the Civil Procedure Rules are as elaborate as ever and the cost of litigation has actually risen. Moreover, in my view there have been some dangerous unintended consequences of the reform process. The Access to Justice Reports contained confusing messages promising access to justice at the same time as launching deep criticisms of legal process and the legal profession. The formal promotion of mediation as a central

22 Jackson, “Review of Civil Litigation Costs: Preliminary Report”, May 2009, Chapter 1, para. 1.1.

23 A conditional fee agreement involves the engagement of a solicitor to act for the client in a case on the basis that if the client is unsuccessful the solicitor will not charge the client for the work done, but if the client is successful the solicitor may charge a success fee on top of the normal fee to compensate for the risk that the solicitor might not have been paid.

24 Jackson, *op. cit.*, para. 1.2.

element in the new civil justice system trivialised civil disputes that involve legal rights and entitlements and redefined judicial determination as a failure of the justice system rather than as its heart and essential purpose.”<sup>25</sup>

## 2.2 The Jackson Review

Lord Justice Jackson’s Review evaluated comprehensively the effect of the Woolf reforms on the efficient conduct and cost of litigation. It resulted in a wide range of recommendations directed at the legal costs regime and aspects of the conduct of specific types of litigation, and litigation generally. Certain of the recommendations turned on provisions of the legal costs regime particular to England and Wales – in particular, third party funding, “after the event” (ATE) insurance<sup>26</sup> and success fee arrangements in CFAs. Other recommendations sought to address the issue of front-loading of costs and control of costs throughout the life-cycle of the litigation process, viz.:

1. the CPR should be amended to clarify that costs are proportionate “if, and only if, the costs incurred bear a reasonable relationship to:
  - (a) the sums in issue in the proceedings;
  - (b) the value of any non-monetary relief in issue in the proceedings;
  - (c) the complexity of the litigation;
  - (d) any additional work generated by the conduct of the paying party; and
  - (e) any wider factors involved in the proceedings, such as reputation or public importance”;
2. lawyers and judges alike should receive training in costs budgeting and costs management, and rules of court to set out a standard costs management procedure, which judges would have a discretion to adopt if the use of costs management would appear to be beneficial in any particular case.<sup>27</sup>

The CPR now require parties to prepare and exchange costs budgets detailing their likely costs.<sup>28</sup> Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees.<sup>29</sup> The court then, by a costs management order, approves or amends those budgets and will thereafter control the parties’ budgets in respect of recoverable costs at Costs and Case Management Conferences;<sup>30</sup>

3. a serious campaign should be undertaken to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits that it can bring, and an authoritative handbook for ADR should be prepared, explaining what ADR is and how it works, and should be used as the standard work for the training of judges and lawyers;
4. introduction of fixed recoverable costs for cases in the fast track. In the event, that recommendation was implemented in respect of personal injury accident cases only;
5. measures should be taken to ensure that the costs of disclosure in civil litigation do not become disproportionate. Lawyers and judges should be given appropriate training on how to conduct e-disclosure efficiently, and there should be a “menu” of disclosure options available for large commercial and similar claims, where the costs of standard disclosure are likely to be disproportionate;
6. case management measures should be introduced to control the content or length of statements, complemented by cost sanctions;
7. case management by judges should be strengthened to ensure that realistic timetables are observed and costs are kept proportionate, including -

25 Genn, *op. cit.*, at page 409.

26 ATE insurance covers the risk that a claimant or defendant is held liable for the legal costs of litigating a claim. ATE insurance can be taken out at any time after a dispute has arisen, including after proceedings have commenced.

27 Jackson, “Review of Civil Litigation Costs: Final Report”, December 2009, Chapter 7, para. 7.17.

28 Rule 3.13 CPR.

29 Rule 3.14, CPR.

30 Rule 3.15 CPR.

- where practicable allocating cases to judges who have relevant expertise
- ensuring that, so far as possible, a case remains with the same judge
- standardising case management directions; and
- ensuring that case management conferences and other interim hearings are used as effective occasions for case management, and do not become formulaic hearings that generate unnecessary cost (e.g. where directions could easily have been given without a hearing).

Lord Justice Jackson produced a Supplemental Report on Fixed Recoverable Costs in 2017 proposing significantly extending the reach of the fixed recoverable costs (FRC) regime, the recommendations of which included the following:<sup>31</sup>

- (i) extension of FRC to all cases in the fast track (i.e. claims of up to £25,000), the figures to be reviewed every three years;
- (ii) a new ‘intermediate’ track with a streamlined procedure to be created for monetary relief claims above the fast track and up to a value of £100,000, which are of modest complexity;
- (iii) extension of FRC in the form of a grid setting out the fixed costs components for those intermediate track cases, the figures to be reviewed every three years;
- (iv) FRC for (a) applications to approve settlements for children and protected parties and (b) costs assessment applications, in respect of intermediate track cases;
- (v) save as set out in (iv), CPR Part 8 claims (broadly, claims which are unlikely to involve a substantial dispute of fact) should be excluded from the proposed FRC regime;
- (vi) The Civil Justice Council should, in conjunction with the Department of Health, set up a working party to develop a bespoke process for clinical negligence claims up to £25,000, together with a grid of FRC for such cases;
- (vii) the piloting of *capped recoverable costs*, in conjunction with streamlined procedures, for business and property cases with a value up to £250,000;
- ...
- (ix) the Aarhus Rules should be adapted and extended to all judicial review claims;
- (x) costs management to be introduced, at the discretion of the judge, in ‘heavy’ judicial review claims.

## 2.3 The Briggs Review

In 2015 Lord Justice Briggs was tasked with reviewing

- the structure by which the Civil Courts - the County Court, the High Court and the Court of Appeal – provide the State’s service for the resolution of civil disputes in England and Wales and
- the boundaries between the Civil and Family Courts, the Tribunals Service and other private providers of civil dispute resolution services,

and making recommendations for structural change and for the deployment of judges and delegated judicial officers to particular classes of case.

Lord Justice Briggs identified five main weaknesses in the system, viz.:

1. “the lack of adequate access to justice for ordinary individuals and small businesses due to the combination of the excessive costs expenditure and costs risk of civil litigation about moderate sums, and the lawyerish culture and procedure of the civil courts, which makes litigation without lawyers impracticable”. The remedy for these shortcomings were seen as lying in the establishment of a new Online Court and an extension in the regime for fixed recoverable costs;
2. “...the inefficiencies arising from the continuing tyranny of paper, coupled with the use of obsolete and inadequate IT facilities in most of the civil courts”, to be resolved by the digitisation of all the processes of those courts;

<sup>31</sup> Enumerated as in the report.

3. “...the unacceptable delays in the Court of Appeal, caused by its excessive workload”, which were being addressed by the reforms (now largely implemented) to the practice and procedure of that court;
4. “...the serious under-investment in provision for civil justice outside London”, to be remedied by allocating more High Court judges to large cases outside London, with case management to take place by video-conference where appropriate; assigning to each regional courts centre a minimum of three specialist Circuit Judges, covering Chancery, Mercantile, Technology and Construction Court and Administrative business; and increasing the proportion of civil work undertaken by Circuit Judges;
5. “...the widespread weaknesses in the processes for the enforcement of judgments and orders”, to be addressed by unification of those processes within the County Court or, if not feasible due to legislative priorities, by the centralisation, rationalisation, harmonisation and digitisation of the processes of enforcement”.

## 3. Scotland

### 3.1 The Gill Review

The Scottish Civil Courts Review was undertaken between 2007 and 2009 by a Project Board chaired by Lord Gill, the Lord Justice Clerk. The Board’s remit – and the reach of its recommendations<sup>32</sup> – was extensive, covering the structure, jurisdiction, procedures and working methods of the courts.

### 3.2 Procedural reform generally

The Board in its approach reflected similar thinking to that underlying the CPR in England and Wales, proposing, *inter alia* -

- a guiding principle in the rules of court that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner with due regard to economy, proportionality and the efficient use of the resources of the parties and the court<sup>33</sup>
- explicit recognition of the principle that the court should have power to control the conduct and pace of all cases before it<sup>34</sup>
- replacement of the common law system of judicial tenders by a rule regulating the making of formal monetary or non-monetary offers by any party in full or partial settlement of the action, including before commencement of proceedings.<sup>35</sup>

The Board strongly advocated<sup>36</sup> extension of case management, recommending extension of judicial case management to all actions in the Court of Session or the sheriff court save for certain excepted types of action, with a case management hearing normally by means of a telephone conference fixed shortly after delivery of the defence.

By contrast with the Woolf report, which considered it lacking in flexibility,<sup>37</sup> the Board recommended use of a “docket” system, allocating a case to a specified judge at the outset. However, it made a distinction between “active judicial case management” and “caseflow management”. The former concept involved: “the early allocation of each case to a particular judge who is a specialist in the area of law and the fixing of one or more case management hearings at which the judge seeks to identify the issues and to determine further procedure. A model of this kind enables the judge to manage complex cases, to

32 Report of the Scottish Civil Courts Review, Volumes 1 and 2, September 2009.

33 Chapter 9 of the Report.

34 Chapter 5 of the Report.

35 Chapter 8 of the Report.

36 Chapter 5 of the Report.

37 Chapter 8, para. 13 of the final “Access to Justice” report.



ensure that the parties are focused on the main points at issue, that the resources of the court and the parties are managed efficiently and proportionately, and that early resolution of disputes is facilitated. The court has extensive case management powers to call for further specification of parties' cases; the disclosure of documents and the identity of witnesses; to supervise the leading of expert evidence; to call for written submissions; and to determine the mode of proof."

"Caseflow management", on the other hand, entailed that:

"the case is conducted by reference to a standard timetable with limited scope for variation and sanctions for non-compliance. Judicial supervision of the case is limited to policing the timetable and dealing with any specific applications to the court, by way of motion. A model of this type is used to deal efficiently with a large volume of routine cases, to eliminate unnecessary delay, to minimise the cost to the parties and to make the most efficient use of the court's time."

The Board was more cautious in its approach to pre-action protocols, noting the potential for these to add to costs prior to commencement of an action and advising against the creation of a general pre-action protocol for all types of action, or a "default" protocol for use in cases to which subject-specific pre-action protocols do not apply.<sup>38</sup>

The Board recommended that new rules for low value cases, in plain language, should be based on a problem solving or interventionist approach requiring the court to identify the issues and specify what evidence or argument it requires, allowing the district judge (the equivalent of a District Court judge in this jurisdiction) to decide what further information is required and what the next stage of procedure should be, and to assist the parties to reach a settlement at any stage in the case.<sup>39</sup>

With regard to expert evidence, it advised against introducing a presumption in favour of the instruction of joint experts, but proposed that in cases subject to active judicial case management, parties should be required to consider whether it would be appropriate to instruct one or more joint experts in relation to either liability or quantum, and that the court be empowered to order the parties to instruct a joint expert.<sup>40</sup> Rules of court should express the overriding duty of an expert witness as being to assist the court and a code of conduct and guidance on the format and information to be contained in expert reports should be adopted. All written and oral instructions to an expert and the basis upon which the expert is remunerated should be disclosable.<sup>41</sup>

The court in cases subject to active case management should have power to require experts to confer, exchange opinions, and prepare a note on what can be agreed and the reasons for their disagreements. Rules of court should create a presumption that an expert's report was to be treated as his/her evidence in chief and oral evidence would be restricted to cross examination or to comment on other expert reports submitted in the proceedings.<sup>42</sup>

The Board also proposed a procedure empowering the court to certify an action as suitable for multi-party proceedings. The certification order should describe the class or group of claimants on whose behalf the action is brought, the question or questions of fact and law which are common to the class and the remedy sought, and should appoint the representative party or parties.<sup>43</sup>

### 3.3 Discovery/disclosure

The Board did not recommend adoption of the English system of disclosure, favouring instead a power being conferred on the court as part of its case management function to order disclosure of documents

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38 Chapter 8 of the Report.

39 Chapter 5 of the Report.

40 Chapter 9 of the Report.

41 Ibid.

42 Ibid.

43 Chapter 13 of the Report.

relating to the action together with authority to recover documents either generally or specifically; and order the lodging of documents constituting, evidencing or relating to the subject matter of the action within a specified period.<sup>44</sup>

### 3.4 Costs

The Board considered that its recommendations regarding allocation of cases to the appropriate level of the court hierarchy, case management, the new simplified procedure in the sheriff court, greater use of information technology, the encouragement of ADR where appropriate, and measures to facilitate settlement “should all contribute towards making the cost of litigation more proportionate to the issues or sums of money in dispute”.

It reserved judgment on whether any changes should be made to speculative fee agreements<sup>45</sup> as constituted in Scotland pending the outcome of the Jackson Review in England and Wales. It recommended that a judicial table of fees for counsel should be introduced in the Court of Session and in the sheriff court for those cases in which sanction for the instruction of counsel is given; and the court should have the power to award interest at the judicial rate on outlays from the date on which they are incurred.

While the Board did not consider that legal expenses insurance should be promoted at the expense of the legal aid system, it recommended that the Scottish Government explore with insurance providers the scope for improving public awareness and increasing voluntary uptake of legal expenses insurance.

### 3.5 Alternative dispute resolution

The Board acknowledged the valuable role mediation and other forms of alternative dispute resolution have to play in the civil justice system and recommended that the court should ensure that litigants and potential litigants are fully informed about the dispute resolution options available to them and should encourage parties, in appropriate cases, to consider ADR. It asked that the development of an ADR telephone help-line and court-linked mediation schemes be considered, and that explanatory material on ADR, along with links to other ADR sources, be made available through the Scottish Court Service (“SCS”) website<sup>46</sup>

### 3.6 e-Litigation and technology

The Board recommended that video and telephone conferencing, in particular for case management hearings should be encouraged and should be facilitated by telephone or videoconferencing. In deciding whether it would be compatible with Article 6 of the European Convention on Human Rights for a hearing to take place in private, the court should have regard to the questions to be decided; whether the parties have consented or have by implication waived their rights to a hearing in open court; and whether the questions to be decided involve the public interest or are of such importance that the public would have an interest in having the hearing take place in open court.

The SCS should develop an up to date strategy for enhanced provision of IT based on research commissioned to identify the needs of all court users. The SCS website should provide guidance and support particularly for parties in cases covered by the proposed simplified procedures falling within the jurisdiction of the district judge. It should include information on other sources of advice and assistance; providers of mediation and other forms of ADR including links as appropriate; and self-help materials.

Use of email as a means of communicating with the courts and the judiciary should be encouraged: court users should be encouraged to communicate electronically, including by lower court fee rates on electronic filings.

<sup>44</sup> Chapter 9 of the Report.

<sup>45</sup> i.e. an agreement that no fee will be charged in the event of the litigation being unsuccessful and that an enhanced fee will be payable in the event of success.

<sup>46</sup> Chapter 7 of the Report.

A pilot on-line small claims and summary cause system should be actively pursued and consideration given to extending the system to other undefended actions.

All evidence in civil cases, apart from those under the simplified procedure, should be recorded digitally.

### 3.7 Facilitating court users

The Board recommended that the sheriff clerk should have discretion to refer any ordinary action<sup>47</sup> or summary application brought by a litigant in person (“party litigant”) to a sheriff who may direct whether or not the action should be allowed to proceed, depending on whether the sheriff was satisfied that the writ discloses a stateable case – the decision of the sheriff to be final and not subject to review. Information on how to bring and defend proceedings and links to other websites providing advice and guidance, and information about ADR, should be available on the SCS website. In-court advice services for litigants in person should be developed and extended.<sup>48</sup>

## 4. Northern Ireland

### 4.1 The Gillen Review

A Civil and Family Justice Review, conducted by a Review Group led by Lord Justice Gillen (“Gillen”), commenced in September 2015, preliminary reports being issued in August 2016 on Family Justice and in October 2016 on Civil Justice. Separate Final Reports on those two areas were published in September 2017. The remit of Gillen was “to look fundamentally at current procedures for the administration of civil and family justice, with a view to:

- improving access to justice;
- achieving better outcomes for court users, particularly for children and young people;
- creating a more responsive and proportionate system; and
- making better use of available resources, including through the use of new technologies
- and greater opportunities for digital working.”

### 4.2 Court procedural reform generally<sup>49</sup>

Gillen recommended a package of measures to ensure the fulfilment of the overriding objective set out in the Rules of the Court of Judicature (NI) – the equivalent of the original text of the Overriding Objective in the CPR – viz. to deal with cases justly, efficiently and in a timely fashion, including: the strengthening of pre-action protocols and practice directions; early case reviews and case-management hearings of all cases in all divisions and tiers; provision for early determination of any point of law or document construction; a requirement of leave for all interlocutory appeals from the county court; greater use of witness statements and provision for plaintiffs to make offers of settlement.

On expert evidence, Gillen recommended a system of accreditation of experts; judicial control of experts’ costs at case-management conferences; joint selection of experts; the use of “hot-tubbing”; furnishing of written questions to experts; and sanctions against errant experts.

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47 The ordinary procedure is mainly used in cases relating to divorce or dissolution of a civil partnership, children, property and claims in debt or for damages exceeding £5,000.

48 Chapter 11 of the Report.

49 Chapters 7 and 8 of the Gillen report.

### 4.3 Discovery/disclosure<sup>50</sup>

Gillen recommended implementation of a standard form of disclosure to replace the conventional *Peruvian Guano*<sup>51</sup> test of relevancy, save where cause is shown and further recommended that automatic pre-action disclosure should be introduced.

### 4.4 Costs<sup>52</sup>

Gillen took a more expansive approach to the fixing of costs than Woolf and Jackson, recommending -

- introduction of a scale of fixed fees in the High Court with four levels depending on complexity of claim, and scope for exceptionality - if scales and bands are not implemented, courts to consider the parties' costs estimates as part of case management
- that costs for interlocutory proceedings be immediately awarded, measured and payable
- that third-party funding be available as a potential alternative to legal aid and a facilitator of access to justice for members of the public
- that a group led by a High Court judge explore the possibilities for conditional fees, qualified one-way cost shifting and ATE insurance
- and that a rule of court be introduced to reflect the relevant rule in the CPR,<sup>53</sup> allowing for the "costs follow the event" principle to be balanced against the conduct of all the parties; the extent to which a party may have succeeded on part of its case, even if they were not been wholly successful; and any admissible offer to settle.

### 4.5 Alternative dispute resolution<sup>54</sup>

With a view to promoting ADR, it was proposed that there be increased training and education on the benefits of mediation. A party's refusal to consider mediation without adequate explanation should be met with sanctions. Mediation should be compulsory in small claims, and a body similar to the UK Civil Mediation Council and a pro bono mediation service should be established. Legislation should require that pre-action advice on mediation be given by practitioners.

### 4.6 e-Litigation and technology<sup>55</sup>

Gillen saw the Judiciary as playing a key role in deploying technology in support of the litigation process:

"The judiciary must lead in enabling the ways in which we conduct cases to match the expectations of the public in that sense. It is time that we gripped the concept of the paperless court. The waste in terms of costs, time in preparation and presentation to court is simply unacceptable. This concept must be taken forward as representing a significant cultural shift and should be regarded as an IT-enabled business change rather than simply the provision of new technology."

It proposed:

- that consideration be given in the forthcoming Programme for Government to include a commitment to the digitalisation and modernisation of the courts process

50 Chapter 10 of the Gillen report

51 Viz. the test set out by Brett LJ in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 at 63-64:

"It seems to me that every document which relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of enquiry which may have either of those two consequences."

52 Chapter 6 of the Gillen report.

53 Rule 44.3 CPR.

54 Chapter 9 of the Gillen report.

55 Chapter 3 of the Gillen report.

- a business case to be developed for digital courts that would capture all of the anticipated monetary and non-monetary benefits, based on experience in other comparable jurisdictions and in the local criminal justice sector
- the ultimate aspiration to be the creation of paperless courts
- in the short to medium term, a move to paper-light courts
- the change programme to include a sequenced and co-ordinated roll-out plan, supported by a programme of education, training and advisory services. This work should be taken forward in consultation with the judiciary, professional bodies and court users
- the establishment of judicial engagement groups to ensure every level of judge takes part in the change programme on a jurisdiction-by-jurisdiction basis
- the setting up of a litigant in person focus group to give thought to the organisation and funding of this element of the reforms
- that Wi-Fi access to be set up in the Royal Courts of Justice and in Laganside Courthouse as a matter of urgency
- that a designated courtroom in the RCJ to be forthwith equipped with the necessary technology to allow parties, by agreement, to run actions electronically
- that a minimum level of IT literacy be a prerequisite for judicial preferment.

#### 4.7 Facilitating court users<sup>56</sup>

Litigants in person were the subject of a range of proposed measures. Gillen recommended a system of justice that “accommodates the needs of personal litigants and which does not revolve entirely around a lawyer-led process”, including -

- early case management in all such instances
- judges to be empowered to introduce an inquisitorial approach where at least one party to proceedings is a litigant in person
- where at least one party is unrepresented: counsel or solicitor to develop a practice (if necessary subsequently enforced by a rule change) of identifying themselves by name when announcing their appearance before the court; the represented party to send to any litigant in person legal authorities adverse to the represented party’s case and the form of application to be assisted by a McKenzie Friend, together with the practice note in relation to McKenzie Friends and any associated documents
- introduction of a legally qualified unrepresented co-ordinator with the appointment of a lawyer by the Northern Ireland Courts and Tribunals Service whose function would be to provide paperwork and logistical assistance, co-ordinate an online advice line and provide accessible and easy-to-understand guidance for litigants in person in the county court and the High Court
- rigorous data recording mechanisms
- revisiting of current websites to provide online information
- introduction of civil restraint orders
- reconsideration of the policy of abatement of fees in all cases
- increased training of staff, judiciary and lawyers
- continued prohibition on rights of audience of McKenzie Friends,<sup>57</sup> save in exceptional circumstances, and a fresh prohibition on remuneration of McKenzie Friends.

Calling for “a fresh approach and renewed vigour” in addressing the challenges posed by persons with disability in accessing civil justice, Gillen made the following recommendations<sup>58</sup> -

- prescribed forms to be used to identify if a party to proceedings requires adjustments to be made to facilitate their participation in proceedings

<sup>56</sup> Chapter 12 of the Gillen report.

<sup>57</sup> Chapter 13 of the Gillen report.

<sup>58</sup> Chapter 14 of the Gillen report.

- the Department of Justice and the Northern Ireland Courts and Tribunals Service to develop systems to capture information on the number of disabled persons in the justice system to inform policy development and support best practice
- a comprehensive review of web-based information and guidance
- the use of registered intermediaries to be extended to support those with communication difficulties in the civil and family courts
- closer liaison with voluntary support organisations in the provision of training to judges, the legal profession and all front-line staff, and
- the Bar Council and Law Society to follow example of the judiciary and appoint a member in charge of disability issues.

## 5. Hong Kong

In 2002 a Working Party was appointed by the Chief Justice of Hong Kong to “review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed.” It published its final report in 2004.<sup>59</sup>

### 5.1 Court procedural reform generally

The Working Party sought “...if possible, to avoid the pitfalls revealed by the CPR experience, for example, in respect of measures carrying front-loaded costs; to try to form a realistic view of the benefits likely to be achievable under local conditions; and... to ask whether such benefits can be achieved with less disruption than by introduction of an entirely new [civil procedure] code.”<sup>60</sup> It opted for adoption of reforms by amendment to the existing rules of court in preference to their wholesale replacement by an entirely new code as was done by the CPR.

The Working Party adopted, albeit with modifications in some cases, many of the ideas behind the CPR, including -

- an overriding objective, stated as: “(i) increasing cost-effectiveness in the court’s procedures; (ii) the expeditious disposal of cases; (iii) promoting a sense of reasonable proportion and procedural economy in respect of how cases are litigated; (iv) promoting greater equality between parties; (v) facilitating settlement; and (vi) distributing the court’s resources fairly, always recognizing that the primary aim of judicial case management should be to secure the just resolution of the parties’ dispute in accordance with their substantive rights”
- case management powers for the court coupled with (a) a duty on the court to manage cases as part of the overriding objective of the procedural system and identifying activities comprised within the concept of case management should be adopted and (b) a requirement that the parties each fill in and file a questionnaire following service of the defence, to enable the court to fix a timetable and give appropriate directions for the conduct of the case including directions fixing milestones for the progress of the case
- adoption of pre-action protocols suitable to Hong Kong conditions with a view to establishing standards of reasonable pre-action conduct in relation to specific types of dispute and rules empowering the court to take into account the parties’ pre-action conduct when making case management and costs orders and penalising unreasonable non-compliance with pre-action protocol standards
- a procedure should be introduced to enable parties who have settled their substantive dispute to bring costs-only proceedings for a party-and-party taxation of the relevant pre-settlement costs

<sup>59</sup> The recommendations in the Final Report cited here are appended after page 502 of the report, at: [https://www.civiljustice.hk/fr/documents/cjr\\_final\\_report.pdf](https://www.civiljustice.hk/fr/documents/cjr_final_report.pdf)

<sup>60</sup> Final Report, section 2, para. 26.

- rationalising of the writ procedures, subject to certain exceptions, with use of a writ where a substantial dispute of fact is likely, and use of an originating summons where there is unlikely to be a substantial dispute of fact (e.g. where the sole or principal issue is one of law or construction)
- a procedure for making admissions and for the defendant to propose terms for satisfying money judgments
- simplification of pleadings, comprising a concise statement of the nature of the claim and of the facts relied on, together with any relevant point of law, defences to be pleaded substantively, with reasons given for denials and positive cases advanced, and a requirement for all pleadings to be verified by statements of truth, the making of a false statement without an honest belief in its truth to be punishable as a contempt
- power to be given to the court to require, of its own motion, any party or parties to particularise or amend their pleadings where clarification is necessary for disposing fairly of the cause or matter or for saving costs
- rules governing the making and costs consequences of offers of settlement and payments into court along the lines of Part 36 of the CPR should be adopted where group litigation orders (if introduced) have been made
- a scheme for multi-party litigation should be adopted
- the court should be expressly empowered to exercise control over the evidence to be adduced by the parties by giving directions as to the issues on which it requires evidence; the nature of the evidence which it requires to decide those issues; and the way in which the evidence is to be placed before the Court. Such power extends to powers to exclude evidence that would otherwise be admissible and to the limiting of cross-examination
- measures aimed at countering lack of independence and impartiality among expert witnesses should be adopted.

## 5.2 Disclosure/discovery

- automatic discovery should be retained, but the *Peruvian Guano* test of relevance should no longer be the primary measure of parties' discovery obligations. Subject to the parties' agreeing otherwise, a primary test restricted to directly relevant documents – those relied on by the parties themselves, those adversely affecting each party's case and those supporting the opponents' case should be adopted instead. The parties should be free to reach agreement as to the scope and manner of making discovery. Where no agreement is reached, they should be obliged to disclose only those documents required under the primary test, ascertainable after a reasonable search, the reasonableness of such search being related to the number of documents involved, the nature and complexity of the proceedings, how easily documents may be retrieved and the significance of any document to be searched for
- the court should be empowered to order disclosure before commencement of proceedings to encompass all types of cases where it is shown by the applicant that the applicant and the respondent are both likely to be parties to the anticipated proceedings and that disclosure before the proceedings have been started is necessary to dispose fairly of the anticipated proceedings or to save costs.

## 5.3 Costs

- the principle that the costs should normally "follow the event" should continue to apply to the costs of the action as a whole, but should be an option in relation to interlocutory applications
- costs orders aimed at deterring unreasonable interlocutory conduct after commencement of the proceedings should be given at least equal prominence in practice, with the court being directed to have regard to the underlying objectives. These powers should not apply to pre-action conduct
- rules should be adopted requiring solicitors and barristers to disclose to their clients full information as to the basis on which they will be charged fees
- barristers should be made subject to liability for wasted costs

- the court should be required to take into account the reasonableness or otherwise of the parties' conduct in the light of the overriding objective in relation to the economic conduct or disposal of the claim before and during the proceedings when exercising its discretion in relation to costs
- court computerised systems to be developed to facilitate any reforms by being able to accommodate not merely administrative support, but also to perform case-flow management, resource allocation and management statistics functions.

#### 5.4 Alternative dispute resolution

- the court should provide litigants with information about and facilities for mediation on a purely voluntary basis and should have power, after taking into account all relevant circumstances, to make adverse costs orders in cases where mediation has been unreasonably refused after a party has served a notice requesting mediation on the other party or parties; or after mediation has been recommended by the court on the application of a party or of its own motion
- mandatory mediation by statutory rule should not be adopted, without prejudice to any initiatives within the construction industry for the adoption of statutory adjudication, nor should mandatory mediation by election of a party to a dispute be adopted
- the Legal Aid Department should have power in suitable cases, subject to further study by the Administration and consultation with all interested institutions and parties on the development and promulgation of the detailed rules for the implementation of the scheme, to limit initial funding of persons qualifying for legal aid to the funding of mediation, alongside its power to fund court proceedings where mediation is inappropriate and where mediation has failed
- the court should not be given power to order the parties to engage in mediation
- the court should be given power, after taking into account all relevant circumstances, to make adverse costs orders in cases where mediation has been unreasonably refused after a party has served notice requesting mediation on the other party or parties; or after mediation has been recommended by the court on the application of a party or of its own motion.

#### 5.5 e-Litigation and technology

The Court's existing computerised system should be developed to enable it to facilitate any reforms by being able to accommodate not merely administrative support, but also to perform case-flow management, resource allocation and management statistics functions.

#### 5.6 Facilitating court users

The Working Party noted:

"... the presence of unrepresented litigants in a case tends to pose problems for the other parties and to increase costs by leading to more court events, by the proceedings suffering from poor definition of the issues and taking longer to deal with evidence and submissions, especially where evidence which is legally irrelevant is tendered."<sup>61</sup>

It considered various measures to address the needs of unrepresented litigants, viz. -

- providing them with representation
- if not full representation for all aspects of the proceedings, providing them with professional legal advice or assistance at key points of the litigation referred to as "unbundled legal assistance"
- streaming disputes involving unrepresented litigants to small claims courts or to special court lists
- encouraging third parties to provide unrepresented litigants with free legal advice or assistance.
- getting the court to provide information about court procedures
- enhancing all systems for delivering information and assistance by use of audio-visual and information technology

61 Para. 856 of the Final Report.



- simplifying the rules, procedures and court forms to give litigants a better chance of being able to conduct cases for themselves
- diverting unrepresented litigants away from the civil justice system by encouraging or requiring them to use ADR schemes.

The Working Party recognised the presence in a case of one or more unrepresented litigants giving rise to special case management needs calling for sensitivity by the court. It recommended that -

- unrepresented litigants be given latitude in relation to compliance with any applicable pre-action protocols
- a plaintiff should serve his statement of claim (whether or not endorsed on the writ) accompanied by a form explaining the payment options for a defendant who has no defence but may wish to propose payment by instalments
- a court should be able to seek clarification of inadequate pleadings of its own motion and should do so where an unrepresented litigant is ill-equipped to seek clarification of the other side's pleadings on his own
- unrepresented litigants should be given latitude in responding to the timetabling questionnaire
- a case management conference should be ordered where this might help in the case management of an action involving an unrepresented litigant
- suitable measures be introduced to deal with vexatious litigation by unrepresented litigants
- the discretion to deal with matters on the papers and without a hearing may be declined if one of the parties is an unrepresented litigant who may be ill-equipped to make the appropriate written submissions
- specific provision should be made for the summary assessment of costs in favour of unrepresented litigants
- suitable steps be taken to ensure that unrepresented litigants are given all material information where court-annexed mediation is to be recommended or requested
- training programmes for judges and court staff should include elements designed to assist them in their handling of unrepresented litigants and
- monitoring of the reforms should be sensitive to the needs of unrepresented litigants and more socio-legal research focussing on their interaction with the civil justice system should be undertaken.

## 6. Canada

### 6.1 Introduction

Canadian civil justice reform initiatives, it has been suggested,<sup>62</sup> have been influenced by the Woolf reforms, the US Federal Rules of Civil Procedure and the ALI (American Law Institute) and UNIDROIT's (International Institute for the Unification of Private Law) joint project, "Principles and Rules of Transnational Civil Procedure" (2004) "particularly as these Principles aim to combine common law and civil law approaches to civil litigation and to provide standards for adjudication of transnational commercial disputes and most other kinds of civil disputes...".<sup>63</sup> Two initiatives from the provinces and one at national level will be considered in this chapter.

### 6.2 Ontario

The Ontario Civil Justice Review of 1995<sup>64</sup> is a much-cited example of such reforms. Its Supplemental and Final Reports included the following proposals:

62 Piché, "Administering Justice and Serving the People: The Tension between the Objective of Judicial Efficiency and Informal Justice in Canadian Access to Justice Initiatives", *Erasmus Law Review* December 2017, No. 3, page 137 at page 141.

63 *Ibid.*

64 Ontario Civil Justice Review, First Report (March 1995); Supplemental and Final Report (November 1996), available at: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/>.

### 6.2.1 Court procedural reform generally<sup>65</sup>

The introduction of a province-wide system of case management for civil cases, operated by Case Management Teams, consisting of Judges, Case Management Masters and Case Management Co-ordinators with the following features -

- two “tracks” of cases, a “fast” track and a “standard” track, with flexibility for dealing with cases requiring more intensive case management built into the system through the case conference mechanism
- court monitoring only after defence through three types of conferences, namely a case conference, a settlement conference, and a trial management conference
- the streamlining of time guidelines through the provision of only two mandated time limits, namely, an ADR Session within 2 months of the filing of a first response; and a Settlement Conference within 3 months of the filing of a first response for fast track cases and within 8 months for standard track cases
- sanctions for failure to comply with case management timelines, including the imposition of costs, the dismissal of actions and the striking out of pleadings and affidavits
- automatic dismissal of proceedings for cases where no defence is filed or steps taken by the initiating party to obtain judgment within 6 months of initiation of the proceedings
- fast track treatment for Simplified Rules cases.

### 6.2.2 Discovery/disclosure<sup>66</sup>

Discovery entitlements and obligations in Ontario comprise (a) automatic disclosure by affidavit and production of documents in a party’s possession, power or control “relating to any matter in issue” or “relating to any/every matter in question” and (b) an entitlement to examine a party adverse in interest by way of oral examination or written questions and answers, but not both, unless leave of the court was granted. The Review recommended that the Civil Rules Committee constitute a Working Group to consider and make recommendations concerning the current Rules of Civil Procedure governing the discovery process with the objectives of preserving its essential disclosure principles while improving its economic effectiveness.

A Task Force on the Discovery Process reported in 2003,<sup>67</sup> whose recommendations included -

- the promotion of best practice in discovery planning, with a standard checklist of items to be addressed
- permitting any party to seek a case conference to resolve issues related to discovery planning and establishing a discovery plan
- authority for the court to require or create a discovery plan at a case conference and individualised management of the discovery process in appropriate cases
- narrowing of the scope of discovery by replacing the Ontario “semblance of relevance” standard to a standard of “relevance” and by replacing the phrase “relating to” any matter in issue in an action in the procedural rules with “relevant to” any matter in issue in an action
- requiring parties to exchange affidavits of documents within 45 days after the close of pleadings, subject to the parties’ agreement otherwise or a court order
- modification of the test for production from non-parties by deleting the requirement in the rules to demonstrate that it would be “unfair to require the moving party to proceed to trial without having discovery of the document” and introducing a new criterion authorising the court to order non-party discovery where satisfied that production of a relevant document would not be injurious to the public interest.

65 Chapter 5 of the Final Report.

66 Chapter 6, section 5 of the Final Report.

67 Report of the Task Force on the Discovery Process in Ontario, November 2003, available at: <http://www.ontariocourts.ca/scj/files/pubs/rtf/report-EN.pdf>

### 6.2.3 Costs<sup>68</sup>

- a Working Group should be established to study the question of the “cost” of justice, both from an institutional perspective and from the perspective of individual litigants, with a view to completing a report within one year of the creation of the Working Group
- the Working Group should include in its study, in particular, the question of alternatives to the billable hour as a mechanism for establishing lawyers’ fees, including the concept of “results based” or overall value for services-based billing.

### 6.2.4 Alternative dispute resolution<sup>69</sup>

- mandatory referral of all civil, non-family, cases to a three-hour mediation session, to be held following the delivery of the first statement of defence, with a provision for “opting-out” only upon leave of a Judge or Case Management Master. The session should be conducted by a mediator selected by the parties from a list of accredited mediators or, failing agreement by the parties, by a mediator selected from that list by a Judge or Case Management Master
- court-connected mandatory referral to mediation to operate with a roster of accredited private sector mediators and a mixed panel of staff and private sector mediators to be made available in those locations where there is an insufficient supply of qualified private sector mediators
- the court-connected mediation program to be funded on a cost recovery basis from filing fees paid by all parties to an action
- in order to contain the cost of a court-connected mediation program and ensure its affordability and accessibility, court roster mediators to be paid a regulated fee
- Government, in conjunction with the Court, the Bar, ADR service providers and the consumers of such services, should establish a consultation process which will lead to the development of standards and an accreditation process for ADR providers.

### 6.2.5 e-Litigation and technology<sup>70</sup>

- steps should be taken immediately to put in place the necessary technology for the creation of a proper management information system for the civil justice system, and thereafter to implement such a system
- a pilot project be established to test the utility of video conferencing technology in civil matters
- automation should support a proper networking system; office and user terminals for information access; access to court lists by lawyers
- applications should permit the monitoring of events and results in a case; file tracking; automated accounting, including the payment and recording of fees; and the generation and capture of case aging, management and statistical information
- representatives of the Bar and representatives of Courts Administration co-operate and co-ordinate their efforts in respect of the installation of technology systems, in order to ensure that the Bar’s systems and the Court’s systems can communicate effectively with each other, technologically speaking. Standardization requirements, protocols and communications formats must be worked out.

### 6.2.6 Facilitating court users<sup>71</sup>

- the Ministry of Education, elementary and secondary schools, universities and community colleges should play a greater role in the education of the public with respect to the purpose, values and processes of the civil justice system
- community based information services be developed through a partnership between the Bar, the Ministry and legal clinics. The information available should be in “plain language” which is readily

68 Chapter 8 of the Final Report.

69 Chapter 5 of the Final Report.

70 Chapter 18 of the First Report.

71 Chapter 20 of the First Report.

understood by general members of the public, and it should be available in a variety of forms -- e.g. written brochures and materials, interactive computer terminals, video cassettes and audio formats – in order to facilitate a broad distribution of information in locations other than courthouses and at times other than regular office hours

- information about legal processes should be more broadly disseminated to the public through the Government’s Kiosk Program
- court forms should be made available at court locations and a “plain language” guide to the steps in a legal proceeding created
- a guide for counter staff should be developed to clarify for them what is permissible information about the legal process for them to impart to the public.

## 6.3 British Columbia

The Civil Justice Review Task Force was formed in November 2004 to “explore fundamental change to British Columbia’s civil justice system from the time a legal problem develops through the entire Supreme Court litigation process”. The recommendations in its report “Effective and Affordable Civil Justice” of 2006<sup>72</sup> included -

### 6.3.1 Court procedural reform generally

- a requirement that parties personally attend a case planning conference (CPC) before they actively engage the system, beyond initiating or responding to a claim. The CPC would address: settlement possibilities and processes; narrowing of the issues; directions for discovery and experts; milestones to be accomplished; deadlines to be met; and setting of the date and length of trial
- a rewriting of the Supreme Court Rules based on an explicit overriding objective that all proceedings are dealt with justly and pursuant to the principles of proportionality.
- replacement of the current pleadings process with a new process requiring the parties to file a document (the “Dispute Summary and Resolution Plan”) which would: succinctly describe the claim and response; define the issues in dispute, if known; state the relief requested, and propose a case management and resolution plan
- a requirement that each party certify, by means of a “statement of truth”, that he or she believes that the facts set out in that party’s initial document are true
- a requirement that the parties, by a date to be set at the CPC, to exchange “will-say” statements, indicating: the name and address of each witness; a brief point-form summary of the evidence expected to be provided by the witness; and the identity and substance of any document, not previously disclosed, that the witness may refer to at trial
- reduction of “expert adversarialism” and limiting of the use of experts in accordance with proportionality principles through the following measures -
  - a new rule to establish that it is the duty of an expert to help the court on the matters within his or her expertise and that this duty overrides any obligation to the person from whom he or she has received instructions or payment
  - a requirement that the expert certify that he or she is aware of and understands the last mentioned duty
  - the parameters of expert testimony to be discussed at the CPC, the CPC judge be required to provide directions, based upon proportionality principles, on the use of experts, including: which issues require expert testimony; how many experts are appropriate; whether a joint expert is appropriate on one or more issues; court appointment of an expert; deadlines for early disclosure of the information upon which the expert’s opinion is based, including test

72 “Effective and Affordable Civil Justice”, Report of the Civil Justice Reform Working Group to the Justice Review Task Force, November 2006, available at:

[https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg\\_report\\_11\\_06.pdf](https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg_report_11_06.pdf)

- results; the delivery of expert “will-say” statements; deadlines for delivery of expert reports; and whether the opposing experts should meet and confer
- unless otherwise ordered, in cases valued at \$100,000 or less, limit each party to one expert only, plus one expert to rebut the evidence of the opposing expert, if necessary
  - experts who give evidence in the proceeding to be confined to the facts, including test results, upon which they relied in forming their opinion
  - streamlining of motion practice by resolving issues at the case planning conference and by placing limits on the hearing process
  - empower the judiciary to make orders to streamline the trial process.

### 6.3.2 Discovery/disclosure

- limiting of discovery, requiring the parties to produce only those documents:
  - referred to in the party’s pleading
  - to which the party intends to refer at trial, or
  - in the party’s control that could be used by any party at trial to prove or disprove a material fact
- eliminating oral discovery without leave or consent for cases valued at \$100,000 or less
- requiring each party in cases valued at greater than \$100,000, absent leave, to be available for oral discovery by all parties adverse in interest for a maximum (in total) of one day (the parties may consent to one additional day of discovery)
- elimination of interrogatories.

### 6.3.3 Costs

The Working Group did not consider specifically reform of the legal costs regime, noting that recommendations had recently been made to the legislation regulating legal costs,<sup>73</sup> but considered that through measures such as the Case Planning Conference the overall process costs to litigants would be “reduced to a level proportional to the value, complexity and importance of their dispute”.<sup>74</sup>

### 6.3.4 Alternative dispute resolution

The Working Group saw a need for an information/assistance “hub” operating a multidisciplinary (legal and non-legal) “triage” process provided by a wide range of skilled personnel that would provide a “diagnosis” of the problem giving rise to a dispute and referral to whatever services are appropriate. Such services might include translation services, debt counselling, mediation, facilitation, neutral evaluation, legal advice and legal representation.<sup>75</sup>

### 6.3.5 e-Litigation and technology

The Working Group did not have any specific recommendations for the use of technology to increase the efficiency and cost-effectiveness of interlocutory procedures, but stated that the ability of technologies such as teleconferencing, videoconferencing, and on-line conferencing should continue to be explored to increase access, improve efficiency and reduce costs.<sup>76</sup>

### 6.3.6 Facilitating court users

The hubs aforementioned should operate to provide people with information, advice, guidance and other services they require to solve their own legal problems.<sup>77</sup> Currently, three such “Justice Access Centres” are in operation in British Columbia, funded by the Ministry of Attorney General, providing: self-help and information services; dispute resolution and mediation options; limited legal advice; community resources and agencies; free publications and courses and presentations. Onsite services are provided by the Ministry of Attorney General and partner agencies.

73 Page 113 of the report.

74 Page 17 of the report.

75 Page 1 of the report.

76 Page 35 of the report.

77 Page 1 of the report.

## 6.4 Report of the Action Committee on Access to Justice in Civil and Family Matters

The Action Committee – a national body established by Chief Justice Beverley McLachlin in 2007, was born out of a view that:

“[the] civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve. While there are many dedicated people trying hard to make it work and there have been many reform efforts, the system continues to lack coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost-effective reform.”<sup>78</sup>

The Action Committee published a report “Access to Civil & Family Justice: A Roadmap for Change” in 2013.<sup>79</sup> While various proposals in the report concerned the wider justice system and legal services sector,<sup>80</sup> the Roadmap designed by the Action Committee set specific goals for courts and tribunals under the heading “Make Courts and Tribunals Fully Accessible Multi-Service Centres for Public Dispute Resolution”, notably:

- courts and tribunals should become multi-service dispute resolution centres
- online dispute resolution options, including court and non-court-based online dispute resolution services, should also be expanded where possible and appropriate particularly for small claims matters, debt and consumer issues, property assessment appeals and others
- court and tribunal services must provide appropriate services for self-represented litigants
- case management should be promoted and available in all appropriate cases
- parties should be encouraged to agree on common experts; to use simplified notices; to plead orally where appropriate (to reduce the cost and time of preparing legal materials); and, generally, to talk to one another about solving problems in a timely and cost-effective manner
- judges and tribunal members should not hesitate to use their powers to limit the number of issues to be tried and the number of witnesses to be examined. Scheduling procedures should also be put into place to allow for fast track trials where possible
- overall, judges, tribunal members, masters, registrars and all other such court officers should take a strong leadership role in promoting a culture shift toward high efficiency, proportionality and effectiveness through the management of cases
- court and tribunal processes and procedures must be more accessible and user-friendly
- the guiding principles in part 2 of the report — specifically including putting the public first, simplification, coherence, proportionality and sustainability, and a focus on outcomes – must animate court and tribunal innovations and reforms. The technology in all courts and tribunals must be modernized to a level that reflects the electronic needs, abilities and expectations of a modern society

78 See the Action Committee’s statement at: <https://cfcj-fcjc.org/action-committee/about-action-committee/>

79 [http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)

80 The Access to Justice Roadmap proposed in the report set the following goals:

“A. INNOVATION GOALS

1. Refocus the Justice System to Reflect and Address Everyday Legal Problems
2. Make Essential Legal Services Available to Everyone
3. Make Courts and Tribunals Fully Accessible Multi-Service Centres for Public Dispute Resolution
4. Make Coordinated and Appropriate Multidisciplinary Family Services easily accessible

B. INSTITUTIONAL AND STRUCTURAL GOALS

5. Create Local and National Access to Justice Implementation Mechanisms
6. Promote a Sustainable, Accessible and Integrated Justice Agenda through Legal Education
7. Enhance the Innovation Capacity of the Civil and Family Justice System

C. RESEARCH AND FUNDING GOALS

8. Support Access to Justice Research to Promote Evidence-Based Policy Making
9. Promote Coherent, Integrated and Sustained Funding Strategies”.

- interactive court forms should be widely accessible. Scheduling, e-filing and docket management should all be simplified and made easily accessible and all court and tribunal documents must be accessible electronically, both on site and remotely
- courts and tribunals should be encouraged to develop the ability to generate real time court orders
- teleconferencing, videoconferencing and internet-based conferencing (e.g. Skype) should be widely available for all appearance types, including case management, status hearings, motions, applications, judicial dispute resolution proceedings, mediation, trials and appeals, etc.
- better public communication, including through the use of social and other media, should be encouraged to demystify the court and tribunal process
- overall, and in all cases, rules and processes should be simplified to promote and balance the principles of proportionality, simplification, efficiency, fairness and justice.

# CHAPTER 3

## RECENT CIVIL JUSTICE REFORM INITIATIVES IN IRELAND





## 1. Introduction

By contrast with the approach in the jurisdictions mentioned in the previous chapter – and unlike the areas of court administration and of criminal jurisdiction, which have been the subject of comprehensive investigation in Ireland<sup>1</sup> – civil justice reform in Ireland in the last two decades has not, prior to this Review, been the subject of a comprehensive examination as a distinct area in its own right.

That is not to say that civil justice reform initiatives have been overlooked. On the contrary, many discrete areas of the administration or functioning of civil justice, and specific aspects of substantive civil law and remedies, have been the subject of detailed evaluation and recommendations on foot of reports of bodies such as the Law Reform Commission, the Committee on Court Practice and Procedure,<sup>2</sup> the Working Group on Medical Negligence and Periodic Payments,<sup>3</sup> the Cost of Insurance Working Group,<sup>4</sup> the Personal Injuries Commission<sup>5</sup> and the Expert Group on Article 13 of the European Convention on Human Rights.

Furthermore, since its establishment in 2004, the Reform and Development Directorate of the Courts Service and the Rules Committee Support Unit within that Directorate have supported the three Court Rules Committees in introducing a range of specific procedural reform initiatives, to which reference is made later in this chapter.

It is nonetheless fair to say that civil justice reform in Ireland in the last two decades has been an exercise in incremental change.

While the Review Group has been concerned to examine afresh the problems falling within its remit, where it is satisfied that solutions already proposed should resolve an issue, it sees its role as being to encourage implementation of that solution. Before advancing in this Report to its own deliberations, therefore, it is

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- 1 See, in relation to courts administration the six reports of the Working Group on a Courts Commission (the Denham Working Group) published between April 1996 and November 1998 and, in relation to criminal jurisdiction, the report on the Criminal Jurisdiction of the Courts of the Working Group on the Jurisdiction of the Courts of May 2003 and the reports of the Criminal Law Codification Advisory Committee published between 2008 and 2010.
  - 2 The Committee on Court Practice and Procedure was established by the Minister for Justice in 1962 with the following terms of reference:
    - “(a) To inquire into the operation of the courts and to consider whether the cost of litigation could be reduced and the convenience of the public and the efficient dispatch of civil and criminal business more effectively secured by amending the law in relation to the jurisdiction of the various courts and by making changes, by legislation or otherwise, in practice and procedure:
    - (b) to consider whether, and if so, to what extent, the existing right to jury trial in civil actions should be abolished or modified;
    - (c) to make interim reports on any matter or matters arising out of the Committee’s terms of reference as may from time to time appear to the Committee to merit immediate attention or to warrant separate treatment.”
  - 3 The Working Group on Medical Negligence Litigation and Periodic Payments was established by the President of the High Court in 2010, with the following terms of reference:
    - “1. To examine the present system within the courts for the management of claims for damages arising out of alleged medical negligence and to identify any shortcomings within that system.
    2. To make such recommendations to the President as may be necessary in order to improve the system and eliminate the shortcomings.
    3. To consider whether certain categories of damages for catastrophic injuries can or should be awarded by way of Periodic Payments Orders and to make such recommendations to the President as may be necessary.
    4. To provide the President with such draft Legislation, Regulations, and Rules of Court as may be necessary to give effect to the Working Group’s recommendations.”
  - 4 The Working Group was tasked to “identify and examine the drivers of the cost of insurance, and recommend short, medium- and longer-term measures to address the issue of increasing insurance costs, taking account of the requirement for the need to ensure a financially stable insurance sector” (Cost of Insurance Working Group Report on the Cost of Motor Insurance January 2017, page 9).
  - 5 The establishment of the Personal Injuries Commission was a recommendation of the Cost of Insurance working Group. It was tasked to investigate and make recommendations on processes in other jurisdictions which could enhance the claims process in Ireland; and to benchmark international personal injuries awards with those in Ireland and report on alternative compensation and resolution models.

appropriate to take stock of prior recommendations, and of the cumulative outcome of reforms, relevant to that remit.

## 2. Law Reform Commission Reports

Since 2004, the Law Reform Commission (LRC) has issued no less than eight reports covering subjects directly pertinent to civil justice, viz.:

- Judicial Review Procedure (LRC 71-2004)
- Multi-Party Litigation (LRC 76-2005)
- Consolidation and Reform of the Courts Acts (LRC 97-2010)
- Alternative dispute resolution: mediation and conciliation (LRC 98-2010)
- Personal debt management and debt enforcement (LRC 100-2010)
- Limitation of actions (LRC 104-2011)
- Jury Service (LRC 107-2013) and
- Consolidation and Reform of Aspects of the Law of Evidence (LRC 117-2016).

Where considered relevant to the Review Group’s deliberations, further attention is given to recommendations in certain of those reports in the chapters of this report relevant to the subject-matter concerned. However, the Commission’s report on Consolidation and Reform of the Courts Acts merits detailed consideration here as it represents the closest approximation to a systemic review of the administration of civil justice undertaken in this jurisdiction prior to this Review.

The Commission’s report was the product of a joint project with the Courts Service and the Department of Justice, Equality and Law Reform to consolidate into a single Courts Act the existing legislative provisions which describe the essential jurisdiction of the courts. The project had three overarching objectives:

1. to publish a draft Courts (Consolidation and Reform) Bill incorporating the text of existing legislation, both pre-1922 and post-1922, dealing with the essential jurisdiction of the courts, and related matters concerning court offices;
2. to present a suitable scheme or framework for a new Courts Act; and
3. to incorporate in the draft Bill a number of reforms arising from relevant bodies including the Commission itself concerning the jurisdiction of the courts.<sup>6</sup>

The draft Bill was appended to the Commission’s report at Appendix A. The third strand of that project – reform – was addressed primarily in Chapter 2 of the report, although other proposals for improvement in the functioning of the courts are made elsewhere in the report. Mention is made here only of those recommendations in the report most pertinent to the Review Group’s areas of interest.

### ***Simplifying terms in court proceedings***

The Commission suggested the rationalisation in the Bill and rules of court of various terms associated with court proceedings. Notably, the word “applicant” could be used generally to describe any person bringing civil proceedings, encompassing “plaintiff”, “petitioner” and “applicant”. “Application” could be used generally to describe the process for initiating civil proceedings and “application notice” to describe any document commencing civil proceedings, replacing terms such as “civil process”, “civil bill”, “petition”, “summons” and “writ”. “Respondent” could be used generally to describe any person served with civil proceedings, replacing terms including “defendant”. The proposed new terms were intended to make clear the distinction between parties in civil and criminal proceedings at a general level only, and would leave any other sub-divisions (and the nomenclature for pleadings and other documents produced by the parties) for statutory Rules of Court. Special provision should, however, continue to be made for family proceedings, as these should not be equated with other adversarial civil proceedings.

<sup>6</sup> Para. 15 of the Introduction to the Report, at page 3.

### ***Case conduct principles and case management***

The Commission included in the draft Bill<sup>7</sup> an obligation on parties to comply with the following “case conduct principles” viz.:

- (a) issues between parties should, at as early a stage as possible, be identified, defined, narrowed (where possible) and prioritised or sequenced;
- (b) proceedings should be conducted in a manner that is just, expeditious and likely to minimise the costs of those proceedings; and
- (c) the parties should be encouraged to use alternative dispute resolution procedures where appropriate, to settle the whole or part of the proceedings where practicable, and be facilitated in doing so,

and proposed<sup>8</sup> a statement of the court’s case management obligations, viz. that a court shall, so far as is practicable, in the conduct of civil proceedings:

- (a) ensure that the parties conduct the proceedings in accordance with case conduct principles (discussed below);
- (b) have regard to the need to allot its time and its resources appropriately among all of the proceedings the Court has to hear and determine; and
- (c) deal with the proceedings in a manner that is proportionate to their nature, and the parties’ resources.

### ***General guiding principles as to the drafting of rules of court***

The draft Bill<sup>9</sup> provided that, in preparing rules of court, each Rules of Court Committee is to have regard to the following considerations:

- (a) rules of court should provide simple and efficient Court procedures, consistent with the requirements of justice;
- (b) rules of court should use plain language, and differences among the procedures and terms used in different Courts for similar matters should be avoided if possible;
- (c) rules of court should encourage the use of alternative dispute resolution procedures, where appropriate, and should encourage expeditious conduct of proceedings and discourage and, where appropriate and just, penalise delay by a party, so as to help minimise the cost of litigation;
- (d) rules of court should provide for and support, where possible, the development of case management, in accordance with the case conduct principles specified in section 75 of the Bill; and
- (e) where practicable, rules of court should regularly be reviewed.

Other relevant recommendations were that the Bill should include provision -

- that rules of court may modify the rules of evidence as they apply to civil proceedings
- for issuing Practice Directions by the President of each court
- for a non-exhaustive statement of the jurisdiction of the High Court and Circuit Court in civil proceedings, and of the jurisdiction of the District Court more generally
- that the Circuit Court’s general monetary limit in civil proceedings be increased to €100,000 subject to a lower limit of €50,000 in personal injury claims and that the District Court’s general monetary limit in civil proceedings be increased to €7,500<sup>10</sup>
- on the general powers exercisable by the courts in civil and criminal cases, including matters such as the power to summon witnesses, remedies in civil cases (including damages and injunctions and enforcement of judgments)

7 Section 75.

8 Section 76.

9 Section 259.

10 Since the report was published, the Circuit Court’s jurisdiction has been increased to €75,000 (€60,000 in personal and fatal injuries actions) and the District Court’s to €15,000.

- on legal costs, including the taxation of costs in contentious business
- comprehensive provisions on execution and enforcement of court orders
- on the procedural aspects of taking evidence concerning proceedings in another State and, correspondingly, to order evidence concerning proceedings in Ireland to be taken abroad.
- on the procedural aspects of taking evidence and recognition of judgments in EU-related matters and comparable international instruments
- authorising the Courts Service to establish administrative sub-divisions of District Court Districts, called Areas, for operational purposes
- that the High Court may make an anonymity order, an order that the identity of the person should not be disclosed in civil proceedings, whether the case is being heard in the High Court or any other court, on the grounds that the needs of justice require that the party should not be identified for the general circumstances in which a trial (civil or criminal) with a jury is to occur
- dealing with service of court documents in civil and criminal proceedings, which should be drafted in a permissive manner, thus allowing for flexibility in specific contexts
- concerning rights of audience in the courts
- that, as at present, appeals from the District Court and the Circuit Court involve full re-hearings
- for a single form of consultative case stated to allow a reference of a point of law from the Circuit Court, District Court or other adjudicative body
- permitting the President of the High Court to determine the time and number of scheduled High Court sittings outside Dublin by reference to the volume of cases which is or can be assigned to each venue
- on court offices and court officers generally, including registers and records
- on court money management and processing.

### 3. The Committee on Court Practice and Procedure

#### *The court rule making process*

In its 28<sup>th</sup> interim report, “the Court Rules Committees”, of 2003, the Committee on Court Practice and Procedure considered whether the Rules Committees should continue to be jurisdiction-based or whether they should be recast to address separate areas of litigation and procedure, with separate rules committees for civil, family and criminal procedure. Consideration was given also to the option of a single rules-making authority with subdivisions for jurisdictions or litigation categories. In the event, the Committee concluded that the separate rules committees for each jurisdiction were “the most appropriate, efficient and effective system for Ireland” and should be retained, being of the view that “[e]ach jurisdiction has its own unique and strong features. The system enables procedures to be adapted to the level of complexity with which the different jurisdictions deal”, and that “no advantage would be achieved by reorganising the Rules Committees on a litigation basis into, say, Civil, Criminal and Family Law Committees. ...In addition to the factors already mentioned, the overall size of the State, the number of jurisdictions and the volume of litigation involved are relevant factors.”

The Committee’s recommendation that a Rules Committees Support Unit be established within the Courts Service to provide administrative, secretarial, drafting and other appropriate expertise and services to the three court rules committees was adopted with the establishment of that Unit within the Reform and Development Directorate of the Courts Service in 2004.

The Committee recommended that consideration be given to setting out in statute policy objectives for the Rules Committees, such as:

- (a) Rules should be drafted to enable a simple court process;
- (b) Rules should be drafted using plain language;
- (c) Rules should be drafted with a view to keeping the cost of litigation down.
- (d) Rules should encourage expedition and discourage delay;

- (e) Rules should enable the development of case management;
- (f) The Rules Committees should, where practical, review regularly the Rules of Court;
- (g) The Rules Committees should, where practical, introduce rules to enable the development of I.T. and e-courts.

The Committee recommended that a specific time of one month be set in legislation wherein the Minister for Justice and Equality should accept or reject rules drafted by a Rules Committee. If the Minister rejects rules the Minister should furnish reasons to the relevant Rules Committee and if the Minister does not sign or reject the draft rules within one month the rules should be deemed to have come into force.

## 4. The Working Group on Medical Negligence and Periodic Payments

This Working Group, chaired successively by Judge John Quirke and Judge Mary Irvine, published three reports between October 2010 and April 2013 addressing various aspects of the conduct of clinical negligence litigation.

In its report on Module 1 of its deliberations, the Working Group recommended that statutory provision be made empowering the courts, under certain conditions, to make consensual and non-consensual periodic payments orders to compensate injured victims in cases of catastrophic injury where long term permanent care will be required, as an alternative to awarding lump sum amounts in damages.

In its report on Module 2, the Working Group recommended the introduction of a pre-action protocol governing clinical negligence claims, to be prescribed by rule of court under an expansion of the court rules committees' remit.

In its report on Module 3, the Working Group proposed new court rules to facilitate pre-trial preparation and management of clinical negligence proceedings and providing for new obligations concerning the disclosure pre-trial of expert and non-expert evidence. The rules would operate in conjunction with the pre-action protocol aforementioned.

Provision was made in Part 15 of the Legal Services Regulation Act 2015 for the pre-action protocols in clinical negligence actions – the prescribing power being assigned to the Minister for Justice and Equality rather than the court rules committees – and in the Civil Liability (Amendment) Act 2017 for periodic payment orders. The introduction of court rules to regulate management of clinical negligence actions await the prescribing of the pre-action protocol.

## 5. The Cost of Insurance Working Group

The Cost of Insurance Working Group's remit was "to identify immediate and longer-term measures which can address increasing costs, while bearing in mind the need to maintain a stable insurance sector". The Working Group examined the Motor Insurance sector in the first phase of its work and the Employer Liability Insurance and Public Liability Insurance sectors in the second phase.

In its first phase report, the Working Group recommended that the Departments of Justice and Equality and Business, Enterprise and Innovation ascertain and set out the measures necessary to extend pre-action protocols from clinical negligence claims to personal injury cases. It recommended measures to strengthen the Book of Quantum<sup>11</sup> – including exploring with the judiciary how future reviews of the Book might involve appropriate judicial involvement in its compilation or adoption, introducing more granularity in the Book, and updating it every 3 years at a minimum. While not finding that legal costs were a major

11 Viz. the Personal Injuries Assessment Board publication containing general guidelines as to amounts that may be awarded or assessed for specified types of injury and to which the courts are required to have regard when assessing damages.

contributory factor in the recent increase in motor insurance premiums, it found that the proportion of legal costs and non-legal costs attributed to the overall claim settlement amount are relevant and recommended that a number of reviews take place in relation to legal costs.

In its second phase report, the Working Group recommended a comprehensive examination of the feasibility of legislating for a cap in relation to the level of damages a court may award in respect of personal injury actions. The Law Reform Commission was subsequently requested to undertake a detailed analysis of the possibility of developing constitutionally sound legislation for the purpose.<sup>12</sup> It noted concerns that section 8 of the Civil Liability and Courts Act 2004, which introduced a requirement that a claimant for damages for personal injuries give early written notification of their claim<sup>13</sup> was regularly not complied with (particularly in public liability cases) and that failure to comply, where it arises, was not raised as an issue in court. It recommended that section 8(1) be amended, so as to limit the timeframe within which notification should be made and to require a court to consider measures where a claimant was in default of the notification obligation. The section has since been amended to those ends.<sup>14</sup> The Working Group further recommended that consideration be given to amending the rules of court to stipulate that the originating document in the proceedings must include an explanation of how section 8 was complied with, or failing that, what reasonable cause existed that prevented the plaintiff from complying with the section. Following the aforementioned amendment of section 8(1), amendments were made to the rules of court to this effect.<sup>15</sup>

The Working Group also recommended that section 14 of the 2004 Act, which requires a plaintiff in a personal injuries action to verify on affidavit, within a specific timeframe, assertions or allegations in pleadings or further information provided to a defendant, be amended to require the court to draw inferences from non-compliance with that requirement. This recommendation was implemented by section 13 of the Central Bank (National Claims Information Database) Act 2018.

## 6. The Personal Injuries Commission

The Personal Injuries Commission's first report included recommendations that a standardised approach to examination of and reporting on soft-tissue injuries ("whiplash") be adopted. Medical reports in personal injuries cases relating to soft tissue injuries should comply with a standard template, incorporating an internationally employed grading tool, to be prescribed by rule of court. It is understood that the Superior Courts Rules Committee has considered this recommendation and has been advised that primary legislation would be required to empower it to prescribe such a mandatory template.

In its second and final report, the Commission recommended that the Judicial Council should, when established, be requested by the Minister for Justice and Equality to compile guidelines for appropriate general damages for various types of personal injury. Section 18 of the Judicial Council Act 2019 now provides for the Judicial Council to establish a Personal Injuries Guidelines Committee, charged with preparing and submitting to the Judicial Council Board for its review draft general guidelines as to the level of damages that may be awarded or assessed in respect of personal injuries and amendments to those

12 Second and Final Report of the Personal Injuries Commission, page 5.

13 Section 8(1) of the 2004 Act provided that where a plaintiff in a personal injuries action fails, without reasonable cause, to serve a notice in writing, before the expiration of 2 months from the date of the cause of action, or as soon as practicable thereafter, on the wrongdoer or alleged wrongdoer stating the nature of the wrong alleged to have been committed by him or her, the court hearing the action may—

- (a) draw such inferences from the failure as appear proper, and
- (b) where the interests of justice so require (i) make no order as to the payment of costs to the plaintiff, or (ii) deduct such amount from the costs that would, but for this section, be payable to the plaintiff as it considers appropriate.

14 Section 13 of the Central Bank (National Claims Information Database) Act 2018 amended section 8(1) to shorten the operative period from two months to one month, to remove the words "or as soon as practicable thereafter" and to require the Court (as distinct from permitting it) to draw inferences and take the measures mentioned in the subsection.

15 S.I. No. 215 of 2019 (Circuit Court Rules); S.I. No. 216 of 2019 (Rules of the Superior Courts).

guidelines. The Judicial Council itself has the function of adopting the guidelines with such modifications (if any) made by the Board.<sup>16</sup>

## 7. The Expert Group on Article 13 of the European Convention on Human Rights

The Expert Group – which reported in May 2013 – was established following the adverse finding by the European Court of Human Rights (ECtHR) against the State in *McFarlane v Ireland*<sup>17</sup> to develop policy and legislative proposals for an effective domestic remedy under the Convention in respect of violations of Article 13 of the European Convention on Human Rights. Mindful of the ECtHR’s preference for the taking of measures to expedite court proceedings as an effective remedy for delay over compensation for delay, the Expert Group recommended a range of measures to facilitate expedition in both criminal trial process<sup>18</sup> (Chapter 2) and civil litigation (Chapter 3).

Insofar as civil litigation is concerned, the Expert Group recommended the following:

### **Pre-action protocols**

- the statutory remit of the Courts Rules Committees should be extended to permit them to prescribe pre-action protocols for categories of litigation under rules of court
- the powers of the courts should be extended by primary legislation to enable them to order disclosure prior to the commencement of proceedings in accordance with rules of court in circumstances where a claim is covered by a pre-action protocol.

In the event, these proposals were not adopted by the Department of Justice and Equality. A power was conferred on the Minister to prescribe a pre-action protocol for clinical negligence actions by section 219 of the Legal Services Regulation Act 2015.<sup>19</sup>

### **Case conduct principles and case management**

- the Law Reform Commission’s proposed statutory case conduct principles and criteria for judicial control of proceedings should be considered for immediate implementation.

### **Limitations on adjournments**

- provision should be made in statute that
  - a judge (or registrar where so empowered), when considering a contested application to adjourn proceedings, or grant an extension of time for the taking of any step in proceedings shall: examine the reasons for the application; have regard to any previous adjournments or (as the case may be) extensions granted; and have regard to whether any adjournment or extension which might be granted would impede the holding of a trial of the proceedings within a reasonable time
  - a judge or registrar shall not grant an adjournment or extension unless satisfied that there is sufficient reason for doing so and that it would be in the interests of justice to do so.

### **Discovery**

- the Expert Group did not consider that a substantial revision of the test of relevance should be made but recommended that the criterion of “necessity” expressed in the current rule of court could usefully be re-examined and restated in the light of recent case law with a view to ensuring that excessively onerous discovery does not work an injustice on litigants

16 Section 7(2)(g) of the 2019 Act.

17 *McFarlane v Ireland*, 10<sup>th</sup> September 2010 (Application no. 31333/06).

18 Chapter 2 of the Expert Group’s report.

19 Inserting a new Part 2A (sections 32A to 32D) in the Civil Liability and Courts Act 2004.

- with a view to providing a disincentive against requests for excessive discovery, the court should be expressly empowered by statute and/or rule of court, when making a final award of costs, to take into account the extent to which any discovery which had been required under court order was, in the light of the judgment on the claim, unnecessary, and award – and where appropriate set off – in favour of the discovering party the costs attributable to the unnecessary element of the discovery exercise. Any award of the costs of a motion for discovery should be subject to the courts power to make such an award or set off.

### ***Case management***

- consideration should be given to the introduction in the High Court by rule of court of a case management or progression regime for such category or categories of action as the President of the High Court might deem suitable to be designated for the purpose. The procedures prescribed should be sufficiently flexible as to allow the level of pre-trial supervision to be tailored to each type of proceedings so designated
- with a view to alleviating the pressure on judicial time which case management would impose, consideration should be given to assigning by rule of court powers to registrars to exercise case management functions such as the monitoring of compliance with directions of the judge and the giving of certain types of direction, such as the fixing of time limits for service of notices and the granting of extension of time for delivery of pleadings.

The Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial procedures) 2016 came into operation on the 1<sup>st</sup> October 2016. However, by notice issued in September 2016 it was indicated that, following representations which have been made to the President of the High Court and pending the provision of appropriate necessary resources the President does not intend to appoint either a list judge or registrar within the meaning of the above rules, and that consequently these rules shall have no practical effect pending such assignments being made.

### ***Automatic discontinuance***

- consideration should be given to making provision for automatic discontinuance of proceedings on a similar basis to that provided for in the Rules of Court of Singapore,<sup>20</sup> but subject to the conditions that it would not apply to any proceeding affecting the interest of a person who was under disability or otherwise not sui juris and that no discontinuance would take effect once a notice of trial had been lodged and served.

### ***Expert evidence***

- consideration should be given to introducing similar provisions as to expert and other witness evidence and legal submissions, respectively, as apply in the Commercial Court, for such other categories of litigation as may be prescribed by rule of court or designated by the President of the High Court.

20 The Rules of Court of Singapore provide for the automatic discontinuance of proceedings initiated by writ if proof of service of the writ on the defendant is not filed within 12 months after the validity of the writ for the purpose of service has expired and a) within that time an appearance has not been entered by the defendant, and b) judgment has not been obtained in the action against that defendant in respect of the whole or any part of the relief claimed. Further, if no party to an action or a cause or matter has, for more than one year (or such extended period as the Court may, on application made to it before that period has elapsed, allow), taken any step or proceeding in the action, cause or matter “that appears from records maintained by the Court”, the proceedings concerned are deemed to have been discontinued. A discontinuance on this basis will not apply where the proceedings have been stayed pursuant to an order of court. The deemed discontinuance of an action or counterclaim does not affect a plaintiff’s entitlement to bring a fresh action in respect of the claim provided the limitation period for the right of action has not expired. It may also not serve as a defence to a subsequent action for the same, or substantially the same, cause of action (see Order 21, rules 2, 4 and 5 of the Rules of Court of Singapore).



**Advance lodgment of legal submissions**

- provision for the advance lodgment of legal submissions should be extended to other civil trials and these should be lodged on the basis that the court may direct at hearing the extent (if any) to which it requires counsel to supplement them with oral submissions. Such a provision was introduced in relation to judicial review proceedings in 2011<sup>21</sup>
- a court should be empowered to penalise or sanction a party who behaves or so conducts the proceedings as to cause delay when determining liability for costs in respect of that action.

**Judicial Review**

- a party seeking leave to apply for judicial review should, in order to be entitled to such leave, be required to show that the deficiency in the order or decision complained of could not have been remedied by an application to the court which made the order for a direction or order for the correction or amendment as the case may be, of the order or decision concerned
- consideration should be given to further expansion of the slip rule.

Provision was made for these recommendations in the General Scheme of a Criminal Procedure Bill submitted to Government for approval in June 2015, but only insofar as criminal proceedings are concerned.

- a respondent's entitlement to apply to set aside leave which has been granted on an ex-parte basis should be placed on a statutory footing or specifically provided for by rules of court.

**Expedition procedure**

- statutory provision should be made for an expediting remedy by way of an application to a judge for an early hearing date and/or other appropriate order to expedite the conduct of proceedings (criminal or civil) where a risk of unreasonable delay in the conduct of the proceedings arises.

## 8. The Reform and Development Directorate of the Courts Service and court rules-based reforms

Since its establishment in 2004, and its assumption of the role of supporting the three jurisdictional courts rules committees as mentioned earlier in this chapter, the Reform and Development Directorate in collaboration with the rules committee has pursued procedural reforms to address the key obstacles to access to justice – delay, cost and complexity of proceedings – while at the same time facilitating recourse to alternative dispute resolution mechanisms.

**Delay**

A series of case management tools – notably, case management conferences, pre-trial directions hearings, trial timetabling and power to dispense with written submissions – have been introduced in the procedural regimes of the High Court and the Circuit Court<sup>22</sup> modelled on the case management regime created for the Commercial Court on its establishment in 2004,<sup>23</sup> to –

- ensure that proceedings are prepared for trial “in a manner which is just, expeditious and likely to minimise ...costs”<sup>24</sup>

21 S.I. No. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011: Order 84 rule 22(8).

22 Rules of the Superior Courts (Competition) 2006 - S.I. No. 130 of 2005; Circuit Court Rules (Case Progression in Family Law Proceedings) 2008 - S.I. 358 of 2008; Circuit Court Rules (Case Progression (General)) - S.I. 539 of 2009; Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial procedures) 2016 - S.I. No. 255 of 2016.

23 Rules of the Superior Courts (Commercial Proceedings) 2004 - S.I. No. 2 of 2004.

24 See rule 4 of Order 63C (Chancery and non-jury actions and other designated proceedings: pre-trial procedures), Rules of the Superior Courts.

- meet the obligation of the State under the Constitution and under Article 6.1 of the European Convention on Human Rights to ensure independently of the pace at which the parties were proceeding that a case is disposed of within a reasonable time and
- in the case of the Circuit Court, reduce the volume of interlocutory applications occupying the time of Circuit Court judges at the expense of time devoted to trial work, by enabling them, where appropriate, to be disposed of by county registrars.

With a view to reducing the time occupied at trial by the traditional examination-in-chief and cross examination of expert witnesses on their reports, the “debate between experts” procedure (originating in the Australian courts and known as “hot-tubbing”) was introduced,<sup>25</sup> which dispenses with separate examinations of the experts, sometimes days apart, and enables the court to direct a conference between experts followed by an iterative “debate between experts” overseen by the court.

### **Cost**

Insofar as the cost of litigation is concerned, amendments have been introduced<sup>26</sup> to –

- limit the incentive for unnecessary pre-trial applications by requiring the Court, on determining any interlocutory application, to make an award of costs in respect of the application save where it is not possible justly to adjudicate upon liability for costs on the basis of the application
- provide greater transparency for all parties as to the costs cumulatively incurred during the course of a case, by empowering the court at any stage of the proceedings, to require the parties to produce and exchange with each other estimates of the costs respectively incurred by them, and
- ensure that Calderbank-type letters (i.e. offers to settle a claim made “without prejudice save as to costs”) may be taken into account when awarding costs, thus incentivising early settlement of proceedings.

### **Complexity**

Measures have also been taken to reduce procedural complexity, and standardise and rationalise the forms of application which may be made to the courts. With the introduction of the comprehensive revisions to the civil rules for the District Court in 2014,<sup>27</sup> it may be said that civil procedure in the three first instance jurisdictions – the District Court (equivalent to magistrates’ court), the Circuit Court and the High Court – has seen significant alignment insofar as is appropriate having regard to the value or complexity of the dispute.

The Rules on Statutory Applications and Appeals applicable in the High Court, Circuit Court and District Court<sup>28</sup> introduced template originating notices of application and appeal and a template pre-trial procedure for the myriad of applications and appeals which the Oireachtas (our Parliament) has been adding to the jurisdictional remit of those courts. These template procedures include an early initial return date, at which the Court may give directions relating to matters such as the mode of trial (on affidavit or by plenary hearing); discovery; the exchange of memoranda between the parties for the purpose of the agreeing or the fixing by the Court of issues of fact or law to be determined; the delivery of written submissions and fixing of time limits for completion of the steps to prepare the case for trial.

### **Promotion of ADR**

Promotion of Alternative Dispute Resolution mechanisms has also been a particular focus of civil procedural reform in Ireland, and has been complemented by significant primary legislative measures in the areas of arbitration and mediation.

25 Order 39, rules 60 and 61, Rules of the Superior Courts.

26 Rules of the Superior Courts (Costs) 2008 (S.I. No. 12 of 2008); Circuit Court Rules (Costs) 2008 (S.I. No. 353 of 2008); Circuit Court Rules (Costs) 2010 (S.I. No. 444 of 2010).

27 District Court (Civil Procedure) Rules 2014 (S.I. No. 17 of 2014).

28 Rules of the Superior Courts (Statutory Applications and Appeals) 2007 - S.I. No. 14 of 2007; Circuit Court Rules (Statutory Applications and Appeals) 2009 - S.I. 470 of 2009; Orders 40C and 40D, DCR.

Ireland has applied the UN Model Law on International Commercial Arbitration<sup>29</sup> both to domestic arbitrations and arbitrations having a cross-border element, thus restricting significantly the extent to which court intervention in an arbitration is possible.<sup>30</sup>

Amendments to the court rules in 2010,<sup>31</sup> subsequently replicated in primary legislation,<sup>32</sup> enable the courts, on a party's application or on its own initiative, to order that proceedings or any issue arising in proceedings be adjourned for such time as the Court considers just and convenient and —

- invite the parties to use an ADR process – including arbitration, mediation or conciliation - to settle or determine the proceedings or issue or
- where the parties consent, refer the proceedings or issue to such process,

and the Court may, where seeking to facilitate mediation, invite the parties to attend an information session on the use of mediation.

Where the parties decide to use an ADR process, the Court may extend the time for compliance with any provision of the rules of court or any order of the Court in the proceedings.

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29 UNCITRAL Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and amended.

30 See section 6 of the Arbitration Act 2010.

31 Rules of the Superior Courts (Mediation and Conciliation) 2010 (S.I. No. 502 of 2010). See also rule 9 of Order 33A (Mediation and other Alternative Dispute Resolution processes), Circuit Court Rules.

32 See section 32, Arbitration Act 2010 and sections 16 and 23, Mediation Act 2017.

# CHAPTER 4

## THE CIVIL JURISDICTION OF THE COURTS



## 1. Introduction

The remit of the Review Group requires it to examine the current administration of civil justice in the State for the various objects mentioned in Chapter 1. This part of the Review Group’s remit clearly envisages detailed consideration and review of the present jurisdictional structure and operation of the court system, to include both first instance and appellate jurisdictions.

These elements of court structure and operation combine to form the fundamental framework that underpins the administration of civil justice in this jurisdiction.

All of the courts in the jurisdictional hierarchy, being courts of ordinary jurisdiction, exercise criminal and family law jurisdiction. However, given the remit of the Review Group, the focus of this chapter is on the civil jurisdiction of the courts excluding family law matters.

Sections 2 to 4 of this chapter examine the fundamental features of court structure as well as the jurisdiction – both first instance and appellate – of the District Court, the Circuit Court and the High Court, respectively.

Section 5 of this chapter examines the jurisdictions of the Court of Appeal and the Supreme Court. The establishment and introduction of the Court of Appeal has been described by leading commentators as “the most significant alteration to the court structure since the adoption of the Constitution in 1937...”<sup>1</sup>

Section 6 of this chapter contains a summary of the submissions made to the Review Group on the subject of court jurisdiction. Section 7 is a summary of the Review Group’s recommendations.

Details of the civil caseload and caseload of the various court jurisdictions are set out at Appendix 2 to this report.

## 2. The Courts System

### 2.1 Overview of the establishment of the present courts system

Detailed discussion of the history and development of the court system in Ireland is beyond the remit of the Review Group.<sup>2</sup> However, a brief consideration of the development of the court system provides a helpful backdrop to an examination of the organisation and jurisdiction of the courts.

As will be seen below,<sup>3</sup> certain provisions of Bunreacht na hÉireann<sup>4</sup> provide the constitutional underpinnings of the present-day court system. However, certain statutes regulating the jurisdiction and operation of the courts pre-date the adoption and enactment of the Constitution – the most important of all being the Courts of Justice Act 1924 (“the 1924 Act”) – and were retained notwithstanding that the court system was reconstituted by the Courts (Establishment and Constitution) Act 1961.<sup>5</sup>

1 Byrne et al., “Byrne and McCutcheon on the Irish Legal System”, 6th Ed., 2014, Bloomsbury Professional, Preface to Sixth Edition of that publication.

2 For comprehensive analysis see generally Byrne et al., *op. cit.*; see generally Delany, “The Courts Acts 1924 – 1997”, 2nd. Ed., 2000, Round Hall. In particular, see Delany *op. cit.*, and the Preface to the First Edition of that publication.

3 Section 2.2 of this chapter.

4 In this chapter Bunreacht na hÉireann is referred to variously as “Bunreacht na hÉireann” or “the Constitution”.

5 See Law Reform Commission, Consultation Paper on Consolidation and Reform of the Courts Acts, LRC CP 46-2007, at para. 2.02.

Byrne et al. comment:

“...while the Constitution passed in 1937 required the establishment of a “new” court system in 1961, the arrangements put in place by the 1924 Act were repeated at that time, and this layout of the system continues to the present day.”<sup>6</sup>

In 1923 a Judiciary Committee was appointed by the Executive Council of the Irish Free State to devise a court system to be established under the 1922 Constitution.<sup>7</sup> The Committee was appointed:

“To advise the Executive Council of Saorstát Eireann in relation to the establishment in accordance with the Constitution of Courts for the exercise of judicial power and the administration of justice in Saorstát Eireann and the setting up of the office and other machinery necessary or expedient for the efficient dispatch of legal business.”<sup>8</sup>

The Judiciary Committee recommended a court system for the Irish Free State which would take the following form:

- The District Court, which would have jurisdiction in minor civil and criminal matters;
- The Circuit Court, which would have criminal and civil jurisdiction, replacing the Court of Assizes and the County Court respectively;
- The High Court;
- The Court of Criminal Appeal;<sup>9</sup> and
- The Supreme Court.<sup>10</sup>

The Courts of Justice Act 1924 broadly implemented the recommendations of the Judiciary Committee.

The coming into effect of the Constitution of 1937 required the establishment of a new court system<sup>11</sup> as envisaged under Article 34.1. This was finally achieved with the enactment of the Courts (Establishment and Constitution) Act 1961, a short Act of eight sections enacted for the purpose of carrying forward the existing courts system that had been created by the 1924 Act. Sections 1 – 5 of the Courts (Establishment and Constitution) Act 1961 established and specified the constitution of each of the Supreme Court, the High Court, the Court of Criminal Appeal, the Circuit Court and the District Court.

The Courts (Supplemental Provisions) Act 1961 made provision for the jurisdiction, organisation and operations of the courts thus established and constituted.

6 Byrne et al, op. cit., at para. 2.111. See also LRC CP 46-2007, op. cit., at paras. 1.04 – 1.08.

7 Byrne et al. comment that the Judiciary Committee faced certain constraints on account of the fact that Article 73 of the Constitution of the Irish Free State envisaged a High Court of Justice and Supreme Court of Justice, as well as courts of local and limited jurisdiction; Byrne et al, op. cit., at para. 2.105.

8 The Judiciary Committee, “Report of the Judiciary Committee” (Stationary Office 1923). See LRC CP 46-2007, op. cit., at para 1.05.

9 Byrne et al. provide the following description: “The Judiciary Committee also recommended the establishment of a Court of Criminal Appeal along the lines of the court of the same name established in England in 1907. This court would hear appeals from the Circuit Court and High Court in serious criminal matters, and a further appeal to the Supreme Court would be possible in cases involving points of law of exceptional public importance.” Op. cit., at para. 2.109.

10 Byrne et al. provide the following description: “The report was obliged to recommend that a final court of appeal entitled the Supreme Court be established. Its functions were to be virtually identical to those of the Court of Appeal of Southern Ireland under the [Government of Ireland Act 1920]. The Supreme Court would be presided over by the Chief Justice of Ireland, the most senior member of the judiciary in the state.” Op. cit., at para. 2.110.

11 See *The State (Killian) v Minister for Justice* [1954] IR 207. Byrne et al. comment that the effect of decision of the Supreme Court in this case was the “re-establishment of the court system by the enactment of new legislation”, op. cit., at para. 4.46. See also detailed analysis in LRC CP 46-2007, op. cit., at paras. 2.40 – 2.71.

It has been observed that the two 1961 Acts had the primary effect of the “re-establishment” of the pre-1961 courts system that had been in place since the passing of the 1924 Act.<sup>12</sup> Commentary suggests that as a consequence of this re-establishment of an existing court system many provisions of the 1924 Act were carried over into the new system and there was at no time a “complete break” with the pre-1961 regime.<sup>13</sup> However, while the courts established by the Courts (Establishment and Constitution) Act 1961 were identical in jurisdiction to the earlier courts, they were in fact new courts and decisions of the pre-1961 courts are not decisions of the new courts.<sup>14</sup>

In 2013 Article 34.2 of the Constitution was amended to provide for the creation of the Court of Appeal, the jurisdiction of which is considered below.<sup>15</sup>

## 2.2 The constitutional basis for the present courts system<sup>16</sup>

### 2.2.1 The constitutional provisions

The following Articles of the Constitution establish the essential elements of the Irish court system.

Article 34.1 provides:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

Article 37.1 provides:

“Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.”

Article 34.2<sup>17</sup> describes courts of first instance and of courts of appeal:

“The Courts shall comprise:

- i Courts of First Instance;
- ii a Court of Appeal; and
- iii a Court of Final Appeal.”

Article 34.3.1° states:

“The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.”

Article 34.3.4° recognises courts other than the High Court, the Court of Appeal and the Supreme Court, namely the Circuit Court and the District Court:

“4° The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law.”

12 Byrne., *op. cit.*, at para. 4.04.

13 *Ibid.* However, for a different description see also Delany, *op. cit.*, at page 214: “...As a result of [the Courts (Establishment and Constitution) Act 1961] the courts established by the Courts of Justice Act 1924 and continued in force by the provisions of Article 58 of the Constitution were finally extinguished...”

14 LRC CP 46-2007, *op. cit.*, at para 2.45, citing Byrne and McCutcheon, “The Irish Legal System”, 4th Ed., 2001, Butterworths, at 359.

15 At Section 5.

16 For comprehensive analysis of the individual Articles of the Constitution referred to see generally Hogan et al., Kelly: “The Irish Constitution”, 5th Ed., Bloomsbury Professional, 2018.

17 As amended by the Thirty-Third Amendment of the Constitution (Court of Appeal) Act 2013 which was approved by a referendum held in 2013.

Articles 34.4 to 34.6 describe the appellate jurisdiction of the Court of Appeal and the Supreme Court:

“4 1° The Court of Appeal shall–

- i save as otherwise provided by this Article, and
- ii with such exceptions and subject to such regulations as may be prescribed by law,

have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law.

2° No law shall be enacted excepting from the appellate jurisdiction of the Court of Appeal cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.

3° The decision of the Court of Appeal shall be final and conclusive, save as otherwise provided by this Article.

5 1° The Court of Final Appeal shall be called the Supreme Court.

2° The president of the Supreme Court shall be called the Chief Justice.

3° The Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the Court of Appeal if the Supreme Court is satisfied that–

- i the decision involves a matter of general public importance, or
- ii in the interests of justice it is necessary that there be an appeal to the Supreme Court.

4° Notwithstanding section 4.1° hereof, the Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the High Court if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors:

- i the decision involves a matter of general public importance;
- ii the interests of justice.”

### 2.2.2 Terminology: first instance, appellate and local and limited

As noted above Article 34.3.1° provides for the establishment of courts of first instance and invest the High Court with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.

Generally, courts of “first instance” are those courts in which proceedings are commenced or initiated and tried,<sup>18</sup> in contrast with appellate courts (courts of “second instance”) which hear appeals from determinations made by trial courts. The courts exercising first instance jurisdiction are the District Court, the Circuit Court and the High Court.<sup>19</sup>

The primary consequence of the High Court being conferred with full original jurisdiction under the Constitution is that the powers of the High Court, like those of the Court of Appeal and the Supreme Court on appeal, are not dependent on or limited to those conferred by statute.<sup>20</sup> This broad jurisdiction can be contrasted with the limited and local jurisdiction of the District Court and the Circuit Court. The powers and functions of these courts derive from, and the jurisdictions of these courts are therefore confined to, those granted by statute.

18 Murdoch and Hunt’s “Encyclopaedia of Irish Law”, 6th Ed. (2016), Bloomsbury Professional.

19 See discussion of the limited first instance jurisdiction of the Supreme Court below.

20 For detailed analysis of the concept of “full jurisdiction” see Hogan et al., op. cit., chapter 6.



## 3. The Courts of first instance<sup>21</sup>

### 3.1 The District Court

#### 3.1.1 Organisation

The District Court was established by section 5(1) of the Courts (Establishment and Constitution) Act 1961. It is the court of basic jurisdiction in civil and criminal matters, is a court of record<sup>22</sup> and comprises the President of the District Court together with such number of judges as may be fixed from time to time by Act of the Oireachtas.<sup>23</sup> The current number of District Court judges stands fixed at not more than 63.<sup>24</sup> The District Court operates as a judge-only court, viz. without a jury.

The President of the District Court is responsible for the general organisation of the work of the District Court.<sup>25</sup>

The District Court, as a court of local and limited jurisdiction, is organised on a regional basis with the State divided into 25 District Court Districts, comprising the Dublin Metropolitan District and 24 other Districts.<sup>26</sup>

In addition to its civil jurisdiction described below, the District Court tries minor offences and has a wide-ranging jurisdiction in family law with the exception of divorce and judicial separation proceedings.

#### 3.1.2 Civil jurisdiction<sup>27</sup>

In matters of tort (including personal injuries) and contract and in proceedings seeking to recover a debt, the District Court is empowered to award damages not exceeding €15,000.<sup>28</sup> Where the parties consent in writing, and where the District Court would have jurisdiction to hear and determine the claim had the claim fallen within the applicable monetary threshold, the District Court may exercise jurisdiction in excess of this limit.<sup>29</sup>

Importantly, the District Court does not have jurisdiction to hear certain types of claim, including actions for defamation (libel and slander), which are reserved for the Circuit Court and the High Court.<sup>30</sup> A further important limitation is that the District Court has no jurisdiction to hear cases where equitable reliefs are sought.

21 As noted previously, Family Law matters were not included in the remit of the Review Group in view of the publicised intention of the Government to bring forward modernising legislation in the form of a Family Courts Bill. Accordingly, the following descriptions of the features of the courts' jurisdictions will not include those features that concern Family Law matters.

22 Section 13 of the Courts Act 1971. Byrne et al. describe the concept of a "court of record" in the following terms: "The concept of a court of record is of some antiquity. Originally, it referred to a royal court, with authority to impose fines and to imprison. It also was a court whose acts and proceedings were to be enrolled 'for perpetual memorial and testimony', the rolls thus being its permanent record. The authority of the monarch has been replaced by the authority conferred by Article 34 of the Constitution, but the concept of keeping records for perpetuity remains an important indication that a court has a permanent standing..." Op. cit., at para. 4.53, FN. 111.

23 Section 5(2) of the Courts (Establishment and Constitution) Act 1961.

24 Section 11 of the Court and Court Officers Act 1995, as amended by section 32 of the Civil Law (Miscellaneous Provisions) Act 2008.

25 Section 36 of the Courts (Supplemental Provisions) Act 1961. See Delany, op. cit., at pages 217 – 218 where the author discusses, inter alia, the introduction of the office of the President of the District Court.

26 Those districts are specified in the District Court (Districts) Order 2017 (S.I. No. 182 of 2017).

27 The jurisdiction of the District Court is set out in section 33 of the Courts (Supplemental Provisions) Act 1961.

28 Section 15 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 and Part 2 of the Schedule to that Act.

29 Section 4(c) of the Courts Act 1991.

30 Section 22 of and the Third Schedule to the Courts (Supplemental Provisions) Act 1961. See reference in s.22 of the Courts (Supplemental Provisions) Act 1961 to the fact that the Circuit Court shall have concurrent jurisdiction with the High Court in respect of the matters set out in the Third Schedule.

### 3.1.3 Discrete areas of jurisdiction

In addition to the jurisdiction conferred on the District Court in matters of tort and contract, the District Court has been conferred with jurisdiction to hear various types of claim and application arising under numerous headings, including the following, by way of example.<sup>31</sup>

#### 3.1.3.1 Small claims

The District Court determines small claims, viz. various types of consumer to business and business to business claims not exceeding €2,000 under national law<sup>32</sup> and claims with a cross-border aspect not exceeding €5,000 under EU law.<sup>33</sup> These claims are dealt with under the small claims procedure, which involves an initial mediation by a Small Claims Registrar and adjudication by the court in the event that mediation efforts fail.

The small claims service is provided by District Court offices and is designed to handle consumer claims and business claims cheaply without involving a solicitor.<sup>34</sup>

The small claims procedure may be commenced by completing an application online<sup>35</sup> and the cost of lodging the application is €25.

#### 3.1.3.2 Party structures and Part 8 of the Land and Conveyancing Law Reform Act 2009

The District Court is empowered to hear applications by building owners in dispute with an adjoining owner with respect to the exercise of rights under section 44 of the 2009 Act for an order authorising the carrying out of specified works.<sup>36</sup>

#### 3.1.3.3 Housing legislation

The District Court is empowered to hear applications under the Housing (Miscellaneous Provisions) Act 1997 (“the 1997 Act”) and Housing (Miscellaneous Provisions) Act 2014 (“the 2014 Act”), including applications for excluding orders within the meaning of section 3 of the 1997 Act and proceedings for possession of local authority housing within the meaning of sections 12 and 13 of the 2014 Act.

### 3.1.4 Caseload and caseload

Fuller data on the civil caseload and caseload of the District Court is contained in Appendix 2. The District Court had an incoming caseload, excluding family cases, of 33,954 civil litigious cases in 2019, an increase of almost 49 % over its incoming caseload of 22,791 in that category in 2014. That court resolved 8,944 cases in that category in 2019 compared with 3,171 such cases in 2014 – an increase of 182 % over the figure for 2014 (Chart 2 in Appendix 2). These figures indicate a quite low case clearance rate – just over 26 % in 2019, compared with 14 % in 2014. It should be noted, however, that the clearance rates cited in this report for the various jurisdictions take account only of cases resolved by the court and do not reflect the volume of cases resolved without the court’s involvement, in particular cases settled out of court where no court order ruling the settlement was sought. Hence, the case clearance rate recorded by the Courts Service in its statistics understates the actual rate of clearance of cases.

The case clearance rate for the civil litigious caseload of the District Court, when family cases are included, was significantly higher for both years concerned – almost 64 % in 2019, compared with 65 % in 2014 (Chart 1 and Table 1 in Appendix 2).

31 This is a non-exhaustive list and is intended to illustrate the general nature of the matters that are heard and determined in the District Court.

32 Order 53A, District Court Rules (“DCR”).

33 Order 53B, DCR.

34 As per the notes to the online procedure, available at: <https://www.courts.ie/small-claims-procedure>

35 Via [www.csol.ie](http://www.csol.ie). See also: <https://www.courts.ie/how-apply> <http://www.courts.ie/Courts.ie/Library3.nsf/0/F9B49A71A85F662C802580B100635032?OpenDocument>

36 Under section 45 of the Land and Conveyancing Law Reform Act 2009 and Order 93A DCR.

The average length of civil proceedings excluding licensing applications was reported as 163 days in 2019, a significant reduction on the average of 294 days reported in 2015 (Table 2, Appendix 2).

## 3.2 The Circuit Court

### 3.2.1 Organisation

The Circuit Court was established by section 4(1) of the Courts (Establishment and Constitution) Act 1961 and is also a court of local and limited jurisdiction within the meaning of Article 34 of the Constitution.<sup>37</sup> The Circuit Court is the intermediate first instance jurisdiction in civil and criminal matters, and is a court of record.<sup>38</sup>

The Circuit Court comprises the President of the Circuit Court and such number of ordinary judges as may from time to time be fixed by Act of the Oireachtas. The number of ordinary judges of the Circuit Court is now fixed at not more than 37.<sup>39</sup> In 2013 six<sup>40</sup> specialist Judges of the Circuit Court, within the meaning of Part 6 of the Personal Insolvency Act 2012 were appointed to deal with insolvency applications, but that number has reduced as appointments of specialist judges to ordinary judgeships have been made, and no additional specialist judges have been appointed.

The management powers of the President of the Circuit Court include the power:

- to fix the dates and locations of sittings of the Circuit Court;<sup>41</sup>
- to temporarily assign a judge to a particular Circuit.<sup>42</sup>

The President of the District Court is an *ex officio* judge of the Circuit Court.<sup>43</sup>

There are eight Circuits, namely Dublin, Cork, Eastern, Midland, Northern, South Eastern, South West and Western Circuits.<sup>44</sup> 10 judges are permanently assigned to the Dublin Circuit, with three judges to be permanently assigned to the Cork Circuit.<sup>45</sup> The remaining Circuits are assigned one judge each.<sup>46</sup>

In civil claims Circuit Court judges sit alone to hear cases. A Circuit Court judge may only exercise jurisdiction in the Circuit to which he or she is assigned and Byrne et al. note that this “geographical limitation” of the Circuit Court’s jurisdiction in different areas is a feature that is shared with the District Court.<sup>47</sup>

In addition to its civil jurisdiction, the Circuit Court exercises jurisdiction in respect of the trial

- of serious crime with the exception of murder, rape, aggravated sexual offences, cognates of such offences, and certain other offences, and
- divorce and judicial separation, and ancillary family law proceedings.

37 See also LRC CP 46-2007, op. cit., at para. 2.161.

38 Section 21 of the Courts (Supplemental Provisions) Act 1961.

39 Section 4(2) of the Courts (Supplemental Provisions) Act 1961. The number was fixed to not more than 24 ordinary judges under section 10 of the Court and Court Officers (Amendment) Act 1995, and this number was increased to not more than 37 by an amendment made by section 3 of the Court and Court Officers Act 2007.

40 The number of specialist judges is fixed to not more than eight under section 191 of the Personal Insolvency Act 2012 which introduced amendments to the Court and Court Officers Act 1995.

41 Section 10(2)(a) and (b) of the Courts of Justice Act 1947.

42 Section 10(3) of the Courts of Justice Act 1947.

43 Section 33 of the Court and Court Officers Act 1995.

44 Section 16 of the Courts of Justice Act 1953, carried forward by section 20(1) of the Courts (Supplemental Provisions) Act 1961.

45 Section 36 of the Court and Court Officers Act 1995, which amended section 2 of the Courts Act 1977.

46 Section 2 of the Courts Act 1977.

47 Byrne et al. op. cit., at para. 4.67.

### 3.2.2 The County Registrar

The County Registrar is a professional legal officer of the court attached to the Circuit Court Office in each county.<sup>48</sup> County Registrars now perform largely adjudicative functions, broadly similar to the remit of the Master of the High Court.<sup>49</sup> In the Circuit Court, County Registrars deal with the majority of pre-trial applications – including applications for discovery, particulars and judgment in default – that arise in civil proceedings. The County Registrar also performs a key role in the case management (“case progression”) of proceedings in the Circuit Court.<sup>50</sup>

### 3.2.3 Civil jurisdiction

The monetary jurisdiction of the Circuit Court is limited to €60,000 in personal injury actions and €75,000 in all other civil claims.<sup>51</sup> Similar to the procedure available in the District Court, the parties to a Circuit Court action may consent in writing to an enlargement of the Circuit Court’s monetary jurisdiction.<sup>52</sup>

The Circuit Court has power under statute<sup>53</sup> to hear and to determine at first instance all claims in contract and tort as well as those types of action that fall outside of the jurisdiction of the District Court, within the monetary limits aforementioned.

### 3.2.4 Discrete areas of jurisdiction

The following is a non-exhaustive list of disputes in respect of which the Circuit Court exercises first instance jurisdiction.<sup>54</sup>

#### 3.2.4.1 *New tenancies*

The Circuit Court has exclusive jurisdiction to determine applications relating to claims for new leases.<sup>55</sup>

48 Section 35 of the Court Officers Act 1924, as amended by section 51 of the Court and Court Officers Act 1995.

49 The powers of the County Registrar are set out in section 34(1) of the Courts and Court Officers Act 1995 and the Second Schedule to that Act and Order 18, CCR.

50 See Order 19A and Order 59, Part III, CCR.

51 Amendments to the Third Schedule of the Courts (Supplemental Provisions) Act 1961 in 2013 introduced by the Courts and Civil Law (Miscellaneous Provisions) Act 2013.

52 Section 22(1)(b) of the Courts (Supplemental Provisions) Act 1961.

53 The jurisdiction of the Circuit Court in terms of subject matter and causes of action is set out in section 22 of the Courts (Supplemental Provisions) Act 1961 and the Third Schedule thereto. See LRC CP 46-2007, *op. cit.*, wherein it is stated that: “The main importance of the Supplemental Provisions Act 1961 is that it provides the Circuit Court with its jurisdiction...”; at para. 2.164.

54 This is a non-exhaustive list and this list is employed for the purpose of illustrating the general nature of matters that are heard and determined in the Circuit Court.

55 Under the Landlord and Tenant (Amendment) Act 1980 (as amended). Wylie comments that while the Circuit Court has “exclusive” jurisdiction to hear and to determine applications under that Act, the jurisdiction of the High Court is not “ousted” expressly or by implication. See generally Wylie, “Landlord and Tenant Law”, 3rd Ed., Bloomsbury Professional, 2014. In particular see the author’s discussion of business equity, long-occupation equity and improvement equity, at chapter 30.

### 3.2.4.2 Actions relating to land

The Circuit Court’s jurisdiction in land and equity matters is now based<sup>56</sup> on the concept of “market value”,<sup>57</sup> and the Circuit Court has jurisdiction over land and equity matters relating to land where the market value of the land does not exceed €3,000,000.

### 3.2.4.3 Personal Insolvency

The Circuit Court has exclusive jurisdiction to deal with certain types of application under the Personal Insolvency Act 2012, viz. applications in relation to debt relief notices.<sup>58</sup> The Circuit Court also has exclusive jurisdiction to hear applications concerning Debt Settlement Arrangements where the total value of the unsecured debts does not exceed €2.5 million.<sup>59</sup>

### 3.2.4.4 Company law

The Circuit Court has jurisdiction, concurrently with the High Court, to hear applications to appoint an examiner to a company,<sup>60</sup> applications to restore a company to the register of companies<sup>61</sup> and applications for the appointment of inspectors to investigate the affairs of a company.<sup>62</sup>

### 3.2.4.5 Licensing

The Circuit Court has exclusive jurisdiction to grant or refuse applications for new liquor on-licences within the meaning of the Licensing Acts.<sup>63</sup>

### 3.2.4.6 Home loan mortgages and possession

The Circuit Court has exclusive jurisdiction in respect of certain types of proceedings brought by mortgagees seeking orders for possession of land which is the principal private residence of (a) the mortgagor or (b) such other person(s) without whose consent a conveyance of that land would be void by reason of the Family Home Protection Act 1976 or the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010<sup>64</sup> and where the mortgage in question was created prior to 1<sup>st</sup> December 2009.<sup>65</sup>

56 Prior to the coming into operation of relevant provisions of the Civil Liability and Courts Act 2004 on the 11<sup>th</sup> January 2017, the criterion of “rateable valuation” had been the basis of conferring jurisdiction on the Circuit Court in relation to disputes affecting land. Further, section 1 of the Courts Act 2016 – which inserts a new section 53A into the Civil Liability and Courts Act 2004 – provides that where in any enactment a monetary amount is specified for the market value of land for the purpose of either (a) conferring or limiting the jurisdiction of the Circuit Court in civil proceedings, or (b) requiring or authorising the Circuit Court to transfer civil proceedings to the High Court, in the proceedings concerned it shall be presumed that the market value of the land in question does not exceed €3,000,000 in any proceedings until the contrary is proved.

57 The terms “market value” is defined in s.45 of the Civil Liability and Courts Act 2004 as meaning: “in relation to land, the price that would have been obtained in respect of the unencumbered fee simple were the land to have been sold on the open market, in the year immediately preceding the bringing of the proceedings concerned, in such manner and subject to such conditions as might reasonably be calculated to have resulted in the vendor obtaining the best price for the land.”

58 Under Part 3, Chapter 1 of the 2012 Act.

59 See generally Part 3, Chapter 2 of the 2012 Act. See the definition of “appropriate court” under section 5 of the 2012 Act. See also section 2 of the Land and Conveyancing Law Reform Act 2013.

60 Section 509 of the Companies Act 2014. The Circuit Court may hear a petition for the appointment of an examiner when the company involved is a “small company”.

61 Section 743 of the Companies Act 2014.

62 Section 748 of the Companies Act. Again the jurisdiction of the Circuit Court is limited to applications concerning small companies.

63 Section 24 of the Courts (Supplemental Provisions) Act 1961.

64 Section 3 of the Land and Conveyancing Law Reform Act 2013. See generally Wylie, “The Land and Conveyancing Law Reform Acts: Annotations and Commentary”, 2nd Ed., 2017, Bloomsbury. Referring to s.1 of the Land and Conveyancing Law Reform Act 2013 the authors comment, inter alia, as follows: “As explained in the Introductory Note to Part 10 of the 2009 Act this section was designed to negate the uncertainty caused by Dunne J’s decision in *Start Mortgages Ltd v Gunn* [2011] IEHC 275, in which she cast doubt on the right of mortgagees to invoke in respect of mortgages created prior to 1 December 2009 the statutory provisions in Acts repealed by the 2009 Act. The provisions were those in the Conveyancing Acts 1881–1911 and Registration of Title Act 1964...”; at Note 1 to s. 1.

65 i.e., prior to the date that the Land and Conveyancing Law Reform Act 2009 came into force.

The Circuit Court has exclusive jurisdiction to hear and determine applications for possession and sale on foot of housing loan mortgages<sup>66</sup> created since the 1<sup>st</sup> December 2009.<sup>67</sup>

### 3.2.5 Caseload and caseload

Fuller data on the civil caseload and caseload of the Circuit Court is contained in Appendix 2. That court had an incoming caseload, excluding family cases, of 21,132 civil litigious cases in 2019, a reduction of over 16 % on its incoming caseload of 25,271 in that category in 2014. That court resolved 12,864 cases in that category in 2019 compared with 6,551 such cases in 2014 an increase of 96 % (Chart 6 in Appendix 2). These figures indicate a clearance rate<sup>68</sup> for such cases by the court of 61% approx. in 2019 – a very significant increase on the clearance rate of with 26% approx. in 2014.

The case clearance rate for the Circuit Court’s civil litigious caseload, when family cases are included, was 64.5 % in 2019, compared with 32.4 % in 2014 (Chart 5 and Table 3 in Appendix 2).

The average length of all civil proceedings, including family cases, was reported as 725 days in 2019, a significant increase on the average of 568 days reported in 2015 (Table 5, Appendix 2).

## 3.3 The High Court

### 3.3.1 Organisation

The High Court was established by section 2 of the Courts (Establishment and Constitution) Act 1961 and is a superior court of record.<sup>69</sup> The High Court comprises the President of the High Court and such number of ordinary judges as may from time to time be fixed by Act of the Oireachtas.<sup>70</sup> The number of ordinary judges originally fixed was six<sup>71</sup> and that number has now increased to not more than 37.<sup>72</sup>

The President of the High Court is responsible for the organisation of and the distribution and allocation of the business of the High Court<sup>73</sup> and is an *ex officio* member of the Supreme Court<sup>74</sup> and of the Court of Appeal.<sup>75</sup>

The Chief Justice, the President of the Court of Appeal and the President of the Circuit Court are each *ex officio* members of the High Court.

The majority of civil actions in the High Court are heard by a judge sitting alone and judges sit with juries in defamation actions and actions for damages arising out of assault, false imprisonment and malicious prosecution. The President of the High Court may direct that a panel of two or more judges sit as a Divisional High Court.<sup>76</sup>

Civil business in the High Court is allocated to different court lists depending on the type of case and the cause of action. The court lists include -

- Non-jury
- Chancery

66 For definition see section 3 of the Land and Conveyancing Law Reform Act 2009.

67 See section 101(5) of the Land and Conveyancing Law Reform Act 2009.

68 For an explanation of the clearance rate see the footnote to Section 3.1.4.

69 Section 8(1) of the Courts (Supplemental Provisions) Act 1961.

70 Section 2(2) of the Courts (Establishment and Constitution) Act 1961.

71 By section 4 of the Courts (Supplemental Provisions) Act 1961.

72 Section 9 of the Court and Court Officers Act 1995, as amended by section 1 of the Courts Act 2015. See also section 3 of the Courts (No. 2) Act 1997 which introduced amendments to section 14(1) of the Law Reform Commission Act 1975.

73 Section 10(3) of the Courts (Supplemental Provisions) Act 1961.

74 Section 1 of the Courts (Establishment and Constitution) Act 1961.

75 Section 1A of the Courts (Establishment and Constitution) Act 1961 as inserted by section 6 of the Court of Appeal Act 2014.

76 See Order 49, rule 1 of the Rules of the Superior Courts and Article 40.4 applications Article 40.4.4° of the Constitution.

- Judicial review
- Immigration and Asylum
- Strategic infrastructure judicial review
- Personal injuries
- Bankruptcy
- Competition<sup>77</sup>
- Examiner’s court
- Professional regulation lists, to include the Solicitors Act list, the Medical Council list and the Nurses Act list.

Commercial cases with a value in excess of €1,000,000, as well as other types of commercial proceedings meeting certain criteria, may be admitted to the Commercial Court, which has been described as “a form of the old division, on an administrative basis, of the business of the High Court”.<sup>78</sup>

Certain categories of proceedings, including wardship proceedings and certain statutory appeals, such as disciplinary proceedings under the Solicitors Acts 1954 – 2011, are assigned by statute for hearing within the High Court to the President of the High Court.

Aside from its civil jurisdiction mentioned below, the High Court, as the Central Criminal Court, exercises exclusive criminal jurisdiction in respect of certain offences, including offences of murder, rape, aggravated sexual offences and their cognates.

The High Court sits primarily at the Four Courts in Dublin and on a number of occasions each year also sits “on Circuit” in various venues around the country – including Dundalk, Kilkenny, Cork, Limerick, Galway and Donegal – to hear appeals from the Circuit Court and cases at first instance. As well as hearing personal injuries actions in provincial venues the High Court has in recent years sat in Kilkenny and in Cork to hear non-jury actions.

General litigation in the High Court is administratively supported by the High Court Central Office from which the pool of registrars of that court is supplied. In addition to the Central Office, the following specialised offices are attached to the High Court:

- the Office of the Legal Costs Adjudicator (adjudications of legal costs)
- the Probate Office (issuing of grants of representation to deceaseds’ estates)
- the Examiner’s Office (taking of accounts and inquiries in mortgage and administration suits)
- the Accountant’s Office (custody and management of funds lodged in court).

The Office of Wards of Court is attached to the President of the High Court.<sup>79</sup>

### 3.3.2 The Master of the High Court

The Master of the High Court (“the Master”) is a professional legal officer of the High Court charged with the exercise of limited functions and powers of a judicial nature within the scope of Article 37 of the Constitution.<sup>80</sup> The Master deals with a range of pre-trial applications, save where these have been reserved to a judge by the President of the High Court.<sup>81</sup> Deputy Masters, appointed from the pool of registrars

77 Order 63B RSC.

78 Byrne et al. op. cit., at para. 4.62. See Order 63A of the Rules of the Superior Courts as inserted by S.I. No. 2 of 2004: Rules of the Superior Courts (Commercial Proceedings) 2004. The establishment of the Commercial Court followed the recommendation made in the Twenty-Seventh Report of the Committee on Court Practice and Procedure (2003), available at: <http://www.justice.ie/en/JELR/Pages/Committee-on-Court-Practice-27th-report>

79 Eighth Schedule, Courts (Supplemental Provisions) Act 1961.

80 Section 24, Court and Court Officers Act 1995; para. 4, Eighth Schedule, Courts (Supplemental Provisions) Act, 1961; Order 63, RSC.

81 Section 10(3), Courts (Supplemental Provisions) Act 1961. Sections 24 and 26, Court and Court Officers Act 1995.

assigned to the High Court Central Office, may discharge functions of the Master concurrently with the Master.<sup>82</sup>

### 3.3.3 Civil jurisdiction

The High Court is vested with full original jurisdiction under Article 34.3.1° of the Constitution. It has an “unlimited civil jurisdiction”,<sup>83</sup> which encompasses the original and other jurisdiction prescribed by the Constitution and such jurisdiction as was vested in the former High Court under the Courts of Justice Act 1924<sup>84</sup> as well as other statutes.

Integral to the original jurisdiction exercised by the High Court is its jurisdiction in judicial review which the High Court exercises exclusively.

The Constitution confers exclusive jurisdiction on the High Court in *habeas corpus*.<sup>85</sup>

By virtue of the limitations placed on the Circuit Court’s monetary jurisdiction described above, the High Court is the appropriate court to hear cases involving claims for damages in excess of €60,000 in respect of personal injury actions and in excess of €75,000 in all other actions in tort and contract, and disputes involving land where the market value of the land exceeds €3,000,000.

Section 9 of the Courts (Supplemental Provisions) Act 1961 also vested the High Court with jurisdiction in wardship matters.<sup>86</sup>

By contrast with the District and Circuit Courts which are courts of local, as well as limited, jurisdiction, the High Court’s territorial jurisdiction extends nationwide.

### 3.3.4 Caseload and caseflow

Fuller data on the civil caseload and caseflow of the High Court is contained in Appendix 2. That court had an incoming caseload, excluding family cases, of 17,086 civil litigious cases in 2019, a reduction of 17 % on its incoming caseload of 20,592 in that category in 2014. That court resolved 9,781 cases in that category in 2019 compared with 10,285 such cases in 2014 (Chart 11 in Appendix 2). These figures indicate a clearance rate for such cases by the court of 57.2% in 2019 compared with 50 % in 2014.

The case clearance rate for the court’s civil litigious caseload, when family cases are included, was 57.5 % approx. in 2019, compared with 50.1 % in 2014 (Chart 10 and Table 5 in Appendix 2).

The average length of all civil proceedings, including family cases, was reported as 785 days in 2019, a significant increase on the average of 680 days reported in 2015 (Table 7, Appendix 2).

## 3.4 The Supreme Court

As exceptions to its appellate jurisdiction, the Supreme Court has jurisdiction under the Constitution to determine certain matters at first instance, viz. the determination of a question as to the constitutionality of a Bill, or provision of a Bill, referred to the Court by the President of Ireland after consultation with the Council of State,<sup>87</sup> and the determination of an issue of permanent incapacity of the President of Ireland.<sup>88</sup>

82 Section 27(1A), Court Officers Act 1926. See discussion in Section 7 of Chapter 5.

83 Hogan et al., op. cit., at para. 6.2.02.

84 Byrne et al., op. cit., at para. 5.70., and section 8 of the Courts (Supplemental Provisions) Act 1961.

85 Article 40.4.3°.

86 See LRC CP 46-2007, op. cit., at para 2.124. The report describes the jurisdiction in the following terms: “The jurisdiction has a long history, and the jurisdiction was transferred to the Chief Justice by section 19 of The Courts of Justice Act 1924. The jurisdiction was previously vested in the Lord Chancellor of Ireland and at the time of the 1924 Act was exercised by the Lord Chief Justice of Ireland...” at FN 169.

87 Under Article 26 of the Constitution.

88 Under Article 12.3.1°.



## 4. The appellate jurisdiction of the Circuit Court and the High Court

### 4.1 Introduction

The Constitution provides for a right of appeal as determined by law from the courts of local and limited jurisdiction<sup>89</sup> and for the Court of Appeal to have appellate jurisdiction from all decisions of the High Court, and from such decisions of other courts as may be prescribed by law.<sup>90</sup>

### 4.2 Types of appeal

As will be seen below, depending on where the original claim was initiated, different types of appeal will be available to an appellant and may be categorised under two headings, viz. *de novo* appeals (full rehearings) and appeals on points of law.

#### 4.2.1 De novo hearings

A *de novo* hearing involves a full rehearing of a case before a higher court, including the evidence. All questions of law and fact are open to review and the parties are free to call fresh evidence. In effect, the case is heard for a second time as if the hearing before the lower court had not happened.

#### 4.2.2 Appeal on a point of law

An appeal on a point of law does not involve a complete rehearing of the first instance case but is confined to the higher court considering and resolving issues or points of law.

### 4.3 Appeals from the District Court

#### 4.3.1 Appeals by way of full rehearing

With only very limited exceptions,<sup>91</sup> all decisions of the District Court in civil claims may be appealed by way of a fresh (“*de novo*”) hearing in the Circuit Court. The decision of the Circuit Court judge on appeal is final and conclusive and not appealable.<sup>92</sup> Commentators have suggested that it would be permissible to limit appeals from the District Court to the Circuit Court to appeals on a point of law:

“...it would seem that, provided some form of appeal mechanism remains open, such as an appeal on a point of law, it would be permissible to restrict the present generous arrangements for *de novo* appeals.”<sup>93</sup>

#### 4.3.2 Appeals by way of case stated

The second form of appeal that lies from the District Court is an appeal on a point of law to the High Court. This type of appeal can be made by either party while the case is still in progress, when it is referred to as a consultative case stated,<sup>94</sup> or at the end of the District Court hearing when the judge has made a final determination, at which time the appeal is known simply as a case stated.<sup>95</sup>

Either party to the proceedings may request the District Court judge to refer any question of law to the High Court in this way and the point of law must be referred unless the judge considers the request to be

89 Article 34.3.4°.

90 Article 34.4.1°.

91 See Delany *op. cit.*, at pages 48 - 49.

92 Section 84 of the Courts of Justice Act 1924, as amended by section 57 of the Courts of Justice Act 1936. Byrne et al note that a decision of the Circuit Court on appeal may be subject to judicial review by the High Court pursuant to Article 34.3.1° of the Constitution; *Op. cit.*, at para 7.13, FN21, citing *Tormey v Ireland* [1985] IR 289.

93 Byrne et al., *op. cit.*, at para. 7.13. and FN 20.

94 Section 52 of the Courts (Supplemental Provisions) Act 1961, which replaced section 83 of the Courts of Justice Act 1924.

95 The application for a case stated must be made within 14 days of the final determination of the District Court. See section 51 of the Courts (Supplemental Provisions) Act 1961 which extends the scope of section 2 of the Summary Jurisdiction Act 1857. For comprehensive analysis of the case stated procedure see LRC CP 46-2007, *op. cit.*, at para 3.04 – 3.62.

frivolous. The refusal to state a case may be subject to judicial review.<sup>96</sup> Byrne et al. describe the case stated procedure in the following terms:

“In form, a ‘case stated’ consists of a written document which includes the question or questions of law for determination by the High Court. A case stated will contain a recitation of facts as found by the District Court judge and will end with a question being posed, which must allow for a ‘Yes’ or ‘No’ answer. The question or questions will be put in the following manner: ‘On the basis of the foregoing findings of fact, was I correct in law in concluding that...?’ The question is put in the first person because, in formal terms, it is put to the High Court by the judge of the District Court. However, in practice the content of the case stated document is prepared by agreement between the lawyers representing both parties and this document is then presented to the judge to be ‘signed and stated’.”<sup>97</sup>

The High Court judge will consider the case and then give his or her decision, answering each of the question posed in either the positive or the negative. Thereafter the matter is returned to the District Court for final determination in accordance with the findings of the High Court.

On a consultative case stated the decision of the High Court can be appealed from the High Court to the Court of Appeal with leave of the High Court.<sup>98</sup> On a case stated to the High Court after the final determination of the District Court an appeal lies from the High Court to the Court of Appeal, and leave of the High Court to appeal is not required.<sup>99</sup>

#### 4.4 Appeals from the Circuit Court

Both forms of appeal – *de novo* appeals and appeals on a point of law – are available in the context of claims initiated in the Circuit Court.

In general, an appeal lies to the High Court from all decisions of the Circuit Court in civil matters.<sup>100</sup> Virtually all decisions of the Circuit Court in civil claims may be the subject of a *de novo* appeal in the High Court.<sup>101</sup> Decisions by the High Court on appeals from the Circuit Court are final and conclusive and not appealable<sup>102</sup> although under section 38 of the Courts of Justice Act 1936 the High Court may refer any question of law arising in the appeal to the Court of Appeal by way of case stated.<sup>103</sup>

96 Byrne et al., *op. cit.*, at para 7.14, citing *The State (Turley) v O’Floinn* [1968] IR 245.

97 *Op. cit.*, at para. 7.15.

98 Section 52(2) of the Courts (Supplemental Provisions) Act 1961 and section 75 of the Court of Appeal Act 2014.

99 Section 51 of the Courts (Supplemental Provisions) Act 1961, extending section 2 of the Summary Jurisdiction Act 1857, and section 75 of the Court of Appeal Act 2014. See LRC CP 46-2007, *op. cit.*, at para 3.21 where the differences between the nature of the two forms of cases stated available to parties in the District Court are considered: “One of the most important of these differences arises in relation to a consultative case stated from the District Court to the High Court. The decision of the High Court can only be appealed to the Supreme Court where leave of the High Court has been obtained. No such requirement exists in the case of an appeal by way of case stated; in this case there is an automatic right of appeal to the Supreme Court. The necessity to obtain leave to appeal the decision of the High Court, coupled with the interlocutory nature of the consultative case stated have been advocated as the main reason for the more common use of the appeal by way of case stated. The rationale for the leave requirement in consultative cases stated is twofold; first, as there has been no final determination of the issues between the parties, a further unmeritorious appeal would add to delay in the case, and secondly, a consultative case stated in no way affects the normal avenue of appeal from the District Court to the Circuit Court. On the other hand, if an appeal by way of case stated is taken from the District Court to the High Court, then a party abandons their automatic right of a *de novo* appeal to the Circuit Court.”

100 Section 38 of the Courts of Justice Act 1936 as carried forward by sections 22, 23 and 48 of the Courts (Supplemental Provisions) Act 1961 is the principle provision concerning appeals from the Circuit Court to the High Court. See also section 37 of the Courts of Justice Act 1936 which concerns appeals from Circuit Court actions where no oral evidence is heard.

101 Byrne et al., *op. cit.*, at para. 7.21. Section 38 of the Courts of Justice Act 1936. See express reference in section 38(2) of the 1936 Act to a “rehearing of the action or matter”.

102 Section 39 of the Courts of Justice Act 1936.

103 Section 38(3) of the Courts of Justice Act 1936 and section 75 of the Court of Appeal Act 2014.

## 5. The Court of Appeal and the Supreme Court

### 5.1 The Court of Appeal

#### 5.1.1 Establishment of the Court of Appeal

In December 2006 the Government established a Working Group on a Court of Appeal (the “Working Group”) to consider the question of establishing a Court of Appeal. The terms of reference of the Working Group were threefold, viz. (a) to review and consider the necessity for a general Court of Appeal for the purpose of processing certain categories of appeals from the High Court (b) to address and consider such legal changes as were necessary for the purpose of establishing a Court of Appeal and (c) to make such other recommendations as were appropriate for the purposes of ensuring greater efficiencies in the practices and procedures of the Superior Courts.

The third limb of the terms of reference of the Working Group was, in general terms, of the same nature as a number of the terms of reference of the Review Group; the Review Group has also been tasked, *inter alia*, with making recommendations with a view to improving access to justice, improving procedures and practices so as to ensure timely hearings and the removal of obsolete, unnecessary or over-complex rules of procedure, thus ensuring greater efficiencies in litigation generally.

The Working Group ultimately recommended the establishment of a Court of Appeal.<sup>104</sup> As part of its work the Working Group engaged in comprehensive analysis and review of, *inter alia*, the infrastructure of the courts and of the issues that have a bearing on efficiencies in the practices and procedures of the Superior Courts.

#### 5.1.2 Organisation

The Court of Appeal is composed of a President and not more than 15 ordinary judges. The Chief Justice and the President of the High Court are *ex officio* members of the Court of Appeal. The Court may sit in divisions of three judges. Some pre-trial and procedural applications may be heard by the President alone or by another judge nominated by the President. The President of the Court of Appeal arranges the distribution and allocation of the business of the Court of Appeal including the arrangement of the divisions of the Court.<sup>105</sup>

It has been observed by leading commentators that the emphasis now placed on case management of appeals in the senior appellate jurisdictions represents a “new and significant departure” in the handling of appeals.<sup>106</sup>

#### 5.1.3 Jurisdiction

##### 5.1.3.1 Introduction

The constitutional basis of the Court of Appeal’s jurisdiction has been considered above.<sup>107</sup>

The general jurisdiction of the Court of Appeal is elaborated upon in statute.<sup>108</sup> In addition to vesting in the Court of Appeal jurisdiction that was previously vested in the Supreme Court and Court of Criminal Appeal, that legislation provides for the hearing of certain pre-trial matters by either the President of the Court of Appeal sitting alone, or by a judge of the Court of Appeal nominated by the President to hear such application. The jurisdiction vested in the Court of Appeal also includes all powers, duties and authorities incidental to the jurisdiction so vested.<sup>109</sup>

<sup>104</sup> See Report on the Working Group on a Court of Appeal, available at: <https://www.courts.ie/acc/alfresco/32627080-c831-4fbb-aeb6-297f703fd631/Report%20of%20the%20Working%20Group%20on%20a%20Court%20of%20Appeal.pdf/pdf#view=fitH>

<sup>105</sup> Section 7D, Courts (Supplemental Provisions) Act 1961.

<sup>106</sup> Delany et al., “Delany and McGrath on Civil Procedure”, 4<sup>th</sup> Ed., 2018, Round Hall, at para. 23.57.

<sup>107</sup> Section 2.2 of this chapter.

<sup>108</sup> Section 7A of the Courts (Supplemental Provisions) Act 1961, as inserted by section 8 of the Court of Appeal Act 2014.

<sup>109</sup> Section 7A(8) of the Courts (Supplemental Provisions) Act 1961.

The Court of Appeal has certain powers to stay proceedings before it for the purpose of enabling a party to apply to the Supreme Court for leave to bring a “leapfrog” appeal under Article 34.5.4.<sup>110</sup> By contrast with appeals from the District Court and the Circuit Court, appeals to the Court of Appeal do not involve a full re-hearing, and generally proceed on the basis of the trial judge’s judgment and transcript of evidence in the trial court, although the Court of Appeal may hear further evidence in some circumstances.<sup>111</sup> Decisions of the Court of Appeal are final and conclusive unless otherwise provided for in Article 34 of the Constitution. The Court of Appeal also enjoys an inherent jurisdiction to rule on matters consequent and ancillary to its main judgment.<sup>112</sup> It has also been observed that the inherent jurisdiction of the Court of Appeal extends to the jurisdiction to regulate and give effect to its own appellate jurisdiction.<sup>113</sup>

### 5.1.3.2 Appeals from the High Court

As indicated previously, the Court of Appeal has appellate jurisdiction from all decisions of the High Court to the extent save as otherwise provided by Article 34, and with such exceptions and subject to such regulations as may be prescribed by law.<sup>114</sup>

### 5.1.3.3 Appeals from the Circuit Court

An appeal lies from the Circuit Court to the Court of Appeal on a point of law by way of case stated.<sup>115</sup>

## 5.1.4 Caseload and caseflow

Fuller data on the civil caseload and caseflow of the Court of Appeal is contained in Appendix 2. That court had an incoming caseload of 539 civil appeals in 2019, compared with 637 in 2015, the first full calendar year of its operation. 491 such appeals were resolved in 2019, compared with 753 in 2015 (Chart 15, Appendix 2). These figures indicate a clearance rate for such cases by the court of 91 % approx. in 2019 compared with approx. 118 % in 2015 (Table 7, Appendix 2).

The average length of civil appeals – both those newly lodged with the Court of Appeal and the “legacy” appeals transferred to that court by the Supreme Court – was reported as 1,220 days in 2019, a significant increase on the average of 631 days reported in 2015 (Table 8, Appendix 2). This increase was due to the increased proportion of appeals disposed of by the Court of Appeal represented by “legacy” appeals which had been transferred to that court by the Supreme Court.

110 Section 7B, Courts (Supplemental Provisions) Act 1961. The “leapfrog” appeal is considered at section 5.2.2.2 of this chapter.

111 In the context of appeals to the Court of Appeal in civil proceedings, Order 86A rule 4 RSC provides:

“Subject to the provisions of the Constitution and of statute—

- (a) the Court of Appeal has on appeal full discretionary power to receive further evidence on questions of fact, and may receive such evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner,
- (b) further evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought,
- (c) on any appeal from a final judgment or order, further evidence (save as to matters subsequent as mentioned in paragraph (b)) may be admitted on special grounds only, and only with the special leave of the Court of Appeal (obtained by application by motion on notice setting out the special grounds),
- (d) the Court of Appeal may draw inferences of fact in accordance with law,
- (e) if the Court of Appeal considers that the record available to it of the proceedings in the court below is deficient, it may have regard to such evidence, or to such verified notes or other materials as the Court of Appeal deems expedient,
- (f) where the Court of Appeal considers it necessary, it may direct the Registrar to apply to the trial Judge for a report to the Court of Appeal on the trial or any part of the trial.”

112 Hogan et al., op. cit., at para. 6.3.33.

113 Ibid., at para. 6.3.45 where the authors discuss *Dhand v McCrabbe* (1958) 92 ILTR, *Superwood Holdings plc v Sun Alliance Plc* (No. 2) [1999] 4 IR 531, *The People (Director of Public Prosecutions) v O’Shea* [1982] IR 384; [1983] ILRM 549 and *Hughes v O’Rourke* [1986] ILRM 538.

114 As to the manner in which the Court of Appeal’s appellate jurisdiction may be excluded, see *Kelly v National University of Ireland Dublin* [2017] IECA 161.

115 Section 16 of the Courts of Justice Act 1947 and section 74 of the Court of Appeal Act 2014.

## 5.2 The Supreme Court

### 5.2.1 Organisation

The Supreme Court consists of the Chief Justice, President of the Court, and not more than nine ordinary Judges.<sup>116</sup> The Presidents of the Court of Appeal and High Court are *ex officio* judges of the Supreme Court.

The Court usually sits as a bench of three or five Judges and, exceptionally, seven judges. In the event that the Court-

- hears a case concerning the constitutional validity of an Act of the Oireachtas
- is requested to give an opinion on the constitutional validity of a Bill adopted by the Oireachtas referred to it by the President of Ireland under Article 26 of the Constitution or
- has to determine, pursuant to Article 12 of the Constitution, whether the President of Ireland has become permanently incapacitated

the Court must consist of a minimum of five Judges.

A court composed of five Judges, or exceptionally seven Judges, will also sit for appeals involving questions of law of particular importance or complexity.

Pre-trial applications and procedural matters or issues may be determined by the Chief Justice sitting alone or another judge of the Supreme Court nominated by the Chief Justice.

The introduction of an intermediate court of appeal required changes to the pre-existing jurisdiction of the Supreme Court. The “leapfrog” appeal is considered at section 5.2.2.2 of this chapter. The Supreme Court also has jurisdiction to receive appeals from the Court of Appeal pursuant to Article 34.5.3°.

### 5.2.2 Jurisdiction

#### 5.2.2.1 Third instance jurisdiction: appeals from the Court of Appeal

The Supreme Court exercises an appellate jurisdiction in respect of decisions of the Court of Appeal if the Supreme Court is satisfied that the decision involves a matter of general public importance, or in the interests of justice it is necessary that there be an appeal to the Supreme Court.<sup>117</sup>

The Supreme Court has ruled on the nature of this jurisdiction in a number of determinations. In *B.S. v DPP*<sup>118</sup> the Supreme Court identified the changes to its jurisdiction, observing that the constitutional function of the Supreme Court was “no longer that of an appeal court designed to correct alleged errors by the trial court”.<sup>119</sup> The Constitution now required it to be established that the decision sought to be appealed against involves a matter of general public importance or that it otherwise is in the interest of justice necessary to allow an appeal to the Supreme Court. The Court observed that the interests of justice would not normally require a further appeal from a decision of the Court of Appeal given the fact that the parties would at that stage have been afforded an opportunity to put their cases forward both at trial and on appeal.<sup>120</sup>

#### 5.2.2.2 Second instance jurisdiction: appeals from the High Court

The Supreme Court provided some guidance<sup>121</sup> on the test to be applied in determining whether or not an applicant has met the constitutional threshold in its first decision to grant leave to appeal directly from the

116 Section 1(2) (inserted by section 6(1) of the Courts and Court Officers Act 1995) amended by section 22, Courts and Civil Law (Miscellaneous Provisions) Act 2013.

117 Article 34.5.3° of the Constitution.

118 [2017] IESCDT 134; (Unreported, Supreme Court, 6 December 2017).

119 [2017] IESCDT 134, at para. 5.

120 *Ibid.* See also *Price Waterhouse Cooper (A Firm) v Quinn Insurance Limited (Under Administration)* [2017] IESC 73; [2017] 3 IR 812.

121 Hogan et al., *op. cit.*, at para. 6.3.107.

High Court in *Barlow v Minister for Finance*<sup>122</sup> and in a series of further cases,<sup>123</sup> notably *Wansboro v Director of Public Prosecutions*.<sup>124</sup> In *Wansboro* the Court stated:

“...It is, of course, the case that in order for leapfrog leave to be granted the general constitutional threshold of general public importance or interests of justice must be met. However, it is also necessary, in the case of leapfrog leave, that it be established that there are “exceptional circumstances” which would justify a direct appeal.”<sup>125</sup>

The Court noted that it had previously made clear that the Constitution now regards the Court of Appeal as being “the norm” and that the “leapfrog” appeal therefore requires “that there be some particular feature of the appeal which would warrant departing from that norm and allowing a direct appeal to this Court”.<sup>126</sup>

The Court indicated that the “starting point” has to be a consideration of the advantages of an “intermediate appeal” before the Court of Appeal, stating that it would be reasonable to expect that the issues that might come before the Supreme Court by way of further appeal from the Court of Appeal would be narrower and more focused than would be the case in the event of a direct appeal.

The Court considered the “new constitutional architecture”:

“...The purpose behind that requirement is, amongst other things, that it is more likely that this Court will be able to bring clarity to the important legal issues raised if it is possible to focus on those issues by excluding peripheral or additional questions which do not impact on the important questions which justify an appeal to this Court. Thus, the advantage of an intermediate appeal in many cases may well be that it would allow for a much greater focus in the event that the case ultimately comes to this Court.”<sup>127</sup>

The Court then proceeded to weigh the perceived advantages of an intermediate appeal against those factors which “*point sufficiently strongly in favour of allowing a direct appeal*”.<sup>128</sup> Noting that the headings identified did not amount to an exhaustive list, the Court considered the following issues to be of most relevance to a determination of the question of whether leave for a “leapfrog” appeal should be granted:

1. Costs: litigation places a significant financial burden on participants and that having to finance two appeals rather than one is a factor to be taken into account;
2. Speed: two appeals will inevitably prolong litigation; there may be instances where particular urgency of the case concerned may justify additional weight being attached to this factor;
3. Effect on other cases: in certain circumstances it would appropriate to have regard to the need for a speedy determination of a legal issue which has the potential to affect many other cases;
4. Whether or not the issue will be live: there may be cases which may or may not involve an issue of general public importance depending on how other issues in the case are determined, and in such cases the intermediate appeal may be of considerable importance because the issue that might meet the constitutional threshold may fall away.

The Court also considered the category of “leapfrog” appeals known as “certificate appeal” *i.e.* an appeal from the High Court to the Court of Appeal that cannot be pursued unless the High Court has issued a certificate permitting such appeal. The Supreme Court stated that while it did not propose to make a definitive ruling in relation to such appeals it wished to draw attention to a particular issue. The Court took the opportunity to affirm that the impossibility of pursuing an appeal to the Court of Appeal in a case where the Supreme Court was satisfied that the general constitutional threshold had been met may, at least in some cases, provide the appropriate exceptional circumstances justifying a “leapfrog” appeal.

122 [2015] IESCDET 8.

123 *Craydon Fishing Company Ltd v Sea Fisheries Protection Authority & ors* [2016] IESCDET 77 and *Re Adoption Acts, J.B. (a minor) & ors v Attorney General* [2017] IESCDET 25.

124 [2017] IESCDET 115.

125 *Ibid.* at para. 6.

126 [2017] IESCDET 115, at para. 6, with the Court citing *Fox v Mahon* [2015] IESCDET 2.

127 *Ibid.*

128 *Ibid.*

### 5.2.3 Caseload and caseflow

Fuller data on the civil caseload and caseflow of the Supreme Court is contained in Appendix 2. That court in 2019 had an incoming caseload of 323 civil proceedings, including applications for leave to appeal and substantive appeals, compared with 94 such cases lodged in 2015, the first full calendar year of its operation following the establishment of the Court of Appeal. 343 such cases were resolved in 2019, compared with 488 in 2015 (Chart 16 in Appendix 2). These figures indicate a clearance rate for such cases by the court of 106 % approx. in 2019 compared with approx. 519 % in 2015 (Table 9, Appendix 2). The latter clearance rate reflected a significant reduction of the pending “legacy” appeals disposed of in the transition to the Supreme Court’s new appellate jurisdiction.

The average length of proceedings lodged with the Supreme Court was reported as 2,936 days in 2019, compared with 1,700 days reported in 2015 (Table 10, Appendix 2). However, the average length of time for determination of an application for leave to appeal from issue to determination of the application was 153 days, with an average of 30 days from the date the papers supporting the application are ready to determination of the application.

## 6. Submissions to the Review Group

A number of respondents addressed the area of the jurisdiction of the courts in their submissions to the Review Group.

Ms Justice Leonie Reynolds of the High Court recommended that a review be undertaken of the jurisdiction of the High Court with a view to identifying proceedings which could be adequately dealt with in the Circuit Court or by some other appropriate forum, including by way of specialist tribunal.

A respondent practising barrister submitted that it would be appropriate for the Review Group to consider the most efficient distribution of cases between the Circuit Court and the High Court. He suggested that, with the exception of medical negligence claims and claims involving catastrophic injuries, the majority of personal injuries claims, even those involving relatively serious injuries, could be dealt with in the Circuit Court by a junior counsel alone. It was submitted that the current practice whereby a personal injuries case worth €60,001 typically involves one junior counsel and two senior counsel on the plaintiff’s side is needlessly wasteful of costs and undermines the junior bar by depriving junior barristers of the opportunity to develop their trial advocacy skills in straightforward cases.

He also suggested that the threshold distinction between the Circuit Court and High Court jurisdictions has the “invidious effect” of incentivising plaintiffs to commence proceedings in the High Court to pressurise defendants to settle to avoid higher costs and potentially much higher awards. The barrister also observed that the monetary thresholds of the District Court and the Circuit Court are not index-linked and that consequently, the jurisdiction of these courts shrink in real terms because of the effects of inflation as soon as the new time limits are set.

Judge Francis Comerford, judge of the Circuit Court, observed that there is a significant risk that the exercise of a greater jurisdiction by the Circuit Court would undermine the benefits stemming from the less costly service now provided for in that court in the lesser value cases. However, he also observed that a greater reliance on the Circuit Court for the resolution of civil disputes, if not too pronounced, could have some effect of reducing costs and that this might be supported by the fact that the maximum jurisdiction of the Circuit Court in real economic terms has reduced rather than increased over recent decades. Judge Comerford submitted:

“The overall conclusion of this outline, is that the relative value of the civil cases dealt with [in] the Circuit Court has been reduced. Aside from the further centralising effect of this policy, as far as costs are concerned, some measure of a reduction in costs could be achieved by an increase in the Circuit Court jurisdiction, provided that this increase was not radical.”

Judge John Brennan, Judge of the District Court, noted that the last increase in monetary limits in the District Court, although substantial, has not led to a proportionate increase in civil cases at District Court level and suggested that consideration should be given to an increase in the monetary jurisdiction of the District Court. Judge Brennan also suggested an amalgamation of some of the 25 different District Court areas given the enormous changes in transport and economic activity, describing the retention of so many District Court areas as “an archaic and unnecessarily restrictive compartmentalisation” of that court’s jurisdiction.

One member of the public submitted that the monetary jurisdiction of the Circuit Court be increased to €150,000, the limit on small claims in the District Court should be increased to €10,000 and the range of cases to be dealt with by way of small claims procedure be broadened.

By kind permission of those concerned the Review Group was provided with the February 2019 recommendations made to the Minister for Justice and Equality by the then President of the Circuit Court, Mr Justice Raymond Groarke, in relation to the proposed reconfiguration of the Circuits. President Groarke envisaged a modernisation and reconfiguration of the circuits, with the exception of the Dublin and Cork circuits, that would result in an increase in the amount of work done at Circuit Court venues through longer continuous court sittings.

He suggested that amongst other things, changes in work practices, changes in the volume of work coming through the Circuit Court and increases in both monetary jurisdiction and the number of Circuit Court judges made it an opportune time for a realistic appraisal of the status quo and for a consideration of how the work of the Circuit Court can be carried out more efficiently.

President Groarke observed that on those Circuits where judges are in a position to hold longer court sessions, a significant amount of work can be undertaken during such sessions and there will rarely be a backlog of work to be cleared. However, he noted that the size of the circuits currently makes it impossible for the assigned judge to hold sessions which will clear the optimum amount of work.

He further suggested that the most practical and sensible method to adopt in considering the configuration of new circuits is to calculate the judicial resources in measurement of *weeks for each county* over the years 2014, 2015, 2016, 2017 and 2018 and find the average over those five years. He noted that there may be a degree of inaccuracy in the final results but suggested that the exercise would provide the most accurate overview when compared to alternative methods (circuits re-drawn with reference to census figures, number of TDs etc.).

President Groarke identified re-drawn or reconfigured circuits and identified legislative changes required to achieve an increase in the number of circuits and to give effect to an increase in the amount of Circuit Court judges.

Proposals have also been made to the Minister by former President Horgan of the District Court for a review of the organisation of District Court districts.

## 7. Recommendations

### 7.1

The Review Group understands that the proposals made by Mr Justice Groarke, when President of the Circuit Court, to the Minister for Justice and Equality for reconfiguration of the Circuit Court circuits are to be subject to discussion with the senior judiciary of that court and does not consider it necessary to make any recommendation thereon in the circumstances.

### 7.2

The Review Group also understands that proposals made by Her Honour Judge Horgan when President of the Circuit Court, to the Minister for Justice and Equality for review of the organisation of District Court



districts are to be subject to discussion with the senior judiciary of that court and likewise does not consider it appropriate to make recommendations in the circumstances.

### 7.3

The Review Group has given consideration to the issue of whether or not the general threshold of €1,000,000 for admission of cases to the Commercial Court should be increased. The Review Group does not consider that such an increase is warranted at this time, but recommends that the threshold be kept under review, such review to be conducted every three years.

# CHAPTER 5

## CIVIL PROCEDURE IN THE COURTS



## 1. Introduction

In this chapter, consideration is given to the main features of the procedures that apply in the various court jurisdictions. The review it contains is not exhaustive, but is conducted with a view to identifying

- those practices and procedures that could be improved so as to ensure timelier hearings
- unnecessary or over-complex rules of procedure that require to be addressed and modernised.

Sections 2 to 4 examine the procedures in the District Court, the Circuit Court and the High Court respectively, and Section 5 examines the procedures in the Court of Appeal and the Supreme Court. Recent procedural reforms of relevance are considered in Section 6. The potential for assignment of certain functions to court officers, to include Deputy Masters, is considered in Section 7. The submissions received by the Review Group as part of the consultation exercise are set out in Section 8. Section 9 considers Alternative Dispute Resolution (“ADR”). Section 10 contains the Review Group’s conclusions and recommendations.

## 2. District Court procedure

### 2.1 Introduction

Civil practice and procedure in the District Court is governed by the District Court Rules (Civil Procedure) Rules 2014 (the “DCR”).<sup>1</sup> The introduction of these rules brought about significant changes and enhancements to civil procedure in the District Court, including provision for pleadings (a statement of claim in the claim notice and a defence) and the possibility of case management.

As noted in the preceding chapter, the District Court is a court of local and limited jurisdiction and the rules governing the District Court area in which proceedings are to be commenced are set out under Order 40, rule 4 DCR.<sup>2</sup> Where the procedure for the conduct of civil proceedings is not prescribed by the rules or by an enactment, or where for any other reason there is doubt about the manner or form of the procedure, the court may determine what procedure is to be adopted and may give directions.<sup>3</sup>

### 2.2 Commencement of proceedings

With the exception of certain particular categories of claims, civil proceedings in the District Court are commenced by way of claim notice<sup>4</sup> or, in certain types of case, by originating notice of application<sup>5</sup> or originating notice of appeal.<sup>6</sup> The appropriate form of claim notice or other form to be used will depend on the nature of the claim.<sup>7</sup>

Every claim notice must contain a statement of claim, which must, amongst other details -

- contain, in a summary form, a statement of all material facts on which the claimant relies, but not evidence by which those facts are to be proved
- contain the necessary particulars of every fact
- if the claim arises by or under any enactment, identify the specific provision of the enactment that is relied on

1 S.I. No. 17 of 2014. The District Court Rules 1997 as amended are cited as the District Court Rules 1997 to 2014.

2 See also Order 40A, rule 3 in relation to personal injury proceedings.

3 Order 39, rule 1(1) DCR.

4 In the Schedule to S.I. No. 17 of 2014 the term “claim notice” is defined as “...a document issued under these rules initiating civil proceedings in the District Court in which damages or other relief are claimed against a respondent, and where the context so requires, includes a personal injuries summons, and any reference in an enactment to a “civil summons” must, unless the context otherwise requires, for the purposes of these Rules be taken to be a reference to a claim notice;”

5 E.g. in cases of statutory applications or appeals under Order 40C DCR.

6 In cases of statutory appeals under Order 40D, DCR.

7 Claims for damages founded on contract and tort are commenced by Form 40.01 claim notice and debt claims are commenced by the Form 40.02 claim notice.

- state specifically the amount or other relief or remedy sought
- state the place where and the date when the claim arose
- in the case of a debt claim, state that the claim is for debt or liquidated damages, specify the amount claimed by way of debt or liquidated damages and include particulars of the claimant’s demand for payment
- if the claim is for the payment of money, state the amount claimed, or
- if the claim is for breach of contract, state the alleged breach or breaches of the contract
- unlike the procedure in the Circuit and High Courts, contain a list of all correspondence and other documents on which the claimant will rely at the trial including the date if any and a brief description of each document.<sup>8</sup>

Additional particulars may be required in the claim notice for specific types of case e.g. landlord and tenant proceedings.

Claims for damages for personal injuries are commenced by way of a personal injuries summons.<sup>9</sup> The contents of the personal injuries summons are prescribed by statute<sup>10</sup> and are common to all first instance jurisdictions. In addition to particulars identifying the plaintiff and defendant, that summons must specify -

- the injuries to the plaintiff alleged to have been occasioned by the wrong of the defendant,
- full particulars of all items of special damage in respect of which the plaintiff is making a claim,
- full particulars of the acts of the defendant constituting the said wrong and the circumstances relating to the commission of the said wrong,
- full particulars of each instance of negligence by the defendant.

In addition, a pleading served by the plaintiff in a personal injuries action must contain full and detailed particulars of the claim of which the action consists and of each allegation, assertion or plea comprising that claim.<sup>11</sup>

Claimants in personal injuries proceedings are required to verify their pleadings.<sup>12</sup>

Where a claimant alleges that he or she is unable at the time of the commencement of proceedings to include in the claim notice or personal injuries summons any of the information required by the relevant rules, the notice or summons must contain a statement explaining why the information could not be provided at the time of issue of the claim.<sup>13</sup>

### 2.3 Appearance and Defending proceedings in the District Court

A defence and appearance must be delivered within not later than 28 days from the date of service of the claim notice.<sup>14</sup> The respondent must, in the prescribed form, file an appearance with the District Court Clerk and deliver an “Appearance and Defence” to the claimant or to the claimant’s solicitor.<sup>15</sup>

In claims for damages the defence must -

8 Order 40, rule 5(8) DCR.

9 Form 40A.01 and Order 40A, rule 6 as amended by S.I. No. 327 of 2019: District Court (Personal Injuries: Section 8 Notices) Rules 2019.

10 Section 10 of the Civil Liability and Courts Act 2004.

11 Section 13(1)(a) of the Civil Liability and Courts Act 2004.

12 Section 14 of the Civil Liability and Courts Act 2004, as amended and Order 40A, rule 8 DCR.

13 Order 40, rule 5(10) and Order 40A, rule 6(3) DCR.

14 Order 42, rule 1 DCR.

15 Ibid.

- identify which of the facts contained in the statement of claim are admitted, not admitted and denied. A respondent who does not address the facts contained in the statement of claim in this way will be taken to have admitted the facts
- where a respondent states that a fact is denied, give reasons for denying the fact and if the respondent intends to prove a fact different from that stated in the statement of claim, state, with necessary particulars, the fact that the respondent intends to prove and
- identify, with particulars, any fact or matter which makes the claimant's claim not maintainable, or if not stated specifically might take the claimant by surprise or raises questions of fact not arising from the statement of claim.<sup>16</sup>

Where the defence arises by or under any enactment the specific provision relied upon must be identified in the defence.<sup>17</sup>

As with the claim notice – and again unlike the position in the other first instance jurisdictions – the defence must contain a list of all correspondence and other documents (other than any documents already identified in the statement of claim) on which the respondent will rely at the trial. The date of the document must be set out and a brief description of the document must be provided.<sup>18</sup>

A defence to a debt claim must state whether the claim -

- is disputed both as to liability and amount, or
- is disputed only as to amount and if so, what amount is admitted to be due, or
- is admitted in full and if so, whether the respondent proposes to pay immediately or requires time for payment.<sup>19</sup>

The District Court has broad powers to strike out or amend pleadings, or to stay proceedings, including where any matter in a pleading is unnecessary or scandalous or where a pleading discloses no cause of action or defence.<sup>20</sup>

In the case of personal injuries proceedings the contents of the defence are common to all first instance jurisdictions. The defence must specify -

- the allegations specified, or matters pleaded, in the personal injuries summons of which the defendant does not require proof
- the allegations specified, or matters pleaded in the personal injuries summons of which he or she requires proof
- the grounds upon which the defendant claims that he or she is not liable for any injuries suffered by the plaintiff and
- where the defendant alleges that some or all of the personal injuries suffered by the plaintiff were occasioned in whole or in part by the plaintiff's own acts, the grounds upon which he or she so alleges.<sup>21</sup>

16 Order 42, rule 3 DCR.

17 Order 42, rule 3(6) DCR.

18 Order 42, rule 3(8) DCR.

19 Order 42, rule 2 DCR.

20 Order 42, rule 15 DCR.

21 Section 12(1) of the Civil Liability and Courts Act 2004, as amended and form 40A.02 DCR. A counterclaim in a personal injuries action must specify: (a) the PPS number of the defendant; (b) the injuries to the defendant alleged to have been occasioned by the plaintiff's wrong; (c) full particulars of all items of special damage in respect of which the defendant is making a claim; (d) full particulars of the acts of the plaintiff constituting the wrong and the circumstances relating to its commission; (e) full particulars of each instance of negligence by the plaintiff.

In addition, a pleading served by the defendant must contain full and detailed particulars of each denial or traverse, and of each allegation, assertion or plea, comprising his or her defence.<sup>22</sup>

## 2.4 Particularising the claim or defence

In cases other than small claims and debt claims, the rules provide for the delivery of a notice requiring copy documents or further particulars.<sup>23</sup> A respondent may at any time before or at the time of delivery of a defence apply to the claimant -

- for copies of all or any documents listed in the statement of claim and upon which the claimant seeks to rely, or other documents referred to in the statement of claim
- requiring the claimant to provide further particulars which the respondent asserts are reasonably necessary as to specified matters in the statement of claim.

A claimant may make similar requests within 28 days of delivery of the respondent's defence.

The court may direct the delivery of documents or particulars and may also stipulate that where a party fails to deliver documents or particulars his or her claim or defence stands dismissed or struck out.

A party is entitled to deliver an amended statement of claim or other pleading within 28 days of receipt of further particulars arising from a request for particulars, or within such time period as the court may allow.

Unless otherwise ordered by the court, the costs of requesting particulars may only be allowed as part of the successful party's costs against the unsuccessful party where – and only where – the particulars are certified as necessary by the Court. The costs of replying to particulars may be recovered by the unsuccessful party against the successful party where the particulars are not certified as necessary by the Court.

## 2.5 The joining of parties to proceedings

Where persons allege that a right to relief arises from the same transaction, whether jointly or severally, or alternatively where if all such persons commenced civil proceedings a common question of law or fact would arise, those persons may join as claimants in one proceeding. In such a case the monetary jurisdiction of the District Court is limited to the maximum amount which a court may award in a civil proceeding.<sup>24</sup>

All persons may be joined as respondents in one civil proceeding against whom the right to any relief is alleged to exist,<sup>25</sup> and it is not necessary that every respondent be interested in defending all or every relief sought or cause of action pursued.<sup>26</sup>

A claimant may not be added to proceedings without his or her consent in writing.<sup>27</sup>

The rules envisage the joinder of a third party to proceedings without the necessity of a formal court application, although proceedings on a third party notice may be set aside by the Court at any stage.<sup>28</sup>

## 2.6 Default of appearance or pleading

In debt claims the claimant may apply for an order of judgment in default where the respondent has failed to (a) serve and file an appearance or (b) serve a defence within 28 days from the date of service of the claim notice or within such other time as may be fixed by the court.<sup>29</sup>

22 Section 13(1)(b) of the Civil Liability and Courts Act 2004.

23 Part 3 of Order 42 DCR regulates requests for copy documents or further particulars.

24 Order 43, rule 3(1) DCR. See also rule 3(2) DCR.

25 Order 43, rule 4(1) DCR.

26 Order 43, rule 4(4) DCR.

27 Or, in case of a person under a disability, without the appointment of a guardian ad litem or next friend: Order 43, rule 6(4) DCR.

28 Order 42A, rule 7 DCR.

29 Order 47, rule 1 DCR.

The application is grounded on various documents,<sup>30</sup> including an affidavit of debt and a certificate to be signed by the claimant or his or her solicitor to the effect that no appearance or defence has been filed.

The application for judgment may be considered by a judge “otherwise than at a sitting of the Court”.<sup>31</sup> The judge may list the application for hearing in court if he or she is not satisfied that the order should be made, and must do so where the claimant so requests.<sup>32</sup>

Where a party fails to comply with an order made by the court in civil proceedings and the court considers it just to do so, it may dismiss the civil proceedings or strike out any defence or counterclaim and give judgment or make any order (including any order for costs) as is then appropriate as if the party in default had not pleaded.<sup>33</sup>

In non-debt claims, where a respondent fails to either (a) serve and file an appearance or (b) serve a defence within the time limit set, application may be made to court for judgment in default. The application is brought by way of notice of motion.<sup>34</sup> The claimant must notify the respondent by letter of his or her intention to serve a notice of motion and at the same time consent to the late service of an appearance and defence within 14 days of the date of the letter.<sup>35</sup> On expiry of this period the claimant may bring an application for judgement, grounded on affidavit, and supported further by the necessary proofs.<sup>36</sup> The affidavit verifying the claimant’s claim must be sworn within one month before the date of the application for judgment.<sup>37</sup>

Where a respondent delivers a defence after service of the claimant’s application for judgment and, not less than six days before the return date of the motion, files a copy of the defence with the District Court Clerk, the motion will stand struck out and the respondent will be liable to pay to the claimant the costs of the motion for judgment in accordance with the Schedule of Costs.<sup>38</sup>

At the hearing of the application the court may, *inter alia*, give judgment on the claimant’s claim; permit the respondent to defend all or part of the claim; direct that a further affidavit or affidavits be filed, or adjourn the application for the hearing of further evidence; or refuse to make the order sought in the application.

Application may be brought to set aside judgment on the grounds discussed above in the context of debt claims.<sup>39</sup>

## 2.7 Amendment

The court may at any stage in civil proceedings:

- (a) permit a party to amend his or her statement of claim or pleading in the manner and on the terms the court considers just;
- (b) disallow any amendment already made; or
- (c) amend any defect or error in any proceeding.<sup>40</sup>

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30 Listed under Order 47 rule 2.

31 Order 47, rule 4(1) DCR.

32 Order 47, rule 4(2) DCR.

33 Order 47, rule 8 DCR.

34 Order 47A DCR.

35 Order 47A, rule 2(2) DCR.

36 Order 47A, rule 4 DCR.

37 This rule does not apply in the case of personal injury proceedings where the claimant relies on an affidavit of verification sworn more than one month before the date of the application: Order 47A, rule 4. See also Order 40A, rule 8 as to the claimant’s obligation to verify his or her personal injuries claim.

38 Order 47A, rule 3 DCR.

39 Order 47A, rule 9.

40 Order 45E, rule 1(1) DCR.

All amendments must be permitted as are necessary for the purpose of determining the real questions in controversy between the parties.<sup>41</sup>

## 2.8 Discovery

The issue of discovery is addressed in detail in Chapter 6.

## 2.9 Trial

Civil proceedings are set down for trial by way of service of a notice of trial, which must be filed with the District Court Clerk following service. Generally, the giving of notice of trial operates to set the claim (including any counterclaim) down for hearing at the next available time following the expiry of the period mentioned in the notice.<sup>42</sup>

The parties may request that the matter be specially fixed.<sup>43</sup> The Clerk notifies the party who has served notice of trial by returning to them a copy of the notice of trial with those details inserted, at which time the party who has served notice of trial must promptly notify all other parties of the time and place at which the trial is listed.<sup>44</sup>

A respondent may serve notice of trial or alternatively, where a claimant has failed to serve notice of trial within 10 days after delivery of the respondent's defence, the respondent may apply to the Court by notice of motion to dismiss the claim for want of prosecution.<sup>45</sup>

Service of notice of trial also triggers requirements with respect to the filing of documents in court. At the same time as filing the notice of trial the party serving notice of trial must file with the Clerk, for use by the Judge:

- (a) a set of copies of the pleadings, including particulars, and any affidavits in the case, in chronological sequence;
- (b) a set of copies of any correspondence relied on by either party, in chronological sequence;
- (c) copies of any other documents directed to be filed; and
- (d) where so directed for the time being by:
  - i. the President of the District Court in respect of civil proceedings in the Dublin Metropolitan District, or in respect of particular categories of civil proceedings including the proceedings concerned, in the Court generally or
  - ii. by a Judge permanently assigned to the Court district in which the civil proceedings were brought in respect of civil proceedings, or in respect of particular categories of civil proceedings including the proceedings concerned, in that Court district -
- (e) a completed case management questionnaire (Form 49.02, Schedule C).<sup>46</sup>

41 Order 45E, rule 1(2) DCR.

42 Order 49, rule 4 DCR.

43 Order 49, rules 4(6) and (7) DCR.

44 Order 49, rule 4(8) DCR.

45 Order 49, rule 6 DCR.

46 Order 49, rule 7 DCR.



## 2.10 Appeals and cases stated<sup>47</sup>

An appeal is brought by way of notice of appeal<sup>48</sup> which is to be served upon every party directly affected by the appeal within 14 days from the date on which the decision appealed from was given. Within the 14-day period the appealing party must also lodge the notice of appeal with the clerk.<sup>49</sup>

With the exception of cases of appeals from orders committing to prison under the Enforcement of Court Orders Acts, 1926 and 1940, or unless otherwise provided, an appeal does not operate as a stay of execution in civil proceedings or in summary proceedings of a civil nature unless the Court orders, and then only upon such terms as the Court may fix.<sup>50</sup>

## 2.11 Case management

In 2014, case management of proceedings was incorporated in the District Court Rules by a new Order – Order 49A (case management) – as part of the restatement of the civil procedural rules following the increase in the monetary jurisdictional limits of that jurisdiction.<sup>51</sup> Rule 1 of that Order generally empowers the court

“at any time and from time to time, of its own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of civil proceedings, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the cost of those proceedings.”<sup>52</sup>

More specifically, the court is empowered to -

- ensure that the issues, whether as to fact or law, are defined as clearly, as precisely and as concisely, as possible
- make orders or give directions with respect to pleadings, the exchange between the parties of statements of issues, the identifying of issues in dispute between the parties, particulars, discovery, inspection of documents, or otherwise, which may be necessary or expedient
- make inquiries of the parties so as to ascertain the likely length of the trial and the arrangements, if any, for witnesses, information and communications technology (including video conferencing) and any other arrangements which require to be made for the trial
- fix the time and mode of trial, and may fix a date for trial and may also give directions as to the service of a notice of trial
- make any orders and give any directions in respect of arrangements for the trial as the court considers necessary.<sup>53</sup>

Each representative of a party attending a case management hearing must ensure that he or she is sufficiently familiar with the civil proceedings and has authority from the party he or she represents to deal with any matters that are likely to be dealt with.<sup>54</sup>

47 Order 41 of the Circuit Court Rules prescribes the procedure with regard to the transmission of documents to the County Registrar and the listing of District Court appeals before the Circuit Court. The rules relating to the cases stated from the District Court to both the Court of Appeal and the High Court are set out in Order 102, DCR.

48 Form 101.1 in civil proceedings.

49 Order 101, rules 1 and 2. See also rule 3 in relation to an appeal from a refusal of an ex parte application. See also rules 8 and 9 which deal with service of the notice of appeal in circumstances where the person to be served with the notice of appeal had a solicitor on record and where the person was self-represented.

50 Order 101, rule 5 DCR.

51 Introduced by the District Court (Civil Procedure) Rules 2014 (SI No. 17 of 2014).

52 Order 49A, rule 1(1) DCR.

53 Order 49A, rule 1(2) DCR.

54 Order 49A, rule 4(3) DCR.

The court may adjourn the consideration of case management directions from time to time<sup>55</sup> and may, in the course of case management, and either of its own volition or on application of either party to the proceedings, invite the parties to engage in an ADR process, to which more detailed reference is made in Section 9.<sup>56</sup>

For civil proceedings to which the Mediation Act 2017 applies, the court may, on the application of any of the parties or of its own motion, invite the parties to consider mediation as a means of attempting to resolve the dispute and provide the parties with information about the benefits of mediation.<sup>57</sup>

Where the parties decide to engage in mediation the court may:

- (a) make an order adjourning the proceedings to such date as the court considers just and convenient in all the circumstances;
- (b) make an order extending the time for compliance by a party with any relevant provision of the rules or with any order of the court in the proceedings; or
- (c) make such other order or give such direction as the court considers necessary to facilitate the effective use of mediation.<sup>58</sup>

On the request of any party to a personal injuries action, the court may at any time before the trial and if the court considers that it would assist in reaching a settlement in the action, direct that the parties to the action meet to discuss and attempt to settle the action, with such meeting to be known as a “mediation conference”.<sup>59</sup>

## 3. Circuit Court procedure

### 3.1 Introduction

Civil practice and procedure in the Circuit Court is governed by the Circuit Court Rules 2001 (“CCR”).<sup>60</sup> Where the Circuit Court Rules do not provided expressly for a practice or procedure, the practice and procedure in the High Court may be followed.<sup>61</sup>

As mentioned in the preceding chapter, the Circuit Court is a court of local and limited jurisdiction and the CCR<sup>62</sup> specify the county in which proceedings are to be brought and heard.

### 3.2 Commencement of proceedings

Most proceedings are commenced in the Circuit Court by way of “civil bill”,<sup>63</sup> by personal injuries summons (as in the case of the other first instance jurisdictions), a minority of proceedings types being initiated by

55 Order 49A, rule 1(3) DCR.

56 Order 49A, rule 2 DCR.

57 Order 49B, rules 2(1) and 8 DCR.

58 Section 16(2) of the 2017 Act.

59 Section 15, Civil Liability and Courts Act 2004

60 S.I. No. 510 of 2001.

61 Order 67, rule 16 CCR.

62 See Orders 2 and 5 CCR, and forms of Civil Bill.

63 See LRC CP 46-2007, op. cit., at paras. 2.132 – 2.167 where the Law Reform Commission traces the history of the civil bill. See also Law Reform Commission, *Report on Consolidation and Reform of the Courts Acts*, LRC 97-2010, at para. 1.11 which provides: “As to civil cases, because the key initiating document remains the civil bill, it is clear that the Circuit Court derives its jurisdiction from the pre-1922 County Courts and Recorders, notably governed by the Civil Bill Courts (Ireland) Act 1851 and the County Officers and Court (Ireland) Act 1870.”

originating notice of motion.<sup>64</sup> The rules prescribe different types of civil bill depending on the subject matter of the claim or action.<sup>65</sup> The types of Civil Bill include -

- Ordinary Civil Bill
- Equity Civil Bill
- Ejectment Civil Bill
- Testamentary Civil Bill
- Landlord and Tenant Civil Bill
- Housing Civil Bill
- Planning Civil Bill
- Election Civil Bill.

Civil bills must contain an indorsement of claim and this is incorporated into the body of the civil bill. The indorsement of claim contains particulars of the plaintiff's claim including the basis upon which jurisdiction is claimed together with such further particulars as required depending on the nature of the claim. The civil bill must also contain particulars of the plaintiff's demand, including the nature, extent and grounds of the demand and shall contain particulars of all items of special damage claimed.<sup>66</sup> In claims for a debt or liquidated damages the indorsement shall also state the amount claimed for debt and for costs.<sup>67</sup>

In the case of actions for sale, possession and well-charging relief, the civil bill must contain a special indorsement of claim and an affidavit verifying the claim must be served with the civil bill.<sup>68</sup>

### 3.3 Appearance and defending proceedings in the Circuit Court

A defendant who intends to defend a civil bill must lodge an appearance in the relevant Circuit Court Office or send the appearance by post to the County Registrar<sup>69</sup> within 10 days from the service of the Civil Bill, exclusive of the day of service, or such further time as may be agreed between the parties.<sup>70</sup> Where the defendant or his or her solicitor consents to the receipt of documents by e-mail this should be stated in the appearance.<sup>71</sup>

A defendant who has entered an appearance is obliged within a further period of 10 days to deliver a defence and the defence must state clearly the grounds upon which the defendant disputes the plaintiff's claim.<sup>72</sup> A defendant may also set off or set up by way of counterclaim against the plaintiff's claim any right or claim.<sup>73</sup> Reference has been made in Section 2.3 to the requirements as to content of a defence in personal injuries proceedings.

There are no pleadings subsequent to the defence or defence and counterclaim in the Circuit Court.<sup>74</sup>

### 3.4 Particularising the claim or defence

The parties to civil proceedings may, subject to time limitations and by way of notice in writing, request copies of all or any of the accounts or documents upon which the action or defence or counterclaim is

64 E.g. in cases of statutory applications (Order 64B CCR) and statutory appeals (Order 64C CCR).

65 Order 5 CCR. Each civil bill must conform to the appropriate form in the Schedule of Forms to the CCR and the categories of civil bill are set out in Forms 2A to 20.

66 Order 5, rule 5 CCR.

67 Order 5, rule 6 CCR.

68 See Order 5B CCR and Circuit Court practice direction CC11.

69 Order 15, rule 1(2) CCR.

70 Order 15, rule 2 CCR.

71 Order 15, rules 1(4) and (5) CCR.

72 Order 15, rule 5 CCR.

73 Order 15, rule 7 CCR.

74 Order 15, rule 18 CCR, subject to Order 17 CCR, which concerns particulars and further particulars.

founded, and these must be delivered within seven days after receipt of such notice on payment of the usual scrivenerly charges.<sup>75</sup> Parties may also raise a request in writing for such information as is reasonably necessary as to any specified matters arising upon the claim in a civil bill or upon the defence.<sup>76</sup>

The court may order such further and better statement of the nature of a claim or defence, or further and better particulars of any matter stated in any pleading, upon terms as to costs and otherwise as may be just. Where a party fails to comply with such order the court may stay or dismiss the claim or strike out the defence.<sup>77</sup>

### 3.5 The joining of parties to proceedings

Two or more persons may be joined in one action as plaintiffs where they all allege a right to relief in respect of or arising out of the same transactions<sup>78</sup> and a plaintiff may join, as defendants, all such persons against whom the right to any relief is alleged to exist.<sup>79</sup>

The court has a broad discretion to take steps necessary to ensure that the court is in a position to adjudicate on the real issues in controversy between the parties. No claim will fail because of the mis-joining or non-joining of parties, and the Judge may at any stage of the proceedings, either upon or without the application of any party, and on such terms as may appear just, order that the name of any party who has been improperly joined, be struck out, and that any person who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Judge to adjudicate upon and settle all the questions involved in the cause or matter, be added as a plaintiff or a defendant.<sup>80</sup>

An application must be made to the court for leave to join a third party to proceedings where a defendant claims that he or she is entitled to indemnity or contribution, or on certain additional grounds.<sup>81</sup> The application is made on notice to the plaintiff unless otherwise ordered by the court, after the service of an appearance and at any time prior to the trial of the action.<sup>82</sup>

The third party notice must set out the grounds of the defendant’s claim or the nature of the question to be determined. The rules provide for service of amended pleadings where a defendant elects to join a proposed third party as a defendant.<sup>83</sup>

Application for the addition or substitution of a party, or for the service of a third party notice on the plaintiff, may be made to the county registrar.<sup>84</sup>

### 3.6 Summary applications

Applications may be made for summary judgment in relation to specific categories of claim, namely -

- for a debt or liquidated demand in money, or
- for the delivery of a chattel or specific goods in an action for detinue, or
- for the enforcement, performance or carrying out of a trust, or
- for ejectment, with or without a claim for rent or mesne profits.

75 Order 17, rule 2 and Form 7 of the Schedule of Forms, CCR.

76 Order 17, rule 3 and Form 8 of the Schedule of Forms, CCR, entitled “Notice Requiring Further Information”.

77 Order 17, rule 4 CCR.

78 Order 6, rule 1 CCR.

79 Order 6, rule 2 CCR.

80 Order 6, rule 4 CCR.

81 Viz.: that (s)he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any or either of them. See Order 7, rule 1 CCR.

82 Order 7, rules 2 and 3 CCR.

83 Order 7, rule 4 CCR.

84 Para. 1 (x) and (xxix), Second Schedule, Courts and Court Officers Act 1995, as amended.

A plaintiff may apply for judgment notwithstanding that the defendant has entered an appearance or delivered a defence. Application is brought by way of notice of motion grounded on affidavit verifying the plaintiff's claim and is heard on affidavit.<sup>85</sup>

The Court may enter judgment on the application<sup>86</sup> or may dismiss it, grant leave to defend the claim, or treat the hearing of the application as the trial of the action and dispose of the action summarily.<sup>87</sup>

### 3.7 Default of appearance or pleading

In cases of claims for a debt or liquidated demand, where a defendant has not entered an appearance or, having entered an appearance, has not delivered a defence within the time prescribed, the plaintiff may apply to the Circuit Court Office for judgment.<sup>88</sup>

In all other civil actions, and again where a defendant has not entered an appearance or delivered a defence, application may be made by way of notice of motion, to be served on the defendant, for judgment. Prior to service of a motion for judgment the plaintiff must correspond with the defendant at least 14 days prior to service of the motion giving notice of intention to apply for judgment and at the same time consenting to the late entry of an appearance or late delivery of a defence within 14 days from the date of the letter.<sup>89</sup>

A party against whom judgment in default of appearance or defence has been given may, not later than 10 days after he or she becomes aware of it, apply to vary or set aside the judgment.<sup>90</sup>

### 3.8 Amendment

In the Circuit Court, pleadings may be amended by order of the court on such terms as it considers just, at any stage of the proceedings. All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.<sup>91</sup>

### 3.9 Discovery

The issue of discovery is addressed further in Chapter 6.

### 3.10 Trial

Civil bills are not given an immediate return date and are set down for hearing by way of notice of trial. By way of exception, certain proceedings, e.g. for possession and sale of land by a mortgagee, are given a return date before the County Registrar.

When a defence has been entered and served the plaintiff may serve notice of trial, and where a plaintiff has failed to serve notice of trial within 10 days after delivery of the defence, the defendant may serve notice of trial.<sup>92</sup>

Arrangements for lodging and service of notice of trial differ between the Dublin Circuit and all other circuits.<sup>93</sup>

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85 Subject to where the judge requires or permits evidence to be given orally; Order 28, rule 4 CCR.

86 Order 28, rule 5 CCR.

87 Order 28, rule 7 CCR.

88 Order 26 CCR.

89 Order 27 CCR.

90 Order 30 CCR.

91 Order 65, rule 1 CCR.

92 Order 33, rule 4 CCR.

93 See Order 33, rules 2 and 3 CCR.

In the Dublin Circuit, with certain exceptions,<sup>94</sup> the parties must complete a certificate of readiness prior to setting the proceedings down for trial<sup>95</sup> and file the certificate in the Circuit Court Office at the time of filing of notice of trial. The parties are required to consult with a view to agreeing on the accurate completion of the certificate of readiness. The certificate itself must certify -

- that the proceedings are ready for trial without the necessity for further motions or court listings;
- whether or not it is proposed to call expert witnesses and, in the event it is, that such witnesses have: (a) carried out any necessary inspections; (b) prepared and exchanged with each other their respective reports; and (c) met with each other and considered those reports.

Practice directions also prescribe the procedure for the listing of cases for trial on particular circuits.<sup>96</sup>

If it appears to the court that there is a question of law which it would be convenient to have decided before any evidence is given or before any issue of fact is tried in the case, the court may direct that the question of law be tried in advance, and may stay any further part of the proceedings which may be dependent on the decision on the question of law.<sup>97</sup>

The court may also order that different questions of fact be tried by different modes of trial, or that one or more questions of fact be tried before the others.<sup>98</sup>

### 3.11 Appeals and cases stated

Appeals from the Circuit Court to the High Court in cases originally heard outside Dublin are generally brought to the High Court on circuit where the appeal involves the hearing of oral evidence, and to the High Court sitting in Dublin where no oral evidence is to be heard.<sup>99</sup> The notice of appeal must be served on every party directly affected by the appeal within 10 days from the date on which the judgement or order appealed from was pronounced in open court.<sup>100</sup>

Appeals to the High Court from the Circuit Court are determined on a full re-hearing of the case, and the appellant is not obliged to identify the grounds of appeal in the notice of appeal.

Within 10 days the appellant must meet certain requirements in terms of lodging copies of the notice of appeal and other documents and these requirements differ depending on whether the appeal is to the High Court on circuit or to the High Court sitting in Dublin.<sup>101</sup> Immediately prior to the commencement of an appeal the appellant must lodge with the County Registrar or with the High Court registrar, depending on whether the appeal is to be heard in Dublin or on circuit, a book of appeal.<sup>102</sup>

Fresh evidence upon the hearing of an appeal in respect of which no oral evidence was given at first instance may be admitted by way of affidavit, with the opposing party entitled to serve and lodge an

94 Viz. family Law proceedings, proceedings under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, proceedings in which an Order 19A case progression direction has been given and personal injuries proceedings. In the case of personal injuries proceedings, practitioners are required to give 14 days' written notice of their intention to set a matter down for trial in the Dublin Circuit Court. A copy of such notice should be filed in the Circuit Court Office at the same time as the notice of trial (Circuit Court practice direction CC05).

Under an earlier practice direction of the 8<sup>th</sup> January 1999, parties requesting trial dates must be ready for hearing, ensure that all pre-trial matters have been finalised and advise the court of the likely duration of the matter and in the case of ordinary civil matters whether liability remains an issue.

95 Circuit Court practice direction CC21, as amended by practice direction CC22.

96 Circuit Court practice directions CC15 and CC18.

97 Order 34, rule 1 CCR.

98 Order 34, rule 2 CCR.

99 Section 37, Courts of Justice Act, 1936.

100 Order 61, rule 2 RSC.

101 Order 61, rule 3 RSC.

102 Order 61, rule 4 RSC.

answering affidavit, or to apply to the court at the hearing of the appeal for leave to submit such evidence as may be necessary to address the fresh evidence.<sup>103</sup>

The party appointed by the court to have carriage of a case stated<sup>104</sup> or where no such party has been appointed, the party who requests that a case be stated, must prepare and submit to any other party in the case, without delay, a draft of the case for agreement. The court may also give such directions in relation to the preparation of the case stated as may be appropriate. Where no agreement has been reached, or no draft has been prepared or submitted within the time allowed, the Judge may refuse to state a case or adjourn the matter, and in any event may fix the terms of the case and state and sign it. As soon as the case stated has been signed it is lodged with the county registrar for transmission to the Court of Appeal.

### 3.12 Case management

Case management in the Circuit Court has been in operation for family cases since 2008 and for civil cases more generally since 2010, and in that jurisdiction is known as “case progression”. Case management in the Circuit Court differs from that in the District Court and the High Court largely in that it is conducted by the county registrar rather than a judge.

Case Progression<sup>105</sup> applies to the following proceedings -

- equity proceedings
- proceedings on foot of a succession law civil bill
- any proceedings which include a claim for specific performance or for damages in breach of contract in respect of the construction, extension, alteration or repair of a building or other structure
- any other category of proceedings to be designated by the President of the Circuit Court as proceedings which may be subject to case progression.<sup>106</sup>

The stated purpose of case progression is “to ensure that proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the costs of the proceedings and that the time and other resources of the court are employed optimally.”<sup>107</sup>

A case progression direction may be given by the County Registrar or Judge, of his or her own motion, at any listing or hearing of the proceedings or on application by motion of any party.<sup>108</sup> The direction may be given where warranted by the complexity of the proceedings, the number of issues or parties, the likely volume of evidence or for some other special reason to be specified in the order of the court.

Where a case progression direction is given and the parties are summoned to attend a case progression hearing,<sup>109</sup> at that hearing the County Registrar may make orders and give directions with a view to achieving the objectives set out in Order 19, rule 2 CCR, set out above, and to this end the County Registrar may make orders and give directions as to issues to be determined, pleadings, affidavits and statements to be served and further interlocutory matters.<sup>110</sup>

The County Registrar may make various ancillary orders, including directing that the matter be listed before a Judge in circumstances where there has been undue delay or default by any party to the proceedings.<sup>111</sup>

103 Order 61, rule 8 RSC.

104 The procedure for stating a case from the Circuit Court to the Court of Appeal is set out under Order 62 CCR and Order 86B RSC.

105 Order 19A CCR contains the case progression procedure.

106 Order 19A rule 1(2) CCR. See also rule 1(3) of that Order for particular categories of action that fall outside of the remit of Order 19A.

107 Order 19A rule 2 CCR.

108 Order 19A, rule 3 CCR.

109 Order 19A, rule 4(1)(a) CCR.

110 Order 19A, rule 4(2) CCR.

111 Order 19A, rule 8 CCR.

The County Registrar may, at a case progression hearing – either on the application of any of the parties on notice or of his or her own motion – when he or she considers it appropriate and having regard to all the circumstances of the case, order that the proceedings or any issue therein be adjourned for such time, ordinarily not exceeding 28 days, and invite the parties to use conciliation, arbitration or another dispute resolution process (not including mediation) to settle or determine the proceedings or issue.<sup>112</sup>

The court may on a party’s application or of its own motion, in any civil proceedings to which the Mediation Act 2017 applies, invite the parties to consider mediation and thereafter, having heard the parties, adjourn the proceedings, extend the time for compliance by a party with rules of court or with any order of the court, or make orders or give directions necessary to facilitate the effective use of mediation.<sup>113</sup>

With regard to ADR processes other than mediation, the Court may, either on the application of any of the parties or of its own motion, when it considers it appropriate and having regard to all the circumstances of the case, order that proceedings or any issue therein be adjourned for such time as the Court considers just and convenient, and-

- invite the parties to use such a process to settle or determine the proceedings or issue, or
- where the parties consent, refer the proceedings or issue to that process.<sup>114</sup>

As previously mentioned in relation to the District Court, section 15, Civil Liability and Courts Act 2004 empowers the court to direct a “mediation conference” in personal injuries cases.<sup>115</sup>

## 4. High Court procedure

### 4.1 Introduction

The rules governing civil procedure in the High Court are set out in the Rules of the Superior Courts 1986 (“the RSC”). It has been observed that the RSC “...updated but in essence continued in force the system of practice which had developed in the court system by the end of the 19<sup>th</sup> century”.<sup>116</sup> However, it should be noted that the RSC have been amended by way of statutory instrument on not less than 190 occasions since 1986 to reform procedures, facilitate recourse to ADR, accommodate new jurisdiction conferred on the Superior Courts, and respond to developments in case-law and technology.

### 4.2 Commencement of proceedings

Depending on the nature of the action and the reliefs sought, proceedings are commenced in the High Court by either (a) an originating summons; (b) a petition; or (c) an originating notice of motion.

As to (a), there are four forms of originating summons, viz.:

1. the plenary summons;
2. the personal injuries summons;
3. the summary summons; and
4. the special summons.

A *plenary summons* is used to initiate a claim in the High Court where the proceedings require a trial with oral evidence following the exchange of pleadings.<sup>117</sup> The plenary summons does not, on being issued, receive a return date before the court.

The plenary summons has been described as the “default” summons,<sup>118</sup> with Order 1, rule 6 RSC providing that in all proceedings (other than proceedings to take a minor into wardship) commenced by originating

<sup>112</sup> Order 19A, rule 7 CCR.

<sup>113</sup> Section 16, Mediation Act, 2017 and Order 33A, rule 2 CCR.

<sup>114</sup> Order 33A, rule 3(1) CCR.

<sup>115</sup> See also Order 5A, rule 9(5) CCR.

<sup>116</sup> Byrne et al., op. cit., at para. 6.28.

<sup>117</sup> Order 1, rule 2 and Form No. 1 in Appendix A Part I RSC.

<sup>118</sup> Delany et al., op. cit., at para. 2.07.



summons, the procedure by plenary summons shall be obligatory except where the procedure by summary or special summons is required or authorised by the RSC. While the plenary summons contains an indorsement of claim – entitled a “General Indorsement of Claim” – this is intended to be no more than a general statement of the relief claimed.<sup>119</sup>

The precise nature and extent of a plaintiff’s claim is set out in a separate document called a statement of claim. The plaintiff *may* deliver a statement of claim with the plenary summons<sup>120</sup> or within 21 days from the service of the plenary summons. Where the plaintiff fails to comply with these time limits, and unless the defendant consents in writing to the late delivery of the statement of claim, leave of the court for the late delivery of the statement of claim must be sought.<sup>121</sup>

The obligation to deliver a statement of claim only arises where a defendant, either at the time of entering an appearance to a plenary summons, or within eight days thereafter, gives notice in writing to the plaintiff requiring a statement of claim to be delivered.<sup>122</sup> Every statement of claim must state specifically the relief which the plaintiff claims, either simply or in the alternative.<sup>123</sup> With the exception of personal injuries proceedings, where a plaintiff intends or proposes to offer expert evidence on any matter at the trial, the statement of claim must disclose that intention or proposal and state succinctly the field of expertise concerned and the matters on which expert evidence is intended or proposed to be offered.<sup>124</sup>

As mentioned in Section 2.2 of this chapter, personal injuries actions are required by statute to be commenced by way of *personal injuries summons*. The personal injuries summons does not, on being issued, receive a return date before the court.

A *summary summons* is used to initiate proceedings that are capable of summary disposition, on affidavit and without the need for the exchange of pleadings.<sup>125</sup> This summary summons procedure is commonly invoked in claims for a liquidated sum of money. The summary summons does not receive a return date before the court.

A *special summons* is used to initiate proceedings that are, as in the case of the summary summons, capable of disposition summarily without further pleadings<sup>126</sup> and without the necessity for oral evidence. The court rules list 25 types of claim that may be commenced by way of special summons and also provide that proceedings may be commenced by way of special summons in any other matters as the Court may think fit to dispose of by special summons.<sup>127</sup> The special summons procedure generally applies in cases – actions concerning land, trusts and the administration of estates<sup>128</sup> – where the Court requires to determine issues of law and it is unlikely that there will be substantial dispute as to the facts.

Both the summary summons and the special summons contain a “Special Indorsement of Claim”, which must state specifically and with all necessary particulars the relief claimed and the grounds for that relief.<sup>129</sup>

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119 Order 4, rule 2 RSC.

120 Order 20, rule 2 RSC.

121 Order 122, rules 7 and 8 RSC.

122 Order 20, rule 3 RSC.

123 Order 20, rule 7 RSC.

124 Order 20, rule 12 RSC.

125 Order 1, rule 3 RSC. See also Order 20, rule 1 RSC.

126 Order 20, rule 1 RSC.

127 Order 3, rule 22 RSC.

128 This is a non-exhaustive list.

129 Order 4, rule 4 RSC.

Unlike the other originating summonses previously mentioned, a special summons is given a return date on issuance and the matter is made returnable before the Master of the High Court (“the Master”).<sup>130</sup> The plaintiff’s claim as indorsed on the summons must be verified by affidavit.<sup>131</sup>

*Petitions* are generally used to commence proceedings in a limited number of instances, generally where there is no identifiable defendant or where the proceedings may require to be brought on notice to a large number of persons.<sup>132</sup> A petition requires to be presented<sup>133</sup> in the case of an application to wind up or have an examiner appointed to a company,<sup>134</sup> or to have a person adjudicated bankrupt<sup>135</sup> or taken into wardship.<sup>136</sup>

Proceedings may be commenced by *originating motion* – whether on notice or without notice (“*ex parte*”) depending on the nature of the claim – where this is specifically provided for by the RSC.<sup>137</sup> This procedure is suited to cases requiring the determination of points or issues of law as opposed to conflicts of fact. Originating motions are generally grounded on affidavit. At the time of issue of an originating motion the motion is given a return date for an initial hearing before the court.

The form and content of pleadings in the High Court are regulated by the rules of court. Order 19 RSC sets out a number of both general and specific rules that apply to the many different types of cases that are heard in the High Court. Order 19, rule 3 prescribes what has been described as the “golden rule of pleading”:<sup>138</sup>

“Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures and not in words. Signature of counsel shall not be necessary; but where pleadings have been settled by counsel they shall be signed by him; and if not so settled they shall be signed by the solicitor, or by the party if he sues or defends in person.”

Special statutory requirements apply to the content of pleadings in personal injuries actions, as referred to in Section 2.3 of this chapter. In view of the level of detail of the claim required in a personal injuries summons, a statement of claim is not required to be delivered in such actions.

Specific requirements are also imposed in relation to the pleadings in other categories of action, including -

- cases alleging, misrepresentation, fraud or breach of trust<sup>139</sup>
- civil wrongs<sup>140</sup> and
- probate actions where issues of capacity and undue influence are raised.<sup>141</sup>

The High Court has broad powers to strike out any indorsement or pleadings which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action.<sup>142</sup> The court may

130 Order 38, rule 1 RSC.

131 Ibid.

132 Delany et al., op. cit., at para. 2.95.

133 Order 5, rule 15 RSC.

134 Order 74; Order 74A RSC.

135 Order 76 RSC.

136 Order 67 RSC.

137 See, e.g. Order 84B, RSC (Statutory applications procedure) and Order 84C RSC (Statutory Appeals procedure).

138 Delany et al., op. cit., at para. 5.09.

139 Order 19, rule 5(2) RSC.

140 Order 19, rule 5(1) RSC.

141 Order 19, rule 6 RSC.

142 Order 19, rule 27 RSC. Note that where the High Court makes an order under Order 19, rule 27 it may order the costs of the application to be paid as between solicitor and client.

also order any pleading be struck out on the grounds that the pleading discloses no reasonable cause of action or answer.<sup>143</sup>

### 4.3 Appearance and defending proceedings in the High Court

In the High Court different time limits apply to the entry of appearance depending on the manner in which proceedings have been commenced -

- an appearance to a plenary summons or summary summons must be entered within eight days after the service of the summons, exclusive of the day of service, unless the Court shall otherwise order<sup>144</sup>
- similarly, in personal injuries proceedings a defendant is required to enter an appearance within eight days after service of the summons
- a defendant to a special summons may enter an appearance at any time, but shall not, without the leave of the Court, be entitled to be heard in the proceedings unless he has entered an appearance<sup>145</sup>
- a respondent to certain categories of proceeding commenced by way of originating notice of motion must enter an appearance within eight days after service of the notice of motion. A respondent who has not entered an appearance shall not, without the leave of the court, be entitled to be heard in such proceedings.<sup>146</sup>

In plenary proceedings, a defendant who has entered an appearance is required to deliver their defence and counterclaim (if any) -

- within 28 days from the date of delivery of the statement of claim or from the time limited for appearance mentioned above, whichever is the later and
- within 28 days from the entry of an appearance where the defendant does not by notice require a statement of claim.<sup>147</sup>

The rules of court prescribing general and specific requirements as to the form of pleadings,<sup>148</sup> are also applicable to defences -

- every allegation of fact in any pleading, not being a petition, if not denied specifically or by implication, or stated to be not admitted, shall be taken to be admitted<sup>149</sup>
- a defendant, or a plaintiff where a counterclaim has been raised, must raise by his pleadings all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings.<sup>150</sup>
- it is not sufficient for a defendant in his defence (or for a plaintiff in his reply) to deny generally the grounds alleged by the statement of claim or defence and counterclaim, but the relevant party must deal specifically with each allegation of fact, of which he does not admit the truth, except damages.<sup>151</sup>

A person named in a defence as a party to a counterclaim may deliver a reply to the counterclaim within the time permitted to deliver a defence, the defence and counterclaim being regarded for that purpose as

143 Order 19, rule 28 RSC.

144 Order 12, rule 2(1) RSC.

145 Order 12, rule 2(2) RSC.

146 Order 12, rule 2A(a) RSC.

147 Order 21, rule 1 RSC.

148 Order 19 RSC.

149 Order 19, rule 13 RSC.

150 Order 19, rule 15 RSC. The example provided in that rule is that of a defence based on the Statute of Limitations.

151 Order 19, rule 17 RSC. See also Order 19, rule 19 RSC which precludes insufficiently specific denials of allegations of fact, and Order 19, rule 20 RSC, which deals with bare denials when a contract is alleged in any pleadings.

a statement of claim.<sup>152</sup> There are further and detailed rules in relation to both defences and counterclaims and in relation to denials and defences in particular classes of claim, including -

- actions for a debt or liquidated demand<sup>153</sup>
- actions upon bills of exchange, promissory notes or cheques<sup>154</sup>
- certain landlord and tenant actions under Order 2, rule 1 RSC.<sup>155</sup>

In personal injuries proceedings the defendant is obliged to deliver a defence within eight weeks of the service on them of the personal injuries summons.<sup>156</sup>

#### 4.4 Summary summons and special summons procedures

A plaintiff may in certain circumstances apply to the court for summary judgment.

The summary summons procedure is used most frequently in claims for a debt or liquidated sum of money.<sup>157</sup> The first opportunity for judgment in such cases arises where a defendant fails to enter an appearance within eight days after service of the summons.<sup>158</sup> The plaintiff may then apply for judgment in default of appearance in the Central Office in accordance with the procedure set out in Order 13 RSC, except in the limited instances where this procedure is not available.<sup>159</sup>

Where a defendant has entered an appearance to a summary summons, the plaintiff must set the summons down for hearing before a Judge of the High Court.<sup>160</sup> The application to the court is brought by way of notice of motion and the application is heard on affidavit.<sup>161</sup> Where a defendant seeks to “show cause” against or defend the motion he must do so by affidavit,<sup>162</sup> and the affidavit must state whether the defence alleged goes to the whole or to part only, and (if so) to what part, of the plaintiff’s claim.<sup>163</sup>

From this point onwards the proceedings will proceed along one of three possible tracks. The court may:

- (a) give judgment for the relief to which the plaintiff may appear entitled; or
- (b) dismiss the action; or
- (c) adjourn the case for plenary hearing – i.e. for trial on oral evidence with pleadings – with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate.<sup>164</sup>

152 Order 21, rule 13 RSC.

153 Order 21, rule 3 RSC.

154 Order 21, rule 4 RSC.

155 Order 21, rule 5 RSC.

156 Order 1A, rule 8 RSC. See also Order 1A, rule 10(4) RSC: “Where the copy of the affidavit of verification is delivered subsequent to delivery of the pleading or other document, the time prescribed by these Rules for delivery of any pleading or other document in reply shall run from the date of delivery of such copy.”

157 See the actions and claims which may be brought by summary summons, set out in Order 2, rule 1, RSC.

158 Order 12, rule 2 RSC.

159 See Order 13, rules 14 and 15 RSC.

160 Under a practice direction of January 2019 (HC84 Motions for judgment in summary summons proceedings). Prior to that practice direction coming into effect, application for liberty to enter final judgment was made to the Master in accordance with Order 37, rule 1 RSC.

161 Order 37, rule 2 RSC.

162 Order 37, rule 3 RSC.

163 Ibid.

164 Order 37, rule 7 RSC. See also Order 37, rule 10, RSC; leave to defend may be given unconditionally or subject to such terms as to give security, or time and mode of trial, or otherwise as the court may think fit.

On the return of a special summons for hearing before the Master, in cases in which the Master has jurisdiction, the Master may determine the matter<sup>165</sup> or may transfer the matter to the Judge’s List.<sup>166</sup> In all other cases, the Master must transfer the summons, when in order for hearing, to the Court list for hearing on the first opportunity.<sup>167</sup>

Where the matter is transferred to the Judge’s List the court has a broad discretion. The court may:

- (a) give judgement for the relief to which the plaintiff may appear to be entitled; or
- (b) may dismiss the action or matter;
- (c) may adjourn the case for plenary hearing with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate.<sup>168</sup>

The court may also make such order for determination of the questions in issue in the action or matter as may seem just.<sup>169</sup> Unless the court otherwise orders, the hearing of the proceedings will take place on affidavit.<sup>170</sup>

#### 4.5 Particularising the claim or defence

The Court may on application of a party order a more detailed<sup>171</sup> statement of the nature of the claim or defence, or more detailed particulars of any matter stated in any pleading, notice or written proceeding requiring particulars, upon such terms, as to costs and otherwise, as may be just.<sup>172</sup> Before a party may apply for such an order, they must firstly have sought the particulars by letter (a “notice for particulars”) without having received a satisfactory response.<sup>173</sup> The court will not order particulars to be delivered before defence or reply unless it considers that they are necessary or desirable to enable the defendant or plaintiff, as the case may be, to plead or ought for any other special reason to be delivered.<sup>174</sup> Where a party fails to provide particulars as ordered, the court may strike out the relevant pleading or proceedings pursuant to its inherent jurisdiction.

In personal injuries proceedings a defendant may under statute raise a request for further information.<sup>175</sup>

#### 4.6 The joining of parties to proceedings

The criteria for joining parties in a single action, whether as plaintiffs or defendants, and the procedure for having them joined, are broadly the same in the High Court<sup>176</sup> and the Circuit Court (see Section 3.5 above).

Application to join a party to proceedings may be made at any stage of the proceedings.<sup>177</sup> Where a party wishes to join another party to proceedings prior to the trial of the action the application is brought by way of notice of motion grounded on affidavit.

An application to have a party added or substituted may be made to the Master on notice. Joining a third party to proceedings without the plaintiff’s consent requires an application to a judge on the basis of the

165 Order 38, rule 4 RSC.

166 Order 38, rule 5 RSC.

167 Order 38, rule 6 RSC.

168 Order 38, rule 9 RSC.

169 Ibid.

170 Order 38, rule 3 RSC.

171 A “further and better statement”, as the court rule describes it.

172 Order 19, rule 7(1) RSC.

173 Order 19, rule 7(2) RSC.

174 Order 19, rule 7(3) RSC.

175 Section 11 of the Civil Liability and Courts Act 2004; Order 1A, rule 11(1) RSC.

176 See Order 15 RSC.

177 Orders 15, rules 13 and 14 RSC.

same criteria as apply in the Circuit Court. The application is brought by motion on notice to the plaintiff.<sup>178</sup> Unlike the position in the Circuit Court, where a county registrar may permit service of a third party notice irrespective of the plaintiff's attitude, the Master may only make such an order with the plaintiff's consent.<sup>179</sup>

#### 4.7 Default of appearance or pleading

As noted in Section 4.4 of this chapter, in summary summons proceedings a plaintiff may apply for judgment in default of appearance in the Central Office. This procedure may also be used where there has been default of appearance to a plenary summons in the case of a claim for a liquidated amount and certain proceedings for recovery of land.<sup>180</sup>

Where a defendant has failed to enter an appearance to a plenary summons claiming unliquidated damages or other relief the plaintiff must first deliver a statement of claim by filing same in the Central Office and thereafter may apply to the court by way of notice of motion for judgement in the proceeding in default of appearance.<sup>181</sup>

In the case of personal injuries proceedings the plaintiff, without delivering a statement of claim, may apply to the Court by motion for judgment in the action in default of appearance upon filing in the Central Office an affidavit or affidavits of service of the personal injuries summons and an affidavit verifying the contents of the personal injuries summons.<sup>182</sup>

Where judgment is granted the court will direct that damages be assessed by a judge sitting alone or by a judge and jury.<sup>183</sup> Judgment obtained in default of appearance may be set aside on application to the court in certain circumstances.<sup>184</sup>

A defendant may apply to the court to dismiss a plaintiff's action where the plaintiff, being required to do so, does not deliver a statement of claim within the time allowed for doing so.<sup>185</sup>

Where the plaintiff's claim is for a debt or liquidated demand, or for certain other relief,<sup>186</sup> and the defendant fails to deliver a defence within the time allowed for that purpose, the plaintiff may enter final judgment in the Central Office.

Where a defendant has failed to deliver a defence to an unliquidated claim within the time allowed, the plaintiff may set down the action on a motion for judgment. Prior to issuing this motion the plaintiff is required to write to the defendant giving notice of intention to serve a motion for judgment and at the same time consenting to the late delivery of the defence within 21 days of the date of the letter.<sup>187</sup> Where the plaintiff issues the application and the defendant delivers and files a defence within the prescribed time in advance of the hearing of the motion the motion will stand struck out and the plaintiff will be entitled to a set sum for costs.<sup>188</sup>

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178 Order 16, rule 2 RSC.

179 Order 63, rule 1(34) RSC.

180 Order 13, rules 3 and 4 RSC.

181 Order 13, rule 6 RSC.

182 Order 13, rule 6A RSC.

183 Order 13, rule 6 RSC.

184 See Order 13, rule 11 RSC and Delany et al., op. cit., para. 4-40.

185 Order 27, rule 1 and 1A RSC.

186 Identified in Order 27, rule 2 RSC.

187 Order 27, rules 8(1) and 9 RSC.

188 Order 27, rule 9(3) RSC.

While the court has broad discretion when dealing with the first application for judgment in default of defence, on any subsequent application the discretion is more limited, with the rule<sup>189</sup> stipulating that the court must give to the plaintiff such judgment as upon the statement of claim it considers the plaintiff to be entitled to, unless it is satisfied that special circumstances exist which explain and justify the failure, and only when the court is so satisfied may it make an order extending the time for delivery of the defence or adjourning the application to enable the defence to be delivered within the extended time.

Where judgment is granted the court will not assess damages at that sitting but will direct that damages be assessed at a later stage by a judge sitting alone or by a judge and jury, or by the Master or by the Examiner.<sup>190</sup>

Judgment obtained for want of prosecution or in default of defence may be set aside on application to the court in certain circumstances.<sup>191</sup>

## 4.8 Amendment

A plaintiff may, without needing permission from the court, amend a statement of claim, once at any time before the expiration of the time limited for reply, and before replying or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who has last appeared.<sup>192</sup>

A party who has received a pleading that has been amended may apply to court within eight days after delivery of the amended pleading to disallow the amendment and the Court may, if satisfied that the justice of the case requires it, disallow the amendment, or allow it subject to such terms as to costs or otherwise as may be just.<sup>193</sup>

The Court may, at any stage of the proceedings, allow either party to alter or amend their indorsement of claim or pleadings in such manner and on such terms as may be just, and “all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties”.<sup>194</sup> Any application by a party to the court for amendment must be on notice.

Mistakes in judgments or orders, or errors arising in judgments or orders from any accidental slip or omission may be corrected (a) by the court registrar, with court approval, where the parties consent or (b) by the court on application by motion on notice.<sup>195</sup>

## 4.9 Discovery

The procedure for discovery in High Court proceedings is dealt with in Chapter 6.

## 4.10 Trial

Notice of trial is to be served in all actions commenced by plenary summons or adjourned to plenary hearing (other than probate and admiralty actions).<sup>196</sup>

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189 Order 27, rule 8(1) RSC.

190 Order 27, 8(2) RSC.

191 Order 27, rule 14 RSC.

192 Order 28, rule 2 RSC. A similar facility is available to a defendant who has set up a counterclaim or set-off, and such defendant may without any leave, amend the counterclaim or set-off at any time within six days from the delivery of the reply or the expiration of the time allowed for delivery thereof, whichever shall be the shorter.

193 Order 28, rule 4 RSC.

194 Order 28, rule 1 RSC.

195 Order 28, rule 11 RSC.

196 Order 36, rule 3 RSC.

Unless otherwise provided by statute or by the RSC, all proceedings in the High Court are tried in Dublin save where, having regard to (a) availability of facilities for the trial of the proceedings and (b) the desirability of providing a trial date as soon as possible once proceedings are ready for trial, the President of the High Court, whether in respect of individual proceedings or any category or categories of proceedings, otherwise directs.<sup>197</sup>

Notice of trial for certain actions<sup>198</sup> must be served for certain cities or towns (specified in the rules of court<sup>199</sup>) where the plaintiff resides or the wrong is alleged to have been committed in that or a specified nearby county.

An action must be set down for trial within 14 days of service of notice of trial and if this is not done the notice of trial is no longer valid.<sup>200</sup>

#### 4.11 Appeals and cases stated

The procedure governing appeals from the High Court to the Court of Appeal and to the Supreme Court, and that for stating a case from the High Court to the Court of Appeal, is examined in Section 5 of this chapter.

#### 4.12 Case and trial management and ADR

Rules inserting a new Order 63C in the RSC, providing for a comprehensive regime for case management in chancery and non-jury cases, were introduced in 2016 (“the case management rules”). Currently, by court direction, the rules have no practical effect pending the provision of the appropriate and necessary resources. The case management rules were accompanied by a complementary set of rules regulating the conduct of trials in the High Court and adducing of expert evidence (“the conduct of trials rules”).<sup>201</sup> The conduct of trials rules have been in operation since the 1<sup>st</sup> October 2016. Each set of rules will be considered in turn.

##### 4.12.1 The case management rules

The case management rules apply to proceedings which would be listed for trial in the Chancery List or the Non-Jury List of the Court and any category of proceedings designated by the President of the High Court, or any proceedings having or involving any characteristics identified in such a designation. The rules do not apply to proceedings admitted to the Commercial List or required to be heard in the Competition List, personal injuries actions and jury actions.<sup>202</sup>

Order 63C, rule 3 provides for the assignment by the President of the High Court of a Judge to be the Judge in charge of the List for any category of proceedings mentioned to which the rules of Order 63C apply.<sup>203</sup>

The case management rules, which draw inspiration in part from the case management procedures in the Commercial Court,<sup>204</sup> envisage a form of judge-led management of cases falling within the scope of that Order. The rules include provision for the following:

197 Order 36, rule 1 RSC.

198 Viz. generally, proceedings for personal injuries and fatal injuries (see section 1 (1) and (2) of the Courts Act 1988).

199 Order 36, rule 2(b) RSC.

200 Order 36, rule 18 RSC.

201 Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. No. 254 of 2016).

202 Order 63C, rule 2 RSC.

203 See also Order 63C, rule 3(2) RSC in relation to the assignment of a court Registrar or Registrars, with rule 3(3) providing: “Each Registrar shall perform the functions and exercise the powers conferred on him by this Order in accordance with any general guidance or instructions given to him by the appropriate List Judge concerning the proceedings, or category of proceedings, in respect of which said Registrar has been assigned in accordance with sub-rule (2)”.

204 See Order 63A RSC.



- (a) Pre-trial preparation: Rule 4 prescribes the general powers of the court in its conduct of proceedings: “A Judge may.... give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings”. Rule 5 sets out a non-exhaustive list of the orders and directions that may be given to facilitate the determination of the proceeding in accordance with the principles identified above;
- (b) Case management: A case management order may be made under rule 6. The court will thereafter fix a date for a case management conference and give further directions as appropriate.<sup>205</sup> The case management conference must be attended by the solicitor or counsel appearing for each of the parties or, where a party, not being a body corporate, does not have legal representation, by the party themselves. Each solicitor or counsel attending the case management conference must ensure that they are sufficiently familiar with the proceedings, and have authority from the party that they represent to deal with any matters that are likely to be dealt with at the conference;<sup>206</sup>
- (c) Pre-trial conferences: Where no case management order has been made the matter will be listed for a pre-trial conference, chaired by the Judge, who will identify the steps remaining to be taken to prepare the case for trial, the likely length of the trial and the arrangements, if any, for witnesses, information and communications technology (including video conferencing), as well as any other arrangements needed for the trial;<sup>207</sup>
- (d) Certificate of readiness for trial: the case management Judge or the List Judge, where a pre-trial conference has been dispensed with, will issue a certificate of readiness for trial if satisfied that the proceedings are ready to proceed to trial;<sup>208</sup>
- (e) Evidence: the parties are required to deliver a summary of the evidence to be given by witnesses at trial, not later than 30 days prior to the date of trial unless the court otherwise orders;<sup>209</sup>
- (f) Costs: the List Judge may prescribe requirements as to the form and content of bills of costs to be prepared in respect of relevant proceedings which have been made the subject of a case management order.<sup>210</sup> The court may also limit the amount of a party’s expert fees and expenses that may be recovered from any other party.<sup>211</sup>

#### 4.12.2 The conduct of trials rules

The conduct of trials rules made the following changes of significance to the RSC -

- Disclosure: Order 31 RSC was amended to make provision for applications concerning disclosure of documents held by non-parties – which subject is considered in more detail in Chapter 6
- Trial management:
  - Order 36, rule 9 RSC empowers the court to order that different questions of fact be tried by different modes of trial and that one or more questions or issues of fact be tried before the others.
  - Order 36, rule 9(2) RSC introduces the possibility of modular trials, by empowering the judge chairing any case management conference or pre-trial conference, or the trial judge, to direct that the trial be conducted in particular stages (“modules”), to specify the nature of the evidence, or the witnesses required to enable the court to determine the questions or issues arising in a module; and to direct the exchange of written submissions on the questions or issues of law arising.<sup>212</sup>

<sup>205</sup> Order 63C, rule 6(2) RSC.

<sup>206</sup> Order 63C, rule 6(6) RSC.

<sup>207</sup> Order 63C, rule 12 RSC.

<sup>208</sup> Order 63C, rule 14 RSC.

<sup>209</sup> Order 63C, rule 17 RSC.

<sup>210</sup> Order 63C, rule 19 RSC.

<sup>211</sup> Order 63C, rule 20 RSC.

<sup>212</sup> This provision applies to cases that have been admitted to the Commercial or Competition Lists or cases to be heard in either the Chancery List or the Non-Jury List.

- Order 36, rule 42 RSC empowers the court or an officer of the court to require any party to proceedings to provide a reasoned estimate of the time likely to be spent in the trial of the proceedings, including a list of the witnesses intended to be called by that party and an estimated time for the examination or cross-examination of each witness intended to be called. The rule stipulates that the trial of proceedings shall, as regards the time available for any step or element, be under the control and management of the trial judge, and the trial judge may, from time to time, make such orders and give such directions as are expedient for the efficient conduct of the trial consistently with the interests of justice
- Evidence: the case management rules and conduct of trials rules contain a package of measures designed to render more efficient and contain the cost of adducing evidence and expert evidence in particular -
  - Order 20, rule 12 RSC provides that, save in the case of personal injuries actions, where a plaintiff intends or proposes to offer expert evidence on any matter at the trial, the statement of claim shall disclose that intention or proposal and state succinctly the field of expertise concerned and the matters on which expert evidence is intended or proposed to be offered. A similar rule applies to defendants who intend or propose to offer expert evidence on any matter
  - Order 36, rule 41 RSC makes provision for the appointment of a person (an “assessor”) to assist the court in understanding or clarifying a matter, or evidence in relation to a matter, in respect of which that person has skill and experience
  - Order 39, rules 56 to 61 RSC referred to below lay out comprehensive rules concerning expert evidence. Rules 56, 57 and 58 are of general application, while rules 59 to 61 inclusive apply to chancery or non-jury proceedings and proceedings in the Commercial List or the Competition List
  - Order 39, rule 57(1) RSC identifies the overriding duty of experts: “It is the duty of an expert to assist the court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert.” Rule 57(2) requires that every expert report contain a statement acknowledging the overriding duty and disclose any financial or economic interest of the expert, or of any person connected with the expert, in any business or economic activity of the party retaining that expert
  - Order 39, rule 58 RSC restricts expert evidence to that which is reasonably required to enable the court to determine the proceedings. The court may, *inter alia*, make orders requiring the parties to identify the field in respect of which expert evidence is required and, where practicable the expert proposed. The court may also direct that evidence on an issue is to be given by a single joint expert
  - Order 39, rule 59 RSC makes provision for the submission of written questions to an expert concerning the contents of that expert’s report
  - Order 39, rules 60 and 61 RSC prescribe a new procedure where two or more parties intend to call experts who may contradict each other as to evidence. The court may direct that those experts meet privately, without the presence of any party or any legal representative of any party, to discuss with each other their proposed evidence. Following such meeting the experts are required to draw up a written statement (known as the “joint report” under this rule) identifying such evidence as is agreed between or among them and such evidence as is not agreed. The joint report is lodged in court to be furnished to the trial Judge in advance of the trial and a copy is provided to each of the parties.<sup>213</sup> On considering the joint report, and at any stage in the trial, the court may require the experts to be examined and cross-examined (either on the whole or on a specified part of their evidence) one after another. As an alternative to the traditional examination-in-chief and cross-examination of each expert, the judge may apply the “debate among experts procedure” (also known as “hot-tubbing”) whereby:

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213 Order 39, rule 61(2) RSC.

“... each of two or more contradicting experts shall be sworn in order to testify at the same time. When sworn, each expert, in such order as the trial Judge shall determine, and without being examined by, or by counsel for, any party, shall give an outline of the evidence that is agreed between or among them. The experts shall then, in such order as the trial Judge shall determine, present the evidence on which they are not agreed the one with the other or others. Following such presentation, the experts may, subject to the directions of the trial Judge in that regard, be required to debate the points which are not agreed between or among them, the one with the other or others.”<sup>214</sup>

#### 4.12.3 ADR

The court may hear applications for referral of proceedings to mediation under section 16 of the Mediation Act 2017 and may also, of its own motion, in any civil proceedings to which that Act applies, invite the parties to consider mediation and may, having heard the parties, adjourn the proceedings, extend the time for compliance by a party with rules of court or with any order of the court in the proceedings, or make other orders or give directions necessary to facilitate the effective use of mediation.

The court may, when it considers it appropriate and having regard to all the circumstances of the case, adjourn proceedings or any issue in proceedings for such time as it considers just and convenient and (a) invite the parties to use an ADR process other than mediation to settle or determine the proceedings or issue or (b) where the parties consent, refer the proceedings or issue to such process.<sup>215</sup>

As previously mentioned in relation to the District Court, section 15 of the Civil Liability and Courts Act 2004 empowers the court to direct a “mediation conference” in personal injuries actions.<sup>216</sup>

## 5. Procedure in the Court of Appeal and the Supreme Court

### 5.1 Procedure in the Court of Appeal

#### 5.1.1 The rules of court

The Court of Appeal’s procedures are comprised in rules of court and practice directions.

Orders 86 and 86A RSC set out the general framework for bringing appeals. Order 86 regulates, *inter alia* -

- the general conduct of appeals
- the giving of directions and the imposition of time limits by the Court of Appeal
- service of documents
- lodgment of documents with the Court
- security for costs and
- the bringing of pre-trial applications before the Court of Appeal.

#### 5.1.2 Case management

The conduct of appeals is *judge-led* and appeals are actively case-managed. The procedural framework introduced by the Court of Appeal Act 2014 and Order 86, rules 2 and 3 are key to this approach.<sup>217</sup>

<sup>214</sup> Order 39, rule 61(4) RSC.

<sup>215</sup> Order 56A, rule 10 RSC.

<sup>216</sup> See also Order 1A, rule 12 RSC.

<sup>217</sup> The Working Group on a Court of Appeal commented that rules 5 and 6 of Order 63A (the Commercial Court rules), which enabled the High Court judge to take control of the proceedings by way of case management, were key to the success of the Commercial Court. Rule 5 of Order 63A identifies a number of overriding principles or objectives: “A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings.”

Section 8 of the Court of Appeal Act 2014 empowers the President of the Court of Appeal, or other judge of the Court of Appeal nominated by the President, to hear interlocutory and procedural applications or motions in individual cases.

Rules 2 and 3 of Order 86 RSC follow a very similar pattern to the procedural model in the Commercial Court. All appeals and other matters must be prepared for hearing or determination and heard and determined in a manner which is “just, expeditious and likely to minimise the costs of the proceedings”.<sup>218</sup> The Court of Appeal may give directions and make orders for the conduct of proceedings before it, as appear convenient for the determination of the proceedings in like manner.<sup>219</sup>

Order 86A RSC<sup>220</sup> specifically regulates civil appeals to the Court of Appeal. Again, the Commercial Court model has been adopted and tailored to address the issues that arise in civil appeals. The rules set out time limits for the bringing of appeals, the delivery of notices of appeal and respondents’ notices and the filing of appeal booklets.

### 5.1.3 Practice directions

Case management is further underpinned by the powers conferred by the Court of Appeal Act 2014 -

- on the President of the Court of Appeal, or other judge of the Court of Appeal nominated by the President, to issue directions in relation to the conduct of individual proceedings *and*
- on the President to issue general practice directions “In the interests of the administration of justice and the determination of proceedings in a manner which is just, expeditious and likely to minimise the cost of those proceedings”, in relation to the conduct of appeals or applications made to the Court of Appeal”.<sup>221</sup>

A practice direction may relate to civil or criminal proceedings or both, or a class or classes of civil or criminal proceedings, or both. It may make provision for such incidental, supplementary and consequential matters, including in respect of a failure to comply with any matter provided for in a direction, as may appear to the President of the Court of Appeal to be necessary or expedient for the purposes of the direction.<sup>222</sup>

To date practice directions have been issued governing -

- expedited appeals<sup>223</sup> and non-compliant notices of appeal
- appeals transferred by the Supreme Court pursuant to Article 64 of the Constitution
- extension of time to appeal
- submissions, books of appeal and authorities in civil appeals and
- McKenzie Friends.<sup>224</sup>

Practice direction CA06, which concerns submissions, books of appeal and authorities in civil appeals lays down requirements for the preparation of written submissions and the filing of books of appeal and books of authorities in the Court of Appeal.

218 Order 86, rule 2(1), RSC.

219 Order 86, rule 3(1), RSC.

220 With amendments introduced by S.I. No. 469 of 2018: Rules of the Superior Courts (Court of Appeal) 2018.

221 Sections 7C(1) and (2) of the Courts (Supplemental Provisions) Act 1961, inserted by section 10 of the Court of Appeal Act 2014.

222 Section 7C(3) of the Courts (Supplemental Provisions) Act 1961, inserted by section 10 of the Court of Appeal Act 2014.

223 It should be noted that the rules providing for expedited appeals were revoked by para. 2(ii) of the Rules of the Superior Courts (Court of Appeal) 2018 (S.I. No. 469 of 2018).

224 The practice directions are available at: <https://www.courts.ie/appeal-court-practice-directions>

### 5.1.4 Conduct of the appeal

In civil proceedings an appeal<sup>225</sup> is brought by lodgment of a notice of appeal which must be lodged for issue together with an attested copy of the order of the court below not later than 28 days from the perfecting of the order appealed against. A return date for a directions hearing is assigned to every notice of appeal issued. Service of the notice of appeal must be effected within seven days after the notice of appeal has been issued, on all parties directly affected by the appeal.<sup>226</sup> Each respondent served with a notice of appeal must, within 21 days thereafter lodge in the Court of Appeal Office and serve on the appellant and every other respondent a notice in the prescribed form known as a “respondent’s notice”.<sup>227</sup>

The appellant must lodge a directions booklet not later than four clear days in advance of the directions hearing, and on this being done the court will give directions for the conduct of the appeal and ultimately fix a date and allocate a time for the hearing of the appeal.<sup>228</sup>

### 5.1.5 Case stated procedure<sup>229</sup>

Cases stated by the High Court on Circuit, or by a Circuit Court Judge, are transmitted by the county registrar to the Court of Appeal within seven days of lodgment with the county registrar, the latter having served notice of the signing by the High Court judge and lodgment of the case on every party who appeared on the hearing of the appeal or matter. Cases stated on an appeal to the High Court sitting in Dublin, and cases stated by the High Court in proceedings originating in that court are similarly transmitted by the High Court registrar concerned.

In a case stated under Article 40.4.3° of the Constitution<sup>230</sup> the High Court may direct which party is to have carriage of the case stated and the case will be entered by the Registrar to the Court of Appeal before the court for directions.

The parties must exchange and lodge written submissions on a case stated, and as soon as the necessary papers are in order, the Registrar to the Court of Appeal sets down the case stated for hearing.

## 5.2 Procedure in the Supreme Court

### 5.2.1 Rules of court and practice directions

The Court of Appeal Act 2014 introduced for the Supreme Court a similar framework to that in the Court of Appeal empowering the Chief Justice, or other judge of the Supreme Court nominated by the Chief Justice, to hear interlocutory and procedural applications or motions in individual cases and to issue directions for the conduct of individual proceedings, and empowering the Chief Justice to issue general practice directions “In the interests of the administration of justice and the determination of proceedings in a manner which is just, expeditious and likely to minimise the cost of those proceedings.”<sup>231</sup>

Order 58 RSC<sup>232</sup> and practice direction SC19 govern the conduct of appeals in the Supreme Court. Similar to the approach in the Court of Appeal, the conduct of appeals is case-managed by the Court.

225 For the procedure governing actions where leave of the court is necessary to bring an appeal to the Court of Appeal see Order 86A, rule 6 RSC.

226 Order 86A, rules 12 - 14 and Form No. 6, Appendix U RSC.

227 Order 86A, rule 15 and Form No. 7 Appendix U RSC.

228 Order 86A rule 16 RSC. Order 86A, rule 16(3), stipulates that:

“Each counsel and solicitor attending the directions hearing shall ensure that he is sufficiently familiar with the proceedings, and has authority from the party he represents to deal with any matters that are likely to be dealt with at the directions hearing.”

229 The procedure in cases stated to the Court of Appeal is prescribed in Order 86B RSC.

230 i.e. a reference by the High Court to the Court of Appeal of a question of the validity of a law raised on an application under Article 40.4 of the Constitution.

231 Section 44 of the Court of Appeal Act 2014, inserting new subsections (3A), (6) and (7) in section 7 of the Courts (Supplemental Provisions) Act 1961.

232 Introduced by S.I. No. 583 of 2018.

The relevant rules closely resemble provisions of the Commercial Court and Court of Appeal rules – providing that all applications, appeals and other matters before the Supreme Court shall be prepared for hearing or determination in a manner which is just, expeditious and likely to minimise the costs of the proceedings,<sup>233</sup> and conferring on the court the power to give directions to achieve those objectives.<sup>234</sup>

Significantly, applications seeking leave to appeal against a decision of the Court of Appeal or the High Court, as the case may be may be determined by the Supreme Court otherwise than with an oral hearing.<sup>235</sup> However, where the Supreme Court considers it appropriate to do so, having considered the documents lodged in respect of an application for leave to appeal, it may direct that the application, or any matter arising on the application, be determined with an oral hearing.<sup>236</sup>

In addition to the criteria for conduct of proceedings identified in Order 58, rule 2 RSC, the practice direction stipulates that:

“[t]he parties are under an obligation to ensure that all steps in the proceedings before the Court are taken expeditiously and within the time prescribed by the rules and this statutory practice direction.”<sup>237</sup>

### 5.2.2 Application for leave to appeal

Applications for leave to appeal are considered by the Supreme Court consisting of at least three judges and are normally decided on the documents unless the Court otherwise orders.<sup>238</sup> All applications for leave are to be prepared in the prescribed form<sup>239</sup> and word limits apply.

Notice of application for leave to appeal must be lodged in the Supreme Court Office within 21 days from the perfecting of the order appealed against.<sup>240</sup> Applications for leave may be filed physically in the Supreme Court Office or via the Supreme Court’s e-filing platform.<sup>241</sup>

The notice of appeal must be served on all parties on the same day on which the application has been filed.<sup>242</sup> Each respondent must thereafter, within six weeks from perfecting of the order from which leave to appeal is sought, file in the Office and serve a respondent’s notice.<sup>243</sup> The applicant is required to file an application for leave booklet within seven weeks of the perfecting of the order appealed against.<sup>244</sup>

The Court may, upon consideration of the application, (a) direct that written submissions on the application for leave to appeal be filed; (b) refuse leave; (c) grant leave on all or specified grounds; (d) direct an oral hearing with or without the filing of written submissions; (e) invite the parties to file written submissions as to the grant of leave on terms whether as to costs or otherwise.<sup>245</sup>

Where leave is granted,<sup>246</sup> that part of the notice of appeal containing the grounds on which leave was granted (and excluding any grounds of appeal on which leave to appeal was refused) will stand as the notice of appeal and the grounds of appeal are limited to those on which leave has been granted. The appellant

233 Order 58, rule 2(1) RSC.

234 Order 58, rule 3(1) RSC.

235 Section 7(10) of the Courts (Supplemental Provisions) Act 1961, as inserted by section 44 of the Court of Appeal Act 2014.

236 Section 7(11) of the Courts (Supplemental Provisions) Act 1961, as inserted by section 44 of the Court of Appeal Act 2014.

237 SC19, paragraph 2(b).

238 SC19, paragraph 3(2).

239 Form No. 1.

240 Order 58, rule 16 and paragraph 3(2)(h) of SC19.

241 See [www.csol.ie](http://www.csol.ie). The process allows firms and law offices of state bodies to lodge Applications for Leave to Appeal in the Office of the Supreme Court electronically in cases where parties are legally represented.

242 Order 58, rule 17(1).

243 Order 58, rule 18 and the requirements in SC19, paragraph 5.

244 Order 58, rule 19(1).

245 SC19, paragraph 9.

246 See SC19, paragraphs 11, 12 and 13.

must, within seven days of the grant by the Court of leave to appeal, file notice that he or she intends to proceed with the appeal and serve that notice on each of the respondents to the appeal. Alternatively, the appellant must file written notice of intention to withdraw or abandon the appeal.<sup>247</sup>

### 5.2.3 Procedure where leave to appeal is granted

Where leave to appeal is granted, and where an appellant wishes to proceed, the following sequencing applies -

- Subject to any case management directions given, the appellant must within two weeks of filing of the notice of intention to proceed file his or her written submissions with the Court and deliver a copy to every respondent to the appeal
- No later than two weeks following delivery of the appellant's written submissions, each respondent must file with the Court and deliver to the appellant and all other respondents a copy of his or her written submissions
- Immediately on the filing of a notice of intention to proceed, the appeal proceedings are assigned by the Chief Justice to a case management judge
- A date will be fixed for a case management hearing
- Unless already filed or unless otherwise directed the appellant must file in the Office not later than four days before the date fixed for the first case management hearing three copies of the case management booklet and any other document in the appeal to which any party proposes to refer at that hearing
- The proceedings will also be listed for a second case management hearing.<sup>248</sup>

Where the case management judge is satisfied that the appeal is ready for hearing (whether after the second case management hearing or any subsequent case management hearing that may be required in the particular circumstances of the case) that judge will direct accordingly, and the appeal will be recorded as ready for hearing.<sup>249</sup>

## 6. Procedural reform and innovation to date

### 6.1 The direction of recent procedural reform

Detailed reference has been made in Chapter 3 to various reform measures – chiefly undertaken through amendments to the rules of court – introduced in recent years.

Problems of *delay in case disposition* have been addressed through -

- the extension of comprehensive case management in the High Court to those areas of litigation (chancery and non-jury actions) not already covered by case management provisions, and in the Circuit Court to discrete areas of civil litigation (e.g. equity and construction disputes) which, empirically, have presented challenges in ensuring adequate preparation and readiness for trial
- substantial new trial management powers in the High Court including fixing or limiting the amount of time allowed to the parties for opening and closing the case (including oral submissions on points or issues of law) and for examining and cross-examining witnesses, use of written submissions and restriction or elimination of oral argument

*Cost containment and transparency* has been promoted through rules -

- to discourage unnecessary pre-trial applications by requiring the costs of such applications to be awarded when the application is determined unless it would be unjust to determine liability at that stage

<sup>247</sup> Order 58, rule 22 and SC19, paragraph 17.

<sup>248</sup> SC19, paragraph 19.

<sup>249</sup> Ibid.

- empowering the court at any stage of a case to require the parties to produce and exchange estimates of the costs respectively incurred by them and
- providing for offers to settle a claim made “without prejudice save as to costs” (so-called “Calderbank letters”) to be taken into account when awarding costs, thereby encouraging early settlements.

*Use of expert evidence* has been regulated by rules: requiring early disclosure of a party’s intention to rely on expert evidence; codifying the overriding duty of an expert witness to assist the court as to matters within his or her field of expertise; restricting expert evidence to that reasonably required to enable the court to determine the proceedings; enabling the court to direct meetings of experts and the production of a joint report; enabling the court to direct that evidence on an issue is to be given by a single joint expert; and introducing the debate among experts (“hot tubbing”) procedure, as an alternative to the conventional separate examinations-in-chief and cross examinations of expert witnesses.

*Procedural complexity* has been reduced and *procedural standardisation and rationalisation* advanced with the introduction of the standard personal injuries summons and pleadings requirements for personal injuries actions<sup>250</sup> and of template procedures for applications for public law remedies in all three first instance jurisdictions in the rules regulating statutory applications and appeals.<sup>251</sup> Procedural standardisation has also been achieved with the broad alignment of District Court civil procedure in 2014 with the other first instance jurisdictions in the context of the increase in the monetary threshold of that court’s jurisdiction.<sup>252</sup>

*Recourse to ADR* was promoted through referral arrangements to mediation, conciliation and arbitration and suspension of time limits to facilitate ADR in the Commercial Court rules in 2004<sup>253</sup> and more generally in civil proceedings in 2009 and 2010,<sup>254</sup> followed by primary legislative provisions largely modelled on the existing rules of court in section 16 of the Mediation Act 2017.

## 6.2 Procedural innovations in prospect

Reference has been made in Chapter 2 to the range of pre-action protocols in the Civil Procedure Rules for England and Wales regulating matters such as disclosure between prospective parties to various types of civil proceedings. These require, *inter alia*, notification of the prospect of a claim being made, encourage exchange of information between the parties and promote settlement efforts prior to the institution of proceedings. As mentioned in Chapter 3, the Expert Group on Article 13 of the European Convention on Human Rights (“the Expert Group on Article 13 ECHR”) in this jurisdiction recommended the extension of the statutory remit of the Courts Rules Committees to permit them to prescribe pre-action protocols for categories of litigation under rules of court. In the event, this recommendation was not adopted by Government, the approach taken being to provide in primary legislation<sup>255</sup> for a specific pre-action protocol, to be implemented by Ministerial regulations, for clinical negligence actions.

In the absence of an expansion by primary legislation of the court rules committees’ remit to give them a general power to prescribe such protocols – as in England and Wales – wider use of pre-action protocols in

250 Civil Liability and Courts Act 2004.

251 Rules of the Superior Courts (Statutory Applications and Appeals) 2007 - S.I. No. 14 of 2007; Circuit Court Rules (Statutory Applications and Appeals) 2009 - S.I. 470 of 2009; Order 40C (Procedure in Statutory Applications by Notice of Application) and Order 40D (Procedure in Statutory Appeals by Notice Of Appeal to the Court), inserted by the District Court (Civil Procedure) Rules 2014 (S.I. No. 17 of 2014).

252 District Court (Civil Procedure) Rules 2014 (S.I. No. 17 of 2014).

253 Order 63A RSC, inserted by the Rules of the Superior Courts (Commercial Proceedings) 2004 (S.I. No 2 of 2004).

254 Order 19A, rule 7 of the Circuit Court Rules inserted by the Circuit Court Rules (Case Progression (General)) 2009 (S.I. No. 539 of 2009); section 32, Arbitration Act 2010; Rules of the Superior Courts (Arbitration) 2010 (S.I. No. 361 of 2010) and Rules of the Superior Courts (Mediation and Conciliation) 2010 (S.I. No. 502 of 2010). The RSC arbitration provisions are contained in Order 56, the mediation and other ADR processes in Order 56A.

255 By the insertion of a new Part 2A in the Civil Liability and Courts Act 2004 by section 219 of the Legal Services Regulation Act 2015.



this jurisdiction will have to await primary legislation specifying in detail the content of individual pre-action protocols which may be prescribed by Ministerial regulations.

## 7. Assignment of functions to court officers

### 7.1 Quasi-judicial functions

Article 37.1 of the Constitution permits the exercise of *limited* functions and powers of a judicial nature, in matters other than criminal matters, by a person or body of persons not holding judicial office, where the person or body is authorised by law for that purpose.

A range of quasi-judicial functions and powers of a limited nature are performed by court officers, in the High Court primarily by the Master of the High Court (“the Master”) and Deputy Masters,<sup>256</sup> and in the Circuit Court by county registrars.<sup>257</sup>

Since 2004, one or more Deputy Masters may be appointed by the Courts Service where the Courts Service considers it desirable that its power of appointment be exercised, to execute the office of Master concurrently with the Master.<sup>258</sup> To be eligible for appointment as a Deputy Master, a person must either possess the statutory qualifications prescribed for the office of Master or be an officer employed in the Central Office who has during the next preceding 12 years been employed in one or more of the offices of the Superior Courts.<sup>259</sup>

The Master’s and county registrars’ adjudicative remits include the determination of a wide range of applications for orders or directions of a procedural nature in the pre-trial phase of proceedings. Depending on the nature of the application, such functions and powers may be exercisable on an application -

- made
  - *ex parte* (i.e. in the absence of the opposite party in the proceedings) – e.g. an application for directions as to service of an originating summons, or
  - on notice – e.g. an application to extend time or to dismiss an action with costs for want of prosecution, or
- which is
  - contested – as in the example last mentioned
  - uncontested – e.g. an application for the appointment or the discharge of a receiver, or to have an account taken, or
  - on consent – e.g. the amendment of pleadings, the assessment of damages or the trial of any issue of fact.

256 Certain adjudicative functions of a limited nature are also performed in contentious matters by the Examiner of the High Court (adjudication in mortgage and administration suits) and the legal costs adjudicators (adjudication of bills of legal costs).

257 In the case of the Master of the High Court, see in particular section 14 and para. 4(2) of the Eighth Schedule, Courts (Supplemental Provisions) Act 1961, section 25, Courts and Court Officers Act 1995 and Orders 37, 38 and 63, RSC. In the case of county registrars, see in particular section 34 and the Second Schedule of the Courts and Court Officers Act 1995, as amended, and Orders 18 and 19 CCR. With the enactment of section 34 and the Second Schedule of the Courts and Court Officers Act 1995, the quasi-judicial functions and powers of a county registrar in civil proceedings were – with some exceptions – broadly aligned with those of the Master. The county registrars’ remit was subsequently modified and extended by section 22 of the Courts and Court Officers Act 2002, notably to include power to make various orders in default of appearance or defence, viz. for recovery of a liquidated amount or specific chattels, entering judgment in an action for unliquidated damages, for the recovery of possession of any land in ejectment proceedings or for possession of land on foot of a mortgage or charge or mortgage.

258 Section 27(1A), Court Officers Act 1926, inserted by section 43, Civil Liability and Courts Act 2004. Provision had already existed under section 27 for the appointment of a Deputy Master in the event of the temporary absence through illness, or a vacancy in the office of, the Master. See also section 27(2) of the 1926 Act, similarly inserted.

259 Section 27(4), Court Officers Act 1926.

Certain types of application have over the years been allocated by direction of Presidents of the High Court to a judge of the High Court (viz. applications for discovery<sup>260</sup> and motions for liberty to enter final judgment)<sup>261</sup> or to a Deputy Master (viz. applications for recognition or enforcement of a maintenance order sent by the Central Authority in the State; applications for a European order for payment; certain types of application for the payment out of Court of funds standing to the credit of an infant; requests for service of certain types of foreign process; and the issuing and transmission of certificates in respect of depositions taken under the Foreign Tribunals Evidence Act 1856).<sup>262</sup>

The power of the county registrar under the rules of court<sup>263</sup> to determine whether a replying affidavit in proceedings by a mortgagee for possession disclosed a *prima facie* defence – for the purpose of deciding whether the county registrar should exercise his or her statutory power to make an order for possession<sup>264</sup> – was removed in 2012<sup>265</sup> following representations by the Department of Justice and Equality. In such cases, the county registrar is now required, where a replying affidavit has been filed, to transfer the proceedings, when in order for hearing, to the Judge’s list.<sup>266</sup>

Having considered the extensive range of pre-trial applications which may be entertained by the Master and Deputy Masters and county registrars, the Review Group does not see a need to recommend extension of that range. However, potential does exist to enhance significantly the role of those officers, and of the Deputy Masters in particular, in overseeing the preparation of cases for trial, as mentioned below.

## 7.2 Case management

### 7.2.1 High Court

The potential of the office of the Master to perform a case management role has long been recognised. In its Sixteenth Interim Report of 1972 on “The Jurisdiction of the Master of the High Court”, the Committee on Court Practice and Procedure recommended that “the fullest possible use should be made of the office of Master of the High Court in the judicial sphere”.<sup>267</sup> The Committee further recommended that the Master should be charged with “simplifying and narrowing in so far as possible all the issues, including those of damages, which may arise in a trial”.<sup>268</sup>

It proposed that legislation should be enacted expressly to provide that in every action, subject to the exceptions referred to below, the plaintiff should be required within one month after close of pleadings, or the deeming of pleadings closed, take out a summons for directions returnable to the Master. The object of this procedure would be

“to provide an opportunity for consideration of the preparations for trial of an action and to enable all matters which must or can be dealt with in interlocutory applications, and have not already been dealt with, to be dealt with in so far as possible and such directions to be given as to the future course of the action as may appear best to secure the just, expeditious and economical disposal of the action”.<sup>269</sup>

260 High Court Central Office notice of the 24<sup>th</sup> June 2011.

261 Practice direction HC 84 of the 23<sup>rd</sup> January 2019.

262 Practice direction HC 52 of the 20<sup>th</sup> May 2010.

263 Rule 7(2) of Order 5B, CCR, inserted by the Circuit Court Rules (Actions for Possession and Well-Charging Relief) 2009 (S.I. No. 264 of 2009).

264 In accordance with paragraph 1 (xxxiii) or (xxxiv) of the Second Schedule of the Courts and Courts Officers Act 1995.

265 By the amendments effected by the Circuit Court Rules (Actions for Possession and Well-Charging Relief) 2012 (S.I. No. 358 of 2012).

266 Order 5B, rule 7(2), CCR.

267 Committee on Court Practice and Procedure, Sixteenth Interim Report on “The Jurisdiction of the Master of the High Court” (1972), para. 16, page 11.

268 Committee on Court Practice and Procedure, Sixteenth Interim Report op. cit., para. 19, page 12.

269 The recommendations confirmed views the Committee had previously expressed in its third interim report, “Jury Trial in Civil Actions”, of 1970.

It recommended that on the hearing of the summons, the Master should have power to make orders and give directions and to adjourn the case to enable compliance, and if satisfied as to compliance, certify that the case was ready for entry in the list of cases ready for hearing before the court.<sup>270</sup> The Master could make the necessary orders for interrogatories, discovery, etc. “as well as performing the extremely useful function of recording all the areas of agreement between the parties and also recording the areas where agreement was sought but was refused on questions of proof as this may be a matter of some considerable importance on the question of costs when the matter has been finally tried in the High Court”.<sup>271</sup> The summons for directions procedure would apply to all actions brought by summons except actions in which applications have been made for summary judgment or where the court has ordered trial without pleadings, or without further pleadings.<sup>272</sup>

Addressing a concern expressed by the Committee that the Master’s quasi-judicial role be set out in statute, section 24 of the Courts and Court Officers Act 1995 expressly provided that the Master of the High Court is authorised by law to exercise limited functions and powers of a judicial nature within the scope of Article 37 of the Constitution.

The Master of the High Court and the county registrars already perform a role in preparing certain categories of proceedings for trial. Under Order 37, rule 6 RSC, the Master is required to transfer contested cases on a summary summons, “when in order for trial”, to the Court list for hearing on the first opportunity, and for that purpose, the Master may extend the time for filing affidavits and give such directions and adjourn the case before him/her as (s)he shall think fit. The Master may also, on consent, adjourn the case for plenary hearing (i.e. for trial before the court with pleadings on oral evidence), with such directions as to pleadings, discovery, settlement of issues or otherwise as may be appropriate.

The Master has similar powers in respect of proceedings on a special summons, with the distinction that the power to adjourn for plenary hearing in such instances does not require the parties’ consent.<sup>273</sup>

As mentioned in Chapter 3, the case management rules were introduced in 2016<sup>274</sup> modelled broadly on the existing High Court case management regimes for commercial and competition proceedings, involving one or more case management conferences and a pre-trial directions hearing.

In the absence of availability of suitably qualified court officers for that task, the case management rules were predicated on judges performing the case management role. The judge chairing the case management conference may make or give a range of orders and directions, whether adjudicative and/or managerial in nature to facilitate the determination of the proceedings “in a manner which is just, expeditious and likely to minimise the costs of those proceedings”. These include orders for amendment of pleadings, fixing the issues of fact or law to be tried, requiring delivery of interrogatories, or discovery or inspection of documents, requiring the exchange of documents or information between the parties, directions as to the mode of trial and fixing a timetable for the completion of preparation of the case for trial.

The functions assigned to the court registrar in those rules were confined to document and records management in the case. In the event, following representations made to the President of the High Court and pending the provision of the appropriate judicial resources, it was announced that the President did not intend to appoint a list judge or registrar for the purposes of the case management rules, and that the rules would consequently have no practical effect pending such assignments being made.

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270 Committee on Court Practice and Procedure, Sixteenth Interim Report, *op. cit.*, para. 19, pages 12 and 13.

271 *Ibid.* para. 20, page 13.

272 *Ibid.* para. 19, page 13.

273 Order 38, rule 9 RSC.

274 Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial procedures) 2016 - S.I. No. 255 of 2016.

### 7.2.2 Circuit Court

County registrars were conferred with extensive powers of case management under the “case progression” regimes introduced in relation to family proceedings and certain categories of civil proceedings in 2008<sup>275</sup> and 2010<sup>276</sup> respectively. Those case management regimes were modelled substantially on those for commercial and competition proceedings in the High Court<sup>277</sup> and, given their comprehensive nature, merit closer examination.

The following categories of civil proceedings are liable to case management:

- (a) Equity proceedings;
- (b) proceedings on foot of a Succession Law Civil Bill;
- (c) any proceedings, not referred to at paragraph (a), which include a claim for specific performance or for damages for breach of contract in respect of the construction, extension, alteration or repair of a building or other structure;
- (d) any other category of proceedings, or any other proceedings having or involving any characteristics, designated by the President of the Circuit Court as proceedings which may be subject to case progression, such designation to be published in such manner as the President of the Circuit Court shall direct.

Mortgage possession proceedings are not covered by the case progression rules,<sup>278</sup> being returnable immediately before the county registrar, who, as indicated in the preceding section, is tasked to transfer such cases where contested to the Judge’s list when in order for hearing.

A case progression direction may be given -

- by the county registrar of his/her own motion at any listing or hearing before him/her in the proceedings
- by the Judge of his/her own motion at any listing or hearing before him/her in the proceedings or
- by the county registrar or the Judge on the application by motion of any party to the county registrar or the Judge, as the case may be, on notice to the other party or parties

where the county registrar or the Judge (as the case may be) is satisfied that it would be appropriate to do so having regard to the complexity of the proceedings, the number of issues or parties, the likely volume of evidence, or for other special reason, such reason to be specified in the order.<sup>279</sup>

At the case progression hearing, the county registrar:

- (a) is required to establish what steps remain to be taken to prepare the case for trial, fix a timetable for the completion of preparation of the case for trial, and for that purpose adopt any timetable proposed by the parties if satisfied that it is reasonable;
- (b) may make orders or give directions with respect to pleadings, the exchange between the parties of statements of issues, the identifying of issues in dispute between the parties, particulars, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions and examination of witnesses, or otherwise, which may be necessary or expedient;
- (c) may, in respect of parties who are *sui juris*, receive and record on behalf of the Court undertakings to the court pending the trial of the proceedings or until further order made by the court;

<sup>275</sup> Circuit Court Rules (Case Progression in Family Law Proceedings) 2008 (S.I. No. 358 of 2008), now replaced by Part III of Order 59 CCR. Similar case management powers are exercisable by a county registrar in civil partnership law proceedings and cohabitation proceedings under Order 59A, rule 39 CCR.

<sup>276</sup> Circuit Court Rules (Case Progression (General)) 2009 (S.I. No. 539 of 2009).

<sup>277</sup> See Orders 63A and 63B RSC.

<sup>278</sup> Order 19A, rule 1(3) CCR.

<sup>279</sup> Order 19A, rule 3 CCR.

- (d) may make inquiries of the parties so as to ascertain the likely length of the trial and the arrangements, if any, for witnesses, information and communications technology (including video conferencing) and any other arrangements which require to be made for the trial;
- (e) may fix the time and mode of trial, and may fix a date for trial and may also give directions as to the service of a notice of trial or a notice to fix a date for trial;
- (f) may make any orders and give any directions in respect of arrangements for the trial as (s)he considers necessary;
- (g) may direct any expert witnesses to consult with each other within such time as the county registrar shall specify for the purposes of—
  - (i) identifying the issues in respect of which they intend to give evidence,
  - (ii) where possible, reaching agreement on the evidence that they intend to give in respect of those issues, and
  - (iii) considering any matter which the county registrar or the Judge may direct them to consider,

and require that such witnesses record in a memorandum to be jointly submitted by them to the county registrar and delivered by them to the parties, particulars of the outcome of their consultations, within such time as the county registrar shall specify, provided that any such outcome shall not be in any way binding on the parties.<sup>280</sup>

The County Registrar may adjourn a case progression hearing from time to time and from place to place as may be appropriate to enable any order made or direction given to be complied with or any act to be done or step to be taken in the proceedings to be done or taken, or so as to resume a case progression hearing after a matter has been referred to the court.<sup>281</sup>

The County Registrar at a case progression hearing, may on the application of any of the parties on notice or of his/her own motion, when (s)he considers it appropriate and having regard to all the circumstances of the case, adjourn the proceedings or any issue therein for such time, ordinarily not exceeding 28 days, as (s) he considers appropriate and invite the parties to use conciliation, arbitration or another dispute resolution process, not including mediation,<sup>282</sup> to settle or determine the proceedings or issue. Where the parties decide to take such a step, the county registrar may extend the time for compliance by any party with any provision of the rules of court and the Circuit Court judge may extend the time for compliance by any party with any order made by the judge in the proceedings.<sup>283</sup>

Where the county registrar concludes that there has been undue delay or default in complying with any order made or direction given by the court or the county registrar or with any requirement of the rules of court, (s)he may list the matter for hearing at the next sitting of the Court or cause the matter to be listed at the next sitting of the Court, and must furnish a report to the Court setting out the delay or default concerned.<sup>284</sup>

## 7.3 Potential to extend case management

### 7.3.1 High Court proceedings

Clearly, the appointment of sufficient additional judges to handle case management tasks under the case management rules would afford an opportunity to extend case management in the High Court beyond the existing catchment of commercial and competition cases without a requirement for additional rules amendments.

<sup>280</sup> Order 19A, rule 6(1) CCR.

<sup>281</sup> Order 19A, rule 6(3) CCR.

<sup>282</sup> Referrals to mediation being governed by the court's powers under the Mediation Act 2017.

<sup>283</sup> Order 19A, rule 7 CCR.

<sup>284</sup> Order 19A, rule 8 CCR.

However – and whether in conjunction with such an approach, or as an alternative to it – the appointment of a sufficient number of suitably qualified court officers as Deputy Masters would enable those officers to be assigned a function – to be incorporated in the case management rules – of presiding at case management conferences. This would not need to apply in proceedings on a summary summons or special summons, where the procedures already envisage the overseeing by the Master or a Deputy Master of preparation of the case for trial.

### 7.3.2 Circuit Court proceedings

By contrast with the position in relation to family proceedings, where case management is well established, the Review Group has the impression that in non-family civil proceedings case management has not been availed of by parties, or been imposed by county registrars or judges, to the extent that it might be. The Review Group considers that case progression orders might usefully be made by judges and county registrars more regularly in the existing categories of cases identified in the rules of court, in particular where at a pre-trial hearing it appears likely that the case will occupy more than a day at its eventual trial.

## 8. Submissions to the Review Group concerning procedural reform

### 8.1 Introduction

Given the important role that procedures play in the functioning of the court system, it is no surprise that the Review Group received detailed submissions on this area from many respondents. In this part the submissions are grouped together under headings reflecting common trends and themes.

What follows does not purport to be an exhaustive account of all submissions concerning procedure, but rather seeks to give a representative coverage of those issues raised in submissions which the Review Group considered significant in light of its remit.

### 8.2 Pre-action protocols

A significant number of submissions advocated the introduction of pre-action protocols (“PAPs”), i.e. protocols regulating the conduct of prospective parties to litigation in the period prior to commencement of the litigation (the Courts Service; a large law firm jointly with the Irish Hotels Federation, another large Dublin-based law firm; the Self-Insured Taskforce (“SITF”), NewsBrands Ireland (formerly National Newspapers of Ireland), Medical Protection Society (“MPS”).

The benefits of PAPs were identified, variously, as: greater efficiency in resolving cases; early communication between claimant and defendant; early and full disclosure of information about a dispute; early investigation of circumstances (MPS); assisting in early consideration and identification of the issues in dispute (NewsBrands Ireland); and resolution of cases in advance of their entry into the courts system (including by discouraging unmeritorious claims) (Bar Council).

One respondent argued for the extension of such protocols beyond clinical negligence actions (for which provision is made in Part 15 of the Legal Services Regulation Act 2015) to “mainstream” personal injury claims, with alignment between the PIAB process and any personal injuries PAP, and clear procedural pathways and specified timescales for appropriate cases to move from the PIAB process to the PAP (or in the other direction where appropriate) (a large law firm jointly with the Irish Hotels Federation (“IHF”). Another respondent recommended their extension to defamation and breach of privacy actions (NewsBrands Ireland).

With respect to the PAP for clinical negligence actions – yet to be introduced – the State Claims Agency (“SCA”) suggested that any protocol introduced under the Legal Services Regulation Act 2015 should oblige a plaintiff, when requesting his or her medical records from a healthcare provider, to confirm whether or not a claim in respect of clinical negligence is contemplated. It also submitted that provision should be made to compel a plaintiff who is contemplating a clinical negligence action and who has received a supportive

medical report dealing with breach of duty and / or causation, to send a formal letter of notification to the healthcare provider within a period of 4 weeks of receipt of the medical records.

Noting that the PAP for clinical negligence actions was rooted in primary legislation, the Courts Service considered that a general power to prescribe PAPs for other litigation types should be conferred on the court rules committees as a “natural complement to a court rules committee’s power to regulate litigation procedure”, in line with the approach in England and Wales and other jurisdictions.

### 8.3 Case management

Considerable support was expressed from within the private sector and the State sector for the introduction of active case management, which would put the progress of a case under the control of the court as opposed to the parties, including: the Bar Council; the Law Society; the Chief State Solicitor’s Office (“CSSO”); SCA; a large law firm jointly with the IHF; another large Dublin-based law firm; NewsBrands; the Department of Business, Enterprise and Innovation, IDA Ireland and Enterprise Ireland (“DBEI, IDA and EI”); the Department of Defence, the Commission for Communications Regulation (“ComReg”); partner in large Dublin-based law firm; the Dublin Solicitors Bar Association (“DSBA”; MPS; SITF; and Insurance Ireland. Benefits cited included early identification of issues in dispute and the assistance which this offers parties in considering resolution at an early stage, and provision of a more accurate estimate of the length of a given trial, and, ultimately, savings on time and costs and reduction of demand on judicial resources.

Assignment of case management powers to Masters, including control of case timetables and issuing of binding directions to parties, received support (large law firm jointly with IHF; CSSO, Court of Appeal judges). Case management should, it was suggested in one submission, be supported by “clear and consistently-enforced sanctions” for non-compliance with case management tasks.

Identifying a potential role for Masters and Deputy Masters in case management, Ms Justice Irvine, on behalf of the judges of the Court of Appeal observed:

“Every Monday, in the High Court, several judges are assigned to hearing procedural applications which are well capable of being dealt with by a Master or Deputy Master. In the North of Ireland there are six Masters to support the Superior Courts whereas in this jurisdiction there is but one. If three of the four judges currently assigned to dealing with motions on a Monday could be released to work on the case management in complex cases, in my view, those cases will be dealt with in a much shorter timeframe than otherwise would be the case thus reducing the demands of scarce court time and significantly reducing the cost of the litigation to the parties.”

Ms Justice Leonie Reynolds, judge of the High Court, recommended movement towards a judge-led system of litigation across all areas rather than a party-led system, under which every initiating document would provide for a return date and there would be no option of issuing open-ended proceedings. Judge Reynolds acknowledged that such a system would have major resource implications and require investment. She suggested that case management apply in long cases to ensure engagement between the parties and experts prior to the trial date. Parties should also be required to agree books of core documents prior to the hearing. She suggested that greater control should be exercised over the duration of trials, noting that the rules of court currently provide for this although they have not been implemented.

Judge Reynolds submitted that the exchange of witness statements in advance would help reduce the time spent on oral evidence and cross examination and suggested that consideration be given to widening the scope of the rules relating to security for costs, and to the limitation of costs to the time allotted by the court to the case. In the event of overrun the court would have discretion in relation to costs, but for stated reasons only. An alternative would be to provide that the costs in proceedings could not exceed the award and Judge Reynolds referred to the analogous provision in section 17 of the Courts Act 1981. Consideration should also be given to the introduction of a rule that would see costs disallowed, even to successful parties, in the event of unnecessary witness testimony which has prolonged the hearing of the case.

The Bar Council proposed a *reactive* type of case management procedure – with party-led timetabling at its core and supervision by the court, where there is default, by way of case management conference (“CMC”). Where a party was in default or unreasonably withheld agreement to a timetable, costs sanctions would follow and this would have the effect of encouraging litigants to agree a timetable at an early stage:

“The proposed model should allow for effective case management that is party-led, but that is supervised by the Court, so that proceedings will be prosecuted and not permitted to fall into abeyance while simultaneously limiting the degree of court supervision that will actually be required in order to secure compliance with case management procedures.”

A CMC would take place prior to trial and additional CMCs would be required in more complex cases. At the CMC the court may provide tailored directions in relation to documents and expert evidence. Directions could also be made in relation to preliminary issues to be determined.

Against this, the SITF submitted that “...there is a clear requirement for close and pro-active case management by the judicial system of litigation from the time proceedings are issued, supported by prescriptive [PAPs] which will soon apply in clinical negligence claims.”

The Law Society, DSBA and ComReg recommended implementation of the rules of court facilitating case management in the High Court, which were introduced in 2016. The Law Society asked that consideration be given to assigning a case to one judge for its duration so that familiarity with the case will lead to more efficient management of the case and that there be “better management” of adjournments with strict application of the rules in this regard.

A large Dublin-based law firm suggested that where possible, a judge should be assigned to a case from early in the proceedings with the intention that the judge should be responsible for all pre-trial matters and the trial at first instance. Exceptions could be made for issues such as reviewing claims of privilege: “...The view is that where the parties know who the trial judge is likely to be from the outset, this should promote early settlement. Furthermore, appropriate judicial signalling at interlocutory stages by the judge expected to be the trial judge could also facilitate early settlement. Such signalling by a judge who is not expected to be the trial judge is much less impactful.”

A practising barrister submitted that another way to reduce the burden and cost of interlocutory motions would be through the greater use of binding directions at the outset of proceedings. Such directions would govern the exchange of pleadings and particulars and the exchange of discovery requests. He saw it as essential that there be a threshold at the outset where directions are made as it would be impractical for there to be a directions hearing for every single plenary action. An alternative may be to have a set of directions that apply by default and are engaged from the time a defendant enters an appearance. Ideally parties would be entitled to adjust their directions by consent without reference to court via an online portal. Directions should have the force of a court order and default in the absence of additional court direction or agreement would lead automatically to a penalty.

The SCA noted that, ideally every clinical negligence case should be case managed, but if resource limitations currently rendered this unfeasible, case management should however be available on the parties’ application or on the court’s own initiative where the case meets certain criteria including complexity of the case and the number of legal issues. Citing the recommendations of the Working Group on Medical Negligence and Periodic Payments, the SCA suggested that there should be a single CMC for clinical negligence actions “...which would capture the purposes served by the initial directions hearing, case management conference and the pre-trial directions hearing in the Irish Commercial Court.”

By contrast, the High Court judges assigned to the High Court Personal Injuries List submitted that the parties to personal injuries litigation and their legal advisers are usually best placed to perform the task of narrowing the issues rather than by way of complex case management. They contended that complex pre-trial procedures, which may be entirely justified in other court lists, serve to increase the costs, volume and time consumed in personal injury cases and would result in litigation becoming more and more the monopoly of a few larger firms who could carry out such pre-trial procedures.



The CSSO suggested that “the application of clear and consistent case management practices is essential in order to enhance the administration of civil justice and to make our litigation process more streamlined and efficient.” It pointed out that case management measures are set out in Order 63C RSC and that this Order also contains a general power for the court to give directions and make orders so that proceedings can be determined in a way that is just, expeditious and likely to minimise costs. Noting that Order 63C does not currently have any effect given the unavailability of necessary court resources, the CSSO queried whether it would now be feasible to introduce these case management practices.

DBEI, IDA and EI considered that the pre-hearing process should be strengthened by narrowing down the issues under discussion to those that are most relevant in order to make earlier progress where possible and that there should be early guidance to all parties on case management, likely timelines and “transparency to the greatest extent possible” as to the likely scheduling and duration of proceedings. Judges should be directed to adhere strictly to deadlines and should direct all parties to adhere to deadlines (for submissions etc.) with “little tolerance” for extensions. There should be a limited number of adjournments permitted in a case.

A major insurance company recommended that a case review be undertaken within six weeks of service of a summons; at the case review the presiding judge or administrator could establish what expert reports are needed, whether liability is in issue, whether discovery is required etc. A second or further case review could be undertaken at a later stage.

Transport Infrastructure Ireland (“TII”) recommended active case management for cases involving procurement challenges.

With respect to case management in the Circuit Court, a partner in a large Dublin-based law firm, while acknowledging that case management rules exist in the Circuit Court, noted that it does not operate as a matter of course across a wide spectrum of civil matters and suggested that directions hearings and direction orders should be routine particularly across all Circuit Court civil actions.

Judge Petria McDonnell, judge of the Circuit Court, observed that while most civil actions in the Circuit Court run smoothly and efficiently, there are certain types of cases – to include equity cases involving boundary disputes and other land related disputes – that would benefit from case management, which would serve to streamline such cases, promote settlement and / or reduce hearing times in court. Case management may also be of particular benefit in the context of building contract disputes and proceedings brought pursuant to Section 117 of the Succession Act 1965.

The Review Group notes that these case types fall within the categories in respect of which case management may be directed under the existing case progression rules in the Circuit Court.

Judge McDonnell also suggested that a judicial case review would enable a judge to refer a matter, particularly a highly contentious matter, to mediation if appropriate. At worst, such a review would help clarify the real issues in the case and highlight any unrealistic expectations that the parties may have as to legal entitlements and the likely outcome of the proceedings.

Judge Francis Comerford, judge of the Circuit Court, acknowledged a number of benefits with regard to pre-trial checklists and case management but noted that it may be a “patent fallacy” to assume that by making lawyers do more work costs could be reduced. Acknowledging that the Circuit Court does deal with a proportion of cases that are in no way straightforward, and can involve complex legal concepts with involved issues in cases of considerable economic significance, he submitted that the Circuit Court does require a full panoply of case management powers to deal with those cases.

Judge Comerford suggested that in non-personal injuries cases in the Circuit Court liberty to serve notice of trial should be obtained at a list to be heard before the County Registrar. Both parties would be required to attend and the purpose of the hearing would be to confirm by oral evidence that mediation has been considered and to establish if case management is required for the hearing. This hearing would take place

in advance of any application for discovery and cases that do not require case management would proceed to hearing pursuant to generic practice directions governing discovery and the preparation of pre-trial documentation. It is only in those cases that require a full case management that the full range of pre-trial directions akin to those that apply in the High Court (but not as onerous as the directions applied in the High Court) would be applied.

Insofar as personal injuries actions are concerned, Insurance Ireland suggested that many of the proposals and recommendations set out in the reports (Modules 2 and 3) of the Working Group on Medical Negligence and Periodic Payments could be extended and applied to personal injury claims generally. It suggested that in theory litigation in personal injuries claims could be avoided if PAPs were introduced as there would be more pre-action contact between the parties, better and earlier exchange of information and the parties would be more likely to settle claims without litigation.

The Self-Insured Taskforce (“the SITF”), observing that less than 6% of personal injury claims proceed to oral hearing, submitted that “...there is a clear requirement for close and pro-active case management by the judicial system of litigation from the time proceedings are issued, supported by prescriptive PAPs which will soon apply in clinical negligence claims.”

#### 8.4 Pleadings reform

On behalf of the Court of Appeal judiciary, Ms Justice Irvine suggested that while the basic form of pleadings – plenary summons, special summons, summary summons etc. – have worked well, there has been a proliferation of other forms of originating documents and that consideration should therefore be given to a single unified procedure, along the lines of a special summons with a short pleaded case and a verifying affidavit. It was suggested that consideration be given to a restructuring of the general pleading rules along the lines of Order 1A and Order 1B RSC (personal injuries summons and defamation actions respectively). Judge Irvine further submitted that Order 21 RSC should be amended to require the defendant who wishes to advance an affirmative defence to plead that affirmatively.

The Bar Council described the system of exchange of pleadings as cumbersome and as contributing to the inefficiency of the system. It suggested that the use of vague, boilerplate or prolix language is problematic and the traversed opposition discourages engagement with the real issues in dispute. It recommended a simplified system as follows -

- the initiating document should identify precisely the nature of the cause of action and relief together with the relevant facts relied upon, and the defence should follow the same model
- the parties would be limited to agitating the matters identified in these documents, subject to a limited right to amend, thus forcing parties to address the real claims at the outset
- the originating summons and statement of claim documents should be amalgamated into one document, thus reducing the need for “endless” requests for particulars
- mandatory discovery obligations would apply in respect of those matters identified in this form of exchange
- the streamlining of pleadings could also be linked to the reform of the rules relating to service.

The Bar Council set out a model timetable relating to the exchange of a Statement of Case and Statement of Defence, the exchange of mandatory discovery and the listing of the matter for a CMC.

The Courts Service recommended the integration of the statement of claim with the originating summons / document in High Court proceedings and asked that consideration be given to implementing the recommendations of the Law Reform Commission in its Report on Consolidation and Reform of the Courts Acts of 2010 (Chapter 2(1)) for rationalisation and simplification of terms in proceedings and pleadings and other documents, both across jurisdictions and as between proceedings categories.

A practising barrister submitted that unnecessary distinctions between differing originating documents should be eliminated and described a standardised format that summonses should follow. Where urgent

reliefs are sought provision could be made for an abridged claim form. Pleadings should annex any document specifically referenced in the pleading where practicable, or same should be provided as a matter of initial disclosure within a further 14 days. The practice of requesting extensive particulars should be discouraged and should be limited to complex litigation.

A solicitor who routinely acts for claimants in medical negligence actions suggested that defendants in such cases should be required to identify in the defence what happened and why it happened. This obligation should be backed up by the requirement to deliver an affidavit of verification with penalties to apply for “false pleading”. The solicitor observed that defences continue to contain “blanket denials” notwithstanding the provisions of Section 12 of the Civil Liability and Courts Act 2004. The solicitor acknowledged that difficulties may arise where a defendant is obliged to plead “truthfully”, but that the apparent or perceived right against self-incrimination comes at “too high a cost”.

The SCA proposed greater consistency across the first instance jurisdictions in the application of time limits for filing and delivery of pleadings. It also suggested that it would be beneficial if all jurisdictions had the same drafting requirements and offered the example of the different forms of Appearance across the jurisdictions. Similarly, the SCA proposed greater consistency in the rules that apply to the filing of certain documents in the relevant court offices, noting that notices to produce are required to be filed but pleadings are not. It suggested that the requirement to seek a letter consenting to the late filing of an Appearance in the Circuit Court should be removed.

The SCA submitted that the consequence of the failure on the part of plaintiffs in personal injuries cases to draw a clear distinction in their pleadings between pre-existing medical conditions and the injuries alleged to have been sustained by reason of the alleged negligence of the defendant, is that defendants are obliged to issue lengthy notices for particulars. The SCA observed:

“The effect of excessively drafted pleadings is that cases take longer to resolve and are more expensive than they would otherwise be if it were clearly stated at the outset which injuries the plaintiff alleges are a result of the defendant’s negligence as distinct from those which are the result of a pre-existing or on-going condition.”

The SCA proposed an amendment to Section 10(2) of the Civil Liability and Courts Act 2004 which would impose an obligation on plaintiffs to delineate clearly between any relevant pre-existing condition and the injuries the subject of the claim.

Addressing the same issue, Insurance Ireland submitted that on the issue of a personal injuries summons the plaintiff should be obliged to furnish pre-accident medical history, medical reports, expert reports and all supporting documentation for the claim. This should reduce the need to raise particulars. In similar vein the DSBA suggested that relevant medical records for a period of three years pre-accident be served together with the personal injuries summons. The DSBA considered that one of the reasons why cases take so long to settle is inability or failure on the part of defendants to deal with the matter at issue in a meaningful way, and frequently it was not possible to ascertain the defendant’s true position due to their defence being pleaded too generally. A requirement that defendants set out their position with particularity would result in more focus at an earlier stage in the proceedings.

The DSBA made other points in relation to pleadings, viz. -

- It should be necessary for parties to file all pleadings and other documents not currently required to be filed so as to ensure that all documents are on the court file. This would be of benefit where, for example, one party is a litigant in person and would ensure that the court has full visibility of all pleadings
- With a view to ensuring that both parties to a personal injuries action have equality of process the rules should be amended to impose the same obligations on defendants in the context of the delivery and filing of affidavits of verification as those imposed on plaintiffs.

The MPS considered that, if not provided for under the relevant PAP, a personal injuries summons should provide particulars of all hospitals / practitioners that provided relevant treatment. Plaintiffs should also be required to serve a “condition and prognosis” report with the summons. The Review Group notes that the information required by the PAP in clinical negligence actions and the contents of the personal injuries summons are not matters within the competence of the rules committees concerned but that of the Minister for Justice and Equality.

## 8.5 Measures to reduce delay in and time and cost of proceedings

A variety of reforms were proposed in submissions designed to curtail time spent at hearings and reduce legal costs generally.

On behalf of the Court of Appeal Ms Justice Irvine recommended that, rather than the “leisurely” approach to litigation that is pre-supposed by the current rules of court, modern rules should take a different approach, viz. -

- that litigation is ultimately under the control of the court
- the objective should be for the fair administration of justice in a manner which is speedy, efficient and minimises costs to the parties
- oral evidence should be kept to a minimum and the parties should be encouraged to reduce evidence to writing where it is possible to do so. It was not suggested that oral evidence should become a rarity, but rather that this is kept in check where this is consistent with fair procedures.

To this end Judge Irvine suggested the rules contain a statement of general principles to reflect the above objectives so that the rules themselves would be interpreted by reference to the principles and in such a manner as would minimise cost and expense and promote efficiency in the legal system.

A similar point was made on behalf of the Courts Service by Mr Noel Rubotham, Head of its Reform and Development Directorate. Observing that there have been instances of civil cases lasting many days or weeks where the issues in dispute, viewed objectively, could not be said to merit the expenditure of court and practitioner time and legal costs incurred, he advocated that case conduct principles according with those incorporated in the Law Reform Commission’s draft scheme of a Bill consolidating the Courts Acts, be adopted in primary legislation. The Courts Service also recommended implementation of recommendations of the Expert Group on Article 13 ECHR concerning the introduction of limits on the power to adjourn cases and a provision, along the lines of the procedure operating in the Singapore courts, for the automatic discontinuance of proceedings where no steps had been taken in them for a minimum period.

With respect to time limits and the permitting of extensions of time, Judge Irvine suggested that Order 122 RSC be amended to -

- include a statement of principle to the effect that litigants are obliged to prosecute and, as the case may be, to defend litigation with appropriate expedition.
- provide that the court is under a duty to ensure that, so far as possible, the goal of speedy and expeditious litigation is achieved
- empower the courts expressly to strike out or stay proceedings by reason of undue delay
- provide that in those cases where a notice to proceed is required to be served by any party:
  - no such notice could be served save with leave of the court;
  - such an application would have to be made by motion on notice; and
  - no such leave should be granted save where the court was satisfied that the delay has not been prejudicial to the parties or to the general administration of justice.

With regard to delay Ms Justice Irvine submitted that “[u]necessary and unreasonable delay by litigants and / or their lawyers must carry real consequences in terms of costs.” She suggested that it is time for the rules of court to be reviewed and for all anachronistic timelines and procedures to be removed. It was suggested that a sub-committee of the Rules Committee should be tasked with identifying simple rule changes to

speed up the progress of cases and to shift the onus to a party in default to apply to court to do whatever they failed to do in the time prescribed by the rules.

Significant support was evident for a move away from conventional, fully orally conducted, hearings. A law firm and the IHF recommended greater use of telephone hearings particularly in interlocutory matters. The CSSO considered that a shift in emphasis from oral submissions to paper-based applications could aid in reducing the length of oral hearings. A Dublin-based law firm also recommended that the reading out of pleadings should be the exception. Courts should rise to read pleadings and openings should be time-limited by the court. The CSSO submitted that if court resources were increased and if judges were prescribed a role in researching and interrogating the issues, with “...less of a role for advocacy by the parties”, then costs to litigants would be significantly reduced. The CSSO noted that this would amount to radical change to the civil justice system and might be more suitable for certain areas of practice, such as judicial review, than others.

The CSSO observed that this approach would also require significant funding by the State in terms of additional resources to support the courts system/judiciary.

DBEI, IDA and EI also advocated written or “document only” reviews, rather than hearings, in planning and commercial cases where appropriate, noting that under the reformed Order 84 RSC a judge may exercise his or her discretion as to whether an oral hearing is necessary or not in judicial review proceedings. Proceedings could be expedited considerably if it was deemed that oral hearings are not required in many cases where the matters to be addressed are procedural in nature. While state bodies can already indicate their preference for written submissions only to the judge in question in cases of judicial review, further use and facilitation of this through “digital platforms” could greatly expedite decision making. The Review Group should consider whether “written only” procedures could be used to a greater extent in other areas, such as commercial cases.

One practising barrister observed that a large amount of court time and a significant amount of litigants’ resources are expended on oral hearings in relation to interlocutory motions and applications. Giving the example of a typical High Court personal injuries action, he submitted that there may be multiple hearings prior to the trial of the action. He observed that oral hearings can be costly and time consuming, with the common law motions list on a Monday collectively consuming 16 hours of court hearing time. He contended that applications of this nature add little to the determination process and suggested that “[i]t would be far more efficient if such motions were determined solely on the basis of written applications submitted electronically.” Oral hearings could be replaced with electronic applications where the parties consent to simple procedural steps, e.g. fixing of dates for hearing should be possible without lawyers being required to attend court in person.

Other submissions directed to reducing the time and cost of litigation included:

- (a) assignment of interlocutory matters to Masters as opposed to Judges (Ms. Justice Reynolds; law firm and IHF; Minister of State for Financial Services and Insurance, Michael D’Arcy TD; Court of Appeal judiciary). A practising barrister commented that: “This would significantly free up High Court judges for hearing substantive matters. For example, apart from the Monday motions lists, at present a considerable amount of time in the chancery and non-jury lists is taken up with motions and matters for mention which often take up to an hour each day.” The Law Society recommended greater delegation of non-contentious matters to court registrars and the greater use of email to arrange non-contentious matters, such as adjournments. The Department of Defence recommended extending the remit of court registrars and clerks to conduct call-over listing with the additional powers to adjourn etc..

On behalf of the Court of Appeal judiciary, Ms Justice Irvine submitted that several High Court judges are assigned to hearing procedural applications which are well capable of being dealt with by a Master or Deputy Master and indicated that in the North of Ireland there are six Masters to support the Superior Courts, whereas in this jurisdiction there is but one. Deployment of Deputy Masters would enable release of three of the four judges currently assigned to dealing with motions on a Monday to work on case management in complex cases;

- (b) service of expert evidence in professional negligence claims, either prior to commencement or with the statement of claim (law firm and IHF);
- (c) use of pre-trial motions to narrow down the issues in dispute or to be resolved at hearing. It was observed that in defamation actions the determination of preliminary issues can assist in the early resolution of proceedings (NewsBrands);
- (d) a prohibition on setting down actions for trial while significant matters such as discovery remain unresolved (NewsBrands);
- (e) a practising barrister submitted that more focussed submissions would result if time for oral submissions were limited as a matter of course. Specific limitations should be imposed in the context of interlocutory appeals before the Court of Appeal and following the trial of actions in the High Court, and serious consideration should be given to requiring counsel to estimate witness times with some reasonable flexibility allowed; while a degree of latitude has been afforded counsel in cross examining witnesses, it should not be regularly permitted to compromise the efficient running of trials, which is an equally important objective of an effective system of justice. That respondent submitted that many interlocutory and procedural applications do not necessarily warrant full court hearings and suggested that case conferences be introduced. Most motions for default of appearance and pleading should not require a full court hearing, and the respondent set out a proposal for default timetables for directions;
- (f) the Revenue Commissioners observed that many delays and increases in costs are caused not by the procedures set out in rules of court but by the management of court lists, and suggested that greater efficiencies could be achieved if applications for hearing dates could be made electronically to the relevant court office with only disputed applications being made to court. Observing that the practice in the Circuit Court as to the listing of cases varies from circuit to circuit, the Commissioners submitted that that practice should be standardised across all circuits and that applications for hearing dates should be made electronically to the relevant court office;
- (g) a Dublin-based law firm recommended that following opening submissions the court should give “time budgets” to the parties for each component of the case. These could be revisited but the court should have the power to adjust costs orders where parties do not keep to time budgets;
- (h) the Law Society observed that the practice of reading aloud the pleadings and affidavits at the start of each case is very time-consuming and that greater control should be exercised over the time taken by advocates in court. It also observed that the delivery of judgments needs to be timely and that to this end greater resources are needed together with improved case management and scheduling. In similar vein, DBEI, IDA and EI submitted that more definitive requirements could be introduced to encourage judges to deliver judgments within reasonable timeframes;
- (i) the CSSO suggested that where a habeas corpus challenge is brought in respect of a High Court committal warrant or remand on foot of a European Arrest Warrant, such challenge should be heard directly by the Court of Appeal to avoid a multiplicity of applications being made to different High Court judges arising out of one warrant. Whatever the merits of this proposal, the Review Group notes that such a change would seem to require an amendment to the Constitution;
- (j) the CSSO also suggested that leave to amend pleadings is granted too readily, including during the course of proceedings, resulting in the State being required to meet an altogether different case, and delay and unnecessarily increased costs. It submitted that when an amendment to pleadings is necessary in the interests of justice, this should be reflected in a costs order against the relevant party;
- (k) the CSSO contended that timely hearings would be facilitated if courts had set time limits (e.g. one hour) for submissions and closing remarks, as is often the case in the Court of Appeal. Papers should be taken “as read” and the practice of pleadings being read aloud at hearing should not be facilitated; where oral hearings are necessary it would be desirable if all but the most complex interlocutory motions could be dealt with by several masters of the High Court rather than one as at present: “This would significantly free up High Court judges for hearing substantive matters. For example, apart from the Monday motions lists, at present, a considerable amount of time in the chancery and non-jury lists is taken up with motions and matters for mention which often take up to an hour each day.”

- (l) the CSSO also submitted that in complex areas of litigation the establishment of specialist divisions would allow for tailored case management practices and two areas that may benefit in particular are planning and environmental judicial review matters and procurement challenges. On the same topic, DBEI, IDA and EI recommended an assessment of whether there is scope to deploy specialist judges in technical areas of high demand. The developments in the area of strategic infrastructure development cases were welcomed but it was suggested that perhaps more “transformative changes” could bring further efficiencies, such as enabling and resourcing a specialist Planning and Environmental Division in the High Court. Resource constraints were acknowledged and further appointments of judges were required. The Commercial Litigation Association of Ireland (“the CLAI”) set out a detailed proposal for the establishment of a specific list in the High Court in which cases involving intellectual property would be conducted and in which cases involving high technology would be conducted where appropriate;
- (m) DBEI, IDA and EI also recommended that measures to improve efficiencies, where successfully implemented in courts of first instance, should be replicated in the relevant appeal courts to ensure that “bottlenecks” are simply not shifted from one jurisdiction to another;
- (n) another large Dublin-based law firm suggested that fixed time periods within which reserved judgments are to be delivered should be set, and a publicly available list of judges, their outstanding reserved judgments and the time taken to deliver their reserved judgments should be maintained. All stamp duty paid by litigants should be refunded where the fixed time limits are missed. The DSBA also drew attention to the need for timely delivery of judgments;
- (o) the Minister of State for Financial Services and Insurance, Michael D’Arcy TD proposed that appropriate “writing days” be introduced so as to enable the judiciary to properly compose their judgments in a timely manner on the conclusion of a case;
- (p) a large Dublin-based law firm recommended that appeals from interlocutory motions should be subject to a triage review by a judge so that minor matters can be listed and dealt with expeditiously;
- (q) one member of the public suggested that a finite time limit of perhaps 15 minutes should be allocated in any instance where a case has been listed for hearing and where the parties seek time to discuss the matter. Where additional time is required the next case would be called for hearing. The respondent contended that this may lead to less delay and would ensure that witnesses are not in attendance unnecessarily;
- (r) the Office of the Attorney General suggested that consideration be given to the concept of prior reading time and pre-trial steps to condense arguments. It was observed that while this would involve significant investment of judicial time pre-hearing, it could cut litigants’ costs and arguably lead to less expenditure of judicial time overall.

## 8.6 Standardisation and simplification

The Law Society and DSBA submitted that the use of plain modern language and uniform terms across the rules of court will increase accessibility and promote clarity and understanding. Insurance Ireland suggested that the rules of court should be streamlined and consolidated and that court jurisdiction-specific rules are not necessary. It submitted that generic cross-jurisdictional rules would be preferable with specific case management rules for designated areas such as personal injury. The rules of court should be a “live document”, annotated and updated with “interpreting caselaw and incorporating amendments rather than piecemeal amendment”.

The Free Legal Advice Centre (“FLAC”) argued that procedures that apply at District Court level are more complex and cumbersome than those that apply at Circuit Court and High Court level:

“In the High Court, to commence civil proceedings, it is only necessary to have the relevant papers stamped, and filed and served in the appropriate manner on the respondent. Only one visit to the Central Office is involved at the initial stage. Whereas in the District Court for most civil matters, it is necessary to first issue the relevant summons / notice, then effect service, then prepare a statutory declaration in relation to service, before returning to the Court office to lodge the summons and declaration, and it is only at that point that the matter is listed.”

FLAC suggested that this procedure is unnecessarily cumbersome and that the relevant rules and forms are not set out in a format that is accessible or easy to understand. Together with a number of suggested wide-ranging reforms, discussed in greater detail below, FLAC submitted that procedures in the District Court should be simplified.

In the context of first and second tier decision making, and citing the various adjudicative bodies to include the WRC, deciding officers in the Department of Social Protection, the Social Welfare Appeals Office and the Residential Tenancies Board (“RTB”), FLAC observed that each of these bodies have differing forms, time limits, procedures as well as differing forms of appeal. FLAC submitted that “[t]hese quasi-judicial bodies should provide accessible, low cost mechanisms for dispute resolution.” Describing the current approach as “ad hoc”, FLAC suggested that the UK Courts and Tribunal Service may provide some guidance in this context:

“These tribunals are administered by a single body where appointed persons make legally binding decisions at a layer just below the courts. Decision makers are appointed in much the same way as ordinary judges, though they are not always lawyers. They have clear rules set out governing their operation, appeals and the routes to the higher courts.”

FLAC recommended that the current system of first and second tier quasi-judicial decision making be reviewed for the purpose of establishing a more streamlined system with common procedures, where the focus of the dispute would be on the substantive rights.

The Legal Aid Board recommended that consideration be given to the introduction of a simplified, standard set of civil procedure rules covering the High Court, the Circuit Court and the District Court and to the introduction of more “lay-friendly” terminology – for example replacing “plaintiff” with “claimant”.

The RTB recommended that there should be greater consistency in the application of procedures – citing procedures concerning the assignment of hearing dates and service – across the various Circuits and greater consistency in the manner in which Circuit Court orders are issued.

A practising barrister submitted that a single rule should identify what motions may be brought *ex parte* and that motion dockets could be simplified.

The same respondent advocated that plaintiffs should be required to indicate whether they assess their claim to constitute either (a) complex or (b) non-complex litigation, in which default timetables for exchange of pleadings and case progression would apply. “Complex should be understood in the sense of requiring significant court supervision. Most litigation is to be regarded as non-complex. Most personal injuries, liquidated debt, defamation, judicial review and pure issues of law would be non-complex.”

## 8.7 Evidence

A major insurance company submitted that because evidence can ordinarily only be given at the main trial of the action, litigation is conducted by ambush. The insurer supported the proposal that would see a case review undertaken within six weeks of service of a summons; at the case review the presiding judge or administrator could establish what expert reports are needed, whether liability is in issue, whether discovery is required etc. A second or further case review could be undertaken at a later stage.

It also submitted that all witnesses should be required to produce a witness statement and further, that case review would assist with the difficulties associated with failures to exchange expert reports at an early stage. It suggested that penalties for failing to deliver expert reports prior to service of the notice of trial, or at another stage, would assist. It was further submitted that mediation should be compulsory.

In relation to expert evidence, it submitted that reports from a single independent expert should be all that is required in proceedings. Noting that this procedure would be novel in the Irish context, it submitted that rules and procedures should be modified to permit evidence on specified points to be taken in advance of



trial by way of oral deposition and the potential benefits that might accrue from this novel approach were set out under a number of headings.

The MPS indicated that it would welcome a more proactive approach by the courts to determining the appropriateness of expert witness instructions, and cited the example of two experts from the same discipline being requested to comment on similar issues. It also suggested that the court should have the power to order that experts meet before the trial date.

The Review Group notes in this regard that the reforms to expert evidence introduced in 2016<sup>285</sup> require that expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings, and empower the court, *inter alia*, to:

- (a) require each party intending or proposing to offer expert evidence to identify–
  - (i) the field in which expert evidence is required; and
  - (ii) where practicable, the name of the proposed expert;
- (b) determine the fields of expertise in which, or the proposed experts by whom, evidence may be given at trial;
- (c) fix the time or times at which a report setting out the key elements of the of the evidence of each expert intended or proposed to be offered by each party shall be delivered to each other party concerned or exchanged; and
- (d) where two or more parties wish to offer expert evidence on a particular issue, direct that the evidence on that issue is to be given by a single joint expert.

## 8.8 Resources

A large Dublin-based law firm observed in a detailed submission that procedural changes alone will not ensure a more consistent and responsive justice system or meet evolving international requirements and standards, making the point that the increasing demands placed on the Irish courts necessitate significant investment – specifically, in judicial appointments and remuneration and in support of the Courts Service – to enable the courts and the Courts Service to meet the needs and expectations of 21<sup>st</sup> Century court users.

Judge Reynolds recommended that resources be allocated to ensure that greater time and opportunity is given to trial judges to read the papers in advance and prepare for the hearing, to enable cases to be conducted in a more efficient manner. The High Court Personal Injuries List judges observed that one area where significant delay can be incurred is in relation to specially fixed actions and suggested that this issue could be addressed by the allocation of extra judges to the Personal Injury List.

Insurance Ireland recommended that more judges should be assigned to deal with court lists “in arrears” in country venues.

TII submitted that additional judicial resources are required to enable active case management and the trial promptly of cases involving procurement challenges.

The RTB recommended that greater resources be made available to court offices in circumstances where some court offices are understaffed and to sheriffs’ offices around the country.

## 8.9 Court sittings and sitting times

The CSSO recommended that consideration be given to aligning the legal terms with the academic year i.e. three legal terms with a long vacation in July and August and the courts reopening in September, noting that this structure is adopted in Northern Ireland and suggesting that it would seem to fit more naturally with wider society. It also suggested that the business hours of the courts might be extended to perhaps 9:30am – 4:30pm.

<sup>285</sup> Order 39, rule 59, RSC, inserted by para. 2(vii) of the Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. No. 254 of 2016).

Conveying the suggestions made by in-house counsel working for commercial organisations, the managing partner of a large Dublin-based law firm suggested that court sittings should commence earlier than 11am and should end later than 4pm, and that this should be particularly so if no witness evidence is being heard. Time for writing judgments should be allocated to judges in days and half days, rather than sought to be accommodated prior to 11am and subsequent to 4pm. It was also submitted that court vacations are too long and that the long vacation is regarded as an anachronism.

The Courts Service submitted that, to facilitate practitioners, parties and court users generally, court vacation periods should align with school holidays.

The Department of Defence also submitted that court sitting times could be considered for review “in the context of maximising court availability”.

## 8.10 Discrete issues

Some respondents also raised concerns regarding deficiencies in practice or procedure – including concerns about non-compliance with or failure to enforce existing procedural requirements. These deficiencies were not seen as requiring a recommendation by the Review Group, but as meriting mention, for consideration, as the case may be, by the president of the court concerned, court rules committee(s), courts management, or the Government Department with responsibility for the area of legislation concerned.

With respect to personal injuries proceedings, the SCA described how in its experience the provisions of Section 8 of the Civil Liability and Courts Act 2004<sup>286</sup> are rarely adhered to and indicated that it is not uncommon for the SCA to receive a section 8 notification when the personal injuries summons has already issued. It noted that while costs sanctions may be imposed for non-compliance with this provision, the sanctions are discretionary and “...have failed to encourage plaintiffs to comply with the legislation”.

The Review Group notes that section 8 was recently strengthened by an amendment to *require* a court to draw such inferences as appear proper – and apply costs sanctions where the interests of justice so require – from a plaintiff’s failure to serve a notice on the wrongdoer or alleged wrongdoer, within *one* month from the date of the cause of action or as soon as practicable thereafter, stating the nature of the wrong alleged. It also notes that the rules of court were amended in consequence to require a plaintiff who alleges that they failed for reasonable cause to serve the section 8 notice, positively to indicate in the personal injuries summons particulars of the cause of that failure.<sup>287</sup> In the Review Group’s view, it falls to defendants to invoke these provisions in an individual personal injuries case should they consider that a costs sanction is appropriate.

The SCA observed that under Order 8, rule 2 RSC it is open to a defendant, before entering an appearance, to bring a motion to set aside the renewal of a summons. However, a difficulty arises on account of the fact that the defendant who is considering whether to bring such a motion to set aside the renewal will wish to consider the grounding affidavit and exhibits which were filed in support of the plaintiff’s *ex parte*

286 Section 8, as amended by section 13 of the Central Bank (National Claims Information Database) Act 2018, provides:

“8.—(1) Where a plaintiff in a personal injuries action fails, without reasonable cause, to serve a notice in writing, before the expiration of one month from the date of the cause of action, or as soon as practicable thereafter, on the wrongdoer or alleged wrongdoer stating the nature of the wrong alleged to have been committed by him or her, the court hearing the action shall—

(a) draw such inferences from the failure as appear proper, and

(b) where the interests of justice so require—

(i) make no order as to the payment of costs to the plaintiff, or

(ii) deduct such amount from the costs that would, but for this section, be payable to the plaintiff as it considers appropriate.

(2) In this section “date of the cause of action” means—

(a) the date of accrual of the cause of action, or

(b) the date of knowledge, as respects the cause of action concerned, of the person against whom the wrong was committed or alleged to have been committed, whichever occurs later.”

287 Order 1A, rule 6, RSC, substituted by para. 2 of the Rules of the Superior Courts (Personal Injuries: Section 8 Notices) 2019 (S.I. No. 216 of 2019) with effect from the 19th June 2019.

application to renew: the defendant’s solicitor may encounter difficulties when attempting to access the motion papers in the Central Office as he or she will not yet have entered an appearance. The SCA submitted that a plaintiff, when serving the summons that has been renewed, should also be obliged to serve a copy of the motion papers on foot of which the order to renew was granted. The Review Group considers that this proposal is more appropriately addressed to the Superior Courts Rules Committee for consideration.

The SCA suggested that the rules of court be amended to allow for the amendment of a pleading without leave of the court on one occasion, at any time prior to trial, provided the parties are in agreement as to the nature of the amendment proposed. The Review Group also considers that this proposal should be addressed to the Superior Courts Rules Committee for consideration.

The SCA observed that the principles expressed in *Wright v HSE*<sup>288</sup> – requiring that the court sanction a plaintiff in costs where the plaintiff, though succeeding on one issue, fails on other issues they have raised in the case – have not, to date, been more widely applied in the Superior Courts and that “the practice of making numerous (and frequently contradictory) allegations continues”. The SCA submitted that the practice of making unmeritorious or unsubstantiated claims has both financial consequences and also leads to distress on the part of clinicians whose conduct is impugned in clinical negligence actions. The SCA submitted in the interests of justice that a plaintiff should face costs penalties where he or she pursues a claim that is later to be found to be without merit. In this context the SCA noted the obligations imposed on parties in the High Court to exchange expert reports in advance of the trial.

The Review Group notes that the statement in *Wright* has been followed in other personal injuries cases,<sup>289</sup> and it is open to a party to invoke that jurisprudence in an individual case where they consider it should apply.

In relation to claims for aggravated or exemplary damages, the SCA expressed the view that the practice of making claims for aggravated and / or exemplary damages is an increasing feature of clinical negligence claims. Noting that there are clearly circumstances in which claims for these heads of damages will be appropriate, the SCA also observed that the instances of deliberate, dishonest or malicious behaviour on the part of clinicians are rare. It was submitted that claims for aggravated and / or exemplary damages cause huge distress to clinicians and the SCA expressed the view that it is hard to avoid the conclusion that in many claims such claims are made for tactical reasons. It was suggested that it would be appropriate that a plaintiff should face penalties for inappropriately alleging malice (as opposed to negligence) against a defendant.

The Review Group likewise considers that this is not a matter requiring any recommendation from it, but one for a party in an individual case to raise, where they consider it appropriate, by pursuit of costs sanctions.

Noting that Section 10(2)(e) of the Civil Liability and Courts Act 2004 stipulates that the personal injuries summons shall specify full particulars of all items of special damage, the SCA observed that full particulars are rarely set out in the summons but rather are delivered very close to trial which can have implications in terms of delay and costs. It was submitted that a possible solution would involve an amendment to Order 1A, Rule 10 RSC to provide that the time prescribed for the delivery of a defence shall run from the date of delivery of particulars of special damage. The SCA recognised that plaintiffs should of course be entitled to deliver updated or further particulars of special damage where this aspect of the plaintiff’s claim is ongoing, provided that this is done in a timely manner.

However, the Review Group notes that it is already open to a defendant once they have entered an appearance to a personal injuries summons which omits full particulars of items of special damage, to seek

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288 [2013] IEHC 363, See also *Veolia Water UK Plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81.

289 See, e.g.: *Dowling v Bord Altranais agus Cnaimhseachais na hÉireann* [2017] IEHC 641; *Anderson v Birthistle* [2019] IEHC 302.

that information by way of a notice for particulars to enable them to prepare their defence,<sup>290</sup> and to apply to court for an order requiring such delivery in the event that the information is not provided.<sup>291</sup>

The Review Group notes that section 10(3) and (4) of the 2004 Act already contain provision for sanctions in the event of non-compliance with the requirement to specify all items of special damage. Those subsections provide that where a plaintiff fails to comply with section 10, the court

- (a) may (i) direct that the action shall not proceed any further until the plaintiff complies with such conditions as the court may specify, or (ii) where it considers that the interests of justice so require, dismiss the plaintiff's action, and
- (b) shall take such failure into account when deciding whether to make an order as to the payment of the costs of the personal injuries action concerned, or the amount of such costs (section 10(3)) and when hearing the action may draw such inferences from the failure as appear proper (section 10(4)).

The SCA's proposal that the time for delivery of a defence should be fixed to run from the date of delivery by the plaintiff of such information would seem unnecessary in the circumstances, and might even have the unintended effect of introducing delay in the closing of pleadings.

The SCA observed that in the context of clinical negligence cases the option of making a tender pursuant to Order 22 RSC is frequently unavailable. Order 22 rule 1(7) RSC, allows a defendant once without leave to make a lodgment in such a case, either at the time of the delivery of a defence or within a period of four months from the date of the notice of trial. The SCA asserted that this four month "window" will often have expired long before the parties have exchanged experts' reports.

The SCA proposed an amendment to Order 22 RSC to provide for an additional lodgment or tender "window" which would be available for a period of four weeks from the date of exchange of expert reports and the date of the provision of full particulars of special damage pursuant to section 45(1)(a) of the Courts and Court Officers Act 1995 and Order 39, rule 46 RSC.

The Review Group notes that under the existing rules of court, a plaintiff must within one month of the service of the notice of trial furnish to the defendant and any other party or parties a schedule of his or her expert witnesses' reports, the defendant must within seven days of receipt of the plaintiff's schedule furnish a schedule of his or her expert witnesses' reports, and within seven days of the receipt of the latter schedule all parties must exchange copies of the reports listed in the relevant schedule.<sup>292</sup> Assuming compliance by parties with the rules concerned, this should leave adequate time for a defendant to make a decision regarding the making of a lodgment or tender offer.

Questions that arise from this proposal are: whether stricter compliance with the timeline for exchange of experts reports should be imposed; whether the time for exchange of experts' reports should be revised; or whether the SCA's proposal to extend the time for making of a lodgment or tender offer should be adopted, and if so, by how many weeks. These are matters which involve a balancing of the rights of plaintiffs and defendants – if not also of other parties – and a consideration of the likely effect any alteration in the timeline might have on the operation of the Personal Injuries List. Given the discrete nature of the proposal and the number of interests potentially affected, the Review Group considers that the SCA's proposal should more appropriately be considered by the rules committees concerned.

With regard to the High Court personal injuries list, the SCA proposed a reversion to the list system and an end to the use of the "tombola" – the system under which personal injuries cases are selected for actual trial by the drawing of lots from a group of cases listed as potentially triable on the date(s) concerned. This arrangement was introduced several years ago and replaced that under which a specific case was assigned a

<sup>290</sup> Order 19, rule 7, RSC. See also Delany and McGrath, "Civil Procedure", 4th Edition, para. 29-36, at pages 1205 and 1206.

<sup>291</sup> Ibid., see also Order 1A rule 11, RSC.

<sup>292</sup> Order 39, rule 46(1), RSC.

trial date(s) with a number of cases “backing up” that case lest it might settle immediately prior to trial. The object of the “lottery” system was to encourage parties to cases assigned a tentative date(s) for trial to seek to settle the case or, if not susceptible to settlement, to have the case fully prepared, and their respective witnesses ready, for trial.

The SCA contended that abolition of the “lottery system” would bring greater certainty in relation to the scheduling of witnesses and the SCA hoped that this would lead to cost savings in relation to standby fees for experts etc. It submitted that the provision of an electronic list of personal injury cases carried-over would greatly assist this outcome. Insurance Ireland also supported reform of the “lottery” approach to listing personal injuries cases.

The SCA queried why it is necessary to apply to court to have a case remitted from the Circuit Court to the High Court when there is no requirement to do so when a case is to be adopted from the District Court to the Circuit Court. In fact, statute does require an application to the District Court judge for the forwarding of a case from that court to the Circuit Court or the High Court<sup>293</sup> and the Review Group considers it appropriate that the transfer of cases between jurisdictions should be subject to judicial control. The SCA suggested that the facilities available to parties to High Court litigation in terms of taking up copy orders should be available in all court jurisdictions.

Finally, the SCA submitted that costs penalties should apply in cases where a defendant has sought to meet for settlement talks and where the plaintiff’s solicitor refuses to do so, without sufficient reason, before a defence is filed:

“The benefit for a plaintiff’s solicitor in doing so is that he/she can claim greater costs. A defendant is often faced with such a scenario. Perhaps there may be some merit in introducing a scale of costs like that which presently operates in the District Court? The scale should be weighted towards encouraging, where possible, early settlement of cases so that there is no benefit in seeking a Defence from a defendant.”

The difficulty with this proposal is that a plaintiff’s solicitor may consider that it would be imprudent to participate in settlement discussions, or form a view on a settlement offer, without sight of the defendant’s defence. Furthermore, any costs sanction which might feasibly be imposed could easily be circumvented by the solicitor formally attending, but not substantively engaging at, a settlement meeting.

One barrister practising on circuit and in Dublin suggested that there should be more collaboration and communication between the Courts Service and court users, including legal practitioners, to ensure that court lists and sessions do not clash with other court lists.

The CSSO indicated its experience as being that the subpoena *duces tecum* process can be applied in too vague a manner and is onerous / wasteful on non-party actors. Applications made *ex parte* are imprecisely constituted and “not examined by the Master” before subpoenas are issued. The process should be revised to be on notice, grounded on an affidavit and should address the adequacy or otherwise of any prior third party discovery applications / interrogatories / notice to admit facts / documents. There should be cost penalties if the process is abused and ordinary subpoenas should specify why a particular person is required and what category of evidence is sought from them.

A large Dublin-based law firm suggested that where possible, a judge should be assigned to a case from early in the proceedings with the intention being that the judge should be responsible for all pre-trial matters and the trial at first-instance. Exceptions could be made for issues such as reviewing claims of privilege. “...The view is that where the parties know who the trial judge is likely to be from the outset, this should promote early settlement. Furthermore, appropriate judicial signalling at interlocutory stages by the judge expected to be the trial judge could also facilitate early settlement. Such signalling by a judge who is not expected to be the trial judge is much less impactful.” It submitted that judges of the Court of Appeal and of the Supreme Court should periodically hear cases at first instance in the High Court “...so that their

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293 Section 22(8)(b), Courts (Supplemental Provisions) Act 1961, inserted by section 21, Courts Act, 1971.

experience of trials at first instance is reinforced and so that they can be exemplars of good practice for ordinary High Court judges.”

In a joint submission the Society of Chartered Surveyors Ireland and the Apartment Owners’ Network addressed the specific area of the recovery of service charge debts by Owners Management Companies. The submission highlighted issues that arise when service charge debts are sought to be enforced in court. A suggestion was made also in relation to service of proceedings on unit owners.

The Professional Regulatory and Disciplinary Bar Association (“the PRDBA”) suggested that Order 95 RSC, which provides for certain applications to the High Court in relation to professional disciplinary bodies to be made by way of special summons, is out of date, has not been amended to reflect many legislative changes and does not refer to many professional disciplinary bodies whose legislation requires applications to be made to the High Court. The PRDBA also observed that there is overlap between Order 95 and Orders 84B and 84C RSC and it was submitted that Order 95 is unnecessary and could be omitted from the RSC. The Review Group understands that a drafted up-dated version of Order 95 has been under consideration by the Superior Courts Rules Committee.

The PRDBA also suggested that consideration might be given to making provision in Order 84B RSC for the procedure to be followed in relation to applications for costs in statutory applications. The PRDBA noted that despite the decision of the High Court in *Medical Council v Boateng*<sup>294</sup> some uncertainty remains as regards the entitlement of a regulator to seek costs under the Rules of the Superior Courts. It was submitted that in particular it might be specifically provided that if an applicant intends to seek an order for costs – in an application that might otherwise be made *ex parte* – the application shall be served on the party against whom costs are to be sought. The Review Group notes that in *Boateng* Hedigan J stated:

“16. ...it is a reasonable consideration to weigh in the balance that the Medical Council is obliged by law to come to the High Court to seek confirmation [of the Council’s decision to impose a sanction]. Therefore, in the absence of some special grounds for doing otherwise, it is a perfectly reasonable exercise of the Court’s discretion to award costs to the Medical Council even where they have been notified by the doctor that he will not oppose confirmation.

17. What those special grounds might be is not for me to list here. There may be as many as there are cases. It is for the Court to decide in the particular circumstances if they are such as to warrant the making of no order in favour of the Medical Council.”

The Review Group considers that the PRDBA’s proposal should more appropriately be considered by the Superior Courts Rules Committee.

A large Dublin-based law firm submitted that consideration be given to the enactment of provisions enabling documents to be put into evidence, and that such provisions might mirror sections 5, 6 and 30 of the Criminal Evidence Act 1992. This would likely result in significant savings in court time and costs.

It suggested that a company should be permitted to be represented by an officer designated by board resolution and it was submitted that the current rule is a restrictive practice. A similar suggestion was made by Mr. Donncha O’Laoghaire T.D..

In a detailed submission on the topic one individual also submitted that companies should not be required to engage legal representation to appear in court.

In a separate submission this individual also submitted that the process for parties to a case to obtain a copy of the transcript of a hearing should be simplified. It was submitted that the current process is overly complex, unnecessarily costly and less than open.

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294 [2011] IEHC 34.

The CLAI suggested that if its proposal for a specific list in the High Court in which cases involving intellectual property was accepted the recommendations could be implemented through amendments to the Rules of the Superior Courts providing for a number of specialised rules in addition to the rules set out in Order 63A, Order 63C and S.I. 254 of 2016.

In relation to offers and payments into court a member of the public suggested that the rules should be modified so as to ensure that once-off and vulnerable court users do not face a disadvantage in not having access to data concerning levels of awards.

The Law Society recommended that -

- the rules governing the tender and lodgment processes need to be reviewed: there are concerns that the time limits under the existing rules are impractical and do not allow for the updating of information to support a “fully informed decision”
- the use of interrogatories should be expanded and there should be no requirement to seek the leave of the court to serve interrogatories
- sufficient time and resources should be allowed for the writing and delivery of written judgments
- the proposal that would see liquidated sum proceedings (unless they become defended) being dealt with by one dedicated court office should be progressed
- the procedures around notification, communication and listing of hearing dates should be improved and modernised
- further improvements are required with a view to ensuring the timely and cost-effective resolution of clinical negligence claims, and consideration should be given to the recommendations set out in the Report of the Working Group on Medical Negligence and Periodic Payments (Modules 2 and 3).

The Irish Society of Insolvency Practitioners (“ISIP”) suggested that the current procedure for registration of a *lis pendens* is such that it is open to abuse. A person alleging that immovable property is affected by a Circuit Court or High Court action claiming or counterclaiming an estate or interest in land, or any proceedings to have a conveyance of an estate or interest in land declared void, may, through lodging a short application form with the High Court Central Office, register a *lis pendens* placing the public on notice of the litigation.<sup>295</sup> Registration of the *lis pendens* will effectively impede a sale of the property concerned. A *lis pendens* may only be vacated by order of the court at the request of:

- (a) the applicant for registration; or
- (b) on notice to the applicant for registration, by any person affected by it where the action has been discontinued or determined or there has been unreasonable delay in prosecuting the action or the action is not being prosecuted *bona fide*.<sup>296</sup>

ISIP indicated that its members have experienced numerous instances where the process is used by an aggrieved and/or defaulting borrower to frustrate the sale of a property by a receiver or secured lender. The process of vacating a *lis pendens* unjustifiably registered requires the expense of an application to court and ISIP asserted that even where successful the vacating of it by the court is often frustrated by the registration of a fresh *lis*.

Insurance Ireland suggested that many of the proposals and recommendations set out in the reports (Modules 2 and 3) of the Working Group on Medical Negligence and Periodic Payments could be extended and applied to personal injury claims generally.

Insurance Ireland submitted that in personal injuries actions -

- affidavits of verification “do not work very well in practice” and should be replaced by a requirement that all parties to the claim should file a declaration, at the time of service of notice of trial, to the effect that they approve of their pleadings

<sup>295</sup> Section 121, Land and Conveyancing Law Reform Act 2009.

<sup>296</sup> Section 123, Land and Conveyancing Law Reform Act 2009.

- in relation to disclosure there should be an increased transparency and a culture of disclosing information and documents should be fostered. Before a case can be listed for trial in the High Court there should be evidence of full compliance by the parties with S.I. 391 of 1998. Consideration should also be given to the introduction of a Certificate of Readiness in personal injuries actions
- sharing of booklets digitally should be the norm and one set of agreed booklets should be used for every court hearing and application
- reports from a single independent expert should suffice in court proceedings. The adversarial aspect of involving two sets of experts in a case is a cause of major cost and delay
- the working hours of the courts and court offices should be extended to 9am – 5pm and the legal terms should be extended to “complement normal working hours”
- the tender process in the High Court should be the same as that in the Circuit Court, and a defendant should be able to tender at any point in the litigation process. Parties should be entitled to make “Calderbank” offers at any stage and as often as they like, and costs sanctions should follow. Insurers should be entitled to tender post-PIAB authorisation and prior to the commencement of proceedings.

A practising barrister recommended that the use of interrogatories and notices to admit facts be encouraged and advocated a scheme of pre-trial steps as follows:

- a. Pre-trial conference;
- b. Issue paper;
- c. Witness statements.

A senior counsel identified certain aspects of Order 22 RSC as having the effect of potentially preventing a Calderbank offer being made in a case where a lodgment or tender may be made, and suggested that this may discourage settlement by Calderbank offer in such cases.

The Alliance for Insurance Reform (“AIR”) submitted that it would be beneficial to society as a whole if the courts fully adopted and implemented the Book of Quantum. The Personal Injuries Assessment Board contended that there appeared to be little consistency in the use of the Book of Quantum by the courts.

The SITF identified the volume of unreported decisions as contributing to additional legal costs and submitted that “written and reasoned decisions on personal injury claims” be made available to educate parties in terms of what is expected of them in terms of duty of care, both of plaintiff and defendant, as well as to assist the appellate jurisdiction. The SITF also submitted that full disclosure of medical history should be mandatory in all personal injury cases under the rules.

Allied Irish Banks plc’s legal department submitted that the rules of court be amended so as to clarify the jurisdiction of the Master of the High Court in contested cases and provide for the allocation of business of the Master of the High Court – insofar as it relates to proceedings on summary summonses and special summonses – to the Deputy Master.

The DSBA considered that in view of technological advances in tracking delivery of documents the rules of court should be amended to provide for the acceptance of affidavits of service earlier than the 10 day waiting period once the signature page has been exhibited. The rules should also be amended to accept a declaration of service (as opposed to an affidavit of service) and no stamp duty should be payable on a declaration of service. The DSBA made a number of other suggestions which are more appropriate for consideration by the court rules committee, court president or court operations management concerned -

- The scope of Order 30 CCR should be extended to empower the county registrar to renew or reissue an execution order in the office, thereby obviating the necessity of a court appearance
- Consideration should be given to introducing amendments to Order 22 RSC (lodgment and tender procedure) to provide greater clarity
- The greater use of interrogatories should be encouraged and it should not be necessary to seek the leave of the court to serve interrogatories



- The proposals to deal with liquidated sum proceedings in one court office (unless defended) should be progressed
- Procedures relating to the notification, communication and publication of court listings and hearing dates should be improved and modernised across all courts, with better search facilities.

The MPS recommended -

- the introduction of a specialist “Personal injuries/clinical negligence” court with specialist judges and procedural rules
- the introduction of the equivalent to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases
- mandatory pre-trial meetings where, for example, parties would be required to meet at least eight weeks before the trial with a view to narrowing the issues.

## 9. ADR

### 9.1 Introduction

The remit of the Review Group also requires it to examine the current administration of civil justice in the State with a view to encouraging alternative methods of dispute resolution.

As noted in Chapter 2, a key feature or premise of Lord Woolf’s Final “Access to Justice” report was the emphasis placed on the use of ADR to achieve early settlement of disputes and proceedings.<sup>297</sup> In Scotland the Project Board responsible for the Scottish Civil Courts Review acknowledged the valuable role mediation and other forms of alternative dispute resolution have to play in the civil justice system and recommended that the court should ensure that litigants and potential litigants are fully informed about the dispute resolution options available to them.<sup>298</sup> In Northern Ireland the Gillen Review recommended that with a view to promoting ADR there be increased training and education on the benefits of mediation and that a party’s refusal to consider mediation without adequate explanation should be met with sanctions.<sup>299</sup>

Promotion of ADR mechanisms (mediation, conciliation and arbitration) has been a particular focus of civil procedural reform, complemented by significant primary legislative measures in the areas of arbitration and mediation. Recourse to ADR has for quite some time been promoted through provision in rules of court for referral of litigation pending before a court to ADR whether on the court’s own initiative or at the request of a party, and for the suspension of time limits to facilitate ADR – in the Commercial Court Rules in 2004,<sup>300</sup> the Competition List Rules in 2005<sup>301</sup> and more generally in civil proceedings in 2009 and 2010.<sup>302</sup> The provisions in the rules of court were followed by primary legislative provisions largely modelled on the existing rules of court, in section 32 of the Arbitration Act 2010 – which substantially applies the UNCITRAL Model law on Arbitration to domestic arbitrations as well as those with an international element – and section 16 of the Mediation Act 2017 (“the 2017 Act”).

297 Chapter 2, at Section 2.1.8

298 Ibid. at Section 3.5.

299 Ibid. at Section 4.5.

300 Order 63A RSC, inserted by the Rules of the Superior Courts (Commercial Proceedings) 2004 (S.I. No 2 of 2004).

301 Order 63B, rule 6(1)(b)(xiii), RSC, inserted by para. 1 of the Rules of the Superior Courts (Competition Proceedings) 2005 (S.I. No. 130 of 2005).

302 Order 19A, rule 7, CCR, inserted by the Circuit Court Rules (Case Progression (General)) 2009 (S.I. No. 539 of 2009); section 32, Arbitration Act 2010; Rules of the Superior Courts (Arbitration) 2010 (S.I. No. 361 of 2010) and Rules of the Superior Courts (Mediation and Conciliation) 2010 (S.I. No. 502 of 2010). The RSC arbitration provisions are contained in Order 56, the provisions on mediation and other ADR processes in Order 56A. The CCR provisions on mediation and other ADR processes are contained in Order 33A, CCR, their DCR counterparts in Order 49B, DCR.

In all three first instance jurisdictions, a channel for referral to ADR from a case management hearing exists, in providing an opportunity for the exercise of the court’s general powers of referral of the case to ADR, and to extend time limits fixed by the rules or a court order to facilitate the ADR process.<sup>303</sup>

In personal injuries actions, the court may at any time before the trial if it considers that it would assist in reaching a settlement in the action, direct that the parties to the action meet to discuss and attempt to settle the action, such meeting being known as a “mediation conference”.<sup>304</sup>

In civil proceedings to which the 2017 Act applies, legal practitioners are subject to a statutory obligation to apprise their clients of the benefits of, and provide information concerning mediation as an alternative to litigating a dispute.<sup>305</sup> The court is empowered to invite parties to consider mediation as a means of resolving the dispute, and where the parties decide to engage in mediation, to make orders or give directions necessary to facilitate mediation.<sup>306</sup>

## 9.2 Submissions to the Review Group

The MPS welcomed the 2017 Act as a means of achieving fair but swift resolutions to potentially complex disputes. It submitted that in order for the 2017 Act to achieve its purpose the court should impose cost sanctions against any party to unreasonably refuse to engage in the mediation process. With reference to mediation in the context of clinical negligence claims, it commented:

“Particularly in clinical negligence actions, mediation can be particularly useful in order to create a forum for the plaintiff to seek an explanation from the clinicians involved as to what happened and to seek an apology, where appropriate.”

Brian G. Hutchinson, Associate Professor in the School of Law, UCD, and Dr. Aonghus Cheevers<sup>307</sup> made a detailed submission entitled “Encouraging Alternative Methods of Dispute Resolution”. The authors welcomed the recent enactment of the 2017 Act and the associated amendments to the Superior Court Rules. They noted that many forms of ADR exist, to include early neutral evaluation and the “med-arb” process and suggested that in order to make litigants aware of lesser known forms of ADR, the Courts Service should prepare a list of the different procedures that are available and are likely to be approved under the rules. They further submitted that the Review Group could consider undertaking a wider examination of how civil disputing operates: “...This review could examine how disputes progress through the civil litigation system and the different factors that influence the resolution, or non-resolution, of disputes inside and outside a courtroom...”.

With regard to procedural changes generally they submitted that procedural changes could also help encourage engagement with ADR methods:

“...Instead of punishing parties for a refusal to consider or attempt mediation, or another alternative, perhaps parties might be offered a reduction of court fees, if they attempt mediation or another process. If such procedures were offered at a reduced fee, or free of charge, more litigants might also be encouraged to use them to resolve their disputes. The Mediation Act 2017, already goes some way towards this by legislating for mediation information sessions in certain disputes...”.

The DSBA also welcomed the 2017 Act and suggested -

- that ADR be encouraged at an earlier stage in the dispute process to the benefit of all litigants, and that this could be achieved in tandem with greater adoption of case progression and / or at interlocutory and motion stages
- that there should be a greater emphasis on ADR in the jurisdictions of the Circuit Court and the District Court

303 Order 63C, rule 5(2)(d), RSC; Order 19A, rule 7, CCR; Order 49B, rule 2, DCR.

304 Section 15, Civil Liability and Courts Act 2004.

305 Sections 14 and 15, Mediation Act 2017.

306 Section 16, Mediation Act 2017.

307 PhD candidate, Sutherland School of Law (UCD).

- that there should be greater educational initiatives, and that judges, legal professionals and litigants in person would benefit from additional and more regular emphasis on ADR developments
- that through the use of cost orders the courts would encourage parties to engage in ADR.

The Revenue Commissioners observed that it was too early to assess whether or not the 2017 Act and associated rules of court will have the desired effect of encouraging parties to resolve disputes without resort to litigation and suggested that in awarding costs a court should take into account the failure of a party to engage in mediation when invited to do so by the court. The Revenue Commissioners commented that mediation may be particularly helpful where one party is a litigant in person and suggested that in all cases where a party is a litigant in person the court should advise the parties to consider mediation as a means of resolving the dispute.

The SITF expressed disappointment that the provisions for mediation in sections 15 and 16 of the Civil Liability and Courts Act 2004 (“the 2004 Act”) seem not to be supported by the judiciary and are not reflected in any court rules. It hoped that the 2017 Act would “strengthen moves in that direction”. It submitted that the high level of “unsupervised settlements” must raise concerns about equity between parties. It also suggested that the netting-down or “marshalling” of the real issues in dispute in a given case would assist effective ADR. It further submitted that there has been a “lost opportunity” of not availing of the provision for court-appointed experts under section 20 of the 2004 Act.

The Review Group notes that, contrary to the SITF’s impression, detailed provision is in fact made in the rules of court of all three first instance jurisdictions for the operation of the mediation procedure under sections 15 and 16 of the 2004 Act.<sup>308</sup>

The AIR suggested that PIAB was established as a method of alternative dispute resolution and submitted that there has been an increase in the number of persons declining PIAB offers in non-contested cases between 2008 (36%) and 2016 (45%) due, they asserted, to claimants’ solicitors regularly advising their clients that more could be recovered if they rejected the PIAB assessment and pursued their claims in the courts. The AIR pointed to the high cost of litigating such claims in the courts compared with the much lower “delivery cost” of the PIAB system.

A practising barrister submitted that ADR could be encouraged by requiring adequate pre-action engagement and that the latter should be a key factor in costs awards, although based around flexible principles rather than rigid, prescriptive protocols. He suggested that the principles should be focussed around clear communication of the claim basis, transparent provision of the relevant information and reducing the areas of dispute if litigation cannot be avoided. He further submitted that express provision should be made in the rules in relation to potential costs sanction where there is a failure to write an appropriate pre-action letter of claim.

Judge Leonie Reynolds noted the obligations imposed on solicitors under the 2017 Act and made a number of suggestions in relation to the use of mediation in proceedings -

- in medical negligence cases – and having regard to the nature of such proceedings and the fact that it can take a number of years for such matters to come on for trial – the obligation to advise on mediation prior to the initiation of proceedings could be extended to impose a similar obligation upon service of the notice of trial;
- the identification of certain categories of proceedings where there would be merit in compulsory mediation;
- online dispute resolution – e.g. as developed in other jurisdictions including the Netherlands – should be considered.

308 See Order 1A, rule 12, RSC, Order 5A, rule 9, CCR and Order 40A, rule 10, DCR.

Judge Irvine, on behalf of the Court of Appeal judges, observed that there is a limit to what a court and the rules of court can achieve in the context of encouraging ADR and that the rules of court do not permit a presiding judge to force the parties to engage in an ADR process.

Judge Kevin Cross observed that it is not necessary in most personal injury actions to advocate mediation as the parties or their representatives are best placed to settle the disputes between them and avoid the cost of mediation. However, in relation to medical negligence he observed that in medical negligence actions it would be of some assistance if the obligations to advise mediation prior to the initiation of proceedings were – as a matter of law – required to be repeated by the solicitor for both the plaintiff and the defendant upon the service of the notice of trial.

ISIP queried whether, following the introduction of the 2017 Act and associated rules of court, further encouragement of ADR processes is warranted at this time.

One individual with experience of representing herself in proceedings said she would be cautiously supportive of ADR but warned against ADR processes becoming a replacement for proceedings.

The Law Society welcomed the 2017 Act and suggested that its operation and effectiveness could more properly be assessed once it has become more embedded in practice. It made a number of recommendations, viz. -

- ADR should be encouraged at an earlier stage in the dispute process to the benefit of litigants, in terms of cost and speed, and to ease the demand on court resources. This could be achieved alongside case progression and single judge oversight
- there should be greater emphasis on ADR processes at District Court and Circuit Court levels
- Judges, legal professionals and litigants in person would benefit from additional and more regular emphasis on ADR
- certain types of dispute – to include probate suits and shareholder disputes – are inherently suited to be resolved by mediation. However, it did not favour the mandatory referral of such cases to mediation by the court and suggested that such cases be case-managed on a pilot basis so as to allow the parties' representatives to explain to the judge whether mediation has been considered and why it has not been undertaken.

A member of the public submitted that the State should not engage in ADR “encouragement” other than by way of passive facilitation of mediation and other ADR processes, contending that other encouragement should be limited to the publication of judgments relating to costs and of orders relating to cost disputes. They submitted that the consequence of adverse costs orders is ample deterrent to litigation and that, aided by open justice, more than a sufficient encouragement to enter into settlement talks when appropriate.

Judge Keenan Johnson of the Circuit Court suggested that lawyers may need to be encouraged to adopt mediation as a normal aspect of litigation as opposed to the exception, and further that the courts have a considerable role to play in fostering and encouraging the rollout of mediation. He suggested a number of actions with a view to encouraging the more widespread adoption of mediation, viz. -

- all parties prior to the institution of proceedings should be required to attend a mandatory session on mediation, which session could be provided by a trained mediator or court staff. The session would involve the furnishing of information about mediation and the showing of a video which shows the mediation process in action. This approach has proved very successful in other jurisdictions and in Canada in particular
- lawyers should be made aware that mediation is something to be embraced and not feared and this could be achieved by judicial encouragement as well as advice to the effect that the parties should have the benefit of legal advice throughout the mediation process
- the introduction of robust case management rules which would allow judges, during preliminary hearings, to encourage the parties to consider mediation and to offer advice as to the benefits of mediation.

Judge Johnson argued for early judicial intervention “prior to the closure of pleadings and indeed possibly prior to the institution of proceedings”, as being far more effective in channelling the parties towards mediation, “because at that stage they will not have incurred significant legal costs and their positions may not have become entrenched.”

Judge John Brennan noted that given the low level of costs and the nature of the cases involving small monetary sums, it is likely that the attraction of ADR to litigants in the District Court would be minimal, but that this may have to be revisited were the monetary jurisdiction to increase however.

ComReg observed that it has had very positive experience of ADR in the context of previous litigation where ADR was resorted to in an attempt to reduce both costs and time, and identified the potential downside of “free standing” dispute resolution mechanisms in that they do not necessarily determine a dispute, with recourse frequently or normally being available to the court system.

The Legal Aid Board observed that it was too early to gauge the impact of the 2017 Act. It submitted that consideration might be given to a form of compulsory mediation in small claims matters.

Judge Francis Comerford submitted that the system for civil hearings should facilitate mediation, but should also have regard to the fact that mediation can turn out to be nothing more than a particularly costly interlocutory step.

The Department of Defence welcomed the greater use of ADR and suggested that where internal ADR processes are available to parties, but the parties have not engaged with same, the courts should have greater regard to the exhaustion of these remedies before the litigation progresses before the courts.

The Office of the Attorney General suggested that consideration should be given to legislative steps to encourage parties to take genuine steps to resolve a dispute before commencing legal proceedings and the Australian Civil Dispute Resolution Act 2011 was suggested as a possible template.

The Society of Chartered Surveyors Ireland and the Apartment Owners’ Network submitted that dispute resolution for the multi-unit / apartment sector should be moved from the courts to an online portal, albeit with a right of appeal to the courts, noting that in Canada the Condominium Authority of Ontario has adopted such a regime.

One lay respondent suggested that legal professionals be made aware of the different mediation models with a view to ensuring that the valuable profession of “traditional mediator” is preserved.

The SCA suggested that in cases where persons are self-represented or have not yet commenced litigation there should be greater publicity and awareness of the availability of mediation and recommended that there be a link on the Courts Service website to mediation services provided in conjunction with Mediators Institute of Ireland and the services offered by Community Law and Mediation.

The SCA submitted that ADR is underutilised in clinical negligence cases and noted that if PAPs come into force it is envisaged that the claimant and the respondent to a claim would explore ADR options prior to the initiation of proceedings and, if proceedings issue, the parties would be required by the court to provide evidence of whether ADR was considered.

The SCA further submitted that in addition to the obligations imposed by the 2017 Act a solicitor should, prior to serving notice of trial and / or obtaining a hearing date, write to the solicitor for the opposing party suggesting that an attempt be made to resolve the case by ADR or, alternatively, setting out why ADR would not be appropriate. This correspondence should be brought to the court’s attention before the court decides to fix a date. It suggested that consideration be given to an amendment to Order 56A RSC to include a provision obliging the court to consider whether Order 56A should be invoked before a hearing date is fixed.

A professional involved in the provision of arbitration services suggested that resolution of commercial disputes would be much better addressed through a dedicated tribunal system such as arbitration and observed that the challenge is to educate and inform the legal professions of the basic advantages of arbitration so that they may inform clients accurately as to their options.

The Chartered Institute of Arbitrators made a number of recommendations, to include -

- that rules of court be amended to require that all parties to proceedings are informed of the alternatives to court, to include ADR and mediation
- that all originating summonses and motions, and defences, would confirm that the foregoing obligation has been complied with
- that greater use be made of early case management and case progression at which mediation and ADR would be suggested and discussed
- that clear and concise information on mediation and ADR would be provided on the Courts Service website
- that statistics would be included in the Courts Service Annual Report of the numbers availing of mediation and ADR
- that a separate unit would be set up within the Courts Service to promote and develop the use of mediation and ADR at all levels (District Court, Circuit Court, High Court, Court of Appeal and Supreme Court).

The Bar Council cited the benefits of early neutral evaluation (“ENE”), noting that these were considered in the Gillen Report. ENE was described in the submission as a half-way house between mediation and arbitration providing a forum in which parties have their case independently assessed without being bound by the views formed by the evaluator. The Bar Council envisaged that were ENE to be facilitated and / or encouraged by the Irish Courts, the role of evaluator would be undertaken by a barrister, solicitor or retired judge assigned with the mutual assent of the parties. Noting resource limitations in this jurisdiction, and that the practice in Northern Ireland appears to favour the engagement of sitting judges to conduct ENE, the Bar Council felt that, notwithstanding the advantages of having a sitting judge express a preliminary view as to the merits of a case it may be impracticable that the judiciary be assigned an additional layer of work.

The Bar Council suggested that the Review Group recommend that ENE be facilitated and encouraged, and in order to avoid a situation where the practice became a passing phase, that bespoke rules of court be developed that clearly identify the circumstances in which a court would be obliged to consider, of its own motion, whether it should direct the parties to explore ENE and the circumstances in which a party may apply to the court for directions to seek ENE. It considered that the earliest point in time at which ENE should be sought is after pleadings have closed and preferably after discovery has been made.

## 10. Conclusions and recommendations

### 10.1 Introduction

As mentioned in Chapter 3 and Section 6 of this chapter, in recent decades a series of reforms of civil procedure have been implemented or recommended for implementation to address the problems of delay, complexity and cost, and to promote recourse to ADR. Nonetheless, it is clear from Chapter 3, from submissions received by the Review Group and from opinions expressed within it, that:

- (a) some reforms already legislated have not been implemented effectively;
- (b) a range of proposals by expert bodies on civil justice have yet to be adopted; and
- (c) potential for further reforms exists.

The Review Group’s recommendations on court procedure embrace these three elements.

## 10.2 Embedding reforms already legislated

### 10.2.1 Pre-action protocols

The benefits of a pre-action protocol (“PAP”) in prompting prospective litigants to make early disclosure to each other of their cases, narrow areas of disagreement and consider solutions alternative to litigation are well recognised. Submissions received support early implementation of the PAP in clinical negligence cases – power to prescribe which was conferred by section 219 of the Legal Services Regulation Act 2015.<sup>309</sup> The Review Group recommends that early attention be given to the introduction of the Ministerial regulations concerned.

A further recommendation as to the basis for extending PAPs to other categories of litigation is made in Section 10.3 of this chapter.

### 10.2.2 Case management

Strong support for the extension of case management, in particular to a wider range of litigation in the High Court, was evident both from within the judiciary, the legal profession and private and State sector litigants. The rules of court introduced in 2016 enable such an extension and the Review Group recommends their application to chancery and non-jury cases falling within their scope – i.e. with the exception of personal injuries claims. The Review Group also notes and endorses the recommendations of the Working Group on Medical Negligence and Periodic Payments on the employment of case management in clinical negligence claims, which set out draft rules in the appendix to its report on Module 3 – these rules being contingent on the introduction of the PAP for clinical negligence cases.

The Review Group acknowledges differences of view as to whether case management would be of practical benefit in other categories of personal injuries action, but notes in any event that section 18 of the Civil Liability and Courts Act 2004 already empowers the court, where it considers it appropriate, to direct that a hearing be held before the trial of the action to determine what matters relating to the action are in dispute, which hearing may be presided over in the High Court by a judge, the Master or a Deputy Master or a registrar, and in the Circuit Court by a judge or a county registrar.

The Review Group also recognises that implementation of case management across a significant category of chancery and non-jury cases will present resourcing challenges in particular for the High Court, where case management powers are at present vested in judges only. Assignment of case management powers to Deputy Masters, including control of case timetables and issuing of binding directions to parties, also received support from respondents and from within the Review Group.

The Review Group recommends that case management powers be conferred on an expanded cadre of Deputy Masters by rule of court, enabling judicial resources to be concentrated on (a) hearing pre-trial applications disposal of which requires the exercise of judicial powers which could not, within the bounds of Article 37.1 of the Constitution, be assigned to a Master or Deputy Master and (b) conducting trials.

Optionally, to save on staffing resources, the Deputy Master role could be combined with the existing role conceived for the registrar in the case management rules.

Deployment of Deputy Masters to the case management role would also ensure that the Master could focus on attending to the conventional business of the Master’s List.

However, the employment of court officers as Deputy Masters will be dependent on the existence of a sufficient cadre of appropriately qualified staff competent to exercise judicial functions of a limited nature and manage complex litigation. To that end, the Courts Service needs to make provision within its staffing structure at appropriate grades, and recruit for, a cadre of legal officers qualified by expertise and experience to carry out those functions. In that regard, it is noted that the Courts Service’s Long Term Strategic Vision statement approved in June 2019 commits the Courts Service to “[d]evelop enhanced roles

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309 Inserting a new Part 2A (sections 32A to 32D) in the Civil Liability and Courts Act 2004.

for staff focused on the management of case progression and engagement with court users. We will develop professional career paths for key quasi-legal roles.”

It would also appear from submissions received that far greater use could be made of the case management rules in the Circuit Court in cases to which those rules already apply, and that consideration could usefully be given to extending case progression by practice direction – as permitted by those rules – to other categories of case, viz. to any case other than -

- (a) proceedings – such as mortgage possession proceedings - in which an immediate return date before the county registrar is given and
- (b) proceedings for summary judgment under Order 28 CCR,

in which, following written inquiry of the parties by the county registrar after six months from the issue of the Civil Bill, the county registrar ascertains that no defence has been delivered, or has not received confirmation as to whether one has been delivered or not (i.e. cases which are not, or do not appear to be, proceeding with expedition).

Consideration should also be given to extending case progression by practice direction under the rules of court to cases which are likely to occupy more than one day at trial.

### 10.2.3 Pleadings reform

Certain submissions received would suggest that the requirements of the 2004 Act for particularising of personal injuries summonses and defences are not being fully complied with. The Review Group notes that parties disadvantaged by non-compliance have remedies available to them in applying for a stay or dismissal of proceedings or (as the case may be) judgment against a defendant, or seeking a sanction in costs. The Review Group also endorses the suggestion of the SCA that consideration be given to strengthening section 10(2) of the Civil Liability and Courts Act 2004 to impose an obligation on plaintiffs to distinguish clearly in the particulars provided in the personal injuries summons between any relevant pre-existing medical condition of a claimant and the injuries that are the subject of the claim.

More generally, and in conjunction with its recommendations for replacement of the discovery remedy in Chapter 6, the Review Group recommends that the rules of court regulating the content of pleadings be amended to require parties to plead their case with far greater precision than has been the case to date with a view to ensuring that the real issues in dispute can be identified prior to trial. The standard of particularity of pleading in personal injuries actions introduced by the Civil Liability and Courts Act 2004 should serve as the model for such rules.

### 10.2.4 Measures to reduce delay in and time and cost of proceedings

The Review Group has considered in detail in Section 4.12.2 of this chapter the existing rules of court comprehensively regulating the adducing of evidence by expert witnesses in the High Court, which are designed, as soon as possible in advance of trial, to identify and narrow down the issues and to contain the extent of and costs associated with the expert evidence required to be given in a dispute. It would appear from submissions to the Review Group that these rules – in particular those enabling the directing of meetings between and a joint report from experts, the use of a single joint expert and the debate between experts (“hot-tubbing”) procedure – are not being fully availed of, if availed of at all.

Supported again by concerns raised in submissions, the Review Group recommends that full use be made of the powers conferred by the conduct of trials rules in the High Court to contain the time and expense incurred in adducing of expert evidence and to impose timetables on the successive stages of the trial process. The Review Group further recommends that orientation on those rules be included in the continuing professional development programmes of both branches of the legal profession and in the programme of judicial studies.

The Review Group also notes that under section 169(1) of the Legal Services Regulation Act 2015, the factors which a court may take into account when determining whether to depart from the default position



– which is that the party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings – include (a) conduct before and during the proceedings and (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings. When seen in conjunction with the provisions of Order 99 RSC<sup>310</sup> that allow the court to impose costs sanctions where costs have been incurred improperly or without any reasonable cause<sup>311</sup> – including ordering the disallowing of costs between legal practitioners and clients and directing legal practitioners to repay certain costs for which their clients have become liable – these recently enacted provisions set out a comprehensive regime for the regulation of costs in the context of the duration of trials.<sup>312</sup>

### 10.2.5 Periodic payment orders

On foot of the recommendations of the Working Group on Medical Negligence and Periodic Payments referred to at Section 4 of Chapter 3 of this report, section 2 of the Civil Liability (Amendment) Act 2017 – inserting a new Part IVB in the Civil Liability Act 1961 – makes provision enabling a court to make a periodic payment order (“PPO”) in a personal injuries action.

The Working Group had recommended that legislation be made for adequate and appropriate indexation of periodic payments as an essential prerequisite for their introduction as an appropriate form of compensation. In particular, it recommended the introduction of earnings and costs-related indices which will allow periodic payments to be index-linked to the levels of earnings of treatment and care personnel and to changes in costs of medical and assistive aids and appliances. It expressed the view that the Central Statistics Office (“CSO”) was uniquely qualified to compile and maintain the indices required.<sup>313</sup>

In the event, section 51L(1) of the Civil Liability Act 1961 now provides that a PPO must provide for the amount of a payment under the order to be adjusted annually by reference to the Harmonised Index of Consumer Prices “or such other index as may be specified under this section. Section 51L(2) provides that the Minister shall, not less than 5 years after the commencement of the relevant provisions, carry out an initial review of the application of the index in order to determine its suitability for the purposes of the annual adjustment of the amount of payments provided for under periodic payments orders. Section 51L(3) provides for five-yearly reviews commencing five years after the initial review.

While the legislative provision for PPOs was a most welcome development, the Review Group is aware that due, to the lack of an index of health care sector inflation - similar to the Annual Survey of Hours and Earnings (ASHE) (2000) 6115 employed for PPO indexation in the UK - PPOs are not in practice being sought by plaintiffs. In *H (A Minor) v The Health Service Executive*,<sup>314</sup> Murphy J stated:<sup>315</sup>

“It is clear, on the basis of the expert evidence before the court, that no competent financial expert would recommend a periodic payment order linked to the harmonised index of consumer prices to provide for the future care needs of a plaintiff. In its current form therefore, the legislation is regrettably, a dead letter. It is not in the best interests of a catastrophically injured plaintiff to apply for a PPO under the current legislative scheme.”

The Review Group recommends that an assessment be carried out, with the assistance of the CSO, in order to determine a replacement index for the Harmonised Index of Consumer Prices which would take appropriate account of the need to address health care sector inflation relevant to PPOs, and that, on a replacement index being identified, section 51L of the 1961 Act be amended as necessary to facilitate the substitution of the replacement index for the Harmonised Index of Consumer Prices.

310 Order 99 RSC substituted in full by S.I. 584 of 2019, effective as of the 3<sup>rd</sup> December 2019.

311 Order 99, rule 9 RSC.

312 For recent judicial consideration of certain features of the costs regimes both pre-2015 and under sections 168 and 169 of the Legal Services Regulation Act 2015 and the recently recast Order 99 RSC, see *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183.

313 Section 7 in Chapter 4, pages 31 – 33 of the Working Group’s report on Module 1 of its deliberations (October 2010).

314 [2019] IEHC 788

315 At para. 74 of the judgment.

## 10.3 Implementing reforms previously recommended

### 10.3.1 Extension of pre-action protocols

Submissions received support the extension of PAPs beyond clinical negligence actions to other areas of civil litigation. The most effective means of extending PAPs to other areas of litigation would, in the Review Group’s view, be to confer on the court rules committees – rather than a Minister – a general power to prescribe PAPs for specific categories of dispute identified by those committees. The assignment of such a power to the court rules committees would ensure that the content of PAPs was informed by the professional expertise and experience represented in those committees and was fully aligned with and integrated into the procedures of the court concerned.

The Review Group endorses the recommendations of the Expert Group on Article 13 ECHR that primary legislation should (a) extend the remit of the courts rules committees to permit them to prescribe PAPs for categories of litigation under rules of court, and (b) empower courts to order disclosure prior to the commencement of proceedings in accordance with rules of court in circumstances where a claim is covered by a PAP.

The Review Group is conscious however that civil litigation in the District Court and the Circuit Court tends to be less complex than litigation in the High Court, and for those cases in the lower courts that would benefit from the narrowing of issues at the pre-trial stage, case management and case progression is available to the parties and to the court. For these reasons the Review Group recommends that PAPs be prescribed for specific categories of High Court litigation only at this time. Should the monetary jurisdictional thresholds of the District Court and the Circuit Court be increased in the future, the need for a PAP for particular case-types in those jurisdictions could then be examined by the rules committees for those jurisdictions.

### 10.3.2 Limitations on adjournments

The Review Group recommends implementation of the recommendation of the Expert Group on Article 13 ECHR that provision be made in statute that:

- (a) a judge (or court officer where so empowered), when considering a contested application to adjourn proceedings, or to grant an extension of time for the taking of any step in proceedings shall: examine the reasons for the application; have regard to any previous adjournments or (as the case may be) extensions granted; and have regard to whether any adjournment or extension which might be granted would impede the holding of a trial of the proceedings within a reasonable time;
- (b) a judge or court officer shall not grant an adjournment or extension unless satisfied that there is sufficient reason for doing so and that it would be in the interests of justice to do so.

### 10.3.3 Automatic discontinuance

Reference has been made in Chapter 3 to the recommendation of the Expert Group on Article 13 ECHR that provision be made by rule of court for automatic discontinuance of proceedings on a similar basis to that provided for in the Rules of Court of Singapore, but subject to the conditions that it would not apply to any proceeding affecting the interest of a person who was under disability (or otherwise not *sui juris*) and that no discontinuance would take effect once a notice of trial had been lodged and served.

The Expert Group on Article 13 saw merit in a “self-executing” solution similar to the Singapore automatic discontinuance procedure, Singapore – in common with Ireland – having a very low judge to population ratio by international standards. It has been observed of the Singaporean procedure that:

“It seems that the court has now found a solution – in the form of the automatic discontinuance provision – to the problem of having to adhere to its case management philosophy on the one hand, and having to husband scarce judicial resources on the other.”<sup>316</sup>

<sup>316</sup> Min, “Automatic Discontinuance under Order 21 Rule 2 – First Dormant, then Dead” (2001) 13. S.Ac. L.J. 150, at pp. 151-152.

An automatic discontinuance mechanism was also seen as serving to concentrate parties' minds on their own responsibility to act with expedition in preparing a case for trial.

The Review Group recommends that provision be made by rules of court to provide for automatic discontinuance, subject to a power on the court's part to reinstate the proceedings as set out below. However, it recommends a somewhat different approach to that taken in Singapore, where the possibility of automatic discontinuance may recur, being liable to be triggered at the expiry of every 12 month period during the course of a pending proceeding if no step as shown in the court records has been taken within that period. Instead, the Review Group envisages that automatic discontinuance would only apply on a "once-off" basis to proceedings which, within a period of 30 months of their commencement, have not been notified to the court as ready for trial.

The period of 30 months is being recommended as a period within which preparation of the proceedings for trial at first instance, even in a case with complex attributes, might reasonably be expected to be completed for the purpose of compliance with Article 6.1 ECHR. It does not, of course, relieve parties of the obligation to prosecute or defend their proceedings more expeditiously where that is appropriate.

The Review Group recommends that provision be made by rule of court for automatic discontinuance – and to that end that the court rules committees be expressly empowered by statute, in terms of the principles and policies, to prescribe an automatic discontinuance procedure – along the following lines (the provision is expressed as a rule of court here for convenience):

1. (1) Subject to sub-rules (2) to (6), any proceedings which, within a period of 30 months of their commencement –
  - (a) have not been set down for trial or
  - (b) in cases not requiring to be set down for trial, have not had a date fixed for trial, and
  - (c) in which there has been no proceeding (not including an entry of appearance or delivery of a notice of intention to proceed) that appears from records maintained by the Court,

shall be deemed to have been discontinued.

- (2) A discontinuance under sub-rule (1) does not apply -

- (a) where the proceedings have been stayed pursuant to an order of the Court,
- (b) to any proceedings affecting the interest of a person who is under disability or otherwise not *sui juris*.

- (3) A discontinuance under sub-rule (1) may, on application made by a party to the Court within the period referred to in sub-rule (1), be deferred by the Court for good reason and for such period, and on such terms (including as to costs), as the court may direct.

- (4) A discontinuance under sub-rule (1) does not affect a claimant's entitlement to bring a fresh action in respect of the claim provided the limitation period applicable to the right of action concerned has not expired.

- (5) A discontinuance under sub-rule (1) shall not serve as a defence to a subsequent action for the same, or substantially the same, cause of action.

- (6) Where proceedings have been discontinued under this rule, the Court may, on application by a party to those proceedings on notice to the other party or parties, and on such terms as it deems just, reinstate the proceedings and allow them to proceed.

For the sake of clarity and legal certainty, the implementing statutory instrument should provide that Order 122 rule 7(1) RSC, which empowers the court to enlarge or abridge the time for doing any act or taking any proceeding, shall not apply to an application under sub-rule (3). A claimant would retain under sub-rule (4) an entitlement to bring a fresh action in respect of the claim provided the limitation period applicable to the right of action concerned has not expired, and to apply for reinstatement under sub-rule (6).

The aforementioned provisions should also be incorporated, with any adaptations necessary, in the rules of court for the other first instance jurisdictions.

Each implementing statutory instrument concerned should provide that the new procedure shall have application only to proceedings commenced after it comes into operation.

### 10.3.4 The recommendations in the Law Reform Commission’s Report on Consolidation and Reform of the Courts Acts

Detailed reference has been made in Chapter 3 to the draft Bill prepared by the Law Reform Commission on foot of its extensive set of recommendations in its Report on Consolidation and Reform of the Courts Acts. The Review Group is of the view that early consideration should be given to incorporating in legislation those provisions of the draft Bill not already legislated. In the context of this chapter, the Review Group draws attention in particular to, and recommends early implementation of the Commission’s proposals:

- (a) for the enshrining in primary legislation of “case conduct principles”<sup>317</sup> governing the conduct of litigation and case management obligations of the court;<sup>318</sup>
- (b) that the court rules committees’ remit be extended to modifying the rules of evidence as they apply to civil proceedings; and
- (c) that the powers of the Presidents of the first instance jurisdictions to issue practice directions be codified in statute (as has since been done for the Supreme Court and Court of Appeal in the Court of Appeal Act 2014).

## 10.4 Further procedural reforms

### 10.4.1 Standardisation and simplification

A gradual approximation of the civil procedural regimes has taken place in key areas in the first instance jurisdictions, in particular since revision of the District Court civil procedural rules in 2014, notably with the introduction of –

- pleadings in the District Court<sup>319</sup>
- common rules-based principles governing the conduct of proceedings
- the possibility of case management
- creation of a channel for referral to ADR of proceedings pending before a court<sup>320</sup>
- the standardisation of procedures relating to personal injuries litigation and
- the introduction of common “template” procedures for statutory applications and appeals in the area of public law remedies.

However, the submissions to and opinions expressed within the Review Group indicate that significant further potential for alignment of court procedures and forms remains.

<sup>317</sup> Viz.:

- (a) issues between parties should, at as early a stage as possible, be identified, defined, narrowed (where possible) and prioritised or sequenced;
- (b) proceedings should be conducted in a manner that is just, expeditious and likely to minimise the costs of those proceedings; and
- (c) the parties should be encouraged to use alternative dispute resolution procedures where appropriate, to settle the whole or part of the proceedings where practicable, and be facilitated in doing so.

<sup>318</sup> Viz. that a court shall, so far as is practicable, in the conduct of civil proceedings:

- (a) ensure that the parties conduct the proceedings in accordance with case conduct principles (discussed below),
- (b) have regard to the need to allot its time and its resources appropriately among all of the proceedings the Court has to hear and determine and
- (c) deal with the proceedings in a manner that is proportionate to their nature, and the parties resources.

<sup>319</sup> See Section 2.1 – 2.2 above.

<sup>320</sup> See discussion of the procedures relating to case management and ADR in each of the first instance jurisdictions at 2.11 (District Court), 3.12 (Circuit Court) and 4.12 (High Court) above.

The Review Group, supported in its view by a number of submissions on the subject, sees potential for improvement in two related areas, namely (a) the harmonisation of the forms and proofs necessary for the commencement of proceedings across the first instance jurisdictions and (b) the standardising and simplification of terms and language used in civil procedure.

#### 10.4.1.1 A single originating document: the claim notice

In the Final “Access to Justice” report, Lord Woolf commented that the complexity of the then current rules of court in England and Wales could be seen as an obstacle to access to justice, and he noted that a “prime example” of that complexity were the four different ways of starting proceedings in the High Court, and another four in the county courts.<sup>321</sup> Reference has been made in Chapter 2 to the Woolf recommendation that civil proceedings should be commenced by means of a single claim form that could be used for every civil case as “an important step toward achieving simplicity in civil litigation”.<sup>322</sup>

Marked differences exist between the forms and terminology employed in commencing proceedings within and between the first instance jurisdictions,<sup>323</sup> in that -

- most civil proceedings in the District Court are commenced by a claim notice, and in certain types of cases proceedings are commenced by originating notice of motion or originating notice of appeal
- most civil proceedings in the Circuit Court are commenced by civil bill, and less commonly by originating notice of motion
- in the High Court there are three forms of originating summons (plenary summons, summary summons and special summons) and proceedings are also commenced by petition and by originating notice of motion.

There is also a lack of uniformity in the content of forms and in the terms and titles used in the three first instance jurisdictions, in that -

- claim notices in the District Court and the forms of civil bill in the Circuit Court contain a relatively detailed statement of the nature of the claim, and both documents require to be filed in the appropriate court office. By contrast, in the High Court the plenary summons contains only a very brief description of the claim, more particular details of it being set out in a separate statement of claim, and the statement of claim is filed in the Central Office in certain limited circumstances only
- parties to civil proceedings in the District Court are to be addressed and described as either “Claimant” or “Respondent” whereas the terms that continue to apply in both the Circuit Court and the High Court are “Plaintiff” and “Defendant”.

The resulting inconsistency of approach is illustrated when one considers how claims for damages for breach of contract, founded on identical facts but with anticipated damages of €10,000, €30,000 and €75,000, are commenced, viz. by way of District Court claim notice, Circuit Court civil bill and High Court plenary summons, respectively. The party pursuing the claim in the District Court is termed a “claimant” and in the Circuit Court and High Court a “plaintiff”. The opposing party – in the District Court termed the respondent and in the Circuit Court the defendant – would receive a relatively detailed statement of the case as part of the originating document, but in the High Court the statement of claim usually is served at a later stage. In the District Court the claimant must list, in the claim notice, the documents that he or she will use to support his or her case, with no such requirement in the Circuit Court or the High Court.

These differences are, in the Review Group’s opinion, a source of needless complexity and confusion, in particular for the lay person involved in litigation.

The Review Group recommends the introduction of a new standard form of “claim notice” – adopting the term currently used in the District Court – to replace the numerous other forms of originating documents.

321 Lord Woolf, Final Report on Access to Justice, 1996, chapter 12, at para. 1.

322 Woolf, op. cit., chapter 12, para. 3.

323 See 2.2, 3.2 and 4.2 above.

The Review Group recommends the harmonising across the jurisdictions of the forms of originating document, terminology and information requirements associated with the way in which proceedings are commenced, as follows -

1. A single and uniform term should be used to describe the originating document: the “claim notice”
2. The terms “plaintiff” or “applicant” should be replaced by “claimant” and “respondent” should be used instead of “defendant”
3. That every claim notice should follow a similar format, to include, in sections:
  - (a) the title to the proceedings, including the court in which the proceedings are to be issued (including, in the case of the District Court, the District number and area and, in the case of the Circuit Court, the Circuit and county concerned), the record number and the names and addresses of the parties or (where the proceedings do not involve a respondent) the claimant;
  - (b) notice to the respondent, in High Court and Circuit Court proceedings, that an appearance must be entered to the claim notice within eight days of service on the respondent of the claim notice;
  - (c) where appropriate to the nature of the claim, notice to the respondent of the course available to them (i.e. admitting the claim, defending the claim) and of the consequences of a failure by the respondent to respond to the claim by entering an appearance and defending the claim;
  - (d) a detailed statement of the claim, including any necessary information to establish compliance with local jurisdictional requirements (in the case of the District Court or Circuit Court proceedings), to show an entitlement to seek specific reliefs forming part of the claim, or to establish compliance with any statutory requirements which may be pre-requisite to the bringing of the claim. The level of detail to be set out in this section would be comparable to that contained in the indorsement of claim in a Civil Bill or (in the High Court) a statement of claim or special indorsement of claim;
  - (e) where appropriate to the nature of the claim, reference to the supporting sworn evidence or (as the case may be) additional documentation supporting the claim;
  - (f) where appropriate to the nature of the claim, a return date for the initial hearing;
  - (g) the signature of the claimant or their solicitor; and
  - (h) the date of issue of the claim and the appropriate form of official authentication of the claim.

The Review Group’s recommendation would further the approach already adopted in the three first instance jurisdictions in using a single form to commence personal injuries proceedings. The single claim form would replace every originating document in each of the three jurisdictions – including originating notices of motion and petitions – but sub-categories of claim notice would continue to exist depending on the nature of the underlying cause of action, claim or relief sought. For example -

- a Landlord and Tenant Civil Bill would be replaced by a “Claim Notice – Landlord and Tenant”
- an application for leave to apply for judicial review would be replaced by a “Claim Notice – request for leave to seek Judicial Review”
- an originating notice of motion in a statutory appeal would be replaced by a “Claim Notice – appeal under [citing the section and Act concerned]”
- A petition by an unpaid creditor to wind up a company would be replaced by a “Claim Notice – request by unpaid creditor for winding up of company”.

The Review Group sees this new approach as operating in much the same way as that in England and Wales: while as a general rule the CPR 7 “claim form” is the appropriate means of commencing the majority of claims there, even within the standard commencement process under the CPR “there are many exceptions and numerous special rules such that considerable care needs to be taken in order to ensure that the correct form is used”.<sup>324</sup> However, it should be noted that non-compliance with the requirements in a prescribed form will not, under the rules of court in this jurisdiction, necessarily render proceedings void.<sup>325</sup>

<sup>324</sup> Zuckerman, “On Civil Procedure”, 3rd Ed., 2013, at para. 4.14.

<sup>325</sup> See Order 124, rule 1 RSC, Order 67, rule 15 CCR and Order 39, rule 2 DCR.

Since numerous references appear in the statute book to existing types of originating document, such as “civil bill”, “originating motion” etc., replacement of the existing originating documents will require a primary legislative amendment of general application to provide that references to those documents in existing statutes or statutory instruments shall be construed as references to a claim notice.

As mentioned at 3(b) of the description of the contents of the claim notice above, in High Court and Circuit Court proceedings an appearance would require to be entered by a respondent to the notice within eight days of its being served on the respondent. This would be a new requirement for proceedings such as judicial review and various proceedings on originating notices of motion.

The Review Group does not propose that the replacement of the originating documents by the claim form would alter the current requirement – depending on the nature of the claim, for delivery of a defence or a replying affidavit where these are currently required.

#### *10.4.1.2 Simplifying terms and language*

The Law Reform Commission proposed in its draft Bill that in preparing rules of court, each court rules committee would require to have regard, amongst other things, to the considerations that rules of court should use plain language, and avoid differences among the procedures and terms used in different Courts for similar matters if possible.<sup>326</sup>

In its draft Bill on Consolidation and Reform of the Courts Acts, the Law Reform Commission included four new general terms “applicant”, “application”, “application notice” and “respondent” – “intended to allow for the eventual simplification of existing court terminology”. As mentioned above, the Review Group favours use of the term “claim notice” rather than “application notice”, as being more self-explanatory to the lay person.

The Review Group acknowledges the need for simplifying of language in rules of court and court forms but also recognises that the task of doing so will be a challenging and resource-intensive one. Many expressions in the rules and forms are a product of the provisions and terms in the primary legislation they facilitate, or of long-established legal terms derived from the usage of earlier centuries. Some primary legislation on court proceedings impacting on lay persons – such as that relating to possession of mortgaged homes and personal insolvency remedies – is itself expressed in quite complex terms.

As will arise when changing the terms for originating documents, the replacing of terms in the rules of court may require accompanying amendments to primary legislation or statutory instruments which refer to the terms replaced.

Given the very time-consuming nature of a comprehensive revision, and the burden it may place on the court rules committees while discharging their on-going rule-making obligations, the Review Group considers that a specific programme of simplification should be undertaken by the court rules committees in stages, with priority being assigned to those procedures, and their associated forms, which most frequently impact on potentially vulnerable individuals.

#### *10.4.1.3 Simplifying procedures*

The Law Reform Commission proposed in its draft Bill that in preparing rules of court, each court rules committee must have regard to the considerations that rules of court should, consistently with the requirements of justice, provide simple and efficient Court procedures and avoid differences among the procedures and terms used in different Courts for similar matters if possible.<sup>327</sup>

There are, broadly, three routes to the disposal of most civil proceedings, viz.:

1. proceedings issued without an immediate return date leading:
  - (a) to judgment in default of appearance or

<sup>326</sup> Section 259 of the draft Bill.

<sup>327</sup> Section 259 of the draft Bill.

- (b) in cases which are contested, to a trial either on affidavit evidence or on oral evidence following exchange of pleadings.

This route is taken, e.g. by claims on a summary summons in the High Court and in the Circuit Court for a fixed amount as a debt due – these representing a very substantial part of the courts' caseload;

2. proceedings issued without an immediate return date followed by exchange of pleadings, ending with a trial.

This route is taken, e.g. by claims in the High Court on a plenary summons and in the Circuit Court on a civil bill for damages for breach of contract or claims on a personal injuries summons; and

3. proceedings issued with an early return date, followed by a hearing determining the case, whether on affidavit evidence or on oral evidence following exchange of pleadings.

Claims in the High Court on a special summons for a sale of property on foot of a mortgage and statutory applications in all three first instance jurisdictions made on an originating notice of motion are examples of this route.

Small claims in the District Court are, in effect, a hybrid of the routes at 1 and 3 above. If undisputed, they are resolved according to route 1(a). If disputed, they are open initially to being resolved by a form of mediation, but if not resolved, are remitted to the court for disposal at a hearing, i.e. in like manner to route 3.

The three routes outlined above recognise that:

- (a) many types of claim for recovery of fixed amounts for debt which are uncontested should be disposed of without the need for a formal hearing. An important exception to this is the obligation of courts to conduct assessments, of their own motion, of a claimant's compliance with EU law in certain classes of claim, notably contracts engaging certain provisions of EU consumer law,<sup>328</sup> and
- (b) claims which are disputed generally fall into two categories, viz.
- those in which the extent of the facts potentially in dispute is limited such that they may be adequately determined on the basis of sworn documentary (affidavit) evidence and
  - those in which the factual dispute is more extensive such that pleadings are required to frame the scope of that dispute and a hearing on oral evidence is required to resolve it.

Though submissions received identified a need for greater standardisation and simplification of procedures, the Review Group did not detect any fundamental concerns about the effectiveness of the aforementioned routes to and the mechanisms (viz. trial on sworn documentary evidence vs. trial on oral evidence preceded by pleadings) for resolution of claims, or any concrete suggestions for alternative methods of trying claims.

The Review Group does not see any compelling argument for departing from the three broad routes to and mechanisms for disposal of a claim referred to above and has concluded that, subject to the alignment across jurisdictions of the forms and information requirements for originating documents, those routes and mechanisms should be retained. A solid and clear logic or rationale underpins the distinctions and differences seen in the procedures that apply. Consistent with this view, the Review Group does not propose that the replacement of the originating documents by the claim form would alter the requirement – depending on the nature of the claim – for delivery of a defence or a replying affidavit.

#### 10.4.2 Lodgment and tender procedure

Order 22, rule 1(9) RSC should be amended to allow for a defendant to make or increase a lodgment or tender without leave of the court upon delivery of a further medical report by a plaintiff in personal injuries proceedings. As drafted currently, rule 1(9) allows a defendant to make a payment or increase any payment made into Court within 21 days of receipt of replies to particulars or additional particulars.

<sup>328</sup> See, e.g., Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya* (ECJ, 14 March 2013).



### 10.4.3 Notices for particulars in personal injuries actions

In personal injuries actions parties should not be permitted to raise separate notices for particulars and notices for further information under section 11 of the Civil Liability and Courts Act 2004 (“Section 11 Notice”) and should instead be required to raise a combined or composite notice. Rules of court in the first instance jurisdictions relating to the raising of particulars should be amended to provide that in personal injuries actions, and where parties intended to raise particulars and pleadings and to raise a Section 11 Notice, this should be done by way of a single composite notice.

### 10.4.4 Interrogatories

The Review Group shares the view of a number of respondents that the greater use of interrogatories should be encouraged and to this end the Review Group recommends that the requirement to seek the permission of the court in most categories of High Court litigation to serve interrogatories<sup>329</sup> should be removed. The Review Group also recommends that amendments to the relevant rules and forms be introduced so as to allow for the raising of interrogatories in modern language by way of straightforward questions. These reforms should also be implemented in the Circuit Court and the District Court.<sup>330</sup>

### 10.4.5 *Lis pendens* procedure

The Review Group agrees with the contention of ISIP mentioned at Section 8.10 above that the statutory requirements for registration of a *lis pendens*<sup>331</sup> are insufficiently rigorous to prevent abuse of that procedure. In the interests of achieving a greater balance between the rights of those persons seeking to register a *lis pendens* and those persons who will be adversely affected by the registration, the Review Group recommends that the lifespan of a *lis pendens* would be limited to a period of 28 days and that upon the expiration of this period the *lis pendens* would be deemed to be vacated. However, the party who registered the *lis pendens* would be entitled to apply to the High Court before the expiration of the period, by way of motion on notice to all affected parties and supported by affidavit evidence, to have the period of time extended. A primary legislative amendment would be required to achieve this, with consequential amendments to rules of court.<sup>332</sup>

### 10.4.6 Summonses to produce documents

Allied to the views and recommendations expressed in Chapter 6, the Review Group is aware that the current ease at which persons can be required to attend court and to bring unspecified categories of documents with them can allow litigants to circumvent the procedures governing particulars, discovery and interrogatories in particular. The Review Group therefore recommends the introduction of rules of court to require a party seeking to compel attendance of a witness before the High Court – by *subpoena duces tecum* – to apply to the Master of the High Court for permission to do so and, as part of that application, to disclose whether or not discovery has been made in the case. Under the current rules of court<sup>333</sup> permission of the court to serve a *subpoena* is required only in circumstances where the *subpoena* is to be served on certain officers of the State.

### 10.4.7 Requirement to enter appearance

As indicated in the context of its recommendation of a single claim notice, the Review Group recommends amendment of the rules of court to require solicitors to enter an appearance in all actions and matters

329 Order 31, rule 4 RSC and Form No. 8 in Appendix C, which has application to the Circuit Court by virtue of Order 67 rule 16 CCR.

330 In the District Court Order 45B, rule 12(2) envisages an application to court for an order directing a non-party to answer interrogatories or to make discovery. Further, Order 39, rule 1 states that if the procedure for the conduct of civil proceedings is not prescribed by the District Court Rules, or by an enactment, or for any other reason there is doubt about the manner or form of the procedure, the court may determine what procedure is to be adopted and may give directions. Similarly, in the Circuit Court Order 32, rule 9 envisages application to the judge or county registrar for an order directing a non-party to answer interrogatories or to make discovery. Under Order 18, rule 1, sub-rules 1(iv), (vi) and (vii) the county registrar may make an order for interrogatories and may dismiss an action or strike out a defence for failure to answer interrogatories. Order 67, rule 16 states that where there is no rule under the Circuit Court Rules to govern practice or procedure, the practice and procedure in the High Court may be followed.

331 See sections 121 – 123 of the Land and Conveyancing Law Reform Act 2009.

332 Order 63, rule 1(29), RSC.

333 Order 39, rule 19, RSC and Order 39, rule 30, RSC.

before the High Court and Circuit Court within eight days from service on the respondent of the claim notice – the period currently applicable in the High Court. Currently a defendant or respondent, or his or her solicitor, is required to enter an appearance in certain types and categories of proceedings<sup>334</sup> but is not required to do so in certain matters, e.g. various types of application and appeal brought by originating notice of motion. The period of time for entry of an appearance in proceedings for service out of the jurisdiction would not be affected.

#### 10.4.8 Judgment in default of defence

The Review Group shares the concerns of a number of respondents that an inordinate amount of time and judicial resources are consumed in the hearing and determination of pre-trial (interlocutory) motions. The volume of those applications could be reduced by modifying the rules of court to encourage increased compliance with the time limits for delivery of pleadings as well as greater compliance with existing rules requirements.

Frequently in the High Court plaintiffs are required to issue a second motion for judgment in default of defence, despite the fact that the rules provide that where a second motion is necessary, judgment should be granted unless there are “special circumstances” justifying a different order.<sup>335</sup> Many defendants apparently do not regard the risk of judgment being entered in the event of a second motion requiring to be brought as sufficiently serious. The Review Group considers that a rule of court automatically giving judgment for the plaintiff where the defendant has failed to deliver a defence within the period of time allowed by the court on the “first” motion for judgment would strike an appropriate balance between the right of the plaintiff to have his or her case proceed with due expedition and the right of the defendant to defend the action in a timely manner.

#### 10.4.9 Special High Court lists

Clinical negligence actions present particular and significant challenges which have been considered previously in the reports of the Working Group on Medical Negligence and Periodic Payments (Modules 2 and 3) and expressed again by many respondents considering the issue in the context of the work of the Review Group.

In addition to the recommendations made above in relation to the introduction of a PAP in clinical negligence actions and the employment of case management in such claims – reforms also recommended by the Working Group on Medical Negligence and Periodic Payments – the Review Group recommends the establishment of a separate and distinct High Court clinical negligence list and that the required judicial and other resources be made available to ensure the proper functioning of this list. The viability of such a list will be heavily dependent on judicial resources and attendant supports.

Further, the Review Group recommends the establishment of a dedicated list, by way of adjunct to the Commercial Court, to hear and determine intellectual property disputes and disputes concerning technology. The Review Group recognises the benefits which are likely to result from the introduction of a specialised intellectual property list and recommends that the appropriate resources be made available so as to ensure that the courts of Ireland remain an attractive forum for parties seeking to resolve such disputes in as timely and cost-effective manner as possible.

#### 10.4.10 Other proposals for procedural reform considered

##### 10.4.10.1 Further measures to reduce pre-trial applications

The Review Group considered other opportunities – beyond that already mentioned in relation to motions for judgment in default of defence – to reduce the volume of pre-trial applications to court.

In particular, it examined whether it should propose removing altogether the need for leave from the court to (a) serve a third party notice (i.e. in addition to those circumstances where amendment without leave is

<sup>334</sup> See Order 12 RSC generally and see 4.3 above.

<sup>335</sup> Order 27, rule 8(1), RSC.

currently permitted by the rules of court) and (b) amend pleadings, but decided against those proposals for the following reasons, respectively -

- the requirement in the Circuit Court and the High Court to seek leave to issue and serve third party notices acts as a procedural safeguard against the improper, vexatious or late joinder of third parties to proceedings and is, in turn, a safeguard against a proliferation of applications to set aside service of third party proceedings. The absence of a requirement in the District Court for leave to serve a third party notice is, in the Review Group's view, justified in that litigation in that jurisdiction tends to be less complex and involve fewer parties than in the higher courts, and the costs of a requirement for a court application for leave in that jurisdiction would in any event be disproportionate to the value of the dispute
- removal of the need for court permission to amend pleadings could place the opposing party at an unfair disadvantage in the event that the amendment raised new issues requiring to be addressed by the latter.

#### 10.4.10.2 *The structure of the court rules committees*

As mentioned in Chapter 3, the Committee on Court Practice and Procedure ("the Committee") in its 28th Interim Report considered whether the rules committees should continue to be jurisdiction-based or whether they should be recast, with separate rules committees for civil, family and criminal procedure, but concluded that the separate rules committees for each jurisdiction were "the most appropriate, efficient and effective system for Ireland" and should be retained.

Consideration was given also to the option of a single rules-making authority with subdivisions for jurisdictions or litigation categories. The Review Group supports the rationale of the Committee that each jurisdiction has its own unique and strong features and that the current system operates in a manner that enables procedures to be adapted to the level of complexity required in each jurisdiction. It is not at all apparent to the Review Group that the recasting of the current model to one based on substantive areas of law (civil, criminal, family law rules committees etc.) would lead to any greater efficiencies.

## 10.5 ADR

As related in Section 9.1 of this chapter, Ireland now has an extensive and robust legal framework supporting recourse to ADR in the form of the rules of court and provisions of the Arbitration Act 2010 and the Mediation Act 2010. The Review Group does not see any immediate need for further enhancement of that framework.

Near-universal support for the enactment of the 2017 Act was evident among respondents addressing the issue. The Review Group shares the view of some respondents that it is perhaps still too early to gauge the practical effectiveness or otherwise of the recent mediation reforms and that in the absence of data (the number of cases wherein parties have been invited to consider mediation etc.) at this time, any such assessment would be speculative.

The challenge undoubtedly facing practitioners and judges alike is to ensure that civil disputes which by their nature are open to resolution through ADR mechanisms are only resolved through litigation as a last resort.

The Review Group acknowledges and endorses views expressed by some respondents as to the importance of education and orientation focussed on practitioners and litigants and extension of ADR to categories of dispute where it is underutilised. These suggestions speak to the need for cultural change and perhaps also a change in emphasis in certain areas of professional legal training and education.

## 10.6 Court sittings and vacations

### 10.6.1 Background

A number of submissions were made to the Review Group concerning the sittings and vacation arrangements of the courts, as referred to in Section 8.9 of this chapter.

The power to regulate court sittings and vacations rests with different authorities depending on the court jurisdiction. In the Superior Courts the sitting days of the Supreme Court, the Court of Appeal and the High Court are prescribed by the Rules of the Superior Courts.<sup>336</sup> These rules, as with the rules of court for the other jurisdictions, have statutory force once concurred in by the Minister for Justice and Equality.

The court vacation periods in the Superior Courts are also set by the rules.<sup>337</sup> The four periods of sittings of the Superior Courts in Dublin – the Michaelmas sittings, the Hilary sittings, the Easter sittings and the Trinity sittings<sup>338</sup> – are punctuated by periods of “vacation”.<sup>339</sup> The longest period of vacation is known as the “Long vacation”<sup>340</sup> and this period begins on the 1<sup>st</sup> August and ends on the 30<sup>th</sup> September.

In the Circuit Court, the places and dates of the sittings of each circuit are fixed by the President of the Circuit Court,<sup>341</sup> who must, before fixing them, consult with the judge permanently assigned to the circuit concerned.<sup>342</sup> The Circuit Court Rules provide that the times of the sittings of a circuit shall be as set by the judge of the circuit concerned.<sup>343</sup>

The Circuit Court rules prescribe the months of August and September as the vacation period for the Circuit Court, although dates may be fixed for hearings during these months both in Dublin and on circuit outside of Dublin.<sup>344</sup>

Power to alter the places or vary the days or hours for District Court sittings in any district is vested in the Courts Service, that power<sup>345</sup> having been transferred to it from the Minister for Justice upon its establishment.<sup>346</sup> However, under a recent amendment to the legislation concerned, the Courts Service was empowered – notwithstanding its statutory power aforementioned – following consultation with and with the consent of the President of the District Court, by notice to alter the places or vary the days or hours for holding that court in any district court area where the Courts Service is of the opinion that such alteration is necessary to ensure the efficient operation and continuation of the business of the court.<sup>347</sup>

Section 5 of the Courts Act 1964 provides that the times at which District Court judges may take vacations shall be such as may be approved by the Minister for Justice.

August is the vacation period for the District Court.

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336 Order 118 RSC.

337 Order 118, rule 1 RSC

338 Order 118, rule 2 RSC.

339 Order 118, rule 2 provides: “The vacations to be observed in the Supreme Court, the Court of Appeal and the High Court shall be four in every year, viz.: the Christmas vacation, the Easter vacation, the Whitsun vacation and the Long vacation. The Christmas vacation shall begin on the 24<sup>th</sup> December and end on the 6<sup>th</sup> January. The Easter vacation shall begin on the Monday of the week before Easter week and end on the Saturday of Easter week. The Whitsun vacation shall begin on the Friday of the week preceding Whitsun and end on the Saturday of Whitsun Week. The Long vacation shall begin on the 1<sup>st</sup> August and end on the 30<sup>th</sup> September

340 Ibid.

341 Section 10(2) of the Courts of Justice Act 1947 and Order 1, rule 1 CCR.

342 Section 10(2)(d) of the Courts of Justice Act 1947. In respect of “specialist judges” within the meaning of section 26A of the Courts (Supplemental Provisions) Act 1961, as inserted by section 189 of the Personal Insolvency Act 2012, the President of the Circuit Court may by order fix, in respect of any circuit, the places, times and hours between which sittings of specialist judges are to be held. Before exercising these powers the President of the Circuit Court may consult the specialist judge permanently assigned to the relevant circuit; see Section 10 of the Courts of Justice Act 1947, as amended by Section 194 of the Personal Insolvency Act 2012.

343 Order 1, rule 1 CCR.

344 Order 1, rule 4 CCR.

345 Section 26(1)(f) of the Courts of Justice Act 1953.

346 Section 29 of the Courts Service Act 1998 and the Second Schedule thereto.

347 Section 26A of the Courts of Justice Act 1953 inserted by section 33 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

## 10.6.2 Sitting times and days

### 10.6.2.1 Sitting times

In its submission the Department of Defence suggested that court sitting times should be considered for review “in the context of maximising court availability”. In a submission made on behalf of in-house counsel working for commercial organisations it was suggested that court sittings should commence earlier than 11am and end later than 4pm. The CSSO suggested in its submission that the “business hours” of the courts be extended to 9:30am – 4:30pm. In a submission made on behalf of Insurance Ireland it was suggested that the working hours of the courts and court offices should be extended to 9am – 5pm, and that there should be a mechanism whereby parties can apply for early or late court sittings.

Having deliberated upon the issue the Review Group considers that the standardisation of court sitting times would reduce the flexibility available in each jurisdiction to arrange the sitting times to meet the business needs of each court. Accordingly, the Review Group did not consider it necessary to make any recommendation in relation to the alteration of court sitting times.

### 10.6.2.2 Sitting days

The Review Group understands that outside Dublin and Cork, the Circuit Court is not formally scheduled to sit on Mondays.

This arrangement would appear to have historical origins which may no longer be relevant. The operation of the Circuit Court remains configured on this basis. It has been submitted that scheduling sittings on Monday would have the direct benefit of increasing the amount of Court time available for litigants. It is recognised that this matter is within the statutory competence and capacity of the Courts.

The Review Group makes no recommendation in relation to sitting days in the Circuit Court, but rather suggests that the advantages and disadvantages of Monday sittings of the that court should be considered by the President of the Circuit Court and by the Judges assigned to each Circuit. In considering the matter, it is suggested that account would be taken of the facility to conduct hearings of classes or types of proceedings, including applications in proceedings, by remote hearings as permitted by section 11 of the recently enacted Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

## 10.6.3 Vacations

In its submissions the CSSO suggested that consideration be given to greater alignment between the court vacation periods and the academic terms or school holidays, offering the opinion that a long vacation in July and August (as opposed to August and September) – which is the structure adopted in Northern Ireland – would seem to fit more naturally with wider society. The Courts Service also suggested that consideration also be given to the merits of aligning court vacation periods with school holidays, noting that school holidays generally influence family holiday periods, and impact on the availability of parties and witnesses to attend court proceedings, aside altogether from the facility any realignment may afford judges, practitioners and court staff. Insurance Ireland, in its submission, suggested that the legal terms in the High, Circuit and District courts be uniform.

It should be said that the use of the term “vacation” is somewhat out of step with the reality of court activity during the vacation periods. In the Superior Courts provision is made for judges to sit during the Long vacation<sup>348</sup> and in addition to judges being available to hear urgent matters every day during the Long vacation – and during each of the other vacation periods – many court lists continue to operate in September and have done so for many years now. While similar arrangements apply in the Circuit Court in relation to urgent matters<sup>349</sup> the Circuit Court routinely sits during September, as do County Registrars. In the District Court, judges are available for urgent matters during the August vacation period.

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348 Order 118, rule 5 RSC.

349 Order 1, rule 5 RSC.

Having considered the submissions received, the Review Group has taken the view that the scheduling of vacation periods is more appropriately a matter for the judiciary and – where it falls within their remit, the courts rules committees concerned – to consider.



# CHAPTER 6

## DISCOVERY





## 1. Introduction

The Review Group has been specifically tasked with reviewing the law of discovery. In addressing this area, the Review Group is also conscious of other elements of its remit, including the mandates to improve access to justice generally, reduce the cost of litigation and improve procedures so as to ensure timely hearings. As this chapter will demonstrate, each of these considerations are directly engaged by the operation of the current discovery process.

Discovery is one of a number of procedural mechanisms under the Rules of the Superior Courts available to a party to assist in prosecuting or defending his or her case. The important role that the discovery process plays in the legal system in this State has been recognised consistently by the courts and most recently in a leading decision of the Supreme Court in *Tobin v The Minister for Defence & Ors*.<sup>1</sup>

However, the current procedures that give effect to the right to discovery have their origins in the middle of the 19<sup>th</sup> century,<sup>2</sup> and while the nature of litigation has changed immeasurably since that time,<sup>3</sup> and although the discovery procedure has been significantly refined and supplemented through successive amendments to it since the early 1990s, the essential principles that give effect to a litigant's entitlement to seek to access documents by means of discovery remain largely unchanged.

Furthermore, the underlying principles governing the test for relevance derive from a case decided in 1882 – the “Peruvian Guano” case<sup>4</sup> – long before the advent of the photocopier, fax machine and e-mail – developments which have expanded considerably the extent of material potentially discoverable between the parties.

The increasing complexity of litigation and continuous technological advances have led to frequently expressed concerns as to the cost of discovery and the potential for the discovery process to delay the trial of actions for significant periods.<sup>5</sup>

Section 2 of this chapter examines the discovery regime as it currently operates in the first instance civil jurisdictions of the High Court, the Circuit Court and the District Court, as well as other procedural remedies alternative or complementary to discovery.

Section 3 considers the problems presented by the current discovery process. The key issues are identified in the decision of *Tobin v The Minister for Defence & Ors* above mentioned and will be examined with the assistance of an analysis of that case as decided at first instance and on appeal. This section also examines the numerous submissions received by the Review Group on the subject of discovery.

1 [2019] IESC 57.

2 Abrahamson et al., *Discovery and Disclosure*, Round Hall, 3<sup>rd</sup> Ed., at para. 1.06. See also para. 1.08 where the authors note *inter alia* as follows: “...In December 1985, the Superior Courts Rules Committee made the current Rules of the Superior Courts (RSC). Order 31 of those rules was in very similar terms to the provisions of Ord.XXXI of the Rules of 1905 and remains in force today, subject to certain amendments.”

3 Abrahamson et al., *op. cit.*, at para. 1.02.

4 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

5 See, e.g.: the observations of Clarke J (as he then was) in *Thema International Fund plc. v HSBS Institutional Trust Services (Ireland) Ltd* [2012] 3 IR 528, at para. 6 and of Hogan J in *IBB Internet Services Ltd v Motorola* [2015] IECA 282. at para. 10. Abrahamson et al. cited the dicta of Hogan J in *Tobin v Minister for Defence* [2018] IECA 230; unreported, Court of Appeal 9 July 2018, in which the learned judge stated (at paragraph 12):

“In its own way, this appeal serves to illustrate the crisis – and there really is no other word for it – now facing the courts regarding the extent of burdens, costs and delays imposed on litigants and the wider legal system by the discovery process as it presently operates. I should say immediately that this is not intended in any sense as a criticism of the plaintiff or his legal advisers. They have quite properly sought to follow and apply the existing discovery rules and practice for the benefit of their client. It is rather the existing discovery rules and practice which have become the problem in terms of the burdensome nature of discovery, the significant costs of which are imposed on litigants and, not least, the delays which are entailed in the entire discovery process.” Abrahamson et al. *op. cit.*, at para. 1.17.

Section 4 considers procedures for disclosure of documents in the courts of England and Wales and certain other jurisdictions of the common law and civil law traditions. In particular this section plots the reforms introduced following the publication of Lord Woolf’s “Access to Justice” interim and final reports in 1995 and 1996 respectively and considers the move away from the principles of discovery as set out in *Peruvian Guano*, referred to in Section 3.

Section 5 sets out the conclusions and recommendations of the Review Group.

## 2. The existing discovery regime

### 2.1 Introduction

Discovery<sup>6</sup> is the procedure whereby a litigant obtains documents which are of relevance to the issues in dispute and which are in the possession of another party to the proceedings, or a person not a party to the proceedings, prior to the trial of the action.

The main purpose of discovery is to ensure that as far as possible all of the relevant facts concerning the issues in dispute in any matter before the court are capable of being presented to the court by the parties, and this in turn ensures that the court’s determination of the matter is based on full information rather than on partial revelation of those facts.<sup>7</sup>

In each of the first instance civil jurisdictions of the District Court, the Circuit Court and the High Court the discovery process is governed by specific rules of court. As will be seen, and notwithstanding the fact that the rules across the jurisdictions differ in form, the central principles that underpin the right of discovery are uniform in their application.

### 2.2. Alternative or complementary remedies

Discovery is one of four distinct procedures, the others being: (a) interrogatories; (b) production and inspection of documents; and (c) disclosure of information by non-parties – which may be alternative to or complement each other – enabling a litigant to access evidence to assist in the prosecution or defence of his or her case. A consideration of these processes is therefore necessary to any analysis of the proper role of discovery.<sup>8</sup> While each procedure has its own distinct scope, a criterion common to discovery and the other three procedures is that each is only properly invocable where it is shown to be necessary in order to dispose fairly of the claim or to save costs.<sup>9</sup>

#### 2.2.1 Interrogatories

The term “interrogatories” is used to describe the process whereby a litigant may require an opposing party to answer, on oath, relevant questions as to factual matters in dispute in the proceedings.<sup>10</sup> Save in actions founded on a claim of fraud or breach of trust or proceedings entered in the Commercial Court<sup>11</sup> a party

6 Abrahamson et al. note that discovery is in fact one form or species of disclosure: *op. cit.*, at para. 1.03.

7 *As per* Finlay CJ in *Allied Irish Banks Plc v Ernst & Whinney* [1993] 1 IR 375 at 390.

8 Reference should also be made here to the facility under the rules of court to serve a notice on the other party requesting them to admit facts or documents, which enables a party to obviate the need to prove formally a particular document(s) or fact(s) at trial. A party may call on his or her opponent, not later than nine days prior to the trial of the action, to admit for the purpose of the proceedings the fact or facts as specified in the notice to admit facts. Where the party called upon to admit the facts refuses or neglects to admit the facts, that party may be responsible for the cost of proving those facts; see Order 32, rule 4 RSC. A similar procedure is available under Order 32, rule 2 RSC in relation to documents. Again, adverse costs consequences may be visited upon the party who fails or refuses to admit the documents. See also Order 31, rule 1 CCR and Order 45D, rule 1 DCR. In respect of a request to admit facts see also Order 31, rule 2 CCR and Order 45D, rule 2 DCR.

9 Order 31, rule 12(5) RSC (Discovery); Order 31, rule 2 RSC (Interrogatories); Order 31, rule 18(2), rule 18(2) (production and inspection of documents); Order 31, rule 30(2)(e) RSC (Non-party disclosure of information).

10 Order 31, rule 1, RSC.

11 Order 63A, rule 9, RSC.

must seek leave of the court to deliver interrogatories,<sup>12</sup> which take the form of specific questions (“Did not... etc.”; “Has not...etc.”) and must be answered on affidavit within 10 days.<sup>13</sup> Leading commentators have noted that, in light of the complexity of modern litigation and the extent to which discovery of documents has become ever more burdensome in both time and cost, “...interrogatories can provide an alternative mechanism to glean relevant information and to narrow the issues in dispute.”<sup>14</sup>

Other leading commentators on civil procedure have described the purpose of the procedure as well as its advantages as follows:

“It can be seen, therefore, that the purpose of this procedure is to ascertain information about the issues which arise in the action or to obtain admissions from the opposing party, with a view to narrowing the issues in dispute between the parties, thus saving time and expense at the trial. In particular, interrogatories provide a useful means of preventing a party denying facts which he knows to be true and of establishing the veracity of facts which might otherwise be difficult to prove. They can, thus, be useful as a means of discharging the burden of proof borne by a party in respect of an issue.”<sup>15</sup>

### 2.2.2 Production and inspection

Discovery does not result in the automatic production and delivery of the documents to be discovered, but rather entails listing on affidavit the documents that fall within the categories of discovery as agreed or ordered by the court.<sup>16</sup>

“Inspection” is the term used to describe the entitlement of a party to require – by service of a notice for the purpose – another party who has made reference to a document in a pleading or affidavit or in a list of documents to produce that document for inspection and to permit copies to be taken.<sup>17</sup>

Inspection generally takes place following delivery of a notice to produce which is a written notice calling on the party making discovery to make the discovered documents available for inspection.

### 2.2.3 Disclosure of information by a non-party

While the discovery procedure extends to documents in the possession, custody or control of a person not party to the proceedings concerned, Order 31 RSC was amended in 2016 to entitle a party to proceedings to seek from a person not party to the proceedings (the “non-party”) having access to it, information likely to support the case of the moving party or adversely affect the case of one of the other parties to the cause or matter but which -

- is not reasonably available to a party to the proceedings and
- would not have been procurable by means of discovery made, or answers to interrogatories by the non-party.

Failing compliance with the request, the requesting party may seek an order from the court directing the non-party to prepare and file a document recording the information and serve a copy of that document on the parties to the cause or matter. The application must be supported by an affidavit setting out the grounds on which the requesting party believes that (a) the information sought is not reasonably available to them; (b) the information would not have been procurable by means of discovery made, or answers to interrogatories; (c) the information sought is reasonably available to the non-party against whom such an order is sought; (d) the information sought is likely to support the case of the moving party or adversely affect the case of one of the other parties to the cause or matter; and (e) disclosure of the information sought is necessary in order to dispose fairly of the claim or to save costs.

12 Order 31, rule 1, RSC.

13 Order 31, rule 8.

14 Abramson et al., op. cit., at para. 14.01.

15 Delany et al., op. cit. at para. 12.02.

16 Abramson et al., op. cit., at para. 13.01.

17 See in particular Order 31, rules 15 to 19, RSC, and Delany et al., op. cit., at paras. 11.37 to 11.63.

The court may grant the application unless satisfied that it would not be in the interests of justice that the information concerned be disclosed, and only where:

- (a) the information disclosure of which is sought is likely to support the case of the moving party or adversely affect the case of one of the other parties to the cause or matter; and
- (b) disclosure of the information sought is necessary in order to dispose fairly of the claim or to save costs.

The entitlement to seek disclosure is without prejudice to any remedy of discovery available to the applicant against the non-party and to any rule of law entitling or obliging the non-party to withhold disclosure of the information.<sup>18</sup>

While the Circuit Court Rules do not expressly provide for a non-party information disclosure procedure, it should be noted that where those rules do not contain a provision governing practice and procedure, the practice and procedure in the High Court may be followed.<sup>19</sup>

## 2.3 Discovery in the High Court, the Circuit Court and the District Court

### 2.3.1 Discovery in the High Court

#### 2.3.1.1 Order 31, rule 12 RSC

The procedure for seeking discovery in the High Court is governed by Order 31 rule 12 RSC. This rule has been successively refined and expanded upon through amendment since the current Rules of the Superior Courts were introduced in 1986.

Order 31 rule 12 was first amended in 1993<sup>20</sup> to introduce a procedure for voluntary discovery between parties having essentially the same effect as court-ordered discovery and to require, as a condition generally<sup>21</sup> of any application to the court for discovery, that the applicant shall have previously applied by letter in writing requesting that discovery be made voluntarily, that a reasonable time for discovery has been allowed, and that the party or person requested has failed, refused or neglected to make the discovery requested or has ignored the request.

Prior to a further and significant revision of the discovery procedure in 1999, parties seeking discovery could do so by applying to court, without the need to file an affidavit. A number of authorities prior to the 1999 amendment had expressed judicial concern as to the potential for the discovery process, if insufficiently regulated, to lead to increased costs and delay. In *Allied Irish Banks plc v Ernst & Whinney*<sup>22</sup> the court noted that the discovery process could be used to “swamp” an opposing party with masses of material.<sup>23</sup> In *Brooks Thomas Ltd v Impac Ltd*,<sup>24</sup> a case delayed for over nine years as a result of discovery applications,<sup>25</sup> Lynch J commented:

18 Order 31 rule 30 RSC.

19 Order 67, rule 16 CCR.

20 By the Rules of the Superior Courts (No. 2) of 1993 (S.I. No. 265 of 1993), which inserted a new sub-rule (4) in Order 31, rule 12.

21 In any case where “by reason of the urgency of the matter or the consent of the parties, the nature of the case or any other circumstances which to the Court seem appropriate, the Court may make an order for discovery, without the necessity for such prior application in writing”.

22 [1993] 1 IR 375.

23 Abrahamson et al. note: “...In *Allied Irish Banks plc. v Ernst & Whinney*, O’Flaherty J noted the experience in other jurisdictions where discovery was used “to swamp the opposing party with masses of material”, either to burden one’s opponent or to increase the likelihood that a significant document would be overlooked. He commented that “[t]o engage in such a tactic is as much an abuse as to withhold relevant information”. 1<sup>st</sup> Ed., at para. 7.01. Citing *Allied Irish Banks plc v Ernst & Whinney* [1993] 1 IR 375, as *per* O’Flaherty J at 396.

24 [1999] ILRM 171.

25 Abrahamson et al., 1<sup>st</sup> Ed., at para. 7.02.

“In view of the trend in modern times to seek discovery in almost every case, the Superior Courts Rules Committee might consider changing r.12(1) so as to require an affidavit before discovery is ordered.”<sup>26</sup>

On foot of these concerns, the 1999 amendment required that an applicant for discovery specify the precise categories of documents in respect of which discovery is sought and, should they require to apply for a court order for discovery, on affidavit set out the reasons why each category of documents is required to be discovered and verify the necessity for the discovery sought.

Morris P. in *Swords v Western Proteins Ltd* commented on the object of the 1999 amendment thus:<sup>27</sup>

“I am satisfied that the amendment to O.31, r.12 was made for the purpose of addressing a problem which had given rise to delays and potential injustices over a number of years. A practice had developed whereby orders for discovery were obtained unnecessarily and such orders delayed litigation. As has been pointed out by the courts on a number of occasions, discovery before the advent of the photocopying machine, fax, e-mail and word processors would probably involve the discovery of a dozen documents. In recent years the number of documents can amount to many thousands and the process has become unmanageable.”<sup>28</sup>

In the later Supreme Court decision in *Ryanair Plc v Aer Rianta Cpt*, Fennelly J observed:

“The change made [to O.31, r 12] in 1999 exemplifies... growing concern about the dangers of unnecessarily costly and protracted litigation and, in particular, the burdens on parties and the courts arising from excessive resort to automatic blanket discovery. The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy.”<sup>29</sup>

A further revision of Order 31 rule 12 RSC, taking effect in April 2009,<sup>30</sup> sought to address technological advances and the increasing importance of electronically stored information (“ESI”) by making specific provision for the discovery of such information.<sup>31</sup> The requirements and arrangements for discovery of ESI are addressed below.

### 2.3.1.2 Request for discovery

Save in urgent cases, by consent or where it appears to the court appropriate,<sup>32</sup> a party may only apply to court for an order for discovery having first delivered a written request for discovery to the party from whom documents are sought *and* in the event that the requested person fails or refuses to make discovery within a reasonable period of time. Order 31 rule 12(6) RSC provides that an order directing a party to make discovery shall not be made unless:

1. the party requesting discovery (the “applicant”) has previously applied to the other side by letter in writing requesting that discovery be made voluntarily;
2. the written request specified the precise categories of documents in respect of which discovery is sought;
3. the request provided the reasons why each category of documents is required to be discovered;
4. where the discovery sought includes ESI, the request has specified whether the applicant seeks the production of any documents in searchable form and if so, whether for that purpose the applicant

26 *Brooks Thomas Ltd v Impac Ltd* [1999] ILRM 171, *per* Lynch J at 178. Abrahamson et al. note that approximately one year after Lynch J delivered his judgment the new Order 31, rule 12 rules were introduced which in turn introduced a new requirement that motions for discovery be grounded on affidavit; Abrahamson et al., *op. cit.* 1<sup>st</sup> Ed., at para. 7.04.

27 [2001] 1 IR 324. Abrahamson et al., 1<sup>st</sup> Ed., at para. 7.03. The authors also cite *Ryanair v Aer Rianta cpt* [2004] 1 ILRM 241, *per* McCracken J at 255.

28 [2001] 1 IR 324 at 328.

29 [2003] 4 I.R. 264, at 277.

30 It was introduced by the Rules of the Superior Courts (Discovery) 2009 (S.I. No. 93 of 2009).

31 Delany et al., *op. cit.* at para. 10.08.

32 Proviso to Order 31, rule 12(6), RSC.

seeks the provision of inspection and searching facilities using any information and communications technology system owned or operated by the party requested;<sup>33</sup>

5. the request provided a reasonable period of time for discovery to be made; and
6. the other party has failed, refused or neglected to make discovery or has ignored the request.

### *2.3.1.3 Response to letter seeking voluntary discovery*

Where a party refuses to make voluntary discovery or does not respond to the letter seeking voluntary discovery, the applicant may apply to court for an order compelling that party to make discovery.

Where a party agrees to make discovery on foot of the letter seeking voluntary discovery delivered pursuant to Order 31 rule 12(6) RSC or following negotiations as to the breadth and scope of the categories as initially appearing in the applicant’s letter for discovery, the agreement will have the same effect as a court order made in the terms as requested or agreed.<sup>34</sup>

The same remedies for default in making discovery within the time agreed are available to the party requesting discovery provided that the party requested to make discovery was informed:

1. that voluntary discovery was being sought pursuant to Order 31 rule 12 RSC;
2. that agreement to make discovery would require it to be made in like manner and form and would have such effect as if directed by order; and
3. that failure to make the discovery may result in an application under Order 31 rule 21 RSC.<sup>35</sup>

### *2.3.1.4 Application to the court for discovery*

Generally, application for discovery shall be brought no later than 28 days after the action has been set down or in cases which are not set down, 28 days after the case has been listed for trial. However, the court may order, or the party requested may agree, to extend the time for the application for discovery where it appears just and reasonable to do so.<sup>36</sup>

An order for discovery may not be made if the court is satisfied that discovery is not necessary either for disposing fairly of the matter or for saving costs.<sup>37</sup>

A party may apply to the court by way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession, power or procurement relating to any matter in question in the cause or matter.<sup>38</sup> The notice must specify the precise categories of documents in respect of which discovery is sought and be grounded upon the affidavit of the party seeking such an order of discovery.

The affidavit grounding the application must:

1. verify that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs;
2. furnish or set out the reasons why each category of documents is required to be discovered; and
3. where the discovery sought includes electronically stored information, specify whether the requesting party seeks the production of any documents in searchable form and if so, whether for

33 See the observations of Abrahamson et al. at paras. 7.26 – 7.27, *op. cit.*

34 Order 31 rule 12(7) RSC provides: “Any such discovery sought and agreed between parties or between parties and any other person shall, subject to sub-rule (9), be made in like manner and form and have such effect as if directed by order of the Court.”

35 Order 31, rule 21 RSC provides: “If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court for an order to that effect, and an order may be made accordingly.”

36 Order 31, rule 12(9) RSC.

37 See first paragraph of Section 2.2 of this chapter.

38 Order 31, rule 12(1), RSC.

that purpose the party seeking discovery seeks the provision of inspection and searching facilities using any information and communications technology system owned or operated by the party requested.

On the hearing of the application for discovery the court has a broad discretion and may make an order for discovery in terms of the notice of motion or in amended terms.<sup>39</sup> The court may refuse or adjourn the application if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, or by virtue of non-compliance with the applicant's failure to first seek discovery by way of voluntary letter.<sup>40</sup> Alternatively the court may make an order for discovery either in terms of some or all of the categories of documents sought or limited to certain documents or classes of documents within any or all of those categories.<sup>41</sup> It has been noted that this provision "...reflects current practice, in that the courts often reword or redraft the categories of document sought by an applicant for discovery."<sup>42</sup>

#### 2.3.1.5 *The affidavit of discovery*

Discovery is to be made by way of affidavit in the form as set out in Form 10 of Appendix C to the Rules of the Superior Courts and the Form 10 affidavit contains two schedules. In the First Schedule the party making discovery is required to list all of the documents that fall within the relevant categories of discovery. The First Schedule has two parts and in the first part the party must list all of those documents that are within the possession, power or procurement of the party making discovery. In the second part the party must list all of those documents in respect of which he is claiming privilege.

In the Second Schedule the party making discovery is obliged to list relevant documents which the deponent had but no longer has in his possession, power or procurement. In the body of the affidavit the deponent is required to (a) state when the relevant documents were last in his possession, power or procurement and (b) to state what has become of the documents and to identify in whose possession the documents now are.

#### 2.3.1.6 *Electronically stored information*

Where the discovery sought includes ESI, the party seeking discovery must specify whether they are seeking production of any documents in searchable form and if so, whether they wish to avail of any information and communications technology system owned or operated by the party requested for the inspection and search.<sup>43</sup> The Court may order that ESI be provided by the party requested in searchable form or that they make available the searching functionality of their own information and communications technology system to the requesting party, if the court is satisfied that this could be done without the latter incurring significant cost.<sup>44</sup> The court may also –

- impose restrictions and require the giving of undertakings from any party or person to ensure that ESI not covered by the discovery request are not accessed or accessible, and otherwise to secure the requested party's information and communications technology system, and
- direct the inspection and searching of ESI be undertaken by an independent expert or person agreed between the parties, or appointed by the Court in default of agreement – this being a means of ensuring that any discovery-related search does not compromise the information systems of the requested party.<sup>45</sup>

39 Delany et al., op. cit., at para. 10.100.

40 Order 31, rule 12(2)(a) RSC.

41 Order 31, rule 12(2)(b) RSC.

42 Delany et al., op. cit., at para. 10.100.

43 Order 31, rule 12(1)(c) RSC.

44 Order 31, rule 12(2)(c) RSC.

45 Order 31, rule 12(3)(a) RSC.

### 2.3.1.7 Security for costs

The High Court may order discovery on terms as to security for costs or otherwise.<sup>46</sup> In *Framus v CRH Plc*,<sup>47</sup> the High Court indicated that factors to be taken into account in exercising its discretion whether or not to order security for costs of discovery included: the apparent strength of the case presented by the party seeking discovery; the burden that compliance with the order of discovery will impose upon the party making discovery; the detriment that it is likely the party seeking discovery would suffer if unable to provide the security as ordered; any evidence that the inability to pay security for costs is solely or principally due to the conduct of the other party that gave rise to the cause of action; the probable proportion between the costs of the discovery and the costs of the proceedings as a whole; whether the case raises a matter of major public importance to which the discovery is relevant.<sup>48</sup>

### 2.3.1.8 Further and better discovery and enforcement of an order for discovery

A party to an action, whether having previously delivered an affidavit or list of documents or otherwise, may be required to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power.<sup>49</sup> Commentators note that while there is no express provision in the rules providing for the making of an order for further and better discovery:

“...it is well established that the courts have an inherent jurisdiction to order further discovery and, as noted above, this is the remedy that is most commonly pursued where a party believes that there has been a failure by another party to make proper or adequate discovery.”<sup>50</sup>

A party who fails to comply with an order for discovery (or for inspection of documents or to answer interrogatories) is liable to have his action dismissed for want of prosecution if a plaintiff or, if a defendant, to have his defence struck out. Order 31, rule 21 RSC provides:

“If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court for an order to that effect, and an order may be made accordingly.”<sup>51</sup>

### 2.3.1.9 Non-party discovery and disclosure in the High Court

A party may apply to the High Court for an order for discovery from a person who is not a party (a “non-party”) to the proceedings of documents which are relevant to the issues in dispute in the proceedings in the latter’s possession, custody or power. While the rule concerned – Order 31 rule 29 RSC – makes no reference to a requirement that a request for voluntary discovery should be made prior to a court application, it is “best practice to do so”.<sup>52</sup>

While Order 31 rule 29 RSC stipulates that the provisions of Order 31 shall apply *mutatis mutandis* as if the order had been directed to a party to the action, there is one important exception to this general rule, viz. the party seeking non-party discovery must indemnify the non-party in respect of “all costs thereby reasonably incurred” by the non-party, but on the basis that such costs shall be deemed to be the costs of the requesting party in the proceedings, i.e. rendering the costs recoverable from the opposing party should the party requesting discovery be awarded the costs of the proceedings.

46 Order 31 rule 12(2)(b) RSC.

47 [2003] 1 ILRM 462 (HC); [2004] IESC 25; [2004] 2 IR 20 (SC).

48 That list of factors received approval in the appeal before the Supreme Court; [2004] IESC 25; [2004] 2 IR 20 (SC) per Murray J.

49 Order 31, rule 20(3) RSC.

50 Delany et al., op. cit., at para. 10.204. The authors cite *Sterling-Winthrop Group Ltd v Farbenfabriken Bayer Aktiengesellschaft* [1967] IR 97 as the leading authority in relation to the circumstances where further and better discovery will be ordered.

51 As to the processes of attachment and committal Abrahamson et al. comment that although provided for in the rules the “draconian” mechanism of attachment is rarely an appropriate response to a party’s failure to comply with an order for discovery. Op. cit., at para. 11.21.

52 Abrahamson et al., op. cit., at para. 10.20.



### 2.3.2 Production and inspection in the High Court

While it is common practice to supply copies of discovered documents together with the affidavit of discovery,<sup>53</sup> discovery itself does not entail the actual handing over of documentation but rather the listing of documents on affidavit – the second stage of the process being production and inspection.<sup>54</sup>

A party is entitled to serve on any other party a notice to produce any document referred to in that other party's pleadings, or affidavits, to include his or her affidavit of discovery, for the inspection of the party giving such notice, or of his solicitor, and to permit copies of the documents to be taken. Notice to produce may be served at any time in the proceedings.<sup>55</sup>

A party in receipt of a notice to produce is required to serve notice to inspect in the prescribed form and the notice must state a time, within three days from the delivery of the notice to produce, at which the documents, or such of them as the party does not object to produce, may be inspected at the office of that party's solicitor, or in the case of bankers' books or other books of account, or books in constant use for the purposes of any trade or business, at their usual place of custody, and state which (if any) of the documents he objects to produce, and on what ground.<sup>56</sup>

While the rules anticipate the arrangement of inspection at a particular time and place, the standard practice of delivering documents in electronic form has emerged in certain instances:

"In cases where there is a large volume of documentation (particularly electronically stored documentation), it is now standard practice to provide copies electronically (e.g. on a memory stick). However the entitlement to inspect original documents remains, and may be important in some instances."<sup>57</sup>

A party failing to comply with a notice to produce

"... shall not afterwards be at liberty to put any such documents in evidence on his behalf in such cause or matter, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice; in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit."<sup>58</sup>

A party may also seek an order for inspection where the recipient of a notice to produce fails to serve notice of inspection and the court may order inspection in such place and in such manner as it may think fit.<sup>59</sup>

Further, the court may at any time during the course of the proceedings order the production, upon oath, by any party to the action, of such documents in his or her possession or power and relating to any matter in question on the cause or matter.<sup>60</sup>

53 Abrahamson et al., op. cit., at para. 13.01, citing the Court of Appeal in *Burke v Boston Scientific* [2016] IECA 230, unreported, Court of Appeal, 28 July 2016.

54 See Abrahamson et al., op. cit., at para. 13.01.

55 Order 31, rule 15 RSC.

56 Order 31, rule 17 RSC and Form no. 12 of Appendix C to the Rules of the Superior Courts.

57 Abrahamson et al., op. cit., at para. 13.13.

58 Order 31, rule 15 RSC.

59 Order 31, rule 18(1) RSC.

60 Order 31, rule 14 RSC.

### 2.3.3 Discovery in the Circuit Court

#### 2.3.3.1 Introduction

The procedure for seeking discovery in the Circuit Court is similar, although not identical, to that prescribed for the High Court, a number of the procedural changes introduced in the High Court not having been introduced in the Circuit Court.<sup>61</sup>

Where a request in writing has been made at least fourteen days prior to the issuing of the notice of motion (seeking discovery), and where no agreement in writing to make discovery in the terms as requested has been received within that period,

“any party may apply to the Court or to the County Registrar by notice of motion to be served not less than four clear days before the hearing thereof, for an order directing any other party to any proceedings to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein...”.<sup>62</sup>

The time limits that apply to discovery in the High Court<sup>63</sup> do not apply in the Circuit Court, the only stipulation as to time being that the request for voluntary discovery must be made 14 days prior to the issuing of the motion and the motion must be served four clear days prior to the return date.<sup>64</sup>

#### 2.3.3.2 Request for discovery

The absence of an express requirement in the Circuit Court Rules for the letter seeking voluntary discovery to specify the precise categories of documents and to specify the reasons why each category is sought is in “stark contrast” to the rules applicable in the High Court,<sup>65</sup> and it is open to an applicant, in the Circuit Court, to write a preliminary letter simply seeking discovery of all documents in the other party’s possession or power relating to any matter in question in the proceedings i.e. general discovery.<sup>66</sup> However it would appear no longer to be common practice for the Circuit Court to grant general discovery, and best practice dictates delivery of a letter seeking voluntary discovery which identifies the categories of documents sought.<sup>67</sup>

The Circuit Court Rules and the Rules of the Superior Courts further diverge on the effect of an agreement to make voluntary discovery. Whereas Order 31 rule 12(7) RSC provides that an agreement to make discovery on foot of the letter seeking voluntary discovery will have the same effect as a court order made in the terms as requested or agreed, there is no equivalent rule in the Circuit Court. Abrahamson et al. comment:

“...In the High Court, where such an agreement is made but no discovery is ultimately forthcoming, the applicant need not seek an order for discovery, but may seek to have his or her opponent’s proceedings or defence struck out for failure to comply with the agreement. The logic behind this is presumably that a party who agrees to make voluntary discovery should not be entitled later to change his or her mind and argue in court that the applicant is not entitled to that discovery because, for example, it is not relevant to the proceedings. The lacuna in the CCR which effectively allows a respondent to proceed

61 Dowling and Martin comment: “CCR Ord.32 governs the procedure for seeking discovery and it is important to note that the procedural changes that have been made in the High Court have not been introduced in the Circuit Court. However, some changes were made when the CCR were consolidated in 2001; most significant was the requirement to seek voluntary discovery prior to the bringing of an application to the court seeking to compel discovery. The level of specificity as to categories of documents and reasons for same is not as strict in the Circuit Court as it is in the High Court. However the degree of relevance and necessity of document does not differ between the two courts.” *Civil Procedure in the Circuit Court*, Round Hall, 2018, 3<sup>rd</sup> Ed., at para. 11.03.

62 Order 32, rule 1 CCR.

63 See para. 2.3.1.4 above.

64 Order 32, rule 1 CCR.

65 Abrahamson et. al, op. cit. at para. 8.03.

66 Ibid.

67 Abrahamson et. al, op. cit., at para. 8.04.

in that manner is unfortunate and is one which the Circuit Court Rules Committee might consider addressing in due course.”<sup>68</sup>

#### 2.3.3.3 *Response to letter seeking voluntary discovery*

A respondent may fail to respond to the letter seeking voluntary discovery, refuse to make discovery, or renege on an agreement to make discovery on foot of the voluntary request and in those circumstances the applicant may proceed to issue a motion for discovery.

#### 2.3.3.4 *Application for discovery*

Application for discovery is brought by way of notice of motion<sup>69</sup> and the discovery sought in the notice of motion should mirror that set out in the letter seeking voluntary discovery.<sup>70</sup> While, unlike the High Court procedure, there is no express requirement that the application be grounded on affidavit, it has been noted that most motions for discovery in the Circuit Court are grounded on an affidavit.<sup>71</sup> Motions for discovery are generally heard at first instance by the county registrar.

The application may be refused or adjourned if the county registrar or the judge is satisfied that discovery is not necessary, or not necessary at that point in the proceedings, or may be granted on such terms as to security for costs of discovery or otherwise, and discovery ordered either generally or limited to certain classes of documents as the county registrar or judge may think fit.<sup>72</sup>

#### 2.3.3.5 *The affidavit of discovery*

The form and content of the affidavit of discovery are prescribed by the rules of court concerned<sup>73</sup> and are largely the same as that under the Rules of the Superior Courts.<sup>74</sup>

#### 2.3.3.6 *Security for costs*

Discovery may be ordered on terms as to security for costs, as in the High Court.<sup>75</sup>

#### 2.3.3.7 *Further and better discovery and enforcement of an order for discovery*

There is no express mechanism in the Circuit Court rules for seeking further and better discovery. Commentary suggests that while the courts have traditionally been reluctant to look behind a deponent’s averment to the effect that all relevant documents have been identified,<sup>76</sup> it has been suggested that the courts have an inherent jurisdiction at common law on an application by a party seeking further and better discovery to ensure compliance with the terms of an existing order or agreement for discovery.<sup>77</sup>

68 Abrahamson et. al., op. cit., at para. 8.06. As regards the effect of Order 67, rule 16 of the Circuit Court Rules the authors comment at FN 7: “CCR Ord. 67 r.16 provides that where there is no rule in the CCR to govern any procedure, the High Court procedure should be followed. However, as the CCR does make detailed provision for discovery, the provisions of the RSC relating to the effect of an agreement to make voluntary discovery are probably of no application in the Circuit Court...”

69 Order 32, rule 1 CCR.

70 Abrahamson et. al, op. cit., at para. 8.10.

71 Dowling and Martin, op. cit., at para. 11.11; Abrahamson et. al., op. cit., at para. 8.11. Abrahamson et. al. also comment as follows at para. 8.11: “...Indeed, a grounding affidavit is a de facto requirement in seeking an order for discovery in the Circuit Court, as the preliminary letter cannot properly be placed before the court as an essential proof otherwise than as an exhibit to an affidavit. Although not strictly required, the affidavit should ideally verify that the discovery sought is necessary for disposing fairly of the cause of matter or for saving costs, as is required in the High Court.”

72 Ibid.

73 The affidavit of discovery is described in Order 32 rule 1 of the Circuit Court rules as an “affidavit of documents”. The form is in Form 31 of the Schedule of Forms.

74 Abrahamson et. al., op. cit., at para. 8.19.

75 Order 32, rule 1 CCR.

76 Abrahamson et. al., op. cit., at para. 12.01; Dowling and Martin, op. cit., at para. 11.32.

77 Abrahamson et. al., op. cit., see detailed discussion at paras. 12.03 – 12.10. Dowling and Martin, op. cit., see detailed discussion at paras. 11.32 – 11.39.

### 2.3.3.8 Non-party discovery in the Circuit Court

Non-party discovery is available in the Circuit Court.<sup>78</sup> An applicant for an order seeking non-party discovery is required firstly to write to the non-party and to the other parties to request that discovery be made voluntarily.<sup>79</sup> The party seeking non-party discovery must indemnify the non-party in respect of “all costs thereby reasonably incurred by such person” and costs borne by the said party are deemed to be costs of that party in the proceedings.

### 2.3.4 Production and inspection in the Circuit Court

In the Circuit Court a party seeking the production of documents for inspection is required to serve a notice in writing to the party in whose pleading or affidavit reference is made to any document.<sup>80</sup> On receipt of the notice to produce the respondent should reply by delivering a notice to inspect in accordance with Order 32, rule 5 CCR.

Where the party served with the notice to produce fails to deliver notice of inspection, or objects to inspection, the judge or the county registrar may make an order for inspection at such time and in such place and manner as the court thinks right.<sup>81</sup> Where on such application the respondent claims privilege over documents the county registrar or the judge may inspect the documents for the purpose of determining the validity of the claim for privilege.<sup>82</sup>

As in the High Court, a party failing to comply with any order for discovery or inspection of documents is liable to have his or her action dismissed for want of prosecution, and, if a defendant, to have his or her defence, if any, struck out, and to be placed in the same position as if he had not defended.<sup>83</sup> A party failing to comply with a notice to produce risks being prevented from relying on the documents the subject of the notice to produce at a later stage in the proceedings.<sup>84</sup>

While the Circuit Court Rules do not specifically provide for attachment for failure to make discovery, attachment is generally available wherever a person fails to comply with a court order by which he or she is bound.<sup>85</sup>

The Circuit Court has a like power to that of the High Court<sup>86</sup> to order general production of documents.

### 2.3.5 Discovery in the District Court

#### 2.3.5.1 Introduction

Prior to February 2014, discovery was not available in the District Court. The procedure – governed by Order 45B of the District Court Rules – was introduced in that court as part of the general revision of the District Court Rules for civil proceedings which followed the last general increase in its monetary jurisdictional limits.<sup>87</sup> Discovery in the District Court applies to all claims with the exception of debt claims and small claims. However, where the respondent to a debt claim has been given leave to defend, the discovery procedure may be invoked.<sup>88</sup>

78 Order 32, rule 9 CCR.

79 Order 32, rule 9 CCR.

80 Order 32, rule 4 CCR.

81 Order 32, rule 5 CCR.

82 Ibid.

83 Order 32, rule 6 CCR.

84 Order 32, rule 4 CCR provides:

“...any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf, unless he satisfy the Judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse, which the Judge shall deem sufficient for not complying with such notice; in which case the Judge may allow the same to be put in evidence on such terms as to costs and otherwise as he shall think fit.”

85 Order 37, rule 1 CCR.

86 Order 31, rule 14 RSC.

87 The District Court (Civil Procedure) Rules 2014 (S.I. No. 17 of 2014), which came into operation on the 3<sup>rd</sup> February, 2014.

88 Order 45B, rule 1 DCR.

Where the District Court has already given directions as to discovery or inspection, a party is precluded, without further order, from serving a request for discovery on any other party except in accordance with those directions.<sup>89</sup>

#### 2.3.5.2 *Request for discovery*

In the District Court a party seeking discovery must first make a request in writing for voluntary discovery within a period of 21 days from the date of the request.<sup>90</sup> The request must:

- (a) specify the precise documents or categories of documents in respect of which discovery is sought;
- (b) set out the reasons why each category of documents is required to be discovered; and
- (c) explain why discovery of the documents sought is necessary for disposing fairly of the claim or for saving costs.<sup>91</sup>

As in the case of the High Court, in urgent cases, by consent or where it appears to the court appropriate, the court may order discovery without the necessity of a request in writing for voluntary discovery.<sup>92</sup>

#### 2.3.5.3 *Response to letter seeking voluntary discovery*

The District Court Rules, unlike the rules applying in the High Court,<sup>93</sup> do not prescribe the effect of an agreement to make voluntary discovery.

Where the party requested to make discovery fails, refuses or neglects to make discovery or ignores the request, the party seeking discovery may apply to the District Court by notice of motion supported by an affidavit for an order directing the party requested to make discovery on oath of the documents which are or have been in his possession or power of procurement, relating to any matter in question in the civil proceeding.<sup>94</sup>

#### 2.3.5.4 *Application for discovery*

On hearing the application for discovery, and having regard to the value of the claim, the court may:

- (a) refuse or adjourn the application, if satisfied that discovery is not necessary, or not necessary at that stage of the proceeding; or
- (b) make such order on such terms as to the security for the costs of discovery or otherwise, and either generally or limited to certain classes of documents, as the judge thinks just.<sup>95</sup>

A party failing to comply with an order for discovery, if a claimant, is liable to have his or her claim dismissed for want of prosecution and, if a defendant, is liable to have his or her appearance and defence, if any, struck out, and to be placed in the same position as if he or she had not defended.<sup>96</sup>

#### 2.3.5.5 *The affidavit of discovery*

The party making discovery must swear an affidavit in the prescribed form<sup>97</sup> specifying which, if any, of the documents scheduled in the affidavit he or she objects to produce.<sup>98</sup>

89 Order 45B, rule 11 DCR. Abrahamson et al. comment as follows: “This appears to be a reference to the case management arrangement provided for in the DCR, which enable the court to make a wide range of directions for the just and expeditious determination of the proceedings, including direction as to discovery.” The authors cite Order 49A rule 1 DCR, as inserted by S.I. No. 17 of 2014. *Op. cit.*, at para. 9.07.

90 Order 45B, rule 3(1) DCR.

91 Order 45B, rule 3(2) DCR.

92 Order 45B, rule 4 DCR.

93 Order 31, rule 12(7) and (8) RSC.

94 Order 45B, rule 3(3) DCR.

95 Order 45B, rule 3(5) DCR.

96 Order 45B, rule 7 DCR.

97 Form 45B.01 in Schedule C to the District Court Rules

98 Order 45B, rule 5 DCR.

### 2.3.5.6 Security for costs

As noted above, the District Court may make an order for discovery on terms as to security for costs.<sup>99</sup>

### 2.3.5.7 Further and better discovery and enforcement of an order for discovery

There is no express provision for further and better discovery under the District Court Rules.

### 2.3.5.8 Non-party discovery in the District Court

The District Court has a procedure for non-party discovery which requires an initial request for voluntary discovery<sup>100</sup> and requires the party seeking non-party discovery to indemnify the non-party in respect of the costs reasonably incurred by the latter in complying with the request and on terms that the costs borne by the party seeking the order must be costs of that party in the civil proceedings.<sup>101</sup>

## 2.3.6 Production and inspection in the District Court

A party may request inspection of copies of documents listed in a claim notice or defence.<sup>102</sup> There is no express provision in the District Court Rules for the inspection of documents listed in an affidavit of discovery.<sup>103</sup>

A respondent may, at any time after service of a claim notice on him or her, and before delivery of an appearance and defence, request in writing copies of all or any of:

- (a) the correspondence or other documents listed in the statement of claim;
- (b) any other document referred to in the statement of claim.<sup>104</sup>

A claimant may, at any time after service of an appearance and defence on him or her request in writing from the respondent copies of all or any of:

- (a) the correspondence or other documents listed in the appearance and defence;
- (b) any other document mentioned in the appearance and defence.<sup>105</sup>

In each instance the party requested to deliver copy documents, within seven days of receipt of the request, must: (a) provide copies of such of the documents requested as are in his possession or power of procurement on payment of the reasonable charges for copying them; or (b) produce such of the documents requested as are in his or her possession or power of procurement for inspection by the party who made the request, or by his or her solicitor, and permit him or her to take copies.<sup>106</sup>

The parties may agree to the provision of copy documents in electronic form or in such other form as agreed or directed and the parties may further agree that inspection is to be undertaken by way of inspection of electronic copies of documents or of documents in electronic form.<sup>107</sup>

A party who fails to comply with the request for correspondence or other documentation aforementioned may not afterwards put any such document in evidence on his or her behalf unless the court is satisfied

99 Order 45B, rule 3(5)(b) DCR.

100 Order 45B, rule 12 DCR.

101 Order 45B, rule 12(5) DCR.

102 Order 45B, rule 2. See also Order 39, rule 5(8) DCR which provides that a statement of claim must contain a list of all correspondence and other documents on which the claimant will rely at the trial including the date if any and a brief description of each document and Order 42, rule 5(8) DCR which provides that a respondent's defence must contain a list of all correspondence and other documents (other than any documents already identified in the statement of claim) on which the respondent will rely at the trial.

103 See consideration by Abrahamson et al., op. cit., at para. 13.06.

104 Order 45B, rule 2(1) DCR.

105 Order 45B, rule 2(2) DCR.

106 Order 45B, rule 2(3) DCR.

107 Order 45B, rule 2(4) DCR.

that there was a sufficient reason for not complying with the request, in which case the court may allow the document to be put in evidence on such terms as to costs and otherwise as it thinks just.<sup>108</sup>

The District Court also enjoys a general power to order the production of documents for inspection. Where a party requested to provide documents fails to provide copies or to identify a time for inspection, or objects to allowing inspection, the court may on the application of the requesting party, make an order for inspection at such time and in such place and in such manner as the court directs.<sup>109</sup>

## 3. Discovery - benefits and challenges

### 3.1 Introduction

The discovery process, as it currently operates, has been the subject of criticism by judges, practitioners and litigants. These concerns centre on the potential for discovery to affect access to justice adversely by increasing the cost of litigation and by frustrating and delaying the progress of cases before the courts, or even to be used “as a means of forcing a party into an unfavourable compromise or settlement out of fear that the costs otherwise incurred would be irrecoverable.”<sup>110</sup>

The benefits of and challenges presented by discovery were considered at the most senior three jurisdictional instances in the recent leading case of *Tobin v Minister for Defence & Ors* and the judgments at each of those instances merit consideration in some detail. While the judgments concerned take differing views on the application of the legal principles to the facts of that case, they have in common a recognition of the potential for overly broad, burdensome and disproportionate discovery to act as a barrier or impediment to access to justice.

This section also examines the submissions made to the Review Group in relation to discovery.

### 3.2 Judicial concerns

#### 3.2.1 *Tobin v Minister for Defence* as starting point

The utility of the discovery process and the challenges it presents were examined in detail successively by the High Court, the Court of Appeal and the Supreme Court in the case of *Tobin v Minister for Defence & Ors*,<sup>111</sup> a case in which the plaintiff claimed damages for personal injuries alleged to have been suffered by him in the course of his employment as an aircraft mechanic through exposure to various dangerous chemicals and organic solvents. The defendants opposed the application for discovery of certain categories of documents on grounds that the discovery request was unnecessarily wide and would impose too heavy a burden on the defendants, and that the information sought by the plaintiff could adequately be obtained through interrogatories.

#### 3.2.2 The High Court decision

The High Court (McDermott J) determined that interrogatories would be an insufficient remedy, noting that the plaintiff did not know and could not be expected to know all of the chemicals which were in use within the workplace and that the quantities and dates of purchase and use of chemicals and mixtures and the safety data concerning their handling, application and use formed a highly relevant and important part of the case.<sup>112</sup>

The court granted discovery of certain categories of document, indicating that it was satisfied that the documents concerned may reasonably be supposed to contain information either directly or indirectly

108 Order 45B, rule 2(5) DCR.

109 Order 45B, rule 6(2) DCR.

110 *Framus Ltd. v and C.R.H. Plc*, High Court [2002] IEHC 113, as per Herbert J at para. 59.

111 [2016] IEHC 547; [2018] IECA 230; [2019] IESC 57.

112 [2016] IEHC 547, at para. 23.

enabling the plaintiff to advance his own case and/or damage the case of the defendants, and that the plaintiff would suffer a serious disadvantage if discovery was not granted.<sup>113</sup>

Importantly, the court accepted that there must be proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the plaintiff’s case or damage the defendants’ case.<sup>114</sup> In this context it held that “it is therefore important to bear in mind that an order for discovery should not be oppressive to the defendants”.<sup>115</sup> It cited with approval Murray CJ in *Framus v CRH Plc*. (in adopting and applying the principles set out by Fennelly J. in *Ryanair Plc*):

“... in certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse. As Fennelly J. pointed out the crucial question is whether discovery is necessary for ‘disposing fairly of the cause or matter’. I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial. That is not to gainsay in any sense that the primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues.”

### 3.2.3 The Court of Appeal decision

On appeal by the defendants,<sup>116</sup> Hogan J in delivering the Court of Appeal’s judgment<sup>117</sup> observed that judicial concerns regarding “the breadth of discovery orders”<sup>118</sup> had been expressed with “increasing frequency and – perhaps it would even more correct to say – stridency” in the last two decades or so, and cited his own dicta in *IBB Internet Services Ltd v Motorola Ltd*:<sup>119</sup>

“...experience has regularly shown that the practical benefits [sic] of such discovery is often entirely outweighed by the costs and delays in the entire process. How often is it the case that even in complex litigation only a relatively small number of documents prove to be the important ones, despite the generation of thousands of documents in the course of the discovery process, most of which are never used or deployed in court?”<sup>120</sup>

The Court recalled that similar concerns had been expressed by Kelly J (as he then was) in *Astrazeneca AB v Pinewood Laboratories Ltd*,<sup>121</sup> in which Kelly J held that proportionality required an assessment “of the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of an applicant or damage the case of his opponent”<sup>122</sup> and by Fennelly J in the Supreme Court in *Ryanair Plc v Aer Rianta Cpt* in the passage cited earlier in this chapter.<sup>123</sup>

On foot of this review of the authorities Hogan J stated that it was necessary for the Court of Appeal in *Tobin* “to ensure that discovery does not potentially overwhelm the action or impose unreasonable burdens on the parties”<sup>124</sup> and observed that the appeal in *Tobin* served to illustrate “the crisis...now facing the courts regarding the extent of burdens, costs and delays imposed on litigants and the wider legal system

113 *Ibid.* at para. 24.

114 *Ibid.* at para. 25.

115 *Ibid.*

116 [2018] IECA 230. With Peart and Irvine JJ concurring.

117 Hogan J delivered the judgment for the court.

118 *Ibid.* at para. 1.

119 [2015] IECA 282.

120 *Ibid.* at para. 10.

121 [2011] IEHC 159.

122 *Ibid.* at page 4.

123 [2003] 4 I.R. 264.

124 [2018] IECA 230 at para. 4.



by the discovery process as it presently operates.”<sup>125</sup> The Court identified the problem as resting with the current discovery rules and practice:

“...It is rather the existing discovery rules and practice which have become the problem in terms of the burdensome nature of discovery, the significant costs of which are imposed on litigants and, not least, the delays which are entailed in the entire process.”<sup>126</sup>

Hogan J traced the existing rules of practice to the words of Brett LJ in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co.*<sup>127</sup> (“*Peruvian Guano*”):

“It seems to me that every document which relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words “either directly or indirectly” because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of enquiry which may have either of those two consequences.”<sup>128</sup>

He noted that up until relatively recently the burdens imposed by the discovery rules were relatively light as the number of documents captured by the *Peruvian Guano* relevance and necessity rules were, by modern standards, relatively small and manageable.<sup>129</sup> However, modern discovery practices had been “transformed” because of technological advances:

“Accordingly, the advent of the photocopier from the late 1950s, email in the 1980s and the world wide web in the 1990s have all wrought their own impact on the discovery process. One way or another, the burdens now imposed by the process contribute significantly to legal costs and to delays within the legal system to the point where a process designed to assist the fair administration of justice now at times threatens to overwhelm it by imposing disproportionately onerous demands upon litigants.”<sup>130</sup>

Hogan J acknowledged judicial efforts to bring about change in discovery practices<sup>131</sup> but concluded that these efforts had not been fully successful and that the burdens imposed on the litigants remained “almost as acute as ever”.<sup>132</sup>

The Court of Appeal allowed the appeal in respect of a number of the 15 categories of documentation sought by way of discovery, on grounds that the application for discovery was premature and that the plaintiff should, in the first instance, seek the information sought by means of interrogatories. In respect of the second category, the Court of Appeal held that the High Court discovery order would be “very onerous and in all likelihood out of all proportion to the likely benefits which might otherwise accrue to the plaintiff” and given that the plaintiff had furnished a list of the chemicals to which he believed to have been exposed, ordered that he instead serve interrogatories to ascertain whether these particular chemicals were, in fact, in use during the course of his employment and, if so, in what quantities. Should the information obtained by way of interrogatories be insufficient, the plaintiff would be at liberty to renew his discovery application before the High Court. Similar orders were made in respect of five other categories.

125 Ibid. at para. 12.

126 Ibid.

127 (1882) 11 QBD 55.

128 (1882) 11 QBD 55, per Brett LJ at 63.

129 [2018] IECA 230 at para. 14.

130 Ibid. at para. 15.

131 Hogan J, at para. 16, observed that general discovery orders have been prohibited since 1999; that the Supreme Court has repeatedly stressed the need to proportionality – *CRH v Framus* [2004] IESC 25, [2004] 2 IR 20; that the criterion of necessity is just as important as that of relevance – *P.J. Carroll & Co. Ltd v Minister for Health and Children* [2005] IESC 26, [2005] 1 IR 294.

132 [2018] IECA 230, at para. 16.

### 3.2.4 The Supreme Court decision

Having permitted a further appeal to it by the plaintiff against the Court of Appeal’s decision, on the basis that the issues raised a question of general public importance,<sup>133</sup> the Supreme Court in its judgment on the appeal (Clarke CJ delivering judgment for the court) recalled that, in addition to the test under Order 31, rule 21 RSC of relevance and necessity, “in an effort to limit the burdens, costs and delays incurred by orders for discovery in modern practice” two further considerations have sometimes been proposed, namely (a) the concept of proportionality and (b) the suggestion that alternative, more efficient methods of disclosure should first be pursued.<sup>134</sup>

The Court noted the important role that discovery plays in the legal system in the State and that cases in a common law system are decided on evidence which is presented by the parties themselves, the veracity or reliability of which is tested by way of cross examination or challenged by way of the presentation of competing evidence. For such a system to work well parties must have a reasonable opportunity to present evidence which may have a bearing on the questions of fact to be determined. A party may not have access to all material evidence without recourse to the procedural measures under the rules of court, and discovery is one such measure.<sup>135</sup>

The Court also recognised the important role that discovery plays in ensuring that the case presented by an opponent is not inconsistent with the documentation which that opponent possesses but which is withheld from the court: discovery may play a role in “keeping parties honest”.<sup>136</sup>

While acknowledging that much discovered documentation does not find its way into evidence, the Court stated that “it would be to underplay the potential importance of discovery to confine its contribution to ascertaining the true facts to the documents which ultimately find their way into the evidence”,<sup>137</sup> observing that discovery can also influence the evidence presented in other ways, such as by ensuring that it may be unnecessary to consider much documentary material at the trial of the action because the party who has discovered the documentation will be required to present a case in oral evidence that is consistent with the documentary record.<sup>138</sup>

The Court emphasised these considerations in highlighting the valuable contribution that discovery can make:

“It improves the chances of the court being able to get at the truth in cases where facts are contested. In that way, it makes a significant contribution to the administration of justice.”<sup>139</sup>

The Court then considered the potential for discovery to hinder access to justice if it becomes disproportionately burdensome, observing that: “[a]ll are now aware that the costs of litigation can potentially impact on access to justice”.<sup>140</sup> It noted that in some types of cases the cost of complying with discovery obligations may amount to upwards of 50% of the total costs of a case and that against this backdrop overbroad or disproportionate discovery can operate as a barrier or an increased impediment to

133 [2018] IESCDET 202.

134 [2019] IESC 57, at para. 6.1.

135 Ibid. at para. 7.2

136 Ibid. at para. 7.3. On this latter point Clarke CJ stated: “I might add that, in my experience, discovery can also play a role in keeping parties honest, for it cannot be ruled out that some parties might succumb to the temptation to present a less than full picture of events to the court, were it not for the fact that they know that any attempt to do so may be significantly impaired if there is a documentary record which shows their account either to be inaccurate or materially incomplete. I consider that latter point to be of particular importance, for it provides a potential counterweight to the oft quoted argument that the vast majority of documents which are discovered do not find their way into the evidence presented to the court.”

137 Ibid. at para. 7.4.

138 Ibid.

139 Ibid. at 7.5.

140 Ibid. at para. 7.6. Clarke CJ cited *Persona Digital Telephony Limited v Minister for Public Enterprise & Ors* [2017] IESC 27 and *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Limited & Ors* [2018] IESC 44.

access to justice<sup>141</sup> and observed that it is important for the courts to keep in mind that particularly in cases where the financial resources of the parties may differ significantly, the existence of overbroad discovery “can operate to the advantage of the well resourced and to the inappropriate disadvantage of the small man or the small or medium sized enterprise.”<sup>142</sup>

It referred to a broader consideration which the courts should take into account in the application of procedural rules:

“Almost all procedures have a purpose, and that purpose is almost always one which is justified by the need to ensure that the ultimate trial of proceedings is conducted in a way most conducive to the necessary facts being truthfully determined and to the parties having a fair and reasonable opportunity to challenge or contest the factual position as put forward by their opponent. The overall purpose of all procedures should also include the need that parties are able to access justice in a timely and cost effective way.”<sup>143</sup>

The Court acknowledged that the price to be paid for seeking “perfect justice” is that the costs of litigation generally soar to the extent that they impose a materially increased barrier to access to justice, then the overall interests of justice are not served<sup>144</sup> and cautioned that any regime for the interpretation and application of procedural measures needs to keep in mind and needs to operate “under principles which at least minimise the risk of procedures being used solely or mainly for tactical reasons rather than for the purpose of ensuring fairness and completeness of the ultimate trial.”<sup>145</sup>

The Court held that while the requesting party bears the initial onus of establishing that disclosure of any particular category of documents is “necessary” for the fair and just resolution of the proceedings at a proportionate cost, where that onus is *prima facie* discharged it is for the requested party to establish that there are other means of achieving the same ends, being a fair and just resolution of the proceedings, which are likely to be capable of being delivered at a significantly reduced deployment of resources.<sup>146</sup>

On the facts of the case, the Court considered that it was “well removed from the type of case which has led to many judicial pronouncements about the very real problems which discovery can create for access to justice”<sup>147</sup> and that the defendants had not established that a very great saving would be achieved by using interrogatories as opposed to discovery.<sup>148</sup> The Court allowed the appeal subject to confinement of the discovery obligation of the defendants in respect of certain categories of document to the period of time during which the plaintiff was employed in a specific work location.

### 3.2.5 Subsequent case-law

In a decision in 2019, the Supreme Court further elaborated on the principles it stated in *Tobin*, focussing on the need for cooperation by the parties in the voluntary stage of the discovery process and the circumstances in which a staging of discovery may be appropriate. In *Tweedswold Ltd v Power*,<sup>149</sup> Clarke CJ for the Court stated:

“5.5 It seems to me to follow from *Tobin*... that the first overall principle is to the effect that there is an obligation on parties at the voluntary discovery stage to engage appropriately and constructively to attempt to agree reasonable discovery. It follows that it may be appropriate for a judge, who is asked to adjudicate on a discovery dispute, to have regard to the manner in which the parties have engaged up to that point when resolving contested discovery issues. In an extreme case it may, indeed, be open to

141 *Ibid.* at para. 7.7.

142 *Ibid.* at para. 7.8.

143 *Ibid.*

144 *Ibid.* at para. 7.9.

145 *Ibid.*

146 *Ibid.*, at para. 10.1

147 *Ibid.*, at para 9.2.

148 *Ibid.*, at para 9.4.

149 [2019] IESC 93.

a judge to decline to order discovery at all or to require discovery in the full terms sought, simply on the basis of a particularly egregious failure on the part of one side or the other properly to engage in the voluntary discovery process.

5.6 But even in less extreme cases, it may be appropriate for the Court to take into account, in a manner which is both reasonable and proportionate, the approach of the parties at the voluntary stage in assessing the proper course of action to adopt. It is in that context that it is necessary to address the issue raised by the trial judge as to whether there may be cases where it is appropriate to order a certain level of discovery and leave over the question of whether some specific and focused additional disclosure might be appropriate until after the initial discovery has been made and its contents assessed.

5.7 I would not go so far as the trial judge in saying that such a course of action must necessarily be followed in all cases. There may be circumstances where creating the possibility that a party may have to go through a second discovery process may run a serious risk that the overall burden of the discovery process will be increased rather than decreased. For example, in circumstances where discovery involves a very large volume of electronically stored information, the process which may need to be engaged in to review that information using one of the modern data systems may be achieved on a more cost efficient basis if it only has to be done once. In such a case, a partial discovery with the possibility of “coming back for more” may mean that the whole process, or something very close to it, may have to be repeated a second time, with a consequent increase rather than decrease in the resources which need to be applied. It follows that the possibility of directing a certain amount of discovery with the facility to seek further discovery, should it prove necessary, is one which may be considered but whose efficacy will depend on the circumstances of the case in question.

5.8 It will, therefore, be very much a matter for a trial judge to consider whether the best route to cost effective discovery may, in the circumstances of a particular case, be to direct a limited form of discovery while keeping open the possibility that further narrow and focused discovery might be required once the requesting party has had the opportunity to assess the documents initially disclosed. Inevitably, the assessment of whether this represents a sensible course of action will require forming a view on the likely savings that might be achieved should it transpire that there would either be no or little additional discovery needed as against the risks that a two stage process may turn out to be more costly and time consuming. It must always be remembered that experience has often shown that the longest way round may be the shortest way home.”

### 3.3 Responses to the consultation exercise and views expressed within the Review Group

Many respondents to the consultation exercise took the opportunity to address the subject of discovery in the submissions made to the Review Group.

In its February 2018 submission the Bar Council noted that the discovery process has increasingly become one of the most costly aspects of litigation before the Irish Courts. The Bar Council recognised the important role that discovery plays in the litigation context, but also submitted that “its importance and potential impact on the outcome of a case must be balanced against its cost to the parties, both in terms of financial expense and time consumed in reviewing documentation for the purpose of making discovery”.

It suggested that one possible solution would be to introduce a mandatory rule requiring parties, at the very earliest stage possible, to disclose documents that are relevant or are in any way connected to the issues in dispute in the parties’ pleadings. Disclosure would be performed in a manner similar to discovery, with certification or verification to be completed by the solicitor on record. The rules relating to privilege would continue to apply and sanctions would apply in the case of non-compliance.

The Bar Council submitted that the effect of these reforms would be to ensure that all parties put their “cards on the table” at an early stage and it was suggested that the system would only work if, in tandem, the rules relating to pleadings were changed to ensure greater precision. It did not recommend a change

to the underlying principles governing the concept of discoverability but suggested that any costs or delays that are necessarily caused by the discovery process could be controlled by way of case management. It also suggested that a review of the capabilities of artificial intelligence in the context of discovery be undertaken.

In its submission the Law Society of Ireland (“the Law Society”) accepted the need for “serious reform” and submitted that this would include a review of the tests of relevance and necessity.

The Law Society indicated that the vast extent of electronically stored information had rendered discovery very cumbersome and expensive, and that the law and rules on discovery needed to evolve to address this. It suggested that the use of technology assisted review (“TAR”) and other technology-assisted tools was growing in prominence and that consideration should be given to ensuring equality of arms between litigants.

In a detailed paper on the subject the Commercial Litigation Association of Ireland (“the CLAI”) suggested that the aspect of civil procedure which most contributes to the time and cost of resolving litigation is the discovery process. It identified a number of areas in which this was the case. It noted that ESI is now stored across a variety of media and devices and may be held by different custodians who are situated in different locations; unless the parties agree some form of appropriate limitation, the party making discovery will have to carry out a wide search for relevant material held by different custodians across all geographical locations.

The CLAI submitted that the changes introduced following the amendments to Order 31, rule 12 RSC in 1999 and 2009 have not had the desired effects of curbing the scope and breadth of discovery. It suggested that the 1999 amendment to Order 31, rule 12 RSC, basing the obligation to make discovery on categories of documents, had contributed to the delays in the discovery process and to the cost of making discovery for three principal reasons, viz.: disputes about the wording of the categories of documents; even where the wording of the categories is agreed, the categorisation is usually phrased in quite broad terms; and document reviewers must not only determine whether the documents relate to the matters at issue in the case, but must also consider which of the categories each individual document falls within, thereby lengthening and increasing the costs of the document review process.

The CLAI suggested that application of the primary “relevance” test, “drawn in particularly wide terms” in the “Peruvian Guano” case, leads to an increase in the time and costs of making discovery because a broad range of documents will fall to be reviewed and discovered. It noted that practitioners tend to draft pleadings with the intention of ensuring that the issues in the case remain as broad as possible for as long as possible, the direct consequence of this practice being that the range of the matters at issue in a case will remain very broad and the quantity of documents requiring to be discovered similarly broad.

In relation to the obligation to list every document over which privilege is claimed the CLAI noted that this practice adds little to the discovery process but leads to an increase in costs and in the time involved in making discovery.

The CLAI proposed the introduction of a number of reforms -

- parties should be required to interrogate their own cases at an early stage as this would lead to a better and earlier awareness of what documents the party actually needs for the purpose of presenting their case. One possible solution would see an obligation placed on parties, at the time of delivery of the statement of claim or defence to (a) furnish a summary of the evidence that the party intends to rely on at the trial of the action and (b) deliver the documents which are referred to in the pleading and or in the narrative statement and to which the party intends to refer in evidence at trial

- rather than requiring parties to agree upon the categories of documents to be discovered, parties should be required to disclose certain pre-determined classes of documents at specified stages in the litigation<sup>150</sup>
- replacing the obligation to make discovery in accordance with the Peruvian Guano principles with the obligation to make discovery of documents which are “material” to the issues in the case and / or its outcome: “Allowing a court hearing an application for discovery to consider not only whether documents are relevant to the issues in the case but also whether they are material to its outcome would be likely to narrow, perhaps considerably, the range of documents which would ultimately be discovered...”
- the refinement of the obligation to make discovery of a document within a party’s “procurement” to a test that is based on the concept of a “reasonable search”
- the curtailment of the requirement to list each individual document over which a claim of privilege is being asserted, and describe the basis of the claim to privilege, to only those documents generated before the date on which proceedings were commenced
- parties should be entitled to apply to court for specific directions as to how the case should be brought to trial with provision for further discovery or without discovery at all or with limited discovery.

While accepting that the speed of technological change limited the extent to which court rules can be amended to detail procedures for handling of ESI on discovery, the CLAI suggested that the rules be amended to require parties to discuss and seek to agree on limiting the scope of searches of ESI with regard to: (i) identities of relevant data custodians; (ii) the date range that the searching of data should cover; (iii) the forms of electronic communications in use by the parties during the date range concerned; (iv) the details of the keyword searches or other forms of automated searching processes that the parties intend to form when making discovery; (v) details of the data sources in which the data of the relevant custodians is held; and (vi) any policies which may relate to the storage of the data of relevant custodians, including any jurisdictional considerations. It also suggested introduction of a requirement that parties must use technology assisted review (“TAR”) processes in making discovery unless the technology in question is not reliable, efficient, cost effective or affordable.

The CLAI also suggested that the rules of court be amended to provide that on the bringing of a second motion to strike out for failure to make discovery, the proceedings/defence must be struck out save in exceptional circumstances or where the interests of justice require it.

The CLAI proposed the introduction of specialised rules of discovery in intellectual property cases, to ensure that discovery would only be ordered where it is necessary to resolve the actual technical issues in dispute and where it is proportionate.

The Dublin Solicitors Bar Association (the “DSBA”) recommended the expansion of the use of interrogatories without the leave of the court, stating: “[i]nterrogatories help to narrow down the issues and prevent general allegations in pleadings, and assist both parties to prepare for and focus on the issues to be tried. It saw as “self-evident” that the current procedures governing the discovery of documents in litigation were cumbersome, slow and disproportionately expensive and supported generally the CLAI’s proposals.

A law firm and the Irish Hotels Federation (“IHF”) in a joint submission described the discovery process in personal injury claims as unnecessarily cumbersome and the requirement for the parties to exchange long letters for discovery as time consuming and wasteful of costs. They noted that in other jurisdictions discovery takes place “automatically” after the close of pleadings, with a facility being available to the parties to seek “specific discovery” if required at a later stage.

<sup>150</sup> At para. 10 of the CLAI’s paper. The CLAI proposed the following classes: (a) documents which the party making disclosure has relied upon (whether expressly or otherwise) in preparing their pleadings; (b) documents which adversely affect the case being made by a party to the proceedings, including the party making disclosure; and (c) documents which support the case being made by a party to the proceedings, including the party making disclosure.

One practitioner particularly experienced in representing plaintiffs in personal injuries cases indicated that he had found the discovery process “extremely useful” and “particularly useful in medical negligence cases where you get protocols, risk management reports, the patients’ records and the like”. He also suggested that knowledge that discovery has been made may make a defendant “a bit more circumspect as to what they say and what they do not say”. He indicated that he had not experienced a situation where discovery had been used in an oppressive way against a litigant.

The State Claims Agency (“the SCA”) submitted that in cases concerning medical causation and/ or aggravation of injuries, it should be more difficult for parties to refuse to make pre-defence discovery. The SCA suggested that consideration should be given to the imposition of costs sanctions, on a solicitor and client basis, in circumstances where a party has failed to comply with an order for discovery. An effective cost budgeting scheme was suggested as a potential way to control the “escalating costs of discovery in the State”. In the context of clinical negligence claims the SCA submitted that imprecise, unfocused and / or excessive pleadings all contribute to an increase in the volume of documents to be discovered, and consequently an increase in the costs incurred. Given the fact that certain categories of documents will “invariably” be the subject of a request for discovery, the SCA submitted that discovery of documents should happen according to the following timetable:

- a letter of claim served pursuant to the pre-action protocol regulations to be introduced under Part 15 of the Legal Services Regulation Act 2015 should be accompanied by a booklet containing the claimant’s healthcare records for a period of three years prior to the date of the incident giving rise to the claim;
- the letter of response to be delivered under the regulations should be accompanied by a booklet containing all of the documents upon which the defendant intends to rely, save for expert reports and proceedings;
- within 12 weeks of the commencement of personal injury proceedings the parties should be required to agree any additional categories of discovery;
- in default of agreement the parties would be entitled to make an application to court for discovery.

In similar vein, the Medical Protection Society (the “MPS”) asserted that the current discovery rules “impede defendants’ ability to investigate and resolve cases at the earliest possible stage”. It submitted that it is common for plaintiffs to refuse to make disclosure until after a defence has been filed and commented that if defendants are to be able to accurately quantify claims in order to make early settlement offers, full disclosure of all relevant evidence including up to date clinical records is crucial to allow defendants to reach a view of breach, causation, condition and prognosis and quantum. It suggested that where a plaintiff refused to discover certain documents, those documents that the plaintiff is willing to discover should be disclosed, with the “controversial” documents put before the court, with the court then asked to determine whether any restrictions or redactions are justified.

In its submissions the Chief State Solicitor’s Office (“the CSSO”), with reference to the impact of the General Data Protection Regulation (EU/2016/679) saw a difficulty as to how “voluntary” discovery requests from the State, or indeed from any third party, will be permissible post-GDPR and that the court rules may need to be amended to address this.

A practitioner from a large Dublin firm of solicitors submitted that discovery served a very useful purpose in most commercial litigation and noted the “incremental and moderating effect” that discovery can have on a party’s view of its own case as well as its opponent’s case. In a further submission he suggested that in the context of commercial cases the right to seek discovery in relation to the issue of quantum in a case should be replaced with an entitlement by the party’s designated expert on quantum to have access to information held by the other party sufficient to enable that expert to give appropriate expert evidence on quantum. He submitted that this would likely lead to a saving of time and costs.

The same firm of solicitors also submitted that a party’s duty to make discovery should be expanded to include the specific highlighting of material that would be regarded as unhelpful to their case and helpful to the other parties’ cases.

Another very large Dublin solicitors' firm suggested that the rules governing discovery be reviewed and their scope narrowed, observing that discovery is one of the most expensive and time consuming elements of litigation, and may be prohibitive and a barrier to justice, even for large corporations. It indicated its support for the proposals put forward by the CLAI, commenting that "perhaps the fundamental issue with discovery is the scope of the relevance test". It submitted that the *Peruvian Guano* test should be replaced by a test that would see discovery limited to "material documents, genuinely necessary, with greater regard for proportionality", and by an obligation on each party to make disclosure of documents in terms similar to the obligation placed on parties seeking *ex parte* relief.

In relation to ESI it suggested that discovery should not become an unreasonable burden or expense, and that the rules of court should provide for a proportionate approach to review and discovery of ESI. It recommended the increased use of TAR and other electronic review techniques in such instances.

It submitted that the requirement to list documents individually by category is burdensome, redundant and expensive and that consideration be given to a system that would oblige parties to discover pre-determined classes of documents at fixed points in time. It supported introduction of a requirement that parties deliver narrative statements with their pleadings, and the increased use of interrogatories, subject to clear governance.

It submitted that where a request for discovery is excessive the courts should have powers to require that party to contribute to the cost of making discovery before discovery is furnished.

In relation to a proportionate approach to discovery it submitted that the courts should encourage the parties' advisors to meet to discuss (a) the type of documents that are relevant (b) the searches that each side expects (c) the technologies they intend to employ and (d) the volumes of data they anticipate. The parties would be entitled to apply to court if agreement could not be reached. "Discussion of these issues at the outset should reduce the need for late applications."

Another large Dublin firm of solicitors submitted that the processes and technologies relating to e-discovery are complex and suggested that documents, once agreed and exchanged, could be stored on an agreed electronic platform and accessed via a tablet device, ensuring that documents are available both before the trial and during the trial.

The Office of the Attorney General noted the concern that the time, effort and expense required to make discovery is inordinate and is frustrating the timely and efficient disposal of proceedings, and that this is a particular issue in the context of electronic documentation.

The Department of Defence welcomed the review of the law of discovery, noting that discovery can be complex and cumbersome and can present resource issues. The Department of Defence proposed a focus on the wide scope of discovery and on the timeframes relating to discovery.

A major insurance company submitted that the rules relating to the use of interrogatories –requiring leave of the court for issue in most cases – should be relaxed.

The Legal Aid Board observed that discovery can be very time consuming in some cases, in particular in medical negligence cases. Given the fact that a case itself may turn on a "fraction" of the documents discovered it was suggested that consideration should be given to simplifying the rules relating to discovery. The Legal Aid Board cited the reforms that had been introduced in England and Wales and observed that "standard disclosure" in that jurisdiction placed a duty of search and disclosure on parties which effectively replaced the test of relevance and necessity. Noting the interaction between disclosure and pre-action protocols in England and Wales, the Legal Aid Board recommended the commencement of section 219 of the Legal Services Regulation Act 2015 to enable introduction of pre-action protocols in clinical negligence cases. The Legal Aid Board also recommended that consideration be given to the introduction of a system of pre-action "standard disclosure" in this jurisdiction, while retaining the jurisdiction of the court to order discovery where standard discovery proves insufficient.



The Commission for Communications Regulation (“ComReg”) submitted that significant discovery exercises can be extremely onerous, time consuming and expensive and “quite disproportionate in terms of their evidential value”. ComReg indicated its support for the fundamental principles of proportionality in the discovery process and the careful and precise defining of discovery categories and supported steps to keep the discovery process “effective, efficient, focussed and proportionate.”

Another respondent suggested that a requirement that the party to whom the discovery request is made pay the costs of discovery irrespective of the outcome of the proceedings would have the advantage that “the person doing the discovery is best placed to control and minimise the cost of discovery. If the costs are shifted to the losing party at the end of the case, this can create a “perverse” incentive to inflate the costs and to deploy inefficient methods.”

The Irish Society of Insolvency Practitioners (“ISIP”) observed that the “substantial and burdensome costs of discovery” are well known to its members and that the cost of discovery, together with other costs, can act as a bar to the pursuit of legitimate claims by insolvency office holders against former directors, debtors and other parties. ISIP confirmed its support for any reforms that are likely to reduce the cost and complexity of the discover process.

In relation to data access requests it observed that “it may be worth considering whether any changes to the court rules should include a provision addressing a common situation where a party, such as a liquidator, has already fully complied with a data access request under the Data Protection Acts 1988 and 2003 prior to completing the discovery process which can result in significant repetition and unwarranted costs to the extent that that party must then disclose the same documentation that was captured by the data access request.”

Insurance Ireland submitted that there should be increased transparency in all litigation and that a culture of disclosing information and documents should be fostered. It suggested that all litigation should be modelled on the District Court Civil Summons for A Debt, which requires a list of all documents being relied on to be included in the pleadings. It asserted that full compliance with the obligations to disclose expert reports in personal injuries cases<sup>151</sup> rarely occurs and that “the norm” is to receive reports of information the day before or the day of the trial. It was suggested that parties should be obliged to demonstrate full compliance prior to applying for a date for hearing of an action in the High Court.

In his submission to the Review Group one practising barrister noted that there are no special discovery rules for public procurement cases and that a protocol or court guidance concerning disclosure of documents in such cases could potentially assist in reducing the time and cost that is often spent in discovery disputes. He contended that costs arguably would be reduced if the parties disclosed at an early stage key documents which would ultimately be subject to discovery in any event and noted that this practice is encouraged in the Technology and Construction Court in England and Wales.

Another practising barrister submitted that the use of interrogatories and notices to admit facts prior to and in ease of discovery should be widely encouraged:

“It should be permissible to raise up to 25 closed-question interrogatories, prior to discovery (or subsequent to discovery) without leave of the Court...”

He submitted that the following principles should underpin any reform of discovery obligations -

- Discovery obligations must be proportionate to the litigation; i.e. cost efficiency is a valid consideration in the just resolution of disputes
- Trial by ambush should be avoided
- Relevant documents should not be suppressed by the parties
- Discovery should not be permitted to be used as a tool of oppression in litigation
- Discovery should be based around issue papers, or in default of agreed issue papers, the pleadings.

151 See Order 39, rules 45 to 51.

He pointed to the introduction in New Zealand in 2012 of basic discovery obligations which may be supplemented, where appropriate with tailored discovery and commended that approach, favouring a basic level of discovery based around issue papers with provision for tailored discovery, or conversely for discovery to be dispensed with.”

He proposed that a number of reforms should be considered, to include -

- formalising the obligation on parties to cooperate in relation to discovery
- the introduction of pre-discovery case conference in complex litigation
- the abandonment of category-based discovery and the reintroduction of standard discovery based on pleadings and issue papers
- provision in the rules for Orders for: (a) dispensing with the need for discovery; (b) varying discovery orders on proportionality grounds; (c) providing for: tailored discovery; production of specific documents or categories; (d) directions for: protocols for e-discovery; further and better discovery orders; inspection facilities including e-discovery inspection.

He submitted that standard discovery – along the lines of English and Australian Federal Court procedures – should be introduced requiring the discovering party to make reasonable searches having regard to the scale and complexity of the proceedings; the ease of document retrieval; and the number of documents involved. Discovery would then be required to be made of the following documents -

- documents on which a party intends to rely
- documents adversely affecting a party’s own case
- documents supporting the opposing party’s case
- documents adversely affecting the opposing party’s case.

Self Insured Task Force (“SITF”) submitted that from a defendant perspective discovery has become an automatic interlocutory stage in proceedings which needlessly adds to costs and delay. Discovery was described as often amounting to a “muscle flexing” exercise which is wasteful of judicial and parties’ resources. The SITF suggested that case management could be employed to tackle the problems associated with discovery and that more fulsome disclosure of medical records should be a mandatory requirement in personal injury cases.

The Revenue Commissioners observed that in some cases, particularly the more complex cases, discovery forms a significant part of the costs of proceedings and can also cause significant delay in proceedings:

“...There is no clear evidence that wide-ranging discovery leads to a more just outcome for either of the parties. Notwithstanding the introduction of the requirement to identify in writing the precise categories of sought and the reasons for the same orders for discovery continue to be wide in scope...”

They commented that discovery continues to be a major burden on parties to litigation to the extent that it may be a deterrent to less well-off litigants and a weapon used by better off litigants and submitted that the rules should be altered to significantly narrow the scope of discovery while providing clear and meaningful sanctions for failure to comply.

In its June 2018 submission Transport Infrastructure Ireland (“TII”) observed that a very significant proportion of that respondent’s costs of defending a procurement challenge can relate to discovery, with most discovered documents “being irrelevant to the issues being tried”. It submitted that increased case management is required to limit such wasteful discovery “trawls”.

Ms Justice Irvine, on behalf of the Court of Appeal judges, observing that the current rules of court pre-suppose a leisurely approach to litigation in which the control of the litigation is in the hands of the parties and where oral evidence is the norm and not the exception, commented that Sir William Brett would be horrified that his seminal judgment in *Peruvian Guano* in 1882

“has been responsible for the creation of huge, expensive para-legal industry, for he could not have foreseen the invention of the photocopier in the late 1950s and its implications for modern practice in relation to discovery.”

Judge Irvine was in no doubt that discovery applications are currently over-burdening both litigants and the courts system. Indicating that the case for reform and for dilution of the *Peruvian Guano* test is pressing, she stated:

“Indeed, I would go so far as to say that the reform of the discovery rule is the single most important step which requires to be taken in our entire corpus of civil procedure.”

She proposed amendments to Order 31, rule 12 RSC by the incorporation of an entirely new rule which would re-state the law and practice along the following lines -

- An applicant for discovery must demonstrate that the documents sought are both relevant and necessary for the fair administration of justice
- The applicant must demonstrate that the documents are likely to be directly material and are likely to be of practical assistance in the fair conduct of the litigation
- The court when considering applications for discovery is entitled to have regard to principles of proportionality and cost effectiveness.

Mr Justice Cross of the High Court observed that:

“A significant problem causing delay and extra costs in the Personal Injuries litigation is that there are too many needless applications for discovery of documentation.”

He suggested that there ought to be a general obligation on all parties, without the necessity of a court order, to make discovery of any relevant documentation which may assist their case or be harmful to their opponent’s case within a certain time period, e.g., within eight weeks of service of the notice of trial or, in the alternative, within a certain time after the delivery of the defence. Judge Cross also proposed that a plaintiff in a personal injuries action should be obliged, again in the absence of a court order, to discover all relevant medical records for a period of three years pre-accident when initiating proceedings. He also acknowledged the need for a procedure to entitle a party to seek “bespoke” discovery i.e. for specific and focussed requests.

Ms Justice Reynolds of the High Court submitted that discovery in its current form adds greatly to delay – and costs – in all High Court litigation. Judge Reynolds observed that on the basis that some form of discovery would be retained, applications should be dealt with by a deputy Master and not by the court. She further suggested that parties should be obliged to make discovery of all relevant documentation, in the absence of an order of the court, within a certain pre-determined time period e.g. within eight weeks of service of the notice of trial or, the alternative, within a certain time after delivery of the defence. Judge Reynolds submitted that in personal injuries actions, a plaintiff should be obliged, without a court order, to make discovery of all relevant pre-accident medical records for a period of three years pre-accident, observing that at present most plaintiffs consent to such discovery but usually after a motion has issued.

Judge Francis Comerford of the Circuit Court expressed the view that the Circuit Court requires a full panoply of case management procedures, commenting:

“...This requirement exists despite the burdens that can be imposed by unnecessary application of procedures such as discovery. At present, excessive disclosure and discovery requirements are only blighting a minority of Circuit Court civil cases, but the potential for this does exist. Burdensome discovery, with all the costs and inconvenience that entails, in cases where it is not necessary, has been noted as growing feature of the Circuit Family Law jurisdiction. Family law cases aren’t directly relevant to the considerations of this group, save as a warning that this is a problem that could develop within Circuit Court civil cases. Discovery also provokes interlocutory disputes which expend court time.”

Judge John Brennan of the District Court commented that while applications for discovery are not common in the District Court, they do take up considerable court time. He submitted that any simplification of the existing procedure would be of great assistance in the reduction of both costs and court time.

Mr. Noel Rubotham, Head of Reform and Development at the Courts Service, observed that the reforms in England and Wales that saw the introduction of “standard discovery” do not appear to have been as successful as expected. He submitted that if the Review Group was minded to retain *Peruvian Guano* “relevance” as a criterion, that test should be expressly qualified in the rules of court to:

- enable a party liable to discovery to seek from the court relief from discovery where the strict application of the test would create a burden in time and cost disproportionate to the nature and extent of the issues involved, and
- entitle a party burdened by a discovery obligation which turns out at trial to be excessive to that required to dispose of the case fairly, to recover the costs and expenses involved, including by way of set-off.

## 4. Approaches to discovery in certain other jurisdictions

### 4.1 Introduction

In this section, the operation of discovery / disclosure processes in England and Wales and a number of other jurisdictions is examined. Key features of the relevant civil procedure reforms introduced in the courts of England and Wales are considered, including the transition from the traditional *Peruvian Guano* test to one based on the concept of direct relevance, and the experience of implementation of those reforms.<sup>152</sup>

### 4.2 England and Wales

#### 4.2.1 From “*Peruvian Guano*” to the Woolf reforms

A leading commentator in the area of civil procedure in England and Wales has observed that in modern English procedure, disclosure – the equivalent of what previously was known as discovery – is now but one component of what has come to be known as the “cards on the table approach”:<sup>153</sup>

“This approach seeks to ensure that parties to a dispute are able to find out as much as possible about each other’s case as early as possible, so that no party is taken by surprise and so that the court is appraised well before the trial of the nature of the evidence.”<sup>154</sup>

Prior to the introduction of the Civil Procedure Rules (“CPR”) on foot of the Woolf reforms, discovery could be very laborious and very costly without producing worthwhile results.<sup>155</sup> Parties were expected to disclose to each other all of the documents in their possession or control that related to any matter in question between them, and even a tenuous relationship between documents and issues would be sufficient to justify a disclosure or discovery order.<sup>156</sup>

152 It should also be noted that EU Law has recognised in the specific context of competition law litigation the need to ensure that claimants and defendants are afforded the right to obtain disclosure of evidence relevant to their claim or defence, without it being necessary for them to specify individual items of evidence, and that national courts should also be able to order that evidence be disclosed by third parties, including public authorities: See recital (15) and Chapter II, Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.

153 Zuckerman, Adrian, “On Civil Procedure”, 3<sup>rd</sup> Ed., 2013, at para. 15.3.

154 Zuckerman, op. cit. at para. 15.3.

155 Ibid. at para. 15.4.

156 Ibid.

Citing the *Peruvian Guano* test,<sup>157</sup> which continues to be of application in this jurisdiction, Zuckerman observes how a broader definition of relevance will lead to a correspondingly large range of documents that fall within its confines:

“Under [the *Peruvian Guano*] test, discovery extended to documents with only a tangential connection to the issues. It stands to reason that the broader the definition of relevance for the purpose of disclosure, the larger would be the range of documents that would come within its ambit. It is also clear, that the further we move away from documents with a direct connection to the issues, the less likely it is that documents will make a substantial contribution to the resolution of the issues. Where the documentary pool is large, a point will come in the disclosure process beyond which the benefits of any extra disclosure will be outweighed by the disadvantages of high costs and an increased risk of confusion. This is especially the case with the proliferation of electronically stored material.”<sup>158</sup>

The aim of the disclosure procedures under the CPR was to avoid the waste and excesses of the previous system without losing the principal advantages that mutual disclosure can produce.<sup>159</sup> Under the CPR disclosure has moved away from the “leading to a train of enquiry” test which has its origins in *Peruvian Guano* and confines discovery to documents that are directly relevant.<sup>160</sup>

Under the CPR, disclosure involves “standard disclosure” which includes only documents of direct relevance to the issues, with the court retaining a discretion to order more extensive disclosure in those few cases that are likely to benefit from a deeper and wider search for documents.<sup>161</sup>

#### 4.2.2 The disclosure regime under the CPR

It has been observed that by reason of the application of pre-action protocols mutual disclosure is now more likely to have been undertaken at an earlier stage in proceedings than in the past.<sup>162</sup>

Disclosure after the pre-action stage is largely governed by Rule 31 of the CPR, which applies to fast track<sup>163</sup> and multi-track proceedings.<sup>164</sup> The main features of the regime are as follows -

157 The author states: “Discovery was demanded not only of documents with a direct bearing on the issues, but also of every document that: “it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party [seeking discovery] either to advance his own case or to damage the case of his adversary...a document can properly be said to contain information which may enable the party [seeking discovery] either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.” Zuckerman, op. cit., citing *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 63.

158 Zuckerman, op. cit. at para. 15.5.

159 Zuckerman, op. cit. at para. 15.6.

160 Ibid. The author cites *Three Rivers District Council v Bank of England (Disclosure) (No. 4)* [2002] EWCA Civ 1182 at 27, [2002] 4 All ER 881 at 27, [2003] 1 WLR 210 at 27.

161 Zuckerman, op. cit. at para. 15.7.

162 Zuckerman notes: “Mutual disclosure is likely to be given earlier than in the past, because compliance with pre-action protocols calls for meaningful pre-action exchanges between prospective parties, including exchanges of the principal documents relevant to the dispute. Thus, prospective parties who have fulfilled the requirements of the relevant pre-action protocol (or who, in the absence of a protocol, have adequately co-operated) will already have disclosed to each other the key documents before the commencement of proceedings.” Op. cit. at para. 15.8.

163 Rule 26.6(4) CPR. “The fast track is designed for mid-range cases, of between £5,000 and £25,000. It consists of a more probing procedure than the small claims track but is less intensive and extensive than the multi-track procedure which is reserved for the really serious or difficult cases.” Zuckerman, op. cit. at para. 1.90.

164 Rule 26.6(6) CPR. “The multi-track procedure caters for a large variety of cases with widely differing needs. Cases of a value just above the £25,000 fast track limit will normally require a relatively trim procedure. However, such procedure would be quite inadequate for deciding a mass tort claim involving large sums of money and many parties, or a heavy commercial dispute. Accordingly, a multi-track procedure could, at one end of the spectrum, be conducted in accordance with simple standard directions, similar to fast track directions, whereas at the other it may involve hands-on judicial case management throughout the process of the litigation. The nature of multi-track case management will depend on what the court considers appropriate in the circumstances of the particular case.” Zuckerman, op. cit. at para. 12.55.

- parties to proceedings in the multi-track (excluding personal injuries proceedings) are required to exchange reports identifying what documents each party has and containing information regarding where and how these documents are stored<sup>165</sup>
- parties are required to attempt to agree a proposal for disclosure that is consistent with the overriding objective<sup>166</sup>
- the above steps are taken prior to the first case management conference
- where a claim is founded on documents a claimant will normally attach the documents to the particulars of claim<sup>167</sup>
- after the close of pleadings most proceedings come under the standard discovery regime whereby parties are required to disclose documents that are directly relevant.<sup>168</sup> It has been observed that the rules adopt rigorous measures to ensure compliance: “Parties are now required to set out the nature of the search they carried out in order to locate and identify those documents that need to be disclosed, and they must make disclosure statements confirming that they understand their disclosure duty and that they have discharged it.”<sup>169</sup>

Rule 31 of the CPR also envisages situations that may call for more extensive disclosure or inspection. Rule 31.12 empowers the court to direct a party to take one or more of the following steps:

1. disclose documents or classes of documents specified in the order;
2. carry out a search to the extent stated in the order;
3. disclose any documents located as a result of that search;
4. permit inspection of documents that the disclosing party has stated, under CPR 31.3(2), that he will withhold on the grounds that it would be disproportionate to do so.<sup>170</sup>

In some cases the power will be exercised by the court to order very extensive disclosure that is more far reaching than standard disclosure:

“Where a claim involves serious fraud allegations, it may be desirable to order very wide disclosure, up to *Peruvian Guano* level, in order to ensure that all possible investigations are made. Where a party is suspected of questionable practices, it may be desirable to relieve the party’s solicitors of discriminating between significant and insignificant documents, and impose detailed disclosure obligations on the party in question.”<sup>171</sup>

Importantly, an order for specific disclosure does not necessarily extend disclosure beyond standard disclosure: “In the exercise of its discretion, the court may order disclosure that is more limited than standard disclosure and it may equally stipulate wide disclosure (Rule 31.5(1) and (2), CPR). Accordingly, the power to order specific disclosure is not so much a power to order disclosure that is different from standard disclosure, as it is a power that enables the court to address special problems that may arise.”<sup>172</sup> A party who seeks specific disclosure bears the onus of satisfying the court that specific disclosure is necessary.

Further, when determining whether to grant an order for specific disclosure the court should also have regard to the overriding objective described in Part 1 of the CPR.<sup>173</sup>

165 Rule 31.5(3) CPR.

166 Rule 31.5(5) CPR. The overriding objective is set down in Rule 1.1(1) CPR and provides: “These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.” See analysis by Zuckerman, *op. cit.* at paras. 1.1 – 1.4.

167 Zuckerman, *op. cit.* at para. 15.8.

168 *Ibid.* Rule 31.5(1) CPR. The documents that must be disclosed under a standard disclosure order are set out under Rule 31.6 CPR.

169 Zuckerman, *op. cit.* at para. 15.9. Rule 31(5)(3) CPR.

170 *Ibid.* at para. 15.59. See also Practice Direction 31A, part 5.

171 *Ibid.* at para. 15.62.

172 *Ibid.* at para. 15.60.

173 Practice Direction 31A, part 5.4.

### 4.2.3 Further reform in England and Wales

Notwithstanding the move away from *Peruvian Guano* discovery and the nature of the limitations placed on disclosure in the CPR a leading commentator has noted that:

“...the increase in the complexity of litigation together with the increase in the volume of electronically stored information...has led to an increase in litigation costs and delay.”<sup>174</sup>

Further amendments to the CPR were introduced in 2013<sup>175</sup> to address these issues, on foot of recommendations made by Lord Justice Jackson in his Review of Litigation Costs.<sup>176</sup> The “standard disclosure approach”, while remaining as the default option, could be replaced by the parties or the court with one of a “menu” of options,<sup>177</sup> viz.:

- (a) dispensing with disclosure completely;
- (b) disclosing documents on which the party relies and making a request for any specific disclosure required from another party;
- (c) disclosure on a per-issue basis;
- (d) broader disclosure, encompassing documents enabling a party to advance its own case or damage another party’s case, or that lead to an enquiry with either of those consequences.

Not less than 14 days before the case management conference, each party was required to serve a report describing: (a) the likely relevant documents to the dispute; (b) where and with whom these are located; (c) their estimate of the range of costs of giving ‘standard disclosure’; and (d) which of the ‘menu’ disclosure options it will seek. The parties would then discuss their proposals with a view to choosing a cost-effective option from the menu of options.

In 2016, a Disclosure Working Group (“the Working Group”), chaired by Lady Justice Gloster<sup>178</sup> and comprising a wide range of judges, lawyers, experts and representatives of professional associations and court users,<sup>179</sup> was established as a result of widespread concerns expressed by court users over the excessive costs, scale and complexity of disclosure. The Working Group identified key defects in the current disclosure scheme under the CPR -

- since the CPR first came into force the volume of data that may fall to be disclosed has “vastly increased”, often to unmanageable proportions, and as such the hope that the standard disclosure test introduced under the CPR would reduce the volume and cost of disclosure has not been fulfilled
- neither the profession nor the judiciary has adequately utilised the wide range of orders available under CPR 31.5(7) – introduced in 2013 as part of the Jackson reforms – and therefore standard disclosure has remained the default in most cases
- the existing rule is conceptually based on paper disclosure and is not fit for purpose in dealing with electronic data
- disclosure orders are not sufficiently focussed on the issues
- there is often inadequate engagement between the parties prior to the first case management conference in relation to disclosure
- searches are often far wider than is necessary.<sup>180</sup>

174 Zuckerman, op, cit., at para. 15.7.

175 The Civil Procedure (Amendment) Rules 2013, in respect of standard disclosure which led to the introduction of a practice direction to deal with electronic disclosure. See also Practice Direction 31B (Disclosure of Electronic Documents). Zuckerman, op. cit. at para. 15.7, Fn 11 and 12.

176 See Section 2.2 of Chapter 2 and Section 8.2.3 of Chapter 9 of this report.

177 Rule 31.7 CPR.

178 Then Vice-President of the Civil Division of the Court of Appeal.

179 See Briefing Note of the 2<sup>nd</sup> November 2017 and a full list of members of the working group at Annex 1 of same. Briefing Note available at: <https://www.judiciary.uk/wp-content/uploads/2017/11/dwg-guidance-note-2-nov-2017.pdf>

180 See Briefing Note of the 2<sup>nd</sup> November 2017, at para. 3.

The unanimous view of the Working Group was that “wholesale cultural change is required and ... this can only be achieved by the widespread promulgation of a completely new rule and guidelines.”<sup>181</sup> Its central proposals were that (a) there would be no automatic entitlement to “search based” disclosure and (b) the court would only make an order for “extended disclosure” if there has been full engagement between the parties before the case management conference, with any extended disclosure order to be tailored to the issues in the claim.<sup>182</sup>

With a view to achieving the proposed cultural change the Working Group recommended that CPR 31 and the associated practice directions be “rewritten, reordered, and simplified, into a single rule.”<sup>183</sup> It proposed the introduction of a pilot scheme by way of practice direction. The specific proposals of the Working Group were to be introduced by way of practice direction which took the form of a draft new rule and a draft disclosure review document (“DRD”). In summary, the Working Group’s proposals envisaged the following -

- that the principles upon which disclosure is based are to be clearly stated
- the term “standard disclosure” will disappear in its current form, and its replacement should not be ordered in every case and should not be regarded as the default form of disclosure
- the duties of the parties and their lawyers in relation to discovery should be clearly set out
- a duty to cooperate with each other and to assist the court in relation to discovery should be set out
- the duty of the parties to preserve relevant documents should remain
- one of the core duties is the requirement to disclose known documents that are adverse to the disclosing party
- save where parties agree to dispense with this (and subject to other limited exceptions) “basic disclosure” i.e. disclosure of key / limited documents which are relied on by the disclosing party and are necessary for other parties to understand the case they have to meet, should be given with statements of case
- a search should not be required for basic disclosure, although one may be undertaken. The Briefing Note provides: “It is expected that Basic Disclosure will often not be suitable in the largest cases but, in the more moderate sized claim, it will provide both information to assist in an early understanding of the parties positions and will inform cultural change by requiring the parties to consider whether the documents they have are sufficient. In some cases, the initial disclosure that has been provided will be sufficient to enable the claim to go forward without further disclosure being ordered.”<sup>184</sup>
- basic disclosure does not require a party to disclose at the outset of a claim documents that are adverse. In other words, the proposals draw a distinction between “known adverse” documents and “adverse” documents. The Briefing Note acknowledges that while this limitation was the subject of much debate, it was decided to allow for basic disclosure to be deliberately limited because the duty to disclose “known adverse documents” provides adequate protection<sup>185</sup>
- at the close of statements of case but prior to the case management conference the parties will, using the DRD as a framework (a) list the main issues in the case for the purpose of disclosure (b) exchange proposals for extended disclosure (and where necessary, decide which of the prescribed extended disclosure “Models” is appropriate) and (c) share information about how documents are stored and how they might, if required, be searched and reviewed
- at the case management conference the court should consider which of the five prescribed extended disclosure Models is appropriate to adopt
- the “fundamental yardstick for the parties and the Court” should be what is appropriate in order fairly to resolve the issues in the case: “The well-recognised test of reasonableness and

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181 *Ibid.* at para. 5.

182 *Ibid.*

183 *Ibid.* at para. 6.

184 *Ibid.* at para. 11(vi).

185 *Ibid.* at para. 11(vii).



proportionality will be applied by reference to defined criteria in the [practice direction] which are relevant to disclosure. This test builds upon the overriding objective.”<sup>186</sup>

- the parties should liaise before the case management conference so that the court can be informed (a) of any joint view as to the disclosure model that should apply and (b) of the estimated work and cost of using any disclosure model that is proposed by one or more of the parties.<sup>187</sup>

The Working Group described the “new models” as follows -

- Model A is no disclosure
- Model B requires disclosure of documents on which a party relies. The Briefing Note provides: “It is similar to Basic Disclosure with the important distinction that it requires adverse documents in the hands of the disclosing party to be provided.”<sup>188</sup>
- Model C adds to Model B a facility for a party to request from the other party specific disclosure it requires with a requirement to carry out a search and to produce adverse documents
- Model D replaces what was previously known as “standard” disclosure. A party may require a reasonable search for documents that support or adversely affect either side’s case. Where Model D is proposed the court must be satisfied that the model is reasonable and proportionate and appropriate in order to fairly resolve the issues
- Model E, described in the briefing note as “exceptional”, extends the Model D “reasonable search” to documents that may lead to a train of enquiry that may support or adversely affect either side’s case.

The recommendations of the Working Group were implemented on a pilot basis by Practice Direction 51U, entitled “Disclosure Pilot for the Business and Property Courts” which took effect from 1<sup>st</sup> January 2019.<sup>189</sup>

In accordance with the Briefing Note the Practice Direction obliges parties to proceedings to which the Practice Direction applies, and once proceedings have commenced, “to disclose, regardless of any order for disclosure made, known adverse documents, unless they are privileged.”<sup>190</sup> In addition, and at the stage of delivery of a party’s statement of case, that party shall furnish to all other parties a list of documents accompanied by the following:

- (a) the key documents on which that party has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case); and
- (b) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

This form of disclosure is known as “Initial Disclosure”.<sup>191</sup>

Where “Extended Disclosure” is required such disclosure may take one of the following forms -

- Model A: Disclosure confined to known adverse documents
- Model B: Limited Disclosure
- Model C: Request-led search-based disclosure
- Model D: Narrow search-based disclosure, with or without Narrative Documents
- Model E: Wide search-based disclosure.

186 Ibid. at para. 11(x).

187 Ibid. see generally paras. 10 – 12.

188 Ibid. at para. 12(ii).

189 The Practice Direction states that the pilot applies from the 1<sup>st</sup> January 2019 for two years to existing and new proceedings in the Business and Property Courts of England and Wales and the Business and Property Courts in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle.

190 Practice Direction 51U, para. 3.1(2).

191 Referred to as “Basic Disclosure” in the Briefing Note.

In all cases an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective and the following factors will be taken into account:

- (a) the nature and complexity of the issues in the proceedings;
- (b) the importance of the case, including any non-monetary relief sought;
- (c) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
- (d) the number of documents involved;
- (e) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
- (f) the financial position of each part; and
- (g) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.<sup>192</sup>

### 4.3 Scotland

In Scotland, disclosure and production of documents in civil litigation may take place by a number of methods, namely:

- (a) by agreement between the parties;
- (b) at specific stages during the proceedings where required by rule of court;
- (c) prior to commencement or in the course of the proceedings, on foot of an order under the Administration of Justice (Scotland) Act 1972; and
- (d) on foot of an order for a commission and diligence.

The methods at (b), (c) and (d) are examined below.

#### 4.3.1 Disclosure under rules of court

Parties are required to lodge any documents within their possession or control “founded on ..., or adopted as incorporated, in” their pleadings.<sup>193</sup> As to the precise scope of the documentation “founded on” the pleadings, this is not confined to documents encapsulating the whole of the pursuer's (plaintiff's) case of the defender's (defendant's) defence, but would extend to “all the deeds and writings on which the summons or the defence is in any respect or to any effect founded.”<sup>194</sup>

The documents are required to be lodged at the time of lodging the writ or pleading concerned.<sup>195</sup> A party failing to lodge a document at the prescribed time may be sanctioned in costs.<sup>196</sup> Where a party will be relying on documentary evidence (productions) in support of their case, the documents will be presented in an Inventory of Productions lodged in court and served on the parties early in the case,<sup>197</sup> and once a trial date has been set all documents to be relied on must be lodged in court not later than 28 days before the trial hearing (diet of proof), in default of which they may not be relied on at trial save by consent of the parties or with the leave of the court on cause shown and on such conditions, if any, as to expenses or otherwise as the court thinks fit.<sup>198</sup> Where a document is found that is contrary to the case that has been

192 Practice Direction 51U, para. 6.4.

193 Rule 27.1 Rules of the Court of Session (“RCS”).

194 *Western Bank v Baird* (1863) 2 M. 127 at 133, cited in MacSporran and Young, *Commission and Diligence* (Sweet & Maxwell, 1994).

195 Rule 27.1 RCS.

196 Rule 27.2 RCS.

197 Rule 4.5(1) RCS provides:

“4.5.- (1) On each occasion a production is lodged in process-

(a) an inventory of productions shall be lodged in process; and

(b) a copy of the inventory of productions shall be sent to every other party.”

198 Rule 36.3 RCS.

pleaded, it would appear that the solicitor acting for the party concerned has a duty to disclose this to the court.<sup>199</sup>

### 4.3.2 Disclosure by order under the Administration of Justice (Scotland) Act 1972

The provisions for disclosure and production in the rules of court have been significantly enhanced by section 1 of the Administration of Justice (Scotland) Act 1972, under which an order – a “section 1 order” – may be sought for production of documents before or after the commencement of proceedings, on notice to the party holding the documents (the “haver”).

Under section 1 of the 1972 Act, a court<sup>200</sup> is empowered, subject to the raising of a valid claim of privilege founded on confidentiality or public interest, to order the “inspection, photographing, preservation, custody and detention” of documents and other property (including, where appropriate, land) which appear to the court to be property “as to which any question may relevantly arise” in existing civil proceedings or in civil proceedings “which are likely to be brought”, and to order the production and recovery of any such property, the taking of samples thereof and the carrying out of any experiment thereon or therewith.

An applicant for a section 1 order prior to commencement of proceedings must establish an “intelligible *prima facie*” case for the prospective claim,<sup>201</sup> and provide the court with sufficient information about it.<sup>202</sup> The court may direct that such notice of the application be given as it considers fit.<sup>203</sup> Where it is apprehended that a party holding documents relevant to a case may conceal or destroy the documents if made aware that their recovery is being sought, the application may be made *ex parte*.

### 4.3.3 Disclosure on foot of a court order (commission and diligence)

At common law the Court of Session has an inherent power to compel parties to a cause as well as non-parties to produce documents which may have a bearing on the points in issue.<sup>204</sup> Parties seeking documents from another party or non-party, and who are unable to obtain the documents voluntarily, may apply by motion to the court for a disclosure order specifying the document or category of documents that they require. This may take the form of an order for production of the documents, or a “commission and diligence”.

The commission and diligence procedure involves the court ultimately appointing a commissioner to whom it delegates the task of taking on oath the depositions of those persons in possession of the documents.<sup>205</sup> As indicated below, however, this appointment may not be required where, following the making of the initial order on the motion, the haver avails of the option of providing voluntary disclosure.

A party granted an order of commission and diligence may serve it on the haver, requesting voluntary production.<sup>206</sup> Thereafter the haver is required by the order to lodge with or send to the Deputy Principal Clerk of Session the order, the certificate signed by the haver as to the documents and all documents in the haver’s possession falling within the specification and a signed list or inventory of those documents. The party who requested the order of commission and diligence may then take up and examine the documents.

199 In an article: “Duty to disclose all in litigation? Differences between Scotland and England” (6/7/16), John McKenzie, solicitor advocate, of the Scottish law firm Shepherd and Wedderburn states: “In Scotland, there is not a general duty to disclose, unless a document is found that is contrary to the case that has been pleaded. If this happens, the solicitor acting must disclose this to the court.”

200 Viz. the Court of Session, Sheriff Appeal Court and Sheriff Court.

201 *Baxter v Lothian Health Board* 1976 S.L.T. (Notes) 37.

202 *Falkingham v Lothian Regional Council* 1983 S.L.T. (Sh. Ct.) 2.

203 Rule 64.5(1) RCS.

204 MacSporran and Young, *op. cit.*, para. 3.1.

205 *Ibid.*

206 Order 35.3 and 35.3A RCS.

If the haver claims an entitlement to refuse disclosure on grounds of confidentiality, the document must be lodged/sent in a sealed envelope and may only be opened by order of the court on a motion of the party seeking disclosure on notice to the producing party.<sup>207</sup>

Where the party requesting disclosure/production is dissatisfied with the haver's response, or where there has been no response within the time prescribed, they may seek – as will have been authorised by the order – to execute the commission and diligence for recovery of the documents concerned. The commission and diligence involves a hearing before a commissioner appointed by the court – usually an advocate in the Court of Session or a respected local solicitor in the Sheriff Court. The requesting party summonses the haver to the hearing before the commissioner for questioning on oath before the commissioner about the whereabouts or existence of relevant documents covered by the specification.

The hearing before the commissioner has been described in the following terms:

“The commission hearing is not a trial, and the scope of questions is restricted. However, at its conclusion, the commissioner prepares a report for the court which can be tactically very important if it is sought to argue certain documents do not exist, or that they are likely to exist but one party or another has not lodged them with the court. Ultimately, if there is no cooperation with the commissioner, then in a worst case conceivably if orders by the court are ignored, one party or another could be found to be in contempt of court.

If a company (because sometimes *commission and diligence* orders are served on people who are not party to the action at all) are served with an order for the recovery of documents, it is important that independent legal advice is taken as soon as possible. If the cost of complying is going to be prohibitive (because of the volume or searching to be done) it is possible in limited circumstances to argue that the party requesting the documents has to pay for the cost of production and searching of them. However, the circumstances in which this applies are complex and advice needs to be sought. Similarly, if documents are considered confidential, there are procedures whereby documents can be produced to a commissioner on a confidential basis and then argument made about whether they should be released to the other side.”<sup>208</sup>

It has been commented that:

“The practical effect of Scottish procedure [on disclosure] is that the parties may not automatically see all documentation relevant to a litigation, which may impact on settlement prospects. However the disclosure process is also generally less burdensome than it is in England and Wales, which can bring about cost savings.”<sup>209</sup>

#### 4.4 Civil law jurisdictions

The German Code of Civil Procedure does not provide for disclosure, although German courts have the power to request a party or even a third party to produce specific documents relating to certain points raised by either party regardless of the burden of proof.<sup>210</sup>

In France, there is no obligation on any party to disclose particular documents or categories of documents and the disclosure of evidence is entirely voluntary. French law sets out only limited processes by which parties may attempt to gain access to documents.<sup>211</sup>

207 Rule 35.8 RCS.

208 “*Recovery of Documents in Scottish Litigation*”, Eric J Baijal, solicitor, BBM solicitors: <https://www.bbmsolicitors.co.uk/Blog/recovery-of-documents-in-scottish-litigation.html>

209 Drummond and Deeprose: “The Scottish Civil Justice System”, DLA Piper <https://www.dlapiper.com/en/uk/insights/publications/2016/02/the-scottish-civil-justice-system/>

210 Baker & McKenzie report *Dispute Resolution Around the World*, 2011, at page 5. In the context of the power of the court to request documents the report also provides: “The courts may make such a request if the party who relies on these documents does not have possession of them or if production of such documents would further the court’s understanding of the case.”

211 Squire Patton Boggs, *La Revue, Gathering evidence: how does France compare?*, June 2013, available at: [https://larevue.squirepattonboggs.com/gathering-evidence-how-does-france-compare\\_a2075.html](https://larevue.squirepattonboggs.com/gathering-evidence-how-does-france-compare_a2075.html)

In Spain disclosure is restricted and has been described in the following terms:

“The duty to exhibit documents is governed by Article 328 of the Civil Procedure Act, under which each party can require the other parties to exhibit any documents that relate to the matter in dispute or the value of evidence presented. However, this duty cannot be characterised as a pre-trial discovery procedure as found in common law jurisdictions.”<sup>212</sup>

In Denmark there is scope for seeking court-ordered discovery, and the party seeking discovery must specify the need for the documents and demonstrate the likelihood that the other party has the documents in their possession. However, parties to litigation are also obliged to share any documents they will use as a basis or to support their claim or defence. This exchange of documents is part of the presentation of material to the court. However, this does not include an obligation for the parties to submit potentially adverse or damaging documents on their own initiative.<sup>213</sup>

#### 4.5 The Dubai International Financial Centre (“DIFC”) Judicial Authority

The Review Group’s attention was drawn to the provisions relating to production of documents of the procedural rules of the DIFC Judicial Authority (now known as the DIFC Courts) of the Emirate of Dubai, which was established to adjudicate on civil and commercial disputes arising from or within the DIFC.<sup>214</sup> The DIFC Courts are modelled on the Commercial Court of the High Court of England and Wales,<sup>215</sup> and apply common law principles and procedure.<sup>216</sup>

However, in apparent recognition of difficulties which would be created by importing the procedure of disclosure as understood in England and Wales,<sup>217</sup> they declined to adopt those provisions. Instead Part 28 of the Rules of the Dubai International Financial Centre Courts 2014 (“RDC”)<sup>218</sup> contains a procedure governing the production of documents broadly modelled on Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration.<sup>219</sup>

That procedure occupies a middle ground between the conventional approach to discovery at common law – under which a party must disclose documents it has or has had in their possession, custody or control that they intend to rely on or which adversely affects their own case or supports the case of the opposing party – and that of the civil law tradition – under which a party must disclose only those documents upon which they rely. In the DIFC Courts, a party must disclose documents upon which it relies and may request certain documents from an opposing party.

Part 28 (Production of Documents) of the RDC contains the following provisions:

- (a) documents referred to in statements of case, affidavits etc. may be inspected;<sup>220</sup>

212 López-Iboret et al., *Litigation and enforcement in Spain: overview*, Practical Law, Thomson Reuters, available at: [https://uk.practicallaw.thomsonreuters.com/7-523-2553?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhpc=1](https://uk.practicallaw.thomsonreuters.com/7-523-2553?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhpc=1)

213 Schwarz Nielsen and Hove Thomsen, *Litigation and enforcement in Denmark: overview*, Practical Law, Thomson Reuters, available at: [https://uk.practicallaw.thomsonreuters.com/0-594-0727?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/0-594-0727?transitionType=Default&contextData=(sc.Default))

214 Law No.12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre, as amended, available at: [https://www.difccourts.ae/wp-content/uploads/2017/10/Dubai12of2004\\_amended2011.pdf](https://www.difccourts.ae/wp-content/uploads/2017/10/Dubai12of2004_amended2011.pdf)

The DIFC Courts’ jurisdiction was subsequently extended to include disputes which have no relation to the DIFC, but where the parties agree in writing to opt for the Courts’ jurisdiction (new Article 5A (2))

215 Le Gal and Raynaud, “The Success of the DIFC Courts: When Common Law Makes Its Way into a Civil Law Region”, 2017 *Int’l Bus. L.J.* 289 (2017), at 292.

216 The Court has among its members retired former judges of the senior jurisdictions of England and Wales and Commonwealth jurisdictions.

217 Viz. that set out in Part 31 of the CPR.

218 Available at: <https://www.difccourts.ae/court-rules/part-28-production-of-documents/>

219 Available at: <https://www.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D68336C49-4106-46BF-A1C6-A8F0880444DC&usg=AOvVaw3HzXoVle-Dn3sPkjBUdWRb>

220 Rules 28.5 – 28.9 RDC.

- (b) parties are obliged to co-operate at an early stage and in any event prior to the first case management conference. Discussions concerning searches, preliminary production requests and related matters should be undertaken as early in the case as possible;<sup>221</sup>
- (c) there is to be standard production of documents upon which a party will rely and documents required to be produced under any law, rule or practice direction;<sup>222</sup>
- (d) parties may exchange requests to produce. These are not dissimilar to the request for voluntary discovery under Order 31, rule 12 RSC. Requests shall be in the form as prescribed under the RDC;<sup>223</sup>
- (e) where no objection to production is made, the party requested to produce documents shall carry out a reasonable search and shall then produce the documents identified by the search. Certain information is to be given to the requesting party as to retention of documents policies etc. The factors to be employed when determining the reasonableness or otherwise of a search are identified in rule 28.21 RDC;
- (f) additional conditions apply to any search of electronic documents;<sup>224</sup>
- (g) a party may object, in writing, to the production of some or all of the documents requested.<sup>225</sup> The reasons for objecting shall be any of the reasons set out in rule 28.28 RDC, namely:
  - (i) lack of sufficient relevance or materiality;
  - (ii) legal impediment or privilege;
  - (iii) unreasonable burden to produce requested documents;
  - (iv) loss or destruction of documents;
  - (v) grounds of commercial or technical confidentiality that the court determines to be compelling;
  - (vi) special political or institutional sensitivity that the court determines to be compelling;
  - (vii) considerations of “procedural economy, proportionality, fairness or equality of the parties” that the Court determines to be compelling”;
- (h) a party may claim a right or duty to withhold documentation;<sup>226</sup>
- (i) a party may apply for an order permitting him or her to withhold documentation;<sup>227</sup>
- (j) where a party is of the view that a responding party’s decision to withhold documents is “not justified” or that the search carried out was not a reasonable search, that party may apply to court for a “production order”,<sup>228</sup>
- (k) a document production order will direct a party to produce documents, to carry out a search and thereafter to produce documents and / or to identify documents that were, but no longer are, in that party’s possession, custody and control;<sup>229</sup>
- (l) the respondent shall verify compliance with the production order by way of Document Production Statement;<sup>230</sup>
- (m) an application for production of documents prior to the commencement of proceedings may be made;<sup>231</sup>
- (n) a person who is not a party may be ordered to produce documents;<sup>232</sup>

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221 Rules 28.10 – 28.14 RDC.

222 Rule 28.15 RDC.

223 Rule 28.18 RDC.

224 Rule 28.22 – 28.25 RDC.

225 Rule 28.26 RDC.

226 Rule 28.29 RDC.

227 Rule 28.31 RDC.

228 Rule 28.36 RDC.

229 Rule 28.39 RDC.

230 Rule 28.42 – 28.44 RDC.

231 Rule 28.47 – 28.48 RDC.

232 Rule 28.52 RDC.

- (o) the court may at any time request a party to produce to the court and to other parties documents the court considers to be relevant and material to the outcome of the case;<sup>233</sup>
- (p) where a party fails to produce a document, they may not rely on that document unless the court gives permission and if a party fails without satisfactory explanation to produce a document on foot of a request to produce the court may infer that such document would be adverse to the interests of that party.<sup>234</sup>

## 5. Conclusions and recommendations of the Review Group

### 5.1 Conclusions

The Review Group has formed the clear view that (a) the current discovery regime is failing all parties involved in litigation and (b) that significant reform is now required. Borrowing a phrase employed by the Gloster Working Group in England and Wales,<sup>235</sup> a “wholesale cultural change” is required, and the Review Group considers that such cultural change can only be achieved if underpinned by an entirely new scheme for discovery.

There is little dispute in the submissions received on this issue: all recognise that discovery is a major contributor to both delay and cost in the conduct of civil litigation in the State.

A confluence of factors is contributing to the problems identified.

The combined effects of the increase in the complexity of litigation and the relentless increase in the volume of electronically stored information and data are, too often, acting as a barrier or impediment to access to justice rather than assisting in the administration of justice. Put simply, the discovery regime in its current form allows for the deployment of discovery as a weapon by the economically stronger party to effectively prevent or impede the less well-resourced party in the prosecution of their action or in the defence of proceedings.

Having considered the discovery regime in operation in the courts of England and Wales, both prior to and subsequent to the introduction of the Woolf reforms, the Review Group understands first that the problems that arise in this jurisdiction are by no means peculiar to this jurisdiction and second that notwithstanding the introduction of relatively radical reforms on foot of Lord Woolf’s recommendations, widespread concerns relating to excessive costs, scale and complexity of disclosure continued to be expressed by court users.<sup>236</sup>

A consideration of both the rules of court in Section 2 and the case law in Section 3 of this chapter allow the Review Group to draw certain conclusions.

Despite the introduction of comprehensive amendments to Order 31 RSC in 1999 and 2009, experience has shown that the introduction of more stringent procedures by way of rules of court alone has not had the effect of addressing the very real problems that persist: discovery is still sought in a high proportion of cases;<sup>237</sup> litigants continue to possess the potential to “swamp” an opposing party with masses of material;<sup>238</sup> discovery continues to have the effect of giving rise to delays; and technological advances – which have led to

<sup>233</sup> Rule 28.56 RDC.

<sup>234</sup> Rule 28.61 - 62 RDC.

<sup>235</sup> The Disclosure Working Group, chaired by Lady Justice Gloster.

<sup>236</sup> See Briefing Note of 2<sup>nd</sup> November 2017, available at: <https://www.judiciary.uk/wp-content/uploads/2017/11/dwg-guidance-note-2-nov-2017.pdf>

<sup>237</sup> See Lynch J’s comments in *Brooks Thomas Ltd v Impac Ltd* [1999] ILRM 171 at 178.

<sup>238</sup> See O’Flaherty J’s comments in *Allied Irish Banks v Ernst & Whinney* [1993] 1 IR 375 at 396.

the proliferation of information and data – can act as an impediment or barrier to access to justice.<sup>239</sup> These deficiencies were variously recognised in the vast majority of submissions to the Review Group on discovery.

Under current law an applicant for discovery is required to meet quite stringent criteria, viz.: the applicant must demonstrate -

- that the documents sought are relevant
- that the documents are necessary
- that discovery is not disproportionate or excessive
- that consideration has been given to alternative sources of information, where appropriate.

In addition, an applicant must be in a position to demonstrate service of a written request for voluntary discovery, in which the precise categories of documents sought are identified and full reasons for requiring them provided.<sup>240</sup> Further, an application for discovery must be supported by a grounding affidavit which must (a) verify that discovery sought is necessary for disposing fairly of the cause or matter or for saving costs and (b) set out the reasons why each category is sought to be discovered.<sup>241</sup>

The issues identified by the Review Group do not, however, stem from any form of procedural deficiency that can be addressed by way of updated procedural rules. The problems presented by the current discovery process do not stem from the procedural framework but rather from the underlying substantive legal test: the test for relevance still falls to be decided with reference to *Peruvian Guano*.

As has already been observed,<sup>242</sup> the broader the test for relevance the larger the potential range of documents that would possibly fall within its ambit. The *Peruvian Guano* test encompasses even those documents with only a tangential connection to the primary issues in dispute as well as those documents which may fairly lead a litigant to a train of inquiry in the context of either advancing his own case or damaging the case of his adversary. The *Peruvian Guano* test, as broad as it is in its scope, was therefore perfectly suited to a time before the arrival of photocopying. In an era of the mass proliferation of electronic data and information the test is now completely unsuited to the demands of modern litigation.

A further feature of the difficulties experienced by court users concerns the fact that relevance is to be determined by an examination of the pleadings in a given case. Despite legislative changes in relation to personal injuries actions<sup>243</sup> that have endeavoured to encourage a more focussed and precise style of pleading, the reality is that cases continue to be pleaded broadly with the intention of ensuring that the issues in a case are kept as broad as possible for as long as possible. Broader pleadings are a symptom of a regime that allows broad *Peruvian Guano* discovery. Again, the Review Group notes that similar concerns have been expressed by a number of contributors in relation to the correlation between broad and imprecise pleadings and overly burdensome discovery.

Whilst the “relevance” criterion is the greatest source of mischief, that of “necessity” is also a contributor. At the time when a court is called upon to adjudicate discovery disputes it can identify relevant issues by an examination of the pleadings. However, at this time the court generally has insufficient evidence before it to enable it to make a very precise determination as to how necessary a document or documents might be to the actual presentation of the case in court. The concept of “necessity” therefore tends to be interpreted in a very wide fashion.

A similar difficulty presents itself in the context of proportionality. In a small number of cases it may be very evident that the documents sought and the time and cost to be applied in identifying the documents is completely disproportionate to a particular issue in the case: it will be clear that the benefits of such

239 See Morris P’s comments in *Swords v Western Proteins Ltd* [2001] 1 IR 324 t 328.

240 Order 31 rule 12(6) RSC.

241 Order 31 rule 12(1) RSC.

242 See Zuckerman quoted at Section 4.2.1 *supra*.

243 See sections 10, 12 and 13, Civil Liability and Courts Act 2004.



discovery will be outweighed by the disadvantages of high costs and delay. However, in the absence of sufficient evidence to enable the court to make a full and precise determination, the court is often hampered from taking a robust approach on this topic.

The Review Group also acknowledges the point raised in submissions<sup>244</sup> to the effect that the obligation to list every document over which privilege is claimed also adds unduly to the cost and expense associated with making discovery.

The Review Group has considered all of the submissions and has had regard to the efforts made in other common law jurisdictions to try to contain the problem of discovery.

As stated above, the Review Group has come to the conclusion that this is an area where a radical change is necessary in order to dispose of a major obstruction to the administration of justice. The Review Group is of the opinion that legislation ought to be introduced to bring an end to the making of discovery of documents in the form in which it has been known since the 19<sup>th</sup> century. It notes that countries with a civil law system appear to have faced no difficulties in the administration of justice in the absence of discovery.<sup>245</sup> In Scotland a very limited form of disclosure is available and this does not seem to have presented any problems of significance in that jurisdiction.<sup>246</sup>

The Review Group has had an opportunity to consider the procedure in the DIFC Courts under Part 28 of the RDC for production of documentation employed and described in detail in Section 4.5 above. The Review Group believes that that procedure, with certain modifications to suit the Irish context, would be best suited to address the concerns identified above regarding the discovery process as it currently operates and achieve the desired outcomes of less costly and less burdensome discovery by way of a number of safeguards inherent in the RDC. It is of the view that consideration ought to be given to the abolition of discovery as it is now known and replacement of the regime for discovery, inspection and production of documents by rules similar or analogous to Part 28, subject to certain important modifications as mentioned below.

Firstly, the RDC encourage both cooperation and thereafter reciprocal production of documents at an early stage in the proceedings, this being achieved by way of operation of Rule 28.10 and Rule 28.15(1) RDC. Rule 28.10 places obligations on the parties in terms of liaising and discussing issues that may arise in the context of the production of electronically stored documents. The Review Group believes this obligation should be expanded, in the domestic setting, to cover issues that may arise in the context of all categories of documents. Rule 28.15 RDC obliges a party, within the time ordered by the court, to submit to the other parties all documents available to that party upon which it relies.<sup>247</sup> It is the court, rather than the parties, that has control over the timing of production and the obligation to produce all documentation upon which a party relies at an early stage in the proceedings.

However, the Review Group does not see a necessity, in an Irish context, for immediate involvement of the court to supervise production of documents, given the additional costs this would incur, in circumstances

244 See in particular the CLAI's *Reviewing the law of discovery*, at para. 7(e).

245 Reyes notes that "...full disclosure is not a feature of the civil law system. To get documents produced, parties may petition the court, commonly referencing a known document. Before proceedings, search and seize orders may be obtainable." Reyes, Eduardo, *Civil law disputes: written in code*, The Law Society Gazette, 11<sup>th</sup> April 2016, available at: <https://www.lawgazette.co.uk/law/civil-law-disputes-written-in-code/5054636.article>. Bailly and Haranger note that in the context of civil disputes in France, "Each party decides which documents will be disclosed to support its argument. All the documents mentioned by a party for its defence must be disclosed spontaneously (Articles 132 § 1 and § 2, Code of Civil Procedure (CCP))...However, before a trial, the judge can order a preparatory inquiry if there is a legitimate reason to preserve or to establish the evidence of the facts on which the resolution of the dispute depends (*mesures d'instruction in futurum*)." "Litigation and enforcement in France: overview", Practical Law, Thomson Reuters, available at: [https://uk.practicallaw.thomsonreuters.com/9-502-0121?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co\\_anchor\\_a226023](https://uk.practicallaw.thomsonreuters.com/9-502-0121?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a226023)

246 At para. 4.4 above.

247 Rule 28.15(2) RDC obliges parties, in addition, to submit to the other side the documents that he or she is required to produce by any law, rule or practice direction. It is envisaged that it will not be necessary to introduce an equivalent requirement in this jurisdiction.

where in the majority of cases no controversy as to production of documents may be expected to arise. The Review Group considers that the parties should initially be afforded an opportunity, within a specified time following delivery of their respective initial pleadings (in the case of the claimant, the claim form incorporating the detailed statement of claim), to produce the documents on which they intend to rely at trial or are otherwise required by law to produce. Only where such production is not made, or a dispute arises concerning such production, should there be a need for intervention by the court, or a deputy Master.

Secondly, the RDC employ “discoverability” principles that are far more narrow and confined than *Peruvian Guano*. A party raising a request to produce under Rule 28.17 RDC must not only identify the documents requested with a high degree of specificity, but must also – and crucially – provide a description of “how the documents requested are relevant and material to the outcome of the case”. Accordingly, the *Peruvian Guano* test has been replaced with a requirement for the requesting party to demonstrate *how* the documents are relevant and material to the outcome of the case. Should an analogous test be adopted in this jurisdiction the Review Group believes that tangential discovery will be replaced with discovery of documents that could reasonably be said to have a bearing on the final determination of the issues. This substantial narrowing of the parameters of discoverability should have a significant impact on the scope and breadth of discovery requests raised and discovery orders made.

Thirdly, the Review Group notes that Rule 28.21 RDC lays down the criteria to be applied in a determination of the reasonableness of a search for electronic documents. The Review Group believes that a similar test should be adopted and applied as part of a new scheme of rules, but should apply not just in the case of electronic documents. The effect of an analogous rule in this jurisdiction would be to empower a court to impose further limitations on the scope of any search for documents. The criteria identified under Rule 28.21, which include the nature and complexity of the proceedings and the significance of any document likely to be located during the search, could broadly be described as factors that go to the issue of proportionality.

Fourthly, the Review Group notes the nature of the additional protections against disproportionate and overly burdensome discovery set out in Rule 28.28 RDC. This rule provides that the court may, either at the request of a party or on its own initiative, exclude from production any document for a number of reasons, including: lack of sufficient relevance or materiality, an unreasonable burden on the party requested to make discovery; and considerations of procedural economy, proportionality, fairness or equality of the parties that the court determines to be compelling.

The Review Group notes that the RDC contain provision enabling an application for production of documents to be made before proceedings have started where: (a) the applicant and respondent are likely to be a party to subsequent proceedings; (b) if proceedings had started, the Court would make a document production order in relation to the material concerned; and (c) production before proceedings have started is desirable in order to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings or save costs.

However, pre-action discovery – a type of equitable relief in the form of what is known as a *Norwich Pharmacal* order – has been allowed in Ireland on very strict terms. The Supreme Court in the *Megaleasing* case, in considering the case-law in England on which this jurisdiction is based, was satisfied that those authorities “do in fact confine the remedy to cases where a very clear proof of a wrongdoing exists, and possibly, so far as applies to an action for discovery alone prior to the institution of any other proceedings, to cases where what is really sought are the names and identity of the wrongdoers, rather than factual information concerning the commission of the wrong.”<sup>248</sup> The Review Group does not consider it necessary or desirable to extend the ambit of these principles in the regime it proposes as a replacement for discovery. The Review Group has appended at Appendix 3 to this report a draft scheme of rules of court which seeks to adapt to an Irish context the approach taken in the RDC to inspection and production of documents.

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248 *Megaleasing UK Ltd, Megaleasing Holdings Ltd and Quantum Data SA v Vincent Barrett and Others* 1993 ILRM 497, at 504 (Finlay CJ, Hederman and Egan JJ concurring).

While the draft scheme is designed for incorporation in the Rules of the Superior Courts, it should serve, with appropriate incidental modifications, as the model for all three first instance jurisdictions.

## 5.2 Recommendations

### 5.2.1

The Review Group recommends that primary legislation be enacted to (a) abolish the current entitlement to discovery, inspection and production of documents under the existing rules of court for the various jurisdictions and the associated case law and (b) specify the principles and policies underpinning a new remedy to be elaborated upon in new rules of court – to be designated “production of documents” so as to make clear the departure from the regime it will replace – which will regulate the entitlement of parties to civil litigation to documents in advance of trial.

### 5.2.2

The primary legislation should provide for the prescribing of a date on which the existing regime should come to an end and mandate the respective court rules committees to replace by that date the existing discovery rules with rules complying with the principles and policies mentioned at Section 5.2.1.

### 5.2.3

The principles and policies set out in the primary legislation should facilitate regulation of the entitlement to pre-trial documents on the basis of a scheme of rules of court along the lines included at Appendix 2 to this report.

### 5.2.4

The proposed requirement that parties should, as the default arrangement, produce their documents within a specified time following delivery of their initial pleading will require further amendment to the time periods for delivery of the defence to allow time for delivery of that pleading to run from the date of receipt of the documents produced in respect of the claim form. Consequential amendments to each of the rules of court for the various jurisdictions concerned will also be required, to ensure alignment of the new scheme with those rules when incorporated therein.

### 5.2.5

In addition the Review Group is of the opinion that those rules of court should be complemented by rules of court specifically obliging parties to plead their case with far greater particularity and precision than has been the case to date – so as to ensure that the real issues in dispute can be identified prior to trial. The standard of particularity of pleading in personal injuries actions introduced by the Civil Liability and Courts Act 2004 should serve as the model for such rules.

# CHAPTER 7

## JUDICIAL REVIEW



# 1. The judicial review procedure generally

## 1.1 Nature of the judicial review remedy

Judicial review is a remedy which may be sought from the High Court to challenge the lawfulness of decisions or acts of public bodies, including decisions of those courts – viz. the District Court, Circuit Court and Special Criminal – which are not Superior Courts of record, and decisions or acts of others exercising public functions.<sup>1</sup>

Judicial review is a remedy available originally at common law,<sup>2</sup> but various statutes have provided for a judicial review remedy modified from the non-statutory remedy. This chapter primarily addresses the non-statute-based form of judicial review – this being the most commonly employed – the procedure for which is regulated by the rules of court.

Different types of remedy may be obtained by way of judicial review,<sup>3</sup> viz. -

- an order of *certiorari* – to quash (set aside) a decision where it has been made in excess or abuse of the public body's<sup>4</sup> jurisdiction or even if made within jurisdiction – where an error appears on the face of the record pertaining to the decision
- an order of *mandamus* – to secure performance of a public duty imposed on a public body by law, where a specific demand for performance of the duty concerned has been made and been expressly or impliedly refused<sup>5</sup>
- an order of *prohibition* – to restrain a public body from acting in excess of its jurisdiction
- an order of *quo warranto* – to challenge the entitlement of a person to hold a specific public office (this particular remedy now being effectively “obsolescent, if not indeed obsolete”)<sup>6</sup>
- declaratory or injunctive relief. Order 84, rule 18(2) RSC provides:
  - “(2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to:
    - (a) the nature of the matters in respect of which relief may be granted by way of an order of *mandamus*, *prohibition*, *certiorari*, or *quo warranto*,
    - (b) the nature of the persons and bodies against whom relief may be granted by way of such order, and

1 See further: De Smith's “Judicial Review”, Chapter 1, para. 1-001; Delany and McGrath on Civil Procedure, Chapter 31, para. 31-01. The term “judicial review” is also employed in another sense not the subject-matter of the Review Group's inquiries, viz. the review by the High Court of the constitutionality of a law under Article 34.3.2 of Bunreacht na hÉireann. De Blacam comments that:

“we now speak of judicial review as the means, no matter how the application may be initiated, whereby the courts examine the legality (including legality in the sense of consistency with constitutional norms) of all actions in the public domain including their own. “Judicial review” thus includes the examination of both the constitutional validity of a statute and the legality of all other forms of public decision-making”. “Judicial Review” (de Blacam, “Judicial Review” (3rd Ed.), page 4).

2 Hogan and Morgan make the point that one of the remedies within judicial review – *mandamus* – is technically statutory in nature in that section 28(8) of the Supreme Court of Judicature Act (Ireland) 1877 provided for an interlocutory order of *mandamus* to be granted in all cases “where it is just and convenient to do so”. Hogan and Morgan, “Administrative Law in Ireland” (4<sup>th</sup> Ed., 2010), Chapter 16, para. 16-21.

3 See further, Bradley, *Judicial Review* (2000), Chapters 18 to 21; Hogan and Morgan, *op. cit.*, Chapter 16; de Blacam, “Judicial Review” (3<sup>rd</sup> Ed., 2017), Chapters 38 to 43; Delany et al., *op. cit.*, Chapter 31.

4 “Public body” in this context includes a tribunal or court.

5 *R (Butler) v Navan UDC* [1926] IR 466 at 470-471; *State (Modern Homes) (Ire) Ltd v Dublin Corporation* [1953] IR 202.

6 Law Reform Commission, “Judicial Review of Administrative Action: The Problem of Remedies” LRC WP 8 (1979). Hogan and Morgan noted that there had been only one reported case involving *quo warranto* since 1922: Hogan and Morgan, *op. cit.*, Chapter 16 Fn. 1. In its Working Paper, “Judicial Review of Administrative Action: The Problem of Remedies” of 1979 (Working Paper No 8 1979), the Law Reform Commission recommended the abolition of the remedy of *quo warranto*, which recommendation was not implemented in the 1986 amendments to the Rules of the Superior Courts which substantially incorporated the other recommendations of the Commission.

- (c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.”
- damages. Order 84, rule 25(1) RSC provides:
  - “(1) On an application for judicial review the Court may, subject to sub-rule (2), award damages to the applicant if:
    - (a) he has included in the statement in support of his application for leave under rule 20 a claim for damages arising from any matter to which the application relates, and
    - (b) the Court is satisfied that, if the claim had been made in a civil action against any respondent or respondents begun by the applicant at the time of making his application, he would have been awarded damages.”

## 1.2 Common law judicial review

The procedure for the common law remedy of judicial review is set out in Part V (rules 18 to 27) of Order 84 RSC. The procedure differs markedly from most other types of High Court proceedings, in requiring that the High Court’s permission (“leave”) be sought before the substantive challenge to the decision or act concerned may be brought.

That procedure is the product of two major reforms of Order 84, viz. those contained in the 1986 consolidation of the RSC and those introduced in 2011.

The reforms introduced in 1986<sup>7</sup> – on foot of a Working Paper of the Law Reform Commission of 1979<sup>8</sup> – included provision for:

- (a) a single, uniform procedure – judicial review – by means of which not only the old State Side remedies of *certiorari*, *mandamus*, prohibition and *quo warranto*, but additionally declaratory relief, injunctive relief or relief by way of damages, may be sought;
- (b) replacement of the old procedure, which involved an initial application *ex parte* for a “conditional order” which, if granted, was followed by an application on notice to have the conditional order made “absolute”. The new procedure comprises an initial application *ex parte* for leave to apply for judicial review followed, if leave is granted, by an application on notice to the respondent for substantive relief in the form of judicial review;
- (c) introduction of time limits for the making of an application for judicial review, viz. three months from the date when grounds for the application first arose, or six months in the case of an application where relief in the form of *certiorari* is sought. Prior to the 1986 reform, save in the case of an application for *certiorari* to quash a court decision – to which a six month time limit applied “unless the Court considers that there is good reason for extending the period” – the question as to whether an application was out of time was within the High Court’s discretion; and
- (d) codifying of the requirements for *locus standi*, by providing that leave to apply for judicial review would not be grantable unless the court considered that the applicant had a sufficient interest in the matter to which the application related.<sup>9</sup>

The reforms of 2011<sup>10</sup> were different in nature, being aimed at making the procedure operate more efficiently and expeditiously, and reducing the potential for it to become a source of delay in itself. They consisted principally of the following measures:

7 Order 84 RSC, 1986 (S.I. No 15 of 1986).

8 Law Reform Commission, “Judicial Review of Administrative Action: The Problem of Remedies”, op. cit..

9 Order 84, rule 20(4) of the 1986 rules, now Order 84 rule 20(5) RSC.

10 Rules of the Superior Courts (Judicial Review) 2011 (S.I. No. 691 of 2011)

- (a) reduction of the time limit for an application for *certiorari* to three months;<sup>11</sup>
- (b) revision of the criteria for the granting of an extension of time within which to apply for leave to apply for judicial review generally. While previously an applicant for leave was required by Order 84, rule 21(1) RSC to apply “promptly” and in any event within the time limit specified for the relief concerned, it is now provided that, notwithstanding the new general time limit of three months, the Court may on application extend that period but only if satisfied that: (a) there is “good and sufficient reason” for doing so and (b) the circumstances that resulted in the failure to apply for leave within the prescribed period either (i) were outside the control of or (ii) could not reasonably have been anticipated by, the applicant.<sup>12</sup> In considering whether “good and sufficient reason” exists, the court may have regard to the effect which an extension of the period might have on a respondent or third party.<sup>13</sup> These criteria mirror those governing the granting of an extension of time under section 50(8) of the Planning and Development Act 2000 (“the 2000 Act”).<sup>14</sup>

While the 2011 amendments removed the express reference to an application for leave requiring to be made “promptly”, a new rule 21(6) provides that nothing in the relevant amendments shall prevent the Court dismissing the application for judicial review on the ground that the applicant’s delay in applying for leave – even if otherwise within the prescribed time limit or within an extended period allowed by an order – has caused or is likely to cause prejudice to a respondent or third party.

An application for an extension of time must now be supported by an affidavit setting out the reasons for the applicant’s failure to apply for leave within the prescribed time limit and must verify any facts relied on in support of those reasons;<sup>15</sup>

- (c) express empowerment of the High Court to adjourn an application for leave in relation to proceedings which are subject to appeal until either the appeal is determined or the time for appealing has expired;<sup>16</sup>
- (d) a requirement for more specific and particularised pleading. The rules now expressly require a statement of each relief sought and of the particular grounds upon the same is sought.<sup>17</sup> The rules also make clear that assertions in general terms of a ground supporting an application will not suffice, and that each ground must be stated precisely, particularised where appropriate, and the facts or matters relied on to support each ground identified in respect of the ground concerned.<sup>18</sup>

Similar requirements apply to a respondent in completing their statement of opposition, and it will not suffice to deny generally the grounds alleged by the statement grounding the application;<sup>19</sup>

- (e) tightening of the conditions for the granting – where leave to seek judicial review is given of a stay on proceedings the subject of an application for relief by way of prohibition or *certiorari*.

11 Order 84 rule 21(1) of the 1986 rules had provided:

“(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the Court considers that there is good reason for extending the period within which the application shall be made.”

That sub-rule, as amended in 2011, now provides:

“(1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.”

12 Order 84, rule 21(3) RSC.

13 Order 84, rule 21(4) RSC.

14 See also the like criteria set out in section 47(5), Transport (Railway Infrastructure) Act 2001.

15 Order 84, rule 21(5) RSC.

16 Order 84, rule 20(6) RSC.

17 Order 84, rule 20(2)(a) (ii) RSC. See also Order 84, rule 20(2)(a) (iii) RSC in relation to interim relief.

18 Order 84, rule 20(3) RSC. The court may, at the leave stage, require an applicant to amend their statement of grounds by setting out further and better particulars of the ground on which any relief is sought: Order 84, rule 20(4) RSC.

19 Order 84, rule 22(5) RSC.

The court is now required to consider whether it would be “just and convenient” to grant a stay;<sup>20</sup>

- (f) expressly empowering the court to direct an application for leave to be heard on notice to the respondent where the issues arising, the likely impact of the proceedings on the respondent or another party, or other “good and sufficient reason”, require it;<sup>21</sup>
- (g) expressly empowering the court to merge the hearing of the application for leave with the substantive hearing of the application for judicial review, and adjourn the application and give directions;<sup>22</sup>
- (h) introduction of new time limits for conduct of the proceedings where leave has been granted. The applicant is accorded seven days (instead of the previous 14) to serve the proceedings for judicial review for the first available motion day after expiry of seven weeks from the grant of leave unless the court otherwise directs, and the respondent three weeks (lengthened from seven days) to file and serve a statement of opposition.<sup>23</sup> The parties are required, ordinarily, within three weeks of service of the statement of opposition or such other period as the Court may direct, to exchange and file written submissions on points or issues of law intended to be raised at the hearing<sup>24</sup> – the intention being that this would provide a realistic opportunity for the substantive proceedings to be ready for hearing by the return date;
- (i) the possibility for the court to dispense with the requirement for oral submissions (as distinct from any evidence which may require to be adduced) at the substantive hearing for judicial review;<sup>25</sup>
- (j) provision for comprehensive case management directions on the hearing of an application for leave directed to be on notice, or the application for judicial review itself, including: directions as to the filing and delivery of further affidavits; orders fixing time limits; directions as to discovery; directions as to the exchange of memoranda for the purpose of the agreeing by the parties or the fixing by the Court of any issues of fact or law to be determined in the proceedings, or orders fixing such issues; directions as to the furnishing by the parties to the Court and delivery of written submissions; and directions as to the publication of notice of the hearing of the application and the giving of notice in advance of such hearing to any person other than a party to the proceedings who desires to be heard on the hearing of the application.<sup>26</sup>

20 Order 84, rule 20(8) RSC. In *PI v The Minister for Justice, Equality and Law Reform* [2012] IEHC 7, Hogan J described (at para. 9) the changes made by the new rule 20(8) thus:

“...the new r. 20(8) introduces at least three important new changes. First, the primary basis for the granting of interim and interlocutory relief is now contained in r. 20(8)(a) which clearly assimilates the *Campus Oil* test to all applications for interlocutory relief in judicial review proceedings, irrespective of whether the ultimate relief claimed is certiorari or prohibition on the one hand or a declaration or an injunction on the other. Second, the new r. 20(8) makes no implicit assumptions regarding the granting of interlocutory relief, such might be thought to have been contained in the old wording of r. 20(7) (a) (“and the Court so directs, the grant shall operate as a stay of the proceedings...”). Rather, the language of the new r. 20(8) makes it absolutely clear that the grant of relief is entirely permissive (...should it consider it just and convenient to do so, may, on such terms as it thinks fit...). The reference to “just and convenient” ... is the clearest possible signal from the Rules Committee that the granting of interlocutory relief in judicial review proceedings has been generally assimilated to the principles which would apply in other plenary actions. Third, whereas the power to stay in the old r. 20(7) was the primary relief which might have been granted in those cases where certiorari or prohibition was sought, it is now clear ... that this power is now considered to be supplementary and complementary to what is henceforth to be the primary form of relief, namely, what I might describe as the unified power contained in the new r. 20(8)(a) to grant interim or interlocutory relief in judicial review proceedings, irrespective of the nature of the specific type of relief claimed.”

21 Order 84, rule 24(1) RSC.

22 Order 84, rule 24(2) RSC.

23 Order 84, rule 22(3) and (4) RSC.

24 Order 84, rule 22(7) RSC.

25 Order 84, rule 22(8) RSC.

26 Order 84, rule 24(3) RSC.



A further amendment to the judicial review procedure in 2015<sup>27</sup> sought, in effect, to codify the principle of personal immunity attaching to judges whose conduct of court proceedings was the subject of challenge by way of judicial review by a party to the original proceedings.<sup>28</sup> Prior to the amendment, such a judge would be named as respondent to the judicial review proceedings, the other party to the original proceedings being named as notice party. The amendment provided that, in such circumstances -

- the judge concerned shall not be named in the proceedings either as a respondent or as notice party, or be served, unless the relief is based on an allegation of mala fides or other form of personal misconduct by that judge in the conduct of the proceedings such as would deprive the judge of immunity from suit
- the other party or parties to the original proceedings must be named as the respondent(s) in the judicial review proceedings
- notice of the judicial review proceedings must be given to the clerk or registrar of the court before which the original proceedings were brought (to alert the judge to the judicial review proceedings) and
- the High Court may require production of a transcript or the record of the original proceedings.<sup>29</sup>

### 1.3 Statutory judicial review

Statutory judicial review remedies, while generally based on the Order 84 RSC procedure, may differ from that procedure with respect, variously, to

- the threshold for locus standi: thus, whereas an applicant for leave to seek non-statutory judicial review is required only to establish a “sufficient interest” in the matter to which the application relates, some statutory judicial review regimes have required an applicant to demonstrate a “substantial interest” in the matter to which the application relates<sup>30</sup>
- a requirement in some statutory regimes that notice be given of the application for leave<sup>31</sup>
- the time limit within which the application for leave may be made<sup>32</sup> and
- the criterion/criteria for granting of leave, examples being statutory regimes which require an applicant for leave to show “substantial grounds” supporting their challenge by way of judicial review<sup>33</sup> or that the application “raises a substantial issue” for determination.<sup>34</sup>

Such variations will derive from the legislative policy underlying the statutory regime concerned.

The statutory judicial review remedy may also be circumscribed by provisions of EU law – as done by section 50B of the 2000 Act, as amended, which imposes special rules regulating or limiting liability for costs of judicial review proceedings under section 50 of that Act, on foot of the requirements of Article 11(4) of Directive 2011/92 of 13 December 2011 and Article 9(4) of the Aarhus Convention.

Given that statutory judicial review remedies are subject to substantive and procedural requirements which may derive from policy considerations or – as in the planning and environmental area – requirements of EU

27 Rules of the Superior Courts (Judicial Review) 2015 (S.I. No. 345 of 2015).

28 See, e.g. *McIlwraith v Fawsitt* [1990] 1 IR 343; *O'Connor v Carroll* [1999] 2 IR 160; *Curtis v Kenny* [2001] 2 IR 96.

29 Order 84, rules 22(2A) and 27(2A) RSC.

30 See e.g. section 47A(2)(b), Transport (Railway Infrastructure) Act 2001.

31 E.g. an application for leave to apply for judicial review under section 38 of the Aviation Regulation Act 2001 is required to be made on notice, grounded in the manner specified in Order 84 RSC in respect of an *ex parte* motion for leave.

32 Thus, an application for leave to apply for judicial review in respect of a decision or other act of a planning authority, a local authority or An Bord Pleanála in the performance or purported performance of a function under the Planning and Development Act 2000 must be brought within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate: section 50(6), Planning and Development Act 2000.

33 E.g. section 47A(2)(b), Transport (Railway Infrastructure) Act 2001; section 43(5)(b), Waste Management Act 1996; section 5(2), Illegal Immigrants (Trafficking) Act 2000, as amended.

34 Section 193(1)(b), National Asset Management Agency Act 2009.

law informing the particular statutory regime concerned, the Review Group has focussed primarily on the common law remedy of judicial review (“non-statutory judicial review”), the requirements relating to which are legislated for solely by Part V of Order 84 RSC.

## 2. The Law Reform Commission’s recommendations for reform

Reference has already been made to the Law Reform Commission’s Working Paper of 1979, which led to the 1986 amendments of the Superior Court Rules.<sup>35</sup> Prompted largely by a sharp increase in the volume of judicial review proceedings in the late 1990s and debate on the question of whether the leave stage in judicial review should be retained or abolished, the Law Reform Commission undertook a fresh examination of the procedure in late 2001, resulting in a Consultation Paper published in January 2003<sup>36</sup> and a report published in February 2004.<sup>37</sup>

The Commission saw nothing to be gained by collapsing the distinction between the six remedies available in judicial review proceedings into a procedure involving a single remedy, but repeated its 1979 recommendation that the remedy of *quo warranto* be abolished, being of the view that the existing remedies of declaration and injunction would be sufficient.<sup>38</sup>

With regard to the requirement to seek leave to apply for judicial review, the Commission considered the arguments against and in favour of retention of the leave stage in both conventional and statutory judicial review regimes. With respect to the criticism that the leave stage entailed duplication of arguments at the leave hearing and (if leave is granted) substantive hearing, the Commission noted that this concern was more pertinent to statutory judicial review regimes, where the usual threshold for obtaining leave (“substantial grounds”) was so high as to necessitate a consideration at the leave stage which is more appropriate to and will need to be reproduced at the substantive hearing.<sup>39</sup> Addressing concerns as to the delaying effect on proceedings of the leave requirement, the Commission noted that a grant of leave would generally operate to an applicant’s advantage in that it almost invariably resulted in the challenged decision not being implemented, while accepting that it presented disadvantages for respondents.<sup>40</sup>

As to the filtering function performed by the leave requirement, the Commission noted that, of the 990 cases (898 of which involved common law – or “conventional” – judicial review) it analysed for the period 1998-1999, 64% were granted leave, and concluded that that indicated “a fair degree of filtration at the leave stage in conventional judicial review”.<sup>41</sup>

The Commission recommended the retention, in common law judicial review proceedings, of a discretion on the court’s part to direct that the *ex parte* application be instead heard on notice to the respondent – to be exercised only in exceptional cases.<sup>42</sup> As mentioned above, the 2011 amendments to the Rules of the Superior Courts empower the court to direct an application for leave to be heard on notice to the respondent where the issues arising, the likely impact of the proceedings on the respondent or another party, or other “good and sufficient reason” require it, and to merge the hearing of the application for leave with the substantive hearing of the application for judicial review, and adjourn the application and give directions.

35 The Law Reform Commission had recommended that the changes to the judicial review procedure it proposed should be incorporated in primary legislation, as had been done in Ontario and New Zealand: Chapter 6, para. 6.4 and Chapter 8 of the 1979 Working Paper.

36 LRC CP 20 – 2003.

37 LRC 71 – 2004.

38 LRC 71 – 2004, Chapter 5, para. 5.13 and 5.14.

39 Chapter 1, para. 1.07.

40 Chapter 1, para. 1.09.

41 Chapter 1, para. 1.17.

42 Chapter 1, para. 1.35.

The Commission recommended retention of the requirement that a successful applicant must establish an “arguable case” in conventional judicial review proceedings and “substantial grounds” in cases of statutory judicial review.<sup>43</sup>

It also recommended that the existence of a right of appeal or an alternative remedy ought not automatically to preclude the possibility of a court granting relief by way of judicial review, this being in its view a matter best decided on at the discretion of the court, taking into account all the circumstances of the case.<sup>44</sup>

The Commission recommended that amendments should be permitted to the grant of leave where the material upon which such amendments are based was not or could not have been discovered with reasonable diligence at the time, provided no unacceptable delay arose in making the application.<sup>45</sup>

The Commission recommended codification in the rules of court of the principle that “the exercise of the court’s inherent jurisdiction to discharge orders giving leave should ... be used only in exceptional cases”.<sup>46</sup> Where the application for leave is conducted on notice to the other party, the respondent should not be permitted to seek to have the grant of leave set aside unless there is a change in circumstances such as to render the substantive hearing nugatory.<sup>47</sup>

The Commission proposed retention of the current requirement in certain statutory judicial review regimes that an applicant, in order to appeal a refusal of a grant of leave, obtain a certificate from the High Court.<sup>48</sup>

With respect to time limits, the Commission stressed that the onus lies on the applicant to establish good reason to extend time and that lack of prejudice to a respondent should not, in and of itself, be sufficient to satisfy this onus. Instead the issue of prejudice should be regarded as one of a number of factors to be weighed up in deciding the question of an extension of time and where prejudice exists it should not, in itself, foreclose the possibility of an extension.<sup>49</sup> It further recommended that the six month time limit for an application for leave seeking *certiorari* should be abolished and replaced with a standard limit of six months (that which applied to other remedies in judicial review) which would remain subject to the requirement of promptness and open to the possibility of an extension where the court considers that there is good reason.<sup>50</sup> In the event, as indicated in Section 1.2 of this chapter, the 2011 rules amendments reduced the time limit for applications for leave generally to three months.

On the subject of costs, the Commission recommended that greater use should be made of the court’s discretion to apportion the costs of the leave stage to allow recovery of costs only in relation to those grounds successfully argued or challenged.<sup>51</sup> Where a successful judicial review application involved a respondent judge and where the error was made *bona fide* and the application was unopposed, the Commission recommended that costs, appropriately taxed, be awarded out of a central fund.<sup>52</sup> As indicated above, the 2011 amendments to the Rules of the Superior Courts preclude the naming of a judge as respondent in judicial review proceedings challenging his or her conduct of proceedings unless *mala fides* or other personal impropriety is alleged, and require that the other party to the original proceedings be named as respondent.

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43 Chapter 1, para. 1.54.

44 Chapter 1, para. 1.59.

45 Chapter 1, para. 1.67.

46 As stated in *Adam v Minister for Justice, Equality and Law Reform* [2001] 2 ILRM 452, 469 (per McGuinness J).

47 Chapter 1, paras 1.73 – 1.74.

48 Chapter 1, paras 1.90 – 1.91.

49 Chapter 1, paras 2.19 – 2.21.

50 Chapter 2, paras 2.44 – 2.45.

51 Chapter 3, paras. 3.10.

52 Chapter 3, paras. 3.20.

The Commission recommended that the court’s power to make a pre-emptive costs order<sup>53</sup> should be exercised only in exceptional circumstances and that, where any doubt exists, the court should instead simply indicate the approach to be taken in relation to costs at the conclusion of the judicial review proceedings.<sup>54</sup>

The Commission made a number of recommendations designed to reduce the number of contentious judicial review proceedings and expedite the management of cases at first instance and on appeal. Some of these recommendations have been addressed or overtaken by subsequent amendments to the rules of court or by changes in allocation and management of judicial resources. The Commission proposed that prior to the application for leave to apply for judicial review, the would-be applicant should be encouraged to send a letter to the opposing side informing them that failure to concede the claim within ten days will result in leave being sought to apply for judicial review. Failure to issue such a letter should be capable of being taken into account when determining costs, save where the failure is attributable to the fact that the making of the application for leave was a matter of justifiable or demonstrable urgency.<sup>55</sup>

While adopting a different approach, a new rule 1A subsequently incorporated into Order 99 RSC (Costs) facilitated the sending of a letter of offer made without prejudice save as to the issue of costs (known as a “Calderbank letter”) by defendants or respondents in cases other than claims for damages or debt, with a view to settling the proceedings, by providing that a court may, where it considers it just, have regard to the terms of the offer when awarding costs.

The High Court practice direction of the 23<sup>rd</sup> February 2012<sup>56</sup> further enabled a respondent who is offering or undertaking to consent to, or not to oppose, relief sought in proceedings under Article 40.4 of the Constitution or for judicial review, to furnish to an applicant a costs offer in a specific amount.<sup>57</sup> Where the applicant accepts the costs offer within the time specified in that offer for acceptance, or such extended time as the parties may agree, the parties may apply to the court, when making any order disposing of the proceedings, for an order awarding costs in the terms of the costs offer. Where the applicant does not within the time specified, or any extended time agreed, communicate to the respondent acceptance of that offer and the court grants the relief sought in the proceedings, the respondent may inform the court of the costs offer without disclosing the amount offered. Should the court measure the costs in an amount which does not exceed the amount specified in the costs offer, the respondent may apply to the court for an order awarding to the respondent against the applicant the costs of the proceedings subsequent to the date of expiry of the costs offer.

The Commission recommended that a minimum of three judges from the High Court be nominated by the President of the High Court to administer the judicial review list, with one judge to act as ‘lead judge’ with overall responsibility for the list and a minimum of two other judges available to hear cases from the judicial review list. If sufficient judges were not available, consideration should be given to the appointment of sufficient judges to enable this.<sup>58</sup>

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53 Viz. an order, in a case where the claim is based on the public interest, ensuring that a particular party will not be faced with an order for costs against him/her at the conclusion of the proceeding: see *Village Residents Association Ltd v An Bord Pleanála (No 2)* [2000] 4 IR 321.

54 Chapter 3, para. 3.38.

55 Chapter 4, para. 4.08.

56 HC 57.

57 Viz. one made not on a ‘without prejudice’ basis, to discharge the costs of the proceedings, or the costs of a specified part of the proceedings, in a specified amount, and on terms that in the event that (a) the offer is not being accepted within the time specified in the offer and (b) the sum measured by the court in respect of the costs concerned does not exceed the sum offered, the respondent may seek against the applicant the costs of the proceedings subsequent to the date of expiry of the costs offer.

58 Chapter 4, para. 4.15.

At the time of preparation of this report, nine of 40 High Court judges were permanently assigned to dealing with judicial review applications. By a High Court practice direction of the 2<sup>nd</sup> February 2018,<sup>59</sup> all applications for leave to apply for judicial review in respect of permissions or decisions concerning strategic infrastructure developments must be made to a single designated judge, who sits at 10.30am each Thursday during term to hear such applications. The applicant for leave must lodge all the necessary papers not later than 4.00pm on the preceding Monday. In the event of leave being granted, the judge concerned will give all necessary ancillary directions with a view to ensuring a fair, just and expeditious hearing of the matter. The Commission recommended that the rules of court should enable the general development of case management.<sup>60</sup> As detailed in Section 1.2 of this chapter, the 2011 amendments to Order 84 RSC made comprehensive provision for case management directions on the hearing of an application for leave directed to be on notice, or the application for judicial review itself.

With a view to reducing the length of court hearings, the Commission recommended that affidavits need not necessarily be read in open court and judges on the judicial review list should be permitted sufficient time to allow affidavits to be read in chambers.<sup>61</sup> While this recommendation was not adopted, reference has already been made in Section 1.2 of this chapter to the 2011 amendments enabling the court to dispense with the requirement for oral submissions – though not evidence – at the substantive hearing for judicial review.

The Commission recommended that in *ex parte* applications for leave, where the application is to be heard on a Monday, papers should, save in urgent applications, be filed by the preceding Wednesday, or otherwise two clear days in advance of the hearing and written legal submissions filed should be as succinct but as comprehensive as possible and should be filed in sufficient time to allow the court a real opportunity to consider their content.<sup>62</sup>

The Commission recommended the introduction of a *pro forma* timetable to operate where leave is granted, a statement of opposition to be filed within 28 days and any reply by the applicant filed within a further 28 days, these limits only to be extendable where there is good and sufficient reason, and failure to comply to be subject to costs sanctions.<sup>63</sup> Reference has been made in Section 1.2 of this chapter to the new time limits introduced by the 2011 amendments for conduct of the proceedings where leave has been granted.

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59 HC 74.

60 Chapter 4, para. 4.23.

61 Chapter 4, para. 4.28.

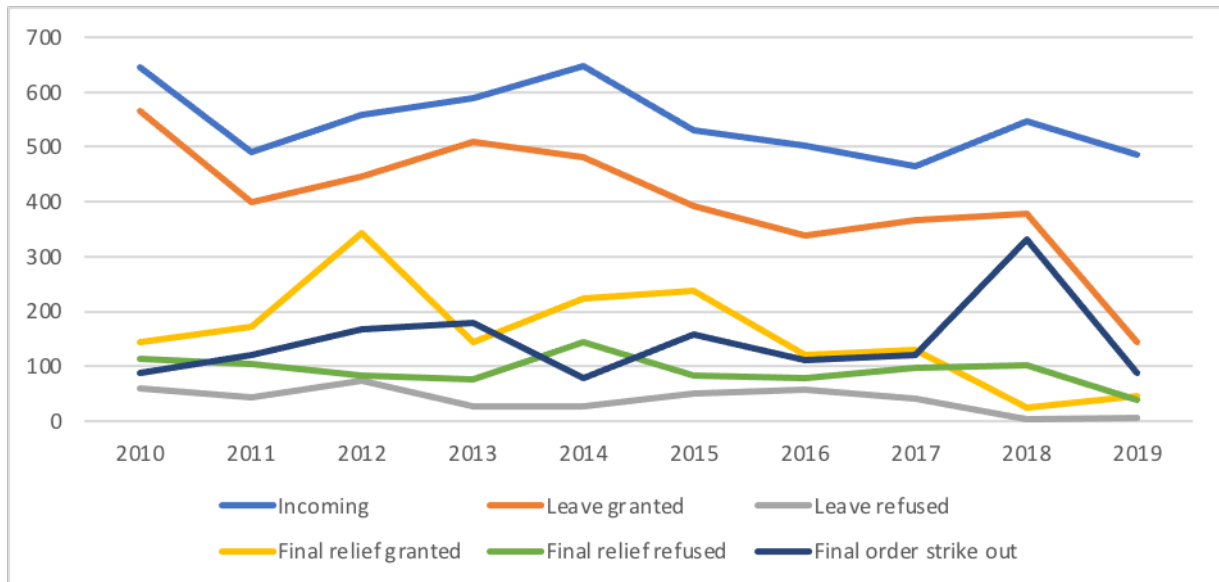
62 Chapter 4, paras. 4.35 - 4.36.

63 Chapter 4, para. 4.46.

### 3. Judicial review caseload

Charts 1 and 2 and the corresponding Tables 1 and 2 track the caseload and case-flow data, respectively, for judicial review proceedings for non-immigration related relief and immigration-related<sup>64</sup> relief over the past decade.

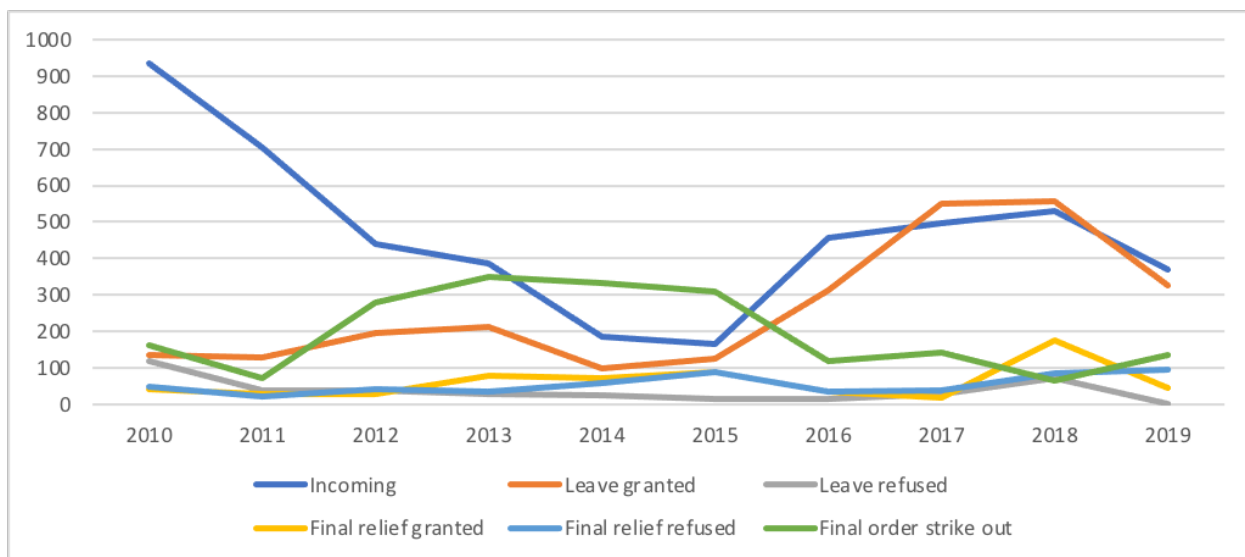
**Chart 1: Judicial review – non-immigration cases (Source: Courts Service Annual Reports)**



**Table 1 Judicial review – non-immigration cases (Source: Courts Service Annual Reports)**

Year	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
<b>Incoming</b>	645	490	558	588	648	529	502	464	546	485
<b>Leave granted</b>	566	400	447	510	481	392	339	367	379	143
<b>Leave refused</b>	59	44	73	28	27	51	57	42	3	6
<b>Final relief granted</b>	144	173	342	145	224	237	120	129	25	45
<b>Final relief refused</b>	113	104	83	75	144	83	79	97	102	39
<b>Final order strike out</b>	88	121	167	178	78	159	111	121	332	88

<sup>64</sup> Immigration-related judicial review proceedings, as referred to in this chapter, include judicial review proceedings in respect of asylum.

**Chart 2: Judicial review – immigration-related cases (Source: Courts Service Annual Reports)****Table 2 Judicial review – immigration-related cases (Source: Courts Service Annual Reports)**

Year	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
<b>Incoming</b>	936	703	440	385	187	164	458	497	530	368
<b>Leave granted</b>	135	129	195	213	98	124	314	551	556	325
<b>Leave refused</b>	120	40	40	29	24	14	15	30	73	1
<b>Final relief granted</b>	42	29	29	77	72	89	34	20	174	44
<b>Final relief refused</b>	49	21	41	35	58	87	36	37	85	97
<b>Final order strike out</b>	163	73	280	350	334	309	120	143	64	135

The data shows non-immigration related judicial review cases initiated as having reached their highest volumes in 2010 (645) and 2014 (648), with the trend moderating in the three years thereafter, and volume recovering to 546 in 2018 and reducing again to 485 in 2019. Immigration-related judicial review cases initiated saw a significant reduction in volume between 2010 (936) and 2015 (164) – 82% – with a significant and sustained increase (over 220 %) in the following three years to 530 in 2018, before reducing to 368 in 2019.

## 4. Responses to the consultation exercise and views expressed within the Review Group

A quite limited number of respondents addressed the area of judicial review in their submissions.

The Law Society submitted that, with a view to streamlining judicial review procedure -

- the procedure for applying for or resisting judicial review, including applying for ex parte relief, should be reviewed
- more rigorous case management, to include automatic directions variable only by court order, be employed and

- significantly increased resources should be allocated to the Courts Service to enable case management.

The Bar Council acknowledged that the manner in which the judicial review list currently operates is a drain on judicial resources but suggested that “in reality there is little enforcement” of the reforms introduced by the 2011 amendments to the rules of court on time limits and the content of statements and affidavits, and that proper enforcement of the rules, including affording less latitude to respondent bodies to file and deliver opposition papers, should reduce the number of unmeritorious claims.

The Department of Business, Enterprise and Innovation, IDA Ireland and Enterprise Ireland recommended that the Review Group consider introduction of improvements to efficiency – including implementation of procedural reforms already introduced – in the area of judicial review of planning, including strategic infrastructure, cases. In their proposals on the judicial review procedure generally, the Department of Business, Enterprise and Innovation, IDA Ireland and Enterprise Ireland recommended as follows -

- using written or “document only” reviews, rather than oral hearings, in commercial and planning cases where appropriate. They cited the 2011 reforms to Order 84 RSC as enabling a judge to exercise discretion as to whether an oral hearing is necessary or not in judicial review proceedings and suggested that proceedings could be expedited considerably if it was deemed that oral hearings are not required where the issues are procedural in nature. While state bodies can already indicate to the court their preference for written submissions only “further use and facilitation of this through digital platforms could greatly expedite decision making. The Review Group should consider whether “written only” procedures could be used to a greater extent in other areas, such as commercial cases.”
- noting that visibility on timeframes for the administration of justice are of key concern for many enterprises looking to invest or expand in the State, there should be early guidance to all parties on case management, likely timelines and the greatest possible transparency as to the likely scheduling and duration of proceedings, strict adherence by judges and parties to deadlines – with little tolerance for extensions and a defined and enforced limit on the number of adjournments permitted in a case – and more definitive requirements on judges to deliver their judgements in reasonable timeframes
- strengthening of the pre-hearing process by narrowing down the issues under discussion to those that are most relevant in order to make earlier progress where possible
- use of electronic methods of communications including e-litigation, with reports such as age of pending cases reports and single-case progress reports, being available digitally and online as appropriate, and replication at appellate level of those accelerated procedures introduced at first instance to allow more efficient decision making by courts, to avoid “shifting the ‘bottleneck’ to the appeals process from the decision making process”.

With particular regard to judicial review in planning and environmental cases, the last mentioned respondents acknowledged that the assignment in February 2018 to a specific judge exclusively of applications for leave in respect of permissions or decisions concerning strategic infrastructure developments may help speed up judicial reviews in such cases, but commented that certain issues needed to be addressed, some of which arose from legislative constraints.

Noting that “[t]he usability and efficiency of Ireland’s planning system, and its judicial aspects, have become an area of reputational risk for the state in its efforts to attract significant overseas investors and employers to expand their operations in the jurisdiction”, the last mentioned respondents asked that consideration be given to the following measures -

- appointment of more judges to deal with planning and environmental judicial reviews, and the enabling and resourcing of a specialist Planning and Environmental law division in the High Court – while acknowledging that this would require further appointments of judges at appellate level



- reduction to four weeks of the eight-week time limit for bringing of an application for leave to seek judicial review under the 2000 Act – while preserving judicial discretion to extend that time limit in certain circumstances
- tightening of the rules concerning who may challenge a planning decision without compromising Aarhus Convention requirements, including -
  - a requirement that a person must have previously participated in the planning process before they can seek a judicial review of the decision resulting from that process
  - limiting of the class of persons having *locus standi* to those who are “directly affected” by a proposed development test instead of the current “sufficient interest” requirement
  - prescription by legislation of the criteria a group must meet to be defined as an “environmental association” under EU legislation, “so as to preserve the integrity and credibility of groups who seek to make legitimate interventions in such matters under this provision”
  - introduction of statutory caps on the legal costs an unsuccessful individual litigant in a judicial review of a planning matter can be obliged to pay and on the amount they can recover if successful, with a view to deterring frivolous or unsound objections being made
- application of the abovementioned accelerated procedures to all other consent or licencing requirements, such as industrial emissions and waste licences authorised by the Environmental Protection Agency and challenges to procurement decisions affecting significant infrastructure projects.

The Commission for Communications Regulation (“ComReg”) expressed an interest, *inter alia*, in statutory appeals, enforcement procedures and judicial review, and indicated its view that the procedures for these remedies should be “accountable, expeditious, consistent, informed and transparent”. In terms of specific proposals, ComReg indicated that it had an “extremely positive” experience of case management in the Competition and Commercial Lists of the High Court and would welcome the extension of case management, in particular, “clear timetables, appropriate directions, exchange of witness statements, active case management and efficient timetables to get to hearing”.

Transport Infrastructure Ireland (“TII”) made submissions on the judicial review procedure as it affected planning and public procurement processes.

In relation to *judicial review in planning matters*, TII stated that it had noted a significant increase in recent years in judicial review proceedings challenging consents and decisions relating to strategic infrastructure proposals, particularly by individual applicants, corresponding to legislative changes to, *inter alia*, costs and standing requirements made with a view to ensuring compliance with the Aarhus Convention and related EU legislation, but which in TII’s view went “beyond that required and, potentially, not in keeping with the spirit of Aarhus”.

TII suggested, in particular, that the current Irish requirements “fail to recognise the important role the Aarhus Convention accords environmental Non-Government Organisations (“eNGOs”) in focussing and channelling environmental disputes” and cited the view expressed by Advocate General Sharpston in her Opinion in the *Djurgården* case<sup>65</sup> that the authors of the Convention and Aarhus Directive attempted “to steer a middle course between the maximalist approach of the *actio popularis* and the minimalist idea of a right of individual action available only to parties having a direct interest at stake. Giving special standing to non-governmental organisations reconciles these two positions.”<sup>66</sup> TII contended that to reflect the importance of the role of eNGOs in focussing and channelling environmental disputes, Ireland’s rules on access to judicial review in this area should be altered along the following lines -

- the rules regarding locus standi of individuals should be tightened to encourage litigation of environmental decision-making being focussed through eNGOs

65 Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967.

66 Opinion of AG Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms Kommun genom dess Marknämnd* [2009] ECR I-09967 (at para. 63).

- the definition of eNGO should be altered to ensure that organisations acquiring automatic standing rights are genuinely concerned with protection of the environment and comply with requirements in relation to: membership; the length of time that such organisations must have existed for; the pursuit of an organisation’s aims or objectives being otherwise than for profit; the possession of a specified legal personality and of a constitution or rules; and the relevance of the eNGO’s environmental protection aims or objectives to the decision the subject of challenge
- the Irish rules should be altered to allow the award of reasonable costs against unsuccessful individual applicants, as allowed under Article 3(8) of the Aarhus Convention. It might be appropriate that eNGOs could continue to avail of the current special cost rules, whilst eNGO applicants might not. If the special costs rules were altered, it might be appropriate to introduce a counter-balancing measure by making legal aid available to environmental NGOs
- consideration should be given to amending section 50A(2)(a) of the Planning and Development Act 2000,<sup>67</sup> which removed the requirement for notice of an application for leave, to restore the previous position that application for leave be on notice, with a view to “weeding out unmeritorious claims when the “chilling” effect of costs rules is removed.

In relation to *judicial review in public procurement matters*, TII made the following points –

- there are not enough judges available to try cases promptly, suggesting that, even in the Commercial List of the High Court it takes nine months or more for a trial: the State should accordingly appoint more judges to address this
- there is a need for greater active case management in procurement cases, and for more judges for this purpose. In procurement challenges much of challengers’ cases comprise “makeweight allegations”, and stronger case management is required to test the substance and merit of challenges at an early stage
- more case management is also required to reduce the use of discovery and avoid the discovery process becoming costly and wasteful, with most discovered documents currently being irrelevant to the issues being tried
- there is a need for a Commercial List in the Court of Appeal.

The Chief State Solicitor’s Office (CSSO) expressed the view that the leave requirement was not operating as an effective barrier to ill-founded or poorly pleaded cases being admitted and that the threshold to obtain leave – viz. establishment of an “arguable case” on the applicant’s part<sup>68</sup> – “seems extremely easy to satisfy in practice”. The CSSO suggested that this increases the overall judicial review caseload and has a significant “knock-on” impact in terms of costs to the State in defending such actions. The CSSO would welcome the exploration of an alternative filtering mechanism to reduce the volume of judicial review litigation.

The CSSO submitted that the problem is particularly acute in Immigration and Asylum Judicial Review cases – where the leave application is no longer required to be on notice – notwithstanding that the threshold for leave (“substantial grounds” rather than merely an “arguable case”) is ostensibly higher. It suggested that in such cases “there is now no effective filter mechanism”. It contended that by virtue of a practice which had evolved since September 2017 whereby -

- leave applications were heard *ex parte* with no written submissions
- any grant of leave would be without prejudice to the determination at the substantive stage of any point that could have been contended for by a respondent at the leave stage
- if leave were granted on that basis and a respondent had sought to make oral submissions at the leave stage, the costs of the leave application may be awarded to the applicant and
- respondents are expressly invited to consider whether to postpone any such submission to the substantive stage,

67 As inserted by section 32 of the Planning and Development (Amendment) Act, 2010.

68 *G. v. DPP* [1994] 1 IR 374.

leave was effectively being granted in all immigration and asylum cases with a resulting significant increase in the number of cases to be defended by the State, with associated costs, both direct and indirect, in terms of allocation of resources.

Since the CSSO's submission, a new practice direction of the 17<sup>th</sup> December 2018<sup>69</sup> provides that “[i]n order to give effect to the duty of candour to the court resting on all legal representatives, every *ex parte* application ... shall be accompanied by a written legal submission on behalf of the Applicant”,<sup>70</sup> and makes detailed provision as to the content of such submissions.

A lay respondent concerned with statutory judicial review regimes in the area of planning and environmental law criticised the time limits, notice requirements and higher threshold for granting of leave in such regimes as impeding access to justice, expressed concern at the possibility that referral of such cases to the Commercial Court for “fast-tracking” placed an unfair burden on lay applicants for judicial review and criticised the test of irrationality, as formulated by the Supreme Court in *O’Keeffe v an Bord Pleanála*,<sup>71</sup> employed to determine whether a decision-maker had erred in exercising jurisdiction.

A detailed case was made by Ms Justice Irvine, on behalf of the judges of the Court of Appeal for abolition of the requirement for an application for leave to apply, on the basis that the sheer volume and complexity of applications for leave, coupled with the low threshold for the granting of leave set by the Supreme Court’s decision in *G. v. DPP* referred to earlier in this Section – viz. the existence of an arguable case – placed the judge hearing the leave application in an “impossible predicament” in seeking to conduct an effective filtering exercise at the leave stage. Judge Irvine commented:

“The reality is that the leave requirement adds little or nothing to modern judicial review practice, save perhaps that it represents a burden on the judicial system and adds to costs. It can only act as a true filtering device with a great deal more judicial time and effort, notice to the respondents and a higher threshold for leave. But this system has already been tried in planning cases and it simply did not work.”

Judge Irvine noted that the leave requirement had been abolished in public procurement review applications without complaint and suggested that, while a special strike out facility (where a claim was manifestly untenable or otherwise doomed to fail) might serve as an early filtering system, this would still not justify retention of the current leave requirement. Judge Irvine also pointed to the benefit of abolition in eliminating appeals to the Court of Appeal against refusal of leave and the added delay which currently arises where a refusal of leave is reversed on appeal.

The Attorney General’s Office posed two questions as meriting consideration in relation to judicial review in its submission, viz.:

- should judicial review and the remedies it leads to have a statutory basis?
- is there too great a readiness on the High Court’s part to grant leave for judicial review?

but did not offer views on those issues.

## 5. Issues for consideration and recommendations

### 5.1 The requirement for leave to apply for judicial review

Consideration was given by the Review Group to the merits of abolishing the need for leave to apply for judicial review altogether and simply permitting the commencement of such proceedings by an initiating

69 HC81.

70 *Ibid.*, para. 7(1).

71 [1993] 1 IR 39. In *O’Keeffe*, Finlay CJ stated (at page 72):

“in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally ... so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision.”

document. It would then be up to the respondents to apply to make a preliminary application to strike out the proceedings if they felt they had a basis for so doing, whether by recourse to the High Court’s inherent jurisdiction to strike out frivolous or vexatious claims or to its powers under Order 19, rule 28 RSC to stay or dismiss proceedings on the ground that the pleadings disclose no reasonable cause of action or that the proceedings are frivolous or vexatious. This procedure was not considered by the Review Group to be likely to bring about greater efficiencies or savings in cost because of the high level of proof required on an application to strike out. The Law Reform Commission, in considering this aspect in its 2004 Report, noted that the jurisdiction under Order 19, rule 28 RSC may be invoked only in circumstances where there is no dispute as to issues of fact and commented:

“[g]iven the reasoning behind this restrictive approach, serious doubts must exist as to the merits of relying on the High Court’s inherent jurisdiction to perform adequately the function of the current leave stage.”<sup>72</sup>

The Review Group also felt that given the nature of judicial review and the circumstances in which it falls to be used it was desirable that the court should exercise a supervisory jurisdiction over such applications from the outset.

Thus, the Review Group recommends that the obligation to obtain leave in order to commence judicial review proceedings should be maintained. However, it is of the view that the current threshold of proof which has to be achieved is altogether too low.

## 5.2 The threshold for granting of leave

Since the unified judicial review procedure was introduced in 1986 there has been an enormous growth in this type of litigation, although – as indicated in Chart 1 and Table 1 – the volume of incoming non-immigration-related cases had reduced in the years 2015 to 2019 from its peak in 2014 of 648 to 485 in 2019, with the exception of an increase to 546 in 2018.

Order 84, rule 20 RSC requires that leave of the High Court be obtained in order to bring judicial review proceedings. This procedure is supposed to provide a filter or barrier to ensure that ill-founded cases are not permitted to be commenced. A broad comparison over the years 2010 to 2019 of the annual volume of non-immigration related cases in which final relief was granted (as opposed to being refused or struck out) with the number of cases initiated in each year would indicate a success rate of roughly 29 %. Although significant variations are to be observed in certain years during that period in the ratio of successful cases to incoming cases, the average ratio would nonetheless suggest that the filter falls short in performing its function effectively.

The threshold requirement to obtain leave to commence judicial review as set by the decision of the Supreme Court in *G. v. DPP*<sup>73</sup> mentioned in Section 4 of this chapter – which makes clear that all that an applicant must demonstrate in order to obtain leave is the existence of an arguable case – is a very low threshold which can be surmounted with relative ease by the vast majority of applicants for leave. Once leave is granted this has a significant knock-on impact in costs to the respondents. In the majority of cases the State in some manifestation or another is the respondent.

The Review Group is of the view that the current position concerning the entitlement to commence judicial review proceedings is unsatisfactory and wasteful of time and money.

The Oireachtas sought to address this problem for specific types of judicial review. The best known examples of such are to be found in the planning and development legislation and in the immigration legislation. In these and other instances the Oireachtas has imposed the requirement that leave to bring judicial review proceedings should not be granted unless the High Court is satisfied that there are “substantial grounds” for contending that the impugned decision is invalid or ought to be quashed. That

72 Chapter 1, para. 1.13 of the 2004 Report.

73 [1994] 1 IR 374.

statutory test has been considered on a number of occasions, with some disparity of judicial opinion being evident. The high watermark appears to have been the decision of Smyth J. in *FP. v. Minister for Justice, Equality and Law Reform*,<sup>74</sup> who regarded the statutory language<sup>75</sup> as requiring the demonstration of “a strong case which was likely to succeed”.<sup>76</sup> Other courts and judges have taken the view that the statutory language only required that a substantial issue be raised, in other words that the points at issue were neither trivial nor tenuous and that there was real substance in the argument that was being advanced.<sup>77</sup>

Whilst the legislation has certainly raised the bar insofar as the threshold of proof is concerned it does not appear to have had much success in operating as a filter to exclude weak cases.

A modification of the threshold of proof for an application for leave in non-statutory judicial review proceedings is one that goes beyond a matter of pleading, practice and procedure such as would fall within the remit of the Superior Courts Rules Committee. The Review Group is therefore of the view that primary legislation will be required in order to prescribe a new level of proof that has to be achieved by an applicant in order to obtain leave to apply. It is of the opinion that such legislation should not merely prescribe that an applicant must demonstrate substantial grounds but must also prove to the satisfaction of the court that the claim has a reasonable prospect of success. Consideration should also be given to incorporating the latter criterion into statutory judicial review remedies.

### 5.3 *Locus standi*

Currently, the applicant for non-statutory judicial review must establish that they have a “sufficient interest in the matter to which the application relates”.<sup>78</sup> The Review Group recommends that all applicants for judicial review must be required to demonstrate that they have a substantial interest in the subject matter of the decision that is challenged. This would be in accord with what has already been prescribed in a number of the statutory provisions governing judicial review.<sup>79</sup>

### 5.4 Alternative remedies

The Review Group is also of the view that provision should be made in primary legislation to the effect that parties should not be entitled to seek judicial review due to an alleged deficiency falling within any of the following categories -

1. clerical or typographical errors in that tribunal’s or court’s determination or order,
2. unintentional slips or omissions in the determination or order, and
3. text, or an omission of text, which has the effect that the determination or order as issued does not on its face accurately express the determination or order which the tribunal or court had intended to make,

unless they can show that they had previously applied to the tribunal or court at first instance for rectification of the deficiency concerned, and had wrongly been refused that relief.

This should be supplemented by a provision conferring a jurisdiction on the High Court, residually, to require an applicant for judicial review to apply to the tribunal or court at first instance to rectify a deficiency of the kind enumerated above, where it was satisfied that such recourse would be an adequate alternative to granting judicial review.

74 [2002] 1 ILRM 16.

75 Section 5(2)(b) of the Illegal Immigrants (Trafficking) Act, 2000.

76 citing (at page 36) Keene J. in *R.-v-Cotswold District Council Ex Parte Barrington Parish Council* 75 P. and C.R. 515 at p.530.

77 See, e.g. *McNamara v An Bord Pleanála* [1995] 2 ILRM 125.

78 Order 84, rule 20(5) RSC.

79 See Section 1.3 of this chapter.

## 5.5 Measures to address delay and inefficiency

### 5.5.1 Meeting the time limit for the application for leave

A divergence of views exists in the jurisprudence on the question of when time is to be regarded as having ceased to run for the purpose of the period (three months, subject to extension) within which an application for leave is to be made. On one view, the filing of the application for leave in the Central Office causes time to stop running both in the case of non-statutory<sup>80</sup> and statutory judicial review.<sup>81</sup> However, an alternative view has been expressed – at least in relation to statutory judicial review<sup>82</sup> – that the application for leave must be moved in court within the time limit for applying.

Irrespective of the merits of these differing interpretations of the law, a perception that an application must be moved in court in order to meet the time limit has, the Review Group understands, proved cumbersome, stressful and inconvenient for practitioners and judges alike, in that parties have felt obliged to arrange for a hearing before a judge at short notice in order to avoid exceeding the time limit.

This difficulty could be resolved by amending Part V of Order 84 RSC to replace the requirement that the application for leave be made within three months with provision that the *ex parte* motion papers be filed within three months, and further provide that the application be listed before the Court in the next available *ex parte* List for such applications.

### 5.5.2 “Unless” orders

In general, the procedure which is prescribed by the rules of court subsequent to leave being granted is considered to work reasonably well. Directions are given by the court at the time leave is granted and these can be reviewed on an interlocutory basis. It is however noted that in many instances time limits directed by the court are not observed thus giving rise to avoidable delays. In not a few instances parties were forced to comply with time limits only by the utilisation of “unless” orders.<sup>83</sup> In many instances the mere awarding of costs produced little by way of result. The Review Group would recommend a greater use of “unless” orders in such circumstances with a view to ensuring that judicial review applications are disposed of in a timely fashion.

### 5.5.3 Preparation for the substantive hearing

The amendments introduced in 2011 to reform the non-statutory judicial review procedure included a requirement that, where leave has been granted, the parties exchange submissions before the initial return date of the motion for the substantive hearing. This is, the Review Group understands, ignored in practice. The Review Group considers that a relatively short period should be afforded until the first return date, after which the case would be remitted to the Judge’s List, involving a six weeks’ adjournment for lodgment and delivery of opposition papers and then one further adjournment of two weeks. If after that period opposition papers have not been filed the case should be remitted to the Judge’s List for further measures, as appropriate. Once pleadings are closed, the case should be given the next available date for hearing. Submissions would then require to be delivered – normally within two weeks for the applicant and two further weeks for the respondent. Time for submissions should start in effect on the closing of pleadings.

The Review Group recommends that consideration be given to amending Part V of Order 84 RSC to introduce a similar sequencing of the preparatory steps, coupled with listing arrangements to oversee compliance therewith.

The Review Group noted the submission by the Department of Business, Enterprise and Innovation, IDA Ireland and Enterprise Ireland that greater expedition could be secured by the use of written or “document only” reviews, rather than oral hearings, in commercial and planning cases where appropriate. The

80 *Burke v Minister for Justice and Equality* [2015] IEHC 614.

81 *McCreesh v. An Bord Pleanála* [2016] IEHC; *O.M.A. (Sierra Leone) v The Refugee Appeals Tribunal* [2018] IEHC 370.

82 *McDonnell v An Bord Pleanála & Anor* [2017] IEHC 366.

83 An “unless” order is an order containing a direction that, unless a party concerned takes a step with a period of time specified in the order, the party shall, without the need for a further application to the court, suffer a sanction (e.g. dismissal of their claim, or liability for costs).

2011 amendments to Order 84 RSC facilitate the court in dispensing with oral submissions in favour of reliance on written submissions, and scope undoubtedly exists to expand the use of this facility. However, this innovation is not to be understood as displacing entirely the need for an oral hearing. Indeed, the Constitutional requirement that justice be administered in public save in such special and limited cases as may be prescribed by law<sup>84</sup> would seem to preclude entirely paper-based adjudications, at least in the absence of a means of opening all documentation concerned, and the adjudication itself, to the public.

#### 5.5.4 Pleadings

The 2011 amendments also, the Review Group understands, encouraged a certain amount of prolixity in pleading by requiring the statement of grounds to set out all material facts, but without specifying a structure within which this was to be done. A practice has developed of including this material under the statement of grounds for the application, which results in an unwieldy number of legal grounds. The 2011 procedure also resulted in grounding affidavits becoming shorter – in some cases formalistic – verifications of the statement of grounds. The Review Group recommends that there be a specific heading for facts in the statement and that the grounding affidavit should set out those facts in a narrative manner.

The Review Group understands that the 2011 amendments have also led to prolixity in statements of opposition, by precluding the possibility of a statement containing a general traverse. It was represented to the Review Group that a general traverse should be acceptable where no specific new facts or matters are being alleged by the respondents, and that the statement of opposition address any material facts or issues disputed and incorporate any matters positively relied on, such as time, discretion, or alternative remedies. An affidavit verifying a statement of opposition should only be necessary if there is a distinct plea as to a new fact that is not otherwise in evidence. The Review Group recommends that the relevant rule of court – Order 84, rule 22(5) and (6) RSC – be revisited with a view to incorporating these suggestions.

#### 5.5.5 Appeals

##### 5.5.5.1 “Leapfrog” appeals

It has been represented to the Review Group that, even though a respondent to an appeal from the High Court to the Court of Appeal in judicial review proceedings may see such significance to an appeal as to consider that it merited determination by the Supreme Court, it is not open to the respondent – unlike the appellant – to have the appeal adopted by the Supreme Court, the “leapfrog” procedure being confined to cases where the appellant seeks to invoke it. It has been suggested that the current restriction is open to abuse by appellants. The Review Group recommends that this shortcoming be addressed in primary legislation.

##### 5.5.5.2 Statutory requirements for a certificate for leave to appeal

It has also been represented to the Review Group that the requirement in various statutory judicial review regimes for a certificate from the High Court to obtain leave to appeal made sense where only one appellate instance was available in respect of a High Court decision, but makes less sense now that two appellate tiers exist. It has been pointed out that the effect of granting a certificate may be to delay proceedings by two years in many cases, with the prospect of a further appeal to the Supreme Court.

It has been suggested that, where expedition is a particular requirement of legislative policy, as in the case of immigration and environmental planning cases, the solution would be to legislate for one appeal only, by providing – as would be required constitutionally – that the High Court determination in such cases is final subject only to leave to appeal to the Supreme Court.

### 5.6. Statutory applications for judicial review

As will appear from Section 4 of this chapter, the submissions made to the Review Group disclosed some dissatisfaction within the State sector with the manner in which statutory judicial review regimes, in particular in the area of planning and environmental matters, have been framed – despite successive legislative amendments which have sought to ensure the legislation operates effectively and in a manner

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84 Article 34.1 of the Constitution.

compatible with EU law. Concerns were expressed variously regarding: *locus standi* and the broad definition of entitlement to invoke the judicial review remedy; access to that remedy not being limited to persons who have previously participated in the planning process; the time limit of eight weeks for bringing of the application for leave; the limited exposure which unsuccessful applicants have to liability for costs; and the removal of the notice requirement for the application for leave.

On the other hand, concern was expressed by a lay respondent that the requirements to be met by applicants for leave in planning and environmental matters as currently framed impede access to justice by individual applicants.

Some of the recommendations made from within the State sector present discrete issues of interpretation of EU law and the Aarhus Convention.

In this regard, the Review Group notes that the Department of Housing, Planning and Local Government published a General Scheme of a Housing and Planning and Development Bill 2019 in December last. The General Scheme provides, *inter alia*, for

- amendment of the requirements as to locus standi of an applicant for leave to bring judicial review in this area – including requirements concerning the nature of the applicant’s interest, prior participation in the planning process and the conditions to be met by an NGO in order to enjoy “automatic standing rights”<sup>85</sup> and
- replacement of the existing special legal costs rules in section 50B(2) of the 2000 Act.<sup>86</sup>

The Review Group notes that the Department invited public submissions on the General Scheme and in light of this does not consider it necessary or appropriate to make any recommendations in respect of the judicial review procedure under sections 50 to 50B of the 2000 Act.

Non-EU law related statutory judicial review remedies which modify the Order 84 RSC procedure derive from national policy considerations associated with the particular statutory regime concerned. Such issues of interpretation and/or policy are not ones which can be resolved in a general review of the administration of civil justice, and the question as to whether statutory judicial review mechanisms should be further refined is one for the Executive to consider having regard to the particular policy underpinning the review mechanism concerned.

However, those recommendations of the Review Group directed to enhancing the procedural efficiency of the common law judicial review remedy – in particular the timetable for preparation of the proceedings for trial post a grant of leave, the recommendations as to pleading content and the use of “unless” orders – have relevance and potential for application to statutory judicial review regimes.

## 5.7 Summary of recommendations

### 5.7.1

Applications for judicial review should continue to require leave of the High Court before they can be commenced.

### 5.7.2

Primary legislation should be introduced which will prescribe that leave to commence judicial review proceedings should not be granted unless the court is satisfied that there are substantial grounds for contending:

- (i) in the case of *certiorari*, that the impugned decision is invalid or ought to be quashed; and
- (ii) in the case of reliefs other than *certiorari*, that such reliefs should be granted.

<sup>85</sup> Head 4 of the General Scheme.

<sup>86</sup> Head 6 of the General Scheme.



### 5.7.3

In addition, leave should not be granted unless the court is also satisfied that the claim has a reasonable prospect of success at trial. Consideration should also be given to incorporating the latter criterion into statutory judicial review remedies.

### 5.7.4

Save in cases in which primary legislation has, as a matter of policy, set less stringent criteria, leave should not be granted unless an applicant is able to demonstrate a substantial interest in the subject matter of the decision which is challenged.

### 5.7.5

Primary legislation should also prescribe that judicial review may not be sought in respect of an alleged deficiency falling within any of the following categories:

- Clerical or typographical errors in the decision, order or determination which is sought to be quashed or in material relied on in making such decision, order or determination;
- Unintentional slips or omissions in the decision, order or determination or in material relied on in making such decision, order or determination; and
- Text, or an omission of text, which has the effect that the decision, determination or order as issued does not on its face accurately express the determination or order which the decision-maker, tribunal or court had intended to make,

unless it can be shown that the applicant had previously applied to the decision-maker, tribunal or court for rectification of the deficiency concerned and had wrongly been refused that relief.

### 5.7.6

Primary legislation should confer a jurisdiction on the High Court, residually, to require an applicant for judicial review to apply to the tribunal or body or court at first instance to rectify the deficiency of the kind enumerated above where satisfied that such recourse would be an adequate alternative to granting judicial review. Correspondingly, the primary legislation underpinning adjudicative or decision-making regimes in the administrative law field should expressly confer a general jurisdiction on the decision-makers and tribunals concerned to re-open decisions to correct errors of the type referred to.

### 5.7.7

Part V of Order 84 RSC should be amended to replace the requirement that the application for leave be made within three months with provision that the *ex parte* motion papers be filed within three months, and further provide that the application be listed before the Court in the next available *ex parte* List for such applications.

### 5.7.8

Rules of Court should be introduced to tighten up the post-leave procedures so as to ensure a speedy trial of the judicial review application. This could include provisions with cost consequences including a greater use of wasted cost orders for failure to adhere to time limits fixed by the court, subject to any limitation on liability for costs in statutory judicial review proceedings imposed by statute or EU Law (e.g. Article 11(4) of Directive 2011/92 of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment and Article 9(4) of the Aarhus Convention).

### 5.7.9

There should be a greater use of “unless” orders with a view to ensuring that judicial review applications are disposed of in a timely fashion.

### 5.7.10

Part V of Order 84 RSC should be amended to introduce a sequencing of the preparatory steps to a hearing, involving a relatively short period until the first return date and remittal to the Judge's List, six weeks to be afforded in that List for lodgment and delivery of opposition papers and then one further adjournment of two weeks. Should opposition papers not have been filed by the end of that period, the case should be remitted to the Judge's List for further measures, as appropriate. Once pleadings are closed, the case should be given the next available date for hearing. The applicant would be afforded two weeks for his/her submissions and the respondent two further weeks. Time for submissions should start in effect on the closing of the pleadings.

### 5.7.11

The statement of grounds required in an application for leave to apply for judicial review should contain a specific heading for facts alleged and the grounding affidavit should set out those facts in a narrative manner.

### 5.7.12

The rule of court precluding a general traverse in the statement of opposition should be amended to allow this where no specific new facts or matters are being alleged by the respondents, and the statement of opposition should require to address any material facts or issues disputed and incorporate any matters positively relied on, such as time, discretion, or alternative remedies.

### 5.7.13

An affidavit verifying a statement of opposition should only be necessary if there is a distinct plea as to a new fact that is not otherwise in evidence.

### 5.7.14

With a view to reducing unnecessary delay in the ultimate disposal of judicial review proceedings subject to appeal, provision should be made in primary legislation to enable a respondent to an appeal to the Court of Appeal against a High Court decision in judicial review proceedings to apply to the Supreme Court to adopt that appeal under its appellate jurisdiction under the 33<sup>rd</sup> Amendment to the Constitution.

### 5.7.15

The Law Reform Commission's recommendation in its 2004 Report that the remedy of *quo warranto* be abolished as being obsolescent and adequately replaced by the declaratory remedy should be implemented.



# CHAPTER 8

## MULTI-PARTY LITIGATION



# 1. Introduction

## 1.1 Background

The Law Reform Commission's Second Programme of Law Reform for 2000 to 2007 had committed it to examining the law relating to class actions and representative actions taken in the public interest,<sup>1</sup> the objective of which was to "formulate recommendations for reform of the current procedures governing one form of multi-party litigation, namely, cases involving multiple plaintiffs with similar claims against the same defendant or defendants."<sup>2</sup>

In its Consultation Paper on Multi-Party Litigation (Class Actions) of 2003<sup>3</sup> ("LRC Consultation Paper"), the Law Reform Commission observed that "the Irish legal system lacks a comprehensive procedure that would tackle multi-party actions in a consistent, effective and expeditious manner"<sup>4</sup> and confirmed this view in its subsequent Report of September 2005 ("the LRC Report"). The Law Reform Commission's recommendations will be considered in detail in Section 4 of this chapter.

When launching the LRC Consultation Paper, the then Minister for Justice, Equality and Law Reform was quoted as indicating that the Government would be slow to agree to the idea of a class action procedure because of the serious implications it could have for the Exchequer, stating that the State was likely to be the main object of claimants, as Ireland "did not have the 'vastly wealthy multinationals' who were trading in a way that exposed themselves to the Irish consumer".<sup>5</sup>

The LRC Consultation Paper of 2003 was followed by a consultation exercise and further research, leading to the publication of the LRC Report.

In recent years, views advocating the introduction of a class action procedure in Ireland have received greater publicity in the face of developments such as the De Puy hip replacement litigation, the Pyrite damage litigation and the tracker mortgage controversy. A Multi-Party Actions Bill 2017, largely – though not entirely – similar in content to draft rules of court to regulate multi-party actions appended to the LRC report,<sup>6</sup> was introduced as a Private Members Bill in late 2017, the General Scheme of the Bill being referred to the Joint Oireachtas Committee on Justice and Equality in November 2017 and considered by that Committee on the 21<sup>st</sup> February 2018.

The Official Report of the public session of the Joint Committee at which the General Scheme of the Bill was discussed and evidence from witnesses heard thereon is available at: [https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint\\_committee\\_on\\_justice\\_and\\_equality/2018-02-21/debate/mul@/main.pdf](https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint_committee_on_justice_and_equality/2018-02-21/debate/mul@/main.pdf)

In indicating the Government's concerns regarding and opposition to the Bill at Second Stage in Dáil Éireann on the 14<sup>th</sup> November 2017, it was stated on behalf of the Minister for Justice and Equality that the Minister with the Government's agreement would be referring the question of the introduction of a multi-party action procedure in the Irish legal system to the Review Group for consideration.<sup>7</sup>

## 1.2 Developments since the LRC Report

The LRC Consultation Paper and LRC Report have, quite properly, served as the main reference points for the Review Group in its consideration of Multi-Party Litigation procedures, and the Review Group is greatly indebted to the Law Reform Commission for its thorough evaluation of and recommendations on

1 Part 2, para. 3 under the heading "The Legal System" in the Second Programme.

2 Para. 1 of the LRC Consultation Paper.

3 LRC CP 25-2003.

4 Ibid., Introduction, para. 2.

5 "McDowell cool on new class actions legislation here", Irish Independent July 30 2003:

<https://www.independent.ie/irish-news/mcdowell-cool-on-new-class-actions-legislation-here-25941007.html>

6 LRC 76-2005.

7 The statement made on behalf of the Minister is available at: <http://www.justice.ie/en/JELR/Pages/SP17000386>

the subject. However, a number of considerations justify a fresh evaluation – albeit one building on the foundations the Commission has laid.

Firstly, developments have taken place since publication of the LRC Report in some of the multi-party action procedures of the jurisdictions considered by the Commission, and at EU level, which require attention. In the United States, the Class Action Fairness Act of 2005 introduced measures to counter various deficiencies in and abuses of the class action procedure in that jurisdiction. The US Federal court rules regulating class actions have undergone a series of amendments to streamline, lend clarity to and also address risks of abuse of the class action procedure. The Australian Law Reform Commission at the end of 2018 published a wide-ranging evaluation of the Federal Court of Australia’s class action procedure and third party funding arrangements.<sup>8</sup> In Canada, in July 2019 the Law Commission of Ontario published its long-awaited comprehensive assessment of the operation of the Class Proceedings Act, 1992 since its introduction.<sup>9</sup> In England and Wales, the Consumer Rights Act 2015 amended competition law to create a class action procedure with an “opt out” requirement along US lines in the form of collective proceedings in the Competition Appeal Tribunal.

At EU level, the European Commission issued a Recommendation in 2013 on common principles for injunctive and compensatory collective redress mechanisms for violations of EU law rights, and a proposed Directive on representative actions for the protection of the collective interests of consumers and proposed Regulation on promoting fairness and transparency for business users of online intermediation services are in course of being finalised.

Secondly, certain issues considered by the Commission left open the approach to be taken – in particular the question of multi-party litigation funding arrangements.<sup>10</sup> Others, such as the merits of whether a new multi-party action procedure needs to be based in statute as opposed to the Commission’s preference for rules of court<sup>11</sup> require further consideration in view of the recently proposed alternative of a statute-based solution.

## 2. Current procedures facilitating collective remedies

Court procedural and statutory regimes in Ireland currently offer a number of possibilities for the pursuit of civil rights of action having common features by, on behalf or for the benefit of a group or category of individuals – either by means of the same action or of separate actions tried in conjunction with each other. A survey of those regimes, and their utility and shortcomings, should assist in understanding -

- (a) how much of a procedural deficit in securing collective access to justice currently exists in this jurisdiction and
- (b) how any such deficit would most effectively be addressed.

To facilitate reference back to the LRC Report, use is made here of certain terms employed in that report to describe those types of proceeding, viz. “private actions” (these being multi-party actions in the stricter sense), “public actions” and “organisation actions”.

8 “Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders”, ALRC Report 134 (December 2018), available at: [https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc\\_report\\_134\\_webaccess\\_2.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_134_webaccess_2.pdf)

9 “Class Actions: Objectives, Experiences and Reforms”, Final Report (July 2019), available at: <https://www.lco-cdo.org/wp-content/uploads/2019/07/LCO-Class-Actions-Report-FINAL-July-17-2019.pdf>

10 See Chapter 3 of the LRC report.

11 See para. 1.45 on page 17 of the LRC Report.

## 2.1 Private actions

### 2.1.1 Joinder of parties<sup>12</sup>

Order 15 rule 1 RSC provides:

“1. (1) All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise; provided that if, upon the application of any defendant, it shall appear that such joinder may embarrass or delay the trial of the proceeding, the Court may order separate trials or make such order as may be expedient.

(2) In a case under this rule judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment but the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court shall otherwise direct.”<sup>13</sup>

#### **Deficiencies**

The most immediate constraints of this rule in facilitating a collective remedy are that, for joinder to be available under it:

- (a) the right of action must derive from a transaction or series of transactions – hence, in a leading Australian decision concerning an action for a declaration of invalidity of a public law-based action, the levying of a fee under a statutory scheme was held not to be covered by the equivalent provision of the Rules of the High Court of Australia;<sup>14</sup>
- (b) the right of action must derive from the same transaction or series of transactions – joinder is thus not available under the rule when the relief claimed derives from a transaction or series of transactions peculiar to each individual plaintiff;
- (c) As the Law Reform Commission of Australia noted, “[j]oinder is] an unwieldy way of dealing with claims by a large group, especially where there were a number of different issues or claims to be determined. In such cases it might not be possible to meet the requirements of the joinder rules”.<sup>15</sup>

### 2.1.2 Representative actions

#### 2.1.2.1. General representative action procedure

Order 15 rule 9 RSC provides:

“Where there are numerous persons having the same interest in one cause of action or matter, one or more of such persons may sue or be sued, or may be authorised by the court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested.”

#### **Deficiencies**

The possible constraints of this provision in serving as a basis for a class action were identified in the LRC Consultation Paper and Report:<sup>16</sup>

- (a) the person purporting to represent all claimants must provide evidence that each claimant has authorised that person to act on their behalf;<sup>17</sup>

12 Joinder of parties is to be distinguished from joinder or consolidation of different causes of action in the one set of proceedings brought by the same plaintiff, as may be done under Order 18, rule 1 RSC.

13 Insofar as an action against several defendants is concerned, Order 15, rule 4 RSC provides:

“4. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. Judgment may be given against such one or more of such defendants as may be found to be liable, according to their respective liabilities, without any amendment.”

14 *Payne v Young* [1980] 145 CLR 609.

15 Australian Law Reform Commission, “Grouped Proceedings in the Federal Court” report No. 46 (1988), at para. 48, page 21.

16 Chapter 1, section 1 of the LRC Consultation Paper and Chapter 1, paras. 1.18 to 1.20 of the Report.

17 *Madigan v Attorney General* [1986] ILRM 136, 148.

- (b) the requirement that the representative plaintiff and each claimant represented must have “the same interest in one cause of action or matter”<sup>18</sup> is generally interpreted strictly: it will not be seen as met where separate defences might be open to the various classes of members,<sup>19</sup> where each claimant is relying on a separate contract or where the claim of each depends on its own merits;<sup>20</sup>
- (c) it had been long established that the representative action procedure did not apply to tort claims<sup>21</sup> – a principle expressly codified in the Circuit Court Rules<sup>22</sup> – and that damages were not available in a representative action;<sup>23</sup>
- (d) judgment in a representative action does not bind a potential claimant who has not authorised the bringing of the action, and hence leaves a defendant exposed to further proceedings by such claimant(s), while even claimants who have authorised representation may apply to the court for leave to be exempted from the judgment<sup>24</sup> and will not be bound by a judgment where the proceedings are tainted by fraud or collusion; and
- (e) civil legal aid is not available where “the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.”<sup>25</sup>

However, as was also indicated in the LRC Consultation Paper, the constraints at (a), (b) and (c) have been relaxed somewhat in modern times.

As to (a), in *Greene v Minister for Agriculture*<sup>26</sup> five farmers purported to sue the Irish State in relation to its operation of schemes for cattle headage payments under an EC directive on their own behalf and on behalf of all farmers in the relevant areas and, in particular, some 1,390 farmers named in a list transmitted to the defendants. The High Court, while noting that the represented claimants had not signed any specific authorisation in respect of the proceedings, heard evidence that the problem was debated in a number of venues throughout the country where interested parties were invited to attend, a general exchange of views took place and those attending were asked to subscribe to a “fighting fund”. Murphy J accepted that the listed plaintiffs had authorised the proceedings on their behalf and in their name.

With regard to (b), in the English case of *Irish Shipping Ltd v Commercial Assurance Co*<sup>27</sup> 77 underwriters entered into separate insurances but on the same terms including a term obliging each underwriter to abide by any judgment obtained by the insured against the lead underwriter. The Court of Appeal held that all 77 underwriters had the same interest in the proceedings. The court made this finding notwithstanding that the underwriters held separate contracts of insurance, since the contracts were on identical terms, each underwriter was bound by the leading underwriter clause, and the defence of all the insurers was that their obligations to the charterers had not been transferred to the shipowners – albeit that some of the 77 might have had grounds for arguing that defence which were not available to others.

As to (c), in *Prudential Assurance Co Ltd v Newman Industries Ltd*,<sup>28</sup> the English High Court held that a claim for damages in tort was available in a representative action on the conditions that (i) the relief claimed

18 Per Lord Macnaghten in *Duke of Bedford v Ellis*, [1901] AC 1, there must be “a common interest, a common grievance and relief in its nature beneficial to all” (at page 8).

19 *Roche v Sherrington* [1982] 1 WLR 599.

20 *Barker v Allanson* [1937] 1 KB 463; *Markt & Co Ltd v Knight Steamship Co* [1910] 2 KB 1021.

21 As affirmed by the Supreme Court in *Moore and Others v Attorney-General and Others (No. 3)* [1930] IR 471 at 490 and 499 in relation to the predecessor provision to Order 15, rule 9 RSC in the 1905 Rules. O’Kennedy CJ in that judgment stated (at page 499) “... No such thing is possible as an action of tort against “representative” defendants.”.

22 Order 6, rule 10 CCR.

23 *Markt & Co Ltd v Knight Steamship Co Ltd* [1910] 2 KB 1021.

24 *Moore v Attorney General* [1930] IR 471, 489.

25 Section 28(9)(a)(ix), Civil Legal Aid Act 1995.

26 [1990] 2 IR 17.

27 [1991] 2 Q.B. 206.

28 [1981] Ch. 229. The High Court’s decision was allowed on appeal but without disturbing the trial judges finding on this point: see Andrews, “Multi-Party Proceedings in England: Representative and Group Actions”, 11 *Duke J. Comp. & Int’l L.* 249 (2001).



in the representative action could not have the effect of conferring a right of action on a member of the class which the member could not have asserted in a separate action, or of barring a defence which might otherwise have been available to the defendant in a separate action, (ii) all members of the class represented shared an “interest” and (iii) it was for the benefit of the class that the plaintiff be permitted to sue in a representative capacity.<sup>29</sup> In the *Irish Shipping* case aforementioned, a case resting on a contract, the Court of Appeal held that the inclusion in proceedings of claims for debt or damages did not of itself preclude those proceedings being begun or continued as a representative action. However, while doubt has been expressed on the non-applicability of the representative action procedure to claims against representative defendants<sup>30</sup> there would appear to be no reported precedent to date of damages being awarded to a representative plaintiff in representative proceedings in Ireland.

### ***Western Canadian Shopping Centres Inc. v. Dutton***

The shortcomings of the representative action under Order 15 rule 9 in serving as a platform for a class were noted by the Supreme Court of Canada in the leading case of *Western Canadian Shopping Centres Inc. v. Dutton*<sup>31</sup> when it considered the equivalent rule in the Alberta rules of court in a case where individual plaintiffs sought to use the representative action procedure to represent a class of 231 investors in pursuing a claim alleging breach of fiduciary duty in mismanaging their funds:<sup>32</sup>

“32. [The rule] does not specify what is meant by “numerous” or by “common interest”. It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit should be conveyed to potential class members, or how a court should deal with the possibility that some potential class members may desire to “opt out” of the class. And it does not provide for costs, or for the distribution of the fund should an action for money damages be successful.

33. Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies the parties *ex ante* certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold “certification” provision. ...In Alberta, ...courts effectively certify *ex post*, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.”

Significantly, however, the Supreme Court of Canada went on to find that, absent comprehensive legislation establishing a class action procedure,<sup>33</sup> the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them.<sup>34</sup> It noted that the Alberta courts had already “moved to fill the procedural vacuum”<sup>35</sup> in prescribing four conditions for a class action and determined that class actions should be allowed to proceed under the existing representative action rule where those four conditions are met, viz.:

- (1) the class is capable of clear definition by stated, objective criteria (though it is not necessary that every class member be named or known);

29 For the purpose of condition (iii), the court had to be satisfied that the issues common to every member of the class would be decided after full discovery and in the light of all the evidence capable of being adduced in favour of the claim.

30 In *Hickey v McGowan* ([2017] 2 IR 196), O’Donnell J in the Supreme Court stated (at para. 57): “Order 15 Rule 9 of the Rules of the Superior Courts, 1986 does permit a person to sue, or be sued on behalf of all persons having the same interest in the cause or matter. However, Kennedy C.J. stated bluntly in *Moore v. Attorney General (No.2)* [1930] I.R. 471 at p.499, that the almost identical provisions of Order XVI Rule IX of the Rules of the Supreme Court (Ir.), 1905, did not apply to an action in tort. I am not sure that that is necessarily correct in all circumstances and in particular where a claim is made for the same vicarious liability against a number of parties (something that might not have been conceived possible in 1930).”

31 [2001] 2 S.C.R. 534.

32 Rule 42 of the Alberta Rules of Court provided:

“Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.”

33 At the time of the judgment only the provinces of British Columbia, Ontario, and Québec had enacted comprehensive statutory schemes to govern class action practice (see para. 30 of the judgment).

34 Para. 34 of the judgment.

35 In *Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337: see para. 35 of the judgment.

- (2) there are issues of law or fact common to all class members (though it is not essential that the class members be identically situated vis-à-vis the opposing party, or that common issues predominate over non-common issues, or that the resolution of the common issues would be determinative of each class member’s claim);
- (3) success for one class member means success for all (although not necessarily to the same extent) and class members do not have conflicting interests; and
- (4) the proposed representative adequately represents the interests of the class (in the sense that they “will vigorously and capably prosecute the interests of the class”),

and provided the court is satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed. In that regard, the Supreme Court held that the court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause and ultimately must strike a balance between efficiency and fairness.

As to the procedure to be employed, the Supreme Court stated that all potential class members should be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, before any decision is made that purports to prejudice or otherwise affect the interests of class members. The court also retains discretion to determine how the individual issues should be addressed, once common issues have been resolved. Absent comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis in a flexible and liberal manner, seeking a balance between efficiency and fairness.

In the case before it, the Supreme Court found that the basic conditions for a class action were met and that efficiency and fairness favoured permitting it to proceed.<sup>36</sup>

#### *2.1.2.2 Representative action procedure for specific case types*

Representative actions may be brought on behalf of claimants for particular rights of action, as indicated below.

##### ***Actions by trustees, executors, and administrators***

A facility exists under rules of court<sup>37</sup> for actions to be brought and defended, and compromised, by trustees, executors, and administrators on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate.

##### ***Fatal injuries actions***

An action may be brought by the personal representative or dependant of a deceased for damages for the benefit of all the dependants of the deceased where the death was caused by the wrongful act of another.<sup>38</sup>

##### ***Action for oppression under the Companies Act 2014***

An application may be made by a member of a company alleging that the company’s affairs are being conducted or that the powers of the directors of the company are being exercised in a manner oppressive to him/her or any of the company’s members or in disregard of his/ her/their interests as members.<sup>39</sup>

##### ***Derivative actions***

Since the Law Reform Commission’s consideration of the matter, the rules of court now incorporate a procedure<sup>40</sup> for the bringing or defending of proceedings for the benefit of a company (a “derivative

<sup>36</sup> Paras. 38 to 51 of the judgment.

<sup>37</sup> Order 15, rules 8 and 10 RSC.

<sup>38</sup> Under section 48 of the Civil Liability Act 1961.

<sup>39</sup> Such an application is now made under section 212 of the Companies Act 2014.

<sup>40</sup> Part IV (Derivative actions) of Order 15 RSC.

action”). The procedure requires that an applicant for leave to bring a derivative action provide evidence, where available, of the views of members of the company other than the applicant<sup>41</sup> and empowers the court to direct that a meeting of members of the company take place to ascertain the views of members whose interest in the subject matter of the proposed derivative action is independent of that of the applicant and the respondent.<sup>42</sup>

### **Data protection actions**

Section 120 of the Data Protection Act 2018 (“the 2018 Act”), giving full effect to Article 80(1) of the EU General Data Protection Regulation (“GDPR”), provides, in subsection (1), that a data subject may mandate a body, organisation or association to which section 120(2) applies to -

- (a) bring an action under section 128 of the 2018 Act (a “data protection action”) against a data controller or processor for infringement of the data subject’s data rights to protection of their personal data and
- (b) appeal under section 150 of the 2018 Act against a legally binding decision of the Data Protection Commission made under Chapter 2 (Enforcement of Data Protection Regulation) or Chapter 3 (Enforcement of Directive) of Part 6 of the 2018 Act.

Section 120(2) applies to a body, organisation or association—

- (a) that provides its services on a not-for-profit basis,
- (b) that has been properly constituted in accordance with the law of the State or another Member State,
- (c) whose objectives, as specified in the documents establishing the body, organisation or association concerned, are in the public interest, and
- (d) that is active with regard to the protection of data subject rights and freedoms, including protection of their personal data.

Where the Data Protection Commission or the court has reasonable doubts as to whether a particular body, organisation or association is one to which section 120(2) applies, it may request the provision by the body, organisation or association concerned of such additional information as is necessary in order to confirm that it is such a body, organisation or association.

## **2.1.3 Consolidation and coordinated hearings of separate actions**

### **2.1.3.1 Consolidation**

Order 49, rule 6 RSC provides that actions pending in the High Court may be consolidated by order of the Court on the application of any party and whether or not all the parties consent to the order.

The criteria to be applied in considering whether consolidation of actions should be ordered were affirmed by the Supreme Court in *Duffy v News Group Newspapers*<sup>43</sup> as follows:

- (1) Is there a common question of law or fact of sufficient importance?
- (2) Is there a substantial saving of expense or inconvenience?
- (3) Is there a likelihood of confusion or miscarriage of justice?<sup>44</sup>

In *Duffy*, the High Court, on the application of the defendants, had consolidated a number of defamation cases brought by separate members of a sports club. The Supreme Court set aside the consolidation order, stating that, whilst the wording of Order 49, rule 6 RSC was very wide, that did not mean that it was to be applied widely or that a heavy burden did not lie upon those who sought to join or consolidate actions.

41 Order 15 rule 39 (5)(vi) RSC.

42 Order 15 rule 39 (11)(c) RSC.

43 [1992] 2 IR 369.

44 At page 376 (per McCarthy J).

As to the first criterion above, the Court held that no common question of law or fact existed as between the cases, since, although the question of law to be considered in each case was the same – viz. whether the words complained of were capable of referring to the particular plaintiff – the answer would depend on the evidence called by each plaintiff and although the question of fact to be addressed in each case was the same, viz. whether the words complained of did in fact refer to the particular plaintiff, the answer would depend on the evidence called by each plaintiff.

As to the second criterion, the Court was also persuaded by the consideration that any substantial saving by consolidating the actions was unlikely since the various plaintiffs had few common witnesses and it was unlikely that the defendants would call any witnesses.

Applying the third criterion, the Court noted the likelihood that one plaintiff would be tainted by unreliable evidence given on behalf of another plaintiff; that there was a danger of confusion as to the individuals to whom the witnesses were referring; and that there was a significant danger that witnesses, and therefore plaintiffs, would stand or fall together, so that the likelihood of confusion had not been removed.

However, the Court determined that it was appropriate that the actions be tried in succession and that the trials be presided over by the same judge.

In *J.O’C. v G.D.*<sup>45</sup> Keane J, while satisfied that there was a commonality of questions of law and fact as between two actions sought to be consolidated (criterion 1 under Order 49, rule 6 RSC) and that no obvious likelihood of confusion or miscarriage of justice would arise out of consolidating them (criterion 3), nonetheless refused consolidation under criterion 2, on the basis that consolidation was unlikely to effect substantial saving of expense or avoid unnecessary duplication in pleadings (the pleadings having already closed in each) and that delivery of new and consolidated pleadings was also likely to add to an already unacceptable delay in bringing the cases to trial.

### 2.1.3.2 Coordinated hearings

The court has an inherent jurisdiction to direct that cases be heard simultaneously.<sup>46</sup> While Keane J in *J.O’C. v G.D.* aforementioned refused to consolidate the cases, he considered it appropriate that the evidence in each be heard at the same time.

In *Kalix Fund Ltd v HSBC Institutional Trust Services (Ireland) Ltd*,<sup>47</sup> Clarke J (as he then was) considered an application to stay certain proceedings among a multiplicity of cases arising from the failure of an investment fund pending the court’s determination of a related case. Clarke J held that the court had an inherent jurisdiction to manage the conduct of a series of cases which were connected by reason of having significant factual overlap for the purposes of bringing about a just and expeditious trial while seeking to minimise costs.

Clarke J stated that the court’s obligation was to ensure that each party to each of the cases would achieve, as best as could be done, a just and expeditious trial but also that costs be minimised and scarce court resources not be wasted. Factors to be considered in assessing how to manage connected cases included, *inter alia*: the fact that each individual plaintiff was entitled to have their proceedings determined expeditiously subject only to ensuring that no disproportionate added expense or drain on court time was imposed; and the extent to which the first case to be tried was likely to bind all other cases in whole or in part.

An example of court management of multiple pending cases having common attributes in conjunction with an alternative dispute resolution (“ADR”) mechanism is the Depuy hip implant litigation. Having been advised that approximately 1,000 claims for damages for injuries caused by allegedly defective hip implants

45 [2017] IEHC 781.

46 Per Blayney J in *O’Neill v Ryanair Ltd* (No. 2) [1992] 1 IR 160 at 163. See also *Malone v Great Northern Railway Co. (Ir.); Ennis & Ors v Same* [1931] IR 1.

47 [2010] 2 IR 581.

supplied by Depuy International Ltd. were pending – each case estimated to last up to six weeks – the court in December 2015 by order authorised the setting up of an ADR scheme. Those cases deemed to qualify for the scheme would be disposed of by a panel of evaluators on the papers before them without hearing evidence, and without any determination of liability. The court further directed<sup>48</sup> that no further cases qualifying for the scheme be listed for hearing pending the first of a series of six-monthly reports to the court on the scheme’s operation, except where the court on application to it permitted, and allowed cases not qualifying for the scheme to proceed to trial.

### **Deficiencies**

As with the procedures for joinder and consolidation, though offering opportunities for containing or reducing costs, coordination of hearings is not a solution for cases where the high cost of litigation may itself be a barrier to the bringing of individual sets of proceedings in cases of multiple claims.

#### **2.1.4 Test cases**

##### **Concept**

In the absence of a class action procedure, the selection of a specific case – a “test case” – raising issues which are replicated in the circumstances of other potential claimants and constitute a precedent for their claims has been the principal means by which resolution of multiple claims in Ireland has been resolved. The effectiveness of the test case approach rests upon the common law doctrine of precedent.<sup>49</sup>

Test cases have been employed to address various instances of multiple claims, examples being the claims by married women for equal treatment concerning social security entitlements in the 1980s and 1990s,<sup>50</sup> the army deafness cases in the 1990s and the claims for pyrite-related damage in this decade.<sup>51</sup>

### **Deficiencies**

The Law Reform Commission has pointed<sup>52</sup> to the limitations of the test case approach as a means of resolving multi-party claims, notably:

- (a) the test case is conducted and adjudicated “exclusively on its own merits and without regard to the broader class perspective” without input from other prospective claimants and, if not typical of the class may not be a suitable test of common issues.
- (b) in the adjudication or settlement of a test case, no account is taken of or provision made for the global extent of the defendant’s liability for all potential claims.
- (c) while a test case reduces the length and cost of subsequent proceedings through narrowing the range of disputed issues and promoting settlement, it does not relieve other claimants of the need to bring proceedings individually and the publicity attaching to it may indeed invite litigation and raise unrealistic expectations on the part of potential claimants
- (d) resolution of multiple claims are resolved by means of a test case lacks transparency and may necessarily understate the extent of multiple wrongdoing on the part of a defendant.

48 Under Order 56A, rule 2(2) RSC, which provided:

“Where the parties decide to use an ADR process, the Court may make an order extending the time for compliance by any party with any provision of these Rules or any order of the Court in the proceedings, and may make such further or other orders or give such directions as the Court considers will facilitate the effective use of that process.”

That sub-rule has since been replaced by section 16(2) of the Mediation Act 2017, and Order 56A has been revised to facilitate the operation of that Act.

49 “A true test case, properly so called, is one where a court is asked to pronounce the law on a question of legal principle.

The outcome will have a decisive bearing on the result of a range of cases, sometimes of exceptional public importance.

Quintessentially, the issues will be well defined. ... The effect or principle of the decision is to have a precedential effect.”: *Barry (A Minor) v National Maternity Hospital* [2016] IESC 41, Supreme Court (McMenamin J) at para. 39.

Neutral Citation:

[2016] IESC 41

50 *Cotter and McDermott v Minister for Social Welfare* (No 1) [1987] ECR 1453; *Cotter and McDermott v Minister for Social Welfare* (No 2) [1991] 1 ECR 1155; *Tate v Minister for Social Welfare* [1995] 1 IR 418.

51 <https://www.independent.ie/irish-news/building-giants-to-fight-liability-as-400-pyrite-claims-filed-29931191.html>

52 LRC Consultation Paper, Chapter 1, paras. 31 to 35.

To these may be added the fact that the plaintiff bringing the test case assumes the potentially quite substantial risk of exposure to liability for legal costs: the costs risk of the test case is not distributable among all claimants potentially benefitting.

## 2.2 Other collective remedy procedures

Collective redress may to some degree be available by means of civil actions brought by bodies acting under public law or in the public interest. In the LRC Report these actions are divided into “public actions” – maintainable by a public authority on behalf of a wide group of affected individuals – and “organisation actions” – described as such because they are commonly brought by private organisations in the public interest,<sup>53</sup> and these terms are used below.

### 2.2.1 Public actions

#### 2.2.1.1 Proceedings by or at the relation of the Attorney General

The Attorney General is charged, under section 6(1) of the Ministers and Secretaries Act 1924, with the function of representing the public in all legal proceedings involving the assertion or protection of public rights, e.g. to restrain interference with a public right of way. Where a private individual or body seeks to enforce a right belonging to the public as a whole rather than one in respect of which that person or body would have *locus standi* in their own right, the private individual or body may, with the agreement of the Attorney General, institute “relator” proceedings, i.e. proceedings brought by the Attorney General “at the relation of” the private litigant.

Most commonly, however, public actions arise in the area of consumer protection, as in the instances given below.

#### 2.2.1.2 Proceedings under the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995

The 1995 Regulations as amended<sup>54</sup> give effect to the Unfair Contract Terms Directive,<sup>55</sup> Article 7 of which required Member States to ensure that, in the interests of consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers, including provisions whereby “persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair...”.<sup>56</sup>

The 1995 Regulations, as amended, afford to a consumer organisation<sup>57</sup> the same standing as the Competition and Consumer Protection Commission (“CCPC”) – as successor to the National Consumer Agency – the Central Bank and the Commission for Communications Regulation to apply to the Circuit Court or High Court for a declaration that any term drawn up for general use in contracts concluded by sellers or suppliers is unfair, and for an order prohibiting the use or continued use of such a term or similar terms of like effect and, ancillary to the declaratory remedy, an injunction against the use or recommending of the use by a seller or supplier of an unfair term drawn up for general use in contracts concluded with

53 LRC Report, Chapter 1, pages 3 to 6.

54 The 1995 Regulations (S.I. No. 27 of 1995) were amended successively by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations, 2000 (S.I. No. 307 of 2000), and the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2013 (S.I. No. 160 of 2013) and the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2014 (S.I. No. 336 of 2014).

55 Directive No. 93/13/EEC on unfair terms in consumer contracts.

56 Article 7(2) of the Unfair Contract Terms Directive.

57 Viz. (a) a company, the memorandum of association of which states the company’s main object or objects to be the protection of consumer interests, or  
(b) a body corporate (other than a company) or an unincorporated body of persons in relation to which there exists a constitution or a deed of trust which states the body’s main object or objects to be the protection of consumer interests”: Regulation 2 of the 1995 regulations as amended.

consumers. These remedies are without prejudice to the right of an individual consumer to seek a judicial remedy for infringement of his/her rights under the Directive.

### 2.2.1.3 Proceedings under the Consumer Protection Act 2007

Under section 71 of the Consumer Protection Act (“the 2007 Act”) the CCPC or any other public body prescribed for the purpose may apply to the Circuit Court or High Court for an order prohibiting a trader or person from committing or engaging in certain prohibited acts or practices.<sup>58</sup> In determining the application under this section, the court must consider “all interests involved” and, in particular, the public interest. The court may where necessary or appropriate make an order under this section without proof of any actual loss or damage or of any intention or negligence on the part of the trader.

Under section 72 of the 2007 Act, the CCPC may apply to the Circuit Court or High Court for an order prohibiting a person responsible for formulating, revising or monitoring compliance by traders with a code of practice from promoting certain prohibited acts or practices or requiring that person to withdraw the code or amend it as the court considers necessary to prevent such promotion. In determining an application under this section, the court must, again, consider “all interests involved” and, in particular, the public interest.

### 2.2.1.4 Proceedings under the European Communities (Court Orders for the Protection of Consumer Interests) Regulations 2010

The Injunctions Directive (Directive 2009/22/EC) requires Member States to have in place an injunction remedy available to a “qualified entity” designated by the Member State – in the case of Ireland the CCPC – requiring cessation of any act contrary to the Directives listed in Annex I of that Directive<sup>59</sup> as transposed into the internal legal order of the Member States which harms the collective interests of consumers.<sup>60</sup>

A “qualified entity” must have a legitimate interest in ensuring that the listed Directives are complied with, and in particular be an independent public body specifically responsible for protecting the collective interests of consumers and/or an organisation(s), whose purpose is to protect those interests in accordance with national law.

The European Communities (Court Orders for the Protection of Consumer Interests) Regulations 2010 (S.I. No. 555 of 2010) implement the Injunctions Directive and entitle the CCPC and a qualified entity from another Member State to apply for the injunctive relief concerned.

### Deficiencies

None of the consumer protection remedies described above allow for the granting of compensation to individual consumers or a group of consumers for loss they may have suffered as a result of the unlawful conduct concerned.

## 2.2.2 Organisation actions

The courts have been prepared to relax the usual rule concerning *locus standi* – requiring a plaintiff to show a specific prejudice or injury to himself/herself – to enable the bringing of proceedings to vindicate rights of a public nature – an *actio popularis*. This approach was summarised by McKechnie J in *Digital Rights Ireland Ltd v Min for Communication and Others*<sup>61</sup> as follows:

58 See section 67 and 71(1) of the 2007 Act as to the acts and practices concerned.

59 13 Directives are listed, concerned with: consumer rights; consumer credit; television broadcasting activities; package travel; unfair terms in consumer contracts; protection of consumers in respect of distance contracts; sale of consumer goods and associated guarantees; information society services, in particular electronic commerce, in the internal market; the Community code relating to medicinal products for human use; distance marketing of consumer financial services; unfair business-to-consumer commercial practices in the internal market; services in the internal market; and protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

60 To the extent that the legal system of a Member State permits, the Directive also requires that it make provision for payment by a non-compliant defendant into the public purse or to any beneficiary designated by national legislation, of a financial penalty to ensure compliance with the injunction: Article 2 of the Injunctions Directive. In the case of Ireland, the payment is to be made into the Central Fund: regulation 4(2)(a)(ii) of S.I. No. 555 of 2010.

61 [2010] 3 IR 251.

“a plaintiff may be granted *locus standi* where, having regard to the rights in question, it can show either that it has a *bona fide* concern or interest in the provisions seeking to be impugned, or else that the rights which it seeks to protect are of general importance to society as a whole; this provided the plaintiff is not a crank, meddlesome or a vexatious litigant.”<sup>62</sup>

Although it will be seen from this statement that the bringing of this type of action is not confined to bodies or organisations, typically it will be brought by such an entity – hence the name given to it in the LRC Report – examples being the case taken by Irish Penal Reform Trust Ltd for declaratory relief in relation to the treatment of persons in custody suffering from psychiatric illness<sup>63</sup> and that taken by Digital Rights Ireland Ltd. challenging the processing and storage of mobile phone data at the State’s direction.<sup>64</sup>

### **Deficiencies**

The public interest action is suited to the seeking of injunctive or declaratory relief relating to a specific right enjoyed by the public at large or a defined section of the public. It does not contain provision for formal consultation with or input by the members of the public affected, nor does it facilitate a damages award which might be apportionable among those affected.

### **2.2.3 Other public law remedies**

The focus of the Review Group is necessarily directed to multi-party action procedures and the options for their reform. However, the importance of the role of regulatory oversight in securing effective collective remedies – and thus avoiding the need for litigation – should be acknowledged. Dr. Joanne Blennerhassett of UCD Sutherland School of Law has commented:

“It is clear that the multi-party action or collective action is only one of [a] range of possible mechanisms for delivering collective redress and recent research indicates a major shift in debates on this subject. Traditionally it was assumed that the only available mechanism was considered to be some form of court-based collective action. It must be highlighted that new techniques other than traditional civil procedure mechanisms are available to deliver collective redress. In consumer-trader redress these options include:

- civil claims piggy-backing on criminal prosecutions (known as parties civil in some jurisdictions);
- regulatory redress: redress ordered or brought about by the intervention of public enforcers;
- consumer ombudsmen: a specific form of alternative dispute resolution (ADR) but within the context of a dispute resolution structure that is entirely separate from the courts.

Empirical evidence is conclusive that some of these new techniques are far better at delivering collective redress than others, in particular the use of regulatory redress and consumer ombudsmen, especially when they are used together. Multi-party actions and the piggy-back technique are not quite as effective as these other two techniques.”<sup>65</sup>

## **2.3 EU initiatives on collective redress**

### **2.3.1 European Commission Recommendation of 11th June 2013 on common principles for injunctive and compensatory collective redress mechanisms for violations of EU law rights<sup>66</sup>**

The European Commission issued in this Recommendation a series of non-binding principles for collective redress mechanisms in EU Member States. Certain of the Recommendation’s recitals<sup>67</sup> evidence a concern

62 At para. 48 of the judgment.

63 *Irish Penal Reform Trust Ltd and Others v Governor of Mountjoy Prison and Others* [2005] IEHC 305.

64 *Digital Rights Ireland Ltd v Min for Communication and Others*, *supra*.

65 Blennerhassett, “Mass Harm Litigation in Ireland, Multi-Party Actions and Routes to Collective Redress”, 10 *Contemp. Readings L. & Soc. Just.* 35 (2018), at page 49.

66 The European Commission Recommendation of 11<sup>th</sup> June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN>

67 Recitals (13), (15) and (20).



not to import a US-style class action culture in fashioning collective redress mechanisms.<sup>68</sup> Hence, recital (15) provides that “...Elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule”.

The principles it sets out include -

- designation of representative entities to bring representative actions on the basis of clearly defined conditions of eligibility<sup>69</sup>
- verification of the court’s own motion at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued<sup>70</sup>
- declaration by the claimant of the source of the funding of the litigation and power to the court to stay proceedings where (a) there is a conflict of interest between a third party funder and claimants, (b) the third party has insufficient resources to meet its financial commitments to the claimant or (c) the claimant has insufficient resources to meet any adverse costs should the collective redress procedure fail<sup>71</sup>
- an opt in only mechanism for claims, with exception to this principle, by law or by court order, requiring to be “duly justified by reasons of sound administration of justice”<sup>72</sup>
- maintenance of the “costs follow the event” principle<sup>73</sup>
- restrictions on contingency fees<sup>74</sup>
- restrictions on the exercise by third party funders of influence on the litigation<sup>75</sup> and
- a prohibition on punitive damages.<sup>76</sup>

The Recommendation envisages the representative action encompassing a claim for damages,<sup>77</sup> a form of relief which, as indicated in Section 2.1.2.1 of this chapter, is not an established characteristic of the existing representative action procedure in Ireland.

The European Commission reported in January 2018 on implementation of its 2013 Recommendation.<sup>78</sup> The summary conclusions of the report were that “[l]egislative activities affected by the Recommendation

68 Stadler, “The Commission’s Recommendation on common principles of collective redress and private international law issues”, *Nederlands Internationaal Privaatrecht* (Netherlands journal of private international law) (2013), Issue 4, 483 at page 484.

69 Para. 4.

70 Para. 8 and 9.

71 Paras. 14 and 15.

72 Part V.

73 Para. 13.

74 Paras. 29 and 30 provide:

“29. The Member States should ensure that the lawyers’ remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties.

30. The Member States should not permit contingency fees which risk creating such an incentive. The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party.”

75 Para. 32 provides:

“The Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties.”

76 Para. 31.

77 Para. 10 of the Recommendation provides:

“The Member States should ensure that it is possible for the representative entity or for the group of claimants to disseminate information about a claimed violation of rights granted under Union law and their intention to seek an injunction to stop it as well as about a mass harm situation and their intention to pursue an action for damages in the form of collective redress. The same possibilities for the representative entity, ad hoc certified entity, a public authority or for the group of claimants should be ensured as regards the information on the ongoing compensatory actions.” (Emphasis added)

78 Available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-40-F1-EN-MAIN-PART-1.PDF>

have remained somewhat limited in the Member States”.<sup>79</sup> While collective redress in the form of injunctive relief existed in all Member States with regard to consumer cases falling within the scope of the Injunctions Directive, compensatory collective redress was available only in 19 Member States, Ireland not being one of them: in over half of those Member States it was limited to specific sectors, mainly to consumer claims.<sup>80</sup> Nine Member States currently still had no compensatory collective redress mechanisms in place.<sup>81</sup>

The Commission reported that in Ireland and four other Member States “a number of situations were reported, mostly in consumer cases, where no action was taken due to the absence of compensatory relief schemes under national law.”<sup>82</sup>

Two initiatives at EU level envisage the further embedding in the national laws of Member States of collective redress procedures, as follows.

### 2.3.2 Proposed Directive on representative actions for the protection of the collective interests of consumers

#### 2.3.2.1 The scheme of the proposal

The Proposal for a Directive on representative actions for the protection of the collective interests of consumers,<sup>83</sup> repealing the Injunctions Directive referred to above<sup>84</sup> stemmed from perceived shortcomings in the Injunctions Directive.<sup>85</sup> As originally framed by the European Commission, the proposal seeks, *inter alia*, to expand the scope of the existing Injunctions Directive to cover other horizontal and sector-specific EU instruments relating to the protection of collective interests of consumers in economic sectors such as financial services, energy, telecommunications, health and the environment, and to make the procedure more responsive to the range of infringements which may arise.

“Qualified entities” designated by the Member States to bring representative actions under the existing Injunctions Directive will require to meet minimum reputational criteria (i.e. be properly constituted, have a legitimate interest in ensuring compliance with the relevant EU law) and be not for profit.<sup>86</sup> A “representative action” means “an action for the protection of the collective interests of consumers to which the consumers concerned are not parties”.<sup>87</sup>

The proposal seeks to strike “the necessary balance between access to justice and procedural safeguards against abusive litigation which could unjustifiably hinder the ability of businesses to operate in the Single Market.”<sup>88</sup>

To be entitled to bring a representative action, there must be a direct relationship between the main objectives of the entity and the rights granted under EU law claimed to have been violated in respect of which the action is brought.<sup>89</sup>

79 Page 2 of the report.

80 Page 3 of the report.

81 Page 3 of the report.

82 Page 4 of the report.

83 Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0184>

84 See Section 2.2.1.4 of this chapter.

85 Identified in the Report on the Fitness check of consumer and marketing law of 2017, available at: [https://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59332](https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332)

86 Article 4.

87 Article 3(4).

88 Recital (4).

89 Article 5(1).

For compensatory collective redress actions, qualified entities would also be required to disclose their financial capacity and the origin of their funds supporting the action. The courts and administrative authorities will be empowered to assess the arrangements for third party funding.<sup>90</sup>

The proposal will require Member States to ensure “due expediency” of procedures<sup>91</sup> and avoid procedural costs becoming a financial obstacle to bringing representative actions.<sup>92</sup> Consumers would require to be adequately informed of the outcome of representative actions.<sup>93</sup> The proposal also promotes collective settlements, subject to court or administrative authority scrutiny.<sup>94</sup> Final decisions of a court or authority establishing that a trader has infringed the law will, within the same Member State, constitute irrefutable evidence in redress actions or, for cases brought in another Member State a rebuttable presumption that the infringement has occurred.<sup>95</sup>

The proposal will enable qualified entities to bring representative actions seeking a range of measures including interim or final measures to stop and prohibit a trader’s practice, if it is considered an infringement of the law, and measures eliminating the continuing effects of the infringement. The latter could include redress orders (viz. orders obligating the trader “to provide for, *inter alia*, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate”) and declaratory decisions establishing the trader’s liability towards the consumers harmed by the infringements.<sup>96</sup>

Where the quantification of the harm of the consumers concerned by the representative action is complex due to the characteristics of their individual harm, Member States will, subject to certain exceptions, be enabled to empower courts or administrative authorities to decide whether to issue, instead of a redress order, a declaratory decision regarding the liability of the trader towards the consumers harmed by an infringement of Union law, which may be directly relied upon in subsequent redress actions.<sup>97</sup>

### 2.3.2.2 The European Parliament’s revisions

In March 2019 the European Parliament approved an amended version of the European Commission’s proposal,<sup>98</sup> including provision for minimum “opt in” entitlements and clarification of the status of existing representative actions under national law, as follows.

The Commission’s original proposal had provided that “A Member State may require the mandate of the individual consumers concerned before a declaratory decision is made or a redress order is issued”, i.e. allowing Member States in their national law to prescribe an “opt in” requirement. The Parliament has put forward a revision to the effect that if a Member State does not require an individual consumer’s consent to join the representative action (i.e. an “opt out” approach), it must nevertheless allow individual consumers not habitually resident in the Member State where the action is brought to participate in the representative action on an “opt in” basis.

The original proposal had indicated (in recital 24) that it did not replace existing national collective redress mechanisms: “Taking into account their legal traditions, it leaves it to the discretion of the Member States whether to design the representative action set out by this Directive as a part of an existing or future collective redress mechanism or as an alternative to these mechanisms, insofar as the national mechanism

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90 Article 7(1).

91 Article 12(1).

92 Article 15(1).

93 Article 9.

94 Article 8.

95 Article 10.

96 Article 6(1).

97 Article 6(2).

98 The amended version is available at: [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0222\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0222_EN.html)

complies with the modalities set by this Directive.”<sup>99</sup> Revisions by the Parliament sought to remove any ambiguity as to the interaction between the proposed representative action and national law remedies by providing that the “Directive is without prejudice to other forms of redress mechanisms provided for in national law” (new Article 2(3A)) and (in recital 24) that the Directive “aims at a minimum harmonisation” and “...does not prevent Member States from maintaining their existing framework, neither does it oblige Member States to amend it. Member States will have the possibility to implement the rules provided for this Directive into their own system of collective redress or to implement them in a separate procedure.”

### 2.3.3 Proposed Regulation on promoting fairness and transparency for business users of online intermediation services

As originally framed by the European Commission, the Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services<sup>100</sup> would entitle representative organisations, associations or public bodies to bring judicial proceedings to stop or prohibit any non-compliance by providers of online intermediation services with the requirements contained in the Regulation. It would require such representative organisations and associations to meet certain requirements such as having a non-profit making character, being properly constituted under the law of the relevant Member State, and pursuing objectives that are in the collective interests of the business users or corporate website users they represent.<sup>101</sup>

The right conferred on the representative entities concerned is without prejudice to the rights of business users and corporate website users individually to take action before competent national courts<sup>102</sup>

## 2.4 Conclusions on existing multi-party litigation procedures

A consideration of the limitations, as described above, of the existing multi-party litigation procedures currently available would, subject to the caveat entered below, tend towards the same conclusions reached by Lord Woolf in relation to the equivalent Rules of the Supreme Court in England and Wales in place at the time of his “Access to Justice” inquiry, viz.:

“Although the existing rules of court provide means of dealing with multi-party actions, they were not drafted with group actions in mind and therefore none has provided a sufficient answer to the problems they create. Representative actions are provided for ... but the experience here and in comparable jurisdictions is that there are definite limits to the weight the rule can bear. Cases can also be joined or consolidated ... But consolidation deals with situations where actions have already been begun, and it is better that multi-party litigation be dealt with on a collective basis before then, and joinder is not satisfactory where the interests of claimants differ.”<sup>103</sup>

It should be noted that Lord Woolf’s report pre-dates the decision of the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, and were the approach taken by that Court in *Dutton* to find favour in Ireland, the representative action procedure under Order 15 rule 9 RSC<sup>104</sup> might have potential, if elaborated upon in a similar manner, to become a platform for a class action. Against this, an application of Order 15 rule 9 which would allow – as in *Dutton* – for a representative action to be taken on behalf of a class even where every class member is not named or known, and without evidence of express authority from each of the class members represented, would be a significant departure from the jurisprudence on this side of the Atlantic and involve a re-invention of the concept of the representative action in this jurisdiction. The absence of a clear precedent in Ireland for the granting of damages in a representative action represents a further obstacle to reliance on *Dutton* as a basis for class action reform in this jurisdiction.

99 See also Article 2(2), which provides “This Directive shall not affect rules establishing contractual and non-contractual remedies available to consumers for such infringements under Union or national law.”

100 Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0238>

101 Article 12.

102 Article 12(3).

103 Final Report “Access to Justice” (1996), Chapter 17, para. 7.

104 See 2.1.2.1 above.

In short, the preliminary conclusions of the Law Reform Commission in its 2003 Consultation Paper that the Irish legal system “lacks a comprehensive procedure that would tackle class claims in a uniform and consistent fashion”,<sup>105</sup> a conclusion endorsed by recent commentary,<sup>106</sup> remain – it is suggested – valid.<sup>107</sup>

Furthermore, such public law or public interest remedies – outlined above – as may be available depending on the wrong concerned do not bridge this procedural gap.

Aside from these conclusions, it is clear from the European Commission’s report of January 2018 on implementation of its 2013 Recommendation mentioned at Section 2.3.1 of this chapter that Ireland is in a minority of EU Member States in not having a compensatory collective redress procedure.

Lastly, both the representative action proposed by the Recommendation of 11<sup>th</sup> June 2013 and that which would be required by the representative action under the Proposed Directive on representative actions for the protection of the collective interests of consumers envisage relief being claimed for damages and/or other financial redress. These types of relief are not an established characteristic of the existing representative action procedure in Ireland and this supplies a further rationale for the introduction of a new and more comprehensive multi-party action procedure to accommodate mass claims.

### 3. Multi-party litigation procedures in other jurisdictions

In its project on multi-party actions, the Law Reform Commission examined the class action regimes in operation in the US Federal Courts, Canada, and Australia, and also considered the Group Litigation Order (“GLO”) introduced in England and Wales on foot of the Woolf recommendations. In this section those regimes, and relevant developments in and evaluations of them since publication of the LRC report, will be surveyed. Given its role as a model for other common law jurisdictions which have adopted the class action, the US class action procedure will be examined initially and in some detail.

#### 3.1 The United States<sup>108</sup>

The US Federal class action procedure – contained in Rule 23 of the Federal Rules of Civil Procedure<sup>109</sup> (“Federal Rules”) – is the earliest of its kind<sup>110</sup> and merits particular attention, having served as a key point of reference for US State court systems and other jurisdictions designing class action regimes.

##### 3.1.1 Costs and litigation funding

An important initial consideration to be taken into account in evaluating the class action in the US is that costs do not generally follow the event in that jurisdiction: parties are expected to bear their own costs and plaintiffs’ lawyers are often remunerated with a percentage of damages awarded, which can exceed 20%

<sup>105</sup> Chapter 3, section 1 (The Need for Reform), para. 4.

<sup>106</sup> “...while it is still possible to use existing key mechanisms in combination to provide an alternative framework for MPAs, the resulting improvisation falls short of delivering the procedural justice contained in the aim of the [Multi-Party Action] objectives”: Blennerhassett, “A Comparative Examination of Multi-Party Actions: The Case of Environmental Mass Harm”, Hart (2016), at 266. Those objectives were identified by Blennerhassett as: access to justice, judicial and procedural autonomy; fairness; predictability; deterrence; and compensation. *Ibid.* Chapter 3, 58 -97.

<sup>107</sup> The Commission confirmed these conclusions in its 2005 report, citing the instances of the social welfare equality cases and Army deafness claims: see Chapter 1, Section D, page 14 et seq., of the report.

<sup>108</sup> The description of the US Federal class action procedure in this chapter derives from Rule 23 of the Federal Rules, Alexander, “An Introduction to Class Action Procedure in the United States” (Conference paper at the Conference “Debates over Group Litigation in Comparative Perspective, Geneva”, July 21-22, 2000) and Chapter 2, LRC Consultation Paper, as well as other sources specifically referred to in individual footnotes.

<sup>109</sup> Rule 23, containing the amendments which came into effect as of the 1<sup>st</sup> December 2018, is available at: [https://www.uscourts.gov/sites/default/files/cv\\_rules\\_eff\\_dec\\_1\\_2018\\_0.pdf](https://www.uscourts.gov/sites/default/files/cv_rules_eff_dec_1_2018_0.pdf)

<sup>110</sup> having been introduced in its initial form in the 1938 Federal Rules.

of the amount recovered.<sup>111</sup> Rule 23 was amended most recently with effect from December 2018 in some limited but significant respects, referred to below.

### 3.1.2 Pre-requisites for a class action

Rule 23(a) of the Federal Rules provides that one or more members of a class may sue or be sued as representative parties on behalf of all members provided:

1. the class is so numerous that joinder of all members is impracticable (the “numerosity” requirement);
2. there are questions of law or fact common to the class (the “commonality” requirement);
3. the claims or defences of the representative parties are typical of the claims or defences of the class (the “typicality” requirement); and
4. the representative parties will fairly and adequately protect the interests of the class (the “adequacy of representation” requirement).

### 3.1.3 Class types

An action which meets those conditions may be maintained as a class action if the court is satisfied that it falls into one of the following class types:<sup>112</sup>

1. prosecuting separate actions by or against individual class members would create a risk of:
  - (a) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class;<sup>113</sup> or
  - (b) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;<sup>114</sup>
2. final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole;<sup>115</sup> or
3. the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members,<sup>116</sup> and that a class action is superior to other available methods for fairly and efficiently adjudicating the dispute. The matters pertinent to the findings at 3 include: (a) the class members’ interests in individually controlling the prosecution or defence of separate actions; (b) the extent and nature of any litigation concerning the dispute already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action.<sup>117</sup>

111 Eisenberg and Miller, “Attorney Fees in Class Action Settlements: An Empirical Study”, Cornell University Law School Journal of Empirical Legal Studies Volume 1, Issue 1, 27-78, March 2004, at page 27.

112 Rule 23(b).

113 The Advisory Committee on Rule 23 in the commentary on that rule gives as one example of litigation suitable to this case type a dispute as to landowners’ rights and duties respecting a claimed nuisance, where separate litigation could create a possibility of incompatible adjudications see Advisory Committee’s comments at: [https://www.law.cornell.edu/rules/frcp/rule\\_23](https://www.law.cornell.edu/rules/frcp/rule_23).

114 The Advisory Committee on Rule 23 commented on this case type:

“In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.”

115 According to the Advisory Committee on Rule 23, this case type “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.”

116 This requirement provides an assurance that the class will be “sufficiently cohesive to warrant adjudication by representation.”: *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997).

117 The Advisory Committee on Rule 23 noted this this class type “encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote, uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”

Many civil rights-related class actions have been brought as class action type 1 above, while class actions seeking damages are generally brought as type 3. However, in its commentary on Rule 23 the Advisory Committee on the Rule noted:

“A “mass accident” resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.”

An action may be brought or maintained as a class action with respect to particular issues<sup>118</sup> and may, when appropriate, be divided into subclasses that are each treated as a class.<sup>119</sup>

### 3.1.4 Certification

The definition of the class is stated in the claim, but may be changed by order of the court. At an early practicable time after a person sues or is sued as a class representative, the court must decide whether to certify the action as a class action and in the certifying order must define the class and the class claims, issues, or defences, and appoint class counsel.

### 3.1.5 The “opt out” model and notice

The US procedure is an “open class” – or “opt out” – model,<sup>120</sup> i.e. one in which the adjudication in or settlement of the action generally binds a member of the class unless that member positively opts out of the action.

A fundamental feature of the “opt out” model – and a requirement deriving from constitutional due process<sup>121</sup> – is the giving of notice to persons who may fall within the class to be affected. In the case of class action types 1 or 2, the court may direct “appropriate notice” to the class. In the case of class action type 3, the court must direct to class members “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort”. This latter notice may be by one or more of the following means: mail, electronic, or other appropriate means and must “clearly and concisely state in plain, easily understood language” the following information:

(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defences; (iv) that a class member may enter an appearance through an attorney if they wish; (v) that the court will exclude from the class any member requesting exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members.

While standard mail remains usual as a means of disseminating notice,<sup>122</sup> notice in newspapers, magazines and on TV is employed to supplement individual notice where the names and addresses of certain class members are unknown, or to provide constructive notice where the identities of individual class members are not reasonably ascertainable.<sup>123</sup> More recently, courts have permitted notice by e-mail in lieu of postal

118 Rule 23(c)(4).

119 Rule 23(c)(5).

120 The modern class action damages claim, falling within class action type 3 described above, was introduced as an “opt out” procedure by amendments to Rule 23 in 1966. See Bone, “Walking the Class Action Maze: Toward a More Functional Rule 23”, *University of Michigan Journal of Law Reform* Vol. 46, Issue 4, 1097 (2013), at 1102 to 1105; Marcus, “The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980”, *Washington University Law Review* Vol. 90, Issue 3 587 (2013)587, at 588.

121 In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), a case brought on behalf of all traders of low value stock trades on the New York Stock Exchange during a six-year period, some 2,250,000 class members were identified by the parties. Although requiring individual notice to all the class members was considered so costly for the plaintiff as to render a class action prohibitively expensive, the U.S. Court of Appeals for the Second Circuit and the Supreme Court refused to allow notice by general publication on the grounds that both Rule 23 and due process required individual notice to all members who could be identified: Aitken, “Class Action Notice in the Digital Age”, *University of Pennsylvania Law School Law Legal Scholarship Repository* (2017), at pages 975 and 976.

122 Aitken, *op. cit.* at page 977.

123 Aitken, *op. cit.* at pages 979 to 982.

notice, especially in actions involving large internet companies or small settlements and have authorised use of the internet to provide supplemental or constructive notice, including tools such as banner and pop-up advertisements, keyword search results and dedicated websites.<sup>124</sup>

The 2018 amendments to Rule 23 now expressly allow notice through “electronic means, or other appropriate means”, leaving some flexibility to accommodate developments in technology.

The plaintiffs must bear the expense of giving of notice to class members unless and until the liability on the defendant’s part is established.<sup>125</sup> The significant expense of giving notice in large class actions potentially impedes the bringing of meritorious consumer class actions though the impediment seems to have been overcome by the well-financed plaintiff firms who can cover the expenses.<sup>126</sup>

Whether the court’s judgment is or is not in favour of the class, it must in the case of class action types 1 and 2 include and describe those whom the court identifies as class members, and it must in the case of class action type 3 identify the class members to whom notice was directed and who have not opted out.<sup>127</sup>

### 3.1.6 Conduct of the action

The court has a wide range of powers to ensure economy and efficiency in the conduct of the action and protect the interests of class members and fairness of procedures. It may make orders to

- determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;
- require that notice be given to some or all class members of: (i) any step in the action; (ii) the proposed extent of the judgment; or (iii) the members’ opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defences, or to otherwise come into the action;
- impose conditions on the representative parties or on intervenors;
- require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or
- deal with similar procedural matters.<sup>128</sup>

### 3.1.7 Settlement

The court’s approval is required for the settlement, voluntary dismissal or compromise of the claims, issues, or defences of a certified class, or a class proposed to be certified for purposes of settlement.<sup>129</sup>

The court must direct notice “in a reasonable manner” to all class members who would be bound by the proposal if notice is justified by the parties’ showing that the court will likely be able to: (i) approve the proposal; and (ii) certify the class for purposes of judgment on the proposal.

The court may approve a proposal binding class members only after a hearing. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal. The court may approve the proposal only on finding that it to be “fair, reasonable, and adequate” and the 2018 amendments to Rules 23 now expressly state key factors to be considered so as to ensure a uniform approach by the Federal judicial circuits. In evaluating the proposal for its fairness, reasonableness and adequacy, the court must consider whether:

- the class representatives and class counsel have adequately represented the class;
- the proposal was negotiated at arm’s length;

124 Aitken, op. cit. at page 984.

125 Eisen, op. cit.

126 Alexander, op. cit., page 8.

127 Rule 23(c)(3)(B).

128 Rule 23(d)(1).

129 Rule 23(e).



- the relief provided for the class is adequate, taking into account: (i) the costs, risks and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and (iv) any agreement identified concerning it, and
- the proposal treats class members equitably relative to each other.

In the case of a class action certified as type 3 above, the court may refuse to approve a settlement unless it affords a fresh opportunity to opt out to individual class members who did not avail of an earlier opportunity to do so. Any class member may object to a proposal,<sup>130</sup> including provision for counsels’ fees. Under the 2018 amendments, the objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection and an objector may not receive any consideration for foregoing or withdrawing an objection or resiling from an appeal without receiving court approval to do so.<sup>131</sup> These two new requirements seek to ensure that *bona fide* objections are heard and to discourage bad faith objectors.

Most settlements are ultimately approved, sometimes after modifications required by the court. In large class actions, it is common for the trial judge, or a settlement judge or special master (viz. a lawyer or law professor appointed in a particular case) – appointed for convenience or to preserve the trial judge’s neutrality – to be actively involved in the settlement negotiations, and hence in formulation of the proposed settlement.

### 3.1.8 Damages awards

Where a class action sought to be brought under Rule 23 seeks monetary damages, the intended class must satisfy the additional requirements of Rule 23(b)(3), in particular that the questions of law or fact common to the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the dispute. Hence, the US Supreme Court has reversed certification of a class of cable television customers who claimed that their provider created a monopoly local market for cable services as the expert for the plaintiffs could not establish injury or damages class-wide, entailing that common questions did not predominate over individual issues.<sup>132</sup>

Courts typically calculate and apportion damages based on a methodology submitted by the plaintiff’s expert, but the calculation itself may vary depending on the characteristics of individual class members.<sup>133</sup>

### 3.1.9 Limitation periods

The filing of a class action suspends (“tolls”) the limitation period under the statute of limitations applicable to the cause of action concerned for all putative class members encompassed in the class claim while the court considers certification, and where class action certification is refused members of the “failed” class may intervene as individual plaintiffs in the still-pending action, it having lost its class character.<sup>134</sup> This “tolling” rule is not dependent on the claimant concerned intervening in or joining an existing suit but applies also to absent class members who, after denial of class certification, opt to bring an individual action.<sup>135</sup>

### 3.1.10 Class action reform

The Class Action Fairness Act of 2005<sup>136</sup> (“CAFA”) – amending title 28, United States Code – was enacted by Congress in response to the advent of numerous, large multi-state and national class actions and

130 Ibid.

131 Ibid.

132 *Comcast Corp v Behrend*, 133 S Ct 1426 (2013).

133 Kliebard and others, “Class/collective actions in the United States: overview”, Thomson Reuters Practical Law, available at: [https://uk.practicallaw.thomsonreuters.com/4-617-9264?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/4-617-9264?transitionType=Default&contextData=(sc.Default))

134 *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

135 *Crown, Cork & Seal Co. Inc. v. Parker*, 462 U.S. 345 (1983).

136 Available at: <https://www.congress.gov/109/plaws/publ2/PLAW-109publ2.pdf>

settlements and perceived abuses of the class action procedure. In section 2 of CAFA, Congress listed its findings:

“..

- (1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.
- (2) Over the past decade, there have been abuses of the class action device that have—
  - (A) harmed class members with legitimate claims and defendants that have acted responsibly;
  - (B) adversely affected interstate commerce; and
  - (C) undermined public respect for our judicial system.
- (3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where—
  - (A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;
  - (B) unjustified awards are made to certain plaintiffs at the expense of other class members; and
  - (C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights”,

and asserted further that “[a]buses in class actions undermine the national judicial system ...”.

The package of measures in CAFA included provisions to:

- reduce forum shopping
- greatly expand the oversight and jurisdiction of federal courts over class actions, including class action settlements
- require courts to hold a fairness hearing to review a coupon settlement and to issue written findings<sup>137</sup>
- require attorneys’ fees to be based on the value of the coupons actually redeemed by class members as opposed to the previous practice of relating them to the value of all coupons issued to the class<sup>138</sup>
- require defendants to contribute a portion of the value of the unredeemed coupons to charitable or governmental organizations<sup>139</sup>
- limit courts’ authority to approve class action settlements under which any class member would be required to pay class counsel more in fees than the class member receives in the settlement.<sup>140</sup>

### 3.2 Canada

Court systems in nine of the ten Provinces of Canada now have legislation-based class action regimes, while the Federal court system has such a regime for certain prescribed categories of claim. The legislative regimes draw on the model Uniform Class Proceedings Act adopted by the Uniform Law Conference of Canada and the US Federal Rule 23.

However, the Supreme Court of Canada in the landmark decision in *Western Canadian Shopping Centres Inc. v. Dutton*<sup>141</sup> held that even in the absence of a legislative framework the courts had inherent powers to make the class action available on an “opt out basis”<sup>142</sup> and determine the mechanics of class action practice.<sup>143</sup>

137 28 USC 1712(e).

138 28 USC 1712(a).

139 28 USC 1712(e).

140 28 USC 1713.

141 [2001] 2 S.C.R. 534.

142 Para. 49 of the judgment.

143 Paras. 33 and 34 and 49 to 51 of the judgment.

The Canadian class action regime differs from the US Federal procedure in a number of respects, notably:

### 1. Costs and litigation funding

Significantly, costs follow the event in Canada (as in Ireland and most other common law jurisdictions) and this raises the issue of how class actions can be funded given the heavy costs risk to which the representative plaintiff is exposed. Other than the representative plaintiff, class members are not liable for costs except with respect to the determination of their own individual claims. In determining by whom and to what extent costs should be paid, a court may consider whether the class action was a test case, raised a novel point of law or addressed an issue of significant public interest.<sup>144</sup>

It is common for plaintiffs' lawyers to act on a contingency fee basis but advance court approval must generally be sought of any requested fee or disbursement payment in order to protect the interests of the class.<sup>145</sup> In assessing the reasonableness of the fee request, the court will consider a range of factors, including the complexity of the matter and the risk undertaken by class counsel. Though it is more common for class counsel to seek a fixed fee or a percentage fee only, most provincial class action statutes allow class counsel to include the use of "multipliers" (effectively, success fees) in contingency agreements, whereby a counsel's base fee is multiplied by a factor to reflect the risk of the proceeding. In a number of cases, class counsel have received fee approvals of between 20% and 33% of the total settlement funds that have been recovered for class members.<sup>146</sup>

Unlike the US, where third party litigation financing has only recently been employed in litigation generally, and is yet to become a feature of class actions,<sup>147</sup> third-party funding arrangements have been approved in Provincial courts on a case by case basis. In Ontario, which accounts for a significant proportion of adjudications of class actions in Canada, notwithstanding the survival of the offences of champerty and maintenance, third-party funding has in recent years been permitted in recognition that "the financial assistance of a third-party funder might be the only means for a litigant to achieve access to justice".<sup>148</sup> In the case concerned, the Ontario Superior Court of Justice affirmed the first instance judge's summary of the jurisprudence: viz. to approve a third-party funding agreement, the court must be satisfied that:

- (a) the agreement must be necessary in order to provide access to justice
- (b) the access to justice facilitated by the third-party funding agreement must be substantively meaningful
- (c) the agreement must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants
- (d) the third-party funder must not be overcompensated for assuming the risks of an adverse costs award because this would make the agreement unfair, overreaching, and champertous
- (e) the third-party funding agreement does not interfere with: the lawyer-client relationship; the lawyer's duties of loyalty and confidentiality; or the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or class members
- (f) the representative plaintiff retains the right to instruct and control the litigation and the representative plaintiff does not become indifferent in giving instructions to class counsel in the best interests of the class members.<sup>149</sup>

In its 2019 report referred to earlier at Section 1.2 of this chapter, the Law Commission of Ontario recommended that Ontario's Class Proceedings Act 1992 be amended to add provisions to provide

144 Section 37(1) and (2), Uniform Class Proceedings Act.

145 Carson, Dixon and Harding: "U.S. Guide to Class Actions in Canada" at: <https://www.osler.com/en/resources/regulations/2018/u-s-guide-to-class-actions-in-canada>

146 Carson, Dixon and Harding, op. cit..

147 Fitzpatrick, "Can and Should the New Third-Party Litigation Financing Come to Class Actions?" 19 Theoretical Inquiries L. 109 (2018), at 112 and 115 – 116.

148 F.L. Myers J in *Houle v. St. Jude Medical Inc.*, 2018 ONSC 6352, at para. 26, citing from Perell J's judgment at first instance.

149 *Houle v. St. Jude Medical Inc.*, at para. 27.

greater clarity to courts when considering counsel’s fees, including: specifying that such fees must be fair and reasonable and approved by the court, regardless of the method of calculation or the source of the payment; requiring that the court consider the results achieved for the class and the degree of responsibility/risk assumed by class counsel when considering whether a proposed fee is fair and reasonable; and giving courts the authority to (a) appoint an *amicus curiae* to assist the court in considering fee approvals; (b) adjust counsel’s fees to ensure they bear an appropriate relationship to results achieved; and (c) hold back a small percentage of those fees pending the final outcome of the case.<sup>150</sup>

The Commission further recommended that third party funding be permitted under certain circumstances.<sup>151</sup> It also considered that the court should have the discretion to determine the appropriate levy or fee in the circumstances of each specific funding arrangement and that the court retain authority to approve and manage particular terms related to control of the litigation, reporting obligations, and rights of exit and privilege.<sup>152</sup>

## 2. Certification requirements

The test for certifying a class action in the common law Provinces is less restrictive in relation to:

- (a) numerosity: an identifiable class of two or more persons must exist – the class does not, as with US Federal class actions, have to be so numerous as to render joinder of all claimants impracticable;
- (b) commonality: the claims of the class members need only raise a common issue, and it is not necessary that that common issue predominates over issues affecting only individual members;
- (c) typicality: there is no requirement that the claims or defences of the representative parties are typical of those of the class.

A class proceeding is certifiable as such by the court if -

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who, (i) would fairly and adequately represent the interests of the class, (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.<sup>153</sup>

## 3. Standard of proof for certification

Provided that the plaintiff can show that the pleadings disclose a cause of action, all that the plaintiff must then establish is that there is “some basis in fact” to show that the class action certification

150 Ibid., page 77.

151 Viz.:

- The representative plaintiff must bring a motion seeking court approval of a funding agreement;
- The motion must be brought forthwith on notice to the defendant.
- The court retain jurisdiction in an oversight capacity even after the agreement is approved. Any changes to the agreement or disputes arising from it must be brought to the attention of the case management judge;
- The court should be entitled to see the full, unredacted agreement. The extent of disclosure of the agreement to the defendant should be in the discretion of the judge.
- If an agreement is approved, defendants should be able to recover costs awards directly from the funder.
- The deemed undertaking rule in the Rules of Civil Procedure should be amended to explicitly account for non-parties’ duties.
- The existence of funding and the amounts owing to the funder if there is a recovery to the class should be disclosed in the notice of certification. Ibid. at page 88

152 “Class Actions: Objectives, Experiences and Reforms”, op. cit., page 88.

153 E.g. section 5, Ontario Class Proceedings Act, 1992.

requirements are met (i.e. not that they are met “on the balance of probabilities”) and conflicts in evidence are unlikely to be adjudicated on at certification stage – this contrasts with the “rigorous analysis” that is required at that stage in the U.S. Federal Courts.

#### *4. Exceptions to “opt out”*

In a minority of Provinces, an exception is made to the general “opt out” approach in that class members residents outside the Province only participate in the action if they have positively opted in.

#### *5. Determination of issues applicable to individual class members*

Typically,<sup>154</sup> where the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues (other than apportionment of an aggregated award among class members), the court may:

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint a referee to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.

#### *6. Damages awards*

Typically,<sup>155</sup> the court may aggregate a defendant’s liability to class members and give judgment to that effect where:

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant’s monetary liability; and
- (c) the aggregate or a part of the defendant’s liability to some or all class members can reasonably be determined without proof by individual class members.

The court may order that all or a part of an aggregated award be applied so that some or all individual class members share in the award on an average or proportional basis, and in deciding whether or not to do this, the court must consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. Where the court orders that all or a part of an aggregated award be divided among individual class members, it must determine whether individual claims need to be made to give effect to the order.

#### *7. Limitation periods*

Unlike Rule 23 in the US, the Canadian class action statutes themselves regulate the application of statutory limitation periods in a class action situation. Typically,<sup>156</sup> a limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when:

- (a) the member opts out of the class action;
- (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
- (c) the class is de-certified;
- (d) the class action is dismissed without an adjudication on the merits;
- (e) the class action is abandoned or discontinued with the approval of the court; or
- (f) the class action is settled with the approval of the court, unless the settlement provides otherwise.

<sup>154</sup> The example cited here is section 25(1) of Ontario’s Class Proceedings Act 1992 (S.O. 1992, c. 6).

<sup>155</sup> The example cited here is section 24 of Ontario’s Class Proceedings Act 1992.

<sup>156</sup> The example cited here is section 28 of Ontario’s Class Proceedings Act 1992.

Where there is a right of appeal in respect of an event described in paragraphs (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

### 3.3 Australia

Class actions were introduced in Australia at Federal level in 1992<sup>157</sup> based on recommendations of the Australian Law Reform Commission (“ALRC”) in a report of 1988,<sup>158</sup> and served as the model for statutory class action regimes in Victoria in 2000,<sup>159</sup> New South Wales in 2011<sup>160</sup> and Queensland in 2017.<sup>161</sup> The references to the class action regime which follow are to the Federal regime.

The following features of the Australian class action regime (known as “representative proceedings”) distinguish it from the US and Canadian models described above.

#### 1. *Costs and litigation funding*

- While, as in Canada, costs follow the event, contingency fee agreements remunerating a lawyer on the basis of a percentage of any damages awarded are not permitted. Third-party litigation funding is well established in Australia,<sup>162</sup> The ALRC in its report of December 2018<sup>163</sup> on the financing of class action proceedings recommended the lifting of the prohibition on solicitors entering into “percentage-based fee agreements”, but only where they are acting for the representative plaintiff in a class action, and subject to the following conditions<sup>164</sup>—
- an action that is funded through a percentage-based fee agreement cannot also be directly funded by a litigation funder or another funding entity which is also charging on a contingent basis
- a percentage-based fee cannot be recovered in addition to professional fees for legal services charged on a time-cost basis
- a solicitor who enters into a percentage-based fee agreement must advance the cost of disbursements, and account for such costs within the percentage-based fee
- percentage-based fee agreements in class actions should be permitted only with leave of the Court<sup>165</sup>
- the Court should have express power to reject, vary, or amend the terms of a percentage-based fee agreement<sup>166</sup>
- third-party litigation funding agreements with respect to representative proceedings must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order<sup>167</sup> and
- such third-party litigation funding agreement should be governed by Australian law and the funder should submit irrevocably to the jurisdiction of the Court.<sup>168</sup>

157 Through the enactment of the Federal Court of Australia Amendment Act 1991, which inserted a new Part IVA in the Federal Court of Australia Act 1976.

158 Australian Law Reform Commission, “Grouped Proceedings in the Federal Court”, op. cit., see in particular para. 69 and Chapter 9.

159 Supreme Court Act 1986 (Vic), Part 4A.

160 Civil Procedure Act 2005 (NSW), Part 10.

161 Civil Proceedings Act 2011 (Qld), Part 13A.

162 Australian Law Reform Commission Final Report, “Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders” (December 2018) ALRC Report 134, Chapter 1, para. 1.30, page 27. In that report, the ALRC noted that “[t]he conditions in Australia that are said to have allowed litigation funding to flourish include: the opt out model; the very high costs involved in conducting largescale class actions; the cost shifting rule; the lack of a public fund or other mechanism to finance class actions, and the prohibition on lawyers charging contingency fees.” (Chapter 2, para. 2.76 at page 68).

163 Ibid.

164 Recommendation 17.

165 Recommendation 19.

166 Recommendation 19.

167 Recommendation 14.

168 Recommendations 14.

The ALRC further recommended that -

- it should be open to the Court to appoint a referee to assess the reasonableness of legal costs charged in a representative proceeding prior to settlement approval<sup>169</sup>
- third-party litigation funders who fund a class action should be subject to a statutory presumption that they will provide security for costs in any such proceedings in a form enforceable in Australia<sup>170</sup>
- solicitors who fund a class action on the basis of percentage-based fee agreements should be subject to a statutory presumption that they will be required to provide security for costs in the action<sup>171</sup>
- third-party litigation funding agreements with respect to class actions must provide expressly for a complete indemnity in favour of the representative plaintiff against an adverse costs order and
- the Court be empowered to award costs against third-party litigation funders and insurers who fail to comply with the overarching purposes of the Federal Court of Australia Act 1976.<sup>172</sup>

## 2. No Certification requirements

Where:

- (a) 7 or more persons have claims against the same person;
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) the claims of all those persons give rise to a substantial common issue of law or fact,

a proceeding may be commenced by one or more of those persons as representing some or all of them.<sup>173</sup>

Unlike the US and Canada, Australia does not have a requirement that a class action be certified. When considering the merits of such a requirement in its 1988 report, the ALRC saw no need for the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure at any time. It further noted that a certification hearing does not always achieve its goal of protecting class members and felt that, if a class member's claim is individually recoverable, then, as long as adequate notice is given, he or she can opt out and pursue individual proceedings. It emphasised that “[i]t is notice, not certification, that protects group members”.<sup>174</sup>

## 3. Exceptions to “opt out”

Although the Australian class action procedure was conceived as an open class “opt out” model, the Full Federal Court of Australia in *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*,<sup>175</sup> permitted use of a “closed class” group definition where the represented group was defined, *inter alia*, on the basis that they “had as at the commencement of the ... proceeding entered a litigation funding agreement with [the litigation finance company].” The Court found that closed classes were permissible as the relevant statutory provision of the class action legislation<sup>176</sup> expressly provided that a proceeding could be commenced by only “some” of the persons who had claims against a respondent.

The ALRC recommended that the legislation should be amended so that all representative proceedings are initiated as open class actions and that criteria are specified as to when it is appropriate to order

169 Recommendation 8.

170 Recommendation 12.

171 Recommendation 18.

172 Viz. “to facilitate the just resolution of disputes (including representative proceedings) according to law, and as quickly, inexpensively, and efficiently as possible” (section 37M). Recommendation 13.

173 Section 33C, Federal Court of Australia Act 1976.

174 Australian Law Reform Commission, “Grouped Proceedings in the Federal Court”, *op. cit.*, Chapter 5, paras. 146 and 147, at page 63.

175 (2007) 164 FCR 275.

176 Section 33C of the Federal Court of Australia Act 1976, as amended.

class closure during the course of a representative proceeding and the circumstances in which a class may be reopened.<sup>177</sup>

#### *4. Determination of issues applicable to individual class members*

Where the court considers that determination of the common issues will not finally determine the claims of all class members, it may give directions in relation to the determination of the remaining issues. In the case of issues common to the claims of some only of the group members, the court may establish a sub-group comprising those group members and appointing a representative party for the sub-group in which event that person (if a person different to the representative party for the entire class) is liable for costs associated with determination of the sub-group-related issues.<sup>178</sup>

The court may permit an individual class member to appear in the action for the determination of an issue relating only to that member's claim (in which event that member, and not the representative party, is liable for costs associated with the determination of the issue).<sup>179</sup> Alternatively, the court may direct the bringing of a separate action by that member if the issue concerns only that member's claim, or the bringing of a separate class action in relation to the claims of a sub-class of members if the issue is common to the claims of the sub-class.<sup>180</sup>

#### *5. Damages awards*

The court is empowered to award damages to the class, or a sub-class or individual class members, or award damages in an aggregate amount without specifying amounts awarded in respect of individual group members.<sup>181</sup> In awarding damages, the court must make provision for payment or distribution of the money to the class members entitled.<sup>182</sup> Save on approval of a settlement or discontinuance, the court may not award damages in an aggregate amount only (i.e. without specifying individual members' share) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.<sup>183</sup> The court in awarding damages may give directions as to how a group member is to establish his or her entitlement to share in the damages; and how any dispute regarding a group member's entitlement to share in the damages is to be determined.<sup>184</sup>

#### *6. Limitation periods*

The Federal class action statute also regulates the application of the statutory limitation periods applicable to the cause of action comprised in the class action, but is less extensive than the Canadian legislation, providing simply that:

- (a) upon the commencement of a representative proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended and
- (b) the limitation period does not begin to run again unless either the member opts out of the proceeding or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim.

177 Australian Law Reform Commission Final Report, "Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders", op. cit., recommendations 1 and 2.

178 Section 33Q of the Federal Court of Australia Act 1976, as amended.

179 Section 33R of the Federal Court of Australia Act 1976, as amended.

180 Section 33S of the Federal Court of Australia Act 1976, as amended.

181 Section 33Z(1) of the Federal Court of Australia Act 1976, as amended.

182 Section 33Z(2) of the Federal Court of Australia Act 1976, as amended.

183 Section 33Z(3) of the Federal Court of Australia Act 1976, as amended.

184 Section 33Z(4) of the Federal Court of Australia Act 1976, as amended.



## 3.4 England and Wales

### 3.4.1 The Group Litigation Order procedure

#### 3.4.1.1. Background

The solution adopted in England and Wales for multi-party litigation on foot of Lord Woolf's recommendations in his Final Report "Access to Justice"<sup>185</sup> of 1996<sup>186</sup> was the Group Litigation Order ("GLO") procedure. That procedure merits particular attention as it ultimately formed the basis for the Law Reform Commission's recommended model for a multi-party action.

In that report, Lord Woolf considered the merits of a procedure to facilitate collective pursuit of a civil remedy at a time when the relevant civil procedure in England and Wales broadly equated to that currently in operation in Ireland. In supporting the need for such a procedure, Woolf commented:

"Unlike the position in some other common law countries, there are no specific rules of court in England and Wales for multi-party actions. This causes difficulties when actions involving many parties are brought. In addition to the existing procedures being difficult to use, they have proved disproportionately costly. It is now generally recognised, by judges, practitioners and consumer representatives, that there is a need for a new approach both in relation to court procedures and legal aid. The new procedures should achieve the following objectives:

- (a) provide access to justice where large numbers of people have been affected by another's conduct, but individual loss is so small that it makes an individual action economically unviable;
- (b) provide expeditious, effective and proportionate methods of resolving cases, where individual damages are large enough to justify individual action but where the number of claimants and the nature of the issues involved mean that the cases cannot be managed satisfactorily in accordance with normal procedure;
- (c) achieve a balance between the normal rights of claimants and defendants, to pursue and defend cases individually, and the interests of a group of parties to litigate the action as a whole in an effective manner."<sup>187</sup>

The GLO procedure, provided for in Part 19 of the Civil Procedure Rules ("CPR") and Practice Direction 19B (Group Litigation) ("the PD"), fundamentally differs from the class action approach in consisting of a scheme for the management of individual cases by a single judge as opposed to the unifying in one set of proceedings of multiple claims. Furthermore, the GLO regime as adopted did not include provision for the court to direct a GLO to proceed on an "opt out" basis.

A GLO is an order for the case management of claims which give rise to common or related issues of fact or law ("the GLO issues"). The court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues.<sup>188</sup> The GLO regime has been authoritatively described as:

"...a case management regime designed to manage effectively a large number of individual claims, which raise common or related issues of law or fact. A GLO is not a form of representative action. Representative claimants or defendants are not identified or selected under a GLO. On the contrary individual claims are brought within an overarching managerial framework; a framework which, in

<sup>185</sup> Chapter 17 (Multi-Party Actions).

<sup>186</sup> Lord Woolf in turn drew heavily from the report of the Law Society "Group Actions Made Easier" of September 1995.

<sup>187</sup> Woolf, "Access to Justice" Final Report, Chapter 17, para. 2.

<sup>188</sup> Rule 19(11), CPR.

common with the rest of the CPR, must operate according to the overriding objective (CPR 1.1)<sup>189</sup> so as to promote judicial and party efficiency and economy.”<sup>190</sup>

Since the GLO regime’s introduction in May 2000, some 105 GLOs had by 2019 been made, the bulk of these in mainly consumer-focused areas (e.g. product liability claims, tax disputes, environmental claims, and industrial disease claims), with only a few for financial services or shareholder claims.<sup>191</sup>

#### 3.4.1.2 Costs and litigation funding

The “costs follow the event” principle applies to litigation in England and Wales. GLO proceedings may be financed through conditional fee agreements (“CFAs”) – generally, “no win, no fee (or reduced fee)” agreements – and damages-based agreements (“DBAs”) – under which the lawyer will receive a percentage of the damages awarded.<sup>192</sup>

#### 3.4.1.3 The application for a GLO

Before applying for a GLO, the solicitor acting for the proposed applicant – who may be a claimant or defendant – is required by the PD to consult the Law Society’s Multi Party Action Information Service to obtain information about other cases giving rise to the proposed GLO issues.<sup>193</sup> Claimants’ solicitors are advised by the PD to consider whether an alternative option such as consolidation or a representative action would be more appropriate. They are also advised by the PD to form a Solicitors’ Group and to choose one of their number to take the lead in applying for the GLO and in litigating the GLO issues and to carefully define in writing the lead solicitor’s role and relationship with the other members of the Solicitors’ Group.

The application should include the following information:

- (1) a summary of the nature of the litigation;
- (2) the number and nature of claims already issued;
- (3) the number of parties likely to be involved;
- (4) the common issues of fact or law (the ‘GLO issues’) that are likely to arise in the litigation; and
- (5) whether there are any matters that distinguish smaller groups of claims within the wider group.<sup>194</sup>

189 CPR 1.1. provides

“(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.”

190 Civil Justice Council, “Improving Access to Justice through Collective Actions, Developing a More Efficient and Effective Procedure for Collective Actions” Final Report (November 2008), Part 2, page 31.

191 HM Courts & Tribunals Service quoted in Foggo and Hill, “Group Litigation Orders—Sharing the Spotlight”, 169 New Law Journal 7851, page 20 (August 2019).

192 See further on CFAs and DBAs in Sections 8.2.2 and 8.2.3.6 of Chapter 9.

193 Practice Direction 19B – Group Litigation.

194 Ibid, Section 3.

A GLO may not be made without the consent of the President of the High Court division concerned or, in the case of the County Court, the Head of Civil Justice. The court may make a GLO of its own initiative, on obtaining the consent aforementioned.<sup>195</sup>

#### 3.4.1.4 *The GLO and the Group Register*

A GLO must:

- (a) contain directions about the establishment of a register (the “group register”) on which the claims managed under the GLO will be entered;
- (b) specify the GLO issues which will identify the claims to be managed as a group under the GLO; and
- (c) specify the court (the “management court”) which will manage the claims on the group register.

A GLO may:

- (a) in relation to claims which raise one or more of the GLO issues, direct their transfer to the management court; order their stay until further order; and direct their entry on the group register;
- (b) direct that from a specified date claims which raise one or more of the GLO issues should be started in the management court and entered on the group register; and
- (c) give directions for publicising the GLO.<sup>196</sup>

Where a judgment or order is given or made in a claim on the group register in relation to one or more GLO issues, it is binding on the parties to all other claims that are on the group register at the time it is given or made unless the court orders otherwise, and the court may give directions as to the extent to which that judgment or order is binding on the parties to any claim which is subsequently entered on the group register.<sup>197</sup>

A party to a claim which was entered on the group register after a judgment or order which is binding on him was given or made may not seek to set it aside or have it varied or stayed or appeal it, but may apply to the court for an order that the judgment or order is not binding on him/her.<sup>198</sup>

Unless the court orders otherwise, disclosure of any document relating to the GLO issues by a party to a claim on the group register is disclosure of that document to all parties to claims on the group register and subsequently entered on the group register, unless the court orders otherwise.<sup>199</sup>

The Group Register contains such details as the court may direct of the cases which are to be subject to the GLO. A claim must be issued before it can be entered on a Group Register, and an application for details of a case to be entered on a Group Register may be made by any party to the case. The Group Register will normally be maintained by and kept at the court but the court may direct this to be done by the solicitor for one of the parties to a case entered on the Register, on the basis that it be inspectable by the public. A party to a claim on the group register may request documents relating to any other claim on the group register as if he were a party to those proceedings.<sup>200</sup>

#### 3.4.1.5 *Case management*

A managing judge will be appointed for the purpose of the GLO as soon as possible, and will assume overall responsibility for the management of the claims and will generally hear the GLO issues. A Master or a District Judge may be appointed to deal with procedural matters, in accordance with any directions given by the managing judge. A costs judge may be appointed and invited to attend case management hearings.<sup>201</sup>

<sup>195</sup> Ibid.

<sup>196</sup> Rule 19(11), CPR.

<sup>197</sup> Rule 19(12), CPR.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> PD, Section 6.

<sup>201</sup> PD, Section 8.

The management court may order that as from a specified date all claims that raise one or more of the GLO issues shall be started in the management court.<sup>202</sup> Directions given at a case management hearing will generally be binding on all claims that are subsequently entered on the Group Register.<sup>203</sup>

The management court may, *inter alia*:

- (a) direct that one or more of the claims are to proceed as test claims and give directions about how the costs of resolving common issues or the costs of claims proceeding as test claims are to be borne or shared as between the claimants on the Group Register;<sup>204</sup>
- (b) appoint the solicitor of one or more parties to be the lead solicitor for the claimants or defendants;<sup>205</sup>
- (c) specify a date after which no claim may be added to the Group Register unless the court gives permission;<sup>206</sup>
- (d) direct that the GLO claimants serve ‘Group Particulars of Claim’ setting out the various claims of all the claimants on the Group; and
- (e) give directions for the trial of common issues and of individual issues.<sup>207</sup>

Common issues and test claims will normally be tried at the management court. Individual issues may be directed to be tried at other courts whose locality is convenient for the parties.<sup>208</sup>

Where the court has made an order about costs in relation to any application or hearing which involved both (1) one or more of the GLO issues and (2) an issue or issues relevant only to individual claims, and the court has not directed the proportion of the costs that is to relate to common costs and that which is to relate to individual costs, the costs judge will make a decision as to the relevant proportions at or before the commencement of the detailed assessment of costs.<sup>209</sup>

A party to a claim entered on the group register may apply to the management court for the claim to be removed from the register and if the management court does so it may give directions about the future management of the claim.<sup>210</sup>

### 3.4.2 “Opt out” class actions

#### 3.4.2.1. Background

In a 2008 report,<sup>211</sup> the Civil Justice Council (“CJC”) recommended that a generic class action procedure be introduced, permitting claims to be brought on behalf of a class of claimants, in some instances on an opt out basis, and either at the instance of individual claimants or of authorised representative entities.

In the event, HM Government did not accept the recommendation for a generic right of collective action, indicating that regulatory alternatives might be preferable as a “holistic and relatively inexpensive and timely way” to address complaints and that class action solutions would be considered by the Government Departments concerned on a sector-by sector basis only, with discrete requirements appropriate to the sector claim concerned.<sup>212</sup>

202 PD, Section 9.

203 PD, Section 12.

204 Ibid.

205 Rule 19(13)(c), CPR

206 Rule 19(13)(e), CPR.

207 PD, Sections 12 to 15.

208 Ibid., Section 15.

209 PD, Section 16.

210 Rule 19(14), CPR.

211 Civil Justice Council, “Improving Access etc.” op. cit., Part 9.

212 See Acrapopulo, Poffley and Tolaini, “Class Actions In The UK: The Long Grass Beckons” (2010), available at: <http://www.mondaq.com/x/95350/Class+Actions/Class+Actions+In+The+UK+The+Long+Grass+Beckons+>

### 3.4.2.2. *Collective proceedings under section 47B, Competition Act 1998*

Following this sectoral approach, the Consumer Rights Act 2015<sup>213</sup> introduced a class action procedure to facilitate collective proceedings for damages, or other money relief or for an injunction before the Competition Appeal Tribunal (“CAT”) in respect of private competition proceedings, based on an “opt out” approach – the first and only such procedure in England and Wales to date.

Collective proceedings involve the making of a collective proceedings order (“CPO”) by the CAT including authorisation of the person who brought the proceedings to act as the representative in those proceedings, the description of a class of persons whose claims are eligible for inclusion in the proceedings, and specification of the proceedings as “opt in” collective proceedings or “opt out” collective proceedings.

In order to be able to make a CPO, the CAT will, chiefly, require to determine that “the claims raise the same, similar or related issues of fact or law”, and that a collective proceeding would be appropriate based upon a preliminary assessment of the merits and available alternative regimes.<sup>214</sup> The CAT determines in the CPO whether the collective proceedings are to proceed as “opt in” or “opt out” collective proceedings.<sup>215</sup>

Upon certifying the class in an “opt out” action, all members falling within the definition and domiciled within the UK automatically become part of the action unless they opt out before the end of a designated time period. Non-UK domiciled claimants are required actively to opt in before the end of the specified time period.<sup>216</sup>

The CAT may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person. Where it awards damages in “opt out” collective proceedings, it must make an order providing for the damages to be paid on behalf of the represented persons to the person it has authorised as representative, or such person other than a represented person as it thinks fit.<sup>217</sup> If all damages are not claimed within a period specified, the CAT may order that undistributed damages are paid to the representative in respect of all or part of the costs or expenses incurred by them in connection with the proceedings.<sup>218</sup> Any other remaining unpaid damages are to be paid to charity.<sup>219</sup>

Once a CPO has been made and proceedings are authorised to continue on an “opt out” basis, claims may only be settled by way of a collective settlement approved by the CAT, which may approve the settlement only where it deems the terms “just and reasonable”. A collective settlement is not binding on a person who (a) opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective settlement, or (b) is not domiciled in the UK at the relevant time and does not by a time specified, opt in by notifying the representative that the claim should be included in the collective settlement.

### 3.4.2.3 *Costs and litigation funding*

In 2007<sup>220</sup> the CJC recommended that properly regulated third party funding should be recognised as an acceptable option for mainstream litigation – as having the potential to increase access to justice in areas of consumer rights and multi-party action – and that in multi-party cases where no other form of funding is available, regulated contingency fees should be permitted to provide access to justice.

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213 through an amendment to the Competition Act 1998: Consumer Rights Act 2015, Schedule 8, Part 1.

214 Section 47B, Competition Act 1998 and Rule 79, Competition Appeal Tribunal Rules.

215 Rule 80(1)(f), Competition Appeal Tribunal Rules 2015.

216 Section 47B(11), Competition Act 1998.

217 Section 47B(7), Competition Act 1998.

218 Section 47C(6), Competition Act 1998.

219 Section 47C(5), Competition Act 1998.

220 Civil Justice Council, “Improved Access to Justice – Funding Options & Proportionate Costs” (June 2007).

As in the case of GLO proceedings, CFAs and third party financing may be employed to fund collective proceedings under section 47B, but a DBA relating to opt-out collective proceedings is unenforceable.<sup>221</sup>

## 3.5 Evaluating the different procedural models

### 3.5.1 Evaluation criteria

Commentators have suggested varying ranges of criteria by which to evaluate the efficacy of class or group litigation procedures. Blennerhassett has proposed<sup>222</sup> an analytical framework comprising six multi-party action objectives, viz.: (a) facilitating access to justice (including ability to fund the litigation); (b) achievement of judicial and procedural economy in the disposal of the proceedings; (c) fairness (both as between the plaintiffs themselves and the plaintiffs and the defendants); (d) predictability (of outcome and rules for the conduct of the dispute); (e) deterrence of wrongful behaviour by prospective defendants; and (f) compensation.

A Canadian commentator, Professor Jasminka Kalajdzic, suggests four measures to assess the efficacy of class actions, including whether they provide (1) an opportunity to litigate a claim that would not otherwise be litigable (2) a process that is fair and transparent, (3) meaningful participation rights, and (4) a substantively just result.<sup>223</sup>

However, attempts to measure the performance of the varying class action models have been frustrated by an absence of reliable and standardised data for the jurisdictions concerned.<sup>224</sup> As Kalajdzic, has put it, “Depending on whom you ask, therefore, class actions are either with the angels or with the devil, as one Ontario judge has put it. Plaintiffs’ lawyers are either the courageous defenders of the rule of law or rapacious ambulance chasers. Separating the wheat from the chaff in such rhetoric is difficult. Like most jurisdictions all over the world, Canada lacks empirical data by which to measure any of the pressing questions that critics of class proceedings routinely raise.”<sup>225</sup>

A further factor complicating comparison is the difference in approaches to legal costs and funding arrangements – a key influence on recourse to class actions. In the US, each side bears their own whereas costs follow the event elsewhere. In Canada, contingency fees are permitted while third party litigation financing has only recently been facilitated and then subject to strict regulation in jurisprudence. In Australia, contingency fees are not permitted but third party litigation financing of class actions is well established. In England and Wales, third party costs financing and contingency fees in the form of damages-based agreements are employed for group litigation but the latter are prohibited in the case of the “opt out” version of the new competition collective proceedings.

### 3.5.2 Authoritative views

In light of this, reliance on informed and authoritative opinion is indispensable. Reference has already been made to the criticism by the US Congress of abuses of “opt out” class actions in the 1990s and 2000s resulting in harm to genuine claimants and defendants who have behaved responsibly, and to commerce, with significant costs provision being made for lawyers while claimants had received minimal awards of little or no value and class members had been poorly informed of their rights.

As mentioned above, concerns at EU level about the importing of a US-style entrepreneurial litigation culture have led the European Commission and European Parliament to build safeguards into representation and funding arrangements for proposed EU collective action procedures.

221 Section 47C(8), Competition Act 1998.

222 Blennerhassett, “A Comparative Examination of Multi-Party Actions: The Case of Environmental Mass Harm”, op. cit. chapter 3, pages 67 to 91.

223 Kalajdzic, “Class Actions in Canada: The Promise and Reality of Access to Justice”, UBC Press (2019), page 70.

224 Blennerhassett, “A Comparative Examination of Multi-Party Actions: The Case of Environmental Mass Harm”, op. cit., page 154.

225 Kalajdzic, op. cit., page 5.

Against this, McLachlin CJ in *Western Canadian Shopping Centres Inc. v. Dutton*<sup>226</sup> has pointed to three important advantages of the class action over a multiplicity of individual suits:

“First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times)...

Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied...

Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation...”<sup>227</sup>

In its 2018 report aforementioned, the ALRC reflected on the performance of the Federal class action regime, noting that four principal concerns were expressed by critics concerning its introduction, viz.: that it would constitute an attack on the traditional method of exercising legal rights; that it would foster a litigious culture in Australia; that it would change the nature of legal practice by the creation of an “entrepreneurial class” of lawyer promoting proceedings; and that it was a misdirected overreaction to the problem of the cost of litigation. The ALRC concluded:

“These fears have, in large measure, not materialised. As was intended, the regime has provided a remedy where, although many people are affected and the total amount at issue is significant, each person’s claim is small, and to deal efficiently with similar individual claims that would nevertheless be large enough to justify individual actions. To date, the cases that have been brought under the regime reflect a broad range of both commercial and non-commercial causes of action, including shareholder and investor claims, anti-cartel claims, mass tort claims, consumer claims for contravention of consumer protection law, environmental claims, trade union actions, claims under the *Migration Act 1958* (Cth), and human rights claims. One of the more recent examples of the Part IVA regime promoting access to justice is the formal apology and settlement award of \$30 million to 447 residents of Palm Island in their action against the Queensland Government following claims of racism and police misconduct in 2004.<sup>13</sup>

A development that was unlikely to have been with [sic] the contemplation of the proponents of the original Bill is that insurers are now class members in matters. There have been instances of insurers relying on rights of subrogation, and opting insureds out of class actions—even without their authority to do so.

If a criticism could be levelled at Part IVA regime, as it was introduced, it was that neither the Part IVA, nor any other relevant legislation, dealt with the issue of an appropriate costs regime—leaving unanswered the difficult question of how to relieve a principal applicant from the brunt of an adverse costs order should the proceeding fail...”<sup>228</sup>

In England and Wales, the CJC conducted a major evaluation of the merits of the “opt in” GLO procedure in 2008<sup>229</sup> which included a critical scrutiny of the GLO procedure then in operation for some eight years.

226 [2001] 2 S.C.R. 534.

227 Ibid., paras. 27 to 29.

228 Australian Law Reform Commission Final Report, “Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders” (December 2018) ALRC Report 134, paras. 2.5 – 2.8, at pages 48 and 49.

229 Civil Justice Council, “Improving Access to Justice through Collective Actions” (November 2008).

Having noted the relatively few GLOs made since the procedure came into operation (62 in 3 ½ years),<sup>230</sup> it saw the GLO procedure as having certain shortcomings:

“17. ... GLOs could, and can, provide a useful and flexible tool for managing multi-party claims ... They are not, however, ideal vehicles for the prosecution of collective claims. Claimants must opt-in through issue of a claim form, rather than opt-out. Barriers to entry, to access to justice, remain therefore a part of the GLO regime, which cannot provide effective access to justice for those individuals whose claims are of limited individual quantum and where the litigation (cost) risk far outweighs the potential value of a successful judgment. Moreover simply being party to a GLO remains in itself a relatively expensive exercise for individual litigants in any event, not least because, as an opt-in mechanism, it still requires, as was evident from *Taylor v Nugent*<sup>231</sup> significant front-loading of litigation cost. The GLO does not therefore mitigate, but on the contrary, institutionalises the inability of those litigants, with relatively small claims that give rise to common issues, to prosecute them effectively. The GLO does nothing to satisfy the first of Lord Woolf’s three principles which collective actions are required to meet.

18. These problems are further compounded by: the use of cut-off dates which preclude claimants joining the opt-in register but which does not, nor could it, preclude them from prosecuting their claim as an individual claim; the lack of provision to aggregate damages; and the lack of a mechanism whereby the court can scrutinise and approve any proposed settlement. Each of these factors reduce the utility of the mechanism as a means to reduce the number of separate actions which may be commenced arising out of a common cause of action. Where, for instance, as in *Taylor v Nugent*, an individual misses the cut-off date they will still be able to prosecute their action individually. Such an action may be stayed pending the outcome of the group litigation, but it will nevertheless be prosecuted; thus undermining the efficiency and economy benefits of the GLO. Equally, the inability to aggregate damages means that damages will necessarily have to be dealt with on an individual basis, further undermining efficiency and economy savings.”<sup>232</sup>

## 4. The Law Reform Commission’s recommendations

The principal recommendations of the Law Reform Commission are considered below. Those recommendations were proposed for implementation in draft rules of court, appended at Appendix A of the LRC Report.<sup>233</sup>

### 4.1 “Opt in” and “opt out” models

The Commission took the view in the Consultation Paper, and confirmed in its Report, that “the wholesale incorporation of the US model of a class action procedure would be inappropriate for the Irish legal system”.<sup>234</sup> It responded to concerns about “the popular connotations associated with the concept of a class action” and recommended another term for the reformed procedure proposed, viz. the ‘multi-party action’ (MPA).

In its Report, it weighed the arguments for and against the “opt out” model it had tentatively recommended in its Consultation Paper. It noted that one of the attractions of an opt in system “lies in its familiarity or, conversely, in the unfamiliarity of the opt out approach. An opt out regime would require a dramatic shift away from the traditional voluntary method of instituting litigation. The idea of compelling an individual to take steps to withdraw from litigation that they never undertook sits uneasily with the traditional concept of litigation. Thus, the real possibility arises that individuals may become involved unwittingly in litigation.”<sup>235</sup>

<sup>230</sup> Ibid., Part 2, para. 9, page 29.

<sup>231</sup> *Taylor v Nugent Care Society* [2004] 1 WLR 1129.

<sup>232</sup> Civil Justice Council, “Improving Access etc.” op. cit., Part 6, paras. 17 to 18.

<sup>233</sup> Page 73, et seq., LRC report.

<sup>234</sup> Chapter 2, para. 2.04, LRC Report.

<sup>235</sup> LRC report, Chapter 2, para. 2.14.



While noting the perceived advantage of the “opt out” model in improving access to justice for those who are less likely to have recourse to the courts and whose valid legal claims accordingly remain unsatisfied, especially those whose claim is too small to warrant the risk and expense of an individual action, it suggested that that reasoning does not apply in the Irish context where there already exists a small claims mechanism. It noted that an “opt out” model served other much larger jurisdictions, where claimants are dispersed over a wide geographical area and it may be difficult to communicate the commencement of the group to many of those affected. However, whereas in Ireland the pool of potential litigants is relatively small, “an organised and targeted means of notification should serve the objective of widespread reach and obviate the need for an opt out approach. In short, the geographic and demographic profile of Ireland does not warrant an opt out system.”<sup>236</sup>

The Commission considered the particular Constitutional dispensation in Ireland, stating that it is arguable that the right of access to the courts involves a corresponding and converse right of non-access or, in other words, a right not to be compelled to litigate and that a requirement to “opt out” may have implications for personal property rights in that a cause of action may attract the constitutional protection afforded to other forms of private property.

While accepting that opt out systems offered the advantage for litigants and the system as a whole of closure as to the class issues and containment of the likely volume of claims which might be brought, it noted the argument that “the optout regime does not ensure greater closure as it filters from the group those with a greater predilection for individual litigation.” It also noted that “an opt in regime will not leave the litigation door interminably open” given the operation of limitation periods.<sup>237</sup>

However, the Commission saw the possibility of gaining some of the advantages of finality associated with the “opt out” approach by recommending that the MPA procedure would operate on the opt in principle, subject to a power of the court to oblige an action to be joined to an existing MPA.<sup>238</sup>

## 4.2 Opting in and the operation of the Statute of Limitations

The Commission considered how a claimant wishing to join the group might be added to the MPA and the implications for limitation periods.<sup>239</sup> It noted the options considered in relation to the GLO procedure, viz. (a) that the Statute of Limitations would stop running as against the claim from the time of entry on the group register and (b) that each claim would be issued separately before entry on the register.

On balance, the Commission favoured solution (b) in the Irish context, stating that “judicial control over entry onto the register and the important implications this would have in terms of the Statute of Limitations militate heavily in favour of maintaining the traditional rules which require each claim to be issued separately”.<sup>240</sup>

The Commission therefore recommended that the Statute of Limitations should not stop running against each claim until that case has been filed in court in the normal way, to be followed by judicially controlled entry onto an MPA register.<sup>241</sup>

## 4.3 Certification

The Commission recommended that the point at which an action becomes an MPA should be subject to judicial certification, whether at the initiative of the parties or on the court’s own initiative,<sup>242</sup> with no

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236 LRC report, Chapter 2, paras. 2.13 to 2.18.

237 LRC report, Chapter 2, paras. 2.23 to 2.23.

238 LRC report, Chapter 2, para. 2.26.

239 LRC report, Chapter 2, paras. 2.27 to 2.32.

240 LRC report, Chapter 2, para. 2.32.

241 LRC report, Chapter 2, para. 2.33.

242 LRC report, Chapter 2, para. 2.37.

minimum number of claimants to be required for certification of an MPA, though the number of claimants would be taken into account by the court in considering whether the MPA offers a fair and efficient means of resolving the issues both known and anticipated.<sup>243</sup>

In deciding whether to certify proceedings as an MPA, the court must be satisfied that an MPA would be an appropriate, fair and efficient procedure in the circumstances.<sup>244</sup>

#### 4.4 Common Interest

Having considered the separate questions of the degree of commonality necessary as between the cases in the group and whether there should be a requirement that the common issues predominate over the individual issues within the group of cases, the Commission favoured a broad concept of commonality and recommended that to qualify for certification for entry to the group cases should give rise to common issues of fact or law rather than be required to show strict commonality.<sup>245</sup> It further recommended that there not be a requirement that common issues predominate over individual issues in an MPA.

#### 4.5 Representation

The Commission recommended that a representative or lead case should be selected to litigate a specific issue which will fairly and adequately represent the interests of the individual litigants in the MPA. It considered that the representative should not have to meet a “typicality” requirement as in the US<sup>246</sup> but that typicality should be a factor in selecting the lead case within the group.<sup>247</sup> However, it suggested that the choice of whether or not a lead case is appropriate will depend on the circumstances of the group and on careful scrutiny of the register and selection by the court, and recommends that the issue of the number or need for lead cases be left to the discretion of the court.<sup>248</sup>

#### 4.6 Defendant multi-party actions

While appreciating the added difficulties that attempting to certify a defendant MPA might involve in that the criterion of “common issues” may need to be more strictly applied and it may prove more difficult to find a defendant willing to represent the class, the Commission felt that there was little reason why the procedure should not be sufficiently flexible to accommodate such, which were likely to comprise a very small fraction of MPAs overall. It therefore recommended that the proposed procedure should accommodate defendant MPAs.<sup>249</sup>

#### 4.7 Legal Representation: “Lead solicitor”

The Commission saw the selection of a single legal representative dealing with a generic issue as clearly “an essential factor in the effective functioning of the procedure.” It noted that the GLO Practice Direction in England and Wales,<sup>250</sup> encouraged claimants’ solicitors to form a Solicitors’ Group and to choose one of their number to take the lead in applying for the GLO and litigating the GLO issues and that the Law Society in that jurisdiction has provided a coordination mechanism through the Multi-Party Action Coordination Service, facilitating, in a neutral way, cooperation between solicitors and channelling potential claimants who contact the Law Society to the relevant legal representatives.

The Commission considered that the Law Society of Ireland and the Courts Service would both be in a position to carry out this function, but that, as the papers in relation to the MPA will already have been

243 LRC report, Chapter 2, para. 2.46.

244 LRC report, Chapter 2, para. 2.73.

245 LRC report, Chapter 2, paras. 2.47 to 2.58.

246 See “pre-requisites for a class action” in Section 3.1 above.

247 LRC report, Chapter 2, paras. 2.59 to 2.63.

248 LRC report, Chapter 2, paras. 2.64 to 2.68.

249 LRC report, Chapter 2, paras. 2.74 to 2.79.

250 See Section 3.4.1 of this chapter.

filed with the Courts Service, it is the institution best placed to successfully carry out the coordination task in this jurisdiction. On this view, the Courts Service should be informed of the identity of the nominated legal representative for the generic issue and would then refer any enquiries to that solicitor. Where a lead solicitor has not been selected voluntarily or is considered inappropriate by the court, the certifying judge may be empowered to make a selection. Separate legal representatives may be responsible for discrete issues within the group on either a sub-group or individual level.

It is therefore recommended that a single lead solicitor be responsible for the representation of the generic issue of the MPA, nomination of whom to be voluntary subject to judicial approval, or by judicial appointment. Separate legal representatives may be responsible for discrete issues within the group on either a sub-group or individual level.<sup>251</sup> However, the draft rules do not specify the precise functions and obligations of the lead solicitor.

#### 4.8 Cut-off dates for entry in the Group Register; exiting the Register

The Commission recommended that at the certification stage, the court will determine a cut-off date beyond which entry on the register will require court authorisation.<sup>252</sup> Where an individual litigant wished for whatever reason to opt out of the group beyond the filing, court permission should be required, and it should be open to the court to make a costs order penalising the individual litigant for the delay in opting out and for the potential harm caused to the MPA proceedings.<sup>253</sup>

#### 4.9 Global Settlement

The Commission recommended that in keeping with the generally self-regulatory nature of the register – in the context of which final court approval appears cumbersome and inappropriate – the terms and conditions on which a settlement is to be accepted or rejected should be a matter for the determination of the group and should be made clear from the point of opt in. The certifying court should nonetheless seek confirmation from the group at certification stage that it has agreed these issues amongst itself. Exceptionally, where the group has been unable to agree these points itself, the certifying judge may be requested to set the terms and conditions for acceptance of the settlement by the group, and individual members should also be able to seek relief from the court in the event of allegations of unjust or oppressive application of the agreed terms of acceptance of the settlement, but in none of these circumstances would the final approval of the court of the proposed settlement be necessary.<sup>254</sup>

#### 4.10 Costs and funding of the multi-party action

The Commission noted that “[t]he issue of whether liability for costs should be shared among those on the register or should rest solely with the lead or representative case goes to the heart of the form that the procedure will take”.<sup>255</sup> It recommended retention of the “costs follow the event” rule for MPAs and that costs involved in the litigation of the generic issue of the MPA be shared in equal measure as among the constituent members unless the court considers that this rule should be varied in the interests of justice in the particular case. It further considered that a scheme of joint and several liability would provide the most appropriate and just method of placing and distributing the risk of default on an order for costs made against the MPA, subject to a power on the court’s part to depart from this where it gives rise to potential for injustice.<sup>256</sup>

The Commission recommended that the Civil Legal Aid Act 1995 be amended to make provision for the funding of an otherwise eligible group member for his/her proportion of any eventual costs order.<sup>257</sup>

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251 LRC report, Chapter 2, paras. 2.80 to 2.87.

252 LRC report, Chapter 2, paras. 2.88 to 2.91.

253 LRC report, Chapter 2, paras. 2.92 to 2.98.

254 LRC report, Chapter 2, paras. 2.99 to 2.103.

255 LRC report, Chapter 3, para. 3.21.

256 LRC report, Chapter 3, paras. 3.16 to 3.34.

257 LRC report, Chapter 3, para. 3.49.

The Commission noted<sup>258</sup> that the use of “After the Event” (“ATE”) insurance available in England and Wales was closely tied to use of Conditional Fee Arrangements (CFAs), whereby a lawyer agrees to forego his/her fee in the event of failure of the action on the condition that s/he will receive a basic fee as well as an uplift or success fee if the action succeeds. While noting that CFAs do not at present exist in Ireland, the Commission suggested that, in the interests of security for defendants as well as claimants, an MPA regime “militates in favour of legal expenses insurance cover” and would also complement the use of deferred costs payment arrangements between clients and solicitors in largely the same way. The cost of an ATE premium could be divided among those opting into the collective group.

The Commission made no definitive recommendations on use of contingency fee arrangements along US lines (whereby the lawyer is remunerated by reference to a percentage of any damages award made),<sup>259</sup> but noted the potential of CFAs, were they to be permitted in Ireland, in the financing of MPAs. It expressed the view that CFAs in particular “offer a controlled enabling mechanism for the financing of litigation in the light of the limits of civil legal aid at present”.<sup>260</sup>

#### 4.11 Legislative basis for the multiparty action – statute or rules of court?

The Commission opted for the use of rules of court rather than primary legislation in legislating for an MPA procedure, on the basis that this would be consistent with the principles set out in the Government’s White Paper of 2004, “Regulating Better”.<sup>261</sup> Though the Commission did not elaborate further on its reasoning, it may be presumed that it had in mind the third of six principles of good regulation set forth in that paper, viz. “We will regulate as lightly as possible given the circumstances, and use more alternatives”.

## 5. Responses to the consultation exercise

A limited number of submissions received on foot of the public consultation exercise identified the need for a multi-party/class action procedure.

The European Bar Association and Irish Society of European Law made available material from a conference they organised on “Private Damages Remedies in Competition Law” in October 2017, which included a comparative analysis of collective redress procedures available in a range of common law and civil law jurisdictions.

FLAC recommended that the Law Reform Commission’s recommendations “be given due consideration with a view to the introduction of a new litigation procedure to provide for class actions”.

The Department of Business, Enterprise and Innovation, IDA Ireland and Enterprise Ireland pointed to the absence of a legislative framework for class actions in which damages would be available in the context of the proposed EU Directive on representative actions and proposed EU Regulation on promoting fairness and transparency for business users of online intermediation services, considered at sections 2.3.2 and 2.3.3 of this chapter respectively.

Sinn Féin, through its spokesperson on Justice and Equality Donnchadh Ó Laoghaire TD, also expressed support for the model proposed by the Commission, identifying as benefits the reduction in overall costs and outlay in litigating an issue and achieving a resolution, more efficient use of scarce court resources and affording access to justice to many “who would otherwise be excluded”. The Bar Council submitted that a strong public argument in favour of the class action procedure was that class actions “assist in ensuring that large corporate entities are held accountable for their behaviour in relation to groups such as consumers

258 LRC report, Chapter 3, paras. 3.49 to 3.53.

259 The Commission noted the potential for abuse of contingency fees, in directly the financial interest of the lawyer not only to success of the action but also to the quantum of an eventual award: LRC report, Chapter 3, para. 3.57.

260 LRC report, Chapter 3, para. 3.60.

261 LRC report, Chapter 1, para. 1.45. The White Paper is available at: <https://assets.gov.ie/3477/281118144439-cf60aac3e3504e6f9f62f0ccda38f203.pdf>

which on an individual basis may not have cost a significant amount but when repeated across the class of individuals concerned has enabled the defendant to realise very significant gains for its wrongful behaviour.”

Dr Joanne Blennerhassett, whose work on the subject has been cited elsewhere in this chapter, suggested that there was an urgent need for an efficient procedural mechanism to manage mass harm and multi-plaintiff personal injury litigation, though noting that “collective actions alone are an outdated approach for dealing with the problem of mass harm and they are clearly not the most efficient route to justice...MPAs are part of [a] suite of remedies that ought to be available as routes to redress...As part of this solution, consideration ought to also be given to new techniques of collective redress such as ombudsmen and collective redress.”

Professor Christopher Hodges of the University of Oxford, a leading expert on comparative collective redress law, drew the Review Group’s attention to a major study of EU-wide collective redress systems undertaken by that university and the University of Leuven.<sup>262</sup> He indicated that the study found that the “new technology” mechanisms of regulatory redress and consumer ombudsmen were “clearly better than the “old technology” mechanism of collective litigation in its various models: the former were “notably faster, cheaper and successful in delivering outcomes...”. Professor Hodges submitted that

“[a] government looking at delivering mass redress now should evaluate the ‘new technologies’ that have become available, rather than default into older methods that have been superseded. There is strong evidence that regulatory redress and consumer ombudsmen perform extremely well...The introduction of a ‘class action’ before putting in place other mechanisms that are likely to be more effective is only likely to raise expectations and create problems, rather than solve them.”

## 6. Summary, conclusions and recommendations

### 6.1 Summary

#### 6.1.1

While the LRC Consultation Paper of 2003 and LRC Report of 2005 are the main reference points for the Review Group in its consideration of MPA procedures, a fresh evaluation is merited in view of (a) developments which have taken place since publication of the Law Reform Commission Report in the various jurisdictions considered by the Commission and at EU level which merit attention and (b) the need to examine certain issues which the Commission either left open as to the approach to be taken – in particular the question of multi-party litigation funding arrangements – or which merit further consideration – as on the question of whether a new MPA procedure should be statute – or court rules-based.

[Section 1.2]

#### 6.1.2

Currently a range of procedural options are available to litigate claims involving multiple parties as private actions, viz.: joinder of parties; representative actions; consolidation and coordinated hearings of separate actions; and test cases. Other collective remedy procedures are potentially available to secure collective redress depending on the wrong concerned, including relator actions, actions taken by bodies such as the Competition and Consumer Protection Commission and actions taken by private law bodies or persons in the public interest. Furthermore, redress measures may be available to regulatory bodies or ADR solutions accessible through Ombudsman authorities.

[Sections 2.1; 2.2]

#### 6.1.3

The European Commission in its Recommendation of 11<sup>th</sup> June 2013 issued a series of non-binding principles for collective redress mechanisms in European Member States, including

262 See: <https://www.fljs.org/sites/www.fljs.org/files/publications/Delivering%20Collective%20Redress%20in%20Markets-New%20Technologies.pdf>

- designation of representative entities to bring representative actions on the basis of clearly defined conditions of eligibility
- verification of the court’s own motion at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued
- declaration by the claimant of the source of the funding of the litigation and power to the court to stay proceedings where (a) there is a conflict of interest between a third party funder and claimants, (b) the third party has insufficient resources to meet its financial commitments to the claimant or (c) the claimant has insufficient resources to meet any adverse costs should the collective redress procedure fail
- an opt in only mechanism for claims, with exception to this principle, by law or by court order, requiring to be “duly justified by reasons of sound administration of justice”
- maintenance of the “costs follow the event” principle
- restrictions on contingency fees
- restrictions on the exercise by third party funders on the litigation and
- a prohibition on punitive damages.

[Section 2.31]

#### 6.1.4

Quite aside from the European Commission’s Recommendation, the Proposed Directive on representative actions for the protection of the collective interests of consumers will, if implemented, extend the need for a Multi-party Litigation procedure by qualifying entities meeting minimum reputational criteria, to cover other horizontal and sector-specific EU instruments relevant for the protection of collective interests of consumers in economic sectors such as financial services, energy, telecommunications, health and the environment.

[Section 2.32]

#### 6.1.5

The preliminary conclusions of the Law Reform Commission in its Consultation Paper and confirmed in its later Report that the Irish legal system “lacks a comprehensive procedure that would tackle class claims in a uniform and consistent fashion” remain valid. Such public law or public interest remedies as may be available depending on the wrong concerned do not bridge this procedural gap.

Aside from these conclusions, it is clear from the European Commission’s report of January 2018 on implementation of its 2013 Recommendation mentioned at Section 2.3.1 of this chapter that Ireland is in the minority of EU Member States in not having a compensatory collective redress procedure.

Furthermore, both the representative action proposed by the European Commission’s Recommendation of 2013 and that which would be required by the representative action under the Proposed EU Directive on representative actions for the protection of the collective interests of consumers envisage relief being claimed for damages and/or other financial redress. These types of relief are not an established characteristic of the existing representative action procedure in Ireland and this supplies a further rationale for the introduction of a new and more comprehensive MPA procedure to accommodate mass claims.

[Section 2.4]

#### 6.1.6

In examining the options for a new MPA procedure, consideration has been given not only to the model procedure recommended by the Law Reform Commission in its 2005 report, but to the class or group action procedures in the other common law jurisdictions examined by the Commission (the US, Canada, Australia and England and Wales) as they have been developed and/or evaluated since the Law Commission’s examination.

[Section 3]

### 6.1.7

Class or group action regimes in the US, Canada and Australia share common features in requiring active involvement by the court in case management of the class action and in approving any settlement, in empowering the court to award aggregate damages (in the case of the US, where the class action is one in which damages are available) and direct distribution of damages, and in operating on an “opt out basis” (requiring individual claimants to opt out within a specified period or by a certain stage in the proceedings, failing which they are bound by the proceedings).

Those regimes differ in other respects, notably, in the rules on liability for legal costs (parties generally bearing their own costs in the US, while costs generally follow the event in Canada and Australia) and in their requirements for the treatment of associated claims as claims meriting collective resolution.

The most prescriptive of the regimes – the US Federal procedure – requires, *on a rigorous analysis*, compliance with requirements of

- (a) conditions of “numerosity” of claimants; “commonality” to the class of questions of law or fact; “typicality” of the claims or defences of the are typical of the claims or defences of the class (the “typicality” requirement); and “adequacy of representation” by the representative party of the interests of the class combined with
- (b) qualification as one of three class types arising, viz.:
  - (i) cases the separate and individual treatment of which would prejudice the defendant or prejudice associated claimants not parties to the individual adjudications;
  - (ii) cases for which final injunctive relief or declaratory relief is appropriate for the whole class of claimants; or
  - (iii) cases where the common questions of law or fact predominate over any questions affecting only individual members and for which a class action would be superior to other means of fairly and efficiently adjudicating the dispute.

[Section 3.1]

The Canadian model is less restrictive in requiring, *some basis in fact* that,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who would fairly and adequately represent the interests of the class, has a plan setting out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and does not have a conflict of interest with other class members on the common issues for the class.

[Section 3.2]

The Australian model is also less restrictive, requiring that:

- (a) seven or more persons have claims against the same person;
- (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- (c) the claims of all those persons give rise to a substantial common issue of law or fact.

There is no requirement that a class action be certified: it falls to the respondent to challenge the validity of the procedure at any time.

[Section 3.3]

### 6.1.8

The England and Wales model – the Group Litigation Order (“GLO”) – merits particular attention as it formed the basis for the Law Reform Commission’s recommended model for a MPA. It fundamentally differs from the class action approach in that it is a scheme for the management by a single judge of individual

cases, separately initiated, which give rise to common or related issues of fact or law, as opposed to the unifying of multiple claims in a single set of proceedings and operates on an “opt out” basis (claimants are only bound to the extent that they have joined in the proceedings).

[Section 3.4]

### 6.1.9

The lack of data makes it difficult to compare the various class or group action regimes objectively. Authoritative opinion would point to key risks of the class action model as the burden which it may place on reasonable defendants, the potential for “entrepreneurial litigation” generating large fees for lawyers with minimal awards for class members, and poor engagement by class representatives with class members.

Against this, however, key benefits of the class action approach are -

- the efficiency and economy which aggregating similar individual actions brings by avoiding unnecessary duplication in fact-finding and legal analysis, freeing judicial resources to deal with other conflicts
- the reduction in the costs of litigation both for plaintiffs – who can share litigation costs – and for defendants – who need to litigate the disputed issue only once, rather than multiple times
- improved access to justice by making more economical the prosecution of claims that would otherwise be too costly to prosecute individually and
- the deterrent effect on potential wrongdoers who might otherwise assume that minor wrongs would not result in litigation.

The development of the Australian class action has seen unexpected issues arising from the role of litigation costs insurers in subrogating to the rights of insured class members and opting insureds out of class actions even without their authority to do so, and the exposure of class representatives to adverse costs orders in the event the proceedings fail.

In England and Wales, the CJC, while acknowledging the GLO procedure as a useful and flexible tool for managing multi-party claims, has viewed it as not having reduced barriers to access to justice for those individuals whose claims are of limited individual quantum and where the litigation cost risk far outweighs the potential value of a successful judgment. It also criticised the use of cut-off dates which preclude claimants joining the opt-in register but do not preclude them from prosecuting their claim individually and the lack of provision to aggregate damages or for court of any proposed settlement.

[Section 3.5]

### 6.1.10

The Law Reform Commission took the view in the Consultation Paper, and confirmed in its Report, that wholesale incorporation of the US model of a class action procedure would be inappropriate for the Irish legal system.

In view of concerns about “the popular connotations associated with the concept of a class action” it recommended an MPA based not on the “opt out” model it had tentatively recommended in its Consultation Paper, but on an “opt in” approach.

Although noting arguments supporting the “opt out” model as improving access to justice for those who are less likely to have recourse to the courts, especially those with claims too small to warrant the risk and expense of an individual action, the Commission considered that

- that reasoning did not apply in Ireland where a small claims mechanism was available
- a distinct attraction of an “opt in” system was its familiarity, whereas the “opt out” approach was unfamiliar, and a dramatic departure from the traditional voluntary litigation approach in Ireland
- an “opt out” model was more suited to much larger jurisdictions, where claimants are dispersed over a wide geographical area whereas in Ireland organised and targeted notification of the relatively small pool of potential litigants should obviate the need for an opt out approach



- it is arguable that the Constitutionally guaranteed right of access to the courts involves a corresponding and converse right of non-access or, in other words, a right not to be compelled to litigate
- a requirement to “opt out” may have Constitutional implications in that a cause of action may attract the constitutional protection afforded to other forms of private property
- an “opt out” regime does not assure greater closure to litigation of claims as it merely filters from the group those with a greater predilection for individual litigation
- an “opt in” regime will not leave the “litigation door interminably open” given the operation of limitation periods.

However, the Commission sought to incorporate some of the advantages of finality associated with the “opt out” approach by recommending that the court be empowered to require an action to be joined to an existing MPA.

With regard to the operation of limitation periods, the Commission favoured the traditional approach that the limitation period for each claim should stop running only when that claim is issued separately (i.e. before entry on a group register), in preference to the Statute of Limitations ceasing to run from the time of entry of the claim on the register.

There should be a requirement for judicial certification of an MPA, whether on the parties’ application or on the court’s own initiative. No minimum number of claimants should be required for certification, though the number of claimants should be relevant in considering whether the MPA offers a fair and efficient means of resolving the issues. In deciding whether to certify proceedings as an MPA, the court must be satisfied that an MPA would be an appropriate, fair and efficient procedure in the circumstances.

The Commission favoured a broad concept of commonality of issues as a pre-requisite for certification and recommended that to qualify for entry to the group cases should give rise to common issues of fact or law rather than be required to show strict commonality, with no requirement that common issues predominate over individual issues.

A representative or lead case should be selected to litigate a specific issue which will fairly and adequately represent the interests of the individual litigants without having to be typical of the other claims, though typicality should be relevant in selecting the lead case. Whether there should be a lead case, and if so how many, should be left to the discretion of the court.

The proposed procedure should be flexible enough to accommodate defendant MPAs.

A single lead solicitor should be responsible for the representation of the generic issue of the MPA, nomination of that solicitor to be voluntary subject to judicial approval, or by judicial appointment. Separate legal representatives may be responsible for discrete issues within the group on either a sub-group or individual level. The Courts Service should be informed of the identity of the nominated legal representative for the generic issue and would then refer any enquiries to that solicitor.

At the certification stage, the court should determine a cut-off date beyond which entry on the register will require court authorisation. Court permission should be required for an individual litigant to opt out of the group beyond the filing, with power to sanction that litigant in costs for delay in opting out and for the potential harm caused to the MPA proceedings.

The terms and conditions on which a settlement is to be accepted or rejected should be a matter for the group – and not subject to final approval by the court – and made clear from the point of opt in and should require to be confirmed to the court at certification stage. Exceptionally, where the group is unable to agree the terms, the certifying judge should be empowered on application to set the terms and conditions for acceptance of the settlement by the group, and individual members should be able to seek relief from the

court in the event of allegations of unjust or oppressive application of the agreed terms of acceptance of a settlement.

The “costs follow the event” rule should be retained for MPAs and the costs of the litigation of the generic issue of the MPA should be shared in equal measure between the group members unless the court considers that this rule should be varied in the interests of justice in the particular case. A scheme of joint and several liability would provide the most appropriate and just method of placing and distributing the risk of default on an order for costs made against the MPA, subject to a power on the court’s part to depart from this where it gives rise to potential for injustice.<sup>263</sup>

The Civil Legal Aid Act 1995 should be amended to provide for the funding of an otherwise eligible group member for his/her proportion of any eventual costs order.

An MPA regime “militates in favour of legal expenses insurance cover” and complements the use of deferred costs payment arrangements between clients and solicitors. The cost of an “after the event” premium could be divided among those opting into the collective group. Contingency fee arrangements (“CFAs”) whereby the lawyer is remunerated by reference to a percentage of any damages award made, “offer a controlled enabling mechanism for the financing of litigation in the light of the limits of civil legal aid at present”.

Rules of court rather than primary legislation should be the legislative basis for an MPA procedure, consistent with the principles set out in the Government’s White Paper of 2004, “Regulating Better”, in particular that regulation should be as light as possible given the circumstances.

[Section 4]

### 6.1.11

Respondents to the public consultation exercise who expressed a view on the subject were generally in favour of the introduction of a class or group action procedure, while the academic experts among them either cautioned that such a procedure on its own and in the absence of regulatory or ombudsman-type redress solutions would not meet public needs, or argued, indeed, that the latter solutions should precede the introduction of a class litigation procedure.

[Section 5]

## 6.2 Conclusions and recommendations

### 6.2.1

It would seem clear that there is an objective need to legislate for a comprehensive multi-party action (“MPA”) procedure in Ireland, while acknowledging the importance of public law redress mechanisms such as regulatory oversight and intervention in resolving certain multiple claim categories.

### 6.2.2

The Review Group shares the preference of the Law Reform Commission for a model along the lines of the Group Litigation Order (“GLO”) procedure in England and Wales which would require claimants individually to institute proceedings in pursuit of their claims and join an MPA register. While noting the perceived benefits of the US style class action model, the Review Group does not consider it either realistic or legally safe to adopt such a model in this jurisdiction given lack of familiarity with it here and possible constitutional difficulties presented by the “opt out” approach in binding passive claimants to proceedings they have not instituted.

### 6.2.3

The Review Group notes that, even if its recommendation of the GLO model is adopted, there will be a need in due course to legislate discretely for a single representative action procedure encompassing multiple claims to meet the requirements of the proposed EU Directive on representative actions – whether by

<sup>263</sup> LRC report, Chapter 3, paras. 3.16 to 3.34.

adapting the existing representative action under Order 15 rule 9 RSC for that purpose or by providing separately for such an action.

#### 6.2.4

The risk of exposure of a representative or lead plaintiff to an adverse costs order and the high costs of litigating the issues common to the group or class have been identified as a significant obstacle to the bringing of class or group litigation. This has, to a limited extent, been addressed by the Law Reform Commission's recommendation that any relevant costs incurred in the MPA proceedings should be divided equally among the members of the Register, unless the nominated judge orders otherwise, and that members of the MPA Register should be jointly and severally liable for costs.

The Review Group considered whether it should supplement its recommendation for an "opt in" GLO-type procedure by recommending one or more of the following -

- the permitting in law of third party litigation financing for actions covered
- the permitting of contingency fee-based remuneration arrangements in connection with that procedure
- that the Civil Legal Aid Act 1995 be amended to make provision for the funding of an otherwise eligible class/group member for his/her proportion of any eventual costs order.

The Review Group notes the arguments in favour and against the individual options concerned and considers that they raise issues of policy concerning the funding of litigation which require more detailed discussion with the interests involved. In the circumstances, it did not consider it appropriate to express an opinion on those options.

#### 6.2.5

The Review Group notes that the Law Reform Commission's draft rules of court and the Private Member's Bill provide for a lead solicitor to be appointed but do not specify the latter's functions or obligations. The Review Group supports the approach that a single lead solicitor be responsible for the representation of the generic issue of the MPA, nomination of whom should be made by the solicitors representing claimants on the register ("the solicitors' group"), or in the absence of agreement between the solicitors, by judicial appointment. The Review Group agrees with the Law Reform Commission's suggestion that separate legal representatives may be responsible for discrete issues within the claimants' group on either a sub-group or individual level. The precise role of the lead solicitor and relationship with the other claimants' solicitors – in particular in liaising and co-ordinating with those solicitors – should be defined by a protocol agreed by the solicitors' group and notified to the Court.

#### 6.2.6

The Review Group notes that the Law Reform Commission's draft rules of court differ from the Private Member's Bill in providing that

- the MPA may be compromised or settled only where the terms of the compromise/settlement have been agreed in writing by the those registered as members of the MPA register at or before the time that they become members of the register
- the court be informed of the existence of the terms of such agreement on the application for certification and any subsequent application to join the register
- where the terms on which the proceedings are to be compromised/settled are not agreed between the parties, the court must convene a case conference to arrange for the terms to be agreed, if need be by mediation and
- in the absence of a mediated agreement, the court shall specify the terms on which proceedings are to be compromised or settled.

The Review Group agrees with this approach and recommends that it be expressly provided for in the procedure.

### 6.2.7

The Review Group considers that, based on the precedent of the existing arrangements in the rules of court for consolidation of proceedings, a GLO-type procedure (as recommended by the Law Reform Commission) which relied on the separate initiation by individual claimants of actions followed by a grouping of the actions, could be provided for in rules of court and does not require primary legislation.

An advantage of legislating by way of rules of court is that, where any deficiency is identified in a rules-based procedure, the process of amending the rules to meet the deficiency is much easier than were the procedure prescribed in primary legislation.

### 6.2.8

The Review Group recommends that a GLO-type procedure should be introduced in the High Court and the Circuit Court. It further recommends that the exclusion by Order 6, rule 10 CCR of tort claims from the Circuit Court's existing representative action procedure be revoked.



# CHAPTER 9

## LITIGATION COSTS



# 1. Introduction

## 1.1 Legal costs<sup>1</sup> levels and their consequences

The remit of the Review Group requires it to examine the current administration of civil justice in the State and make recommendations with a view, *inter alia*, to “...[r]educing the cost of litigation including costs to the State...”.

It may be noted that this strand of the Review Group’s remit was seen as necessary notwithstanding the anticipated coming into operation of the new legal costs assessment regime under Part 10 of the Legal Services Regulation Act 2015, to which reference is made later in this chapter.

The cost of pursuing or defending litigation will impact directly on an individual’s or enterprise’s ability to access justice. More generally, the cost of resolving civil disputes influences the cost of doing business, and hence prices for goods and services, as well as imposing a burden on the taxpayer where the litigation involves the State, or is ultimately financed by the State. High costs of pursuing a judicial remedy have implications both for the strength of the rule of law in a jurisdiction and for the capacity of a country’s economy to attract domestic and foreign investment.

The wider consequences of high litigation costs were summarised by Lord Woolf in his Final Report “Access to Justice” of 1996 as follows:

“The adverse consequences which flow from the problems in relation to costs contaminate the whole civil justice system. Fear of costs deters some litigants from litigating when they would otherwise be entitled to do so and compels other litigants to settle their claims when they have no wish to do so. It enables the more powerful litigant to take unfair advantage of the weaker litigant. The scale of costs per case has an adverse effect on the scope of the legal aid system. It also adversely affects the reputation of our civil justice system abroad and may be making this country less attractive for overseas investment and as a forum for the settlement of commercial disputes. ... it is incorrect to assume that high costs are not a problem merely because they are met out of a relatively deep pocket or are passed on in insignificant amounts to individual consumers. They still constitute an unnecessary cost to the economy as a whole and are not acceptable however they are distributed.”<sup>2</sup>

In their 2014 study, “International Comparisons of Litigation Costs”, McKnight and Hinton comment: “... litigation costs affect the ability of companies to compete and prosper. But higher direct costs of doing business are just the tip of the iceberg: litigation also imposes indirect costs. These indirect costs stem from the uncertainty created by litigation, which may deter investment in high-cost jurisdictions. They also may affect companies’ borrowing costs and hence their ability to invest, grow, and create jobs...”<sup>3</sup>

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1 References made elsewhere in this chapter to “costs” are to legal costs, unless the context otherwise indicates.

2 “Access to Justice”, Final Report, 1996, Chapter 7, para. 3.

3 David L. McKnight and Paul J. Hinton, “International Comparisons of Litigation Costs” (2014), study prepared for the U.S. Chamber of Commerce’s Institute for Legal Reform, page 1.

The issue of high legal costs in Ireland featured in the structural reforms forming part of the Economic Adjustment Programme for Ireland agreed by the Irish Government with the Troika in December 2010<sup>4</sup> and has been the subject of comment in the review of Ireland’s progress in effecting structural reforms within the framework of the European Semester. In its Country Report for Ireland for the purpose of the 2020 European Semester,<sup>5</sup> the European Commission noted that legal costs in personal injury cases, “which have also grown significantly in recent years”, were contributing to driving up the cost of premiums for motor vehicle and liability insurance policies<sup>6</sup> and expressed concern that high legal costs might hamper access by SMEs to public procurement remedies.<sup>7</sup>

The particular element of the Review Group’s remit mentioned above clearly envisages a proposal for a system for assessment of legal costs which not only meets expectations of fairness and efficiency, but one which in its design *ensures* that litigation costs levels will be *reduced* – as distinct from merely containing, or moderating an increase in, legal costs levels.

## 1.2 Legal costs levels in Ireland from a comparative perspective

While recent comprehensive data on the levels of litigation costs in cases disposed of at trial or on settlement in this jurisdiction are not available, it would seem clear from surveys, reports and experience in individual cases that Ireland ranks among the highest-cost jurisdictions internationally for civil litigation.

The annual Doing Business Survey of the World Bank Group for 2020 ranks countries for ease of doing business based on ten separate underlying scoring categories,<sup>8</sup> one of which is “enforcing contracts”.

4 See European Commission Directorate-General for Economic and Financial Affairs paper, “The Economic Adjustment Programme for Ireland” (February 2011) page 66, available at:

[https://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2011/pdf/ocp76\\_en.pdf](https://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp76_en.pdf)

In a periodic review of the implementation of that programme covering Autumn 2012, the Directorate-General for Economic and Financial Affairs of the European Commission noted:

“The high cost of legal services continues to pose problems for Ireland:

- Cost competitiveness, in particular for SMEs, for which the high level of legal costs can act as an impediment to business success, particularly in contentious contract law issues. Since non-tradables like legal services also feed into the cost base in the Irish export sector, high legal service costs also hamper external competitiveness
- Equity concerns, as low income households who cannot afford high legal fees may be locked out of equal access to justice
- Fiscal issues, as the State is the largest buyer of legal services, making high legal costs a further challenge in terms of meeting fiscal targets under the Programme.”

(European Commission Directorate-General for Economic and Financial Affairs paper, “Economic Adjustment Programme for Ireland Autumn 2012 Review” (January 2013), page 42, available at: [https://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2013/pdf/ocp127\\_en.pdf](https://ec.europa.eu/economy_finance/publications/occasional_paper/2013/pdf/ocp127_en.pdf))

5 Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0506&from=EN>

6 At page 56 of the report.

7 At page 59 of the report.

8 The ten categories, and Ireland’s international ranking in 2020 under each, are:

- Starting a business (23)
- Dealing with construction permits (36)
- Getting electricity (47)
- Registering property (60)
- Getting credit (48)
- Protecting minority investors (13)
- Paying taxes (4)
- Trading across borders (52)
- Enforcing contracts (91)
- Resolving insolvency (19).

See country report on Ireland at: <https://www.doingbusiness.org/en/data/exploreconomies/ireland>



Ireland’s ranking under the “enforcing contracts” category is based on a measure of various criteria<sup>9</sup> including the cost of resolving a commercial contract dispute. The estimated costs, inclusive of disbursements, of resolving the dispute are calculated as a percentage of the value of a claim which would be equal in value to twice the national income per capita or \$5,000, whichever is greater. In Ireland’s case those costs are estimated at 26.9%, comprised as follows:

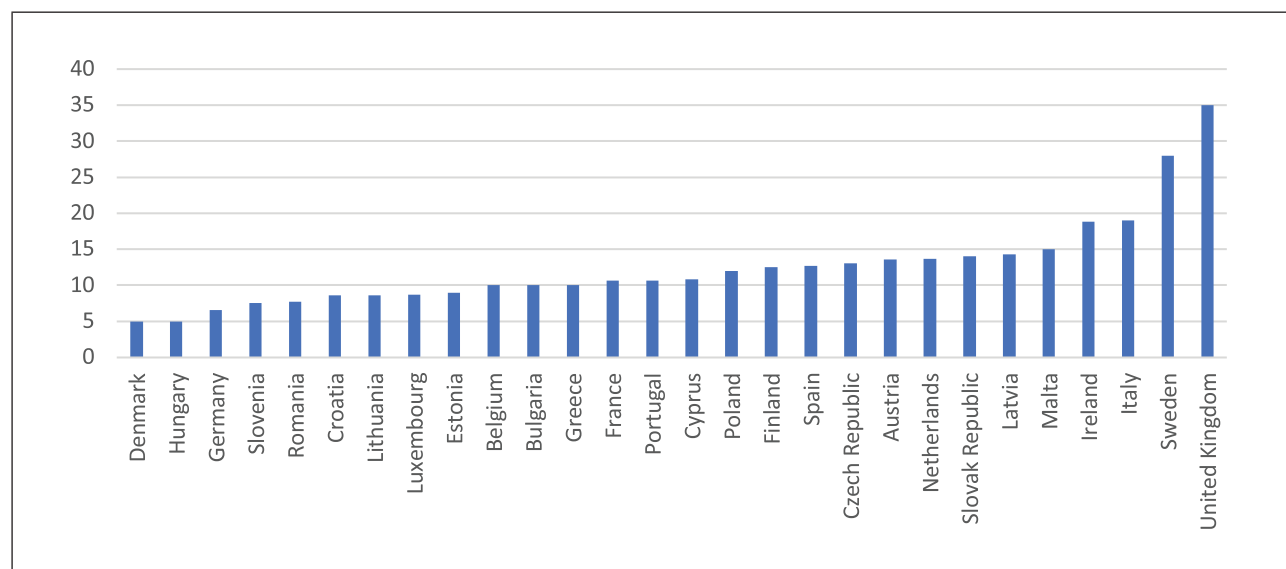
Attorney’s fees	18.8%
Court fees	2.3%
Enforcement fees	5.8%

As mentioned, the legal costs (“attorney costs”) of resolving a commercial contract dispute are estimated at 18.8% of the value of the claim. While enjoying a ranking of 24 out of 190 economies surveyed when all ten performance categories are aggregated, Ireland stands at 91st place in the category relating to ease of resolving a contract dispute – its lowest ranking by far under all of the categories under which it is ranked.

While the last mentioned ranking represents an improvement over Ireland’s 102<sup>nd</sup> placing in 2019, this is not due to any intrinsic improvement in the scores given to Ireland under enforcing contracts but rather to changes in the scores of the other countries ranked. The overall cost of resolving a contract dispute expressed as a percentage of claim value, and the component percentages for attorney’s fees, court fees and enforcement fees, remained unchanged in those years.

A comparison solely of the attorney’s fees element of litigation costs for Ireland with that estimated for other EU jurisdictions in the Doing Business survey (see **Chart 1**) indicates that Ireland is the fourth most expensive jurisdiction in the EU for litigation of commercial contract disputes. A comparison on the same basis with other significant common law jurisdictions indicates Ireland as performing more favourably (see **Chart 2**).

**Chart 1: Legal Costs as % of claim value EU Member States  
(Word Bank Group Doing Business Survey 2020)**



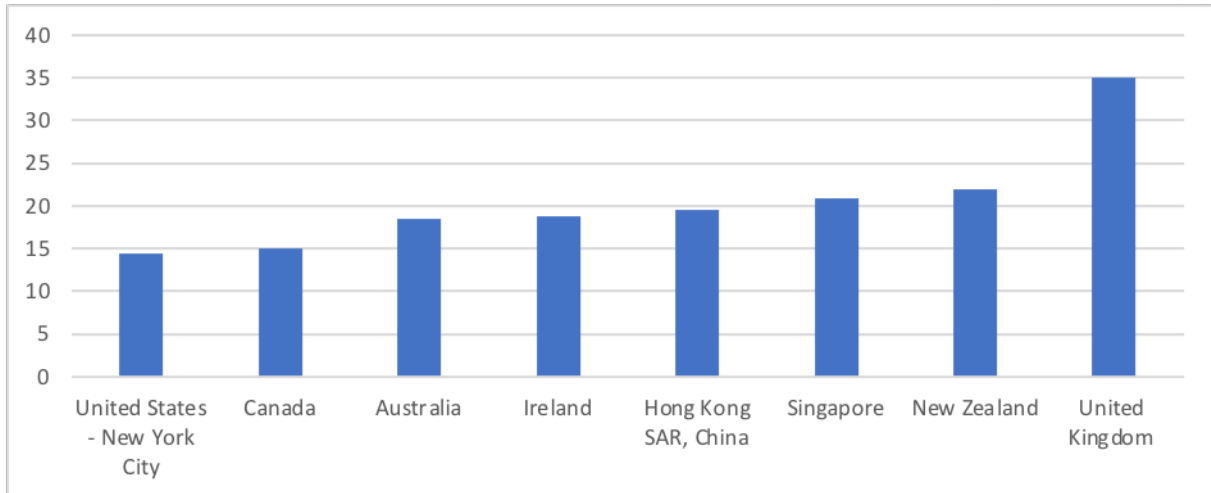
9 The component scoring criteria and weightings are: (a) Days to resolve a commercial dispute through the courts (33.3%); (b) attorney, court and enforcement costs, as % of claim value (33.3%); and (c) use of good practices promoting quality and efficiency (33.3%). See World Bank Group Doing Business methodology at:

<https://www.doingbusiness.org/en/methodology/enforcing-contracts>

The percentage weightings are referred to in Figure 10.2 at page 55 at:

<http://documents1.worldbank.org/curated/en/556871468162294131/pdf/624720PUB0Doin00Box0361484B0PUBLIC0.pdf>

**Chart 2: Legal Costs as % of claim value significant common law jurisdictions  
(World Bank Group Doing Business Survey 2020)**



A comparative study of civil litigation costs in 34 common law and civil law tradition jurisdictions published in 2009<sup>10</sup> identified Ireland, together with Denmark and England, as “particularly striking examples” of some Western European States where the costs of litigation are high in relation to the value of the case.<sup>11</sup> Insofar as the general economic impact of litigation costs is concerned, a comparison of the costs of resolving claims – “liability costs”,<sup>12</sup> encompassing both the value of the claim and the costs of resolving it – as a percentage of Gross Domestic Product (GDP) conducted across Europe, the U.S., Canada and Japan, published by the U.S. Chamber of Commerce’s Institute for Legal Reform in June 2014, showed Ireland to be the fourth-highest cost jurisdiction after the United States, Canada and the United Kingdom (see **Chart 3**).

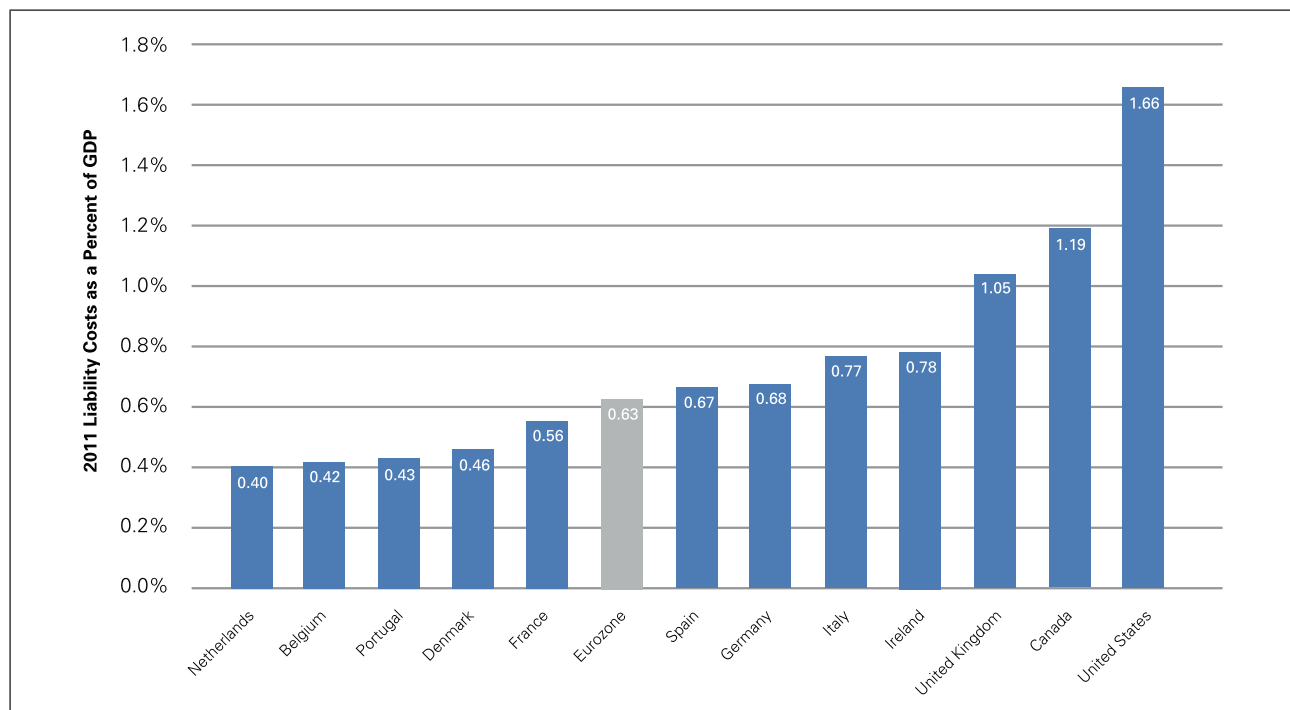
In a submission to the Review Group as part of its consultation exercise, the Department of Business, Enterprise and Innovation, IDA Ireland and Enterprise Ireland stated that feedback received from enterprises indicates that Ireland is an expensive jurisdiction in which to enforce intellectual property rights and that this may be a barrier to SMEs seeking such protections.

10 Hodges, Vogenauer and Tulibacka, “Costs and Funding of Civil Litigation: a Comparative Study”, Oxford University Legal Research Paper Series Paper No 55/2009 (November 2009).

11 Ibid. Para. 70, page 19.

12 “Liability costs” describe the costs of resolution of a claim whether through litigation or other claims resolution processes, based on research of businesses’ general liability insurance costs, the research being controlled for non-litigation-related factors.

**Chart 3 Liability Costs as a Fraction of GDP**  
 (“International Comparisons of Litigation Costs” (2014), U.S. Chamber of Commerce Institute for Legal Reform)



In its paper, “Challenging the Cost of Clinical Negligence: The Case for Reform” of 2014, the Medical Protection Society (“MPS”) – then with nearly 300,000 members worldwide – commented:

“High plaintiff costs also contribute to the increasing cost of claims. In our experience, plaintiffs’ costs [in Ireland] are amongst the highest in any country in which we have members...<sup>13</sup>... Few law firms charge with reference to hourly rates for work undertaken. This means there is little transparency on bills offered as part of the settlement of a claim; plaintiffs’ lawyers seek payment of a lump sum “professional fee” to reflect the work undertaken. ...It is not unusual for the bill to be reduced by 20-30% following negotiation; however, the cost of this service also adds to the overall cost....

...Another significant driver for high costs is barristers’ fees, which are exceptionally high in Ireland. ...A senior barrister’s brief fee for a short trial in Ireland can easily be set at €30,000, which is twice the figure we would pay to a Queen’s Counsel in England. The high fees are further distorted by the attempts by some plaintiffs’ lawyers to argue that junior counsel should receive 50% of the fee of senior counsel, regardless of work undertaken...<sup>14</sup>

In a survey of consumers in eight European countries (Belgium, Czech Republic, France, Germany, Hungary, Ireland, the Netherlands, and Switzerland) conducted by IPSOS for RIAD (the International Association of Legal Protection Insurance) in 2017 and 2018, fear of the legal costs ranked as the greatest concern associated with involvement in a legal dispute for 50% of respondents in Ireland, compared to 53% of respondents in the Czech Republic, 43% in Switzerland and Belgium, 38% in Germany, 35% in Hungary, 30% in the Netherlands and 29% in France.<sup>15</sup> By contrast, 18% of respondents in Ireland considered deprivation of their rights as the greatest concern deriving from a legal dispute, 17% cited the time and energy spent on the dispute and 10% cited “not knowing who to turn to”.

<sup>13</sup> Page 5.

<sup>14</sup> Page 13.

<sup>15</sup> The survey “Consumer Perception of Legal Issues and Legal Protection Insurance in France, Germany, the Netherlands, and Ireland”, was conducted between August 2017 and March 2018 on a sample of 8,000 Europeans (Belgium, Czech Republic, France, Germany, Hungary, Ireland, the Netherlands, and Switzerland) and is available at:

[http://riad-online.eu/fileadmin/documents/Key\\_issues/Consumer\\_survey/PPT-Ipsos\\_Survey\\_Selection.pdf](http://riad-online.eu/fileadmin/documents/Key_issues/Consumer_survey/PPT-Ipsos_Survey_Selection.pdf)

The National Competitiveness Council (NCC) selected legal services costs as one of six areas of focus in its report on Ireland’s Competitiveness Challenge for 2019<sup>16</sup> and noted:

“There is growing evidence to suggest that the cost of settling a claim in Ireland is: (i) more expensive than in comparable jurisdictions; and, (ii) has increased dramatically over the last number of years. These changes reflect both increases in the amounts awarded and the number of claims made.

For example, the Personal Injuries Commission’s report in 2018 revealed that the award level of general damages for soft-tissue (whiplash) injuries in Ireland was 4.4125 times higher than award levels in England and Wales. According to the report, the average soft tissue claims cost in Ireland is €19,862, whereas it is in the range of €3,589 and €3,254 in the UK.”<sup>17</sup>

### 1.3 Legal costs levels in Ireland from a national perspective

The Cost of Insurance Working Group in its Report on the Cost of Motor Insurance of January 2017<sup>18</sup> noted representations from some stakeholders that legal costs “are a significant factor in the rising cost of motor insurance claims” but was unable to verify this in the absence of a statistical basis for the measurement of legal costs either in the economy in general or in relation to the legal costs associated with motor insurance, and did not offer any view as to the level of legal costs in comparison with that in other jurisdictions.<sup>19</sup>

That Working Group, in its Report on the Cost of Employer and Public Liability Insurance of January 2018,<sup>20</sup> while noting that a large number of stakeholders held strong views that legal costs associated with the claims process are too high and that these costs fed into the overall increase in the cost of insurance, was not able to corroborate those views directly in the absence of data on legal costs in the employer liability and public liability insurance sphere.<sup>21</sup>

It cited the finding in the Motor Insurance Key Information Report that the overhead in legal and other costs to insurers for private motor business averaged around 40% of the amount of compensation and commented that “[w]hile that data shows that there hasn’t been a large increase in legal and other costs as they relate to the level of compensation paid, it does demonstrate that legal and other costs are a major factor in the cost of claims for insurers”. It noted that the Law Society had indicated that “it is certainly the experience of solicitors practising in the area that such costs have reduced over the past five years”.<sup>22</sup>

In its Competitiveness Bulletin on Legal Costs of January 2016,<sup>23</sup> the NCC remarked that “[t]hroughout the recession, and relative to most other professions, prices for legal services did not adjust downwards to the degree that might have been expected given economic circumstances. While prices dipped for a brief period in 2013, in Q3 2015 legal service prices were 5.8% higher than 2010 levels”.<sup>24</sup> In its report “Costs of Doing Business in Ireland 2017” of June 2017,<sup>25</sup> the NCC noted that by Quarter 3 of 2016 legal service prices were 10.4% higher than the comparable quarter in 2013.<sup>26</sup>

16 NCC, “Ireland’s Competitiveness Challenge 2019 (December 2019), available at: <http://www.competitiveness.ie/publications/2019/ireland-s-competitiveness-challenge-2019.pdf>

Legal services costs are addressed in Chapter 5 of the report.

17 Ibid., at page 60.

18 Available at: <https://assets.gov.ie/6254/060219172049-067f7ed921f44343a7f41144ac3d4940.pdf>

19 Page 102 of the Report.

20 Available at: <https://assets.gov.ie/6256/060219173306-502d0dda6b644e7db5d019dd44ac49b6.pdf>

21 Pages 73 and 74 of the Report.

22 Page 74 of the Report.

23 Available at: <http://www.competitiveness.ie/Bulletins/Legal-Costs-Bulletin.pdf>

24 At page 1 of the bulletin.

25 Available at: <https://dbe.gov.ie/en/Publications/Publication-files/Costs-of-Doing-Business-in-Ireland-2017.pdf>

26 At page 52 of the report.

While acknowledging limitations as to sources of data regarding legal costs levels, the NCC, in its report on Ireland’s Competitiveness Challenge for 2019 above mentioned, noted that “the available evidence suggests that the cost of legal services in Ireland is high and is continuing to rise”.<sup>27</sup> It commented:

“... further evidence is needed in relation to data sources, data collection methods, and transparency to reduce the scope of misinterpretation and to truly identify the legal services’ costs faced by businesses in Ireland. To maximise the value of any statistics in this area a further breakdown of the figures by area of litigation and type of legal services is needed. Data on the legal costs of adjudicators and courts could be augmented with wider data from several sources.”<sup>28</sup>

The courts themselves have, in individual cases, noted the high cost of litigation in this jurisdiction.<sup>29</sup> In his concurring judgment in the Supreme Court in *Persona Digital Telephony Limited and Anor. v The Minister for Public Enterprise and Others*<sup>30</sup> (where that court declined to accept an argument that the third party arrangement to fund the litigation in that case did not, having regard to the constitutional entitlement to access to justice, contravene the law against champerty or maintenance), Clarke J (as he then was), addressing the challenges parties faced in funding the cost of litigation, observed:

“...it is at least arguable that there is a very real problem in practise about access to justice. An assessment of the precise extent of the problem would require detailed evidence and, therefore, nothing which I say should be taken as indicating a concluded view. Nonetheless it is worth recording that the experience of the courts suggests that there may well be problem, that it may well be significant and that there are at least arguable grounds for suggesting that it is growing.”<sup>31</sup>

In his statement for the new legal year 2017, Chief Justice Clarke commented:

“... there is little point in having a good court system, likely to produce fair results in accordance with law, if a great many people find it difficult or even impossible to access that system for practical reasons. A high priority must, therefore in my view, be accorded to questions relating to practical access to justice. I emphasise the practical because there are few formal legal barriers to access to justice in the Irish legal system. But it has increasingly become the case that many types of litigation are moving beyond the resources of all but a few...”.

## 2. Categories of legal costs

Legal costs generally fall into two categories, viz. (a) costs arising from non-contentious business, and (b) costs arising from contentious business, principally in connection with litigation before the courts.

### 2.1 Costs arising from non-contentious business

This category of costs encompasses costs incurred in relation to uncontested matters such as sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, excluding any litigation or business transacted in a court. The remuneration of solicitors in respect of non-contentious business is regulated by the Solicitors Remuneration Act 1881 and the Solicitors’ Remuneration General Orders made under that Act. General Orders under the Act – the first of which was made in 1884 and the last in 1986<sup>32</sup> – set percentage-based fees and detailed fixed fee charges over the years for various types of non-contentious work. However, section 8 of the 1881 Act allows a solicitor to contract with the client as to the basis for remuneration for such work, whether by a gross sum, commission, percentage, salary or otherwise, and it is fair to say that the fees fixed under the General Orders are effectively defunct.

27 “Ireland’s Competitiveness Challenge 2019”, op. cit., at page 54 of the report.

28 Ibid.

29 See, e.g., *Defender Ltd v HSBC Institutional Trust Services (Ireland) Ltd* [2018] IEHC 706; *Sheehan v Talos Capital Ltd* [2018] IEHC 361.

30 [2017] IESC 27, 23<sup>rd</sup> May 2017.

31 Ibid., at para. 2.8(h).

32 The General Order-making authority is vested in the Chief Justice, the President of the High Court, the senior ordinary judge of the Supreme Court and the President of the Incorporated Law Society: section 2 of the Solicitors’ Remuneration Act, 1881 as adapted by the Solicitors’ Remuneration Act, 1881, Adaptation Order, 1946 (S.I. No. 208 of 1946).

## 2.2 Costs arising from contentious business

Given the Review Group’s remit, the focus of this chapter is the regulation and assessment of legal costs arising from contentious business. Liability for legal costs in connection with contentious business, and the approach to their assessment, essentially falls within one or other of two categories.

Where a litigant retains a practitioner to act for them in litigation or business transacted in a court, the legal costs incurred on behalf of the client are termed *solicitor and client costs*. Since the coming into operation of the legal costs provisions of the Legal Services Regulation Act 2015 – which permits a bill of costs from a barrister to be furnished directly to a client and be adjudicated directly between the barrister and client – this category is now more properly described as *legal practitioner and client costs*.<sup>33</sup>

Legal costs due by a party to court proceedings to another party, whether on foot of a court’s award of the costs or otherwise,<sup>34</sup> are termed *party and party costs*.

## 3. Disclosure of legal costs charges to client

Section 150 of the Legal Services Regulation Act 2015 (“the 2015 Act”) strengthens the statutory obligation concerning disclosure of charges in respect of legal costs which previously had only applied to solicitors and extends that obligation to barristers. A legal practitioner is required to -

- provide to the client a written notice in clear, easily understood language disclosing the legal costs that will be incurred in relation to the matter concerned or
- if not reasonably practicable to disclose the legal costs at that time, set out the basis on which the legal costs are to be calculated and, provide the notice aforementioned as soon as may be after it becomes practicable to do so.

A legal practitioner must, where he/she becomes aware of any factor that would increase the legal costs likely to be incurred significantly beyond that disclosed or indicated, provide the client concerned with a new notice as soon as possible.<sup>35</sup>

A legal practitioner may not engage a practising barrister, expert witness or provider of any other service without first, to the extent practicable -

- ascertaining the likely cost or basis of cost of engaging the person
- providing the client with that information and
- satisfying himself/herself of the client’s agreement to engaging the person.<sup>36</sup>

The notice must, save in specified circumstances, allow for a “cooling off” period for the client.<sup>37</sup>

Where a charge for a matter or item is not included in a section 150 notice the charge may not be allowed on a later adjudication of legal costs unless the Legal Costs Adjudicator considers that to disallow the matter or item would create an injustice between the parties.<sup>38</sup>

33 Section 2(1) employs the term “legal practitioner” to describe a practising solicitor or a practising barrister.

34 An example of liability for party and party costs arising without a court having made an award of same is where a plaintiff incurs liability for the defendant’s costs on serving a notice of discontinuance.

35 Section 150(5) of the 2015 Act.

36 Section 150(6) of the 2015 Act.

37 Section 150(7) of the 2015 Act.

38 Section 157(6) of the 2015 Act.

## 4. Recoverability of costs

### 4.1 The general principle

The long established general principle in this jurisdiction has been that liability for the costs of litigation “follows the event”, i.e. unless the court for special and express reason otherwise determines,<sup>39</sup> the party who is successful in the case is entitled to recover their costs – as party and party costs – against the unsuccessful party. This principle, previously enshrined in the rules of court, is now restated and qualified in subsection (1) of section 169 of the 2015 Act, which provides:

“(1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise,<sup>40</sup> having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

- (a) conduct before and during the proceedings,
- (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
- (c) the manner in which the parties conducted all or any part of their cases,
- (d) whether a successful party exaggerated his or her claim,
- (e) whether a party made a payment into court and the date of that payment,
- (f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
- (g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.”<sup>41</sup>

### 4.2 Pre-emptive/protective costs orders

A pre-emptive costs or protective costs order may be made, as an exception to the general approach to determining liability for costs, so as to insulate a litigant from liability for costs to another party irrespective of the outcome of the litigation. A variant upon such an order is an order capping the extent of a party’s liability for costs if unsuccessful in the proceedings.

Such an order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that it is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and (v) were the order not made the applicant would probably discontinue the proceedings and be acting reasonably in so doing.

39 The Supreme Court has stated that “[i]t would neither be possible nor desirable to lay down one definitive rule according to which exceptions are made to the general rule. The discretionary function of the Court to be exercised in the context of each case militates against such a definitive rule of exception and it is also the reason why previous decisions on such a question are always of limited value.”: *Curtin v Clerk of Dáil Éireann and Others* [2006] IESC 27.

40 Section 169(2) provides that where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.

41 For recent judicial consideration of section 169 of the Legal Services Regulation Act 2015 and the recently recast Order 99 RSC, see *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183.

Where the legal representatives of the applicant party are acting *pro bono* this will be likely to enhance the merits of the application for the order. It is in the court’s discretion to decide whether it is fair and just to make the order in the light of the considerations above mentioned.<sup>42</sup>

Special rules on costs liability apply in certain types of environmental judicial reviews, as set out in section 50B(1) of the Planning and Development Act 2000. In such cases, the general rule is that each party to the proceedings bears their own costs.<sup>43</sup> However, the costs or a portion of the costs of the case may be awarded to an applicant to the extent that they have succeeded in obtaining relief against a respondent or notice party, or both, to the extent that the actions or omissions of the respondent or notice party, or both, contributed to the applicant obtaining relief.<sup>44</sup> The court may also award costs against a party where it considers that a claim or counterclaim by the party is frivolous or vexatious or because of the manner in which the party has conducted the proceedings, or where the party is in contempt of court.<sup>45</sup>

Furthermore, the general rule that parties in such cases bear their own costs does not affect the court’s entitlement to award costs in favour of a party in a matter of exceptional public importance where in the special circumstances of the case it is in the interests of justice to do so.<sup>46</sup>

## 5. Assessment of legal costs in Ireland

### 5.1 Legal costs assessment in transition

During the course of the Review Group’s deliberations, the system for assessment of legal costs – known as *taxation*<sup>47</sup> and conducted by a *Taxing Master* in the High Court and by a County Registrar in the Circuit Court – was in course of being replaced in the Superior Courts by a new process of *adjudication* conducted by a *Legal Costs Adjudicator*. The new system came into operation on the 7<sup>th</sup> October 2019.<sup>48</sup> The changes introduced are best explained by comparing the old and the new assessment regimes by reference to: (a) the legal framework; (b) costs allowable; (c) the format of the bill of costs; (d) the assessment process; (e) scales of legal costs; and (f) transparency and predictability.

Although the taxation process has been retained in the Circuit Court and the term “taxation” remains applicable to the assessment of costs in that court, the old assessment regime will be referred to in this chapter by the term “taxation” and the new regime by the term “adjudication”.

### 5.2 The old legal costs assessment regime: taxation

#### 5.2.1 Legislative framework

The taxation of legal costs had been regulated principally by section 27 of the Courts and Court Officers Act 1995 and by Order 99 of the Rules of the Superior Courts (“RSC”) and Order 66 of the Circuit Court Rules (“CCR”).

42 The several conditions set out are those specified by the Court of Appeal in England in *R. (On the Application of Corner House Research) v. Secretary of State for Trade and Industry* [2005] 4 All E.R. 1 and approved by the High Court in Ireland in *Friends of the Curragh Environment Ltd v Trustees of the Turf Club* [2006] IEHC 243. The *Corner House Research* case itself involved a restatement of the principles set out by the High Court in England in *R. v. Lord Chancellor Ex Parte CPAG* [1999] 1 W.L.R. 347, which had been approved by the High Court here in *Village Residents Association Limited v. An Bord Pleanála and Ors.* [2000] 4 I.R. 321.

43 Section 50B(2), Planning and Development Act 2000.

44 Section 50B(2A) of the 2000 Act.

45 Section 50B(3) of the 2000 Act.

46 Section 50B(4) of the 2000 Act.

47 The term “taxation” remains applicable to the assessment of costs in the Circuit Court.

48 Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No. 2) Order 2019 (S.I. No. 502 of 2019).



Order 53 of the District Court Rules (“DCR”)<sup>49</sup> regulates assessment of legal costs in the District Court, where the amount of costs allowable is determined by a Schedule of Costs<sup>50</sup> containing scales of amounts recoverable for solicitor’s costs and outlays and counsel’s fees for various categories of proceedings listed in the Schedule, the amount of costs allowable generally being related either to the value of the amount due or (where the claim is dismissed) claimed. The District Court may award an amount for costs and/or counsel’s fees in excess of the amount provided in the Schedule where appropriate in the special circumstances of a case, to be specified by the court,<sup>51</sup> and may fix the costs itself either at or within a reasonable time after the hearing, if it considers that application of the relevant scale of costs would be inappropriate or unjust.<sup>52</sup>

### 5.2.2 Costs allowable

Under the rules of court regulating taxation by the Taxing Master, assessment of legal costs on a solicitor and client basis and assessment on a party and party basis have followed separate standards. Generally, the allowance for costs likely to be made to a solicitor against his/her client on taxation were more generous than where the costs being taxed are due by one party to another.

On a taxation as between solicitor and client, costs claimed by the solicitor were allowed “except in so far as they are of an unreasonable amount or have been unreasonably incurred”.<sup>53</sup> By contrast, on a taxation on a party and party basis, costs were allowed to the party entitled against the party liable to the extent that they “were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed”.<sup>54</sup>

The rationale for this long-established distinction in approach was explained by Sullivan M.R. in *Dyott v Reade*<sup>55</sup> thus:

“Costs between party and party are not the same as solicitors and client’s costs. In costs between party and party one does not get full indemnity for costs incurred against the other. The principle to be considered in relation to party and party costs is that you are bound in the conduct of your case to have regard to the fact that your adversary may in the end have to pay the costs. You cannot indulge in the “luxury of payment”; a remarkable instance of that occurred in this case, but it was occasioned by way of excessive caution, and the adversary is not to pay for that...”<sup>56</sup>

Reflecting the distinction, the rules of court required the Taxing Master to allow:

“all such costs, charges and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for enforcing or defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the Taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons or by other unusual expenses.”<sup>57</sup>

This difference in the threshold for allowance on taxation between the two categories of legal costs must be read in light of section 27(2) of the Courts and Court Officers Act 1995 (“the 1995 Act”), which empowered the Taxing Master or the County Registrar, as the case may, on all taxations, both on a solicitor and client and on a party and party basis, to allow

“...in whole or in part, any costs, charges, fees or expenses included in a bill of costs in respect of counsel (whether senior or junior) or in respect of a solicitor or an expert witness appearing in a case, or any

49 District Court (Civil Procedure) Rules 2014 (S.I. No. 17 of 2014).

50 Ibid., Schedule 3.

51 Order 53, rule 2(2), DCR.

52 Order 53, rule 14(1)(e), DCR.

53 Order 99, rule 11(1), RSC.

54 Order 99, rule 10(2), RSC.

55 [1876] 10 I.L.T.R 110.

56 Ibid., at page 110. See also *Tobin and Twomey Services Ltd v Kerry Foods Ltd & Anor* [1999] 1 I.L.R.M. 428, where Kelly J accepted “the general principle that luxury payments are not recoverable on party and party taxations.”

57 Order 99, rule 37(18), RSC. Emphasis added.

expert engaged by a party as the Taxing Master (or County Registrar as the case may be) considers in his or her discretion to be fair and reasonable in the circumstances of the case, and the Taxing Master shall have power in the exercise of that discretion to disallow any such costs, charges, fees or expenses in whole or in part.”<sup>58</sup>

### 5.2.3 The format of the bill of costs

While not prescribing a specific form of bill of costs for taxation, the rules of court did specify the basic format (i.e. how many columns were to be included)<sup>59</sup> and prescribed a scale of items – set out in and known as Appendix W of the rules – which were required to be included in the bill for certain steps or activities in the proceedings to which the costs related.

An examination of Appendix W, its operation and shortcomings is important as a pre-cursor to a consideration later in this chapter of the merits and de-merits of fee scales. Part I of Appendix W,<sup>60</sup> prior to its amendment on foot of the new legal costs adjudication regime, listed a total of 81 items under twelve headings, viz.: (1) institution of proceedings; (2) discovery and inspection; (3) preparation for trial, etc.; (4) trial of hearing; (5) taxation; (6) execution; (7) attendances; (8) drawing documents not otherwise provided for; (9) copies; (10) letters, etc.; (11) perusals; and (12) service.

Certain items in Appendix W were fixed -

- at specific amounts for the task concerned (e.g. attending to register a judgment,)
- within a set range as to amount (e.g. drawing, filing and delivery of pleadings, drafting instructions to counsel to advise) or
- at specific amounts by reference to time expended (e.g. attending counsel in consultation, attending hearings, conducting searches in certain registers)
- at specific amounts by reference to length of the document prepared, examined or copied (e.g. drafting brief for counsel, writing letters, length being measured by “folio”).

The fixed items in Appendix W had, over the years, been criticised as being long since out of date.<sup>61</sup> Other items in Appendix W, most notably Item 16 – “instructions for trial or hearing of any cause or matter, petition or motion, whatever the mode of trial or hearing (including the taking of accounts or making of inquiries)” – and Item 17 – “Instructions for appeal from an interlocutory or final order or judgment” – were at the discretion of the Taxing Master. These items were – as indicated in the notes to those items in Appendix W, Part I – intended to “cover the doing of any work, not otherwise provided for, necessarily or properly done in preparing for a trial, hearing or appeal, or before a settlement of the matters in dispute, including:

- (a) taking instruction to sue, defend, counter-claim or appeal, or for any pleading, particulars of pleading, affidavit, preliminary act or a reference under Order 64, rule 46 RSC;
- (b) considering the facts and law;
- (c) attending on and corresponding with the client;

58 Section 27(2), Courts and Court Officers Act 1995, emphasis added. Order 18 rule 6 of the Circuit Court Rules provides that “[i]n every case [the County Registrar] shall measure the costs by fixing a reasonable sum in respect of the entire Bill or any particular item therein.”

59 Order 99 rule 29(5) provided that bills of costs were to be prepared with seven separate columns, viz.:

- (a) the first or left hand column for dates;
- (b) the second for the numbers of the items;
- (c) the third for the particulars of the services charged for;
- (d) the fourth for disbursements;
- (e) the fifth for the Taxing Masters’ deductions from disbursements;
- (f) the sixth for the professional charges;
- (g) the seventh for the Taxing Masters’ deductions from professional charges.

60 The other Parts of Appendix W related to: costs of judgment in default of appearance (Part II); non-contentious probate matters (Part III); bankruptcy (Part IV); appeals from the Circuit Court (Part V); and fees payable to commissioners for oaths (Part VI).

61 See, e.g. *Best v Wellcome Foundation Ltd & Ors* [1996] 1 I.L.R.M. 34 at 55; *Sheehan (an infant) v Corr* [2017] 3 IR 252 at paras. 50 - 51.

- (d) interviewing and corresponding with witnesses and potential witnesses and taking proofs of their evidence;
- (e) arranging to obtain reports or advice from experts and plans, photographs and models;
- (f) making searches for relevant documents;
- (g) inspecting any property or place material to the proceedings;
- (h) perusing pleadings, affidavits and other relevant documents;
- (i) where the cause or matter does not proceed to trial or hearing, work done in connection with the negotiation of a settlement; and
- (j) the general care and conduct of the proceedings.

Counsel's fees were treated in the bill of costs as disbursements made by the solicitor (and included in the disbursements column of the bill) albeit that in many if not most cases counsel's fee may not have been fully discharged at the time the bill was presented for taxation.<sup>62</sup> Expert witnesses' fees are similarly itemised.

Item 16 (the general instructions fee payable to the solicitor), counsel's brief fee and, where applicable, the fees payable to any expert witness retained in the proceedings, have invariably been the most significant components of the bill of costs in terms of amount.

The solicitor's general instructions fee has been described, with judicial approval,<sup>63</sup> as follows

"it was to cover taking instructions for the trial or hearing and not merely instructions for the preparation of a brief. ... the overall care and attention which the case required: the difficulties in taking proofs of evidence from intended witnesses and generally organising the case; ensuring the availability of witnesses and indeed the availability of counsel. It had to cover "living with the case". It covered a variety of consultations as well as the cost of assembling and preparing the brief itself ...".<sup>64</sup>

and

"...the instruction fee was frequently referred to as "the great equaliser". It was the means by which solicitors were compensated for the minimal nature of the fees allowed on the itemised basis...".<sup>65</sup>

## 5.2.4 The taxation process

### 5.2.4.1 The Taxing Master's role

Section 27(1) of the 1995 Act<sup>66</sup> provides that on a taxation either on a solicitor and client or on a party and party basis, the Taxing Master (or County Registrar as the case may be) shall have power:

"to examine the nature and extent of any work done, or services rendered or provided by counsel (whether senior or junior), or by a solicitor, or by an expert witness appearing in a case or any expert engaged by a party, and may tax, assess and determine the value of such work done or service rendered

62 "What can be recovered in party and party taxation is the money paid out or, perhaps in tune with more modern practice, the monies which the successful party had already undertaken with his solicitor and counsel and other persons to pay such as witnesses etc even though not yet paid...": *Attorney General (McGarry) v. Sligo County Council (No. 2)* [1989] ILRM 785 (Supreme Court) at 786.

63 *Smyth v Tunney* [1993] 1 IR 451 (Murphy J). See also: *C.D. v. Minister for Health* [2008] IEHC 299, (High Court (Herbert J.)) unrep, 23<sup>rd</sup> July 2008, at p. 26) and *Sheehan (an infant) v. Corr* [2017] 3 IR 252 at para. 51.

64 *Smyth v Tunney* [1993] 1 IR 451 at 468-469.

65 *Smyth v Tunney* [1993] 1 IR 451 at 469.

66 Section 27(1) and (2) of the 1995 Act "... introduced a fundamental change in relation to the function of the Taxing Master in the taxation of solicitor's disbursements, including counsel's fees. Before the coming into operation of the Act of 1995, it was no part of the function of the Taxing Master to make a value judgment as to what the disbursements should be. However, by virtue of sub-s. (1) it is part of his function to examine the nature and extent of work to which disbursements relate and to determine the value of the work done or the service rendered. By virtue of sub-s. (2) his function is to assess what he considers in his discretion to be a fair and reasonable allowance for the work done or service rendered.": Laffoy J in *Minister for Finance v Laurence Goodman, Goodman International and Subsidiary Companies (No. 2)* [1999] 3 I.R. 333 at pages 349 – 350.

or provided in connection with the measurement, allowance or disallowance of any costs, charges, fees or expenses included in a bill of costs.”

As mentioned in Section 5.22 of this chapter, section 27(2) of the 1995 Act specifies the approach to be taken by the Taxing Master in allowing costs, charges, fees or expenses. This approach was explained in a High Court judgment<sup>67</sup> as follows

“The Taxing Master should have objectively examined each of the separate items in the bill of costs which together make up the claim for a general instructions fee. He should have ascertained precisely what work was done by the solicitors for the costs, with particular reference to the documentation furnished in support, and by what level of fee earner it was done. The Taxing Master should next have considered whether it involved the exercise of some special skill on the part of the doer and, indicated what he considered that skill was and why he considered its use was necessary in the circumstances. The Taxing Master should have indicated what amount of time he considered should reasonably have been devoted to this work, employing as much precision as the nature of the work and the information available to him would permit. The Taxing Master should have considered whether the doer of the work bore any special responsibility in the course of carrying out that work and, identified what he considered that to be and, how it arose. The Taxing Master should have considered the extent to which the work was proper and necessary for the attainment of justice so as to be allowable on a party and party taxation...”.<sup>68</sup>

In taxing both solicitor and client and party and party costs, a Taxing Master was required by the rules of court to have regard to all relevant circumstances, and in particular to—

- “(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
- (b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor;
- (c) the number and importance of the documents (however brief) prepared or perused;
- (d) the place and circumstances in which the business involved is transacted;
- (e) the importance of the cause or matter to the client;
- (f) where money or property is involved, its amount or value;
- (g) any other fees and allowances payable to the solicitor in respect of other items in the same cause or matter but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.”<sup>69</sup>

#### 5.2.4.2 *Sheehan (an Infant) v Corr*

In *Sheehan (an Infant) v Corr*<sup>70</sup> – now the leading case on assessment of legal costs – the Supreme Court held: that a central feature of the function of the Taxing Master was to examine the nature and extent of the work done, with a view to assessing its value; that the amount of time actually spent on a case was only one element of the relevant circumstances by reference to which the nature and extent of the work done was to be assessed; and that it was incorrect for the Taxing Master to adopt an approach towards taxation of a solicitor’s instructions fee that started by reference to the hours worked in relation to each service provided by the solicitor. Accordingly, as a general proposition, the amount of time actually spent on a case should not be elevated above the various other criteria (viz. (a) to (g) listed above).<sup>71</sup>

The Court held that the rules of court envisaged the solicitor’s general instructions fee in a bill of costs being an omnibus figure covering work done and there was no requirement for a bill of costs to specify a

67 *C.D. v. Minister for Health* [2008] IEHC 299 (Herbert J) at pages 32 and 33, cited with approval by the Supreme Court in *Sheehan (an infant) v. Corr* [2017] 3 IR 252 (at para. 48).

68 *C.D. v. Minister for Health* [2008] IEHC 299 at pages 32 and 33.

69 Order 99 rule 37(22)(ii), RSC.

70 [2017] IESC 44.

71 *Ibid.*, para. 81.

professional charge, the hours worked, or the hourly rate for the solicitor performing the work in respect of each item of professional services encompassed within the general instructions fee. The Taxing Master was not obliged to put a value on each individual item.<sup>72</sup>

The Court stated that the appropriate starting point for the Taxing Master in taxing a solicitor's instructions fee (or counsel's brief fee)<sup>73</sup> was to ascertain precisely what work was done by reference to the bill of costs and supporting documentation, and then to consider the other relevant circumstances set out at (a) to (g) above. In ascertaining what work was done, the Taxing Master should have regard to the time spent on the case, and consider which particular solicitor did the work and his or her place in the hierarchy of fee earners. However, a solicitor or a barrister were not required to keep contemporaneous records of time spent on a case or include same in a bill of costs, though it might be prudent to keep such records or other documents containing accurate and credible evidence of time spent in order to assist the Taxing Master in ascertaining the nature and extent of work done, in the event of taxation.<sup>74</sup>

The Court further stated that the Taxing Master's statutory function on taxation was to determine the material or monetary worth of work done by legal professionals by reference to the period during which the work was done, and when assessing a solicitor's general instructions fee or a barrister's brief fee, the Taxing Master should have regard to the impact of the economic climate at the time the relevant work was done on the remunerative value of that work. It was not, however, open to the Taxing Master to apply an across the board reduction to the fees charged in the bill of costs on the basis of economic conditions.<sup>75</sup> The impact of a change in economic conditions is to be assessed by reference to appropriate evidence.<sup>76</sup>

#### 5.2.4.3 Inefficiencies in the process

The taxation process has invariably been an oral procedure, requiring an examination in the presence of the parties or their representatives of the bill, item by item.

While a taxation could, at the request of the parties, be confined to that part of a bill of costs actually in dispute,<sup>77</sup> a party was not required to identify in advance of taxation what items they took issue with – necessitating as a result considerable potentially unnecessary expenditure of time by parties and Taxing Master alike in advance of or during a taxation. In *Sheehan*, the Supreme Court made clear that references in certain previous decisions<sup>78</sup> to the Taxing Master being obliged to carry out a "root and branch examination of the bill" should not be misunderstood as requiring the Taxing Master to conduct an inquisitorial review of every item in every bill. Such an analysis should be confined only to items in dispute. The Supreme Court expressed concern that in the case before it the time expended on the taxation of the costs and the review – consuming a total of seven days – almost rivalled the substantive hearing of the original proceedings.<sup>79</sup>

In view of the development of lengthy delays in the taxation of costs earlier in this decade, a practice direction was introduced in the High Court<sup>80</sup> to the effect that in all cases where liability for the payment of costs is not disputed and in any other case which a judge thinks appropriate, an order may be made directing payment of a reasonable sum on account of costs within such period as may be specified by the judge pending the taxation of the costs. Such orders may be granted on an undertaking being given by the solicitor for the successful party that, in the event of taxation realising a smaller sum than that directed to be paid on account, the overpayment will be repaid. Although it is understood that timescales for taxation

72 Ibid., para. 50.

73 The Court indicated that the same principles applied to taxation of a barrister's brief fee as applied to a solicitor's general instructions fee: see para. 112 of the judgment.

74 [2017] IESC 44 at para. 74.

75 Ibid., at para. 104.

76 Ibid., at para. 115.

77 Section 27(8), Courts and Court Officers Act 1995.

78 E.g. *Superquinn Ltd. v. Bray U.D.C. (No. 2)* [2001] 1 I.R. 459

79 [2017] IESC 44 at para. 121.

80 Practice Direction HC71 (Payment on account of costs pending taxation) of the 28<sup>th</sup> March 2017.

of costs have more recently been reduced significantly, the practice of applying for interim payments on account of costs continues.

#### 5.2.4.4 Promoting settlement of the costs dispute

As the costs of the taxation process itself were, by statute,<sup>81</sup> not recoverable by a party to taxation, it was not possible to introduce a procedure comparable to the lodgment and tender procedure for money or damages claims, so as to enable a party liable to pay costs to make an offer in settlement of the costs and thereby place the party due the costs at risk as to the costs of the taxation process should they refuse the offer and then fail to “beat the offer” on taxation.

#### 5.2.5 Scales of legal costs

Quite distinct from the provision for scale items in Appendix W, RSC, already detailed in Section 5.2.3 of this chapter, section 46 of the 1995 Act provides that where a court rules committee is requested by the Minister to submit for the concurrence of the Minister rules governing questions of costs including scales of solicitors’ costs and counsels’ fees, and either fails to submit such rules within three months of the request, or submits rules containing a scale(s) which the Minister considers excessive, the Minister may by regulation, prescribe appropriate scales of solicitors’ costs and counsels’ fees. The Ministerial powers conferred by section 46 have not been invoked to date, although the Legal Costs Working Group – referred to below – was asked to consider whether scales should be introduced.

#### 5.2.6 Transparency and predictability

The report of the Legal Costs Working Group, referred to in the next section, criticised the costs taxation regime as making:

“the outcome of the process difficult to predict, for legal practitioners and lay persons alike. Given the nature of legal work in the area of contentious business, some degree of uncertainty as to the precise amount which will ultimately be chargeable in respect of a legal dispute is inevitable. The absence of data on previously taxed cases compounds this difficulty.”<sup>82</sup>

It noted the absence of express taxation policies or guidelines as to how the criteria governing the exercise of discretion by the Taxing Master (e.g. complexity, skill required, importance of case to client, value of claim, etc.) were to be applied in particular types of action or application, and suggested that this impeded solicitors in advising clients on the extent of their likely exposure to costs and rendered the process of predicting or settling costs as an alternative to taxation more difficult.<sup>83</sup>

### 5.3 Genesis of the new legal costs assessment regime

#### 5.3.1 The Haran Report recommendations

##### 5.3.1.1 The Haran remit

In 2004 the then Minister for Justice, Equality and Law Reform established the Legal Costs Working Group (“Haran”<sup>84</sup>), tasking it to

- examine the present level of legal fees and costs arising in civil litigation; how such fees and costs arise and are calculated; the basis for such fees and costs, and the system and arrangements in place in the State relating to the taxation of costs
- undertake a historical analysis of fees and costs to determine whether the relative level of such fees and costs have increased over time and, if so, the reasons for such increase
- to the extent that the Group thinks it appropriate, undertake a comprehensive study of the systems and methods employed in other jurisdictions for setting and determining fees and costs in civil litigation

81 Section 27(6), Courts and Court Officers Act 1995.

82 Para. 7.6 of the Report on page 44.

83 Para. 7.7 of the Report on page 44.

84 The Working Group was chaired by Mr Paul Haran, the former Secretary General of the Department of Enterprise, Trade and Employment.

- consider whether a scale of solicitor’s costs and counsel’s fees should be made by way of regulation as provided for by section 46 of the 1995 Act and
- on the basis of the aforementioned examination and study, make recommendations for initiatives or changes in this area which, in the Group’s considered view, would lead to, or assist in, a reduction of costs associated with civil litigation, would improve accessibility to justice and provide for greater transparency.

It may be noted that Haran’s remit incorporated an expectation that its recommendations would lead to a reduction in legal costs.

In its report of November 2005,<sup>85</sup> Haran made recommendations under various headings, the most significant being as follows:

#### *5.3.1.2 The “costs follow the event” principle*

Haran considered that, “for all its faults”, this principle should be retained, providing as it does an opportunity for persons of modest means to engage a solicitor to vindicate their rights and that a departure from it would undermine the ‘no foal, no fee’ system which is dependent on it, with the result that access to justice may be more impaired than it is at present resulting in pressure for the introduction of a better resourced system of civil legal aid.

#### *5.3.1.3 Costs recoverable*

Haran recommended that a legal costs regulatory body should be established to formulate guidelines setting out the amounts of legal costs that normally can be expected to be recoverable by a party awarded costs against another party in respect of particular types of proceedings or steps within proceedings, the guidelines to be based on an assessment of the amount and nature of work required to be done in such a case and to comprehend such elements as -

- the appropriate hours expended by the various persons to be remunerated
- the complexity of the proceedings and the stages therein, and
- the level of the court in which the case is heard.

The guidelines should allow for flexibility to reflect the individual and exceptional circumstances which may arise at different stages of a particular case. While some cognisance should be given to the financial value of the claim or counterclaim in dispute and the complexity of the case, costs should be assessed primarily by reference to work actually and appropriately done, and the level of recoverable costs should not be proportionate to that value nor should it be the main determinant of the amount of costs recoverable.

The legal costs regulatory body should be charged under statute with keeping its costs guidelines up-to-date.

Haran considered that the lumping together of so many elements of the solicitor’s work into one instructions fee seriously inhibits transparency and openness: the solicitor’s instructions fee should be broken down into its component parts and follow the guidelines aforementioned, and a similar approach should be adopted in relation to counsel’s brief fee.

It recommended against the introduction of costs scales. It noted obvious advantages to setting a fixed scale of fees, viz.: transparency, in giving clients full knowledge of the likely costs to be incurred; bringing predictability to a very uncertain environment; reducing the scope for disputes about the level of legal costs. Against these, it was concerned that a fixed scale may not comprehend the totality and complexity of the range of legal proceedings that emerge. It found difficulty in seeing how a scale would not undermine, to some extent, the principle of equality of arms. It noted suggestions that lawyers may restrict their input and effort in a case to a level of input which they related to the scale fee available, and was concerned that fixed scales maxima could become the standard charge.

85 Available at: <http://www.justice.ie/en/JELR/legalcosts.pdf/Files/legalcosts.pdf>

Haran did, however, recommend that the onus should be on a party seeking costs higher than those set out in the guidelines aforementioned to show why, in the particular circumstances of the case, the higher amount claimed should be paid.

#### 5.3.1.4 *The two-thirds rule*

The “almost universal” practice whereby Junior Counsel is paid two thirds the rate of Senior Counsel was, Haran considered, unacceptable and unfair given its arbitrary nature, and would seem to offend against the intent of section 27(1) of the 1995 Act.

#### 5.3.1.5 *Competition*

The principle of costs being assessed by reference to work done is the proper approach to be taken and the costs guidelines should not take the ‘grade or level’ of the counsel into consideration.

#### 5.3.1.6 *Empowering the Client*

Full and up-to-date information on the costs implications of their cases should be provided at the critical stages of the process to aid the clients in making informed decisions, including to terminate proceedings and prevent the further escalation in costs.

#### 5.3.1.7 *The costs assessment process*

Haran recommended that the taxation system should be replaced by a new system of “costs assessment” carried out by a Legal Costs Assessment Office. The costs guidelines and other associated reforms proposed would bring a greater simplicity and transparency to the system and the assessment process should be a written procedure. Parties should be encouraged to have only those elements of costs assessed which were actually in dispute. Parties liable to pay costs should be entitled to make a lodgment or tender in advance of assessment, and in the event that the amount of their offer or tender is not exceeded on assessment, the opposing party should be liable to pay the court fees in respect of the assessment.

Appeals should lie to an Appeals Adjudicator and be conducted through an oral, public procedure. Decisions of the Appeals Adjudicator would be reviewable, where it was contended that the Appeals Adjudicator had erred as to the amount of an allowance or disallowance so that the decision is unjust, by a High Court judge assigned by the President of that court from a small panel. The Circuit Court would review decisions by County Registrars.

#### 5.3.1.8 *Other recommendations*

Haran also recommended the strengthening of the statutory obligation of solicitors<sup>86</sup> to provide information to clients on costs, and a range of court procedural reform measures including:

- (a) a specific Order to be introduced in the rules of court facilitating supervision by the court of the pace of litigation and containing measures to ensure delay is minimised;
- (b) the making by the courts of “unless” orders imposing sanctioning for delay<sup>87</sup> in respect of directions given by the court;
- (c) introduction of a general rule placing an onus on the court to fix liability for costs at the pre-trial stage save where it would, in the circumstances of the case, be unjust to do;
- (d) complementing of the existing lodgment and tender procedure by provision for a letter of offer of settlement of the proceedings on a “without prejudice save as to costs” basis (the so-called “Calderbank” letter) particularly in cases where satisfaction other than by means of a monetary payment is involved in the settlement;
- (e) extension of the penalties in costs to be applied to a solicitor responsible for delay to all steps in the litigation process and not just the trial;
- (f) empowering the court to require the parties to produce to the court and exchange with each other estimates of costs incurred at any stage of the proceedings, including the pre-trial stage.

<sup>86</sup> Then provided for in section 68 of the Solicitors (Amendment) Act 1994.

<sup>87</sup> For an explanation of an “unless” order see Section 5.5.2 in Chapter 7.



The recommendations listed have been implemented by amendment to the rules of court<sup>88</sup> with the exception of those at (b) and (e), rules changes not having been considered necessary to enable those two recommendations to be implemented by the court. In the case of recommendation (a), the case management rules concerned have not been operated in practice pending the provision of appropriate necessary resources.<sup>89</sup>

### 5.3.2 The Miller Report recommendations

In 2006, the Minister established the Legal Costs Implementation Advisory Group (“Miller”<sup>90</sup>) to progress implementation of the Haran recommendations. The Miller report of November 2006<sup>91</sup> made more detailed proposals – in some cases modifying recommendations made by Haran, most notably the following.

Miller proposed that, to facilitate an assessment of costs based on examination of the work actually done, solicitors and barristers should be obliged to maintain a system of time recording and set out their hourly/daily charge-out rates. Solicitors and barristers should also be obliged to enter into a formal legal costs agreement with the client.

A bill of costs should require to be produced within twelve weeks (extendable by the court under certain conditions) from the making of an order for costs or ruling of a settlement. A default costs assessment certificate would issue for costs not disputed within the time allowed for contesting the costs. An oral assessment procedure should be available (a) at the option of either party, where the bill exceeds €100,000 exclusive of V.A.T. or (b) where the costs assessor considers it necessary. A further appeal should lie to the Court from the decision of an Appeals Adjudicator on a point of law only.

“Global’ fees” (whether in the form of the solicitors’ instructions fee or the barristers’ brief fee) should be replaced by a set of charges based on the component steps making up the work done and the current Appendix W should be abolished. Miller appended a model form of bill of costs which broke the legal services down chronologically by reference to the progressive stages of the proceedings with separate sections for solicitor’s counsel’s and any experts’ fees, and dispensed with the global fee items aforementioned.

The legal costs regulatory body – to be responsible for formulating and updating recoverable costs guidelines, regulating the procedure for the assessment of costs, and providing information to the public on legal costs – should comprise three part-time commissioners appointed by the Government and should have access to taxed bills of costs.

The courts, when determining liability for costs in respect of an action, should be required by rule of court to take into account a range of factors such as the extent to which the party seeking costs has been successful, whether a party has caused costs to be incurred unnecessarily or otherwise unreasonably and whether a party has made reasonable efforts to settle the claim.

Consideration should be given to no longer confining the parties entitled to make a tender in respect of costs to the insured sector and the State.

The jurisdictional limit of the Small Claims Procedure should be increased from €2,000 to €3,000 and revised every two years thereafter and the Minister should give consideration to expanding the range of cases covered by it.

88 Recommendation (a): Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial procedures) 2016 (S.I. No. 255 of 2016); recommendations (a): (c), (d) and (f): The Rules of the Superior Courts (Costs) 2008 (S.I. No. 12 of 2008). See also Circuit Court Rules (Costs) 2008 (S.I. No. 353 of 2008).

89 By High Court Central Office notice of the 22<sup>nd</sup> September 2016, it was indicated that, pending the provision of appropriate necessary resources, the President of the High Court would not be appointing a List Judge or Registrar under the new rules regulating pre-trial procedures. Practitioners would be given at least two months’ notice of when the required arrangements, appointments and resources are in place, to allow for the practical implementation of the new procedures.

90 The Implementation Advisory Group was chaired by Mr Desmond Miller, Chartered Accountant.

91 Available at: <http://www.justice.ie/en/JELR/LegalCostsImpGrp.pdf/Files/LegalCostsImpGrp.pdf>

The increases in the monetary jurisdiction of the District and Circuit Courts provided for in the Courts and Court Officers Act 2002 (bringing the jurisdictions up to €20,000 and €100,000 respectively) should be implemented except for personal injury cases. The factors causing delay in the allocation of hearings and in disposal of litigation should be the subject of examination and remedial action.

## 5.4 The new legal costs assessment regime: adjudication

### 5.4.1 The legislative framework

The new assessment regime for legal costs was established by Part 10 and Schedule 1 of the 2015 Act. The legal costs provisions in the 2015 Act generally apply both to a practising solicitor and to a practising barrister, collectively referred to by the term “legal practitioner”.<sup>92</sup> New Rules of the Superior Courts – including a new Order 99 – were made<sup>93</sup> to facilitate the operation of the new regime.

The elements of the new regime were substantially informed by the Haran and Miller recommendations, albeit not implementing those recommendations exhaustively. The significant changes effected by the 2015 Act will be considered under the last five of the six headings mentioned in Section 5.1 of this chapter.

### 5.4.2 Costs allowable

The 2015 Act applies to practitioner and client legal costs and to party and party legal costs a common criterion of reasonableness both in determining whether the costs were reasonably incurred and whether those costs are reasonable in amount.

Schedule 1, paragraph 1 of the 2015 Act sets out the principles to be applied to the adjudication of a bill of costs by a Legal Costs Adjudicator,<sup>94</sup> viz.- (a) that the costs have been reasonably incurred, and (b) that the costs are reasonable in amount.

Paragraph 2 of that Schedule elaborates upon the criterion of reasonableness. In determining whether the costs are reasonable in amount a Legal Costs Adjudicator shall consider, where applicable:

- (a) the complexity and novelty of the issues involved in the legal work;
- (b) the skill or specialised knowledge relevant to the matter which the legal practitioner has applied to the matter;
- (c) the time and labour that the legal practitioner has reasonably expended on the matter;
- (d) the urgency attached to the matter by the client and whether this requires or required the legal practitioner to give priority to that matter over other matters;
- (e) the place and circumstances in which the matter was transacted;
- (f) the number, importance and complexity of the documents that the legal practitioner was required to draft, prepare or examine;
- (g) where money, property or an interest in property is involved, the amount of the money, or the value of the property or the interest in the property concerned;
- (h) whether or not there is an agreement to limit the liability of the legal practitioner;<sup>95</sup>
- (i) whether or not the legal practitioner necessarily undertook research or investigative work and, if so, the timescale within which such work was required to be completed;
- (j) the use and costs of expert witnesses or other expertise engaged by the legal practitioner and whether such costs were necessary and reasonable.

By contrast with the old assessment regime – taxation – the 2015 Act does not expressly make a distinction between the criteria applicable in determining what legal costs are allowable as between a legal practitioner

92 Section 2(1) of the 2015 Act.

93 Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019).

94 See also section 155(1) of the 2015 Act.

95 As provided for in section 48 of the 2015 Act.

and their client and those applicable to party and party legal costs. Section 155(6) of the 2015 Act does require the Legal Costs Adjudicator, when adjudicating on legal practitioner and client legal costs, to have regard to any agreement made between the legal practitioner and the client as to the amount, and the manner of payment of those costs as permitted by section 151 of the 2015 Act.

However, as was required by section 27(2) of the 1995 Act in the case of a taxation of costs under the old regime,<sup>96</sup> the criterion of “reasonableness” is critical to determining the costs chargeable and the amount of same recoverable, both in the case of legal practitioner and client costs and party and party costs.

### 5.4.3 The bill of costs

#### 5.4.3.1 Legal practitioner and client costs

Section 152 of the 2015 Act requires a legal practitioner, as soon as is practicable after concluding the provision of legal services in relation to a legal matter for a client, to provide to the client a bill of costs containing certain mandatory requirements<sup>97</sup> in such form (if any) as may be specified in rules of court, and an explanation of the procedure for disputing any aspect of the bill of costs.

Where an agreement between a practitioner and a client encompasses all of the legal costs payable by the client to the legal practitioner for legal services, an invoice prepared by the legal practitioner containing a summary of the costs and outlays pursuant to the agreement, together with a copy of the agreement, will suffice as a bill of costs of the purposes of section 152.<sup>98</sup>

#### 5.4.3.2 Party and party costs

Section 154(1) of the 2015 Act provides that in the case of costs awarded as between party and party, the person awarded the costs must furnish a bill of costs to the person paying the legal costs, in a form and manner consistent with (a) the terms of the order, (b) the 2015 Act, and (c) any rules of court relating to the preparation and furnishing of bills of such costs.

Reflecting substantially the Haran and Miller recommendations, the rules of court introduced to facilitate the operation of the 2015 Act have prescribed an entirely new form of bill of costs<sup>99</sup> – applicable both to legal practitioner and client costs and to party and party costs – which requires that the costs be broken down -

- (a) chronologically, viz. separately identifying costs incurred:
  - (i) before commencement of proceedings;
  - (ii) from commencement to trial/settlement date;

96 Section 27 of the 1995 Act was amended by section 2 of the Courts Act 2019, which repealed subsections (6) and (7) and inserted a new subsection (12), which provided that the section shall not apply to an adjudication of legal costs under Part 10 of the 2015 Act.

97 Section 152(1) specifies these as follows:

- (a) a summary of legal services provided to the client in connection with the matter concerned;
- (b) an itemised statement of the amounts in respect of the legal costs in connection with the legal services;
- (c) the registration number of the legal practitioner for VAT purposes, and the amount of VAT chargeable
- (d) where time is a factor in the calculation of the legal costs concerned, the time spent in dealing with the matter;
- (e) the amount of any damages or other moneys recovered by, or payable to, the client arising from the matter in respect of which the legal services were provided;
- (f) the amount of any legal costs recovered by or payable to the legal practitioner on behalf of the client, including costs recovered from another party, or an insurer on behalf of another party, to the matter concerned.

Where the client has made an agreement with the legal practitioner as to legal costs payable, a summary prepared by the legal practitioner of the costs and outlays under that agreement will meet the requirements of (a), (b) and (d).

98 Section 152(6) of the 2015 Act. Where a practising solicitor instructs a practising barrister in relation to a matter for a client, the barrister’s obligation to provide a bill of costs will be fulfilled where the barrister provides the bill of costs to the solicitor, who must immediately on receipt of that bill provide it to the client: section 152(8).

99 The new form of bill is set out at Form No. 3 in Appendix W, Part V of the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019).

- (iii) during course of trial/ settlement and up to determination of proceedings; and
- (iv) subsequent to trial; and
- (b) as between
  - (i) solicitor’s fees;
  - (ii) counsel’s fees;
  - (iii) any expert’s fees and
  - (iv) expenses,

and thereby effectively eliminates the global instructions fee for the solicitor and the general brief fee for counsel.

The new form of bill also provides for the hourly rates for a solicitor, counsel or an expert to be identified unless the fees concerned are not based on an hourly rate. The grade of each solicitor or other member of the solicitor’s staff involved and, where relevant to the rate claimed, the year of qualification or number of years’ post-qualification experience, is required to be shown.

## 5.4.4 The adjudication process

### 5.4.4.1 The Legal Costs Adjudicator’s role

In adjudicating on a bill of legal costs, the Legal Costs Adjudicator is required by section 155 of the 2015 Act, as far as he/she considers necessary, to “consider and have regard to the entire case or matter to which the adjudication relates and the context in which the costs arise”<sup>100</sup> and must:

- (a) verify that the matter or item the subject of the application for adjudication represents work that was actually done;
- (b) determine whether or not in the circumstances it was appropriate that a charge be made for the work concerned or the disbursement concerned;
- (c) determine what a fair and reasonable charge for that work or disbursement would be in the circumstances; and
- (d) determine whether or not the costs relating to the matter or item concerned were reasonably incurred.<sup>101</sup>

In carrying out those four tasks, the Legal Costs Adjudicator must, so far as reasonably practicable, ascertain, in relation to work (including work to which a disbursement relates) -

- (i) the nature, extent and value of the work,
- (ii) who carried out the work, and
- (iii) the time taken to carry out the work.<sup>102</sup>

### 5.4.4.2 *Sheehan (an Infant) v Corr*

As mentioned earlier, the Supreme Court in *Sheehan* held, *inter alia*, that the amount of time actually spent on a case should not, generally, be elevated above other criteria (e.g. complexity, skill, importance to client, money value etc.) and that the rules of court envisaged the solicitor’s instructions fee as being an omnibus figure, with no requirement for a bill of costs to specify a professional charge, the hours worked, or the hourly rate for the solicitor for the professional services encompassed within the general instructions.

Section 155(5) of the 2015 Act, as just noted, now cites “time taken” as one of the three broad reference points for the Legal Costs Adjudicator when considering the costs claimed, but again without according that factor any preference over the others. However, as also noted above, a legal practitioner in billing a client is now required, where time is a factor in the calculation of the legal costs, to detail the time spent in

100 Section 155(3) of the 2015 Act.

101 Section 155(4) of the 2015 Act.

102 Section 155(5) of the 2015 Act.

dealing with the matter. Furthermore, the form of bill of costs newly prescribed for adjudication purposes excludes global/omnibus-type fee items, requiring the breaking down of fees by stages of the litigation and identification of hourly rates where fees are based on an hourly rate.

Hence it would seem that, while *Sheehan* is unquestionably still relevant to the assessment of costs under the new regime, the scope for its application has, given the more logical breakdown of work now required in bills of costs, been reduced.

#### 5.4.4.3 Inefficiencies in the process

While not mandating a written procedure for all adjudications at first instance as advocated by Haran, the 2015 Act enables an adjudication on costs, with the parties' consent, to be conducted without an oral hearing where the Legal Costs Adjudicator considers it to be expedient and in the interests of justice to do so.<sup>103</sup>

Addressing the concerns expressed in the *Sheehan* case referred to above,<sup>104</sup> an adjudication may be confined at the outset to an item or items in dispute rather than the entire bill of costs,<sup>105</sup> and the rules of court now require that the notice of application for adjudication specify precisely the matters or items on which the Legal Costs Adjudicator is required to adjudicate and the matters or items which have been agreed between the parties or the legal practitioner and client, as the case may be.<sup>106</sup>

#### 5.4.4.4 Promoting settlement of the costs dispute

A legal practitioner whose client disputes legal practitioner and client costs<sup>107</sup> and a party seeking to refer disputed party and party costs to adjudication<sup>108</sup> are now statutorily obliged to seek to resolve the dispute with the client or other party (as the case may be) before applying for adjudication.

The restriction in statute on recovery of the costs of the taxation process does not apply to the new adjudication process<sup>109</sup> and the new rules of court on adjudication of legal costs now provide that the costs and expenses of such an adjudication shall, generally, follow the event.<sup>110</sup> Those rules have also incorporated<sup>111</sup> a lodgment and tender procedure, enabling the party or person liable to pay the costs to make an offer in settlement of the costs within 21 days of service on him/her of the application for adjudication. The party or practitioner entitled to the costs may accept the offer within 14 days from receipt of it,<sup>112</sup> on the basis that should that offer not be accepted, and not be bettered on adjudication of the costs, the latter would bear the costs of the adjudication process. This new procedure is designed to incentivise settlement of applications for adjudication of costs, reduce the volume of disputes requiring adjudication by Legal Costs Adjudicators, and in the process reduce waiting times for adjudication.

#### 5.4.5 Scales of legal costs

Departing from the Haran and Miller recommendations, the 2015 Act not only provides for retention of Appendix W in the rules of court, but requires the Superior Courts Rules Committee, not less than once every two years, to review the scales of fees set out in that Appendix.<sup>113</sup>

103 Section 156(5) of the 2015 Act.

104 See Section 5.2.4.3.

105 Section 154(2), (3) and (4) of the 2015 Act.

106 Order 99, rule 25(3), RSC.

107 Section 153(2) of the 2015 Act.

108 Section 154(2) and (3) of the 2015 Act.

109 By virtue of section 2 of the Courts Act 2019.

110 Order 99, rule 13(2), RSC: see Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019). The Legal Costs Adjudicator may only depart from this approach for special reason to be stated in his or her determination.

111 Part XII (Lodgment or tender in respect of costs) of Order 99, RSC.

112 This period may be extended by the parties' agreement: see Order 99, rule 58(1) RSC.

113 Section 143 of the 2015 Act.

Addressing criticisms of the content and out-dated nature of the charges in the pre-existing Appendix W, the new rules of court introduced to implement the 2015 Act have –

- (i) expanded the number of items in the Appendix, relating them to the corresponding sections of the new form of bill of costs,
- (ii) increased the money amounts of items to reflect present money values and
- (iii) expanded the number of items which are discretionary in nature. Thus, items which hitherto carried fixed charges – such as preparing instructions to counsel to advise as to institution of proceedings, preparing a notice of motion or preparing an affidavit of discovery – are now at the discretion of the Legal Costs Adjudicator.

## 5.4.6 Transparency and predictability

### 5.4.6.1 Register of determinations

The 2015 Act has also addressed to some extent the criticisms in Haran as to the absence of data on costs assessment outcomes referred to above. Section 140 of the 2015 Act has introduced a requirement for a register of applications for adjudication of party and party legal costs, which – subject to some significant exceptions will include the outcomes of and reasons for the determination.<sup>114</sup> This – combined with the more logical and detailed breakdown of costs required by the new format of the bill of costs – offers potential for greater transparency as to the approach to assessment of party and party costs at least in cases involving matters of precedential value, or otherwise of legal importance.

However, section 140(4) dispenses the Chief Legal Costs Adjudicator from publishing the reasons for a determination where he/she is of the opinion that the adjudication concerned does not involve a matter of legal importance.

### 5.4.6.2 Guidelines

Section 142(1) of the 2015 Act enables the Chief Legal Costs Adjudicator, after consultation, to issue for the guidance of Legal Costs Adjudicators, legal practitioners and the public, guidelines “indicating the manner in which the functions of the Chief Legal Costs Adjudicator and the Legal Costs Adjudicators are to be performed”. It is not clear to what extent these guidelines are intended to extend to the amounts allowable in costs for particular types of case or application or step within a case. Section 142(3) provides – without prejudice as to the generality of section 142(1) – express examples of what the guidelines may do.<sup>115</sup> However, those examples do not include the giving of guidance as to amounts allowable for costs of particular types of proceedings or steps in proceedings.

<sup>114</sup> Section 140(2)(e) and (h).

<sup>115</sup> Viz. the guidelines may—

- (a) describe the procedures for the adjudication of legal costs,
- (b) set out the documents and other information that are required to accompany an application for the adjudication of legal costs,
- (c) describe the notices and other information that will be provided by the Legal Costs Adjudicator in relation to applications for adjudication,
- (d) identify legislative and rules provisions relevant to an application,
- (e) describe the procedures that are to be followed in the Office of the Legal Costs Adjudicators in relation to the adjudication of legal costs,
- (f) provide guidance as to the circumstances in which a Legal Costs Adjudicator may exercise his or her powers to dispense with a public or oral hearing,
- (g) set out the fees that are to be charged in the Office of the Legal Costs Adjudicators and the manner in which those fees may be paid,
- (h) provide such other information as appears to the Chief Legal Costs Adjudicator to be appropriate, having regard to the purposes of the guidelines referred to in section 142(1).

## 6. Responses to the consultation exercise on legal costs

### 6.1 General

Respondents to the consultation exercise suggested measures to reduce the incidence of legal costs, including changes in jurisdiction (revision of monetary jurisdictional thresholds) and to practice and procedure (notably, reduction in recourse to, or scope of discovery; promotion of recourse to ADR; use of witness statements for cases triable on oral evidence; setting of indicative timeframes for completion of a case with costs sanctions for non-compliance; costs sanctions for reliance on an unnecessary number of witnesses and for unnecessarily bringing motions for pre-trial orders). However, only a small minority of submissions directly addressed the process of assessment of costs and how costs levels should be calculated and assessed.

The Bar Council refrained from making any substantive submissions on the issue of costs, noting that the rules of court on costs were under review consequent on the enactment of the 2015 Act. It observed, however, that “an essential feature of the reform of the administration of civil justice in the Irish courts will be an entire reassessment and overhaul of the manner in which legal costs are approached”.

### 6.2 Assessment of costs

The MPS recommended that bills of costs should be provided within three months of the conclusion of the proceedings, with sanctions for non-compliance. The MPS submitted that a lodgment and tender system should be introduced to address unreasonable refusal to settle on the amount of costs, and that an applicant for an interim payment on account of costs should be required to furnish a draft bill of costs and evidence that they had meaningfully engaged with the party liable for the costs with a view to settling on the amount of costs. Where an interim payment is sanctioned, a time limit should be imposed for setting the bill down for taxation. Where the interim payment exceeds the amount allowed on taxation, a court order should provide that the excess be recoverable with interest.

The State Claims Agency (“SCA”) also pointed to the facility to apply to the court for an interim payment in respect of costs as acting as a disincentive to the party receiving the interim payment in proceeding expeditiously with production, and agreement or taxing of a bill, and suggested that applications for interim payments in respect of costs should instead require to be made to the Taxing Master, who would have the expertise to determine what amount by way of interim payment would be reasonable. The amount of the interim payment should also act as a de facto tender, failure to exceed which on taxation should incur a penalty in terms of liability for the costs of taxation. The SCA saw the absence of a lodgment and tender procedure as a major obstacle to the resolving of costs disputes. The 2015 Act, as recently amended<sup>116</sup>, and the rules facilitating operation of the 2015 Act, provide for a lodgment and tender procedure in relation to costs claimed.

The SCA proposed that where a party due costs fails to present a bill for taxation, the rules of court should entitle the party liable to pay the costs to set the bill down for taxation. Section 154(2) of the 2015 Act provides that where a person liable to pay costs receives a bill of costs they may, having attempted to agree the bill of costs with the person due the costs, apply to the Chief Legal Costs Adjudicator for adjudication on any matter or item claimed in the bill of costs. However, the 2015 Act does not – by contrast with the case of a practitioner and client bill<sup>117</sup> – specify a criterion as to when a party and party bill should be furnished to the party liable to pay the costs, and would not seem to entitle the party liable to force the furnishing to them of the bill for taxation. In those circumstances, it would seem doubtful that the rules of court could confer such an entitlement on the party liable to pay the costs.

The SCA also suggested that -

<sup>116</sup> Section 3(b)(iii), Courts Act 2019.

<sup>117</sup> Section 152(1) provides that a legal practitioner shall, as soon as is practicable after concluding the provision of legal services in relation to a legal matter for a client, prepare and sign a bill of costs,

- a principle of proportionality of costs be introduced along the lines of that recommended by Lord Justice Jackson, and to which reference is made later in this chapter. As mentioned earlier, however, the criteria both for recovery and for assessment of costs are now prescribed comprehensively and in detail in the 2015 Act – reasonableness being the overriding standard for each – and it would not seem open to rules of court to overreach or re-order those criteria
- the voluntary practice of limiting counsels’ fees in personal injuries actions to the fees for one senior and one junior counsel should be formalised in the rules of court. The power to impose such a limit falls, however, within Ministerial regulations under section 5 of the Courts Act 1988, not with rules of court
- the use of the breakdown employed in the format for a bill of costs recommended by Miller should operate to address the concerns expressed about the impenetrable and uninformative nature of the global instructions fee. As was also indicated earlier, the Miller format has been adopted in the new form of bill of costs prescribed in the new rules of court.

One respondent recommended that legal bills should be simplified “and regulated by outsiders, not by lawyers”.

### 6.3 Fixed legal costs

The High Court judges charged with the trial of personal injuries proceedings expressed the view that the cost of litigation could be reduced if the practice of “scale fees” for pleadings and motions and briefs etc. could be reintroduced. These scales could be fixed and subject to review, by consultation between the Taxing Masters and the Bar and Law Society and would not prevent by agreement higher costs being chargeable. They noted that at present the free market operates to push up the cost of litigation as those at the top of the profession can, even in personal injury litigation, set the market price which is then, in effect, followed by the rest of the market.

The judges indicated that they were aware that “the above proposal runs counter to some ‘competition ideology’ but if there were scale fees adopted the cost of litigation would be considerably reduced, [and] the practice can be justified in the interests of the Common Good”. They accepted that certain litigation, e.g. medical negligence may necessarily attract higher fees and in the case of particularly difficult litigation, the Taxing Master would be free to allow fees substantially greater than the “scale”, or to introduce special scales of fees for such actions.

The Irish Hotels Federation and a law firm representing insured interests requested that serious consideration be given to the introduction of fixed recoverable costs, citing the reasons relied on by Lord Justice Jackson in his supplemental report on fixed recoverable costs, to which reference is made below. The MPS proposed the introduction of -

1. a “legislative scale” for settlement of costs in low value cases including both pre-action and litigated claims
2. “legislative court costs” based on chargeable time and procedural landmarks, such as motions, lodgments and trials
3. Costs sanctions for non-compliance, through partial recoverability of costs.

The MPS suggested that junior counsels’ fees should be determined on a case by case basis, in place of the “established practice” of junior counsel charging two-thirds of senior counsel’s fees. This practice is now prohibited by section 149(1)(b) of the 2015 Act.

One respondent solicitor recommended that the “archaic procedure in relation to Legal Costs and Appendix W of the Rules of the Superior Courts should be abolished or extensively revised and brought up to date in a comprehensible and relevant manner”, without providing details of the revisions desired. She suggested that legal costs and the preparation of a bill of costs “should not be the sole preserve” of a legal costs accountant. In fact, the drawing of bills of costs is not legally confined to legal costs accountants, though



heavy reliance is placed by the solicitors' profession on legal costs accountants in preparing bills of costs and attending at the taxation of costs.

Updating of the amounts itemised as recoverable in Appendix W was also proposed by another respondent. As indicated earlier in this chapter, Appendix W has been revised, and amounts updated, in the new rules which come into operation in conjunction with the commencement of the relevant Parts of the 2015 Act.

## 6.4 Litigation funding

Four respondents – including the Irish Society of Insolvency Practitioners (“ISIP”) and a UK litigation and arbitration funding company – recommended removal of the restriction (affirmed by the Supreme Court decision in *Persona Digital Telephony Ltd v Minister for Public Enterprise and Others*<sup>118</sup>) which the law of maintenance and champerty imposes on third party litigation funding agreements. The litigation financing company recommended that, in the event third party litigation funding was permitted, funding providers should be regulated through a voluntary code, as in the UK, rather than by legislation.

ISIP identified third party litigation funding as a “key issue for our members in improving access to justice”. It asserted that its members, in particular liquidators of insolvent companies “all too regularly encounter scenarios where a company or its liquidator may have a substantive and robust claim against former company officers, counterparties or other parties which if pursued would benefit the creditors of the company”, but are inhibited in pursuing a remedy due to the company having insufficient funds by the time of its liquidation. While acknowledging “legitimate public policy reasons to restrict third party litigation funding generally”, ISIP contended that the restriction on such funding in insolvency litigation means that “significant returns to creditors of insolvent companies are foregone”.

ISIP proposed that third party funding would be available to liquidators, receivers, administrators under the Insurance (No. 2) Act 1983, the Official Assignee or trustees in bankruptcy to fund proceeding intended to increase the pool of assets available to creditors, on condition that the applicant was satisfied that a reasonable case against a prospective defendant existed and would result in increasing the pool of available assets.

Another of the respondents recommended that third party litigation funding be available in human rights, environmental, constitutional and most tort actions against the State and its agencies, in business vs large business cases, and in consumer vs business cases, where the business has a minimum turnover of perhaps €10 million. He further recommended that contingency fees should be permitted and the current prohibition on linkage of client costs to the value of the claim or award should be repealed.

Dr Gerry Whyte of Trinity College Dublin School of Law recommended that “no foal no fee” agreements between a solicitor and client as the basis for remuneration of the solicitor in undertaking litigation for the client be placed on a statutory footing to remove any possible doubt about their enforceability which English case law<sup>119</sup> may have created.

## 6.5 Pre-emptive/protective costs orders

FLAC proposed that, to remove deterrents to public interest litigation (in particular the risk of exposure to liability for costs) exceptions to the rule that “costs follow the event” should be expanded to include protective costs orders – viz. that there be no order for costs, that costs be capped at a certain amount, or that the defendant should pay the costs – for litigants taking cases that are in the public interest.

On the other hand, the Department of Business, Enterprise and Innovation, IDA Ireland and Enterprise Ireland submitted that objectors to planning decisions face little risk of bearing the other side's costs if they lose – and in many cases recover their own costs. As a “deterrent to frivolous or unsound objections“, they recommended introduction of statutory caps on the amount of costs an individual litigant in a judicial

118 [2017] IESC 27.

119 *Awwad v Geraghty & Co. Ltd.* [2001] QB 570 and *British Waterways Board v Norman* [1993] 26 HLR 232.

review of a planning matter can be obliged to pay if unsuccessful and on the amount of costs they can recover if successful.

Dr Gerry Whyte recommended that the availability of pre-emptive/protective costs orders (which currently may only be granted, *inter alia*, where the case raises an issue of general public importance and the plaintiff has no private interest in the matter) be extended to cases where the plaintiff might also benefit individually from the outcome of the case. A respondent involved in an environmental planning challenge asserted that the discretionary nature of the protective costs order regime provides little or no legal certainty to persons wishing to assert their rights under environmental legislation.

## 7. Benefits and limitations of the new regime for assessment of legal costs

### 7.1 Measuring the new assessment regime’s effectiveness

The efficacy of the revisions effected by the 2015 Act may be measured in part by the extent to which it is likely to -

- assure greater clarity and predictability as to the amount of the costs liability which will be visited (a) on clients to the practitioners they retain and (b) on parties held liable for the costs of another party and
- promote greater efficiency in the way litigation is conducted and
- achieve a reduction in levels of litigation costs currently obtaining – this being of most relevance to the Review Group’s remit as to litigation costs.

### 7.2 Clarity and predictability as to extent of liability for legal costs

As has been noted above<sup>120</sup> section 150 of the 2015 Act has strengthened the entitlement of the client to receive information on charges in respect of legal costs at the outset of the client practitioner relationship and where the practitioner becomes aware of a factor significantly increasing the extent of those charges. However, insofar as disputed legal costs (whether as between practitioner and client or as between party and party) are concerned, the 2015 Act, though offering greater *potential* for the dissemination of more information on costs adjudication outcomes and the rationale for same through the register of determinations under section 140, provides no assurance that a comprehensive database of the likely costs of particular litigation case-types and steps within such case-types will come into existence.

It is also very doubtful whether guidelines under section 142 would permit norm-setting by the Chief Legal Costs Adjudicator as to amounts of costs allowable for particular types of proceedings or steps within proceedings.

The emphasis placed in the 2015 Act on the key criterion of reasonableness both in determining whether legal costs were reasonably incurred and whether those costs are reasonable in amount does not address the need for clarity and predictability. In an issues paper on legal costs presented to the Woolf Inquiry, “Devices for Controlling the Cost of Litigation Through Costs Taxation”, Professor Adrian Zuckerman, noted of the then existing legal costs assessment regime in England and Wales, which closely resembled the present, revised, regime in this jurisdiction:

“Our present costs system already attempts to establish a sensible relationship between the complexity and value of the dispute and the expenditure of litigation. The broad principle is that on taxation only reasonable costs for work reasonably done are recoverable. However, this system has failed to curb the capacity of litigation to consume vast amounts of resources.

The failure of the present system to curb costs is due to two factors. First, costs are determined by reference to what is considered by the profession to be reasonably necessary work and by the prevailing

<sup>120</sup> See Section 3 (Disclosure of legal costs charges to client) of this chapter.

standards of hourly fees and overheads. In other words, the judicial pitching of costs follows the forensic practices and expectations and not the other way round. Secondly, taxation is conducted retrospectively so that it reflects the way in which the parties chose to conduct the case. In other words, retrospective taxation does not influence the steps which are pursued in litigation.”<sup>121</sup>

Hence the new regime will continue to exhibit some of the critical shortcomings of its predecessor in (a) not enabling parties to quantify in advance, with some degree of accuracy, the likely cost of the services provided in the dispute and (b) not enabling control, as the litigation progresses, of the extent of any liability for recoverable costs that may be imposed on them.

### 7.3 Promoting greater efficiency in the conduct of litigation

The Haran Report, comparing the market in legal services for civil disputes with other markets for services, pointed to the peculiar difficulty in controlling the levels of costs of legal services in civil litigation which may be visited on the unsuccessful party in litigation:

“Unlike most other markets, the person who procures or purchases the services of a solicitor to conduct litigation on his or her behalf may have an expectation that another party will pick up the bill. This is because those who lose an action generally pay for the other party’s costs — the person who ‘pays the piper’ (the loser) is not in a position to ‘call the tune’. This situation, especially in the context of the ‘no foal, no fee’ system, may result in the litigant not exercising adequate control over the level of their costs.

... Defendant demand for legal services is largely generated by another party (the plaintiff) taking a case against the defendant, and the defendant may face considerable difficulty in controlling costs incurred by the plaintiff. Plaintiff demand may be exaggerated by the operation of the ‘no foal, no fee’ system in encouraging proceedings at no cost to plaintiffs...”<sup>122</sup>

A leading expert on civil litigation costs, Professor John Peysner, has explained the difficulty more pithily:

“It does not require an overly cynical view of lawyers to assume that rational economic actors, paid by the hour, will, if unrestrained, tend to increase the number of hours they devote to a job. If the actors are paid by a stranger (as in successful litigation), rather than by their own client, they have none of the emotional pressure that often comes with a professional relationship with a client (possibly someone who may instruct you again)...”<sup>123</sup>

The new regime retains reliance on time spent in providing legal services as a remunerative factor,<sup>124</sup> without providing a mechanism which would contain the work or time spent by practitioners on a case and incentivise practitioners to tailor the time they spend in servicing litigation to that which would be proportionate.

### 7.4 Potential to reduce costs levels

The Explanatory Memorandum to the Legal Services Regulation Bill stated that the provisions for the Legal Services Regulatory Authority, the Office of the Legal Costs Adjudicator and an independent complaints structure to deal with complaints supported by an independent Legal Practitioners Disciplinary Tribunal were intended to “promote competition and transparency in the organisation and provision of legal services in the State and in relation to legal costs”.

121 Zuckerman, “Devices for Controlling the Cost of Litigation Through Costs Taxation”, paras. 7 and 8 on page 4, in Lord Woolf’s Access to Justice Inquiry: Issues papers (January 1996).

122 Haran report, paras. 5.2 and 5.3, on page 27.

123 Peysner in Hodges, Vogenauer and Tulibacka (editors) “The Costs and Funding of Civil Litigation: A Comparative Perspective”, Chapter 9, at page 317.

124 See Sub-section 5.4.4.1 of the paper above, para (iii).

## 8. Litigation costs regimes and reform in other jurisdictions

### 8.1 General

Reference has already been made in Chapter 2 to proposals for containment or reduction of costs emanating from civil justice reform initiatives in other jurisdictions.<sup>125</sup>

By comparison with other jurisdictions, very considerable attention has been devoted to reviewing and reforming the civil litigation costs regime in the three jurisdictions within the United Kingdom in recent years and a detailed examination of developments in each of those jurisdictions is considered merited. Attention will then be given to notable litigation costs containment and reduction measures in other common law and civil law tradition jurisdictions. The civil law jurisdictions selected – Denmark and Germany – rank respectively as the least expensive and third least expensive jurisdictions in the EU in which to litigate a contract dispute, according to the World Bank Doing Business survey (Chart 1 in Section 1.2 of this chapter).

### 8.2 England and Wales

#### 8.2.1 The Woolf recommendations

In his Interim Report “Access to Justice” of 1995 Lord Woolf had identified “[t]he “problem of costs” as “the most serious problem besetting our litigation system”, and remained of that view at the end of the consultations and deliberations leading to his Final Report. He explained the problem of legal costs in England and Wales as deriving from the fact that (a) litigation was so expensive that the majority of the public cannot afford it without financial assistance; (b) costs incurred in litigation were out of proportion to the issues involved; and (c) costs were uncertain in amount so that parties had difficulty in predicting what their ultimate liability might be if an action was lost.

Assisted by the issues paper prepared by Professor Adrian Zuckerman mentioned above,<sup>126</sup> Lord Woolf considered various options for controlling costs in advance, viz. budget-setting, fixed fees related to value, fixed fees related to procedural activity or a mixture of the two – relying also in his consideration of fixed fees on research on the fixed legal costs system then in operation in Germany,<sup>127</sup> and a survey of German practitioners’ views on its operation.<sup>128</sup>

In the event, Lord Woolf declined to recommend budget-setting or fixed costs models, noting that the issues paper aforementioned “occasioned a general outcry from the legal profession”, prospective budget-setting being seen by it as “unworkable, unfair and likely to be abused by the creation of inflated budgets” while fixed fees, even relating only to party and party costs, were seen as “unrealistic and as interference with parties’ rights to decide how to instruct their own lawyers. There was widespread concern that these suggestions heralded an attempt to control solicitor and own client costs.”<sup>129</sup>

Lord Woolf’s recommendations comprised

(i) proposals for reform of the *conduct of litigation* as follows:

- a requirement that the court, in making an order for costs, should pay greater regard to the manner in which the successful party has conducted the proceedings and the outcome of individual issues
- the court should have power to deal with the question of costs even where all other issues have been resolved without litigation

125 See sub-section (c) under the heading for each jurisdiction concerned.

126 See Section 7.2 of this chapter.

127 Annex 5 to the Interim Report contained a schedule of fixed costs which applied to litigation in Germany in 1994.

128 See Zuckerman, “Lord Woolf’s Access to Justice: Plus ça change . . .” 59 *Modern Law Review* No. 6 (November 1996), at pages 792 to 795.

129 “Access to Justice” Final report, op. cit, Chapter 7, at para. 17.

- where one of the parties is unable to afford a particular procedure, the court, if it decides that that procedure is to be followed, should be entitled to make its order conditional upon the other side meeting the difference in the costs of the weaker party, whatever the outcome
- the court should be able to order payment of interim costs in cases where the opponent has substantially greater resources and where there is a reasonable likelihood that the weaker party will be entitled to costs at the end of the case and

(ii) proposals for limited changes to the *system of assessment of legal costs*, viz.-

- Costs assessment - “fast-track” cases

In “fast track” cases, the costs payable by a client to his/her solicitor should be limited to the level of the fixed costs plus disbursements unless otherwise agreed in writing between the client and the solicitor. The amount of costs recoverable would be fixed a scale/matrix reflecting case value in two bands; up to £5,000 and up to £10,000 with two levels of costs within each value band, one for straightforward cases and the other for cases requiring additional work, and the recoverable amounts increasing as the case progresses through different stages before it is settled or determined. There should be a fixed advocacy fee for each band payable in cases which go to trial whether the advocate is a solicitor or a barrister. A cancellation fee should be payable to the advocate to cover work undertaken on cases which settle shortly before trial. The costs of interlocutory hearings, applications for interim injunctions and hearings for the court to approve a settlement should be additional to the fixed costs.

Woolf recommended that the levels of fixed costs should be reviewed each year, and the general operation of the fixed costs regime should be reviewed every three years by a committee reporting to the Lord Chancellor through the Civil Justice Council

- Costs assessment – “multi-track” cases

For higher value, “multi-track” cases, Lord Woolf recommended that for proceedings which have a limited and fairly constant procedure, the court, with the assistance of user groups and the information available to the Supreme Court Taxing Office, should over time produce figures indicating a standard or guideline cost or a range of costs for a class of proceedings. An obvious candidate for this approach would be cases which do not substantially turn on issues of fact, e.g. those dealt with in the Chancery Division using the originating summons procedure and Judicial Review proceedings. A party to a “normal” application for e.g. judicial review would have to justify seeking to recover from the other side more than the published benchmark cost. The guideline would apply to practitioner and client as well as party and party costs, and where a lawyer proposed to charge a client more than the guideline figure, the Law Society could require a written agreement to be entered into which would set out the client’s acceptance of the increase. The guideline figures would require periodic review to be kept up to date.

Lord Woolf also recommended that the indemnity/“costs follow the event” principle for recovery of legal costs should be retained, but that the test for allowability of costs be changed to what is “reasonable to both parties to the taxation”.

The stated objects of these recommendations were to -

- reduce the scale of costs by controlling what is required of the parties in the conduct of proceedings;
- make the amount of costs more predictable;
- make costs more proportionate to the nature of the dispute;
- make the courts’ powers as to costs a more effective incentive for responsible behaviour and a more compelling deterrent against unreasonable behaviour;
- provide litigants with more information as to costs so that they can exercise greater control of the expenses which are incurred by their lawyers on their behalf.<sup>130</sup>

### 8.2.2 Criticism of the Woolf recommendations on legal costs

A preponderance of authoritative opinion had viewed the Woolf reforms as implemented in the CPR - for all their benefits – as not only having failed to solve the problem of the high cost of litigation but, if anything, as having compounded it– necessitating the conduct of a further extensive review by Lord Justice Jackson.

In a wide-ranging review by various contributors of the operation of the CPR a decade after their introduction, Professor Deirdre Dwyer, editor, commented:

“One of the few points on which all the contributors to this volume would agree...is that the problem of costs has not been brought under control by the CPR...Indeed, the situation may have deteriorated since that which existed “pre-Woolf”.<sup>131</sup>

Professor Hazel Genn commented in 2012:

“While there have undoubtedly been some positive gains from the introduction of the reforms, it seems that the Civil Procedure Rules are as elaborate as ever and the cost of litigation has actually risen...”.<sup>132</sup>

As intimated in Chapter 2 of the Review Group’s report, Lord Justice Jackson in his Preliminary Report noted that, notwithstanding the success generally of the Woolf reforms, the costs of litigating had continued to rise, due in no small part to the legitimating of conditional fee agreements (“CFAs”)<sup>133</sup> and rendering the success fee under a CFA recoverable from the other party. These measures were introduced by the Access to Justice Act 1999 as a counterweight to the removal by that Act of a wide range of civil cases from the scope of civil legal aid.

However, Jackson concluded that aside from CFAs and recoverable success fees:

“...it must be accepted that some of the cost increases since 1999 do appear to be consequential upon the Woolf reforms. Pre-action protocols and the requirements of the CPR have led to “front loading” of costs. Also the detailed requirements of the CPR and the case management orders of courts cause parties to incur costs which would not have been incurred pre-April 1999. Where cases settle between issue and trial (and the vast majority of cases do so settle) the costs of achieving settlement are sometimes higher than before. I say “sometimes” because the Woolf reforms promote earlier settlements and thus in some cases they achieve an overall cost saving. Furthermore, settlements based upon a fuller understanding by parties of their opponents’ cases are more likely to be fair.”<sup>134</sup>

In an early commentary on the Woolf Report recommendations,<sup>135</sup> Zuckerman noted Lord Woolf’s view, expressed in his Interim Report,<sup>136</sup> that the high cost of litigation was due not so much to the complexity of procedure as the “uncontrolled nature of the litigation process”, and that Woolf’s costs reduction strategy sought to place the litigation process under firm controls through two means –

- “rule control” viz. – “economical and tightly drawn procedures which, when applicable, will ensure that the litigation moves forward expeditiously and in a more or less predetermined direction and pace” and
- judicial supervision. viz. – “as soon as the defence has been served, judges will take the management of the litigation in hand. Thereafter, they, and not the parties’ lawyers, will determine the nature of the processes to be followed and their pace.”<sup>137</sup>

131 “Cost is without doubt the Woolf reform’s central failing. Litigation costs are still disproportionate. They are still excessive in a significant number of cases.”: Lord Clarke, “The Woolf Reforms: a Singular Event or an Ongoing Process?”, in Dwyer (Ed.) “The Civil Procedure Rules: Ten Years On” Oxford (2010), Chapter 2 at page 47.

132 Genn, “What Is Civil Justice For? Reform, ADR, and Access to Justice”, Yale Journal of Law & the Humanities Volume 24, Issue 1 (2012), page 397 at page 409.

133 A conditional fee agreement involves the engagement of a solicitor to act for the client in a case on the basis that if the client is unsuccessful the solicitor will not charge the client for the work done, but if the client is successful the solicitor may charge a success fee on top of the normal fee to compensate for the risk that the solicitor might not have been paid.

134 Lord Justice Jackson, “Review of Civil Litigation Costs: Preliminary Report (May 2009), para. 1.2.

135 Zuckerman, “Lord Woolf’s Access to Justice: Plus ça change ...” 59 Mod. L. Rev. 773 (1996) 773.

136 “Access to Justice” Interim Report, op. cit, chapter 3, para. 1.

137 Zuckerman, “Lord Woolf’s Access to Justice: Plus ça change ...” op. cit. at page 775.

However, Zuckerman queried the validity of the two methods as costs-reducing measures. He pointed to three factors which generated upward pressure on costs in England and Wales, viz. -

- the system of remunerating lawyers on an hourly basis, which rewards complexity
- the indemnity rule whereby the winner recovers his costs from the loser, which encourages a competition of investments in litigation and
- the availability of almost unlimited legal aid funds.

While the third of these factors could not be said to apply to this jurisdiction, the first two factors are, it is suggested, quite relevant.

As to the first factor, although (as held in *Sheehan* cited above<sup>138</sup>), time expended on a case is not, at least under the old costs assessment regime, to be given more weight than other criteria, it remains the case that the amount of time invested in litigation by a practitioner on behalf of a client is a key influencer on the amount of legal costs likely to be incurred.

In comments reflective of the conclusions of Haran and Peysner mentioned in section 7 of this chapter, Zuckerman describes the effect of a criterion of remuneration according to time and effort expended:

“...Virtually all economic activity tends to follow the most rewarding path, often without any self-conscious decision on the part of the actors. In our system, whether charging is by the hour, by the day or in proportion to complexity, lawyers have no direct incentive to economise in the provision of services. These two economic factors, the natural desire to maximise reward and the systemic incentive, lead irresistibly to forensic practices designed to increase profits.”<sup>139</sup>

Zuckerman also pointed to other eroding effects of the second factor – the principle that costs generally follow the event – has on containment of costs:

“Given that success brings with it not only the sum claimed but also the expenses laid out, a litigant who believes that an increase in the amount spent on litigation will increase his chances of success has good reason for progressively raising his stakes. Once one party has done so, the opponent would feel compelled to follow suit, for fear that by using inferior procedural devices he could compromise his chances of success and run a greater risk of having to pay the other party’s costs as well as losing the subject-matter in dispute. ...

The freedom a litigant has of running high costs may be used oppressively. A rich litigant may intimidate a poorer opponent simply by running a high-cost litigation strategy. The litigant who cannot afford to raise the necessary funds to match the opponent’s procedural stakes may well feel obliged to settle on unfavourable terms. Further, it may happen that, in order to persuade a defendant to enter into serious negotiations, a plaintiff has to demonstrate, through prosecuting pre-trial proceedings in earnest, a commitment to litigation, without which the defendant will not take the action seriously. It is clear, therefore, that the high cost of litigation could itself generate further upward pressure on costs.”<sup>140</sup>

A research paper prepared by Professors John Peysner and Mary Seneviratne for the UK Department of Constitutional Affairs in 2006 which, aided by consultations with judges, practitioners and courts staff, examined the effectiveness of the Woolf reforms as implemented by the Civil Procedure Rules (“CPR”), concluded:

“The major finding we made, unequivocally confirming the findings at the development stage, and agreed unanimously by all interviewees is that costs are front-loaded. The reasons relate to procedural demands as set out above and, unless procedures in the pre-action protocols were reduced in scope, or

138 See Section 5.2.4.2 of this chapter.

139 Zuckerman, “Lord Woolf’s Access to Justice: Plus ça change ...” op. cit. at page 776.

140 Zuckerman, “Lord Woolf’s Access to Justice: Plus ça change ...” op. cit. at page 778.

costs were fixed and reduced in the pre-litigation and early litigation phases, case management has no impact on this forward loading effect.”<sup>141</sup>

The authors observed that the requirement that parties furnish estimates to the court of costs incurred and to be incurred had not operated effectively to contain costs levels<sup>142</sup> and summed up the shortcomings of the CPR in reducing or containing legal costs thus:

“We found that the effect of the CPR, including the extensive range of pre-action protocols, unsurprisingly front-loaded costs. For the many cases that under the pre-CPR regime would have settled before or just after issue, the impact of the arrangements in the CPR to divert cases from litigation, or to ensure that litigated cases were better prepared and disclosed more information relevant to liability and quantum, not least so that an opponent could make a better informed offer to settle, the inevitable result was that costs per case were higher. There was some feeling that cases that were litigated further down the tracks, possibly to trial, cost more overall. The failure of estimates as a cost control measure was noted but in the absence of prospective cost control (fixed costs, cost capping and/or budgeting) in the run of the mill cases, rather than exceptionally as now, it is hard to see how estimates on their own could ever constitute an effective brake on costs. In effect we draw the same conclusion as RAND,<sup>143</sup> that case management (which in this context includes pre-action protocols, the Fast Track and individual case control) is effective in cutting delay but it is ineffective in cutting costs or, indeed, may increase costs. Lord Woolf’s aspiration that case management would achieve his aims in relation to costs has not been achieved. Rules alone cannot achieve proportionality, economy, certainty and predictability of costs: policy solutions are required...”.

### 8.2.3 The Jackson Review and subsequent developments

Lord Justice Jackson’s Review,<sup>144</sup> having examined in detail the effectiveness of the Woolf reforms, made a series of recommendations relating to the conduct of litigation generally and specific types of litigation as well as to the legal costs regime itself.

#### 8.2.3.1 Proportionate costs

Jackson recommended that the CPR should be amended to clarify that costs are proportionate “if, and only if, the costs incurred bear a reasonable relationship to:

- (a) the sums in issue in the proceedings;
- (b) the value of any non-monetary relief in issue in the proceedings;
- (c) the complexity of the litigation;
- (d) any additional work generated by the conduct of the paying party; and
- (e) any wider factors involved in the proceedings, such as reputation or public importance”.<sup>145</sup>

141 Peysner and Seneviratne: “The management of civil cases: the courts and post-Woolf landscape” DCA Research Series 9/05 November 2005, para. 6.6(a) on page 62.

142 Ibid., page 70.

143 A reference to a RAND Corporation study of case management in the US courts: Kakalik et al., “Speedy, and Inexpensive?: An Evaluation of Judicial Case Management Under the CJRA” (RB-9027, RAND Institute for Civil Justice, 1996), [www.rand.orgs/pubs](http://www.rand.orgs/pubs).

144 Jackson, “Review of Civil Litigation Costs: Final Report”, available at: <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>

145 Jackson, Final Report, op. cit., Chapter 3, para. 5.15. Rule 44.3(2), CPR, now provides:

- “(2) Where the amount of costs is to be assessed on the standard basis, the court will –
- (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
  - (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.”

Rule 44.3(5), CPR, provides:

- “(5) Costs incurred are proportionate if they bear a reasonable relationship to –
- (a) the sums in issue in the proceedings;
  - (b) the value of any non-monetary relief in issue in the proceedings;
  - (c) the complexity of the litigation;
  - (d) any additional work generated by the conduct of the paying party; and
  - (e) any wider factors involved in the proceedings, such as reputation or public importance.”



### 8.2.3.2 Procedural measures to control costs

In his Preliminary and Final Reports Jackson identified significant factors in the growth of litigation costs and suggested reforms of practice and procedure to address them<sup>146</sup> -

- Pre-action protocols:  
Repeal of the general protocol regulating pre-action conduct by the parties – on the basis that “one size does not fit all” – but on the basis that a claimant who begins contentious proceedings without giving appropriate notice to other parties, and appropriate opportunity to respond, remains at risk as to costs. Other pre-action protocols for specific litigation categories should be revised and a new protocol for debt claims introduced<sup>147</sup>
- e-discovery:  
Identifying the sheer volume of potentially disclosable electronic material generated as rendering disclosure even more expensive than hitherto,<sup>148</sup> Jackson recommended that in large commercial cases and any case where the costs of standard disclosure are likely to be disproportionate, parties and the court should be required to consider the most appropriate process for disclosure at the first case management conference<sup>149</sup>
- Witness statements and expert evidence:  
A party seeking permission to adduce expert evidence should be required to furnish an estimate of the costs of that evidence to the court. The Australian procedure known as “concurrent evidence” should be piloted in cases where all parties consent (this procedure, also known as “hot-tubbing”, was adopted in Ireland in 2016<sup>150</sup>)<sup>151</sup>
- Case management  
Jackson made various recommendations to streamline case management, including use of standard case management directions for common case types, issuance of paper directions and early fixing of the entire timetable for the action, including trial date or trial window, in multi-track cases.<sup>152</sup>

### 8.2.3.3 Costs management and budgeting

By contrast with Lord Woolf’s view, Jackson considered that a system of costs management and budgeting should be introduced – by an amendment to the CPR – to be overseen by the court itself as part of its case management directions. He saw costs management as having the following elements<sup>153</sup> -

- the parties prepare and exchange litigation budgets or (as the case proceeds) amended budgets
- The court states the extent to which those budgets are approved
- so far as possible, the court manages the case so that it proceeds within the approved budgets
- at the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget.

Jackson acknowledged a disadvantage of costs management as being that the winning party would not make a full recovery of its costs, but saw the principal advantages as twofold, viz. -

- each party would have certainty about the extent of its costs liability in the event of losing the action and
- the parties and their lawyers would have an incentive to keep costs down at each stage of the action.<sup>154</sup>

146 See Part 8 of the Preliminary Report and Part 6 of the Final Report.

147 Para. 7.1, Chapter 35, Final Report, page 354.

148 Para. 1.1, Chapter 40, Preliminary report, page 373.

149 Para. 4.1, Chapter 37, Final report, page 374.

150 See last bullet point in Section 4.12.2 of Chapter 5 of this report.

151 Para. 4.3, Chapter 38 of Final Report, page 385.

152 Para. 8.1, Chapter 39, Final Report, page 399.

153 Jackson, Final Report, op. cit., Chapter 40, para. 1.4.

154 Jackson, Preliminary Report, op. cit., Chapter 48, para. 3.23.

Jackson recommended that lawyers and judges alike should receive training in costs budgeting and costs management, and rules of court to set out a standard costs management procedure, which judges would have a discretion to adopt if the use of costs management would appear to be beneficial in any particular case.<sup>155</sup>

The CPR were amended on foot of those recommendations to require parties to prepare and exchange costs budgets detailing their likely costs.<sup>156</sup> Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees.<sup>157</sup> The court then, by a costs management order, approves or amends those budgets and will thereafter control the parties' budgets in respect of recoverable costs at Costs and Case Management Conferences.<sup>158</sup>

#### 8.2.3.4 Fixed recoverable costs<sup>159</sup>

For cases in the CPR “fast track” (i.e. those up to a value of £25,000, where the trial can be concluded within one day), Jackson recommended that the costs recoverable in road traffic accident (“RTA”), employer liability accident and public liability accident cases be fixed by reference to a matrix, additional costs being allowed for further stages of the case up to settlement or determination.<sup>160</sup> For other case-types he recommended a dual system (at least in the short term), whereby costs are fixed for certain types of case (e.g. in RTA cases not involving injury)<sup>161</sup> and in other cases (non-personal injuries) a financial limit on costs recoverable would apply.<sup>162</sup>

Jackson stated that “[t]he ideal is for costs to be fixed in the fast track for all types of claim”.<sup>163</sup> He recommended that the fixed costs recoverable for the various types of claim be reviewed regularly “to make sure that they are reasonable and realistic” and that the review be undertaken by an independent Costs Council, which should be chaired by a judge or other senior person with long experience of the operation of the costs rules and costs and include representatives of stakeholder groups, including a consumer representative, an economist and a representative of the Ministry of Justice. “However, its membership should not be dominated by vested interests”.<sup>164</sup>

Notwithstanding implementation of much of the Jackson Review,<sup>165</sup> pressure remained for further measures to address the high level of legal costs in England and Wales. In September 2016 a paper “Transforming Our Justice System” jointly published by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals<sup>166</sup> stated that:

“More needs to be done to control the costs of civil cases so they are proportionate to the case, and legal costs are more certain from the start. Building on earlier reforms, we will look at options to extend fixed recoverable costs much more widely, so the costs of going to court will be clearer and more

155 Jackson, Final Report, op. cit., Chapter 40, para. 7.17.

156 Rule 3.13 CPR.

157 Rule 3.14 CPR.

158 Rule 3.15 CPR.

159 Jackson, Final Report, op. cit., Chapters 15 to 17.

160 The matrices are set out in Appendix 5 of Jackson, Final Report, op. cit..

161 In such cases the fixed costs would be £626 plus 4% of damages where the case was resolved pre-issue of proceedings. Where the case was resolved post-issue of proceedings fixed costs would be £1,583 plus 9% of damages. If the case went to trial, the trial advocacy fee amount specified in the CPR would apply: Final Report op. cit., Chapter 15, para. 6.9.

162 £12,000 for pre-trial costs.

163 Jackson, Final Report, op. cit., Executive Summary, para. 2.9.

164 Jackson, Final Report, op. cit., Chapter 6, para. 2.4.

165 Implementation was effected by provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and amendments to the CPR.

166 Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/553261/joint-vision-statement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf)

appropriate. Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action.”<sup>167</sup>

Lord Justice Jackson was accordingly asked to revisit the extent of the litigation types covered by fixed recoverable costs (“FRC”) and in a 2017 supplemental report of July 2017<sup>168</sup> proposed significantly extending that scope, with recommendations including:<sup>169</sup>

- (i) extension of FRC to all cases in the fast track (i.e. claims of up to £25,000), the figures to be reviewed every three years;
- (ii) a new ‘intermediate’ track with a streamlined procedure to be created for monetary relief claims above the fast track and up to a value of £100,000, which are of modest complexity;
- (iii) extension of FRC in the form of a grid setting out the fixed costs components for those intermediate track cases, the figures to be reviewed every three years;
- (iv) FRC for (a) applications to approve settlements for children and protected parties and (b) costs assessment applications, in respect of intermediate track cases;
- (v) save as set out in (iii), CPR Part 8 claims (broadly, claims which are unlikely to involve a substantial dispute of fact) should be excluded from the proposed FRC regime;
- (vi) The Civil Justice Council should, in conjunction with the Department of Health, set up a working party to develop a bespoke process for clinical negligence claims up to £25,000, together with a grid of FRC for such cases;
- (vi) a pilot of *capped recoverable costs*, in conjunction with streamlined procedures, for business and property cases with a value up to £250,000;
- ...
- (ix) the CPR which limit the amount of costs recoverable in the case of a claim under the Aarhus Convention<sup>170</sup> should be adapted and extended to all judicial review claims;
- (x) costs management to be introduced, at the discretion of the judge, in ‘heavy’ judicial review claims.

Jackson considered that for FRC to work in intermediate cases a streamlined procedure would be needed for such cases, including -

- statements of case no longer than 10 pages
- written witness statements as evidence in chief, with a party’s statements limited to 30 pages
- standard disclosure in PI cases; in non-PI cases each party will disclose the documents upon which it relies, as well as documents that the court specifically orders
- oral evidence limited to one expert witness per party (two, if reasonably required and proportionate), with each expert report limited to 20 pages (excluding photographs etc). Oral evidence would be time-limited and directed to the matters identified at the Case Management Conference (CMC)
- applications to be made at the CMC, as much as possible and
- control by the court of the scope and number of interim applications or “procedural gamesmanship”.

A consultation exercise on extending FRCs in civil cases in England and Wales in light of Lord Justice Jackson’s 2017 report was undertaken by the Ministry of Justice between March and June of 2019,<sup>171</sup> and conclusions from that exercise are awaited.

<sup>167</sup> Ibid., page 11.

<sup>168</sup> Jackson, “Review of Civil Litigation Costs: Supplemental Report – Fixed Recoverable Costs” (July 2017), available at: <https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf>

<sup>169</sup> Enumerated as in the report at para. 2.2, Chapter 11.

<sup>170</sup> UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998.

<sup>171</sup> The Consultation Paper “Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson’s proposals” is available at: [https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/supporting\\_documents/fixedrecoverablecostsconsultationpaper.pdf](https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/supporting_documents/fixedrecoverablecostsconsultationpaper.pdf)

### 8.2.3.5 Costs “capping”

In April 2013, an optional regime was introduced for environmental judicial review applications under the Aarhus Convention by section VII of CPR, Part 45, under which the liability of an applicant opting into the regime was capped at £5,000 (or £10,000 when claiming as or on behalf of a business) and a defendant’s liability was capped at £35,000. Since February 2017, those rules were substantially amended. Claimants must now submit a statement of means, including any financial support provided by others, and the court has power to vary upwards or downwards the figures for capped costs.

Separately, in August 2016 a new regime of costs capping in other judicial review cases was introduced, enabling the court to impose caps on each party’s liability having regard to a wide variety of circumstances, include a claimant’s means and matters such as whether the claimant’s representatives are acting free of charge.

In his July 2017 report mentioned above, Jackson recommended that the Aarhus judicial review costs regime should be extended to any case where the judicial review applicant is an individual on the basis that any applicant should be able to opt in. Applicants opting in should be subject to means testing. The default figures of £5,000/£10,000 for claimants and £35,000 for defendants should remain, but be subject to three yearly review, and any application to vary those figures should be made by the applicant in the claim form and by the defendant in the acknowledgement of service, and be dealt with at the permission stage. Applications to vary should only be entertained later in exceptional circumstances, e.g. a fundamental change in the case or the discovery of dishonesty in the applicant’s disclosure. If the applicant’s costs liability were increased above the default figure, they should be permitted to discontinue within 21 days and in that case only be liable for adverse costs to the extent of the previous figure.

On foot of this recommendation a voluntary capped costs pilot scheme was introduced in January 2019 for two years in certain business and property courts for cases valued up to £250,000.<sup>172</sup>

### 8.2.3.6 Litigation financing

Certain of Jackson’s recommendations turned on litigation financing arrangements particular to England and Wales, and expanding the options for litigants in funding litigation. As mentioned above, Jackson concluded that CFAs – of which “no win, no fee” agreements were the most common type – had been “the major contributor to disproportionate costs in civil litigation in England and Wales”. He identified two “key drivers” of cost deriving from CFAs, viz. the lawyer’s success fee and the after-the-event (“ATE”)<sup>173</sup> insurance premium usually taken out when a CFA is entered into to cover the claimant against the risk of having to pay the defendant’s costs. Both the success fee and the ATE litigation insurance premium were recoverable from an unsuccessful defendant.

Jackson recommended in particular that –

- success fees under CFAs and insurance premia for ATE litigation insurance should no longer be recoverable by successful claimants against unsuccessful defendants<sup>174</sup>
- to off-set any impediment to claimants in accessing justice which this might represent
  - awards of general damages for pain, suffering and loss of amenity should be increased by 10%
  - the maximum amount of damages that lawyers may deduct for success fees should be capped at 25% of damages (excluding any damages referable to future care or future losses)
  - “qualified one-way costs shifting” (i.e. relieving a claimant from liability for a defendant’s costs if unsuccessful while retaining liability of an unsuccessful defendant for the claimant’s costs)

<sup>172</sup> Details of the pilot scheme are available at: <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/cpr-guides-and-forms/capped-costs-pilot-in-the-business-and-property-courts/>

<sup>173</sup> ATE insurance covers the risk that a claimant or defendant is held liable for the legal costs of litigating a claim. ATE insurance can be taken out at any time after a dispute has arisen, including after proceedings have commenced.

<sup>174</sup> Jackson recommended reintroduction in personal injury cases of a limit on success fees – abolished in 1999 – at 25% of damages, to be recoverable against the client only: see Final Report op. cit., Executive Summary, para. 2.4.

should be introduced for certain categories of litigation in which ATE insurance is commonly taken out, and

- contingency fees, enabling practitioners to charge for their work based purely on a share of damages, should be permitted.

On foot of these recommendations, since the 1<sup>st</sup> April 2013 in England and Wales -

- success fees under CFAs and insurance premia for ATE insurance are no longer recoverable from the losing defendant if the claim succeeds.<sup>175</sup> Parties can still enter into CFAs and take out ATE insurance to fund their litigation, but have to bear the additional costs thereby incurred
- contingency fees/damages-based agreements (“DBAs”) – enabling a legal practitioner to act for a client in return for a share of any damages recovered – may be entered into in relation to civil litigation before the courts.<sup>176</sup> Such agreements are currently not permissible in Ireland save in relation to proceedings for debt or recovery of a liquidated amount.<sup>177</sup> Contingency fees/DBAs in England and Wales are subject to a cap – 35% for employment tribunal cases, 25% for personal injury and clinical negligence claims and 50% in other cases. A contingency fee/DBA will not affect the amount of costs recoverable against the unsuccessful party: this remains subject to the “party and party” standard for allowance of costs
- qualified one-way costs shifting was introduced for personal injury claims, entailing that defendants will generally be liable to pay the costs of successful claimants but, with certain exceptions (e.g. where the claim is found on the balance of probabilities to be fundamentally dishonest), will not recover their own costs if they successfully defend the claim.<sup>178</sup>

In September 2015, the Civil Justice Council published a report<sup>179</sup> recommending further changes to make the DBAs regime, including increasing some of the caps on payments for cases – e.g. where a defendant successfully defends a personal injury action, and allowing lawyers and clients to agree the “trigger point” at which a DBA becomes payable, and the circumstances under which it can be terminated.

Lord Dyson, the then Master of the Rolls, welcomed the report’s recommendations, noting that DBAs had been envisaged by Jackson as an important litigation funding option for claimants and defendants but that they had been used infrequently since their introduction. He hoped the amendments recommended would help promote confidence in DBAs and encourage their wider use.<sup>180</sup>

In February 2019 the UK Government published the report of its post-implementation review of the legislation implementing the introduction of DBAs and other Jackson reforms.<sup>181</sup> The broad conclusions were that the reforms had been successful in achieving the principal aim of reducing the costs of civil litigation. The evidence indicated that, in a range of personal injury claims (including clinical negligence claims), costs had reduced significantly (c. 8-10%) and early settlement had also improved. Claims volumes data, the changes in financial incentives to CFAs, the test of fundamental dishonesty for qualified one-way costs shifting and anecdotal stakeholder feedback indicated an overall decline in unmeritorious claims.

175 Sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, amending provisions of the Courts and Legal Services Act 1990.

176 Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (amending section 58AA of the Courts and Legal Services Act 1990) and The Damages-Based Agreements Regulations 2013.

177 Section 149(1)(a), Legal Services Regulation Act 2015, replacing section 68(2) of the Solicitors (Amendment) Act 1994.

178 CPR 44.13 to 44.17.

179 Civil Justice Council: “The Damages-Based Agreements Reform Project: Drafting and Policy Issues”, available at: <https://www.judiciary.uk/wp-content/uploads/2015/09/dba-reform-project-cjc-aug-2015.pdf>

180 Lord Dyson’s statement was formerly available on the website of the Judiciary for England and Wales, but is also cited: in BC Legal “Disease News” 16 October 2015 Edition 115 at page 4 available at: <https://www.bc-legal.co.uk/images/pdf/115%20BC%20Disease%20News%20-%2016.10.2015%20Edition%20115.pdf>

181 UK Ministry of Justice “Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) Civil litigation funding and costs”, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777039/post-implementation-review-of-part-2-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777039/post-implementation-review-of-part-2-of-laspo.pdf)

While it was noted that claimants and their lawyers would benefit from the extension of qualified one-way costs shifting to claims other than for personal injuries, in being able to litigate at no or reduced costs risk, it was recognised that this would shift costs back to defendants, risk an overall increase in costs and create potential for prolonging rather than settling litigation. Government wished to be satisfied that these risks have been addressed before considering the case for extending costs protection further.

## 8.3 Scotland

### 8.3.1 The existing costs regime

Scotland operated a dual system under which legal costs (termed “judicial expenses” in Scotland) may be claimed, as described in the Report of the Taylor Review (referred to later):

“There are two bases which a successful litigant can use to prepare a judicial account of expenses. These are known as i) a detailed account and ii) a block fee account. Both bases use the same quarter hourly rate. The difference is perhaps best illustrated by example. The table of block fees provides for a lump sum as a fee for the work done from the commencement of proceedings to the stage of the open record. Not surprisingly, this is known as the block “Instruction Fee.” Block fees reflect the average value of the work done under each heading. The alternative means of making up a judicial account to reflect this work is to set out all the meetings, letters and phone calls etc. that have occurred in the time from the commencement of proceedings to the stage of the open record. A discrete charge is then made for each item based upon the same quarter hourly rate. The latter means of preparing an account is much more time consuming. Should the paying party consider that the items of work charged in an account are unreasonable, he can request the auditor of court to tax the account and thereby assess whether the charges are reasonable.”<sup>182</sup>

Fee rates were set by the Lord President’s Advisory Committee on Solicitors’ Fees, which was chaired by a Judge of the Court of Session and included as members the Auditor of the Court of Session (the Scots equivalent of the Taxing Master), a representative nominated by the Faculty of Advocates (the equivalent of the Bar Council) and three solicitors from different geographical locations with experience of Court of Session and sheriff court practice, nominated by the Law Society of Scotland.

Where the block fees, based on an estimate of the time reasonably spent on a stage of procedure, would not adequately remunerate the practitioner, the account could be charged on the “detailed account” basis, but it was not, however, possible to elect to charge part of an account on a block fee basis and part on a time and line basis. The court officer responsible for assessing party and party fees (the auditor) was empowered under both bases to “tax off” work if considered unreasonably charged.<sup>183</sup> It was also possible for a party to apply to the court for allowance of (or for referral to the auditor of the question of allowing) an “additional fee” to reflect the complexity of a case having regard to:

- (a) the complexity of the cause and the number, difficulty or novelty of the questions raised;
- (b) the skill, time and labour, and specialised knowledge required, of the solicitor or the exceptional urgency of the steps taken by him;
- (c) the number or importance of any documents prepared or perused;
- (d) the place and circumstances of the cause or in which the work of the solicitor in preparation for, and conduct of, the cause has been carried out;
- (e) the importance of the cause or the subject matter of it to the client;
- (f) the amount or value of money or property involved in the cause;
- (g) the steps taken with a view to settling the cause, limiting the matters in dispute or limiting the scope of any hearing.<sup>184</sup>

<sup>182</sup> Review of Expenses and Funding of Civil Litigation in Scotland”, Chapter 2, para. 28, page 12.

<sup>183</sup> Report of the Scottish Civil Courts Review (Gill), Chapter 14, paras. 27 and 28, page 80.

<sup>184</sup> Ibid.

Scotland has not had a procedure for costs budgeting and management or a procedure for summary assessment of legal costs – whereby the legal costs of a hearing are determined at the conclusion of the hearing by the hearing judge – as operate in England and Wales.

### 8.3.2 The Gill Review

The Civil Justice Review Board chaired by Lord Gill (“Gill”)<sup>185</sup> considered that allocation of cases to the appropriate level of the court hierarchy, case management, the new simplified procedure in the sheriff court, greater use of information technology, the encouragement of ADR where appropriate, and measures to facilitate settlement “should all contribute towards making the cost of litigation more proportionate to the issues or sums of money in dispute”.<sup>186</sup>

Gill reserved judgment on whether any changes should be made to speculative fee (i.e. “no win no fee”) agreements pending the outcome of the Jackson Review in England and Wales. It recommended that a judicial table of fees for counsel should be introduced in the Court of Session and in the sheriff court for those cases in which sanction for the instruction of counsel is given; and the court should have the power to award interest at the judicial rate on outlays from the date on which they are incurred.

### 8.3.3 The Taylor Review

However, Gill recognised the need for a separate review into the costs and funding of civil litigation in Scotland. In October 2013, the resulting review chaired by Sheriff Principal James A. Taylor (“Taylor”) was published.<sup>187</sup> The various recommendations made by Taylor for adjustments to Scots civil justice regime concerning legal costs included the following, perhaps of most relevance -

- the function of reviewing and recommending changes to the level of legal costs recoverable on a party and party basis should be transferred from the Lord President’s Advisory Committee on Solicitors’ Fees to the Scottish Civil Justice Council, which should form a committee for the purpose comprised of users of the system (such as the existing members of the Lord President’s Advisory Committee on Solicitors’ Fees), the funders of the system (i.e. representative of the insurance industry and also a representative of the Scottish Legal Aid Board), a court costs taxing officer, a judge from the sheriff’s court, a law accountant, a lay person such as an economist and a representative of consumer interests
- recoverable expenses in actions under the new simplified procedure (viz. for claims up to £5,000) should, with the exception of personal injury actions, be fixed
- a system of capping of legal costs at maximum amounts for particular procedural steps, e.g. attending a case management conference or preparing witness statements, should be introduced for commercial actions along the lines of that in operation in the Patents County Court (now the Intellectual Property Enterprise Court) in England and Wales<sup>188</sup>
- a procedure for summary assessment of legal costs should be introduced
- pilot schemes for legal costs budgeting and management should be introduced for commercial actions in the Court of Session and at a sheriff court where case management procedures are employed
- qualified one-way costs shifting should be introduced for personal injuries actions
- damages-based costs agreements between solicitor and client should be enforceable in Scotland
- success fees in speculative fee agreements should be capped.

185 Report of the Scottish Civil Justice Review, Volumes 1 and 2, available at:

<https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4> and

<https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4>

186 Gill, Volume 1, chapter 2, para. 73, page 30.

187 “Review of Expenses and Funding of Civil Litigation in Scotland”, available at: <https://www2.gov.scot/resource/0043/00433831.pdf>

188 The fixed costs concerned are set out in Practice Direction 45 of the CPR: <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs#IV>

The Taylor recommendations relating to the role of the Scottish Civil Justice Council in reviewing legal costs levels were adopted in 2013, a Costs and Funding Committee being established by the Council for the purpose. The Costs and Funding Committee’s recommendations inform the preparation by the Civil Justice Council of draft rules, which are considered by the Court of Session, the rule-making authority. The Committee’s remit is to –

- keep the relevant costs rules, tables and fees under review;
- consider proposals for modification and reform; and
- report to the Scottish Civil Justice Council with its recommendations and, where applicable, draft rules.

The Committee’s papers and deliberations are publicly disseminated.<sup>189</sup>

The recommendations on qualified one-way costs shifting and success fees were implemented in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. The tables of recoverable fees were rationalised and comprehensively revised in a statutory instrument in April 2019,<sup>190</sup> fees now being calculated on the basis of a unit-based charge rather than on a block fee basis. Items in the detailed table of charges set out in the instrument are quantified in units, each unit amounting to £16.40 and representing six minutes of a solicitor’s time – equating to a value of £164 per hour as the maximum allowable against the unsuccessful party.

The 2019 Rules empower the court to grant a percentage increase – to be specified by the court or, where directed by the court, by the costs assessment officer – in the legal costs claimed where the court is satisfied that an increase is justified to reflect the responsibility undertaken by the solicitor in the conduct of the proceedings. When considering an application for an uplift, the court should have regard to matters such as the complexity of the proceedings, the importance of the proceedings, the amount or value of money or property involved in the proceedings, and any steps taken to settle the proceedings or limiting the matters in dispute.

## 8.4 Northern Ireland

### 8.4.1 The existing costs regime

Fixed recoverable costs have been prescribed but only for proceedings in the County Court (the jurisdictional equivalent of the Circuit Court). The County Court Rules (NI)<sup>191</sup> contain detailed scales of costs recoverable on a party and party basis both in relation to solicitors’ and counsels’ fees for the various types of contentious proceedings in the County Court. The scales were up-dated in 2014. Solicitors’ and counsels’ fees are calculated by reference to the value of the amount of the claim as adjudicated or, in equity cases, the value of the property the subject-matter of the dispute.

Additional charges, e.g. for attendance at a court hearing, are prescribed. Where a solicitor or counsel has conducted more than one case on the same day at the same venue, the attendance fee may be claimed once only and must be divided proportionately over the number of cases conducted by the solicitor or counsel.

Where a trial runs beyond a day, an attending solicitor is entitled to an additional sum equivalent to 50% of the solicitor’s scale fee on the amount claimed/decreed not exceeding £600 and counsel is entitled to an additional sum of 50% of counsel’s scale fee on the amount claimed/decreed.

189 See: <http://www.scottishciviljusticecouncil.gov.uk/committees/costs-and-funding-committee>

190 Act of Sederunt (Taxation of Judicial Expenses Rules) 2019, available at: <http://www.legislation.gov.uk/ssi/2019/75/made>

191 Order 55 and Appendix 2 of the County Court Rules (Northern Ireland) 1981 (SR 1981/225) as amended, available at: [https://www.justice-ni.gov.uk/sites/default/files/publications/justice/County\\_Court\\_Rules.pdf](https://www.justice-ni.gov.uk/sites/default/files/publications/justice/County_Court_Rules.pdf)



For various categories of proceeding, where the judge is satisfied that the issues in a case were of particular complexity, he/she may order that the costs be enhanced by an additional one-third of the scale fee and may certify an additional sum for drafting of certain documentation.

Insofar as High Court proceedings are concerned, no statutory fixed fees regime applies and costs recoverable by one party against another are assessed on the “standard basis”, viz. there shall be allowed “a reasonable amount in respect of all costs reasonably incurred and any doubts which the Taxing Master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party”.<sup>192</sup>

However, in practice non-statutory scales, relating remuneration generally to case value, are employed separately for solicitors’ and counsels’ fees. Two informal scales operate for solicitors’ fees in standard personal injuries actions, the Belfast Solicitors Association (BSA) scale and the “insurers’ scale” which have gained acceptance as benchmarks in the agreement of solicitors’ costs in such cases and solicitors will usually mark a fee “somewhere in the range that is footed by the ‘Insurers’ Scale’ and headed by the ‘Belfast Solicitors Association (BSA) Scale’”<sup>193</sup> Counsels’ fees in personal injuries actions are governed by the “Comerton scale”, published by the Bar Council after discussions with the Law Society, and which has received judicial approval.<sup>194</sup>

Northern Ireland has not operated procedures for legal costs budgeting and management nor has it provided for summary assessment of costs.

#### 8.4.2 The Gillen Review

The Final Report on Civil Justice of the Review of Civil and Family Justice in Northern Ireland (“Gillen”)<sup>195</sup> reviewed the arguments for and against the prescribing of fixed recoverable legal costs and took a more expansive approach to their introduction than had Woolf and Jackson, recommending introduction of a scale of fixed fees in the High Court with four levels depending on complexity of claim, and scope for exceptionality. Gillen proposed that in the event that scales and bands were not implemented, courts should be required to consider the parties’ costs estimates as part of case management.<sup>196</sup>

Gillen also recommended that -

- costs for interlocutory proceedings be immediately awarded, measured and payable. This approximates to the provision in the rules of court in this jurisdiction requiring that the court, on determining any pre-trial application, shall make an award of costs unless it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application<sup>197</sup>
- costs budgeting and management be available in exceptional circumstances e.g. in small cases where, at the case-management stage, it is obvious costs are getting out of proportion or in some litigant in person cases where it “could be a useful tool to bring some reality into the thinking”<sup>198</sup>
- third-party funding be available as a potential alternative to legal aid and a facilitator of access to justice for members of the public
- a group led by a High Court judge explore the possibilities for conditional fees, qualified one-way cost shifting and ATE insurance and

<sup>192</sup> Order 62 rule 12(1), The Rules of the Court of Judicature (NI) 1980 (formerly titled: Rules of the Supreme Court (NI) 1980) SR 1980/346.

<sup>193</sup> Review of Civil and Family Justice (Preliminary Report on Civil Justice) (October 2016), Chapter 6, para. 6.25 on page 71.

<sup>194</sup> *Boyd v Ellison & Anor*, 29 June 1995, Carswell LJ (unreported).

<sup>195</sup> Final Report on Civil Justice of the Review of Civil and Family Justice in Northern Ireland (September 2017), available at: <https://judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Civil%20Justice%20Report%20September%202017.pdf> Chapter 6 of the Review Group’s Final Report addresses legal costs.

<sup>196</sup> *Ibid.*, Chapter 6, recommendations, at page 82.

<sup>197</sup> Order 99, rule 2(3) RSC.

<sup>198</sup> *Ibid.*, Chapter 6, para. 6.18 at page 67.

- a rule of court be introduced to reflect the relevant rule in the CPR,<sup>199</sup> allowing for the “costs follow the event” principle to be balanced against the conduct of all the parties; the extent to which a party may have succeeded on part of its case, even if they were not wholly successful; and any admissible offer to settle.

## 8.5 Australia

### 8.5.1 General

Scales or tables of cost amounts recoverable by a successful party against another party are employed in the Federal Court and in all State Supreme Courts except New South Wales.<sup>200</sup> However, in New South Wales the court may, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.<sup>201</sup>

Costs budgeting is not generally employed in Australia, though in the Federal Court parties are required to exchange their best preliminary estimate of the cost associated with discovery<sup>202</sup> and in the Family Court of Australia lawyers are required to serve notice of costs incurred and estimated future costs on their clients before each court event, and to submit that information to the court and the other party at each court event.<sup>203</sup>

Both the Commonwealth Access to Justice Report of 2009<sup>204</sup> and the Australian Government’s Productivity Commission in its wide-ranging inquiry into Australia’s civil justice system, “Access to Justice Arrangements” of 2014,<sup>205</sup> have recommended steps to introduce costs budgeting.

Two different approaches at State level to prescribing of levels of party and party costs recoverable are described below.

### 8.5.2 Western Australia

In Western Australia a Legal Costs Committee is charged by statute<sup>206</sup> with the making of “costs determinations” prescribing the maximum levels of costs allowable for legal costs chargeable on a solicitor and client basis (including for non-contentious business) and for legal costs recoverable in court proceedings

199 Rule 44.2 CPR

200 Cameron in Hodges, Vogenauer and Tulibacka, *op. cit.*, page 203.

201 New South Wales Uniform Civil Procedure Rules, Part 42 Division 1 Rule 42.4.

202 Federal Court of Australia, Practice Note 17: Pre-Discovery Conference Checklist, cited in the Australian Law Reform Commission report “Managing Discovery: Discovery of Documents in Federal Courts” (ALRC Report 115) at para. 6.207, available at: <https://www.alrc.gov.au/publication/managing-discovery-discovery-of-documents-in-federal-courts-alrc-report-115/6-limited-discovery-and-discovery-plans/federal-court-of-australia-3/>

203 Rule 19.04 of the Family Law Rules 2004 requires the lawyer for a party immediately before each court event, to give the party a written notice of: (a) the party’s actual costs, both paid and owing, up to and including the court event; (b) the estimated future costs of the party up to and including each future court event; and (c) any expenses paid or payable to an expert witness or, if those expenses are not known, an estimate of the expenses. At each court event: (a) a party’s lawyer must give to the court and each other party a copy of the notice given to the party under sub-rule (2); and (b) an unrepresented party must give to the court and each other party a written statement of: (i) the actual costs incurred by the party up to and including the event; and (ii) the estimated future costs of the party up to and including each future court event.

204 A Strategic Framework for Access to Justice in the Federal Civil Justice System September 2009, recommendation 9.3, at page 126:

<https://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf>

205 “Access to Justice Arrangements”, Productivity Commission Inquiry Report Volume 1, Recommendation 13.3 on page 55: <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>

206 Section 310, Legal Profession Act 2008 (WA).

for the various court jurisdictions.<sup>207</sup> Fee levels prescribed for solicitor and client business do not apply where the client has entered into a costs agreement with the solicitor.<sup>208</sup>

The Committee is appointed by the State Governor and consisting of

- a judge of the Supreme Court or the District Court as chairperson or a legal practitioner of no less than 8 years' standing;
- two local legal practitioners in private practice nominated by the Attorney General from a list submitted by the Law Society and
- three persons who are not Australian lawyers, at least one of whom must be an accountant.

The Legal Costs Committee must review each costs determination in force at least once every two years and the Attorney General may at any time request it to review a costs determination in force.<sup>209</sup> The making or review of a costs determination must be publicly notified and the Committee is required to take into account submissions received.

The costs determinations concerning contentious business are quite comprehensive. They specify the maximum hourly and daily rates allowable for different grades of solicitor, junior and senior counsel as well as clerks/paralegals and then prescribe the hours and grading of lawyer which will be allowable for particular steps in the proceedings.<sup>210</sup>

Costs determinations are not absolutely mandatory, in that a court or judicial officer may, if of opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter, make an allowance beyond the maxima set in the determination.<sup>211</sup>

### 8.5.3 Queensland

The Uniform Civil Procedure Rules (UCPR) prescribe in separate scales the costs allowable on a “standard” (i.e. party and party) basis in the Supreme Court, District Court and Magistrates Courts. In similar manner to that provided for in Appendix W of the Rules of the Superior Courts in this jurisdiction, the scales in the UCPR list items for specific steps/activity in the case. The scales for the lower courts include fixed fees for taking instructions in the proceedings and in the case of the Magistrates Court scale solicitors' and counsels' fees fall into seven bands related to the claim value. The Supreme Court scale provides a fee item for “general care and conduct” of the case – effectively performing the function which a global instructions fee does in Ireland – which is discretionary, to be quantified by reference to a number of criteria.<sup>212</sup>

207 The costs determinations function as the scales of costs for the purpose of the separate jurisdictional rules of court. See, e.g. Rules of the Supreme Court 1971 Costs Order 66 General Division 1 r. 11.

208 Section 271, Legal Profession Act 2008 (WA).

209 Section 276, Legal Profession Act 2008 (WA).

210 Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2020, available at: [http://www.legalcosts.wa.gov.au/docs/2020/Supreme%20&%20District%20Courts%20\(Contentious%20Business\)%202020.pdf](http://www.legalcosts.wa.gov.au/docs/2020/Supreme%20&%20District%20Courts%20(Contentious%20Business)%202020.pdf)

211 Section 280(2), Legal Profession Act 2008 (WA).

212 Viz.: (a) the complexity of the matter; (b) the difficulty and novelty of any question raised in the matter; (c) the importance of the matter to the party; (d) the amount involved; (e) the skill, labour, specialised knowledge and responsibility involved in the matter on the part of the solicitor; (f) the number and importance of the documents prepared or perused (without regard to length); (g) the time spent by the solicitor; and (h) research and consideration of questions of law and fact.

## 8.6 Canada

### 8.6.1 General

Scales or “tariffs” limiting the amount of legal costs recoverable by one party against another are employed in eight of the nine provinces in Canada which observe the common law tradition,<sup>213</sup> with some variants of approach between them. As will be seen, Ontario has since 2005 replaced a tariff with guidelines. Generally, the tariffs prescribed are not absolutely mandatory, some scope being reserved for the judge when awarding costs, and for the legal costs assessor when assessing them, to depart from the tariff.

Costs budgeting and management regimes such as that in England and Wales are not operated in Canada.<sup>214</sup>

To illustrate the varying approaches taken, two examples of tariff systems operated by Provinces, and the guidelines in operation in Ontario, are described below.

### 8.6.2 Alberta

Schedule C (Tariff of Recoverable Fees) of the Alberta Rules of Court contains a table of tariffs specifying the lawyer’s fees that may be recovered as costs by one party from another under each of five columns, viz.

Column 1	Column 2	Column 3	Column 4	Column 5
Up to and including \$50,000	Over \$50,000 up to and including \$150,000	Over \$150,000 up to and including \$500,000	Over \$500,000 up to and including \$1.5 million	Over \$1.5 million

213 The provinces concerned and corresponding legislation are:

Alberta	Alberta Rules of Court, Part 10, Division 2 and Schedule C <a href="http://www.qp.alberta.ca/documents/rules2010/Rules_vol_1.pdf">http://www.qp.alberta.ca/documents/rules2010/Rules_vol_1.pdf</a>
British Columbia	Supreme Court Civil Rules and Appendix B to those rules: <a href="http://www.bclaws.ca/civix/document/id/complete/statreg/168_2009_00">http://www.bclaws.ca/civix/document/id/complete/statreg/168_2009_00</a>
Manitoba	Court of Queen’s Bench Rules: <a href="https://web2.gov.mb.ca/laws/rules/qbr2e.php#ta">https://web2.gov.mb.ca/laws/rules/qbr2e.php#ta</a>
Nova Scotia	Rule 77, Civil Procedure Rules of Nova Scotia, Tariffs of Costs and Fees Determined by the Costs and Fees Committee to be used in determining Party and Party Costs: <a href="http://www.courts.ns.ca/Civil_Procedure_Rules/CPRs_in_html/Rule_77_Tariffs.htm">http://www.courts.ns.ca/Civil_Procedure_Rules/CPRs_in_html/Rule_77_Tariffs.htm</a> .
Newfoundland and Labrador	Rule 55, Rules of the Supreme Court Scale of Costs in the Appendix to that rule: <a href="https://www.assembly.nl.ca/legislation/sr/regulations/RulesSC/rc86ru55.htm">https://www.assembly.nl.ca/legislation/sr/regulations/RulesSC/rc86ru55.htm</a>
New Brunswick	Rule 59, Rules of Court: <a href="http://laws.gnb.ca/en/ShowPdf/cr/Rule-59.pdf">http://laws.gnb.ca/en/ShowPdf/cr/Rule-59.pdf</a>
Prince Edward Island	Rules 58, Supreme Court of Prince Edward Island Rules of Civil Procedure, available at: <a href="https://www.courts.pe.ca/sites/www.courts.pe.ca/files/Forms%20and%20Rules/A-58.pdf">https://www.courts.pe.ca/sites/www.courts.pe.ca/files/Forms%20and%20Rules/A-58.pdf</a>
Saskatchewan	Queen’s Bench Rules and Tariff of Costs: <a href="https://sasklawcourts.ca/index.php/home/court-of-queen-s-bench/rules-and-practice-directives">https://sasklawcourts.ca/index.php/home/court-of-queen-s-bench/rules-and-practice-directives</a>

214 International Comparative Legal Guides: Litigation and Dispute Resolution (Canada), Section 1.5:  
<https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/canada>

Tariffs are set under each column – increasing in value with the range of claim value for each of various steps within the proceedings.<sup>215</sup>

For claims which are not quantifiable in monetary terms, the costs recoverable, unless the court otherwise orders, are calculable under Column 1. Disbursements (e.g. for photocopying, expert reports, etc.) are allowable in addition to the fees set out in Schedule C.

Schedule C is not absolutely mandatory. In awarding costs, the court may order any one or more of the following:

- (a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;
- (b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;
- (c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;
- (d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.<sup>216</sup>

In assessing legal costs, the costs assessment officer -

- may not allow lawyer's fees at more than the amounts specified in Schedule C unless the rules of court including the Schedule, explicitly permit or a written agreement expressly provides for a different basis for recovery
- may not reduce an amount provided for in Schedule unless the Schedule C so permits, or except in exceptional circumstances, and
- may, in exceptional circumstances, reduce an amount, or allow a fraction of an amount, if the services were incomplete or limited.<sup>217</sup>

If the assessment officer disallows or reduces a fee specified in Schedule C, he/she must give reasons for doing so.<sup>218</sup>

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215 The steps are:

- (a) Commencement documents and pleadings related documents
- (b) Uncontested trial appearance
- (c) Disclosure
- (d) Expedition or better definition of the case through notices to admit facts, opinion
- (e) Oral questioning
- (f) Uncontested Applications
- (g) Contested Applications
- (h) Applications requiring written briefs
- (i) Trial readiness/case management
- (j) Trial and summary trial
- (k) Preparation for trial and summary trial
- (l) Trial and summary trial (broken down into tariffs for the first ½ day or portion of it, each additional ½ day, with a tariff for second counsel where allowed by trial judge)
- (m) Submission of written argument at request of/where allowed by trial judge
- (n) Post-judgment (encompassing the various steps/options for enforcement of the judgment)
- (o) Appeals (encompassing steps to file Notice of Appeal, Preparation for appeal, appearance at appeal hearing, the latter broken down into tariffs for the first ½ day or portion of it, each additional ½ day, with a tariff for second counsel where allowed by trial judge)
- (p) Appearance on contested application before Appeal Court.

216 Rule 10.31(3), Alberta Rules of Court.

217 Rule 10.41(3), Alberta Rules of Court.

218 Rule 10.41(4), Alberta Rules of Court.

### 8.6.3 Manitoba

The Court of Queen’s Bench Rules<sup>219</sup> contain a detailed set of tariffs for party and party costs (Tariff A) and disbursements (Tariff B) for four classes of cases types, with charges being prescribed for individual steps in the proceedings.<sup>220</sup>

Again, the tariffs are not absolutely binding on the court which, in awarding costs, may fix all or part of the costs, with or without reference to Tariff A or B, instead of referring them for assessment. Furthermore, in exercising its discretion to fix costs the court will not consider any tariff as establishing a minimum level for costs.<sup>221</sup>

Where costs are to be assessed, the assessment officer shall assess and allow (a) lawyers’ fees and disbursements in accordance with Tariff A or B and (b) disbursements for fees paid to the court, a court reporter, an official examiner or a sheriff under the regulations under The Law Fees and Probate Charge Act. No other fees, disbursements or charges shall be assessed or allowed unless the court orders otherwise.<sup>222</sup>

### 8.6.4 Ontario

Prior to 2002, the rules of court in the Superior Court of Justice and the Court of Appeal for Ontario contained a table of allowable charges for steps in the proceedings. This was replaced between 2002 and 2005 by a “costs grid” or matrix which set out two scales of maximum fee amounts allowable for “partial indemnity costs” (i.e. party and party costs) and “substantial indemnity costs” (i.e. solicitor and client costs) respectively.<sup>223</sup> The amounts were fixed for each step in the action and were set by reference to the number of hours expended and hourly billing rates for lawyers performing the legal services with various years of experience. The costs grid was revoked in 2005, partly due to concerns of the judiciary that it was leading to extensive hearings relating to costs issues and that the grids were having an inflationary effect on costs awards.<sup>224</sup> It should be noted that judges in Ontario, by contrast with the position in Ireland, as a matter of practice assess legal costs themselves as distinct from referring them to an assessment officer.

219 Available at: <https://web2.gov.mb.ca/laws/rules/qbr2e.php#ta>

220 The steps are:

- (a) Pleadings
- (b) Amendment of Pleadings
- (c) Default Judgment
- (d) Discovery of Documents
- (e) Examination for Discovery and Interrogatories
- (f) Examination Before Trial, Cross-examination on an Affidavit and Examination of a Witness Before a Hearing
- (g) Taking Evidence on Commission
- (h) Preparing Applications and Motions
- (i) Adjournments
- (j) Attendance on Uncontested Hearing of an Application, Motion, Motion to Vary or Application to Vary Corollary Relief
- (k) Attendance on Contested Hearing of an Application, Motion, Motion to Vary or Application to Vary Corollary Relief
- (l) Uncontested Hearing of an Action to Obtain a Final Order in a Family Proceeding
- (m) Preparation for Trial of an Action, Application, Motion to Vary or Application to Vary Corollary Relief
- (n) Preparing or Answering a Request to Admit or Offer to Settle
- (o) Lawyer’s Fee on a Pre-trial Conference or Case Management Conference, Other than in a Family Proceeding
- (q) Lawyer’s Fee on a Case Conference or Pre-trial Conference in a Family Proceeding
- (r) Lawyer’s Fee at the Trial of an Action
- (s) Assessment of Costs (uncontested)
- (t) Assessment of Costs (contested)
- (u) Services Provided after Order Pronounced, Excluding Enforcement, Execution and Examination in Aid of Execution
- (v) All Services Provided after Order Pronounced, in Relation to Enforcement and Execution, Except Where Otherwise Provided in this Tariff
- (w) Examination in Aid of Execution.

221 Rule 57.01(3), Court of Queen’s Bench Rules.

222 Rule 58.05(1), Court of Queen’s Bench Rules.

223 Perell, Ontario’s Costs Grid - Questions and Answers, 25 ADVOC. Q. 511, 520 (2002).

224 Manitoba Law Reform Commission Report: “Costs Awards in Civil Litigation”, Chapter 4, page 13.

The rules of court now in effect provide that costs awarded on a “substantial indemnity”/solicitor and client basis shall be 1.5 times that awarded on a “partial indemnity”/party and party basis, i.e. the party and party rate is two-thirds of the solicitor and client rate.<sup>225</sup> In place of the costs grid, non-mandatory guidelines were issued by the Civil Rules Committee’s Costs Subcommittee<sup>226</sup> in 2005 setting out maximum advised party and party level hourly rates for legal representatives of various levels of experience as follows:

Law Clerks	Maximum of \$80.00 per hour
Student-at-law	Maximum of \$60.00 per hour
Lawyer (less than 10 years)	Maximum of \$225.00 per hour
Lawyer (10 or more but less than 20 years)	Maximum of \$300.00 per hour
Lawyer (20 years and over)	Maximum of \$350.00 per hour.

Applying the rules-based multiplier aforementioned, solicitor and client rates would be 1.5 times those rates.

The guidelines have advisory status only. While they have been criticised as being out of date, courts continue ad hoc to refer to and apply them and some courts apply the maximum rates but adjust them for inflation, based on the Bank of Canada’s Inflation Calculator.<sup>227</sup>

## 8.7 Hong Kong

Hong Kong does not operate a fixed recoverable fees regime. Scales of costs items allowable on taxation are appended to the rules of court,<sup>228</sup> but fixed charges are confined to minor items such as preparation of document bundles and copying, professional fees for solicitors and counsel being at the discretion of the taxing officer.

The Chief Justice’s Working Party on Civil Justice Reform (the Working Party) was established in February 2000 and completed its Final Report in March 2004.<sup>229</sup> It did not, therefore, have available to it the re-assessment of the Woolf reforms undertaken by Lord Justice Jackson and subsequent refinements of the litigation costs regime in England and Wales.

On the issue of costs containment, the Working Party declined to follow the recommendation in Woolf that benchmark or guideline costs for proceedings “which have a limited and fairly constant procedure” be adopted, citing the difficulties arriving at fair and reasonable benchmarks and the possibility that they might encourage lawyers to regard stated levels of costs as a minimum. However, where the compilation and use of costs “indications” may be feasible, e.g. in the context of a specialist list in relation to well-understood and frequently recurring events in the operation of that list, it agreed that use of such indications should be attempted.

## 8.8. Denmark

As indicated in Chart 1 in Section 1.2 of this chapter, Denmark ranks as the least expensive jurisdiction in the EU for litigating of a contract dispute.

225 Rule 1.03(1), Ontario Rules of Civil Procedure R.R.O. 1990, Regulation 194.

226 Carthy, Millar & Cowan, Ontario Annual Practice, 2017-2018 (Thomson Reuters Canada Limited, 2016) at 1417.

227 Whaley: “Costs in Estate Litigation”, Osgoode Professional Development (May 2019).

228 The First Schedule and the Second Schedule to Order 62 of the Rules of the High Court (Cap. 4 sub. leg. A) and (b) Schedule 1 and Schedule 2 to Order 62 of the Rules of the District Court (Cap. 336 sub. leg. H).

229 Available at: [https://www.civiljustice.hk/fr/paperhtml/toc\\_fr.html](https://www.civiljustice.hk/fr/paperhtml/toc_fr.html) The principal recommendations on legal costs are contained in Section 17: Interlocutory applications and summary assessment of costs; Section 18: Wasted costs; Section 24: General approach to inter-party costs; Section 25: Costs transparency; Section 26: Challenging one’s own lawyer’s bill; and Section 27: Taxing the other side’s costs.

Lawyers and clients may agree the terms of remuneration with each other, but a lawyer is prohibited from claiming higher remuneration for his/her work than is reasonable.<sup>230</sup> Fees may not be agreed in an amount based on a share of the proceeds of an award.<sup>231</sup>

With regard to party and party costs, the losing party must pay the successful party's legal costs, unless the parties have agreed otherwise or the court for special reasons otherwise decides.<sup>232</sup> Legal costs which have been necessary for the proper conduct of the case are recoverable by the successful party.<sup>233</sup> Guidelines issued by the High Court set the legal costs recoverable by reference to the value of the claim as follows:

Value of the case (Danish Kroner*)	Fee (excluding VAT)	Fee (including VAT)
0 – 50.000	10.000 – 18.000	12.500 – 22.500
50.001 – 200.000	11.000 – 37.500	13.750 – 46.875
200.001 – 500.000	22.000 – 55.000	27.500 – 68.750
500.001 – 1.000.000	37.500 – 82.500	46.875 – 103.125
1.000.001 – 2.000.000	55.000 – 115.000	68.750 – 143.750
2.000.001 – 5.000.000	87.500 – 225.000	109.375 – 281.250

\* 1 Danish Krone = .13 Euro as of mid-August 2019

The amount may be set above or below the specified range, if the case has been unusually difficult or unusually simple. Where the case involves a reference to the ECJ, costs will be set at a higher rate. The table excludes cases employing a written rather than oral procedure, or cases where the hearing has lasted more than one day, though the table may serve as guidance also in these cases. The table excludes cases with no economic value.

In the case of small claims, the lawyer's remuneration is governed by standard rates set for the number of hours involved. For cases with a value exceeding 500,000 Danish Kroner, the legal costs are subject to an assessment.<sup>234</sup>

## 8.9 Germany

Germany is the third least expensive jurisdiction in the EU in which to litigate a contract dispute. The underlying principles of the German approach to ascertainment of litigation costs have been described as follows:

“Predictability – High Level of Regulation

A high level of regulation of all types of costs incurred in civil litigation is supposed to deliver a greater predictability of costs of any proceeding. As a rule, parties are fully informed as to the amount of costs to be incurred. This information (which means that the precise amount of the costs can be calculated) is intended to enable them to take a reasoned decision as to the prospects of the case when they consider initiating proceedings.

Court Charges and Statutory Lawyer Fees are calculated on the Amount in Controversy...

230 Section 126(2), Administration of Justice Act.

231 Para. 16(2), Code of Conduct for the Danish Bar and Law Society, available at: [http://www.advokatsamfundet.dk/Service/English/Rules/~media/Engelsk/Code%20of%20Conduct%20-%20Advokatetiskeregler\\_UK.ashx](http://www.advokatsamfundet.dk/Service/English/Rules/~media/Engelsk/Code%20of%20Conduct%20-%20Advokatetiskeregler_UK.ashx)

232 Section 312(1) and (2), Administration of Justice Act.

233 Section 316(2), Administration of Justice Act.

234 Svenningsen, Svensson and Ørgaard in Hodges Vogenauer and Tulibacka, op. cit., Chapter 6, page 282.



Tying court charges and statutory lawyers' fees to the amount of a claim is supposed to set the costs in proportion to the economic value of the claim, rather than the actual costs of the work performed by courts and attorneys. This legal technique is intended to promote both the predictability of costs and the pursuit of small claims.<sup>235</sup>

The Law on the Remuneration of Attorneys (*Rechtsanwaltsvergütungsgesetz* ("RVG")) of 2004<sup>236</sup> comprehensively prescribes the fees payable to a lawyer by the client for contentious and non-contentious business. For contentious business, a table of basic fees fixes a fee (by reference to the value of the claim<sup>237</sup>) as follows:

Value of the claim is less than €500		Total fee: €45
Value of the claim is up to €...	... for each additional amount of €... or part thereof [as shown below]	Total fee shall increase by €...
2,000	500	35
10,000	1,000	51
25,000	3,000	46
50,000	5,000	75
200,000	15,000	85
500,000	30,000	120
more than 500,000	50,000	150

To this basic table, however, multipliers may apply for different actions or factors within proceedings. Two principal fee items will be allowable for civil proceedings generally which proceed to trial, viz. the procedural fee (*Verfahrensgebühr*) and the hearing fee (*Terminsgebühr*). The procedural fee is a multiple of 1.3 times the basic fee appropriate to the value of the claim in the table above. The hearing fee is 1.2 times the basic fee. For proceedings that proceed to trial, the combined proceedings and hearing fees will be 2.5 times the basic fee in the table. If the parties arrive at a settlement after proceedings have issued, the settlement fee is equal to the basic fee in the table. Certain additional fees, including fixed amounts, may be payable depending on the type of proceedings or steps in the proceedings.

These fees are the minimum payable as between the client and his/her lawyer,<sup>238</sup> and higher fees may be agreed contractually. If in all the circumstances the agreed remuneration is assessed, on referral to the court, as inappropriately high, it may be reduced to the amount of the statutorily prescribed remuneration aforementioned.<sup>239</sup> An agreement between lawyer and client remunerating the lawyer on the basis of a share of the proceeds of an award is permissible only in an individual case and only if the client, upon reasonable consideration, would be deterred from taking legal proceedings without such an agreement due to the client's economic situation.<sup>240</sup>

235 Hess and Hübner, in Hodges Vogenauer and Tulibacka, op. cit., Chapter 11, page 351.

236 An English language version of the law is available on the Federal German Ministry of Justice's web site at: [https://www.gesetze-im-internet.de/englisch\\_rvg/englisch\\_rvg.pdf](https://www.gesetze-im-internet.de/englisch_rvg/englisch_rvg.pdf)

237 Section 2(1), ZPO. An English language version of the Code is available on the Federal German Ministry of Justice's web site at: [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html#p0336](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0336)

238 Section 49b of the Federal Lawyers Regulation (*Bundesrechtsanwaltsordnung* or "BRAO").

239 Section 3a(2), RVG.

240 Section 4a, RVG.

Zuckerman has summarised the German costs regime thus:

“The German system proves the effectiveness of the strategy of reversing the economic incentives. In Germany, lawyers are paid a fixed litigation fee, which represents a small and reasonable proportion of the value of the dispute. As a result, they have no reason to complicate litigation unnecessarily. Access to justice in Germany is affordable by large sections of the public because costs are low....”<sup>241</sup>

## 9. Summary and conclusions

### 9.1 Summary

#### 9.1.1

The remit of the Review Group requires it to examine the current administration of civil justice in the State and make recommendations with a view, *inter alia*, to “...[r]educing the cost of litigation including costs to the State...”. This element was included in the Review Group’s remit notwithstanding the anticipated coming into operation of the new legal costs assessment regime under Parts 10 of the Legal Services Regulation Act 2015. The Review Group believes that the entire Report has been written with this in mind.

[section 1.1]

#### 9.1.2

International comparisons and opinion expressed by persons or bodies involved in or concerned with civil litigation on a regular basis in this jurisdiction indicate that Ireland is a very high cost litigation jurisdiction, especially by European standards. The high cost of litigation in this jurisdiction represents a barrier to access to justice, translates into increased costs in the economy, hampers national competitiveness and imposes a burden on the taxpayer where the litigation involves, or is ultimately financed by the State. The high cost of litigation is a matter of far greater concern to litigants in Ireland than in most other European countries with which we have been compared on this criterion.

[section 1.2 and 1.3]

#### 9.1.3

Despite the extensive reforms to civil procedure undertaken in England and Wales in the latter part of the 1990s, litigation costs remained disproportionate to the value of claims and the process of quantifying them continued to lack transparency and predictability. To ensure predictability and proportionality of costs in relation to the dispute, a series of costs reforms in that jurisdiction in this Century has sought to -

- apply fixed recoverable costs to an ever wider catchment of litigation
- introduce capped recoverable costs for higher value cases and
- require costs budgeting and management by the court for cases not covered by fixed or scale costs.

[Section 8.2.2 and 8.2.3]

#### 9.1.4

Reform measures in Scotland – where scale and block fees have already been in operation – have introduced fixed recoverable expenses in actions for claims of lower value and capping of legal costs at maximum amounts for particular procedural steps in commercial actions, as well as pilot schemes for legal costs budgeting and management for commercial actions and case-managed actions.

Other reforms recommended included: qualified one-way costs shifting for personal injuries actions; enforceability of damages-based costs agreements between solicitor and client and capping of success fees in “no win no fee” fee agreements.

Significantly, the function of reviewing and recommending changes to legal costs levels has been transferred in Scotland to a body – the Costs and Funding Committee of the Scottish Civil Justice Council – whose membership extends beyond representatives of the judiciary and legal profession to public and private funders of the civil justice system and consumer/lay interests.

[Section 8.3]

241 Zuckerman, “Lord Woolf’s Access to Justice: Plus Ça change . . .”, *op. cit.*, at pages 795 - 6.

### 9.1.5

In Northern Ireland, fixed recoverable costs have applied to proceedings in the jurisdictional equivalent of the Circuit Court, up-dated in 2014. Solicitors' and counsels' fees are calculated by reference to the value of the amount of the claim as adjudicated or, in equity cases, the value of the property the subject-matter of the dispute. Additional charges, e.g. for attendance at a court hearing, are prescribed. Where a solicitor or counsel has conducted more than one case on the same day at the same venue, the attendance fee may be claimed once only and must be divided proportionately over the number of cases conducted by the solicitor or counsel. For various categories of proceeding, where the judge is satisfied that the issues in a case were of particular complexity, he/she may order an uplift by one-third of the scale fee and certify an additional sum for drafting of certain documentation.

In High Court proceedings, no statutory fixed fees regime applies but in practice non-statutory scales, relating remuneration generally to case value, are employed separately for solicitors' and counsels' fees. Two informal scales operate for solicitors' fees in standard personal injuries actions, the Belfast Solicitors Association (BSA) scale and the "insurers' scale" – with fees being marked usually within the parameters set by those scales – and a scale of counsels' fees in personal injuries (the "Comerton scale"), published by the Bar Council after discussions with the Law Society, has received judicial approval.

The Gillen reform proposals in Northern Ireland recommended introduction of a scale of fixed fees in the High Court with four levels depending on complexity of claim, and scope for exceptionality. In the event that scales and bands were not implemented, courts should be required to consider the parties' costs estimates as part of case management.

Other recommendations included: introduction of discretionary costs budgeting and management in exceptional circumstances; third-party funding of litigation; further investigation of the merits of introducing conditional fees, qualified one-way cost shifting and ATE insurance; and qualification of the "costs follow the event" principle to reflect factors such as the conduct of all the parties; the extent to which a party may have succeeded on part of its case, even if they were not wholly successful; and any admissible offer to settle.

[Section 8.4]

### 9.1.6

In Australia, scales or tables of cost amounts recoverable by a successful party against another party are employed in the Federal Court and in all State Supreme Courts except New South Wales. However, in New South Wales the court may specify the maximum costs that may be recovered by one party from another.

In Western Australia a statutory Legal Costs Committee with judicial, legal professional and lay representation (one being an accountant) prescribes "costs determinations" fixing the maximum levels of costs allowable for legal costs chargeable on a solicitor and client basis and for legal costs recoverable in court proceedings. The costs determinations specify the maximum hourly and daily rates allowable for different grades of solicitor, junior and senior counsel as well as clerks/paralegals and the hours and grading of lawyer allowable for particular steps in the proceedings. Each costs determination is reviewable once every two years or where the Attorney General requests. The making or review of a costs determination is publicised and submissions may be made for consideration on a review. A court or judicial officer may, if of opinion that the amount of costs allowable under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter, make an allowance beyond the maxima set in the determination.

In Queensland, the Uniform Civil Procedure Rules (UCPR) prescribe in separate scales the costs allowable on a party and party basis in the Supreme Court, District Court and Magistrates Courts in a manner similar to that provided for in Appendix W of the Rules of the Superior Courts in this jurisdiction. The scales for the lower courts include fixed fees for taking instructions in the proceedings and in the case of the Magistrates Court scale solicitors' and counsels' fees fall into seven bands related to the claim value.

Costs budgeting is not generally employed in Australia, though estimates of discovery costs are required from parties in the Federal Court and estimates of costs incurred and future costs are required to

be exchanged and submitted to the court in the Family Court of Australia. Reform proposals have recommended introduction of costs budgeting more generally.

[Section 8.5]

### 9.1.7

In Canada, scales or “tariffs” limiting the amount of legal costs recoverable by one party against another are employed in eight of the nine common law tradition provinces in Canada, while Ontario has replaced a tariff with guidelines. Generally, the tariffs prescribed are not absolutely mandatory, some scope being reserved for the judge when awarding costs, and for the legal costs assessor when assessing them, to depart from the tariff.

Alberta specifies in a table of tariffs the amount of costs recoverable on a party and party basis by reference to five ascending ranges of claim value, the lowest being actions for claims up to \$50,000 and highest being for claims above \$1.5 million. For claims which are not quantifiable in monetary terms, the costs recoverable, unless the court otherwise orders, are set within the lowest range. The tariff is not mandatory: the court may make various costs orders including -

- awarding a party all or part of their reasonable and proper costs of the action, or a particular issue, application or proceeding or part of an action, with or without reference to it
- awarding costs as a multiple, proportion or fraction of an amount set out in any column of the tariff
- awarding a party a percentage of assessed costs, or assessed costs up to or from a particular point in an action.

In assessing legal costs, the costs assessment officer -

- may not allow fees at more than the amounts specified in the table unless the rules of court explicitly permit or a written agreement expressly provides
- may not reduce an amount provided for in the table unless it so permits, or exceptional circumstances justify the reduction, and
- may, in exceptional circumstances, reduce an amount, or allow a fraction of an amount, if the services were incomplete or limited.

Any assessment departing from the fee specified must be justified by express reasons.

Manitoba operates sets of tariffs for party and party costs and disbursements respectively, with charges being prescribed for individual steps in the proceedings. The tariffs are not absolutely binding on the court which, in awarding costs, may fix all or part of the costs, with or without reference to a tariff. In exercising its discretion to fix costs the court is precluded from considering any tariff as establishing a minimum level for costs.

In Ontario, judges, unlike in Ireland, regularly conduct assessments of costs themselves as distinct from referring them to an assessment officer. Ontario replaced its set of tariff “grids” of recoverable costs in 2005 with non-statutory guidelines issued by the Civil Rules Committee’s Costs Subcommittee setting out maximum advised party and party hourly rates for legal personnel of various levels of experience – viz. Law Clerks, Students-at-law, Lawyers (less than 10 years), Lawyers (10 or more but less than 20 years) and Lawyers (20 years and over). Solicitor and client rates are advised to be limited to 1.5 times those rates.

The guidelines have advisory status only. While they have been criticised as being out of date, courts continue ad hoc to refer to and apply them and some courts apply the maximum rates but adjust them for inflation, based on the inflation index.

[Section 8.6]

### 9.1.8

Hong Kong does not operate a fixed recoverable fees regime. Scales of costs items allowable on taxation are appended to the rules of court, but fixed charges are confined to minor items such as preparation of document bundles and copying, professional fees for solicitors and counsel being at the discretion of the taxing officer. The Chief Justice’s Working Party on Civil Justice Reform declined to recommend benchmark

or guideline costs for proceedings but proposed that, where the compilation and use of costs “indications” may be feasible, e.g. in the context of a specialist list in relation to well-understood and frequently recurring events in the operation of that list, use of such indications should be attempted.

[Section 8.7]

### 9.1.9

In Denmark – the least expensive jurisdiction in the EU for litigating of a contract dispute – guidelines issued by the High Court specify in a table the legal costs recoverable in five bands related to the value of the dispute – the lowest being 0 to 50,000 Danish Kroner, the highest being 2.000.001 to 5.000.000 Danish Kroner – by reference to the value of the claim. Costs may be set above or below the specified range if the case has been unusually difficult or unusually simple. Where the case involves a reference to the ECJ, costs will be set at a higher rate. The table excludes cases employing a written rather than oral procedure, or cases where the hearing has lasted more than one day, though the table may serve as guidance also in these cases.

[Section 8.8]

### 9.1.10

Germany – the third least expensive jurisdiction in the EU in which to litigate a contract dispute – comprehensively prescribes by statute the fees payable to a lawyer by the client for contentious and non-contentious business. For contentious business, a table of basic fees is set according to eight bands of claim value, the lowest band covering claims up to €500, the highest covering claims in excess of €500,000. Multipliers may apply for different actions or factors within proceedings.

Two principal fee items are allowable for civil proceedings generally which proceed to trial, viz. the procedural fee and the hearing fee. The procedural fee is a multiple of 1.3 times the basic fee appropriate to the value of the claim in the table. The hearing fee is 1.2 times the basic fee. For proceedings that proceed to trial, therefore, the combined proceedings and hearing fees will be 2.5 times the basic fee in the table.

[Section 8.9]

## 9.2 Conclusions

### 9.2.1

Ireland is, in comparative terms, a high cost litigation jurisdiction. The fact that the 2015 Act is at an early stage of implementation does not obviate the need for the Review Group to examine ways of reducing costs, as required by its remit.

### 9.2.2

It would seem clear from the experience in neighbouring jurisdictions that reforms designed to render civil procedure more efficient cannot, of themselves, be relied upon to render litigation costs proportionate to the nature of the claim or dispute, or certain or predictable as to their amount – much less contain or reduce costs levels. For a wide range of litigation, measures specifically directed to enabling litigation costs to be calculated by reference to objective and transparent criteria are needed if costs levels are to be contained and reduced.

### 9.2.3

The general approach most common to jurisdictions with lower litigation costs levels than Ireland’s is the employment of tables of tariffs or authoritative guidelines quantifying the amount of costs recoverable by a party awarded costs by reference to the value of the claim or subject-matter in dispute.

### 9.2.4

Many of such tariff tables or guidelines allow courts or costs assessment officers some flexibility to depart from the amounts specified in particular circumstances and on expressed grounds.

### 9.2.5

Litigation costs reform in England and Wales is now largely focussed on the extension of fixed recoverable costs as the perceived assured means of containing legal costs levels, complemented by costs management and budgeting of prospective costs under court supervision in cases not subject to fixed recoverable costs. Fixed recoverable costs have been favoured in Scotland for low value cases, and have not been adopted in Northern Ireland. However, in those jurisdictions, recoverable costs are in any event largely fixed by detailed statutory tables of charges (Scotland) or by non-statutory scales which have received judicial approval (Northern Ireland).

### 9.2.6

For reasons of objectivity and the public interest, certain jurisdictions – e.g. Scotland and Western Australia – have considered it appropriate to vest the function of prescribing of costs tariffs or scales in independent bodies having representation from experts such as economists or accountants, and from lay or consumer interests. Lord Justice Jackson recommended a similar model for England and Wales.

### 9.2.7

For litigation types not amenable to calculation of costs by reference to the value of a claim, scales of charges for specific procedural steps within the proceedings, capping of costs at maximum amounts for particular steps and costs management by means of budgeting for prospective costs are seen in a number of jurisdictions as operating to contain or reduce costs.

### 9.2.8

In certain jurisdictions, to ensure that they are fairly remunerative and reflect inflationary or deflationary trend, costs tariffs or scales are required to be kept under periodic review by the body charged with prescribing them.

## 10. Recommendations

### 10.1 Options for regulating litigation costs levels

The Review Group has examined various options by means of which the mandate given to it to recommend a reduction in levels of litigation costs might be achieved.

While it considers that the range of procedural reform measures it has recommended will contribute to that aim, some members of the Group are convinced from the experience in other jurisdictions – and in particular the series of procedural and systemic reforms introduced in England and Wales commencing with the Woolf reforms of the 1990s – that procedural reforms and efficiencies in and of themselves will not suffice to import full transparency, predictability and competitiveness in the setting of litigation costs and – more significantly given the Review Group’s remit – reduce levels of litigation costs both for the litigating client and for the party who may be required by a court award or under a settlement to bear liability for the costs incurred by an opposing party.

The same cohort of the Review Group, in light in particular of the experience of reforms in England and Wales, is satisfied that application of general principles or criteria of reasonableness (as employed in the Legal Services Regulation Act 2015) or proportionality (as incorporated in the Civil Procedure Rules for England and Wales in 2013 on foot of the recommendations of Lord Justice Jackson) to the assessment of litigation costs will not, without further measures, suffice to reduce litigation costs levels in Ireland.

Having reviewed the experience in other jurisdictions as outlined earlier in this chapter, and in particular litigation costs regimes in Canada and Australia, a minority of the Review Group (consisting of the representatives of the Departments of An Taoiseach, Public Expenditure and Reform, Justice and Equality, and the Courts Service) considers that a mechanism for prescribing the maximum levels of litigation costs chargeable, in the form of a table of costs should be introduced, as the only practicable means of ensuring reduction of levels of legal costs for private individuals and businesses engaged in litigation, as well as

State bodies, and the future containment of those costs levels, while at the same time recognising the entitlement of legal practitioners to be reasonably remunerated for their work.

By contrast, a majority of the Group (comprising the representatives of the Supreme Court, Court of Appeal, High Court, Circuit Court, District Court, Bar Council and Law Society) does not agree that the Group should make such a recommendation, for a variety of different reasons. Chief among those is the fact that it is too early to assess the efficacy of the new adjudication system provided for by the 2015 Act. Other reasons include concerns about access to justice, an apprehension that the proposals may infringe EU competition law or be contrary to the EU Services Directive,<sup>242</sup> and the fact that the Miller and Haran reports<sup>243</sup> expressly did not make such a recommendation.

The majority favoured the drawing up of guidelines for the assistance of parties and their representatives, by reference to individual items that could be outlined in a table. The obligation to produce such guidelines could be achieved with minimal legislative intervention, with the function assigned either to the Legal Costs Adjudicators or the LSRA (with input from the former). Those guidelines should be non-binding but intended to improve the certainty and transparency of the adjudicative process.

The advantage of such a recommendation is that it would be simple and straightforward to introduce and would not require any additional resources to implement. If the functions are carried out by the Adjudicators or the LSRA, it would not require the establishment of a new body at further cost (staff, members, etc.). The guidelines should be expressed by reference to the criteria established in Schedule 1 of the 2015 Act and the levels at which parties have either resolved or had adjudicated costs disputes. They should take into account prevailing economic conditions and refer to the need to ensure no more than a reasonable level of remuneration on a party and party basis.

The majority cannot in principle see why separate guidelines should not also be formulated in the context of practitioner and client costs, subject to the principles set out in the 2015 Act. In the event that a competition analysis showed that there was some distortion in the market for litigation services, it may be necessary to expand the scope of the guidelines to cover this area also.

Despite the issue having been discussed at three meetings of a subcommittee established for that purpose, and three meetings of the full Review Group, it has not been possible to reach a consensus as to either approach.

In this context, by a majority, the Review Group does not recommend the introduction of mandatory scales; rather, it recommends the introduction of non-binding guidelines as set out above.

The views of the minority on the subject are contained in a Minority Report which appears at the end of this report.

## 10.2 Remaining issues for consideration

The Review Group has considered the following issues or matters remaining for consideration, including those arising from submissions on litigation costs made by respondents to the consultation exercise.

### 10.2.1

The Review Group has considered whether court supervised budgeting during litigation of costs to be incurred – as currently operates in England and Wales – be introduced, whether in addition to or in substitution for other measures to address costs levels. The Review Group notes that costs budgeting has been recommended for introduction to a limited extent in the other neighbouring jurisdictions (in Scotland by the Taylor Review and in Northern Ireland by the Gillen Review) – generally in conjunction with case management and in Australia by the Australian Government’s Productivity Commission. However, the

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242 For example, in their express deprecation of the concept of proportionality.

243 As noted above, both Miller and Haran were expressly tasked with the consideration of this possibility.

Review Group is conscious of the potentially significant burden on a court's time which an active budgeting role would impose. It is of the view that further consideration of the utility of costs budgeting should be deferred in the immediate term.

### 10.2.2

The Review Group notes concerns expressed in the submissions to it regarding the apparent absence of a time-bound requirement in the Legal Services Regulation Act 2015 for the furnishing of and submission for adjudication of bills of party and party costs. It endorses the submission of the Medical Protection Society (MPS) that bills of costs should be provided within three months of the conclusion of the proceedings, with sanctions for non-compliance.

The Review Group recommends that the Legal Services Regulation Act 2015 be amended to require that such bills be delivered to the party liable for the costs within three months of perfection of the court order awarding costs or ruling a settlement in which liability for costs has been agreed. To sanction non-compliance, section 30 of the Courts and Court Officers Act 2002 (as amended by section 41 of the Civil Liability and Courts Act 2004) should be amended to preclude a party awarded costs, or who is to be paid costs under a settlement ruled by the court, from recovering judgment interest on those costs where the bill of costs has not been delivered within that three-month period.

The 2015 Act should also be amended to provide that, where the party due costs, having furnished the bill to the party liable for the costs, fails to apply for their adjudication within such period as may be specified in rules of court, the party liable should be entitled to present the bill for adjudication.

The MPS's submission that, where an interim payment is sanctioned, a time limit should be imposed for setting the bill down for taxation, could, in the Review Group's view, be adequately addressed by an amendment to the relevant practice direction requiring that a party due costs, as a condition of receiving an interim payment on account of costs, undertake to lodge an application for adjudication of the costs within, say, one month of a failure to agree the amount of costs to be paid following delivery of the bill to the party liable. The Review Group does not see merit in the MPS's recommendation that, where the interim payment exceeds the amount allowed on taxation, a court order should provide that the excess be recoverable with interest. The premise of the practice direction concerned is that only payments on account of (and clearly less than) the full amount of costs likely due should be authorised, and the party liable should be able to address that issue at the point when payment on account is being sought.

### 10.2.3

The Review Group does not accept the suggestion of the MPS that the Legal Costs Adjudicators should have a role in determining applications for interim payments in respect of costs: the authorisation of payments on account of costs is a function appropriately reserved to the court concerned. In any event, the Review Group envisages that the necessity for the practice direction on payments on account of costs should be obviated once waiting times for dates for adjudications on costs have been eliminated.

### 10.2.4

The Review Group does not consider that the introduction here as suggested by the State Claims Agency (SCA) in its submission – of a principle of proportionality of costs along the lines of that introduced in England and Wales on foot of the Jackson recommendations – should be necessary in light of the criterion of reasonableness applied by the 2015 Act both to the incurring of costs and the amount of costs charged.

### 10.2.5

The Review Group notes the SCA's submission that the voluntary practice of limiting counsels' fees in personal injuries actions to the fees for one senior and one junior counsel should be formalised in the rules of court. However, the Review Group would point out that the power to impose such a limit falls within the remit of Ministerial regulations under section 5 of the Courts Act 1988, not rules of court, and that this course is already open to the Minister.



### 10.2.6

The Review Group has considered whether or not the restriction (affirmed by the Supreme Court decision in *Persona Digital Telephony Ltd v Minister for Public Enterprise and Others*<sup>244</sup>) which the Irish law of maintenance and champerty imposes on third party litigation funding agreements should be removed, as suggested by four respondents, including the Irish Society of Insolvency Practitioners (ISIP) and a UK litigation and arbitration funding company. The impediment to third party funding of litigation stems from the laws designating as torts and criminal offences *maintenance* the “giving of assistance, by a third party, who has no interest in the litigation, to a party in litigation”<sup>245</sup> – and *champerty* – assistance given to a litigant by a third party on the basis that the latter will receive a share of the proceeds of the award if the litigation succeeds.<sup>246</sup>

Policy arguments both in favour of and against retaining champerty and maintenance were cited by the Law Reform Commission in its 2016 issues paper on contempt of court and other offences and torts involving the administration of justice,<sup>247</sup> which also considered the various options for funding litigation including conditional fee agreements, contingency fee agreements, after the event insurance and third party funding. That project, which formed part of the Commission’s previous (fourth) Programme of Law Reform approved in 2013 remains, it is understood, to be completed. The issues were also ventilated in the *Persona Digital Telephony Ltd.* case, where the Supreme Court held that any change in the law was a matter for the Oireachtas.

Third party funding may in individual cases facilitate access to justice for a poorly-resourced claimant who, in the absence of a comprehensive civil legal aid system, may not otherwise be able to pursue a claim. However, the Review Group is equally conscious of the potentially significant risks arising from any resultant “commoditisation” of litigation, including the incentivising of the making of dubious claims and the imposition of a “litigation culture” on a courts system which is already heavily burdened.

Subject to the exception mentioned below, the Review Group considers that the weighing of the policy considerations should await completion of the more detailed examination of this subject being undertaken by the Law Reform Commission, of which the issues paper aforementioned is the first stage.

The Review Group does see merit, in the more immediate term, in the more limited proposal of the Irish Society of Insolvency Practitioners that third party funding should be available to liquidators, receivers, administrators under the Insurance (No. 2) Act 1983, the Official Assignee or trustees in bankruptcy to fund proceedings intended to increase the pool of assets available to creditors, on condition that the applicant was satisfied that a reasonable case against a prospective defendant existed and would result in increasing the pool of available assets. Such funding arrangements would have an obvious benefit in ensuring that the creditors of a company or individual or members of a company were not left without effective recourse against misfeasance or fraud on the part of the debtor or company concerned.

### 10.2.7

The Review Group does not see a necessity, apropos the submission of Dr Gerry Whyte of Trinity College Dublin School of Law to that effect, to place “no foal no fee” agreements between a practitioner and client as the basis for remuneration of the practitioner in undertaking litigation for the client on a statutory footing, being of the view that their enforceability in Irish law is well entrenched.

### 10.2.8

The Review Group has considered whether - as was submitted by one respondent to its public consultation - contingency fees should be permitted and whether the current prohibition (in section 149(1)(a) of the Legal Services Regulation Act 2015) on linkage of the amount of client costs to the value of damages, or other unliquidated amount, recovered, be repealed. The Review Group would have concerns that the permitting

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244 [2017] IESC 27.

245 *Persona Digital Telephony Ltd v Minister for Public Enterprise, Ireland* [2017] IESC 27 (Denham CJ), at para. 25.

246 *Ibid.*

247 (LRC IP 10 - 2016).

of contingency fees would tend to encourage speculative litigation and contribute to a “claims culture”. It would also be concerned that repeal of the prohibition on a practitioner charging costs as a percentage or proportion of damages or other unliquidated amount recovered would encourage inflated claims for damages.

The Review Group does not recommend any change in the law in these areas.

### 10.2.9

The Review Group considered the submission of FLAC that legislative provision be made to expand the exceptions to the “costs follow the event” rule to include protective costs orders i.e. orders that there be no order for costs, that costs be capped at a certain amount, or that the defendant should pay the costs for litigants taking cases that are in the public interest. FLAC saw this as providing certainty as to costs at the outset of litigation. Separately, Dr Gerry Whyte submitted that the restriction on availability of protective/pre-emptive costs orders (which currently may only be granted, *inter alia*, where the case raises an issue of general public importance and the plaintiff has no private interest in the matter) be extended to cases where the plaintiff might also benefit individually from the outcome of the case.

By contrast, the Department of Business, Enterprise and Innovation, IDA Ireland and Enterprise Ireland recommended that statutory caps be introduced on the amount of costs an individual litigant in a judicial review of a planning matter can be obliged to pay if unsuccessful and on the amount of costs they can recover if successful, as a “deterrent to frivolous or unsound objections.”

The Review Group notes that the existence of the “costs follow the event” rule in subordinate legislation (namely, in the rules of court), prior to the entry into force of the Legal Services Regulation Act 2015 in which that rule has now been restated, did not impede the development at common law of protective costs orders and of the conditions for their availability. The conditions on which the courts have made such orders available appear to the Review Group to strike an appropriate balance between the need to facilitate access to justice in cases engaging the public interest, on the one hand, and the need to avoid incentivising risk-free litigiousness on the other. The Review Group does not recommend that any change be made by legislation to the existing balance of interests in the area of costs-shifting.



# CHAPTER 10

## FACILITATING COURT USERS



## 1. Introduction

One element of the Review Group’s remit enjoins it to “examine the current administration of civil justice in the State with a view to...[i]dentifying steps to achieve more effective outcomes for court users with particular emphasis on vulnerable court users including children and young persons, impecunious litigants who are ineligible for civil legal aid and wards of court”. The Review Group has considered this aspect of its remit by reference to facilitating (a) court users generally and (b) different categories of vulnerable, or potentially vulnerable, court user.

## 2. Court users generally

### 2.1 The court user experience

Individuals may come in contact with the civil justice system in a number of ways, including:

- as a litigant: though reliable data on the subject would not seem to be available, it has been suggested that, on average, an individual is likely to attend court proceedings once in their lifetime<sup>1</sup>
- as a witness to proceedings
- as a juror (in those limited categories of civil case still triable by judge and jury)
- in making an inquiry of a court office at the counter or by phone or electronic communication
- as a member of the public attending to observe a public hearing.

Depending on the purpose of the attendance, that experience may – in particular where there is involvement in litigation – have considerable significance personally for that individual. The quality of that experience in its totality will undoubtedly affect their view of the efficacy of – and may even influence their confidence in – the civil justice system. In the case of litigants, the International Consortium on Court Excellence in its “International Framework for Court Excellence” (“the IFCE”) has noted:

“Research has consistently shown that the perceptions of those using the courts are influenced more by how they are treated and whether the process appears fair, than whether they received a favourable or unfavourable result.”<sup>2</sup>

The court user’s ability to access justice will be conditioned by a range of factors including:

- (a) the quality, clarity and accessibility of the information available related to the court user’s needs;
- (b) accessibility to the court, which is conditioned, in particular, by: the physical proximity to a court user of a court or court office; ease of access for persons with disability; the channels open to a court user for conducting business with a court – personal attendance, post, electronic communication – and the quality of the court’s facilities and services (e.g. adequacy of: courtroom; reception and consultation room facilities; signage);
- (c) the standard of service, efficiency and technical competence of court staff in serving the court user;
- (d) the degree of expedition with which the court user’s business with the court is transacted, or case conducted (including the punctuality and length of hearings, time for delivery of the court’s decision etc.);
- (e) the degree of complexity of the processes relating to the business transacted/case conducted;
- (f) the costs (including court fees) of transacting the business/ conducting the case; and
- (g) the courts administration’s approach to obtaining input from and handling of complaints from court users.

1 European Commission for the Efficiency of Justice (CEPEJ) commentary on “Analysis of Rationalisation of the Court Network” CEPEJ-COOP (2010)2 (October 2010).

2 International Consortium on Court Excellence, “International Framework for Court Excellence” 2nd Edition (March 2013), available at: [http://www.courtexcellence.com/\\_data/assets/pdf\\_file/0013/7312/the-international-framework-2e-2014-v3.pdf](http://www.courtexcellence.com/_data/assets/pdf_file/0013/7312/the-international-framework-2e-2014-v3.pdf)

Items (d), (e) and – insofar as lawyers’ costs are concerned – (f) are addressed in other chapters of this report, and attention is directed here to the remaining four headings and to court fees levels.

## 2.2 Courts Service strategy and modernisation

### 2.2.1 The Organisational and Capability Review

The Courts Service has a key role to play in improving the court user experience. An Organisational and Capability Review of the Courts Service was undertaken by central Government and published in agreement with the Courts Service in April 2019 (“the Capability Review”).<sup>3</sup> It identified four key areas in which it made detailed recommendations for improvement, viz.

- 1) Developing strategic capability
- 2) Engaging in common purpose with justice agencies
- 3) Delivering customer service, and
- 4) Creating an e-court environment.<sup>4</sup>

The Capability Review recommended that the Courts Service “pursue a long term vision for the organisation as a whole”.<sup>5</sup>

### 2.2.2 The Long-term Strategic Vision Statement

On foot of the Capability Review recommendations, the Courts Service in June 2019 approved a 10-year Long-term “Strategic Vision Statement”, entitled “Supporting Access to Justice in a modern, digital Ireland” for the period to 2030, which envisages reforms in the following areas -

- Digital Services, involving “major reforms in the way the courts system uses technology, that will see a significant increase in access to digital services. This will include e-filing and digital case management, which will reduce the need to file and process paper, reduce non-value-added work, drive greater efficiency and support improved access to justice”
- A “User Centric Approach”, entailing “a focus on better understanding the needs of those who interact with the courts system and those who use our services. We will work to simplify court practices and procedures and design our services based on the needs of those who use them.”
- Support for Judiciary, including “modern technology, which will allow judges make optimal use of their knowledge and time in deciding cases”
- Better Ways of Working: ensuring that court staff “have the skills and capabilities to perform at the high level required for the implementation of this vision. As we move away from heavily paper-based operations, staff will have more meaningful and rewarding roles”
- Better Facilities, with a commitment to “continue to modernise court venues and facilities, to ensure those court users who attend in person, will be provided with the level and range of facilities that a modern society should aspire to. We will focus on providing a much higher-level of service in a smaller number of locations.”<sup>6</sup>

The Vision Statement sets out twenty “specific ambitions we want to deliver” under headings corresponding to the Courts Service’s statutory mandate,<sup>7</sup> viz.:

#### **“Manage the Courts**

1. Minimise the number of cases that need be dealt with by the courts system
2. Only require attendance in person at hearings where necessary
3. Hold and manage hearing and case information digitally

3 “Courts Service Organisational and Capability Review”, available at: <https://www.courts.ie/acc/alfresco/909f953b-947f-4694-b99c-c1e422ca7338/Organisational%20Capability%20Review%20Report.pdf/pdf#view=fitH>

4 Ibid., page 16.

5 Ibid., page 47.

6 Courts Service, “Supporting Access to Justice in a modern, digital Ireland” (2019), page 2.

7 As set out in section 5, Courts Service Act 1998.

4. Adopt digital first for the filing of court documents and case progression
5. Be effective and efficient in the delivery of our services
6. Be agile and innovative in driving change across our organisation
7. Provide staff with interesting and rewarding roles
8. Proactively manage performance to ensure a high and consistent service
9. Play a proactive role as a key element of a modern justice system

***Provide support services for the judges***

10. Provide the judiciary with access to the resources and information they need
11. Support the judiciary to focus on those activities which require judicial input
12. Promote the profile and reputation of the Irish courts system

***Provide information on the courts system to the public***

13. Provide information that supports court users to interact with the courts system as easily as possible
14. Provide services which are designed around the needs of users
15. Adopt digital first in the delivery of appropriate services
16. Provide excellent service for those court users who do need to contact us directly
17. Be a trusted source of court system information

***Provide, manage and maintain court buildings***

18. Provide a safe, modern and professional environment across the estate

***Provide facilities for users of the courts***

19. Provide excellent services and facilities for those attending court venues and offices
20. Provide joined-up delivery of services.”<sup>8</sup>

As to the timescale for concrete realisation of these ambitions, the Vision Statement envisages a three-stage “phased road map”, viz. -

- “Transition: Build the foundations for change” – to end 2022
- “Transform: Deliver priority reforms” – to end 2025
- “Optimise – Deliver long-term vision state” – to end 2030.

The Courts Service has produced a Modernisation Programme, described as a “high level approach to realising the long-term strategy”,<sup>9</sup> with implementation of the following four key reform workstreams:

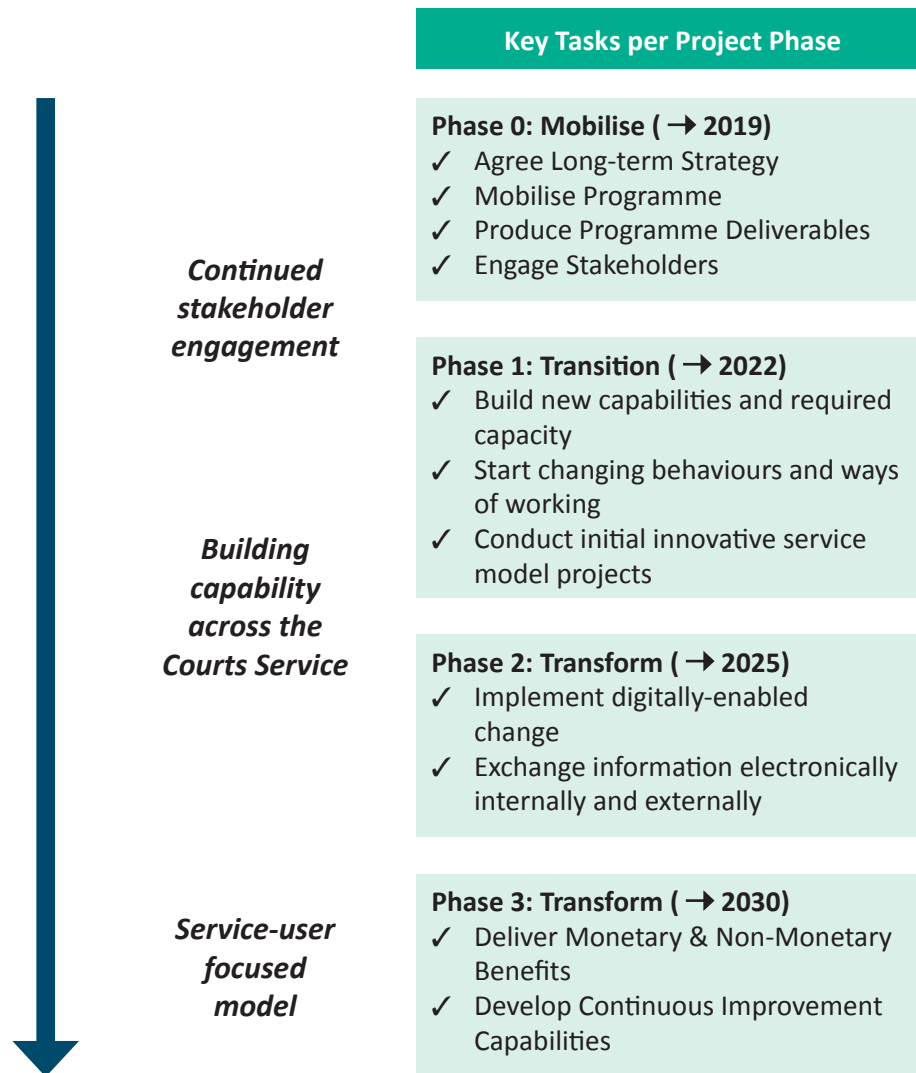
1. Organisation reform – reform of (a) cross-department and shared capabilities and assets and (b) corporate / HQ functions;
2. Criminal reform – reform of the management of criminal business across all jurisdictions;
3. Civil reform – reform of the management of civil business across all jurisdictions and functions; and
4. Family Reform – reform of the management of family business across all jurisdictions and functions.

The Courts Service has already identified and assigned a priority ranking to 23 separate modernisation projects in areas such as litigation support (e.g. civil case management and e-filing, debt claims on-line, e-Probate), courtroom technology (extension of video-link and video-conferencing), enhancement of information and communications tools (e.g.: redevelopment of the Courts Service website; Judges’ Intranet), jurisdictional change (implementation of the Assisted Decision-Making (Capacity) Act 2015) and facilities development (viz. development of the courts complex at Hammond Lane in Dublin), which will

<sup>8</sup> Courts Service, “Supporting Access to Justice”, op. cit., page 13.

<sup>9</sup> Courts Service, “Supporting Access to Justice in a modern, digital Ireland: Modernisation Programme Briefing Paper”.

form part of the Modernisation Programme. Implementation will be in four phases as indicated below, initial delivery of the projects being achieved by the end of 2025:<sup>10</sup>



Management of the Modernisation Programme will include the development of a Target Operating Model, which will provide a detailed view of the future Courts Service operating model including -

- the services to be delivered and channels for their delivery
- the people and skills (numbers and grades of staff) required
- technology and data solutions
- the estate and facilities supporting services and
- operating costs

The Target Operating Model will chart the steps progressing towards the ultimate outcome, indicating what the Courts Service's operating arrangements will look like at the end of each year as it moves towards delivery of its Long-term Strategy.

Implementation of the Modernisation Programme will be overseen by a sub-committee of the Courts Service Board already established for the purpose and chaired by the Chairperson of the Board, the Chief Justice.

<sup>10</sup> Ibid.



## 2.3 Information for court users

While information is available to court users over the counter or by phone at the nationwide network of court offices, the Courts Service has increasingly sought to service court users' needs for information through its website ([www.courts.ie](http://www.courts.ie)) – managed by its Information Office – which contains a range of information for persons attending court in various capacities or transacting business with a court office, including -

- the court calendar (the “Legal Diary”) for each of the Superior Courts and the Circuit Court, and details of court terms and sittings
- a database of written court judgements delivered
- an on-line search facility for High Court cases
- a directory of court offices nationwide
- information of procedures for various litigation categories
- searchable court rules, forms, fees and practice directions
- guides on the procedures for particular categories of litigation (e.g. family proceedings, possession proceedings, licensing) or other business transactable in a court office (e.g. small claims, probate, licensing, deeds poll)
- textual and/or audio-visual guides for particular types of court user, such as self-represented litigants and young witnesses and for schools and colleges.

The Courts Service website received over 3.294 million visits in 2019 (2.5 million visits in 2013) of which visits via mobile/portable devices comprised 38% (compared to 36% in 2018). The most visited sections are the Legal Diary (the courts' calendar of sittings), judgments and determinations, the court rules and the High Court search facility.

The Capability Review identified scope to improve the extent and quality of legal information provided on the website, particularly in a user-friendly format, especially given the on-going growth in the number of litigants in person and vulnerable court users. A project to redevelop the website commenced in October 2018, with the aim of redesigning it “to deliver a more customer centred approach to content”.<sup>11</sup> New features include an informally consolidated version of the Rules of the Superior Courts with annotations showing the amendment history of the rules and hyperlinks from those rules to the relevant court forms.

The Courts Service has also established a social media presence, disseminating news of initiatives, events and court sittings through its Facebook page and Twitter account – the latter having been launched in mid-2019 – and has provided instructional and informational videos on a dedicated YouTube channel.

## 2.4 Accessibility and quality of court facilities and services

### 2.4.1 The court venues and offices network

The Courts Service has overseen a significant programme of rationalisation of court venues since the end of the 1990s. It reported to the European Commission for the Efficiency of Justice (“CEPEJ”) that it maintained a total of 187 court venues nationwide in 2004,<sup>12</sup> including the various Dublin venues. This gave Ireland – at 4.6 venues per 100,000 inhabitants – one of the densest court venues networks in Europe – ranking third place among 45 Council of Europe jurisdictions.<sup>13</sup> By 2016, the number of court venues in Ireland had been

11 “Courts Service News”, December 2018, page 6.

12 Answer to Question 34 in the return by Ireland to CEPEJ of September 2006 available at: <https://rm.coe.int/answer-to-the-revised-scheme-for-evaluating-judicial-systems-2004-data/168078a8db>

13 Graph 15, page 63, CEPEJ biennial report, “European Judicial Systems, 2006 Ed. (2004 data), available at: <https://rm.coe.int/168074778d>

reduced to 95<sup>14</sup> – or 2 venues per 100,000 inhabitants – placing Ireland just above the average (1.9 venues per 100,000 inhabitants) in terms of network density.<sup>15</sup>

Following enactment of the enabling legislation concerned,<sup>16</sup> the Courts Service from 2010 commenced a gradual formal amalgamation of District and Circuit Court offices in each county outside Dublin into a single Combined Court Office for the county concerned, supporting both of those jurisdictions. While the physical configuration of existing offices has limited the opportunities for creation of unified reception areas, staff previously assigned to a District or Circuit Court office are now deployable between both jurisdictions concerned as business needs require.

The Capability Review<sup>17</sup> commented that the Courts Service “has...been very successful in modernising much of its portfolio of Court buildings nationwide and a major capital investment programme with a significant PPP dimension continues to be implemented”,<sup>18</sup> further noting that “[w]idespread and thorough consultation has taken place with the full range of court users in the design of all new builds...”.<sup>19</sup>

The Government’s Infrastructure and Capital Investment Plan 2016-2021 envisaged -

- the development of new courthouse buildings in Drogheda, Letterkenny, Limerick and Wexford and
- the refurbishment and extension works to existing courthouses in Cork, Mullingar and Waterford.

This project bundle saw the completion by 2018, at a total cost of €150 million, of construction of four new courthouses – in Drogheda, Letterkenny, Limerick, and Wexford – and substantial refurbishment and extension works to existing courthouses in Mullingar, Waterford and Cork. These projects totalled 37,000 sq. metres, containing 31 fully fitted courtrooms, and necessary support facilities for court users, judges and staff. The courthouses were delivered as public-private partnership projects.

- the development of a new, purpose-built Family Law and Children’s Courts complex, for which a budget of €80 million has been made available, and
- a €10 million refurbishment programme for the Courts Service.

On completion of the Family Law and Children’s Courts complex and refurbishments aforementioned, only five county courthouses will remain to be completed.<sup>20</sup>

The IFCE has prescribed the following standard for accessibility within court buildings:

“Physical access is easy and comfortable. Court users can easily reach the public visitors’ area of courtrooms, directions in the courts are clearly displayed, and a central information point guides court users through the court. Safety is guaranteed, but excessive safety measures do not prevent litigants from feeling comfortable.”<sup>21</sup>

These standards are generally met in the Four Courts complex and the new and refurbished court facilities nationwide. However, the Capability Review, citing a statement of former Chief Justice Denham in relation to the seven court project bundle that “...[e]ach new courthouse will be of a standard befitting the serious nature of the business conducted there, and respectful of the dignity of the people who are called upon to appear in court, in any capacity”, has commented:

14 Answer to Question 42 in the return by Ireland to CEPEJ of August 2018 available at: <https://rm.coe.int/ireland/16808e27f1>

15 Table 4.1 on page 197 and Map 4.12 on page 209, CEPEJ biennial report, “European Judicial Systems, 2018 Ed. (2016 data), available at: <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>

16 Part 3, Courts and Court Officers Act 2009.

17 “Courts Service Organisational and Capability Review”, available at: <https://www.courts.ie/acc/alfresco/909f953b-947f-4694-b99c-c1e422ca7338/Organisational%20Capability%20Review%20Report.pdf/pdf#view=fitH>

18 Ibid., page 15.

19 Ibid., page 79.

20 Ibid., page 80.

21 IFCE, Section 3.1.6 “Affordable and Accessible Court Services”, page 10.

“As the Courts Service strives towards achieving this aim it needs to commence with an audit of its existing facilities in order to determine refurbishment requirements. Many stakeholders and staff expressed concerns about the adequacy of facilities throughout the country regarding them as unfit for purpose and unsuited to individual needs.”<sup>22</sup>

### 2.4.2 Access for persons with disability

Action 18 of the National Disability Inclusion Strategy 2017-2021 (NDIS)<sup>23</sup> commits the Courts Service to ensuring that courts services and information are accessible to and supportive of all users with disabilities. In pursuance of its commitment under the NDIS and in response to Article 13 of the UN Convention on the Rights of Persons with Disabilities,<sup>24</sup> Courts Service policy requires that all newly constructed or refurbished buildings wholly reflect the specific requirements and objectives of relevant law and good industry practice regarding -

- BS 8300 (Design of Buildings and their ability to meet the requirements of disabled persons)
- Technical Guidance Document M (Access and Use) of the Building Regulations, which set standards of accessibility to persons with disabilities and
- the guidance of the National Disability Authority’s Centre for Excellence in Universal Design, “Buildings for Everyone: A Universal Design Approach”.<sup>25</sup>

22 Ibid., page 79.

23 Available at: <http://www.justice.ie/en/JELR/dept-justice-ndi-inclusion-strategy-booklet.pdf/Files/dept-justice-ndi-inclusion-strategy-booklet.pdf>

24 Article 13 provides:

“1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.  
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

In August 2020, a set of “International Principles and Guidelines on Access to Justice for Persons with Disabilities” was published under the auspices of the United Nations to promote and facilitate compliance with the Convention. The principles are as follows:

“Principle 1: All persons with disabilities have legal capacity and, therefore, no one shall be denied access to justice on the basis of disability.

Principle 2: Facilities and services must be universally accessible to ensure equal access to justice without discrimination of persons with disabilities.

Principle 3: Persons with disabilities, including children with disabilities, have the right to appropriate procedural accommodations.

Principle 4: Persons with disabilities have the right to access legal notices and information in a timely and accessible manner on an equal basis with others.

Principle 5: Persons with disabilities are entitled to all substantive and procedural safeguards recognized in international law on an equal basis with others, and States must provide the necessary accommodations to guarantee due process.

Principle 6: Persons with disabilities have the right to free or affordable legal assistance.

Principle 7: Persons with disabilities have the right to participate in the administration of justice on an equal basis with others.

Principle 8: Persons with disabilities have the rights to report complaints and initiate legal proceedings concerning human rights violations and crimes, have their complaints investigated and be afforded effective remedies.

Principle 9: Effective and robust monitoring mechanisms play a critical role in supporting access to justice for persons with disabilities.

Principle 10: All those working in the justice system must be provided with awareness-raising and training programmes addressing the rights of persons with disabilities, in particular in the context of access to justice.”

25 Information provided by Courts Service management to the Review Group.

The Courts Service has also adopted the approach that full accessibility<sup>26</sup> should be provided even in refurbished heritage buildings which otherwise may be exempt in some respects.

A 2012 report to the Building Committee on the accessibility of buildings and compliance with the Disability Act 2005 concluded that 52 buildings met the accessibility requirements which existed at that time. All recently completed and newly renovated court buildings comply with established accessibility standards and have attained Disability Access Certificates and comply with Technical Guidance Document M (Access and Use) of the Building Regulations, which set standards of accessibility to persons with disabilities. The Review Group was informed by Courts Service management that the seven major courthouse projects completed in 2017 and 2018,<sup>27</sup> which include a number of protected heritage buildings, all comply with the requirements and objectives above mentioned.<sup>28</sup>

The Courts Service is currently undertaking a condition survey of approximately 70 buildings in its estate. As part of the survey, each building will be assessed for compliance with statutory obligations including accessibility requirements. The survey will, where appropriate, make specific recommendations in respect of each building surveyed.

The Review Group understands that the Courts Service has a dedicated Disability Liaison Officer, who is a member of the disability network, and presents the findings of the network meetings to its Human Resources team, in order to maintain awareness of the most recent developments as they apply to staff and users of the service.

### 2.4.3 Options for transacting court business

Court filings may be made either by lodgment of the document personally at the office, or by post.<sup>29</sup> On-line filing remains restricted to certain limited categories of business – small claims, applications for intoxicating liquor licenses in certain districts and solicitor-lodged applications for leave to appeal to the Supreme Court. The potential for e-filing in improving the court user experience and expediting the conduct of court business is examined separately in Chapter 11.

## 2.5 Efficiency, responsiveness and competence of court staff

### 2.5.1 Customer service standards and efficiency

In its examination of the Courts Service’s approach to service delivery, the Capability Review commented:

“...[t]here is a general internal perception of a strong customer service ethos and this is viewed as an organisational strength. In the 2017 internal staff engagement survey, 61% of staff felt that the organisation was customer focussed and provided a high quality service.

26 Accessibility includes, but is not limited to:

Access to the facility.

Emergency evacuation.

Accessibility of external paths/walkways and landscaping.

Circulation within the facilities including their interior layout.

Effective lighting and signage and colour or tone contrast on or adjacent to doors to aid orientation.

Desks, work surfaces and reception desks at varying or flexible heights.

Appropriate seating.

Appropriate signage (tactile, high contrast, appropriate font).

Accessible toilets.

Ramps and/or lifts are provided to allow wheelchair users access all the raised positions in the courtroom including Judges bench, Registrars bench, jury box and witness box.

Convenient and reserved parking spaces for those with mobility difficulties.

Sound amplification configured to provide maximum acoustic clarity.

Induction loops at counters and infrared hearing systems within courtrooms (persons engaging with the courts may adapt hearing aids to make use of induction loops).

27 Viz.: Cork Anglesea Street; Limerick Mulgrave Street; Waterford; Wexford; Letterkenny; Mullingar; and Drogheda.

28 Information provided by Courts Service management to the Review Group.

29 Order 117A, rule 2(3), RSC; Order 11, rule 3 and Order 67, rule 9 CCR, Order 40, rule 4(3), DCR.

A counterbalance to that view however is that apart from stakeholder feedback at user groups, users of the courts are not surveyed on their expectations and experiences and therefore it is not possible to conclude whether internal perceptions of customer service are in fact correct. It is noteworthy that issues around access to justice in a reasonably timely fashion were unfavourably commented upon in both internal and external engagements conducted as part of this capability review. As already outlined these issues do not fall exclusively within the Courts Service’s remit.”

The Courts Service has published a Customer Charter<sup>30</sup> which makes commitments to court users under the following headings:

- ethics and professionalism
- courtesy
- equality and diversity
- replies to correspondence
- handling of telephone inquiries
- information
- service through Irish
- physical access
- consultation.

Of these commitments, one – to reply to letters within 15 working days and “If it is not possible to send a full reply we will send you an interim reply, explaining the position” – is measurable in quantitative terms.

Subsequent to the issuing of the Courts Service’s national customer charter, the Dublin Circuit Court Civil Office in 2005 issued its own separate and additional customer charter<sup>31</sup> with a list of more specific and measurable service timescales, notably -

- Counter service within 20 minutes, failing which extra staff will be deployed to the counter
- *Trial dates*: notification of court date within two weeks of lodgment of a Notice of Trial
- *Issuing of orders*: all injunction orders will be available on the day of granting; all orders with time limits will be available within 10 days of granting; all infant orders will be available within 10 days of granting; all other orders will be available within 4 weeks of granting. If an order is not available within the times specified, it will be processed on the day this is brought to the office’s attention
- *Judgment sets* (i.e. papers required for obtaining judgment in the office) will be processed within 4-6 weeks
- *Judgment mortgage affidavits, memoranda of registry of a judgment and satisfaction pieces* will be processed within 2 weeks
- *Payment out of lodgments* will be processed within three weeks of acceptance.
- *Letters* will be replied to within 10 days
- *E-mails* will be replied to within five days
- *Files stored off site* will, where available, be made available in less than five days
- *Minors’ awards* will be paid out within four weeks of request.

The Circuit Court Civil Office Customer Charter provides more specific measurements as to the performance and actual level of service that may be expected from court staff, and while some of the time-bound commitments it contains – such as those for processing judgment sets and payment out of lodgments – are themselves open to improvement, the charter could serve as a model for customer service standards and performance measurement more widely within the Courts Service.

30 Previously available at: <http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/EE250E12BE3CA1D880257FB8004BCCDF?opendocument>

31 Previously available at: [http://www.courts.ie/Courts.ie/Library3.nsf/0/5CCCDCA8E72DEF2B80257003003FDC8D/\\$file/Dublin%20Circuit%20Civil%20Office%20-%20Customer%20Charter.pdf?openelement](http://www.courts.ie/Courts.ie/Library3.nsf/0/5CCCDCA8E72DEF2B80257003003FDC8D/$file/Dublin%20Circuit%20Civil%20Office%20-%20Customer%20Charter.pdf?openelement)

At the end of 2018, the Courts Service was engaged in developing a new Customer Charter together with “clearer and consistent parameters for customer service delivery in combined court offices”.<sup>32</sup> The Capability Review concluded:

“There is scope to collaborate on customer service matters more regularly on a formal basis with external stakeholders, including non-governmental organisations such as the Free Legal Advice Centres and Women’s Aid and other justice agencies such as the Director of Public Prosecutions, Revenue, Chief State Solicitor’s Office, Irish Prison Service, the Legal Aid Board and the Probation Service with the objective of improving service to court users.”<sup>33</sup>

It recommended that -

- the Customer Service Charter should be reviewed and updated with a particular emphasis on the services provided and the quality of service which court users can expect
- a programme of regular engagement on customer service matters should be developed with other justice agencies and key stakeholders in order to improve service planning and delivery, supplemented by a stakeholder engagement framework when developing strategies and major reform proposals and
- a corporate leader or sponsor for corporate services should be appointed in order that a greater emphasis would be placed on ascertaining the needs and measuring the experiences of customers.<sup>34</sup>

Under the Government’s Quality Customer Service (QCS) Initiative, public service organisations are required to formulate Customer Service Action Plans to achieve progressive improvement in standards of service delivery, and to address development of improved customer service standards in their Strategy Statements and annual Business Plans.

### 2.5.2 Competence

Levels of staff competence are heavily influenced by the quality of training, and management of the performance of staff. In 2016 the Courts Service restructured its arrangements for and approach to delivery of training of court staff, with the establishment of a Learning and Development Unit (“the LDU”), the formulation of a Learning and Development Strategy 2016 – 2018 and an increase in the budgetary allocation for staff training.

The LDU has developed and delivered a range of courses to support the organisation, including induction training, technical courses (including courses for newly appointed registrars, warrants, e-licensing, ICT skills), developmental courses (including handling of difficult personal interactions) and coaching.

Learning and Development expenditure in 2018 was €592,648 – an overspend of 7.75% on the agreed budget of €550,000<sup>35</sup> – and compares with a budgetary allocation of €250,000 for 2015.

The Courts Service’s on-line e-learning platform – L&D Connect – was launched in 2017 enabling allocation of staff to 34 different courses, 10 of which were e-learning courses. By the end of 2018, 972 staff members had accessed L&D Connect. Course subjects covered included IT skills, Microsoft Office, Having a Difficult Conversation, Legal Diary Formatting, and Goal Setting.

The new strategy, approach to delivery of training and increased funding allocation has, the Courts Service has indicated, resulted in a steadily increasing number of staff receiving training and in the number of training days provided (3396.40 training days delivered in 2019, compared with 2,083 in 2018 and 1,782 in 2017).

Technical training courses designed and operated by the Courts Service have concentrated on the Circuit and District Courts, and on acquisition or enhancement of ICT skills.

32 Courts Service Annual report 2018, page 27.

33 Capability Review, op. cit., at page 50.

34 Capability Review, op. cit., at page 59.

35 The budget was increased by €50,000 following a mid-year review and the overspend of €42,648 was within that limit (information furnished to the Review Group by Courts Service management).

The LDU operates a two-day training programme to provide newly appointed Circuit and District Court Registrars with an understanding of the basic rules, etiquette and procedures required to carry out their role as Court Registrar. The course contains interactive and practical elements taking place in a real Courtroom environment and covers such areas as registrar skills, training in pre-court, in-court and post-court duties and courtroom etiquette.

Training projects planned for 2020 include a multi-modular programme on District Court criminal business, a refresher course in preparation of warrants, a video-link assistants programme, courtroom security and a programme for court messengers.

The Capability Review noted that the Courts Service had reorganised its induction training and that this training is being aligned with the changes being made centrally within the wider civil service in relation to induction processes and procedures. It identified a need for the Courts Service to “continue to address the specific challenges of dealing with new and often inexperienced Court Registrars”.<sup>36</sup>

The Capability Review, among its findings relating to the organisational capacity of the Courts Service, noted that the Courts Service was facing into a very significant capability challenge arising from the fact that:

“35% of staff are over 55 years of age, many of them in senior positions. The bulk of these staff are due to retire in the next 5 -7 years, thus having major implications for succession planning and knowledge retention”,

and indicated considerable staff frustration at the perceived lack of priority given to matching staff skills to job vacancies. However, it noted that “[s]ignificant progress has been made in devising and delivering a long-term vision and strategy for Learning and Development underpinned by best practice measurement methodologies” and that “[a]llied to this, a HR Strategy, which has been absent to-date, is also being developed which will have strong linkages with L&D as well as workforce planning and succession planning.”<sup>37</sup>

The Capability Review recommended that -

- the Courts Service should conclude the work currently underway on developing a HR strategy which would deal with many organisational and staff development issues such as succession planning and staff mobility
- subject to approval by the Courts Service Board, the senior management team and the HR manager should develop a comprehensive plan for managing the impacts arising from a very significant scale of retirements over the next 5 – 7 years. In that respect, attention will need to be given to business continuity and knowledge retention matters, involving as required, the Business Support Unit
- as part of the process to improve skills matching with job vacancies, a skills audit should be undertaken and incorporated into wider workforce planning considerations
- to mitigate the risks associated with the departure of experienced court registrars, a standardised upskilling and handover policy should be developed for the new replacement, involving many internal units particularly the HR unit, the L&D unit and Business Support Unit
- the Courts Service should put in place a support programme for staff to assist them in dealing with disturbing and harrowing cases arising in the course of their day-to-day work. The programme might cover both training and access to psychological supports.<sup>38</sup>

36 Capability Review, op. cit., at page 76.

37 Capability Review, op. cit., at page 83.

38 Capability Review, op. cit., at page 85.

## 2.6 Court user input and complaints

### 2.6.1 Court user groups

The Courts Service operates a number of court user groups in Dublin and in each county nationwide, which provide a formal channel for feedback on customer service from regular court users and serve as a forum to obtain views of the court user community on proposed changes e.g. on new methods of service delivery. The court user groups serve: users of the Superior Courts generally; users of the Examiner’s Office (Insolvency); users of the Probate Office; users of the offices of the Circuit and District Courts offices within the combined court offices network; and users of the Dublin family law courts. Each group is chaired by a Courts Service manager and consists of practitioners, State law officers and other professional users and bodies active in the area of court business concerned, and meets on a periodic basis – thrice yearly in the case of the Superior Courts user group and, generally, once yearly in the case of the other groups. The Dublin family law courts user group has generally met on a quarterly basis or more regularly as the need arises, and has participation from a judge of the Circuit Family Court.

### 2.6.2 Court user surveys

Both the IFCE<sup>39</sup> and CEPEJ<sup>40</sup> recommend the use of court user surveys to evaluate the court user experience. The last general customer service satisfaction survey was conducted by the Courts Service on-line in 2012. It has also undertaken “mystery shopper” exercises whereby independent researchers pretending to be customers are tasked to visit offices without advance notice to experience and evaluate quality of service delivered against pre-set criteria. The last such exercise was undertaken in 2007 and involved 100 interactions – 70 across the counter, 15 by telephone and 15 by e-mail – covering larger and smaller offices nationwide. 26 items/questions required to be reported on by researchers including: the information available in the office; cleanliness of the facility; number of staff available and personal service provided by staff; attentiveness and knowledge of the staff member providing service; the speed of answering of a telephone/e-mail inquiry; and the accuracy of the information provided.

The Capability Review recommended, *inter alia*, that a programme of regular surveys should be put in place to measure the experiences of court users by jurisdiction, distinguishing separately the general public and legal practitioners.<sup>41</sup>

The Courts Service has recruiting recently recruited for a new post of Head of Communications, the functions of which include engagement with and obtaining of feedback from stakeholders to inform the

39 IFCE, op. cit., Section 5.1 Measurement of Performance, at page 29.

40 In its Handbook on the subject, “Handbook for Conducting Satisfaction Surveys Aimed at Court Users in Council of Europe Member States” (10<sup>th</sup> September 2010), CEPEJ suggests that this may be done by reference to the following specific headings and indicators:

- *General perception of the functioning of justice*  
Indicators include: degree of expedition with which the case was disposed of; levels of court fees; level of trust in the court system
- *Access to information*  
Indicators include: ease of access to information about rights; clarity of information provided by the court/court administration
- *Accessibility of and facilities in the court*  
Indicators include: how easy it was to reach the court; quality of signage in the court building; waiting area conditions; court furnishings
- *Functioning of the court*  
Indicators include: degree of clarity of court summons; time lapse between the issue of the court summons and the hearing; punctuality of the hearings; attitude and politeness of non-judge court personnel; level of competence of non-judicial court personnel
- *Judges*  
Indicators include: attitude and politeness of judge; clarity of judge’s language; judge’s impartiality in conducting the hearing; sufficiency of time allowed for submissions at the hearing; clarity of court’s decisions; timeframe for delivery of court’s decision.

41 Capability Review, op. cit., at page 59.



development of its modernisation programme. It is understood that the remit of the post will extend to overseeing of any future court users surveys or other customer service measurement exercises.

### 2.6.3 Complaints handling

The Courts Service has introduced a revised complaints procedure, which covers matters not falling within the province of business conducted before a judge. Complaints are handled by the Customer Complaints Co-ordination Office. The Courts Service has made a public commitment to:

- (a) resolving complaints, where possible, at the first instance;
- (b) acknowledging all complaints within 3 working days; and
- (c) investigating a complaint and issuing a reply to it within 15 working days or, where this is not possible, providing an interim reply explaining the position and advising when a substantive response will issue.<sup>42</sup>

The Courts Service is, in its performance of its administrative functions under its parent statute, a reviewable agency subject to investigation by the Ombudsman.<sup>43</sup>

The Capability Review recommended that, as a follow-up to its revision of its complaints procedure, a corporate leader or sponsor for corporate services should be appointed “in order that a greater emphasis would be placed on ascertaining the needs and measuring the experiences of customers.”<sup>44</sup>

## 3. Vulnerable court users

### 3.1 Children and young persons

#### 3.1.1 Introduction

The Review Group is not examining as part of its remit the areas of family law or child care law, and it has confined its examination under this sub-heading to the arrangements and facilities for children to engage with the civil justice system more generally, in particular as parties or witnesses.

#### 3.1.2 Children as parties to proceedings

##### 3.1.2.1 *Next friends and guardians ad litem*

Children who are parties to proceedings before a court are required to participate in those proceedings through an adult acting on their behalf – a “next friend” in the case of a child plaintiff<sup>45</sup> and a guardian *ad litem* in the case of a child defendant.<sup>46</sup>

A written authority for the purpose signed by the person whose name is to be used as next friend must be filed with the court.<sup>47</sup> A similar authority is required to be filed by an intending guardian *ad litem* in the District Court.<sup>48</sup> In Circuit Court proceedings, an application must be made to the County Registrar for appointment of a guardian *ad litem*. By contrast, no order for the appointment of a guardian is required in High Court proceedings, but the solicitor applying to enter an appearance must make and file an affidavit confirming that the intending guardian is a fit and proper person to act in that capacity, and has no interest

42 See Courts Service’s customer complaints procedure at: <https://www.courts.ie/customer-service>

43 See section 1A, Ombudsman Act 1980, inserted by section 4 of the Ombudsman (Amendment) Act 2012 (“the 2012 Act”) and para. (d) of Part II, First Schedule, Ombudsman Act 1980, inserted by section 16 of the 2012 Act.

44 Capability Review, *op. cit.*, at page 59.

45 Order 15, rule 16 RSC; Order 6, rule 5 CCR; Order 43, rule 8(1) DCR.

46 Order 15, rule 16 RSC; Order 6, rule 6 CCR; Order 43, rule 9(1) DCR.

47 Order 15, rule 20 RSC; Order 6 rule 5 CCR; Order 43, rule 8(2) DCR.

48 Order 43, rule 9(2) DCR.

in the matters in question in the proceedings adverse to that of the child, and exhibit a consent of the intending guardian to act.<sup>49</sup>

No prescribed form of consent is required to be completed by an intending next friend or guardian.

In England and Wales, a child must have a “litigation friend” to conduct proceedings on his or her behalf, whether as claimant or defendant, unless the court by order dispenses with this requirement.<sup>50</sup> A person wishing to act as a “litigation friend” may act as such without the need for a court order provided he or she

- (a) can fairly and competently conduct proceedings on behalf of the child or protected party;
- (b) has no interest adverse to that of the child or protected party; and
- (c) where the child is a claimant, undertakes to pay any costs which the child may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child.<sup>51</sup>

Such person must file a certificate of suitability stating that he or she satisfies the conditions at (a) to (c) aforementioned either –

- (a) where the person is to act as a litigation friend for a claimant, at the time when the claim is made; or
- (b) where the person is to act as a litigation friend for a defendant, at the time when he or she first takes a step in the proceedings on behalf of the defendant,<sup>52</sup>

and must serve the certificate of suitability on specified persons, as appropriate, on whom a claim form in proceedings against a child would require to be served (parent, guardian etc.).<sup>53</sup>

As mentioned above, in England and Wales the court may dispense with the need for a child to be represented by a litigation friend. In a 2015 report,<sup>54</sup> the Children’s Rights Alliance and the Law Centre for Children and Young People, having noted that children cannot independently institute legal proceedings in Ireland, commented that “in circumstances where there may be a conflict of interest between a parent’s interests and a child’s or where a child is in care or is a separated child within the asylum system, the absence of a provision whereby children may institute proceedings independently can provide a real barrier to the child’s access to justice”.<sup>55</sup>

### 3.1.2.2 Settlement of claims on behalf of children

Special arrangements apply to the settlement of certain types of action taken on behalf of a child. Section 63 of the Civil Liability Act 1961 provides that where a sum of money has been lodged in court by the defendant in an action for tort in which the plaintiff is an infant, an application may be made to the court by the plaintiff for a determination as to whether that sum should be accepted or whether the action should go to trial. Where the court determines that the action should go to trial and damages are awarded which do not exceed the sum lodged, the awarding of costs is at the discretion of the judge, i.e. the usual “costs follow the event” principle does not automatically apply.

However, no procedure exists for the approval of a settlement of a claim made on behalf of a child where no proceedings have been issued, a deficiency to which the Law Society and the DSBA drew attention in their

49 Order 15, rule 18 and Form No. 4 in Appendix A, Part II RSC.

50 Rule 21.2(2), CPR.

51 Rule 21.4(3), CPR.

52 Rule 21.5(3), CPR.

53 Rule 21.5(4), CPR.

54 Children’s Rights Alliance and the Law Centre for Children and Young People, “Making Rights Real for Children: A Children’s Rights Audit of Irish Law”, July 2015, available at: [https://www.childrensrights.ie/sites/default/files/submissions\\_reports/files/MakingRightsReal2015.pdf](https://www.childrensrights.ie/sites/default/files/submissions_reports/files/MakingRightsReal2015.pdf)

55 Ibid. at page 28.

submissions to the Review Group. In England and Wales, such no settlement, compromise or payment in respect of such a claim, or of a claim against a child, is valid without the approval of the court.<sup>56</sup>

### 3.1.2.3 Protection of privacy of child parties

Article 3(1) of the UN Convention on the Rights of the Child provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Article 40 (2)(b) (vii) of the Convention obliges the State party to the Convention to ensure that a child alleged as or accused of having infringed the penal law shall have his or her privacy fully respected at all stages of the proceedings.

The Self-insured Taskforce (“SITF”) in its submissions to the Review Group expressed concern about publicity attaching to the details of settlements approved by the court in favour of vulnerable claimants, including minors, pointing to the fact that the defendant in the proceedings is not permitted to be present at such hearings. It suggested that the best interests of such persons would best be protected by not allowing publication of the claimant’s identity, noting that media coverage often published very sensitive personal information about the vulnerable claimant’s medical condition.

The Review Group notes that a court is already empowered in any civil proceedings, on application made to it in chambers, to prohibit the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify a party as a person having a medical condition.<sup>57</sup>

Statutory restrictions apply to most family proceedings involving children,<sup>58</sup> to childcare proceedings<sup>59</sup> and to criminal proceedings involving child offenders.<sup>60</sup>

### 3.1.3 Children and young persons as witnesses in proceedings

Special provision has been made for the hearing of evidence in civil proceedings concerning the welfare of a child. In such proceedings, a child may, with the court’s permission, give evidence through a live television link.<sup>61</sup> The court may in such a case, on its own initiative or on the application of a party to the proceedings, direct, having regard to the age or mental condition of the child, that any question be put through a competent intermediary either in the words used by the questioner or in words that convey to the child, in a way that is appropriate to his or her age or mental condition, the meaning of the questions being asked.<sup>62</sup>

Again within the confines of civil proceedings concerning the welfare of a child, a statement made by a child is admissible as evidence of any fact therein of which direct oral evidence would be admissible, notwithstanding the rule against hearsay, where the court considers that the child is unable to give evidence by reason of age, or the giving of oral evidence by the child, either in person or by live TV link, would not

56 Rule 21.10 CPR and para. 5 (Settlement or compromise by or on behalf of a child or protected party before the issue of proceedings) of Practice Direction 21.

57 Section 27, Civil Law (Miscellaneous Provisions) Act 2008.

58 See Shannon, “Child Law”, 2<sup>nd</sup> ed., 2010, Chapter 2 at para. 2.43 and fn. 56.

59 Sections 23NH, 23NN(8) and 29, Child Care Act 2001.

60 Section 93, Children Act 2001, as substituted by section 139, Criminal Justice Act 2006. Section 93 provides that in relation to proceedings before any court concerning a child, no report which reveals the name, address or school of any child concerned in the proceedings or includes any particulars likely to lead to the identification of any such child shall be published or included in a broadcast or any other form of communication, and no still or moving picture of or including any such child or which is likely to lead to his or her identification shall be so published or included.

While the original version of section 93 confined it to proceedings under Part 9 of the 2001 Act – i.e. proceedings involving a child charged with an offence before the District Court when sitting as the Children Court – section 93 as substituted is not expressly confined as to the type of court proceedings, or as to the court to which it applies.

61 Section 21, Children Act 1997. Such evidence is required to be video-recorded (section 21(2)). Further, where evidence is given by a child in those circumstances that any person was known to him or her before the date of commencement of the proceedings, the child is not required to identify the person during the course of those proceeding, unless the court directs otherwise (section 21(5)).

62 Section 22, Children Act 1997.

be in the interest of the child’s welfare, unless the court considers that, in the interests of justice, the statement or a part of the statement ought not to be so admitted.<sup>63</sup>

## 3.2 Litigants in person

### 3.2.1 The increasing presence of litigants in person in civil litigation

The growth in recent years in the number of persons bringing or defending proceedings in the courts without legal representation is a phenomenon observable not only in Ireland but in other, larger common law jurisdictions.<sup>64</sup> Statistics on the number and types of cases involving litigants in person in Ireland are not generally available – a deficiency by no means unique to Ireland.<sup>65</sup> However, some indication of the proportion of the total caseload which such cases represent may be gleaned from the statistics provided by the Supreme Court and the Court of Appeal, which indicate that, currently, approximately 30% of the proceedings being initiated in those courts involve litigants in person:

#### Court of Appeal (Source: Courts Service)

Year	Appeals lodged	Lodged by litigants in person	%
2015	639	188	29%
2016	591	162	27%
2017	611	170	28%
2018	499	156	31%
2019 to 4 <sup>th</sup> Dec	501	148	30%

63 Section 23(1) and(2)(a), Children Act 1997. In considering whether the statement or any part of the statement ought to be admitted, the court must have regard to all the circumstances, including any risk that the admission will result in unfairness to any of the parties to the proceedings (section 23(2)(b)).

64 In Australia, Deputy Chief Justice Faulk of the Family Court of Australia, in a presentation in 2013 commented: “Self-representation has reached a level in many courts where it is common for at least one of the parties to be unrepresented for one half of the time. This means that courts are no longer dealing with a minority aberration but are being obliged to contend with change which may require altering the way in which courts operate...”:

“Self-represented litigants: tackling the challenge” (February 2013), Managing People in Court Conference, National Judicial College of Australia and the Australian National University, available at: <http://www.familylawexpress.com.au/family-law-factsheets/representing-yourself/selfrepresentation-guide/self-represented-litigants-tackling-the-challenge/>

In Canada, the Final Report of the National Self-Represented Litigants Project “Identifying and Meeting the Needs of Self-Represented Litigants”, based on research conducted by Dr Macfarlane in three Canadian provinces from 2011-2013 on self-represented litigants in family and civil courts, notes: “There have been dramatic increases in the numbers of people representing (self-represented litigants or SRL’s) themselves in family and civil court over the past decade, across North America. In some family courts this number now reaches to 80% and is consistently 60-65% at the time of filing.” The report is available at:

[https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/s/self-represented\\_project.pdf](https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/s/self-represented_project.pdf)

See also Summary of the 7th Annual Civil Justice Council for England and Wales Forum Event for Access to Justice for Litigants in Person (December 2018), page 11, available at:

<https://www.judiciary.uk/wp-content/uploads/2018/12/lip-forum-minutes-7-Dec-2018-final.pdf/>

65 A recent Australian study observed: “The lack of consistent, high quality data relating to [litigants in person] is a considerable barrier to assessing their impact on courts and tribunals, and the impact of self-representation on outcomes.” E. Richardson, G. Grant, and J. Boughey, “The impacts of self-represented litigants on civil and administrative justice: Environmental scan of research, policy and practice” (Australasian Institute of Judicial Administration, 2018), at page IV, available at: [https://aija.org.au/wp-content/uploads/2018/11/10803\\_SRL\\_Enviro-Scan-Report\\_WEB3.pdf](https://aija.org.au/wp-content/uploads/2018/11/10803_SRL_Enviro-Scan-Report_WEB3.pdf).

See also House of Commons Select Committee on Justice report “Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012” (2015), at para. 90, available at: <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31102.htm>

**Supreme Court (Source: Courts Service)**

Year	Applications for leave to appeal filed	Filed by litigants in person	%
2015	94	48	51%
2016	152	52	34%
2017	176	52	29%
2018	193	56	29%
2019 to date	214	64	30%

Lack of legal representation, in the first place, places the litigant in person in difficulty in pursuing effectively a claim which may have merit, or in resisting effectively a claim against him or her which may be open to challenge. Addressing the particular situation of defendants to home loan mortgage possession proceedings, Dr Padraic McKenna of the School of Law, NUI Galway, made the point in a submission to the Review Group that:

“[l]imited availability of civil legal aid, and the cost of privately paid legal services, are leading to situations where a significant number of debtors have no legal representation, or are forced to represent themselves in court. The result can be a denial of justice for some, and compromised access to justice for others. In many cases, EU and Irish citizens, as defendants to civil proceedings, have no option but to attempt to represent themselves, or allow judgment to be entered in default of a response to the claimant’s case. In some cases, those with genuine and good claims face no option but to abandon their rights, and leave problems unresolved and potentially worsening, unless they are prepared to attempt to represent themselves in court.”

Aside from the impediment to accessing justice which lack of legal representation entails, the presence of an increasing number of litigants in person in civil proceedings presents challenges for courts and other parties. These have been well described by Master Evan Bell of the High Court in Northern Ireland:<sup>66</sup>

“Self-represented parties are facing courts today with “an ever increasing frequency”.<sup>67</sup> While the right to represent oneself is fundamental, the presence of personal litigants in increasing numbers creates a problem for the courts because the contribution of most litigants in person in the preparation and conduct of their cases is not of the same standard as that of counsel. Litigation involving self-represented litigants is therefore usually less efficiently conducted and tends to be prolonged. Consequently, the costs for opposing litigants are increased and the drain upon court resources is considerable.<sup>68</sup> The difficulties presented by self-represented litigants are a result of their entering an arena where adversarial litigation is designed to be conducted by persons with professional skills. In the absence of competent legal representation, the court does not receive the assistance that it ought in relation to questions of law and fact, and a burden is placed upon it to assist the litigants.<sup>69</sup>”

**3.2.2 Impecunious litigants and the availability of civil legal aid**

The relevant strand of the Review Group’s remit mentioned at the outset of this chapter refers to impecunious litigants ineligible for civil legal aid as falling within the category of vulnerable court users. While data is not available to indicate the reasons for absence of legal representation in civil cases coming before the courts, experience would suggest that such persons undoubtedly make up a not insignificant proportion of the number of unrepresented litigants before the courts (“litigants in person”).

66 Evan Bell, “Judges, Fairness and Litigants In Person”, [2010] 01 The Irish Judicial Studies Journal, pages 1 and 2. Available at: <https://www.ijsj.ie/assets/uploads/documents/pdfs/2010-Edition-01/article/judges-fairness-and-litigants-in-person.pdf>

67 *Baziuk v. BDO Dunwoody Ward Mallette* (1997) 13 C.P.C. (4th) 156 (Ont. Gen. Div.).

68 *Cachia v. Hanes* [1994] H.C.A. 14.

69 *Kenny v. Ritter* [2009] S.A.S.C. 139.

Currently, under the civil legal aid scheme, legal advice and representation is available to persons meeting the eligibility criteria in relation to civil law matters not classed as “designated matters” under the Civil Legal Aid Act 1995.<sup>70</sup> Generally, to be entitled to legal advice and representation under the scheme, an applicant must have an annual disposable income of less than €18,000 and disposable assets of less than €100,000 and satisfy a merit test.<sup>71</sup>

Aside from the civil legal aid scheme, access to legal advice is also available under the *Abhaile* scheme operated by the Money Advice and Budgeting Service (MABS) to eligible home mortgage holders<sup>72</sup> who are at risk of losing their homes. The expressed aim of this scheme is “to help mortgage holders in arrears to find the best solutions and keep them wherever possible, in their own homes”.<sup>73</sup>

In addition to certain types of insolvency and financial advice,<sup>74</sup> for mortgage holders facing Circuit Court proceedings by a mortgage lender for possession of their home due to mortgage arrears, *Abhaile* provides the services of a duty solicitor who is located in the courthouse building where the possession proceedings are listed. The duty solicitor provides advice and help to unrepresented borrowers at court, which may include explaining to the borrower what is happening in the proceedings, speaking for the borrower in Court, to explain what steps they are taking to try and deal with their mortgage arrears, and applying for the proceedings to be adjourned, if the borrower is trying to put a solution in place. However, this service does not extend to acting as the borrower’s legal aid solicitor, or defending the repossession proceedings on the borrower’s behalf. Where a borrower may have a valid legal defence to the possession proceedings, legal aid may be available separately under the civil legal aid scheme. Since its establishment in 2016 the scheme has provided financial advice and negotiation support to over 12,000 borrowers at risk of losing their homes.

The total allocation to the Legal Aid Board has been €42.2 million for 2020 – and increase of €500,000 over the previous year – which includes a provision of €1m made to continue the *Abhaile* Scheme for mortgage arrears.

70 Viz., subject to certain exceptions set out in section 28 of the 1995 Act: (i) defamation; (ii) disputes concerning rights and interests in or over land; (iii) civil matters within the jurisdiction of the District Court (Small Claims Procedure) Rules; (iv) licensing; (v) conveyancing; (vi) election petitions; (vii) a matter as respects which the application for legal aid is made in a representative, fiduciary or official capacity and the Board, having regard to any source from which the applicant is or may be entitled to be indemnified in respect of the costs of the proceedings concerned and any resources of the persons who would be likely to benefit from a successful outcome of the proceedings for the applicant, is of opinion that legal aid should not be granted; (viii) a matter the proceedings as respects which, in the opinion of the Board, are brought or to be brought by the applicant as a member of and by arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest; (ix) any other matter as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.

71 Viz. meet the following conditions: the applicant must as a matter of law have reasonable grounds for instituting, defending or being a party to the proceedings for which legal aid is sought; the applicant must be reasonably likely to be successful in the proceedings; the proceedings for which legal aid is sought are the most satisfactory means of achieving the result sought by the applicant; and having regard to all the circumstances (including the probable cost to the Legal Aid Board, measured against the likely benefit to the applicant), it is reasonable to grant the application: section 28(2), Civil Legal Aid Act 1995.

72 To be eligible a mortgage holder must be -

- in mortgage arrears on their home
- insolvent (as defined under the Personal Insolvency Act 2012). This means that someone is unable to pay their debts in full as they fall due. MABS or a PIP will be able to help work this out
- at risk of losing their home due to arrears
- “reasonably accommodated”, i.e. the costs of continuing to live in the same home must not be disproportionately expensive, bearing in mind a person’s reasonable accommodation needs and those of their dependents, and the costs of alternative accommodation.

73 A detailed description of the *Abhaile* scheme is available at: [https://www.mabs.ie/en/abhaile/abhaile\\_about.html](https://www.mabs.ie/en/abhaile/abhaile_about.html)

74 MABS operates panels of Personal Insolvency Practitioners (PIPs), Solicitors and Accountants for specialised financial and legal advice and will assess each individual case and refer the applicant on to the most suitable expert for advice by issuing them with a voucher for a consultation with that expert.

Legal representation may also be available *ex gratia* outside the civil legal aid scheme in relation to certain other types of proceedings classed as civil proceedings where custody of a person is at issue, under the Legal Aid – Custody Issues Scheme.<sup>75</sup>

Some representations were made to the Review Group relating to the current availability of civil legal aid and the operation of the *Abhaile* scheme.

The Free Legal Aid Centres (FLAC), describing civil legal aid as “a fundamental part of the administration of justice”, requested that the Review Group recommend that its provision be adequately resourced and, as a matter of urgency, that a root and branch review of the civil legal aid and advice scheme be undertaken.

In his submission aforementioned, Dr Padraic McKenna of the School of Law, NUI Galway, referred to research conducted into housing mortgage possession proceedings in the Circuit Court by the Centre for Housing Law, Rights and Policy at NUI Galway, which examined a sample of 99 Circuit Court, County Registrar and Call-over Lists in December 2017 and January 2018. In the 2,396 cases examined, the home loan debtor had no recorded legal representation in 70% of cases. In 7% of these cases the home loan debtor represented themselves, having no recorded legal representation. In relation to ECB directly supervised lenders, some 64% of home loan debtors at risk of repossession or home loss had no recorded legal representation in the proceedings.

The Bar Council submitted that:

“[t]here is manifest desirability for improvements to the civil legal aid system in Ireland. The Courts, in particular the Superior Courts, have increasingly had to determine cases that have (at least) one litigant in person participating. The consequences of this for the smooth, efficient and economical administration of justice are well known. In the event that civil legal aid were to be made more widely available this would undoubtedly lead to the smoother and more efficient administration of justice in the civil courts.”

The Law Society suggested that further analysis is required on the extension of legal aid to provide greater access to civil justice.

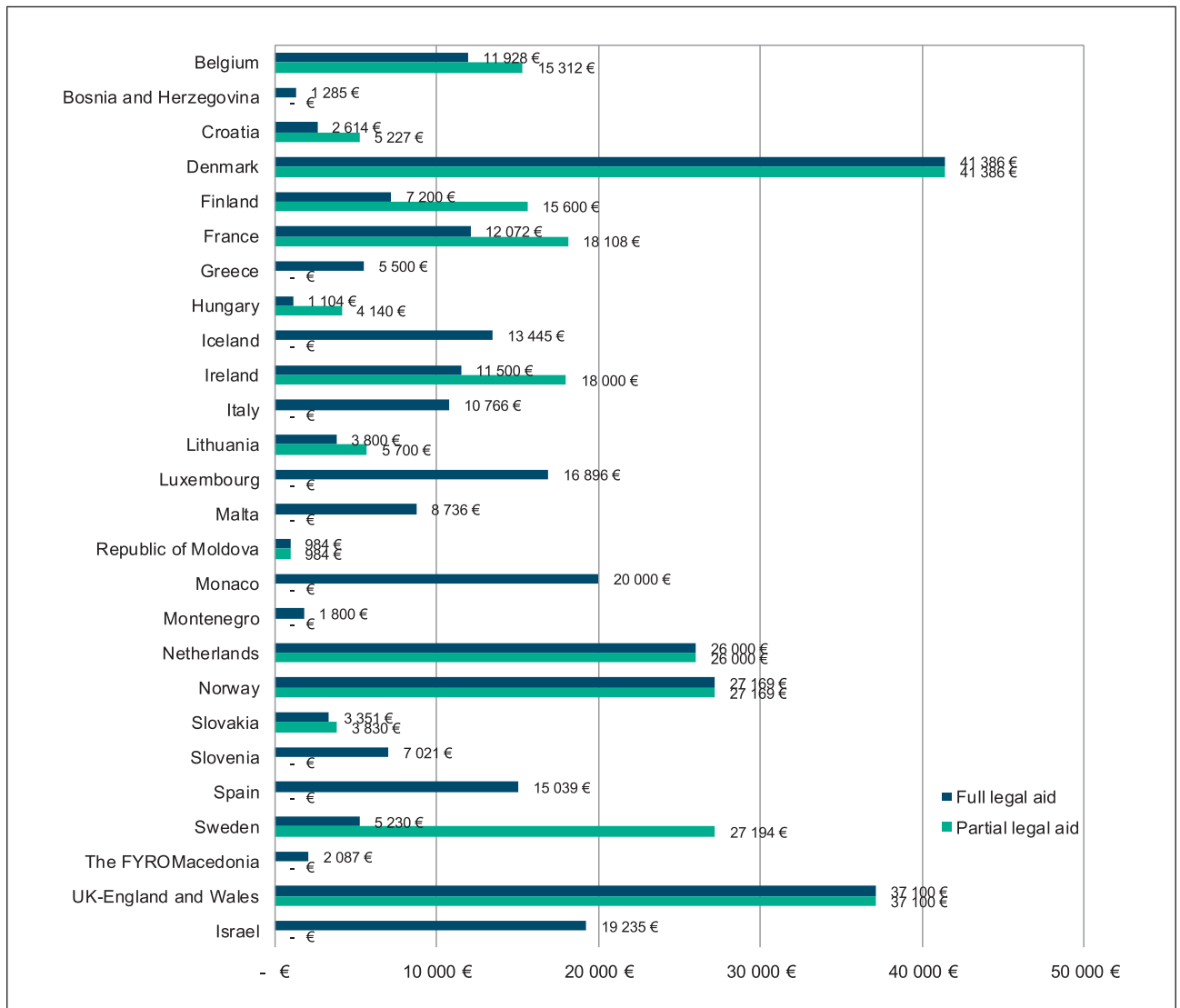
The bar chart below shows a comparison made by CEPEJ in its 2018 biennial evaluation of European judicial systems – based on 2016 data – of maximum income levels for eligibility for civil legal aid in Council of Europe Member and Observer States participating in its evaluation of European judicial systems. CEPEJ notes that “it must be considered that in most of the states, as already described, the annual income is not the only criterion adopted, so these data must be compared with caution.”<sup>76</sup> No comparison table is available for maximum capital amounts for eligibility purposes.

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75 Formerly known as the Attorney General’s Legal Aid Scheme. This scheme provides payment for legal representation for certain types of cases not covered by civil legal aid or the Criminal Legal Aid Scheme. The cases covered include Habeas Corpus (Article 40.4.2) Applications, High / Supreme Court Bail Motions, certain types of Judicial Review, Extradition and European Arrest Warrant Applications.

76 European judicial systems: Efficiency and quality of justice CEPEJ STUDIES No. 26 (2018), page 76, available at: <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>

**Chart 1: Maximum annual income level for eligibility for partial or full legal aid 2016, Council of Europe<sup>77</sup>  
(Source: CEPEJ, European Judicial Systems: Efficiency and quality of justice, 2018 (2016 data))**



Although higher than that of most Member States in the Council of Europe area, the income level for Ireland for eligibility for civil legal aid is relatively low when compared to that applying in those member States having relatively high per capita GDP<sup>78</sup> which prescribe an annual income level, as illustrated by the following table:

<sup>77</sup> The chart only records Council of Europe Member States which operate prescribed annual income levels and also includes Israel, an Observer State to CEPEJ.

<sup>78</sup> The per capita GDP figures are taken from CEPEJ, “European Judicial Systems, Quality and Efficiency”, op. cit., Table 1.1 (Economic and demographic data in 2016, in absolute value), page 12.



**Income level for eligibility for civil legal aid in Council of Europe Member States having relatively high per capita GDP (Source: CEPEJ, European Judicial Systems: Efficiency and quality of justice, 2018 (2016 data))**

Member State	Per capita GDP (Euros)	Income threshold for civil legal aid*
Luxembourg	90,700	16,896
Monaco	72,091	20,000
Norway	65,747	27,169
Ireland	58,961	18,000
Denmark	48,474	41,386
Sweden	46,125	5,230
Netherlands	41,258	26,000
Belgium	37,407	11,928
UK England and Wales	31,088	37,100

The Review Group is not best equipped to evaluate the extent to which the civil legal aid scheme may be failing to meet legitimate demand for civil legal aid, whether through shortcomings in the range of legal services it provides, the resourcing of such services or deficiencies in the eligibility criteria and income or assets thresholds for accessing civil legal aid. However, based on the comparison made above, a case would appear to exist for reviewing whether the annual disposable income level operating as a “cut off” for entitlement to civil legal aid requires to be increased – if not also the disposable assets level. The Review Group recommends that the Department of Justice and Equality give consideration to initiating a review of the criteria governing access to civil legal aid and the likely resourcing implications of any modification of those criteria.

Insofar as the *Abhaile* scheme is concerned, the Law Society asserted that concerns have arisen about its effectiveness in providing the appropriate level of legal representation and advice that is required in complex possession cases, particularly in light of recent concerns about the handling of tracker mortgages. The Law Society particularised its concerns as follows: the scheme did not extend far enough in its scope; control over disbursement of funds under the scheme rested with MABS and PIPs, but not with lawyers; funding of legal representation is confined to personal insolvency appeals, with much of the budget for this being given to PIPs, not lawyers; outlay and town agents fees are not provided and the scheme rules prohibit collecting of these items from the debtor, requiring that solicitors must pay the items from the scale fee; administration of the payment of the legal fees is, in the Society’s view, very frustrating and the forms contradictory. In the result, the Law Society contended that most solicitors are reluctant to take *Abhaile*-related work, to the prejudice of the debtors concerned.

As noted above, where a borrower may have a valid legal defence to the possession proceedings, legal aid may be available separately under the civil legal aid scheme.

The Review Group is also conscious that the Circuit Court practice direction in respect of mortgage possession proceedings of the 12<sup>th</sup> November 2009 imposes a number of requirements designed to ensure that a defendant is apprised of the importance of attending the hearing in person or through a solicitor and

is afforded sufficient time to seek professional advice and, as appropriate, treat with the plaintiff lender.<sup>79</sup> Furthermore, the Circuit Court procedure for possession has been extensively amended<sup>80</sup> to introduce new information requirements and safeguards to ensure that the position of defendant mortgage holders is fairly protected and that they are not taken by surprise by any application for possession, and have an opportunity to take informed advice. That procedure provides, *inter alia*, that

- the return date of the Civil Bill be fixed not earlier than eight weeks from the date of issue of the Civil Bill
- the Civil Bill attaches for the defendant’s convenience, the form for entry of appearance
- the plaintiff lender in their supporting affidavit, to be served on the defendant, *inter alia* identify the relevant Central Bank code of practice applicable to the mortgage or loan agreement and provide – independently of any evidence offered by the defendant – such information as would enable the court to evaluate the extent to which the plaintiff has been in compliance with the code. In the case of a mortgage loan of a borrower which is secured by his or her primary residence, the applicable Central Bank code is the Code of Conduct on Mortgage Arrears,<sup>81</sup> which imposes obligations on a mortgage lender, *inter alia*, pro-actively to encourage borrowers to engage with it about financial difficulties which may prevent the borrower from meeting his or her mortgage repayments and to operate a Mortgage Arrears Resolution Process (“MARPS”).<sup>82</sup>

One respondent suggested that, for individual litigants not eligible for legal aid, the costs and expenses of engaging in litigation be tax deductible. Such costs and expenses may already be deductible against tax where the litigation relates to an individual’s business.

It should be appreciated that not all persons conducting litigation in person do so solely because of lack of means to fund professional representation. While no data is available to enable the cohort of litigants in person to be fully quantified and categorised, experience suggests that a not insignificant number are not represented professionally either because they are not disposed to engage legal representation or do not have a case which would satisfy a lawyer as having legal merit. Such persons are undoubtedly also at a disadvantage in conducting litigation, and may – whether through their lack of familiarity with substantive law or court procedure or in their approach to the litigation – place the other party to the litigation at a disadvantage, by causing delay or contributing to excessive length and cost in the litigation, as well as placing additional burdens on the courts and court offices and staff.

79 Practice Direction CC11 (Actions for possession) which provides:

- “...2. In proceedings in which a claim for recovery of possession of land on foot of a legal mortgage or charge is made, the return date of the Civil Bill shall be fixed not earlier than eight weeks from the date of issue of the Civil Bill. Except with the consent of each defendant in the proceedings, no order for possession shall be made on the return date. The proceedings shall be adjourned to such later date as the County Registrar considers just in the circumstances.
3. The Civil Bill, when being served on each defendant, should be accompanied by a letter from the plaintiff or the plaintiff’s solicitor addressed to the defendant stating:
- (a) that, except with the consent of each defendant in the proceedings, no order for possession will be made on the initial return date before the County Registrar and that the proceedings will be adjourned to such later date as the County Registrar considers just in the circumstances;
  - (b) the importance of the defendant or his legal representative attending before the County Registrar on the return date and on any date to which the proceedings are adjourned, should the defendant wish to make any representations to the County Registrar concerning the proceedings; and
  - (c) that a defendant not intending to enter a defence is not required to file and serve on the plaintiff a replying affidavit.
4. Where a defendant is not present or represented on the initial return date when proceedings are adjourned in accordance with paragraph 2, the plaintiff should notify the defendant by letter of the adjournment forthwith in such manner as may be directed by the County Registrar.”

80 The procedure is set out in Order 5B, CCR.

81 Available at: <https://www.centralbank.ie/docs/default-source/Regulation/consumer-protection/other-codes-of-conduct/24-gns-4-2-7-2013-ccma.pdf?sfvrsn=4>

82 The terms of the MARPS are set out in paras. 16 to 48 of the Code and envisage detailed engagement by the lender with the borrower within a four-step process (Step 1: Communication with borrowers; Step 2: Financial information; Step 3: Assessment; and Step 4: Resolution).

Even were access to the civil legal aid system expanded, therefore, the involvement of legally unrepresented litigants in the civil justice system may be expected to continue, if not indeed further increase. It is therefore important to consider the arrangements currently in place to facilitate litigants in person appropriately in accessing justice and to address the issues which their participation in litigation may present.

### 3.2.3 Assistance for litigants in person

#### 3.2.3.1 Information resources

Courts Service staff at the public counters regularly assist litigants in person in identifying relevant court forms, explaining procedural steps and listing and hearing arrangements. They are precluded, however, from offering legal advice, or assisting litigants with the content of their pleadings or submissions.

Aside from the general information for court users provided by the Courts Service on its website referred to at Section 2.3 of this chapter, certain material has been developed specifically for litigants in person. A 37-page set of guidelines for litigants in person involved in proceedings in the High Court, prepared by the Pleadings Section of the Central Office of the High Court, and previously available on the Courts Service website, contains a range of practical information, *inter alia*, on the issuing, filing and service of court documents, the various steps arising generally in the litigation process, listing arrangements and various court lists, the role of the McKenzie friend,<sup>83</sup> and links to rules of court, the fees orders and the Citizens Information, Legal Aid Board, and Money Advice and Budgeting Service and to the Irish statutes and statutory instruments. The Courts Service website also contains a guide for litigants in person defending mortgage possession proceedings in the Circuit Court<sup>84</sup> and a section on the District Court small claims procedure.<sup>85</sup>

Citizens Information provide information for individuals engaging with the civil justice system or affected by events which may involve litigation, e.g. marital or relationship breakdown, personal insolvency, and mortgage arrears.

NGOs have also been active in providing information and guides for those facing the prospect of a civil dispute. FLAC has published a series of legal information leaflets on different areas of law such as family law, landlord and tenant law, and moneylending. Community Law & Mediation, FLAC and the Phoenix Project, with the support of the Citizen's Information Board, have produced guides to Circuit Court and High Court possession proceedings for those in mortgage arrears facing repossession of their family home.

#### 3.2.3.2 Pro bono legal assistance

The Bar Council operates a Voluntary Assistance Scheme (“VAS”) providing legal advice and representation from volunteer practising barristers in areas such as debt, housing, landlord and tenant, social welfare, employment and equality law. By contrast with the schemes operated by the Bar in England and Wales (see Section 3.2.8.1 below), VAS does not receive requests from individuals. It only accepts requests from charities, NGOs and bodies such as MABS and Citizens Information, but will accept requests from such bodies voluntarily acting on behalf of individuals. Each request is considered on a case by case basis.

While the Law Society does not operate a similar scheme, it does promote the undertaking of *pro bono* work by solicitors.<sup>86</sup> The Public Interest Law Alliance (“PILA”), an initiative of FLAC, operates a Pro Bono Referral Scheme connecting social justice organisations with free legal expertise provided by *pro bono* barristers and solicitors. The scheme does entertain requests for assistance from individuals, save where an NGO partner is supporting a person with a legal need that relates to a wider systemic issue. PILA currently works with 35 law firms, four in-house legal teams and more than 350 barristers, and with 12 law schools, and 150 NGOs and Independent Law Centres.

83 See Section 3.2.4 of this chapter

84 Available at: <https://www.courts.ie/acc/alfresco/14aa096b-5938-45e6-bc46-f8ff9808535c/Guide%20to%20Possession%20in%20the%20Circuit%20Court%20-%20updated%20November%202015.pdf/pdf#view=fitH>

85 Available at: <https://www.courts.ie/small-claims-procedure>

86 Director General of the Law Society, quoted in “Working pro bono: good idea or an excuse for State inaction?”, Irish Times, 16<sup>th</sup> March 2015.

A number of independent law centres offer free legal advice in areas such as family law, employment law and environmental law.<sup>87</sup>

### 3.2.4 McKenzie friends

Litigants in person may, subject to the court’s direction, avail of certain practical assistance in conducting their case from an accompanying person known as a “McKenzie friend”.<sup>88</sup> The Supreme Court cited as “an accurate description of the role of a McKenzie friend ... generally accepted by our courts”<sup>89</sup> the following description from a much earlier English case:

“Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices.”<sup>90</sup>

In approving this statement of the McKenzie friend’s role, Fennelly J (delivering judgment for the Court) added:

“This is not to say that a judge may not, on occasion, as a matter of pure practicality and convenience, invite the McKenzie friend to explain some point of fact or law, where the party is unable to do so or do so clearly. That must always be a matter solely for the discretion of the judge. The McKenzie friend has no right to address the court unless invited to do so by the presiding judge.”

The McKenzie friend must also comply with certain conditions in exercising the role:

“The McKenzie friend must perform his function in a manner consistent with accepted court practice and procedure, and must show due respect for acknowledged court decorum; further, he must remain fully detached from the opposing parties, their witnesses and all persons present in support of them. Overall he is expected to behave in such a manner as reflects the mutuality of respect essential for all players participating in the administration of justice.”<sup>91</sup>

Practice directions were issued in 2017 by the Court of Appeal, High Court and Circuit Court clarifying the basis on which and manner in which McKenzie friends may participate in proceedings.<sup>92</sup> Those practice directions appear to have been prompted, at least in part, by concerns expressed – including judicially – concerning the increasing incidence of persons or groups purporting to offer assistance to litigants as McKenzie friends who act beyond the proper scope of that role, or even abuse the role in suggesting to the litigant arguments of dubious legal merit or which are vexatious in nature.

In *Bank of Ireland Mortgage Bank v Martin and Anor*<sup>93</sup> Noonan J observed:

“The exponential increase in this category of litigant is now at a level where it presents a very serious challenge to the Irish courts system, already overburdened with an ever increasing case load of genuine cases. It seems to me that the time is now well past when the courts should indulge and tolerate the mode of litigation that this case typifies, engendered solely for the purpose of an anarchic attempt to frustrate and obstruct the administration of justice.”<sup>94</sup>

The practice directions of 2017 provide that -

- Litigants may obtain reasonable assistance from a lay person, sometimes called a McKenzie friend (“MF”). Litigants assisted by MFs remain litigants in person. MFs have no independent right to provide

87 See the list of such centres on the PILA website at: <https://www.pila.ie/who/our-alliance.html>

88 The term derives from the decision of the Court of Appeal in England *McKenzie v McKenzie* [1970] P. 33 in which the entitlement was recognised in more recent times.

89 *Re Coffee and Ors* [2013] IESC 11, at para. 18 (Fennelly J delivering judgment for the Court).

90 Lord Tenterden C.J. in *Collier v Hicks* (1831) 2 B. & Ad. 663, cited by Davies L.J. in *McKenzie v McKenzie* [1970] P. 33, 38.

91 *Allied Irish Banks Plc v Aqua Fresh Fish Ltd.* [2017] IECA 77, para. 29 (per McKechnie J, delivering judgment for the Court of Appeal).

92 Available at: <https://www.courts.ie/content/mckenzie-friends-2> and <https://www.courts.ie/content/mckenzie-friends-1>

93 [2017] IEHC 707.

94 *Ibid.* at para. 12.

assistance. They have no right to act as advocates or to carry out the conduct of litigation. They have no entitlement to payment for their services

- In court MFs may:
  - provide moral support for litigants;
  - take notes;
  - help with case papers, subject to limitations imposed by statute;<sup>95</sup>
  - quietly give advice on any aspect of the conduct of the case.
- MFs may not:-
  - address the court, make oral submissions or examine witnesses. MFs do not have a right of audience or a right to conduct litigation. In exceptional circumstances a court may permit an MF to address the court. Such circumstances will be rare;
  - receive any payment for their services;
  - act as the litigants’ agent in relation to the proceedings;
  - manage litigants’ cases outside court, for example, by signing court documents.
- Whilst litigants may receive reasonable assistance from MFs the court retains the power to refuse to permit such assistance. The court may do so where it is satisfied that the interests of justice and fairness do not require the litigant to receive such assistance. Where the court permits a litigant to receive assistance from a MF, it may regulate the manner in which assistance is provided. It may withdraw the permission if of opinion that the administration of justice is being impeded by the MF. If requested by the court a MF must provide his or her name, address and contact details.
- Only one MF may assist a litigant in court.

The practice directions also draw attention to the provisions of section 58 of the Solicitors Act 1954 as amended which makes it a criminal offence for an unqualified person as defined in the Act, to draw or prepare a document relating, *inter alia*, to any legal proceeding either directly or indirectly for or in expectation of any fee, gain or reward.

A further High Court practice direction issued in April 2018 precludes from acting as McKenzie friends former solicitors who have been struck off the Roll of Solicitors because of professional misconduct and former barristers who have been disbarred for professional misconduct.<sup>96</sup>

### 3.2.5 Managing litigation involving litigants in person

In common with their counterparts in other common law jurisdictions,<sup>97</sup> the Irish courts adapt their approach to the conduct of proceedings to meet the challenges which the participation of a litigant in person may present. The essence of that approach is captured in the statement of Keane CJ in *R.B. v A.S.*:<sup>98</sup>

“The conduct of a case by a lay litigant naturally presents difficulties for a trial court. Professional advocates are familiar with the rules of procedure and practice which must be observed if the business of the courts is to be disposed of in as expeditious and economic a manner as is reconcilable with the requirements of justice. That is not necessarily the case with lay litigants. Advocates, moreover, are expected to approach cases with a degree of professional detachment which assists in their expeditious and economic disposition: one cannot expect the same of lay litigants, least of all in family law cases.

The trial of cases involving lay litigants thus requires patience and understanding on the part of trial judges. They have to ensure, as best they can, that justice is not put at risk by the absence of expert legal representation on one side of the case. At the same time, they have to bear constantly in mind that the

95 See reference to section 58 of the Solicitors Act 1954 below.

96 Practice Direction HC77, available at: <https://www.courts.ie/content/mckenzie-friends-3>

97 See, e.g.: Zuckerman on Civil Procedure, Chapter 11, paras. 11.196 to 11.198 as to the approach taken by the courts in England and Wales to litigation involving litigants in person; Gray, “Reaching out or Overreaching: Judicial Ethics and Self-Represented Litigants”, 27 J. Nat’l Ass’n Admin. L. Judiciary 97 (2007) as to the approach taken in the United States.

98 [2002] 2 IR 428.

party with legal representation is not to be unfairly penalised because he or she is so represented. It can be difficult to achieve the balance which justice requires...”<sup>99</sup>

The courts may decide not to apply procedural rules rigidly against a litigant in person in their conduct of their case,<sup>100</sup> and may take a more active role in the case e.g. by itself seeking to identify the issues and what matters are relevant to the dispute.<sup>101</sup> However, the courts will not accommodate the particular needs of litigants in person to an extent which would sacrifice fairness between the parties, and litigants in person will be expected to have addressed in their pleadings matters which are relevant to the underlying dispute. The following passage from the article of Master Evan Bell mentioned in Section 3.2.1 of this chapter has received judicial approval in this jurisdiction:<sup>102</sup>

“The primary principle applied by Judges in cases involving self represented litigants is the principle of fairness. Fairness is the touchstone which enables justice to be done to all parties. A judge in proceedings involving a self represented litigant must balance the duty of fairness to that litigant with the rights of the other party and with the need for as speedy and efficient a judicial determination as is feasible. Achieving this balance is one of the most difficult challenges a judge can face. While a trial judge’s overarching responsibility is to ensure that the hearing is fair, it is not unfair to hold a self represented litigant to his choice to represent himself. A litigant who undertakes to do so in matters of complexity must assume the responsibility of being ready to proceed when his case is listed. If he embarks upon the hearing of his case, he is representing to the court that he understands the subject matter sufficiently to be able to proceed. ... While the court will take into account the litigant’s lack of experience and training, implicit in the decision to represent himself is the willingness to accept the consequences that may flow from that lack. Indeed, to hold to the contrary would mean that any party could derail proceedings by dismissing his representatives.

It is the courts duty to minimise the self-represented litigant’s disadvantage as far as possible, so as to fulfil its task to do justice between the parties. However, the court should not confer upon a personal litigant a positive advantage over his represented opponent nor is it the position that the party with the greater expertise must be disadvantaged to the point at which they have the same expertise effectively as the other party. That would be a perversion of what is required, which is a fair and equal opportunity to each party to present its case.”<sup>103</sup>

In noting the references in the passage to a person who “chooses” to self-represent, Clarke J (as he then was) commented:

“It may well be that in many cases the party concerned has no real choice in the matter for they may not be able to afford legal representation. That may well be a factor to take into account in deciding precisely how to deal with difficult situations which may arise in the course of a trial. However, whether a person represents themselves of choice or of necessity does not alter the overriding requirement that the conduct of the trial must be fair to both sides, and that the fact that a person is, for whatever reason, unrepresented cannot be allowed to operate as an unfairness to the represented party.”<sup>104</sup>

A practice direction was introduced in the High Court in July 2010 governing proceedings in which one or more of the parties does not have professional legal representation<sup>105</sup> with the object of ensuring that motions to the court and trials were adequately prepared for by the litigant in person, and that the hearing is effectively conducted, by requiring that the litigant in person and the other party identify the factual and legal issues requiring to be addressed at the hearing. To that end, the unrepresented party and the represented party were required to complete, file and (except in the case of an application not required

99 Ibid, 447.

100 E.g. *European Fashion Products Ltd and Others v Eenkhoorn and Others* [2001] IEHC 181.

101 *Tracey t/a Engineering Design & Management v Burton* [2016] IESC 16 at para. 48.

102 By Clarke J in the High Court *ACC Bank v Kelly* [2011] IEHC 7 at para. 6.

103 Bell, op. cit., pages 5 and 6.

104 [2011] IEHC 7 at para. 8.

105 HC54 (Proceedings involving a litigant in person), available at: <https://www.courts.ie/content/proceedings-involving-litigant-person>

to be made on notice) serve a form in advance of (a) making a pre-trial application and (b) the trial of the proceedings.

In the form to be used for pre-trial applications each party is required to

- state concisely their claim or defence in the main proceedings
- state concisely and in chronological sequence the essential facts on which they will be relying in making the application
- state concisely any principles of law on which they will be relying and indicate how those principles apply to the facts
- list any statutory provisions on which they intend to rely
- list any case-law on which they intend to rely

In the form to be used for the trial each party is required to

- state concisely and in chronological sequence the essential facts on which they will be relying in the course of the trial, and indicate whether these have been agreed with the other party/parties, and if not, why not
- state concisely any issues of fact which they consider will require to be determined at trial and indicate whether these have been agreed with the other party/parties, and if not, why not
- state concisely any principles of law on which they intend to rely at the trial and indicate how those principles apply to the facts
- set out any issues of law which they consider will require to be determined at trial and indicate whether these have been agreed with the other party/parties, and if not, why not
- list any statutory provisions on which they will be relying at the trial
- list any case-law on which they intend to rely at the trial.

It is understood, however, that the practice direction is not currently being complied with in practice by parties and practitioners.

### 3.2.6 Measures to address vexatious or unfounded cases

Concern was expressed within the Review Group as to the increase in the number of applications to strike out proceedings, in particular since the onset of the financial crisis, due to a proliferation of pseudo-legal arguments sometimes raised by professionally unrepresented litigants, and to the separate but overlapping legal bases on which applications to strike out may be made.

Under its rules-based jurisdiction, the High Court under Order 19, rule 28 RSC may:

- (a) strike out a pleading where a pleading discloses no reasonable cause of action or answer;
- (b) in the case of (a) or where the action or defence is, on the pleadings, shown to be frivolous or vexatious, stay or dismiss the proceedings in their entirety or (as the case may be) order judgment to be entered,

and under Order 19, rule 27 RSC, may order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action.

There is no express rule in the Circuit Court Rules to the same effect but by virtue of Order 67, rule 16 CCR, the High Court rules concerned have application in that jurisdiction.<sup>106</sup> The District Court Rules make similar provision to the rule applicable in the High Court.<sup>107</sup>

<sup>106</sup> Order 67, rule 16 CCR provides: “Where there is no Rule provided by these Rules to govern Practice and Procedure, the Practice and Procedure in the High Court may be followed.”

<sup>107</sup> Order 42, rules 15 and 16 DCR.

The High Court has a separate inherent jurisdiction to strike out or stay proceedings if they are frivolous or vexatious or bound to fail.<sup>108</sup> The jurisdiction stems from the court’s inherent power to prevent an abuse of process.<sup>109</sup> By contrast with its rules-based powers aforementioned, the court is not confined to a consideration of the pleadings, but may hear evidence on affidavit.<sup>110</sup> However, the inherent jurisdiction is to be exercised “sparingly and only in clear cases”<sup>111</sup> and will not be exercisable where the facts are disputed between the parties and may only be resolved by oral evidence.<sup>112</sup>

The Review Group considers that Order 19 rules 27 and 28 RSC, should be re-stated to align their provisions with the basis on which the court may exercise its inherent jurisdiction, but dispensing with the terms “frivolous” and “vexatious” as those terms do not in modern parlance sufficiently convey what is in dispute on an application to the court of this nature and are often seen by the litigant in person as an insult, when invoked. This recommendation is set out in further detail in Section 6 of this chapter.

### 3.2.7 Simplification of procedures and language

The need for simplification of procedures and the language in court rules and forms is recognised in submissions to the Review Group and in reforms in other jurisdictions directed at improving access to justice for litigants in person.

The current Rules of the Superior Courts and associated forms underwent their last formal consolidation in 1986, but without effecting extensive modernisation of terms or language.

The process of simplifying court rules is not necessarily a simple task, in that the rules are often conditioned by requirements – e.g. as to the matters on which evidence may require to be given in support of an application to the court – and language set out in primary legislation, which may be complex in its design and expression. Although the Law Reform Commission in its report, “Statutory Drafting and Interpretation: Plain Language and the Law”<sup>113</sup> made specific recommendations concerning clarity and simplicity of language and the Attorney General’s Office has produced a drafting manual designed to modernise and simplify the approach to statutory drafting, the adverse impact of complex primary legislation on the resolution of litigation has been the subject of criticism.<sup>114</sup>

The Courts Service’s Long-term Strategic Vision Statement for the period to 2030 mentioned at Section 2.2.2 of this chapter commits it to working to “simplify court practices and procedures and design our services based on the needs of those who use them.” The related outcome of this intended reform is stated as:

“[s]implified provision of access to justice for individuals and organisations through reduced complexity and associated cost, particularly in lower value / lower complexity cases, with people only having to come to court to have their case dealt with where necessary.”

The Review Group makes recommendations for rationalisation and simplification of civil procedure and forms in Chapter 5 and, as mentioned in recommendation 6.15 in Section 6 of this chapter, it sees a role for a Steering Group of Justice sector agencies, the legal profession and voluntary and publicly-funded advice bodies in provide input to the court rules committees on opportunities for simplification of procedures and language in rules and forms.

108 *Barry v Buckley* [1981] IR 306.

109 *Keohane v Hynes* [2014] IESC 66 at para. 6.5.

110 *Barry v Buckley* [1981] IR 306 at 308.

111 *Ibid.*

112 *Olympia Productions Ltd v Mackintosh and Ors.* [1992] I.L.R.M. 204 at 207.

113 (LRC 61–2000), available at: [https://www.lawreform.ie/\\_fileupload/Reports/rPlainLanguage.pdf](https://www.lawreform.ie/_fileupload/Reports/rPlainLanguage.pdf)

114 “Intentions of new laws often hard to discern, Chief Justice says”, Irish Times, 17<sup>th</sup> July 2018.



### 3.2.8 Initiatives to assist litigants in person in other jurisdictions

#### 3.2.8.1 England and Wales

A number of initiatives have been undertaken in England and Wales to facilitate access to justice by litigants in person, driven in part by the reduction in the budget available for civil legal aid.<sup>115</sup>

A Litigant in Person Support Strategy was launched in 2014 the objectives of which are (i) to create arrangements across England and Wales to enable litigants in person to know what support is available to them; (ii) to enable them to get practical support and information; and (iii) to provide them with a route to some free or affordable legal advice.<sup>116</sup> The strategy is a collaborative effort between publicly funded and voluntary legal information and advice bodies.<sup>117</sup>

As part of the strategy a section, “Going to Court and Tribunal”, has been created within the central website, “Advice Now”<sup>118</sup> – a website maintained by a private charity, Law for Life: the Foundation for Public Legal Education, providing legal and practical information on various aspects of law affecting the individual in plain language. The “Going to Court and Tribunal” section contains practical information on conducting proceedings in the family courts, civil courts and before tribunals, and links to sources of advice.

Within the courts system itself, a series of guides have been developed by the Judiciary for litigants in person, including a general – 160-page plus – Handbook for Litigants in Person and separate guides for particular lists or types of application.<sup>119</sup> This complements a wide range of legal information resources for litigants in person provided by publicly-funded and voluntary legal advice bodies.

The legal profession, the citizens advice bureaux and independent charities are active in providing advice and assistance to litigants in person. This includes *pro bono* legal assistance schemes, including the Chancery Bar Litigant in Person Support Scheme (“CLIPS”), the Interim applications scheme in the Queen’s Bench Division and a scheme for applications for leave to appeal to the Court of Appeal. The first mentioned scheme is supported among others, by the Bar Pro Bono Unit, the High Court Citizen’s Advice Bureau, the Chancery Bar Association, Law Works – the Solicitors Pro Bono Group – and the Personal Support Unit (“PSU”), and receives co-operation from the Judiciary. Volunteers from the Bar are rostered to be available at court from 10 am to 4.30 pm to provide, on a “first come first served” basis, advice to litigants in person before they go to court and on the spot representation where the litigant may have an interim application before the court.

In 2008, the Bar Council, Law Society and Chartered Institute of Legal Executives established a charity – the Access to Justice Foundation (“AJF”) – in partnership with the voluntary advice sector to raise funds from the profession and distribute them to voluntary legal advice centres. Additional funding for AJF’s activities is now supplied by costs orders made under section 194 of the Legal Services Act 2007, under which a court may award a party represented *pro bono* costs on the basis that the costs are remitted to be paid to the Access to Justice Foundation, as the designated charity. The AJF then applies the funds to regional Legal Support Trusts, national *pro bono* organisations and towards its own projects.

115 These initiatives followed upon a number of reports including the Civil Justice Council’s report “Access to Justice for Litigants in Person”, available at: <https://www.judiciary.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf>

and the report of the Judicial Working Group on Litigants in Person of 2013 available at: [https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/lip\\_2013.pdf](https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/lip_2013.pdf)

116 Lord Justice Briggs, “Civil Courts Structure Review: Interim Report”, Chapter 3, para. 3.40.

117 The strategy is led by the Foundation for Public Legal Education (Law for Life), LawWorks (the Solicitors Pro Bono Group), Support Through Court (previously known as the Personal Support Unit) – a charity dedicated to providing assistance to individuals facing court alone – and RCJ Advice, the citizens’ advice bureau located at the Royal Courts of Justice in London, with support from the Bar Pro Bono Unit and the Access to Justice Foundation.

118 Available at: [www.advicenow.org.uk/going-to-court](http://www.advicenow.org.uk/going-to-court)

119 Interim Applications in the Chancery Division: A Guide for Litigants in Person; Terminology for Litigants in Person Practice guidance issued by the Master of the Rolls; The Interim Applications Court of the Queen’s Bench Division of the High Court: A guide for litigants in person. The various guides are available at: <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/advice-for-litigants-in-person/>

In addition to *pro bono* legal assistance, a separate charity, Support Through Court, supports litigants in person, witnesses, victims, their family members and other supporters attending the Royal Courts of Justice in London and courts in other cities (over 100 fully trained and experienced volunteers service the Royal Courts of Justice). Support provided varies from directions or advice about procedures to the moral and emotional support of being accompanied in court.

In 2015 a High Court judge was appointed to improve co-ordination at judicial level of efforts to assist litigants in person, which included developing with the Judicial College and the Civil Justice Council specific training for judges in dealing with litigants in person.<sup>120</sup>

A new rule 3.1A CPR came into force in 2015 regulating case management in cases in which at least one party is legally unrepresented.<sup>121</sup> The rule provides, *inter alia*, that -

- when the court is exercising any powers of case management, it must have regard to the fact that at least one party is unrepresented
- the court must adopt such procedure at any hearing as it considers appropriate to further the overriding objective of the CPR, viz. to enable the court to deal with cases “justly and at proportionate cost”
- at any hearing where the court is taking evidence this may include—
  - (a) ascertaining from an unrepresented party the matters about which the witness may be able to give evidence or on which the witness ought to be cross-examined; and
  - (b) putting, or causing to be put, to the witness such questions as may appear to the court to be proper.

### 3.2.8.2 Northern Ireland

The Gillen Report in Northern Ireland recommended that the Northern Ireland Courts and Tribunal revise its present website and provide “a genuine and easily accessible information hub” for litigants in person (“PLs”) couched in appropriately plain language with an emphasis on information, education, what the courts expect and how the court will assist the PL. The hub should complement “over the counter” support and the use of social media, such as YouTube, and provide short videos on aspects of bringing a claim to court, e.g.:

- a rudimentary guide to the forms, pleadings, applications and skeleton arguments that have to be completed in the court process
- a basic guide to court etiquette
- the stages through which cases progress
- the importance of time limits for applications and appeals
- alternatives to the court process
- a description of the court environment/how the court is to be addressed, etc.
- rudimentary guidelines as to how evidence is taken and obtained in the civil justice court system
- voluntary and *pro bono* help that is available
- the use of McKenzie friends
- signposts to services for the vulnerable
- cost implications of the legal process
- the consequences of refusal to obey court orders.

### 3.2.8.3 Scotland

In-court advice services have operated in Sheriff courts independently of the court itself under varying management arrangements, with the involvement of public bodies such as Citizens Advice Scotland,

120 See Ms Justice (now Lady Justice) Asplin, “The need to coordinate LIP initiatives” at <https://www.judiciary.uk/wp-content/uploads/2017/03/asplin-j-the-need-to-coordinate-lip-initiatives-autumn-2016.pdf>

121 The rule change was recommended by the Judicial Working Group on Litigants in Person of 2013, op. cit.

voluntary bodies and local authorities.<sup>122</sup> The Scottish Civil Courts Review (“Gill”) in its Final Report recognised the contribution of these services and recommended that they should be developed and extended within the context of the Scottish Legal Aid Board’s plans for improvement and co-ordination of publicly-funded civil legal assistance and advice.<sup>123</sup>

#### 3.2.8.4 Other jurisdictions

Measures proposed to facilitate litigants in person in Hong Kong and Canada, referred to in Chapter 2, included, notably, the following:

- the enhancement of the information content available to such litigants and broadening of the means by which that information is made available to them, including audio-visual formats
- the simplification of forms and procedures
- provision of specific training and guides for judges and court staff in dealing with litigants in person, including on what information court staff may appropriately impart on the legal process to members of the public
- a power on the court’s part to intervene, whether to clarify inadequate pleadings delivered by, or to manage cases involving, litigants in person
- encouraging recourse to options for alternative dispute resolution
- and making available of information and limited, or “unbundled” legal advice to litigants in person, whether at the court itself or in the community. In British Columbia, this is provided through “Justice Access Centres”, funded by the Ministry of the Attorney General and operated in partnership with pro bono legal advice, debt advice and mediation bodies, providing self-help and information services, limited legal advice, and mediation and other dispute resolution options.<sup>124</sup>

The Canadian Judicial Council adopted a “Statement of Principles on Self-represented Litigants and Accused Persons” in 2006,<sup>125</sup> which encompasses promotion of rights of access to justice and equal justice<sup>126</sup> and a statement of the responsibilities of the participants in the justice system,<sup>127</sup> including the Judiciary, court administrators, litigants in person themselves and the legal profession.

#### 3.2.8.5 Lessons from other jurisdictions

A feature common to the jurisdictions examined is the recognition that facilitating and improving access to justice for litigants in person depends on a mix of measures and a collaborative approach between the courts system, the legal profession, Justice agencies and the voluntary sector. The Canadian Judicial Council’s Statement of Principles above mentioned comments that “[t]he design of programs to assist self-represented persons should be a collaborative effort among the judiciary, the courts, the Bar, Legal Aid providers, the public, and relevant governmental agencies.”<sup>128</sup>

### 3.3 Persons whose capacity is or may be in issue

#### 3.3.1 Wardship and the new capacity regime

The Review Group has given careful consideration to the position of persons in wardship in light of the prospect that wardship will, insofar as adults with incapacity are concerned, be replaced in the near future by a new regime under the Assisted Decision-Making (Capacity) Act 2015. That Act provides, *inter alia* for -

122 See Evans, “Rethinking Legal Aid: An Independent Strategic Review”, Appendix 3, page 99 et seq..

123 Scottish Civil Courts Review report, Volume 2, Chapter 11, para. 36.

124 See: <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/jac>

125 Canadian Judicial Council, “Statement of Principles on Self-represented Litigants and Accused Persons”, available at: [http://www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_other\\_PrinciplesStatement\\_2006\\_en.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf)

126 “Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.”

127 “All participants are accountable for understanding and fulfilling their roles in achieving the goals of equal access to justice, including procedural fairness.”

128 Canadian Judicial Council, “Statement of Principles on Self-represented Litigants and Accused Persons”, op. cit., at page 11.

- replacement of the current approach to determining capacity – involving a general capacity test – with a new, functional approach,<sup>129</sup> founded on the presumption of capacity<sup>130</sup> and that any intervention should be to the least extent necessary, should promote participation by the relevant person in the intervention and should give effect to such matters as his or her past and present will and preferences<sup>131</sup>
- a range of new types of intervention to facilitate decision-making by or for the benefit of persons with incapacity issues, including
  - decision-making assistance<sup>132</sup>
  - co-decision-making<sup>133</sup>
  - substituted decision-making by the court or a decision-making representative<sup>134</sup>
  - enduring powers of attorney with expanded scope in the area of decisions relating to personal welfare<sup>135</sup>
  - advanced healthcare directives, allowing for nomination of a designated healthcare representative<sup>136</sup> and
  - other forms of court intervention, e.g. to make a declaration as to the lawfulness of an intervention proposed to be made in respect of the relevant person<sup>137</sup> and
- a new Decision Support Service under a Director charged with oversight of the operation of the new decision support mechanisms.<sup>138</sup>

Insofar as court-based remedies are concerned, the 2015 Act also envisages the appointment of a “court friend” for a relevant person where he or she has not instructed a legal practitioner and there is no decision-making assistant, co-decision-maker, decision-making representative, attorney under a power of attorney available and willing to assist the relevant person in the course of the hearing.<sup>139</sup>

The 2015 Act envisages a review by the wardship court of the capacity of adult wards of court, either

- individually on the application of the ward, a relative or friend of the ward having the ward’s trust or such other person as the court considers to have a sufficient interest or expertise in the welfare of the ward or
- on foot of the court’s obligation to conduct such a review of adult wards within 3 years from the date of commencement of Part 6 of the 2015 Act.<sup>140</sup>

The court on carrying out the review may declare that

- the ward does not lack capacity
- the ward lacks capacity, unless the assistance of a suitable person as a co-decision-maker is made available to him or her, to make one or more than one decision
- the ward lacks capacity, even if the assistance of a suitable person as a co-decision-maker were made available to him or her.<sup>141</sup>

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129 Section 3 of the 2015 Act.

130 Section 8(2) of the 2015 Act.

131 Section 8(7) of the 2015 Act.

132 Part 3 of the 2015 Act.

133 Part 4 of the 2015 Act.

134 Part 5, Chapter 4 of the 2015 Act.

135 Sections 2(1) and 62 of the 2015 Act.

136 Part 8 of the 2015 Act.

137 Section 37(3) of the 2015 Act.

138 Part 9 of the 2015 Act.

139 Sections 36(9) and 100 of the 2015 Act.

140 Section 54 of the 2015 Act.

141 Section 55 of the 2015 Act.

Certain provisions of the 2015 Act have been commenced and the Review Group understands that a considerable amount of preparatory work has been undertaken with a view to the new regime coming into operation.

The Review Group is aware from submissions received as part of its the public consultation exercise – including those from the National Safeguarding Committee which reviewed adult wardship in a 2017 report<sup>142</sup> and the Law Society<sup>143</sup> of various criticisms which have been made of the present wardship jurisdiction. These cover a range of issues, including

- arrangements for assessing and informing persons subject to wardship proceedings,
- the affording to wards of input into the care of their persons and property,
- provision for appeals against de facto detention
- arrangements for investment of wards’ funds
- retention of outmoded and offensive terminology associated with the 19th century primary legislation regulating wardship.

Against that, a submission from the Self-insured Task Force, representing a number of public bodies and private companies which are regularly engaged in defending personal injuries claims, expressed concern that the abolition and replacement of the wardship regime might have adverse implications for protection of the interests of vulnerable plaintiffs in receipt of large compensation awards.

It is important to note that certain of the criticisms of wardship – such as that relating to as the performance of wardship funds invested – are not undisputed<sup>144</sup> and that some – such as the test for admission to wardship – derive from the substantive law of capacity as regulated by primary legislation,<sup>145</sup> changes to which could only be effected by primary legislative amendment.

The Review Group is also conscious that the courts in exercising wardship jurisdiction have emphasised the requirement that that jurisdiction must be exercised in accordance with fair procedures and constitutional justice.<sup>146</sup> It notes that a scheme has been initiated<sup>147</sup> by the President of the High Court for review of individual wards’ circumstances by general practitioners, geriatricians and psychiatrists on a random, unannounced basis. Insofar as investment of wardship funds is concerned, it notes that the recommendation in the Joint Committee on Justice and Equality’s report of February 2018<sup>147</sup> that the relevant primary legislation<sup>148</sup> be amended to enable investments funds for wards of court to be audited by the Comptroller and Auditor General was not deemed feasible on constitutional grounds.<sup>149</sup> The Review Group is also aware that measures have been taken in recent years by the Courts Service to issue annual statements of wards’ funds in court to committees of wards of court.

It is also understood that considerable work has been done within the Courts Service in preparing draft rules of court, replacing the existing rules relating to wardship, to facilitate the operation of the new capacity regime once the relevant provisions of the 2015 Act have been commenced.

142 The National Safeguarding Committee, “Review of current practice in the use of wardship for adults in Ireland”, December 2017, available at: <https://www.safeguardingireland.org/wp-content/uploads/2018/10/Wardship-Review-2017.pdf>

143 See Theme V of the Law Society’s submission, available at: <https://www.lawsociety.ie/globalassets/documents/committees/litigation/submission-administration-civil-justice-2018.pdf>

144 See submissions of the Courts Service referred to at para. 8.2 of the Joint Committee on Justice and Equality Report on the Wards of Court February 2018, available at: [https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint\\_committee\\_on\\_justice\\_and\\_equality/reports/2018/2018-02-22\\_report-on-the-wards-of-court\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2018/2018-02-22_report-on-the-wards-of-court_en.pdf)

145 The Lunacy Regulation (Ireland) Act 1871.

146 See judgment of Denham J (Supreme Court) in *Eastern Health Board v. M.K.* [1999] 2 I.R. 99 at 111; Kelly J (High Court) in *F.D (an Infant) v Registrar of Wards of Court* [2004] 3 IR 95 at para. 29.

147 Joint Committee on Justice and Equality Report on the Wards of Court (February 2018).

148 The Comptroller and Auditor General (Amendment) Act 1993.

149 Written reply by Minister for Justice and Equality to Parliamentary Questions Nos. 186 to 188, issued on the 9<sup>th</sup> October 2018, available at: <https://www.oireachtas.ie/en/debates/question/2018-10-09/187/>

Aside from these factors and developments, the Review Group is mindful of the relatively short timeframe remaining until replacement of wardship by the new capacity regime. The diversion of effort and resources which would be required to amend primary legislation to effect changes, *ad interim*, to the wardship jurisdiction – which effort and resources might be better invested in establishing the new capacity regime – would not seem either productive or desirable. The Review Group does not therefore consider it advantageous to make recommendations for interim measures to reform the wardship jurisdiction.

### 3.3.2 Capacity issues and litigation

#### 3.3.2.1 Parties with capacity issues

Article 13 of the United Nations Convention on the Rights of Persons with Disabilities (CRDB) provides:

“1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

Currently, a person who lacks intellectual capacity to manage his or her affairs according to the general capacity test may only bring proceedings through a person appointed as their committee by the court exercising wardship jurisdiction or by a next friend, and may only defend proceedings by such a committee or by a guardian appointed for that purpose.<sup>150</sup> Ordinarily, a solicitor acting for a client with intellectual incapacity who is involved in or faced with litigation will make inquiries with a view to the client being taken into wardship and a committee appointed to act in the litigation.

Under the functional approach to capacity of the new capacity regime described above, the question of whether a person has capacity to litigate will require distinct consideration. In England and Wales, the procedure for appointment of a “litigation friend” described in Section 3.1.2.1 of this chapter in relation to children applies also to a “protected party”, viz. a party, or an intended party, who lacks capacity to conduct the proceedings.<sup>151</sup> A standard form of certificate of capacity to conduct proceedings has been provided by the Official Solicitor for completion by medical practitioners or psychologists conducting an assessment of an adult’s capacity to conduct their own proceedings in the Family Court, the High Court, a county court or the Court of Appeal.<sup>152</sup> The standard form requires, *inter alia*, that the professional identify the impairment of, or disturbance in the functioning of the person’s mind or brain concerned and why it causes the person to be unable to make the decisions necessary to conduct of the proceedings concerned.

The Review Group recommends that a standard certificate be prescribed by rule of court for use in cases of an assessment of litigation-related incapacity for use under the new capacity regime.

The Law Society and the DSBA drew attention in their submissions to the absence – as in the case of claims involving children – of a procedure for the approval of settlement of claims involving persons under a disability where proceedings have not issued in respect of the claim. In such a situation, a solicitor acting for the adult would, under current law, be expected to bring the matter to the attention of the Office of Wards of Court with a view to the adult being taken into wardship and a committee being appointed and, with the benefit of professional advice and subject to the wardship court’s approval, entering into any settlement and giving a valid receipt for any moneys payable for the ward.

150 Order 15 rule 17 RSC; Order 6 rule 8 CCR; Order 43, rule 10 DCR. An application for appointment of a guardian *ad litem* is made to the Master of the High Court in the High Court (Order 63, rule 1(3) RSC), to the County Registrar in the Circuit Court (Order 19, rule 1 CCR) and to the District Court judge in the District Court (Order 43, rule 7 DCR).

151 Rule 21.1(2)(d) CPR.

152 The standard form of certificate is available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/582243/capacity-to-conduct-proceedings-certificate.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/582243/capacity-to-conduct-proceedings-certificate.pdf)

The Law Society’s Guide to Good Professional Conduct for Solicitors<sup>153</sup> provides certain advice to solicitors in dealing with persons lacking intellectual capacity to deal with their assets and draws attention to the need to have recourse to wardship in such circumstances.<sup>154</sup> However, the guidance does not specifically address a situation where a compromise of proceedings brought or defended by or on behalf of a person lacking capacity is in question.

In England and Wales the rules of court (referred to in Section 3.1.2.2 of this chapter) which require a settlement, compromise or payment in respect of a claim of or against a child to be approved by the court so as to be valid, apply equally to persons who lack intellectual capacity in relation to the claim.

Those rules, however, co-exist with the mental capacity regime introduced in that jurisdiction by the Mental Capacity Act 2005, which operates on the basis of a functional test of capacity similar to that which will apply in this jurisdiction on the commencement of the 2015 Act. Until that new regime is introduced, it would seem necessary that any compromise of a claim by or against a person with intellectual capacity should be dealt with within the wardship jurisdiction.

### 3.3.2.2 Witnesses with capacity issues

The special arrangements for adducing of evidence and for admissibility as evidence of statements from children in proceedings concerning a child’s welfare referred to at Section 3.1.3 of this chapter apply, with the necessary modifications, to civil proceedings before any court concerning the welfare of a person who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live independently.<sup>155</sup>

## 4. Court fees

Court fees are prescribed by the Minister for Justice, Equality and Law Reform with the consent of the Minister for Finance<sup>156</sup> – the last sets of fees for the various jurisdictions being set in 2014 – and the Courts Service may from time to time recommend to the Minister appropriate scales of court fees and charges.<sup>157</sup> Exemptions from court fees are provided for in various categories of proceedings, including family law, child care and guardianship proceedings, judicial review in respect of immigration and criminal matters, bail applications and applications under Article 40.4 of the Constitution.<sup>158</sup>

Court fees are generally payable by reference to the individual documents filed or issued in the proceedings. The following fees are commonly payable in the jurisdictions indicated:

	District Court	Circuit Court	High Court	Court of Appeal	Supreme Court
Document initiating proceedings <sup>159</sup>	€80	€130	€190		
Pleading		€15			
Affidavit	€15	€15	€20.00	€20	€20

153 Available at: <https://www.lawsociety.ie/globalassets/documents/committees/conduct-guide.pdf>

154 Ibid., page 21.

155 Section 20(b), Children Act 1997.

156 Section 65, Courts of Justice Act 1936.

157 Section 6(2)(e), Courts Service Act 1998.

158 i.e. for *habeas corpus*. The full list of exempted proceedings is set out in the fees orders for the court jurisdictions concerned, viz.: the Supreme Court, Court of Appeal and High Court (Fees) Order 2014 (S.I. No. 492 of 2014); the Circuit Court (Fees)(No. 2) Order (S.I. No. 491 of 2014) and the District Court (Fees) Order 2014 (S.I. No. 22 of 2014).

159 For proceedings to recover a debt or liquidated amount, the fee on the initiating document will be determined by the amount claimed: in the District court this ranges between €25 and €80, in the Circuit Court, between €90 and €130 and in the High Court, between €150 and €400.

	District Court	Circuit Court	High Court	Court of Appeal	Supreme Court
Notice of motion	€15	€60	€60	€60	€60
Notice of /setting down for trial		€120	€250		
Notice of appeal	€25	€25	€130	€250	€250
Court order	€15				

The total cost of court fees incurred in a case will depend on the number of pre-trial applications made and volume of documents filed in the proceedings, and on whether an appeal is lodged.

Revenue from court fees represents a significant proportion of the Courts Service’s annual budget. The Courts Service collected €46.2 million approx. in court fees in 2018, representing just over a third of its current expenditure in that year.<sup>160</sup> Based on the most recently available comparable data – for 2016 – Ireland ranked third highest in the Council of Europe area in terms of the proportion court fees represented of the court budget.<sup>161</sup> However, comparing revenue raised from court fees per inhabitant in that year, Ireland, at €10.22, ranked less than the European average of €11.30.<sup>162</sup>

Potential clearly exists for court fees, if fixed at an excessive level, to impede access to justice for individual litigants. However, unlike in England and Wales, Ireland has never adopted a policy of setting court fees at a level with the object of fully funding the cost of administering the courts from court fees revenue. Indeed, limitations both of a constitutional and statutory nature would seem to preclude the possibility of any such approach.

In *Murphy v Minister for Justice and Ors*,<sup>163</sup> the Supreme Court held that the imposition of charges for court services was not unconstitutional provided that such charges are reasonable – there being a constitutional presumption that charges imposed are not unreasonable – and that in determining whether such charges are reasonable, regard should be had to the nature of the charges and their amount. While the Court acknowledged that court fees could present a significant burden to a litigant, that burden had to be considered in light of the State’s obligation to provide legal aid or comparable facilities in certain circumstances. Statute provides that the Minister may prescribe court fees so that so much of the expenditure on court offices or courts, transaction of business of court offices or courts or provision of services and facilities to court or court office users as the Minister considers reasonable is recovered from court fees.<sup>164</sup>

Court fee costs in Ireland are in any event generally lower than, and in many instances are significantly lower than, those charged in comparable common law jurisdictions.<sup>165</sup> Significantly, Ireland has not followed the trend in some common law jurisdictions to levy substantial repeat court fees for use of court hearing time.<sup>166</sup> In the New Zealand District Court, after the first half-day of a hearing, a hearing fee of NZ \$ 900 is

160 Courts Service Appropriation Account (Vote No. 22), available at: <https://www.audit.gov.ie/en/Find-Report/Publications/Appropriation%20Accounts/Appropriation-Accounts-2018.pdf>

161 Figure 2.34 on page 70, CEPEJ biennial report, “European Judicial Systems, 2018 Ed. (2016 data), op. cit..

162 Figure 2.31 on page 65, CEPEJ biennial report, “European Judicial Systems, 2018 Ed. (2016 data), op. cit..

163 [2001] 2 ILRM 144.

164 Section 65(1A) and (1B), Courts of Justice Act 1936, inserted by section 66, Civil Law (Miscellaneous Provisions) Act 2011.

165 Comparisons made are with: England and Wales (The Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015); Australia (New South Wales Civil Procedure Regulation 2017 and High Court of Australia (Fees) Regulation 2012); New Zealand (District Courts Fees Regulations 2009; High Court Fees Regulations 2013); Canada (Ontario Regulation 293/92 Superior Court of Justice and Court of Appeal Fees).

166 A fee of €5,000 is now payable on filing a notice of motion for entry of proceedings in the Commercial List of the High Court, but this is not a hearing fee as such, as is payable irrespective of whether the proceedings go to trial: Item 17(a), Schedule 1, Supreme Court, Court of Appeal and High Court (Fees) Order 2014, op. cit..



payable for every half-day or part of a half-day of further hearing time.<sup>167</sup> Higher rates are charged in the High Court.<sup>168</sup> In New South Wales, an ascending rate for a trial hearing applies for each day or part of a day after the first day, viz.: A\$ 909 for days 2 to 4, A \$1,460 for days 5 to 9 and A\$2,941 for each day or part of a day after the ninth day.<sup>169</sup> In England and Wales, a single hearing fee is charged: £1,090 for a multi-track case, £545 for a fast-track case and between £25 and £170 for a small claims case, depending on the claim value.

In Australia, higher scale of fees than those applicable to individual litigants have been introduced for corporations.<sup>170</sup>

However, unlike the position in some common law jurisdictions, no exemption from liability for court fees is available to specific categories of persons such as medical card holders (as, e.g., in the Federal Court of Australia) or recipients of means-related social assistance (as e.g., in England and Wales, New Zealand and Ontario). No statutory discretion exists to waive court fees for inability to pay (as, e.g., in New Zealand, where the court registrar may grant such a waiver<sup>171</sup>) or to apply a reduced prescribed fee where the standard fee would cause financial hardship to an individual (as, e.g., in the High Court of Australia<sup>172</sup>).

In submissions to the Review Group, FLAC recommended that persons in receipt of means-tested social welfare payments or holding a medical card be automatically exempted from court fees. The Dublin Solicitors Bar Association recommended that court documents filed in appeals to the Circuit Court of decisions made by Mental Health Tribunals and inquiry orders in wardship applications be exempted from court fees.

## 5. Responses to the consultation exercise and views expressed within the Review Group

The submissions to the Review Group contained a range of suggestions as to how vulnerable litigants in particular might be assisted in more effectively accessing justice. Reference has already been made in Section 3.3.1 of this chapter to submissions made concerning the existing wardship regime.

The DSBA recommended

- that the “Brady Circular” (Legal Aid Board Circular 07/2007) utilised in the District Court to facilitate the appointment of advocates / staff liaison persons to vulnerable court users to assist in their accessing legal advices and the courts be applied to all court jurisdictions
- removal of the obligation to pay court fees on the filing of court documents relating to appeals to the Circuit Court of decisions made by Mental Health Tribunals and court fees on inquiry orders in wardship applications
- extension of the civil legal aid scheme to Ward of Court applications to the High Court, depending on value of estate
- provision of more “Consultation Areas/Rooms” to facilitate communication with vulnerable court users
- setting specific “not before time slots” in Court Lists to facilitate attendance by vulnerable Court users

167 Item 11, Schedule 1, District Courts Fees Regulations 2009.

168 Item 20, Schedule, High Court Fees Regulations 2013.

169 Item 9, Schedule 1, Civil Procedure Regulation 2017, as amended.

170 E.g. Regulation 4, New South Wales Civil Procedure Regulation 2017, which also applies the higher rate to unincorporated partnerships. An exemption is available under the NSW Regulations where the corporation shows an annual turnover of less than A\$200,000 (Regulation 4(4)).

171 Regulation 5, District Courts Fees Regulations 2009, New Zealand, available at: <http://www.legislation.govt.nz/regulation/public/2009/0318/latest/DLM2438106.html>

172 Regulation 12, High Court of Australia (Fees) Regulation 2012, available at: <https://www.legislation.gov.au/Details/F2018C00801>

- provision of facilities for vulnerable Court users including nominated access friendly courtrooms, sufficient audio microphones to facilitate addressing the Court, supportive furniture, specific audio headphones at the rear of the courtroom.

The DSBA also suggested that consideration could be given to the introduction of procedures for approval of settlements of claims involving persons under disability prior to the issue of proceedings. It also sought greater clarity on the process of choosing a next friend in litigation and the onus and risks that attach to the undertaking of that function, and that consideration be given to providing guidance in rules on the steps to be taken where a plaintiff loses intellectual capacity during the course of the litigation and the effect this has on the legal practitioner’s engagement with the client. These recommendations were also reflected in the submissions made by the Law Society.

However, the Review Group notes that the Law Society’s Guide to Good Professional Conduct for Solicitors mentioned in Section 3.3.2.1 of this chapter already advises, *inter alia*, that “[a]s with any other contract, if a client lacks mental capacity, he does not have the legal capacity to enter into a contractual relationship with the solicitor” and that “[a]n assessment as to capacity should be made at the time the client is giving instructions and at the time of the execution of any document. However, it should also be recognised that in some cases a person may not have the capacity to make any decisions which have legal consequences.”<sup>173</sup>

The Bar Council endorsed the recommendation of the Gillen Report referred to in Section 3.2.8.2 of this chapter, and recommended that links to the Guidelines for Personal Litigants previously available on the Courts Service’s website (referred to at Section 3.2.3.1 of this chapter) be provided on public service websites such as that of the Citizens Information Board and that litigants in person at the outset of their participation in litigation be informed by court offices of the official information guide for them and required to “certify in writing that they have received, considered and understood the information”. This latter recommendation begs the question, however, as to whether litigants in person may be singled out for imposition of such a requirement and what the consequence of their failure to so certify could be.

The Bar Council, while noting that the principles applicable to McKenzie friends had been developed in the jurisprudence and welcoming the practice directions concerning their participation in proceedings (referred to at Section 3.2.4 of this chapter), recommended the introduction of rules of court consolidating and “where appropriate” reforming the principles concerning McKenzie friends “to properly regulate and govern their involvement in proceedings in a consistent fashion”. However, no specific recommendations for reform were made in that regard.

The Law Society referred to the proliferation of McKenzie friends and submitted that “the delays and cost this entails needs to be addressed within the Rules particularly in light of the right of access to proper legal representation and the need for efficiency and fairness in litigation.” Again, however, no specific proposals were made as to how these difficulties could be addressed by rules of court, or as to where, if at all, the new practice directions were deficient.

FLAC recommended that the Courts Service and the Legal Aid Board collaborate to -

- ensure that clear, concise and accessible information on civil and criminal legal aid is available from the Courts Service and its staff in a variety of formats
- locate a Legal Aid Board office in the Four Courts building.

With respect to litigants in person, FLAC recommended -

- that the Courts Service establish a working group with a widely drawn membership to examine access to justice for litigants in person which would draw up a report and action plan
- that any reforms of the administration of civil justice factor in that many litigants will not be represented by lawyers

<sup>173</sup> Law Society, “Guide to Good Professional Conduct for Solicitors”, op. cit., page 12.

- that all forms and procedures should be accessible, accurate, precise, clear and reader-friendly in plain English and in the other languages most frequently used in the State
- that a “liaison person” be available at court sittings to provide practical information to assist litigants in person
- simplification of the District Court’s procedures
- dissemination in a variety of formats, including video, accessible to persons with literacy issues or certain disabilities, of guides
  - on court listing and hearing arrangements,
  - in a “Nutshell” guide for litigants in person
  - on “how to represent yourself in court”
  - on “the areas of law where there are the most lay litigants”, including links to downloadable forms and basic instructions on their completion
  - on McKenzie friends, with a code of conduct
  - for court staff on dealing with litigants in person
- and of summaries of the judgments of the Superior Courts
- that persons in receipt of means-tested social welfare payments or holding a medical card be automatically exempted from court fees
- that the Courts Service collect data on the number of: litigants receiving legal aid; litigants in person; and persons facing home repossessions or evictions

FLAC also recommended, as a matter of priority, the establishment of a “dedicated court/tribunal which can deal with problem mortgage arrears on a case-by-case basis with a view to proposing solutions”.

Ms Justice Irvine, on behalf of the judges of the Court of Appeal, recommended-

- that the Law Society and Bar Council consider establishing a pro bono scheme for impecunious persons faced with litigation, which might be operated by young or newly qualified lawyers seeking to add to their experience
- provision of a service to assist litigants in person concerning court procedure and forms, but without offering legal advice.

The Irish Human Rights and Equality Commission (“the IHREC”) made a specific submission recommending repeal of section 19 of the Intoxicating Liquor Act 2003 – which enables an application for redress to be made to the District Court by a person complaining in respect of discriminatory conduct<sup>174</sup> against them on or at the point of entry to a licensed premises – and the effective returning of the function of determining applications for such redress to the Workplace Relations Commission (“the WRC”). The IHREC justified its submission on the bases that the procedure for making an application to the District Court was more complex and costly than that before the WRC, that the District Courts procedure was adversarial in approach, and might entail unwanted publicity for the complainant, and that a complainant in the District Court risked an award for costs being made against them.

The Review Group notes from the Oireachtas debates on the Intoxicating Liquor Bill 2003 – during which the merits of section 19 were debated at some length, that the District Court was specifically chosen as the forum for determining applications for such redress because of its existing jurisdiction in regulating the

<sup>174</sup> Section 19(1) refers to “prohibited conduct”, meaning “discrimination against, or sexual harassment or harassment of, or permitting the sexual harassment or harassment of a person in contravention of Part II (Discrimination and Related Activities) of the Equal Status Act 2000 on, or at the point of entry to, licensed premises”.

operation by licensees of their premises, and to avoid the possibility of separate proceedings – regarding discrimination and regarding renewal of the licence – being brought in different fora.<sup>175</sup>

It also notes that section 19 provides additional remedies – e.g. the making of an order for temporary closure of the premises<sup>176</sup> – which would not be available in the WRC, and that the District Court has powers to facilitate the parties in having recourse to mediation.<sup>177</sup> Furthermore, section 19 enables the IHREC, at a complainant’s request, to lend assistance to them in applying to the court for redress where the IHREC is satisfied that it is not reasonable to expect the person making the request adequately to present the case before the Court without assistance.<sup>178</sup>

The Authority may, and at any stage, provide such assistance to the person in such form as it thinks fit.

While noting the IHREC’s concerns, the Review Group does not consider that it would be justified in gainsaying the policy considerations which informed the Government’s decision to locate such proceedings in the District Court, and notes the role conceived in the legislation for the IHREC in offering assistance to complainants.

The Review Group is not in a position to judge whether the lack of anonymity in proceedings under section 19 has discouraged use of the provision by prospective complainants, but should that be demonstrable, it would be open to the Government to propose a statutory amendment to restrict publicity in such proceedings appropriately.

## 6. Conclusions and recommendations

### *Information for court users generally*

#### 6.1

With a view to addressing the particular needs of litigants in person, the Review Group recommends that priority be given to

- (a) providing on the Courts Service’s website informal consolidations of the Circuit Court and District Court Rules and hyperlinks from those rules to the relevant court forms, on the model of the consolidation undertaken in relation to the Superior Courts Rules and
- (b) collating and updating all current guides and information for litigants in person in a dedicated section of the website for that purpose.

175 On the reading of the Intoxicating Liquor Bill 2003 at Second Stage in the Seanad the then Minister for Justice, Equality and Law Reform explained the policy underlying section 19 as being:

“...that licensees should, in principle, be answerable for all their decisions in respect of admission, exclusion and maintaining order in their premises in a single jurisdiction. At present, the District Court is extensively involved in licensing matters, including the annual renewal of intoxicating liquor licences, the grant of special exemptions orders to licensed premises and the application of sanctions and penalties and temporary closure. It makes sense, therefore, to extend the court’s jurisdiction to include the adjudication of cases taken against licensed premises under the Equal Status Act.

Under existing licensing law, licensees are required to operate their premises in a peaceful and orderly manner. This is a licence renewal condition. If, for example, a licensee admits or serves a person who is violent or disorderly, the action could expose him or her to an objection to the renewal of the licence before the District Court on the grounds that it is not being properly operated. Not admitting or serving a person can, on the other hand, expose the licensee to a claim of discriminatory action before the Equality Tribunal. A situation in which a decision to permit or refuse entry of service could expose a licensee to actions in two jurisdictions with different results is unsatisfactory, which is why I am proposing to adjust existing arrangements. I propose that, in future, it will be the responsibility of the District Court to adjudicate in such cases. However, the non-discrimination provisions of the Equal Status Act will continue to apply and heavier penalties will be available to the District Court than are now available to the Equality Tribunal, including temporary closure and revocation of the licence on the grounds of objections because of discrimination.”

See: <https://www.oireachtas.ie/en/debates/debate/seanad/2003-06-18/7/?highlight%5B0%5D=intoxicating&highlight%5B1%5D=liquor&highlight%5B2%5D=bill>

176 Section 19(3)(c), Intoxicating Liquor Act 2003.

177 Under section 16, Mediation Act 2017.

178 Section 19(7), Intoxicating Liquor Act 2003.

The information at (b) should in due course be extended to all jurisdictional instances as proposed in recommendation 6.13 in this Section and integrated or linked with the information hub for litigants in person, the creation of which is proposed in recommendation 6.14.

### ***Accessibility and quality of court facilities and services***

#### **6.2**

The Review Group notes

- (a) the Courts Service's commitment under Action 18 of the National Disability Inclusion Strategy 2017-2021 to ensuring that courts services and information are accessible to and supportive of all users with disabilities,
- (b) the measures taken to ensure that recently completed and newly renovated court buildings comply with established accessibility standards and have attained Disability Access Certificates and
- (c) the survey currently being undertaken of the condition of approximately 70 other buildings in its estate which includes an assessment for compliance with accessibility requirements and obligations.

The Review Group recommends that, based on the findings of the survey last mentioned, the Courts Service prepare and undertake, as soon as feasibly possible, a programme of work to address any deficiencies in accessibility identified in the buildings surveyed.

### ***Efficiency, responsiveness and competence of court staff***

#### **6.3**

The Review Group endorses the recommendations of the Courts Service Capability Review of April 2019 on service delivery referred to earlier in this chapter. In particular the Review Group recommends that the Courts Service:

- (a) revise its Customer Charter for court offices serving the various jurisdictions to provide more specific measurements as to the performance and actual level of service they may expect from court staff for a wider range of transactions – e.g.: the time within which a summons will issue after being lodged, the time within which a court order will issue after granting, the time for entering of judgment in the office after lodgment of a complete set of judgment papers; and
- (b) up-date and publicly disseminate its Customer Service Action Plan in accordance with the Government's Quality Customer Service (QCS) Initiative.

#### **6.4**

The Review Group recommends that the Courts Service consult court user groups when deciding on the content of its Customer Charter and Customer Service Action Plan, including the transactions for which performance measures are set and the nature of the performance measures.

#### **6.5**

The Courts Service should track, and report in its Annual Report on compliance with, the performance measures last mentioned.

### ***Vulnerable court users: Children and young persons***

#### **6.6**

The Review Group does not see a need for a requirement – as arises currently solely in the Circuit Court – that an application be made for an order appointing a guardian *ad litem*. Vetting of an intended next friend or guardian by a solicitor acting in the litigation for the child concerned, and the provision by that solicitor of appropriate confirmation to the court as to the next friend's or guardian *ad litem*'s suitability for the function, should afford sufficient assurance with minimal expense in costs.

## 6.7

The Review Group considers that the arrangements for naming of a next friend or *guardian ad litem* to act on behalf of a child in litigation should be standardised by the introduction of a common requirement in the procedural rules for all first instance jurisdictions – by way of expansion on the current procedure in the High Court – that the solicitor intending to act for the child in the proceedings should file an affidavit confirming that -

- (a) he or she is familiar with the person proposed as next friend or *guardian ad litem*,
- (b) the proposed next friend or *guardian ad litem* is a fit and proper person to act in that capacity, being capable of fairly and competently conducting proceedings on behalf of the child, and
- (c) the proposed next friend or *guardian ad litem* has no interest in the matters in question in the proceedings adverse to that of the child,

and exhibit a consent of the proposed next friend or guardian ad litem to act in that capacity which records that they have been advised and are aware of the duties and obligations attaching to that function.

## 6.8

The Review Group recommends the introduction of:

- (a) a requirement, to be introduced in primary legislation, for the approval by the court at the jurisdictional instance appropriate to the claim value, of a settlement of a claim made on behalf of or against a child where no proceedings have been issued; and
- (b) provision that in the absence of court approval, no settlement, compromise or payment in respect of a claim made on behalf of or against a child shall be valid.

## 6.9

The Review Group notes concerns expressed to it regarding publication in the media of details of settlements approved by the court in favour of vulnerable claimants, including minors, and of sensitive personal information about the vulnerable claimant’s medical condition.

The Review Group notes that a court is already empowered in any civil proceedings, on application made to it in chambers, to prohibit the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify a party as a person having a medical condition, and does not consider it necessary to recommend any additional legislative measures to address this concern.

## 6.10

The special arrangements for adducing of evidence and for admissibility as evidence of statements from children in proceedings concerning a child’s welfare referred to at Section 3.1.3 of this chapter should be extended to all civil proceedings in which a child may require to give evidence.

### ***Vulnerable court users: Impecunious litigants and the availability of civil legal aid***

## 6.11

The Review Group does not consider itself best equipped to evaluate the extent to which the civil legal aid scheme may be failing to meet legitimate demand for civil legal aid, whether through shortcomings in the range of legal services it provides, the resourcing of such services or deficiencies in the eligibility criteria and income or assets thresholds for accessing civil legal aid. However, having regard to European comparators, a case would appear to exist for reviewing whether the annual disposable income level operating as a “cut off” for entitlement to civil legal aid requires to be increased.

## 6.12

The Review Group notes the concerns expressed concerning the *Abhaile* scheme, while also acknowledging the procedural safeguards now provided for in mortgage possession cases, which concerns and safeguards are described at Section 3.2.2 of this chapter. It recommends that the Steering Board of the *Abhaile*

Mortgage Arrears Resolution Service examine both the concerns expressed by the Law Society concerning the scheme and the potential to improve linkages between *Abhaile*, citizens' information centres nationwide and the Legal Aid Board to ensure that eligible mortgage holders are afforded adequate opportunity to access the services of *Abhaile* or, as appropriate, the Legal Aid Board.

### ***Vulnerable court users: litigants in person***

#### **6.13**

The range of information currently made available by the Courts Service for litigants in person, though very helpful, is nonetheless limited to specific jurisdictions or proceedings types. The Review Group sees a need for guides for litigants in person to be made available covering proceedings in all court jurisdictions and utilising audio-visual as well as textual formats. Information provided by the Courts Service, however, necessarily cannot extend to legal advice or any assistance which might compromise the impartiality of the courts administration, and is unlikely to meet all the needs of litigants in person.

#### **6.14**

The Review Group recommends a collaborative approach between the courts administration, other Justice agencies, the legal profession and the voluntary sector to assisting litigants in person, as adopted in neighbouring and other common law jurisdictions and described earlier in this chapter – in particular:

- (a) the creation of a central on-line information hub – along the lines of the “Going to Court and tribunal” section of the “Advice Now” website in the UK – through which dedicated legal and practical information is provided for those contemplating bringing proceedings without professional representation; and
- (b) provision of “drop in” facilities in proximity to court buildings – such as operate in Scotland and the Royal Courts of Justice in London – to enable unrepresented litigants to consult voluntary legal advice centres.

#### **6.15**

The Review Group acknowledges the need for co-ordinated planning of measures by the public sector, voluntary advice sector and branches of the legal profession to facilitate impecunious litigants in need of legal advice and assistance and recommends that the Department of Justice and Equality, as an initial step, establish a Steering Group comprised of the various agencies and bodies concerned – which should include the Courts Service, the Legal Aid Board, Citizens Information, FLAC, MABS/*Abhaile*, the Law Society and the Bar Council.

#### **6.16**

Without limiting its remit, the Steering Group last mentioned should be tasked to:

- (a) examine the existing information sources for individuals seeking advice or assistance in relation to litigation, and in particular those who are unlikely to have the means to secure private legal representation;
- (b) provide content (textual, audio-visual etc.) for and design of a new, dedicated website to assist such individuals;
- (c) identify and provide for categories of individual with particular needs (including linguistic and accessibility needs) in providing that content;
- (d) identify opportunities for co-location of legal advice or assistance services with court buildings, existing and planned;
- (e) provide input to the court rules committees on opportunities for simplification of procedures and language in rules and forms.

#### **6.17**

The Review Group notes the submissions, in particular by the Bar Council and the Law Society, that rules of court be introduced to reform the procedures in relation to McKenzie friends – although no specific

proposals to that end have been made. However, the Review Group has considered the contents of the recent practice directions regulating participation by McKenzie friends in proceedings and does not consider that any further provision beyond that made in those instruments is required, or that any additional benefit would be conferred by prescribing for this area by rule of court.

## 6.18

The Review Group has considered the submission of the Irish Human Rights and Equality Commission (“the IHREC”), referred to in Section 5 of this chapter, recommending repeal of section 19 of the Intoxicating Liquor Act 2003 – which enables an application for redress to be made to the District Court by a person complaining in respect of discriminatory conduct against them on or at the point of entry to a licensed premises – and the effective returning of the function of determining applications for such redress to the Workplace Relations Commission. While noting the IHRC’s concerns, the Review Group does not consider that it would be justified in gainsaying the policy considerations which informed the Government’s decision to locate such proceedings in the District Court, and notes the role conceived in the legislation for the IHREC in offering assistance to complainants.

The Review Group is not in a position to judge whether the lack of anonymity in proceedings under section 19 has discouraged use of the provision by prospective complainants, but should that be demonstrable, it would be open to the Government to propose a statutory amendment to restrict publicity in such proceedings appropriately.

### *Managing litigation involving litigants in person*

## 6.19

The Review Group notes that a practice direction was introduced in the High Court in July 2010 governing proceedings in which one or more of the parties does not have professional legal representation requiring that the litigant in person and the other party complete, file and (where applicable) serve a form in advance of (a) making a pre-trial application and (b) the trial of the proceedings, to assist in identifying the factual and legal issues requiring to be addressed at the hearing.

The Review Group understands, however, that the practice direction is not being complied with in practice by parties and practitioners, and recommends that it be implemented by the High Court Central Office.

### *Measures to address vexatious or unfounded cases*

## 6.20

Order 19 rules 27 and 28 RSC, should be re-stated to align their provisions with the basis on which the court may exercise its inherent jurisdiction, but dispensing with the terms “frivolous” and “vexatious” as those terms do not in modern parlance sufficiently convey what is in dispute on an application to the court of this nature and are often seen by the litigant in person as an insult, when invoked. The Review Group recommends that the rules concerned be amended to provide that the High Court have express power:

- (a) to strike out a claim or part of a claim which (i) amounts to an abuse of process or (ii) is bound to fail or (iii) has no reasonable chance of succeeding;
- (b) on an application for such an order, to consider the pleadings and, if appropriate, evidence, for the purpose.

### *Wards of Court*

## 6.21

Having regard to:

- (a) the factors and developments mentioned at Section 3.3.1 of Chapter 10;
- (b) the relatively short timeframe remaining until replacement of wardship by the new capacity regime under the Assisted Decision-Making (Capacity) Act 2015; and



- (c) the diversion of effort and resources which would be required to change primary legislation to effect changes, *ad interim*, to the wardship jurisdiction – which effort and resources might be better invested in establishing the new capacity regime,

the Review Group does not consider it advantageous to make recommendations for interim measures to reform the wardship jurisdiction.

### **Capacity issues and litigation**

#### **6.22**

Under the functional approach to capacity of the new capacity regime required by the Assisted Decision-Making (Capacity) Act 2015, the question of whether a person has capacity to litigate will require distinct consideration. The Review Group recommends that a standard certificate be prescribed by rule of court for use in cases of an assessment of litigation-related incapacity for use under the new capacity regime.

#### **6.23**

The special arrangements for adducing of evidence and for admissibility as evidence of statements from children in proceedings concerning a child's welfare referred to at Section 3.1.3 of this chapter apply, with the necessary modifications, to civil proceedings before any court concerning the welfare of a person who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live independently.<sup>179</sup>

These special arrangements should be extended to all civil proceedings in which such a person may require to give evidence.

### **Court fees**

#### **6.24**

The Review Group did not consider it necessary or appropriate to recommend exemption from liability for fees of any category of individual or proceedings.

#### **6.25**

The Review Group did not consider it appropriate to recommend introduction of daily or half-daily court hearing fees as apply in Australia and New Zealand.

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<sup>179</sup> Section 20(b), Children Act 1997.

# CHAPTER 11

## TECHNOLOGY AND E-LITIGATION



## 1. Introduction

The Review Group’s remit commits it to reviewing the use of electronic methods of communications including e-litigation and examining the extent to which pleadings and submissions and other court documents should be available or accessible on the internet.

Within the last three decades at least, court systems across the world have benefitted from the technology revolution, implementing automated processes, case management systems, data exchange, on-line information portals, technology in the courtroom and, more recently, on-line resolution of claims.<sup>1</sup>

Though the potential of Information and Communications Technology (“ICT”) in aiding civil justice is well understood, it is nonetheless perhaps worthwhile recalling, in the words of a leading commentator, the benefits it can deliver:

“

- Technology can help to reach out – communication/information;
- It can speed up processes – e-filing, online procedures; document handling
- It can simplify processes for [litigants in person] – by embedding procedural rules within online forms and processes. You don’t need to know the rule if the system prompts you to do things and explains why;
- It can facilitate the sharing of complex information instantaneously;
- It can allow people to congregate without the need for physical presence;
- It can facilitate online resolution;
- Ultimately it could support or replace human-decision-making through automated processes;
- Finally, databases of the subject matter, duration and outcome of disputes could help dispute prevention and early resolution”.<sup>2</sup>

Since shortly after its establishment in 1999, the facilitating of e-litigation has been a strategic goal of the Courts Service in successive corporate strategic plans and ICT strategy documents.<sup>3</sup> Although that period has witnessed the equipping of the courts and court offices with a nationwide, connected ICT infrastructure and various case support applications, progress in creating an e-litigation environment for the larger part of the caseload of the courts has been slow for various reasons. In considering this part of its remit, the Review Group had the benefit of a presentation by the Courts Service’s ICT department outlining the current state of ICT within the courts, project work in progress and plans for digitalisation.

## 2. The current state of ICT in the Irish courts

### 2.1 The Capability Review findings

The Organisational and Capability Review of the Courts Service undertaken by central Government and published in agreement with the Courts Service in April 2019 (“the Capability Review”)<sup>4</sup> was critical of the state of ICT in the Courts Service, commenting that

1 For an account of the development of court technology in the US, see Bermant G., “The Development and Significance of Courtroom Technology: A Thirty-Year Perspective in Fast Forward Mode”, 60 N.Y.U. Ann. Surv. Am. L. 621 (2005). For a survey of court technology implementation in Europe, see: Fabri M. and Contini F. (Editors), “Justice and Technology in Europe: How ICT is changing the Judicial Business”, Kluwer (2001); CEPEJ Thematic report “Use of information technology in European courts” (2006), available at: <https://rm.coe.int/european-judicial-systems-efficiency-and-quality-of-justice-cepej-stud/1680788229>

2 Professor Hazel Genn., “Online Courts and the Future of Justice”, Birkenhead Lecture, Gray’s Inn, 16<sup>th</sup> October 2017, page 3.

3 See, e.g. Courts Service Strategic Plan 2000-2003, page 19 available at: [http://www.supremecourt.ie/Courts.ie/Library3.nsf/\(WebFiles\)/5B631A71C3B8C42D80256DA6004829BB/\\$FILE/engfin.pdf](http://www.supremecourt.ie/Courts.ie/Library3.nsf/(WebFiles)/5B631A71C3B8C42D80256DA6004829BB/$FILE/engfin.pdf) and “eCOURTS A 5 year Strategy for Information Technology”, available at: [http://legaldiarary.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/9E9F6C5D0DB24B6B80256DA60044747A/\\$FILE/Strategy.pdf](http://legaldiarary.courts.ie/Courts.ie/library3.nsf/(WebFiles)/9E9F6C5D0DB24B6B80256DA60044747A/$FILE/Strategy.pdf)

4 “Courts Service Organisational and Capability Review”, available at:

“it is not resourced and configured to deliver effectively for the organisation across its key business functions. In particular, many features of its current ICT systems are not fit for purpose, and are unsuited for managing, administering and delivering services in an efficient and effective manner. Overall, the current ICT state is in part a legacy of uneven strategy and inadequate investment, and these matters will have to be addressed in a planned and consistent manner over the years ahead.”<sup>5</sup>

It cited the following principal factors as contributing to these deficiencies:

“

- The consequences of under-resourcing
- The effects of persistent underinvestment
- Poor prioritisation and partnering by the business side
- Underdeveloped standardisation by business units
- Legacy standalone systems
- Uneven leadership by the Department of Justice and Equality on ICT interoperability across the justice sector and related enabling legislation
- Weak collaboration by some justice agencies on change initiatives – for example, in the computerisation of Charge Sheets from An Garda Síochána
- The impacts on ICT priorities of unanticipated demands, internal as well as external, and
- The absence of a long range and appropriately funded ICT vision and strategy.”<sup>6</sup>

## 2.2 Case support systems

Currently, the Courts Service processes civil cases with the aid of various standalone legacy systems, in particular the standalone Progress™ system used in the High Court Central Office, and numerous standalone Lotus Notes™ applications operated in the various Circuit and District Court offices, and the specialised offices in the High Court. These systems have no interoperability between them and very weak reporting functionality, and are facing loss of technical support due to their age. A new case support and e-filing platform, Courts Service On-line (“CSOL”), was developed in 2013 and is referred to below.

## 2.3 E-filing

E-filing for litigation is available for five categories of civil proceedings via CSOL,<sup>7</sup> viz.:

- (a) small claims in the District Court<sup>8</sup>
- (b) applications in insolvency proceedings<sup>9</sup> processed by the Insolvency Service of Ireland under the Personal Insolvency Act 2012
- (c) applications for leave to appeal to the Supreme Court
- (d) applications to the Office of the Legal Costs Adjudicators for adjudication of bills of legal costs
- (e) e-filing of licensing applications on CSOL operating on a pilot basis in four counties – Donegal, Sligo, Leitrim and Louth – which is planned to be extended nationwide in the first half of 2020.

These proceedings types currently represent a very small percentage of the total annual incoming civil caseload in the courts. Once e-licensing is deployed nationwide, e-filing will be available for approximately

5 <https://www.courts.ie/acc/alfresco/909f953b-947f-4694-b99c-c1e422ca7338/Organisational%20Capability%20Review%20Report.pdf/pdf#view=fitH>

Capability Review, op.cit., Section B.4, page 18.

6 Capability Review, op.cit., page 60.

7 CSOL also supports processing (as distinct from e-filing) of appeals to the Court of Appeal.

8 i.e. consumer small claims and business small claims as defined in Order 53A of the District Court Rules, where the amount of the claim does not exceed €2,000.

9 i.e. applications for issue of a debt relief notice or in proceedings for a debt settlement arrangement or a personal insolvency arrangement.

20% of the annual civil caseload,<sup>10</sup> but will not extend to the most common civil proceedings types, such as summary claims for debt or claims for damages in tort or breach of contract.

In the Supreme Court, Court of Appeal and some areas of the High Court, a file sharing application is in use to enable parties to upload their documents for storing in shared folders on the drive for forwarding to the appropriate Judge. However, a decision on procurement of the most suitable document management system and annotation software for the longer term has not yet been made.<sup>11</sup>

The original proto-type for e-filing on the CSOL platform – “Debt Claims On Line” – was developed about a decade ago to handle the large caseload of claims for debt brought by proceedings for summary judgment – a substantial proportion of which result in a default judgment issued in the court office, without a court hearing. However, deployment of the application was – the Review Group understands – impeded by delay in enacting the necessary legislative provisions to enable substitution of the hard copy affidavit evidence required to be provided by a claimant<sup>12</sup> with an electronic document – termed in the draft legislation originally prepared by the Courts Service as a “a statement of truth”. Sections 20 and 21 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 – enacted while this report was in preparation<sup>13</sup> – now provide a statutory basis for e-filing, and have had effect since the 21<sup>st</sup> August 2020.<sup>14</sup>

A review in 2019 of CSOL and plans for its further development identified lack of confidence in many operational areas of the Courts Service in CSOL’s ability to meet their future business requirements within timescales and budget, and it was suggested that “these perceptions primarily arise as a result of insufficient capacity (both IT and business resources) to deliver CSOL-based technology-enabled change programmes – an issue that will likely be amplified with an increased need for digital services to support the Long-term Strategy”. The review concluded, *inter alia*, that “The likely scale of the future technology investment necessary to provide appropriate support to Family and Civil business requires a robust and evidence-based investment appraisal of potential”, i.e. whether the Courts Service should itself build applications such as CSOL or buy them from the market.<sup>15</sup>

Ireland lags behind most other EU jurisdictions – as evidenced by the table below from the EU Justice Scoreboard 2020 – and behind comparable jurisdictions internationally in the extent to which it makes e-filing available for civil proceedings:

10 Of a total of 226,772 incoming proceedings in the various jurisdictional instances in 2018, 41,960 were licensing applications (all counties), 3,476 were small claims, 1,092 were applications for taxation of legal costs, 984 were originating applications in personal insolvency proceedings and 193 were applications for leave to appeal to the Supreme Court (Courts Service Annual Report 2018, Chapter 3).

11 Information provided by Courts Service management.

12 The provisions of the Electronic Commerce Act 2000 allowing use of paperless documents operate without prejudice to “the law governing the making of an affidavit or a statutory or sworn declaration, or requiring or permitting the use of one for any purpose”: section 10(1)(c) of the 2000 Act.

13 Section 21 provides that where, in civil proceedings (a) evidence is to be given on, or a document or information is to be verified by, affidavit or statutory declaration, and (b) a document may be lodged or filed, or is required to be lodged or filed, or an application may be made, or is required to be made, by electronic means, rules of court may provide for a “statement of truth” to be made and transmitted by electronic means in place of the affidavit or statutory declaration concerned.

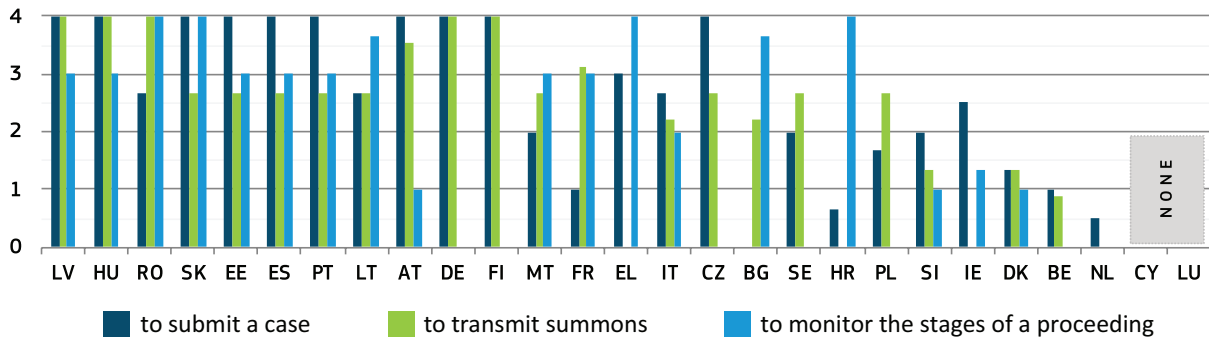
A statement of truth may be in electronic form, would require to contain a statement that the person making the statement of truth has an honest belief that the facts stated therein are true and may be signed by the person making it by that person entering his or her name in an electronic format or otherwise electronically as may be permitted by the rules. It must comply with any other requirements as to its content, verification, authentication or form as may be prescribed by the rules. A person who makes or causes to be made a statement in a statement of truth without an honest belief as to the truth of that statement would be guilty of an offence.

14 Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (Commencement) Order 2020 (S.I. No. 306 of 2020).

15 PA Consulting, “Focused Review of Courts Service On-Line (CSOL)”, 13<sup>th</sup> May 2019, page 12.

## EU Justice Scoreboard 2020

Figure 27: Availability of electronic means, 2018(\*) (0 = available in 0% of courts, 4 = available in 100% of courts<sup>(61)</sup>) (source: CEPEJ study)



(\*) New methodology, data is not comparable to past years. DK and RO: cases may be submitted to courts by email.

In the annual Doing Business Survey of the World Bank Group for 2020 – which ranks countries for ease of doing business by reference to a range of scoring categories including enforcement of contracts – Ireland scored 0.5 out of a total score of 4 for court automation,<sup>16</sup> by reference to four scoring criteria carrying one mark each, viz. the availability of a dedicated platform for filing of claims electronically (score: 0); the possibility of serving proceedings electronically (score: 0); facility to pay court fees electronically (score: 0); and publication of judgements in commercial cases at all jurisdictional instances (score: 0.5). The following table indicates scores for comparable common law jurisdictions:

## Court Automation Scores (World bank Doing Business Survey 2020)

Country	e-filing of claim	e-service of process	e-payment of court fees	Publication of judgments in commercial cases	Total score (out of 4)
Singapore*	1	1	1	1	4
UK**	1	1	1	0.5	3.5
Canada***	1	0	1	1	3
US****	1	0	1	1	3
Australia*****	1	0	1	1	3
New Zealand*****	0	1	0	.5	1.5
Hong Kong, SAR China*****	0	0	0	1	1
Ireland*****	0	0	0	.5	.5

\* Singapore District Court \*\* County Court of England and Wales \*\*\* Ontario Superior Court of Justice  
 \*\*\*\* Supreme Court of the State of New York, Civil Branch \*\*\*\*\* District Court of New South Wales  
 \*\*\*\*\* Auckland District Court \*\*\*\*\* Hong Kong District Court \*\*\*\*\* High Court

16 Court automation constituted one of four categories within the total of 18 marks allocated to “Quality of judicial processes”. Report available at: <https://www.doingbusiness.org/content/dam/doingBusiness/country/i/ireland/IRL.pdf>

## 2.4 On-line registries

CSOL hosts on-line registries for licensing applications, bankruptcies and legal costs adjudications. A High Court on-line search facility enables public inspection of limited information<sup>17</sup> as to the status of proceedings issued in the High Court.

## 2.5 Technology in the courtroom

The Courts Service has invested heavily in the deployment of *digital audio recording* (“DAR”), with DAR now being available in 211 courtrooms in all jurisdictions in Dublin and nationwide, 55 of which are portable devices which may be brought to outlying court venues if required. Each court has a *desktop device* for the registrar in every court nationwide, and at all jurisdictional instances. A project to refresh the DAR technology in over 240 courtrooms was completed in 2018.

*Evidence display* facilities, including CCTV, are available in 90 courtrooms in Dublin and nationwide. This includes 10 civil courtrooms in the Four Courts and six Circuit Court sites outside Dublin, the remainder being located in criminal and family law courtrooms and District Court sites. The equipment enables viewing of evidence including recordings, CCTV security footage and other forms of evidence held electronically including scanned documentary evidence.<sup>18</sup>

The Review Group is aware of a range of e-Litigation products on the market,<sup>19</sup> many now relying on Cloud-based technology, which enable practitioners, using evidence display, to organise and present to the court pleadings, documentary evidence, case law and statute law in a variety of document formats. The electronic materials can be made accessible to the judge and other parties, and can be highlighted or annotated. Use of these products requires that the courtroom be equipped with secure Wi-Fi, satisfactory bandwidth and the evidence display hardware, including large screens to enable members of the public to follow the proceedings.

*Video-conferencing* is available at a total of 65 courtrooms in Dublin and nationwide, including at five civil courtrooms in the Four Courts and 28 Circuit Court sites (including three civil courts in Cork), the remainder being criminal courtrooms, family law courtrooms and District Court sites.<sup>20</sup> The Courts Service uses proprietary virtual meeting room software to facilitate remote video-assisted hearings. This uses a video streaming application – PEXIP. Parties can join a PEXIP session from other video streaming services, including Skype, Zoom, Cisco Webex, Microsoft Teams etc., without the need for all parties to use either the same application or a managed integration tool to connect to it.

Unlike the position in relation to e-filing, legislative provision had existed since 2008 to support the use of video-conferencing in hearings in civil proceedings, whether for participation of parties or witnesses.<sup>21</sup> As mentioned earlier, the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 was enacted during the preparation of this report, section 5 of which repealed the 2008 provision and section 11 of which expanded on the provision repealed by enabling the Chief Justice in the case of the Supreme Court and the president of any other court exercising civil jurisdiction to direct that any category or type of civil proceedings shall proceed before the court by remote hearing.<sup>22</sup> These provisions have had effect since the 21<sup>st</sup> August 2020.<sup>23</sup> Rules of court may provide for: the means by which remote hearings are to take place; the conduct of remote hearings; the attendance of witnesses at remote hearings (including the compelling

17 Viz. the date of issue of the proceedings, the date of setting down of the case for trial and its setting down number, the date(s) on which any appeal was lodged with the Court of appeal or Supreme Court, and the appeal reference number.

18 Additionally two mobile evidence display units are available to enable video viewing in courtrooms without built-in viewing facilities in and outside of Dublin.

19 The Review Group received a submission from an Irish provider of e-litigation software.

20 A mobile unit is also available for those courtrooms in the Criminal Courts of Justice building which are not equipped with a static video-conferencing facility.

21 Section 26, Civil Law (Miscellaneous Provisions) Act 2008.

22 Section 11(1) and 11(11).

23 Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (Commencement) Order 2020 (S.I. No. 306 of 2020).

of such attendance); and the procedures by which a party may object to the proceedings proceeding by remote hearing.<sup>24</sup>

Since 2007, a practice direction has regulated use of video-conferencing in the High Court. Applications for permission to hear evidence by way of video-conferencing are required to be made to the List Judge or, where a case has been assigned, to the judge assigned to the case not less than three working days prior to the date on which the evidence is intended to be heard. The solicitor for the party calling the witness must undertake to the court to participate fully in all required test-calls to the remote location, provide the registrar with the necessary technical information in relation to that location and make the necessary practical arrangements at it.<sup>25</sup>

Wi-Fi is available at certain court buildings in Dublin, viz. all areas within the Criminal Courts of Justice building, certain areas within the Four Courts – the Supreme Court, Court No. 2, the Round Hall and the area outside the Law Library – and Phoenix House, location of the Circuit Family Court and courtrooms and practitioners' rooms in some 30 court buildings outside Dublin.

Installation of Wi-Fi was undertaken mostly in 2014/2015 largely at the request of the Bar, rather than as part of any court-related business requirements. Wi-Fi access has recently been extended to include facilities for the prosecution and probation services. Any courtrooms not covered are generally in small locations which cannot facilitate Wi-Fi.

The Review Group was informed that the nature of the Four Courts building makes it difficult for the signal to penetrate the walls. However, the Courts Service's ICT Department has commissioned a survey of the Four Courts complex with a view to increasing coverage there.

## 2.6 Court technology projects – recent, current and planned

The table below sets out the list of projects included in the Courts Service's change programme, whether recently completed (and subject to post-implementation review), currently in progress or planned. While all of the 20 projects listed have an ICT element, 12 of those (identified by an asterisk) involve, or will require, some form of e-litigation/on-line solution.

### Projects forming part of Courts Service's change programme

1.*	Redevelopment of Courts Website	Completed - new website live since August 2020
2.	Hammond Lane Court Building Project	Not yet commenced
3.*	Civil Case Management System incl. e-Filing	Not yet commenced
4.*	Office of the Legal Cost Adjudicator	Completed –post implementation review also completed
5.	Criminal Justice Operational Hub (CJOH): Receipt of Electronic Charge Sheets	Underway
6.*	Family Law Case Management System incl e-Filing *	Not yet commenced
7.*	E- Probate	On line application version of CA24 (Inland revenue Affidavit) form is available on the Revenue website, ROS, since 14 <sup>th</sup> September 2020. While this project was underway, no further work commenced on providing for issuing of grant of probate on line.

24 Section 11(5), Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

25 High Court practice direction HC45 of the 3<sup>rd</sup> May 2007, available at: <https://www.courts.ie/content/use-video-conferencing-link-taking-evidence-civil-cases>



8.*	*Debt Claims On-line incl. e-judgments online	Not yet commenced
9.*	*Personal Injuries Register	Not yet commenced
10.*	Extension of the use of videolink/video conferencing	Underway
11.*	E-filing of Licensing Applications	Completed
12.*	Bankruptcy Phase II	Not yet commenced
13.	Combined Office Review Implementation (CORI)	Completed
14.*	Implementation of Assisted Decision Making (Capacity) Act 2015	Not yet commenced
15.*	E-Filing of Supreme Court Leave to Appeal	Completed – Post implementation review completed Q 2 2020, follow up work being undertaken
16.*	European Order for Payment	Not Commenced
17.	CJOH: Higher Court Outcomes	Underway
18.	CJOH: Electronic dissemination of court lists to Irish Prison Service	Underway
19.	CJOH: Transfer of driving disqualifications data from CCTS to Road Safety Authority	Underway
20.	Judges Intranet Phase II	Underway

## 2.7 Spending on court technology

Investment in ICT in the Irish courts has increased substantially in recent years, having suffered a significant reduction during the period of the financial crisis. The budget allocated to ICT for 2020 amounts to €13.42million, which includes a once-off supplement of €4.5 million received from the Dormant Funds Account. A further €1.55m is allocated in current spending for telecommunications, printing and consultancy. The budget for ICT in the current year therefore represents a significant increase on the figure of €5,457,000 allocated in 2010.<sup>26</sup> Measured as a percentage of the overall budget for the courts, ICT investment on the courts in Ireland compares favourably with other European jurisdictions. In 2016 – the last year for which comparable data at European level are available – €8,320,000 was allocated to ICT for the courts,<sup>27</sup> €9,105,000 being ultimately spent in that year. This latter figure represented 8% of the total budget originally approved for the courts,<sup>28</sup> compared with an average investment of 3% in the Council of Europe area.<sup>29</sup>

However, such a comparison conveys an unduly optimistic impression of the extent of investment in court technology here, given that the size of the overall budget for the courts in Ireland is small by European standards: the budget spent on the courts in Ireland per inhabitant in 2016 – €24 – was significantly less

26 European judicial systems: Efficiency and quality of justice CEPEJ STUDIES No. 26 (2012) (2010 data), Table 2.9 on page 30, available at: <https://rm.coe.int/to-fausto-de-santis-president-of-the-cepej-from-2007-to-2010-/16807882a2>

27 The amount originally allocated from the Courts Service's approved budget to ICT in 2016 was €8,320,000. (information furnished to CEPEJ by Courts Service, available at: <https://rm.coe.int/ireland/16808e27f1> (Answer to Question 006 of CEPEJ questionnaire).

28 The budget originally approved for the courts in 2016 was €113,172,000, of which €112,365,000 was spent: see response of Ireland to question 1.1.2.(Budgetary data concerning judicial system) of the CEPEJ evaluation exercise at: <https://rm.coe.int/ireland/16808e27f1>

29 European judicial systems: Efficiency and quality of justice CEPEJ STUDIES No. 26 (2018) (2016 data), Table 2.18 on page 45, available at: <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>

than the European average of €39.<sup>30</sup> A more instructive indicator is provided by comparing the absolute amounts of investment in courts ICT by jurisdictions with comparable population sizes, as indicated in the following table:

**Expenditure on ICT in the courts in 2016  
(CEPEJ report, Evaluation of European Judicial Systems 2018)<sup>31</sup>**

Jurisdiction	Population	Absolute amount allocated to ICT in Courts
Croatia	4.154 million	€10,003,698
Denmark	5.748 million	€20,416,666
Finland	5.503 million	€16,582,298*
<b>Ireland</b>	<b>4.673 million</b>	<b>€8,320,000**</b>
Scotland	5.404 million	€3,056,332
Slovakia	5.435 million	€ 19,403,837***

\* amount actually spent in 2016 (amount allocated was not provided)

\*\* amount actually spent in 2016: €9,105,000

\*\*\* amount actually spent in 2016, the bulk of which was provided by European funds and co-financing.

## 2.8 Response to Covid-19

The Covid-19 pandemic arrived during the final stages of the Review Group's deliberations. In March 2020, the various jurisdictions acted in concert to manage a scaling back of court business in accordance with the restrictions on public gathering which were introduced, prioritising the hearing of urgent cases.<sup>32</sup> At the same time, the Courts Service extended its capacity to facilitate video-assisted remote hearings. In the same month, a committee was established chaired by Mr. Justice Birmingham, President of the Court of Appeal, membership of which includes the Presidents of the Circuit and District Courts together with a judge representing the High Court. The committee meets on a fortnightly basis with Court Service representatives and the Courts' Health and Safety Officer to discuss ongoing issues such as compliance with HSE guidelines, social distancing within the court room setting, traffic flow in court buildings etc..

The meetings provide a platform for the Judiciary to bring issues to the attention of the Courts Service and for the latter to raise with the Judiciary any concerns they may have as to the manner in which court business is being conducted in the current climate.

Covid-19 recovery plans for criminal, civil and family law work have considerably increased the use of video link /video conferencing facilities and other courtroom technology.<sup>33</sup> At an early stage in the pandemic – in April 2020 – both the Supreme Court and the Court of Appeal conducted hearings with all parties being present via remote video technology. The cases were displayed on video screens in largely empty courts for members of the media present, to assure the public nature of the proceedings.<sup>34</sup> The Chief Justice and court

30 Ibid., Figure 2.16.

31 Figures provided in individual Member State returns (answers to questions 1.1.1 and 1.1.2), available at: <https://www.coe.int/en/web/cepej/2016-2018-evaluation-cycle-reply-bey-country>

32 See the statements issued by the Chief Justice and Presidents of the various jurisdictions of the 13<sup>th</sup> March 2020 at: <https://www.courts.ie/news/statements-respect-arrangement-courts-%E2%80%93-13th-march-2020>

33 As of the 11th September 2020, a total of 885 remote court sessions had been held since March 2020. This included High Court Civil, Central Criminal, Legal Costs Adjudication, Callovers (Commercial & PI) COA includes Criminal and Civil, Circuit Ct includes Family, Criminal, Personal Insolvency and sittings outside Dublin (Castlebar, Cavan, Letterkenny, Mullingar, Nenagh, Tullamore and Trim) and the District Court (Child Care). Between January 2020 and the 21st August 2020 there were also 7507 video link ups between the Irish Prison Service and the courts (information supplied by Courts Service management).

34 See Courts Service statement at: <https://www.courts.ie/content/virtual-remote-courts-piloted-ireland-morning>

presidents have permitted parties to apply to their respective courts to use their own software platforms for electronic presentations in the courtroom subject to compatibility with the courts' ICT infrastructure.

Due to health and safety guidance for distancing, where possible call-overs and motions, are dealt with remotely with contested cases being listed for physical hearing when required. The Review Group was informed by Courts Service management that plans are in place to procure a video conferencing platform that will meet business requirements to hear oral testimony and host multi-party cases.

In court offices, drop-box facilities for lodgment of documents and receipt of certain court applications by e-mail have been provided.

By July 2020, as some restrictions on social gatherings were easing, the courts were engaged in a staged resumption of oral hearings while maintaining social distancing and other precautionary measures.<sup>35</sup>

The advent of the Covid-19 pandemic has, if anything, underlined the need for and potential of technology in the courtroom to enable various categories of court business to be disposed of without a conventional hearing, while respecting the need for most hearings to be public in nature.

In response to the pandemic, two working groups were established to coordinate efforts to facilitate remote hearings, viz. a personal injuries working group chaired by Ms. Justice Irvine, President of the High Court, including representation from the Courts Service, the Bar Council and the Law Society and a second working group chaired by Mr. Justice Barniville of the High Court with representation from the Courts Service and including representatives of the Commercial Lawyers Association of Ireland and the Law Society. In addition, Courts Service management has established its own "virtual courts" internal working group to coordinate its own efforts in this area.

The Review Group understands that the second of the working groups aforementioned has been involved in the holding of mock trials with a specific product and that a "live" trial using electronic presentation software has been scheduled for October 2020.<sup>36</sup>

### 3. The Capability Review recommendations and their implementation

In light of its findings as mentioned in Section 2.1 of this chapter, the Capability Review identified four critical actions requiring to be taken in parallel in relation to ICT in the courts,<sup>37</sup> viz. -

- Restoring user confidence through: improvement of network speeds, systems' reliability and interoperability, reduction of the extent of manual processes and improvement of support for hardware peripherals such as courtroom printers, and the responsiveness of service from external contractors
- Implementing structural reforms through -
  - replacement of the numerous standalone legacy systems which support case processing and are going out of technical support soon, in particular the standalone Progress system used in the High Court Central Office, and the standalone Lotus Notes applications used in the various court offices for civil cases, which have no interoperability between them and very weak reporting functionality
  - standardisation of processes prior to development of a proposed ICT solution
  - development of a new partnership between the ICT Unit and the various court office business managers and Change Management Office in developing ICT solutions

35 See statements of the senior judiciary at: <https://courts.ie/covid-19-response-updates>

36 Information provided by Courts Service management.

37 Capability Review, op.cit., pages 63 to 67.

- incorporate reporting functionality in systems to speed up reporting, improve statistical reliability and replace the considerable manual intervention required at present to produce analyses for the Senior Management Team and the Board
- Developing a strong strategic orientation within the ICT function to achieve the objective of an eCourt environment
- Formulating and progressing a vision of an eCourt environment with features such as the following -
  - a number of interconnected solutions, with e-filing, and centralised case management and document management systems forming the centrepiece of the new ICT state
  - the filing of cases and related legal documents with the courts could be done electronically
  - the civil and criminal case management systems would be interoperable with one another where appropriate and would enable the files relevant to a particular case to migrate up through the court jurisdictions (e.g. Circuit to High) as necessary
  - access to be controlled by means of registration processes covering the judiciary, Courts Service personnel, legal practitioners, and litigants
  - internet connections would provide instant access to authorised case information, details, and records that would be governed by policies and procedures aimed at protecting privacy rights
  - court proceedings would be recorded using audio and video-conferencing technologies, and
  - official court outputs, including case lists and court decisions, would be published electronically.

The Capability Review’s summary of its recommendations on ICT<sup>38</sup> included the following of particular relevance to e-litigation:

- (a) As part of a revised structure for ICT planning and delivery, a new unit dealing with strategic ICT and focusing initially on the development of a Digital Transformation Programme should be established and be supported in its work by external facilitation and assistance;
- (b) The Courts Service should develop a vision for the organisation, stretching out to 2030, that would encompass an ideal future eCourt state that would be modern, fit-for-purpose and service oriented. An external partner would be required to help map out the vision;
- (c) The future state should be transformative and be such that the capability of the Courts Service would be significantly enhanced in terms of improving access to justice and supporting the operation of an effective courts system. The state should encompass services that are fit-for-purpose, built in partnership with internal and external stakeholders considered key enablers of business for both the judiciary and other users;

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38 Capability Review, op.cit., pages 71 and 72.

- (d) Separately the Courts Service should develop a comprehensive eCourt strategy that would take into account the 5 pillars of the government’s strategy for ICT as set out in the report of the Office of the Government Chief Information Officer (“OGCIO), “Public Service ICT Strategy”;<sup>39</sup>
- (e) The Courts Service needs to strengthen the arrangements by which ICT projects are prioritised, especially proposals for new development. As a counterbalance to external pressures for alternative choices to be pursued, they should be agreed in the first instance with the Department of Justice and Equality and the OGCIO. Progression of the priorities, covering a 3 to 5 years’ timeframe, should be overseen by a strong governance structure;
- (f) Based on an assessment of statistical reporting needs, the Courts Service should ensure that all new ICT solutions would have facilities for the automated production of statistical outputs, thereby eliminating manual intervention and improving statistical reliability and timeliness.

Among the actions taken with a view to implementing the Capability Review recommendations,<sup>40</sup> the Courts Service finalised in June 2019 a Long-term Strategic Vision statement covering the period to 2030 (“the Vision Statement”).<sup>41</sup> That statement includes a number of “ambition statements” summarising the outcomes to be delivered. Of particular relevance to facilitating of e-litigation are the following:

*“Hold and manage hearing and case information digitally*

Remove non-value adding document handling and manual interventions from our processes, sharing information electronically both externally and internally minimising data entry.

*Adopt “digital first” for the filing of court documents and case progression*

Use digital to enable e-filing of court documents and enhanced case management by monitoring on-going progress of cases between court hearings, minimising the time at court that is required to manage cases, and to focus hearings on the adjudication and determination process. Only require attendance in person at hearings where necessary.

*Be effective and efficient in the delivery of our services*

Use the availability of electronic information to improve our technology solutions, business processes, the ways we work and how we are structured to deliver services. We will develop national centres of excellence to support the new service delivery model.

39 Viz.:

- “Build-to-Share: That would involve the development of ICT shared services solutions that would enable interoperability and support integration between applications internally within the Courts Service and externally with other government bodies, especially the justice agencies, in order to drive efficiency, standardisation, consolidation, reduction in duplication and cost control. An essential precursor to the development of each common application is that the relevant process flows must be standardised for each court jurisdiction.
- Digital First: A Digital Transformation Programme should feature as a requirement in the ICT Strategy so that a common approach to building ICT platforms would be put in place, including for the purposes of developing new digital services for court users and the public in line with OECD and Government policy.
- Data as an Enabler: A plan for the automated generation of management information from ICT systems without resort to manual intervention is needed, particularly from the perspectives of decision-making, service delivery and statistical reliability.
- Improved Governance: The governance model for ICT projects needs to change so that the commissioning business unit would exercise lead responsibility for delivery, and provide all necessary support to the ICT Unit throughout the various project phases. To that end, senior management needs to put in place a new policy on the partnership arrangements to apply between the ICT Unit and the business side.
- Increased Capability: As the ICT function is not appropriately resourced to meet the demands placed upon, in terms of both new development and business-as usual (BAU) activities, it needs to be restructured to best manage and organise the required transformation agenda.”

40 The Action Plan is available at: <https://courts.ie/acc/alfresco/7a7958c2-b0b5-48bf-8623-553453badf40/Organisational%20Capability%20Review%20Action%20Plan.pdf/pdf#view=fitH>

41 Courts Service, “Supporting Access to Justice in a modern, digital Ireland: Long-Term Strategic Vision – 2030” (furnished to the Review group by the Courts Service).

*Only require attendance in person at hearings where necessary*<sup>42</sup>

Reduce the requirement for attendance at court by increasing the range of matters that can be dealt with online, allowing hearings to be dealt with more efficiently. Allowing low complexity / low value cases and activities to be completed online without the requirement for attendance at court will free up significant time at court.”

The Vision Statement envisages a phased implementation in three phases, viz.: “Transition” (to end 2022), “Transform” (to end 2025) and “Optimise” (to end 2030). It commits the Courts Service *in the short-term* as follows:

“ we will initially focus on building the foundations for change;

- We will acquire the new digital transformation capabilities that are required to shape and drive the change set out in this strategic vision
- We will take key investment decisions in relation to those core technology systems (Criminal, Civil and Family) that will be used as a basis to deliver the future state.

In the early phases of this transformation programme, we will focus on:

- Delivering visible momentum and early progress in this transformation programme, to gain the confidence and buy-in from the judiciary, our staff and stakeholders
- Addressing priority areas of operational need, we will work with key stakeholders to run pilot projects to test and explore how the use of digital tools and agile techniques can revolutionise our ways of working.”<sup>43</sup>

The “transition” phase would include -

- Expanding the use of technology in court
- Delivery of e-services including expanding the use of e-filing, e-probate, e-licensing, e-registers
- Expanding electronic exchange of data with other state agencies in criminal and civil cases
- Improving data quality
- Developing digital services strategy<sup>44</sup>

The statement envisages that by end 2025 the Courts Service will be using “[d]igital solutions to change the ways services are delivered”. By end 2030, the Courts Service will “[d]rive sustainable monetary and non-monetary benefits.”<sup>45</sup>

The Courts Service Board has made changes to governance and organisational arrangements to facilitate implementation of its long-term strategy. It has established a Modernisation Committee chaired by the Chief Justice to oversee delivery of the Courts Service’s Modernisation programme. The Courts Service’s ICT Department is being reviewed with a view to its re-structuring and the Review Group understands that additional resources are being secured for it, including a recently appointed Chief Information Officer with executive responsibility for digitalisation of services.

## 4. On-line access to the court file

As mentioned in Section 1 of this chapter, the Review Group was tasked to examine the extent to which pleadings and submissions and other court documents should be available or accessible on the internet.

Traditionally, access to the hard copy file in civil proceedings has not been available to members of the public generally. Section 65(1) and (3) of the Court Officers Act 1926 provide:

42 In relation to this ambition statement, the Courts Service states that its role will be to work in partnership with the judiciary and others in seeking to bring about these reforms.

43 Courts Service, “ Supporting Access to Justice in a modern, digital Ireland etc.” op.cit., page 12.

44 Ibid.

45 Ibid.

“(1) Nothing in this Act shall prejudice or affect the control of any judge or justice over the conduct of the business of his court.

...

(3) All proofs and all other documents and papers lodged in or handed in to any court in relation to or in the course of the hearing of any suit or matter shall be held by or at the order and disposal of the judge or the senior of the judges by or before whom such suit or matter is heard.”

In *BPSG Ltd v The Courts Service*,<sup>46</sup> Baker J considered these provisions as reflecting the principle:

“that a judge must be independent in the exercise of the judicial function has as a corollary an entitlement of an individual court to control its own procedures and processes”.<sup>47</sup>

While that judgment concerned the affording of access by a credit reporting agency of default judgements and judgments issuing on conclusion of proceedings, Baker J stated:

“The fact that as a matter of law the release to a person not party to litigation of documents actually used in the course of the trial for a purpose other than those associated with that trial can be directed only with leave of the court, seems to me to import a recognition that the legal custody and control of documents which record the happening of any proceedings can be available only with leave of the court, and cannot be said to be documents to which the public generally has access.”<sup>48</sup>

The traditional restriction on inspection by – and dissemination to – the public of documents lodged in court would appear to rest on concerns that some documents (such as pleadings) may contain unproven allegations or even scandalous matter and not all documents lodged may ultimately be opened or relied upon in the proceedings. Hence, a facility for public inspection or dissemination of such documents may be open to abuse.

Under a Supreme Court practice direction, the notice of application for leave and the respondent’s notice in proceedings in that court are publishable on the Courts Service’s web site subject only to any redaction required by law. Written submissions lodged in such proceedings will be made available to any person requesting same, on payment of any fee chargeable. The party concerned must redact any information the publication of which would contravene any enactment or rule of law, or order of a court. Parties must also ensure that submissions will not contain scandalous, abusive or vexatious material. Documentation must not contain scandalous material.<sup>49</sup>

Quite aside from this consideration, however, since the judgment in *BPSG* the General Data Protection Regulation (“GDPR”) has come into effect, giving a range of protections to data subjects in relation to the processing (including dissemination) of their personal data. By contrast with its predecessor, the Data Protection Directive of 1995, the GDPR expressly states that it applies to “the activities of courts and other

46 [2017] IEHC 209.

47 *Ibid.* para. 67.

48 *Ibid.*, para. 80. Baker J’s decision followed two previous High Court decisions, statements in which appear to be in conflict. In *Minister for Justice Equality and Law Reform v. Information Commissioner* [2001] 3 I.R. 43, Finnegan J. referred (at para. 34) to the established practice in the High Court Central Office under which only the parties to a case or their representatives may inspect the case file as being founded on the courts’ entitlement to regulate the conduct of court business. By contrast, Hogan J. in *Allied Irish Bank Plc v. Tracey (No. 2)* [2013] IEHC 242 stated (at para. 23):

“...the public are entitled to have access to documents which were accordingly opened without restriction in open court. This is simply part and parcel of the open administration of justice which the Constitution (subject to exceptions) enjoins. Entirely different considerations would naturally arise in respect of material which was not opened in open court or which was protected by the *in camera* rules or by reporting restrictions imposed, for example, pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008.”

However, it should be noted that no reference is made in the *Tracey* judgment either to section 65 of the Court Officers Act 1926 or to the previous decision of Finnegan J.

49 Practice direction SC19 of the 4<sup>th</sup> January, 2019, paras. 7 and 20.

judicial authorities” and states that “Union or Member State law could specify the processing operations and processing procedures in relation to the processing of personal data by courts and other judicial authorities.”

Article 23(1) of the GDPR provides that Union or Member State law may restrict by way of a legislative measure the scope of data subjects’ rights “when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard:

...

(f) the protection of judicial independence and judicial proceedings;

...

(j) the enforcement of civil law claims.”

Hence, the courts’ ability to disseminate personal data of litigants and others mentioned in legal proceedings is not unrestricted, and the GDPR therefore has implications for the making available to the public – on-line or otherwise – of pleadings and submissions and other court documents which contain personal data.

Section 158(1) of the Data Protection Act 2018 (“the 2018 Act”), which gives further effect to the GDPR, provides that data subjects’ rights “are restricted to the extent that the restrictions are necessary and proportionate to safeguard judicial independence and court proceedings.” Rules have been made by a panel of judges nominated by the Chief Justice under section 158(3) of the 2018 Act for the purpose of ensuring the effective application of the restrictions concerned. Those rules permit processing of personal data held by courts for purposes connected with the administration of justice – including the publication of a judgment or decision of a court, or of a list or schedule of proceedings or hearings in proceedings, and to facilitate the fair and accurate reporting of a hearing in the proceedings. However, those rules do not expressly authorise release to the public of documents lodged with the court.<sup>50</sup>

Separate rules for each jurisdiction made under section 159(7) of the 2018 Act<sup>51</sup> authorise the disclosure by court officers and the Courts Service to a *bona fide* member of the Press or broadcast media at that member’s request of information contained in a record of a superior court of record for the purpose of facilitating the fair and accurate reporting of a hearing in proceedings before that court, but do not authorise the use of any information in a court record which has not been opened or is not deemed to have been opened at a court hearing and do not displace a data processor’s data protection obligations.

Section 160 of the Data Protection Act 2018 renders lawful the processing of personal data where that processing (a) consists of the publication of (i) a judgment or decision of a court, or (ii) a list or schedule of court proceedings or hearings in court proceedings, or (b) is necessary for the purposes of such publication.

This provision is intended to protect the traditional approach in Ireland – adhering to the constitutional requirement that justice be administered in public save in such special and limited cases as may be prescribed by law – whereby the names of litigants, witnesses and other persons mentioned in proceedings are published in the decision, save in cases which are *in camera* or where such information is otherwise subject to legal restriction. However, publication of court pleadings, submissions and other documents lodged with the court and containing personal data does not come within the ambit of section 160.

50 Data Protection Act 2018 (Section 158(3)) Rules 2018 (S.I. No. 658 of 2018).

51 Data Protection Act 2018 (Section 159(7): Superior Courts) Rules 2018 (S.I. No. 660 of 2018); Data Protection Act 2018 (S 159(7): Circuit Court) Rules 2018 (S.I. No. 662 of 2018); Data Protection Act 2018 (S 159(7): District Court) Rules 2018 (S.I. No. 664 of 2018).



## 5. Responses to the consultation exercise and views expressed within the Review Group

### 5.1 Introduction

A large number of submissions to the Review Group, as well as views expressed by Review Group members, identified a need for the courts to make much greater use of technology to render civil litigation, and the transaction of court business more generally, more efficient. Proposals for technology-based solutions encompassed the following functions.

### 5.2 On-line access to case status and court file

On-line access to the case file and case tracking for the parties to a case and their legal representatives was requested by respondents from both private and public sectors (State Claims Agency (“SCA”); Chief State Solicitors Office (“CSSO”); a practising barrister; NewsBrands; ComReg; RTB). One benefit of this was cited by the SCA as enabling a party to monitor numerous cases in the various provincial lists to ensure that cases appearing in call-over lists are not being missed or struck out for non-attendance. A respondent practising barrister suggested that court orders should be available electronically save in cases of extreme sensitivity and that where originating summonses and other documents have been opened in court or read by a judge, they should be made publicly available in electronic format. The Bar Council also saw merit in a more limited form of access to the case file for other stakeholders, including solicitors and insurance companies etc., for the purpose of fraud detection and prevention, subject to a registration requirement..

On behalf of the Court of Appeal judges, Ms Justice Irvine stated that with the exception of proceedings required to be heard otherwise than in public, given that justice is administered in public, it is difficult to see why written submissions should not be publicly available in an electronic format, but cautioned that such an arrangement would have staff resourcing implications.

Judge John Brennan of the District Court expressed the view that subject to confidentiality considerations there did not seem to be any impediment to pleadings and submissions being available online in the District Court.

One member of the public submitted that the impediments to unrestricted access to court documents prevent real public oversight of court actions and proposed open access to court documents, the positioning of cameras in court, and access to outcomes in written form, with limited safeguards to allow for parties to raise objections prior to the publication of documents online.

Professor Paul Gorecki, Adjunct Professor of Economics in TCD, advocated the making available of submissions in court proceedings in all jurisdictions on the basis currently available in the Supreme Court, and that transcripts made of the digital audio recording of proceedings be available for a nominal sum on demand. He suggested that the increased availability of court documents will result in greater openness and scrutiny of the justice system, leading to greater accountability and strengthening of the judicial system.

Against this, the Department of Defence observed that where documents are made available to the public at large issues such as litigation privilege, potential for defamation, damage from allegations subsequently proving unfounded and management of exhibited documents with a restricted or classified status will need to be considered. ComReg also acknowledged that there may be cases where, by reason of confidentiality or commercial sensitivity, on-line access may not be appropriate, but considered that the general principle should be one of transparency, subject to applications for exceptional treatment. The Law Society saw a need for a clear policy setting the parameters for sight of pleadings by persons not party to the litigation concerned.

The Irish Society of Insolvency Practitioners (“ISIP”), while considering that the making of court documents available on the internet may increase the visibility and transparency of the court process to the general public and lead to greater sharing of knowledge and practices amongst practitioners, cited risks associated with that approach, noting that were documents to become readily available publicly this may make some

parties reluctant to disclose sensitive information in court documents or even to pursue legal proceedings. It submitted that to the extent that court documents may be made available on the internet, some protection should be applied to private and/or confidential information whether through redaction or restriction of access to solicitors on record. It further noted that the filing of all court papers creates the risk of copyright infringement, particularly in the case of written submissions.

NewsBrands Ireland submitted that *bona fide* members of the Press should have access to documents filed in court offices at the earliest opportunity, and cited the Public Access to Court Electronic Records (“PACER”) service provided by the US Federal courts and the arrangements for access to records in England and Wales as possible models for making court records available.

Currently an on-line search facility on the Courts Service website is available only for High Court cases. A respondent practising barrister suggested that this facility has great potential but tells litigants and lawyers astonishingly little about the litigation they are involved in, and that the documents referenced as “filings” should be available to view in PDF format.

### 5.3 e-Filing

Strong support was evidenced for a facility to file case documents on-line/electronically (Law Society; Court of Appeal judges; High Court Personal Injuries List judges; Ms Justice Leonie Reynolds; Circuit Court and District Court judiciary; SCA; CSSO; Department of Business, Enterprise and Innovation, IDA Ireland and Enterprise Ireland; Revenue Commissioners; a large Dublin-based law firm, conveying suggestions made by in-house counsel working for commercial organisations; a respondent engaged in the business of litigation technology; the Legal Aid Board).

The Law Society submitted that the introduction and support of e-filing of all pleadings and court documents across the various court jurisdictions is “urgently required” and that court rules should mandate e-filing of pleadings and increased use of digital documents, and specify how practitioners are to prepare and file such documents. It considered that the Courts Service’s first proto-type for e-filing – Debt Claims On-line, referred to at Section 2.3 of this chapter – though it had failed to reach fruition, has the potential to greatly improve efficiencies for users and the Courts Service.

Mr. Justice Kevin Cross, on behalf of the High Court Personal Injuries List judges, supported the introduction of e-filing “subject to hard copies being available for the court at trial”.

The CSSO submitted that a forum whereby all court paperwork could be filed electronically via a secure website, with password protected webpages, would be very welcome. This would be particularly useful in areas such as judicial review where there is no oral evidence. The CSSO noted that safeguards would need to be implemented to ensure that the electronic communication could reasonably be regarded as having been received by the recipient.

The Department of Business, Enterprise and Innovation, IDA Ireland and Enterprise Ireland suggested that all court documentation, including judgements, case management documents and case progression reports, be made available digitally on-line, as appropriate.

The respondent involved in the litigation technology business suggested a need for standardisation of documents as a condition of e-filing.

### 5.4 e-Service of court documents

Support was expressed for facilitating of service of documents by electronic means and social media (Bar Council; ComReg; SITF). The Bar Council considered that e-mail should be promoted as the primary method of service of court documents between parties, in particular for registered companies.

The Review Group notes that it has been possible under the Superior Courts Rules since November 2017 and under the Circuit Court Rules since October 2018 for parties – or their representatives – to indicate that

they will accept service by e-mail. Such service applies to natural and artificial legal persons. The District Court Rules Committee expressed reservations about the unrestricted use of service by e-mail, having a concern in particular that documents attached by e-mail in family proceedings could be easily disseminated beyond the category of recipients entitled to see them.

Additionally, in cases subject to case management under the 2016 amendments to the Rules of the Superior Courts,<sup>52</sup> Order 63C rule 22 RSC provides that documents required under or in accordance with that Order to be served, exchanged or inspected in proceedings (including any affidavit of discovery and copies of the documents (not including documents over which privilege is claimed) in any schedule thereto) may be served or exchanged and filed electronically where the President of the High Court by practice direction permits, and on such terms and conditions and subject to such exceptions as may be specified in the direction.

### 5.5 On-line applications and e-communications on case scheduling

The Law Society recommended investigation and development, if feasible, of an “Online Consent Adjournment” system facilitating online applications for online consent and decisions, as well as applications for adjournments made in advance of matters being mentioned in Court. The DSBA also recommended a facility for filing of motions electronically, which in certain straightforward matters could be reviewed by the court and an order made on the materials without the need for anyone physically to attend in court.

A large law firm jointly with the Irish Hotels Federation recommended a facility for e-communication by parties/and practitioners with the court on the scheduling of and hearing time required for applications and trials.

### 5.6 Electronic case presentation in court

Some respondents pointed to the advantages of a facility to present pleadings and other documents in court electronically (CSSO; the Legal Aid Board). The CSSO observed that in large cases, an enormous amount of time is currently spent by practitioners in compiling bankers’ boxes full of folders which invariably are only opened very partially to the court at hearing.

Drawing attention to practical issues which electronic presentation may give rise, Judge Irvine, on behalf of the Court of Appeal judges, observed that documents in electronic format are difficult to mark and highlight in the course of submission and may be difficult to locate in the aftermath of the hearing when writing a judgement.

A practising barrister advocated encouraging, though not requiring, the use of electronic trial presentation methods, especially in longer and more complex cases. That respondent recommended adoption of flexible protocols regarding uploading of video, audio and image evidence, e-books of core documents etc.

### 5.7 On-line dispute resolution

The Society of Chartered Surveyors Ireland (“SCSI”) and the Apartment Owners’ Network suggested that dispute resolution for the multi-unit / apartment sector should be moved away from the courts to an online portal, albeit with a right of appeal to the courts.

Judge John Brennan saw the small claims jurisdiction as an ideal area for a pilot scheme of online dispute resolution provided the technological platform and financial resources were available.

### 5.8 e-Payment of court fees

The Law Society advocated a modern electronic method of payment of court fees, such as are available from other public bodies (CRO, Revenue, etc.). Such a payment method would enable practitioners to

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52 Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial procedures) 2016 (S.I. No. 255 of 2016)

comply with their money-handling and accounting obligations under the Solicitors Acts. Existing paper-based processes (e.g. stamping court documents, filing etc.) should, if requested, be reviewed for digitalisation. The DSBA also requested such a facility.

## 5.9 Other comments

The Law Society recommended that a liaison group be established by the Courts Service for the purpose of ensuring early engagement with stakeholders, including legal practitioners, on the development of eServices. This liaison group should be guided by the following principles -

- Advance eServices to promote greater access to justice and reduce the cost of its administration,
- Promote early consultation with court users,
- Ensure a consistent approach is applied across the eGovernment landscape, such as payment systems, user verification and authentication of digital documents.

The High Court jurisdictional sub-group recommended that the use of video-conferencing to ease the burden on medical practitioners attending court should be promoted and facilitated.

The judiciary of the Circuit and District Courts both supported provision of access by judges to an electronic version of the court file. In the case of the Circuit Court, they recommended that a computerised record of all live Circuit Court cases in each county be maintained and furnished to the County Registrar and the Judge assigned to the circuit on a quarterly basis with a view to striking out cases which are not proceeding and ensuring cases which are proceeding do so expeditiously.

The Legal Aid Board recommended the further deployment of video-conferencing in courts.

## 6. Conclusions and recommendations

### 6.1 The future e-Litigation model

The Review Group saw no need to conduct an in-depth inquiry into the existing state of ICT in the courts in view of the detailed appraisal undertaken and recommendations issued by the Capability Review. However, the Review Group notes that the responses to its public consultation and the views expressed within the Review Group itself show a remarkable alignment with the vision of an eCourt environment articulated in the Capability Review. The Review Group endorses the Capability Review's views in that regard.

The common expectations of an optimal future e-Litigation model for civil proceedings thus emerging include -

- a secure digital environment enabling -
  - parties or their representatives to file with the court and exchange with each other pleadings and other documents throughout the life-cycle of the case, at first instance and on appeal
  - transaction on-line of court fee and other payments associated with the case
  - generation and dissemination of hearing dates and court calendar management
  - on-line applications for adjournments or other orders or directions, where appropriate
  - association of audio or video recordings in the case with the digital case file or record
  - recording and issuance of orders and directions in the case
  - distinct workspaces for judges and court registrars with access to the digital case file or record, and to forms and precedents
  - dissemination/publication of case outcomes (orders, directions and judgments)
- a facility to conduct a case before the court utilising the courtroom technology (e.g. evidence presentation, video-conferencing, digital audio recording) to the fullest extent

- varying levels of access to the digital court record for parties, judges, court staff and members of the public, consonant with data protection and privacy rights and
- capture of case management information and caseflow data (adjournments, timescale to disposal, delivery of judgment etc.)

The features identified above are not intended to be definitive or exhaustive, nor do they address wider issues – such as interoperability of civil case support systems with criminal case support systems and the organisational approach to providing ICT services – which are outside the Review Group’s remit. Quite aside from this, technology – and the potential process improvements it offers – is constantly evolving and expectations of what an e-Litigation model should deliver are likely to change, especially over the ten-year period envisaged by the Courts Service’s Vision statement.

However, the Courts Service should ensure that the e-Litigation model it adopts minimally incorporates or otherwise facilitates the features and functionalities listed above.

## 6.2 On-line access to the court file

Quite aside from any issues of protection of the intellectual property rights in pleadings or submissions which public dissemination of such material may present, it would seem clear from Section 4 of this chapter that any facility for the publication on-line of documents lodged with a court would require to take into account the need to restrict appropriately publication of the personal data of any data subject contained in those documents, through anonymising of references to the individuals concerned and further redaction of information which would tend to identify a data subject.

Such an exercise could not be left entirely to the parties, as the courts cannot divest themselves of their obligations as data processors. However, the assigning to court offices of the task of redacting a high volume of individual documents would have quite significant implications in terms of the additional staffing resources needed, the time consumed in evaluating the documents, consulting with the parties and seeking judicial directions in cases of doubt or difficulty, the associated burden imposed on parties and their legal representatives to review documents individually and the consequent additional costs involved.

The Review Group does not consider that the very considerable administrative burden on the courts and the parties which such a facility would impose would be justified by any perceived benefits in conferring additional transparency on the administration of civil justice, particularly in circumstances where facilities for inspection by the media of court documents are now in place.

## 6.3 The next steps towards an e-Litigation model

### 6.3.1

The Review Group notes the work already undertaken by the Courts Service in appraising critically its CSOL platform for e-Litigation, and the three-phase implementation approach – “Transition” (to end 2022), “Transform” (to end 2025) and “Optimise” (to end 2030) – in its Vision statement. This contains a commitment during the phase to 2022 to “[d]elivery of e-services including expanding the use of e-filing, e-probate, e-licensing, e-registers” – though without specifying the categories of litigation to which e-filing would extend – and to “[d]eveloping digital services strategy”.

The Courts Service also commits in the early phases of the transformation programme – in “addressing priority areas of operational need” – to working with key stakeholders to “run pilot projects to test and explore how the use of digital tools and agile techniques can revolutionise our ways of working”.

The Vision Statement leaves a number of questions open as to implementation, including: whether CSOL – in light of the issues raised on the appraisal of it above mentioned – will serve as the basis for developing the Courts Service’s digital services strategy or whether some other platform should be selected; what case

types may fall within those priority areas of operational need to qualify as pilot projects in the period to end 2022; and how implementation will affect, or be influenced by, the existing project list identified as part of its change programme (see Section 2.6 of this chapter).

These issues will, it may be expected, impact on the Courts Service’s ability to extend e-filing within the next two-year period.

### 6.3.2

The Review Group does not propose to revisit the approach to implementing the recommendations of the Capability Review as disclosed in the Vision Statement. It confines itself to commending the Courts Service’s openness to working with practitioners and court users on piloting of e-Litigation solutions and recommending that liaison with and input from practitioners/court-users affected should be integral to the Courts Service’s methodology for design or procurement of those solutions.

The Review Group’s primary concern is to ensure that the pent-up demand of practitioners and court users for use of e-Litigation methods – clearly evidenced in its public consultation – be addressed in a practical way pending the phased implementation by the Courts Service of its vision of a comprehensive e-Litigation solution over the period to 2030. It therefore recommends some limited steps – set out immediately below – which might be taken in the immediate term to meet the need for practitioners and court users to conduct litigation in the courtroom in a way which reduces – if not eliminates – reliance on paper.

### 6.3.3

The advent of the Covid-19 pandemic has, if anything, underlined the need for and potential of technology in the courtroom to enable various categories of court business to be disposed of without a conventional hearing, while respecting the need for most hearings to be public in nature.

### 6.3.4

In the immediate term, the Review Group sees an opportunity, with relatively limited capital expenditure, to promote and encourage e-Litigation through the equipping of a much larger number of courtrooms across all jurisdictions with Wi-Fi and evidence display hardware to enable the use by practitioners of e-Litigation software to present their cases in court electronically.

The Review Group notes the arrangements established in response to Covid-19 for liaison between the judiciary, the Courts Service and practitioners, and sees such arrangements as playing an important role in:

- (a) evaluating, with the benefit of the experience of remote hearings operated to date, including during the Covid-19 pandemic, the courts’ current capacity to facilitate the holding of remote hearings;
- (b) continuing to pilot – through presentations at mock hearings – collaboration by practitioners and judges in the use of electronic presentation software in the courtroom;
- (c) identifying any practical, technical or other difficulties arising and seek their resolution; and
- (d) promoting within the judiciary and the legal profession, respectively, the conduct of paperless hearings.

While the Dublin courts may most readily lend themselves to a pilot given the number of equipped courtrooms available, pilots at specific venues in the Circuit and District Courts could be selected in consultation with the Presidents of those Courts and the legal professional bodies.

Following the precedent of the practice direction on use of video-conferencing of 2007 referred to in Section 2.5 of this chapter, a practice direction could require practitioners wishing to present their cases electronically to notify the court office of the jurisdiction concerned a set time in advance of the application or trial date, in particular to

- (a) enable a suitably equipped courtroom to be identified
- (b) ensure that the electronic material was made accessible to the Judge and the court registrar sufficiently in advance of the hearing and
- (c) enable the system to be tested in advance of the hearing, if appropriate.

### 6.3.5

Also in the more immediate term – and building on the recommendation of its High Court sub-group – the Review Group sees considerable potential benefit, both in minimising inconvenience to witnesses and containing witness costs, in promoting the use of video-conferencing for the taking of expert and other evidence. It notes that section 11 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 enables the senior judiciary to designate categories or types of civil proceedings for hearing remotely.<sup>53</sup> It recommends that, as an initial step,

- (a) trials of personal injuries actions in the High Court in Dublin be located in courtrooms equipped with video-conferencing and
- (b) the judge in charge of the Personal Injuries List should, when fixing a trial date, enquire of the parties as to whether there is any reason why the expert witnesses should not give evidence by video-conference.

Wider use of video-conferencing for adducing of evidence will require that the Courts Service increase considerably the number of suitably equipped courtrooms – beyond the present three courtrooms in the Four Courts and beyond the present 28 venues in the Circuit Court outside Dublin.

### 6.3.6

The Review Group identified a demand from judges, especially in the Circuit and District Courts, for desktops and docking stations on each bench, to enable judges to reduce their paper-based tasks where possible. It recommends that the Courts Service liaise with the senior Judiciary with a view to settling upon the standard equipment set which should be available on each court bench and implement a programme to install the appropriate hardware in those courtrooms which are currently not equipped to that standard.

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53 See Section 2.5 of this chapter.

# CHAPTER 12

## SUMMARY OF RECOMMENDATIONS





## Jurisdiction (Chapter 4)

### 1.

The Review Group understands that the proposals made by former President Groarke to the Minister for Justice and Equality for reconfiguration of the Circuit Court circuits are to be subject to discussion with the senior judiciary of that court and does not consider it necessary to make any recommendation thereon in the circumstances.

### 2.

The Review Group also understands that proposals made by former President Horgan to the Minister for Justice and Equality for review of the organisation of District Court districts are to be subject to discussion with the senior judiciary of that court and likewise does not consider it appropriate to make recommendations in the circumstances.

### 3.

The Review Group has given consideration to the issue of whether or not the general threshold of €1,000,000 for admission of cases to the Commercial Court should be increased. The Review Group does not consider that such an increase is warranted at this time, but recommends that the threshold be kept under review, such review to be conducted every three years.

## Procedure (Chapter 5)

### 1. Introduction

In recent decades a series of reforms of civil procedure have been implemented or recommended for implementation to address the problems of delay, complexity and cost, and to promote recourse to ADR. Nonetheless, it is clear from Chapter 3, from submissions received by the Review Group and from opinions expressed within it, that:

- (a) some reforms already legislated have not been implemented effectively;
- (b) a range of proposals by expert bodies on civil justice have yet to be adopted; and
- (c) potential for further reforms exists.

The Review Group's recommendations on court procedure embrace these three elements.

### 2. Embedding reforms already legislated

#### 2.1 Pre-action protocols

The Review Group recommends that early attention be given to the introduction of the Ministerial regulations prescribing the pre-action protocol ("PAP") in clinical negligence cases.

#### 2.2 Case management

##### 2.2.1

The Review Group endorses the recommendations of the Working Group on Medical Negligence and Periodic Payments on the employment of case management in clinical negligence claims, which set out draft rules in the appendix to its report on Module 3 – these rules being contingent on the introduction of the PAP for clinical negligence cases.

### 2.2.2

The Review Group acknowledges differences of view as to whether case management would be of practical benefit in other categories of personal injuries action, but notes in any event that section 18 of the Civil Liability and Courts Act 2004 already empowers the court, where it considers it appropriate, to direct that a hearing be held before the trial of the action to determine what matters relating to the action are in dispute, which hearing may be presided over in the High Court by a judge, the Master or a Deputy Master or a registrar, and in the Circuit Court by a judge or a county registrar.

### 2.2.3

The Review Group also recognises that implementation of case management across a significant category of chancery and non-jury cases will present resourcing challenges in particular for the High Court, where case management powers are at present vested in judges only.

### 2.2.4

The Review Group recommends that case management powers be conferred on an expanded cadre of Deputy Masters by rule of court, enabling judicial resources to be concentrated on (a) hearing pre-trial applications disposal of which requires the exercise of judicial powers which could not, within the bounds of Article 37.1 of the Constitution, be assigned to a Master or Deputy Master and (b) conducting trials.

### 2.2.5

Optionally, to save on staffing resources, the Deputy Master role could be combined with the existing role conceived for the registrar in the case management rules.

### 2.2.6

Deployment of Deputy Masters to the case management role would also ensure that the Master could focus on attending to the conventional business of the Master's List.

### 2.2.7

However, the employment of court officers as Deputy Masters will be dependent on the existence of a sufficient cadre of appropriately qualified staff competent to exercise judicial functions of a limited nature and manage complex litigation. To that end, the Courts Service needs to make provision within its staffing structure at appropriate grades, and recruit for, a cadre of legal officers qualified by expertise and experience to carry out those functions.

### 2.2.8

It would also appear from submissions received that far greater use could be made of the case management rules in the Circuit Court in cases to which those rules already apply, and that consideration could usefully be given to extending case progression by practice direction – as permitted by those rules – to other categories of case, viz. to any case other than –

- (a) proceedings – such as mortgage possession proceedings – in which an immediate return date before the county registrar is given and
- (b) proceedings for summary judgment under Order 28 of the Circuit Court Rules,

in which, following written inquiry of the parties by the county registrar after six months from the issue of the Civil Bill, the county registrar ascertains that no defence has been delivered, or has not received confirmation as to whether one has been delivered or not (i.e. cases which are not, or do not appear to be, proceeding with expedition).

### 2.2.9

Consideration should also be given to extending case progression by practice direction under the rules of court to cases which are likely to occupy more than one day at trial.

## 2.3 Pleadings reform

### 2.3.1

Certain submissions received would suggest that the requirements of the Civil Liability and Courts Act 2004 for particularising of personal injuries summonses and defences are not being fully complied with. The Review Group notes that parties disadvantaged by non-compliance have remedies available to them in applying for a stay or dismissal of proceedings or (as the case may be) judgment against a defendant, or seeking a sanction in costs.

### 2.3.2

The Review Group also endorses the suggestion of the State Claims Agency that consideration be given to strengthening section 10(2) of the Civil Liability and Courts Act 2004 to impose an obligation on plaintiffs to distinguish clearly in the particulars provided in the personal injuries summons between any relevant pre-existing medical condition of a claimant and the injuries that are the subject of the claim.

### 2.3.3

More generally, and in conjunction with its recommendations for replacement of the discovery remedy in Chapter 6, the Review Group recommends that the rules of court regulating the content of pleadings be amended to require parties to plead their case with far greater precision than has been the case to date with a view to ensuring that the real issues in dispute can be identified prior to trial. The standard of particularity of pleading in personal injuries actions introduced by the Civil Liability and Courts Act 2004 should serve as the model for such rules.

## 2.4 Measures to reduce delay in and time and cost of proceedings

### 2.4.1

The Review Group has considered in detail in Section 4.12.2 of Chapter 5 the existing rules of court comprehensively regulating the adducing of evidence by expert witnesses in the High Court, which are designed, as soon as possible in advance of trial, to identify and narrow down the issues and to contain the extent of and costs associated with the expert evidence required to be given in a dispute. It would appear from submissions to the Review Group that these rules – in particular those enabling the directing of meetings between and a joint report from experts, the use of a single joint expert and the debate between experts (“hot-tubbing”) procedure – are not being fully availed of, if availed of at all.

### 2.4.2

The Review Group recommends that full use be made of the powers conferred by the conduct of trials rules in the High Court to contain the time and expense incurred in adducing of expert evidence and to impose timetables on the successive stages of the trial process. The Review Group further recommends that orientation on those rules be included in the continuing professional development programmes of both branches of the legal profession and in the programme of judicial studies.

### 2.4.3

The Review Group also notes that under Section 169(1) of the Legal Services Regulation Act 2015, the factors which a court may take into account when determining whether or not costs are to follow the event include (a) conduct before and during the proceedings and (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings. When seen in conjunction with the provisions of Order 99 of the Rules of the Superior Courts that allow the court to impose costs sanctions where costs have been incurred improperly or without any reasonable cause – including ordering the disallowing of costs between legal practitioners and clients and directing legal practitioners to repay certain costs for which their clients have become liable – these provisions set out a comprehensive regime for the regulation of costs in the context of the duration of trials.

#### 2.4.4

The Review Group is aware that due, to the lack of an index of health care sector inflation – similar to the Annual Survey of Hours and Earnings (ASHE) (2000) 6115 employed for periodic payment order (“PPO”) indexation in the UK – PPOs are not in practice being sought by plaintiffs. It notes the statement in *H (A Minor) v The Health Service Executive* that no competent financial expert would recommend a PPO linked to the harmonised index of consumer prices to provide for the future care needs of a plaintiff and that it is not in the best interests of a catastrophically injured plaintiff to apply for a PPO under the current legislative scheme. The Review Group recommends that an assessment be carried out, with the assistance of the CSO, in order to determine a replacement index for the Harmonised Index of Consumer Prices which would take appropriate account of the need to address health care sector inflation relevant to PPOs, and that, on a replacement index being identified, section 51L of the Civil Liability Act 1961 be amended as necessary to facilitate the substitution of the replacement index for the Harmonised Index of Consumer Prices.

### 3. Implementing reforms previously recommended

#### 3.1 Extension of pre-action protocols

##### 3.1.1

Submissions received support the extension of PAPs beyond clinical negligence actions to other areas of civil litigation. The most effective means of extending PAPs to other areas of litigation would, in the Review Group’s view, be to confer on the court rules committees – rather than a Minister – a general power to prescribe PAPs for specific categories of dispute identified by those committees. The assignment of such a power to the court rules committees would ensure that the content of PAPs was informed by the professional expertise and experience represented in those committees and was fully aligned with and integrated into the procedures of the court concerned.

##### 3.1.2

The Review Group endorses the recommendations of the Expert Group on Article 13 ECHR (“the Expert Group”) that primary legislation should (a) extend the remit of the courts rules committees to permit them to prescribe PAPs for categories of litigation under rules of court, and (b) empower courts to order disclosure prior to the commencement of proceedings in accordance with rules of court in circumstances where a claim is covered by a PAP.

##### 3.1.3

The Review Group is conscious however that civil litigation in the District Court and the Circuit Court tends to be less complex than litigation in the High Court, and for those cases in the lower courts that would benefit from the narrowing of issues at the pre-trial stage, case management and case progression is available to the parties and to the court. For these reasons the Review Group recommends that PAPs be prescribed for specific categories of High Court litigation only at this time. Should the monetary jurisdictional thresholds of the District Court and the Circuit Court be increased in the future, the need for a PAP for particular case-types in those jurisdictions could then be examined by the rules committees for those jurisdictions.

#### 3.2 Limitations on adjournments

The Review Group recommends implementation of the recommendation of the Expert Group that provision be made in statute that:

- (a) a judge (or court officer where so empowered), when considering a contested application to adjourn proceedings, or to grant an extension of time for the taking of any step in proceedings shall: examine the reasons for the application; have regard to any previous adjournments or (as the case may) extensions granted; and have regard to whether any adjournment or extension which might be granted would impede the holding of a trial of the proceedings within a reasonable time;
- (b) a judge or court officer shall not grant an adjournment or extension unless satisfied that there is sufficient reason for doing so and that it would be in the interests of justice to do so.

### 3.3 Automatic discontinuance

The Review Group proposes a modified version of the recommendation of the Expert Group that provision be made by rule of court for automatic discontinuance of proceedings on a similar basis to that provided for in the Rules of Court of Singapore.

The Review Group recommends that provision be made by rule of court for automatic discontinuance –and to that end that the court rules committees be expressly empowered by statute, in terms of the principles and policies, to prescribe an automatic discontinuance procedure – along the following lines (the provision being expressed here as a rule of court for convenience):

1. (1) Subject to sub-rules (2) to (6), any proceedings which, within a period of 30 months of their commencement –
  - (a) have not been set down for trial or
  - (b) in cases not requiring to be set down for trial, have not had a date fixed for trial, and
  - (c) in which there has been no proceeding (not including an entry of appearance or delivery of a notice of intention to proceed) that appears from records maintained by the Court,

shall be deemed to have been discontinued.

- (2) A discontinuance under sub-rule (1) does not apply -
  - (a) where the proceedings have been stayed pursuant to an order of the Court,
  - (b) to any proceedings affecting the interest of a person who is under disability or otherwise not *sui juris*.
- (3) A discontinuance under sub-rule (1) may, on application made by a party to the Court within the period referred to in sub-rule (1), be deferred by the Court for good reason and for such period, and on such terms (including as to costs), as the court may direct.
- (4) A discontinuance under sub-rule (1) does not affect a claimant's entitlement to bring a fresh action in respect of the claim provided the limitation period applicable to the right of action concerned has not expired.
- (5) A discontinuance under sub-rule (1) shall not serve as a defence to a subsequent action for the same, or substantially the same, cause of action.
- (6) Where proceedings have been discontinued under this rule, the Court may, on application by a party to those proceedings on notice to the other party or parties, and on such terms as it deems just, reinstate the proceedings and allow them to proceed.

For the sake of clarity and legal certainty, the implementing statutory instrument should provide that Order 122 rule 7(1) RSC, which empowers the court to enlarge or abridge the time for doing any act or taking any proceeding, shall not apply to an application under sub-rule (3). A claimant would retain under sub-rule (4) an entitlement to bring a fresh action in respect of the claim provided the limitation period applicable to the right of action concerned has not expired, and to apply for reinstatement under sub-rule (6).

The aforementioned provisions should also be incorporated, with any adaptations necessary, in the rules of court for the other first instance jurisdictions.

Each implementing statutory instrument concerned should provide that the new procedure shall have application only to proceedings commenced after it comes into operation.

## 3.4 The recommendations in the Law Reform Commission’s Report on Consolidation and Reform of the Courts Acts

### 3.4.1

The Review Group is of the view that early consideration should be given to incorporating in legislation those provisions of the draft Bill prepared by the Law Reform Commission for which provision has not already been made in legislation.

### 3.4.2

The Review Group draws attention in particular to, and recommends early implementation of the Commission’s proposals:

- (a) for the enshrining in primary legislation of “case conduct principles” governing the conduct of litigation and case management obligations of the court;
- (b) that the court rules committees’ remit be extended to modifying the rules of evidence as they apply to civil proceedings; and
- (c) that the powers of the Presidents of the first instance jurisdictions to issue practice directions be codified in statute (as has since been done for the Supreme Court and Court of Appeal in the Court of Appeal Act 2014).

## 4. Further procedural reforms

### 4.1 Standardisation and simplification

The Review Group, supported in its view by a number of submissions on the subject, sees potential for improvement in two related areas, namely (a) the harmonisation of the forms and proofs necessary for the commencement of proceedings across the first instance jurisdictions and (b) the standardising and simplification of terms and language used in civil procedure.

#### 4.1.1 A single originating document: the claim notice

##### 4.1.1.1

The Review Group recommends the introduction of a new standard form of “claim notice” – adopting the term currently used in the District Court – to replace the numerous other forms of originating documents.

##### 4.1.1.2

The Review Group recommends the harmonising across the jurisdictions of the forms of originating document, terminology and information requirements associated with the way in which proceedings are commenced, as follows:

1. A single and uniform term should be used to describe the originating document: the “claim notice”;
2. The terms “plaintiff” or “applicant” should be replaced by “claimant” and “respondent” should be used instead of “defendant”;
3. That every claim notice should follow a similar format, to include, in sections
  - (a) the title to the proceedings, including the court in which the proceedings are to be issued (including, in the case of the District Court, the District number and area and, in the case of the Circuit Court, the Circuit and county concerned), the record number and the names and addresses of the parties or (where the proceedings do not involve a respondent) the claimant
  - (b) notice to the respondent, in High Court and Circuit Court proceedings, that an appearance must be entered to the claim notice within eight days of service on the respondent of the claim notice;
  - (c) where appropriate to the nature of the claim, notice to the respondent of the course available to them (i.e. admitting the claim, defending the claim) and of the consequences of a failure by the respondent to respond to the claim by entering an appearance and defending the claim
  - (d) a detailed statement of the claim, including any necessary information to establish compliance with local jurisdictional requirements (in the case of the District Court or Circuit Court

proceedings), to show an entitlement to seek specific reliefs forming part of the claim, or to establish compliance with any statutory requirements which may be pre-requisite to the bringing of the claim. The level of detail to be set out in this section would be comparable to that contained in the indorsement of claim in a Civil Bill or (in the High Court) a statement of claim or special indorsement of claim

- (e) where appropriate to the nature of the claim, reference to the supporting sworn evidence or (as the case may be) additional documentation supporting the claim
- (f) where appropriate to the nature of the claim, a return date for the initial hearing
- (g) the signature of the claimant or their solicitor, and
- (h) the date of issue of the claim and the appropriate form of official authentication of the claim.

#### 4.1.1.3

The Review Group’s recommendation would further the approach already adopted in the three first instance jurisdictions in using a single form to commence personal injuries proceedings. The single claim form would replace every originating document in each of the three jurisdictions – including originating notices of motion and petitions – but sub-categories of claim notice would continue to exist depending on the nature of the underlying cause of action, claim or relief sought. For example:

- a Landlord and Tenant Civil Bill would be replaced by a “Claim Notice – Landlord and Tenant”;
- an application for leave to apply for judicial review would be replaced by a “Claim Notice – request for leave to seek Judicial Review”
- an originating notice of motion in a statutory appeal would be replaced by a “Claim Notice – appeal under [citing the section and Act concerned]”;
- A petition by an unpaid creditor to wind up a company would be replaced by a “Claim Notice – request by unpaid creditor for winding up of company”.

#### 4.1.1.4

The Review Group sees this new approach as operating in much the same way as that in England and Wales: while as a general rule the “claim form” in that jurisdiction is the appropriate means of commencing the majority of claims there, even within the standard commencement process there are various exceptions and special rules affecting the content of the claim form depending on the category of claim.

#### 4.1.1.5

Since numerous references appear in the statute book to existing types of originating document, such as “civil bill”, “originating motion” etc., replacement of the existing originating documents will require a primary legislative amendment of general application to provide that references to those documents in existing statutes or statutory instruments shall be construed as references to a claim notice.

#### 4.1.1.6

In High Court and Circuit Court proceedings an appearance would require to be entered by a respondent to the notice within eight days of its being served on the respondent. This would be a new requirement for proceedings such as judicial review and various proceedings on originating notices of motion.

#### 4.1.1.7

The Review Group does not propose that the replacement of the originating documents by the claim form would alter the current requirement – depending on the nature of the claim, for delivery of a defence or a replying affidavit where these are currently required.

### 4.1.2 Simplifying terms and language

#### 4.1.2.1

The Review Group acknowledges the need for simplifying of language in rules of court and court forms but also recognises that the task of doing so will be a challenging and resource-intensive one. Many expressions in the rules and forms are a product of the provisions and terms in the primary legislation they facilitate, or of long-established legal terms derived from the usage of earlier centuries. Some primary legislation on

court proceedings impacting on lay persons – such as that relating to possession of mortgaged homes and personal insolvency remedies – is itself expressed in quite complex terms.

#### 4.1.2.2

As will arise when changing the terms for originating documents, the replacing of terms in the rules of court may require accompanying amendments to primary legislation or statutory instruments which refer to the terms replaced.

#### 4.1.2.3

Given the very time-consuming nature of a comprehensive revision, and the burden it may place on the court rules committees while discharging their on-going rule-making obligations, the Review Group considers that a specific programme of simplification should be undertaken by the court rules committees in stages, with priority being assigned to those procedures, and their associated forms, which most frequently impact on potentially vulnerable individuals.

### 4.1.3 Simplifying procedures

The Review Group does not see any compelling argument for departing from the three broad routes to and mechanisms for disposal of a claim referred to in section 10.4.1.3 of Chapter 5 and has concluded that, subject to the alignment across jurisdictions of the forms and information requirements for originating documents, those routes and mechanisms should be retained. A solid and clear logic or rationale underpins the distinctions and differences seen in the procedures that apply. Consistent with this view, the Review Group does not propose that the replacement of the originating documents by the claim form would alter the current requirement – depending on the nature of the claim – for delivery of a defence or a replying affidavit where these are currently required.

## 4.2 Lodgment and tender procedure

Order 22, rule 1(9) of the Rules of the Superior Courts should be amended to allow for a defendant to make or increase a lodgment or tender without leave of the court upon delivery of a further medical report by a plaintiff in personal injuries proceedings.

## 4.3 Notices for particulars in personal injuries actions

In personal injuries actions parties should not be permitted to raise separate notices for particulars and notices for further information under section 11 of the Civil Liability and Courts Act 2004 (“Section 11 Notice”) and should instead be required to raise a combined or composite notice. Rules of court in the first instance jurisdictions relating to the raising of particulars should be amended to provide that in personal injuries actions, and where parties intended to raise particulars and pleadings and to raise a Section 11 Notice, this should be done by way of a single composite notice.

## 4.4 Interrogatories

The Review Group recommends that the requirement to seek the permission of the court in most categories of High Court litigation to serve interrogatories should be removed. The Review Group also recommends that amendments to the relevant rules and forms be introduced so as to allow for the raising of interrogatories in modern language by way of straightforward questions. These proposed reforms should also be implemented in the Circuit Court and the District Court.

## 4.5 *Lis pendens* procedure

The Review Group agrees with the contention of the Irish Society of Insolvency Practitioners that the statutory requirements for registration of a *lis pendens* are insufficiently rigorous to prevent abuse of that procedure. In the interests of achieving a greater balance between the rights of those persons seeking to register a *lis pendens* and those persons who will be adversely affected by the registration, the Review Group recommends that the lifespan of a *lis pendens* would be limited to a period of 28 days and that upon the expiration of this period the *lis pendens* would be deemed to be vacated. However, the party who registered the *lis pendens* would be entitled to apply to the High Court before the expiration of the period,



by way of motion on notice to all affected parties and supported by affidavit evidence, to have the period of time extended. A primary legislative amendment would be required to achieve this, with consequential amendments to rules of court.

## 4.6 Summonses to produce documents

Allied to the views and recommendations expressed in Chapter 6, the Review Group is aware that the current ease at which persons can be required to attend court and to bring unspecified categories of documents with them can allow litigants to circumvent the procedures governing particulars, discovery and interrogatories in particular. The Review Group therefore recommends the introduction of rules of court to require a party seeking to compel attendance of a witness before the High Court – by *subpoena duces tecum* – to apply to the Master of the High Court for permission to do so and, as part of that application, to disclose whether or not discovery has been made in the case.

## 4.7 Requirement to enter appearance

As indicated in the context of its recommendation of a single claim notice, the Review Group recommends amendment of the rules of court to require solicitors to enter an appearance in all actions and matters before the High Court and Circuit Court within eight days from service on the respondent of the claim notice – the period currently applicable in the High Court. Currently a defendant or respondent, or his or her solicitor, is required to enter an appearance in certain types and categories of proceedings but is not required to do so in certain matters, e.g. various types of application and appeal brought by originating notice of motion. The period of time for entry of an appearance in proceedings for service out of the jurisdiction would not be affected.

## 4.8 Judgment in default of defence

### 4.8.1

The Review Group shares the concerns of a number of respondents that an inordinate amount of time and judicial resources are consumed in the hearing and determination of pre-trial (interlocutory) motions. The volume of those applications could be reduced by modifying the rules of court to encourage increased compliance with the time limits for delivery of pleadings as well as greater compliance with existing rules requirements.

### 4.8.2

The Review Group considers that a rule of court automatically giving judgment for the plaintiff where the defendant has failed to deliver a defence within the period of time allowed by the court on the “first” motion for judgment would strike an appropriate balance between the right of the plaintiff to have his or her case proceed with due expedition and the right of the defendant to defend the action in a timely manner.

## 4.9 Special High Court lists

### 4.9.1

The Review Group recommends the establishment of a separate and distinct High Court clinical negligence list and that the required judicial and other resources be made available to ensure the proper functioning of this list. The viability of such a list will be heavily dependent on judicial resources.

### 4.9.2

The Review Group recommends the establishment of a dedicated list, by way of adjunct to the Commercial Court, to hear and determine intellectual property disputes and disputes concerning technology. The Review Group recognises the benefits which are likely to result from the introduction of a specialised intellectual property list and recommends that the appropriate resources be made available so as to ensure that the courts of Ireland remain an attractive forum for parties seeking to resolve such disputes in as timely and cost-effective manner as possible.

## 4.10 Other proposals for procedural reform considered

### 4.10.1 Further measures to reduce pre-trial applications

The Review Group considered other opportunities – beyond that already mentioned in relation to motions for judgment in default of defence – to reduce the volume of pre-trial applications to court.

In particular, it examined whether it should propose removing altogether the need for leave from the court to (a) serve a third party notice (i.e. in addition to those circumstances where amendment without leave is currently permitted by the rules of court) and (b) amend pleadings, but decided against those proposals.

### 4.10.2 The structure of the court rules committees

The Committee on Court Practice and Procedure (“the Committee”) in its 28th Interim Report concluded that the separate rules committees for each jurisdiction were “the most appropriate, efficient and effective system for Ireland” and should be retained. The Review Group supports the rationale of the Committee that each jurisdiction has its own unique and strong features and that the current system operates in a manner that enables procedures to be adapted to the level of complexity required in each jurisdiction. It is not at all apparent to the Review Group that the recasting of the current model to one based on substantive areas of law (civil, criminal, family law rules committees etc.) would lead to any greater efficiencies.

## 5. ADR

### 5.1

As related in Section 9.1 of Chapter 5, Ireland now has an extensive and robust legal framework supporting recourse to ADR in the form of the rules of court and provisions of the Arbitration Act 2010 and the Mediation Act 2010. The Review Group does not see any immediate need for further enhancement of that framework.

### 5.2

The Review Group shares the view of some respondents that it is perhaps still too early to gauge the practical effectiveness or otherwise of the recent mediation reforms in the rules of court and the Mediation Act 2017 and that in the absence of data (the number of cases wherein parties have been invited to consider mediation etc.) at this time, any such assessment would be speculative.

### 5.3

The Review Group acknowledges and endorses views expressed by some respondents as to the importance of education and orientation focussed on practitioners and litigants and extension of ADR to categories of dispute where it is underutilised. These suggestions speak to the need for cultural change and perhaps also a change in emphasis in certain areas of professional legal training and education.

## 6. Court sittings and vacations

### 6.1

Having deliberated upon the issue the Review Group considers that the standardisation of court sitting times would reduce the flexibility available in each jurisdiction to arrange the sitting times to meet the business needs of each court. Accordingly, the Review Group did not consider it necessary to make any recommendation in relation to the alteration of court sitting times.

### 6.2

The Review Group makes no recommendation in relation to sitting days in the Circuit Court, but rather suggests that the advantages and disadvantages of Monday sittings of that court should be considered by the President of the Circuit Court and by the Judges assigned to each Circuit. In considering the matter, it is suggested that account would be taken of the facility to conduct hearings of classes or types of

proceedings, including applications in proceedings, by remote hearings as permitted by section 11 of the recently enacted Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020.

### 6.3

The use of the term “vacation” is somewhat out of step with the reality of court activity during the vacation periods. In the Superior Courts provision is made for judges to sit during the Long vacation and in addition to judges being available to hear urgent matters every day during the Long vacation – and during each of the other vacation periods – many court lists continue to operate in September and have done so for many years now. While similar arrangements apply in the Circuit Court in relation to urgent matters the Circuit Court routinely sits during September, as do County Registrars. In the District Court, judges are available for urgent matters during the August vacation period.

Having considered the submissions received, the Review Group has taken the view that the scheduling of vacation periods is more appropriately a matter for the judiciary and – where it falls within their remit, the courts rules committees concerned – to consider.

## Discovery (Chapter 6)

### 1.

The Review Group has formed the clear view that (a) the current discovery regime is failing all parties involved in litigation and (b) that significant reform is now required. Borrowing a phrase employed by the Gloster Working Group in England and Wales, a “wholesale cultural change” is required, and the Review Group considers that such cultural change can only be achieved if underpinned by an entirely new scheme for discovery.

### 2.

Primary legislation should be enacted to (a) abolish the current entitlement to discovery, inspection and production of documents under the existing rules of court for the various jurisdictions and the associated case law and (b) specify the principles and policies underpinning a new remedy to be elaborated upon in new rules of court – to be designated “production of documents” so as to make clear the departure from the regime it will replace – which will regulate the entitlement of parties to civil litigation to documents in advance of trial.

### 3.

The primary legislation should provide for the prescribing of a date on which the existing regime should come to an end and mandate the respective court rules committees to replace by that date the existing discovery rules with rules complying with the principles and policies mentioned at Section 5.2.1 of Chapter 7.

### 4.

The principles and policies set out in the primary legislation should facilitate regulation of the entitlement to pre-trial documents on the basis of a scheme of rules of court along the lines included at Appendix 3 to this report.

### 5.

The proposed requirement that parties should, as the default arrangement, produce their documents within a specified time following delivery of their initial pleading will require further amendment to the

time periods for delivery of the defence to allow time for delivery of that pleading to run from the date of receipt of the documents produced in respect of the claim form. Consequential amendments to each of the rules of court for the various jurisdictions concerned will also be required, to ensure alignment of the new scheme with those rules when incorporated therein.

## 6.

In addition the Review Group is of the opinion that those rules of court should be complemented by rules of court specifically obliging parties to plead their case with far greater particularity and precision than has been the case to date – so as to ensure that the real issues in dispute can be identified prior to trial. The standard of particularity of pleading in personal injuries actions introduced by the Civil Liability and Courts Act 2004 should serve as the model for such rules.

## Judicial Review (Chapter 7)

### 1.

Applications for judicial review should continue to require leave of the High Court before they can be commenced.

### 2.

Primary legislation should be introduced which will prescribe that leave to commence judicial review proceedings should not be granted unless the court is satisfied that there are substantial grounds for contending:

- (i) in the case of *certiorari*, that the impugned decision is invalid or ought to be quashed; and
- (ii) in the case of reliefs other than *certiorari*, that such reliefs should be granted.

### 3.

In addition, leave should not be granted unless the court is also satisfied that the claim has a reasonable prospect of success at trial. Consideration should also be given to incorporating the latter criterion into statutory judicial review remedies.

### 4.

Save in cases in which primary legislation has, as a matter of policy, set less stringent criteria, leave should not be granted unless an applicant is able to demonstrate a substantial interest in the subject matter of the decision which is challenged.

### 5.

Primary legislation should also prescribe that judicial review may not be sought in respect of an alleged deficiency falling within any of the following categories:

- clerical or typographical errors in the decision, order or determination which is sought to be quashed or in material relied on in making such decision, order or determination,
- unintentional slips or omissions in the decision, order or determination or in material relied on in making such decision, order or determination, and
- text, or an omission of text, which has the effect that the decision, determination or order as issued does not on its face accurately express the determination or order which the decision-maker, tribunal or court had intended to make,

unless it can be shown that the applicant had previously applied to the decision-maker, tribunal or court for rectification of the deficiency concerned and had wrongly been refused that relief.

## 6.

Primary legislation should confer a jurisdiction on the High Court, residually, to require an applicant for judicial review to apply to the tribunal or body or court at first instance to rectify the deficiency of the kind enumerated above where satisfied that such recourse would be an adequate alternative to granting judicial review. Correspondingly, the primary legislation underpinning adjudicative or decision-making regimes in the administrative law field should expressly confer a general jurisdiction on the decision-makers and tribunals concerned to re-open decisions to correct errors of the type referred to.

## 7.

Part V of Order 84 of the Rules of the Superior Courts should be amended to replace the requirement that the application for leave be made within three months with provision that the *ex parte* motion papers be filed within three months, and further provide that the application be listed before the Court in the next available *ex parte* List for such applications.

## 8.

Rules of Court should be introduced to tighten up the post-leave procedures so as to ensure a speedy trial of the judicial review application. This could include provisions with cost consequences including a greater use of wasted cost orders for failure to adhere to time limits fixed by the court, subject to any limitation on liability for costs in statutory judicial review proceedings imposed by statute or EU Law (e.g. Article 11(4) of Directive 2011/92 of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment and Article 9(4) of the Aarhus Convention).

## 9.

There should be a greater use of “unless” orders with a view to ensuring that judicial review applications are disposed of in a timely fashion.

## 10.

Part V of Order 84 should be amended to introduce a sequencing of the preparatory steps to a hearing, involving a relatively short period until the first return date and remittal to the Judge’s List, six weeks to be afforded in that List for lodgment and delivery of opposition papers and then one further adjournment of two weeks. Should opposition papers not have been filed by the end of that period, the case should be remitted to the Judge’s List for further measures, as appropriate. Once pleadings are closed, the case should be given the next available date for hearing. The applicant would be afforded two weeks for his/her submissions and the respondent two further weeks. Time for submissions should start in effect on the closing of the pleadings.

## 11.

The statement of grounds required in an application for leave to apply for judicial review should contain a specific heading for facts alleged and the grounding affidavit should set out those facts in a narrative manner.

## 12.

The rule of court precluding a general traverse in the statement of opposition should be amended to allow this where no specific new facts or matters are being alleged by the respondents, and the statement of opposition should require to address any material facts or issues disputed and incorporate any matters positively relied on, such as time, discretion, or alternative remedies.

## 13.

An affidavit verifying a statement of opposition should only be necessary if there is a distinct plea as to a new fact that is not otherwise in evidence.

## 14.

With a view to reducing unnecessary delay in the ultimate disposal of judicial review proceedings subject to appeal, provision should be made in primary legislation to enable a respondent to an appeal to the Court of Appeal against a High Court decision in judicial review proceedings to apply to the Supreme Court to adopt that appeal under its appellate jurisdiction under the 33<sup>rd</sup> Amendment to the Constitution.

## 15.

The Law Reform Commission's recommendation in its 2004 Report that the remedy of *quo warranto* be abolished as being obsolescent and adequately replaced by the declaratory remedy should be implemented.

## Multi-party Litigation (Chapter 8)

### 1.

It would seem clear that there is an objective need to legislate for a comprehensive Multi-party Action (“MPA”) procedure in Ireland, while acknowledging the importance of public law redress mechanisms such as regulatory oversight and intervention in resolving certain multiple claim categories.

### 2.

The Review Group shares the preference of the Law Reform Commission for a model along the lines of the Group Litigation Order (“GLO”) procedure in England and Wales which would require claimants individually to institute proceedings in pursuit of their claims and join MPA register. While noting the perceived benefits of the US style class action model, the Review Group does not consider it either realistic or legally safe to adopt such a model in this jurisdiction given lack of familiarity with it here and possible constitutional difficulties presented by the “opt out” approach in binding passive claimants to proceedings they have not instituted.

### 3.

The Review Group notes that, even if its recommendation of the GLO model is adopted, there will be a need in due course to legislate discretely for a single representative action procedure encompassing multiple claims to meet the requirements of the proposed EU Directive on representative actions – whether by adapting the existing representative action under Order 15 rule 9 of the Rules of the Superior Courts for that purpose or by providing separately for such an action.

## 4.

The risk of exposure of a representative or lead plaintiff to an adverse costs order and the high costs of litigating the issues common to the group or class have been identified as a significant obstacle to the bringing of class or group litigation. This has, to a limited extent, been addressed by the Law Reform Commission's recommendation that any relevant costs incurred in the MPA proceedings should be divided equally among the members of the Register, unless the nominated judge orders otherwise, and that members of the MPA Register should be jointly and severally liable for costs.

The Review Group considered whether it should supplement its recommendation for an "opt in" GLO-type procedure by recommending one or more of the following

- the permitting in law of third party litigation financing for actions covered
- the permitting of contingency fee-based remuneration arrangements in connection with that procedure
- that the Civil Legal Aid Act 1995 be amended to make provision for the funding of an otherwise eligible class/group member for his/her proportion of any eventual costs order.

The Review Group notes the arguments in favour and against the individual options concerned and considers that they raise issues of policy concerning the funding of litigation which require more detailed discussion with the interests involved. In the circumstances, it did not consider it appropriate to express an opinion on those options.

## 5.

The Review Group notes that the Law Reform Commission's draft rules of court and the Private Member's Bill provide for a lead solicitor to be appointed but do not specify the latter's functions or obligations. The Review Group supports the approach that a single lead solicitor be responsible for the representation of the generic issue of the MPA, nomination of whom should be made by the solicitors representing claimants on the register ("the solicitors' group"), or in the absence of agreement between the solicitors, by judicial appointment. The Review Group agrees with the Law Reform Commission's suggestion that separate legal representatives may be responsible for discrete issues within the claimants' group on either a sub-group or individual level. The precise role of the lead solicitor and relationship with the other claimants' solicitors – in particular in liaising and co-ordinating with those solicitors should be defined by a protocol agreed by the solicitors' group and notified to the Court.

## 6.

The Review Group notes that the Law Reform Commission's draft rules of court differ from the Private Member's Bill in providing that

- the MPA may be compromised or settled only where the terms of the compromise/settlement have been agreed in writing by the members of the Register at or before the time that they become members of the Register
- the court be informed of the existence of the terms of such agreement on the application for certification and any subsequent application to join the Register
- where the terms on which the proceedings are to be compromised/settled are not agreed between the parties, the court must convene a case conference to arrange for the terms to be agreed, if need be by mediation and
- in the absence of a mediated agreement, the court shall specify the terms on which proceedings are to be compromised or settled.

The Review Group agrees with this approach and recommends that it be expressly provided for in the procedure.

## 7.

The Review Group considers that, based on the precedent of the existing arrangements in the rules of court for consolidation of proceedings, a GLO-type procedure (as recommended by the Law Reform Commission), which relied on the separate initiation by individual claimants of actions followed by a grouping of the actions, could be provided for in rules of court and does not require primary legislation.

An advantage of legislating by way of rules of court is that, where any deficiency is identified in a rules based procedure, the process of amending the rules to meet the deficiency is much easier than were the procedure prescribed in primary legislation.

## 8.

The Review Group recommends that a GLO -type procedure should be introduced in the High Court and the Circuit Court. It further recommends that the exclusion by Order 6 rule 10 of the Circuit Court Rules of tort claims from the Circuit Court’s existing representative action procedure be revoked.

# Litigation Costs (Chapter 9)

## 1. Options for regulating litigation costs levels

The Review Group has examined various options by means of which the mandate given to it to recommend a reduction in levels of litigation costs might be achieved.

While it considers that the range of procedural reform measures it has recommended will contribute to that aim, some members of the Group are convinced from the experience in other jurisdictions – and in particular the series of procedural and systemic reforms introduced in England and Wales commencing with the Woolf reforms of the 1990s – that procedural reforms and efficiencies in and of themselves will not suffice to import full transparency, predictability and competitiveness in the setting of litigation costs and – more significantly given the Review Group’s remit– reduce levels of litigation costs both for the litigating client and for the party who may be required by a court award or under a settlement to bear liability for the costs incurred by an opposing party.

The same cohort of the Review Group, in light in particular of the experience of reforms in England and Wales, is satisfied that application of general principles or criteria of reasonableness (as employed in the Legal Services Regulation Act 2015) or proportionality (as incorporated in the Civil Procedure Rules for England and Wales in 2013 on foot of the recommendations of Lord Justice Jackson) to the assessment of litigation costs will not, without further measures, suffice to reduce litigation costs levels in Ireland.

Having reviewed the experience in other jurisdictions as outlined earlier in this chapter, and in particular litigation costs regimes in Canada and Australia, a minority of the Review Group (the representatives of the Departments of An Taoiseach, Public Expenditure and Reform, Justice and Equality, and the Courts Service) considers that a mechanism for prescribing the maximum levels of litigation costs chargeable, in the form of a table of costs should be introduced, as the only practicable means of ensuring reduction of levels of legal costs for private individuals and businesses engaged in litigation, as well as State bodies, and the future containment of those costs levels, while at the same time recognising the entitlement of legal practitioners to be reasonably remunerated for their work.

By contrast, a majority of the Group (comprising the representatives of the Supreme Court, Court of Appeal, High Court, Circuit Court, District Court, Bar Council and Law Society) does not agree that the Group should make such a recommendation, for a variety of different reasons. Chief among those is the fact that it is too early to assess the efficacy of the new adjudication system provided for by the 2015 Act. Other reasons include concerns about access to justice, an apprehension that the proposals may infringe EU competition



law or be contrary to the EU Services Directive,<sup>1</sup> and the fact that the Miller and Haran reports<sup>2</sup> expressly did not make such a recommendation.

The majority favoured the drawing up of guidelines for the assistance of parties and their representatives, by reference to individual items that could be outlined in a table. The obligation to produce such guidelines could be achieved with minimal legislative intervention, with the function assigned either to the Legal Costs Adjudicators or the LSRA (with input from the former). Those guidelines should be non-binding but intended to improve the certainty and transparency of the adjudicative process.

The advantage of such a recommendation is that it would be simple and straightforward to introduce and would not require any additional resources to implement. If the functions are carried out by the Adjudicators or the LSRA, it would not require the establishment of a new body at further cost (staff, members, etc.). The guidelines should be expressed by reference to the criteria established in Schedule 1 of the LSRA and the levels at which parties have either resolved or had adjudicated costs disputes. They should take into account prevailing economic conditions and refer to the need to ensure no more than a reasonable level of remuneration on a party and party basis.

The majority cannot in principle see why separate guidelines should also be formulated in the context of practitioner and client costs, subject to the principles set out in the 2015 Act. In the event that a competition analysis showed that there was some distortion in the market for litigation services, it may be necessary to expand the scope of the guidelines to cover this area also.

Despite the issue having been discussed at three meetings of a subcommittee established for that purpose, and three meetings of the full Group, it has not been possible to reach a consensus as to either approach.

In this context, by a majority, the Group does not recommend the introduction of mandatory scales; rather, it recommends the introduction of non-binding guidelines as set out above.

The views of the minority on the subject are contained in a Minority Report which appears at the end of this report.

## 2. Remaining issues for consideration

The Review Group has considered the following issues or matters remaining for consideration, including those arising from submissions on litigation costs made by respondents to the consultation exercise.

### 2.1

The Review Group has considered whether court supervised budgeting during litigation of costs to be incurred – as currently operates in England and Wales – be introduced, whether in addition to or in substitution for other measures to address costs levels. The Review Group notes that costs budgeting has been recommended for introduction to a limited extent in the other neighbouring jurisdictions (in Scotland by the Taylor Review and in Northern Ireland by the Gillen Review) – generally in conjunction with case management – and in Australia by the Australian Government’s Productivity Commission. However, the Review Group is conscious of the potentially significant burden on a court’s time which an active budgeting role would impose. It is of the view that further consideration of the utility of costs budgeting should be deferred in the immediate term.

### 2.2

The Review Group notes concerns expressed in the submissions to it regarding the apparent absence of a time-bound requirement in the Legal Services Regulation Act 2015 for the furnishing of and submission for adjudication of bills of party and party costs. It endorses the submission of the Medical Protection Society

1 For example, in their express deprecation of the concept of proportionality.

2 As noted above, both Millar and Haran were expressly tasked with the consideration of this possibility.

(MPS) that bills of costs should be provided within three months of the conclusion of the proceedings, with sanctions for non-compliance.

The Review Group recommends that the Legal Services Regulation Act 2015 be amended to require that such bills be delivered to the party liable for the costs within three months of perfection of the court order awarding costs or ruling a settlement in which liability for costs has been agreed. To sanction non-compliance, section 30 of the Courts and Court Officers Act 2002 (as amended by section 41 of the Civil Liability and Courts Act 2004) should be amended to preclude a party awarded costs, or who is to be paid costs under a settlement ruled by the court, from recovering judgment interest on those costs where the bill of costs has not been delivered within that three-month period.

The 2015 Act should also be amended to provide that, where the party due costs, having furnished the bill to the party liable for the costs, fails to apply for their adjudication within such period as may be specified in rules of court, the party liable should be entitled to present the bill for adjudication.

The MPS's submission that, where an interim payment is sanctioned, a time limit should be imposed for setting the bill down for taxation, could, in the Review Group's view, be adequately addressed by an amendment to the relevant practice direction requiring that a party due costs, as a condition of receiving an interim payment on account of costs, undertake to lodge an application for adjudication of the costs within, say, one month of a failure to agree the amount of costs to be paid following delivery of the bill to the party liable. The Review Group does not see merit in the MPS's recommendation that, where the interim payment exceeds the amount allowed on taxation, a court order should provide that the excess be recoverable with interest. The premise of the practice direction concerned is that only payments on account of (and clearly less than) the full amount of costs likely due should be authorised, and the party liable should be able to address that issue at the point when payment on account is being sought.

## 2.3

The Review Group does not accept the suggestion of the MPS that the Legal Costs Adjudicators should have a role in determining applications for interim payments in respect of costs: the authorisation of payments on account of costs is a function appropriately reserved to the court concerned. In any event, the Review Group envisages that the necessity for the practice direction on payments on account of costs should be obviated once waiting times for dates for adjudications on costs have been eliminated.

## 2.4

The Review Group does not consider that the introduction here – as suggested by the State Claims Agency (SCA) in its submission – of a principle of proportionality of costs along the lines of that introduced in England and Wales on foot of the Jackson recommendations – should be necessary in light of the criterion of reasonableness applied by the 2015 Act both to the incurring of costs and the amount of costs charged.

## 2.5

The Review Group notes the SCA's submission that the voluntary practice of limiting counsels' fees in personal injuries actions to the fees for one senior and one junior counsel should be formalised in the rules of court. However, the Review Group would point out that the power to impose such a limit falls within the remit of Ministerial regulations under section 5 of the Courts Act 1988, not rules of court, and that this course is already open to the Minister.

## 2.6

The Review Group has considered whether or not the restriction (affirmed by the Supreme Court decision in *Persona Digital Telephony Ltd v Minister for Public Enterprise and Others*<sup>3</sup>) which the Irish law of maintenance and champerty imposes on third party litigation funding agreements should be removed, as suggested by four respondents, including the Irish Society of Insolvency Practitioners (ISIP) and a UK

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3 [2017] IESC 27.

litigation and arbitration funding company. The impediment to third party funding of litigation stems from the laws designating as torts and criminal offences *maintenance* the “giving of assistance, by a third party, who has no interest in the litigation, to a party in litigation”<sup>4</sup> – and *champerty* – assistance given to a litigant by a third party on the basis that the latter will receive a share of the proceeds of the award if the litigation succeeds.<sup>5</sup>

Policy arguments both in favour of and against retaining champerty and maintenance were cited by the Law Reform Commission in its 2016 issues paper on contempt of court and other offences and torts involving the administration of justice,<sup>6</sup> which also considered the various options for funding litigation including conditional fee agreements, contingency fee agreements, after the event insurance and third party funding. That project, which formed part of the Commission’s previous (fourth) Programme of Law Reform approved in 2013 remains, it is understood, to be completed. The issues were also ventilated in the *Persona Digital Telephony Ltd.* case, where the Supreme Court held that any change in the law was a matter for the Oireachtas.

Third party funding may in individual cases facilitate access to justice for a poorly-resourced claimant who, in the absence of a comprehensive civil legal aid system, may not otherwise be able to pursue a claim. However, the Review Group is equally conscious of the potentially significant risks arising from any resultant “commoditisation” of litigation, including the incentivising of the making of dubious claims and the imposition of a “litigation culture” on a courts system which is already heavily burdened.

Subject to the exception mentioned below, the Review Group considers that the weighing of the policy considerations should await completion of the more detailed examination of this subject being undertaken by the Law Reform Commission, of which the issues paper aforementioned is the first stage.

The Review Group does see merit, in the more immediate term, in the more limited proposal of the Irish Society of Insolvency Practitioners that third party funding should be available to liquidators, receivers, administrators under the Insurance (No. 2) Act 1983, the Official Assignee or trustees in bankruptcy to fund proceedings intended to increase the pool of assets available to creditors, on condition that the applicant was satisfied that a reasonable case against a prospective defendant existed and would result in increasing the pool of available assets. Such funding arrangements would have an obvious benefit in ensuring that the creditors of a company or individual or members of a company were not left without effective recourse against misfeasance or fraud on the part of the debtor or company concerned.

## 2.7

The Review Group does not see a necessity, apropos the submission of Dr Gerry Whyte of Trinity College Dublin School of Law to that effect, to place “no foal no fee” agreements between a practitioner and client – as the basis for remuneration of the practitioner in undertaking litigation for the client – on a statutory footing, being of the view that their enforceability in Irish law is well entrenched.

## 2.8

The Review Group has considered whether – as was submitted by one respondent to its public consultation – contingency fees should be permitted and whether the current prohibition (in section 149(1)(a) of the Legal Services Regulation Act 2015) on linkage of the amount of client costs to the value of damages, or other unliquidated amount, recovered, be repealed. The Review Group would have concerns that the permitting of contingency fees would tend to encourage speculative litigation and contribute to a “claims culture”. It would also be concerned that repeal of the prohibition on a practitioner charging costs as a percentage or proportion of damages or other unliquidated amount recovered would encourage inflated claims for damages.

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4 *Persona Digital Telephony Ltd v Minister for Public Enterprise, Ireland* [2017] IESC 27 (Denham CJ), at para. 25.

5 *Ibid.*

6 (LRC IP 10 - 2016).

The Review Group does not recommend any change in the law in these areas.

## 2.9

The Review Group considered the submission of FLAC that legislative provision be made to expand the exceptions to the “costs follow the event” rule to include protective costs orders – i.e. orders that there be no order for costs, that costs be capped at a certain amount, or that the defendant should pay the costs – for litigants taking cases that are in the public interest. FLAC saw this as providing certainty as to costs at the outset of litigation. Separately, Dr Gerry Whyte submitted that the restriction on availability of protective/pre-emptive costs orders (which currently may only be granted, *inter alia*, where the case raises an issue of general public importance and the plaintiff has no private interest in the matter) be extended to cases where the plaintiff might also benefit individually from the outcome of the case.

By contrast, the Department of Business, Enterprise and Innovation, IDA Ireland and Enterprise Ireland recommended that statutory caps be introduced on the amount of costs an individual litigant in a judicial review of a planning matter can be obliged to pay if unsuccessful and on the amount of costs they can recover if successful, as a “deterrent to frivolous or unsound objections.”

The Review Group notes that the existence of the “costs follow the event” rule in subordinate legislation (namely, in the rules of court), prior to the entry into force of the Legal Services Regulation Act 2015 in which that rule has now been restated, did not impede the development at common law of protective costs orders and of the conditions for their availability. The conditions on which the courts have made such orders available appear to the Review Group to strike an appropriate balance between the need to facilitate access to justice in cases engaging the public interest, on the one hand, and the need to avoid incentivising risk-free litigiousness on the other. The Review Group does not recommend that any change be made by legislation to the existing balance of interests in the area of costs-shifting.

# Facilitating Court Users (Chapter 10)

## 1. Information for court users generally

With a view to addressing the particular needs of litigants in person, The Review Group recommends that priority be given to

- (a) providing on the website informal consolidations of the Circuit Court and District Court Rules and hyperlinks from those rules to the relevant court forms, on the model of the consolidation undertaken in relation to the Superior Courts Rules and
- (b) collating and updating all current guides and information for litigants in person in a dedicated section of the website for that purpose.

The information at (b) should in due course be extended to all jurisdictional instances as proposed at 6.1. below and integrated or linked with the information hub for litigants in person, the creation of which is proposed at 6.2 below.

## 2. Accessibility and quality of court facilities and services

The Review Group notes

- (a) the Courts Service’s commitment under Action 18 of the National Disability Inclusion Strategy 2017-2021 to ensuring that courts services and information are accessible to and supportive of all users with disabilities,
- (b) the measures taken to ensure that recently completed and newly renovated court buildings comply with established accessibility standards and have attained Disability Access Certificates and

- (c) the survey currently being undertaken of the condition of approximately 70 other buildings in its estate which includes an assessment for compliance with accessibility requirements and obligations.

The Review Group recommends that, based on the findings of the survey last mentioned, the Courts Service prepare and undertake, as soon as feasibly possible, a programme of work to address any deficiencies in accessibility identified in the buildings surveyed.

### 3. Efficiency, responsiveness and competence of court staff

#### 3.1

The Review Group endorses the recommendations of the Courts Service Capability Review of April 2019 on service delivery referred to earlier in this chapter. In particular the Review Group recommends that the Courts Service:

- (a) revise its Customer Charter for court offices serving the various jurisdictions to provide more specific measurements as to the performance and actual level of service they may expect from court staff for a wider range of transactions – e.g.: the time within which a summons will issue after being lodged, the time within which a court order will issue after granting, the time for entering of judgment in the office after lodgment of a complete set of judgment papers; and
- (b) up-date and publicly disseminate its Customer Service Action Plan in accordance with the Government’s Quality Customer Service (QCS) Initiative.

#### 3.2

The Review Group recommends that the Courts Service consult court user groups when deciding on the content of its Customer Charter and Customer Service Action Plan, including the transactions for which performance measures are set and the nature of the performance measures.

#### 3.3

The Courts Service should track, and report in its Annual Report on compliance with, the performance measures last mentioned.

## 4. Vulnerable court users: Children and young persons

#### 4.1

The Review Group does not see a need for a requirement – as arises currently solely in the Circuit Court – that an application be made for an order appointing a guardian *ad litem*. Vetting of an intended next friend or guardian by a solicitor acting in the litigation for the child concerned, and the provision by that solicitor of appropriate confirmation to the court as to the next friend’s or guardian *ad litem*’s suitability for the function, should afford sufficient assurance with minimal expense in costs.

#### 4.2

The Review Group considers that the arrangements for naming of a next friend or *guardian ad litem* to act on behalf of a child in litigation should be standardised by the introduction of a common requirement in the procedural rules for all first instance jurisdictions – by way of expansion on the current procedure in the High Court – that the solicitor intending to act for the child in the proceedings should file an affidavit confirming that -

- (a) he or she is familiar with the person proposed as next friend or *guardian ad litem*,
- (b) the proposed next friend or *guardian ad litem* is a fit and proper person to act in that capacity, being capable of fairly and competently conducting proceedings on behalf of the child, and
- (c) the proposed next friend or *guardian ad litem* has no interest in the matters in question in the proceedings adverse to that of the child,

and exhibit a consent of the proposed next friend or *guardian ad litem* to act in that capacity which records that they have been advised and are aware of the duties and obligations attaching to that function.

### 4.3

The Review Group recommends the introduction of:

- (a) a requirement, to be introduced in primary legislation, for the approval by the court at the jurisdictional instance appropriate to the claim value, of a settlement of a claim made on behalf of or against a child where no proceedings have been issued; and
- (b) provision that in the absence of court approval, no settlement, compromise or payment in respect of a claim made on behalf of or against a child shall be valid.

### 4.4

The Review Group notes concerns expressed to it regarding publication in the media of details of settlements approved by the court in favour of vulnerable claimants, including minors, and of sensitive personal information about the vulnerable claimant's medical condition.

The Review Group notes that a court is already empowered in any civil proceedings, on application made to it in chambers, to prohibit the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify a party as a person having a medical condition, and does not consider it necessary to recommend any additional legislative measures to address this concern.

### 4.5

The special arrangements for adducing of evidence and for admissibility as evidence of statements from children in proceedings concerning a child's welfare referred to at Section 3.1.3 of Chapter 10 should be extended to all civil proceedings in which a child may require to give evidence.

## 5. Vulnerable court users: Impecunious litigants and the availability of civil legal aid

### 5.1

The Review Group does not consider itself best equipped to evaluate the extent to which the civil legal aid scheme may be failing to meet legitimate demand for civil legal aid, whether through shortcomings in the range of legal services it provides, the resourcing of such services or deficiencies in the eligibility criteria and income or assets thresholds for accessing civil legal aid. However, having regard to European comparators, a case would appear to exist for reviewing whether the annual disposable income level operating as a "cut off" for entitlement to civil legal aid requires to be increased.

### 5.2

The Review Group notes the concerns expressed concerning the *Abhaile* scheme, while also acknowledging the procedural safeguards now provided for in mortgage possession cases, which concerns and safeguards are described at Section 3.2.2 of Chapter 10. It recommends that the Steering Board of the *Abhaile* Mortgage Arrears Resolution Service examine both the concerns expressed by the Law Society concerning the scheme and the potential to improve linkages between *Abhaile*, citizens' information centres nationwide and the Legal Aid Board to ensure that eligible mortgage holders are afforded adequate opportunity to access the services of *Abhaile* or, as appropriate, the Legal Aid Board.

## 6. Vulnerable court users: litigants in person

### 6.1

The range of information currently made available by the Courts Service for litigants in person, though very helpful, is nonetheless limited to specific jurisdictions or proceedings types. The Review Group sees a need for guides for litigants in person to be made available covering proceedings in all court jurisdictions and utilising audio-visual as well as textual formats. Information provided by the Courts Service, however, necessarily cannot extend to legal advice or any assistance which might compromise the impartiality of the courts administration, and is unlikely to meet all the needs of litigants in person.

### 6.2

The Review Group recommends a collaborative approach between the courts administration, other Justice agencies, the legal profession and the voluntary sector to assisting litigants in person, as adopted in neighbouring and other common law jurisdictions and described earlier in this chapter – in particular:

- (a) the creation of a central on-line information hub – along the lines of the “Going to Court and tribunal” section of the “Advice Now” website in the UK – through which dedicated legal and practical information is provided for those contemplating bringing proceedings without professional representation; and
- (b) provision of “drop in” facilities in proximity to court buildings – such as operate in Scotland and the Royal Courts of Justice in London – to enable unrepresented litigants to consult voluntary legal advice centres.

### 6.3

The Review Group acknowledges the need for co-ordinated planning of measures by the public sector, voluntary advice sector and branches of the legal profession to facilitate impecunious litigants in need of legal advice and assistance and recommends that the Department of Justice and Equality, as an initial step, establish a Steering Group comprised of the various agencies and bodies concerned – which should include the Courts Service, the Legal Aid Board, Citizens Information, FLAC, MABS/*Abhaile*, the Law Society and the Bar Council.

### 6.4

Without limiting its remit, the Steering Group last mentioned should be tasked to:

- (a) examine the existing information sources for individuals seeking advice or assistance in relation to litigation, and in particular those who are unlikely to have the means to secure private legal representation;
- (b) provide content (textual, audio-visual etc.) for and design of a new, dedicated website to assist such individuals;
- (c) identify and provide for categories of individual with particular needs (including linguistic and accessibility needs) in providing that content;
- (d) identify opportunities for co-location of legal advice or assistance services with court buildings, existing and planned;
- (e) provide input to the court rules committees on opportunities for simplification of procedures and language in rules and forms.

### 6.5

The Review Group notes the submissions, in particular by the Bar Council and the Law Society, that rules of court be introduced to reform the procedures in relation to McKenzie friends – although no specific proposals to that end have been made. However, the Review Group has considered the contents of the recent practice directions regulating participation by McKenzie friends in proceedings and does not consider that any further provision beyond that made in those instruments is required, or that any additional benefit would be conferred by prescribing for this area by rule of court.

## 6.6

The Review Group has considered the submission of the Irish Human Rights and Equality Commission (“the IHREC”), recommending repeal of section 19 of the Intoxicating Liquor Act 2003 – which enables an application for redress to be made to the District Court by a person complaining in respect of discriminatory conduct against them on or at the point of entry to a licensed premises – and the effective returning of the function of determining applications for such redress to the Workplace Relations Commission. While noting the IHREC’s concerns, the Review Group does not consider that it would be justified in gainsaying the policy considerations which informed the Government’s decision to locate such proceedings in the District Court, and notes the role conceived in the legislation for the IHREC in offering assistance to complainants.

The Review Group is not in a position to judge whether the lack of anonymity in proceedings under section 19 has discouraged use of the provision by prospective complainants, but should that be demonstrable, it would be open to the Government to propose a statutory amendment to restrict publicity in such proceedings appropriately.

## 7. Managing litigation involving litigants in person

The Review Group notes that a practice direction was introduced in the High Court in July 2010 governing proceedings in which one or more of the parties does not have professional legal representation requiring that the litigant in person and the other party complete, file and (where applicable) serve a form in advance of (a) making a pre-trial application and (b) the trial of the proceedings, to assist in identifying the factual and legal issues requiring to be addressed at the hearing.

The Review Group understands, however, that the practice direction is not being complied with in practice by parties and practitioners, and recommends that it be implemented by the High Court Central Office.

## 8. Measures to address vexatious or unfounded cases

Order 19 rules 27 and 28 of the Rules of the Superior Courts should be re-stated to align their provisions with the basis on which the court may exercise its inherent jurisdiction, but dispensing with the terms “frivolous” and “vexatious” as those terms do not in modern parlance sufficiently convey what is in dispute on an application to the court of this nature and are often seen by the litigant in person as an insult, when invoked. The Review Group recommends that the rules concerned be amended to provide that the High Court have express power:

- (a) to strike out a claim or part of a claim which (i) amounts to an abuse of process or (ii) is bound to fail or (iii) has no reasonable chance of succeeding;
- (b) on an application for such an order, to consider the pleadings and, if appropriate, evidence, for the purpose.

## 9. Wards of Court

Having regard to:

- (a) the factors and developments mentioned at Section 3.3.1 of Chapter 10;
- (b) the relatively short timeframe remaining until replacement of wardship by the new capacity regime under the Assisted Decision-Making (Capacity) Act 2015; and
- (c) the diversion of effort and resources which would be required to change primary legislation to effect changes, *ad interim*, to the wardship jurisdiction – which effort and resources might be better invested in establishing the new capacity regime,

the Review Group does not consider it advantageous to make recommendations for interim measures to reform the wardship jurisdiction.



## 10. Capacity issues and litigation

### 10.1

Under the functional approach to capacity of the new capacity regime required by the Assisted Decision-Making (Capacity) Act 2015, the question of whether a person has capacity to litigate will require distinct consideration. The Review Group recommends that a standard certificate be prescribed by rule of court for use in cases of an assessment of litigation-related incapacity for use under the new capacity regime.

### 10.2

The special arrangements for adducing of evidence and for admissibility as evidence of statements from children in proceedings concerning a child’s welfare referred to at Section 3.1.3 of Chapter 10 apply, with the necessary modifications, to civil proceedings before any court concerning the welfare of a person who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live independently.<sup>7</sup>

These arrangements should be extended to all civil proceedings in which such a person may require to give evidence.

## 11. Court fees

### 11.1

The Review Group did not consider it necessary or appropriate to recommend exemption from liability for fees of any category of individual or proceedings.

### 11.2

The Review Group did not consider it necessary or appropriate to recommend introduction of daily or half-daily court hearing fees, as apply in Australia and New Zealand.

## Technology and e-Litigation (Chapter 11)

### 1. The future e-Litigation model

The Review Group notes that the responses to its public consultation and the views expressed within the Review Group itself show a remarkable alignment with the vision of an eCourt environment articulated in the Organisation and Capability Review of the Courts Service (“the Capability Review”) published in April 2019. The Review Group endorses the Capability Review’s views in that regard.

The common expectations of an optimal future e-Litigation model for civil proceedings thus emerging include -

- a secure digital environment enabling -
  - parties or their representatives to file with the court and exchange with each other pleadings and other documents throughout the life-cycle of the case, at first instance and on appeal
  - transaction on-line of court fee and other payments associated with the case
  - generation and dissemination of hearing dates and court calendar management
  - on-line applications for adjournments or other orders or directions, where appropriate
  - association of audio or video recordings in the case with the digital case file or record
  - recording and issuance of orders and directions in the case

<sup>7</sup> Section 20(b), Children Act 1997.

- distinct workspaces for judges and court registrars with access to the digital case file or record, and to forms and precedents
- dissemination/publication of case outcomes (orders, directions and judgments)
- a facility to conduct a case before the court utilising the courtroom technology (e.g. evidence presentation, video-conferencing, digital audio recording) to the fullest extent
- varying levels of access to the digital court record for parties, judges, court staff and members of the public, consonant with data protection and privacy rights and
- capture of case management information and caseflow data (adjournments, timescale to disposal, delivery of judgment etc.)

The features identified above are not intended to be definitive or exhaustive, nor do they address wider issues – such as interoperability of civil case support systems with criminal case support systems and the organisational approach to providing ICT services – which are outside the Review Group’s remit. Quite aside from this, technology – and the potential process improvements it offers – is constantly evolving and expectations of what an e-Litigation model should deliver are likely to change, especially over the ten-year period envisaged by the Courts Service’s Vision statement.

However, the Courts Service should ensure that the e-Litigation model it adopts minimally incorporates or otherwise facilitates the features and functionalities listed above.

## 2. On-line access to the court file

Quite aside from any issues of protection of the intellectual property rights in pleadings or submissions which public dissemination of such material may present, it would seem clear from Section 4 of Chapter 11 that any facility for the publication on-line of documents lodged with a court would require to take into account the need to restrict appropriately publication of the personal data of any data subject contained in those documents, through anonymising of references to the individuals concerned and further redaction of information which would tend to identify a data subject.

Such an exercise could not be left entirely to the parties, as the courts cannot divest themselves of their obligations as data processors. However, the assigning to court offices of the task of redacting a high volume of individual documents would have quite significant implications in terms of the additional staffing resources needed, the time consumed in evaluating the documents, consulting with the parties and seeking judicial directions in cases of doubt or difficulty, the associated burden imposed on parties and their legal representatives to review documents individually and the consequent additional costs involved.

The Review Group does not consider that the very considerable administrative burden on the courts and the parties which such a facility would impose would be justified by any perceived benefits in conferring additional transparency on the administration of civil justice, particularly in circumstances where facilities for inspection by the media of court documents are now in place.

## 3. The next steps towards an e-Litigation model

### 3.1

The Review Group notes the work already undertaken by the Courts Service in appraising critically its CSOL platform for e-Litigation, and the three-phase implementation approach – “Transition” (to end 2022), “Transform” (to end 2025) and “Optimise” (to end 2030) – in its Vision statement. This contains a commitment during the phase to 2022 to “[d]elivery of e-services including expanding the use of e-filing, e-probate, e-licensing, e-registers” – though without specifying the categories of litigation to which e-filing would extend – and to “[d]eveloping digital services strategy”.

The Courts Service also commits in the early phases of the transformation programme – in “addressing priority areas of operational need” – to working with key stakeholders to “run pilot projects to test and explore how the use of digital tools and agile techniques can revolutionise our ways of working”.

The Vision Statement leaves a number of questions open as to implementation, including:

whether CSOL – in light of the issues raised on the appraisal of it above mentioned – will serve as the basis for developing the Courts Service’s digital services strategy or whether some other platform should be selected; what case types may fall within those priority areas of operational need to qualify as pilot projects in the period to end 2022; and how implementation will affect, or be influenced by, the existing project list identified as part of its change programme. These issues will, it may be expected, impact on the Courts Service’s ability to extend e-filing within the next two-year period.

### 3.2

The Review Group does not propose to revisit the approach to implementing the recommendations of the Capability Review as disclosed in the Vision Statement, but confines itself to commending the Courts Service’s openness to working with practitioners and court users on piloting of e-Litigation solutions and recommending that liaison with and input from practitioners/court-users affected should be integral to the Courts Service’s methodology for design or procurement of those solutions.

The Review Group’s primary concern is to ensure that the pent-up demand of practitioners and court users for use of e-Litigation methods – clearly evidenced in its public consultation – be addressed in a practical way pending the phased implementation by the Courts Service of its vision of a comprehensive e-Litigation solution over the period to 2030. It therefore recommends some limited steps – set out immediately below – which might be taken in the immediate term to meet the need for practitioners and court users to conduct litigation in the courtroom in a way which reduces – if not eliminates – reliance on paper.

### 3.3

The advent of the Covid-19 pandemic has, if anything, underlined the need for and potential of technology in the courtroom to enable various categories of court business to be disposed of without a conventional hearing, while respecting the need for most hearings to be public in nature.

### 3.4

In the immediate term, the Review Group sees an opportunity, with relatively limited capital expenditure, to promote and encourage e-Litigation through the equipping of a much larger number of courtrooms across all jurisdictions with Wi-Fi and evidence display hardware to enable the use by practitioners of e-Litigation software to present their cases in court electronically.

The Review Group notes the arrangements established in response to Covid-19 for liaison between the judiciary, the Courts Service and practitioners, and sees such arrangements as playing an important role in:

- (a) evaluating, with the benefit of the experience of remote hearings operated to date, including during the Covid-19 pandemic, the courts’ current capacity to facilitate the holding of remote hearings;
- (b) continuing to pilot – through presentations at mock hearings – collaboration by practitioners and judges in the use of electronic presentation software in the courtroom;
- (c) identifying any practical, technical or other difficulties arising and seek their resolution; and
- (d) promoting within the judiciary and the legal profession, respectively, the conduct of paperless hearings.

While the Dublin courts may most readily lend themselves to a pilot given the number of equipped courtrooms available, pilots at specific venues in the Circuit and District Courts could be selected in consultation with the Presidents of those Courts and the legal professional bodies.

Following the precedent of the practice direction on use of video-conferencing of 2007, a practice direction could require practitioners wishing to present their cases electronically to notify the court office of the jurisdiction concerned a set time in advance of the application or trial date, in particular to

- (a) enable a suitably equipped courtroom to be identified
- (b) ensure that the electronic material was made accessible to the Judge and the court registrar sufficiently in advance of the hearing and
- (c) enable the system to be tested in advance of the hearing, if appropriate.

### 3.5

Also in the more immediate term – and building on the recommendation of its High Court sub-group – the Review Group sees considerable potential benefit, both in minimising inconvenience to witnesses and containing witness costs, in promoting the use of video-conferencing for the taking of expert and other evidence. It notes that section 11 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 enables the senior judiciary to designate categories or types of civil proceedings for hearing remotely. It recommends that, as an initial step,

- (a) trials of personal injuries actions in the High Court in Dublin be located in courtrooms equipped with video-conferencing and
- (b) the judge in charge of the Personal Injuries List should, when fixing a trial date, enquire of the parties as to whether there is any reason why the expert witnesses should not give evidence by video-conference.

Wider use of video-conferencing for adducing of evidence will require that the Courts Service increase considerably the number of suitably equipped courtrooms.

### 3.6

The Review Group identified a demand from judges, especially in the Circuit and District Courts, for desktops and docking stations on each bench, to enable judges to reduce their paper-based tasks where possible. It recommends that the Courts Service liaise with the senior Judiciary with a view to settling upon the standard equipment set which should be available on each court bench and implement a programme to install the appropriate hardware in those courtrooms which are currently not equipped to that standard.



# MINORITY REPORT ON LITIGATION COSTS

The background of the page features a series of overlapping, semi-transparent geometric shapes. A large, bright blue shape starts from the right edge and extends towards the center. Below it, a dark green shape overlaps, and further down, a medium green shape overlaps. On the left side, a small, light green shape is visible. The overall effect is a modern, layered design.

## 1. Introduction

The Review Group members subscribing to this Minority Report (“the Minority”) note that the Review Group’s remit mandates that the Review Group make recommendations with a view to “...[r]educing the cost of litigation including costs to the State...” As indicated in the Introduction to Chapter 9 (Litigation Costs) this envisages measures which would ensure that litigation costs levels will be reduced, and not merely contained or moderated in their growth.

## 2. Limitations of the current legal costs adjudication regime

### 2.1 Principal changes

The detailed examination in Chapter 9 of the legal costs adjudication regime established by the Legal Services Regulation Act 2015 (“the 2015 Act”) points to significant limitations insofar as its potential to effect a reduction in litigation costs levels is concerned.

The 2015 Act has undoubtedly made changes to the litigation costs regime – notably in

- restating (in sections 168 and 169 respectively) the basis on which legal costs may be awarded in litigation and the criteria governing the awarding of those costs
- strengthening disclosure obligations of individual practitioners in relation to legal costs
- offering greater potential, at least in cases of legal importance, for transparency through the new register of determinations of adjudications on legal costs under section 140 (“the register of determinations”).

### 2.2 Criteria for assessment of costs fundamentally unchanged

The old taxation process left the largest components of bills of costs in money terms – in particular instructions and brief fees on trials and pre-trial applications – open to assessment, at the discretion of the taxing officer, having regard to a range of criteria to be applied to the particular circumstances of the case concerned. This rendered it exceedingly difficult, if not impossible, for a lay person or business faced with litigation to quantify the likely extent of their exposure to litigation costs. The method of costs assessment under the new regime has not fundamentally altered this approach.

A comparison of the task of the Taxing Master under section 27 of the Courts and Court Officers Act 1995 (“the 1995 Act”) and the relevant rule of court then applicable<sup>1</sup> with that of the Legal Costs Adjudicator under section 155 and Schedule 1 of the 2015 Act shows considerable overlap between the assessment criteria applying to the old and the new regimes.

Under both regimes, the assessment requires an examination of the nature and extent of the work done and of the factors of: value involved; time expended; levels of skill required; the novelty and degree of complexity of the issues involved; and the place and circumstances in which the business was transacted. On a taxation of solicitor and client or party and party costs under the old regime the taxing officer was tasked to allow, in whole or in part any costs, charges, fees or expenses which he or she considered to be “fair and reasonable in the circumstances of the case”<sup>2</sup> Similarly, the Legal Costs Adjudicator under the 2015 Act is now required to “determine what a fair and reasonable charge for [the] work or disbursement would be in the circumstances.”<sup>3</sup>

Furthermore, the 2015 Act contains no mandate, express or implied, to the Legal Costs Adjudicators to reduce the levels of litigation costs allowable.

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1 Order 99 rule 37(22) RSC.

2 Section 27(2) of the 1995 Act. Emphasis added.

3 Section 155(4)(c) of the 2015 Act. Emphasis added.

## 2.3 Insufficient information on the cost of litigating

In its landmark report on competition in legal services of December 2006, the Competition Authority noted:

“The lack of transparency in the price of legal services makes it difficult for consumers to shop around for legal services. If consumers cannot compare the prices for legal services, there is little incentive for lawyers to compete on price. The lack of information in the market for legal services is stifling competition between lawyers to the detriment of consumers.”<sup>4</sup>

As acknowledged in Section 3 of Chapter 9, section 150 of the 2015 Act strengthened the statutory obligation concerning disclosure in respect of charges for legal costs previously applied to solicitors by section 68 of the Solicitors (Amendment) Act 1994 (“the 1994 Act”) and subsequently voluntarily adopted by the Bar Council in its Code of Conduct. However, the obligation of individual practitioners to disclose charges, or the basis for charges, will not, in and of itself provide a prospective client with access to sufficient information on levels of charges in the wider market for litigation services to enable them to judge whether the charges proposed by a particular practitioner are competitive or not. This is especially so given the highly discretionary nature of the approach to costs assessment described above.

It is quite unrealistic to expect that an individual or enterprise faced with imminent litigation could gain such information on the basis of an approach to an individual practitioner. The Legal Costs Working Group in its report of November 2005 noted that the level of solicitors’ fees in the High Court increased by 4.2% in real terms annually over the period 1984 to 2003 notwithstanding the imposition during that period of the disclosure obligation on solicitors in the 1994 Act.

While the register of determinations will bring more information to light on costs allowed for individual bills of costs which are disputed, it is also quite unrealistic to expect that that register, in and of itself, will provide the comprehensive, fully interrogatable set of data on the amounts likely to be allowed on adjudication for the full range of civil case types – and steps within civil case types – which would be needed to enable an individual or enterprise contemplating litigation to make a reasonable estimate of the likely cost to them of bringing or defending a civil claim.

## 3. Options for regulating legal costs levels: the Minority’s conclusions

In light of the considerations mentioned in Sections 2.2 and 2.3 above, the Minority has concluded that the regime regulating legal costs under the 2015 Act cannot be relied on to ensure that litigation costs levels will be reduced.

Section 8 of Chapter 9 contains a detailed appraisal of the approach to legal costs assessment in 10 other jurisdictions – eight of which follow the common law legal tradition at national and state/province level. Most of those examples are from countries which have been ranked internationally as having lower levels of litigation costs compared to Ireland. A feature common to the large majority of those jurisdictions is that they set maximum levels for costs recoverable in litigation, as opposed to relying solely on principles or guidelines.

While it considers that the range of procedural reform measures the Review Group has recommended in other chapters of its report should assist towards containing or reducing costs, the Minority is convinced from the experience in other jurisdictions – and in particular the series of procedural and systemic reforms introduced in England and Wales commencing with the Woolf reforms of the 1990s – that procedural reforms and efficiencies in and of themselves will not suffice to import full transparency, predictability and competitiveness in the setting of litigation costs and – more significantly given the Review Group’s remit – reduce levels of litigation costs both as between client and practitioner and for the party who may be required by a court award or under a settlement to bear liability for the costs incurred by an opposing party.

4 The Competition Authority, “Competition in Professional Services: Solicitors & Barristers” (December 2006) para. 28, page vii.



Equally, the Minority, in light in particular of the experience of reforms in England and Wales, is satisfied that application of general principles or criteria of reasonableness (as employed in the 2015 Act) or proportionality (as incorporated in the Civil Procedure Rules for England and Wales in 2013 on foot of the recommendations of Lord Justice Jackson) to the assessment of litigation costs will not, without further measures, suffice to reduce litigation costs levels in Ireland.

Having reviewed the experience in other jurisdictions as mentioned above, and in particular litigation costs regimes in Canada and Australia, the Minority considers that a mechanism for prescribing the maximum levels of litigation costs chargeable – in the form of a table of costs prescribed by an independent Legal Costs Committee as described in detail below – should be introduced. This is seen as the only effective means of ensuring reduction of levels of legal costs for private individuals and businesses engaged in litigation, as well as for State bodies. While the proposed approach will be critical in containing these cost levels in the future, it also recognises the entitlement of legal practitioners to be reasonably remunerated for their work.

The Minority is reinforced in this view by the experience in England and Wales – a high cost litigation jurisdiction like Ireland – where following successive reform initiatives aimed at reducing litigation costs levels, the senior judiciary, in its September 2016 paper “Transforming Our Justice System”,<sup>5</sup> concluded:

“More needs to be done to control the costs of civil cases so they are proportionate to the case, and legal costs are more certain from the start. Building on earlier reforms, we will look at options to extend fixed recoverable costs much more widely, so the costs of going to court will be clearer and more appropriate. Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action.”<sup>6</sup>

As noted at Section 6.3 of Chapter 9, support for scales of fixed recoverable costs as a means of addressing high legal costs levels in Ireland was evidenced in some of the submissions received by the Review Group, including the submission from six judges assigned to the Personal Injuries List in the High Court.

The Minority has considered whether guidelines would be an adequate alternative to a table of costs, but has concluded that guidelines would not provide the degree of transparency, certainty and predictability which consumers of legal services should be entitled to expect, and are also likely to leave scope for dispute as to the consequences of exceeding or otherwise not adhering to them.

## 4. A statutory Table of Costs

### 4.1 Safeguarding competitiveness

The Minority is aware of concerns that scales or tariffs may stifle competition, in that they may encourage an upward drift in costs to the ceilings set by the maximum charges or rates. The Minority is of the view, however, that a regime based on graduated charges subject to a maximum, if suitably designed, should not present any impediment to competition, and would not be incompatible with EU or national competition law.

The Minority also notes that, with the exception of England and Wales – where fixed recoverable costs are only gaining ground relatively recently – the World Bank Group Doing Business Surveys cited in Section 1.2 of Chapter 9 would indicate that in the majority of the jurisdictions operating tariff tables or scales cited from those surveys - whether of the common law or civil law tradition – it has been possible to maintain lower litigation costs levels than in Ireland.

Over the past few decades, the ECJ/CJEU has examined national legislation on lawyers’ fee scales in a number of cases from the perspective, variously, of EU law relating to competition law and freedom to

5 Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/553261/joint-vision-statement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf)

6 Ibid., page 11.

provide services – viz. the *Arduino*<sup>7</sup>, *Cipolla*<sup>8</sup>, *Commission v Italy*<sup>9</sup> and *Eurosaneamientos*<sup>10</sup> judgments – in all of which it has rejected challenges to the validity of such fee scales. This should not be surprising: statutory costs scales are an established feature of several of the civil law jurisdictions of the EU as they are in Ireland and the UK. The 2015 Act expressly adopts, in section 143, the scales in Appendix W of the Rules of the Superior Courts into the legal costs assessment framework. Presumably, no concern arose about compatibility with EU law in legislating in the 2015 Act for the continuance of Appendix W.

Considerations which, according to the ECJ/CJEU jurisprudence, have a bearing on whether a maximum tariffs regime would fall foul of EU law include –

- whether the regime is a public law measure, as distinct from one fixed by a private organisation such as a legal professional body
- whether the tariffs set can be contracted out of by the lawyer and client and
- whether the court is at liberty to derogate from the tariffs set in exceptional cases.

As will be seen in the detailed elaboration set out at Sections 4.3 to 4.8 of this Minority Report, all three of these conditions are met by the regime proposed in the recommendations of the Minority.

Furthermore, those recommendations envisage that, in prescribing any charge or rate in the Table of Costs, or amending it, the Litigation Costs Committee would be –

- (a) legally obliged to rely on appropriate evidence, and take into account general economic conditions which the Committee considers affect the market for provision of legal services and
- (b) importantly, resourced and empowered by law to access data on costs levels from various sources for that purpose.

Thus, the task of ensuring that any fees prescribed in the Table of Costs meet requirements of non-discrimination, necessity and proportionality under EU law will be one for the Legal Costs Committee informed by relevant expert evidence and data.

A key premise of the new regime must be that the charges fixed in the table constitute maximum charges or rates only and do not preclude a practitioner, when negotiating charges with the client, from offering legal services at a lesser amount or rate, or a client from seeking such.

In order to ensure that competitiveness in the fee arrangements agreed between practitioner and client feeds into party and party fees, provision should be made in statute – including by an amendment to section 157 of the 2015 Act – that a party shall not be entitled to recover, whether under the Table of Costs or on an adjudication of costs on a party and party basis, an amount for an item or items of legal services which exceeds more than that which may have been –

- (a) specified for the same item or items in a notice under section 150 of that Act or
- (b) agreed for the same item or items between that party and their legal practitioner in any agreement regarding legal costs made in accordance with section 151 of that Act.

Supporting this approach, provision should also be made by statute that the maximum amount or charge set for an item by that part of the table of costs applicable to party and party costs should not exceed the

7 Case C-35/99, which concerned compatibility of a legislative measure fixing minimum and maximum fees for members of the legal profession with Articles 5 and 85 of the EC Treaty.

8 Case C-35/99, which concerned compatibility of a legislative measure approving a scale fixing a minimum fee for members of the legal profession with Articles 10 EC, 81 EC and 82 EC and compatibility of legislation prohibiting derogation by agreement from the minimum fees set by a scale of lawyers' fees with Article 49 EC.

9 C 565/08, which concerned compatibility of legislative provisions requiring lawyers to comply with maximum tariffs for the calculation of their fees with Articles 43 EC and 49 EC.

10 Joined Cases C 532/15 and C 538/15, which, as far as relevant, concerned the compatibility with Article 101 TFEU, read in conjunction with Article 4(3) TEU, of legislation which makes the fees of lawyers subject to a tariff which may be increased or decreased only by 12%, in respect of which the national courts merely check its strict application without being in a position, in exceptional circumstances, to derogate from the limits set by that tariff.

amount set for the equivalent item in that part of the Table of Costs applicable to practitioner and client costs.

## 4.2 Safeguarding equality of arms

The Minority has also considered the possibility that a case may arise where the maximum charges or rates set by the Table of Costs may, due to an exceptional aspect of or development in the case, not suffice to adequately indemnify a party, and thereby raise issues of inequality of arms for less well-resourced litigants or constitute an impediment to access to justice.

However, such cases must – if the Table of Costs is set at a level to ensure reasonable remuneration for practitioners and is sufficiently comprehensive – necessarily be very rare. The most that even a less well-resourced litigant may expect is that, should they be awarded costs, the costs allowed to them will reasonably remunerate their legal representatives for conducting the proceedings on their behalf and that, should they be made liable for costs, they will not be expected to pay more than the costs reasonably incurred by an opposing party in conducting the case against them.

The Minority is satisfied that any such cases can be adequately addressed by providing in the primary legislation that the court, when making an award of costs, may direct that the Table of Costs, or any part of it, shall not apply to the assessment of costs. However, to counter any risk that a practice could develop of courts being persuaded to dispense with the application of the Table of Costs in other than exceptional cases, the primary legislation should provide that the application of the Table of Costs may only be dispensed with by a court, and a Legal Costs Adjudicator may only disregard it, where the court is satisfied that exceptional grounds arising in the case concerned justify the dispensation and where the court has set out those specific grounds in its written order.

Furthermore, and borrowing from the approach in the Manitoba costs rules, express provision should be made in the primary legislation that, where the court dispenses with application of the Table of Costs for the purpose of the assessment of the costs, on any such assessment being made, whether by a Legal Costs Adjudicator or the court, the Legal Costs Adjudicator or court in exercising its/their discretion shall not consider any amount or rate prescribed in the Table of Costs as establishing a minimum level for costs.

## 4.3 An independent costs regulatory body

The Minority notes that, prior to the revisions of the scales of costs in the District Court and the Rules of the Superior Courts Rules in 2014 and 2019 respectively, the court rules committees had not made revisions of significance to those scales for many years. This is perhaps understandable given the pressure on those committees to dispose of the considerable general rule-making business they have to deal with, and the need for resources in research and expertise which any periodic or regular evidence-based review of the costs scales would warrant – resources not available to those committees.

Quite aside from this aspect, however, the Minority considers that the setting of levels of litigation costs has such implications for the wider community as to point to the need for the task to be undertaken by an independent body to be established by statute – which it suggests be given the title “Litigation Costs Committee” with wider membership than the court rules committees, membership of which latter is confined to the judiciary, the legal professional bodies, the Attorney General and the Courts Service.

In recommending the establishment of an independent Costs Council for England and Wales, Lord Justice Jackson in his seminal report *civil litigation costs of 2009* stated:

“If a Costs Council is set up, it should be chaired by a judge or other senior person, who has long experience of the operation of the costs rules and costs assessment. It is appropriate for the Costs Council to include representatives of stakeholder groups. However, its membership should not be dominated by vested interests. It is important that all members be of high calibre and appropriate

experience, so that the recommendations of the Costs Council will be authoritative. The Costs Council, like the Civil Procedure Rule Committee, should include a consumer representative. It should also, in my view, include an economist and a representative of the [Ministry of Justice].<sup>11</sup>

The multi-disciplinary costs regulatory governance models in Scotland and Western Australia have been described in Sections 8.3.3 and 8.5.2, respectively, of Chapter 9 and are also very helpful precedents in considering how legal costs regulation may be opened up to a wider range of experience and expertise and be rendered more active and transparent.

The Scottish Costs and Funding Committee has a permanent membership of 12, comprising a Court of Session judge (broadly equivalent to a High Court judge in this jurisdiction) as chairperson, two judges of the sheriff courts (broadly, the counterpart of the Circuit Court here), a senior barrister, two solicitors, a legal costs accountant, the court costs assessment officer (Auditor), the CEO of Money Advice Scotland, a nominee of the Scottish Government, the Principal Legal Adviser to the Scottish Legal Aid Board and a claims manager of an insurance company. The Committee meets four to six times a year and reports to the Civil Justice Council which, in turn, prepares rules for consideration by the Court of Session as the rule-making authority.

The Legal Costs Committee of Western Australia is appointed by the State Governor and comprises: a judge of the Supreme Court or the District Court or legal practitioner of no less than eight years' standing as chairperson; two local legal practitioners in private practice nominated by the Attorney General from a list submitted by the Law Society; and three non-lawyers, at least one of whom must be an accountant.

The Western Australia committee is required to review each costs determination at least once every two years or otherwise as the Attorney General may request, and the review involves a public consultation process.

#### 4.4 Appointment and composition of the Litigation Costs Committee

The membership of the Litigation Costs Committee should be appointed by the Minister for Justice and Equality and should be composed in a manner similar to that suggested by Lord Justice Jackson in his proposal for the composition of a Costs Council.<sup>12</sup> The Litigation Costs Committee should be chaired by a serving or retired judge of the Superior Courts nominated by the Chief Justice. Its remaining membership should be such as to ensure input from consumers of legal services including State bodies and persons with accountancy and economic expertise, as well as the legal profession and a legal costs accountant. While not wishing to be prescriptive as to the number of its members, the Minority considers it essential that its composition should not be weighted in favour of vested interests.

Consideration has been given to the question of whether the Chief legal Costs Adjudicator should be a member of this body. The Review Group's litigation costs sub-group consulted Mr. Paul Behan, Chief Legal Costs Adjudicator, who very generously made available to them his knowledge and expertise on this issue, and on the subject of legal costs more generally. Given that the Litigation Costs Committee will need to evaluate litigation costs levels and that the Legal Costs Adjudicators will be called upon to apply the Table of Costs in their adjudications, the Minority considers that the input of the Chief Legal Costs Adjudicator may most appropriately be secured by conferring on the Litigation Costs Committee a statutory power to consult with the Chief Legal Costs Adjudicator and to request the latter's assistance in providing data on costs adjudications.

#### 4.5 The Litigation Costs Committee's remit, administration and working method

The Litigation Costs Committee should be tasked by statute to compile and prescribe by statutory instrument, within two years from its establishment, an initial Table of Costs in respect of civil proceedings

<sup>11</sup> "Review of Civil Litigation Costs: Final Report", para. 2.5, page 61.

<sup>12</sup> See the preceding Section of this Minority Report.

of a contentious and non-contentious nature, and to review and, as appropriate revise, the Table of Costs at intervals of not more than two years following promulgation of the first Table of Costs.

While provision should be made in the primary legislation that the Litigation Costs Committee be independent in the exercise of its powers, by analogy with the requirement for concurrence by the Minister for Justice and Equality in the prescribing of rules of court, the prescribing of the Table of Costs should be subject to concurrence by that Minister.

In order that the Litigation Costs Committee be able to operate effectively, it will need to be supported by a small secretariat, which could be located within the Courts Service or the Department of Justice and Equality. More importantly, the Litigation Costs Committee should have the statutory power and be allocated the commensurate budget to commission or conduct analysis of the costs of conducting civil litigation and compile data thereon. In that regard, access to data on litigation costs adjudicated upon by the Legal Costs Adjudicators or settled by the insurance industry and the State Claims Agency would be of particular value to the Litigation Costs Committee.

In addition to having the statutory power to consult with the Chief Legal Costs Adjudicator recommended above, the Litigation Costs Committee should be given powers to

- access the records of determinations of legal costs adjudications, subject to similar restrictions on disclosure of information as apply to the Chief Legal Costs Adjudicator under section 140(5) of the 2015 Act when publishing the outcome of and reasons for a determination in the register of determinations maintained under section 140
- procure from insurance companies providing motor accident, employers' liability and public liability insurance in the State information on the amounts of costs agreed or paid in relation to claims resolved on the basis that such information is to be provided in anonymised form so as not to identify any parties, witnesses or practitioners concerned
- procure from the State Claims Agency information on of the amounts of costs agreed or paid in relation to claims resolved on the basis that such information is to be provided in anonymised form so as not to identify any private parties, witnesses or practitioners concerned
- invite submissions from the legal professional bodies, State and public bodies and the public generally to assist it in the discharge of its remit.

The records of proceedings of the Litigation Costs Committee, any submissions received by it and the any Table of Costs it submits to the Minister for concurrence should be available to the public.

#### 4.6 Practitioner and client/party and party costs

The regime the principles and policies underpinning which would require to be set out in the primary legislation concerned should apply both to -

- practitioner and client costs (as is the case, for example, in Western Australia) subject to the client's entitlement, on being properly apprised by their legal practitioner as to the prescribed fees levels, to exclude the application of part or all of that regime by a contractual agreement with the legal practitioner and
- costs recoverable by a party to litigation from another party, whether under a court award or the terms of a settlement.

#### 4.7 Setting fixed maximum costs charges and rates

In suggesting a design for the new fixed maximum costs regime, the approaches adopted in Alberta's Tariff of Recoverable Fees and Manitoba's Tariff of Recoverable Costs, described in Section 8 of Chapter 9, have been of particular assistance. As will be noted, these tariff tables specify separate classes of proceedings (five in Alberta, four in Manitoba) according to the monetary range within which a claim falls. Claims not quantifiable in money terms are allocated to one of the "value" classes. The tables set out under each class

contain a list of “tariffs” chargeable for the various procedural steps which may arise in the case falling within that class.<sup>13</sup>

The regime proposed by the Minority would mandate the Litigation Costs Committee to prescribe a table of maximum legal costs charges or rates – the Table of Costs – for the various steps or items within proceedings, or categories of proceedings, the amount of the costs allowable for each step or item being subject to variation by reference to factors such as value of claim (where the claim is quantifiable in money terms) or degree of complexity of the proceedings. The Litigation Costs Committee’s powers should also extend, however, to the full range of costs fixing options set out below, such as the fixing of charges on the basis of a unit of time (as is done in Scotland) or the use of grades of practitioner or staff of a practitioner or practitioner’s firm, based on experience, seniority or function, in fixing a charge (as is done in Western Australia).

The primary legislation should provide that the Table of Costs may incorporate one or more of the following, as the Legal Costs Committee may consider it appropriate -

- (a) the fixing of charges by amount for particular steps or items in the dispute to which the proceedings, or a particular category of proceedings, relate, including steps or items arising within the following stages corresponding to the new format in the bill of costs prescribed in the rules of court which implement the 2015 Act:
  - (i) the stage prior to commencement of proceedings;
  - (ii) the stage from commencement to trial/settlement date;
  - (iii) the trial/settlement up to determination of the dispute; and
  - (iv) the post-trial stage,
- (b) where the proceedings incorporate a claim quantifiable in money, or comprise a dispute relating to an entitlement to or ownership of property or relating to a matter, and the value of that property or matter is central to the dispute, the fixing of charges expressed as a percentage of or otherwise by reference to the value of the claim, or property or matter, concerned,
- (c) the designating of a class or classes of proceedings, where the legal services required for a proceedings category would, in the Legal Costs Committee’s view, justify provision for levels of charges specific to that class or classes,
- (d) the grading of
  - (i) proceedings,
  - (ii) a class of proceedings or
  - (iii) a step within proceedings

for the purpose of fixing charges according to the value or degree of complexity (e.g. not complex, medium, high) or any other relevant quality of the proceedings, class or step where, in the Legal Costs Committee’s view, provision for levels of charges based on such grading would reasonably be justified;

- (e) the use of units of time as the basis for fixing a charge in relation to a particular step or item;
- (f) the fixing of a range of amounts or rates for grades of practitioner, or staff of a practitioner or practitioner’s firm, based on experience, seniority or function, which the Legal Costs Committee considers reasonable for the purpose of provision of any legal services.

The individual charges should be fixed at a level so as to represent, for the step or item concerned:

- (a) in the case of practitioner and client costs, the amount which would reasonably remunerate a legal practitioner in prosecuting or defending proceedings for their client in a manner which accords with the instructions given to the legal practitioner by, or which has been approved by the client for that purpose;

<sup>13</sup> The various steps are footnoted in Sections 8.6.2 (Alberta) and 8.6.3 (Manitoba) respectively.

- (b) in the case of party and party costs, that portion of the costs reasonably incurred by the party awarded the costs (“the party to be paid”) which would reasonably remunerate that party’s practitioner in doing that which was necessary or proper for the attainment of justice or for enforcing or defending the rights of the party to be paid.

The criteria at (a) and (b) broadly seek to follow the traditional distinction between the standard for allowance of costs on a practitioner and client basis and a party and party basis, respectively.

Adopting a principle confirmed by the Supreme Court in *Sheehan (an Infant) v Corr*,<sup>14</sup> the primary legislation should provide that in prescribing any charge or rate in the Table of Costs, or any amendment of that table, the Litigation Costs Committee shall, having considered appropriate evidence, take into account general economic conditions which the committee considers affect the market for provision of legal services.

#### 4.8 Derogation from the maximum rates or charges

For the reasons indicated at Section 4.2 above, provision should be made in the primary legislation that a court when making an award of costs, where it is satisfied that exceptional grounds exist in the case concerned to justify it, may, provided that it specifies in its order the nature of those grounds, direct that the Table of Costs, or any part of it, shall not apply to the assessment of costs. The primary legislation should complement this by providing that a Legal Costs Adjudicator may only decline to apply the Table of Costs, or any part of it, where the court has in its order, having specified therein the exceptional grounds justifying the dis-applying of the Table, directed that it shall not apply.

The primary legislation should also provide that, where the court dispenses with application of the Table of Costs for the purpose of the assessment of the costs, on any such assessment being made whether by a Legal Costs Adjudicator or the court, the Legal Costs Adjudicator or court in exercising their/its discretion shall not consider any amount or rate prescribed in the Table of Costs as establishing a minimum level for costs.

#### 4.9 Integration of fixed maximum costs with the existing costs assessment regime

The introduction of a Table of Costs will reduce the extent of adjudicative discretion exercisable by a Legal Costs Adjudicator. However, this is not as radical a departure as it may, at first sight, seem.

The new process of adjudication of costs under Part 10 and Schedule 1 of the 2015 Act was intended and has been designed to operate in conjunction with the scales of costs set out in Appendix W, RSC, which appendix is given a form of primary legislative recognition in section 143 of that Act. The 2015 Act regime, therefore, already envisages that the adjudicating powers of the Legal Costs Adjudicators may be circumscribed by fixed charges, or ranges of charges.

The Legal Costs Adjudicator should retain adjudicative functions under the reforms proposed in the following cases:

- (a) in cases where the Table of Costs has fixed a range of amounts or rates for the proceedings or step depending on their level of complexity (see para. (d) in Section 4.7 above), determining whether proceedings, or a step within proceedings, fall into one or other category of complexity for the purpose of applying the Table of Costs;
- (b) in cases where the Table of Costs has used units of time as the basis for fixing a charge in relation to a particular step or item: determining the amount of such units of time appropriate for the legal services concerned (see para. (e) in Section 4.7 above);
- (c) in cases where the Table of Costs has fixed a range of amounts or rates for employment of grades of practitioner or staff of a practitioner or practitioner’s firm (see para. (f) in Section 4.7 above): determining the particular grade or number of grades appropriate to be employed in provision of the legal services concerned;

<sup>14</sup> [2017] IESC 44, at paras. 100 to 116.

- (d) adjudicating on costs where a court has dispensed with the application of the Table of Costs to those costs; and
- (e) adjudicating on costs governed by the regime in place prior to entry into operation of the Table of Costs.

The primary legislation concerned should make provision extending the adjudicative powers of the Legal Costs Adjudicators accordingly.

The proposed new Table of Costs would replace Appendix W, RSC, Parts I (litigation costs generally in the Superior Courts), II (costs of judgment in default of appearance), III (appeals from Circuit Court) and IV (fees payable to commissioners for oaths) and other scales of costs currently prescribed by rule of court specifically Schedule E of the District Court Rules.

In order to avoid any duplication of costs prescribing powers, the amending primary legislation establishing the new regime would require to amend the statutory rule-making remits of the court rules committees to revoke their powers to prescribe costs. Section 143 of the 2015 Act would also require to be repealed.

John Shaw

Liam Gleeson


Oonagh Buckley

Kevin Fidgeon





# APPENDIX 1: LIST OF RESPONDENTS FURNISHING SUBMISSIONS



1. Apartment Owners' Network<sup>1</sup>
2. A&L Goodbody
3. AIB
4. Alliance for Insurance Reform
5. Aviva Legal Services
6. Bar Council of Ireland
7. Barr, The Hon. Mr. Justice Anthony<sup>2</sup>
8. Barton, The Hon. Mr. Justice Bernard<sup>3</sup>
9. Beauchamps
10. Blennerhassett, Dr. Joanne
11. BLM Law<sup>4</sup>
12. Boland, Clíona BL
13. Brennan, Judge John
14. Britton, Ellen
15. Buckley, Niall BL
16. Bundledocs Ltd<sup>5</sup>
17. Cantillons Solicitors
18. Chartered Institute of Arbitrators
19. Cheevers, Dr. Aonghus, Sutherland School of Law, UCD<sup>6</sup>
20. Chief State Solicitor's Office
21. Clohessy, Patrick
22. Comerford, His Hon. Judge Francis
23. Commercial Litigation Association of Ireland
24. Commission for Communications Regulation
25. Cooney, Fand
26. Courts Service
27. Cronin, Gerard
28. Cross, The Hon. Mr. Justice Kevin<sup>7</sup>
29. CVS Doyle Agencies
30. D'Arcy, Michael, T.D., Minister of State with responsibility for Financial Services and Insurance, Department of Finance
31. Department of Business, Enterprise and Innovation<sup>8</sup>
32. Department of Communications, Climate Action & Environment
33. Department of Defence, Litigation Branch
34. Department of Housing, Planning and Local Government
35. Department of Justice and Equality, Courts Policy Division, Gender Equality Division and Civil Law Division

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1 Jointly with the Society of Chartered Surveyors Ireland.

2 Individual submission and submission jointly with Mr. Justice Kevin Cross, Mr. Justice Bernard Barton, Mr. Justice Michael Hanna and Ms. Justice Bronagh O'Hanlon.

3 Jointly with Mr. Justice Kevin Cross, Mr. Justice Anthony Barr, Mr. Justice Michael Hanna and Ms. Justice Bronagh O'Hanlon.

4 Jointly with Irish Hotels Federation.

5 Jointly with Legal IT Ltd.

6 Jointly with Professor G. Brian Hutchinson, Sutherland School of Law, UCD.

7 Jointly with Mr. Justice Anthony Barr, Mr. Justice Bernard Barton, Mr. Justice Michael Hanna and Ms. Justice Bronagh O'Hanlon.

8 Jointly with IDA Ireland and Enterprise Ireland.

36. Dublin Solicitors Bar Association
37. Dunleavy, Nathan, BL
38. eCúirt Teoranta
39. Enterprise Ireland<sup>9</sup>
40. EU Bar Association Ireland<sup>10</sup>
41. Eversheds Sutherland
42. Fitzgerald, Paddy
43. Fitzpatrick, Kieran
44. FLAC
45. Flanagan, Lorraine
46. Golden, Cllr. Trevor, Meath County Council
47. Gorecki, Dr. Paul, Research Affiliate, Economic and Social Research Institute, Adjunct Lecturer, Department of Economics, Trinity College Dublin
48. Graham, Fintan
49. Hallinan, Patrick and Christina
50. Hanna, The Hon. Mr. Justice Michael<sup>11</sup>
51. Hayes Solicitors
52. Hodges, Professor Christopher, Professor of Justice Systems, and Fellow of Wolfson College, University of Oxford
53. Hutchinson, Professor G. Brian, Associate Professor, Sutherland School of Law, UCD<sup>12</sup>
54. IDA Ireland<sup>13</sup>
55. Insurance Ireland
56. Irish Hotels Federation<sup>14</sup>
57. Irish Human Rights and Equality Commission
58. Irish Society of European Law<sup>15</sup>
59. Irish Society of Insolvency Practitioners
60. Irvine, The Hon. Ms. Justice Mary<sup>16</sup>
61. John T. Garrett & Associates
62. Johnson, His Hon. Judge Keenan
63. Justice for Wards
64. Keane, Patrick SC
65. Kenna Dr. Padraic, School of Law, NUIG
66. Lannon, Daniel
67. Law Society
68. Legal Aid Board
69. Legal IT Ltd<sup>17</sup>
70. Martin, Eoin, BL

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9 Jointly with the Department of Business, Enterprise and Innovation IDA Ireland.

10 Jointly with Irish Society of European Law.

11 Jointly with Mr. Justice Kevin Cross, Mr. Justice Anthony Barr, Mr. Justice Bernard Barton and Ms. Justice Bronagh O’Hanlon.

12 Jointly with Dr. Aonghus Cheevers, Sutherland School of Law, UCD.

13 Jointly with the Department of Business, Enterprise and Innovation and Enterprise Ireland.

14 Jointly with BLM Law.

15 Jointly with EU Bar Association Ireland.

16 On behalf of the judges of the Court of Appeal.

17 Jointly with Bundledocs Ltd.

71. Mason Hayes & Curran
72. McAleese, Simon
73. McDonagh, Emmet
74. McDonnell, Her Hon. Judge Petria
75. McPartland, Seamus
76. Medical Protection Society (MPS)
77. Murphy, Sylvester
78. National Safeguarding Committee
79. Newman, Jonathan SC
80. NewsBrands Ireland
81. Office of the Attorney General
82. O’Hanlon, The Hon. Ms. Justice Bronagh O’Hanlon<sup>18</sup>
83. O’Laoghaire, Donnchadh T.D., Sinn Fein Justice and Equality Spokesperson
84. Personal Injuries Assessment Board.
85. Price, Haydn
86. Professional Regulatory & Disciplinary Bar Association
87. Ravima
88. Residential Tenancies Board
89. Revenue Commissioners
90. Self-insured Taskforce
91. Transport Infrastructure Ireland
92. Reynolds, The Hon. Ms. Justice Leonie
93. Society of Chartered Surveyors Ireland<sup>19</sup>
94. State Claims Agency, NTMA
95. Whyte, Professor Gerard, School of Law, Trinity College
96. Williams, Michael
97. Woodsford Litigation Funding

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18 Jointly with Mr. Justice Kevin Cross, Mr. Justice Anthony Barr, Mr. Justice Bernard Barton and Mr. Justice Michael Hanna.

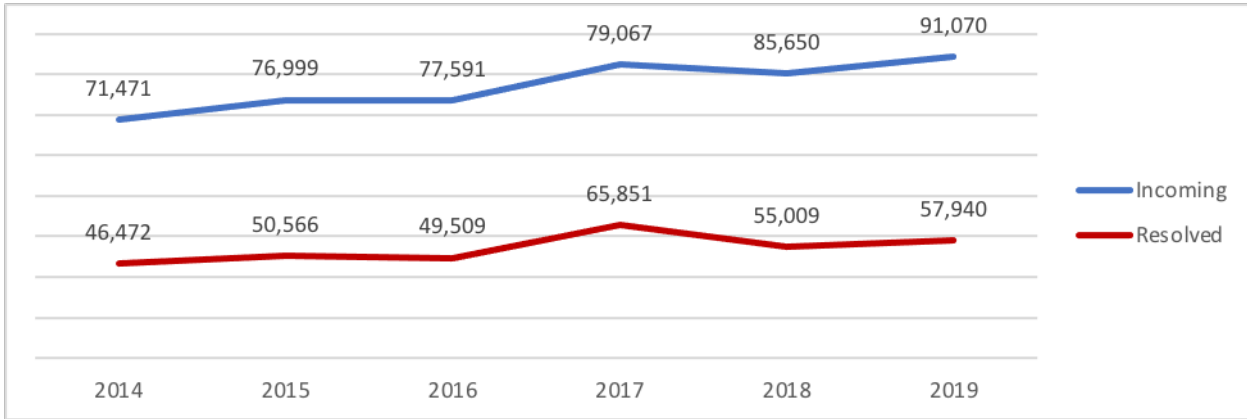
19 Jointly with the Apartment Owners’ Network.

# APPENDIX 2: COURT CASELOAD STATISTICS<sup>1</sup>

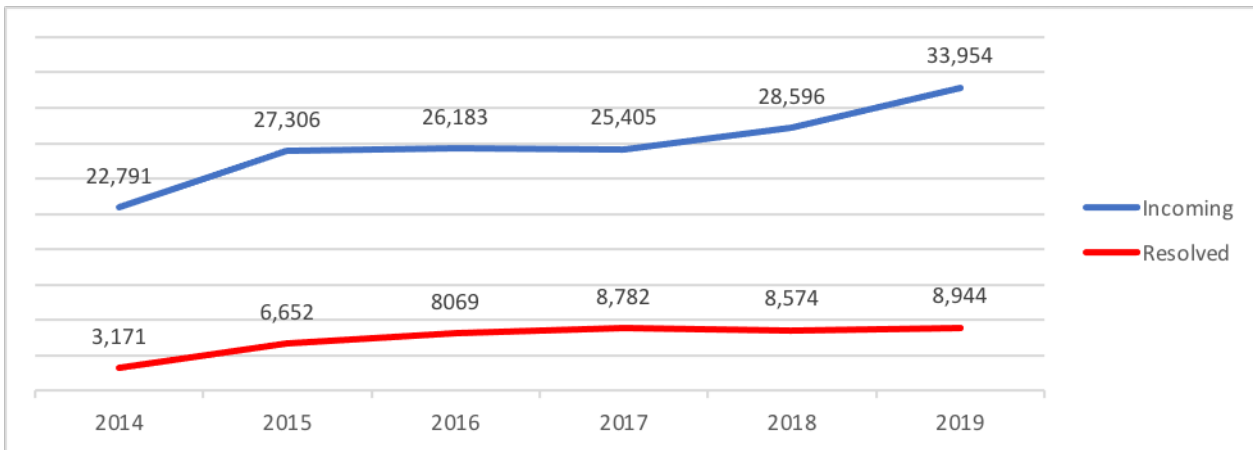
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<sup>1</sup> The tables and charts in this Appendix are based on caseload and caseflow data extracted from the Annual Reports of the Courts Service for the years concerned.

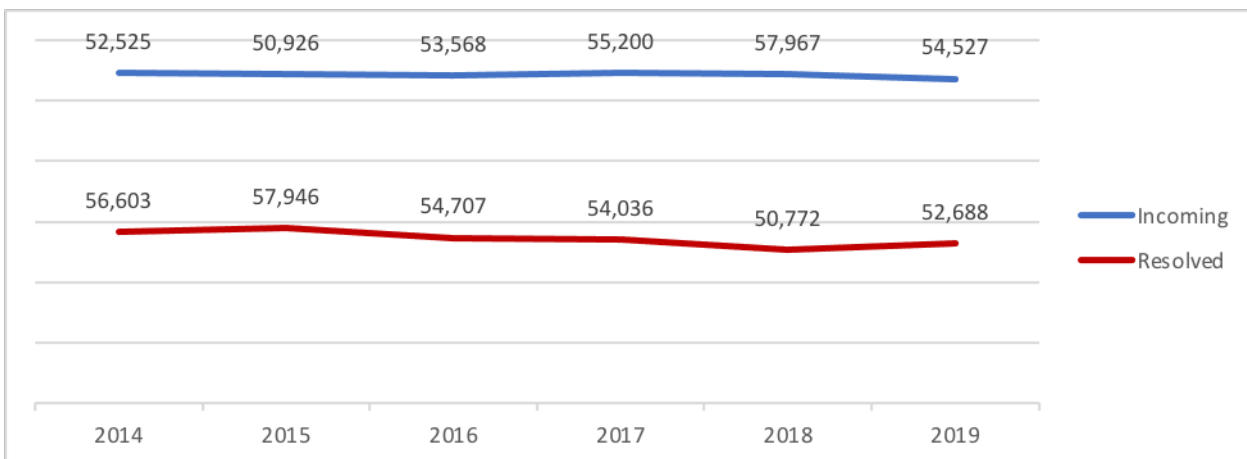
**Chart 1: District Court - Civil and commercial litigious caseload including family cases**

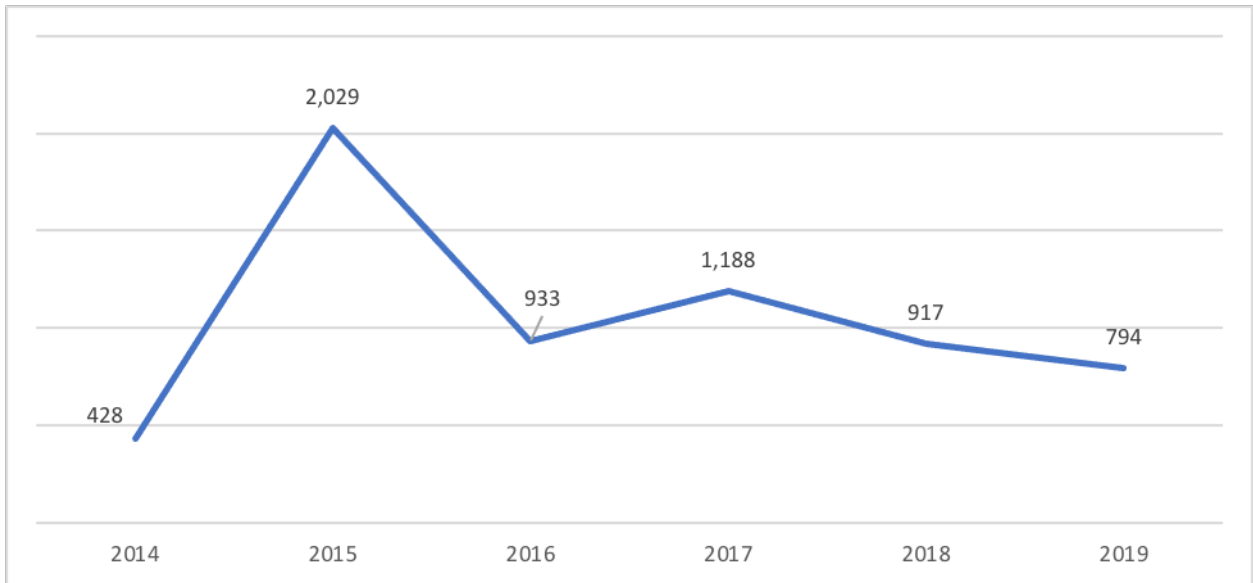


**Chart 2: District Court - Civil and commercial litigious caseload excluding family cases**



**Chart 3: District Court - Civil and commercial non-litigious cases**



**Chart 4: District Court - Non-litigious enforcement cases****Table 1: District Court – Case clearance rates**

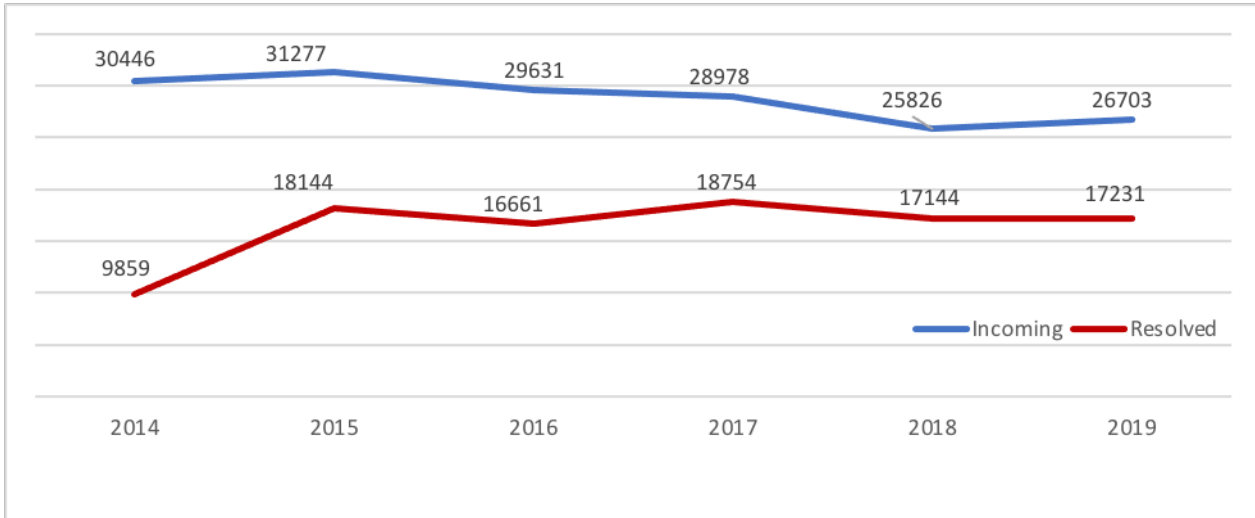
	2019	2018	2017	2016	2015	2014
Civil and commercial litigious (including family cases)	63.6%	64.2%	83.2%	63.8%	65.6%	65%
Civil and commercial non-litigious	96.7%	87.6%	97.8%	102%	113.7%	107%
Non-litigious enforcement	100%	100%	100%	100%	100%	100%

**Table 2: District Court - Average length of proceedings in days, from issue to disposal**

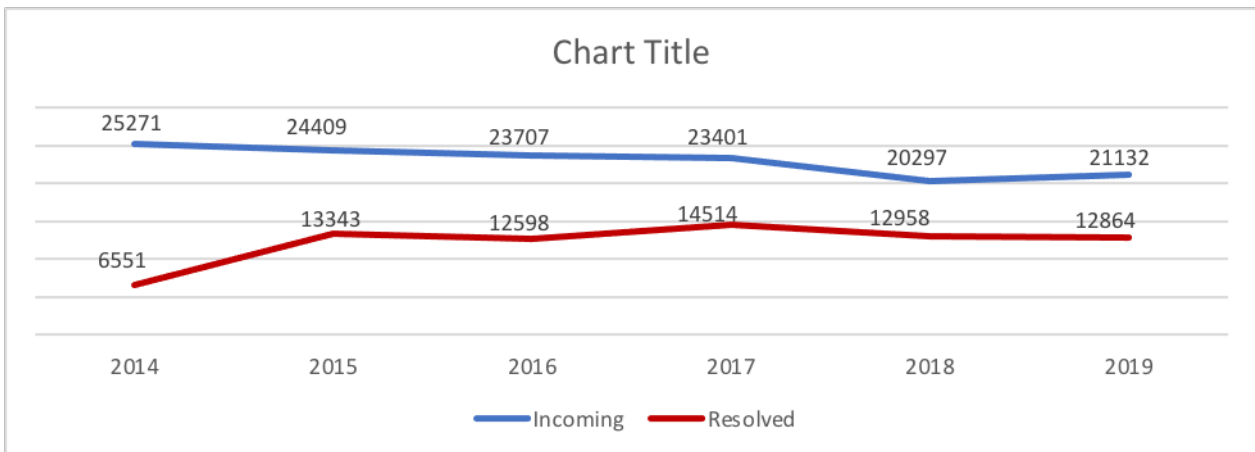
	2019	2018	2017	2016	2015
All civil and commercial categories excluding licensing applications	163	144	120	514	294



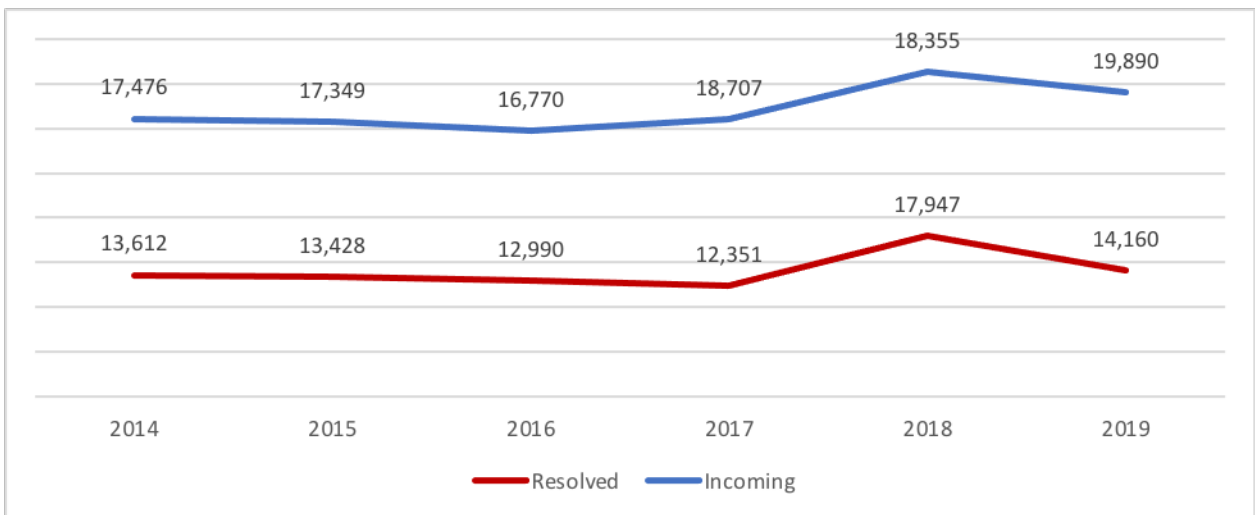
**Chart 5: Circuit Court – Civil and commercial litigious caseflow including family cases**



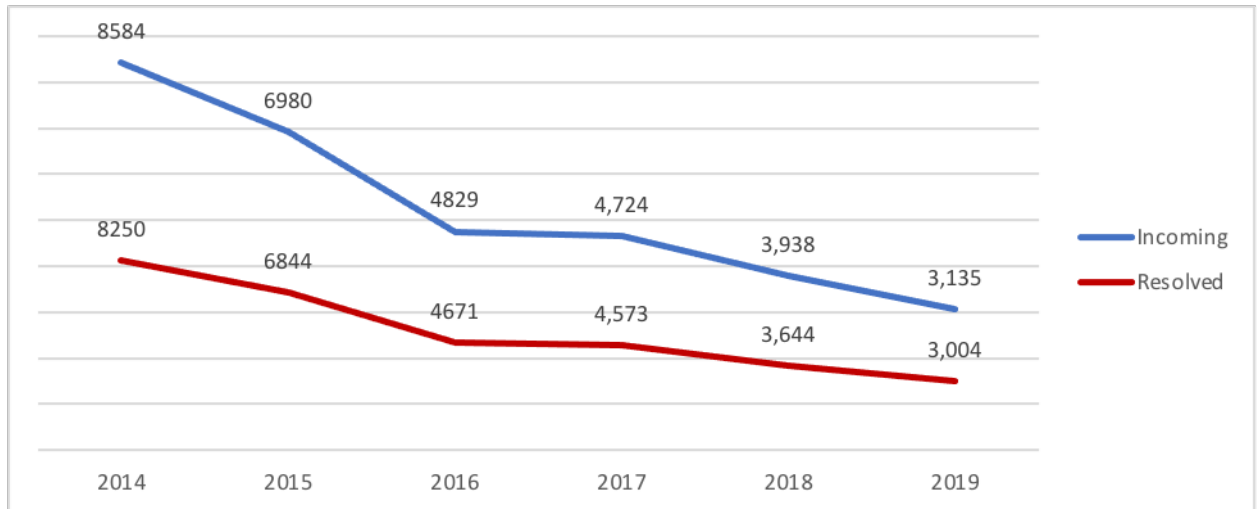
**Chart 6: Circuit Court - Civil and commercial litigious caseflow excluding family cases**



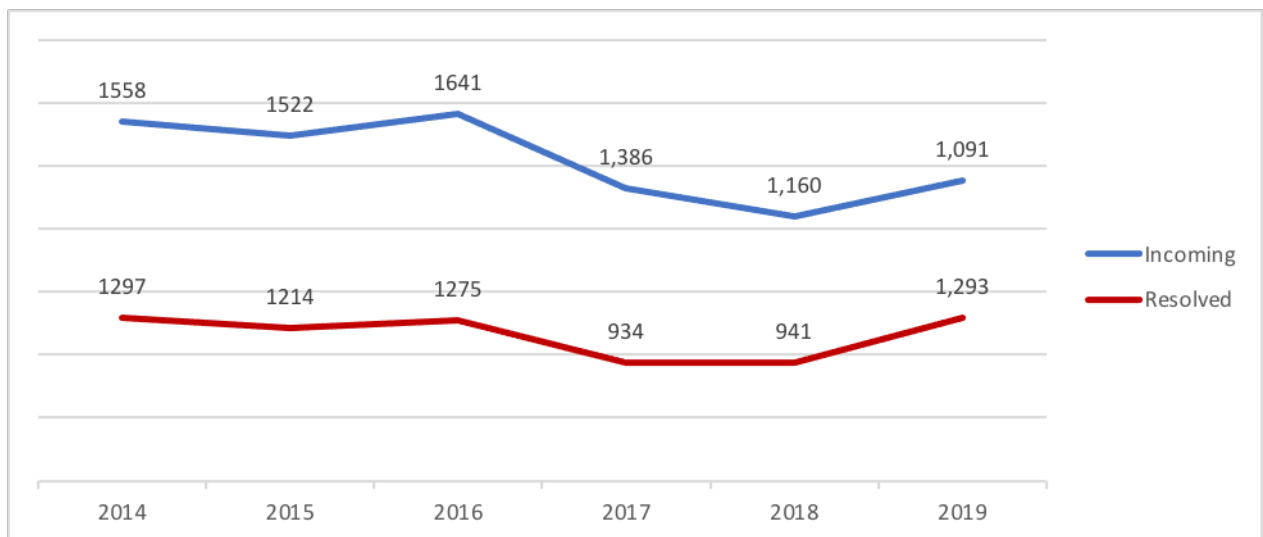
**Chart 7: Circuit Court - Civil and commercial non-litigious caseflow**



**Chart 8: Circuit Court - Non-litigious enforcement caseflow**



**Chart 9: Circuit Court - Appeals caseflow**



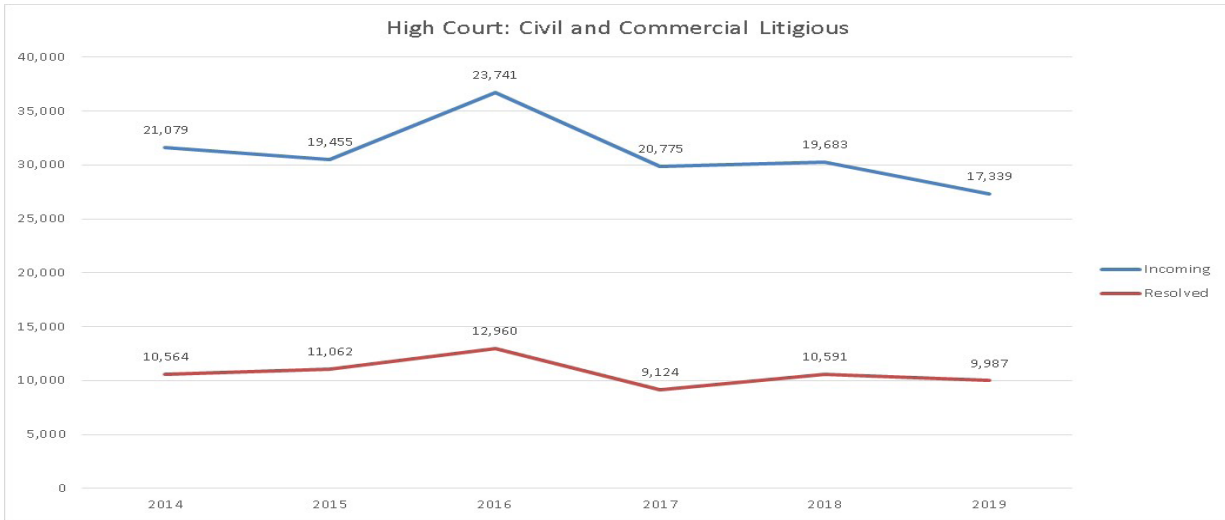
**Table 3: Circuit Court- Case clearance rates**

	2019	2018	2017	2016	2015	2014
Civil and commercial litigious including family cases	64.5 %	66.3 %	64.7 %	56.2 %	58 %	32.4%
Civil and commercial non-litigious	71.1 %	97.7 %	66%	77.4 %	77.3 %	77.8 %
Non-litigious enforcement	95.8 %	92.5 %	96.8 %	96.7 %	98 %	96.1 %
Appeals	118.5 %	81.1 %	67.4%	77.6 %	79.7 %	83.2 %

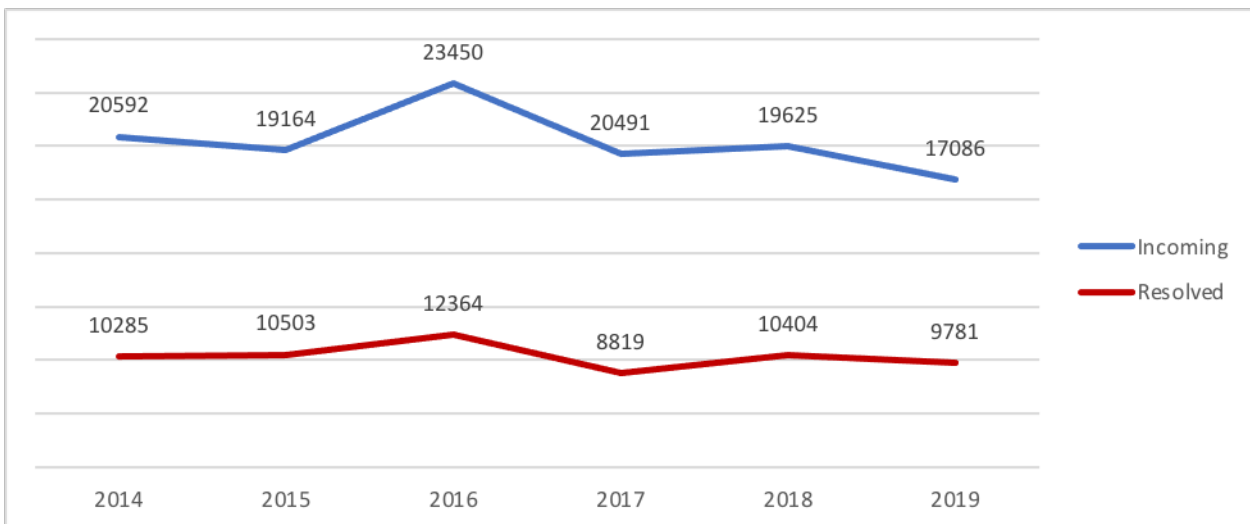
**Table 4: Circuit Court - Average length of proceedings in days, from issue to disposal**

	2019	2018	2017	2016	2015
All civil and commercial categories	725	749	534	532	568

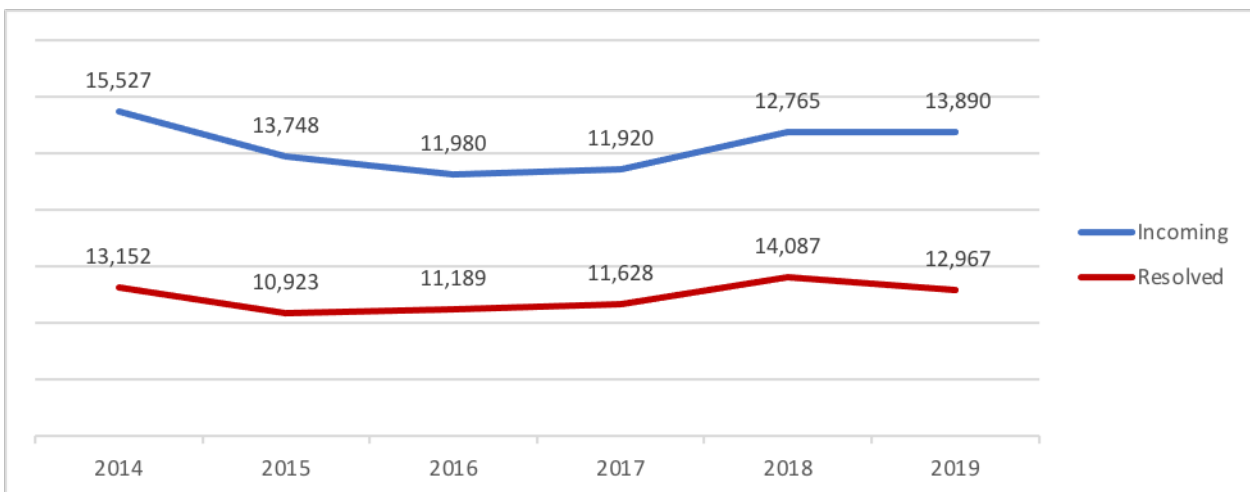
**Chart 10: High Court - Civil and commercial litigious caseflow including family cases**



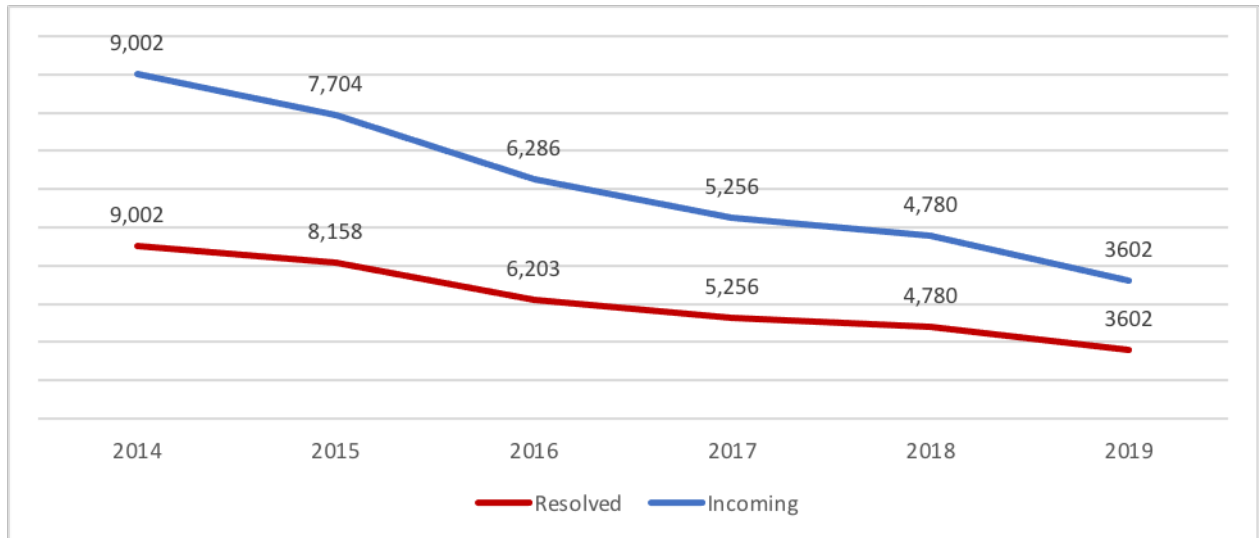
**Chart 11: High Court - Civil and commercial litigious caseflow excluding family cases**



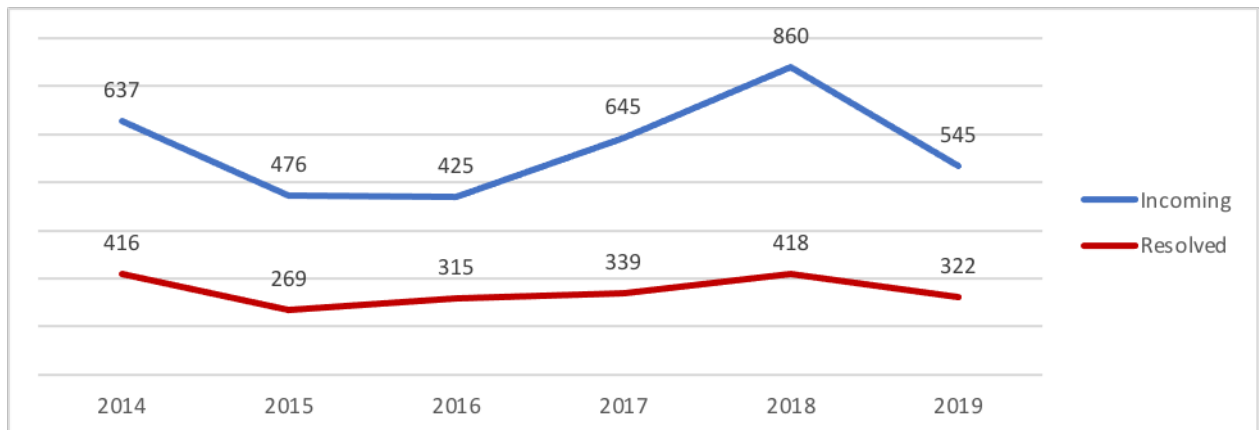
**Chart 12: High Court - Civil and commercial non-litigious cases caseflow**



**Chart 13: High Court - Non-litigious enforcement cases**



**Chart 14: High Court – Appeals**

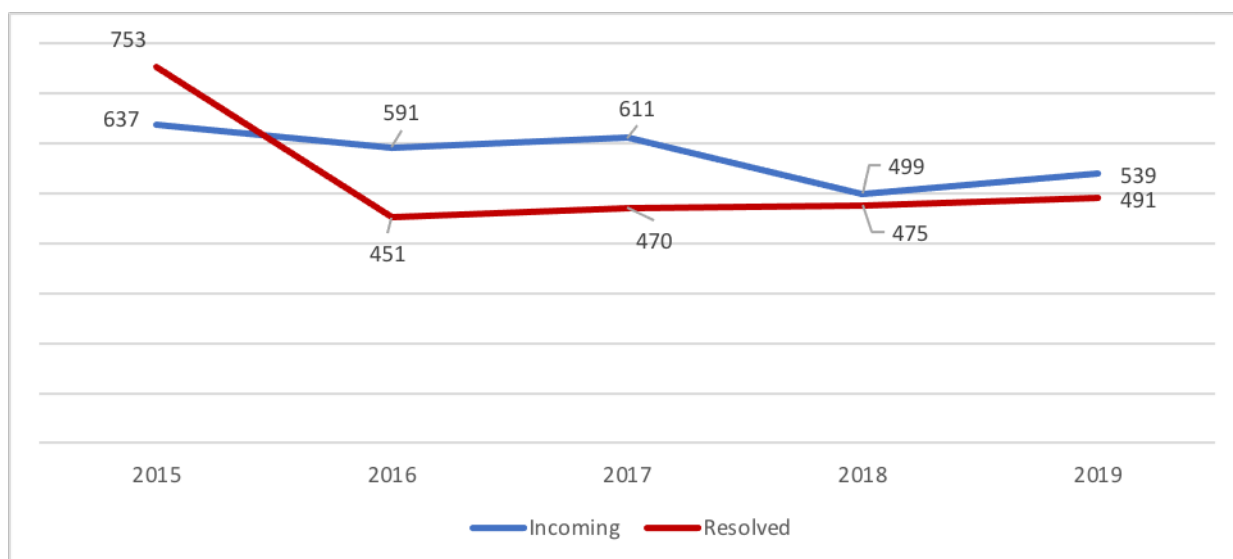


**Table 5: High Court - Case clearance rates**

	2019	2018	2017	2016	2015	2014
Civil and commercial litigious including family cases	57.5 %	53.8 %	43.9 %	54.5 %	56.8 %	50.1 %
Civil and commercial non-litigious	93.3 %	110.3 %	97.5 %	93.3 %	79.4 %	84.7 %
Non-litigious enforcement	100%	100%	100%	98.7 %	105.8 %	100%
Appeals	59%	48.6 %	52.5%	74.1 %	56.5%	65.3 %

**Table 6: High Court - Average length of proceedings in days, from issue to disposal**

	2019	2018	2017	2016	2015
All civil and commercial categories	785	749	753	772	680

**Chart 15: Court of Appeal - Civil appeals<sup>2</sup>****Table 7: Court of Appeal - Case clearance rates**

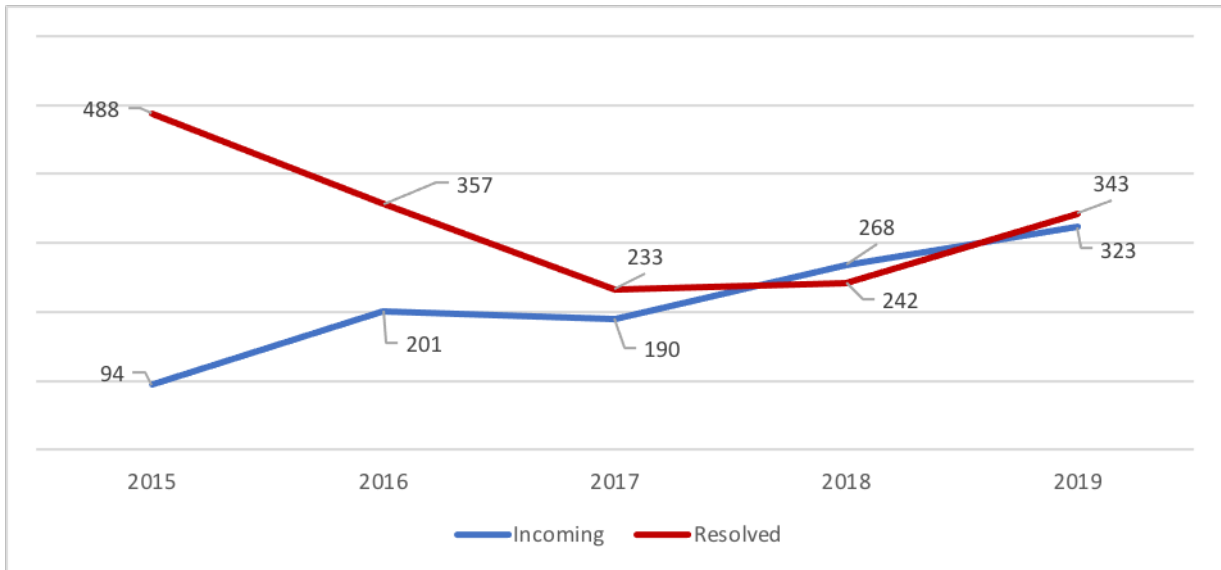
	2019	2018	2017	2016	2015
Appeals (new)	91 %	95.1 %	76.9 %	76.3 %	118.2 %

**Table 8: Court of Appeal - Average length of civil appeal proceedings in days – from issue to disposal**

	2019	2018	2017	2016	2015
All (new and Article 64 <sup>3</sup> )	1,220	1,101	631	585	631

2 The number of incoming civil appeals refers to new appeals received by the Court of Appeal and does not include “legacy” civil appeals transferred to that court by the Supreme Court. 1,293 such appeals were recorded as pending in the Court of Appeal in 2015, the first full calendar year of that court’s operation. 59 were recorded as remaining pending in that court at the end of 2019.

3 Article 64 appeals refer to “legacy” civil appeals transferred to that court by the Supreme Court.

**Chart 16: Supreme Court - Civil appeal proceedings<sup>4</sup>****Table 9: Supreme Court - Case clearance rates**

	2019	2018	2017	2016	2015
Appeals and applications for leave to appeal	106.1 %	90.2 %	122.6 %	177.6 %	519.1 %

**Table 10: Supreme Court - Average length of proceedings in days, from issue of notice of appeal to disposal**

2019	2018	2017	2016	2015
2,936	2,201	2,175	1,969	1,700

<sup>4</sup> Includes applications for leave to appeal as well as substantive appeals.



# APPENDIX 3: DRAFT SCHEME OF RULES FOR PRODUCTION OF DOCUMENTS<sup>1</sup>

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<sup>1</sup> This Scheme has been prepared for insertion in the Rules of the Superior Courts, hence the references therein to other provisions of the RSC. The scheme will require to be modified as appropriate for insertion in the Circuit Court Rules and District Court Rules to replace the provisions on discovery, inspection and production of documents in those rules.



### *Interpretation*

1. In this [Part] [Order], unless the context or subject matter otherwise requires:  
“document” means anything in which information of any description is recorded and extends to electronic documents, including email and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that are stored on servers and back-up systems and electronic documents that have been deleted. It also extends to additional information stored and associated with electronic documents known as metadata;  
and  
“copy”, in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.

### *Production of copies*

2. (1) A party need not produce more than one copy of a document.  
(2) A copy of a document must conform fully to the original. At the request of the Court, any original must be presented for inspection. A copy of a document that contains a modification, obliteration or other marking or feature shall be treated as a separate document. Parties should not redact documents which they produce without the agreement of the other parties or the permission of the Court.

### *Inspection of documents*

3. (1) A party may inspect a document<sup>2</sup> mentioned in:
  - (a) a pleading of another party<sup>3</sup>
  - (b) an affidavit or statutory declaration filed or delivered by another party
  - (c) a list of documents delivered by another party in compliance with a requirement of these Rules
  - (d) a witness statement or report of an expert of another party required to be served under these Rules.
- (2) A party wishing to inspect a document referred to in this rule (in this rule, “the requesting party”) shall firstly request inspection by notice in writing in the Form No. [X] in Appendix C.
- (3) The party from whom inspection has been requested (in this rule, “the requested party”) shall, within ten days of receipt of the request, arrange with the requesting party for inspection within 14 days of receipt of the request or such other time as may be agreed by those parties.
- (4) The requesting party may, where the requested party has failed or refused to arrange inspection in accordance with this rule, apply to the court by notice of motion grounded on affidavit for an order for inspection of the document concerned.
- (5) On an application made under sub-rule (4) of this rule, and subject to sub-rule (6) of this rule, the Court may give directions for inspection of the document concerned.
- (6) Where a statement of a witness or report of an expert required to be served under these Rules refers to a large number or volume of documents and it would be burdensome to copy or collate them, the Court shall only order inspection of such documents if it is satisfied that it is necessary for the just disposal of the proceedings and the requesting party cannot reasonably obtain the documents from another source.

### *Cooperation between the parties*

4. (1) The parties should communicate with each other and discuss any issues that may arise regarding searches for and the preservation of electronic documents and may for this purpose seek from

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<sup>2</sup> Under Order 125, rule 1 RSC, words importing the singular are to be construed as importing the plural and *vice versa*.

<sup>3</sup> The meaning of “pleading” in the rules of court for the various jurisdictions would, on introduction of the claim notice to replace other originating documents, require to be amended to incorporate a claim notice.

and provide information to each other about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties, their document retention policies, the provision of inspection and searching facilities using any information and communications technology system owned or operated by the party requested and/or technology assisted review using predictive coding software, and the anticipated time and cost of carrying out any searches which might be requested.

- (2) Where the number or volume of documents to be searched is likely to be extensive, the parties should, where possible, seek to exchange preliminary production requests in draft form before standard production of documents in accordance with rule 5 takes place. Any such exchange shall not limit the parties' rights to submit further requests to produce after standard production in accordance with rule 6.
- (3) The parties should co-operate at an early stage as to the format in which electronic copy documents are to be provided on production of documents.
- (4) Where the physical structure of a file is or is claimed to be of evidential value:
  - (a) any such claim should be raised with the other party at the earliest opportunity; and
  - (b) the solicitor for the party holding the file should make one complete copy of the file in the form in which the solicitor received it before any documents are removed for the purpose of producing documents.
- (5) In the event of any difficulty or disagreement arising with respect to any of the matters referred to in sub-rules (1) to (4) of this rule, a party may apply to [the Court] [a Deputy Master] for directions at the earliest possible date, and where the proceedings are subject to case management, if possible at the first case management conference.

#### ***Standard Production of Documents***

5. (1) The claimant, within 14 days of service on the respondent of the claim form, or such longer period as may be agreed by the parties or permitted by the court on application made to it on notice, shall submit to the other parties all documents available to the claimant on which the claimant relies in prosecuting the claim, including documents publicly available, except for any documents that have already been submitted by another party.
- (2) The respondent, within 28 days of service on the claimant of the respondent's defence, or such longer period as may be agreed by the parties or permitted by the court on application made to it on notice, shall submit to the other parties all documents available to the respondent on which the respondent relies in defending the proceedings, including documents publicly available, except for any documents that have already been submitted by another party.

#### ***Request to produce documents***

6. (1) A party (in this rule, "the requesting party") may apply to the Court for liberty to serve on the other party (in this rule and the rules following, "the responding party") a notice (in these Rules a "request to produce documents"), in the Form No. [XX ] in Appendix C, to produce the document concerned.
- (2) A request to produce documents shall contain:
  - (a) a description of a requested document sufficient to identify it; or
  - (b) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
  - (c) a description of how the documents requested are relevant and material to the outcome of the proceedings; and
  - (d) a statement of the reason why that party believes the documents requested to be in the possession, custody or control of the other party and either:
  - (e) a statement that the documents requested are not in the possession, custody or control of the requesting party, or

- (f) a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents.
- (3) In the case of documents which are or which are likely to be maintained in electronic form, the requesting party may, or the Court may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner.

***Production of Documents as to which no objection is made***

7. The responding party shall, on receipt of the request to produce documents:
- (a) carry out a reasonable search for the documents in the responding party's possession, custody or control as to which no objection is made;
  - (b) produce to the requesting party all such requested documents which have been identified by such search as to which no objection is made;
  - (c) provide to the requesting party information about the responding party's document retention policy and the nature of the searches which have been undertaken; and
  - (d) state that, to the best of the responding party's knowledge, that party has produced copies of all documents in the responding party's possession, custody and control which have been requested and to which no objection is raised, such statement to be verified by an affidavit accompanying the statement.
8. The factors that may be relevant in deciding the reasonableness of a search for electronic documents include (but are not limited to) the following:
- (a) the number of documents involved;
  - (b) the nature and complexity of the proceedings;
  - (c) the ease and expense of retrieval of any particular document. This includes:
    - (i) the accessibility of electronic documents or data including email communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents taking into account alterations or developments in hardware or software systems used by the producing party and/or available to enable access to such documents;
    - (ii) the location of relevant electronic documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents;
    - (iii) the likelihood of locating relevant data;
    - (iv) the cost of recovering any electronic documents;
    - (v) the cost of producing any relevant electronic documents;
    - (vi) the likelihood that electronic documents will be materially altered in the course of recovery, or production;
  - (d) the significance of any document which is likely to be located during the search.
9. (1) The parties should seek to agree in advance the parameters of any search of electronic documents, including:
- (a) The electronic databases to be searched;
  - (b) Any search terms to be used; and
  - (c) the provision of inspection and searching facilities using any information and communications technology system owned or operated by the party requested and/or technology assisted review using predictive coding software.
- (2) Where any dispute arises between the parties about the parameters of or method to be employed in any electronic search, a party may apply to [the Court] [a Deputy Master] for a determination of the dispute and for any consequential directions before the relevant search is carried out.
- (3) The [Court] [Deputy Master] may take into account any failure to comply with sub-rules (1) or (2) of this rule in awarding costs.

**Objection to production**

10. (1) Where the responding party objects to the production of some or all of the documents requested, that party shall, in a notice, in the Form No. [XXX] in Appendix C, give notice to the requesting party of objection to producing the document concerned within seven days from the date of receipt of the request to produce documents.
- (2) The reasons for such objection shall be confined to any of those set out in rule 11.

**Grounds for excluding documents from production**

11. The Court may, at the request of a party or on its own initiative, exclude from production any document for any of the following reasons:
  - (a) lack of sufficient relevance or materiality to the outcome of the proceedings;
  - (b) legal impediment or privilege;
  - (c) unreasonable burden to produce the requested document;
  - (d) loss or destruction of the document that has been reasonably shown to have occurred;
  - or
  - (e) considerations of procedural economy, proportionality, fairness or equality of the parties that the Court determines to be compelling.

**Document Production Order**

- 12.(1) Where a requesting party considers:
  - (a) that the responding party's objection to production is not justified; or
  - (b) that the responding party has failed to carry out a reasonable search for documents which have been requested or has otherwise failed, without objection, to produce such documents which are within that party's possession, custody or control,
 the requesting party may apply to the Court for a document production order.
- (2) An application for a document production order should be supported by a schedule substantially in the form of Form XX in Appendix C.
- (3) The Court may, unless it is satisfied that a document should be excluded from production for any of the reasons referred to in rule 11, order the party to whom a request to produce documents is addressed to produce to the other parties those requested documents in its possession, custody or control (in this rule and the following rules of this [Part] [Order], a "document production order").
- (4) A document production order will direct that a party must do one or more of the following things:
  - (a) produce documents or classes of documents specified in the order;
  - (b) carry out a search to the extent stated in the order;
  - (c) conduct a search by any method (including technology assisted review using predictive coding software) specified in the order;
  - (d) produce any documents located as a result of that search; and
  - (d) identify documents or classes of documents which were, but are no longer, in the party's possession, custody and control and explain, to the best of the party's knowledge and belief, what has happened to them.
- (5) The responding party should provide to the applicant and to the Court information as to the factors listed in rule 8 and that party's document retention policy, to the extent such information is relevant to the application and has not already been provided. At the hearing of an application for a document production order, the Court may take into account the factors listed in rule 8 as well as the width of the request and the conduct of the parties.
- (6) If the validity of an objection can only be determined by review of the document, the Judge hearing the objection may refer the objection to another Judge to review any such document and determine the objection. To the extent that the objection is upheld by the other Judge, the Court may determine that the other Judge will not disclose to the other parties the contents of the

document reviewed and will take no further part in the case, either for the purpose of the hearing of applications or as the Judge at trial, unless the parties agree otherwise.

- 13.(1) Compliance with a Document Production Order must be verified by a document production statement in the form set out in Form No. XXXX of Appendix C.
  - (2) A document production statement is a statement made by a party:
    - (a) setting out the extent of the search that has been made to locate documents which he is required to produce;
    - (b) certifying that he understands the duty to search for and produce documents; and
    - (c) certifying that to the best of that party's knowledge they have carried out that duty.
  - (3) Where the party making the document production statement is a company, firm, association or other organisation, the statement must also:
    - (a) identify the person making the statement; and
    - (b) explain why he is considered an appropriate person to make the statement.
14. (1) The parties' obligation to produce documents in response to a request to produce documents within the meaning of rule 6 or pursuant to a document production order is a continuing one. Where a party subsequently comes into possession of further documents falling within the scope of such a request or order, the party must notify the requesting party of that fact and either produce the document or object to its production in accordance with rule 10.
  - (2) This rule shall not apply where the party has previously objected to production on grounds which apply to the new document and such objection has not been challenged by the other parties or has been upheld by the Court.

#### ***Production of documents in stages***

15. The parties may agree in writing, or the Court may direct, that production of documents shall take place in stages.

#### ***Orders for production of documents against a person not a party***

16. (1) An application for production of documents by a person who is not a party to the proceedings must under these Rules be supported by evidence.
  - (2) The Court may make an order under this rule only where:
    - (a) the documents of which production is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
    - (b) production is necessary in order to dispose fairly of the claim or to save costs.
  - (3) An order under this rule shall:
    - (a) specify the documents or the classes of documents which the respondent must produce; and
    - (b) require the person to whom it is addressed, when producing the documents, to specify any of the documents which the Court has ordered should be produced:
      - (i) which are no longer in that person's control; or
      - (ii) in respect of which that person claims a right or duty to withhold production.
  - (4) Such an order may:
    - (a) require the respondent to indicate what has happened to any documents which are no longer in his control; and
    - (b) specify the time and place for production.

#### ***Request to produce documents by the Court on its own initiative***

- 17.(1) The Court may at any time request a party to produce to the Court and to the other parties any documents that it considers to be relevant and material to the outcome of the proceedings.
  - (2) A party may object to such a request based on any of the reasons set out in rule 11.

- (3) If a party raises such an objection, the Court shall decide whether to order the production of such documents based upon the considerations set out in rule 11 and, if the Court considers it appropriate, through the use of the procedures set out in rule 12(6).

***Additional Documents***

18. Not later than 28 days prior to the date of trial or within such other period prior to the date of trial as may be ordered by the Court, the parties shall produce to the other parties any additional documents which they believe have become relevant and material as a consequence of the issues raised in pleadings, documents, affidavits, statements of any witnesses or reports of experts required to be served or produced under these Rules, or raised in other submissions of the parties.

***Consequence of failure to produce documents***

- 19.(1) A party may not rely on any document which he fails to produce unless the Court gives permission.
- (2) If a party fails without satisfactory explanation to produce any document requested in a request to produce documents to which that party has not objected in due time or fails to produce any document ordered to be produced by the Court, the Court may draw such inferences from such failure as it thinks fit.

***Subsequent use of produced documents***

20. (1) A party to whom a document has been produced may use the document only for the purpose of the proceedings in which it has been produced, except where:
- (a) the document has been read to or by the Court, or referred to, at a hearing which has been held in public;
  - (b) the Court gives permission; or
  - (c) the party who produced the document and the person to whom the document belongs agree.
- (2) The Court may make an order restricting or prohibiting the use of a document which has been produced, even where the document has been read to or by the Court, or referred to, at a hearing which has been held in public.
- (3) An application for such an order may be made:
- (a) by a party; or
  - (b) by any person to whom the document belongs.

***Restriction on use of a privileged document inspection of which has been inadvertently allowed***

21. Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the Court.

***Rules not to limit other obligations of a party to exchange an expert report or Court's power to order production of documents***

22. The preceding rules of this [Part] [Order] are without prejudice to and do not limit -
- (a) any obligation of a party under these Rules or under statute to make available an expert report to another party and
  - (b) any other power which the Court may have to order:
    - (i) production of documents before proceedings have started; and
    - (ii) production of documents against a person who is not a party to proceedings.

## APPENDIX C

Form No. X

## REQUEST TO INSPECT DOCUMENTS

*[Title of action]*

Take notice that the [Claimant]\* [Respondent]\* requires you to arrange with the requesting party for inspection within two weeks of receipt of this request, or such other time as may be agreed by us, the following documents referred to in your *[claim form, or defence, or affidavit, or list dated the day of]*.

*[Describe documents required]*

Dated

*[Signed]*\* *Delete as appropriate*To: *[etc.]*

Form No. XX

## REQUEST TO PRODUCE DOCUMENTS

*[Title of action]*

Take notice that the [Claimant]\* [Respondent]\* requests that you produce the documents set out in the schedule hereto

Dated

*[Signed]*\* *Delete as appropriate*To: *[etc.]*

## Document Production Schedule

Description (a) of requested document(s) sufficient to identify it (them) (b) in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist [Enumerate as 1, 2 etc.]	State opposite each document/ category of documents enumerated how the document/ category requested is relevant and material to the outcome of the proceedings	State opposite each document/ category of documents enumerated why the requesting party believes it to be in the possession, custody or control of the party to whom the request to produce documents is addressed (the “responding party”)	Opposite each document/category of documents enumerated	
			(a)	(b)
1.				
2. Etc.				

Form No. XXX

## OBJECTION TO PRODUCE DOCUMENTS

*[Title of action]*

Take notice that the [Claimant]\* [Respondent]\* objects to production of the document(s) set out in the schedule hereto for the reason(s) specified opposite each document concerned.

Dated  
[Signed]

\* *Delete as appropriate*

To: [etc.]

Description of requested document(s) production of which is objected to <i>[Enumerate as 1, 2 etc.]</i>	State opposite each document the grounds(s) of objection to its production as referred to in [rule 11 of the draft scheme of rules of court] which is/are relied upon.
1.	
2. Etc.	

Form No. XXXX

## DOCUMENT PRODUCTION STATEMENT

I, the above named [Claimant]\* [Respondent]\* *[if the party making production is a company, firm or other organisation, identify here the person making the Document Production Statement and explain why he is the appropriate person to make it]* state that I have carried out a reasonable search to locate all the documents which I am required to produce under the order made by the Court dated the day of 20 . *[Explain what was searched and extent of search]*

I did not search:

- (1) for documents predating.
- (2) for documents located elsewhere than.
- (3) for documents in categories other than.

*For electronic documents*

I carried out a search for electronic documents contained on or created by the following:

*[Explain what was searched and extent of search]*

I did not search for the following:

- (1) documents created before .
- (2) documents contained on or created by the [Claimant's]\* [Respondent's]\* PCs\* portable data storage media\* databases\* servers\* back-up tapes\* off-site storage\* mobile phones\* laptops\* notebooks\* handheld devices\* PDA devices\* *[delete as appropriate]*,
- (3) documents contained on or created by [Claimant's]\* [Respondent's]\* mail files\* document files\* calendar files\* spreadsheet files\* graphic and presentation files\* web-based applications\* *[delete as appropriate]*,
- (4) documents other than by reference to the following keyword(s)/concepts *[delete if your search was not confined to specific keywords or concepts]*.



I certify that I understand the duty to produce documents and to the best of my knowledge I have carried out that duty. I certify that the list above is a complete list of all documents which are or have been in my control and which I am obliged under the said order to produce.

Signed and dated this.

\* *Delete as appropriate*

