Outline of Issues related to the Circuit Court

The central tenet of this outline is that the Circuit Court has a role to play in providing for the locally based resolution of civil disputes at a lesser cost that would result for High Court hearings and that there could be greater utilisation of this role. There are marked restrictions in logic and as a matter of practicality which would limit any greatly increased extension in of the Circuit Court jurisdiction. Nonetheless, there could be a benefit as concerns costs from some extension in jurisdiction. Within the Circuit Court jurisdiction, this outline takes the view that the core requirement for appropriate resolution of disputes in the Circuit Court in a cost-efficient manner a system is which minimises the procedural hurdles, with their attendant costs in those cases capable of a resolution by way of streamlined access to a hearing date, while affording a greater degree of pre-trial management for those cases which require this. This system should also facilitate a process of settlement, by mediation or otherwise, at as earlier stage than commonly occurs at present.

The primary proposal is that liberty to serve a notice of trial, (in non-personal injuries cases) should be obtained at a list to be heard before the County Registrar, at which both parties (or decision-makers from corporate or institutional parties) must attend in person. The purpose of this hearing is to confirm by oral evidence that mediation has been considered and to establish if case management is required for the hearing. It is postulated that this is likely to carry the benefit of creating an occasion of settlement at point prior to full exposure to hearing costs. The hearing at this interlocutory list will take place in advance of any applications for discovery. Cases that do not require case management should proceed to hearing pursuant to generic practice directions governing discovery and the preparation of pre-trial documentation, so there will be minimal need for further court applications. It is only in those case that require full case management that the full range of pre-trial application, akin to those as apply in the High Court (but not the extent of the Commercial Court) will be applied. In those cases, liberty to serve a Notice of Trial will not be given till the process of case management is concluded.

The requirement that parties or decision-maker of a party attend in person at a procedural interlocutory hearing is a marked change from current practice. It is contended that it is justified. It is submitted that it is not an onerous restriction upon access to the Court system for the parties to attend at Court to order to confirm that they require a hearing. This isn't necessary of itself, but if the attendance has benefits it is not an unreasonable requirement. It is submitted that the point of service of a notice of trial, when pleadings are closed, is the appropriate time to have a pause point for the purpose of creating an occasion for settlement, for the consideration of mediation and to make procedural decisions in respect

of a case. It is submitted that the attendance of lawyers only at a list in this point will not be conducive to a decisive consideration of issues, but will merely treated as a procedural formality, with cases appearing with a list for the sake of appearing in a list.

This outline makes further submissions with regard to costs and procedures, but the *a liberty to serve a notice of trial/seek case management* list, with a mandatory requirement for the attendance by parties is the core submission.

Focusing comments in respect of the purpose of the outline:

To frame the issue, this consideration is solely on the issue of the reduction of the costs for litigants as opposed to reductions of costs for the State in the provision of services. Though distinct, these are not unrelated. There would be a direct connection if the policy was that all Court operations were to be funded by the persons using the service at litigants. As it is; courts charges, including stamping charges do have some impact upon the cost of litigation, but this outline will proceed the basis of an untested assumption that these charges are not a significant factor. Equally, if there was a policy of centralisation of Court services, which might reduce cost of the provision of services for the State, this could have the effect of imposing substantial indirect costs on litigants. If an adverse possession case concerning lands in west Kerry heard in Tralee, was to be heard instead in Dublin or in even in a regional court centre in Cork or Limerick, this would impose a further significant cost on litigants. These would arise from travel and accommodation for hearings but perhaps even more so for the costs and difficulty of obtaining access to legal expertise and justice as could arise in the absence of a sufficiency of locally based lawyers as exist now to service the local courts within each county.

This outline is proceeding on the basis that a decentralised locally accessible system of justice for a wide range of civil disputes will be provided by the State throughout the availability of regular Circuit Court civil sittings in every county and, in case of larger counties at least, at more than one venue. [1]

The setting out of this assumption does highlight a tension between the costs to the State of providing a service and the provision of that service. It is the view of this submission that the needs of a proper service should take priority when balanced against the costs of providing that service. There is obviously a balance but the balance should be tilted to the

[1] This submission focuses on the Circuit Court - but the extent to which the cost of county based Circuit Court decentralisation is an extra cost, is mitigated by the requirement of the District Court for a greater range of local venues than would necessitated for Circuit Court decentralisation, and as District Court venues, aside from their civil jurisdiction, would require facilities capable of dealing with criminal matters, these, by definition, should be suitable for Circuit Court civil sittings

requirements of the service for the provision of justice determining the costs, rather than the costs determining the level of service.

The Circuit Court Civil Jurisdiction:

On an overview, without addressing various procedural incongruities, the current Circuit Court civil jurisdiction for cases based on the amount of damage that a party might to have awarded is €75,000.00 for cases other than personal injuries and €60,000.00 in personal injuries cases. In respect of cases relating to property which really means the identification of interests in property, the jurisdiction lies in respect of any property with a market value of less than €3,000,000.00. There is a significant practical restriction on this property based jurisdiction in that if the property qualifies for a Circuit Court, the case will nonetheless be commenced in the High Court, if there is a prospect that damages in excess of €75,000.00 will be sought. The Circuit Court has a full equity jurisdiction in respect of granting of reliefs such as injunctions, but these may only be granted if there is claim within the Circuit Court jurisdiction. The Circuit Court has a jurisdiction unlimited by an amount in respect of applications by lenders to repossess family homes from borrowers. This jurisdiction was put in place on the basis of an expressed intent to limit cost of defendants in repossession actions. The Circuit Court also had a jurisdiction unlimited by amount in respect of Multi-Unit Developments, once again presumably with a view to reducing costs to management companies.

As indicated there are Circuit Court sitting every county and in more than one location in most counties. There is distinction in the exercise of the Circuit Court jurisdiction between Dublin and other Circuits that in respect of non-personal injuries cases, in that cases of a nature that would be commenced in the Circuit Court outside of Dublin, are often commenced in the High Court in Dublin cases. Planning injunctions appear to be an area of considerable divergence between Dublin and the rest of the country. This distinction between Dublin and the rest of the country will probably be heightened by the move to a jurisdiction based on property values.[2] As matters stand, it would appear that if there is a difference in the amount of costs incurred that this often isn't a decisive factor in the minds of litigants, or their lawyers in choosing between the High Court and Circuit Court, if both jurisdictions are available locally. Rules limiting or qualifying the costs that can be recovered in respect of High Court cases which could have been commenced in the Circuit Court doesn't deter parties from a High Court resolution when it is readily available.

Nonetheless, it would appear obvious that the resolution of a dispute in the Circuit Court will as a rule be less expensive than a case conducted in the High Court, with the differential greater if the choice is between a Circuit Court case heard locally or a High Court case heard some distance away from the litigants. A differential would still be presumed for cases that

[2] There is a failing in this outline that too little regard is had to Cork which is forever sui generis, but there are number of members of the group with a firmer idea of the position in Cork than the writer

can be conducted in the High Court based locally, so for example if the litigants are based near Dublin or Cork or in the respect of personal injuries actions near one of the High Court venues. Taking two simple bases for this, there are generally fewer lawyers in the Circuit Court and that the professional fees for the lawyers allowed in taxation before County Registrars are as a rule less than the costs allowed by the Taxing Masters of the High Court.

Even if there was a marked cost benefit, the Supreme Court has commented recently in Permanent TSB v. Langan that too extensive a conferral on the Circuit Court could offend against the Constitutional requirement the jurisdiction of any non-Constitutional Court is be local and limited. The concern doesn't bear on this outline due to the large number of factors that contend for an optimum level for a Circuit Court civil jurisdiction well below that which might trigger constitutional concerns.

This is so even if the matter is looked at solely from the perspective of costs. It is unlikely that a diversion of a wide swathe of cases from the High Court to the Circuit Court, (on the assumption that the Circuit Court, has to capacity to take a significant increase in workload) would be a panacea on the issue of cost. The extent of the differential as exists as present would be reduced in the event that there was significant increase in the Circuit Court jurisdiction. Taking taxation, the principle reason for the disparity between taxation by County Registrars and by the Taxing Masters must be the value of the cases, so the costs allowed for the Circuit Court would undoubtedly rise. Indeed the increase in the Circuit Court costs for newly added high value cases might produce unintended inflation in the costs of cases now being dealt by the Circuit Court, due to a "conditioning effect" if County Registrars are regularly awarding higher costs. Further, taking this just an example of the commitment of greater resources to larger case, an increase in the value of the cases dealt with by the Circuit Court might also result in the engagement of Senior Counsel becoming the counsel of prudence in the higher value cases. Further the practice of engaging Senior Counsel in addition to Junior Counsel, could by readier availability, creep downwards into cases now conducted by Junior Counsel, so that the resulting increased costs might apply not only to the "increased jurisdiction" cases but into cases which were previously heard by the Circuit Court. The unintended inflation in the costs of cases overall in the Circuit Court could readily occur without the Senior Counsel factor. It may be that the lower costs of Circuit Court can be attributed to the less rigorous requirement for preparatory work in the Circuit Court than in the High Court and also, rightly or wrongly, by the greater discretion that a Judge who is hearing the case subject to appeal de novo, has over a Judge how is hearing a case subject to appeal by review, in the closing down of issues. If cases of greater value were being dealt with the Circuit Court, since the amount of work by a lawyers acting in a dispute isn't always unrelated to the value of the case, and since the ad hoc discretion

to shorten trials might be less readily exercised in high value cases, the savings on this headings mightn't be pronounced in the event of an considerably increased jurisdiction.[3]

There is at least 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 the Circuit Court in the lesser value cases.

There is also the reality that the proper development of a reasoned and consistent rule of law to be applied across various areas of civil law is better fostered if a significant element of cases within any strand of law are commenced and conducted in the High Court. There is no procedural requirement before the Circuit Court or the High Court on Circuit as the Appellate Court exercising a Circuit Court jurisdiction for the production of a judgement suitable to be reviewed by a higher court. Written judgements are produced by the High Court on Circuit but historically decisions ex urbe are regarded with some suspicion. Written judgement are rare in the Circuit Court and of those that are produced, only an infinitesimally small proportion are disseminated beyond the parties to the dispute. Taking an example of adverse possession, the majority of these cases are dealt with in the Circuit Court (certainly outside of Dublin) but the application of the rule of law to these cases would far less clear and consistent but for the case of Dunne v C.I.E. being commenced in the High Court and appealed to the Supreme Court. A significant turnover across the civil law of High Court decisions, subject to review on the law, is of such benefit to the consistent application of law to argue decisively against too extensive a conferral of jurisdiction on the Circuit Court.

A further factor militating against an extensive transfer of cases is that the control of civil cases, at the present moment, is still re-adjusting to the abolition of Circuit Court offices under the control of a County Registrar. A substantial degree of confusion exists in some areas due to the lack of clarity as the roles to be played in the management of civil lists, as between Officer Managers and the denuded County Registrars. The potential for confusion in this area is a topic which requires and is receiving attention within the Circuit Court regardless of any issues of costs or jurisdiction, but at present, in some areas of the country, it would impede the transfer of additional civil work to the Circuit Court.

Benefits of some increase in jurisdiction:

All this being said, a greater reliance on the Circuit Court for the resolution of civil disputes if not too pronounced could have some effect of reducing costs. The argument for 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 and the proportion

[3] This isn't to say that a pronounced increase in jurisdiction wouldn't have more wide-ranging decentralisation benefits unrelated to costs without significant increasing costs for the State.

of civil work, at least in monetary terms, below that maximum jurisdiction has also been reduced.

1981 the basic Circuit Court jurisdiction was raised to **£15,000.00** (DC £2500). Average Industrial wage (1979) £5228.60. Average new house price (1978) £19,000.00.

1988 Juries were abolished for most High Court personal injuries cases

In 1991, the Circuit Court jurisdiction was raised to **£30,000.00** (€38,092.14) (DC £5000) Average industrial wage (1989) £13,032.76. Average new house price (1988) £41,300.00)

The 1991 Act also conferred a power to change the jurisdictional limits for the Circuit Court and District Court by statutory instrument.

In 2002 legislation was passed but never enacted, its provisions would have raised the basic Circuit Court jurisdiction to €100,000.00 (DC €20,000) Average Industrial wage (1999) £ 17,257.24 Average house price (1998) £97.800.00. These provisions were repealed by the 2013 Act

In 2013, the basic Circuit Court jurisdiction was raised to **€60,000.00** in personal injuries and **€75,000.00** in other matters. (DC €15,000) Average annual earnings (2012) €36,079 Average house price (2013) approximately €147,00.00. The average house price in Dublin 3 in January, 2018 was €355,000.00.

Accordingly:

> *In 1981, the jurisdiction was 287% of the average industrial wage and over 79% of the average house price.*
>
> *In 1991, the jurisdiction was 230% of the average industrial wage and 75% of the average price of a house.*
>
> *In 2013, the figures indicate the personal injuries jurisdiction is 166% of the annual earning. The non-personal injuries jurisdiction is 207% [4] and just about 50% of the average house price nationally.*

Viewed as against the average earnings or house prices, there appears to be a reduction in the real value of the Circuit Court maximum jurisdiction as between 1981 and 2013.

The shift from the rate based system[5] to market value has reduced the property based jurisdiction. The true limitation on this jurisdiction is probably the level of damages that may be awarded and this factor applied prior to the change to the basis of jurisdiction. Still

[4] A caveat applies to comparing both figures to the preceding years that is that average annual earnings and average industrial wage may to be directly comparable

[5] Even without having regard to the effective extension of jurisdiction which was ultimately recognised as having been brought about by the abolition of rates for domestic premises.

disputes concerning development sites of high commercial value which in the past had low rateable valuations would now clearly fall outside the Circuit Court jurisdiction. This reduction in jurisdiction is most likely to have effect in the Dublin. In all parts of the country the uncertain basis of a market based jurisdiction may also in practice set a practical ceiling for the Circuit Court jurisdiction well below the statutory limits.

There has also been a consistent trend of longer duration whereby the proportion of the District Court's jurisdiction within the maximum Circuit Court jurisdiction has increased, thereby on the face of it decreasing the Circuit Court jurisdiction from below. Going by pure value terms, in 1961, the District Court jurisdiction was 10% of the amount below the maximum Circuit Court jurisdiction, in 1971, was 12.5%, in 1981 in was 16.6%, in 1991 it was 16.6.%, in 2013 it is 25% in personal injuries actions and 20% in non-personal injuries cases.

It should be noted though, that any supposed reduction in the civil workload of the Circuit Court arising from the relative reduction in jurisdiction, is most likely offset by the increase in the number of non-personal injuries civil cases, and in particular by new statutory jurisdictions, and it has been more than cancelled out by the growth in the numbers of cases in the Criminal Law and Family Law lists. In 1981, there were still Circuits where the substantial bulk of the work of the Circuit could be done by the single Judge assigned to the Circuit. That position has altered dramatically with a number of Judges being required permanently even on the smaller Circuits. This may indicate a policy basis that might justify the reduction in the civil jurisdiction of the Circuit Court, but it is likely this has involved more litigants having to bear High Court costs.

The overall conclusion of this outline, is that the relative value of the civil cases dealt with the Circuit Court has been reduced. [6] 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.

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[6] This commentary of a reduction in the significance of the Circuit Court civil jurisdiction over time, doesn't take into account the inflation factors that have reduced the spending power of the amounts falling within the Circuit Court jurisdiction. These figures don't compare levels of awards to consumer price inflation and house price inflation. The perceived experience Is that in the late 1980's into the 1990's a significant soft tissue could result in an award that would go substantially towards or beyond the price of the house, by the mid-2000's the award for such an injury would be more in the order of a deposit. It should also be noted that the risk of personal injuries award inflation has been an argument made against increases in jurisdiction. This outline tends to the view that there are many more significant factors contributing to the amounts made by way of award that changes in jurisdiction. In light of the loss in relative values of awards, whether there is a real increase is open to question, but in so far as there is any upward pressure, the increase of the maximum jurisdiction in the District Court may have been a factor in award inflation but the change in jurisdiction doesn't appear to be an appreciable factor, if there has been any increases in awards in the range of €38, 000.00 and €60,000.00. In terms of the quantity of cases involved, it is likely that there more cases fall in the €5,000.00 to €15,000 range than fall in the €38,000 to €60,000.00 range.

Reforms in Circuit Court civil procedures.

In a consideration of reform of civil proceeding, two diametrically opposed approaches can be identified. There is a greater control model, with strict procedures ensuring compliance with checklists, disclosure and pre-trial testing of evidence, as against a stream-lining approach whereby regulation is eschewed in favour of simply getting the hearing to a final hearing with minimum expense. For a Judge about to embark upon a hearing, detailed pre-trial management has pronounced attractions. The process of setting a serious of procedural chokepoints through which litigants have to negotiate a case to get it to hearing does mean that cases reach the day of hearing in good order and well-positioned for an efficient and effective disposal of the dispute with minimum delays before the Court. More importantly, it allows for the information available for the hearing, to have been identified and considered and therefore to be more reliable. If the quality of the information feeding the decision is better, it is to be presumed that quality of the decision will be better. The system of allowing proceedings to be commenced blithely and to fetch up before the Court, in a chaotic unconsidered state, effectively in the raw, means:

(a) that information useful for a fair disposal, isn't available to the Court,
(b) the information on which the Court is being asked to rely hasn't received prior consideration by both parties and maybe unreliable.
(c) court time is wasted establishing matters that could have been determined, by agreement or otherwise, long before trial
(d) the fact that important information is only identified at hearing means that the cases that could have settled far earlier are contested
(e) cases take longer to hear that they would if they if they were properly prepared.

Put like that, there is strong call to put in place a range of procedural steps to ensure that all cases reach the day of hearing in as pristine a state as possible. However, if the goal is the reduction of costs, it seems a patent fallacy to assume that making the lawyers do more work is going to reduce costs. It isn't an unreasonable for a Judge to expect every cases will be addressed by lawyers and litigants in a serious and significant manner on repeated points during its currency. However, a system that puts in place procedural chokepoints to ensure this happens has the potential to make litigation more costly. There isn't a direct correlation between the extent of work done and the costs of a case, for there is an economic reality as to the cost a dispute will bear but there has to be some correlation between work and costs. The drawback of increasing the quality of the service by the

imposition of increased costs, is that a more costly service is less likely to be utilised. This could constitute a restriction on the right of access to the Court. A system of reform that imposes additional procedures and thereby most likely additional costs can be viewed as contrary to the goals of this review. Once again, there is a balance here, if additional expense to litigants in necessary for a proper hearing of the dispute, it is necessary and that cost will have to be borne, but those costs should not be imposed when they are not necessary. By way of example, when it was envisaged that there would be significant District Court personal injuries jurisdiction by reason of jurisdictional changes in the Courts and Civil Liability Act 2013, the Rules of the District Court were redrafted, it would appear with the intended effect that High Court procedures applying to personal injuries actions would apply to every personal injuries case before the District Court. The wisdom of replicating High Court procedures for District Court proceedings is questioned. This outline does take the view that it is appropriate that Courts dealing with more straightforward issues should have more straightforward procedures and is conditioned by the view that there are very few Circuit Court civil cases that need the level of management required for cases before the Commercial Court of the High Court.

This distinction between procedures of the Statutory Courts and the High Court isn't solely a factor of the lesser commercial value of the dispute, which makes the imposition of greater costs on parties, less proportionate and therefore more of a restriction on access to justice. There is also a structural argument in favour of more streamlined procedures in the statutory courts. The fact that appeals from the civil cases in the Circuit Court are by way of hearing de novo, with no restriction on the introduction of new evidence, means there is a chance to remedy failings arising for a lack of pre-trial testing. This doesn't apply in respect of High Court civil procedure where the system provides for a single determinative hearing as to the facts. This is not to say there shouldn't be a satisfactory hearing at first instance in the Circuit Court but that the prospect of a remedying adverse consequence does influence the balance between the benefits of pre-trial procedure and the disadvantages of greater expense.

All that being said, the Circuit Court has by tradition operated in a formalistic manner, historically more akin by its procedures to the High Court than the District Court. This was until relatively recently reflected in the Rules of Court. The Circuit Court does deal with a proportion of cases that are in no way straightforward, can involve complex legal concepts with involved issues in cases of considerable economic significance particularly in relation to the identification of property rights, significant Landlord and Tenant disputes, Testamentary and Succession matters. Accordingly, the Circuit Court does require a full panoply of case management powers to deal with those cases. This requirement exists despite the burdens that can be imposed by unnecessary application of procedures such as discovery. At present, excessive disclosure and discovery requirement 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.

It is probably more perception than reality, that it is the straightforward cases which are coming to court, burdened by interlocutory procedural disputes which add to the costs of the proceedings without any substantial assistance in the resolution of issue, while it is the cases that are complex that are arriving at the day of hearing with little or no preparatory work, and no sign that issues were ever addressed seriously. Nonetheless, each of these systems-failures do occur and should be addressed.

Another notable aspect of the Circuit Court civil hearings is the high level of settlements on the day when a case is listed. It is a commonplace occurrence that cases which would settle reasonably and easily, only do so, on the morning of a hearing date, at a point, at which maximum costs have been occurred and when all the witnesses in a case have been assembled. This occurs sometimes because the parties won't reconcile themselves to concessions until the point at which a hearing is commencing, or won't accept the unavailabiity of potential evidence until that point. It can also occurs because the issues in first simply haven't been considered seriously until this point. If the cases that were likely to settle, did so without taking a hearing slot, presumably fewer cases could be listed for hearing but with somewhat less uncertain prospects of being heard. A system that encouraged the parties to properly address the issues at an earlier stage would result in a saving in costs.

On the issue of mediation, 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. Cases are resolved by mediation very creatively and effectively, and can be an ideal avenue by which to avoid protracted litigation. However, the view, and it is a view strongly held by some Circuit Court judges, that there should be a process of mediation, perhaps Judge led, in every civil case prior to any listing for full hearing before Court, has its problems. There is the inherent philosophical contradiction that arises from compelling a party to go to voluntary mediation, whether by costs sanctions or otherwise. Mediation meetings, which can involve lawyers for both sides, commonly both solicitor and counsel, involved in engagement that last for hours and take advance preparation and commitment aren't free of expense. It also seems somewhat suspect for a legal system to insist that a litigant who wants to stand on his legal rights should be encouraged away from doing so. The ascertainment of legal rights is as legitimate a goal for a Court system as achieving commercial reasonably dispute resolution.

Viewing mediations solely from the point of view of costs, cases that go to mediation can be divided into three categories,

(i) cases that would have settled readily without formal mediation once the parties addressed the issue,
(ii) cases that would not have settled but for mediation and
(iii) cases which didn't respond to mediation and had to go to hearing after the expense of mediation was incurred.

In the first category, mediation claims a success in resolving the dispute, but mediation was the occasion not the cause. In these cases, it is likely the costs of mediation were pretty much unnecessary.

In the second category, mediation has achieved a success, and there is real benefit to a mediated as opposed to a contested hearing, regardless of costs, but there will only have been saving in costs, if the costs of mediation, are less than the costs a contested hearing. If the legal fees charged to each side are comparable as between mediation and a hearing, the issue is whether the costs of those witnesses who didn't' come to court are less than the mediator's fees. Of course if the contested hearing would have lasted for days or weeks, there is no question but that the mediation has resulted in a substantial saving in costs.

In the third category, the mediation hearing has added to the costs to be borne by the parties, and however that cost is divided, that puts an additional burden of costs on one or both parties.

Mediation does have the potential to become another layer of expenses. The view of the outline is that a process that seeks to reduce costs by affording an opportunity for settlement that will obviate the need for a hearing, should also afford the opportunity for settlement without the need for mediation, as well as an opportunity to ensure that in cases that don't settle, mediation will be considered but that it should not be mandatory. As indicated, there are Circuit Court Judges who feel that mediation should be mandatory.

The proposal for a Liberty to Serve Notice of Trial/Case Management List

The primary proposal to meet these goals of the identification of necessary procedures, the encouragement of settlement and the consideration of mediation, all prior to full expense being incurred, is to make the point at which a Notice of Trial is served of critical important in the conduct of proceedings. The decision to invoke a Court hearing has already been made by the institution of proceedings, but a check point to consider all the implications of this can reasonably put it place at the point of Notice of Trial. It is at this point, a determination should be made as to whether the case should proceed to hearing on the basis of generic practice directions without need for interlocutory applications or whether it is a case that should be case managed, with oversight over the preparatory work and need

for interlocutory applications. This should all be structured to encourage settlements and to consider mediation. There will still be cases, where applications for injunctions or summary judgement have led to significant considerations having already been given to the issues, but even in those cases, where the case proceeds, the point of Notice of Trial should still be hallmarked as a significant point in the proceedings, and parties should be required to attend.

Two preliminary procedural reforms are suggested to facilitate the proper operation of this proposed systems, these are a simplification of the originating documents and the creation of generic practice direction for different causes of action.

The simplification of Originating Documents.

There are at present as wide range of different types of Civil Bills, as well as Personal Injuries Summons, by which civil proceedings can be commenced.[7] As well as the standard general Ordinary and Equity Civil Bills, there varieties of Ejectment Civil Bills, Landlord and Tenant Civil Bills, Succession Civil Bills, Testamentary Civil Bills, Civil Bills for Possession and Well-charging Relief and this is not exhaustive and the variety pose a difficulty even for represented litigants and with only a few exceptions, there is little to justify the distinctions.

The basic proposal is that there be three primary originating documents; Ordinary Civil Bills, Special Civil Bills and Personal Injuries Summonses. The distinction between Ordinary Civil Bills and Special Civil Bills is that a relief other than damages and costs can only be awarded on foot of an Ordinary Civil Bill with leave of the Court. The Special Civil Bill will be appropriate form of proceedings in seeking for Equitable and non-pecuniary Statutory Relief (by way of example only s.160 Planning injunctions or relief under the Ground Rents Act or the Multi-Unit Development Acts). The term Special is being instead of the present term Equity, to highlight that it is of wider application.

No order will be made in any case where this is no Civil Bill or Personal Injuries Summons. So that a Civil Bill must be issued for all statutory reliefs, even to the point for example, where an application is brought for inspection of the locus of an accident prior to application to the Injuries Board, this would be done by issuing a Special Civil Bill, which could be served in conjunction with the motion, and that Civil Bill would be spent and struck out when the application for inspection was concluded but would have provided the jurisdictional basis to make an order. The same procedure would apply to applications to accept a personal injuries assessment in respect of infants and if the assessment wasn't ruled, the Special Civil Bill would be spent with the ruling and the Personal Injuries Summons would issue subsequently.

[7] These proposals don't bear at all on the various civil bills by which family law proceedings are instituted

In any form of proceedings, if the relief sought is a statutory relief, the statutory provision which creates the entitlement to this relief must be identified in the originating document.

By a model of greatest simplification, Civil Bills under the current Rule 5A for Possession and Well-charging Relief would be subsumed into Special Civil Bills, but that jurisdiction is now being operated by the County Registrars almost independently of the main civil lists and it would so disruptive of the large numbers of cases at various points in the system, that it would be unwise to alter the existing position. There may also be a functional argument for keeping Testamentary Civil Bills separate as significantly different pre-trial rules apply but they could be subsumed into Special Civil Bills with the issue of pre-trial steps being dealt by a generic practice direction for Testamentary proceedings.

The benefit of having a multiplicity of different types of originating documents isn't readily apparent. It doesn't seem to feed into any administrative advantage and it doesn't appear to be anything but a focus of wholly unnecessary disputes at hearing. It is hard to see any merit to a landlord and tenant dispute being determined because the proceedings were commenced by an Ejectment Civil Bill for Overholding rather than an Ejectment Civil Bill on the Title and if this isn't determinative, then why have the distinction? Still, the Rules Committee is regularly recommending the creation of new forms of Civil Bills so there may be a benefit from the different forms of pleadings that this outline is failing to consider.

Generic Practice Directions:

Rather than having interlocutory disputes in every case, distinct areas of cases should have a generic practice direction applying to each area. An example, being the case of Adverse Possession proceedings, is set out but on the footing that it is indicative only. It doesn't engage with all the issues in respect of which provision might have to be made, such as multi-party actions, but sets out the standard approach that could be imposed without need for specific court orders in each case. It is intended that these will identify core steps and not that it will be exhaustive of every preparatory step that might considered. These are crafted on the basis that there is an obligation on parties to take substantive steps in the proceedings before serving a Notice of Trial.

<u>Adverse Possession Actions</u>: Outline of generic practice direction.

1. The party serving any application for liberty to serve Notice for Trial (or for case management) must accompany the Notice of Motion with a Booklet of Pleadings and a Booklet of all open inter-party correspondence. The respondent to the motion must set out any objections to the Booklet, including through indicating any omission within three weeks of receipt and will otherwise be taken as having agreed to the Booklets as presented.

2. If liberty is given to serve a Notice of Trial, the Plaintiff must furnish to the Defendant, within three weeks of the Notice of Trial having been served by either party, the following documents in a single bundle of documents:
   - a map setting out the area of land in dispute, which is at the least, of sufficient quality as would be accepted by Property Registration Authority in an application to amend a Folio. This map must identify the lands in respect of which any claim of adverse possession is being believed to be made, it must identify any lands in the area owned or occupied by any party to the dispute.
   - A Booklet of Title relating to the disputed lands.
   - A Booklet of Folios in respect of any property which the Plaintiff registered owner or in respect of which he asserts any entitlement to be the registered owner.
   - An affidavit of discovery setting out all documents relating to any acts of ownership, or other activities in respect of the disputed lands by any person.
   - A booklet of containing any photographs upon which the Plaintiff intends to rely.
   - A list of any expert reports received from any expert upon whose evidence the Plaintiff intends to rely at hearing. This should identify the date of any such report.

3. Within three weeks of receiving the bundle of documents from the Plaintiff, the Defendant has furnish in a single bundle of documents, the following documents:
   - Confirmation in writing that the map furnished by the Plaintiff is accurate or in the alternative, the map being put forward by the Defendant, complying with the same condition as to quality and content as was required for by the Plaintiff.
   - Confirmation in writing that the Booklet of Title in respect of the disputed land is accurate or in the alternative, the Booklet of Title with the Defendant is putting forward in respect of the disputed land.
   - A Booklet of Folios in respect of any property which the Defendant is the registered owner or in respect of which the Defendant asserts any entitlement to be the registered owner.
   - An affidavit of discovery setting out all documents relating to any acts of ownership, or other activities in respect of the disputed lands by any person.
   - A booklet of containing any photographs upon which the Defendant intends to rely.
   - A list of any expert reports received from any expert upon whose evidence the Defendant intends to rely at hearing. This should identify the date of any such report.

4. Either party may supplement the bundle by the addition of further documentation or photographs, but only on condition that the party supplementing the compliance swears an affidavit setting out the reason why such documentation or photograph

was not included at the relevant time, and the event of late disclosure that results the adjournment of the action, the Court shall have to power to impose costs.

5. The court at hearing shall be entitled to take into account any failure to comply with this direction either for the purpose of drawing any appropriate inference or in respect of any award of costs.

The Liberty to Serve Notice of Trial/Case Management system

With the two foregoing changes in place, the procedure envisaged that a liberty to serve notice of trial will have to be sought at a special list before the County Registrar as which the parties must attend. This list will also decide if generic practice directions should apply or if there should be case management. This does not apply to personal injuries actions, although generic practice directions will apply there as well unless case management is ordered.

The procedures envisaged are:

In personal injuries actions:

(i) In personal injuries actions, (which administratively should only include cases commenced by way of Personal Injuries Summons) there should be a liberty to serve a Notice of Trial, on notice to the other side without need to apply for leave. During the set notice period that opposing party, or at any time prior to that, either party, can serve papers to make an application in for the Liberty to Serve Notice of Trial/Case management list, seeking an order of case management. No notice of trial can be served while that application for case management is unheard.

(ii) There will be no applications for discovery in advance of the service of a Notice of Trial.

(iii) A party seeking discovery in a personal injuries action beyond the discovery provided for in the generic practice direction must make an application for case management before the expiration of the notice period given prior to the service of the Notice of Trial. This application should be grounded on an affidavit, there is no requirement that parties attend. The County Registrar will decided if case management is required.

(iv) Once a Notice of Trial is served and there being no order for case management, the generic practice direction applies and the case can be listed for hearing within two months of the date of the Notice of Trial.

(v) If there is an order for case management, the Notice of Trial will be vacated and liberty to serve a Notice of Trial, will be granted at the conclusion of the case management process.

(vi) There should also be a procedure to apply for an expedited hearing on substantial grounds.

(vii) The Court should retain a power to direct that a case listed for hearing without case management should be adjourned for case management in any case where this is required by the interests of justice on such terms as to the Court seems fit.

(viii) After the Notice of Trial is served, the case will next be listed at a list to fix dates where the compliance with the generic practice direction or any requirement arising from case management should be confirmed prior to a hearing date being assigned.

In respect of all cases commenced by Ordinary Civil Bill or Special Civil Bill,

(i) Neither party may serve a Notice of Trial without obtaining leave at the Liberty to Serve Notice of Trial/Case Management list. This list will be heard by the County Registrar.

(ii) No party can seek discovery by way of Notice of Motion prior to order being made at the Liberty to Serve Notice of Trial/Case Management list for Case Management.

(iii) An application for liberty to serve a Notice of Trial can be served for the Liberty to Serve Notice of Trial/Case Management list and must be on notice to the other party. A Motion seeking leaving must be accompanied by a Booklet of Pleadings and a Booklet of open inter-party correspondence. There is no requirement for a grounding affidavit but there is liberty for both parties to serve affidavits. The Motion must identify the generic practice direction which is appropriate practice direction to apply to the proceedings.

(iv) A Motion seeking case management can be served for the Liberty to Serve Notice of Trial/Case Management list on notice to the other party. This must be grounded on an affidavit. It must be accompanied by a Booklet of Pleadings and a Booklet of the open interparty correspondence.

(v) Any motion to the Liberty to Serve a Notice of Trial/Case Management List will be served for the list and not for any specific return date. A return date will be furnished by the Combined Office to both parties, with limited procedures of applying for a variation in the dates with the consent of the other party. **Each party to the proceedings, or a decision maker in the case of corporate or institutional parties is obliged to attend at the assigned date at the Liberty to Serve a Notice of Trial/Case Management List. This is a mandatory obligation than can only be waived by order of a Judge on exceptional circumstances.** It is

a pre-condition to any case going to hearing that the parties attend, it should be regarded as important as attendance at the hearing.

(vi) There is no requirement to attend if the case has settled or the parties have commenced mediation.

(vii) A limited number of cases, initially a figure of 20 cases is suggested, should be listed in any one Liberty to Serve a Notice of Trial/Case Management List. At this list, each party or a decision maker for a corporate or institutional client must given oral evidence. The decision-maker must give evidence satisfying that they are a decision maker. Each party must give evidence that they have considered mediation and indicate if they have made any proposals in settlement. There will be no obligation to indicate what the terms of this proposal are. The party should also indicate if they are aware that the other side has made proposals for settlement. Once again without any indication of what the proposals are.

(viii) At the hearing in the list before the County Registrar, after the oral evidence is heard, if all parties consent, the County Registrar may refer the case for mediation with liberty to re-enter. The parties need not attend again in the event of any re-entry.

(ix) At the hearing in the list before the County Registrar, after the oral evidence is heard, and arguments made the County Registrar can grant liberty to serve notice of trial and identify the generic practice direction that will apply or can give direction as to case management and adjourn the issue of the Notice of Trial until the case management is concluded.

(x) In the event of non-attendance by one party, the party or parties in attendance shall give evidence and the party not present party shall bear the costs of the day and the proceedings shall be adjourned to a Judge's motion list for the purpose of striking out the claim or granting relief on the basis of an uncontested hearing. The party not attending shall have liberty to apply to the Court for such order as to the Court deems fit, on the basis of such terms as the Court sees fit.

(xi) Each party must set out the approach to whether the case should proceed by way of Notice of Trial by way of compliance with generic practice direction, or if the case should be adjourned for case management. The County Registrar should note the positon of each of the parties and the Court can consider the approach of each party in respect of any order of costs made at the conclusion of the proceedings.

(xii)The County Registrar may decide the issue or may adjourn the decision as to whether the Notice of Trial may be served or whether the proceedings should be case-managed to another day, and the parties need not attend on any adjourned date. This applies also to an adjournment to facilitate settlement.

(xiii) If case management is ordered by the County Registrar, the case will be transferred into a distinct case management list, and when the process is concluded, liberty will be given to serve a Notice of Trial.

(xiv) There should also be a procedure to apply for an expedited hearing on substantial grounds.

(xv)A Judge, including a Judge not assigned to the Circuit shall have the power to hear a Liberty to Serve a Notice of Trial/Case Management List if deemed appropriate by the Judge assigned to a Circuit.

(xvi) After the Notice of Trial is served, the case will next be listed at a list to fix dates where the compliance with the generic practice direction or any requirement of case management should be confirmed prior to a hearing date being assigned.

The purpose of these rules is to make the decision to serve a Notice of Trial, the point at which the case must be addressed in full. It may be that the requirement of attendance will lead to case settling prior the application at the Liberty to Serve a Notice of Trial/Case Management List. It could be envisaged that when a Motion for the list is served phone calls will be made, in the week prior to listing, in a manner that might only occur now in the week prior to the date of full hearing. The attendance of the parties is essential, they have to present in Court to invoke the hearing, and this has to draw their attention to the costs that are about to be incurred in circumstances where the parties are present and may be ready to talk or to go to mediation. If any parties is determined to go to hearing, as a party is fully entitled to do, the clock should start running on the preparation to have case in a proper state for hearing. It is easy to envisage difficulties with the system, its operation when lay litigants are involved may be more uncertain, and the authority of some of the "decision-makers" furnished by corporate bodies or institutions may often be open to question. However, even in those cases, perhaps especially in lay litigants cases, the process of the parties being present at this point, has the prospect of the enhancing the quality of the eventual hearing.

There is a real issue as to whether this system should be applied to Dublin. There is already in place in Dublin a more clear-cut system of management of the civil lists and there are already distinct Court rules applying to Dublin which don't apply to other Circuits. The level of family law work for the Dublin County Registrar is so large in comparison to other counties that there is probably no feasibility of the Dublin County Registrar taking on this role. If this system was to be put in place, there would considerable sense to introducing it outside of Dublin at first.

The preceding proposals are only indications of the bones of system designed to create a crunch point for decisions by the parties at an earlier point in proceedings.

Other Circuit Court proposals

Beyond this, there are a number of other procedural improvements to mitigate inefficiency and pointless costs, and some areas where there shouldn't be alteration.

***Witness statements - no change*:**

Whatever tools of case management are applied, the view of this outline is that there is no call for statements of evidence in the Circuit Court. Their preparation is labour intensive and productive of costs, they constitute a mechanism for taking all the benefit of leading questions without having to ask them, and are an avenue for unnecessary collateral disputes about the methodology of their preparation. The fight too often becomes about the statement and not their content. They operate effectively in very high-value dispute when under rigorous control but they are not appropriate for the Circuit Court.

Relaxation of the Rules against Hearsay:

There should be a relaxation of the rule against hearsay to the effect that documents other than formal and executed contractual documents, which are created contemporaneously or near-contemporaneously to the subject matter of the dispute, and which are not other than those created for the purpose of legal proceeding or with the intent of being used in legal proceedings, shall be accepted as evidence going to the truth of what they assert. The weight of this evidence is a matter for the factfinder subject to any submissions that either said may make and any party can offer evidence going to the weight of the document, or tending to disprove the assertions in the document.

Applications for Injunction to go directly to a Judge

Motions seeking interim or interlocutory injunctions, or short service for an application for an injunction or for an application to move an injunction at a location other than the normal venue, shall be allowed to bring an ex parte docket or a Notice of Motion directly to the Circuit Court without a preliminary application to the County Registrar. The practice on some circuits or counties that there must be an application to the County Registrar in order to be listed before a Judge creates an unnecessary delay in having an application that can be urgent considered and adds the costs of an additional appearance before the Court system.

***Rules relating to Defence and Notice for Further and Better Particulars – no change*.**

There are constant difficulties and delays in delivering defences and the protracted nature of some further and better particulars disputes. There could be some scheme for financial penalties for a late delivery of a defence, that would apply more automatically and effectively than interlocutory costs order that are so often lost in the wash, but any such

scheme would require some procedures for the rules not to apply. The rules shouldn't apply if the case as set out by the Plaintiff does genuinely require clarification before a defence can be delivered, and where automatic penalties could operate unfairly in what the quite common circumstance of the time being fixed by the rules not allow sufficient time to investigate and form a proper view on the defence that should be made.[8] As far the effectiveness of imposing interlocutory sanctions, the actual enforcement by one party of an interlocutory order of costs, is often as the legal equivalent of murdering the other side's emissaries, ensuring that any fight will be without quarter. If there is any desire to settle the case, it isn't a step that is generally taken. The actual instrument of control to ensure a more timely delivery of the Defence and of Particulars haven't proven particularly effective. However, in the absence of a proposal that wouldn't make things worse and more cumbersome, the present system should be left in place, and the lawyers let get on with arguing out the pleadings.

E-dealings:

The majority of Circuit Court Judge who expressed a view believed that all Circuit pleadings and all orders that have been made should be available on the internet for a Judge hearing this case. There is done, in effect, for the benefit of the Specialist Circuit Court Judges, or those ordinary Circuit Court Judges who are exercising the Personal Insolvency jurisdiction. It is also available in some sections of the public service, so that past and current planning applications are available to planning staff in carrying out functions and also to the public, including reports, decisions and supporting documentation.

There is also a view that decisions on interlocutory matters, for example particulars or discovery application, could be made on the perusal of documentation on line, without a Court hearing. The approach of this outline is rheotactic within the stream of expressed Circuit Court opinion. There is value for the legal system being seen to deliver justice to a citizen, through decisions, even on interlocutory matters, made in person before a litigant on the basis of the argument that the litigant has the opportunity to see. It can also be argued that there is little benefit to a County Registrar or Judge sitting down in front of computer and clicking yes to a hundred Applications all seeking three weeks to file a Defence. If a rule isn't being complied with, a party who isn't complying with, should have to go to the trouble of going to Court for seeking from a relaxation of the rule and face sanction for doing so. If that sanction is to be imposed, it should be done openly in Court and not over a computer screen. The making of more complex decisions on a computer

[8] The present 10 days set by the current rules, even as modified by warning letter rules, is never complied with but it does give the other party to basis for putting pressure during the exchange of pleadings, and there would drawbacks to extending it, but even greater drawbacks to imposing automatic penalties for non-compliance

screen in an office, would seem to involve a Judge conducting his own enquires into the electronic record rather than in an inter-active process involving the parties. Making interlocutory decisions, ad hoc, at a remove, done at a computer screen, replete with electronic ease, without an opportunity for an oral plea, is less satisfactory for the process of delivering justice, than a system in which there are fewer interlocutory decision but they are important, and as seen to be treated as such by the Court. Justice as administered in the Circuit Court in the bulk of civil cases is more personal than commercial and a drive for reduced costs and greater through-put, shouldn't detract from the core function of satisfying a litigant's need that a request for justice, even at interlocutory stages, is receiving public consideration by a Judge rather than a disposition by a system.

That said, there are problems with the availability of information about files. It sometimes seems only a matter of chance that a Circuit Court Judge becomes aware of previous orders in the case made by other Judges. The most reliable recording are usually the notes written in biro on the outside and over onto the back of the cover folder of the File. A system of ready access to any orders made in a case would be of considerable benefit and if this could best be done electronically it would be appropriate to do so.

However, as far as software systems, an electronic register of cases allowing for proper control of lists, as indicated in the next heading, should be greater priority than having electronic access to pleadings.

Computerised record of all live Circuit Court cases in a county to be maintained and furnished to the County Registrar and the Judge assigned to the Circuit on a quarterly basis:

In every county (once again with the probable exception of Dublin) a register of "live" civil cases should be maintained. The rationale for this is that costs and inefficiency which result from the absence of clear information as to outstanding proceedings that need to be addressed. To deal with the issue, live cases should be identified by listed in the following categories. Each case will only fall into one category and it is classified into the highest number category which applies. This system would require an appropriate "pulse-like"software that allowed cases to be entered onto the register and transferred from category to category.

The categories are:

In respect of Personal Injuries Summonses:

Category P1 All Personal Injuries Summonses which have issued and in respect of which no notice of trial has been served. This should be listed chronologically from the date when the proceedings issued.

Category P2 All Personal Injuries Summonses in respect of which an order for case management, has been made and in respect of which no current Notice of Trial has been served. These should be listed chronologically from the date for the order of case management.

Category P3 All Personal Injuries Summonses in which a Notice of Trial has been served. These should be listed chronologically from the date of the Notice of Trial.

Category P4 All Personal Injuries Summonses which have been listed for hearing but in respect of which a hearing has not commenced with the number of times they have been listed for hearing identified. These should be listed chronologically form the date when they were first listed for hearing.

Category P5 All Personal Injuries Summonses which are part heard. The Judge before whom they are being heard should be identified. These should be listed chronologically from the date when the hearing commenced.

Category P6 All Personal Injuries Summonses which are still live but have been adjourned generally with liberty to re-enter. These should be listed chronologically for the date when they were adjourned generally.

Category P7 Any Personal Injuries Summonses which are deemed not to fall into any of the foregoing categories. Listed chronologically from the date when the proceeding issued.

In Respect of Ordinary and Special Civil Bills:-

Category B1 All Civil Bills which have issued and in respect of which no application to serve a notice of trial or for case management has been served. This should be listed chronologically from the date when they issued.

Category B2 All civil bills in which an Application for Liberty to serve a Notice of Trial or for Case management has been served but has not yet been listed. Listed chronologically from the date of the Application was served.

Category B3 All Civil Bills in which there has been an application for Liberty to serve a Notice of Trial or an Application for Case management which stands adjourned, without liberty to serve a Notice of Trial having been granted or an order of Case management having been made. Listed chronologically from the date when the application was first made.

Category B4 All Civil Bills in which a Notice of Trial has been served following a grant of liberty on the basis that generic practice directions will apply. Listed chronologically from the date of the grant.

Category B5 All Civil Bills in which an Order for Case Management has been made but in which a Notice of Trial has not been served. Listed chronologically from the date of the order of case management.

Category B6 All Civil Bills in which a Notice of Trial has been served following an order for case management. These should be listed chronologically from the date of the Notice of Trial.

Category B7 All Civil Bills which have been in a list for hearing but in respect of which a hearing has not commenced, with the number of times they have been listed for hearing identified. These should be listed chronologically from the date when they were first listed for hearing.

Category B8 All Civil Bills which are part heard. The Judge before whom they are being heard should be identified. These should be listed chronologically from the date when the hearing commenced.

Category B9 All Civil Bills which have been adjourned for implementation of settlement. These should be listed chronologically from the date when adjourned for implementation.

Category B10 All Civil Bills which have been adjourned generally with liberty to re-enter. These should be listed chronologically from the date when they were adjourned generally.

Category B11 All Civil Bills which has not been struck out but which are deemed not to fall into any of the foregoing categories. Listed chronologically from the date when the proceeding issued.

Summary listings and interlocutory applications don't affect these classifications.

The up to date version of this list must be furnished by the Combined Court Office to the County Registrar and the Judge assigned to the Circuit on the 1st of March, the 1st of June, the 1st of September and the 1st of December or the first working day thereafter. The County Registrar should have the power to direct that a case should be listed within a different category. The County Registrar should have the power to set dates of call-overs for any or any number of the categories. The Judge should the same powers in respect of transferring cases from one category to the other and setting up dates for call-overs, but it is envisaged that these functions would be exercised primarily by the County Registrar. The process is being suggested as a means for controlling list and a method of facilitating judicial oversight of the list.