Truncated 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.

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.

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. 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 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.

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.

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. 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.

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

The overall conclusion of this outline, is that the relative value of the civil cases dealt with 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.

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.

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. 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.

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. 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.

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.

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.

Rules should be crafted 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.

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.

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. 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.

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 categorie indicating their state of preparation. 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. Summary listings and interlocutory applications don't affect these classifications.

The up to date list of all categories 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.

Judge Francis Comerford
Circuit Court