Submission to the Review Group on the Administration of Civil Justice

The Review Group will have received my earlier compendium of extracts from Law Reform Commission reports relating to civil justice and the summary of the Report of the Expert Group on Article 13 of the European Convention on Human Rights. The following suggestions in part reflect or revisit issues and solutions identified in certain of those reports, and I have referred to the report concerned where this is the case.

Statement of case conduct principles in primary legislation

Provision has been made in the rules of court for all three first instance jurisdictional levels for case management in respect of a wide range of proceedings types.[1] The purpose common to these regimes is to ensure that the proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the costs of the proceedings. These principles, as elaborated in the rules, are in effect the counterpart of the Overriding Objective of the Civil Procedure Rules for England and Wales (CPR).

Mindful of the fact that judicial case management also reflects the need to ensure compliance with the right of access to the courts under Article 40.3 of the Constitution, and comparable rights and obligations under Article 6 of the European Convention on Human Rights, the LRC considered it appropriate that specific provisions on judicial case management in civil proceedings be incorporated as primary legislation in the Courts (Consolidation) Bill. The LRC's draft Bill (section 76) provides that a court shall, so far as is practicable, in the conduct of civil proceedings:

> (a) ensure that the parties conduct the proceedings in accordance with case conduct principles[2],
> (b) have regard to the need to allot its time and its resources appropriately among all of the proceedings the Court has to hear and determine and
> (c) deal with the proceedings in a manner that is proportionate to their nature, and the parties' resources. (emphasis added)

Paras (b) and (c) aforementioned reflect a key element of the approach in the CPR introduced on foot of the Woolf reports in England and Wales. As Professor. Adrian Zuckerman has stated in his seminal work on the CPR[3],

> "..no matter how hard the court may strive to reach a decision on the merits, practical constraints of time and resources are bound to impinge on the litigation process. There is no escaping the fact that court resources are limited. Litigants are entitled to have access to justice, but they are not entitled to insist that the taxpayer should provide the best possible adjudicative process, regardless of how much it costs and how long it takes.
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> ….The overriding objective brings into the open the need for articulating resource allocation decisions. The CPR strategy of matching process to dispute…"[4]

In considering the application of the Overriding Objective on successive occasions, Lord Woolf stated successively:

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

[1] Orders 63A Rules of the Superior Courts (RSC) Commercial Proceedings; Order 63B RSC (Competition proceedings;
Order 63C RSC (Chancery and Non-Jury Actions and other designated proceedings: pre-trial procedures); Order 19A Circuit Court Rules (Case Progression (General)) CCR; Order 59; Part III (Family Law) CCR; Order 49A DCR (Case Management).

[2] The "case conduct principles" set out in section 75 of the draft Bill substantially reflect the case management objectives abovementioned as set out in the rules of court.

[3] Zuckerman, "Civil Procedure: Principles of Practice", Thomson Sweet and Maxwell, 2006.

[4] Ibid., pages 8-9.

should be observed."[5]

and:

> *"*A judge's responsibility today in the course of properly managing litigation requires him, when exercising his discretion in accordance with the overriding objective contained in CPR Pt 1 , to consider the effect of his decision upon litigation generally. An example of the wider approach is that the judges are required to ensure that a case only uses its appropriate share of the resources of the court: CPR r 1.1(2)(e) . Proactive management of civil proceedings, which is at the heart of the Civil Procedure Rules, is not only concerned with an individual piece of litigation which is before the court, it is also concerned with litigation as a whole." [6]

Resourcing constraints are no less a consideration – if not indeed a much more pressing one - within our civil justice system, and while a cogent argument may be made that under-resourcing should not be allowed to set limits to access to justice for individual litigants, any allocation of additional resources which might be secured will inevitably be limited and will be coupled with an expectation that those resources be employed optimally.

There have been instances of civil cases lasting many days, if not weeks, at trial, where the issues in dispute, viewed objectively, could not be said to merit the expenditure of court and practitioner time and legal costs incurred. Judges should not have to be concerned that case management decisions reasonably made by them to limit time for pre-trial preparation or at trial in a manner proportionate to the nature of the dispute and the court's case docket are likely to be impugned on appeal or by way of judicial review.

There is therefore considerable merit, it is submitted, in introducing an express requirement that the courts consider both the needs of other litigants and the magnitude of the dispute before it in determining the time to be allocated to the latter. However, restrictions on extension of time limits introduced in the rules of court have been the subject of a number of challenges – so far unsuccessfully – on vires grounds on the basis that those restrictions amount to an unjustified curtailment of access to justice. In light of that experience – and without commenting on the merits of any individual challenge - it is submitted that it would be both of practical significance as well as being otherwise desirable that the case conduct criteria advocated by the LRC be included in primary legislation.

Pre-action protocols

Pre-action protocols are widely employed in England and Wales for various categories of proceedings with a view to diverting disputes to ADR and, for those disputes not resolvable in that manner, narrowing the issues between the parties and securing pre-action disclosure.

The Expert Group on Article 13 in its report recommended that

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

However, when legislating for pre-action protocols in clinical negligence actions in the Legal Services Regulation Act 2015 – by the insertion of a new Part 2A in the Civil Liability act 1961 – the opportunity was not taken to confer a general remit on the courts rules committees to prescribe pre-action protocols due, it would seem, to concerns that the conferring of a remit on those committees extending to pre-action behaviour of the parties would not be legally feasible – this notwithstanding that any sanctions accruing for non-compliance would only be available post-issuance of the proceedings and on foot of a court order. The solution for clinical negligence actions was to confer the power on the Minister for Justice and Equality [7]. The ability to prescribe requirements to be complied with in the pre- commencement of proceedings phase – as distinct from setting pre-conditions for

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

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

[7] Section 32B of the 1961 Act as amended.

issuance of proceedings - is a natural complement to a court rules committee's powers to regulate litigation procedure. I can see no justification for limiting the remit of the court rules committees in this way, which marks this jurisdiction out from England and Wales and other jurisdictions.

Criteria governing the granting of adjournments

Recent years have seen an increasing acknowledgement of the significance of the requirement in Article 6.1 ECHR that proceedings be disposed of within a reasonable time – quite aside from, or as a complement to, the Constitutional requirement in that regard.[8] The Expert Group on Article 13 in its report commented:

> "A significant contributing factor to delay in completion of proceedings is the indulgence shown to parties in granting adjournments of pre-trial motions and extensions of time limits laid down by the rules of court. The Legal Costs Working Group in its report of 2005 expressed the view that "a tolerance has built up within the system for parties who fail to adhere to the time limits prescribed by the rules for completion of steps preparatory to trial, such as the delivery of pleadings." In order to limit the delays which build up as a result of the failure to adhere to time limits it would be appropriate to require extensions of time to be granted on the basis of specific justifications."

Part of the difficulty that may arise is that individual requests for adjournments are often made and determined without any considered evaluation of the impact of an adjournment,or the cumulative impact of a series of adjournments, on the overall timeline for disposal of a case.

The Expert Group recommended that

> "provision be made by statute that –
> a) A judge (or registrar where so empowered), when considering an application to adjourn proceedings, or grant an extension of time prescribed by a rule of court for the taking of any step in proceedings shall:
> (i) enquire into the reasons for the application and shall invite and hear any submissions from the other party on the merits of the application for an adjournment or extension of time;
> (ii) have regard to any previous adjournments or extensions granted and the reasons for same;
> (iii) have regard to whether any adjournment or extension which might be granted would impede the holding of a trial of the proceedings within a reasonable time.
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> b) A judge (or, as the case may be registrar) shall not grant an adjournment or extension unless, having regard to the considerations referred to at paragraph (a), he or she is satisfied that there is compelling reason for doing so and that it would be in the interests of justice to do so."

Rationalisation and simplification of terms and pleadings

Consideration should be given to implementation of the recommendation of the Law Reform Commission (LRC) in its Report on Consolidation and Reform of the Courts Acts of November 2010 for rationalisation and simplification of terms in proceedings and pleadings and other documentation, both across jurisdictions and as between proceedings categories (see Chapter 2(1)).

The CPR provide for the initiation of proceedings by a "claimant" by means of a claim form,[9]

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[8] See:. *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 (Hardiman J.); *McGrath v. Irish ISPAT Limited* [2006] I.E.S.C. 43 (Denham J.); *Rodenhuiz and Verloopb v. The HDS Energy Limited* [2011] 1 I.R. 611; *Comcast International Holdings Inc & Ors. V. Minister for Enterprise &* Ors [2012] IESC 50 (Denham CJ) and *McNamee v Boyce* [2017] IESC 24 (Denham CJ) .

[9] Rule 7, Civil Procedure Rules (CPR). A claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings. .Particulars of claim must be contained in or served with the claim form, or be served on the defendant by the claimant no later than the latest time for serving a claim. Particulars of claim must include –
(a) a concise statement of the facts on which the claimant relies;
(b) if the claimant is seeking interest, a statement to that effect and the details set out in paragraph (2);
(c) if the claimant is seeking aggravated damages(GL) or exemplary damages(GL), a statement to that effect and his grounds for claiming them;
(d) if the claimant is seeking provisional damages, a statement to that effect and his grounds for claiming them; and

"defendant" being used for most categories of respondent to a claim. Other terms for originating documents are still used for particular proceedings types (e.g. "notice of application" in divorce and "petition" in nullity proceedings). Terms such as "application notice" and "application" are now used for motions on notice and ex parte notices. The term "defence" has been retained. "Statements of case" is the term collectively used for pleadings. Affidavits have now, in respect of the verification of various types of document or information, been replaced by a signed (not sworn) "statement of truth".[10]

The LRC recommends the use of four connected definitions -

- "applicant" to describe any person bringing civil proceedings in a Court
- "application" to describe the process for initiating civil proceedings in a Court
- "application notice" to describe any document involved in commencing civil proceedings and
- "respondent" to describe any person served with a claim form application in civil proceedings.

The LRC approach assumes that "claim form" would not be an appropriate description for all types of originating document. However, use of "application" or "notice of application" for an originating document would present a difficulty in the event that it were thought appropriate to replace "motion" with "application" in the case of motions for interlocutory relief. It is submitted that the term "claim notice", as introduced in the comprehensive reform of the District Court civil procedure rules in 2014, be considered for use in the other first instance jurisdictions in substitution for the originating summons and civil bill.

Integration of the statement of claim with the originating summons / document in High Court proceedings

There would seem to be no reason why, as is the case in the District and Circuit Courts and in personal injuries proceedings in all jurisdictions - the originating document commencing a claim should not require to particularise the claim to the extent expected in a statement of claim. Clearly, this would not preclude a claimant seeking to amend the indorsement of claim at a later stage in appropriate circumstances. Such a requirement would serve to concentrate a claimant's mind on formulating the case at the outset with sufficient particularity – subject to the possibility in appropriate circumstances of amending the indorsement at a later stage – and shortening the timeline for closing of pleadings and making a lodgment or tender.

Automatic discontinuance of proceedings

As stated by the Court of Appeal in *Granahan v Mercury Engineering*[11]:

> "It is accordingly now well accepted that the Irish courts are under a Convention based obligation to ensure that all proceedings, including civil proceedings, are concluded within a reasonable time. This means that any court dealing with an application to dismiss a claim on the grounds of delay must be vigilant and factor into its consideration, not only its own constitutional obligations but Ireland's obligations under Article 6 of the Convention."

However, short of a very significant increase of the numbers of judges which would enable pre-trial judicial supervision of civil cases to the extent seen in civil law tradition jurisdictions, and given the limitations on the powers exercisable by court officers which would apply having regard to Article 37.1 of the Constitution, any case management or pre-trial supervision of civil proceedings in this jurisdiction

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(e) such other matters as may be set out in a practice direction. (Rule 16, CPR)

[10] Viz.

- a statement of case,
- a response complying with an order under rule 18.1 to provide further information,
- a witness statement,
- an acknowledgment of service in a claim begun by the Part 8 procedure,
- a certificate stating the reasons for bringing a possession claim or a landlord and tenant claim in the High Court
- a certificate of service.

Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false Statement in a document verified by a statement of truth without an honest belief in its truth – Rule 32.14 CPR. The term "statement of truth" has been proposed by the Courts Service as the term to be used for the electronically created substitute for an affidavit in court proceedings.

[11] 2015 IECA 58 at para. 11 (Irvine J).

is unlikely to extend to a large proportion of the civil caseload. In those circumstances, "self-executing" procedural measures need to be considered to address delay in proceedings where court oversight or intervention may not be feasible or practicable.

In Singapore – a common law jurisdiction similar to Ireland in having a relatively limited number of judges in relation to its population - the civil procedural rules (see extract in Appendix) since 2001 make provision for the automatic discontinuance of proceedings initiated by writ in certain circumstances. The procedure was not directly based on precedents in other jurisdictions.[12]

An action will be deemed to have been discontinued against a defendant if proof of service of the writ on the defendant concerned is not filed within 12 months after the validity of the writ for the purpose of service has expired and

a) within that time an appearance has not been entered by the defendant, and
b) judgment has not been obtained in the action against that defendant in respect of the whole or any part of the relief claimed.

Separately, if no party to an action or a cause or matter has, for more than one year (or such extended period as the Court may, on application made to it before that period has elapsed, allow), taken any step or proceeding in the action, cause or matter "*that appears from records maintained by the Court*", the proceedings concerned are deemed to have been discontinued. A discontinuance on this basis will not apply where the proceedings have been stayed pursuant to an order of court.

The deemed discontinuance of an action or counterclaim does not affect a plaintiff's entitlement to bring a fresh action in respect of the claim provided the limitation period for the right of action has not expired. It may also not serve as a defence to a subsequent action for the same, or substantially the same, cause of action.

Where a party is deemed to have discontinued an action and is liable to pay costs and subsequently brings an action for the same, or substantially the same, cause of action, the Court may order the proceedings in the second action to be stayed until those costs are paid.

The Expert Group on Article 13 considered that

> **"**An automatic discontinuance mechanism would serve to concentrate parties' minds on their own responsibility to act with expedition in preparing a case for trial. The rules of court already contain limited sanctions where steps have not been taken within time, such as those relating to the length of time an original summons remains in force, and requiring service of a notice of intention to proceed."

Discovery

The deficiencies in, and suggestions for reform of the current procedure for discovery have been addressed in the Expert Group on Article 13 Report (para. 3.25 to 3.33) and the Commercial Litigation Association of Ireland discussion paper "Possible reforms to the Rules of the Superior Courts to reduce the time and cost of Discovery". It would appear that the reforms in England and Wales which introduced "standard discovery" do not appear to have been as successful as expected. I suggest that, in the event that the Review Group were minded to retain *Peruvian Guano* "relevance" as a criterion, that test should be expressly qualified in the rules of court to

- enable a party liable to discovery to seek from the court relief from discovery where the strict application of the test would create a burden in time and cost disproportionate to the nature and extent of the dispute and issues involved, and
- entitle a party burdened by discovery which turns out to be excessive to that required to recover the costs and expenses involved, including by way of set-off.

The first of these suggestions would, in effect, merely serve to codify existing judicial dicta on the appropriate limits of discovery.

Limiting the circumstances in which claims for unliquidated damages may be made.

Consideration might usefully be given to reducing the types of claim and circumstances in which

[12] Min, "Automatic Discontinuance under Order 21 Rule 2 – First Dormant, then Dead" (2001) 13. S.Ac. L.J. 150, at page 151.

unliquidated damages may be sought. There would appear to be no reason why a claimant for damages for breach of contract or for various torts where the damages were by their nature quantifiable at the date of issuing of the claim should not be expected to quantify their claim in the originating document. This is already, in effect, done where a claimant brings proceedings in the courts of limited jurisdiction. Such a restriction should not apply where the nature and extent of the loss is not always quantifiable at the point of commencement of proceedings – e.g. personal injuries cases and cases where a claim in contract or tort involved continuing loss beyond the date of commencement of the action.

Alignment of court vacation periods with school holidays

The Review Group may wish to consider the merits of revising court vacation periods to coincide with school holiday periods. School holiday periods generally influence family holidays and impact on the availability of parties and witnesses for court proceedings, aside altogether from the facility any realignment may afford judges, practitioners and court staff.

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February 2018

APPENDIX

Extract from Order 21, Rules of Court, Singapore

"*Discontinuance of action, etc., without leave*

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(5) An action begun by writ is deemed to have been discontinued against a defendant if the memorandum of service referred to in Order 10, Rule 1(4) is not filed in respect of the service of the writ on that defendant within 12 months after the validity of the writ for the purpose of service has expired, and, within that time —

(a) a memorandum of appearance has not been filed in the action by that defendant; and

(b) judgment has not been obtained in the action against that defendant in respect of the whole or any part of the relief claimed against that defendant in the action.

(6) Subject to paragraph (6A), if no party to an action or a cause or matter has, for more than one year (or such extended period as the Court may allow under paragraph (6B)), taken any step or proceeding in the action, cause or matter that appears from records maintained by the Court, the action, cause or matter is deemed to have been discontinued.

(6A) Paragraph (6) shall not apply where the action, cause or matter has been stayed pursuant to an order of court.

(6B) The Court may, on an application by any party made before the one year referred to in paragraph (6) has elapsed, extend the time to such extent as it may think fit.

(7) Paragraph (6) shall apply to an action, a cause or a matter, whether it commenced before, on or after 15th December 1999, but where the last proceeding in the action, cause or matter took place before 1st January 2000, the period of one year shall only begin on 1st January 2000.

(8) Where an action, a cause or a matter has been discontinued under paragraph (5) or (6), the Court may, on application, reinstate the action, cause or matter, and allow it to proceed on such terms as it thinks just.

Discontinuance of action, etc., with leave (O. 21, r. 3)

3.—(1) Except as provided by Rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against all or any of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

(2) An application for the grant of leave under this Rule may be made by summons.

Effect of discontinuance (O. 21, r. 4)
4. Subject to any terms imposed by the Court in granting leave under Rule 3, the fact that a party has discontinued or is deemed to have discontinued an action or counterclaim or withdrawn a particular claim made by him therein shall not be a defence to a subsequent action for the same, or substantially the same, cause of action.

Stay of subsequent action until costs paid (O. 21, r. 5)
5.—(1) Where a party has discontinued or is deemed to have discontinued an action or counterclaim or withdrawn any particular claim made by him therein and he is liable to pay any other party's costs of the action or counterclaim or the costs occasioned to any other party by the claim withdrawn, then, if before payment of those costs, he subsequently brings an action for the same, or substantially the same, cause of action, the Court may order the proceedings in that action to be stayed until those costs are paid.
(2) An application for an order under this Rule may be made by summons or by summons for directions under Order 25, Rule 7."