Review of the Administration of Civil Justice

Observations of the COURT OF APPEAL

(A) IMPROVING ACCESS TO JUSTICE

There are no significant barriers to the citizens' access to justice. There are, of course, court fees for filing documents etc. These charges, however, are relatively modest and would appear to be proportionate to the funds needed by the Courts Service to provide for the administration of justice.

There is perhaps one legal exception to this generalised statement and that concerns the impecunious company which cannot afford to engage lawyers and yet cannot be represented by a director or shareholder; (see *Battle v. Irish Art Promotions Central Limited* [1968] I.R.252). No doubt this rule has denied the occasional company the right to mount a valid defence to proceedings taken against it or to bring a claim which might have benefited the company and its creditors. Perhaps it is time for statutory reform to enable such a company to be represented by a director, duly approved for that purpose?

The cost of litigation however, is indeed a barrier in a different sense. A plaintiff of modest income may be unable to afford representation and may consider there is nothing they can do to access justice in such circumstances. Other potential plaintiffs may be too fearful of the consequences in terms of costs of losing their claim and for that reason may feel they cannot risk embarking upon litigation. Then there is the worry faced by all plaintiffs, even those assured of the success of their intended claim, that they maybe unable to recover from their opponent not only such damages as they

may be awarded but the costs which they expended to achieve that end. It is accordingly vital, in the interests of all litigants, including defendants, that litigation be conducted in a manner that is as timely and as cost effective as possible.

(B) COST REDUCTION, INCLUDING TO THE STATE

The cost of litigation is too high in this jurisdiction and in many cases is prohibitive. The costs payable by a losing party is controlled to some extent by orders for taxation. The taxing master will scrutinise the individual fees charges, for example, by the solicitor, senior counsel or junior counsel for attending court on each day of the hearing. The real difficulty is that the taxing master must allow the costs, at the appropriate rate, for each and every date the proceedings were at hearing. He / she cannot reduce the number of days in respect of which such costs are payable. For this reason it is essential that the Rules of Court and the actions of the judiciary reflect the need to ensure that proceedings are determined in as short a timeframe as is consistent with the proper administration of justice. At the moment, there is no real incentive for the likely successful litigant to speed up the litigation process once they consider the defendant a good mark for the collection of any costs order that they may obtain. Why, if they consider it likely that they will recover fifteen days costs would they try to complete the case in seven days?

The Rules of Court need to be changed to reduce, where possible, the number of days required to determine litigation. Potential rule changes might include:

(a) Witness statements to constitute the evidence in chief of their authors. This already applies in the Commercial Court.

(b) Provision for at least one case management session to be carried out by a judge of the High Court [or Master as the case may be] in any case in which a plaintiff's solicitor cannot give reasonable assurance that the proceedings will be concluded within four days. Case management should not be introduced routinely in every case, even if the resources necessary to achieve that end were available. It adds another layer to the litigation and accordingly adds additional costs. It is most effective in cases which are potentially lengthy and which, with proper management, might be dealt with in a much reduced timeframe. At that stage the judge should have access to all witness statements, be familiar with the issues in the proceedings and be in a position to fix an indicative timeframe for the hearing.

(c) A rule requiring the judge at the end of every case in which an indicative timeframe was set in the course of case management, to address the issue of costs and to provide reasons for awarding costs for any period beyond the indicative timeframe.

(C) IMPROVING PROCEDURES AND PRACTICES TO ENSURE TIMELY HEARINGS AND REMOVAL OF OBSOLETE, UNNECESSARY AND OVER COMPLEX RULES OF PROCEDURE

The present Rules largely follow the same structure of the civil procedure which is, in many respects, unchanged from the days of the Common Law Procedure Ireland Act 1853 and the Supreme Court of Judicature (Ireland) Act 1877. It is true that the pace of change in the last 20 years or so in terms of specific rule changes has quickened, but the same basic structure remains.

The Rules pre-suppose a rather leisurely approach to litigation in which the control of the litigation is in the hands of the parties and where oral evidence is the norm and not the exception. This was understandable where the volume of litigation was low and the courts were operating in an era before modern technologies have both assisted and hindered the efficient run of litigation. I am sure that the shade of Sir William Brett would be horrified to learn that his seminal judgment in *Peruvian Guano* in 1882 has been the responsible for the creation of huge, expensive para-legal industry, for he could not have foreseen the invention of the photocopier in the late 1950s and its implications for the modern practice in relation to discovery.

The modern Rules should, I suggest, take a different approach in which:

(i) The litigation is ultimately under the control of the Court;

(ii) The objective should be for the fair administration of justice in a manner which is speedy, efficient and minimises costs to the parties.

(iii) Oral evidence should be kept to the minimum and the parties should be encouraged to reduce evidence to writing where it is possible to do so. (I am not suggesting that oral evidence should become a rarity, but rather that where possible it be kept in check where this is consistent with fair procedures)

To that end, suggest that the Rules contain a statement of general principles to begin with which reflect these objectives. My thinking here is that the Rules themselves should be interpreted by reference to these general principles in such a manner as would, *e.g.,* minimise cost and expense and promote efficiency in the legal system.

The Form Of Pleadings:

The basic form of pleadings – plenary summons, special summons and summary summons – have, on the whole, served us well and should be retained. There is, however, a proliferation of other forms of originating summonses, including petitions, grounding statements and originating motions. Is there not a case for a single unified procedure along the lines of a special summons with a short pleaded case and a verifying affidavit?

So far as pleading is concerned is there not a case for re-structuring the general pleading rules along the lines of Order 1A and Order 1B as was done in the case of personal injury summonses and defamation actions?

I also suggest that Order 21 dealing with defences should be amended to require the defendant who wishes to advance an affirmative defence to plead that affirmatively. I have across too many instances of where the defendants still effectively plead a traverse and the pleadings give no real clue as to what the true nature of the defence actually is.

Order 19, Rr. 27 And 28:

Prior to the onset of the economic crash in 2008-2009, applications to strike out proceedings were a comparative rarity. Such applications are now quite common, reflecting as they do the proliferation of pseudo legal arguments sometimes advanced by personal litigants. It is, however, unsatisfactory that there exists overlapping sources of the courts' jurisdiction to strike out unsustainable claims, namely Ord. 19, rr. 27 and 28 and the Court's own inherent jurisdiction.

There are, moreover, anomalies between these different jurisdictions. The jurisdiction to strike out under Ord. 19, r. 28 only applies to the *entirety* of a pleading and not *part* of a pleading.[1] This jurisdiction can, moreover, only be exercised where the "vexation or frivolity" appears from the pleadings alone.[2] The inherent jurisdiction to strike out where the claim is unsustainable is broader than this and the courts can strike out where it is clear from the evidence that the claim amounts to an abuse of process and is bound to fail.[3]

I suggest that rr. 27 and 28 should both be amended to bring them into line with the current practice represented by the inherent jurisdiction. The use of the terms "frivolous and vexatious" do not in modern parlance sufficiently convey what is involved here and they are often seen by the lay litigant as an insult, when invoked. The Court should accordingly be given an express jurisdiction:

- to strike out a claim or part of a claim which amounts to an abuse of process or which is bound to fail or which has "no reasonable chance of succeeding"[4];
- to act for this purpose by considering both the pleadings and where appropriate the evidence.

I also think it would be helpful if Ord. 122 contained a general statement of principle to the effect that the litigants are obliged to prosecute and, as the case may be, to defend litigation with appropriate expedition. It should also state that the court itself is under a duty to ensure that, so far as possible, the goal of speedy and expeditious litigation is achieved.

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[1] *Aer Rianta v. Ryanair* [2004] IESC 23, [2004] 1 IR 506.
[2] *McCabe v. Harding Investments* [1984] ILRM 105.
[3] *Barry v. Buckley* [1981] IR 306.
[4] Adopting the language of Barron J. in *Farley v. Ireland*, Supreme Court, 1 May 1997.

I further suggest that Order 122 be amended so as to give the courts an express power to strike out or stay proceedings by reason of undue delay.

Unnecessary and unreasonable delay by litigants and / or their lawyers must carry real consequences in terms of costs. Far too often a court will penalise a party for delay and then put a stay on the costs order under the conclusion of the proceedings. This practice of imposing a stay does not incentivise compliance with the rules. If costs had to be paid immediately, and if instead of making the costs order against the litigant they were made against the solicitor concerned in certain cases, this would, in my view, have a salutary effect upon solicitors and counsel who are often forgiving significant delay.

One only has to ask how many defendants are ever made aware that three orders for costs have been made against them because their solicitor and counsel failed to deliver a defence within the time prescribed by the rules.

It is time for the Rules of Court to be reviewed and all anachronistic time lines and procedures eradiated. A sub committee of the Rules Committee should be tasked with identifying simple rule changes to speed up the progress of cases and to shift the onus to a party in default to apply to the court to do whatever it is they failed to do within the time prescribed by the Rules of the Court. As matters stand, under the Rules of the Superior Courts, in many instances, it is the party who has complied with their obligations that is required to make application to sanction their opponent for their failure to comply with the rules. The boot should be placed on the other foot. A party

missing a deadline should be put to the cost of applying to the court to have its conduct excused unless they can obtain the consent of their opponent.

(D) ADDITIONAL MASTERS / DEPUTY MASTERS

Every Monday, in the High Court, several judges are assigned to hearing procedural applications which are well capable of been dealt with by a Master or Deputy Master. In the North of Ireland there are six Masters to support the Superior Courts whereas in this jurisdiction there is but one. If three of the four judges currently assigned to dealing with motions on a Monday could be released to work on the case management of complex cases, in my view, those cases will be dealt with in a much shorter timeframe than otherwise would be the case thus reducing the demands of scarce court time and significantly reducing the cost of the litigation to the parties.

(E) DISCOVERY

There is no doubt but that discovery applications are currently over-burdening both litigants and the courts system. As Hogan J. recently said on this topic in *IBB Internet v. Motorola Ltd*.[5]:

> "The fact that the present discovery application in the High Court lasted four days is ample testimony to this. Moreover, as Barrett J. indicated, experience has regularly shown that the practical benefits of such discovery is often entirely outweighed by the costs and delays in the entire process. How often is it the case that even in complex litigation only a relatively small number of documents prove to be the important ones, despite the generation of thousands of documents in the

[5] [2015] IECA 282.

course of the discovery process, most of which are never used or deployed in court?"

The case for reform and the dilution of the *Peruvian Guano* rule is pressing. Indeed, I would go so far as to say that the reform of the discovery rule is the single most important step which requires to be taken in our entire corpus of civil procedure. I suggest that Order 31, r. 12 *et seq*. be amended by the incorporation of an entirely new rule which would re-state the law and practice along the following lines:

- an applicant for discovery must demonstrate that the documents sought are both relevant and necessary for the fair administration of justice;
- the applicant must also demonstrate that the documents are likely to be directly material and are likely to be of practical assistance in the fair conduct of the litigation;
- the court when considering applications for discovery is entitled to have regard to principles of proportionality and costs effectiveness.

(F) ENCOURAGING ADR

There is a limit to what the court and the Rules of Procedure can do in this regard. The Rules of Court do not permit a presiding judge to force the parties to go through a process of ADR.

(G) ELECTRONIC COMMUNICATION AND E-LITIGATION

Subject to adequate court resources, electronic filing and electronic communication should be the order of the day. I am not yet satisfied that sufficiently complex software programmes are available to facilitate paperless court hearings. I have sat on a number

of cases where judges have been provided with tablets uploaded with all relevant documents. However, documents in electronic form are difficult to mark and highlight in the course of submission and are extremely difficult to locate in the aftermath of the hearing when it comes to writing a judgment. The "post it" and "highlighter pen" permit these documents to be accessed very readily after a lengthy hearing and without requiring the judge to disengage from the submission to achieve an equivalent result by engaging with an ipad or tablet.

(H) PLEADINGS AND SUBMISSIONS TO BE AVAILABLE ONLINE

With the exception of proceedings which are in camera or where by reason of statutory provision the proceedings are to be heard otherwise than in public, given that justice is administered in public, it is difficult to see why written submissions should not be publically available in an electronic format. However, there would, of course, be resource implications in terms of the staffing required to facilitate such an advance.

(I) VULNERABLE COURT USERS

The Law Society and the Bar Council might perhaps considering establishing a *pro bono* scheme. Such a scheme might be attractive to young or newly qualified lawyers seeking to add to their experience.

One of the real difficulties faced by the Court of Appeal is that one in four appeals coming before the court has a lay litigant as a party. In almost all such appeals it is the lay litigant that is the appellant. Often times they are litigants who have been dispossessed of their homes or who have lost significant funds in relation to commercial dealings that went wrong during the Celtic tiger years.

This group of lay litigants can be broken down into two categories. The first is the genuine litigant who has lost everything and no longer has the money to pay a legal team and could well have good arguable grounds of appeal. The second category comprises litigants who are understandably distraught by the loss of their homes or businesses but simply have no *bona fide* appeal to pursue. Yet they pursue these appeals relentlessly bringing repeat application of every conceivable type to the Court of Appeal weighing it down with boxes of documents and issuing relentless applications and motions. Their endeavours are not confined to pursuing a *bona fide* appeal but are destined to obstruct and delay the implementation of the order which went against them in the High Court.

There is real difficulty in protecting the court and its staff from the enormous volume of documents presented by lay litigants. Presiding judges have to wade through all of these documents to find out what the particular application or appeal is actually about. It would, however, be remiss of me to fail to acknowledge that from time to time the Court does receive well presented sets of papers from lay litigants. However such events are rare indeed.

A small amount of additional funding might allow for the setting up of a service to help lay litigants negotiate their way around the Rules of Court when seeking to lodge documents, motions, books of appeal etc. Such a service would not provide legal advice but would be confined to offering assistance concerning the court's procedures and as to the manner in which documents should be lodged. Currently the staff of the Court of Appeal are overwhelmed by the demands of lay litigants, many of whom are

frustrated and take out their anger on the court staff. It is not the function of the court staff to advise lay litigants concerning their appeal. A service of this nature, I am convinced, would benefit the litigant, the court staff and the court itself.

(J) RULES OF THE SUPERIOR COURTS

See Sections (C) and (E) above.

(K) JUDICIAL REVIEW

Leave of the court is required for permission to commence judicial review proceedings. This is done by issuing an application supported by affidavit and followed up by a court hearing. Until relatively recent times applications for judicial review were relatively rare. Accordingly, the judge hearing the application for leave had generally time to consider the merits of the application. Such applications tended to be straight forward and rarely raised complex factual or legal issues.

Prior to 1995 there had only been three hundred and thirty applications for leave to commence judicial review proceedings. Since that time the Monday *ex parte* list system has broken down to the point whereby the application is effectively meaningless. There are three reasons why this is so. First, the sheer volume of numbers of applications. Second, the complexity of modern judicial review litigation. Third, the "weak" standard of the *G v. DP*P test, namely that of arguability. All of this means that in practice the judge hearing the application for leave is generally faced with an impossible predicament. The average leave booklet consists of "at least" one lever arch folder, plus a book of authorities. Given the limited time for each application judges tend to rely on the summary of the facts sketched out by counsel added perhaps by a

pithy reference to selective case law or statutory provisions. Save in rare cases, it is difficult for a judge to say that the case is not arguable thus satisfying the *G* test. Nor does the judge have any meaningful opportunity to scrutinise the individual grounds advanced in an effort to compress them.

The only way the "leave" judge can form a meaningful appreciation of the case is to hear from the other side. This was the essence of the application on notice procedure provided for in statute. However, while the system ought to have worked, in practice it has not. The accumulated experience of the statutory judicial review procedure is that the system simply adds to the delay and expense without any benefit to the litigants. The supposed benefits and protections for public bodies afforded by the present rules are doubtful. What is the protection for the public body if, for example, a challenge to some routine administrative decision can be brought by way of judicial review, while the constitutionality of the entire statutory sub-stratum supporting the decision can be brought by a plaintiff who issues a plenary summons without any leave or judicial supervision?

The reality is that the leave requirement adds little or nothing to modern judicial review practice, save perhaps that it represents a burden on the judicial system and adds to costs. It can only act as a true filtering device with a great deal more judicial time and effort, notice to the respondents and a higher threshold for leave. But this system has already been tried in planning cases and it simply did not work.

The leave requirement has been abolished entirely in procurement cases without complaint. It is interesting that the absence of leave has not given rise to problems

because the very act of commencing a procurement challenge may have an unsettling effect on the business of either the contracting authority or the successful tenderer.

If it were designed to have an early filtering system, one might expressly provide in new Rules of Court for a special summary strike out procedure where it could be ascertained that the claim was manifestly untenable or otherwise doomed to fail. But none of this provides a sufficient justification for the retention of the leave procedure in Ord. 84 in its present form.

The abolition of the leave application in judicial review proceedings would have the added benefit of eradicating the appeals to the Court of Appeal against the refusal of leave in the High Court and also appeals against the refusal of leave in respect of some of the grounds proposed, not that many appeals fall into the latter category.

It is also worth reflecting upon the delay caused in those cases where an applicant is refused leave and then later obtains leave consequent upon a successful appeal. This is far from satisfactory in proceedings of a type that the Rules of Court require be commenced and obviously determined within strict time limits.

(L) MISCELLANEOUS

Order 122

Order 122, r. 11 might be amended to provide that in those cases where a notice to proceed is required to be served by any party, that:

(i) no such notice could be served save with leave of the court;

(ii) such an application would have to be made by motion on notice and

(iii) that no such leave should be granted save where the court was satisfied that the delay not been prejudicial to the parties or to the general administration of justice.

Access to justice and delay in the Court of Appeal

Justice delayed, as is so often observed, is justice denied. And, we are fast arriving at that point in the Court of Appeal. The Court of Appeal was, as we all know, established to deal with the arrears of appeals which had built up in the Supreme Court over a long number of years. These arrears, which it was believed this court could eliminate, had nothing to do with a whole new body of litigation which started to emerge in the High Court, probably in and about the years 2009 / 2012, as a result of the collapse of the economy. Hundreds of new cases were spawned as a result of the financial crisis. I include amongst these claims brought by banks for repayment of loans, repossession of homes / premises and claims for injunctions brought by receivers seeking to enforce banks security, to name but a few. Unlike other types of cases which enjoy reasonable settlement rates, thus reducing the demand on court time, the vast majority of these cases fought to the bitter end because the consequences for the defendants were so dire and also because the defendants were in no financial position to make realistic offers of settlement.

I think it is probably not an exaggeration to state that the vast majority of these "financial crisis" cases were lost by the defendants in the High Court and have almost universally been appealed to the Court of Appeal thus placing huge and unanticipated demands on the court's resources.

The number of judges and court staff simply cannot deal with the tsunami of these appeals which have swamped the court. The demand generated by these appeals means that the Court of Appeal, which was set up to deal with the excessive work load and delays of appeals pending before the Supreme Court, has been visited with an enormous unanticipated additional burden without any additional resources having been made available. The Court of Appeal delays are getting longer and longer and, while there are always ways of improving what we do in order to make the court more efficient, this is a "numbers" game. Only more judges, additional support staff and additional researchers will improve the litigants' access to justice in the Court of Appeal. In my view the Court needs at least another six judges to stop further slippage.

Mary Irvine 05/02/18