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Submission by
Council of The Bar of Ireland
to the
Review Group on the Administration of
Civil Justice

February 2018

INTRODUCTION

The Council of The Bar of Ireland has prepared these submissions for the purpose of contributing to the ongoing Review of the Administration of Civil Justice in the Courts of Ireland that is being undertaken by the Review Group chaired by the Honourable Mr Justice Peter Kelly, President of the High Court upon the request of Government. The submissions discuss, in brief detail, the key issues that the Council considers should form part of the Review Group's work.

In preparing these submissions, regard has been had to similar efforts that have been undertaken in other jurisdictions when confronting the issue of reform of civil procedure and issues of access to justice. In particular, helpful insight to the relevant considerations in an initiative of this nature has been had from the Gillen Report¹ which concerned a review of Civil Justice in Northern Ireland, a jurisdiction that is not dissimilar to that of Ireland having regard to relative population size when compared to larger jurisdictions such as England and Wales and the general demographic of court users. In addition, regard has been had to civil procedure that has been refined over time in other, larger common law jurisdictions including that of England and Wales and New York, USA. It is felt that the foregoing provide a wealth of information from which to draw inspiration when considering how best to develop the way in which civil justice is administered in this jurisdiction.

The Council has also been assisted by submissions received from its membership following a call for same towards the end of the Michaelmas Term in 2017.

These submissions focus on the following areas:

- 1) Case management;
- 2) Pre-action protocols;
- 3) Judicial Review;
- 4) Discovery;

¹ Review Group's Report on Civil Justice, Review of Civil and Family Justice in Northern Ireland September, 2017.

- 5) Costs;
- 6) Pleadings;
- 7) Class Action Litigation;
- 8) Access to Justice;
- 9) ADR;
- 10) Modernisation of the Courts; and
- 11) Judicial Resources.

1. CASE MANAGEMENT

- 1.1 An essential feature of any measures introduced ought to be a radical overhaul and formalisation of case management procedures for all civil litigation in the High Court. This is essential, given that the Courts have seen, and are likely to continue to see, an uplift in the volume of litigation, together with an increase in the factual and legal complexity of cases before it.
- 1.2 It is felt that the impact of management procedures of cases could be supplemented by, and work in concert with, enhanced pre-action protocols in certain kinds of litigation. Adherence should be encouraged through the use of appropriate costs and other sanctions in instances of default.
- 1.3 The same should also apply to the concept of pleadings (see further below).
- 1.4 A reactive case management procedure should be adopted whereby the initial obligation to agree and file a timetable is placed on the parties and subject to strict time-limits calculated from the date of commencement of the litigation. The foregoing should be subject to supervision and enforcement by the Courts where in default of filing a timetable there will be a case management conference (“CMC”), where one will be fixed by the court. This CMC will automatically be listed and notified to the parties where a timetable is not filed within time.
- 1.5 Where there has been default by one or other of the parties or in the event of the unreasonable withholding of agreement to a timetable, costs sanctions should be imposed on the responsible party or parties. Litigants will therefore be encouraged to agree a timetable early on or otherwise face costs or other sanctions thus limiting the need for active involvement by the courts in the preparation of a timetable and avoiding the wasting of court time and of costs. Even where a timetable has been lodged, in cases involving litigants in person, benefit may be had from fixing a CMC at an early point in proceedings so that a roadmap for the proceedings can be prepared.

- 1.6 The proposed model should allow for effective case management that is party-led, but supervised by the Court, so that proceedings will be prosecuted and not permitted to fall into abeyance while simultaneously limiting the degree of court supervision that will actually be required in order to secure compliance with case management procedures.
- 1.7 In order for the foregoing model to achieve its purpose and avoid unnecessarily adding to demands on court resources, strict rules providing for the sanctions that will follow in the event of default or unreasonable non-cooperation by a party or parties will be necessary. These rules should include provision for costs orders to be made against legal representatives where sanctions of that nature are warranted.
- 1.8 As a matter of course, a CMC should take place prior to the matter being set down for trial. It may be necessary to allow for more CMCs in complex cases. At this hearing the Court may provide tailored directions regarding documents and expert evidence. In addition, the Court will be in a position to determine whether any issue of law ought to be determined in advance of the trial under Order 25 RSC. Amendment of Order 25 rule 1 RSC may be required to provide, for the avoidance of all doubt, that the Court may direct a trial of a point of law of its motion.

2. PRE-ACTION PROTOCOLS

2.1 Pre-action protocols serve to facilitate the efficient and timely administration of justice, resolve cases in advance of their entry into the courts system (including by discouraging unmeritorious claims) and assist in securing economical use of court resources.

2.2 Part of the difficulty with pre-action procedures in Ireland can be attributed to the constitutional right of access to the Courts. Nonetheless, as with ADR, there are ways in which resolution (whether by settlement or filtering) of litigation can be encouraged in this way. . As appears from the Gillen Report², pre-action protocols in personal injuries proceedings have been established and refined in England and Wales. One notable distinction between the two jurisdictions is that where a defendant has denied liability during the implementation of the pre-action protocol by the parties, there must be *“better provision of information ... so the claimant could properly assess the merits of any defence before incurring the costs of court proceedings, including reasons for any denial as well as any alternative case being put forward and the provision of documents relevant to liability”*³.

² Gillen Report, p. 86

³ Gillen Report, para. 7.8

3. JUDICIAL REVIEW

- 3.1 The Council recognises that the manner in which the judicial review list operates is a drain on judicial resources. It is important to recognise that any reform of the system must be seen to be equitable in respecting the rights of applicants for judicial review, many of whom are of limited means, in respect of legitimate grievances against public bodies.
- 3.2 Changes to the way in which judicial review applications are brought were introduced in recent years (time limits, statements, affidavits, etc.). In reality there is little enforcement of some of these changes, particularly when it comes to the concept of pleading or making a case. Proper enforcement of these rules should reduce the number of unmeritorious claims.
- 3.3 Issues remain to be resolved with the way the cases are managed in High Court lists. Respondent bodies are often given great latitude with regard to opposition papers, which results in cases taking longer to come to Court. The proper adherence to time-limits for the filing of papers should therefore be encouraged and case-managed in an appropriate manner.

4. DISCOVERY

- 4.1 The cost associated with the discovery process has increasingly become one of, the most costly aspects of litigation before the Irish Courts. The Council recognises the important role that discovery plays in litigation but considers that its importance and potential impact on the outcome of a case must be balanced against its cost to the parties, both in terms of financial expense and time consumed in reviewing documentation for the purpose of making discovery.
- 4.2 One solution might be to try to remove the burden of discovery from the court system. Consideration should be given to the introduction of a mandatory rule that requires parties to, at the earliest possible stage, disclose all documents that are relevant or in any way connected with the issues in the case as defined in their, or the other party's pleadings. The mandatory rule could be waived by the parties opposing in less complex cases.
- 4.3 The disclosure would be performed in a manner similar to discovery although it is considered that certification or verification should be completed by the solicitor on record (where applicable) and the rules concerning privilege would continue to apply. Imposing this obligation on the parties at that stage would require sanctions in the event of non- or partial non-compliance (i.e. costs). Any analysis of the extent of compliance could be left to the court, but this would only take place at the end of the process.
- 4.4 The effect of this should be to ensure that all parties put all their cards on the table at a very early stage. This should have the effect of concentrating minds before getting to a Court at all.
- 4.5 This will only work if there is a reform of the system of pleadings to ensure greater precision (see below).
- 4.6 This approach would not require any modification of the test for discoverability, since that is well known. Indeed, there is an argument that any change to the way in

which the courts limit discovery will have no practical impact on the cost and time consumed in making discovery given that all documents in the possession, power or procurement of a party will have to be reviewed to determine whether or not they fall within the categories ordered irrespective of the breath of those categories.

4.7 Rather than radically overhaul the legal principles relating to discovery, it is suggested that the costs and delays that are necessarily caused by the discovery process be controlled and limited insofar as this is possible as part of the case management process.

4.8 In addition, a review on the current capabilities of artificial intelligence in this area should be undertaken. Already the High Court has approved of the use of AI.

5. COSTS

- 5.1 The Council notes that consequent upon the commencement of the Legal Services Regulation Act 2015, Order 99 RSC is currently under review elsewhere and accordingly it is not proposed by that substantive submissions will be made on the issue.
- 5.2 The Council does however note that an essential feature of the reform of the administration of civil justice in the Irish courts will be an entire reassessment and overhaul of the manner in which legal costs are approached. If reform in the area of case management is to have any practical impact on the manner in which litigation is conducted litigants must know that immediate consequences will be felt in the event of default or breach without reasonable excuse.

6. PLEADINGS

- 6.1 The exchange of pleadings system is cumbersome, and contributes to the inefficiency of the system. The employment of vague, boilerplate or prolix language to describe the nature of a claim is problematic. Similarly, the traversed opposition discourages engagement with the real issues in dispute until late in the day and often only when a case is at hearing.
- 6.2 A simplified claim system should be employed, with the parties given one opportunity to set out what their claim and opposition are, should be considered.
- 6.3 Whether this is described as a statement of claim, or defence is irrelevant. What is envisaged is that the initiating document should identify precisely the nature of the cause of action and relief, together with the relevant facts relied upon. The defence should follow the same model.
- 6.4 The parties would thereby be limited to agitating the matters in these documents subject to the entitlement to amend later only in respect of matters of which they were not aware at the time (i.e. subsequently came to light). This will, like the suggested change to the discovery process, force the parties to address the real claims at the outset.
- 6.5 The need for both an originating summons and statement of claim should be amalgamated into one document. The requirement for endless requests for particulars could therefore also be abolished.
- 6.6 This would enhance the mandatory discovery obligations on the parties referred to above, since the obligation to disclose is linked only to the matters disclosed in this exchange.
- 6.7 The streamlining of pleadings could also be linked to the reform of the rules on service. An example of this would look is as follows:

- (a) All civil proceedings to be commenced with the issue of an originating Statement of Case. This must include a statement of each relief claimed and, by reference to each specific relief, a statement of the facts and grounds upon which that relief is sought.
- (b) The issue of the Statement of Case stops time running.
- (c) The Originating Statement must be served within a fixed time (4 weeks?).
- (d) Once served, the opposing party has a fixed time (e.g. 4 weeks?) to file a Statement of Defence, which must contain a response by reference to each relief of the position and the facts relied upon by reference to each.
- (e) Counterclaim to be replaced by Statement of Case as above.
- (f) No need for Particulars or Reply.
- (g) Obligation to comply with mandatory disclosure obligation on either side within a fixed time (e.g. 8 weeks).
- (h) The issue of the originating Statement to be accompanied by a fixed return date for initial CMC (with Deputy Master, etc) e.g. after 16 weeks.
- (i) Extensions to time limits to be permitted only for stated exceptional reasons (matters outside lawyer's control, incapacity, etc).

6.8 For this to work effectively, sanctions in the form of costs will have to be applied. This means that a party that includes a range of claims or issues that do not proceed or by reference to which there is no success must be in jeopardy of having costs awarded against it (as happens in the UK) even if it succeeds with one part, especially where additional time and costs are wasted in the prosecution of unmeritorious arguments on either side.

7. PROVISION FOR CLASS ACTION LITIGATION

- 7.1 Ireland is one of the few jurisdictions where no class action litigation is permitted. Within the past number of years there has been a clear indication of the need for procedures to allow for such claims. If introduced, benefit could be seen by both litigants and the court system. One need only consider the volume of cases relating to the DePuy litigation that occupy the Dublin High Court Personal Injuries List or, historically, litigation surrounding the use of pyrite contaminated building materials to realise that there is merit to conducting a review of whether provision should be made for class action litigation in this jurisdiction.
- 7.2 Looking to the future, regard must be had to the possible wave of litigation against financial institutions arising from the recent controversy surrounding tracker mortgages as well as the potentially crippling number of cases that could arise from a single incident of a breach under the GDPR which will provide for compensation for non-pecuniary loss that has been occasioned by a data breach.
- 7.3 The attraction of class action suits are considerable. The burden placed on the courts system is limited in that the number of individual cases over which the courts must adjudicate is markedly reduced to a sample drawn from the class. Those who do not wish to form part of the class are free to opt-out and accordingly there is no interference with one's right to independently pursue a claim. Conversely, an opt-in model could be considered. The legal costs to the plaintiffs who choose to participate are, to a certain degree, spread across the class thus reducing the overall cost and risk borne by each individual member. In addition, the legal costs faced by the defendant(s) are also reduced given the way in which liability and quantum fall to be determined on a class basis rather than on a case-by-case basis thereby reducing the costs burden of litigation on defendants.
- 7.4 A strong public policy argument favouring the establishment of class action litigation is that such cases assist in ensuring that large corporate entities are held accountable for their behaviour in relation to groups such as consumers which on an individual

basis may not have cost a significant amount but when repeated across the class of individuals concerned has enabled the defendant to realise very significant gains from its wrongful behaviour⁴. It is contended that provision for class action litigation in this jurisdiction would promote access to justice for individuals, and in particular consumers, who have suffered minor but not insignificant loss or damage by reason of the wrongful conduct of service providers and other operators in the domestic marketplace.

7.5 The practice and procedure in relation to class action suits is long-established in New York State. The Council is therefore of the view that, if not only as a starting point, Article 9 of the New York Civil Practice Law and Rules may provide useful guidance on how class action litigation is governed so as to enable a discussion on whether same should be provided for in this jurisdiction.

7.6 The opposition to such an approach has traditionally come from those that might be seen as possible defendants (large institutions, finance houses, the State, etc.). These parties have used the fact that class action suits are not permitted to wear down individual claimants by making them pursue lengthy and cost-prohibitive claims through the Courts. The current system effectively encourages this, with the effect that more court time is taken up with these cases.

7.7 In 2013, the European Commission adopted a recommendation that Member States make provision in law for class action claims to be taken in respect of claims for infringement of EU law⁵. That recommendation has not been implemented in Ireland.

⁴ See for example, *Argento v. Wal-Mart Stores, Inc.* 66 A.D.3d 930, 888 N.Y.S.2d 177 (App. Div. 2d Dep't 2009) which involved the backdating of renewal memberships in breach of the New York General Business Law §349, where members who renewed membership after it had previously expired were required to pay the full annual subscription for less than a year's worth of membership.

⁵ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU)

8. ACCESS TO JUSTICE

- 8.1 The Council is mindful of the specific request of Government that consideration be given as to reforms that enhance access to justice generally and as to specific steps that can be taken to achieve more effective outcomes for impecunious litigants.
- 8.2 Firstly, it may be reasonably apprehended that the financial cost of bringing and/or participating in proceedings before the Courts may be prohibitively expensive or operate to discourage litigants with meritorious claims or, to a lesser degree, defences from engaging in litigation. Secondly, and - it is believed – of far greater impact on the effective access to justice by impecunious litigants, is the issue of securing effective legal representation particularly in the defence of actions.
- 8.3 There is manifest desirability for improvements to the civil legal aid system in Ireland. The Courts, in particular the Superior Courts, have increasingly had to determine cases that have (at least) one litigant in person participating. The consequences of this for the smooth, efficient and economical administration of justice are well known. In the event that civil legal aid were to be made more widely available this would undoubtedly lead to the smoother and more efficient administration of justice in the civil courts.
- 8.4 The Gillen report is also very instructive on measures that can be taken in the short-term, which should not present a significant cost to the State but should yield very significant benefits to both court users and the courts themselves, including the saving resources elsewhere within the system. A thorough analysis of the impact of litigants in person on court resources was undertaken and revealed the following⁶:
- Significant time was taken up both in courts offices and before the Masters in addressing queries from litigants in person requiring basic information on how to deal with and participate in proceedings.

⁶ Gillen Report, p. 158 – 159

- Some litigants in person were found to submit excessively long affidavits – in one case an affidavit running to 94 pages not including exhibits – and to engage in lengthy arguments in court that are devoid of merit. In each case this would often lead to the wasting of time in court and an adjournment of the matter to another date.
- Directions and orders, including orders for discovery, were not being complied with by litigants in person causing delay and wasted listings in court.

8.5 The Gillen Report expresses the belief that litigants in person are not a group that need to be ‘dealt with’ but rather, like any other court user, they should be facilitated in obtaining effective access to justice. In this regard, the report opines that the following should be made available through the use of the court website and social media:

- A basic guide to forms, pleadings, applications and legal submissions;
- A basic guide to court etiquette;
- Information on the stages through which a case progresses;
- The importance of time limits for applications and appeals;
- Alternatives to litigation through the courts;
- Basic information on how evidence is received in the civil courts;
- Information on access to pro bono legal advice and/or representation;
- Information on the use of McKenzie Friends;
- Information on the costs implications and the consequences of breaching court orders;
- Information for vulnerable persons.

8.6 The Council considers that there is no reason why this information should not already be freely available in one location, prominently displayed in an understandable format online. The Guidelines to Litigants in Person issued by the Pleadings Section of the Central Office should be prominently displayed on and linked on public service websites such as citizensinformationboard.ie, etc. Were this information to be made available it is probable that time lost elsewhere in the

system, be it in the Central Office or before the Master or Judges of the High Court, would be won back.

- 8.7 In addition to this information being available, a practice should be adopted in Court Offices whereby when a litigant in person either issues proceedings or enters an appearance in person is given a notice in writing bringing the availability and location of this information to their attention as well as the importance of them reading it carefully. The litigant in person should thereafter be required to certify in writing that they have received, considered and understood the information. The information currently provided online, while considerable in its detail, is not in one central location, is unnecessarily difficult to identify where on the website the information required is located and when located is overly complex.
- 8.8 There has been a considerable increase seen in the involvement of McKenzie Friends in litigation. The principles applicable to McKenzie Friends have been developed by the Superior Courts in the course of a number of judgments that touch upon same. The Court of Appeal and High Court practice direction dated 31 July 2017 concerning McKenzie Friends participation in cases before those courts is welcomed, as is the corresponding practice direction issued in relation to the Circuit Court. Nonetheless, such is the current prevalence of McKenzie Friends it is felt that the time has come for the introduction of a bespoke rule(s) of court that consolidates and, where appropriate, reforms the governing principles in order to properly regulate and govern their involvement in proceedings in a consistent fashion.

9. EXPLORING ADR PROCESSES – EARLY NEUTRAL EVALUATION

- 9.1 Early Neutral Evaluation (“ENE”) and the benefits thereof are considered in the Gillen Report⁷. ENE offers a half-way house between mediation and arbitration; it provides a forum in which parties for whom mediation has either failed due to entrenched positions or is otherwise not an option to have their case independently assessed without being bound by the views formed by the evaluator. It is described in the Gillen Report as providing an opportunity for parties to be given a ‘reality check’ on the merits of their respective cases, thereby encouraging the parties to be realistic about the likely outcomes in the event the case proceeds to full hearing and instead consider settlement.
- 9.2 It is envisaged that were ENE to be facilitated and/or encouraged by the Irish Courts that, similar to mediation and arbitration, the role of evaluator would be filled by a barrister, solicitor or retired judge assigned with the mutual assent of the parties. The practice in Northern Ireland appears to favour the engagement of sitting judges to conduct ENE, however, while this may offer a cost-saving, and therefore incentive to the parties, in light of the limited judicial resources available or likely to be available to conduct ENE and the pressure already applied to those resources it seems impracticable that an additional layer of work be that of the Judiciary. Against this there is the clear benefit of having a sitting judge give a preliminary view on the merits of the case insofar as the parties are likely to give that view the appropriate weight in the circumstances and carefully heed the opinion of the evaluator thereby further increasing the likelihood of settlement. Already in England and Wales there is an example, cited in the Gillen Report, of a case where upon the failure of mediation the High Court in London directed the parties to engage in ENE⁸.
- 9.3 It is felt by the Council that should the Review Group recommend that ENE be encouraged and facilitated that it will be necessary, in order to avoid the risk of such

⁷ Gillen Report, pp. 268 - 270

⁸ Seals & Anor. –v- Williams [2015] EWHC 1829

a practice to become a passing phase or limited to specific kinds of actions (ie. family law proceedings, employment disputes) that bespoke rules of court be developed that clearly identify the circumstances under which the Court will be obliged to consider whether it should, of its own motion, issue directions that the parties engage in the ENE process and which also provide guidelines of the circumstances under which a party may apply to the Court for directions to seek ENE and crucially the point in proceedings at which such an application may be made in the absence of consent from all of the parties. In order for ENE to be of benefit, and the evaluator in a position to fully consider the merits of the case, the Council considers that the earliest point in time at which ENE should be sought is after the pleadings have closed and preferably after the parties have made discovery. In addition, were parties to make use of interrogatories and notices to admit facts this may also contribute significantly to the evaluator's capacity to fully assess the matter in question.

10. MODERNISATION OF THE COURTS

- 10.1 There is no denying that technology will and must play an essential role in the administration of justice into the future. The way in which people conduct their daily lives and the manner in which companies engage in commerce is now and, it would appear, forevermore inextricably linked to technology. To that end a number of rules surrounding the practicalities of litigation in the Irish Courts are now entirely outmoded and unduly cumbersome and expensive having regard to cheaper, reliable and more efficient options that technology now makes possible.
- 10.2 The High Court has recently demonstrated in the course of applications for substituted service that it is amenable to permitting the service of proceedings electronically whether by email or by way of social media where it can be established to the Court's satisfaction that the intended recipient of the proceedings concerned will receive them if they are served in this manner. Developments in judicial attitudes to technology such as this are to be welcomed but it is not progressive enough.
- 10.3 The Council considers that the objective of the Rules Committees should be to move towards service by way of email as a primary method of service of proceedings in favour of personal service. Clearly this departure from established practice will not occur overnight. It is suggested that the primary class of recipient of proceedings to focus on are registered companies. A company either upon registration or on the filing of annual returns should have to provide to the CRO the details of a company email address. This email address should appear on the CRO register of companies alongside the address of the company's registered office. Were this change in practice achievable, the Council can conceive of no reason why it should not be permissible under the Rules to serve a corporate entity by way of email.
- 10.4 The Council notes that it is anticipated from Head 9 of the Courts and Civil Law (Miscellaneous Provisions) Bill 2017 that the Rules Committees will be give the power to provide rules for the electronic filing of documents and issue of proceedings if and when the Bill is enacted.

- 10.5 The Council does not consider it desirable that members of the public be permitted general access to documents filed in the course of proceedings either in the course thereof or following their resolution. It is felt that the need for justice to be administered in public is properly served by the availability of general information concerning the case in question on the High Court Search Database, including when the matter is next listed before the Court. Moreover, third party service providers, it is understood, now offer a service of monitoring specific cases so that interested parties will be notified in the event that progress is made in a case. Members of the public who are interested in a particular case may, armed with the information currently available to the public, attend at the hearing of a case if they chose. It is felt that were documents to be available for members of the public to inspect this may have the negative consequence of discouraging citizens from seeking justice in the Courts lest the material in the case be available, either temporarily or permanently, to be scrutinised by members of the public.
- 10.6 The Council sees no difficulty with the establishment of a database to which registered stakeholders (solicitors, insurance companies etc.) have access for the purpose of fraud detection and prevention provided that only so much information as is necessary for such objectively justifiable purposes is made available.

11. JUDICIAL RESOURCES

- 11.1 Too much of decision making in our courts is currently required to be carried out by constitutional office holders. Where this extends to non-core decisions (e.g. interlocutory applications), alternatives should be found.
- 11.2 An obvious solution is to provide for such decisions to be taken by other persons. In the UK and Northern Irish courts, a system of Masters with decision making powers works very well.
- 11.3 The type of decisions which could be undertaken in this manner should not necessarily be limited to traditional interlocutory applications. With suitable training and resources, the types of decisions involved could be extended to many of the summary issues currently considered by the court. Case management is another area where this should be encouraged.
- 11.4 Once there is recourse by way of appeal to the Court, there can be no issue with compliance with constitutional rights.
- 11.5 Specialist judges should (with appropriate training) be assigned to particular lists and cases. Similarly, the possibility for the assistance of judges in complex cases with independent expertise (whether in the form of assessors or otherwise) should be considered.
- 11.6 Finally, it is worth noting that the system in other jurisdictions has benefitted from the use of part-time judges, drawn from the pool of practitioners. Whilst there are obvious logistical difficulties with such a system, the Council does not consider that all of the traditional counter arguments (proximity, size of the legal system) continue to be valid. It is worth therefore examining this issue in more detail, perhaps in a follow-up to this report.



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