SUBMISSION TO THE REVIEW OF THE

ADMINISTRATION OF CIVIL JUSTICE

Eoin Martin B.L.

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This submission is addressed towards the following two topical areas:

(a) Improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure;

(d) Reviewing the use of electronic methods of communications including e-litigation and possibilities for making court documents (including submissions and pleadings) available or accessible on the internet.

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(a) Improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure

- Interlocutory Motions and other Pre-trial Applications
    - At present, a large amount of court time and a significant amount of litigants' resources are expended on oral hearings in relation to interlocutory motions and applications. A typical High Court plenary action, for example, a personal injuries claim, is likely to involve multiple court hearings prior to the trial.
    - For example, it would not be uncommon for a single action to require one or more common law *ex parte* applications for substituted service or the like, and one or more *inter partes* motions for judgment in default of defence, to compel replies to particulars, joinder of a third party or discovery. Furthermore, parties must attend a court hearing to fix a trial date. Most of these applications are grounded on affidavit and, in straightforward cases, require few if any oral submissions to

supplement the essential proofs on affidavit. Oral hearings of such applications are costly (one side's legal fees for solicitors and counsel would often be at least €750 plus VAT for the hearing alone, on top of the cost of drafting the paperwork) and time consuming (the common law motions lists on a Monday collectively consume 16 hours of court hearing time).

- In my submission, in many cases, oral hearings of simple interlocutory motions add little to the determination process. Either the proofs for substituted service have been adduced or they have not; either a party is in default of delivering particulars or they are not. It would be far more efficient if such motions were determined solely on the basis of written applications submitted electronically. The adjudication of such motions would obviously still be time consuming and labour intensive. However, processing written applications lends itself to more flexible organisation that could be spread more evenly across more judges and masters and dealt with outside of core court hearing hours.

- Another way to reduce the burden and cost of interlocutory motions would be to make greater use of binding directions from the outset of proceedings. Such directions should govern the exchange of pleadings and particulars and the exchange of discovery requests.

- For directions to operate across the board in all cases (as they currently do in the Commercial list for example), it is essential that there be a threshold at the outset where the directions are made. It would be impractical to have a directions hearing for every single plenary action (whereas there are only a few hundred Commercial Court cases each year, there are more than 10,000 personal injuries, chancery and non-jury plenary actions).

- An alternative might be to have a set of directions that applies by default and is engaged from the time a defendant enters an Appearance. Ideally, parties would be able to adjust their directions by consent without reference to court via an online portal. Such directions could be based on the current timelines provided in the rules (e.g. eight weeks for delivery of a personal injuries defence) but should be hard rules rather than guidelines (as they are currently

treated). The directions should have the force of a court order so that default of directions without either a court order or consensual variation leads automatically to a penalty, either in the form of stay on proceedings or an adverse costs order.

- Consent Applications

    - The strongest case for oral hearings to be replaced with electronic applications is where the parties consent to simple procedural steps. For example, it should be possible to fix dates for hearing on consent with lawyers needing to attend court in person. Similarly, motions which are being struck out on consent or where straightforward orders are sought on consent currently require attendance before a registrar in court on the return date or adjourn date of the relevant motion. This could easily be replaced by an electronic application made by the parties remotely.

- Masters of the High Court

    - Where oral hearings are necessary (and indeed where other motions might be processed electronically), it would be desirable if all but the most complex interlocutory motions could be dealt with by not one but several masters of the High Court. This would significantly free up High Court judges for hearing substantive matters. For example, apart from the Monday motions lists, at present, a considerable amount of time in the chancery and non-jury lists is taken up with motions and matters for mention which often take up to an hour each day.

    - The Master's Court should be equipped with a digital audio recording (DAR) set. At present, it is anomalous in lacking this facility. Courts of lesser jurisdiction such as those of County Registrars and District Courts do have DAR facilities. Given that there is an appeal from orders of the Master, it is appropriate that a facility exists to obtain an accurate record of the decision under appeal, in circumstances where written decisions are not typically provided.

- Contempt of Court

    - The laws and procedural rules governing contempt of court and orders for attachment and committal should be codified, in statute and the rules of court respectively. Similarly, codified rules should govern the response to allegations of perjury. Breaches of court orders are serious but at present, they are attended with excessive *ad hocracy*, a lack of transparency and a lack of clarity and consistency in how they should be dealt with.

- Jurisdiction of the Circuit Court

    - While the actual setting of the jurisdictional threshold of the Circuit Court is probably a matter for the Oireachtas more so than the Review Group, it would be appropriate for the Review Group to consider the most efficient distribution of cases between the Circuit and High Courts.

    - For example, while catastrophic injury and medical negligence claims should probably always be dealt with in the High Court, the majority of personal injuries claims, even for relatively serious injuries, could be dealt with in the Circuit Court by a junior counsel alone. The current practice whereby a personal injuries case worth €60,001 typically involves one junior counsel and two senior counsel on the plaintiff's side is needlessly wasteful of costs and undermine the junior bar by depriving junior barristers of the opportunity to develop their trial advocacy skills in straightforward cases. The threshold distinction between the Circuit and the High Court also has the invidious effect of incentivising plaintiffs to commence proceedings in the High Court to pressurise defendants to settle to avoid higher costs and potentially much higher awards.

    - A flaw in the traditional setting of the monetary thresholds of the District and Circuit Courts is that they are not index-linked. Consequently, the jurisdiction of these courts shrink in real terms because of the effects of inflation, as soon as the new limits are set. The jurisdiction of these courts did not change between 1991 and 2014 meaning that the maximum value of cases such courts could deal with was considerably lower in real terms at the end of that

period than it was at the start. This necessarily meant that cases which in principle the Oireachtas had intended to remove from the High Court ultimately ended up being dealt with in the High Court. Without commensurate adjustments of resources, this is inefficient and wasteful.

(d) Reviewing the use of electronic methods of communications including e-litigation and possibilities for making court documents (including submissions and pleadings) available or accessible on the internet.

As a general comment, in my opinion the courts.ie website is utterly unfit for purpose. It presents a vast and diverse range of enormously useful information, probably to a greater extent that any other State website except for irishstatutebook.ie. However, it is undermined by a severe lack of functionality and is difficult to navigate and search. Its most serious flaw however is how little information it makes available to litigants or lawyers about their own cases.

As a matter of principle, making information about the laws of Ireland readily publicly accessible is an important aspect of the rule of law and the principle that laws should be publicly promulgated. As a matter of practice, making more information readily accessible to litigants and lawyers has the potential to enormously streamline the conduct of litigation.

- Publication of Documents
    - Court orders should be available electronically in PDF on the Courts Service website in the majority of cases unless especially sensitive. As a practitioner, it is enormously frustrating that one cannot easily find out what orders have been pronounced in open court about cases one is involved in.
    - Originating summonses, motions or petitions and affidavits that have been opened in court or read by a judge should also be publicly available in electronic format. While justice is supposedly administered in public, in reality, a great deal of civil litigation plays out in writing. For persons that have not been served with all the

documents in a case, the proceedings in question may as well be happening in private. This hinders the legitimate interests of all sorts of people, including journalists, defendants who have not yet been served and parties whose affairs might be affected by the outcome of litigation. Given that the courts are the publicly sponsored dispute resolution fora that administer justice in the name of the public, there should be a strong presumption in favour of publishing documents lodged in court. Publication of these types of documents will require careful consideration of how reporting restrictions and protection of personal data will operate. However, transparency should be the default setting subject to exceptions, rather than the reverse.

- The "High Court Search" facility on the courts.ie website is a good example of the current functionality gap. It has great potential but tells litigants and lawyers astonishingly little about the litigation they are involved in. The documents currently referenced as filings should in future be available to view in PDF.

- Online litigation portal

    - Granting litigants private access to an online portal when they become involved in litigation would offer immense opportunities to improve the efficiency of case management and document exchange. If the suggestions made above whereby interlocutory motions, consent applications and applications for hearing dates are processed electronically are to be facilitated, it would require the parties to have private access to an online account dedicated to their proceedings which would allow them to communicate securely with each other and the court. It would also allow documents to be filed electronically, obviating the need to attend courthouses in person with paper documents. That in turn would ensure that the Courts Service has electronic copies of all documents, which would obviate the need to scan or copy them. An online portal would most likely be much more user friendly for lay litigants.