REVIEW OF THE ADMINISTRATION OF CIVIL JUSTICE

SUBMISSIONS OF THE HIGH COURT

(A) Improving access to justice

As noted previously by Kelly P., the problem with access to the courts is that *"the only people who can litigate in the High Court are paupers or millionaires"*. With a view to tackling this issue and ensuring access to justice for all, the following proposals are made:-

(i) A review of the jurisdiction of the High Court to identify proceedings which could be adequately dealt with within the jurisdiction of the Circuit Court or by some other appropriate forum, e.g. specialist tribunals.

(ii) The removal of inefficiencies and unduly onerous court procedures to facilitate expeditious and more cost effective hearings.

(iii) Increasing and improving access to the courts to ensure that as an essential organ of the State, the courts do not become alienated from society.

(iv) Improving cooperation between the judiciary and other branches of the legal profession to ensure that individual litigants who are unable to afford or do not wish to have legal representation, receive a fair trial.

(v) Improving the resources, buildings and staff to run the courts effectively.

(vi) Embracing the use of technology to improve the effectiveness and efficiency of the courts combined with a support network for those using the system.

(vii) Allocating resources to ensure that greater time and opportunity is given to the trial/hearing judge to read the papers in advance and to prepare for the hearing. This was the original intention when the Commercial Court was established in 2004 but because of pressure on the court and the volume of cases, judges hearing cases in the Commercial List routinely have to start hearing a new case on the day after or shortly after the conclusion of the previous case. This equally applies to judges in other lists who have to deal with lengthy cases. There is no doubt that the greater the opportunity there is for the judge actually hearing the case to read and familiarise himself or herself with the papers, the more efficient the conduct of the case at hearing will be.

These issues are explored further in the course of these submissions.

(B) Reducing the cost of litigation including costs to the State

It is widely accepted that the cost of civil litigation is excessive and needs to be tackled. In this regard, reform is suggested in the manner in which the courts conduct hearings in the Non-Jury/Judicial Review ("J.R.") and Chancery Lists as follows:-

(i) Introduction of a time limit parties may spend in court:

- The Rules of the Superior Courts ("RSC") already make provision for the imposition of time limits in this regard**,** although not currently implemented. The new RSC (Conduct of Trials) 2016 contain provisions for the management of time at trial and empower the courts to limit the duration of trials to such a time as the courts consider consistent with the efficient conduct of trials and the requirements of justice.

(ii) The exchange of witness statements in advance of hearings would help reduce time spent on oral evidence and cross examination.

(iii) Consideration to be given to widening the scope of the rules in relation to security for costs. Currently, in the case of personal plaintiffs, security is generally only available against persons resident outside the EU. Any party subjected to vexatious litigation by a party unlikely to be a mark for costs should have the right to seek security. Security applications could be dealt with as they are currently which is on the basis that the defendant merely has to show that he or she has a *prima facie* defence and that the plaintiff is unlikely to be able to meet the costs if he or she loses. This requirement should apply to all forms of litigation.

(iv) Consideration to be given to limitation of costs to the time allotted by the court to the case. In the event of any overrun, the court will have discretion in relation to the issue of costs but for stated reasons only.

- An alternative solution would be to provide that the costs in proceedings could not exceed the amount of the award; an analogous legislative provision already exists by virtue of s. 17(1) of the Courts Act 1981.

(v) The introduction of a limit on the length of written submissions.

(vi) Consideration to be given as to how to eliminate the financial incentives, by way of legal costs, for cases brought in the High Court which could and ought to have been litigated in the lower courts. One possibility is that if there was a binding and clear costs rule for such challenges such that allowed an alternative but cheaper way to resolve disputes, costs

awarded would be the costs on the lower scale, i.e. the cheapest alternative.

(vii) The introduction of case management for long cases to ensure engagement between the parties and experts prior to the trial date. Parties should be required to agree on books of core documents and books of authority prior to trial.

(viii) The transfer of Garda Compensation cases to PIAB for a more cost effective disposal of such cases. Clearly this would require an amendment to the Garda Compensation legislation to facilitate same.

(ix) In interlocutory or plenary hearings, the introduction of the exchange of skeletal submissions (of no more than five pages) regarding the relevant causes of action prior to the hearing.

(x) In personal injury litigation, the introduction of a rule to disallow costs, even to successful parties, in the event of unnecessary witness testimony which has prolonged the hearing of the case.

(xi) In J.R. proceedings, a significant number of High Court judges are required to deal with these cases. Approximately one in five succeed. There is therefore a strong argument for raising the threshold requirements for leave. All that is currently required for leave is an arguable grounds threshold which renders almost meaningless the requirement for leave, although not entirely. In some cases however, e.g. planning, there is a requirement for a substantial grounds threshold for leave which could be more widely deployed.

(xii) Consideration to be given to the introduction of specialist tribunals to deal with issues such as appeals against decisions of Government

departments to help elevate the work load of the High Court and to provide a more cost effective way of dealing with such issues. Such tribunals could be modelled on the system that prevails in England and Wales.

(C) Improving procedures and practices so as to ensure timely hearings

The primary cause of delay in getting cases on for hearing is lack of judges. It has been recently stated frequently that Ireland has one of the lowest number of judges per head of population in Europe. The situation can only get worse with the increase in population and the ever expanding types of litigation that come before the courts. In this regard, it is suggested that consideration be given to the following:-

(i) The introduction of court masters and deputy masters to deal with the administrative lists which are currently dealt with by the High Court on Mondays. This would immediately result in a 25% increase in the availability of judges to hear cases with a similar reduction in waiting times. As of the 10th April, 2018, there are 10 masters appointed in the High Court of England and Wales. There are 7 masters of the High Court appointed in the High Court of Northern Ireland. They deal with procedural matters. Again, while undoubtedly requiring further resources, the appointment and use of masters and deputy masters would clear space and afford judges greater time both to prepare for cases coming on for hearing and to write judgments in cases in which the hearing has been concluded. A considerable amount of time is spent in motion lists on Mondays dealing with motions for judgment in default of appearance or in default of defence, motions for discovery, motions

to compel replies to particulars and similar relatively routine procedural applications. While not all of those cases may be appropriate to be dealt with by a master or deputy master, most are. It would be useful to give further consideration to the appointment and use of masters and deputy masters to enable judges have the appropriate time to prepare for cases and to write judgments.

(ii) The movement to a judge-led system of litigation (as in J.R.) across all areas, rather than a party-led system. Thus, every initiating document would get a return date and there would be no option for just issuing an open ended set of proceedings that could drag on for years. This, however, would have major resource implications requiring financial investment.

(iii) The provision of a helpdesk/information/support service for personal litigants to ensure that justice is done in the courtroom when a case involving a lay litigant comes on for hearing. This would remove the necessity of adjourning cases where the papers are not in order, where documents have not been properly filed or served and other such procedural issues, thereby enabling the court to deal with these cases more efficiently.

(iv) The devising of a more meaningful and stringent test for the grant of leave in J.R. applications.

(v) Widening the scope of the rules in relation to security for costs as aforementioned should deter vexatious litigants.

(vi) The allocation of longer cases in the Commercial List and other lists as early as possible to the judge hearing the case. This would afford the

opportunity to the trial/hearing judge to engage earlier with the parties so as to ensure, for example, that the parties have agreed time allocation between them and to ensure that the papers are in the form required by the court. It is difficult with current resources for such allocation (or docketing) to be done.

(vii) The allocation of time immediately following the conclusion of a lengthy hearing to commence work on the judgment (this is highly desirable for a judge hearing cases in the Commercial List (and indeed other lists)). This is often not possible in light of the fact that it is often necessary to commence hearing another case on the day after or shortly after the conclusion of the previous case. While this is important in all cases, it is particularly important in commercial cases where, in light of the potential opportunities of increased work and litigation in the context of Brexit, it is important to be in a position to demonstrate that not only can cases be given an early hearing date, those cases can be decided and judgment given as quickly as possible after the conclusion of the hearing. There is little point in obtaining an early hearing date if it then takes considerable time thereafter to produce a judgment. Such writing time immediately after the hearing is also a much more efficient use of court resources, since what might take a certain number of hours or days immediately after the hearing of a complex commercial case when matters are fresh in the judge's mind, will take two or three times longer if it is commenced weeks or months after the completion of the hearing and after the interposing of other equally complex commercial cases.

(D) The removal of obsolete, unnecessary or over-complex rules of procedure

The Rules Committee might be invited to make submissions with regard to reform in this area.

Consideration might also be given to the following proposed rule changes:

(i) The introduction of a provision under the Rules permitting a party to sue a person or persons unknown. Currently, litigants have to come to court to get leave to sue a person or persons unknown as otherwise the proceedings cannot be issued in the Central Office.

(ii) Under the Extradition Rules, the removal of the requirement for the judge of the High Court to be required to personally sign the committal orders under the 1965 Act and 2003 Act.

(iii) In asylum matters, a review of O. 84 in circumstances where some of the well intentioned changes in 2011 have proven counterproductive.

(iv) A practice direction/amendment to the RSC in commercial cases designed to reduce the volume of papers involved in those cases. In particular, the practice direction should require the parties to prepare an agreed core book of documents well in advance of the case (in preparing the core booklet the parties should be required to avoid duplication of documents and to ensure in particular that any chain of e-mails should be presented in a way that enables the e-mails to be read in sequence but without repetition such that the book does not contain multiple copies of any individual e-mail). This will enable the parties to focus their minds on the relevant documents; enable the judge to be familiar with these documents in advance of the hearing and will avoid the necessity for the parties to prepare and for the court to read and familiarise itself with

boxes and boxes of documents, most of which are never referred to or mentioned in the course of either evidence or submissions in the case. It could then be confirmed at the directions stage (either by the judge actually hearing the case or application or by the judge in charge of the Commercial List) that such a core book of documents has been prepared. This should be done and confirmed well in advance of the call over on the Friday preceding the hearing of the case.

(E) Reviewing the law of Discovery

Discovery in its current form adds greatly to delay, and indeed costs, in all High Court litigation. On the assumption that some form of discovery will be retained, discovery motions could be dealt with by a deputy master system and not the court.

In addition, it is suggested that there would be a general obligation without court order for all parties to make discovery of any relevant documentation within a certain time period, e.g. eight weeks of service of the notice of trial or in the alternative, within a certain time after the defence.

Furthermore, a plaintiff in a personal injuries action should be obliged, without court order, to make discovery of their relevant pre-accident medical records for a period of three years prior to the accident when initiating proceedings. At present, most plaintiffs consent to making such discovery but usually after motions have issued in this regard.

In recent years, there have been many useful publications dealing with suggested reform in this area. It is conceded in all that reform in this area would limit the extent of exposure of all parties to significant costs orders arising from discovery applications which rarely bear fruit.

(F) Mediation – encouraging alternative methods of dispute resolution

The law in relation to mediation is now contained in the Mediation Act 2017 which imposes a duty on a solicitor prior to the issuing of proceedings to advise the client to consider mediation etc. and allows a court to invite the parties to consider mediation as a means of resolving disputes.

Consideration might be given to the following suggestions with regards to the use of mediation in proceedings:

(i) In medical negligence cases, extending the obligation to advise mediation prior to the initiation of proceedings to be repeated again upon service of the notice of trial, having regard to the nature of the proceedings and the fact that it can take a number of years for such cases to come on for hearing.

(ii) Identifying the particular types of litigation whereby there would be merit in compulsory mediation.

(iii) Observing how other jurisdictions e.g. the Netherlands, have developed online dispute resolution systems.

(G) Reviewing the use of electronic methods of communications including e-litigation

It is clearly necessary for the courts to embrace the use of technology as a means of improving access to justice and reforming the legal system, in line with contemporary standards. The introduction of a single web-based system for civil litigation, leading to e-filing and management should improve access to justice. However, clearly the aim must be to create a system which enables users to access web pages with ease and to guide them through the litigation process, particularly in light of

increasing numbers of lay litigants. Such a system would clearly require a backup support network, whether through telephone or secure live web chat platforms or face to face, to assist users to navigate the system. In addition, it would assist in tailoring the system to meet the needs of its users by way of regular updates to the system and its operation.

A move towards such a system would clearly result in reducing the amount of times an individual is required to attend court, thereby reducing the cost and duration of litigation.

(H) Identifying steps to achieve more effective outcomes for court users

Arising from the recent global financial crisis, constraints on available resources inevitably affected the outcome for court users. In addition, it led to a proliferation of unprecedented lay litigants at a time of fundamental societal change.

The volume of lay litigants in the court system continues to prevail and the problems ensuing are twofold: lay litigants are often intimidated by the court process and are often unlikely to properly secure effective access to the judicial process without assistance. Further, the court itself is regularly hampered in administering justice due to unruly and intimidating lay litigants, particularly those who attend court with a core support group. The latter issue needs to be addressed by way of adequate and appropriate training for judges and by providing a secure and safe environment to ensure the effective administration of justice.

In respect of the former issue, the commitment to do justice must be embraced by all stakeholders in the legal system. The absence of *pro bono* advice services and organisations has resulted in a lack of support for vulnerable court users and lay litigants. The legal profession needs to be encouraged to develop its own *pro bono*

schemes to assist more vulnerable court users and to give greater assistance for those who need it most.

Further investment is clearly required in terms of staffing levels to facilitate and support the effective administration of justice. Investment is also required to ensure that court buildings are suitable for vulnerable court users including those with disabilities.

It is anticipated that the long awaited Assisted Decision-Making (Capacity) Act 2015 will be commenced on a phased basis later this year dealing with wards of court.

Consideration might also be given to some very simple changes which could be implemented in the short-term, with limited financial investment, to assist court users in their day-to-day use of the court system:

(i) An update on the Court Services' website to include a map of the Four Courts building outlining the location of the various courts and offices.

(ii) The inclusion of a map also at the public entrance to the Four Courts buildings so that litigants can easily locate the court or office which they are seeking to attend.

(iii) An information/helpdesk to assist court users with any queries.

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