

TO:

Group chaired by the President of the High Court, Mr. Justice Kelly

FROM:

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SUBJECT:


Review of the administration of civil justice

ISSUE:

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

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Signed:



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Existing Case Management in the Circuit Court

The rules with respect to case management are set out in the Circuit Court Rules ("the Rules").¹ O.19A of the Rules sets out general case management procedures which apply to equity proceedings, proceedings on foot of a Succession Law Civil Bill, other proceedings including claims for specific performance, claims for damages for breach of contract in respect of the construction, extension, alteration or repair of a building or other structure and any other designated category of proceeding. O.19A does not apply to proceedings to which Order 59 rule 4 (38) (family law case progression) or O.5B apply (i.e. actions for possession and well-charging relief).

Order 19A rule 3 empower the Court or the County Registrar as may be, of his/her own motion, at any listing or hearing or on application by any of the parties by motion on notice, to give a case progression direction where satisfied that it would be appropriate to do so, having regard to the complexity of the proceedings, the number of issues or parties, the likely volume of evidence, or for other special reason, such reason to be specified in the order.

Where such a direction is given, the proceedings are listed for case progression before the County Registrar who issues a summons, giving not less than twenty-one days' notice, and the parties not later than seven days prior to the hearing shall file an indexed book of pleadings. The County Registrar maintains a record of all proceedings at case progression hearings. At the hearing the County Registrar establishes what steps remain to be taken to prepare the case for trial, fixes a timetable for the completion of all case preparation and may adopt any timetable proposed by the parties if satisfied that it is reasonable. He or she may make orders or give directions with respect to pleadings, the exchange between the parties of statements of issues, the identifying of issues in dispute between the parties, particulars, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions and examination of witnesses, or otherwise, which may be necessary or expedient, may fix the mode of trial and direct expert witnesses to consult with one another. Case progression hearings may be adjourned for the parties to avail of alternative dispute resolution.

Where there is undue delay or default with the case progression directions or orders, the Registrar may list the matter for hearing at the next sitting of the Circuit Court and furnish a report to the Circuit Court regarding the delay/default. The County Registrar may award costs incurred in connection with the case progression hearing as between party and party. Unless otherwise ordered by the County Registrar or the Judge, the costs of an application

Order 59 r.4(38) provides for case progression hearings specifically in relation to family law matters.

Proposal which focuses on improving case management in the Circuit Court

At the current time, a directions hearing arises as a matter of course in certain instances throughout the Court system (e.g. in civil appeals before the Court of Appeal, in matters before the High Court admitted to the commercial list and in family law matters). I also note the proposals envisaged by S.I. No. 255/2016 (*Rules of the Superior Courts (Chancery and Non-Jury Actions and Other Designated Proceedings: Pre-trial procedures) 2016*) which will no doubt be implemented once there are sufficient High Court Judges to enable this in practice. Provisions for case progression have been included in the circuit and district court Rules and occur as a matter of course in family law matters.

¹ See for example the Circuit Court Rules (Case Progression in Family Law Proceedings), 2008 S.I. No. 358 of 2008 and S.I. 539 of 2009

While it is accepted that case management rules currently exist, it is not the case that case management Hearings take place as a matter of course across a wide spectrum of civil actions in the Circuit Court. One would like to see directions Hearings and directions Orders becoming a matter of routine particularly across all Circuit Court civil actions. Practical steps towards achieving this end might include making amendments to Order 19A such that:-

- At any listing or hearing of any case before a Judge –
 - the parties shall submit an agreed *list of pre-Trial steps* which remain to be taken in the proceedings (including, but not limited to, Particulars, Interrogatories, Discovery, inspection of documents, inspection of real or personal property) accompanied by *specific time limits* in respect of the foregoing pre-Trial steps (hereinafter “the proposed Directions”);
 - and if it has proved impossible for the parties to agree the proposed Directions, each party shall submit separate proposals in writing in respect of the foregoing;
 - and unless satisfied that it is would be inappropriate to do so, the Judge *shall* issue a Directions Order in respect of the further progression of the case, in terms of the proposed Directions, or otherwise, as the Court deems appropriate.

Procedural changes to the rules may be effected by the Circuit Court Rules Committee, which was established pursuant to the provisions of Section 69 of the Courts of Justice Act 1936 and it holds a number of powers enabling it to make rules.² The rules are made with the concurrence of the Minister.³

Clearly the *form* of any amendment to Order 19A would require a considerable amount of thought and work. However, the foregoing rough draft wording is an attempt to illustrate the *substance* of my submission, namely, to try and bring about a situation whereby Directions Hearings become common place and Directions Orders are made as a matter of routine.

In addition to the foregoing, I would also like to see the Circuit Court specifically empowered to direct that, where a Judge deemed it appropriate (in the context of narrowing issues or otherwise), parties to proceedings provide witness statements of the type provided for in Order 63A of the rules of the Superior Courts. I also believe it would be helpful if parties were routinely directed to exchange written Submissions in advance of any Circuit Court Trial particularly on the civil side.

In very simple terms, let us take a situation where a Motion comes before the Court in circumstances where a party to the proceedings has failed to abide by the time limits in the Rules (e.g. a Motion for Judgment in Default of Defence; a Motion to strike out proceedings for failure to reply to Particulars or a Motion to strike out proceedings for failure to make Discovery). Experience tells us that Motions often come before the Circuit Court where *delay* by one party or another is a background factor.

At the heart of my submission is a twofold aim which I believe would assist in practical terms with the administration of justice but as regards reducing delays and increasing transparency:-

² For example, see section 66 of the Courts of Justice Act 1924, section 70 of the Courts of Justice Act 1936 , (as applied by section 48 of the Courts (Supplemental Provisions) Act 1961 and section 27 of the Courts (Supplemental Provisions) Act 1961).

³ Section 70 of the Courts of Justice Act 1936.

- a. to place an obligation on the parties to the litigation to look *beyond* the Motion at hand, to recognise what steps need to be taken in order that the relevant case is properly pleaded and ready for Trial, to compel those parties to *communicate* with a view to agreeing both the remaining *steps* and a realistic *timetable* for those steps; and
- b. to give the sitting Judge the power, indeed the obligation, to make appropriate Directions in the foregoing context, whether in accordance with a set of draft Directions and a proposed timetable which the parties have urged on the Court, or otherwise, as the circumstances warrant, in the Judge's view.

Benefits

In terms of benefits, I believe the foregoing would contribute to cases being progressed more expeditiously, towards Trial and would contribute to the orderly management of proceedings.

I believe it would also improve transparency. It can only help for parties to litigation to understand the timetable involved in their proceedings and the obligation to progress litigation expeditiously whether a Plaintiff or Defendant, legally represented or not.

The foregoing seems to me to have a wider public interest benefit, particularly given the limited resources available to the Courts.

Unfortunately, experience tells us that, all too often, a civil case in the Circuit Court may proceed at the pace of the slowest party to the dispute, in the absence of case management. In practical terms, where a party to a given civil action is "dragging their heels", the opposing party may well have to bring multiple applications to Court seeking Orders to compel the other side to plead the matter/take the necessary steps in order that a Trial can take place (e.g. to file a Defence, to reply to a Notice for Particulars, to make Discovery, etc.). The imposition of case management means that the Court dictates the pace of the litigation and this can dramatically reduce delay.

As part of a suite of case management measures, the Judge presiding over the Commercial List in the High Court (formerly High Court President, Mr. Justice Kelly and currently Mr. Justice McGovern) routinely requires that detailed witness statements are prepared by both sides and exchanged well in advance of a trial. This is in accordance with the powers conferred by Order (63A) of the Rules of the Superior Courts. The foregoing ensures that the parties to a dispute have a very clear idea of the evidence which will be adduced at a trial and as well as the specific witnesses who will be called. Prior to the trial of a case in the Commercial List, the trial Judge will also have this information, given the requirement to lodge books containing, inter alia, witness statement, in advance of the commencement of a trial.

The imposition of the foregoing discipline is in contrast to the "trial by ambush" which unfortunately occurs routinely in so many other instances, including in certain Circuit Court actions on the civil side. Where case management is not a feature of litigation and where witness statements do not have to be exchanged, and the parties to a case have no clear idea of what evidence will be given at trial, nor does the trial Judge until the case commences before her or him. It is submitted that the administration of justice is improved by the requirement of case management including the requirement to exchange witness statements.

It is submitted that the foregoing would introduce a transparency and a rigour which also has the very real potential to bring about much earlier settlements. The obligation to comply with case management directions' Orders and the obligation to prepare and exchange detailed witness statements could, in my view, also help to ensure that unmeritorious cases are disposed of at an earlier state or not instituted in the first place.

For the user of the Court service, on the civil side, the foregoing proposals could also contribute to improving the legal service which a client receives from their own solicitor/Counsel. This is in circumstances where active case management and the obligation to deliver witness statements will promote the discipline among solicitors of taking comprehensive instructions from all potentially relevant witnesses and committing these to writing in the context of a known obligation to prepare and exchange legal witness statements at a future point.

A consequence of the wider use of witness statements across a range of Circuit Court civil matters could well be that, from a much earlier point, all relevant parties to a given case are clearer about what evidence exists, or not, to back up the case in question. Similarly, a party to litigation will know well in advance of a Trial the case which the other side is making, not merely as pleaded but also as underpinned by a précis of relevant evidence.

Disadvantages

As against the extension of case management in the manner suggested, there would undoubtedly be additional time taken up by Judges having to deal with case management Hearings, even if only in the context of Motions which have already come before the Court. I am very conscious of the workload on existing Judges throughout the Court system.

As an aside, it is undoubtedly the case, speaking as someone with practical litigation experience for the past 25 years that more Judges are needed throughout the Court system.

However, it is submitted that there could also be a saving of time if, as suggested, the broader introduction of case management directions has the effect of limiting the necessity for parties to issue Motions based on the other side's delay in complying with existing time limits in the Rules (or a timetable previously made in a directions Order issued as a result of an earlier Motion).

The potential for *justice delayed* becoming *justice denied* underpins this Submission.⁴ It is noted that the introduction of case management has been particularly successful in respect of the Commercial List of the High Court and has not proved to be an insurmountable obstacle where case management is more common in other contexts.

⁴ For an analysis of delay in the context of applications to dismiss legal proceedings see "*Dismissing Legal Proceedings by Reason of Delay*" Mark Heslin, Commercial Law Practitioner, Volume 23, No. 7, P. 171 – 186 (copy available on request)