CHIEF STATE SOLICITOR'S OFFICE

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Review of the Administration of Civil Justice

Observations of the Chief State Solicitor's Office

1. Introduction

The purpose of this brief submission is to highlight issues which the Chief State Solicitor's Office would regard as being particularly worthy for consideration by the Review of the Administration of Civil Justice Group (the "**Group**"). We understand that it was agreed at the first meeting of the Group on 9 November 2017 that each member of the Group would highlight priority issues from their perspective with a view to particular topics then being selected for more detailed consideration by the Group. We are keen to participate in this exercise and look forward to considering the contributions from other Group members in due course and to assisting in their progression.

In each case, we have linked the issues which we would like to raise to relevant categories from the Terms of Reference for the Group. We have sought to raise issues under five of the nine such headings.

We wish to note at the outset that the issues highlighted in this submission are those which occur to legal practitioners in this Office from their experience of day-to-day practice in the area of civil justice. While our clients may share certain of our views, they do not necessarily do so and we are not speaking for any client in this context.

2. Reducing the cost of litigation, including costs to the State

2.1 Case management

As will be touched on throughout our submission, the application of clear and consistent case management practices is essential in order to enhance the administration of civil justice and to make our litigation process more streamlined and efficient. A key benefit of a more efficient system would be the resulting reduction in costs for all involved. We note that a number of detailed case management measures were set out in Order 63C[1] of the Rules of the Superior Courts (the "**RSC**"). Order 63C includes a general power for the Court to give directions and make orders so that proceedings before it can be determined in a way that is just, expeditious and likely to minimise costs. However a notice was subsequently issued by the Principal Registrar of the High Court in September 2016 to the effect that the rules shall not have any practical effect until appropriate necessary resources are available. Perhaps this Group could have a role in examining whether it would now be feasible to introduce these case management practices.

2.2 Judicial Review leave procedures

In our view, the existing procedure, set out in Order 84, rule 20 of the RSC, whereby leave of the High Court is required in order to bring judicial review proceedings, is not operating as an effective barrier to ill-founded or poorly pleaded cases being admitted. The threshold to obtain leave seems extremely easy to satisfy in practice.[2] This increases the number of judicial

[1] Introduced by SI 255 of 2016: Rules of the Superior Courts (Chancery and Non-Jury Actions and other designated proceedings: Pre-Trial Procedures) 2016

[2] The threshold being that set out in G. v. DPP – the key requirement of which is that the applicant would demonstrate an 'arguable case'.

review actions in being and has a significant knock-on impact in terms of costs to the State in defending such actions. We would welcome the exploration of an alternative filtering mechanism to reduce the volume of judicial review litigation.

This situation is particularly acute in Immigration and Asylum Judicial Review cases where, notwithstanding that the leave threshold is ostensibly higher (the applicant needs to demonstrate "substantial grounds" rather than merely an arguable case) and that previously a leave application was 'on notice' to the respondent to enable it to be opposed, there is now no effective filter mechanism. Possibly in recognition of the high volume of litigation in the area and the potential overlap in issues being heard at both leave and substantive stage, the practice has evolved since September 2017 so that all leave applications in the Immigration and Asylum List are now heard ex-parte, with no written submissions. In a direction to practitioners, the List Judge noted that:

- any grant of leave will be without prejudice to the determination at the substantive stage of any point that could have been contended for by a respondent at the leave stage;
- if leave is granted on that basis and if a respondent has sought to make oral submissions at the leave stage, parties are asked to be aware that costs of the leave application may be awarded to the applicant; and
- respondents are expressly invited to consider whether to postpone any such submission to the substantive stage.

In practice this has meant that leave is granted in all immigration and asylum cases with a resulting significant increase in the number of cases to be defended by the State, with associated costs, both direct and indirect in terms of allocation of resources.[3]

2.3 Mass Litigation – Holding Lists

In certain areas of litigation, a multitude of cases can frequently be brought on similar, if not identical points. Careful case management is essential in this scenario to avoid the Court system being entirely clogged up by such cases. In our view, consideration should be given to formalising, within the RSC, the practice of fixing a 'path-finder" or 'lead/test' case for hearings. This approach could have the benefit of reducing costs for all parties, particularly the State if the State is the respondent in each case. The RSC could set out reasonable procedures for identifying a 'lead' case and 'back-up' cases and could prescribe the parameters for operation of these cases. In our view, once the lead-case is identified, all remaining cases should then take their places in a list behind the lead case and await the hearing and outcome of that case. Furthermore, the requirement to file pleadings in the 'back-up' cases should be suspended so as to await the decision of the Court in the lead case. Currently the practice in the Immigration and Asylum List is frequently to require the filing of Statements of Opposition in all back up cases and we find that this is a significant cost burden on the State. It does not seem to us to be the most efficient approach in circumstances where, if the State loses the lead case, it may decide to settle the 'back-up' cases and if the

[3] By way of illustration, in our Office the number of new Immigration and Asylum judicial review proceedings received in 2016 was an increase of over 100% on previous years which had been fairly stable. The trend continued in 2017, with a further increase of 17% and to date in 2018 the new file numbers are particularly high – an increase of 63% on the same period in 2017.

State succeeds in the lead case, any statements of opposition filed in the 'back-up' cases would require amendment in any event to reflect the outcome of the lead case.

2.4 Court delays

In many areas of practice, one of the key issues which increases costs to the State is the delay in cases being heard in Court (see further paragraph 3 below). For example, in a protracted immigration and asylum case, the State incurs costs in defending the case while another arm of the State is also incurring increased costs by continuing to provide services to the applicant involved in the litigation. Any measures to reduce such delays would be welcome as this would help to reduce the backlog of cases, bring about earlier hearings and in turn would achieve significant savings for the State.

Court delays may be caused to some extent by the Court's flexibility in timeframes and in its willingness to grant adjournments and to hear a number of motions during the lifetime of proceedings etc. This is perhaps an unavoidable facet of our common law system but we would welcome greater discipline being brought to litigation timeframes and a greater premium being placed on Court time. If the Court was less flexible regarding granting adjournments and did not allow motions to run on or for parties to mention matters ad hoc which are not listed for a particular day, this would improve the predictability of the litigation system on a day-to-day basis, thereby allowing the parties to allocate their resources more efficiently in terms of preparation for and attendance at Court. If we could reach the situation where the Court ran a tightly time-tabled day with precise start and end times for lists, motions and hearings, this would in our view operate to the benefit of the parties in the longer term.

One area in which Court delay is causing particular difficulties is that of European Arrest Warrants being a hybrid of civil and criminal justice. The Council Framework Decision of 13 June 2002 (European Arrest Warrant) (the **"Framework Decision"**) provides for surrender of the person within 60 days (90 days in exceptional circumstances). As we understand the position, the Court is obliged to take cognisance of the Framework Decision time requirements but this is complicated by virtue of appeal procedures in our judicial system.

2.5 Reduction in length of oral hearings

A shift in emphasis from oral submissions to paper based applications could aid in reducing the length of oral hearings. If the Court's resources were increased, with appropriate researchers/judicial assistants etc. and the Judge was prescribed a role in researching/interrogating the issues, with less of a role for advocacy by the parties, then costs to litigants would be significantly reduced. This would however amount to a radical change to our civil justice system and might be more suitable for some areas of practice rather than others. In our view, Judicial Review would lend itself particularly well to this approach, as it is entirely paper based, with no oral evidence.

It should also be noted that while this approach would reduce the costs to the State as litigant, it would require significant funding by the State to support the Courts system / judiciary.

2.6 Article 40 Applications

In circumstances where a habeas corpus challenge is brought pursuant to Article 40 of the Constitution in respect of a High Court committal warrant or remand on foot of a European Arrest Warrant, it would seem more appropriate for that challenge to be heard directly by the Court of Appeal. This would prevent a multiplicity of applications being made to different High Court Judges arising out of the one warrant. This would ensure consistency of approach and would streamline the process. This may require a change in the Rules of the Superior Courts and/or a legislative change.

3. Improving procedures and practices so as to ensure timely hearings

3.1 Reduce ability to make late amendment to pleadings

In our view, a key factor in ensuring timely hearings is in ensuring that pleadings are well-argued at the outset so that the State, as respondent, knows the case that it has to meet. It can then make an informed decision as to whether to settle or to argue the case and if defending the case, can prepare detailed and specific opposition papers for the benefit of the Court. In recent months in the Immigration and Asylum area, we have noticed a relaxation of the practices applied in circumstances where applicants seek to amend pleadings that are before the Court. Leave to amend pleadings seems, from our perspective, to be granted very readily at any stage during proceedings. On certain occasions, amendments to pleadings have been permitted by the Court mid-hearing, leaving the State to meet an altogether different case. We find as a result that hearings then tend to take longer, may require an adjournment and costs are unnecessarily increased. Where an amendment to pleadings is necessary in the interest of justice, this should be reflected in a costs order against the relevant party. This issue may also link to an extent with the issue raised in paragraph 2.1 above as a more comprehensive scrutiny of pleadings at the ex-parte leave stage might avoid such difficulties.

3.2 Impose strict time limits at hearing

Timely hearings would be facilitated if the Court had a set time limit (e.g. one hour) for submissions and closing remarks, as is often the case in the Court of Appeal and as permitted under Order 36 of the Rules of the Superior Courts[4]. This would move us closer to the CJEU / US Supreme Court model. Perhaps rather than the parties providing an estimate of the length of time required for an oral hearing in advance of filing their submissions, it should be a matter for the Court to decide the time to be allocated, following the Judge's assessment of the written submissions and identification of the elements of those submissions on which he/she need to hear from counsel. Papers should be taken as read and the practice of pleadings being read aloud at hearing should not be facilitated.

3.3 Appoint specialist administrators to assist judges

Much of the work in efficiently managing a large list of cases is administrative rather than legal and perhaps if Judges had the benefit of a specialist administrator (or perhaps specialist

[4] As amended by SI 254 of 2016 on Conduct of Trials.

deputy masters), this might be of considerable benefit. Non-contentious matters or perhaps case management could be delegated to such administrators, thereby freeing up judicial resources. Specialist administrators with particular training could be of great assistance in net areas of law, for example, assisting with the procedural aspects of EAWs.

3.4 Introduce specialist divisions of the High Court

In complex areas of litigation, it is arguable that a specialist division of the High Court, run by a Judge with expertise in that area, would be able to deal with litigation more effectively and efficiently. This would be similar to the approach currently in place for Competition Law. The establishment of a specialist division would allow for tailored case management practices to be applied (including perhaps for judicial review, a more rigorous leave procedure). Two areas of practice which we believe would benefit considerably from this approach would be planning and environmental judicial review cases and procurement law challenges.

3.5 Changes to Court terms and business hours

It may be worth exploring the merits of changing the legal terms to better align with the academic year, i.e. three legal terms with a long vacation in July and August and Courts re-opening in September. This structure is adopted in Northern Ireland and would seem to fit more naturally with wider society. The majority of practitioners are likely back to full workload in September.

We would also suggest that the 'business hours' of the Courts might be extended to perhaps 9:30am – 4:30pm. Allowing a relatively small amount of additional Court time each day might help to speed up the litigation process and ensure timely hearings.

4. The removal of obsolete, unnecessary or overly complex rules of procedure

4.1 Review Supreme Court Practice Direction SC16

As practitioners, one set of procedures which we find overly complex is that in respect of appeals to the Supreme Court, as set out in Practice Direction SC16. The process has become very complex and onerous on the appellant in particular, both in respect of demands regarding the preparation of the various Booklets and the costs of providing same. If this process could be simplified, that would be very welcome.

Furthermore, the manner in which Practice Direction SC16 is interpreted at case management listings seems to vary somewhat from Judge to Judge. This in turn further complicates the process as the preparation for one appeal can be totally different to another. While we appreciate that the particular circumstances of one appeal might warrant different procedures, it would ease the burden on practitioners and reduce the time it takes to prepare a case for Appeal if a decision was taken that, insofar as possible, all case management and preparation for appeals will follow a single format.

4.2 Review the Subpoena Duces Tecum process

In our experience, the Subpoena Duces Tecum process can be applied in too vague a manner and is onerous/wasteful on non-party actors. Applications are currently made ex-parte, are imprecisely constituted and are not examined by the Master before subpoenas are issued. We would suggest that the process should be revised to be on notice, grounded on an affidavit and should address the adequacy or otherwise of any prior third party discovery applications/interrogatories/notice to admit facts/documents. The actual documents or categories of same should be specified and there should be a costs penalty if abused.

In the case of ordinary subpoenas, these should specify why the particular person is required and what category of evidence is sought from them.

5. Reviewing the law of discovery

A minor point in relation to review of the law of discovery is that the impact of the General Data Protection Regulation (EU/2016/679) will need to be taken into account. It is difficult to see how "voluntary" discovery requests from the State, or indeed from any third party, will be permissible post-GDPR and the Superior Court Rules may need amendment to reflect this new environment.

6. Reviewing the use of electronic methods of communication including e-litigation

6.1 Paperless litigation

This Office would see a real value in reviewing the potential increase in use of electronic methods of communication, including e-litigation. We understand that a system called eCourt is in development which would facilitate the presentation of documents to court in electronic form. At present, in large cases, an enormous amount of time is spent by practitioners in compiling bankers' boxes full of folders which invariably are only opened very partially to the court at hearing.

6.2 Electronic filing and communications

A forum whereby all Court paperwork could be filed electronically via a secure website with password protected webpages would be very welcome. This would be particularly useful in areas such as judicial review, where there is no oral evidence. Safeguards would need to be implemented to ensure that the electronic communication could reasonably be regarded as having been received by the recipient.

7. Examining the extent to which pleadings and submissions and other court documents should be available or accessible on the internet

This Office is very supportive of material being accessible on the internet, with redaction as appropriate. We find the current High Court search facility whereby practitioners can check filing dates, adjournment dates, orders (and whether orders have been perfected) to be very useful. If this could be extended to the Court of Appeal and Supreme Court that would be of considerable assistance. Furthermore, we would also welcome the online search facility

being extended to include Immigration and Asylum Judicial Review cases. In the absence of an online search in this area, we experience delays in accessing information and added costs as an attendance by Town Agents is necessary to obtain the information in hard copy. Consideration might be given to reviewing this position. The anonymising of the title to the proceeding might alleviate any difficulties. It is noted that Immigration and Asylum Judgments are published and readily available on the Courts Service website.