DUBLIN SOLICITORS BAR ASSOCIATION

SUBMISSION FOR THE REVIEW OF THE ADMINISTRATION OF CIVIL JUSTICE

February 2018

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BACKGROUND

The Dublin Solicitors Bar Association (DSBA) welcomes the opportunity to make this submission to the Review Group.

As the largest Bar Association in the country, the DSBA is uniquely placed to provide a practitioner's perspective on the range of improvements that can be made to our civil law system.

The DSBA acknowledges the objectives of the Review Group. In framing our Submission, we have focused, where possible, on practical & achievable improvements as may improve the administration of justice for all users, without significant financial cost or operational upheaval.

This Submission is structured along the broad areas identified in the terms of reference issued by the Review Group. We would welcome an opportunity to discuss and expand upon our submission if the Review Group so wishes.

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

Many of the recommendations made below are aimed at improving the efficiency of the civil litigation process and minimising unnecessary bureaucracy.

1. Plain Language

Amend Court Forms to include plain language. The use of plain modern language throughout the Court rules will increase accessibility (e.g. thereof and forenoon), minimise delay and improve efficiency for all court users.

2. Uniform use of terms

Amend Court Forms to include uniform use of terms to promote clarity and understanding (e.g. use of plaintiff/claimant and defendant/respondent). The current practice can cause confusion especially where there are lay litigants in the case and where for example the Respondent is the moving party in a motion.

3. Case Management and Listing

Case management and case progression need greater promotion and facilitation. Properly deployed, they have the potential to increase efficiency, save time and costs, and reduce the demand on judicial resources. They would also provide greater certainty in the scheduling of cases as only those cases which are going ahead on a day would be listed.

As a first step we recommend the full implementation of S.I. No. 254 of 2016 (Rules of the Superior Courts (Conduct of Trials) 2016 and S.I. No. 255 of 2016 – Rules of the Superior Courts (Chancery and Nonjury Actions and other Designated Proceedings: Pre-Trial Procedures) 2016.

The Case progression procedure under the Circuit Court Rules is not currently being utilised to its full potential or indeed at all.

4. Uniform Procedures

We recommend a uniform approach to basic procedures across all Court jurisdictions. The absence of such uniformity gives rise to the risk of inefficiencies and added costs.

5. Registered post

It is a necessary proof in each case that when case documents are delivered an Affidavit of Service is lodged with the Court to establish proof of service. Excluding the delivery of Plenary Summons or Personal Injuries Summons in the High Court and certain other enforcement documentation, generally speaking, registered post is used for service of the said documentation. Section 7(6) of the Courts Act 1964 provides that a 10 day waiting period is then required before swearing the Affidavit of Service. Since this statute was passed, technology has moved on and accordingly it is possible to track and trace receipt signatures within a day or so of sending the registered post. Accordingly, it should be possible to amend the rules to accept an Affidavit of Service earlier than the 10 day waiting period once the signature page has been exhibited. This would have the effect of expediting the proof of service being lodged to Court.

6. Declaration of Service

The District Court Rules provide that service can be proved by making a Declaration of Service and lodging same to the District Court Civil Office. There is no stamp duty on a Declaration of Service. While it is possible to make a Declaration of Service in the Circuit Court, experience would show that the office is reluctant to accept such declarations. The recommendation regarding proof of service by post is that the rules should be amended to accept a Declaration of Service and no stamp duty should be payable thereon. The Declaration would make it easier and cheaper for court users.

7. Payment of stamp duty

Unless one is in possession of a franking machine, it is necessary for practitioners to attend the Stamping Office at the Four Courts in order to put stamp duty on documentation, The hours kept by the Stamping Office are limited and it is sometimes necessary for an Affidavit or other Court document to be brought before the court urgently and without stamp duty, a situation which has to be rectified after the fact. Apart from the payment on the originating document (e.g. Plenary Summons/Civil Bill), it is recommended to put in place facilities for practitioners to pay stamp duty on line with reference to the title and the date of the document and to print out a receipt for stamp duty which can be attached to the original. This would be along similar lines to the payment of Stamp Duty on Deeds to the Revenue Commissioners.

8. Filing requirements

In any civil case in the High Court or Circuit Court, it is only necessary for the parties to lodge to the Court the originating documents, affidavits and Motions. It is not necessary, for example, for the parties to lodge Notice for Particulars, Replies to Particulars, Notice to Produce, Defence, but it is necessary for them to lodge the Affidavits of Verification, say, relating to them. It should be necessary for parties to file (but not stamp) the pleadings

of this nature to ensure that all documents are on the Court file. This would be of particular benefit where one party is, for example, a lay litigant and would ensure the court had full visibility of all pleadings.

9. Personal Injuries – Affidavits of verification

Currently as the rules stand, it is necessary for the Plaintiff to lodge an Affidavit of Verification with regard to all pleadings. Until, for example, an Affidavit of Verification is filed for the Personal Injuries Summons or Replies to Particulars, it is not possible for the Plaintiff to issue a Motion against the Defendant. It is not necessary for the Defendant to have lodged an Affidavit of Verification of its Defence before issuing a Motion against the Plaintiff. This is uneven and should be amended so that both parties have equality of process.

10. Notice for Particulars

The procedure regarding Notice for Particulars in the Circuit Court is contained in Order 17 of the Circuit Court Rules. Order 17 Rule 2 provides that the Defendant can raise particulars any time after the delivery of the Civil Bill and before the Defence has been filed. This means that unless exceptional circumstances arise, the pleadings are closed at the point the Defence is served. This makes for a streamlined procedure in terms of pleadings and should result in a more detailed Defence to enable the Plaintiff to prepare fully for case the Defendant intends to make.

11. Sequence of pleadings

Generally speaking, once the Defence has been served, the pleadings are deemed closed. This is a sensible approach meaning that there is an end point in the pleadings at which time any advice on proofs or discovery can be considered. Frequently however, in civil proceedings, a very general Defence with traversed denials is served without containing any real detail about the nature of the Defence, and which in turn gives rise to issue of a Notice for Particulars. (Order 19 Rules of the Superior Courts). We recommend that a Notice for Particulars can only be served following service of the Defence in limited and prescribed circumstances, or with leave of the Court.

12. Contents of Defence

One of the reasons that cases take so long to settle, is because of the inability (or failure) of Defendants to deal with the matter at issue in a meaningful way. At the present time, by virtue of the manner in which Sections 12 and 13 of the Civil Liability & Courts Act 2004 are interpreted, a Defendant continues to put in mere traverses by way of Defence. One has no idea, from reading a Defence, as to what a Defendant's position is. Defendant lawyers are under no pressure to set out their true position until the case comes to Court. That is when the case settles. If one can bring forward in time the focus on the defence that needs to be brought to bear by the Defendant, there is a greater prospect of cases resolving earlier and cheaper, and with the consequent benefit to the public interest.

If a Defendant had to set out what his / her position was with particularity that would require focus to be placed at the time of the Defence, particularly when such a Defence has to be verified by Affidavit.

13. Medical Records.

In personal injury cases, the Plaintiff will usually be asked after the Defence has been served to produce historic medical records. There is hardly an exception to this case. The requests in time and scope can vary. Obtaining records from medical practitioners must then be carried out separately in each case in a different way. Given the inevitability of these requests, the Court could consider introducing a practice direction whereby with the Personal Injuries Summons, relevant medical records for a period of three years prior to the incident which gave rise to the personal injury could be served. If anything further is sought by a Defendant outside of that time line would require an Order for Discovery, if not agreed.

14. Side Bar Orders

Order 30 provides the list of circumstances in which the County Registrar may issue an Order of the Circuit Court via a Side Bar. This could be extended to include a provision to renew or reissue an Execution Order in the office, and thereby obviate the necessity of a Court Appearance.

15. Enhanced use of Registrars

Greater delegation of non-contentious matters to Registrars and use of email to deal with non-contentious matters such as adjournments where the parties agree. Better management of adjournments with strict application of the rules in this regard.

16. County Registrars

Transfer jurisdiction of motions for judgement in default of Defence and Appearance to the County Registrar in Equity matters. Currently all Civil motions of this nature come before the County Registrar save in equity matters. In equity matters these motions are listed before a Judge of the Circuit Court. Very often further affidavits or proofs are required before the Court can proceed with the matter. That being the case, by making the Motions returnable before the County Registrar in the first instance, it would ensure that before matters are listed before the Judge all outstanding items have been attended to.

17. Review the Rules on Tender and Lodgement

The time limits for the Plaintiff to respond to a lodgement/tender are short and can be impractical. The time allowed, for example, might not permit the update of information to support the Plaintiff in making a fully informed decision, e.g. obtaining an updated medical report. Order 22 RSC could be amended to provide greater clarity.[1]

18. Interrogatories.

Expand the use of interrogatories without the requirement for leave of the Court. They help to narrow down the issues and prevent general allegations in pleadings, and assist both parties to prepare for and focus on the issues to be tried in the case.

19. Assignment of Judges

Consider assigning a case to one judge for its duration so that familiarity with the case will lead to more efficient management of the case.

[1] *Reaney v Ors v Interlink Ireland Limited (t/a D.P.D.) [2016].*

20. Liquidated Sum proceedings

Progress the proposal to centralise the Liquidated Sum proceedings in one office (unless they become defended). This would remove a significant burden from the other court offices.

21. Publication of Court listings

Notification, communication and publication of listings and hearing dates (i.e. Legal Diary and similar) need to be improved and modernised across all courts, with better search facilities.

22. Reading pleadings

The practice of reading aloud the pleadings and affidavits at the start of each case is very time-consuming. Effective case management would assist in focusing on the issues in dispute and reducing the amount of Court time taken up with reading matters into the record.

23. Judgements

The delivery of judgements needs to be timely. To this end, greater resources are needed together with improved case management and scheduling.

24. Class actions

There is a need for a dedicated process for 'class actions'.

B. Reviewing the law of discovery

It is self-evident that the current procedures governing the discovery of documents in litigation is cumbersome, slow and disproportionately expensive. Applying a cost-benefit analysis to a discovery process in many cases would find relatively limited benefit in the number and ultimate utility of the documents obtained when measured against the cost incurred in doing so, both in financial terms and delay to proceedings.

The primary aim of discovery has to be met while at the same time not ultimately losing any benefit through the delays and expense arising.

The DSBA notes the work of the Commercial Law Association of Ireland ("CLAI") and broadly supports the suggestions put forward in its discussion document produced in late 2017 as meeting the aims of the Review Group – namely to improve access to justice and reduce the costs involved in litigation.

In particular, the DSBA notes the following:

1. Drafting of pleadings

Many of the cost and time issues with the current discovery process stem are as a result of having to locate documents to prove and disprove issues raised in widely-drafted pleadings. There is a clear benefit in drafting

proceedings as widely as possible to make sure that potentially relevant matters are not excluded at the outset and to allow scope to develop and refine one's case in conjunction with the evidence made available. In those circumstances, we agree with the position that reform of the discovery system cannot be entirely effective in a vacuum and should be part of a wider reform of the approach to pleadings. If the pleadings are required to be more focused in the first instance, the documents that are relevant to the case will be similarly narrowed.

We appreciate that, as a result, it may have the effect of "front-loading" the costs of litigation as it will require a very detailed analysis of the available documentation to be conducted at the initiation of all proceedings as opposed to dealing with that analysis at a later stage, if required, once it is more likely that the matter will in fact proceed to trial. However, narrowing the scope of the pleadings should ultimately save on the time and costs overall when it comes to case management, hearing duration and, above all, the documents required to be reviewed and produced on discovery.

As a related consequence, any front-loading of costs in litigation could well have the result of increasing the recourse to mediation as an alternative form of dispute resolution which is in keeping with the current policy of reform within the judicial system.

2. Early disclosure of relevant documents

Tied into the position that more focused pleadings would assist in narrowing the issues that documents will be relevant to, is the suggestion that the documents that are relevant to any pleading should be disclosed with that pleading. The CLAI also proposes extending that requirement to documents that were considered or relied upon in drafting the proceedings. Most of the relevant documents would therefore be available at the earliest possible stage of proceedings as opposed to being delivered in isolation – and thereby meet the aim of making the pleadings more focused from the outset.

In addition, it would also mean that there are less documents required for a lengthy "discovery phase" following the defence as the identification and exchange of the relevant documents would take place alongside the exchange of the existing pleadings.

3. Technology-assisted review

A less radical proposal, which we believe could be accommodated quite readily within the existing structure and make it more efficient, is to make technology-assisted review the default position unless the parties agree or satisfy the Court that it is not reliable, efficient, cost-effective or affordable in the particular circumstances of the case.

It is also proposed that parties would be required to agree custodians, date ranges, the forms of communications used, keyword searches and data sources (including jurisdictions) at the outset. While this approach had been adopted in some of the larger-scale discoveries, applying that approach as the default provision would lead to a more focused approach, again unless

the particular circumstances of the case mean that it is not warranted or appropriate.

4. Standard disclosure

The CLAI proposal to eliminate category-based discovery is also of interest – we agree with the position that, quite often, the focus on relevance to the proceedings can be lost with a focus on being relevant to a particular category. In particular, it can make the determination of categories a very involved and costly process, and which often requires a contested application before the Court, which, if appealed, will add to cost and delays.

The proposed alternative is modelled on the "standard disclosure" procedure in the UK which requires the disclosure of documents within standard classes at the close of pleadings which were not previously disclosed.

This approach re-focuses the review on relevance to the case that has been pleaded and would also avoid disputes on the wording and extent of categories. The CLAI notes that such broad, standard categories may require a great deal of trust to be placed on the compliance of parties with the classes of documents but it goes on to note that the current system is based on a degree of trust and good faith in any event and we would agree with this assessment.

A frequent source of delay and additional cost is the appeal of High Court interlocutory decisions in respect of discovery motions to the Court of Appeal. In addition to costs and delay to the substantive cases themselves, the volume and complexity of such applications impacts on the ability of the Court of Appeal to process its own list. Irvine J has made reference to a threshold level for appeals relating to discovery orders as follows:

> *"In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion."*[2]

We suggest that a requirement that appeals on discovery motions be certified could help to limit the number of discovery motion appeals before the Court of Appeal to only those that are necessary to avoid an injustice. This in turn would reduce delays and additional costs in other cases which may not otherwise require an appeal.

[2] *Lawless v. Aer Lingus Group PLC* [2016] IECA 235

C. Encouraging alternative methods of dispute resolution

The commencement of the Mediation Act 2017 is a welcome development and one that we hope will be embraced by practitioners and the judiciary alike.

1. Earlier promotion of mediation in litigation

The DSBA recommends that Alternative Dispute Resolution [ADR] be encouraged at an earlier stage in the dispute process to the benefit of all litigants, in terms of cost and speed, and to ease the demand of court resources. This could effectively be done alongside greater adoption of case progression and/or at interlocutory/motion stages.

2. ADR in the lower Courts

Greater emphasis on ADR at Circuit or District Court levels is recommended together with increased use of existing ADR provisions in the rules.

3. ADR Education

Increased educational initiatives - Judges, legal professionals and lay litigants would benefit from additional and more regular emphasis on ADR developments and use.

4. Cost orders

Court encouragement to parties to engage at mediation at interlocutory stages.

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

1. E-filing of documents

The introduction and support of e-filing of all pleadings and Court documents across the various Court jurisdictions would be a welcome development (note: while a District Court Claim Notice can issue electronically, Order 40.4(3) of SI 17 of 2014 requires filing of the printed copy of the claim notice with the court's office 'in person or by post').

In the UK, court users can file motions electronically, and if it is a straightforward matter (e.g. on consent, or uncontested), and the Judge can review and make an order on the papers with no need for anyone to physically attend. This saves all parties, including the Court, time and money. If it is not on consent but still relatively straightforward, it can be heard as a conference call with the judge and lawyers. This is not so much time saving for the judge but is both time and cost saving for the parties. If it is contentious the parties can still attend in the formal way.

The UK system operates by way of a court service email address that sends a receipt, and the parties can serve their papers on the other side via email then too. The Court then sends a confirmation to both sides advising if it is intended to review the papers or arrange a teleconference or give a return date to advance matters.

All papers can be filed at court electronically, with only trial books to be handed in. Parties receive an electronic receipt when they file (simple email system) so there is no worry about post etc. Obviously, the Court then picks up the print burden but the parties can pay a nominal fee to cover that, and it saves the Court service having to scan in the docs on receipt.

This system also allows the Court service to become more flexible in terms of working day hours/remote working as staff could assign the documents from anywhere, at any time and would not need to be on site to do so.

2. Payment of fees and lodging of papers

Legal practitioners and court users require a modern electronic method for payment of courts fees, such as are available from other public bodies (CRO, Revenue, etc.)

Existing paper based processes (e.g. stamping court documents, filing etc.) should be reviewed for digitalisation. See also No 1 above.

3. Online Debt Recovery project

The development of the Courts Service On-line Debt Recovery system was very promising but has failed to reach fruition. It has the potential to greatly improve efficiencies for users of the Courts Service.

4. E-licensing

A lot of work has gone into the e-licensing service. This would be beneficial to all users and should be completed as soon as possible.

5. Public access to pleading via the Central Office

A clear policy on the appropriate parameters or a validation of a request of sight of pleadings to those outside the litigation would be welcome.

6. Courtroom screens

Facility for **screens** where memory stick can be plugged in to show CCTV and photographs which can be displayed to entire courtroom.

7. Book of Causes for Circuit Court

Computerize and put on line the Book of Causes for Circuit Court cases in same way as the High Court.

8. Online access to District Court Legal Diary

E. Achieving more effective and less costly outcomes for court users, particularly vulnerable court users

In particular, the DSBA notes the following:

1. Equal & effective access

Persons "under a disability" or vulnerable court users should have equal and effective access to justice and accordingly may require assistance in accessing legal services and courts. The State is due to ratify the UN Convention on the Rights of Persons with Disabilities in March 2018, as to which it is provided in Article 13 as follows:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

The "Brady Circular" (Legal Aid Board Circular 07/2007) is utilised in the District Court to facilitate the appointment of advocates / staff liaison persons to vulnerable court users to assist in their accessing legal advices and the courts. Similar provisions could be applied to all Court jurisdictions.

2. Revision of rules

Revision of the rules, procedures and practices to accommodate greater participation of persons under a disability in their own litigation (e.g. older children, persons with an intellectual disability, persons with a mental disorder). The following are practical measures which may assist: -

- The payment of Stamp Duty on the filing of Court documents relating to Appeals to the Circuit Court of Decisions made by Mental Health Tribunals and Stamp Duty on Inquiry Orders in Wardship Application be removed;
- Provisions of the Free Legal Aid Scheme be extended for Ward of Court applications to the High Court (depending on value of estate);
- Provision of more "Consultation Areas/Rooms" to facilitate communication with vulnerable court users;
- Provision for setting specific "not before time slots" in Court Lists to facilitate attendance by vulnerable Court users;
- Provision of facilities for vulnerable Court users including - nominated access friendly Courtrooms, sufficient audio microphones to facilitate addressing the Court, supportive furniture, specific audio headphones at rear of Court room.

3. Settlement of claims

Greater protection is required for persons under a disability in the settling of claims prior to the issue of proceedings. Consideration could be given to the introduction of procedures for approval of settlement offers prior to the issue of proceedings, similar to the position in England and Wales.

4. Certificate of capacity

Greater clarity would be welcome on (1) the appropriate choice of a next friend and (2) the onus and risks that attach to the next friend. A requirement for a "Certificate as to Capacity to Conduct Proceedings" similar to that produced in the UK could be considered.

5. Loss of capacity during litigation

Consideration should be given to the drafting of rules to provide guidance on steps to be taken in the event of a Plaintiff becoming of unsound mind/losing capacity during the course of ongoing litigation. The effect this has on the continuance or otherwise of the lawyer's engagement needs to be clarified.

CONCLUSION

We hope that this Submission is of interest and assistance to the Review Group, and thank you for your consideration.

If it would assist the Review Group, the DSBA would be pleased to present or expand on the recommendations set out in this Submission.

The DSBA stands ready as required to provide further input regarding the present review and any improvements or changes as may be proposed by the Review Group.

Our contact details are as follows:

Dublin Solicitors Bar Association
First Floor
51 Dawson Street
Dublin 2
Telephone: 01 6706089
Email: maura@dsba.ie

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Killian O'Reilly
Chair – DSBA Litigation Committee

Dublin Solicitors Bar Association
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