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New Rules of the Superior Courts

by **Elizabeth Mara**

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A shake-up of High Court procedures will commence on 1 October when two SIs, the Rules of the Superior Courts (Conduct of Trials) 2016 (SI 254 of 2016) and the Rules of the Superior Courts (Chancery and Non-Jury actions and Other Designated Proceedings: Pre-Trial Procedures) 2016 (SI 255 of 2016) come into operation.

Their aim is to drive Court efficiencies both pre-trial and during hearings. They introduce changes to a range of areas including: case management, pre-trial conferences, certification of readiness for trial, witness statements, expert evidence, modular trials, the use of assessors and time management at trial.

This article considers some of the more significant changes to the Rules.

The new Rules are likely to have an impact on the workload of solicitors pre-trial and may have implications for the ability of parties to fund litigation.

PRE-TRIAL PROCEDURES

*The implementation of these new pre-trial procedures has been delayed . See addendum.

SI 255 of 2016 introduces a new Order 63C which applies to actions in the Chancery and Non-Jury list and any other list designated by the President of the High Court with the exception of the Commercial, Competition, Personal Injury and Jury lists.

List Judge

The President will designate a List Judge. The List Judge will have the power to make case management orders, direct pre-trial conferences or assign another Judge to do so, issue certificates of readiness and fix dates for trial.

Pre-Trial Directions

At any time, a Judge may, upon motion of the parties or upon his or her own motion, give directions and make such orders as appear convenient for the determination of the proceedings in a just, expeditious and cost-effective manner. Order 63C envisages a broad range of orders being made including: the format of proceedings (with pleadings, oral evidence, on affidavit), fixing timetables for exchange of pleadings, consolidating proceedings, delivering interrogatories, defining issues between parties, requiring the exchange or filing of documentation.

Case Management

The Rules provide for more onerous case management where a List Judge is satisfied, due to the complexity, number of issues or parties, volume of evidence or some other special reason; that an action should be the subject of case management orders. The purpose of case management is to ensure that the proceedings are prepared for trial efficiently and in a just manner. A case management application can be made either by motion of one of the parties or by a Judge's own motion. The Rules do not prescribe a time limit on when such an application can be made.

The List Judge will convene a case management conference at which the solicitor and counsel for each of the parties must attend. The attending parties must be sufficiently familiar with the case and have authority to deal with any matters that are likely to be raised at the conference. A case management booklet must be filed with the Registrar four days before the conference which must contain an agreed outline and chronology of the case, a list of the issues and pre-trial documentation.

At the conference the Judge may fix a timetable for the preparation and completion of the case for trial.

The Judge may require a party or solicitor or counsel to attend before the Court where the Judge perceives there to be undue delay or where there may be a cause for concern regarding the conduct of the proceedings. The Judge may also make costs orders.

Pre-Trial Conferences

Where no case management order has been made, on being set down for trial, proceedings shall now be automatically listed before the List Judge for a pre-trial conference. The List Judge may dispense with the requirement for a pre-trial conference, where the significant issues relating to the case are sufficiently clear and the proceedings are otherwise ready for trial.

The parties must complete and lodge with the Registrar, a pre-trial questionnaire and the prosecuting party must prepare trial materials, in consultation with the other parties, and lodge them four clear days in advance of the hearing. The trial materials should include a list of persons involved, a case summary, copy pleadings, expert reports, exhibits, submissions and authorities.

The pre-trial conference will be conducted largely along the lines of the provisions for Commercial Court proceedings. The Judge chairing the pre-trial conference will establish what steps remain to be taken to prepare the case for trial, the likely length of the trial, arrangements for witnesses, IT facilities (including video conferencing) and any other provisions which are required for the trial. Where the parties intend to rely on expert evidence, the Judge may make orders for experts to meet to prepare a joint report and may also make orders in respect of arrangements for the trial, or for modular trials.

Certificate of readiness for trial

Certification for trial will no longer be the preserve of a party's legal team. Order 63C prescribes that it will be the role of the Judge chairing the pre-trial conference, or the List Judge, to issue a certificate of readiness where the Judge considers the proceedings are ready for trial. To make this assessment, the Judge will have to review the trial materials which may be quite an onerous administrative task. In circumstances where Judges' time may already be somewhat constrained, this particular Rule may stretch their already limited resources.

Upon issuing of a certificate of readiness, the List Judge may fix a date for trial, which will be notified to the parties by the Registrar. The Registrar will deliver the trial materials to the trial Judge.

The trial Judge may, at any time following delivery of the trial materials, cause the case to be listed before him or her for mention in order to make a direction that the parties prepare and deliver an agreed list of concise questions to be decided by the Court in order to enable it to determine the proceedings, or any other direction which will facilitate the efficient conduct of the trial.

Witness Statements

The Rules introduce some fundamental changes regarding evidence in Chancery and Non-Jury cases. Order 63C, Rule 17 provides that a party intending to rely on oral evidence of a witness as to fact, or of an expert at trial, shall serve and file a witness statement and, in the case of an expert, a written report, at least thirty days before the trial, summarising the essential elements of the evidence to be given. In certain circumstances, a trial Judge can direct that a witness statement be treated as evidence in chief.

In compelling the delivery of a witness statement, the Rules would appear to oblige a defendant to give evidence - something a defendant would ordinarily have the prerogative to decline.

Commercial Court practitioners will be familiar with the practice of preparing witness statements and will be accustomed to the level of work which they involve. It is arguable that in smaller value cases, the costs associated with the preparation of these, now mandatory, statements may not be justified.

EXPERT EVIDENCE

Pleadings

The Rules introduce some major changes regarding expert evidence. In all cases, with the exception of personal injury actions, where a party proposes to offer expert evidence on any matter at the trial, the statement of claim or defence must disclose this fact and state succinctly the field of expertise concerned and the matters on which expert evidence is intended or proposed to be offered.

Any report of an expert must contain a statement acknowledging that his or her duty is to the Court and not to the party retaining him or her and must disclose any financial or economic interest an expert may have in the party retaining him or her (other than the expert witness fee).

Restriction on Expert Evidence

In an effort to reduce duplication of evidence from expert witnesses and to narrow the matters in dispute between expert witnesses, the new Rules provide that in Commercial, Competition, Chancery or Non-Jury cases, expert evidence shall be restricted to that which is "*reasonably required to enable the Court to determine the proceedings*".

A Judge has broad powers to require the parties to identify the field of expertise, or the expert, that may give evidence at hearing, to order when expert reports are exchanged, to order that evidence be given by a single joint expert, to decide the terms of retention of an expert and to select the joint expert where the parties cannot agree.

Unless permitted for a special reason, each party may offer evidence from one expert only, in a particular field of expertise, on a particular issue.

The new Rules enable a party to put concise written questions to an expert retained by another party or a single joint expert within twenty-eight days of receipt of an expert report. An expert's answers will be treated as part of his or her report. If an expert does not answer the question, the Court may order that the party may not rely on any, or a specified part, of the evidence of that expert, or that the party may not recover fees and expenses of that expert.

Hot Tubbing

The new Rules introduce the concept of debate among experts which is commonly referred to as "hot tubbing".

Where two or more parties intend to call experts who, according to their reports, or statements, may contradict each other, the Court may require that the experts meet privately, without the presence of any

party or any legal representative to discuss their proposed evidence. Those experts will be required to draw up a joint report identifying the evidence that is agreed and disputed between them, to be furnished to the trial Judge and the parties.

The trial Judge may require any opposing experts to be examined and cross-examined one after another, as the trial Judge shall direct, or apply the "debate among experts" procedure. This procedure essentially involves a debate between the experts being carried out before the trial Judge and represents a radical departure from the standard practice of giving evidence.

Use of Assessors

The new Rules provide that a Court can appoint a person with requisite skill to assist the Court in understanding and clarifying an issue or evidence in relation to a matter ("assessor").

An assessor may be directed to prepare a report for the Court on a matter at issue in the proceedings, attend the trial to advise the Court and assist the Court after the trial. Where a report is prepared, a copy will be provided to the parties. Where advice is given, the parties shall be informed and given an opportunity to comment.

The fees paid to an assessor shall be determined by the Court and shall form part of the costs of the proceedings. The Court may order a party to pay the fees of the assessor.

Modular Trials

The Rules on Conduct of Trials empower Judges, in matters pursuant to the Competition, Commercial, Chancery, Non-Jury and any other list designated by the President of the High Court, to direct that proceedings can be heard in modules. The Rules permit a Judge to specify the nature of the evidence or the witnesses required to enable the Court to determine the issues in any module.

Time Management at Trial

The Rules also introduce express powers for the trial Judge to actively manage and direct the hearing. Order 36 provides that a Judge can fix or limit the time allowed for a party for examination, cross examination and re-examination of a witness. Where a Judge determines that the evidence called by a party was unnecessary or duplicative, he or she may make a costs order against that party.

Order 36 also empowers a Judge to give directions as to the issues which the Court requires evidence on, the nature of the evidence to be put before the Court and whether the Judge will require written submissions on points of law. This Order would appear to give Judges very far reaching powers to direct proceedings and would appear to involve the Judge in the question of evidence to be adduced by the parties. Arguably, these powers may interfere with a legal team's ability to present the case as it sees fit and may potentially infringe on a party's entitlement to fair procedures.

Implications

From a practitioner's perspective, the new Rules would appear to front-load the work of solicitors which may bring litigation funding considerations into play early in proceedings and perhaps may restrict the access of some parties to Court. The new Rules may increase pressure on the resources of smaller firms where attendance at pre-trial hearings by the leading solicitor is required and where the preparation of witness statements is now mandatory. The Rules will certainly require an increased level of co-operation between practitioners, particularly in the area of agreeing trial materials.

At a Commercial Litigation Association of Ireland seminar on the new Rules in July of this year, the Chair of the seminar, Mr Justice Brian McGovern, commented that he thought the application of the new Rules might be incremental in practice with Judges initially "dipping toes" in the new procedures. He highlighted the fact that the Rules would require additional resources but on the whole welcomed them in assisting parties

moving away from trial by ambush.

Whether the new Rules are applied with vigour and whether resources will be afforded to the judiciary to enable them to carry out the additional administrative burden they will bring remains to be seen.

Addendum: Courts Service Announcement

On 22 September 2016, the Registrar of the High Court issued a notice to practitioners, which effectively means that the practical implementation of the new rules relating to Pre-Trial Procedures has been delayed.

The notice stated, that following representations that were made to the President of the High Court, and pending the provision of appropriate necessary resources, the President does not intend to appoint either a List Judge or Registrar pursuant to the new rules regarding Pre-Trial Procedures.

Consequently, even though the new Pre-Trial Procedures are technically in force, they have no practical effect until further notice. The Registrar has indicated that practitioners will be given at least two months' notice, of when the required arrangements, appointments and resources are in place, to allow for the practical implementation of the new Pre-Trial Procedures.

The rules relating to Conduct of Trial are in force as of 1 October 2016.

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If you would like further information, please contact Elizabeth Mara at emara@lkshields.ie.

About the Author



Elizabeth Mara
Senior Associate

Elizabeth specialises in the areas of commercial and employment litigation.

T: +353 1 638 5836 E: emara@lkshields.ie