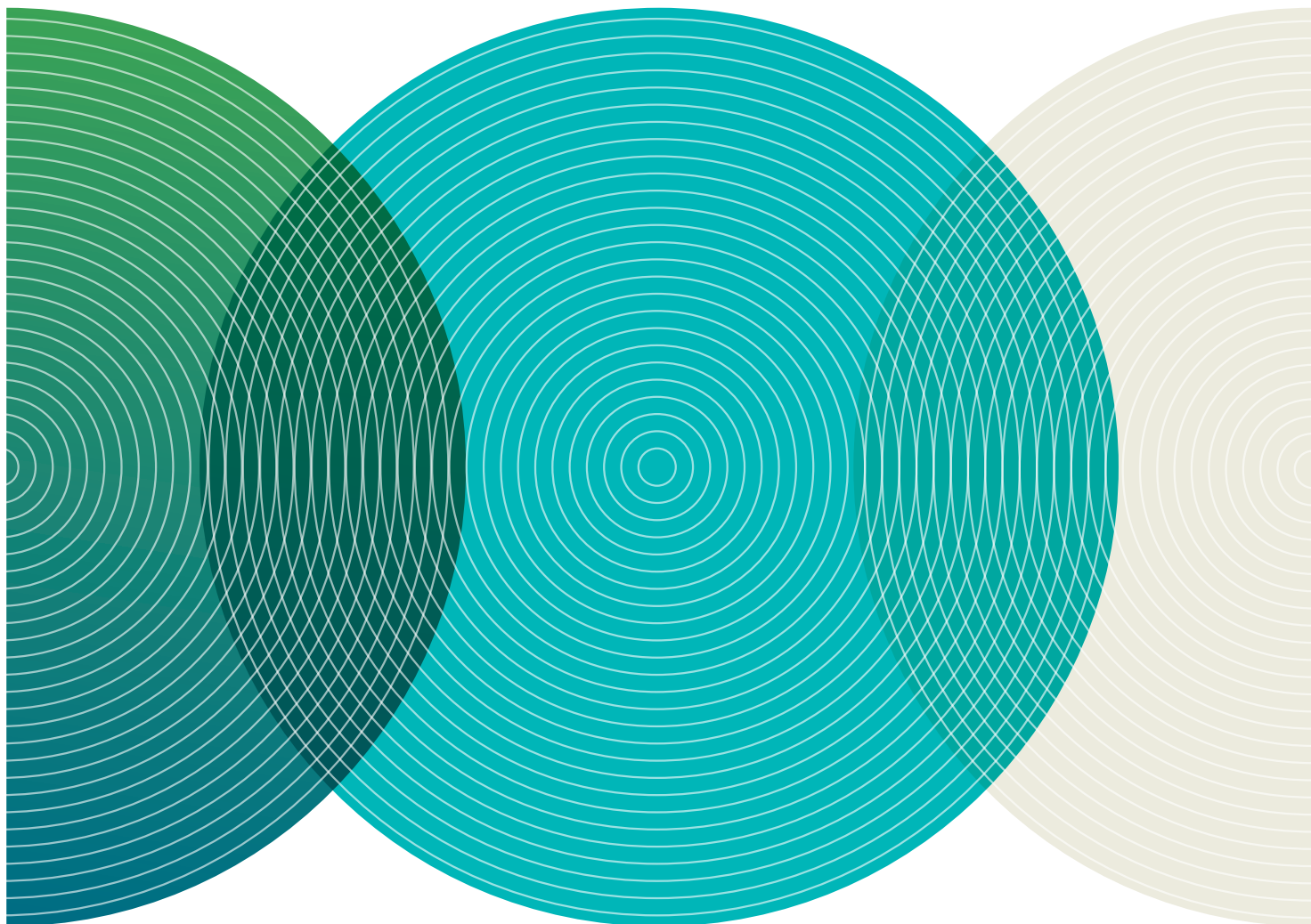

A Guide to
Litigation in Ireland

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Since its establishment in 2004, the Commercial Court, which involves active judicial case management for significant commercial cases, has been the primary forum for determination of substantial commercial disputes in Ireland.

It dramatically reduced timelines for disposing of commercial disputes, with many cases being concluded within weeks or a few months.

The establishment of Ireland's Court of Appeal in 2014 is helping to reduce timelines for appeals from the Commercial Court and the wider High Court. The Court of Appeal has significant case management powers in civil cases and is already helping to slice through a backlog of appeals which had developed before its establishment.

Features of the Commercial Court include that:

- cases are admitted to the Court on application – there is no automatic right of entry;
- the application for entry must be made early in the proceedings;
- cases must normally involve a claim valued at €1 million or more;
 - admissible cases include those concerning: –
 - interpretation of business documents or contracts
 - international trade in, or transport of, goods
 - exploitation of fuels or natural resources
 - banking and financial services, insurance and reinsurance
 - agency
 - purchase and sale of commodities
 - operation of markets and exchanges
 - professional negligence (with certain exceptions)
 - arbitration
 - intellectual property
 - statutory appeals from, or judicial reviews of, regulatory decisions
 - claims involving registration of international interests in mobile equipment assets under the Cape Town Convention (the registry for which is in Ireland)

Significant Differences Between Irish and English Civil Procedure

Summary

- Ireland has a written constitution which protects personal rights and which affects the approach of the courts to interpretation of statutes and rules of civil procedure.
- ‘Broader’ style of pleadings and, in practice, more time allowed in Ireland for delivery of these.
- Irish procedural rules more analogous to pre-CPR Rules – there is no over-riding objective, although Irish court rules are increasingly requiring that proceedings be managed “in a manner which is just, expeditious and likely to minimise the costs of those proceedings”.
- Master of the High Court in Ireland has more limited role than English Masters.
- Restrictive approach to summary judgment in debt cases and very limited summary jurisdiction in non-debt cases.
- Wider power to grant discovery against non-parties, but no provision in the Rules for pre-action discovery.
- Peruvian Guano rule applies to relevance in discovery, but with power to impose proportionality restrictions.
- Exchange of expert reports is not mandatory in all cases and exchange of witness statements generally only occurs in the Commercial Court.
- No provision for Part 36-type offers by the plaintiff outside personal injury cases, but rule-based support for Calderbank offers.
- Significant timing restrictions on paying into court or tender offers.
- No equivalent of the statutory exceptions to the hearsay rule contained in the (English) Civil Evidence Act 1968.
- Pre-trial review by the court is relatively rare.
- No provision for the award of interim or provisional damages or for structured settlements, though proposals are being considered.
- One rate of statutory interest on awards.
- Enforcement of judgments, particularly in debt cases, can be slower and less effective.
- Civil legal aid not available other than mainly in family law matters.
- Acting on a contingency basis is permitted but fees based on a percentage of the amount recovered are not permitted other than in debt collection.

Sources of Law

Ireland shares a common law tradition with England and Wales, and decisions of the English courts are of persuasive value in the Irish courts in most areas of practice.

As in the United Kingdom, statute law, European Union law and delegated legislation are the major sources of modern law. Irish statute law is enacted by a bicameral legislature, the Oireachtas. Some pre-1922 statutes still in force in Ireland were enacted by the Parliament of the former United Kingdom of Great Britain and Ireland.

Ireland has a written Constitution, adopted and amendable only by referendum, which is superior to all other law other than that of the European Union in its proper sphere of operation. The High Court and, on appeal, the Court of Appeal and Supreme Court have jurisdiction to declare invalid legislation which is found to infringe constitutional provisions, including provisions conferring personal rights on individuals. Like the federal courts of the United States, the Irish courts have pursued an activist approach in interpreting the Constitution. Private property rights, for example, are among the rights protected by the Constitution,¹ and constitutional rights to fair hearing and to the judicial determination of disputes affect the implementation of Irish rules of civil procedure in several respects. For example, there are no general arrangements for the hearing of matters by judges in chambers, and statutory provision permitting private hearings are narrowly interpreted and applied.

The European Convention on Human Rights was incorporated into domestic Irish law in 2003. Convention rights can now be relied on directly as against an “organ of the state” before the Irish courts.

¹ In *ESB v Gormley* [1985] IR 129, for example, the Electricity Supply Board was statutorily entitled to lay electricity lines across private land but the absence of a statutory obligation to pay compensation when exercising these powers was found to render the statute unconstitutional.

Ordinary Civil Procedure

Civil litigation in Ireland is adversarial in nature. In contrast to English practice it is still predominantly oral in form and culture. Of those actions that are not settled previously, the majority proceed to a trial on all issues raised in pleadings, presided over by a single judge.

Claims for defamation and false imprisonment are the only common type of civil action now ordinarily tried by jury. The procedural rules of the High Court are derived from the rules established under the Judicature Act.² They are therefore in many respects similar to the English rules as they existed prior to the adoption in England of the Civil Procedure Rules (“CPR”) 1998. However, with the establishment of a Court of Appeal in Ireland in 2014, new procedural rules have been adopted for both the Supreme Court (somewhat analogous to those of the Supreme Court of England and Wales) and the Court of Appeal.³

The Rules of the Superior Courts (“RSC”) were last consolidated in 1986.⁴ The procedural rules of the Circuit Court (consolidated in 2001) are similar but less detailed, while those of the District Court (consolidated in 1997) are less formal in respect of civil matters. Unless otherwise indicated, the procedures and rules described in this overview are those of the High Court.

Limitation periods are established in a number of statutes but those of most general application are contained in the Statutes of Limitation 1957 and 1991, the Civil Liability Act 1961 and Civil Liability and Courts Act 2004. The major limitation periods within which proceedings must be initiated are similar to those in England: six years for simple contract and torts generally; two years for claims arising from personal injuries (though time may not run against a person under a disability eg minority) and one year, or a longer period allowed by the court not exceeding two years, in defamation claims. Outside personal injuries, in most instances there are no discoverability provisions that would extend the limitation period in cases of latent damage.⁵

² The Supreme Court of Judicature (Ireland) Act 1877 - corresponding to the Supreme Court of Judicature Acts 1873 and 1875 in England and Wales.

³ Rules of the Superior Courts (Court of Appeal Act 2014) 2014 (SI 485/2014).

⁴ The Rules of the Superior Courts 1986 (SI 15/1986) as amended.

⁵ In cases of personal injury, the period commences on the date the plaintiff knew or ought to have known of the cause of action (Statute of Limitations (Amendment) Act 1991, Section 3). Similar considerations apply in respect of property damage cases that come within the (narrower) scope of the Liability for Defective Products Act 1991, which gives effect to the EC Product Liability Directive. As to other cases, see *Irish Equine Foundation v Robinson* [1999] 2 IR 442; *O'Donnell v Kilsaran Concrete Limited* [2001] 4 IR 183.

The majority of proceedings in the High Court (including almost every case where damages are among the relief sought) are initiated by summons. For the purpose of service, a summons is in force for 12 months after issue but this period may be extended on showing good reason to the court. There are three forms of summons - plenary, summary and special. The plenary summons is intended to be followed by exchange of pleadings and a trial on oral evidence, and the summons is endorsed only with the relief claimed. The summary summons procedure is designed principally for the recovery of liquidated debt. The special summons procedure is used for claims which do not entail substantial disputes as to fact, though the use of this procedure is diminishing. The procedures initiated by summary and special summons are intended to be summary in nature, and presume that the matters in issue may be dealt with without pleadings or any substantial amount of oral evidence. Both forms of summons should be endorsed with a concise statement of the grounds of the plaintiff's claim as well as the relief claimed.

A petition is used to initiate bankruptcy proceedings, or proceedings seeking the winding up, examinership or investigation of companies.

The **originating notice of motion**, which brings an application promptly before the court, and has largely replaced the special summons procedure, is now prescribed as the means of initiating applications for all other companies matters and most applications for relief and appeals under statutory codes.⁶ Proceedings for judicial review of administrative acts are ordinarily commenced by application *ex parte* for liberty to seek review, though some special statutory schemes of judicial review require the leave application to be on notice, and the judge to whom an *ex parte* application is made has discretion to direct that the intended respondent be put on notice. If permission is granted, the court will direct the appropriate form of procedure to be adopted thereafter, having regard in particular to the nature of the issues and to whether the determination of the claim is likely to require a significant amount of oral evidence.

6 Rules of the Superior Courts (Statutory Applications and Appeals) 2007 (SI 14/2007).

Pleadings

Pleadings are similar to their pre-CPR English equivalents: the statement of claim and defence (with or without counterclaim) are the principal pleadings. A reply is often delivered but is not mandatory. There are no pre-action protocols.⁷ “Broad” pleading has historically been generally acceptable in Ireland, with a defence often consisting simply of a series of denials designed to put the plaintiff on full proof of its claim. However, statutory modifications to the personal injuries regime in 2004 require not only that parties to personal injuries proceedings provide particulars of any assertion, allegation or denial in their pleadings, but also that these be verified on oath by the party concerned.⁸ There is in commercial matters a growing requirement to plead in detail. However, in seeking detailed information as to an opponent’s case reliance is still often placed on requests for particulars. Applications to the court to compel the giving of particulars as well as all other applications for interlocutory relief between the parties are made by notice of motion.

The rules provide for *time limits* for the delivery of pleadings (*eg* a defence is to be delivered within 28 days of the date of delivery of the statement of claim), though time limits may be extended or abridged. In the Commercial Court, a full timetable for pleadings is usually agreed or directed at the first directions hearing.

Outside debt collection, it is not possible to mark summary judgment for default of pleading without a court hearing. The court will usually grant an extension of time in which to file pleadings if a party requires this. Peremptory orders are seldom made on first application. The court has recently appeared more willing to strike out claims for want of prosecution although in practice, this will usually only happen where significant prejudice can be demonstrated.

In cases in which substantial legal issues arise, the parties must usually exchange written pre-trial submissions (and such submissions are required in all appeals to the Court of Appeal and Supreme Court).

7 Though under the Legal Services Regulation Act 2015 there are plans to introduce them for clinical negligence actions.

8 Civil Liability and Courts Act 2004, sections 13 and 14.

Case Management

A single judge of the Supreme Court may make case management directions in accordance with a statutory practice directions of the Chief Justice issued “in the interests of the administration of justice and the determination of proceedings in a manner which is just, expeditious and likely to minimise the cost of those proceedings”. Similarly, a single judge of the Court of Appeal may make case management directions according to a like formula. Case management models are increasingly being rolled out in other areas where judicial and other relevant resources permit.

The rules of the Commercial Court (established in 2004⁹ and dealt with more thoroughly in our Commercial Court briefing) deal most thoroughly with case management. They permit judges to manage the progress of cases, to ensure that they proceed justly, expeditiously and at minimum cost. At or after an initial directions hearing, the court may identify issues of law or fact to be decided, and may order discovery or inspection of documents, or the exchange of expert reports or the holding of conferences of experts. The judge may require that documents or information be exchanged between the parties, or submitted to court, electronically.

In most cases all pre-trial issues are dealt with at the initial directions hearing; although a case management conference may be held. The conference may involve the setting by the judge of a pre-trial timetable and monitoring of compliance with orders and timetable deadlines (with costs penalties possible in the event of unjustified delay). Parties must submit lists of witnesses and details of technical or scientific evidence. The judge can also adjourn the litigation for referral to a suitable ADR procedure. Commercial Court proceedings may also involve a pre-trial conference, with each party required to lodge a response to a pre-trial questionnaire, confirming preparedness and giving details of how it proposes to conduct the trial.

A virtually identical case management process as for commercial cases applies in competition cases,¹⁰ and new court rules will soon extend similar procedures to the Chancery and Non-Jury Lists of the High Court¹¹. A set of procedures for case management in family law cases was put in place by practice direction in 2005¹². The court may also direct a pre-trial hearing in personal injuries cases¹³ to determine what matters relating to the action are in dispute, though this rarely occurs. While case management is not mandatory in all classes of cases, its use has been increasing incrementally and parties to complex cases where no formal case management procedure is available may seek case management directions by analogy with the rules applicable to other classes of cases.

⁹ By the Rules of the Superior Courts (Commercial) 2004 (SI 2/2004).

¹⁰ Rules of the Superior Courts (Competition) 2005 (SI 130/2005).

¹¹ Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial procedures) 2016 (SI 255/2016). They also have the potential to extend to any other proceedings designated by the President of the High Court.

¹² High Court Practice Direction PD40, Family Law Proceedings, 6 October 2005.

¹³ Most personal injuries cases require now to be referred to the Personal Injuries Assessment Board (“PIAB”), for assessment of quantum and proceedings may not be initiated in relevant cases without the Board’s authorisation. This will usually be given where liability is in dispute or where the claimant does not agree with the quantum assessed by PIAB.

Third Parties

Third parties may be joined by a defendant where they are alleged to be concurrent wrongdoers within the meaning of the Civil Liability Act 1961 (*ie* where they are said to be responsible to the plaintiff for the same damage alleged of the defendant). This can also occur where the proposed third-party claim involves the same subject matter and similar relief as those in the main action, or where the proposed claim involves any question or issue which is substantially the same as any arising in the main action. Third-party claims are initiated by an application to the court for permission to issue and serve a third-party notice. An exchange of pleadings between the claimant and the third party follows. Claims against concurrent wrongdoers may be made by an independent action for contribution. It is important to commence claims against third parties and actions for contribution expeditiously, as relief may be refused at the discretion of the court where contribution proceedings were not issued within a reasonable period. A claim of contributory negligence may be raised as a defence in matters of contract as well as tort.¹⁴

There is no provision in the rules similar to Chapter 3 of Part 19 of the CPR to enable group litigation orders to be made, although the rules do provide for representative proceedings in circumstances similar to those described in Chapter 2 of Part 19.¹⁵

making a lodgment or tender is not technically appropriate) in determining costs. In appropriate circumstances a Calderbank letter will persuade an Irish court to exercise its discretion as to costs in favour of the offeror, though there is no comprehensive statement in the rules or case law of the criteria to be applied in exercising that discretion.¹⁵

¹⁴ Section 34, Civil Liability Act 1961.

¹⁵ Order 15, rule 9, RSC.

Payments into Court/Offers to Settle

Payments into court, or lodgments, have long been provided for by the rules and are intended, as in England, to put a plaintiff at risk as to costs if the award is less than a lodgment which has not been accepted. Certain categories of defendant are permitted to make **tender offers** (without the obligation to pay the sum concerned into court) which are treated in all respects as having the same effect as lodgments. There are significant timing restrictions on the use of the lodgment/tender procedure in Ireland. However, the rules do allow, for example, for late lodgment or tender, or an increase in lodgment or tender in certain limited circumstances such as where additional particulars of loss are furnished by the plaintiff.

Each party to a personal injuries action is required by section 17 of the Civil Liability and Courts Act 2004 at a specified pre-trial time to serve a formal notice of settlement offer (or in the case of defendant, to serve formal notice that it will make no offer). This is the only current provision in Ireland analogous to those in Part 36 of the CPR, permitting the claimant to make an offer to settle the action.

Generally the rules on tender offers and lodgments are less defined and less flexible than the Part 36 provisions. The rules require¹⁶ the court to have regard to Calderbank offers (ie offers made “without prejudice save as to costs” in cases where making a lodgment or tender is not technically appropriate) in determining costs. In appropriate circumstances a Calderbank letter will persuade an Irish court to exercise its discretion as to costs in favour of the offeror, though there is no comprehensive statement in the rules or case law of the criteria to be applied in exercising that discretion.¹⁷

¹⁶ Order 99, rule 1A, RSC, inserted by the Rules of the Superior Courts (Costs) 2008 (SI 12/2008).

¹⁷ See *Murnaghan v Markland Holdings Limited and anor*, High Court, Unreported, Laffoy J, 20 December 2004; *N v M*, Supreme Court, Unreported, 5 May 2005.

Security for Costs

Orders for security for costs are at the court's discretion. In practice the Irish courts are probably less ready to grant security than are the courts of England and when security is directed against a plaintiff who is a natural person or a company incorporated outside Ireland it has usually been one-third of the defendant's total estimated costs.¹⁸ It appears that recent changes to company law will afford the court a discretion to apply the same convention in the case of an Irish-incorporated company plaintiff, who would previously have had to provide security approximating to the actual probable costs of the defendant should he succeed, although the point is not yet settled.¹⁹ Security may also be granted for the costs of substantial pre-trial processes, such as making substantial discovery.²⁰

Pre-trial Review

Outside the classes of cases in which formal case management processes permit pre-trial review, no such review is required. The rules require that most forms of action in the High Court must be certified by counsel as ready for trial on behalf of the party seeking to set the case down for a hearing.

Alternative Dispute Resolution (ADR) Procedures

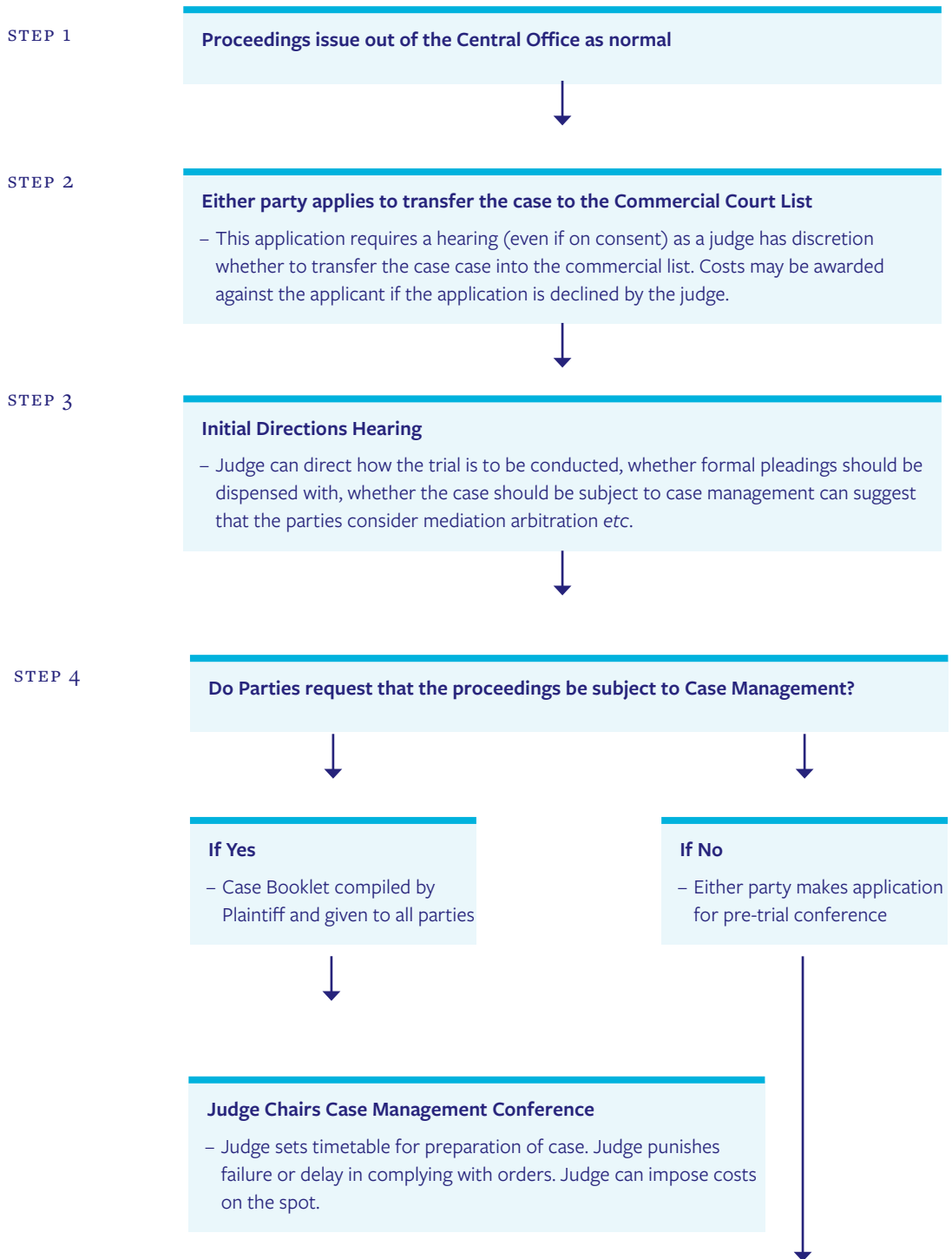
The use of ADR procedures, especially mediation, has increased significantly over recent years in most classes of cases, but particularly in commercial cases. This is both because an agreement made in a mediation can be made a rule of court,²¹ and because a court can encourage (but cannot impose) mediation by adjourning cases for a specified period to enable parties to consider mediation or other methods of dispute resolution.²² While the Irish courts have not as yet imposed costs penalties for unreasonable refusal to mediate, it is one of the factors which the court can take into account in dealing with costs awards. In contrast the court has the power to direct mediation in personal injury cases. In practice however the court has been reluctant to require the parties to do. In almost all personal injury cases the parties will seek to negotiate settlement in advance of trial through their solicitors or counsel. In contentious family law proceedings there is a legal obligation on solicitors to discuss with their clients the option of engaging in mediation as an alternative to litigation.

Flowcharts showing the sequence of steps in ordinary High Court proceedings and in Commercial Court proceedings are set out below and in the following pages.

²¹ European Communities (Mediation) Regulations 2011 (SI 209/2011).

²² Rules of the Superior Courts (Mediation and Conciliation) 2010 (SI 502/2010).

Commercial Court Procedure





STEP 5

Pre-Trial Conference

– Attended by Judge and Counsel/Solicitors. Written witness statements are exchanged.
Judge fixes trial date, which can be deferred for up to 28 days to allow the parties submit to mediation.



STEP 6

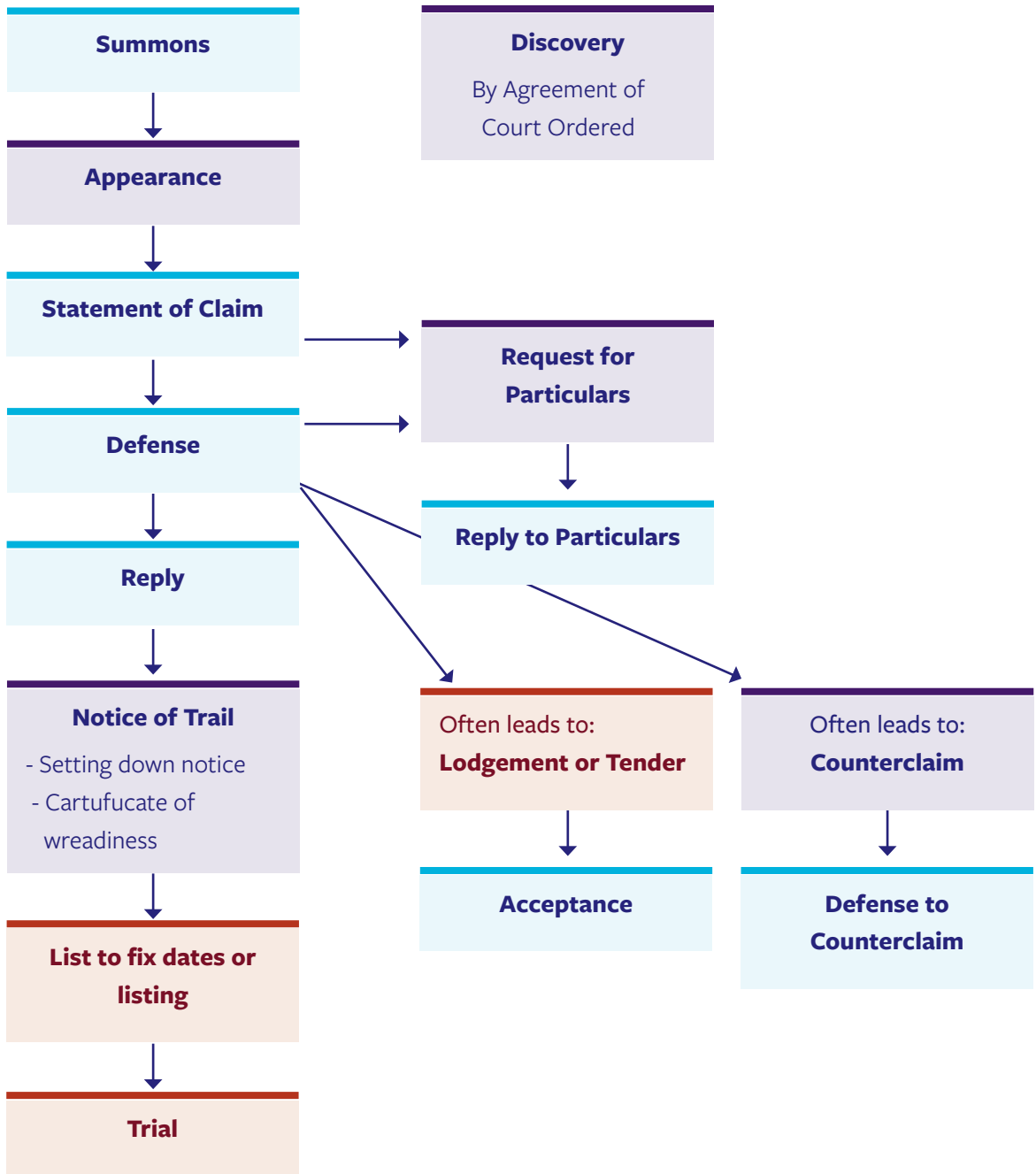
Trial

Standard High Court Procedure

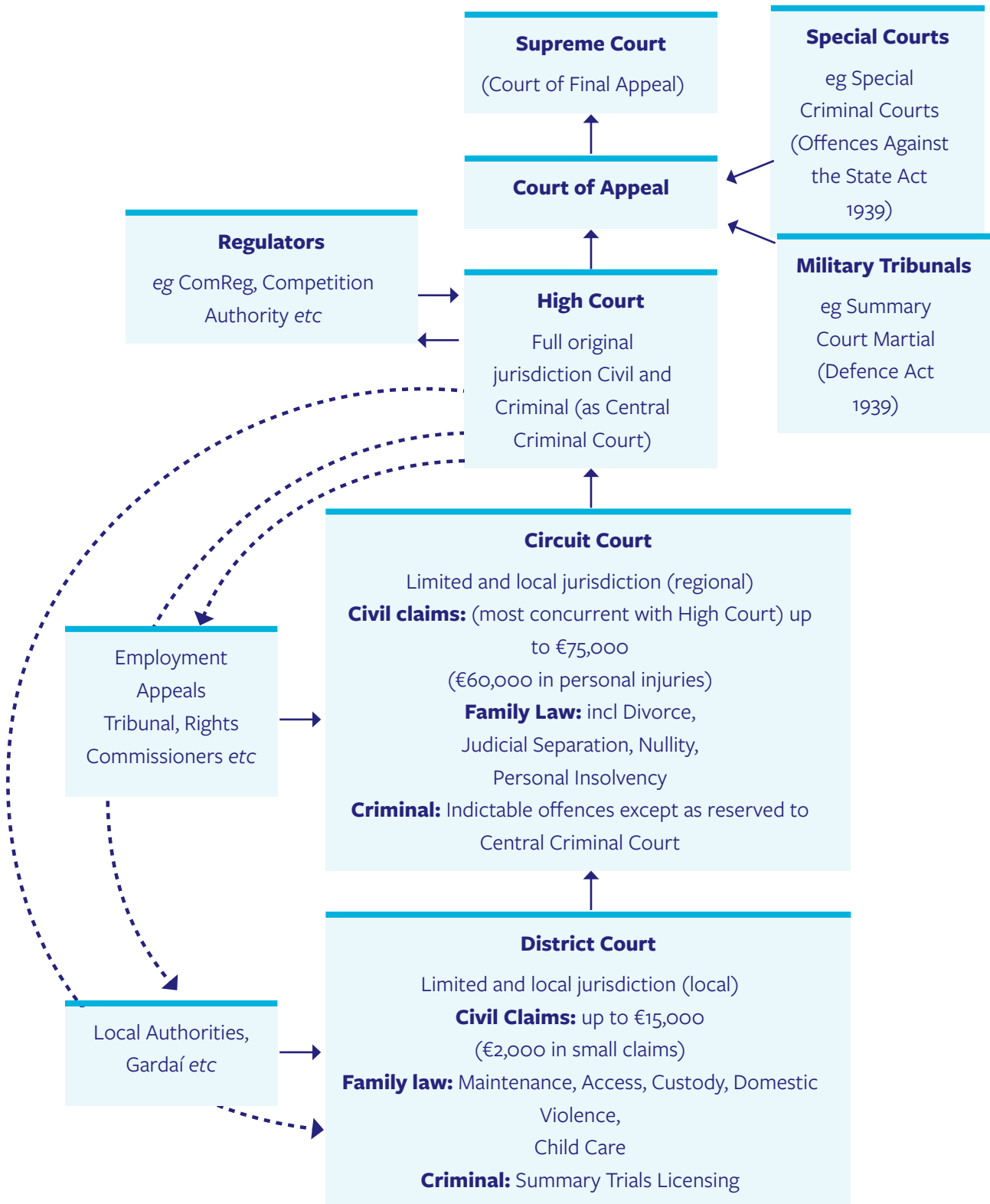
- Plaintiff
- Defendant
- Fixed by the Court

Basic Pleading

Additional Procedures



Court Structure After Court of Appeal Act 2014



Evidence

General

As a general rule, evidence must be given orally at trial. In appropriate cases it may be taken by commission (*ie* at a specially convened sitting other than before the court hearing the action) in Ireland or abroad, or on foot of a request made under Council Regulation (EC) 1206/2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters. In exceptional circumstances evidence on affidavit may be admitted at trial, although never if the opposing party satisfies the court that it genuinely requires that the witness be available for cross-examination and the witness can be produced.

There is no provision in Irish law similar to the relevant provisions of the English Civil Evidence Act 1968 which enables a party to prove a fact by hearsay evidence. This difficulty is usually overcome by application of the well-established exceptions to the hearsay rule, by judicious use of notices to admit facts and documents, and occasionally by relying on the indulgence of the trial judge in the particular case. Indirect evidence, for example of a witness's impression or understanding of a conversation, can sometimes surmount the difficulty.

Expert Evidence

Expert witnesses are usually selected by the parties and play a similar role to such witnesses in English litigation. Under new court rules, the intended use of expert evidence must be flagged in the pleadings.²³ There are also new provisions on the efficient presentation of expert evidence. A party will be able to pose questions on the expert report of an opponent. The debate among experts procedure, commonly known as “hot-tubbing” has also been introduced.

The court may, under statute, appoint an “*approved person*” to perform essentially the role of an expert witness in personal injury cases, although this is rarely done. There is no general provision for court-appointed experts; such appointments have been made by the court under its inherent jurisdiction, but very rarely. Assessors may be appointed under the rules but this has been rare outside of competition, admiralty and patent cases. However, the new court rules may go some way to reversing this as they provide additional detail and safeguards on the use of assessors at trial.

In personal injury actions, the rules²⁴ require the exchange of schedules and copies of experts' reports (which are very widely defined), usually a month after notice of trial has been served. Parties in such cases generally cannot rely at trial on a previously undisclosed report. Exchange of experts' reports will generally be directed where there is case management, and meetings of experts may also be directed to seek to achieve consensus or net the issues. Where exchange of reports is not agreed, required by the rules or directed, a party will not know in advance of the trial what its opponent's expert will say.

²³ Rules of the Superior Courts (Conduct of Trials) 2016 (SI 254/2016).

²⁴ Rules of the Superior Courts (No 6) (Disclosure of Reports and Statements) 1998 (SI 391/1998).

Discovery / Disclosure

Discovery must be explicitly sought between the parties but if it is not given voluntarily, it will almost invariably be ordered by the court in plenary actions. The order requires the filing of an affidavit (rather than provision of a list). The party seeking discovery is required to give (in correspondence prior to any application to court) descriptions of the categories of documents of which discovery is sought, and to give specific reasons why it asserts that discovery of each category of these materials is required.²⁵ Where the documents sought include electronically stored information (ESI),²⁶ the requesting party must also specify whether it seeks the production of ESI in searchable form and if so, whether it seeks the provision of inspection and searching facilities using any ICT owned or operated by the requested party. Irish courts are amenable to use of technology-assisted review, by reference to the Sedona Conference Principles.²⁷ While *Peruvian Guano*²⁸ remains law in Ireland, a discovery order may be limited or modified on the ground of proportionality.

Irish law as to *privilege* is similar to that in England but, having regard to the courts' constitutional role with respect to government, claims to state privilege are always determined by the court's own review of the material. On a point of form, parties are obliged to give brief details of each document over which privilege is claimed, though this requirement may be dispensed with by agreement. A party may apply to the court for an order compelling another party to answer interrogatories. To date, this practice has been relatively infrequent though there are recent signs that the courts are keen to encourage the use of interrogatories as an alternative to discovery in order to reduce litigation costs.²⁹

The rules allow *discovery or interrogatories against a non-party* to an action if the court is satisfied that that party has relevant documents or information. New rules have also been introduced allowing for the provision of non-party information in a civil action. This considerably extends the possibility of obtaining information, as distinct from documents, from a non-party to proceedings.³⁰

There is no provision in the rules for pre-action discovery, but *Norwich Pharmacal* relief has been given by the High Court on several occasions though its ambit is considerably more restrictive than in England. The availability of the relief in appropriate cases is confirmed by Supreme Court dicta.³¹

25 Rules of the Superior Courts (No 2) (Discovery) 1999 (SI 233/1999).

26 Rules of the Superior Courts (Discovery) 2009 (S.I. 93/2009).

27 Irish Bank Resolution Corporation Limited v Quinn and others [2015] IEHC 175.

28 *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.

29 *McCabe v Irish Life Assurance plc* [2015] IECA 239.

30 Rules of the Superior Courts (Conduct of Trials) 2016 (SI 254/2016).

31 *Megaleasing UK Limited v Barrett* [1993] ILRM 497.

Pre-emptive Remedies

The Irish Supreme Court has held that in seeking relief by way of interlocutory injunction the claimant must prove that he has raised a fair or serious question in good faith, and the court has in other respects approved the tests formulated by Lord Diplock in *American Cyanamid*.³² Whether a mandatory injunction may be granted at the interlocutory stage will depend upon the circumstances of the case and is not subject to any general rule.³³

The Irish courts have adopted a jurisdiction to grant Mareva relief and in appropriate cases may grant such relief so as to affect assets outside the jurisdiction.³⁴ They have also adopted the Anton Piller procedure, although this is exercised very sparingly. In the same context the courts may order disclosure of assets on affidavit.

The rules also empower the court to make interlocutory orders providing for the preservation, custody or sale of property, or the appointment of a receiver.

The rule in *The Siskina*³⁵ has been adopted in Ireland and, unlike the position in England, continues to be applied, by the Irish courts.³⁶ Therefore, Irish courts do not generally have jurisdiction to give pre-trial relief in Ireland in aid of proceedings in another state, otherwise than under the special jurisdictional arrangements among the EU member states and Lugano Convention states.³⁷ These arrangements empower the Irish courts to give pre-trial relief in Ireland for the benefit of a party in proceedings

³² *American Cyanamid v Ethicon Limited* [1975] AC 396.

³³ *Campus Oil Ltd v Minister for Industry and Energy (No 3)* [1984] ILRM 45.

³⁴ *Deutsche Bank Aktiengesellschaft v Murtagh* [1995] 1 ILRM 381; *Bennett Enterprises Inc v Lipton* [1999] 2 IR 221.

³⁵ *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210.

³⁶ In England, the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 extended the power to award interim relief under Section 25 of the Civil Jurisdiction and Judgments Act 1982 (when substantive proceedings are pending in a Judgments Conventions Contracting State and the subject-matter of the proceedings is within the scope of the Judgments Conventions) both to non-Convention countries and to proceedings outside the scope of the Conventions.

in another relevant state where that other state has jurisdiction over the substance of the claim. In other cases, the Irish courts do not have jurisdiction to grant pre-trial relief against persons not domiciled in Ireland merely by virtue of a claim being made for injunctive relief.³⁷

Ireland is a participating Member State in the European Account Preservation Order Regulation³⁹ which applies from January 2017 and allows a plaintiff to obtain an order preserving a defendant's bank account across the EU⁴⁰ on proof that the defendant is likely to prevent the enforcement of a future judgment against him.

37 Specifically, these are (i) Article 35 of Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters recast (“Brussels I Recast”) which applies in respect of proceedings begun on and from 10 January 2015 as among the 27 EU Member States except Denmark (and, with certain modifications, including Denmark when Council Decision 2006/325/EC remains in force), (ii) Article 24 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Brussels on 27 September 1968 (the “Brussels Convention”) as amended or extended, as between the 27 and Denmark when Council Decision 2006/325/EC is not in force and (iii) Article 31 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed at Lugano on 30 October 2007 (the “Lugano Convention”) as amended or extended in cases involving non-EU states in which the Lugano Convention applies. We refer to these instruments together as the “Judgments Conventions”.

38 *Caudron v Air Zaire* [1985] IR 716.

39 Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

40 Apart from in the UK and Denmark.

General Remedies

The principal remedies generally available to the Irish courts are identical to those in England.

The methods of measuring damages are also the same, but general damages in personal injury cases are usually substantially higher than those awarded in England. Further, there is no real distinction in Irish law between aggravated and exemplary damages; they are anyway rarely awarded and, in such cases, usually only in modest amounts. Irish law currently makes no provision for the award of interim damages before trial, for provisional damages or for structured settlements. Legislation providing for structured settlements and awards in medical negligence cases is expected. Aside from any contractual right to interest which a claimant may have, pre-judgment interest on the amount of an award may be granted at the discretion of the court at a statutory rate (currently 8% per annum). Interest at the same rate normally becomes due as a matter of right on the amount of any money judgment from the date of judgment.⁴¹

⁴¹ Courts Act 1981 Section 22, and Courts Act 1981 (Interest on Judgment Debts) Order 1989 (SI 12/1989).

Legal Costs

In Ireland the successful party in an action is usually awarded costs against the unsuccessful party, though in complex cases, costs will be apportioned according to the parties' relative success on individual issues.⁴²

These are described as 'party and party costs' which are not intended to provide a full indemnity. Occasionally, the court will award the successful party 'solicitor and client costs', which are intended to indemnify the successful party against all costs other than those that are unreasonably high or unreasonably incurred. All forms of contentious costs may be assessed by a taxing master, although provisions of the Legal Services Regulation Act 2015, when commenced, will overhaul the costs assessment arrangements.

Legal fees as between Irish solicitors and their own clients for contentious commercial work are calculated principally by reference to time expended. Account is also taken of the level of skill committed to a case and other factors, such as urgency, set out in the relevant legislation.⁴³ Barristers have traditionally charged relatively small fees for consultative and drafting work, and correspondingly higher fees for briefs on court appearances. However, in respect of commercial work this balance is changing. Upon commencing their work, solicitors are obliged to specify to clients in writing the basis of their charges, and the Irish Law Society has powers, independently of the taxing masters, to investigate complaints of excessive charges by solicitors and to order repayment.

In practice *civil legal aid* is rarely available in Ireland other than in family law disputes. The effect of this is offset to some extent by an informal tradition whereby lawyers agree to act for individuals on a 'no win, no fee' basis, particularly in claims for personal injuries.

⁴² Veolia Water UK plc and ors v Fingal County Council [2006] IEHC 240

⁴³ Solicitors' Remuneration General Order 1884, Schedule 2, as substituted by the Solicitors' Remuneration General Order 1960 (SI 165/1960), Regulation 5.

Enforcement

Means of enforcement

The means of enforcing court orders in Ireland are similar to those available in England. The following are those which should be considered (subject to the sum at stake, the relief granted and the circumstances of the judgment debtor):

- orders of fieri facias (writs of execution which are levied upon the goods and chattels of the defendant) and possession orders;
- attachment of debts (garnishee);
- charging orders over land (judgment mortgages);
- appointment of receivers by way of equitable execution;
- examination as to means;
- instalment orders;
- attachment and committal for contempt; and
- charging orders over stocks and shares.

Where execution in other EU Member States is a possibility, a European Enforcement Order may be applied for when judgment is given or subsequently.⁴⁴

Judgments for debt may be registered in Ireland and, if registered, are then automatically published in trade gazettes. The prospect of such publicity sometimes induces payment. Enforcement of orders of fieri facias (which is effected through publicly appointed sheriffs and their officers) can be frustrating, both because of paucity of assets in the hands of judgment debtors and because some of the laws and procedures governing this form of execution are antiquated. Further, there are long delays in enforcing orders of fieri facias in some court areas.

Enforcement of Foreign Judgments

Under Article 39 of Brussels I Recast, judgments in civil and commercial matters given in other EU member states are enforceable in Ireland without any declaration of enforceability (exequatur) being required.

Legislation giving effect in Ireland to the Hague Convention on Choice of Courts came into force in November 2015.⁴⁵

The Hague Convention 2005, Brussels I Recast and the Judgments Conventions, are the only Conventions or instruments for the recognition and enforcement of foreign judgments which have effect in Ireland. However, Irish courts will recognise and enforce such judgments where they accord with common law conflicts-of-laws principles, which for practical purposes may be regarded as identical to those applicable in England. For example, a creditor may take proceedings (usually by summary summons) seeking such relief where he has obtained a contested foreign money judgment which is final and which was given by a court recognised in Irish law

⁴⁴ Rules of the Superior Courts (European Enforcement Orders) 2006, (SI 3/06).

⁴⁵ Choice of Court (Hague Convention) Act 2015. The corresponding superior court rules are the Rules of the Superior Courts (Choice of Court (Hague Convention) Act 2015) 2016 (SI 161/2016).

as being of competent jurisdiction. The defences to such a claim for enforcement are limited to circumstances where the judgment was obtained by fraud, where enforcement would be contrary to Irish public policy, or where the enforcement of the judgment would constitute the direct or indirect enforcement of a foreign tax or penalty or of a foreign public law.

The foreign jurisdiction of the Irish courts in relation to ordinary residents of the EU member states is governed by the provisions of Brussels I Recast. The Irish courts' foreign jurisdiction in relation to ordinary residents of contracting states to the Judgments Conventions is governed by provisions of those Conventions.

Irish domestic rules as to the exercise of jurisdiction over other foreign domiciliaries are similar to those in England. Such jurisdiction can be established by service of proceedings on a defendant present in Ireland or by service abroad with the permission of the court⁴⁶ or by the defendant's agreement to or acknowledgement of Irish jurisdiction. Irish courts will seek to avoid granting orders which are likely to lead to a conflict with orders of a foreign court exercising appropriate jurisdiction.

The Rome I Regulation⁴⁷ applies in Ireland and, subject to the terms of that Regulation, Irish courts will recognise choices of governing law made by contracting parties.

Ireland has not implemented the Hague or any other Convention for taking evidence abroad in civil or commercial matters, but as mentioned above is bound by Council Regulation (EC) 1206/2001. The Irish courts will normally accede as a matter of comity to a request from a court in a non-EU state to direct a witness resident in Ireland to give evidence before a judge or commissioner relating to the issues before the foreign court.⁴⁸ An Irish court presented with such a request is not obliged to apply the same level of scrutiny as that adopted by English courts under the Evidence (Proceedings in Other Jurisdictions) Act 1975 as to the nature of the testimony sought. However, an Irish resident will not be ordered to make discovery in aid of non-EU proceedings.⁴⁹ A witness examined under the Irish procedure has the same rights to privilege as a witness under subpoena (summons) at trial in Ireland. He may refuse to answer questions tending to incriminate himself and may refuse to produce documents which are protected by privilege.

Ireland subscribes to established international arrangements applying both within the European Union⁵⁰ and outside it⁵¹ for the service abroad of judicial and extra-judicial documents in civil or commercial matters.

46 Order 11, RSC (Ireland), which is in many respects similar to Rule 6.20 of Part 6, CPR.

47 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

48 Foreign Tribunals Evidence Act 1856 and Order 39, RSC.

49 *Sabretech Inc v Shannon Aerospace In re Air Crash in the Florida Everglades on May 11 1996, In Re Valujet Airlines Inc and Others* [1999] 2 IR 468.

50 Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

51 In cases involving the non-EU Contracting Parties to it, the Convention on the service abroad of judicial and extra-judicial documents in civil or commercial matters done at the Hague on 15 November 1965 continues to apply.

Arbitration

Arbitration is frequently employed in Ireland, particularly in insurance, construction and property disputes. A branch of the Chartered Institute of Arbitrators and a national committee of the International Chamber of Commerce are active.

The substantive law of arbitration is now derived primarily from the Arbitration Act 2010, which incorporates the UNCITRAL Model Law on International Commercial Arbitration⁵² as the basis for both international and domestic arbitrations (with very limited exceptions, mainly in the area of industrial relations).

Where parties have entered into a valid arbitration agreement that is capable of being performed and where a dispute within the terms of the arbitration agreement has occurred, the courts are obliged to stay court proceedings between those parties under Article 8(1) of the Model Law, though courts can give interim relief available under the Model Law in aid of proceedings to be determined by arbitration.⁵³ Arbitration awards are enforceable summarily or by action under section 23 of the 2010 Act.

The 2010 Act expressly gives arbitral tribunals powers to make orders of specific performance and security for costs, in addition to the powers available under the Model Law. It is open to parties to seek to set aside an award to which the 2010 Act applies only on the grounds set out in Article 34 of the Model Law (which broadly are incapacity of a party; invalidity of the arbitration agreement under its proper law; the party seeking set aside having been deprived of proper notice of the proceedings or an opportunity to present its case; the award dealing with matters (not being severable) outside the terms or scope of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; irregularities in the composition of the arbitral tribunal or the arbitral procedure; the subject-matter of the dispute being incapable of settlement by arbitration under Irish law, or the award conflicting with Irish public policy). The Irish courts have shown in practice an increasing reluctance to intervene in arbitrations.

Ireland has ratified the Geneva Protocol and Convention of 1923 and 1927, the New York Convention 1958 and the Washington Convention 1965. As a result foreign awards to which these conventions are applicable may be readily enforced in Ireland under sections 23 and 24 of the 2010 Act, subject to the threshold conditions recognised by those conventions.

⁵² As adopted by the United Nations Commission on International Trade Law on 21 June 1985, with amendments as adopted by that Commission at its thirty-ninth session on 7 July 2006.

⁵³ Arbitration Act 2010, section 10.

Court Structure and the Legal Professions

Court Structure

The *High Court* is the Irish court of unlimited original jurisdiction. It consists of the President of the High Court, a panel of ordinary judges (currently 38) and ex officio, the Chief Justice, the President of the Court of Appeal and the President of the Circuit Court. One Master is attached to the High Court. The court sits ordinarily in Dublin (and has no local registries), but sits occasionally outside Dublin, predominantly to hear personal injury and fatal accident cases. The High Court hears appeals from the Circuit Court and decides points of law by way of case stated from the District Court. There are no formal divisions in the High Court, but particular judges are assigned to lists to hear disputes involving commercial matters; personal injuries; matters involving equity, company law, administrative law, family and child law, insolvency, admiralty, asylum, probate, and other defined matters. The High Court almost invariably comprises a single judge sitting alone, but can comprise a judge and jury in very limited classes of civil cases and exceptionally sits as a divisional court of three judges on matters of exceptional public importance. The High Court's Master has a limited jurisdiction in liquidated claims and in the making of interlocutory procedural orders, but his jurisdiction in both areas is less extensive than that of Masters in England. Several Deputy Masters are appointed, who in practice deal mainly with consent orders and listing issues.

The Court of Appeal is the intermediate appellate court in civil matters. It consists of the President of the Court of Appeal, ex officio the Chief Justice and President of the High Court, and nine ordinary judges. The court sits in Dublin with a court of three judges in most matters, although a single judge may deal with interlocutory applications and case management. In general, there is an unlimited right of appeal from the High Court to the Court of Appeal. Civil appeals are broadly divided into two categories, ordinary appeals and expedited appeals (which are fast-tracked to hearing), which must fall into one of the following categories:

- an appeal against the grant or refusal of relief under Article 40 of the Constitution (equivalent to habeas corpus);
- an appeal against the making or refusal of any interlocutory order;
- an appeal against the making or refusal of any order granting summary judgment;
- an appeal against the making or refusal of:
 - a winding up order;
 - an order appointing a provisional liquidator;
 - an order appointing a receiver; and
 - an order in the course of examinership proceedings;

- an appeal against the making or refusal of:
 - an adjudication in bankruptcy; and
 - an order under Chapter 3 (Debt Settlement Arrangements) or Chapter 4 (Personal Insolvency Arrangements) of Part 3 of the Personal Insolvency Act 2012;
- an appeal against the making or refusal of any order in any proceedings concerning child abduction and enforcement of custody orders (Hague-Luxembourg Convention cases);
- an appeal against the making or refusal of any order making a determination as to the capacity of a person (including an order making or refusing to make a person a ward of court);
- an appeal against the making or refusal of an order in proceedings under the European Arrest Warrant Acts 2003 and 2012 or in extradition proceedings;
- an appeal from the making or refusal in judicial review of an order of prohibition in criminal proceedings;
- an appeal against the refusal of an *ex parte* order; and
- any other appeal designated in a statutory practice direction issued by the President of the Court of Appeal as an expedited appeal.

The *Supreme Court* is the Irish court of final appeal. It consists of the Chief Justice, *ex officio* the Presidents of the Court of Appeal and of the High Court, and nine ordinary judges. The court generally sits in Dublin with a court of three judges in most matters and a court of five or (very exceptionally) seven in matters of special significance. The Supreme Court may sit in two chambers simultaneously. The court hears appeals from the High Court and on points of law by way of case stated from the Circuit Court.

There is no general right of appeal to the Supreme Court; appeals to the Supreme Court are by leave of the Supreme Court only. Leave applications are generally determined on the papers, but the court may direct an oral hearing. A **tertiary appeal** from the Court of Appeal to the Supreme Court is possible where the Supreme Court is satisfied that (i) the decision involves a matter of general public importance, or (ii) in the interests of justice it is necessary that there be an appeal to the Supreme Court. A **leapfrog appeal** from the High Court to the Supreme Court is possible where the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors: (i) the decision involves a matter of general public importance and/or (ii) the interests of justice.

Neither of the superior appellate courts generally hears oral evidence, and they will not normally interfere with findings of fact made at trial where these are based upon the trial judge's view of the credibility or reliability of a witness founded upon the witness's oral evidence.

The *Circuit* and *District Courts* are courts of limited and local jurisdiction. Circuit Court judges sit permanently in Dublin and Cork. Judges assigned outside Dublin and Cork are normally each assigned to circuits consisting of one or more counties, and they sit principally in the main county towns. The Circuit Court's monetary jurisdiction is currently limited to €75,000 in contract and tort claims and €60,000 in personal injuries claims. It has a significant jurisdiction in property disputes and a limited jurisdiction to grant equitable relief. It also has an important family law jurisdiction, jurisdiction in statutory personal insolvency arrangement (excluding bankruptcy) and in examinership (corporate rescue) of smaller companies. It acts as a court of appeal in respect of decisions of the District Court and appeals from the Employment Appeals Tribunal.

The District Court sits permanently in Dublin and Cork, and periodically in numerous towns and villages throughout the State. Its jurisdiction in cases of contract and tort is limited to claims of up to €15,000. It has a minor jurisdiction in property disputes. An informal small claims procedure for consumer claims of up to €2,000 is operated in the District Court, and it also operates the European Small Claims Procedure⁵⁴ and debt enforcement by instalment order.

The Supreme Court, Court of Appeal, Court High Court and Circuit Court sit during law terms which correspond approximately to those in England, though the Irish long vacation runs from the end of July to early October. These courts do not usually sit in vacation, although judges are available to deal with or conclude urgent matters. While pleadings may be delivered or amended during the long vacation, time will not run for default purposes against an opponent during August unless by consent or by order of the court.⁵⁵

The Legal Profession

As in England the legal profession has two branches, solicitors and barristers.

The majority of Irish solicitors practice in firms of one to five principals, but there are six firms in Dublin (including this firm) with over 100 lawyers which are regarded as leaders in commercial business. There are a sizeable number of other firms in Dublin (and many outside Dublin) which have lawyers practising in specific commercial fields. Solicitors have had a right of audience in all Irish courts since 1971 but rarely act as advocates before the higher courts in contested matters.

As in England, barristers act as advocates, draft pleadings, and advise by written opinion or in consultation. Some practise primarily in commercial matters, though many are generalists and relatively fewer specialise to the same extent as do many English barristers.

In contentious matters they may act only on instructions from Irish solicitors. In non-contentious matters they may accept instructions from lawyers practising in other Member States of the European Union and from members of other professions under rules of direct professional access.

54 Regulation 861/2007/EC of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

55 Order 122 as amended by Rules of the Superior Courts (Order 122) 2016 (SI No 471/2016).

Barristers, usually with not less than 10 years' experience, may opt to become senior counsel, giving them precedence in Ireland corresponding to that of Queen's Counsel in England. Senior counsel do not usually draft pleadings though they may review a draft prepared by junior counsel.

Irish counsel do not practice in sets or chambers (although many share office accommodation). They do not employ clerks and thus they accept briefs from, and agree fees with, instructing solicitors directly.

Future Developments

The Irish litigation landscape continues to evolve. We expect significant further reforms in Irish civil litigation in the coming years, including the commencement of legislation on regulation of the legal professions and responding to the recommendations of review groups and committees. Those recommendations address improving court practices and increasing efficiencies, and controlling litigation costs. We will highlight these expected changes in future editions

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