A Guide to **Ireland's Commercial Court**

A Decade of Innovation and Commercial Litigation

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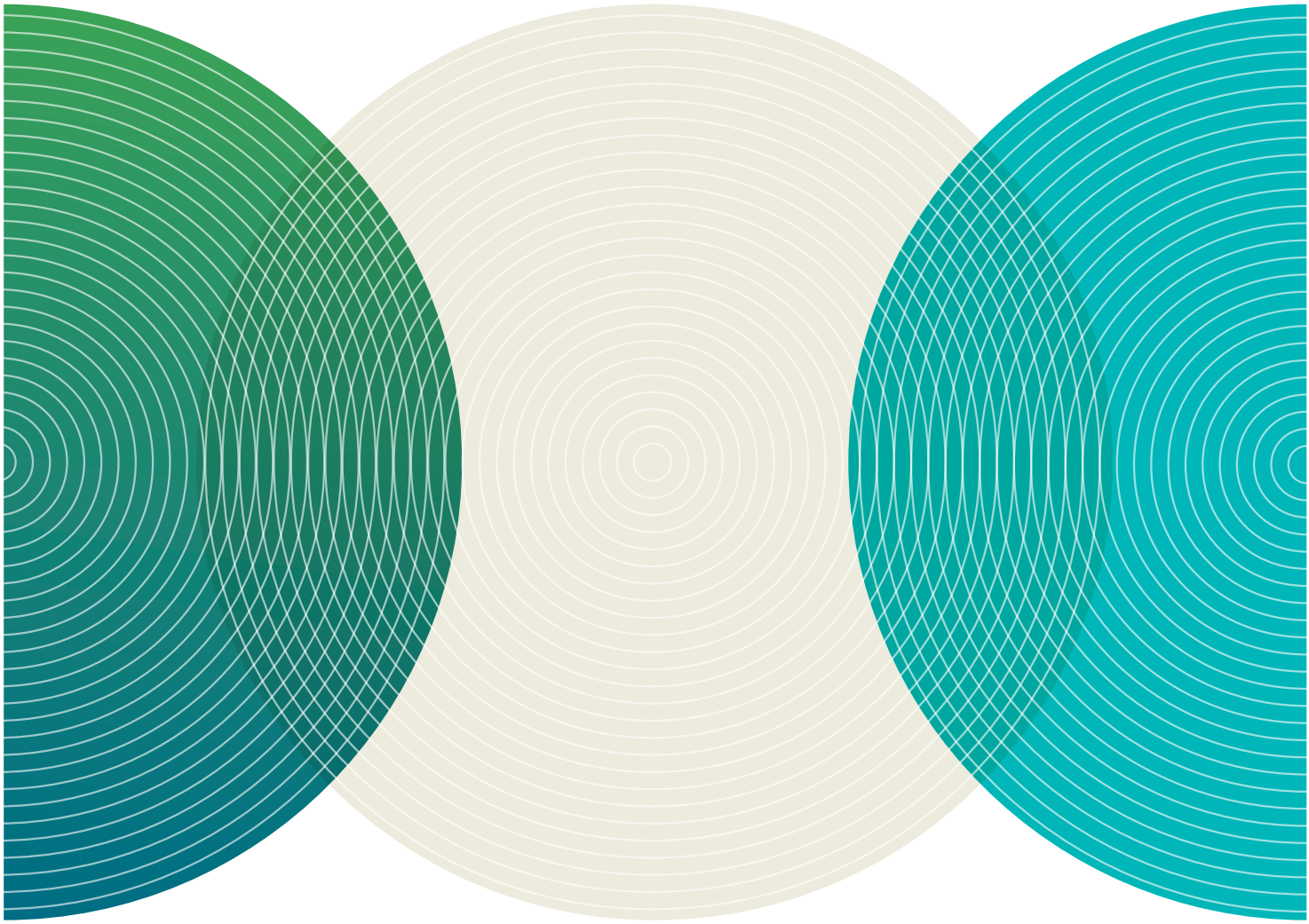

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The Commercial Court has operated as a division of the High Court since January 2004. The court has fundamentally changed commercial litigation in Ireland. In this briefing we outline the court's practices and procedures. Based on our experience of acting frequently in the Commercial Court, we comment on the court's impact on commercial litigation in Ireland while identifying the opportunities and pitfalls it presents for litigants.

Key Features of the Commercial Court

- A division of the High Court established to deal with commercial cases
- The court's judges have extensive experience of commercial litigation
- Entry into the Commercial List is not mandatory for any cases types; special application must be made to enter the court's list and, in general, only business disputes of more that €1 million in value will be admitted
- The court retains a discretion to refuse admission to qualifying cases, for example where there is delay
- Qualifying cases can be prosecuted in the chancery or in the non-jury lists if the parties so wish
- The €1 million minimum value does not apply to intellectual property cases or judicial review proceedings with commercial implications
- The court has discretion to admit commercial cases below €1 million
- Cases are dealt with swiftly: early trials, short deadlines and risk of costs penalties
- Rules are designed to give the court maximum flexibility in managing cases
- Rules provide for directions hearings, case management conferences and pre-trial conferences, though most case management matters are dealt with at directions hearings
- Court can adjourn proceedings to facilitate mediation, conciliation or arbitration
- No pre-action protocols
- Exchange of summaries of witness evidence and experts' reports in advance of the hearing

Key Statistics

In 2014, the last full year for which statistics are available[1], 171 new cases were admitted to the Commercial List, a slight increase on the 169 admitted in 2011. Our research indicates that 147 new cases were admitted between May 2014 and April 2015.

In its first ten years, 199 cases per year have been admitted on average, with 188 on average disposed of within that year.

In 2014, 111 cases were disposed of (compared to 167 disposed of in 2013). This reflects a number of factors. The Commercial Court's caseload in the years immediately following the economic crisis leaned more towards applications for summary judgment, which are of their nature often uncontested or otherwise quickly disposed of. Our research shows that in 2014-2015, the Commercial Court's caseload has spread across plenary actions, summary judgment claims, applications under the Companies Acts (particularly in relation to court-sanctioned insurance reorganisations and cross-border mergers), judicial reviews and intellectual property cases. Also, the Court heard a small number of unusually long trials in 2014, consuming significant judicial capacity. It also underwent the most significant change since its establishment to the composition of the Commercial Court panel, as several judges assigned to the Commercial Court took up more senior judicial positions.

Applications for admission to the Commercial Court continue to have dates immediately available and waiting times for dates for full hearings in 2014 ranged from a maximum of four months to as little as just a week depending on the hearing time required. The average time for disposal is 20 weeks, with 25% of all cases disposed of or concluded in less than 3 weeks, and 90% of all cases being disposed of in less than 51 weeks.

Notably, 55% of cases disposed of during 2014 went to a full hearing (up from 49% in 2013), with 11% settled at hearing and a further 15% settled after a trial date was set, so over 80% of cases avail of a hearing or a full opportunity to plead out the cases before concluding them; dispelling the myth that parties can feel pressurised into early settlement of cases.

1 Courts Service Annual Report 2014, published July 2015.

The Work of the Commercial Court

The most striking features of the Commercial Court are the speed with which cases can progress to trial and the variety of cases which the court is empowered and willing to hear.

The time from entry of a case into the Commercial Court to the allocation of a date for trial in the majority of cases ranges from a matter of weeks to a maximum of three or four months. This is achieved by the use of directions for the exchange of pleadings and the rigorous application of short deadlines. For unprepared plaintiffs and reluctant defendants, this speed has been an influencing factor in focussing seriously at a much earlier stage on the likely outcome, and possible resolution, of cases in the Commercial Court.

The variety of cases admitted to the court's list has been remarkable. The court has jurisdiction to deal with prescribed categories of commercial proceedings. It also has discretion to hear cases of commercial relevance which fall outside those categories. While its caseload in the years immediately following the economic crisis leaned much more towards applications for summary judgment, our research shows that in 2014-2015, its caseload has spread across plenary actions, summary judgment claims, applications under the Companies Acts (particularly in relation to insurance reorganisations and cross-border mergers), judicial reviews and intellectual property cases. The efficiency of the Commercial Court contrasts with the previous imprecision of pleadings and lack of procedural rigour associated with much litigation in the High Court, which gave rise to both uncertainty and significant delays for commercial litigants, although .

The Commercial Court has earned a reputation for a 'no nonsense' approach to commercial litigation. The court has not been slow to use the costs sanctions provided for in its rules to discourage delay and unreasonable stances by litigants. While the court has had to deal with an ever-growing and varied workload, its practices have proved highly effective in disposing of commercial disputes without unnecessary delay.

2 Rules of the Superior Courts.

Admission to the Commercial Court

The Commercial Court has taken a broad view of the meaning of 'commercial matters'. The court has held that "if it can be demonstrated that a commercial development or process or substantial sums of money whether by way of profit, investment, loan or interest are likely to be jeopardised if the case is not given a speedy hearing or is denied the case management procedures which are available in the Commercial Court", then it should be considered for entry into the Commercial Court.

Definition of "commercial proceedings"

The court rules dealing with the operation of the Commercial Court (Order 63A, RSC[2]), define "commercial proceedings" as proceedings in respect of a claim or counterclaim for damages, where the value of the claim is not less than €1 million arising from or related to any one or more of the following (all personal injures cases are expressly excluded):

- a business contract or business dispute (which make up about 69% of all cases admitted);
- construction of a business document, for example, claims for rectification (making up about 1% of all cases);
- purchase or sale of commodities or the export or import of goods (less than 1%);
- carriage of goods by land, sea, air or pipeline (less than 1%);
- exploitation of oil or gas reserves or any other natural resource (less than 1%);
- the construction of any vehicle, vessel or aircraft (less than 1%);
- insurance or reinsurance (about 1.5%);
- provision of services (not including medical, quasi-medical or dental services or any service provided under a contract of employment)(about 1.5%);
- business agency (less than 1%);
- operation of markets or exchanges in stocks, shares or other financial or investment instruments, or in commodities (less than 1%).

The following cases also fall within the definition of commercial proceedings, irrespective of their value:

- intellectual property cases, including passing off (about 5%);
- an appeal or application for judicial review of a regulatory decision where the judge considers that the appeal or application is appropriate for entry in the Commercial List (about 7%);
- an arbitration, including orders in aid of an arbitration or enforcement of a foreign arbitration award under the New York Convention, but not a mere application for a stay of litigation pending reference to arbitration (about 1.5%);
- proceedings by or against the Registrar of International Interests in Mobile Equipment maintained under Article 1 of the Cape Town Convention (who is located in Ireland) in connection with any function exercised or exercisable by the Registrar under the Cape Town Convention or the Aircraft Protocol (less than 1%).

In addition, the judge of the Commercial Court has discretion to admit any other case which, having regard to the commercial and any other aspect thereof, the judge considers appropriate for entry in the list. These make up about 14% of the cases admitted.

Philosophy of the Commercial Court

The Commercial Court has taken a broad view of the meaning of 'commercial matters'. The court has held that "if it can be demonstrated that a commercial development or process or substantial sums of money whether by way of profit, investment, loan or interest are likely to be jeopardised if the case is not given a speedy hearing or is denied the case management procedures which are available in the Commercial Court", then it should be considered for entry into the Commercial Court. The court has repeatedly noted that its purpose is to achieve the objective of "speedy, efficient and just determination of commercial disputes".[3]

Indeed, the disposition is not confined to disputes in the traditional sense; it has become conventional for complex company law and similar applications which are of significant commercial importance, but which may not, at the point of admission, necessarily involve a dispute between parties, to be admitted, so as to avail of the close case management available in fixing timetables for hearings which must often accommodate other transactional timing requirements. Accordingly, the court routinely exercises its discretion to admit applications for confirmation of share capital reductions; to sanction takeovers by scheme of arrangement; to approve insurance portfolio transfers and to confirm the legality and effectiveness of cross-border mergers. Our research suggests that such matters make up about 20% of the cases admitted.

3 Abbey International Finance Limited –v- Point Helicopters Limited [2012] IEHC 374.

The intensive case management available in the Commercial Court aims at ensuring that cases are readied for trial as quickly as possible consistently with affording the parties a fair opportunity to prepare[4] and that the trial of the action (which is likely to be longer where the case is complex) is "focused on the matters which are truly in dispute.. and that time and costs are not wasted on peripheral questions".[5]

Procedure for entry into the Commercial list

Applications for entry into the Commercial Court may be made at any time prior to the delivery of final pleadings or, where appropriate, all affidavits. In practice, such applications should be made shortly after proceedings have issued. The court has repeatedly made it clear that it will not exercise its discretion to admit cases into the list where the application is not made promptly and during the early stages of litigation.

All applications for entry into the Commercial Court must be accompanied by a written certificate from the solicitor on record for the applicant certifying that the proceedings fall within the definition of 'commercial proceedings' in the court rules and undertaking best endeavours to secure the client's compliance with all directions. For this reason solicitors must give careful consideration to the specific basis upon which a case can be certified. In the early stages of the court's operation, the court tended to award costs against applicants who were unsuccessful in seeking to enter the list but the trend in more recent times has been to reserve the cost.

4 Donatex Limited –v- Dublin Docklands Development Authority [2012] IEHC 168.

5 Mulholland and Kinsella –v- An Bórd Pleanála [2005] 3 IR 1.

A Changed Litigation Landscape

Opportunities and Challenges for Litigants

Pre-litigation tactics

The speed and efficiency of the court have a very real impact on litigation tactics. Claimants contemplating a case with no serious intention of pursuing it to trial should consider the implications of a successful application by a defendant to transfer it to the Commercial Court. Equally, claimants contemplating an application to have their case dealt with in the Commercial Court should be ready for the organisational and evidential demands of an early trial. In drafting initiating pleadings, practitioners must be conscious of the impact the pleadings may have on the prospect of the case being admitted to the Commercial Court.

Pre-emptive procedures

The court has demonstrated a willingness to use procedures designed to narrow the issues between the parties or, indeed, to pre-empt the need for trial. It has supported the use of modular trials, and welcomed the opportunity to deal with preliminary issues and applications to strike out on time bar grounds or for failure to disclose a reasonable cause of action. This has resulted in the early disposal of a number of cases and may also have contributed to the level of early settlements.

Frontloading of costs

The court's procedures and timeframes necessitate accelerated preparation of cases. The early deployment of greater numbers of legal and other advisers than is normal for case preparation in Ireland has had cost implications for litigants in the Commercial Court. However, this is aimed at avoiding the significant risk that in the absence of case management, costs could accumulate unnecessarily, and it is recognised that it would be unjust to burden a losing party with unnecessary costs.[6]

Exchange of witness statements – fewer surprises

In cases directed to a trial on oral evidence, the court can, and usually does, direct the exchange of signed statements outlining the essential elements of the evidence that experts or witnesses of fact intend to give at trial. In many cases where parties have opted to provide very detailed statements the statements have been adopted as evidence in chief at the trial of the action.

6 Moorview Developments Limited –v- First Active plc [2009] 2 IR 788.

Direction of issues and modular trials – fewer loose ends

As part of the approach aimed at netting down the real issues in dispute, the court is empowered to direct the parties to prepare issues and, where necessary, to settle issue papers, so that "extraneous and irrelevant issues should be sidelined".[7] These may be issues of law or of fact, although the court has clarified that, as regards issues of law, a party is entitled to know before the hearing the legal basis on which its opponent's case is advanced, though not the legal argument that will be put forward in support of that basis.[8] (However, written legal submissions/outline arguments will almost invariably be directed). This usually anticipates a degree of co-operation between the parties, although the moving party usually prepares the first draft for comment by the other party or parties.

As an obvious adjunct to the identification of separate issues, the Commercial Court recognises the desirability in appropriate cases of modular trials, where discrete issues can be isolated out into separate hearings, and its power to direct modular trials in such cases.[9]

A demanding environment for litigants

The pace of litigation in the Commercial Court can make significant demands on corporate litigants' senior personnel, drawing them away from the day-to-day running of the business. The quid pro quo is the commercial certainty which can be achieved by the early resolution of cases.

Addressing discovery issues

The Commercial Court has been to the forefront in addressing issues which inevitably arise from the volume and complexity of documents and other records (including electronic information) of which discovery is sought in commercial proceedings. The Commercial Court has led the way in considering whether discovery is necessary at all where the information sought by a party can better be addressed by seeking interrogatories;[10] disallowing or limiting discovery on proportionality grounds where the breadth of discovery sought reduced the likelihood of the discovered categories of documents having a meaningful bearing on the proceedings;[11] ordering staged discovery (particularly where a modular trial has been directed), and use of technology-assisted review.[12]

7 Quinn and others –v- IBRC and others [2012] IEHC 36, per Charleton J.

8 Moorview Developments Limited –v- First Active plc [2005] IEHC 329.

9 McCann –v- Desmond [2010] 4 IR 554; see also Cork Plastics (Manufacturing) Limited –v- Ineos Compound UK Limited [2008] 1 ILRM 174.

10 IBRC –v- Browne [2011] IEHC 140.

11 Thema International Fund plc –v- HSBC Institutional Trust Service s (Ireland) Limited [2010] IEHC 19; Astrazeneca AB –v- Pinewood Laboratories Limited [2011] IEHC 159.

12 IBRC and others –v- Quinn and others [2015] IEHC 175.

A More Refined Approach to Decisions on Costs

Order 63A permits the Commercial Court to make costs orders in respect of any pleadings which contain unnecessary matter or are too lengthy. This is designed to focus solicitors and counsel on drafting pleadings with more specificity than was the practice. In addition, the rules provide that the court may make costs orders where there is a delay or default by any party in complying with a deadline, though such orders are rarely in practice made. The court has also exercised its discretion to award the costs of unsuccessful interlocutory applications against applicants, reflecting a more recent general preference, reflected in amendments to costs rules,[13] directed at avoiding having costs of interlocutory applications reserved, unless the issue of which party should bear them cannot fairly be decided.

...the Commercial Court has championed the use of costs orders which are more nuanced than merely awarding the entire costs to the party who on balance has won...

While jurisprudence on issues-based costs orders was already developing, the Commercial Court has championed the use of costs orders which are more nuanced than merely awarding the entire costs to the party who on balance has won, for example by considering whether the costs of the parties overall were increased by virtue of the successful party pursuing issues on which it did not succeed, establishing that while the starting point that costs must ordinarily follow the event remains intact, the court may, particularly in complex litigation, disallow (and award to the unsuccessful party by way of set-off) the costs of an issue on which the successful party failed.[14] This approach is now considered standard in all complex litigation in Ireland.

13 Rules of the Superior Courts (Costs) 2008; SI 12 of 2008.

14 Veolia Water UK plc –v- Fingal County Council [2007] 2 IR 81.

Mediation, Conciliation or Arbitration

The Commercial Court rules have, since its establishment, permitted the judge to adjourn proceedings so that the parties may consider whether the proceedings ought to be referred to a process of mediation, conciliation or arbitration. Apart from family law litigation, this was the first time in Ireland that court rules referred to 'mediation' or 'conciliation'. This reflected a new awareness in Ireland of the potential benefits of alternative dispute resolution beyond their traditional spheres. Under the rules the judge, in an appropriate instance, may direct the adjournment of proceedings for a specified time so that the parties can consider mediation, conciliation or arbitration. Although compliance is not mandatory, there can be cost implications if one of the parties adopts an unreasonable or obstructive position in circumstances where the judge has indicated that mediation may be appropriate. The judges of the Commercial Court have adjourned cases to allow the parties consider mediation, and encouraged parties to avail of the opportunity as actively as they can. In one case, it was observed that "..a process of mediation gives the opportunity for the mediator to bring into play many questions or issues which, while not reflecting current legal rights and obligations, may afford a balanced and mutually beneficial solution to the problems encountered on both sides because of the unsatisfactory nature of the current rights and obligations".[15]

While the prospect of an early resolution through mediation might in theory hold less attraction for litigants who are in any event guaranteed an early trial, many litigants have availed of the opportunity to settle proceedings before trial either through mediation or through negotiations around mediation. It may reflect the relative success of mediation in the Commercial Court or the advance of ADR generally that the possibility of adjournment to facilitate participation in ADR subsequently became available in all High Court cases.[16]

15 Palaceanne Management Limited –v- Allied Irish Banks plc [2012] IEHC 182.

16 Rules of the Superior Courts (Mediation and Conciliation) 2010; SI 502 of 2010.

Wider Influence of Case Management on Irish Litigation

The Commercial Court has acted as a pathfinder for other Irish courts, which have learned from and adopted its case management philosophy in different ways. The rules and procedure of the Competition Court largely replicate the Commercial Court Rules, and the requirement that proceedings be conducted in a manner which is just, expeditious and likely to minimize cost has also been introduced in respect of statutory applications[17] and appeals[18] and judicial review.[19] Judges in other divisions of the High Court have applied Commercial Court type case management procedures to large cases.

The Court of Appeal Act 2014 allows[20] for the making or orders or giving of directions in relation to the conduct of the proceedings before the Court of Appeal by either the President or another nominated Judge of the Court of Appeal sitting alone which are "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 the proceedings". This formula marks the first time that something like the "over-riding objective" well known in the Civil Procedure Rules in England and Wales since the 1990s has been written into statute in Ireland in respect of the courts, and gives considerable support to judicial case management. An identical provision introduced by the same Act[21] empowers either the Chief Justice or another nominated Judge of the Supreme Court sitting alone to make case management orders addressing the same objective.

This reflects the developing consensus among the judiciary that a party's right of access to the courts and right to put his or her case is not absolute, and must be viewed in a context where judicial attention is a scarce and valuable resource, the State has obligations under the European Convention on Human Rights to ensure that litigation determining the rights of parties is determined within a reasonable time22, and the interests of litigants in other proceedings waiting for court access must also be taken into account.[23] A similar formula is also used in respect of case-managed proceedings in the Circuit Court[24] and in cases in the District Court which are case managed to prevent further delay[25].

17 Order 84B, rule 8, RSC.
18 Order 84C, rule 7, RSC.
19 Order 84, rule 24(3), RSC.
20 section 7C(1) of the Courts (Supplemental Provisions) Act 1961, inserted by section 10 of the Court of Appeal Act 2014.
21 section 7(6) of the Courts (Supplemental Provisions) Act 1961, inserted by section 44 of the Court of Appeal Act 2014.
22 Gilroy –v- Flynn [2005] 1 ILRM 290, 294, per Hardiman J.
23 See e.g. Talbot –v- Hermitage Golf Club [2014] IESC 57 per Denham CJ.
24 Order 19A, rule 2, Circuit Court Rules.
25 Order 39, rule 4(4), District Court Rules.

Many of the judges who formed the original panel of the Commercial Court have moved on to roles in the Supreme Court and Court of Appeal. A new generation of judges now forms the Commercial Court panel. The next decade will undoubtedly see the court consolidate its central role in the resolution of business disputes and matters with an Irish dimension and the continued delivery of further case management innovations.

Commercial Court - Essential Steps

Issue proceedings in Central Office of High Court as usual

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Either party applies to transfer the case to the Commercial List

This application requires a hearing (even if on consent) as the judge has discretion aboutwhether to admit a case into the Commercial List. Costs may be awarded against the applicant if the application is declined by the judge. Judge may, and usually does, treat this hearing as an initial directions hearing.

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Directions hearing

Judge may give directions about the exchange of pleadings, defining issues, consultation among expert witnesses, adjournment of proceedings for parties to consider mediation, conciliation or arbitration and provision of information on witnesses. The directions hearing is often adjourned to close of pleadings to deal then with discovery issues (if not agreed) and trial preparation. A trial date is often allocated at the adjourned hearing if there are no outstanding discovery issues. Commonly, there is no case management conference or pre-trial conference and the matter is listed for mention pre-trial or at the call-over in the week before trial to confirm that the directed steps have been completed.

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If the Court directs or the parties request case management (infrequent)

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Yes

Plaintiff lodges case booklet with registrar in advance of case management conference.

or

No

Either party may make an application for a pre-trial conference.

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Case management conference (infrequently used)

Attended by judge, solicitors and counsel. Judge sets timetable for completion of preparation of case for trial. Judge if dissatisfied with conduct of proceedings may disallow costs of certain steps.

Pre-trial conference (infrequently used)

Each party must complete pre-trial questionnaire. Judge to establish length of trial and arrangements for trial. If judge is satisfied case is ready to proceed to trial he will fix a hearing date. Judge may request parties to consult and agree documents for trial.

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