Complex Commercial Litigation

Contributing editors
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2019

GETTING THE DEAL THROUGH

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Published by
Law Business Research Ltd
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Tel: +44 20 3780 4147
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First published 2017
Second edition
ISBN 978-1-78915-004-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Second edition

Getting the Deal Through is delighted to publish the second edition of *Complex Commercial Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Nigeria and the United Arab Emirates.

Getting the Deal Through titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Simon Bushell and Daniel Spendlove of Signature, the contributing editors, for their assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
October 2018

Ireland

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Matheson

Background

1 How common is commercial litigation as a method of resolving high-value, complex disputes?

Commercial disputes are predominantly dealt with through litigation in the Irish High Court, which has jurisdiction to hear all claims with a monetary value in excess of €75,000 (€60,000 for actions for personal injuries). The Commercial Court (a division of the High Court) deals with commercial disputes with a monetary value in excess of €1 million. While the courts remain the ultimate forum for the resolution of commercial disputes, there is a growing trend towards the use of alternative dispute resolution (ADR) in addition to the court system or as an alternative. Arbitration is recognised as an alternative procedure and has been modernised by the Arbitration Act 2010. The High Court can adjourn proceedings to allow parties to engage in ADR.

In May 2011, the European Communities (Mediation) Regulations (SI No. 209 of 2011) (Mediation Regulations) were enacted, which brought into effect in national law Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Mediation Directive). These Regulations deal with the use of mediation in cross-border disputes and apply to all Irish courts. Additionally, the Mediation Act 2017 was commenced on 1 January 2018 with the aim of promoting mediation as an alternative to court proceedings, in terms of time, cost, resources and the avoidance of acrimony. Although mediation may not be suitable for all disputes, the Act aims to encourage parties to resolve their difficulties without commencing litigation where appropriate, and requires legal practitioners to advise their clients of the possibility of mediation before the initiation of legal proceedings.

2 Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

The Courts Service Annual Report 2017 shows that nearly 230,000 civil-law cases were commenced in Ireland in 2017. Since the introduction of the Commercial Court in 2004, Ireland has been a forum of choice for judicially managed commercial disputes. The Commercial Court is recognised internationally as an efficient platform for the determination of substantial commercial disputes and, according to Commercial Court statistics, 90 per cent of cases are decided within one year.

3 What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

Ireland is a common law jurisdiction. This means that the Irish courts place greater reliance on previous case law than courts in civil law jurisdictions and are bound by the decisions of any courts superior to them in the court structure. The court structure in Ireland is made up of the lower courts (the District and Circuit Courts) along with, in order of increasing supremacy, the High Court (which includes the Commercial Court), the Court of Appeal and the Supreme Court.

Bringing a claim – initial considerations

4 What key issues should a party consider before bringing a claim?

A party bringing a claim should consider the limitation period that applies, such as:

- contract law: six years from the date of breach;
- claims for liquidated sums: six years from the date the sum became due;
- tort claims: six years from the date of accrual of the cause of action;
- land recovery: 12 years from accrual of the right of action;
- maritime and airline cases: two years from the date of accrual of the cause of action; or
- defamation: one year from the date of publication.

Parties should also first consider the appropriateness of alternative dispute resolution mechanisms. Where there is an international element to the dispute, a party bringing a claim should consider whether Ireland is the appropriate jurisdiction in which to instigate proceedings. (For further details on jurisdiction, see question 5.)

A party considering bringing a claim should also consider the costs involved. Careful consideration should be given to the approximate value of the claim, as this will determine the level of court in which to bring the proceedings. As to recovery of legal costs, the unsuccessful party is generally ordered to pay the successful party's costs following the event. (For further details on recovery of costs, see question 47.)

5 How is jurisdiction established?

The Irish Constitution gives full original jurisdiction over all claims to the High Court. The Circuit Court and District Court's jurisdiction is assigned by statute; these courts have jurisdiction over a limited range of cases and generally these cases would relate to issues of lesser value and importance. There are specialist insolvency judges in the Circuit Court that allow for a cost-effective administrative process for smaller companies. The High Court deals with large commercial litigation.

The courts respect the choice of jurisdiction in a commercial contract in accordance with the provisions of Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the provisions of the recently recast Brussels I Regulation. The recast Brussels Regulation has been transposed into Irish law under the EU (Civil and Commercial Judgments) Regulations 2015, SI No. 6 of 2015, and applies to judgments in proceedings commenced on or after 10 January 2015.

The Irish courts can also accept jurisdiction to determine a dispute where the choice of jurisdiction is not exclusive or where both parties agree to the Irish courts accepting jurisdiction.

Where the defendant is not domiciled in a contracting state to Brussels I (recast), common-law rules apply and Irish courts may claim jurisdiction where Ireland is the most appropriate forum for the claim.

6 Res judicata: is preclusion applicable, and if so how?

The doctrine of res judicata prohibits reopening an issue that has already been decided between the parties by a competent court or tribunal. The Irish courts regularly enforce the doctrine of res judicata on the grounds that it is in public interest that the litigation comes to an end. The Irish courts will not allow a party to reopen an issue that

has already been decided by a competent court or tribunal between the same parties, or to attempt to reopen in new litigation points that could have been decided in a previous litigation and that could have been raised in that litigation. The only effective way for a litigant to overturn a court's findings is to appeal to a higher court (where a right of appeal exists). Where an issue has been conceded or abandoned in litigation, it is generally not possible to reopen these issues through new litigation.

7 In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

The courts generally recognise an express choice of governing law in civil and commercial contracts between parties in EU member states pursuant to Regulation (EC) No. 593/2008 on the law applicable to contractual obligations. In the case of non-EU member states, the courts will recognise a choice of law under common-law rules, subject to the following qualifications:

- the court may apply overriding mandatory provisions of Irish law (for example, statutory employment-law rights under the Irish unfair dismissals legislation); and
- the application of foreign legal provisions may be refused if the application is manifestly incompatible with Irish public policy.

8 What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

A claimant should consider whether a defendant will have sufficient means or assets to satisfy any judgment made against the defendant. Certain practical steps can be taken in this regard where the defendant is an Irish company, such as conducting a search at the Irish Companies Registration Office to ascertain if the company remains active as a going concern, or commissioning a judgment search to determine if there are any other outstanding judgments registered against the relevant entity.

There are various mechanisms available to ensure satisfaction of a judgment, including instalment orders, recourse to the sheriff or county registrar for the seizure of assets or registration of a judgment mortgage against the defendant's property. Ultimately, the defendant could be rendered bankrupt for failure to satisfy a judgment.

9 When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

A party can seek a freezing injunction to restrain the dissipation of assets by another party if they believe that the other party will do so before they are able to obtain and enforce a court judgment against them. The standard of proof required to obtain such an injunction is high and, by way of summary and in addition to the risk of dissipation, the applicant must prove that they have a prima facie cause of action and that the balance of convenience is in favour of granting the injunction. A freezing order is a type of interlocutory injunction and the object of such injunctions is to maintain the status quo between the parties until the final disposal of the action in court (or such other period as ordered by the court).

10 Are there requirements for pre-action conduct and what are the consequences of non-compliance?

While they are under no obligation to do so, solicitors usually (as a protective measure in relation to future costs applications) send a warning letter to the defendant before initiating legal action. If there is more than one potential defendant, an 'O'Byrne letter' is usually sent, which calls on the potential defendants to admit liability and states that, if no liability is admitted, each will be sued and the letter will be relied on in resisting an application for costs by any party found not liable. In personal injury actions, if the claimant does not notify the alleged wrongdoer or wrongdoers in writing of the wrong alleged to have been committed within two months of the cause of action accruing, the court may take this failure into account when adjudicating on costs. Under the Mediation Act 2017, practitioners must advise clients of the possibility of mediation prior to initiating an action, and must complete a declaration to that effect.

11 What other forms of interim relief can be sought?

Although rare, an order can be granted that allows the claimant to access documentation belonging to the defendant and to remove identified items. This is known as an *Anton Piller* order, and it helps prevent the defendant from destroying evidence pending the trial of the action, by allowing premises to be searched and evidence to be seized.

12 Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

The Commercial Court has discretion to adjourn a case of its own volition or on the application of the parties for up to 28 days to enable the parties to consider using mediation, conciliation and arbitration. The court can extend the adjournment if the parties decide to refer the proceedings to one of these regimes. Under Order 56A of the Rules of the Superior Courts (RSC), similar rules apply to all High Court proceedings, which can now be adjourned to allow the parties to engage in mediation or conciliation. Under these rules, costs sanctions may be imposed for not availing of mediation or conciliation, unless there is a good reason. Under the Mediation Act 2017, there is an obligation on solicitors to advise clients of the option of mediation, and to outline the potential benefits and drawbacks of the process.

13 Are there different considerations for claims against natural persons as opposed to corporations?

Claims awarded against natural persons are generally liable to be satisfied from personal assets (unless covered by valid insurance). In certain instances, additional protections can be afforded to natural persons, such as personal insolvency measures and protections specific to the family home.

Claims awarded against corporate entities are liable to be discharged from the assets of the company.

Corporate entities generally avail the benefit of limited liability to protect the personal assets of directors and shareholders. In general, the courts are less sympathetic towards corporate defendants than natural persons where a corporate defendant has the benefit of limited liability.

In terms of effecting the service of proceedings, a natural person must be served personally where he or she has not authorised a firm of solicitors to accept service on his or her behalf. In contrast, a corporate entity may be served by delivering proceedings to the registered office of the company.

14 Are any of the considerations different for class actions, multi-party or group litigations?

There is no specific Irish legislative provision dealing with class actions or multiparty litigation. The closest procedures are representative actions and test cases. There are limitations with representative actions. For example, damages cannot be awarded and there are specific rules requiring the members of the class to have substantially the same interest. The preferred option is the test case, which arises where there are numerous separate claims arising from the same circumstances. The first case is the test case as it effectively becomes the benchmark by which the remaining cases are resolved. Although technically the subsequent claimants and defendants are not bound by the result (not being parties to the original litigation), the test case has an effect by virtue of the doctrine of precedent. Therefore, the benefits of the original ruling may be extended to cases involving factual situations identical to those of the test case. Subsequent litigation is often settled on the outcome of the test case. The Law Reform Commission published a report in 2005 on multiparty litigation, recommending a formal opt-in procedural structure be put in place to deal with multiparty litigation. To date, the recommendation has not been implemented.

On 11 June 2013, the European Commission published a recommendation calling on all member states to adopt collective redress systems for both injunctive and compensatory relief. Although member states are encouraged to implement the principles set out in the regulations, the recommendation is not binding. The recommendation deals with 'mass harm situations' whereby two or more persons (natural or legal) claim to have suffered harm from the same illegal activity carried out by another person (natural or legal) in breach of EU rights. The recommendation, which will likely form the basis for future

implementing legislation, addresses a number of issues in collective redress, including: standing to bring a representative action; funding; cross-border disputes; ADR; damages; and legal costs and lawyer fees.

15 What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

Litigation is usually funded by the individual parties, but the unsuccessful party is typically ordered to pay the successful party's costs. There is no explicit statutory basis for third-party funding (TPF) in Ireland and TPF is generally prohibited by the common-law principles of maintenance and champerty, which prohibit financial assistance to a party to litigation by a person who has neither an interest in the litigation, nor any legally recognised motive justifying interference.

In the case of *Persona Digital Telephony Limited & anor v The Minister for Public Enterprise Ireland & ors* [2017] IESC 27, the Supreme Court upheld the centuries-old prohibition on litigation funding by a third party without a legitimate interest.

However, the Irish courts have also recently accepted that after-the-event insurance may be allowed.

The claim

16 How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Proceedings are commenced in the High Court by issuing and serving an originating summons. The most commonly issued summons is a plenary summons. This is a short document that lists the various heads of claim. The defendant must then enter an appearance (another short document) within eight days of the service of the summons, either confirming his or her intention to defend the claim or contesting the court's jurisdiction, and also identifying the defendant's solicitor if one is retained.

In plenary proceedings, a statement of claim must be delivered to the defendant within 21 days of the appearance being filed. This is a longer document that sets out the details of the claim. The defendant then has 28 days to deliver a defence or counterclaim. A reply to the defence or counterclaim can be delivered by the claimant within 14 days.

Following the receipt of the statement of claim, the defendant can raise queries on it (known as a 'notice for particulars') to assist with the preparation of its defence. A reply to the notice for particulars is usually required within 21 days; otherwise, an application can be made to court for an order directing delivery of replies. Equally, a notice for particulars can be raised by the claimant on the defence. It is also open to the plaintiff to deliver a reply to the defence delivered. Once these steps are completed, pleadings are 'closed'.

17 How are claims served on foreign parties?

If the foreign party is EU-based, Regulation (EC) No. 1393/2007 on the service in member states of judicial and extrajudicial documents in civil or commercial matters (Service Regulation) applies.

If the foreign party is not EU-based, but is based in a contracting state to the Hague Convention, a request for service must be lodged with the Master of the High Court (the Hague Convention central authority in Ireland), who must certify that the request complies with Hague Convention requirements. The request must then be lodged with the central authority of the state addressed, so that service can be effected.

If the foreign party is not based in an EU member state and is not a party to the Hague Convention, then service must be effected in accordance with the requirements for service in that jurisdiction.

Proceedings can be sent directly by post, provided that the terms of the Service Regulation are observed.

18 What are the key causes of action that typically arise in commercial litigation?

Commercial litigation can involve a wide variety of disputes in the High Court and Commercial Court, which are essentially of a contractual nature. These include breach of warranty claims, large-scale negligence cases involving professionals and other commercial litigation arising from complex corporate transactions.

19 Under what circumstances can amendments to claims be made?

In Irish plenary proceedings the statement of claim sets out the detail of a plaintiff's case. Once formally delivered, a party can only amend the statement of claim by obtaining leave of the court. Parties enjoy complete freedom of pleading. In the ordinary course of events, a plaintiff is free to choose how to plead his or her case. The plaintiff cannot be told how to formulate and present his or her claim absent pleas that are scandalous and vexatious. For further details on the amendment of pleadings, see question 24.

20 What remedies are available to a claimant in your jurisdiction?

The most common remedy awarded is damages (monetary compensation), although the court has discretion to award equitable remedies including specific performance, rescission, declarations, rectification and injunctions. Damages can be compensatory or punitive, for example:

- general damages: compensation for loss with no quantifiable value, such as pain and suffering;
- special damages: compensation for precise financial loss, such as damage to property;
- punitive (exemplary) damages: awarded to punish the behaviour of a defendant (rarely awarded); or
- nominal damages: awarded where the claimant has been wronged but has not suffered financial loss.

21 What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

In relation to contractual damages, the general rule is that damages should (so far as a monetary award can provide) place the claimant in the same position as if the contract had been performed. Loss following directly from a breach of contract and foreseeable consequential losses caused by that breach are compensable through damages. Only net losses are recoverable and there is a duty to mitigate loss (although reasonable costs incurred are also recoverable).

Responding to the claim

22 What steps are open to a defendant in the early part of a case?

If a defendant wishes to set up a counterclaim against the plaintiff as well as defend a claim, they should deliver the defence and counterclaim within the same time allotted for delivery of the defence.

A defendant can also enter a conditional appearance in response to service of the proceedings in order to contest the jurisdiction of the Irish courts to determine the case. A jurisdictional challenge is generally grounded on the basis that the Irish courts are not the appropriate forum for adjudication of the claim or the parties may be contractually bound to refer a dispute to a particular jurisdiction as specified in the contract between them.

Order 16, Rule 1 of the RSC sets out the circumstances in which a defendant may apply to join a third party. (For further detail on joining a third party, see question 25.)

The courts have the power, pursuant to both Order 19, Rule 28 of the RSC and their inherent jurisdiction, to strike out proceedings where they can be shown to be frivolous, vexatious or unsustainable.

23 How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

There are no set rules about the contents of a defence; however, it must contain the appropriate denials in respect of the plaintiff's claim and include any set-off or counterclaim that it seeks to assert. Expert evidence may be used to assist in drafting a defence. In addition, where a defendant proposes to offer expert evidence in any matter at trial, the defence must disclose that intention and state the field of expertise of the expert and the matters on which expert evidence is to be offered.

The defendant must deliver a defence to the plaintiff within 28 days of receiving the statement of claim. Failing this, the plaintiff may issue a motion for judgment in default of defence provided they have first written a warning letter to the defendant's solicitor. Where a defendant

wishes to set up a counterclaim, he or she should deliver a counterclaim within the same time allotted for the delivery of the defence.

24 Under what circumstances may a defendant change a defence at a later stage in the proceedings?

The amendment of pleadings is dealt with in Order 28 of the RSC, which embodies the principle that the interests of justice are best served if the real issues in controversy between the parties are before the court. A party will generally be entitled to amend his or her pleadings provided that irreparable prejudice is not thereby suffered by the opposing party. Order 28 distinguishes between amendments at two stages of proceedings: a party may seek to amend a pleading shortly after its delivery without any necessity for leave; or a party may apply to the court at any time for leave to amend his or her pleadings and this amendment may be allowed upon just terms.

Rule 6(1)(v) of Order 63A states that Commercial Court judges may, either of their own motion or on the application of a party by motion on notice, give a direction to allow any party to alter or amend an endorsement or pleadings. The guiding principle is that this will facilitate the determination of the proceedings in a manner that is just, expeditious and likely to minimise the costs of proceedings. It is a prerequisite to any successful application that the amendment relates to an issue arising from, and relevant to, the subject matter of the proceedings. Other factors that may be considered by the court in deciding whether to allow an amendment include the potential for prejudice being caused to the other party and the applicant's conduct.

25 How can a defendant establish the passing on or sharing of liability?

It should be noted that the court has discretion as to whether or not to permit the joining of a third party. The circumstances in which a defendant can apply to join a third party are as follows:

- the defendant claims that they are entitled to a contribution or indemnity from a third party;
- the defendant claims to be entitled against the third party to any relief or remedy relating to or connected with the original subject matter of the action and that is substantially the same as the claim by the plaintiff against the defendant; or
- the defendant claims that any question or issue relating to or connected with the subject matter is substantially the same as a question or issue arising between the plaintiff and the defendant and should properly be determined, not only between the plaintiff and the defendant, but between the plaintiff, the defendant and the third party, or between any or either of them.

The court may give leave to the defendant to issue and serve a third party notice and may, at the same time, if it appears desirable to do so, give the third party liberty to appear at the trial and take part. The court may also generally give such directions as it considers proper to have any question or the rights or liabilities of the parties most conveniently determined and enforced, and to give directions as to the mode in and extent to which the third party shall be bound or made liable by the decision or judgment in the action. The court may refuse to give leave where the defendant has delayed in making the application to join the third party.

26 How can a defendant avoid trial?

A case may be dismissed before trial if there is a default in pleadings or a failure to meet procedural requirements.

A defendant can make an application to dismiss a claim or pleading provided it can show that either there is no reasonable cause of action or the action is frivolous or vexatious.

It is also possible to make an application to strike out an action in circumstances where the plaintiff does not take reasonable steps to prosecute the claim once issued. This can arise in circumstances where the plaintiff fails to deliver a statement of claim, but an application to strike for want of prosecution can be taken at any stage in the proceedings where the plaintiff has failed to progress the case for any substantive period of time without reasonable excuse.

In addition, an application to strike out a defence to dismiss a claim can be taken against a party who has failed to meet discovery obligations.

Applications to have a pleading or claim struck out are made in a notice of motion, supported by a grounding affidavit, following which the matter is determined at a hearing based on the affidavits.

27 What happens in the case of a no-show or if no defence is offered?

A plaintiff may bring an application to court for judgment in default of defence in circumstances where an appearance has been entered in proceedings commenced by plenary summons and the plaintiff has duly delivered the statement of claim but has received no defence from the defendant's solicitor in the time permitted.

A court may grant judgment to the plaintiff based on their statement of claim and once it is satisfied that all the proofs are in order.

28 Can a defendant claim security for costs? If so, what form of security can be provided?

The defendant may apply for security for costs by way of request to the claimant. If the claimant fails to agree to provide security within 48 hours of receiving the request, the defendant can make an application for security for costs to the court by notice of motion and grounding affidavit.

Security for costs can also be sought against an Irish corporate claimant. It is generally easier to obtain an order against a corporate claimant than an individual claimant as a company has the benefit of limited liability. The defendant must establish a prima facie defence and demonstrate that there is reason to believe that the claimant would be unable to pay a successful defendant's costs. The onus then shifts to the claimant to establish that the order should not be granted. If an order is granted, the proceedings are stayed until the claimant provides the security. If the claimant does not provide the required security, its claim is dismissed.

In respect of obtaining an order for security of costs, it is important to note that different rules apply to foreign individuals and corporations than regarding Irish corporations. It is virtually impossible to obtain an order against an individual based in Ireland, the EU or the territory covered by the Brussels Convention. The granting of the order is at the court's discretion, and the court grants such an order only in the following circumstances:

- if the claimant is resident outside the jurisdiction and not within the EU or the European Free Trade Area (EFTA);
- if the defendant has a prima facie defence to the claim and verifies this on affidavit; or
- if there are no other circumstances that obviate the need for security for costs.

Progressing the case

29 What is the typical sequence of procedural steps in commercial litigation in this country?

Starting proceedings

There is no required pre-action protocol in Ireland (other than in personal injuries actions). However, a warning letter is generally sent prior to the issue of proceedings as a protective measure in relation to costs. Proceedings are commenced in the High Court by issuing and serving an originating summons. The most commonly issued summons is a plenary summons, unless the action is for the recovery of a debt where a summary summons is issued. (See question 16 for details on the initial exchange of pleadings between the parties.)

Subsequent stages

The exchange-of-documents process (discovery), begins when pleadings have closed (for further details on the discovery process, see question 34). Once discovery has been completed, the claim is scheduled for trial.

Role of the courts in progressing the case

The Commercial Court rules alone provide for case management. Once a case is admitted to the Commercial List, court directions are issued setting out a strict timetable for the exchange of pleadings, discovery and other pretrial steps. The solicitor for the party making the application to the Commercial List must give an undertaking that the court's directions will be complied with in full. Cases are regularly listed before the Commercial Court to monitor the progress of the case.

Increasingly, case management occurs in the other lists of the High Court through applications for directions to the relevant High Court judge or the president of the High Court.

Penalties for non-compliance

The Irish Superior Court Rules stipulate specific time limits regarding the exchange of pleadings and all other steps in the litigation process. Where these time limits are not complied with, it is open to the affected party to seek relief from the court through an application to dismiss a claim.

30 Can additional parties be brought into a case after commencement?

Yes. The RSC provides that the names of additional parties may be added, whether they be plaintiffs or defendants who ought to have been joined, or who need to be joined in order to enable the court to effectually adjudicate on and settle all the questions in the case before the court.

If a defendant believes another party is the party responsible or jointly responsible for the plaintiff's claim and so should be held responsible should the plaintiff succeed they can join that party to the proceedings with the permission of the court. (See question 25 for further details on joining third parties.)

31 Can proceedings be consolidated or split?

Causes or matters pending in the High Court may be consolidated by order of the court on the application of any party (whether or not all the parties consent to the order).

The Commercial Court has specific provision for the 'consolidation of the proceedings with another cause or matter pending in the High Court'. This order can be made by the judge's own motion or on the application of either party and will be done where it appears convenient for the determination of the proceedings in a manner that is just, expeditious and likely to minimise the cost of those proceedings.

Modular trial

In certain circumstances, a court may depart from the traditional unitary model of trial and direct that the issues be tried in a particular sequence to be heard in separate modules. There is a distinction to be drawn between the trial of a preliminary issue and a modular trial of all the issues. Determining a preliminary issue in respect of a particular legal or factual question should be adopted with the greatest of care and involves separating that issue from others in the action where the preliminary issue involved will be (largely) determinative of the case at hand. By contrast, where issues are tried in a modular trial, the court will hear all matters relevant to those issues, be it fact or law, and come first to a conclusion on those issues.

32 How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

There are two burdens of proof to be satisfied: the legal burden of proof and the evidential burden of proof. In a civil action, the standard of proof is on the balance of probabilities. The legal burden of proof is borne by the person asserting a fact. This means that, on balance, while there could still be a reasonable doubt, one version of events is marginally more credible than the other version of events. This is lower than the standard of proof used in criminal cases that is 'beyond reasonable doubt'.

The evidential burden of proof is an obligation to adduce sufficient evidence on the facts in issue to justify an affirmative finding by a trier of fact such as a judge but not necessarily to require such a finding. At the conclusion of the claimant's case they must have produced sufficient evidence to compel the other side to rebut the allegations or else the claim will be dismissed by the judge.

33 How does a court decide what judgments, remedies and orders it will issue?

The type of judgment, remedy or order a court will decide to issue will depend on the relief sought by the plaintiff and also by the types of relief open to the court to grant in a particular action.

34 How is witness, documentary and expert evidence dealt with?

The disclosure of documents between the parties in Irish litigation is known as discovery and usually takes place once the pleadings have closed. The rules governing this process are set out in Order 31 of the RSC. Each party issues a written request for voluntary discovery from the other party of specific categories of documents now or previously in its possession, power or procurement, relevant to the dispute. This request must comply with the following requirements:

- parties must stipulate the exact categories of documents that they require;
- requests must be confined to documents that are material to the issues in dispute and necessary for the fair disposal of the proceedings or for saving costs; and
- a reasonable amount of time must be provided for discovery to be made.

If voluntary discovery is agreed, the agreement between the parties has the same effect as a court order. In the absence of an agreement, the court can order discovery pursuant to applications by the parties.

Once discovery has been agreed or ordered, the documents are disclosed in a two-stage process:

- parties disclose on affidavit the existence of documents relevant to the proceedings; and
- the documents are then made available for inspection, unless exempt from production for reasons of legal privilege.

In reality, copies of the documents are usually provided to the other party rather than an inspection taking place. If the parties fail to make discovery as agreed or ordered, applications can be brought to have the claim dismissed or defence struck out and the parties could be liable for an attachment order. Due to the increasing numbers of complex commercial disputes being litigated in the Irish courts and discoveries involving large volumes of electronically stored information, there has been a significant growth in electronic discovery (e-discovery). Although e-discovery is subject to the same general principles and rules as traditional discovery, additional practical considerations have emerged regarding proportionality and reasonable efforts in making discovery. These principles have emanated from recent case law involving high-profile commercial disputes.

Oral evidence

Evidence at trial is normally given orally by witnesses on oath or affirmation. However, the court, in cases involving affidavit evidence, may at any time order that particular facts be proved by affidavit, or that the affidavit of any witness should be read out in court. The Commercial Court Rules provide that a claimant and the defendant must serve on the parties to the proceedings written, signed and dated statements of witnesses of fact and expert witnesses, setting out the essential elements of their evidence or expert opinion. This evidence and expert opinion is often treated as that person's evidence-in-chief at the hearing. Witnesses are subject to cross-examination following examination-in-chief. Cross-examination can be carried out on affidavit evidence, although a notice to cross-examine must be served in advance.

Expert evidence

Experts are appointed by the parties, rather than the court. The role of the expert is to assist the court by providing an honest and unbiased opinion on technical aspects of a dispute. The Commercial Court encourages parties' experts to consult with each other to reach agreement on any matters that can be narrowed down with a view to agreeing the evidence that will be relied on at trial. An expert may reply to the other party's expert report when giving oral evidence and can be cross-examined on their own evidence or their reply.

Recent rules introduced by Statutory Instrument 254/2016 give judges in the other lists of the High Court power to regulate how expert evidence can be adduced and the duties of expert witnesses. These rules also introduce to Ireland the concept of 'hot tubbing'. Hot tubbing is a debate between experts, where two or more parties intend to call experts who may contradict each other in their reports or statements. Under the new rules, the Court can also require the experts to meet privately to discuss their proposed evidence (without the presence of any party or any legal representative).

35 How does the court deal with large volumes of commercial or technical evidence?

In a lot of cases, it is agreed by parties that, unless issue is taken with the authenticity of a particular document, documents that are discovered in proceedings are agreed by parties to be admissible without proof of their contents or execution.

Documents admitted on this basis are still subject to the rules on evidence governing admissibility including the hearsay rule. Therefore, these documents will not be admissible to prove the truth of their contents unless the exception to the rule on hearsay applies. To counter this difficulty, in cases that feature large amounts of documents (in particular, those that have been admitted to the Commercial Court), it is agreed between the parties that the documents that are the subject of the agreement are also admitted as prima facie evidence of the truth of their contents as against the party who created the original of the document in question. Documents where the original was created by another party to the proceedings or a non-party will not be so admitted.

36 Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Evidence can be taken voluntarily from a witness in one jurisdiction for use in proceedings in another jurisdiction. For a witness to be compelled to give evidence, the applicable rules depend on whether the other jurisdiction is within or outside the EU.

Within the EU

To compel evidence from a witness in an EU member state, Regulation (EC) No. 1206/2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters allows the court of one member state to request the court of another member state to take evidence for use in proceedings in the court of the former member state. If a party to litigation in another member state seeks evidence from a witness resident in Ireland, that request is made to the Dublin Metropolitan District Court (the designated requested court) or the Circuit and District Court Operations Directorate (the designated Central Body). The Circuit and District Court Operations Directorate accepts forms from member states in English, and only by post, fax or email. If the order is granted, a subpoena to examine a witness is issued.

Outside the EU

Ireland is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 and the taking of evidence in Ireland for use by a tribunal or court in a non-EU member state is regulated by the Foreign Tribunals Evidence Act 1856 (1856 Act). Under the 1856 Act, an Irish court may, on the application of a foreign tribunal, direct that a witness in Ireland, over which it has jurisdiction, attend to give evidence for use in the foreign proceedings. Proceedings must be ongoing before a request for evidence can be made (1856 Act). A letter of request must be issued from the foreign court to the Irish court requesting assistance by directing the Irish witness to attend before it to give evidence. Alternatively, a request may be forwarded by an embassy of the state where proceedings are pending to the Irish Department of Foreign Affairs, which arranges for a High Court application to be made by the Chief State Solicitor. The application is typically made ex parte and is then served on the witness. The examination is overseen by an examiner appointed by the Irish court and is subject to Irish evidential rules.

37 How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

Evidence must be relevant; it must be admissible and should not normally contain hearsay evidence, opinions, or repetition. Any witness is liable to be cross-examined. All parties to an action have the right to cross-examine any witness not called by them. If evidence is given on affidavit, it is open to the other side to require the deponent to appear in court for the purpose of cross-examination.

Where both parties intend on calling expert witnesses, traditionally, their statements are exchanged and the court will, in certain instances, suggest that the experts should meet with a view to seeing what they can agree on and what they cannot agree on. In addition, the court can raise queries that they would like the experts to address and direct that a joint document should be submitted to the court outlining what they have agreed. The judge dealing with the case will then know in advance of the trial what has been agreed and what's in dispute.

In general, for a document to be received into evidence, the party must prove the contents of the document and, in some instances, the party must prove that the document was properly executed. As discussed in question 35, in cases with large amounts of documentary evidence the parties agree to admit the documents into evidence without further proof.

38 How long do the proceedings typically last, and in what circumstances can they be expedited?

The Commercial Court is designed to provide an expeditious, efficient and effective mechanism for dealing with commercial litigation cases. Cases are dealt with swiftly in the Commercial Court; according to Commercial Court statistics, 90 per cent of cases are decided within one year.

The length of cases in the High Court will depend on the complexity of the case and the backlog of cases before the court.

39 What other steps can a party take during proceedings to achieve tactical advantage in a case?

The court can strike out a party's pleadings, either in whole or in part, if it is satisfied that the pleadings are unnecessary, scandalous, disclose no reasonable cause of action or defence, or are frivolous and vexatious.

The party seeking the order must file and serve a notice of motion supported by an affidavit, explaining the basis for the order being sought. The other party can then file a replying affidavit. Once the affidavits have been exchanged between the parties, the matter is determined at a hearing.

There are other procedural mechanisms that can be used to clarify the issues for trial, including the service of interrogatories requiring the other party to answer specified questions, and the service of a notice to admit facts. Parties can also apply to strike out issues in whole or in part or for orders requiring the trial of a preliminary issue before the action as a whole proceeds.

40 If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

As noted in response to question 15, third parties are not permitted to fund litigation or pay adverse costs.

41 How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

Parallel proceedings are possible in Ireland, but are uncommon. Generally, a regulator will conduct an investigation itself and make a decision at enforcement stage whether to conduct a hearing or refer a matter to the Garda Síochána (the Irish police force) and the DPP for a criminal investigation. Some regulators, such as the Environmental Protection Agency, have the ability to prosecute individuals themselves in the Irish courts.

It is unusual for regulatory and criminal proceedings to progress at the same time given that hearings and tribunals tend to progress more quickly than court proceedings.

Where both criminal and civil proceedings are brought in the same matter, the civil proceedings will most often be stayed by the court pending the outcome of the criminal proceedings. In the interests of the administration of justice, the courts will often direct that the criminal proceedings take precedence over any civil action and stay the civil proceedings so as not to interfere with the criminal trial.

From a tactical point of view, the process of obtaining/exchanging evidence in these scenarios is crucial. It is very important to assert legal privilege over as many documents as possible from the beginning of any parallel/intertwined investigations. This is complicated by a recent Court of Appeal decision, *Ryanair and Aer Lingus v Ireland* [2018] IECA 222, in which it was held that litigation privilege in relation to one set of proceedings does not apply to subsequent actions.

There is limited scope in Ireland for a party to bring a private prosecution. Private prosecutions are only at the District Court level, where less serious offences are heard before a judge only. These are

also unusual but the existence of the right to private prosecution was confirmed by the High Court in 2013 in the decision of *Kelly & anor v Ryan* [2013] IEHC 321.

Trial

42 How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

The Commercial Court has considerable flexibility in managing cases, with the relevant RSC providing for directions, hearings, case management conferences and pretrial conferences. The Commercial Court runs extremely stringent case-management procedures and generally, though not always, delivers judgment promptly.

The length of time for a commercial claim to reach a decision in the High Court can vary considerably depending on the complexity and urgency of the case. However, recent data provides that the average length of High Court proceedings, from issue to disposal, is approximately two years. As discussed above, the Commercial Court is more expedient and, according to Commercial Court statistics, 90 per cent of cases were decided within one year.

43 Are jury trials the norm, and can they be denied?

Cases are usually heard by a judge in the High Court and are heard without jury, with the exception of defamation and civil-assault claims. In such cases, the plaintiff can opt to have it heard by a judge alone. However, the other side may insist that the matter is heard with a jury as specified.

44 How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

In line with the constitutional right that justice must be administered in public, court proceedings are held in public, except for in certain cases set out in legislation. Legally privileged information is protected from disclosure in evidence and other sensitive confidential information can be redacted from the evidence disclosed where it is not relevant to determination of the proceedings.

45 How is media interest dealt with? Is the media ever ordered not to report on certain information?

Yes, the courts can impose reporting restrictions to protect the integrity of the court process while proceedings are ongoing.

In a forthcoming review of the law on contempt of court, the state's legal advisory body is expected to make recommendations in relation to citizen journalists and campaigners posting commentary on social media questioning the evidence of witnesses during trials.

46 How are monetary claims valued and proved?

An award for damages for breach of contract is primarily designed to put the injured party in the same position as if the contract had been performed. In tort actions, damages are generally assessed to return the injured party to their position before the tort occurred. The remedy of damages can be utilised to protect a wide variety of interests including: expectation interest; reliance interest; restitution interest and performance interest.

When assessing quantum, both sides will often obtain expert evidence that the court will consider to form a view. For example, when calculating a claimant's future loss, the services of an actuary are engaged to prepare an actuarial report.

The court may also consider whether the loss and damage suffered by a claimant was caused partly by the negligence or want of care of the claimant and, if proven to be the case, the damages recoverable in respect of the wrong shall be reduced by an amount that the court thinks just and equitable with regard to the degrees of fault of the parties. In addition, a claimant may not recover losses that could have been avoided by taking reasonable steps.

A party may apply to have a trial split into parts – called split trials or modular trials. The most common application is for liability to be determined before quantum. In commercial cases, a party might seek to have some facts determined first, perhaps giving them a chance to settle if they lose that module. Order 63A Rule 6.1(ii) provides that the Commercial Court may fix any issues of fact or law to be determined in proceedings on a modular basis. Separate to these provisions, a party may apply for points of law or point of fact to be decided prior to the hearing pursuant to the courts' inherent jurisdiction to control its own process. The courts have stated that the default position is for one trial. The court will only order modular trials if there are compelling reasons for it.

Post-trial

47 How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

In Ireland, there are two main categories of costs in litigation; party–party costs, which relate directly to the litigation and solicitor–client costs, which are the costs owed by the client to the solicitor under contract. Order 99 of the RSC contains a comprehensive code dealing with the award, assessment and taxation of costs. Generally, the costs of every proceeding in the Superior Courts are awarded at the court's discretion and, therefore, no party can recover costs without a costs order. However, costs generally follow the event (that is, the unsuccessful party is ordered to pay the successful party's costs). Costs are usually awarded on a party–party rather than solicitor–client basis, which means that costs reasonably incurred by the successful party in prosecuting or defending an action are recovered, but other legal fees incurred are not. The court can make costs orders to take account of a party's conduct, including open settlement offers made and the parts of the case in which the otherwise successful party has not succeeded.

Where a payment into court has been made by the defendant (known as a lodgement), which was not taken up by the claimant, and the claimant fails to obtain an award in excess of the sum lodged, the claimant must bear its own costs from the date of lodgement and the defendant's costs from that date, unless otherwise ordered. The court can penalise a party who receives an award that does not meet the court's jurisdictional threshold (€75,000 in the High Court, €15,000 in the Circuit Court) by awarding the typical costs of a lower court action, if it believes the application should have been brought in that court. In addition, the court can take into account a refusal to participate in ADR (arbitration excepted) by a party when making an order as to costs. Cost sanctions can also be awarded in Commercial Court proceedings where either party fails to comply with any directions issued by the court.

The length of written judgments depends on the complexity of the case but can be quite lengthy where in-depth judicial analysis is required to determine a case. Copies of the judgment are made available to the parties. Important and lengthy judgments are made available online through a central database maintained by the court office.

48 When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

The appellate courts in Ireland exercise jurisdiction on questions of both law and fact. However, this does not mean that an appeal will be a retrial of the issues in the litigation. The appellate courts generally do not hear oral evidence or interfere with findings of fact arrived at by the High Court. The Court of Appeal (established in 2014) is the intermediate appellate court, sitting between the High Court and the Supreme Court and is now the default court for all appeals from the High Court. In the majority of cases the decision of the Court of Appeal will be final. However, permission to bring a further appeal may be sought from the Supreme Court. The Supreme Court will only grant such permission if satisfied that the decision involves a matter of general importance or if, in the interests of justice, it is necessary that there be an appeal to the Supreme Court. Any finding by the Supreme Court is final and cannot be appealed unless the case involves an issue of interpretation of EU law, in which case it must be referred to the European Court of Justice.

A 'leapfrog appeal' from the High Court to the Supreme Court, bypassing the Court of Appeal, is possible where the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to the Supreme Court. This will only apply where the decision of the High Court involves a matter of general importance or if, in the interests of justice, it is necessary that there be an appeal to the Supreme Court.

49 How enforceable internationally are judgments from the courts in your jurisdiction?

Whether an Irish Court award can be enforced in another jurisdiction will generally depend on the laws of the state in which one wishes to enforce the award. These rules can be restrictive in nature. As Ireland is a member of the EU, the recast Brussels Regulation and the Lugano Convention provide that there is a legislative system in place for the mutual recognition and enforcement of court awards between Ireland and other EU and EFTA states. Awards made by an Irish Court will be recognised in another EU or EFTA state without a declaration of enforceability being required so long as certain authenticity conditions are met. Enforcement of an Irish judgment can only be refused in an EU or EFTA state on a number of limited grounds, including where the Irish judgment is manifestly contrary to public policy in the member state where it is trying to be enforced. In relation to jurisdictions where there is no convention in force to provide for a reciprocal recognition of judgments, it is for the recognising country to decide whether or not to enforce the Irish judgment and it is necessary to rely on the recognising country's national laws regulating the rules of enforcement. As a general rule, the recognising court will hold a hearing to determine if the requirements of local law are satisfied.

50 How do the courts in your jurisdiction support the process of enforcing foreign judgments?

The enforcement of judgments in civil and commercial matters between EU member states (including Denmark) is regulated by the Brussels I Regulation and the provisions of the recently recast Brussels I Regulation. The enforcement of judgments between EU member states and EFTA countries (Iceland, Norway, Switzerland and Liechtenstein) is regulated by the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (New Lugano Convention). The Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012 was enacted on 10 March 2012, which gives full effect to the updated 2007 Lugano Convention. The procedure involves an application to the Master of the High Court, made ex parte on affidavit together with either the original judgment or a certified copy or a standard form certificate provided by court officials in the member state in which judgment was given, containing details of the judgment.

The Master of the High Court declares the judgment enforceable if the requirements of recast Brussels I are met. After that, the judgment has the same force and effect as a judgment of the High Court. To enforce a judgment from a non-EU/EFTA country it is necessary to rely on Irish common-law rules of enforcement, including the following:

- the judgment must have been obtained from a court of competent jurisdiction, which had the requisite jurisdiction in respect of the particular claim;
- the judgment must be for a definite sum and be final and conclusive;
- the judgment must not have been obtained by fraud or granted in breach of the principles of natural justice; and
- enforcement of the judgment must not be contrary to Irish public policy.

The application is brought by summary summons for a liquidated amount, that is, the value of the award under the foreign judgment.

Other considerations

51 Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

The Commercial Court is recognised internationally as an efficient platform for the determination of substantial commercial disputes given its strict case management procedures. According to Commercial Court statistics, 90 per cent of cases are decided within one year.

52 Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

Commercial Court costs can be expensive given the heavy workload to be managed within strict time frames in preparation for trial and the €5,000 application fee. Alternatively, High Court cases can be delayed due to lengthy court lists.

53 Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

Special considerations to be taken into account when defending a claim include the Statute of Limitations, costs, jurisdiction and the possible suitability of ADR. These factors are dealt with in further detail above.

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ISBN 978-1-78915-004-9