McCann FitzGerald

Litigation Update:

New Rules to Improve Litigation and Cut Delay

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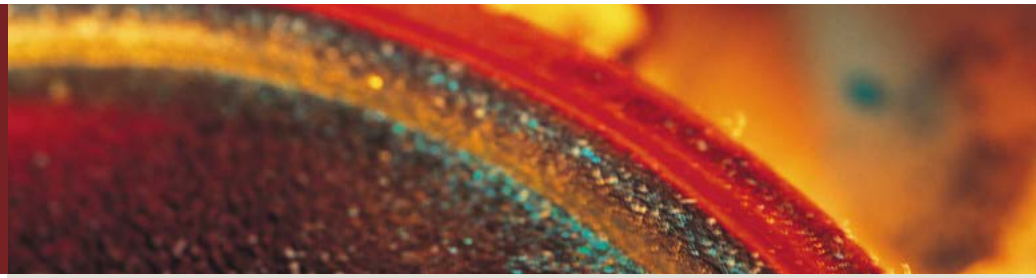

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Litigation Update: New Rules to Improve Litigation and Cut Delay

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Overview

In this litigation update, we discuss the upcoming significant amendments to the High Court rules to address inefficiency and delay in the court system.

New court rules to cut delay and improve trials

New rules in force from 1 October 2016 will extend the successful Commercial Court regime to other types of Irish High Court civil litigation, except personal injuries, and will make other improvements. The new rules, if applied successfully, will cut delay, encourage settlements and improve the conduct of trials.

More management by judges

Judges will have power to set down strict time tables and directions to force the parties to identify the issues and facts in dispute sooner and to get to trial earlier. These powers will be especially important in bigger or more complex cases, where the court may also order staged hearings (mini-trials) on different issues to make resolution of the case less unwieldy.

Better expert evidence

The new rules also require the parties to disclose to each other before trial, written summaries of expert (and ordinary witness) evidence which they intend to call. Unnecessary expert evidence will be discouraged.

In a novel procedure, after receiving an expert's summary evidence, a party may pose written questions to an opposing expert before trial. The court may direct opposing parties' experts to meet to narrow or agree disputed expert issues. Experts will be required to disclose conflicts of interests and to bear in mind their duty of candour to the court.

Better trials

The court may require realistic assessments of how long a trial will take. The court may also require advocates to use time at trial more efficiently. Judges in the past have been reluctant to restrict the manner in which advocates present cases at trial. However, lengthy oral submissions are often very wasteful, in contrast to more focussed oral and written submissions. Another example of waste which judges may target is where lawyers propose to call multiple witnesses to give similar evidence.

New rules also support the use of video evidence to take evidence from witnesses from Ireland or abroad who are unable to attend court.

In addition, parties may seek an order from the court to require companies or individuals not involved in the case to disclose to the parties essential information relevant to the case prior to trial.

New rules also clarify and encourage the use of neutral assessors to assist the judge in evaluating scientific, technical or other specialist evidence relevant to a case.

Challenges for judges and lawyers

Many of the new rules will pose a challenge to judges and lawyers. Outside the Commercial Court, judges have been reluctant to force lawyers and clients to prepare and present cases more efficiently. Traditionally, the courts have not managed litigation. The new rules will encourage judges to combat delay, time-wasting and unnecessary expense. Applying many of these rules will make the judge's role more demanding however, as he or she directs the management of cases whilst acting as neutral arbiter.

Practitioners too will face pressures. Failure to meet deadlines and unjustified delay or neglect will expose lawyers to serious criticism and may compromise their client's case.

The client's perspective

Clients with weak cases will know that delay and obfuscation may not be tolerated. Those with good cases can avail of the rules to get access to justice with less delay and with less risk of the trial being side-tracked by irrelevant issues. If applied, the new rules should reduce the length of trials and the cost of litigation. The changes may also encourage settlement in many instances due to the intended earlier focus on the issues really in dispute in each case.

Further information

The new rules are discussed in detail in the articles following in this briefing.

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All change in the Chancery and Non-Jury Lists as new case management rules are on the way

The Rules of the Superior Courts have been amended to insert a new order 63C which sets out detailed case management procedures for the Chancery and the Non-Jury Lists of the High Court.

Practitioners will undoubtedly welcome the new order 63C which is due to come into operation on 1 October 2016 although the provisions of the new rule can apply to proceedings instituted before that date. Many of the new rules which it introduces mirror similar successful case management provisions which already exist in respect of the Commercial and the Competition Lists.

The new rules will apply to proceedings listed for trial in the Chancery or the Non-Jury Lists of the High Court or in any other proceedings designated by the President of the High Court. However, this second category cannot include personal injury or jury actions or proceedings in the Commercial or Competition Lists.

Order 63C, rule 4 starts the ball rolling by giving the court a general power to give directions and make orders so that proceedings before it can be determined in a way that is just, expeditious and likely to minimise costs. This general power will apply at all stages of pre-trial procedure. Rule 5, which follows, complements rule 4 and sets out particular directions which the judge may give, without limiting the broad discretion set out in rule 4. In summary, these include directions:

- as to pleadings and evidence;
- fixing issues of fact or law for determination;
- for the defining of issues including exchange of memoranda to clarify issues;
- as to the holding of modular trials;
- relating to expert evidence;[1]
- allowing the electronic exchange or submission of documents;
- adjourning proceedings to allow the parties to use an ADR process;
- fixing a timetable for the completion of pre-trial steps.

Proceedings in the list will also be overseen by a List Judge assigned by the President of the High Court. The List Judge will have the power to make a case management order where he/she is satisfied that the proceedings should, by virtue of their complexity, the number of issues or parties, the volume of evidence, or for other special reason, be subject to case management. Of note, is that the court has a discretion whether to make any of the orders mentioned above. It may do so on its own initiative or on the application of any of the parties.

If case management is ordered, this process will include a case management conference which will be chaired and regulated by the List Judge. Again, the purpose of the case management conference will be to ensure that that the proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise costs. The legal representatives of the parties will attend but the judge will also have the power to order the attendance of the parties themselves if this is necessary or desirable. The List Judge will seek to ensure that all necessary steps to advance the case to trial are completed in a timely way. To this end, the court will have the power to set a timetable for preparation of the case for trial, give additional directions or call parties before the court to explain any delay. Cost penalties

1 See our article on page 8 discussing the new rules applicable to experts.

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All change in the Chancery and Non-Jury Lists as new case management rules are on the way (continued)

may be imposed for delay or where pleadings and other court documents are imprecise or unnecessarily long. Indeed, the new rules are characterised by their requirement for co-operation between opposing parties and active participation in the case management process with potential sanction if this does not materialise.

Once all orders or directions have been complied with, the case will be listed for a pre-trial conference. If, in the alternative, no case management order has been made, once proceedings are set down for trial they too will be listed for a pre-trial conference, though in either case the court may dispense with the pre-trial conference if it is satisfied that it is not required. The purpose of this procedure is to make the very final arrangements for trial and it can include such practical issues as arranging for the appropriate information and communications technology to be available in court.

Once the court is satisfied that the matter is ready for trial, a certificate of readiness for trial will issue and a date will be fixed for hearing. If, during the case management process or at the pre-trial conference, a judge forms the view that an assessor could assist at trial, then this recommendation will be appended to the certificate of trial.[2]

Parties will be required to give advance notice if they intend to call expert evidence at trial. In addition, they will have to serve a summary of that evidence on the other party no later than 30 days prior to the trial. The latter rule also applies in relation to witness statements where a witness as to fact will be called at trial.

The new rules also provide that once the trial judge has received the documents submitted for trial that he/she can require the parties to prepare an agreed list of concise questions to be decided by the court in order to determine the proceedings or facilitate that process. If the parties cannot agree the list, each party can provide their own list.

There is also provision for the electronic service, exchange and lodgement of documents. However, a further practice direction will be required to facilitate this process.

Finally, the court will have the power to set out requirements as to the form and content of bills of costs to be prepared in respect of proceedings which have been the subject of a case management order. It will also be able to limit the amount of a party's expert fees and expenses that may be recovered from any other party as well as make cost orders against a party or disallow costs for failure to properly complete certain court forms.

2 See our article on page 11 on the new rules applicable to assessors.

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Watch that clock: new rules on time management at trial

Order 36 of the Rules of the Superior Courts has been amended[1] to include detailed provision for the management of time at trial. With long court lists and court resources at a premium, these measures are welcome.

Many litigants will have encountered the trial that was "called on" for a specific amount of time but which went on to last considerably longer. Not only can this cause inconvenience for those involved in that particular case but also for parties behind them in a court list waiting to be heard but who are not reached. An amendment to order 36 RSC now seeks to address these issues by reinforcing the power of the trial judge to steer a trial through his/her court in an efficient manner which remains consistent with the requirements of justice.

Under the new rule, the court[2] may require any party to proceedings to provide a "reasoned estimate" of the time likely to be needed to deal with an upcoming trial. It may ask for a list of the witnesses that a party intends to call and for an estimate of how long the examination or cross-examination of each witness will take.

In addition, the trial judge may make orders or give directions to ensure that a trial progresses in a timely way. These can include orders fixing or limiting the amount of time allowed to each party for dealing with particular aspects of the case (like the chess-clock procedure used in some arbitration rules).

The trial judge may also give directions as to:

- the issues on which the court requires evidence;
- the type of evidence required for those issues to be determined;
- how that evidence should be presented to the court;
- the need for oral submissions on the law where written submissions have already been provided to the court before trial;
- the identification of issues needing a determination by the court and the questions which the court needs to decide to determine those issues.

When considering whether to make any of these orders, the court can again require the parties to tell it how much time they will need to deal with any witness or take any other step in the trial. The court can allow that amount of time or another period of time which it considers consistent with the efficient conduct of the trial and the requirements of justice. Presumably, this means that the court can reject time estimates which it considers excessive. However, the constitutional right of access to the courts is likely to mean that parties are unlikely to be shut out completely from arguing significant issues even if they mismanage their allotted time.

In relation to witnesses, the new rule also provides that:

- re-examination of witnesses will be limited to new matters raised for the first time on cross-examination and shall be concise;
- a party must avoid duplicating the same evidence by different witnesses except where this is necessary for the just determination of the proceedings.

Importantly, the court will be able to impose cost penalties where it is satisfied that a party called a witness whose evidence was unnecessary or duplicated other evidence presented by that party.

The new rule takes effect from 1 October 2016.

1 Order 36, rule 42 RSC is substituted by the Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. No. 254 of 2016).

2 Or a court officer.

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One bite at a time - new rules for modular trials in Commercial, Competition, Chancery and Non-Jury lists

Order 36, rule 9 of the Rules of the Superior Courts has been amended to expressly provide for the use of modular trial procedures in certain High Court proceedings.

The default rule in litigation is a single trial of all issues at the same time. However, it is well recognised by the courts and practitioners alike that certain complex proceedings may greatly benefit by being heard using a modular trial procedure. This is not the same as the formal separation of preliminary issues but rather it is where some of the issues are separated out and tried before others. A common example is where, in plenary proceedings, issues of liability and causation are tried first with questions concerning the calculation of damages being left over.[1] This can allow the proceedings to be dealt with in a more efficient manner and can save costs.

The High Court has an inherent jurisdiction to order the manner in which a trial is conducted. This already includes the power to order modular trials. However, now the rules of court will be amended to expressly provide for this procedure and to flesh out some of the detail. The new provisions will apply to proceedings in the Commercial, Competition, Chancery and the Non-Jury Lists of the High Court.[2] These are all proceedings which must or may be subject to case management. In each instance, the judge chairing the case management conference or pre-trial conference or the trial judge may make an order:

- directing that the trial be conducted in modules and determining the questions or issues of fact, or of fact and law, for each module, and the sequence in which the modules will be tried;
- specifying the evidence, or the witnesses, including expert witnesses, required to enable the court to determine the questions or issues in each module;
- directing the exchange and filing in court at a specified time of written submissions on the issues of law arising in a particular module.

If a modular trial is ordered, rules on management of time at trial,[3] expert evidence[4] and preparation for trial[5] will apply to each module as if it were a separate trial unless the court orders otherwise.

The amendments to order 36 take effect from 1 October 2016.

1 *Dowling v Minister for Finance* [2012] IESC 32.

2 This may also extend to proceedings designated by the President of the High Court under order 63C. See our related article on page 2 on that order.

3 See our related article on page 4 on these new rules.

4 See our related article on page 8 on these new rules.

5 There are existing rules here under order 63A (Commercial List) and order 63B (Competition List). See our article on page 2 on new rules under order 63C (Chancery and Non-Jury Lists).

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Significant amendment to High Court rules for non-party disclosure of information

Order 31 of the Rules of the Superior Courts has been amended to expressly allow 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.

The new rule[1] which takes effect from 1 October 2016 provides that where a non-party[2] has access to information which is not reasonably available to a party in proceedings, that the court may order the non-party to make the information available. The non-party must then prepare and file a document recording the information and serve that document on the parties to the proceedings.

However, the order is not available simply for the asking. While there are allowances for urgent or consent applications, as a general rule, the applicant must first seek voluntary disclosure by letter and allow a reasonable period of time for any disclosure.[3] The non-party must have failed, refused or neglected to make disclosure or have ignored the request. The applicant must then apply by motion to the court which is on notice to the non-party. The applicant must be prepared to indemnify the non-party for all costs reasonably incurred in making disclosure.[4]

When the matter comes before the court, the applicant will also have to satisfy the court on affidavit that the information sought:

- is not reasonably available to it;
- could not have been obtained by way of non-party discovery or answers to interrogatories;
- is reasonably available to the non-party;
- is likely to support the case of the moving party or adversely affect the case of another party to the proceedings; and
- is necessary to dispose fairly of the claim or to save costs.

The court may only make the order where the latter two requirements are fulfilled. It is also clear from the new rule that the court may refuse to make the order if it is satisfied that it is not in the interests of justice to do so.

If made, the court order itself must:

- specify the information or the classes of information which must be disclosed; and
- require the non-party, when making disclosure, to specify any information which is no longer in its control or where an entitlement or duty to withhold disclosure is claimed.

In addition, the court order may require the non-party to indicate what has happened to information which is no longer in its control. It may also include directions as to the time and manner of disclosure.

It is important to note that the new provision is without prejudice to any rule of law under which the non-party would be entitled or have a duty to withhold disclosure of information or to the existing rules on non-party discovery.[5]

1 A new provision, order 31, rule 30, has been inserted by the Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. No. 254 of 2016).

2 A non-party is a person who is not a party to the proceedings before the court.

3 The court also has a general discretion to dispense with the requirement for a prior application by letter or the requirement for motion on notice depending on the nature of the case or any other circumstances which seem appropriate. In the latter case, a non-party who has not been heard may apply to the court to set aside or vary an order against it.

4 These costs are deemed to be costs of the applicant for the purposes of order 99 RSC.

5 Under order 31, rule 29 RSC.

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Significant amendment to High Court rules for non-party disclosure of information (continued)

This new rule will be welcomed by practitioners. However, it remains to be seen how it will be implemented in practice. The existing rules for non-party discovery under order 31, rule 29 RSC, while similarly widely drafted, have been interpreted narrowly by the courts. For example, in *Fusco v O'Dea*,[6] the Supreme Court refused to make an order for discovery against a non-party resident outside the jurisdiction. The court took the view that order 31, rule 29 RSC was an unusual provision and although widely drafted, it should be construed strictly. In the absence of express provision, it should not be read as conferring an exterritorial jurisdiction on the Irish courts.

It is also interesting to note that the applicant must demonstrate to the court that the information sought is likely to support the case of the moving party or adversely affect the case of another party to the proceedings. This test contrasts with the test of relevance applied in the case of non-party discovery under the preceding rule and indeed generally for inter partes discovery. That wider test can result in the discovery of documentation which although relevant to the proceedings does little to advance the cause of either side. The inclusion of a more precise test under the new rule is welcome.

6 [1994] 2 IR 93.

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New High Court rules focus on quality and efficiency in the provision of expert evidence

Two separate sets of amendments to the Rules of Superior Courts relating to expert evidence will take effect from 1 October 2016 and will have a significant effect for commercial practitioners and their clients.

The first set of amendments[1] will apply generally to High Court proceedings with the exception of personal injury actions while the second set will only apply to proceedings which are listed in the Commercial or Competition Lists of the High Court or where a case management order has been made under order 63C.[2]

Use of expert evidence to be flagged in pleadings

The first set of amendments relate to High Court pleadings generally. Order 20 deals with the delivery of a Statement of Claim in plenary proceedings. This rule has been amended to now provide that where a plaintiff intends or proposes to offer expert evidence at trial, the statement of claim must now disclose this and state succinctly the field of expertise concerned and the matters on which expert evidence is intended or proposed to be offered. The intent here is to flush out the possible use of experts relatively early so that a defendant can be aware that it too may need to brief an expert, or it could ask the judge in case management to appoint a single expert. A similar provision will apply to a defence or counterclaim.

Role of the expert

The second set of amendments opens by focussing on the role that the expert plays in the judicial process. It is generally accepted that when giving evidence, an expert witness owes an overriding duty to the court to give objective and unbiased evidence on matters falling within the scope of his/her expertise.

The role of the experts in proceedings is of "mutual fact finders or opinion givers" rather than "partisan advocates".[3] However, on occasion, this may not be achieved in practice and the courts have recognised that difficulties here do need to be addressed.

To this end, order 39, rule 57(1) expressly provides that:

> "It is the duty of an expert to assist the Court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert."

This is reinforced in the ensuing provisions. Under rule 57(2), every expert report must contain a statement acknowledging this duty. It must also disclose any financial or economic interest of the expert, or of any person connected with the expert, in any business or economic activity of the party retaining that expert. This includes any sponsorship of or contribution to any research of the expert or of any university, institution or other body with which the expert was, is or will be connected. It excludes any fee agreed for the preparation of the expert report or participation in the proceedings.

Expert evidence to be presented in an efficient way

The new rules also contain provisions to ensure that expert evidence is presented to the court in an efficient manner. Order 39, rule 58 provides that:

1 The new provisions are all contained in the Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. No. 254 of 2016).

2 See our related article on page 2 on the new case management rules under order 63C. A case management order can be made under order 63C in respect of proceedings listed for trial in the Chancery or the Non-Jury Lists of the High Court or in any other proceedings designated by the President of the High Court. However, this second category cannot include personal injury or jury actions.

3 *Payne v Shovlin* [2007] 1 IR 114.

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New High Court rules focus on quality and efficiency in the provision of expert evidence *(continued)*

"Expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings."

The court is also empowered to make certain orders or give directions in relation to expert evidence. These include:

(a) requiring each party intending or proposing to offer expert evidence to identify–

  (i) the field in which expert evidence is required; and

  (ii) where practicable, the name of the proposed expert;

(b) determining the fields of expertise in which, or the proposed experts by whom, evidence may be given at trial;

(c) fixing the time(s) for the delivery or exchange of expert reports;

(d) directing that evidence be given by a single joint expert where two or more parties wish to offer expert evidence on a particular issue. The court can go on to make orders in relation to the appointment, instruction and payment of that expert.

Importantly, the rules go on to provide that each party may offer evidence from one expert only in a particular field of expertise on a particular issue. The court can relax this rule for "special reason", however, this will only be done where the court is satisfied that the evidence of an additional expert is unavoidable in order to do justice between the parties.

Ability to pose questions on expert report

Order 39, rule 59 provides that a party may put concise written questions concerning the content of an expert's report to an expert instructed by another party or a single joint expert. However, these questions:

(a) may only be put once;

(b) must be put within 28 days of service of the expert's report; and

(c) only for clarification of the report unless the court permits otherwise, or the party who has instructed that expert agrees.

Any answers that are provided will be treated as part of the expert's report.

An expert is not obliged to answer any written questions which are disproportionate, unnecessary for the determination of any matter in dispute in the proceedings or outside of the expert's field of expertise. If necessary, the expert can apply to the court for a ruling on any issue here. However, if an expert simply refuses to answer a question without a court ruling that he/she may do so, then the court may penalise the party who instructed the expert by making one or both of the following orders:

(a) that the party may not rely on any, or a specified part, of that expert's evidence; or

(b) that the party may not recover any, or a specified part, of that expert's fees and expenses from any other party.

The "debate among experts" procedure

In another innovation, the rules provide that where two or more parties intend to call experts who may contradict each other as to evidence, then if the court considers that it is necessary in the interests of justice, it may order that the "debate among experts" procedure should apply.

First, the experts will be obliged to meet privately, without the parties or their legal representatives to discuss their proposed evidence. After that, they will draw up a written statement or "joint report" identifying what evidence is agreed and what is not. This is lodged in court and provided to the trial judge in advance of the trial. A copy is provided to the parties. Once the court has considered the joint report, it may require

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New High Court rules focus on quality and efficiency in the provision of expert evidence *(continued)*

opposing experts to give all or a specified part of their evidence one after another, in whatever order the court directs, or it can apply the "debate among experts" procedure.

Under this procedure, two or more contradicting experts testify at the same time, again in whatever order the court directs. First, each expert gives an outline to the court of the agreed evidence. The experts are not examined by the legal representatives of the parties at this stage. Then, each presents the evidence on which they are not agreed. Following this, the judge may direct that the experts debate the points which are not agreed. Once this process is complete, the experts may be examined and cross-examined by the legal representatives but only to the extent that the court deems necessary or directs.

This "debate among experts" procedure, also known as "hot-tubbing", is new to Ireland although it has been available in the UK. There are both perceived advantages and disadvantages to the process. Advantages include a better focus on the matters in dispute before trial and consequentially better use of time during the trial. Disadvantages include a fear that the process may be less rigorous when compared with traditional cross-examination. Also, as the role of the legal representatives is restricted, parties may fear a loss of control of the process.

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New High Court rules provide detail and safeguards on the use of assessors at trial

The use of assessors in High Court proceedings outside of specialist areas has been limited. The introduction of new court rules may go some way to reversing this.

A court assessor is an individual who, by virtue of some special skill, knowledge or experience he/she possesses, may advise a judge or be present during court proceedings to answer any questions put by the judge on the subject in which he/she is a specialist. There are reported cases involving the use of assessors as early as the 16th century, most commonly in the courts of admiralty.

Today, order 63B, rule 23 of the Rules of Superior Courts allows for the use of assessors in competition proceedings and sets out some detail on how this should operate in practice.[1] A further provision, order 36, rule 41 allows for the use of assessors generally in the High Court. However, in contrast to the competition rule, this latter provision simply provides that:

"Trials with assessors shall take place in such manner and upon such terms as the Court shall direct."

No further detail is provided in the rules as to how this provision should best operate in practice. This is now set to change with effect from 1 October 2016.[2] The provision will be modified to underpin more firmly the ability of the court to sit with an assessor and to provide greater detail on the practical operation of the process.[3]

The amended rules give the court a wide general discretion as to the mode of trial involving an assessor. Under the new provisions, the court may decide itself to appoint an assessor or it may do so following an application by one of the parties to proceedings. The function of this person is "to assist the court in understanding or clarifying a matter, or evidence in relation to a matter, in respect of which that person... has skill and experience." The court may appoint an assessor nominated by the parties or, having heard the parties, it may nominate the assessor. The court can direct the terms on which the assessor is appointed including how the assessor's fees should be paid and the amount of these fees. However, it will hear submissions from the parties on the issue of fees. The fees will form part of the costs of the proceedings. The court can require that fees be paid in advance or that money be paid into court before the assessor begins to act.

The court will direct the role that the assessor is to take in the proceedings. In particular, it may direct that the assessor:

(a) prepare a report for the court on any matter in dispute in the proceedings; and

(b) attend the whole or part of the trial to advise the court on any matter and be available afterwards to assist the court.

If an assessor prepares a report for the court before trial, the court must send a copy to each party and any party may use that report at the trial. Similarly, if an assessor provides advice or other information to the court, the court must inform the parties and give them an opportunity to make submissions in respect of it. These provisions should satisfy some of the concerns which have traditionally accompanied the use of assessors, namely, that the court could receive undisclosed specialist advice from an individual who was neither sworn nor subject to cross-examination. There was also a perceived danger that, given the specialist knowledge of the assessor, the court might involuntarily abdicate its decision-making function in favour of that individual without the parties having any insight into the role played by the assessor.

1 Assessors also continue to be available in the Admiralty courts.

2 The new provisions are contained in the Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. No. 254 of 2016).

3 The new rules also supplement the existing competition and admiralty provisions.

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Smile for the camera: new rules on video link evidence

Order 39 of the Rules of the Superior Courts has been amended to include a new rule on the provision of evidence by video link.

For more than a decade, the option for a witness to provide evidence by way of video link has been expressly provided for in the rules of court for proceedings in the Commercial and Competition Lists of the High Court. Although, section 26 of the Civil Law (Miscellaneous Provisions) Act 2008 allows for the provision of video link evidence generally in civil proceedings, this wider provision had not found expression in the court rules until now. However, this is set to change with the insertion of a new order 39, rule 55 which takes effect from 1 October 2016.[1]

The new rule acknowledges the provisions of the 2008 Act, namely, that a party may participate in the trial of proceedings or a witness may give evidence from either within or outside of the State, through a live video link or by other means. The court can direct this of its own initiative or on the application of any of the parties to the proceedings. The rule goes on to say that where the court directs that this should occur, it must give further directions as to the participation or evidence as are necessary for the efficient conduct of the trial in a manner which is consistent with the requirements of justice. The new rule also provides that any evidence given by video link must be recorded electronically or in another manner if the court so decides.

Further detail on how the procedure should operate is provided in the 2008 Act itself. For example, the court cannot direct the provision of evidence by video link:

- unless facilities are available which enable the party or witness to see and hear the proceedings at the hearing and to be seen and heard by those present in the courtroom in which the hearing is taking place;
- if it would be unfair to any of the parties to do so; or
- if it would otherwise be contrary to the interests of justice to do so.

Where a court gives the relevant direction, the party or witness concerned is deemed to be present at the hearing. Finally, if the court refuses a request from one of the parties for evidence to be given by video link, it must give reasons for its decision.

1 The new provision is contained in the Rules of the Superior Courts (Conduct of Trials) 2016 (S.I. No. 254 of 2016).

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