Review of Civil and Family Justice in Northern Ireland

Review Group's Report on Civil Justice

September 2017

This is a Report by the Review Group, unless otherwise indicated. This is the approach that was agreed with the Group.

We recommend that the Report, and the preliminary Report, be read in electronic rather than paper form. This will facilitate using the links.

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Preface

As the usages of society alter, the law must adapt itself to the various situations of mankind[1].

Lord Mansfield

It is now 17 years since Lord Justice Campbell conducted a review of civil justice in Northern Ireland and left his trace on future developments. In the interim, Scotland has carried out a full civil justice and family review, England and Wales has just completed a similar consideration of civil justice through Lord Justice Briggs and the Republic of Ireland is about to commence a similar operation where the government has commissioned the first annual study on court efficiency and sitting times.

Accordingly, the Lord Chief Justice announced the launch of a Review of Civil and Family Justice, led by me, at the start of the new legal year on 7 September 2015. A preliminary report was published in October 2016. A wide consultation on that preliminary review has been carried out and numerous responses received. With that consultation period now complete, this is the final report for civil justice.

The aim of the Review has been to look fundamentally at current procedures for the administration of civil and family justice, with a view to:

- improving access to justice;
- achieving better outcomes for court users, particularly for children and young people;
- creating a more responsive and proportionate system; and
- making better use of available resources, including through the use of new technologies and greater opportunities for digital working.

The main areas to be covered by this Review have been as follows:

- the jurisdiction of the small claims and county courts;
- the types of business that should be conducted within these jurisdictions;
- the use of mediation and other forms of alternative dispute resolution (ADR), including online options (for example, online dispute resolution);
- opportunities to facilitate and provide support to unrepresented parties;
- the scale costs system and options for the proportionate recovery of costs;
- opportunities for more proportionate use of evidence;
- opportunities to streamline court procedures and improve case management, including for the transfer of business between court tiers and the potential for a single entry point for all non-criminal claims; and

[1] Barwell v Brooks [1784] 3 Dougl 371 at 373.

- invocation of modern technology into the court process.

The system of review and methodology embraced two main committees. First, a Review Group was established to:

- examine current levels of business in the civil and family courts and how these are being managed;
- look at best practice and experience in other comparable jurisdictions;
- consider the adequacy of currently available data on civil caseloads;
- investigate the potential for closer collaborative working with voluntary sector providers;
- identify potential business improvements;
- highlight areas where legislative reform is required;
- assess the potential equality implications of any proposals, with a view to ensuring there is no adverse differential impact for any groupings within the terms of s. 75 of the *Northern Ireland Act 1998*; and
- identify training and development needs.

Secondly, the Review was substantially informed by the views of interested stakeholders. A Reference Group was established to allow external stakeholder groups to provide their input, and members of the public were encouraged to contribute on the basis of their personal experiences. The full terms of reference for the Review, including the membership of the Review Group and Reference Group, are contained in appendix 1.

A series of issues papers, which have been amended, substituted and approved by the Review and Reference Groups, covering key themes within and across the various court divisions and tiers within the civil justice system, was drawn up by approximately 16 subcommittees comprising professionals within the civil justice system. Those subcommittees have proved invaluable and I commend every member for the time and skill they have invested in this process.

The responses we have received have been informed and comprehensive. They have influenced the final report to a significant degree. Where possible, we have adverted to those responses, but the nature and extent of them has been such that it has been impossible to include all the views that have been expressed. However, a summary of all of the responses received has been made available on our website. In truth, this Review has placed a premium on public involvement from the outset, and in many ways the public input has been the beating heart of this Review. Our aim has been to be as inclusive as possible and this explains why from the outset we have set up a website and mailbox to allow members of the public to share their experience as well as their ideas for how we can create a modern and responsive system.

I make no apology for repeating what I have said in the Family Justice Review. I have chaired many committees in my legal and judicial career but none has been

more assiduous and creative than the two main committees and the various subcommittees with whom I have had the privilege to serve during this Review. I make it clear from the outset that any criticisms of our outcomes and recommendations should fall entirely on my shoulders and not on any of the committee members. Not everything contained in this Review has received unanimous approval during our meetings, and the only person bearing full responsibility for the final content of this document is me. In most instances, the approaches recommended have met with the approval of all or virtually all the committee members. Where there has been a clear division of opinion, I have weighed up the arguments and taken it upon myself to make recommendations.

The Office of the Lord Chief Justice provided the secretariat for the Review. Without the informed, selfless and tireless commitment of Wendy Murray, Karen Caldwell, Julie McGrath, Maura Campbell and Terence Dunlop this paper would never have been assembled much less completed. The Office of the Official Report (Hansard) in the Northern Ireland Assembly, particularly Bronagh Allison, Tom Clarke and Phil Girvan, provided editorial support.

A further crucial component of this Review has been our determination to learn and benefit from the experience of other jurisdictions worldwide with similar legal backgrounds. Hence, we have consulted personally and via electronic platforms with judiciary, members of the legal profession and legal and non-legal experts in the civil and family justice systems, together with a wide array of distinguished papers as far afield as England, Scotland, the Republic of Ireland, New Zealand, Australia, Canada, the USA, South Africa and Holland. The unstinting and timeless support that we have received from all of these jurisdictions is a testament to the internationalism of civil justice and a monument to the concept of international cooperation. As I indicated each time I had the privilege to speak to the representatives of each nation, I fervently hope that one offshoot of this Review will be that the links now forged will remain intact as a harbinger of future relations and contacts between us for the mutual benefit of civil justice in our countries.

We have also been conscious of work being carried on by other bodies touching on many of the issues that have surfaced in this Review. Our aim has been to avoid duplicating their work wherever possible. Thus, for example, we make references throughout to the *Review of the Civil Justice System in Northern Ireland: Final Report* ('The Campbell Report') in 2000, and to *A Strategy for Access to Justice: The Report of Access to Justice (2)* ('The Stutt Report') September 2015 (albeit this report viewed matters from a more cost-driven aspect than this Review), the interim and final reports of Lord Justice Briggs in England on Civil Justice Reform and the civil fees review carried out by the Northern Ireland Courts and Tribunals Service (NICTS).

It has been our intention to produce a Report that is evidence-based. As we have recorded on occasions throughout this Review, at times we have been beset by a lack of statistical underpinning and the absence of raw data simply because it is not available in Northern Ireland as yet. This is a feature of which any future monitoring

body — such as the proposed Civil Justice Council — should be aware and react to the production of such material as it emerges.

Austerity should not be seen as a driver of reform. The rule of law has a value that is not simply the utilitarian value demanded by funding bodies that now seem to have such influence on the development of the law. However, as Adam Smith said, we might be led by an invisible hand to promote an end that is no part of our intention. The times in which we live should act as a spur to look at our systems, our procedures, and our courts and ask whether they are the best they can be, and, if not, how they can be improved. Our role has not been to calculate the costs or the savings that our recommendations will engender. In any event, at the time of writing a budget had not yet been allocated for 2017-18 onwards. Moreover, quantifying with any accuracy the costs of our proposals, or any anticipated savings from alternative approaches, would be beyond our remit. Our role was to identify a strategic blueprint, and it will be for the relevant department(s) to look at issues such as funding. We have endeavoured to highlight in broad terms where we see scope for efficiencies and invite them to consider a re-balancing of spend.

One plea courses through our whole Report. There is a fundamental conceptual difference between mere expenditure on the one hand and investment to save on the other. The proposals we have made are investments for the future of the civil justice system that, in many instances, will not only immensely improve access to justice for everyone, making Northern Ireland a centre of legal excellence, but in doing so will reap rich rewards in the years to come in terms of greater efficiency, time saving and cost reductions — provided there is the will and the foresight to invest the necessary funding now.

We have been wary lest we crossed the boundary between review and policy making. It is not appropriate for me as a member of the judiciary to comment on matters of government policy. As a judge, my role is to uphold the law in force from time to time. Nonetheless, the role of the judiciary in the reform of the legal system is evolving with the passage of time. The modern judge is increasingly involved in administration. Court reform can be successfully accomplished only with judicial participation. There is no longer any question of judicial independence being compromised by a reform programme. The judiciary is not doing the Executive's bidding. Instead, this Review is leading a programme for reform independently drawn up. It is an accepted convention that it is appropriate for the judiciary to comment on matters relating to the administration of justice and to point to possible unintended consequences of proposed government policy. That task we have willingly taken up. That said, judicial leadership is a necessary but not sufficient condition for success. There needs to be the closest co-operation between the judiciary and the NICTS — joint working at its best[2]. Judicial leadership is thus a necessary but not a sufficient condition for reform. To achieve reform, co-operative working with others is essential.

[2] Sir Peter Gross 'Judicial Leadership and Reform', Bahrain, February 2017.

While some of our recommendations may require adoption by way of parliamentary processes, there are other changes that could be effected without rule and legislative changes. The most important change, however, is a cultural change so that the justice system is seen, operated and perfected in a new light. It is a new way of doing business. This is neither a project of restoration nor an interaction with a carefully curated past. The pace of change is accelerating and although we have great adaptive capacity, I recognise change can be stressful and at times disconcerting. This Review aims to create an opportunity for change and to peer, with as much insight and wisdom as we can muster, where we might desirably go. The purpose is to be a radical engagement with the future.

It has not been within the remit of this Review to enter into the government policy dealing with the scope of the overall legal aid budget. However, it cannot be left unsaid that the consequences of the diminution of legal representation that lies in the wake of the changes to the legal aid budget are liable to have a profound effect upon the access to justice that the public currently enjoys. Not only will it serve to increase the number of personal litigants with all the attendant dangers of length of court hearings, increased expenses for court and represented parties, increased appeals and a huge increase in costs in changes in the law to accommodate them, but the standard of justice to which personal litigants are entitled will in itself be endangered. The financial pressures in the public sector are unavoidable realities that have to be accepted. Fiscal constraints are clearly with us for many years ahead. However, the unintended consequences that are currently flowing from the reduction in legal aid will continue, and indeed increase, unless a realistic assessment of those consequences is now investigated.

A consultative approach to this Review has been adopted with the object being to make the Review as inclusive as possible. Where we have proposed fundamental change, we have expended time investigating those areas in other jurisdictions where the proposed change has already successfully occurred. The internationalism of civil justice is a guiding principle needed to serve the interests of the court user in harmony with the administration of justice.

Finally, a key component of our Review has been the need to recognise the requirement for transparency and adherence to the principles of open justice. One of the roles of the Review is to generate debate and consider major issues in the civil courts. This Report is the first rather than the last word on how these matters are to be addressed. Another 17 years must not pass before we look again in depth at our system of civil justice. This jurisdiction urgently requires a body such as a Civil Justice Council to carry on the work of this Review and to monitor future progress in a timely and efficient manner.

The Right Honourable Lord Justice Gillen
September 2017

Key recommendations

This Report contains a large array of individual recommendations arising out of this far-reaching and inclusive exercise to date. We regard all of them as important and they fit a pattern of proposed reform. Nonetheless, we consider it useful to formulate at the outset the key or flagship recommendations around which the other reforms revolve. They are as follows:

- The current dominance of paper-based systems to yield to unfolding inevitability and be replaced by a commitment to paperless courts and digitalisation.
- Consideration be given in the next Programme for Government to include a commitment to the digitalisation and modernisation of the courts process.
- Justice to be delivered in many ways — by the most appropriate decision maker; in modern hearing rooms, community halls or remote locations; by video links, on laptops, tablets and smartphones; and online with the citizen and the decision maker coming together virtually. Hearings in trials will, of course, continue to be held in open as they are now.
- Online dispute resolution as an alternative to court in certain types of low-value money damages cases of under £5,000, excluding personal injuries over the value of £1,000.
- A fresh approach to costs, with fixed fees in the High Court.
- A greater emphasis on pre-action protocols and case management, with effective sanctions for non-compliance.
- Modernisation of court procedures, including efficient use of social media, electronic banking and court officers. The Office of the Lord Chief Justice to use Twitter to advise of judgments and to provide a synopsis and link to each judgment.
- Courts to take a more active role in the encouragement, facilitation and management of dispute resolution in the widest sense by weaving alternative dispute resolution more firmly into the civil justice fabric.
- A new, narrower approach to disclosure.
- Experts to be professionally accredited and subjected to judicial scrutiny for necessity, budget analysis and sanctions.
- A system of justice that accommodates the needs of personal litigants and which does not revolve entirely around a lawyer-led process.
- A fresh approach and renewed vigour in pursuit of the obligation to ensure that those with a disability have real and meaningful access to justice.

- New methods of appeal to the Court of Appeal.
- An increase in jurisdiction in the county court, district judges' court and the small claims court, with the creation of exclusive civil proceedings in three centres.
- The creation of a new business hub in the High Court embracing the Commercial, Chancery and Judicial Review courts;
- Power to be given to refer matters of disputed valuation to the Lands Tribunal, and that the Lands Tribunal be given the necessary jurisdiction to determine such references.
- The creation of a Civil Justice Council as a strategic level forum for driving significant improvements in the performance of the civil justice system.
- The Department of Justice to bring forward legislation to re-constitute the Northern Ireland Courts and Tribunals Service as a non-ministerial department (NMD).

1

Introduction

1.1 Our goal has been to improve citizens' access to civil justice. This is an area that has had less exposure than the criminal justice system, albeit the civil system has infinitely more impact on day-to-day life, given the nature of business affairs. Our report has provided a real opportunity to look fundamentally at the architecture and governance of our civil justice system.

1.2 This Review is not meant to constitute either a jeremiad against the current system or a deliberate attempt to puncture accepted orthodoxy. Rather, it is our hope that it constitutes an evidence-based blueprint to benefit court users, centred as it is on an outcome-based focus. It will open up opportunities to innovate, create transformative change and embrace new technologies within the civil justice system to reflect the society we inhabit in the twenty-first century.

1.3 Our methodology has carried to a new level a judicially led venture to ensure collaborative working between government departments, the legal fraternity (including the judiciary), other important stakeholders and the general public. It is a harbinger of the future and hopefully the key recommendations emerging shall find expression in the forthcoming Programme for Government.

1.4 This has been a time-consuming task and this Review is accordingly a lengthy document. We take the opportunity in this introduction to summarise the salient points in most of the chapters that follow.

Paperless courts

1.5 To serve the needs of the twenty-first century society, the justice system must be digital by default and design. The continuing maturation of the digital age has created an environment where court systems can and must maintain all or part of their information electronically. Given this new electronic access, most activity by courts must now centre on how they should align their traditional policy with new capability of providing remote access to searchable records and enact rules and regulations to deal with this new reality.

1.6 Our ultimate aspiration must be the creation of paperless courts, albeit in the short to medium term a move to paper-light courts with a reduction in current use of paper is a step on the way. However, a programme for change is strongly recommended to include a sequenced and coordinated rolled-out plan, supported by a programme of education, training and advisory services. This work should be taken forward in consultation with the judiciary, professional bodies and court users. The key to this whole exercise is proper and adequate investment by government along the lines of that instituted in England. Consideration should be given to the forthcoming Programme for Government, including a commitment to the digitalisation and modernisation of the court process.

Online dispute resolution (ODR)

1.7 Clearly there are emerging expectations of other, less costly, means of accessing justice. Nowadays, clients expect to be served, through the legal processes, by multiple channels as part of the same experience that they encounter elsewhere in their daily lives: in person at a desk, in a courtroom, by smartphone, by e-mail, by chat, by videoconferencing and through web interfaces helping them to navigate complicated procedures. Online dispute resolution can be a powerful tool for courts to address these challenges and expectations and provide such channels

1.8 Hence we have recommended a pilot scheme of voluntary ODR to be set up throughout Northern Ireland for money damages cases of under £5,000, excluding personal injuries over the value of £1,000.

Single-entry system for civil cases

1.9 We discussed this issue and come to the unanimous conclusion that there should be no introduction of a unified system or a single point of entry in the civil courts in this jurisdiction.

Costs

1.10 Cost of litigation is a major feature of public concern and discussion. We have recommended the introduction of the following:

- scale costs in the High Courts;
- immediate measured and payable costs for interlocutory proceedings;
- third-party funding;
- a group led by a High Court judge to explore the possibilities for conditional fees, qualified one-way cost shifting and after-the-event insurance; and
- issue-based and proportional costs orders.

The overriding objective

1.11 To ensure the fulfilment of the overriding objective to deal with cases justly, efficiently and in a timely fashion we have recommended the following:

- a revision and updating of the Rules of the Court of Judicature by a judge-led group;
- the strengthening of pre-action protocols;
- early case reviews and case-management hearings of all cases in all divisions and tiers;
- provision for early determination of any point of law or document construction;
- streamlining of all practice directions;

- a requirement of leave for all interlocutory appeals from the county court;
- greater use of witness statements;
- provision for plaintiffs to make offers of settlement; and
- all minor settlements to require court approval even where proceedings not issued.

Modernising court procedures

1.12 With the reliance on traditional media and methods of communication declining, fresh methods of engaging with the public and sharing information have to be invoked. We have recommended in the court system greater use of the following:

- electronic correspondence;
- social media;
- electronic banking methods;
- tweeting and online services;
- non-judicial court officers; and
- a modern approach to shorter judgments, making notes in court and provision of transcripts.

Alternative dispute resolution (ADR) and mediation

1.13 Mediation has been available in this jurisdiction as a means of dispute resolution since in or about 1994 and has increased significantly in popularity in the civil courts generally over the past five years or so. It has already been brought within the formal framework of civil procedure by developing pre-action protocols and the introduction of a rule granting stays for mediation. In order to advance this development, we have recommended the following:

- increased training and education on the benefits of mediation;
- a refusal to consider mediation without adequate explanation to be met with sanctions;
- compulsory mediation in small claims;
- a body similar to the UK Civil Mediation Council to be introduced;
- a pro bono mediation service; and
- legislation requiring pre-action advice on mediation to be given.

Disclosure

1.14 Disclosure has become a major source of expense, inefficiency, delay and time wasting. We have recommended the implementation of a standard form of

disclosure to replace the conventional Peruvian Guano test, save where cause is shown. Automatic pre-action disclosure should be introduced.

Experts

1.15 If we are to have an efficient and cost-effective system providing access to all, whatever the state of their wealth, courts must control the use and expense of experts. Hence we recommend the following:

- accreditation of experts;
- judicial control of their costs at case-management conferences;
- joint selection of experts;
- the use of hot-tubbing;
- written questions to experts; and
- sanctions against errant experts.

Personal litigants

1.16 To reflect the growing need to accommodate the presence of personal litigants within the system we have recommended the following:

- early case management in all such instances;
- judges to be empowered to introduce an inquisitorial approach;
- introduction of a legally qualified unrepresented co-ordinator;
- rigorous data recording mechanisms;
- revisiting of current websites to provide online information;
- introduction of civil restraint orders;
- reconsideration of the policy of abatement of fees in all cases; and
- increased training of staff, judiciary and lawyers.

McKenzie Friends

1.17 The concept of McKenzie Friends incorporating the right to reasonable assistance is now firmly entrenched. However, the danger lies in the potential growth of unregulated and untrained assistance. Hence we recommend the continued prohibition on rights of audience, save in exceptional circumstances, and a fresh prohibition on remuneration of McKenzie Friends.

Disability

1.18 Courts have the task of examining access to justice for persons with disabilities on an equal basis with others. Positive actions are required to remove barriers not only in the built environment but also for communication and information purposes. Thus we have recommended the following:

- Prescribed forms to be used to identify if a party to proceedings requires adjustments to be made to facilitate their participation in proceedings.
- The Department of Justice (DoJ) and the Northern Ireland Courts and Tribunals Service (NICTS) to develop systems to capture information on the number of disabled persons in the justice system to inform policy development and support best practice.
- A comprehensive review of web-based information and guidance.
- The use of registered intermediaries to be extended to support those with communication difficulties in the civil and family courts.
- Closer liaison with voluntary support organisations in the provision of training to judges, the legal profession and all front-line staff.
- The Bar Council and Law Society to follow example of the judiciary and appoint a member in charge of disability issues.

Court of Appeal

1.19 There is an unnecessary premium on an extensive oral process in the appeal system in many cases that are wholly unmeritorious. The result is an unnecessary and disproportionate waste of time and expense. Accordingly, we have recommended alterations to the granting of leave mechanism and the appeal thresholds. In addition, consideration is given to ADR, unnecessary proliferation of documentation, a re-examination of costs, non-compliance with directions and hearing management in appeal hearings.

County court and small claims court

1.20 The key proposals in this chapter involve recommendations to increase the jurisdiction of the county court to £60,000, of the small claims court to £5,000 and a radical uplift of the equity jurisdiction. In addition, we propose not less than three civil centres to be set up given over exclusively to the hearing of civil bill and equity cases together with a strengthening of pre-action protocols.

A business and property hub for Chancery, Commercial and Judicial Review

1.21 We recommend a new business and property hub comprising suitable cases in these divisions serviced by four or five designated High Court judges providing for swift, efficient and cost-saving disposition of litigation.

The Chancery Division

1.22 This chapter recommends regulation of a number of procedures, including

- reduction of the number of oral reviews invoking greater use of online reviews and modern technology;
- more proactive case management with early detailed reviews shortly after issue of proceedings;

- greater encouragement of early neutral evaluation;
- active judicial-led management of the discovery process;
- introduction of scale costs; and
- use of Twitter for judgments.

The Commercial Division

1.23 The successful advent of the Commercial court in Northern Ireland, as part of the new business and property hub, needs to be progressed to keep pace with developments elsewhere. In particular, we have recommended that

- Each case in the commercial list to be subject to an initial directions hearing shortly after entry into the list, case-management conference after the completion of pleadings and pre-trial review around four weeks before hearing.
- A requirement for parties to exchange letters setting out their proposals/objections to mediation.
- Fast-tracking of short uncomplicated net issue cases and fast-tracking of cases where mediation has failed.
- More frequent use of early neutral evaluation.
- The use of automated search technology, keyword searches and predictive coding in complex disclosure issues together with extensive training programmes in their use.
- Implementation of the concept of a disclosure plan at the outset of the disclosure process.
- Consideration to be given to the commencement of the Online Dispute Resolution Advisory Services in low-value commercial claims.

Judicial review

1.24 The fresh approach to judicial review in this chapter reflects shifts that have been unfolding for some time and include proposals for

- Judicial review applications that have as their subject matter issues which are within the jurisdiction of more specialist courts to be transferred to those courts for hearing.
- The criminal/civil causes distinction in judicial review to be abolished.
- Leave to apply for judicial review to be granted on the papers with an oral hearing arranged only if the judge is minded to refuse leave.
- Unless a special request for more time is sought and granted, leave hearings not to last beyond 11 o'clock on any morning.

- The promptness requirement for judicial review proceedings to be abolished.
- The production by the Northern Ireland Courts and Tribunals Service of a guide for personal litigants and others who may use the judicial review court.
- Greater judicial encouragement of alternative dispute resolution in appropriate judicial review cases.

Defamation

1.25 Changes in the law of defamation have recently been under the political spotlight in Northern Ireland. It is not our role to engage in this debate. However, changes in the current set up should include

- Reviews (other than the first review and case-management hearings), where appropriate, to be conducted by video link or Skype, telephone or email and consideration to be regularly given to the disposal of generic, straightforward Queen's Bench interlocutory applications through online determination with a right of an oral hearing on request by either party.
- The right to challenge jurors in civil proceedings, save for cause to be removed.
- Jury trials in defamation cases to be retained but the powers of the judge to be expanded to include a discretion to order trial without a jury in matters of complexity.
- Cost sanctions may be employed against those who refuse to consider participation in alternative dispute resolution without adequate explanation or reason.
- Consideration to be given at the outset of a trial for the jury to determine simple matters that may permit the flow of the trial thereafter to be more focused, less time-consuming and, therefore, cheaper.
- A more flexible approach to court rules, perhaps particularly with regard to such formal matters as pleadings, when personal litigants are involved.

Clinical negligence

1.26 This a specialised, complex and costly area in civil litigation. This review provides an opportunity to further refine the architecture of this process.
Our recommendations include

- Movement to a paperless court concept, accompanied by a paper-light provision.
- Reviews (other than the first review and case-management hearings) and interlocutory hearings typically to be conducted by video, telephone or email, with court oral hearings reserved for substantial issues only.

- After the exchange of liability reports/financial loss information, parties to be encouraged to engage in settlement discussions at an early stage with emphasis on resolution rather than the form of the resolution. A period for negotiation/discussion/mediation to be provided, after close of pleadings, exchange of evidence and preparation of expert schedules, typically, but not always, three months prior to trial depending on the complexities of the case.
- Accreditation for solicitors and junior counsel who wish to practise in the area of clinical negligence to be introduced.
- Use of a single joint expert and witness statements to be encouraged wherever possible.

Licensing

1.27 Modern economic activity has changed radically. Hence in this area government policy approaches to such areas as the concept of, or indeed the need for, vicinity, adequacy or surrender of licences may need to be revisited. Within the remit of this Review, however, we consider that changes need to be made to modernise and refine the approach to licensing applications, including

- In the district judges' courts, the required paperwork to be prepared and communicated electronically for renewals, protection orders and transfers applications.
- Records to be retained electronically.
- Many applications to be processed on paper by the Clerk of Petty Sessions, provided that the statutory proofs are in order, particularly renewal applications.
- Live link/Skype technology to be encouraged.
- Experts to be directed to exchange reports and attend a minuted experts' meeting pre-trial.
- Licensing days to be more often and spread out over the year.
- Objections are substantively pleaded and substantiated as soon as possible.

Lands Tribunal

1.28 Consonant with our desire to provide more informed and fairer justice, we consider that power should be given to the High Court to refer appropriate specialised matters of disputed valuation to the Lands Tribunal for determination.

Civil Justice Council

1.29 To borrow a citation found in this chapter, review and reform of the civil justice system is a complex undertaking. It is necessary to take into account the rights and interests of a diverse range of participants, including litigants large, small

and self-represented, the legal profession, government and the courts. Reform initiatives may have unforeseen consequences, or may require modification in light of practical experience. They should therefore be subject to ongoing review and evaluation to ensure their objectives are being met.

1.30 The formation of a Civil Justice Council in Northern Ireland comprising membership of the legal profession, judiciary, government departments and lay members would echo a step long advocated here and already taken in many jurisdictions worldwide over the years, represents a novel and inclusive method of involving citizens actively in the civil justice system, making it more accessible and comprehensible to the public at large. It will constitute another judge-led exercise where government and the legal fraternity co-operate to advance the cause of civil justice.

Non-ministerial department (NMD)

1.31 Budgetary independence has historically made the concept of an NMD an attractive form for bodies that require the appearance of a degree of independence from ministerial intervention. It follows, then, that it would be entirely appropriate, and in the interests of judicial independence, for NICTS to sit at some distance from the Department of Justice — similar to the arrangements already in place for the Irish Courts Service and the Scottish Courts Service — as an NMD headed by a judicially led board.

1.32 In times of austerity an even more important consideration is the need for difficult strategic decisions on the deployment of scarce resources to be informed by those with direct operational experience, through a judicial board structure.

1.33 Hence we recommend the Department of Justice bring forward legislation to re-constitute the Northern Ireland Courts and Tribunals Service as a non-ministerial department, with a view to having an NMD in place as soon as possible.

2

Current structure of civil justice

2.1 Currently, the majority of substantive civil proceedings in Northern Ireland are commenced by a writ of summons or originating summons (issued in the High Court), a civil bill (issued in the county court), or a small claims application form (issued in the small claims court). The county court deals with civil cases with a quantum of up to £30,000, defamation and slander up to £3,000 and disputes involving land with a net annual value of up to £4,060 or a capital value of £400,000. The district judges' court deals with claims of £5,000 or less. The small claims court deals with cases of £3,000 or less.

2.2 In simplistic terms, when issuing civil proceedings in the High Court:

- Plaintiffs first decide in what division they need to issue the writ: the Queen's Bench Division, the Queen's Bench Division (commercial list), or the Chancery Division.
- Once the plaintiff has complied with the relevant pre-action protocols, the writ can be drafted and issued. In most civil cases, the amount claimed is not particularised on the face of the writ. If the claim is one for liquidated damages, or the precise sum claimed can be particularised, this can be specified within the endorsement.

2.3 Of course, some civil proceedings are commenced by other methods, for example by way of an originating summons, or petition.

2.4 The writ of summons is lodged in the relevant court office, and served on all the other parties.

2.5 Litigation in the Chancery Division involves a broad range of subjects. Generally, the jurisdiction of the Chancery Division is defined by Order 1 rule 10 of the Rules of the Court of Judicature (Northern Ireland) 1980. These thus range from family disputes, perhaps in the context of family provision or probate, to disputes between individuals, perhaps in a specific performance suit, to substantial litigation between commercial parties.

2.6 Again, in simplistic terms, when issuing civil proceedings in the county court:

- The plaintiff first decides that the case falls within the jurisdiction of the county court – that is, that the quantum of the case would not exceed £30,000.
- They then decide in what division the civil bill would need to be issued, depending on the location of the parties involved and/or the location of the cause of action, and what type of civil bill is to be issued.

- The plaintiff particularises a sum claimed, by way of damages, on the face of the civil bill. If £5,000 or less is claimed, the matter will be issued and listed in the district judges' court of the relevant division. If £10,000 to £30,000 is claimed, the matter will be issued and listed in the county court of the relevant division.

2.7 When issuing civil proceedings in the small claims court:

- The plaintiff first decides if the value of the claim is not more than £5,000, and does not fall within one of the excluded claims – for example, a claim for personal injuries.
- A notice of application for a small claim is filled in and filed in the relevant county court division.

2.8 Once each case has entered the relevant court/division, and if the matter is defended, the parties will begin taking substantive steps in each. One such step can be an application to remove or remit an action (that is, apply to move a case that has been commenced in the High Court to the county court, or vice versa). Such an application can be made by consent. If contested, it will be listed for hearing, and representations made by each party. If the judge or Master hearing the case decides that the matter was commenced in the wrong court, and it should either be removed or remitted, an order will be made to that effect.

3

Paperless courts

Current position

3.1 Twenty-third August 2016 marked the twenty-fifth anniversary of the world's first website going live. A quarter of a century later the web is dominated by social networks, search engines and online shopping sites. From here we can expect to continue to leak from the computer screen into the real world with the rise of the Internet and things such as biometric confines and superfast speeds hailing a new era for the World Wide Web. Thus in the period since Lord Justice Campbell's Review, a fundamental change has occurred in society in general and in the law in particular with the advent of the digital era. We now, as a matter of course, conduct many of our business arrangements, daily communication functions and activities using tablets, smartphones and even smartwatches. Personal computers, the Internet, and all the collateral consequences that followed from these innovations — such as laptops, notepads, cell phones, smartphones, Facebook, YouTube, Google, Wikipedia, and Twitter — have radically changed the information world we live in today. The public not only expects easy access to information, but also expects it to be instantaneous, wherever one is located. Arguably, we in the legal profession are the last analogue profession.

3.2 To serve the needs of twenty-first-century society, the justice system must be digital by default and design. The continuing maturation of the digital age has created an environment where court systems can maintain all or part of their information electronically. When these electronic records are properly compiled and maintained with well-defined data fields, searching for and retrieving data is often as simple as pushing the appropriate button on a computer. Moreover, this database can be remotely available in a searchable format to anyone. Given this new electronic access, most activity by courts must now centre on how they should:

- align their traditional policy with the new capability of providing remote access to searchable records; and
- enact rules and regulations to deal with this new reality.

3.3 We in the law must not get left behind. The advent of the photocopier, email, texting and our increasing propensity to communicate with each other in written form has fed a tendency to put everything but the kitchen sink into general disclosure in legal cases. History will record our current subservience to mountains of paper as having the appearance of an absurd Luddite fantasy. Mr Justice Christopher Clarke has described the present situation as 'an explosion in the production of documentary material in court which threatens to swamp the system and is an enemy to understanding'. Sir Brian Leveson, President of the Queen's

Bench Division, speaking in 'Modernising justice through technology' in June 2015[1] said: 'We simply cannot go on with this utterly outmoded way of working… it is a heavy handed, duplicative, inefficient and costly way of doing our work'.

3.4 Every judge in Northern Ireland — particularly those engaged in family, judicial review, commercial, chancery or clinical negligence cases — is well familiar with innumerable lever arch files produced by the parties and copied several times, lined up in court but which remain unopened or largely unreferred to during the course of lengthy trials. A small proportion of what is often literally thousands of pages of disclosed material bears some relevance to the case.

3.5 Moreover, when the files are explored, one often finds that delving into them reveals a lack of pagination, or, worse still, pagination that varies from party to party, an absence of chronological ordering, photocopied documents that are blurred or cut off with multiple vertical lines running down the pages, files that are not adequately labelled, papers that have poor indexing or missing pages, supplemented often by papers served at the last minute that are not contained on the judge's papers or the opposition papers. All of which creates a nightmare for transportation or manipulation during the trial.

3.6 Courts must be able to efficiently store and process an increasingly large volume of data and information, frequently in complex civil proceedings. The collection, holding, editing and transfer of this information in the form of paper documents generates considerable expense, is time-consuming and impedes flexibility and timeliness in the running of cases. It is widely accepted by the judiciary, practitioners and academics that there is a pressing need to deliver mess for less by digitising the current system. The judiciary must lead in enabling the ways in which we conduct cases to match the expectations of the public in that sense. It is time that we gripped the concept of the paperless court. The waste in terms of costs, time in preparation and presentation to court is simply unacceptable. This concept must be taken forward as representing a significant cultural shift and should be regarded as an IT-enabled business change rather than simply the provision of new technology.

3.7 Resolution of the problem is not easy. Currently, many members of the profession and judiciary, particularly those of a certain vintage, declare a strong preference for documents in paper form that facilitates underlining, highlighting, cross-referencing, commenting, etc. as part of the process of ordering their thoughts. Despite the attachment of some to the older paper system, most, if not all, of the practitioners and judges to whom we have spoken are agreed that there must be a more accessible, efficient, less costly and technologically proficient system that reflects the digital era in which we live.

3.8 The digital revolution is not a dot on the horizon; it is already upon us in various courts. Whilst the concept of digitisation and the paperless court is in some

[1] Sir Brian Leveson, President of the Queen's Bench Division, Keynote Speech: 'Modernising Justice through Technology', 24 June 2015.

measure a polymorphous kaleidoscope and we do need to distil the frenzy engendered by it, real progress has been made towards digitising elements of the process already. By way of illustration:

- In England and Wales, employment tribunals have the vast majority of new claims commenced online.
- Immigration and asylum appeals can be issued through an online portal.
- In England, traffic adjudication is almost entirely online with online courts involving telephone and video hearings.
- Electronic bundles have been used in the Mercantile Court in Birmingham since September 2014.
- Nottinghamshire and Manchester family courts have used electronic bundles in care proceedings since 2014 and 2015 respectively. The local authorities will not provide paper documents in the family courts. They simply provide USB sticks with the court bundle contained in the electronic file and so counsel, and anyone else who wants a hard copy, must print it. A judicial delegation from Northern Ireland paid a study visit to Manchester in February.
- Electronic file management systems are used in the Chancery Division, in the Bankruptcy and Companies Court in London (Rolls Building) and, most notably, in the United Kingdom Supreme Court (UKSC), both of which we have visited and experienced.

3.9 The Ministry of Justice (MOJ) Criminal Justice Strategy and Action Plan[2] is committed to turning courtrooms paperless and fitting them with WiFi. Great progress has been made in implementing a fully digital criminal justice system, with police adopting digital case file management and sending case files electronically to the Crown Prosecution Service (CPS), who in turn submit digital case files to magistrates' courts. The majority of police forces in England and Wales are now transferring a vast amount of case information electronically. We are reaching the stage where non-imprisonable standard low-level crime may be dealt with by algorithms that permit fines imposed online without a human being involved.

3.10 As part of the implementation of the Scottish Government's Strategy for Justice in Scotland, following on from the review carried out in that jurisdiction in 2007-09, the intention is to move to an entirely digital system that goes well beyond issues such as digital disclosure and paperless courts to encompass the entire justice system. Of particular relevance to this Review are the proposals for digital recording of evidence, reports, judgments and submission of pleadings, wide-scale use of live videoconferencing TV links, and a secure digital platform to store all information relevant to a case, conforming to set standards of quality and security, which is capable of being used without need for further manipulation. It is understood, however, that this is at a relatively early stage in terms of actual implementation.

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330690/cjs-strategy-action-plan.pdf

3.11 The Irish courts have moved one step closer to paperless litigation, with the use of the bespoke eCourt app in a current Supreme Court case[3]. Android-powered tablets took the place of outdated lever-arch folders and bankers' boxes. Using the eCourt system, pleadings and other court documents are scanned and uploaded to Android tablets, where they can be searched electronically and private annotations made[4].

3.12 In Northern Ireland, it is estimated that over 95% of all correspondence with the Directorate of Legal Services (DLS) family law section is now via email and email attachments. Some counsel already operate from electronic briefs. The infrastructure and basic IT skills required for the use of electronic bundles is already widely available throughout the legal profession.

3.13 The Historical Institutional Abuse inquiry in Banbridge under the chairmanship of Sir Anthony Hart used a wider scope system, whereby the information was logged onto a central network established and maintained by The Executive Office via IT Assist. Each individual user was given an electronic key to access information, including court bundles relating to the case. In this inquiry, The Executive Office via IT Assist was responsible for the running of the system, which included the provision of IT support throughout the hearing — for example, by calling up relevant extracts from the bundle. Each party had to install the software on their own machine or borrow a laptop from IT Assist for the duration of the proceedings. The system worked well for an inquiry that lasted a lengthy period with the same parties. It may not be so manageable or cost-effective for discrete and disparate hearings.

3.14 Government is already firmly committed to the digital era. The head of the Northern Ireland Civil Service in a letter to staff last year said:

> 'One key aspect of reform that I have been particularly keen to progress is the use of digital and information technology to create a better experience for the users of our systems, whether they be the people of Northern Ireland or the employees of the NICS. We have made significant process in terms of the outward facing part of this work through the NI Direct portal, the 16 x 16 Programme and the new departmental web-sites.'

3.15 As regards general courtroom technology provision, video links and videoconferencing facilities are already available in all main court venues in

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[3] Lanigan v Barry *(citation not yet available)*.

[4] Practising barrister **Kieran Morris**, who co-founded **eCúirt Teoranta** with fellow barrister **Dáithí Mac Cárthaigh**, has explained the technology as follows. When the presenter moves his page, the page reference is transmitted to a remote server, and then it transmits the same page reference back to all the receiving devices, which are also registered on the server. Consequently, people can present and receive to and from each other in court. The app also has a lot of additional features, e.g. one can break off and independently view files, and one can annotate and hyperlink across PDFs. The papers are never uploaded to the Internet or cloud storage, and each device is encrypted for heightened security. eCúirt Teoranta has also developed a solution for courts where there is no Wi-Fi access. To get across the whole problem of Wi-Fi - for example, there is no Wi-Fi in the Four Courts in Dublin – they have developed the eCourt Box, which is a local Wi-Fi access point with an in-built server as mobile plug-and-play unit. A preliminary demonstration of the technology had already been shown to Queen's Counsel in Northern Ireland.

Northern Ireland and used to support witnesses giving evidence remotely in the criminal, civil, family and coroners courts and also used to facilitate remand hearings in the magistrates' courts without prisoners having to be produced at court.

3.16 Increasingly, this technology is also being used to facilitate witnesses from Northern Ireland to give evidence via remote link to courts in other jurisdictions, including Europe and other parts of the world. Technology is available within courtrooms at these centres to facilitate the presentation and display of video/DVD evidence, photos and maps, and most courtrooms in the court estate now also have digital audio recording facilities.

3.17 The Northern Ireland Courts and Tribunals Service (NICTS) has invested in web-based services and already delivers a number of online solutions, including: online public search facilities for High Court records and the register of the Enforcement of Judgments Office (EJO); online copy order production; online small claims; online juror management; online case tracking; court lists online; and online fine payment. NICTS plans to redevelop these online services as they are migrated to nidirect — which is the official government website for Northern Ireland citizens that provides a single point of access to public-sector information and services.

3.18 Data held on integrated court operations system (ICOS) (the NICTS line of business system) is routinely shared with various interested parties by way of electronic transfer via interface files. Examples include Legal Services Agency for legal aid-type orders, the Probation Board for Northern Ireland (PBNI) for pre-sentence reports and related orders, the Youth Justice Agency (YJA) for youth justice-related orders, HM Revenue and Customs for probate-related orders and Registry Trust for civil decrees. Court directions and correspondence relating to individual cases in the criminal, civil and family courts are also routinely shared with the legal profession on request via secure email.

3.19 NICTS is already an e-enabled digital business with existing IT infrastructure that will provide a useful paradigm against which future IT provision can be assessed and developed. The benefits to be achieved through sharing and storing case information electronically are already widely recognised, and it is acknowledged that changing the way it works and digitally redesigning its services will require consultation with and the support of the judiciary, partner organisations and key stakeholders.

3.20 In order to be effective and support transition to electronic case files, information must be collected and securely stored in a way that is accessible at the first point of contact with any party or witness in proceedings and from that point onwards it must flow through the system without the need for it to be re-entered, printed or manually handled.

3.21 Information should also, where possible, be stored in one place with only those entitled to access it being able to do so. Making this happen will require supporting technology to be developed, improved and amended as easily and

quickly as possible so as to maximise the benefits of appropriate information sharing.

3.22 ICOS will undoubtedly have to be further developed to include electronic document recording capability to replace paper files and processes. The recent service delivery review carried out by NICTS highlighted the need for the agency to develop a new ICT strategy to include digitisation, and work on this will be taken forward as part of the NICTS modernisation programme.

3.23 Some targeted work has already been carried out in this area. In 2011, NICTS commissioned a digitisation feasibility study using the EJO as the pilot area as it was deemed a paper-heavy back office where digitisation could be implemented. The primary objective was to improve the process, create an exemplar that could be scaled up in other back-office paper-heavy areas across the Department of Justice (DoJ) and inform the future development of a DoJ digital strategy. The study highlighted a number of exercises that required to be carried out to progress digitisation, including process modelling, analysis of files to determine legality of digitalising signatures, identifying what part of the files must be retained, designing a pilot to test moving from hard copy to email communication, enhancement of operating systems to integrate with Outlook, assessing the potential to use nidirect for online self-service to replace NICTS online services, prioritisation of enhancements to IT case management systems and consideration of cloud technology. The feasibility report also noted that in the long term the options for digital innovation should include development of online citizen contact forms, email integration and enhancements to operating systems, and mobile devices to access information off-site.

3.24 In keeping with other UK jurisdictions, DoJ has developed a digital strategy, a task now completed by the digital justice board. A number of meetings and workshops have already been held to formulate a set of agreed design principles. The work on the strategy has recently been extended to include civil justice and is considered central to the transition of the justice system into a digital-by-choice operating environment. In doing so, the DoJ will no doubt reflect much of what has already been considered in similar strategies already developed by the MOJ and the Scottish courts. The strategy will be high level and unlikely therefore to provide a detailed review of every information asset, transaction, service, channel or process. Detailed implementation plans will have to be developed to support priority projects, with emphasis on digital transformation of those services where it provides better value for money.

3.25 Of particular relevance to this Review and its theme of collective collaboration between government and the legal fraternity is the following extract from the strategy:

> 'The Justice Minister is committed to improving access to justice for all citizens. New delivery channels through digital working will improve services for customers and make the justice system more accessible. If justice organisations approach that challenge individually, it will be more difficult to make secure

system-wide improvements and costs are likely to be higher. It is essential that justice organisations have sight of each other's digital programmes to enable a collaborative approach to design and development of systems and information sharing to achieve the best outcomes in terms of service delivery and costs.

To achieve our strategic aim of "faster, fairer justice outcomes supported by digital solutions which deliver for citizens" we need to embrace emerging digital technologies, look beyond conventional delivery methods and enhance and modernise how we provide our services to our customers.'

3.26 In this jurisdiction, the future development of the Causeway system (which provides for data sharing between the principal criminal justice organisations) is already under consideration and will explore: secure data sharing and storage of large document and media files such as the sharing of video evidence; the use of cloud technology for storage purposes and secure retrieval of digital information; how increased use of digital evidence can be accommodated; sharing of digital case files with all parties, including the legal profession and defendants; increased use of digital courts; flexibility for additional criminal justice organisations to join Causeway services, such as PBNI and YJA; and enhanced management information capability, all of which will be equally applicable when gauging system requirements to support transition to electronic case files in the civil and family courts.

3.27 The move to digitisation within the DoJ is part of a wider digital transformation programme to improve services and deliver efficiency savings currently under way within the NICS. The Department of Finance (DoF) carried out a landscape review that fed into the citizen contact strategy to determine which services are being used by the public most frequently across government. This established the criteria for prioritising the services to be considered for development within the digital transformation programme. Each department has now been tasked with developing specific digital action plans.

3.28 The final report of the *Report of Access to Justice (2)*[5], an independent report commissioned by the then Justice Minister, is conceptually consistent with the thrust of this Review in this area. It was published on 4 November 2015 and recommended that the department:

- monitor the development of the Rechtwijzer, a Dutch system of online dispute resolution recently introduced in the Netherlands, and investigate the feasibility of implementing a similar solution in Northern Ireland;
- keep the development of online courts in England and Wales under review and consider the potential of these developments for Northern Ireland; and
- develop proposals for a pilot scheme to test the effectiveness and potential of a dispute resolution officer integrated into the court system who will facilitate early dispute resolution.

[5] Colin Stutt, *A Strategy for Access to Justice: The Report of Access to Justice (2)*, September 2015.

3.29 In England, the government has primed the pump for digitisation with £748 million recently committed to investment in the courts and tribunals system. The HM Courts & Tribunals Service (HMCTS) reform and mission statement is based around three key features: a new online court using digital tools to improve case management; the rationalisation of the court estate and less reliance on the buildings themselves with a move towards a paperless court; and the use of case officers to assist and manage allocated aspects of work in order to maximise the use of judicial time and resources. This is a major investment in the administration of justice on the understanding, of course, that the project will lead to much greater savings in the years to come. The Ministry of Justice's plan will see £160 million invested in IT systems, software and kit. Wi-Fi will be installed in the majority of the nation's 500 courts to reduce adjournments caused by missing paperwork. Digital evidence screens will reduce the need for printing paper documents.

3.30 The Lord Chief Justice of England and Wales has described this reform programme as:

> 'A once in a generation opportunity both to improve the delivery of justice as well as, by introducing efficiencies, to reduce its cost. The announcement of the funding package marks the end of the beginning; the task from now onwards is to deliver what we have promised.'[6]

3.31 The final report by Lord Justice Briggs[7] records the progress that has already been made on foot of the money provided. The current stage of the programme has included the following elements:

- The commencement and inception meetings of what is currently called the Civil Money Claims project, which is tasked both with the development of the online court (i.e. for money claims up to £25,000) and with the digitisation of the rest of the civil courts.
- The Assisted Digital project, tasked with developing measures for the assistance of court users challenged in the use of online services, across all the relevant jurisdictions.
- The Royal Courts of Justice (RCJ) project, which is considering updating of IT systems within the Royal Courts of Justice, including the Rolls Building.

3.32 In the meantime, the Civil Judicial Engagement Group (JEG) has continued to meet, so as to provide expert judicial input into the design process, and commentary on the assumptions upon which the business case is based. This group, which Lord Justice Briggs now chairs, has met three times since December 2015 and it is anticipated that it will continue to meet regularly throughout the life of the reform programme. The programme of court visits by members of the HMCTS reform team that the Civil JEG recommended is progressing, and is reported to have delivered substantial value to the design team in familiarising them with the realities of civil

[6] 'HMCTS Reform: A message from the Lord Chief Justice and Senior President of Tribunals' 11 December 2015.
[7] Civil Courts Structure Review: Final Report, Lord Justice Briggs, July 2016.

litigation, as it is currently conducted. The Litigant in Person Engagement Group (LiPEG), consisting of expert representatives of the pro bono and advice agency community, has been set up and is now meeting regularly, under the chairmanship of Mr Justice Knowles. It is expected to make a vital contribution to the development of Assisted Digital, as well as to the use of language suitable for litigants without lawyers in all the online software, forms and rules to be developed for the online court. Steps have now been taken to establish one or more professional engagement groups, designed to tap into the wealth of expertise and experience available among the legal professions, and to foster the closer engagement of those professions with the reform programme.

3.33 Significant and successful progress has continued to be made since December 2015 in the roll-out of CE-File in the Rolls Building, and of the digital case system (DCS) system for enabling paperless trials to take place in the Crown Court. Both of them were originally commissioned prior to the commencement of funding for the reform programme in April 2016. CE-File enables online issue and filing of claims and documents in the Rolls Building, currently on a voluntary basis, but now constitutes the basis for all storage of case files there. It also enables case management information to be recorded online. The Civil Procedure Rules Committee has recently approved the beginning of a staged process of making the use of CE-File compulsory for court.

3.34 Work is now proceeding, but no decision has yet been taken, in identifying the requirements of an IT platform for use generally within the civil courts (including the Court of Appeal). Neither CE-File nor DCS would currently provide, on its own, a sufficient form of digitisation for everything required in the civil courts, which includes issue, filing and case progression, collection of business management information and the facilitation of paperless trials. There is a general perception (which I welcome) that a common IT structure that would serve all those requirements across the whole of the civil, family and tribunals jurisdictions would be greatly preferable to the current plethora of different, mainly rudimentary, systems currently in use.

3.35 Precisely the same once in a generation opportunity now arises in Northern Ireland. The English example, on a proportionately smaller level of course, needs to be followed in Northern Ireland if our justice system is not to get left behind by virtually every other progressive legal system. It can provide a paradigm case of where government and the judiciary/legal profession combine to effect change.

3.36 It is particularly noteworthy that in England every aspect of the reform programme involves judicial participation; much of the programme requires judicial leadership. At the national level judges are represented on, and actively engaged in, all key reform boards established by HMCTS and in the criminal justice system. The judiciary has established Judicial Engagement Groups to ensure every level of judge takes part on a jurisdiction-by-jurisdiction basis. At the local level, the judiciary is establishing local leadership groups to ensure that principles agreed nationally are implemented with local knowledge and guidance. There is, in truth, an e-judiciary in

England, with the entire judiciary recently given new model flexible laptops with Microsoft Office 365 service.

Discussion

3.37 Perhaps we in Northern Ireland still have 'paper minds'. However, despite the attachment of some to the older paper system, most, if not all, of the practitioners and judges to whom we have spoken in Northern Ireland are agreed that there must be a more accessible, efficient, less costly and technologically proficient system that reflects the digital era in which we live. It is the direction of travel in every other jurisdiction worldwide with which we have made contact. Failure on our part to fully embrace the concept will leave us woefully out of step with the rest of the progressive justice systems worldwide. In the future, appointments by the Northern Ireland Judicial Appointments Commission (NIJAC) to the judiciary should make expertise with computer technology a condition of appointment. Already we understand that NIJAC has taken this concept on board and the need for the exhibition of such skills is now finding a place in the assessment process.

The advantages of a paperless court

3.38 The advantages of developing the concept of a paperless court in line with the digital tech revolution are so obvious that they require only brief rehearsal:

- Vast swathes of documents on computer means reduced storage space for large files and transportation costs, avoids the need to scan, leads to a reduction in photocopying, etc. and will inevitably turn out to be a money saver for everyone within government and the civil justice system.
- A judge or professional lawyer with the benefit of documents carried in a USB stick or the like to refer to, and, where appropriate, to copy from can easily work from home or elsewhere. Documents can be securely accessed by a computer, laptop or iPad from any location with Internet access.
- The presence of documents in e-form (many of which will be in e-form in any event) permits, where appropriate, a largely screen-led trial with very few documents physically copied. Currently, the vast majority of documents in large trials are never likely to be looked at; their presence on computer provides for the off-chance that they may become relevant. They can always be turned into hard copies if need be.
- The interminable footnotes often contained in skeleton arguments can have hyperlink references to the relevant document or transcript accessed easily by clicking on the reference. It precludes the necessity to locate the bundle, page and passage and type out a quotation. It inevitably speeds up the process.
- One emerging development that may benefit the use of electronic disclosure in cases where the issues, and consequently disclosure, may be complex, and which may have a particular bearing in complex commercial litigation, is the use of predictive coding or technology-assisted review

technology. This technology learns from human document reviewers and is able to prioritise and categorise documents automatically using algorithms. Its use has recently been sanctioned in the Republic of Ireland[8]. Clearly such technology is of benefit in any complex disclosure process be it on paper or by electronic means, but combined with electronic discovery it could have the potential to revolutionise discovery in complex cases.

- Documents on computer often have greater clarity and can be enlarged. Photographs, when copied in trial bundles, often are virtually indecipherable. They can be perfectly reproduced on computer.
- An electronic file of evidence can be searched in seconds to find occurrences of anything one wants to obtain. In commercial or family money cases, for example, accounts, if available in a spreadsheet format seen in tabular form, can be filtered to find just the numbers one is looking for and can be used to produce an infinite variety of alternative schedules to illustrate whatever points one wishes to establish.
- Such proposals can be implemented relatively easily. Digital information can be served in large and complex cases. For some years now, using media such as CDs and DVDs, such a system has been used by certain solicitors. A future development may be for barristers and solicitors to sign up for secure email that will enable the profession to communicate securely and be served with electronic bundles.
- The principal aim of this Review is to maintain access to justice. Local justice, especially in rural areas, is and remains a given; the challenge is how best to deliver it. However, the advent of occasional courts, video suites and improved IT infrastructure that clearly lie in the wake of paperless courts will not only reduce journey times to courts but will trigger a move away from our current reliance on face-to-face hearings at every stage of every case. This in turn will release further capacity within the NICTS estate. Provided there is no diminution in the citizen's access to justice, this could potentially lead to a reduction in the need for some existing courts — at times seeing the hiring of halls for a day or half day to deal with laptop-led hearings — with attendant further significant savings.
- It is environmentally friendly.

The disadvantages of a paperless court

3.39 We should not be blind to some of the problems that the paperless concept presents. This digital revolution has brought its own set of vexing challenges and problems, many of which affect the courts. These include:

[8] Irish Bank Resolution Corporation Ltd & Ors v Quinn & Ors [2015] IEHC 175. The court held on the evidence that, in discovery of large data sets, technology-assisted review using predictive coding is at least as accurate as, and probably more accurate than, the manual or linear method in identifying relevant documents.

- Moving to new ways of working is not always easy. Overall, there appears to be a nervous resignation amongst some of the older members of the profession and Bench rather than enthusiasm about the introduction of electronic bundles. Fear of the unknown and the inconvenience of adapting long-established ways of working can delay even the inevitable.
- For the advocate conducting a cross-examination, the limitations imposed by only having access to one, or even part of one, page of any given document at one time can be difficult to overcome. How does one compare documents side by side? The solution to this is learning to use split screens or the availability of two screens.
- E-files are a simple and obvious concept that should be introduced quickly. E-bundles are a little more complex. Even though electronic trial bundle software packages may allow bundles to be annotated electronically, it is likely to take some time before advocates have sufficient familiarity with such a system for this to be adopted as a platform for cross-examination, or as a general alternative to the use of an annotated hard copy version of the trial bundle. Users have to be satisfied that the system permits — and they have been sufficiently trained to operate — software that allows highlighting, bookmarking and annotation on all documents, not just those that have been converted from a word-processed document into a PDF or which can be recognised as text by the optical character reader (OCR) program in a scanner. The answer to this is that the software currently available most certainly does permit this and early training is vital. Moreover, a commitment to incrementally introducing a fully electronic system should assuage fears.
- Not all courtrooms in Northern Ireland are necessarily well suited to a digital-only approach and there is obviously a cost to adapting facilities. It remains to be seen, for example, if the allotted £160 million in England is enough to achieve the Ministry of Justice's ambitious aims.
- Data protection and confidentiality issues, access from third parties or hackers for malicious purpose and manipulation of documents filed electronically also have to be confronted by a rigorous security system drawn up by NICTS. In a future that may see files and information being stored in a cloud-based system, issues of cybersecurity must, therefore, be to the fore in our thinking. We had the benefit of an excellent paper on the issues of data protection that can be found in appendix 2[9]. It addressed issues such as the *Data Protection Act 1998* (DPA) implementing the European Union (EU) Directive 95/46/EEC on the protection of individuals with regard to the processing of personal data and the free movement of such data. The DPA imposed broad obligations on those who collect personal data, as well as conferring rights on the individuals about whom data is collected. Since breaches of the DPA can result in

[9] Civil and Family Justice Review — Report by Sub-Group on Digital Courts and Judicial Case Management on Data Protection Issues to be Considered by Clare Bates and Carson McDowell LLP, 18.2.16.

criminal as well as civil liability, no organisation can afford to ignore the DPA obligations. While the new General Data Protection Regulation entered into force on 24 May 2016, it shall apply from 25 May 2018. The Directive entered into force on 5 May 2016 and EU member states have to transpose it into their national law by 6 May 2018.

- In the case of the Regulation, the stakeholders (member states, companies, law firms and other organisations) will have two years to adjust to the new regime. The Directive will need to be transposed into national legislation over the same period of time. The Regulation was one of the most heavily lobbied pieces of legislation in the EU; it attracted interest from a large variety of organisations, both public and private and from in and outside of the EU. It sets out the conditions for collecting, processing and storing the personal data of EU citizens. These include data subjects' rights, lawfulness of processing, conditions for cooperation between the data protection authorities and the requirements for the security of processing.
- The duties on NICTS if it uses social media.
- Issues of consent — it will no longer be possible to simply rely on implied consent and this could be important in discovery.
- The right to be forgotten and issues surrounding retention of information after a case concludes.
- Digitisation is predicated on ready access to and on ability to use digital technology. Not everyone has such access and can use it readily. We cannot assume that all litigants will have access to a lawyer who is available to enable such individuals to secure effective access. Our proposals must be specifically designed to help people get online. How, for example, will online systems ensure the range of practice directions and pre-action protocols are complied with (without the need to expect litigants in person to digest such guidelines)?
- Systems are being created for use on smartphones and tablets and there will have to be help accessible over the phone, online and in person. This requires careful thought. Pro bono advice centres, while critical to helping litigants in person, cannot be relied on alone. Not only should online application software be interactive, but we recommend the setting up of a litigant in person focus group to give thought to the organisation and funding of this element of the reforms.
- Will the online assistance to personal litigants be sufficient? Software developed for assistance of personal litigants must focus on leading the individual to answer the appropriate and required questions in a manner that ensures they have provided all the necessary information to allow their matter to be processed and in turn to flag up to court staff where judicial scrutiny is required. It must feature an inquisitorial process that asks the right questions, given the array of types of cases and scenarios

that can be presented. For practitioners, this will mean solicitors unbundling their services and being available to help and advise where this becomes necessary (rather than for the full duration of a matter) and for barristers perhaps to contemplate making themselves available for such direct access work.

3.40 Some of the more significant problems raised by barristers both here and in England relate to the inherent difficulties of relying on technology. Sometimes it just does not work, one of the laptops does not work, the USB drive is not compatible (although the provider of the information should really make sure this is not an issue), it crashes, takes time to set up, etc. We have had problems in the Queen's Bench Division co-ordinating public bodies such as Translink and the NICTS to agree in advance what technology should be in the courtroom for CCTV images being displayed[10].

3.41 We have to trust that modern technology is up to the task and we have every confidence that, provided adequate funding is invested, modern technology will be sufficient.

3.42 One way in which we can approach these problems is to draw from experience in other countries, such as the USA, providing digital navigators, available online, over the phone, in an office in the court buildings or over a secure live web chat platform, who could assist litigants to issue claims and find documents, etc. For those who have no access to the Internet of their own, we should provide access to terminals in court buildings and other public buildings, such as libraries, throughout the country. Access to justice should be local. In truth, however, as experience in the Northern Ireland Civil Service has shown, if online services are incentivised — for example, by being cheaper — people will use them, if necessary with the assistance of more digital-savvy family members, friends or neighbours[11]. A good example of an appropriately interactive process is the Dutch site known as Rechtwijzer developed by the Dutch Legal Aid Board, which provides users with a step-by-step guide.

3.43 We are completely confident that these are all teething problems that may arise in the early stages but to be apprised now of them is to be forewarned, and we should be able to deal with them as has happened in every other jurisdiction that has gone down this path. They would be the subject of early detailed discussion with the experienced service provider. Certainly, when we raised these issues with the service providers in the Rolls Building in London and the Supreme Court they were all confident they could be, and had been, obviated under the current systems in operation there. These are matters that need to be considered by all interested stakeholders, but suffice to say at this stage no insuperable difficulty has surfaced in any of our EU neighbours currently invoking the paperless or digitisation concepts.

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[10] Some interesting articles on the issue of technology are found at http://www.familylawweek.co.uk/site.aspx?i=ed147486, http://www.familylawweek.co.uk/site.aspx?i=ed159447 and a website, which seems to provide the service - http://www.paradigmfamilylaw.co.uk/paperless-courtroom/

[11] Discussion with Malcolm McKibbin, Head of the Northern Ireland Civil Service, April 2016.

The paperless arena

E-FILES

3.44 As a judicial colleague robustly asserted to us[12], e-filing of documents is a no brainer. It is already invoked by virtually all the health and social care trusts and local authorities. We are sure it is only a matter of time and experience before all parties avail of it and courts insist on it. All cases should be capable of being filed and case-managed online. There should be digital case files that the judge, court administration and the parties can access. There should be a reduction in labour-intensive paper processes, and a concomitant increase in efficiency and a reduction in cost both to the state and to litigants. We should embrace that aspect of the paperless system as soon as practicable.

3.45 The implementation of an electronic file-management system, whereby all correspondence and documents are processed and retained electronically throughout the length of a case, is a natural progression.

E-BUNDLES

3.46 E-bundles need separate consideration. As part of the inevitable drive towards the paperless court, we should already be recognising that in implementing electronic bundles there are two main options. The first of these is the 'narrow scope'. This refers to a system in which the plaintiff/appellant provides the electronic bundle and emails this to all parties and the court. The other parties and the court office download the bundle onto their own individual laptops.

3.47 Each party is responsible for preparing their case with reference to this bundle and for ensuring that the electronic information is safely retained. Each party uses their own laptop during the hearing with a separate one provided by NICTS for the witness box. No additional IT support is available during the hearing. The judges would have to locate pages in the electronic bundle themselves and the court clerk can assist witnesses as required.

3.48 The advantages of this narrow scope are substantial, namely:

- It minimises the need for multiple computers to be provided and maintained in the courtrooms at the expense of NICTS.
- It does not require NICTS to undergo a lengthy procurement process or extend an existing contract for a specialist service.
- It does not commit NICTS or any of the other parties to a certain provider without the opportunity to test the general application to see what other practical uses may arise.
- It does not require constant IT support to be available throughout the hearing.

[12] Meeting with Judge Newton by telephonic exchange, May 2016.

- It minimises the exposure to system crashes. With one linked network, if the network crashes the entire case has to stop until it has resolved. Using the narrow-scope system, each laptop/tablet operates independently and the electronic bundle can be easily downloaded into different laptops. It allows the parties to prepare cases on their own computers. This ability allows for familiarity and confidence building, something that may be crucially important, particularly at the early stages of any pilot.
- It could be implemented quickly, being dependent upon the provision of computers for the judge and witness and on the relevant training of judiciary in the use of the system.
- It is flexible enough to permit limited use of key documents in paper format — perhaps the core bundle only could be paper (the concept of paper-light) whilst all others, including discovery, are electronic.
- Should individual parties wish to retain and work from a hard copy they have the ability to do so — nothing prevents parties from printing out their own hard copy from the electronic bundle.
- Most of the population have their own tablet or laptop so there should not be any prejudice to personal litigants. They could require a hard copy from NICTS at the appropriate fee. Personal litigants might welcome the option to submit electronic bundles rather than paper copies as few of them have access to photocopiers.

3.49 The second possibility for implementation is the 'wider scope'. In this system, all information is logged and a central network established and maintained by NICTS.

3.50 Each individual user is given an electronic key to access information, including court bundles, relating to their particular case.

ELECTRONIC APPLICATIONS

3.51 The concept of electronic bundles for final hearing needs to be extended to electronic bundles for full applications. This would permit an electronic bundle to be submitted at the outset of an application. It would represent a significant advance towards a fully electronic court. This is likely to be of use in types of cases where all the information is available at the date of the application — it would have limited use in evolving litigation.

3.52 A natural progression of this is for the application to be determined without the need for any party to attend for an oral hearing. Interlocutory applications, second reviews, unopposed applications in all divisions of the High Court and in the county court would provide a fruitful field for such electronic applications. Leave applications to the judicial review court and to the Court of Appeal would also seem an appropriate use.

3.53 In a digital system, parties would potentially be able to initiate cases online, pay fees online, or attend hearings remotely either by exchange of text or

videoconferencing tools from their homes (or, more likely, the offices of their legal representatives). Some of these solutions are already employed on an ad hoc basis by courts.

Virtual reality courts

3.54 Hearings in trials will, of course, continue to be held in open as they are now. Open justice is the central means by which civil justice courts are kept under scrutiny by the public.

3.55 However, that is not to say that all hearings must be held in physically accessible courtrooms. The functions of the court being exercised on each appearance are still required. However, the means by which that function is exercised could, in certain types of cases, and at certain stages of each case, be managed in an alternative format that would maximise the efficient running of the case in isolation, and the entire body of cases that the court processes at any given time. A number of jurisdictions have piloted, and adopted, a variety of schemes.

3.56 If video, live link or telephone-conferencing systems are available to converse across the world, there is no reason why, with suitable facilities for the public and for recording what happens, they should not be used as a mechanism for improving efficiency and avoiding needless trips to court, whether for lawyer or participants.

3.57 There really is no good reason why certain hearings — straightforward case-management hearings, some interlocutories, date fixing, reviews, explanations for various matters, adjournment applications, undefended divorces, etc. — cannot be conducted virtually or on papers, both parties having had the opportunity to submit their argument. Well-prepared papers could be filed, and the decision ultimately left for the judge to exercise on papers or on, for example, telephonic or Skype communication. Telephone conferencing is already an increasingly common feature. Masters in the Queen's Bench Division ran a successful pilot scheme for some weeks but technical difficulties have now arisen on the issue of timing these calls which we hope can be swiftly rectified. This is a classic arena where a move towards hearings on paper or even online should be instituted in the very near future. There is no reason why straightforward interlocutory applications on paper cannot be considered; for example, in personal injury cases with an even greater use of telephone conferencing not simply for reviews but also the interlocutory hearings themselves.

3.58 The current system requires a court appearance in the majority of cases at the stage where any determination is being made by the court, or where case-management functions are being exercised. The primary problem with this system is efficiency. From the perspective of the litigant, their solicitor and counsel, the court staff and the judiciary, attendance at court in the current manner at multiple junctures of every case is time-intensive and unnecessarily expensive. In certain cases, the result reached at that appearance could more efficiently be achieved without a court appearance.

3.59 This is not a fresh concept. Paperless — or, in the interim, paper-light — courts, teleconferencing hearings, video-link evidence and examination, technology-guided mediated dispute resolution systems and minimising oral presentation in favour of judicial officers making determination based on papers electronically filed are all part of the legal fabric not only here in some cases but as far apart as the USA, Australia, Poland, Brazil, India, Sri Lanka, Israel and, of course, England and Wales. The time has come for us to enthusiastically embrace these concepts.

3.60 The professions, the judiciary and NICTS will all need time to accommodate themselves to these new digitisation processes. To that end, we need to hasten cautiously but not slowly. It is important to note that attempts in some other jurisdictions to digitise their court systems have experienced high failure rates. These include the State of California, the State of Victoria in Australia and the Government of Ontario in Canada. All three were forced to abandon large-scale modernisation and integration of their case-management systems in recent years.

3.61 However, this failure may have been due to the way that digitisation was attempted, with modernisation programmes being introduced at local rather than national level in their early stages[13] and also lack of confidence in electronic systems on the part of judges and other court users may have contributed to the collapse of the projects. We require a co-ordinated rolling-out process. A programme of education for court users, as well as the provision of advice services, digital and physical, would be essential components of such a project.

3.62 We need to adopt the English approach of judicial involvement in redesigning the way we work, which has been primarily channelled through the various judicial engagement groups, comprising judges representing all of our judiciary and every part of the country. It is felt that we should make a start with selected areas piloted — for example, divisions of the High Court in Belfast. That is not to say that those judges and Masters currently developing the concept on an ad hoc basis should be inhibited from continuing to do so.

Online dispute resolution

3.63 More radical is the prospect of conducting legal proceedings, wholly or partly, upon electronic platforms across the Internet in the form of an online court service. We have looked at this concept in detail in chapter 4 of this Report.

Practical examples of the paperless court — the UK Supreme Court (UKSC) and Northern Ireland

3.64 We visited both the Rolls Building in London (home of the Chancery and Commercial Courts) and the UK Supreme Court to see the paperless concept currently operating there. Both visits were invaluable. We can illustrate the working of the concept by some analysis of the UKSC system.

[13] Thompsons Reuters Court Management Solutions report "Lessons Learned in Courts Digitisation", p. 7.

- The Supreme Court uses the Microsoft Dynamics software package. This is a widely used software package available on the open market operated by, for example, Barclays Bank and the Royal Bank of Scotland (RBS). It has been commercially tested, is widely available and is on the government-approved list. This means that the legal profession should be able to purchase compatible systems, if required. It needed only modest adaptions. The initial investment was £60,000. By not being tied into the Ministry of Justice, this permits the Supreme Court to remain in control of its IT systems and provision.
- The Supreme Court's experience was that it was much better and cheaper to purchase an off-the-peg, widely used system, such as Microsoft Dynamics rather than go for a bespoke system, which would inevitably turn out to be more expensive.
- There should be no difficulty in setting it up in Northern Ireland. The software is widely available.
- It costs £45,000 per annum in running costs — this being the cost of purchasing licences for 90 users. The Supreme Court is able to keep costs low as they have in-house capability to support their IT provision. There should be economy of scale, given the number of users in NICTS.
- The Supreme Court system took 10 months to design, test and go live.
- The security can be adapted to suit local demands. The Supreme Court thought that the problem was often too much security that makes systems much more expensive and slower. The key is having security that is proportionate.
- Optevia (an approved Microsoft partner) set the system up. They were involved in the design process. There were three days initially given over to training. Any further training is arranged in-house.
- Its use is mandatory in the UKSC.
- The Registry checks the bundles. They are sent back if they are not correct. However, the UKSC did not have experience as yet of personal litigants.
- A paper-light approach is compatible with this system for those who still remain wedded to paper. There are core bundles. Most trials combine electronic bundles and core bundles. However, there have been trials of paperless actions. We witnessed a mock trial. Each justice had a court screen. This was controlled by counsel who displayed on that screen the relevant documents. In addition, each justice had their own laptop where they were able to make notes, etc. on the document being displayed and to highlight those portions of the documents to which the barrister may not have referred. Barristers and solicitors involved in the case also had the ability to use their own laptops to highlight and/or make notes.
- The key to success was to ensure an effective reference for each document. All bundles are numbered sequentially from one to the final number.

There is also another numbering system that depends on volumes, tabs and page numbers. However, the UKSC faced the same problems as in the Rolls Building, namely that too many documents and too many cases are included in the electronic bundle.

- There is no doubt that there is a problem in trying to compare two or more documents. The more documents that are posted on the screen, the smaller the documents become. There may be cases in which it is simply not possible solely to rely on a computer.
- IT experts do not have to be present. The Supreme Court has two IT experts. They problem-solve as and when necessary. The mock trial that we witnessed did not require the attendance of any IT expert.
- There have been substantial savings in costs. The previous system, which was bespoke, cost over £900,000 to design and build. There was then a monthly service and support charge of £4,500 (£54,000 annually). In addition, any amendments to the system came with a hefty price tag (for example, the starting price to write some new statistical reports was £10,000). By comparison, the annual licensing costs of Microsoft Dynamics is just over £45,000.
- No problems have yet surfaced in the use of this system.

3.65 In Northern Ireland, NICTS currently has technology in a number of courtrooms across the court estate to provide:

- remote links to prisoners in various institutions to allow bail applications to be dealt with;
- the for-the-record recording of proceedings;
- access by the court clerk/registrar to the NICTS IT system, including ICOS;
- limited playback facilities for CCTV footage, etc. via TV screens;
- live links to allow witnesses to give evidence from outside the courtroom.

3.66 In addition to the above, within some of the courtrooms in Laganside there are facilities for document scanning and projection onto screens — these are mainly used in criminal jury trials and coroner's inquests.

3.67 On 18 May 2016, Chute v BHSCT, a clinical negligence case, was listed as a two-day High Court action in Belfast. Both parties had agreed in advance that this trial would be processed on an electronic basis. In the event, the case settled on the morning of the first day, but the process has proved invaluable. We are extremely grateful to Ms Debbie Maclam, deputy principal NICTS, for making available a detailed note of the experience and from which we now liberally quote.

3.68 DLS provided:

- A hard drive containing a clean version of the electronic trial bundle controlled by the registrar following instructions to a particular page, section, etc. as directed by counsel, judge, etc.
- Separate screens for the witness, court clerk, judge, counsel and solicitors to view and for counsel and solicitors to connect to their own laptops/devices, which could contain an individually annotated version of the document.
- A copy of the electronic trial bundle to be installed on the judicial laptop.
- All the equipment required for the pilot. This included 10 monitors, two VGA cable splitters, eight VGA cables and one PC.
- A PDF digital copy and scanned it into an optical character reader so the words in the bundle could be recognised by the software. A digital index was then created and linked to each section to ensure easy access to all sections using Adobe Acrobat. This was the copy that was displayed on all of the screens as the controlled or clean copy.

3.69 A digital version was provided to each of the parties that could then be amended for their own requirements to add notes/highlights using Adobe Reader. These then became the uncontrolled or individually annotated copies being displayed by each party's own portable device.

3.70 From the DLS perspective, the test was successful overall in providing a copy of the trial bundle, controlled by the registrar and viewable by all parties and witnesses. The bundle was viewable on all monitors and allowed ease of movement between sections and pages at direction of counsel.

3.71 A few general issues arose:

- The digital bundle had to be created by DLS on this occasion. For other solicitors to create a digital bundle they would need access to software similar to the Adobe Acrobat.
- It took around five hours to create the documents into OCR and create the links.
- Size of the bundle was an issue, with the initial size of the PDF being 47MB when, typically, the maximum size for documents being e-mailed (including via criminal justice secure email) is 10MB.
- To make the size of the document compatible, the quality (resolution) of the copy had to be reduced.
- End quality of the document was acceptable on this occasion; however, for larger bundles the image quality may suffer more in reducing the document size under 10MB and further testing will be required on this.

- Training for solicitors and counsel to use the software (Adobe Reader or equivalent) will be required to enable them to add their own notes and highlights.
- Transporting this large amount of equipment and cabling around the court would not be practical on an ongoing basis.
- There was some feedback from counsel that the retention of information was more difficult using a digital rather than paper bundle.
- There was an addition to the bundle on the morning of the hearing. Further testing would be required to ensure the bundle could be amended quickly and while parties were mobile.
- Physical layout of the courtrooms limits the ability to develop a fully integrated IT solution.
- There is a need for a significant number of screens and cabling to be installed.
- IT security issues mean that the use of a standalone system not linked to NICTS is required.
- There is a requirement for a direction role to be undertaken in moving the viewable evidence to the relevant part of the trial bundle for the witness.
- The potential usage/demand in suitable court cases weighed against the cost and impact on the court environment.
- Data protection concerns would need to be addressed post case, though this would be on a similar basis to the current information and record management processes in place for hard-copy documentation.

3.72 DLS has provided an estimate of the costs for the test case. However, they have noted that to have a fully built-in system would cost considerably more:

- Monitors used belonged to DLS so while there was no cost on this occasion, the equipment would cost around £1,000 to purchase.
- Cabling would cost approximately £100.
- The VGA splitters would cost approximately £80.
- The time spent by the team from DLS amounted to approximately 50 hours, which at a cost of £15 per hour is estimated at £750.

3.73 Although the electronic trial did not proceed, the experience was instructive and extremely useful for NICTS and the practitioners involved. Feedback from counsel and solicitors involved was positive and they were able to add annotations and highlights to their copies and use portable devices in the court. The software worked well and there was no delay in the images moving on all monitors.

3.74 The following positive outcomes were noted:

- electronic trial bundle was easily accessible and easy to navigate;

- no need for endless and wasteful photocopying of papers;
- technology used was relatively straightforward and user-friendly;
- papers in the trial bundle were clear and easy to read: certainly better quality than some hard-copy papers following multiple photocopying;
- there was no question of any of the papers being out of sequence, unlike many photocopied trial bundles;
- large bundles of papers did not need to be carried to and from court or be present in the courtroom and this in turn reduces potential data breaches.

3.75 Overall, DLS found the whole process to be more efficient, and remain very keen to repeat this exercise for other medical negligence trials. They and the plaintiff's solicitors agreed that a short-term option would be a designated courtroom in the Royal Courts of Justice equipped with the necessary technology to allow parties, by agreement, to run medical negligence actions (or indeed other actions) electronically. We endorse that recommendation.

3.76 The feedback from the plaintiff's solicitor, BLM, was similarly encouraging. They recorded:

- document organisation and presentation did not fundamentally alter the trial process itself;
- more efficient, less wasteful means of introducing documentation into the court;
- document bundle could begin its assembly at the outset of the case, be added to and edited as the matter proceeds, ensuring all parties are working from the same set of records with the same pagination;
- resources will be saved by both sides on paper, photocopying, staff time etc.;
- software is user-friendly, capable of amendment and flexible enough for use by all parties;
- overall, the test case demonstrated that this is a possible technology solution that could be pursued and that clinical negligence cases could be run on this basis. They would be happy to repeat the exercise in any future cases.

3.77 BLM similarly indicated some drawbacks:

- All parties would need access to the licensed software, which will involve expenditure for solicitors and counsel.
- All parties would require a certain minimum standard of IT capability and competence.
- Smaller operators may lack the means, financial or otherwise, to invest in the necessary hardware and software to participate.

3.78 While data protection concerns are still present it would be within a different context, by virtue of the digitalisation of the information, and encryption is a potential solution.

Paper-light

3.79 Nevertheless, physical books are still in heavy use in the courtroom. Currently, some lawyers and judges still find it easier to spread out physical notes in front of them and have these tabbed at the right spaces.

3.80 At least in the short term, there may not be a need to choose between digital and analogue approaches. With electronic trial bundling systems, it is possible to print paper copies of trial documents that could be used in parallel by those who prefer a paper-based approach. Similarly, paper-based and electronic research can work very well when used together.

3.81 There is still a need for signed and sealed physical copies sometimes. Electronic contract formation may require certain formalities to be followed, so that it is clear that the parties are agreeing to the wording of the contract as it stands at the time of signing.

3.82 When it comes to proving identity, paper still reigns. Although it cannot be entirely protected against fraud, there can be a lot of comfort in seeing ink on paper by way of a signature or actually seeing a physical identity document such as a passport. When a document needs to be notarised — signed in the presence of a lawyer who then binds the papers to seal them — there is no current digital alternative.

3.83 Paper-light may provide for an interim stage on the way to the paperless courts. Mr Justice Christopher Clarke recently expressed the view that in a large trial you will need to have both paper and computer files. A compromise relates to the critical documents that could operate as a small bundle of hard copy that can be observed by downloading from the computers for the benefit of the judge himself or for counsel when cross-examining. That allows the judge or counsel to move a document from the physical position to somewhere else or insert a critical document in front of or after another document upon which reliance has been made. In other words, the judge would be provided with, or could make their own, core bundle or add to an existing one as they go along in the same way that counsel may wish to do so. Such an approach might ease us all into the inevitable move towards a paperless court by stages.

A timescale for action?

3.84 The targets in England and Wales were as follows:[14]

[14] HMCTS Reform: A message from the Lord Chief Justice and Senior President of Tribunals 11 December 2015.

- 2015-16 — WiFi to be available in all criminal courts; the provision of ClickShare in the Crown Court and the installation of large presentation screens; magistrates working digitally in the courtroom; a digital case system for the Crown Court and an HMCTS case-management data store.
- 2016-17 — WiFi to be available also in civil and family courts; all professional users in the Crown Court to be working fully digitally; a digital case file application (police to Crown Prosecution Service [CPS]) and the introduction of a digital divorce process.
- 2018-19 — All preparatory hearings to be taken out of the courtroom, where appropriate, and dealt with virtually; roll-out of the online court, and case officers to be handling identified case-management functions.
- 2019-2020 — Fully digitalised working in the civil, family and tribunals jurisdictions.

3.85 It may be that such a timeframe in Northern Ireland would be challenging. England and Wales have had a head start and have already been given additional money. However, we need to recognise the reality of this need for reform and commence moving on it as soon as possible. Its symbolism for a new era in civil justice is woven into the texture of its realism.

Responses

3.86 Virtually without exception there has been a universal recognition and endorsement across the entire spectrum of responses that we must find a role within the court system for increased technology. The various proposals found in this chapter had therefore met with welcoming approval.

3.87 That said, there has also been universal caution expressed that this progress will only be achieved if there is adequate funding and investment by the government in this concept.

3.88 Whilst endorsing the recommendation for a commitment to digitalisation and modernisation of the courts process, the Law Society summarised the mood of respondents when it said:

> 'It should be noted though that the existing court system is starting from a very modest position in terms of technological capability at present. Basic equipment is often unreliable and the range of technical issues encountered during the presentation of live link and video evidence provides a compelling example of these limitations. The courtroom machinery is a considerable distance behind the position that the Review aims to achieve, reinforcing the importance of substantial upfront investment to make the improvements required.'

3.89 In truth, therefore, without unflinching commitment from government and the NICTS to the necessary modernisation of the courts process through digitalisation, these vital steps will not occur or, even worse, will be so inadequately implemented that simmering concerns about the future will develop into full-blooded unanswerable disquiet.

3.90 There is a recognition that rolling out this new process will take time and that preparation in terms of training and education will be crucial if it is to be successful.

Recommendations

1. Consideration to be given in the forthcoming Programme for Government to include a commitment to the digitalisation and modernisation of the courts process. **[CJ1]**
2. A business case to be developed for digital courts that would capture all of the anticipated monetary and non-monetary benefits, based on experience in other comparable jurisdictions and in the local criminal justice sector. **[CJ2]**
3. The ultimate aspiration to be the creation of paperless courts. **[CJ3]**
4. In the short to medium term, a move to paper-light courts. **[CJ4]**
5. The change programme to include a sequenced and co-ordinated roll-out plan, supported by a programme of education, training and advisory services. This work should be taken forward in consultation with the judiciary, professional bodies and court users. **[CJ5]**
6. The establishment of judicial engagement groups to ensure every level of judge takes part in the change programme on a jurisdiction-by-jurisdiction basis. **[CJ6]**
7. The setting up of a litigant in person focus group to give thought to the organisation and funding of this element of the reforms. **[CJ7]**
8. Wi-Fi access to be set up in the Royal Courts of Justice and in Laganside Courthouse as a matter of urgency. **[CJ8]**
9. A designated courtroom in the RCJ to be forthwith equipped with the necessary technology to allow parties, by agreement, to run actions electronically. **[CJ9]**
10. A minimum level of IT literacy to be a prerequisite for judicial preferment. **[CJ10]**

4

Online Dispute Resolution

Current position

4.1 With the impending huge reductions in legal aid, our fear must be that civil justice may become beyond the reach of a great number of individuals and small businesses where they are involved in claims that are modest in financial terms. This arises even in Northern Ireland, where the costs of litigation are much less than elsewhere in the UK. The danger in such cases is that the legal costs will be wholly disproportionate to the sums that the participants are claiming and that in some instances the costs at risk could well outweigh the value of the issues that are to be determined.

4.2 Clearly there are emerging expectations of other, less costly, means of accessing justice. However, people appearing in courtrooms vary enormously in their skills, their motivation and their needs for assistance. Nowadays, clients expect to be served, through the legal processes, by multiple channels as part of the same experience that they encounter elsewhere in their daily lives: in person at a desk, in a courtroom, by smartphone, by email, by chat, by videoconferencing and through web interfaces helping them to navigate complicated procedures. People are less likely to rely on authoritative experts and want to be empowered to take informed decisions. However, our current deployment of such outlets can on occasions be inadequate. For example, the Northern Ireland Courts and Tribunals Service (NICTS) currently has only three Skype laptops available, albeit NICTS is in the process of obtaining more laptops. However, these are not encrypted with a secure format because it is not possible to encrypt Skype. In a recent criminal trial, a laptop was not available for a witness scheduled to give evidence from Australia and inquiries had to be made to liaise with the PSNI and the Public Prosecution Service (PPS) to see if another device could be brought in and tested with the courtroom equipment. Problems with playing in court the recorded Achieving Best Evidence (ABE) interviews in criminal matters and the working of the live link when the child is giving her evidence have on occasions surfaced, although there is a current practice of testing by staff routinely before court begins in order to identify and pre-empt hitches. In the modern era, when reliable justice should be at the top of our priorities, we need to urgently address these wrinkles in our system.

4.3 Online dispute resolution (ODR) can be a powerful tool for courts to address these challenges and expectations and provide such channels. It may not be necessary to confine such channels to adjudication. It can help parties to understand the scope for a structured outcome and help them to understand the parameters of their problems. It can be managed to the point of listing.

4.4 Guided pathways that help people navigate their own first steps in their justice journey need to be available. They can organise and select relevant data and

inform people about their rights. Every participant in a court procedure can add to the process at his own pace, at her own time and from their own home.

4.5 During a hearing, the interface can guide the process and nudge people towards fair resolution, much similar to how problem-solving lawyers do that. Results can be immediately logged. Roles, such as helpers to parties or expert case managers and deciding judges, can be assigned and configured. The promise of ODR is even that it can break the problematic cycle in which every real improvement in court procedure is threatened by the prospect of attracting too many cases, putting courts under pressure. With ODR, the marginal costs of serving an extra pair of clients can drop to levels that make it feasible that court interventions are primarily paid for by the users.

4.6 We are reaching the period where people will engage with the justice system through an app or an online platform. Many disputes are already being resolved online through websites such as Amazon, eBay and PayPal. Bearing in mind the public's experience of the online revolution, it is sensible to conclude that people 'may now actually expect the court procedures to go online and place less store by the rituals and traditions of face to face trials'[1]. The potential is enormous. It is anticipated that in due course it will result in significant savings to the public purse. Of far greater importance are the improvements in access to justice that will result from such a programme.

4.7 The benefits, however, of modern IT can only be enjoyed if the systems in place are sufficiently advanced and supported by up-to-date hardware and appropriate training. The returns on investment in such technology, despite high initial costs, can be vast. Funding must not only be adequate but also stable. Fluctuations in funding will result in adverse consequences. Progress should be steady, and funding should be allocated wisely, taking into account the likely exigencies of the future and the need to keep IT systems up to date.

4.8 Consideration has, therefore, been given in Northern Ireland to the creation of an online court (OC) for lower-value disputes as part of a developing landscape. A move towards digitisation and the creation of digital channels does create an opportunity to create an online court that will permit civil disputes under a certain level to be litigated without lawyers (or with lawyers for those who are prepared to pay for it).

4.9 In the wake of the proposals of Lord Justice Briggs in England and Wales, £25,000 has been provisionally identified as the amount at stake below which the disproportionality usually occurs and thus this is the figure invoked as a maximum for the new online dispute resolution court. According to Lord Briggs, the online court should deal with 'simple and modest value disputes'. It would be conducted online rather than on paper, designed primarily for use by litigants in person, investigatory rather than purely adversarial, with conciliation, including mediation and early neutral evaluation (ENE) as a mainstream option rather than only an

[1] Rabeea Assy, 'Briggs's Online Court and the Need for a Paradigm Shift', *Civil Justice Quarterly,* 2017

alternative for resolution, and face-to-face hearings would be for resolution only if documentary, telephone or video alternatives are unsuitable.

4.10 Costs of implementing ODR modules can be very limited compared to the costs of the current generation of custom-built case management systems for courts. Suppliers and investors will be willing to bear most of the development risk, if they see a realistic opportunity to deliver their online services to courts.

4.11 It must be said that lawyers are not the cause of the challenges faced by our court system in enabling access to justice for citizens. To approach the access-to-justice concept on that basis would be entirely misleading. The new thinking involved in an online court does not dispense with the services of lawyers. What it does mean is that lawyers will be involved in these cases possibly in a different manner. There will still be the opportunity for affordable advice at the beginning of cases and, indeed, in some instances professional representation will still be considered appropriate for a litigant, albeit those costs will usually not be recovered even if they were successful.

4.12 Moreover, importantly, online cases in our proposals will have an online judge in the final analysis and still have the potential to be moved to a court setting where they are complex or the importance of the case renders this a proper method of progressing. Technology may have turned traditional models upside down, but justice will always require sophisticated human interventions when the need arises.

4.13 Hence, it is suitable for those cases where there are simple, straightforward issues, capable of being addressed electronically and cheaply, with all parties fully being aware of the case that is being put forward. Ultimately, it will be equipped with a judicial figure to make the final decision on a fair and just basis if that is required. Cost and time for such cases will now be treated as components of justice, parts of its very definition.

4.14 We must make certain that the changes we introduce do not cement a situation whereby those who can afford to have lawyers to handle their litigation will be able to do this, while for others the potential lack of any cost recovery or funding for advice and representation will preclude those who are most likely to need legal support from actually getting it.

4.15 Moreover, online courts must not be the pathway to unregulated, uninsured and often untrained providers of legal advice who are unrestrained by ethical codes of practice. Even if 'paid' McKenzie Friends are prohibited in the future, how easy will it be to police them in the environment of an online court, particularly one where no legal costs are recoverable? Will vulnerable litigants be influenced by other parties, where they are family members or others?

4.16 We must also recognise that not everyone has access to or the ability to use the technology required to participate in an online court. Thus the concept of an online court potentially could become a barrier to accessing the justice system unless

adequate assistance is available[2]. Technology will not solve all our problems. Recently, for example, the Employment Lawyers Association in England and Wales have voiced concerns about the government's proposals to extend online courts to employment cases and urged the government 'to ensure that digitally excluded persons and other vulnerable groups are afforded adequate protection as part of the reforms'. They have urged that the online system must not be compulsory for all Employment Tribunal claims[3].

4.17 We accept that in Northern Ireland it is something entirely new in the justice system. However, it is quite wrong to suggest that the whole of the procedure for the resolution of disputes submitted will inevitably take place online. It is designed for use by litigants without lawyers in low-level cases but lawyers are not excluded entirely from it. Whilst on an online civil justice system minimal assistance from lawyers may be envisaged, I see no reason why in appropriate cases, certified by the online judge, parties cannot recover a limited amount of legal costs where legal assistance was considered appropriate[4].

4.18 In our proposal for ODR there are stages before a judicial figure is reached. However, a number of developments in the tribunals and civil courts offer inspiration for alternative approaches to dispute resolution. Most notable of these is the use in some tribunals of legally qualified and suitably trained registrars — originally legal advisors from magistrates' court — to undertake case-management decisions, allowing judicial time to be focused on hearings. Judges are an expensive resource and it is vital that we make the best use of their judicial expertise. 'Are we making best use of administrators and legally qualified registrars to undertake those aspects of case management that do not require a high level judicial expertise?'[5]

4.19 In England, registrars currently carry out case-management functions in the special educational needs and disability and mental health jurisdictions of the Health, Education and Social Care Chamber, the General Regulatory Chamber, the Administrative Appeals Chamber and the Employment Appeal Tribunal. They not only speed up case management, are consistent in decision making and reduce the risk of hearings being adjourned, but they free up judicial time for hearings.

Proponents of ODR and how it works

4.20 Professor Susskind, the driving force behind the Civil Justice Council Working Group Report[6], has said that, in the legal world, three times as many disagreements each year amongst eBay traders are resolved using online dispute

[2] Professor Smith, formerly of JUSTICE has drawn attention to the September 2016 Ministry of Justice paper on *Transforming our Justice System* that estimated that, while 30% of people had the skills to use digital services unaided, 52% need some assistance and 18% could not or would not engage digitally at all. The House of Commons report of June 2016 estimated the proportion of digitally excluded at 23% of the population (12.6 million people). Of those, 49% were disabled, 63% were over 75 and 60% were unqualified.

[3] See report in *The Times* 24 January 2017.

[4] This is also the view of Lord Justice Briggs in his final report.

[5] Lord Justice Sullivan, *Senior President of Tribunals' Annual Report,* London, 2014, p. 4.

[6] https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version.pdf

resolution than there are lawsuits filed in the entire US court system. In 2014, the US tax authorities received electronic tax returns from almost 48 million people who had used online tax preparation software rather than a tax professional to help them. As we progress into a technology-based Internet society we have to recognise the shortcomings that exist within our professions — they are becoming unaffordable, often antiquated, the expertise of the best is enjoyed only by a few and their workings are not transparent.

4.21 Letting people participate, settle or at least 'own' the outcomes achieved, has become part of judicial ethics. *Delivering Justice in an Age of Austerity* — a report by JUSTICE chaired by the Rt Hon Sir Stanley Burnton — recommended a system of ODR for England and Wales featuring:

- A primary dispute resolution officer who would review all cases where a defence is lodged. Using an investigative or proactive approach, the registrar would identify the relevant issues, the applicable law, the appropriate procedure and the evidence they need to resolve the case.
- Based on the proactive case management, the registrar can:
  - Strike out a statement of a case where appropriate.
  - Undertake an early neutral evaluation.
  - Undertake mediation.
  - Refer the case to a judge where no other resolution is likely to be effective or appropriate. Examples include cases raising complex and factual issues, cases requiring oral evidence, potential test cases or cases requiring interpretation of legislation or policy.
- All decisions by the registrar finally disposing of a case should be subject to a right of appeal to a judge within time limits.

4.22 This model is consistent with art. 6 of the European Convention on Human Rights in that it preserves the right for either party to secure a hearing before a judge in the ordinary manner.

4.23 Over time the system will be more cost-effective than the status quo. The registrar's active case-management and dispute-resolution functions would reduce both the amount of time and the number of judges needed to resolve cases. All other things being equal, a system in which cases are resolved earlier and by registrars — with far fewer cases proceeding to determination by highly paid judges — should deliver significant cost savings, while simultaneously maximising access to justice.

4.24 The system would involve a comprehensive and effective telephone service being developed that is capable of providing accurate, substantive information and advice as well as signposting callers to other relevant services and advice providers. Experience in New South Wales (NSW) with the LawAccess phone line provides a useful framework for similar development in the UK and the proposals in the Burnton Report owe much to the NSW model.

4.25 The model proposed in the interim and final reports of Lord Justice Briggs is essentially a three-stage process advocated in the Susskind Civil Justice Council Working Group Report. Lord Justice Briggs has said:

> 'There is a clear and pressing need to create an Online Court for claims up to £25,000 designed for the first time to give litigants effective access to justice without having to incur the disproportionate cost of using lawyers. There will be three stages. Stage 1 – regards the automated interactive online process with identification of the issues and the provision of documentary evidence. Stage 2 – conciliation of case management by case officers. Stage 3 – resolution by judges. The courts will use documents on screen, telephone, video or face to face meetings to meet the needs of each case.'

Issues surrounding ODR

4.26 A number of issues arise:

- Should the online court be a separate court with its own bespoke rules?
- Which types of claim should be included?
- Are there types of case that, regardless of value, are unsuited for resolution in the OC?
- How much and what types of assistance with IT will be needed for court users?
- How much — if at all — should one side's costs be paid to the other side?
- Should there be costs shifting between the parties?
- How to achieve the transparency needed for the process to comply with the requirements of open justice?
- The design of an appropriate appeals process. Should any appeal be to a county court judge?

How ODR is progressing elsewhere

4.27 Courts around the world are investing massively in digitising their services and bringing them online. At the same time, the technology of online dispute resolution is rapidly developing. Courts, tribunals and legal-aid organisations worldwide are exploring the options, following the lead of the Susskind Group Report. For online dispute resolution services, procedures and outcomes at courts and tribunals remain an important point of orientation. Users operate in the shadow of courts, having a court procedure as an exit option.

4.28 On 15 February 2016, the new European online dispute resolution platform became available to consumers and traders. It offers a single point of entry that allows EU consumers and traders to settle their disputes for both domestic and cross-border online purchases. This is done by channelling the disputes to national alternative dispute resolution (ADR) bodies that are connected to the platform and which have been selected by the member states according to quality criteria and

notified to the European Commission. Around 117 ADR bodies are connected to the platform, but not all of Europe is covered geographically: Croatia, Germany, Lithuania, Luxembourg, Malta, Poland, Romania, Slovenia and Spain are still missing.

4.29 We felt that it was vital to explore other jurisdictions where ODR had been commenced. It is always better to borrow rather than reinvent the wheel. The new approach advocated by this Review to ODR is similar to that already used in other jurisdictions where the trial process is an iterative one that stretches over a number of stages that are linked together. There are examples that already at work. We recognise that this is a somewhat new concept for this jurisdiction and in order to offer a measure of reassurance to those who are still doubtful about the process, we make no apology for taking up some time in this chapter to look in detail at some of these existing models.

ENGLAND AND WALES

4.30 A small claims mediation service already provides a free service for claims worth less than £10,000.

4.31 That jurisdiction is exploring an application of ODR in the tribunal system. It is a concept known as online continuous hearings based on a change of view of litigation from an adversarial dispute to a problem to be solved. All participants — the appellant, the respondent, government department and the tribunal judge — are able to iterate and comment upon the basic case papers online over a reasonable window of time so that the issues and dispute can be clarified and explored. There is no need for all the parties to be together in a court or building at the same time. There is no single trial or hearing in the traditional sense.

4.32 The recently published Briggs report recommends that HM Courts and Tribunals Service (HMCTS) should establish a new Internet-based court service known as Her Majesty's Online Court (HMOC) (online court or OC) for cases below £25,000. It should be a three-tier service.

4.33 Tier 1 should provide online evaluation. This facility will help users with a grievance to classify and categorize their problem, to be aware of their rights and obligations, and to understand the options and remedies available to them. Litigants would be required to present their cases at the outset in some detail, using software that would lead both the claimant and the defendant through a set of questions, the answers to which would then be collated and organised online as detailed statements of case, uniformly structured. Lord Briggs has described stage 1 as the important part of his reform stating that it 'will consist of a mainly automated process by which litigants are assisted in identifying their case (or defence) online in terms sufficiently well ordered to be suitable to be understood by their opponents and resolved by the court, and required to upload (i.e. place online) the documents and other evidence which the court will need for the purpose of resolution'.

4.34 Triage software will therefore be developed to help unaided litigants to present their versions of the case effectively, intelligibly and coherently by winnowing the relevant from the irrelevant, all in a format uniform for claimants and defendants. The contemplated software would perform this task by taking parties through detailed questionnaires prepared in advanced and tailored to specific types of cases. Designing the software would require the construction of a series of questions for litigants that will extract from them the alleged facts and evidence about their case that the court will need to know in determining it and to which the opposing party will need to be able to respond. The efficacy of such software and promoting effective access to the court for unaided litigants will depend solely on its developers' ability to imagine the widest range of scenarios and contingencies, and create questionnaires sufficiently detailed to address the vast range of human disputes[7]. The framing and narrative of cases are crucial. Creating a tree of questions in advance will mean that the relevant facts are determined by questionnaires' authors, and the facts presented by the software will be offered in a specific, uniformed way.

4.35 Tier 2 should provide online facilitation. To bring a dispute to a speedy, fair conclusion without the involvement of judges, this service will provide online facilitators. Communicating via the Internet, these individuals will review papers and statements and help parties through mediation and negotiation. They will be supported, where necessary, by telephone conferencing facilities. Additionally, there will be some automated negotiations, which are systems that help parties resolve their differences without intervention of human experts.

4.36 Tier 3 should provide online judges — full-time and part-time members of the judiciary who will decide suitable cases or parts of cases on an online basis, largely on the basis of papers submitted to them electronically as part of a structured process of online pleading. This process will again be supported, where necessary, by telephone conferencing facilities. Lord Briggs has indicated that 'stage 3 will consist of determination by judges, in practice DJs or DDJs, either on the documents, on the telephone, by video or if face to face hearings but with no default assumption that there must be a traditional trial'. Stage 3 affords judges a very broad discretion to decide whether to conduct a trial and in what form.

4.37 The establishment of HMOC will require two major innovations in the justice system of England and Wales. The first is that some judges should be trained and authorised to decide some cases (or aspects of some cases) on an online basis. The second innovation is that the state should formally fund and make available some online facilitation and online evaluation services.

4.38 It is interesting to note, however, that the pilot scheme to be launched at the end of July 2017 limits cases to claims under £10,000 with users only able to run one case at a time. Cases that fall out of the pilot at certain points (and parties can leave the pilot at any time) will go into the mainstream lists. The Civil Procedure Rule

[7] *Civil Justice Quarterly* 2017 ibid.

Committee has drafted rules alongside the IT deliberately couched in a user-friendly way that is different from the existing civil procedure rules with simpler language aimed at the litigant in person.

BRITISH COLUMBIA, CANADA

4.39 We were privileged to have had the benefit of time generously given to us by Shannon Salter, the chair of British Columbia's online Civil Resolution Tribunal. British Columbia has been a leading light in initiating online tools for providing online dispute resolution to citizens with most success in small property, zoning disputes and consumer protection cases. A February 2012 Green Paper, entitled *Modernizing British Columbia's Justice System*, identified tribunals as a simple and less expensive solution to easing delays in the court system.

4.40 The *Civil Resolution Tribunal Amendment Act, 2015* was passed by the legislature and received Royal Assent on 14 May 2015. The original Act of 2012 established a new dispute resolution body, the Civil Resolution Tribunal (CRT), which will provide an accessible forum for the resolution of strata (condominium) property disputes and small claims. It was anticipated that the tribunal would encourage litigants to use a broad range of collaborative dispute resolution tools to resolve their disputes as early as possible, while still preserving adjudication as a valued last resort.

4.41 The 2015 Act now makes it mandatory to use the CRT. It was found that the voluntary dispute resolution programmes produced low uptake. The CRT's authority is to resolve claims up to an amount of $25,000 Canadian relating to civil claims and strata disputes. The operation is in three stages:

- Stage 1 The users explore possible solutions by using the tribunal's online negotiating platform, which is supported by templates for statements and arguments. If settlement is not reached, it will move to the next stage.
- Stage 2 A case manager is appointed to assist the parties in reaching a resolution and in identifying the facts in dispute and the evidence that will assist the tribunal. The case manager may also provide a non-binding neutral evaluation of the claim. If the dispute does not resolve, it will move to the next stage.
- Stage 3 The case will proceed to the tribunal hearing phase, which may be conducted by email, phone, and video link or, in exceptional circumstances, in person.

4.42 Fees are payable at each stage of the process. If there are credibility issues, it must be referred to the court.

4.43 It is understood that the set-up costs for the British Columbian model were in the region of $10 million Canadian and that the anticipated annual running costs will be $3.8 million Canadian for a country that is, of course, many times larger than Northern Ireland.

4.44 It is anticipated that there will be 15 to 20 case managers and approximately 30 tribunal members who will all be senior and experienced lawyers. The Civil Resolution Tribunal opened for business in strata disputes on 13 July 2016.

THE NETHERLANDS

4.45 We were once more privileged to have the opportunity to consult personally in Belfast with Maurits Barendrecht of the Hague Institute for the Internationalisation of Law (HiiL), who presented the Dutch Rechtwijzer programme, and again to meet him and his team in The Hague this year. The Dutch Legal Aid Board came forward in 2006 with an online dispute resolution project, which became the Rechtwijzer (law signpost).

4.46 This has undergone several transformations in its short life and is very much a work in progress, constantly being developed and enhanced in terms of the services and supports on offer to service users[8]. It provides online mediation services for a range of disputes, including landlord and tenant, consumer financial transactions and divorce and separation.

4.47 The Rechtwijzer system is provided by the Netherlands Ministry of Security and Justice. The Dutch Legal Aid Board developed the legal advice site known as Rechtwijzer, variously translated as 'conflict resolution guide' or 'signpost to justice'.

4.48 The project, which was launched in 2007, initially cost €2.3m and is run by a joint committee with the support of a number of stakeholders, including the Bar. It was comprehensively reworked in 2012. The Rechtwijzer 2.0 implementation was launched at the end of 2014 to support people with divorce-related issues in the Netherlands.

4.49 The first step is a 'diagnostic' one, which is followed by data intake; online dialogue between the parties; if necessary, mediation and adjudication if agreement is not reached. Save for the initial diagnostic process, all stages thereafter attract variable fees depending on income. If an agreement is reached between the parties, it is subject to a review of fairness by an independent adjudicator.

4.50 A significant advantage of Rechtwijzer is the cost. According to the latest figures we could find as to its cost, a separation agreement would cost in the Rechtwijzer procedure a maximum of around £800 compared to £4,000 for a conventional separation.

4.51 For now, Rechtwijzer offers only mediation and adjudication services. Later on, it will offer other services such as financial expertise, psychological help and children support.

[8] Roger Smith 'online dispute resolution: ten lessons on access to justice', The Legal Education Foundation, 2015 Esmée Bickel, Marian van Dijk, Ellen Giebels 'Online Legal Advice and Conflict Support: A Dutch Experience', University of Twente, 2015

4.52 Once the parties have worked through the tasks and have the draft covenant-ready, they are obliged to submit it to the reviewer. This mandatory step aims to guarantee the quality of the covenant. The online review is done by a lawyer specialised in divorce cases who will take the case to court — in the case of marriages and registered partnerships with minor children — or draft the final contract if the separation does not have to go to court. Currently, 900 family cases are being processed with 400 having been completed.

NEW ZEALAND

4.53 New Zealand has an online application system but the adjudication is court-based[9]. Interestingly, in addition to submitted online applications, an applicant can approach their local district court or a community agency, such as a Citizens Advice Bureau, or a community law centre. Staff at these offices can assist the applicant filling out the claim form and with queries regarding the hearing.

AUSTRALIA – NEW SOUTH WALES

4.54 New South Wales offers an online application facility and online scheduling. The state of Victoria is progressively offering online applications. There is a growing interest in Australia in how design thinking and artificial intelligence can improve access to justice and close the 'justice gap' if the large attendance at a recent forum at the Royal Melbourne Institute of Technology University in Melbourne in early 2016 was anything to go by.

UNITED STATES OF AMERICA

4.55 The USA allows for 'blind bidding' negotiations to enable parties to submit a secret offer in respect of calculated money disputes, and parties reserve the right to access the courts where negotiations fail. Providers such as CyberSettle Inc.[10] and SquareTrade inc. provide companies such as eBay with online dispute resolution for their customers. Reportedly, US law attorneys utilise the procedure for settlements concerning insurance disputes, property disputes, business and presumably minor sidewalk claims. It is understood that failed negotiations often proceed to conciliation, mediation or arbitration services via the American Arbitration Association (AAA)[11].

EUROPEAN ONLINE DISPUTE RESOLUTION PLATFORM

4.56 European legislation has introduced options for ADR and ODR for the resolution of consumer disputes. Customers living in the EU are concerned about their consumer rights should a difficulty arise with a seller in a different part of the EU. Directive 2013/11/EU on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes are two pieces of legislation that have been introduced in an effort to address such concerns.

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[9] http://www.justice.govt.nz/tribunals/disputes-tribunal/documents-new/guidelines/dt-guidelines-full

[10] Reportedly $14.5 million was its largest online settlement.

[11] Abstract from Juan Pablo Cortés Déguez, 'A European Legal Perspective on Consumer ODR', *Computer and Telecommunications Law Review 2009*.

4.57 The ADR Directive provides for the establishment of an ADR entity that proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution to a dispute between a trader and a consumer. The ADR does not provide for disputes initiated by a trader or disputes between traders. Nor does the Directive stipulate that any proposed solution will be binding on the trader.

4.58 The ADR entity must issue an award in writing, setting out the reasons for its findings. The award must be made available within 90 days of the receipt of the complaint.

4.59 The ODR Regulation applies to ADR disputes arising from online sales or service contracts between a consumer and a trader and provides for the development of an online dispute resolution platform that will be available to consumers and traders. The platform will consist of an interactive website for consumers and traders seeking to resolve cross-border disputes. The complaint, together with documents relevant to the complaint, may be filed online. The complaint will be forwarded to the respondent trader and, once the ADR entity is agreed, to the ADR entity. The ADR entity must conclude the ADR dispute procedure within 90 days.

4.60 The Directive does not oblige traders to use ADR in disputes with consumers. It is, however, open to each member state to introduce legislation that goes beyond the minimum legal requirements of the Directive.

4.61 The Directive and Regulation provide that the cost of the ADR/ODR procedures is either free of charge or available at a nominal fee for the consumer. Although the commencement date of 9 January 2016 remains in the Regulations, it appears to have been agreed that the go live date of the ODR platform was further delayed. This means that businesses would not have been required to signpost a link to the ODR platform on their website until it was launched.

Other forms of ODR

4.62 The Financial Ombudsman Service receives around 2.4 million contacts annually, which turn into around half a million disputes.

4.63 The other UK ombudsmen for communications, energy, lawyers and pensions report the same sort of ratio.

4.64 The Association of British Travel Agents received 19,000 requests for advice from consumers in 2014 and handled 7,500 enquiries on legal, code of conduct and similar matters.

4.65 Cost proportionality is not the only barrier to access to justice; accessibility, user-friendliness, trust and relative cost are also factors.

4.66 Ombudsmen are also efficient as they deliver more functions than just dispute resolution. They provide extensive advice to consumers (usually at no cost to the consumer).

4.67 Ombudsmen form part of the regulatory system and can save expenditure by regulators as well as on courts. An example is the switch by the Civil Aviation Authority of its passenger complaints function to an external ADR system funded by airlines[12].

4.68 In the Republic of Ireland, the Personal Injuries Assessment Board — in being since 2004 — mandates all personal injuries claims to be processed through that board where legal costs are not provided before it can be determined in court. We have a not dissimilar model in our own Criminal Injuries Compensation Appeals Panel Northern Ireland. In our discussions with both these bodies in Dublin and Belfast it emerged that it is their intent to introduce in the near future online applications only.

Discussion

4.69 Different views have emerged in our committees and discussions about the concept of an ODR.

4.70 Some members of the legal profession oppose its introduction on the basis that the current system at district and county court level works well with a reasonable cost structure. They voice concerns on behalf of litigants about a system that essentially is built to operate primarily without lawyers.

4.71 The overwhelming majority on both our Review and Reference Committees, however, welcomed the concept and recognised that there is a clear public appetite for its introduction.

4.72 Those connected to the judiciary and professions, while wholeheartedly welcoming the proposal, were more likely to adopt the wait-and-see line espoused by Professor Smith OBE formerly of JUSTICE— that is, that we should allow some time to pass to see how the English system and the systems in British Columbia and The Netherlands unfold before developing our own concept. Moreover, responding to the interim report[13] from Lord Justice Briggs on civil courts, the Association of Costs Lawyers in England has sounded a note of caution, citing the examples of

[12] In his article, "Online dispute resolution: answers?" – *The Law Society Gazette,* 20 April 2015, Christopher Hodges, Professor of Justice Systems at the University of Oxford, makes a number of points about the proposals for HM Online Court:-

. The underlying problem remains that the court process is too expensive for many disputes.

. Its proposals are based on using online technology to replace lawyers and speed up processes.

. There are many existing ombudsmen and online dispute resolution systems that provide speedy and effective ADR.

. While written online information is helpful for some people and should be provided, the experience of business complaints-handlers and ombudsmen is that there is an overwhelming demand for people to talk to experts about their problems.

[13] http://www.lawgazette.co.uk/law/briggs-review-online-court-needed-to-cut-out-lawyers/5052973.fullarticle

Money Claim Online and the small claims mediation service as evidence of the need for closer scrutiny if they are to serve as a benchmark for online courts.

4.73 This group raises issues such as security and privacy risks to be managed. Operational and IT risk can be substantial. Courts have legacy IT systems and administrative systems, and are investing heavily in digitising current court procedures. However, the technologies have to be tested safely, scaled up next to the existing systems and then fully integrated. What are the requirements for high-level change management, IT and operational management skills?

4.74 Interestingly, those representing the public at large — the non-lawyers on the Reference Group — were virtually unanimous in urging that we waste no more time to meet the evident public appetite for ODR and that we should take steps to set up such a system of ODR consistent with the English timetable. It will take some time to pass the necessary legislation and, while that process is happening, we can continue to monitor developments elsewhere.

4.75 Views varied amongst committee members as to what the level of an ODR should be, with figures stretching from £100 to £10,000. Should it be mandatory or voluntary if we commence with a pilot scheme?

4.76 In light of the variation in views emerging from the two committees as to how the concept should be processed, I take responsibility for proposing the following steps. ODR is clearly an idea whose time has come. There is plenty of evidence, as outlined in this chapter, that it is an idea that is spreading across many countries and thus justifies piloting an online scheme in this jurisdiction. In truth if we fail to do so, we are one of the few remaining jurisdictions without such an option. Frankly, outside the caution expressed by the members of the legal profession, virtually every other member of the two committees who represented the public or public bodies have enthusiastically embraced the concept of ODR with a clear desire to pilot this as soon as possible. The issue is whether the government will take the opportunity to rethink and redesign the justice system from the users' perspective, at least in small-value cases. To do so will, arguably, empower those users to become actively engaged in resolving their disputes and significantly improve the access to and quality of justice. In an age of austerity, providing another means of voluntary access to justice that is cheaper, swifter and more efficient is an unanswerable proposition. Perhaps the most challenging question for the courts' leaders in this context is to ask the one put by Richard Susskind: 'are courts a place or a service?'. The empowerment model sits at the heart of the various systems operating on this basis in numerous other countries.

4.77 In commending this step, I do not shy away from a recognition — underlined by Lord Justice Briggs in his review — that this is something entirely new, 'the first court ever to be designed in this country, from start to finish, for use by litigants without lawyers'. The primary aspiration is to render self-representation more effective and to reduce dependency on lawyers, although without formally prohibiting legal representation. As Lord Justice Briggs has said, such a court reflects

'the single most radical and important structural change with which this report is concerned'.

4.78 That said, I feel we should advance with some measure of caution and, accordingly, I advocate a voluntary pilot scheme across Northern Ireland at a level of £5,000 (with an increased value of up to £10,000 if the pilot scheme proves successful and a proper funding regime was established) for a one-year/two-year period[14]. It can then be reassessed, possibly under the guidance of the new Civil Justice Council. Equally so, it may be sensible to subject the system to a robust peer review. We could, therefore, have a system of stepping stones towards a final picture starting with lower figures, albeit the higher figures would give a better sample to assess.

4.79 I recognise that without adequate widespread publicity for the service with its obvious advantages in terms of cost (that is, it will be much cheaper than conventional litigation), efficiency and speed, and perhaps in face of a measure of reluctance on the part of some members of the legal profession to encourage the service, a voluntary approach risks underuse as was the experience in Canada as set out in paragraph 4.41 above. However, we have to trust the possibilities. A voluntary scheme would need to be heavily incentivised (carrot rather than stick). In terms of cost, speed and efficiency, provided this is done and the public are made sufficiently aware of it, it has every prospect of outstanding success.

4.80 However, a switch to a mandatory system may have to be considered if there is early evidence that this will be required to ensure sufficient throughput. This pilot will also allow the department to consider the learning from England, Holland and British Columbia, which commenced its scheme in July 2016.

4.81 The online court I propose would follow the English precedent with three stages. Stage 1 — an automated interactive online process with identification of the issues and the provision of documentary evidence. Stage 2 — conciliation of case management by trained case officers. Stage 3 — resolution by judges. If it reaches the stage of the judge, the courts will use documents on screen, telephone, video or face-to-face meetings to meet the needs of each case.

4.82 The online court should have a separate set of rules much simpler than those that presently govern conventional cases drawn up by a body of judges, professional lawyers and government departments, following the English example and run in harness with the main court structure.

4.83 There are obvious advantages in facilitators being legally qualified. Solicitors and barristers might choose to undertake training to act as facilitators on a part-time basis, perhaps at a set fee per case. There may also be a requirement to have a judge or judges trained in online dispute resolution.

[14] five to 10 years: 'because so many people will be excluded' — Dan Bindman, 'Call for delay to making online court mandatory by "up to 10 years"', *Legal Futures,* 3 February 2017.

4.84 Court fees will have to be set for each level. If this pilot is to work, it is crucial that there be cost incentives, and thus if fees are to be charged they must be measurably lower than for conventional litigation. Costs will not be awarded to the parties save in exceptional circumstances at the discretion of the online judge.

4.85 The availability of online judicial input at a higher tier is crucial if the confidence of the litigant in person is to be maintained. This ensures that even in disputes of low value a proportionate access to justice is maintained. It is considered that, in this small jurisdiction, the pilot scheme should be restricted to claims of no more than £5,000, with a possible expansion to include claims over this figure in the future.

4.86 Personal injuries and road traffic cases should for the moment be exempted from the online court save for small cases of £1,000 or under. The primary reason for this is because such cases may bring about an inequality of arms where one party, often the defendant's insurers, will avail of the services of professional lawyers in many cases where an insurance premium excess is being claimed and which might have an effect on other litigation.

4.87 The online judge should have the power to disallow any case to be determined on line because of its complexity, amount of documentation, value as a precedent, factual dispute or other public interest reason.

4.88 There should be a right of appeal to a county court judge.

4.89 Confining this pilot scheme initially to one area, such as Belfast, before rolling it out across the province may have superficial attraction, but, in truth, the expenditure of setting it up probably dictates that it is only cost-effective if set up province-wide from the outset. In the interim, any pilot scheme should be voluntary.

Responses

4.90 Two schools of thought emerged in the responses. On the one hand, members of the legal profession — the Bar Council of Northern Ireland, the Law Society, the Belfast Solicitors' Association, and the Association of District Judges of Northern Ireland — favoured a wait-and-see policy until the outworkings in other jurisdictions had been completed. Concerns about a two-tier system of justice, inequality of arms between those who are represented and those who are not, and its unsuitability for cases where cross-examination was necessary or there was a strong factual dispute, all surfaced.

4.91 On the other hand, the public voice — the Law Centre, the Northern Ireland Human Rights Commission, the insurance industry and virtually the entirety of the Reference Committee who made up a wide spectrum of the public — was in favour of instituting ODR at least on a pilot basis as soon as possible. Within this group there was a strain of thought that a figure of £5,000 was too small and it should be £10,000 on a mandatory basis, with the insurance representatives indicating it should include personal injury and road traffic accident claims.

4.92 I consider that the public appetite for ODR is unmistakeable. It will always be possible to find reasons to postpone implementation of this concept for literally years. The fact of the matter is that most other jurisdictions have already started to implement the concept and in a small jurisdiction such as Northern Ireland with its own unique circumstances, there is no conceivable reason why we should delay further. I strongly recommend therefore that a pilot scheme of ODR on a voluntary basis up to a level of £5,000, excluding personal injuries and road traffic accidents, should be commenced as soon as possible.

Recommendation

1. A pilot scheme of voluntary ODR to be set up throughout Northern Ireland for money damages cases of under £5,000, excluding personal injuries and road traffic claims save possibly for such claims under £1,000. Legislation will be required to introduce such a step. **[CJ11]**

5

Single entry system for civil cases?

Current position

5.1 Currently, it would appear that cases that could, or should, be commenced in the county court, may be being commenced in the High Court. The number of remittals adds credence to this case (see appendix 3).

5.2. Cases may be commenced unnecessarily in the High Court for a variety of reasons, including the following:

- The plaintiff views the quantum of their case as higher than it is.
- The case is commenced by a personal litigant, who is not familiar with the process, and has not chosen the correct court and/or division to commence the case.
- The plaintiff's advisors and/or the parties would prefer to have the matter litigated in the High Court (for example, due to perceived complexities and/or a perceived potential to recover higher damages, for costs purposes, ease, or speed).
- The plaintiff views the case as one that lends itself to an application under Order 14 of the Rules of the Court of Judicature (Northern Ireland) (that is, summary judgment is on the cards).

5.3 Not only does this lead to removal/remittal applications, as mentioned above, it means that the High Court may be routinely dealing with, and judges may be routinely hearing, cases that could or should be heard in other forums.

5.4. If one or both parties make(s) a removal/remittal application, and a hearing ensues, the matter will be heard and determined by a judge or Master. Therefore, subsequent to such a hearing, the case will be in the correct venue.

5.5 However, this is not determinative. There may be cases where both parties will not make such an application, as both parties wish for the matter to remain in the High Court (perhaps due to, inter alia, the reasons set out above). The case will, therefore, remain in the wrong forum. Further, cases can only be remitted from the High Court to the county court (as opposed to the district judge's court). There are likely cases that should be remitted to this forum. Further, the case may be of the necessary quantum, and therefore not lend itself to a remittal application, but be of limited complexity.

5.6 Equally, cases that should be commenced in a certain division of the county court may be commenced in another. Cases that should not be heard in the small claims court, but should be in the county court (due to, for example, complexity or

the nature of the issues and/or cause of action raised) may be commenced therein, and vice versa.

5.7 Further, once a party has decided in which venue to issue proceedings, and those proceedings are defended, those proceedings do begin in earnest (for example, with review hearings, listing dates being given, etc.). Once the process is commenced there is often little opportunity for the parties to put the brakes on to, for example, engage in alternative dispute resolution without incurring further costs, further review dates, etc.

5.8 The above may lead to, inter alia, the following consequences:

- cases being listed and/or heard in the incorrect courts;
- certain divisions being overburdened with cases that are not appropriate for them;
- High Court judges hearing cases of little complexity and/or low quantum;
- of pausing the proceedings to engage in alternative dispute resolution (perhaps especially in the county courts), leading to higher costs and less opportunity for the parties to engage in such a course of action;
- increased workload for court office staff;
- increased costs for both parties.

The English system

5.9 Currently, in England, there is a unified system of sorts. There is a single form process — that is, a single method for issuing civil proceedings (a claim form) — but not strictly a single entry process. Proceedings are issued using a claim form (see Civil Procedure Rules [CPR] part 7). Where the amount of the claim can be specified, a statement of value should be given. Where damages are to be decided by the court, the statement of value should state whether it is expected that the amount to be recovered is no more than £10,000, no more than £25,000, or more than £25,000. These are the bands used for case-management track allocation.

5.10 Despite a unified, single form method, and track-allocation approach, such a claim can still be issued in either the High Court or county court. However, the High Court is reserved for a small percentage of cases. If it is issued in the High Court, unless the claim is for a specified amount, it should be endorsed with a statement that the claim can only be commenced in the High Court, or it is a claim for a specialised High Court list, or that the claimant expects to recover more than a certain value — that is, the claim is expected to be for more than £100,000, or a personal injury claim and the value is expected to be more than £50,000.

5.11 One of the central planks of the Civil Procedure Rules system is judicial case management. As such, defended claims are allocated to one of three tracks.

5.12 Small and simple claims with a value of not more than £10,000 are assigned to a small claims track. Cases expected to last one day or less, and with a value of not more than £25,000, are usually allocated to the fast track, with standard directions and tight timetables of up to 30 weeks for completion of interim stages prior to trial. Larger cases are assigned to the multi-track (see CPR part 29).

5.13 Basic management is used on both the fast and multi-track, with various types of procedural hearings allowed under the CPR: case-management conferences, hearings at the pre-trial checklist stage; and pre-trial reviews. Case-management decisions, pursuant to the CPR r 2.4, can be taken by any judicial officer.

5.14 Subject to the rules relating to commencing proceedings in the High Court, a claimant in England does have a free choice of which court to use when commencing proceedings. It should be noted that money claims can be filed electronically by a Money Claims Online process[1]. However, as of 22 April 2014, there is, in England, a single county court[2]. Proceedings are still issued in a specific location/court. However, sittings of the county court are not restricted to a specific district. The county court sits in locations designated by the Lord Chancellor. Further, the claimant is (within reason) able to make their claim in any county court hearing centre (and is not restricted to the court in which the defendant resides or carries on business), and the county court is no longer referred to as 'The ... county court'. It is now 'The county court sitting at ....'.

5.15 Most cases are commenced in or allocated to the county court. Only the most important, complex and substantial cases are managed and tried in the Royal Courts of Justice. If the defendant files a defence, a court officer will provisionally allocate every defended claim to a track (CPR r26.1). To assist the court, the parties are then required to file direction questionnaires.

5.16 The case is definitively allocated to a track after directions questionnaires are filed and considered[3]. It is therefore the court that decides how the case should be run/where it should be heard. In England, from April to June 2015, a total of 33,608 allocations were made[4]. Almost half of all allocations 16,388 were to the small claims track. Forty per cent, 13,390 were allocated to the fast track — that is, were deemed to contain issues not complex enough to merit more than a one-day trial. Only 11% 3,830 were allocated to the multi-track.

5.17 Specialist proceedings are treated as allocated automatically to the multi-track (for example, claims allocated to the Technology and Construction Court (CPR r60.6), the commercial list (CPR r58.4), the Chancery Division, etc.). Subject to the individual court rules and guides, multi-track procedures are then followed.

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[1] See Practice Direction (PD) 7E, and the amendments to PD 7A.

[2] *The Crime and Courts Act 2013*, s 17, established a new single, national, county court and amends *The County Courts Act 1984*.

[3] CPR r26.5. Post the Jackson reforms, these are now 'directions questionnaires'.

[4] Ministry of Justice, *Civil Justice Statistics Quarterly,* April to June 2015, England and Wales

5.18 However, in the Commercial Court, a new scheme is being piloted: a shorter trial scheme and a flexible trial scheme. Under this scheme, it is envisaged that certain short cases will be dealt with by the same judge, come to fruition within 10 months, and allow the parties a flexible case-management process — for example, with limited disclosure, paper applications, early case-management conferences and early fixing of trials.

5.19 The track system allows for a party to include a request for proceedings to be stayed while the parties try to settle the case. A direction is made staying the proceedings for one month, or such period as is deemed appropriate (CPR r26.4(2)). This saves costs and usually happens prior to an allocation to a track: if the case does not resolve, directions are given, including allocating the case to a track.

5.20 This civil procedural system provides a composite and integrated approach. However, it is not technically single entry; it is a single method system. The system puts less emphasis on entry, and more on case management once the system has been entered.

5.21 It should be noted that a unified civil court (perhaps one step further than a single entry system) was considered in England as early as 1988, by the Hodgson Committee on Civil Justice. They recognised that there was a problem of inefficient allocation and too many cases going unnecessarily to the High Court. But they rejected unification because they felt that selective allocation and realistic financial limits on jurisdiction could solve the problem, and specialist High Court efficiency was required for judicial review, admiralty, building, intellectual property, judicial revenue and chancery. Therefore, there was no consensus in favour of unification: it was ultimately viewed as a step into the unknown, requiring primary legislation, and undermining the respect/independence of the High Court judge[5].

5.22 Unification was again considered in the Woolf reforms in 1995, and again rejected[6]. It was recognised that, although the two jurisdictions were converging, there were problems of allocation, transfer, and cases coming before an inappropriate judge. The reasons for rejection of unification were, *inter alia*, problems of right of audience, the lack of the power in a circuit judge to make an Anton Piller order, and enforcement differences. It was also thought that the tiers of the judiciary should be retained. Only High Court judges should deal with the most demanding cases, and the judicial distinctions would be difficult to maintain in a unified system. Therefore, the reforms focused on alignment, an extension of powers for the circuit judge, a unified court service, case management, and, importantly, an amalgamation of procedural rules; an overall solution, in his opinion, producing the same benefits as unification[7]. It is worth citing *in extenso* the reasoning behind Lord Woolf's conclusions because in many ways they mirror our own thoughts at this time.

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[5] June 1988, Cm.494. Professor I. R. Scott was a member, and Lord Griffiths, Mark Potter (as he then was), Roger Pannone and Richard Thomas. And see Alec Samuels, 'A Unified Civil Court', *Civil Justice Quarterly*, 2006, pp. 250-260 for discussion.

[6] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*

[7] Alec Samuels, 'A Unified Civil Court', *Civil Justice Quarterly,* 2006, pp. 250-260

‘4. In addition, if my recommendations are accepted and the rules of the High Court and county courts are combined, the procedure in the High Court and county courts will be basically the same. These recommendations, together with the other recommendations which I am making as to case management, will mean that the question of whether a case is a High Court or a county court case will be of reduced significance.

5. The distinction between High Court and county courts will then probably be of most significance in relation to rights of audience of solicitors, judicial review, the grant of Mareva and Anton Piller injunctions and defamation actions. There is also the difference in methods of enforcement in the two courts, into which I have not inquired.

6. I have therefore considered whether to recommend the unification of the two courts. This would be an additional step in reducing the complexity of the system. It would be an advance since it would produce a single, vertically integrated court. However, very much the same result could be achieved if the movement towards aligning the jurisdiction of the county courts and the High Court was continued and the powers of Circuit judges were to be extended. This would make it generally unnecessary to identify the criteria which mark the boundary between the jurisdictions.

7. Nothing I have said so far is intended to suggest that the two tiers of the judiciary should be assimilated. On the contrary, my recommendations are intended to reaffirm the principle that High Court judges, and only High Court judges, should deal with the most demanding cases in the system.

8. I accept that for constitutional reasons it is essential that the separate status of the High Court judge is maintained and not undermined in any way. Although it is not impossible to preserve distinct judicial tiers in a single court (as, for example, in the Crown Court), this would become more difficult if the High Court itself were merged in a single court.

9. However, the further alignment of the jurisdictions of the High Court and the county courts should continue, both as to subject matter (the obvious example is defamation) and as to powers. For example, the restrictions on Circuit judges granting Mareva and Anton Piller injunctions should be removed.

10. I should make it clear that I am not proposing total alignment. There would be no point, for example, in extending the power to hear small claims to High Court judges or to confer on the High Court the various statutory jurisdictions of the county courts. Conversely, it would not be appropriate to give county courts general jurisdiction over judicial review (except for certain categories which I will consider further in my final report.)

11. It is more appropriate and more effective for cases to be allocated to the correct level for trial as a result of a judicial examination of all the circumstances of the particular case, taking into account any general guidance which has been issued as part of the management of the case, than for the case to be allocated as a result of some technical rule as to jurisdiction.

12. There are difficulties in amalgamating the High Court and the county courts which go beyond my remit. In particular, there is the problem of rights of audience, which is the subject of a separate statutory regime. I therefore do not suggest that the two courts should be unified. Instead, I seek to achieve the same

benefits that would flow from the courts being unified by the recommendations elsewhere in this report.

13. The new unified rules will provide a common procedure for the conduct of civil business. A new, common approach to the handling of cases centred on the concept of judicial control and case management will introduce a strong unifying element into the way in which cases are handled by all the civil courts. …….

The courts, through the procedural judges, will have responsibility for ensuring that cases are dealt with at the appropriate level.[8]"

5.23 A single entry system has, however, been implemented in the family courts in England and for the reasons set out in our Family Justice Review we consider that it is appropriate in the Family Division in Northern Ireland whilst still preserving the status of the High Court.

Discussion

5.24 We are not satisfied that there is sufficient evidence to merit either a unified system or a single point of entry in this jurisdiction.

5.25 As Lord Woolf reminded us, for constitutional reasons it is essential that the separate status of the High Court judge is maintained and not undermined in any way. Although it is not impossible to preserve distinct judicial tiers in a single court (as, for example, in the Crown Court or Family Division), this would become more difficult if the High Court itself were merged in a single court.

5.26 No practical purpose would be served, for example, in extending the power to hear small claims to High Court judges or to confer on the High Court the various statutory jurisdictions of the county courts. Conversely, it would not be appropriate to give county courts general jurisdiction over judicial review.

5.27 It is more appropriate and more effective for cases to be allocated to the correct level for trial as a result of a judicial examination of all the circumstances of the particular case after the parties have made their selection, taking into account any general guidance that has been issued as part of the management of the case, than for the case to be allocated as a result of some technical rule as to jurisdiction.

5.28 Moreover, we do not see the need for new unified rules to provide a common procedure for the conduct of civil business. The separate rules governing the High Court and the county court work well and, frankly, do not require to be assimilated. The new approach to the handling of cases centred on the concept of judicial control, review and case management operates effectively in both jurisdictions.

5.29 Figures available to us (see appendix 3) on the limited number of remittals/removals do not suggest that any material problem exists with the present system. The numbers of remittals/transfers do not appear disproportionate and the

[8] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales,* chapter 12, 'The Structure of the Courts'

data on settlement figures below the High Court level can be unreliable since liability issues may have led to *prima facie* justifiable High Court cases being compromised. We have heard no evidence from the Bar, solicitors, judiciary or other court users that the courts are overburdened with incorrect allocations under the present system.

5.30 Moreover, one has to ask how would a single point of entry system work in practice[9]? For example, given the size of this jurisdiction, would it be efficient? Presumably, both parties would be required to indicate which band they thought appropriate. Allocation could then be made by a senior and experienced member of the court service. In the event of controversy or difficulty, the matter would have to be referred to a judge for determination. In the case-management process, the judge could always change the allocation if need be. Judges would have overall control and ultimately supervise the process, with the trial judge taking responsibility at an early pre-trial stage.

5.31 Presumably, each party should be entitled to indicate a preference for the venue. In principle, a degree of preference ought to lie in favour of the defendant. Senior staff in the court service could fix the venue, any dispute or difficulty to be determined by the district judge. Judicial guidance on venue would help to identify the relevant factors to be taken into account.

5.32 Whilst there are undoubtedly some points that could be addressed within the current system, we have concluded that this whole process would introduce into a small jurisdiction a level of bureaucracy, delay and potential cost that is currently missing. Refinement of the present system is needed more than significant change. The adage 'if it ain't broke, don't fix it' has a resonance for us in this field.

5.33 We also do not consider that the use of a single claim form that can then be issued in the county court or High Court would be profitable, even with an increase in the county court jurisdiction.

5.34 Our aim is to ensure that the High Court is reserved only for very high-value or complex cases. It would deal mainly with clinical negligence, multiparty actions, defamation, complex legal issues, high-value personal injury claims, commercial and chancery business, judicial review and appeals. Such cases do require the somewhat more complex pleadings that presently govern that jurisdiction.

5.35 There are currently no substantive 'pleadings' in the county court. All the views we have canvassed suggest that this works well, keeping costs down and accelerating listings. The professions should be guaranteed a timely, efficient hearing. The new emphasis on active case management once cases are in the system is sufficient to iron out any wrinkles that have surfaced with pleading problems. It may be, of course, that that process of early assessment and management will

[9] Alec Samuels, 'A Unified Civil Court', *Civil Justice Quarterly,* 2006, pp. 250-260

provide judges with a good opportunity to assess whether each case has been issued in the correct court and transfer the case of its own volition.

5.36 If significant change were to be effected, along the lines of a single jurisdiction or single entry, it would require a considerable overhaul of the legislation and procedural rules in Northern Ireland. Large portions of the County Court Rules, and the Rules of the Court of Judicature, would, in effect, become redundant. Aspects of both would need amalgamated into a consolidated rules regime. There would also need to be conformity in other matters, for example, pre-action protocols, a unified scale of costs, etc. We do not feel the investment of time, effort and money in exploring or implementing such a task is merited.

5.37 Finally, we pause to note that these views are, of course, wholly separate from the concept of a single jurisdiction within the county court, which we wholly endorse and which is dealt with later in this Review.

Responses

5.38 Without exception, every respondent agreed with the recommendation in this chapter as did virtually the entire Reference Committee.

Recommendation

1. No introduction of a unified system or a single point of entry in the civil courts in this jurisdiction. **[CJ12]**

6

Costs

Current position

6.1 We commence our deliberations on the current costs regime by making the fundamental observation that comparing the costs experience in England and Wales with Northern Ireland is comparing apples and oranges. We have a much lower cost regime with maximum hourly rates usually coming out at £450 per hour for the most complex claims, which are only a very small proportion of the overall claims incidence. Our information is that maximum fees in England can be £800 per hour.

6.2 A recent English authority[1] revealed a clinical negligence settlement of £450,000 that produced a costs claim of £1,126,938.53. Even what was allowed as interim costs, which amounted to £106,763, would likely exceed any final costs assessment here, certainly in a £450,000 settlement. A further example was found in a clinical negligence case that settled for £3,250 and the solicitor for the plaintiff had served a bill of costs for £72,320. The court reduced that to £26,604 on the basis that costs are only proportionate if they bear a reasonable relationship to the matters at issue in the proceedings[2].

6.3 Hence, what may be necessary, or what works in England, may be wholly inappropriate here in this small jurisdiction. We must be wary to recognise that the reforms of Lord Justice Jackson and all other fixed fees reforms are driven by the changes introduced by government at a time when it was deregulating the market, bringing in claims farmers and driving the industrialisation of the process. There is a world of difference between our market and elsewhere, and we must avoid making the litigation process one where driving compliance by a costs threat introduces a culture of compliance by enforcement and a ratcheting up of the cost burden as a consequence.

6.4 The current position in Northern Ireland is that there is no provision for cost budgeting/cost capping/costs management as part of case management/use of summary assessment of costs/or use of fixed costs (except in the county court). There is no management of costs in advance. The only control of costs is taxation of costs at the conclusion of the case, which often leaves litigants faced with an unexpectedly large bill.

6.5 While in the High Court there is provision in Order 62, rule 7, rule 7 for an award of costs in a lump sum amount, this power is rarely used as a means of summary assessment of costs. Instead, parties have to await the end of litigation until costs can be taxed. This means that interlocutory costs orders often cannot be enforced until the conclusion of the proceedings, and that interlocutory costs orders

[1] Rallison v North West London Hospitals NHS Neutral Citation Number: [2015] EWHC 3255 (QB).
[2] Rezek-Clarke v Moorfields Eye Hospital NHS Foundation Trust [2017] EWHC B5 (Costs).

are not an effective sanction to ensure compliance with the court's case-management orders and directions.

6.6 There is no formal provision for fixed costs in the High Court. Where litigation takes the form of a money claim, counsel's fees are often marked by reference to the Comerton scale of costs, which was last amended some years ago. For example, in the Chancery Court or Commercial Court that scale is used with an uplift to reflect the complexity of the case.

6.7 In England and Wales, the courts engage in costs management as part of the case-management process. At the outset of the process, the judge makes a determination of a reasonable estimation of the costs that the receiving party is likely to be awarded by the costs judge in the detailed assessment proceedings or as a result of a compromise of those proceedings[3]. In addition, cost capping occurs broadly where the court not only does not approve overall costs, or the costs of a particular aspect of the proceedings, but also where it feels that costs are disproportionate, and puts a limit on the costs that can be incurred (so as to be recoverable)[4].

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[3] To enable this to take place, the overriding objective in England and Wales has now been amended to read (Civil Proceedings Rule (CPR) 1.1): 'These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.'
3.12(2) is explicit that costs management is a central to achieving the overriding objective: 'The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective.'

[4] The English CPR rules provide at Part 3:-
3.19
(1) For the purposes of this Section—
(a) 'costs capping order' means an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made; and
(b) 'future costs' means costs incurred in respect of work done after the date of the costs capping order but excluding the amount of any additional liability.
(2) This Section does not apply to judicial review costs capping orders under Part 4 of the Criminal Justice and Courts Act 2015 or to protective costs orders. (Rules 46.16 to 46.19 make provision for judicial review costs capping orders under Part 4 of the Criminal Justice and Courts Act 2015.)
(3) Omitted.
(4) A costs capping order may be in respect of –
(a) the whole litigation; or
(b) any issues which are ordered to be tried separately.
(5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if –
(a) it is in the interests of justice to do so;
(b) there is a substantial risk that without such an order costs will be disproportionately incurred; and
(c) it is not satisfied that the risk in subparagraph (b) can be adequately controlled by –
(i) case management directions or orders made under this Part; and
(ii) detailed assessment of costs.
(6) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including –
(a) whether there is a substantial imbalance between the financial position of the parties;
(b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;
(c) the stage which the proceedings have reached; and
(d) the costs which have been incurred to date and the future costs.
(7) A costs capping order, once made, will limit the costs recoverable by the party subject to the order unless a party successfully applies to vary the order. No such variation will be made unless –

6.8 A Costs Management Order (CMO) enables the court to control the parties' expenditure throughout proceedings. If a party's costs are above a certain margin outside the agreed or approved budget, excess or disproportionate costs will not be recoverable.

6.9 The object of the rule is to enable a receiving party to recover part of his expenditure on costs before the potentially protracted process of carrying out a detailed assessment[5].

6.10 The question of costs is dealt with at the case-management conference. The idea is that case management and costs budgeting will be interrelated concerns. For example, it may reduce the level of disclosure to be provided or may order the parties to appoint a joint expert instead of them having an expert each.

6.11 Lord Justice Jackson recently reviewed the operation of costs management in England and Wales[6] and noted that costs management has the following advantages:

- the parties know where they stand financially;
- costs management encourages early settlement;
- costs are controlled;
- attention is paid to costs at the outset of proceedings;
- the case management conference is made more useful — it is now more likely that the judge 'takes a grip on the case, identifies the issues and gives directions which are focused upon the early resolution of those issues';
- elementary fairness;
- costs management prevents legal catastrophes (that is, that management prevents losing parties from being destroyed by costs[7]).

(a) there has been a material and substantial change of circumstances since the date when the order was made; or
(b) there is some other compelling reason why a variation should be made.

[5] The proper approach is set out in the commentary at page 64 of the *Civil Procedure: The White Book: Fourth Cumulative Supplement to the 2015 Edition*. As is noted in the commentary: 'Necessarily, the determination of a reasonable sum involves the court in arriving at some estimation of the costs that the receiving party is likely to be awarded by the costs judge in the detailed assessment proceedings or as a result of a compromise of those proceedings. In a case of any complexity, the evidence and submissions arguably relevant to that exercise may be extensive. The court has to guard against the risk that it may be drawn into costly and time-consuming satellite litigation. There is no rule that the amount ordered to be paid on account should be the irreducible minimum of what may be awarded on detailed assessment (Gollop v Pryke, November 29, 2011, unrep. (Warren J)).'

[6] In the Harbour Lecture on 13 May 2015.

[7] The same could be said of litigation concerning a fund — that costs management prevents the fund being destroyed by litigation.

6.12 Lord Justice Jackson also outlined the main objections raised to costs management:

- lawyers now spend more time debating costs and less time on the issues in dispute;
- most cases settle, so what's the point of budgeting?
- costs management requires disproportionate front-loading of costs;
- some litigation is complex and you don't know when that will happen.

6.13 Of perhaps more interest are the problems that Lord Justice Jackson recognised had arisen in England and Wales:

- judicial inconsistency with respect to the level of detail in which costs budgets are examined;
- unduly long hearings and micromanagement;
- variation in forms of costs management orders issued by different courts;
- delays and backlog in dealing with costs management hearings;
- no effective mechanism for dealing with costs already incurred;
- inconsistency between courts as to when budgets are filed and exchanged;
- where cases proceed to detailed assessment, it can be difficult to marry up the approved budget with the final bill of costs.

6.14 Costs concerns have also led to amendments to the Rules of Court in Australia but the system is somewhat more flexible in that it is within the discretion of the judge to order costs budgets disclosure if the court considers it appropriate[8].

Discussion

6.15 We have anxiously considered whether in Northern Ireland we should adopt a system of costs management as in England and Wales, or should adopt an alternative system, perhaps such as one that requires disclosure of a statement of costs incurred and budgeted for the detailed review of the case, as in Australia. This question cannot be considered in isolation from the overall question of the manner in which the court will exercise its case-management powers, and the stage at which those powers are exercised.

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[8] Section 37N of the Access to Justice (Civil Litigation Reform) Amendment Act 2009 provides:
'37N Parties to act consistently with the overarching purpose
[…]
(3) The Court or a Judge may, for the purpose of enabling a party to comply with the duty imposed by subsection (1), require the party's lawyer to give the party an estimate of:
(a) the likely duration of the proceeding or part of the proceeding; and
(b) the likely amount of costs that the party will have to pay in connection with the proceeding or part of the proceeding, including:
(i) the costs that the lawyer will charge to the party; and
(ii) any other costs that the party will have to pay in the event that the party is unsuccessful in the proceeding or part of the proceeding.'

6.16 We have had the inestimable benefit of members of our Review Group meeting senior judges in the High Court in London who generously gave of their time and experience to discuss this concept. We are satisfied that while the concept may be appropriate for that jurisdiction, it is unsuitable for Northern Ireland for the following reasons:

- What is a reasonable sum on account of costs will have to be an estimate dependent on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment. Thus there will always be an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment.
- A reasonable sum would often be one that was an estimate of the likely level of recovery subject to an appropriate margin to allow for error in the estimation. This will have to be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.
- In determining whether to order any payment and its amount, account needs to be taken of all relevant factors, including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser amount and, if so, what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment[9]. Moreover, consideration might also have to be given to factoring in the cost of 'cost budgeting' experts who carry relevant insurance in unusually complex or high-worth cases.
- The introduction of costs budgeting and costs capping could well serve to add an additional layer of bureaucracy to the duties of the Commercial Judge and their staff. The danger is that the focus of practitioners in the Commercial Court will become costs-centred as opposed to resolution-centred. Moreover, courts potentially could get clogged up with time-consuming costs hearings.

6.17 Such a task is, therefore, somewhat complex and uncertain. Judges in Northern Ireland, particularly those appointed from the Bar, are quite unused to such issues. In any event, the usual level of claims here is such that it is quite unnecessary and liable to add another layer of expense, time and even satellite litigation, which we do not require.

6.18 That said, we are of the view that there is much to be said for the Australian approach and it would be beneficial to have a rule permitting it in exceptional circumstances — for example, in small cases where, at the case-management stage, it is obvious costs are getting out of proportion or in some personal litigant cases it could be a useful tool to bring some reality into the thinking. Hence, we suggest an

[9] Relevant authorities were reviewed by Christopher Clarke LJ in Excalibur Ventures LLC v Texas Keystone Inc. & Ors [2015] EWHC 566 (Comm), February 3, 2015, unrep.

amendment to the rules along the Australian lines. In coming to this conclusion we do not ignore the views of the Bar Council who have raised the concern that decision making by a court should not be influenced by cost considerations and the potential risk of detailed cost estimates by parties becoming a defining factor in progressing a case at the case-management stage. However, we are satisfied that efficiency, cost concerns and affordability are part of the system of modern justice. Proportionality in costs has to be a relevant factor in appropriate instances at the case-management stage.

6.19 We consider that many of the advantages identified by Lord Justice Jackson in the Harbour Lecture can be attained by a requirement that *the parties* provide a budget of their costs at the detailed review of the case. The review would need to be held at a time before the parties have incurred significant cost, but should not be held before the parties have had an adequate opportunity to identify the issues in the case, and consider their proofs. The purpose of providing a costs budget would be to allow the parties to consider whether limiting discovery, using a court-appointed expert, or a joint expert in place of opposing experts, would be appropriate in light of the value of the claim or fund. The court would take the costs budget into account in its active management of the case, rather than micro-managing the costs budget of the parties.

6.20 A costs budget would stand as a budget, rather than a binding prediction of costs. However, a budget would be likely to have significant weight in a taxation of costs at the end of the proceedings. A heavy onus would be placed on legal representatives seeking to justify the costs that were in excess of their budget.

6.21 It seems that many of the problems identified by Lord Justice Jackson arise from the costs management part of the English courts' function, while the benefits can largely be obtained from having the parties prepare a costs budget or prediction for review.

Summary assessment of costs

6.22 It is submitted that greater use could be made of summary assessment of costs in interlocutory matters, whether dealt with by the Master or by the judge. At present, counsel's fees for dealing with interlocutory matters are the subject of a practice direction issued by the Taxing Master. It ought to be relatively easy to use this practice direction as the basis of a summary assessment for costs in straightforward interlocutory matters, or for wasted reviews.

6.23 Summary assessment means that an interlocutory costs order would be immediately enforceable, instead of the receiving party having to await taxation. Immediately enforceable costs orders would operate as a real sanction for non-compliance with orders and directions.

Fixed costs

CURRENT POSITION

6.24 In Northern Ireland, we are very familiar with the notion of a fixed-costs scale. It works extremely well in the county court, and the equity scale perhaps provides a lesson to us all in how scales can provide a measure of certainty to the professions and the public about how costs are to be generated and fixed. There are seven bands, initially based on value but with a general discretion for the judge to award a different band to reflect the work, complexity, etc.[10] The public are entitled to know what the price of justice will be before they embark on their legal odyssey.

6.25 In the High Court, there currently exists no fixed costs regime. However, in respect of a significant part of the civil workload of the High Court (*viz* personal injury claims) barristers invariably mark the brief fee that the non-statutory Comerton scale specifies for the action in question. This fee directly correlates with, and is proportionate to, the value of the case. In respect of solicitors, they invariably mark a fee somewhere in the range that is footed by the insurers' scale and headed by the Belfast Solicitors' Association (BSA) scale (again, two non-statutory scales). This fee similarly correlates with, and is proportionate to, the value of the case. Thus, there is arguably a high degree of predictability in respect of legal costs in personal injury actions before the High Court[11].

6.26 In respect of other civil work before the High Court, there exist no equivalents to the above non-statutory scales. However, the taxation process (or, more likely, the threat of taxation) arguably ensures that fees marked in those cases are appropriate (the independent Taxing Master having to be satisfied, in summary, that a claimed cost was incurred, that it was reasonably incurred, and that the amount claimed is reasonable). In practice, only a relatively small percentage of civil cases proceed to taxation.

6.27 Of additional relevance in this regard are the professional codes of conduct governing, respectively, barristers and solicitors. For example: —

- Section 32.1 of the Bar Code of Conduct provides as follows:

  'It is improper for a barrister to mark an excessive fee. A substantial reduction on taxation of the fee marked may be deemed to be *prima facie* evidence of professional misconduct'.

- The Solicitors Practice Regulations 1987 (as amended) provide that a solicitor shall act 'in accordance with the International Code of Ethics of the International Bar Association', which includes the following provisions:

  '17. Lawyers shall never forget that they should put first not their right to compensation for their services, but the interests of their clients and the

[10] Part viii appendix 2 of the County Court Rules.

[11] This has been recognised for many years. See, for example, the article by Owen Catchpole in *Legal Week* dated 6 May 1999.

> exigencies of the administration of justice. … Lawyers' fees should, in the absence or non-applicability of official scales, be fixed on a consideration of the amount involved in the controversy and the interest of it to the client, the time and labour involved and all other personal and factual circumstances of the case'.

- The *Solicitors (Client Communication) Practice Regulations 2008* already oblige solicitors to give an accurate and clear estimate of the total professional fee to be charged for the work.

Discussion

6.28 As we indicate later in this chapter under the heading of 'Responses' we have received conflicting views on the issue of advisability of introducing fixed costs into the High Court.

6.29 The main arguments that emerged against fixed fees in the High Court can be summarised as follows:

- The difficulties in encompassing a fixed-scale fee approach should not be underestimated, given the complexity and variety of cases with which solicitors, barristers and other experts have to engage.
- Recently, the President of the Law Society in England voiced concern that a fixed-fee tariff for experts in clinical negligence cases will result in the leading clinicians refusing to participate to the detriment of plaintiffs on legal aid. However, tariffs have been fixed by the Legal Services Agency in relation to medical experts and it seems to work tolerably well.
- They could deny access to justice if the fixed costs offered did not represent reasonable remuneration for more complex cases.
- Fixed costs would only address legal costs, and would not address the costs of expert witnesses, which are often a considerable part of the costs of complex litigation in the commercial list or Chancery Division.
- It is difficult to apply an *ad valorem* scale to litigation other than a debt or damages claim, which could pose difficulties in applying a fixed-costs regime to much litigation in the Chancery Division.
- There is no real data or research to illustrate that there is any professional or public appetite for changing the status quo.
- High Court civil costs are in many cases predictable, they are generally proportionate to what is at stake, and there exists the facility to have the costs considered by an independent Master/judge who will rule on their appropriateness. The small number of cases, relative to the overall number of civil cases before the High Court, that are taken to taxation rather suggests that the fees being claimed, even outside the areas where the three aforementioned non-statutory scales exist, are not disproportionate or excessive.

- Fixed costs in the county court generally work well because of the nature of the civil justice system in the county court. In short: no very valuable cases come before the county court, relatively few cases are very complex, much less time is spent on interlocutory matters, pleadings, skeleton arguments, etc., and the hearings tend to be quicker and less formal than those before the High Court.
- Contrast the High Court, which usually deals with complex cases. A fixed-costs system in respect of High Court cases (presumably based upon the value of the claim or the sum awarded) could lead to lawyers being inadequately remunerated in cases that, for example, have a low value but involve complex and/or novel legal issues or very complex expert evidence. Building an exceptionality provision into a fixed-costs system would be unlikely to cure this problem, particularly if the determination of whether a case was exceptional was deferred until its conclusion. Rather, an exceptionality provision would in all probability simply create large amounts of satellite costs litigation.
- Defendants with deep pockets may seek to take advantage of any fixed-costs regime by engaging in a war of attrition so that, for the plaintiff's lawyers, the case becomes uneconomic[12].
- The argument that it is unfair for the professions to draw up their own scale of fees is met by the provisions of the code of conduct governing each branch of the profession and the availability of taxation before an independent judge, the Taxing Master. The Comerton scale at least is approved upon each revision by the Taxing Master so as to ensure that it is reasonable.

6.30 The main arguments that emerged in favour of fixed fees can be summarised as follows:

- It provides for transparency and proportionality, and avoids delays in taxation of costs.
- It offers certainty for clients and sets targets for practitioners. It would serve to focus on litigation within a fixed timescale. This could well inure to the benefit and profitability of solicitors by ensuring litigation was completed in timely fashion.
- It inevitably would reduce the need to invoke the taxation process and speed up payment of costs and reduce taxation fees.
- It has worked remarkably well in the county court, and the banding system in equity costs is a standing monument as to how a fixed-costs

[12] The *Law Society Gazette* for 25 February 2016 contained an article regarding Master Cook's view that the plan to push ahead with fixed costs in clinical negligence cases worth up to £250,000 in England & Wales was 'profoundly worrying'. The article contained an extract which illustrates how defendants with deep pockets can wear down plaintiffs whose lawyers are confined to a fixed fee.

system with inbuilt flexibility to reflect complexity, etc. can effectively work.

- They reflect the current public demand and the legal recognition of the need for transparency, predictability and accountability. In few if any other walks of life does a client purchase services without being fully aware in advance what the end cost will be. Why should the law be different?
- Scale fees are on the cusp of being introduced in the Family Division in the High Court. Why should it be different in other divisions?
- The existence of a possible conflict of interest if lawyers are involved in setting the non-statutory scales for their own fees[13].
- The former Master of the Rolls in England, Lord Dyson, in the context of clinical negligence fees, recently captured the mood of the times when he called for the scope of fixed fees to be extended to deal with costs that are 'just too high'[14]. The points he made on that occasion are worth restating, namely:

  (i) The quality of service provided by solicitors delivering civil justice was impressive, but who can afford it?

  (ii) The scope of fixed costs in litigation in England should be extended to include all fast-track cases and all cases in which he referred to as 'the lower reaches' of the multi-track.

  (iii) The government has, in principle, agreed to extend the scope of fixed costs, saying 'It's going to happen. It's going to take a long time. It will be subject to consultation. I suspect there may not be too much resistance to the principle of extending fixed costs.' However, it is worth noting that the government very recently conceded that it would not meet its 1 October 2015 timetable for introducing fixed recoverable costs in clinical negligence cases.

  (iv) The fixed costs would also reduce the need for costs budgeting. Lord Dyson said 'I am horrified that costs litigation is now a recognised specialism'.

6.31 I prefer the arguments set out above in favour of fixed fees in the High Court, subject to the provisos mentioned below. Coursing through my preference is not only my commitment to the desirability of increased transparency concerning the costs incurred in litigation at all stages of the process but also my recognition, over the years, of the undoubted success of the Equity banding scale in the county court.

6.32 I am attracted conceptually by the idea that fixed costs could be applied by reference to, say, four bands, depending on the value or complexity of the case, echoing implementation of such a system in equity civil bills in the county court. The

[13] The Legal Aid Agency draws an analogy between this and the fact that the Appropriate Authority (the body that formerly decided costs in non-standard criminal legal aid cases) was criticised in a Northern Ireland Audit Office report of 29 June 2011 in respect of a conflict of interest because 75% of its panel were lawyers.
[14] Speech to the Leeds Law Society May 2016.

judge would determine the relevant band at the end of the case if it could not be agreed. Indeed, with the current emphasis on early reviews and case-management hearings, there is no reason why, in some instances, the judge could not make a provisional indication of the appropriate band. This could be used rather than an *ad valorem* scale in proceedings in, for example, the Chancery Division. The use of such scales will be familiar to practitioners from the procedure in the county court, particularly in the field of equity civil bills. Any fixed costs would need to be the subject of consultation and negotiation with the profession.

6.33 The detail of any scale of costs would need careful consideration. Care would need to be taken to identify the appropriate events at which different fees become payable. The detail of the proposed fees at each stage of an action would need to be considered to ensure that those scale fees represent reasonable remuneration for practitioners, and do not act as a perverse incentive to delay settlement to a later stage of proceedings in the hope of a greater reward. In introducing and setting the level of such costs, anxious scrutiny would also need to be applied to ensure that such a scale would not be criticised by lay clients as anti-competitive, particularly if such a scale had the effect of dictating solicitor-client costs as well as party-party costs.

6.34 Finally, there was one area in this sphere where there was universal agreement and that was on expert evidence. This is at least one aspect of the current system where costs can be somewhat unpredictable and where, on occasions, costs can become disconnected from the value of what is at stake. We address this problem in more detail under the heading of 'Experts' in chapter 11. Thus, for example, case-management reviews need to be focused upon the need for expert evidence and/or the cost of same (including expert costs budgeting). Courts should encourage, where appropriate, the use of joint experts and concurrent evidence.

Responses to fixed costs

6.35 During the course of our considerations and in the responses to the preliminary civil justice review, differing views have emerged on the advisability of introducing fixed costs into the High Court. The Law Society and the Belfast Solicitors' Association are not against fixed costs in principle but caution the need for further research. They suggest such arrangements may be suitable at appropriate levels for standard cases but not appropriate for non-standard cases and in any event should not be compulsory.

6.36 The Bar Council is also cautious about the concept questioning the basis for four bands of fixed fees suggested in this Report in terms of how a system will be operated in practice and preferring, if the recommendation is to be taken forward, two tiers reflecting both standard and non-standard cases alongside a provision for exceptionality in both instances. It urges that in standard money damages cases the current advisory guidance could be implemented with provision for increases in line with inflation as appropriate. It proposes an uplift at the discretion of the judge or Taxing Master in respect of those cases falling into the standard tier that are deemed to be of exceptional complexity or where the system does not adequately reflect the

work carried out by a legal representative. Non-standard cases could be dealt with through the use of the currently accepted 50% uplift for counsel and the Taxing Master's advisory guidance in the High Court for personal injury cases.

6.37 The Association of Personal Injury Lawyers did not oppose a move to create more certainty in costs but felt that a full review would be needed to ensure that the fees were set at the right level with provision made for regular inflationary increases and three-yearly reviews.

6.38 On the other hand, all of the insurance industry responses were in favour of the concept of fixed fees in the High Court.

6.39 We question the need for any further research on this issue. We have the English precedent. More importantly the fact of the matter is that the county court has worked extremely well for many years on a fixed-costs basis and it is difficult to see why a similar system, with some inbuilt flexibility, could not profitably be introduced into the High Court.

Conditional fees, cost shifting and insurance

CURRENT POSITION

6.40 Law Society regulations currently prohibit solicitors in this jurisdiction from working on a no win, no fee basis. There is no statutory basis for conditional fee agreements (CFAs) under Northern Irish law[15]. By way of contrast, CFAs, including a success fee element, are allowed in England and Wales.

6.41 Qualified one-way cost shifting (QOCS) is a very new development in England and Wales under Part 44 of the Civil Procedure Rules 1998. In summary, an unsuccessful claimant in certain classes of civil claim (personal injury, fatal accidents, etc.) will not be exposed to the costs of the victorious defendant save in certain limited circumstances[16]. This represents a radical departure from the general principle that the 'loser' pays. There is currently nothing similar to QOCS in this jurisdiction. In terms of their practical effect, this is best summed up as 'extend(ing) statutory legal aid cost protection to non-legally aided clients'[17], albeit subject to significant exceptions[18]. The Bar Council is of the view that this concept is worth consideration, as legal aid expenditure continues to reduce the protection given to unsuccessful litigants. The Association of British Insurers are concerned that QOCS could lead to an increase in unmeritorious claims but generally the feeling is that some more detail about this concept is required.

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[15] Section 58 of the *Courts and Legal Services Act 1990* did not extend to Northern Ireland (see s. 123 of the Act in this regard) and s. 58(3)(b) expressly provided that a conditional fee agreement 'must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement'. Although the *Access to Justice (Northern Ireland) Order 2003* made provision for conditional fee agreements, the relevant articles were never commenced. In the recent case of Baranowski v Rice [2014] NIQB 122 Mr Justice Stephens held that fees under a conditional fee agreement were irrecoverable under Northern Irish law unless sanctioned by statute.

[16] Defined by parts 44.14, 44.15, and 44.16 of the CPR

[17] *Access to Justice 2*, chapter 22, para 22.16.

[18] As provided by parts 44.14, 44.15, and 44.16 of the CPR.

6.42 After-the-event insurance (ATE) in respect of liability for legal fees is encountered relatively infrequently in Northern Ireland. This may be because the premiums payable are not recoverable from the losing side. However, it is the experience of those practitioners who *do* encounter ATE policies in this jurisdiction that the premiums payable are very large and that this can act as a bar to the resolution of otherwise resolvable civil disputes. Up until 1 April 2013, ATE premiums were recoverable from the losing side in England and Wales.

6.43 The Stutt Report[19] sets out the reasons why its author believes there should be a move in this jurisdiction at this time to copy the new (2013) English system of CFAs and QOCS. Chief amongst these reasons are: (a) further restrictions in the scope of legal aid and (b) the author's speculation that persons on a 'middle income', who are financially ineligible for legal aid but who would be a mark for costs if they lost a claim, have no effective access to civil justice[20].

Discussion

6.44 Once again there was a division of views in our committees on these issues.

6.45 The arguments against the introduction of these fresh costs measures can be summarised as follows:

- This constitutes an attempt to impose upon this jurisdiction changes that were only ever intended to resolve a particular problem experienced in England and Wales[21].
- CFAs have the potential to place lawyers in a position of a conflict of interest with their clients by giving lawyers a significant financial interest in the outcome of the case. For example, at present a fee is payable whether the case is won[22] or lost, albeit that the level of fee may depend upon the amount of the settlement or award in court. However, a system that only rewards lawyers if a case is won will increase the chances of lawyers settling (so as to secure their fees) cases that ought (in the best interests of their clients) to be run.
- In a world where CFAs are the norm, there exists a real risk that access to justice for those plaintiffs with more difficult and complex cases will be impeded rather than enhanced. For example, cases involving high early investigation costs, cases with complex and disputed liability issues, and cases on emerging or novel points of law may very well be viewed by many lawyers as an unreasonable commercial risk.

[19] *Access to Justice 2* (ATJ2), at chapter 22.
[20] See para 22.4 of the Report at p. 192.
[21] The Stutt report at para 22.12 records that Lord Justice Jackson's *Review of Civil Litigation Costs* (which led to the current England and Wales CFA and QOCS regime), was a response to the fact 'that something had gone terribly wrong with costs in England and Wales'. Additionally, see also paragraphs 5 and 6 of the Bar's formal consultation response regarding *Alternative Methods for Funding Money Damages Claims*.
[22] By 'won' we mean either a victory in court or a settlement in favour of the claimant.

- The suggestion that a success fee, if allowed as part of a CFA model, should be payable from a plaintiff's damages is an idea that many lawyers find repugnant. The fundamental objective of an award of damages is to compensate the plaintiff for pecuniary and non-pecuniary losses sustained as a result of the defendant's wrong doing. Any CFA regime in which a success fee is payable from the plaintiff's damages significantly undermines this fundamental objective. Accordingly, both the Bar and the Law Society in the first instance believe that, if CFAs with success fees were to be introduced, the success fee should be payable by the losing defendant.
- It seems very likely that under any CFA system that provides for success fees there will be an increase in disputes regarding those fees, whether by way of taxation proceedings or otherwise leading to satellite litigation. This has certainly been the experience in England and Wales over the last decade or more.
- The Bar Council is against CFAs and is of the view that legal aid should remain for money damages cases. If CFAs are to be allowed in this jurisdiction, then it is the view of the Bar that they ought to be recoverable only from the losing defendant but, if that is not accepted, that recovery from a plaintiff should be capped at 20% of general damages up to an agreed limit.
- The costs protection provided by QOCS under Part 44 of the CPR is *significantly* limited. The most frequent example of when a plaintiff will likely have to bear some or all of the losing defendant's costs is when that plaintiff fails to beat a defendant's Part 36 offer (or, presumably, our NI equivalent of a lodgement). The result of this is that it is still necessary to obtain ATE insurance and the premium for this cannot, under the current England and Wales model, be recovered from the losing defendant. Thus, it is questionable whether the QOCS regime, when subjected to a more than merely superficial analysis, truly facilitates any greater access to civil justice.
- The Stutt Report endorses, at paragraph 22.24, the abolition of the indemnity principle because of its alleged capacity to generate satellite litigation. It has not been the experience of the Bar that the indemnity principle has ever given rise to any significant volume of litigation. However, this stands in stark contrast to the huge volume of satellite litigation that has been generated in England and Wales in respect of Part 36 and CFAs, and which, in all probability, will be generated in respect of QOCS. In this regard, it is obvious that the exceptions to the QOCS costs protection that are contained in Parts 44.14, 44.15, and 44.16 of the CPR are likely to generate disputes[23].

[23] For example the exceptions to the QOCS costs protection that are contained in Parts 44.14, 44.15, and 44.16 of the CPR are likely to generate disputes regarding whether a claim was 'fundamentally dishonest', 44.16(1), whether the plaintiff had 'no reasonable grounds for bringing the proceedings', 44.15(a), whether the

- The Bar is not in favour of QOCS. However, if a system of QOCS is introduced then it would have to be very carefully designed and implemented. A plaintiff could only be liable for the costs of a defendant in very limited circumstances in order to avoid uncertainty and the potential for a large volume of satellite litigation, for example, for fraud or acts in bad faith.
- The Law Society position overlaps with that of the Bar summarised above[24].
- Legal aid should remain available for money damages cases.
- If, in the alternative, CFAs and QOCS are being introduced, then the abolition of the indemnity principle should be limited to personal injury litigation only and each area reviewed on its own merits.
- Success fees should be recoverable from the losing defendant. If, in the alternative, success fees are to be recovered from the winning plaintiff, there should be a general uplift in the award and deduction from general damages only, subject to a cap. Success fees must be available in road traffic accident (RTA) cases.
- In terms of QOCS, the loss of the 'costs shield' must be very narrowly construed and clearly defined. Failure to beat a lodgement or Part 36 offer should not result in elimination of a plaintiff's damages; some costs protections are essential.

6.46 The arguments in favour of the introduction of these fresh costs measures can be shortly summarised as follows:

- The concept of no win no fee has been in regular use in Northern Ireland for decades by a number of solicitors who selflessly take on cases on the basis that the client will not be responsible for their costs (other than the opposition costs) unless the case is won. The majority of cases settle successfully and so the system has worked relatively seamlessly for years. Why should that not now be recognised rather than opposed at a time when even more plaintiffs may wish to avail of it with the diminution of legal aid? In short, CFAs will continue, irrespective of the current opposition.
- Lord Dyson recently recognised the argument for CFAs to promote access to justice when he said 'you have to be pretty desperate or very rich to be willing to engage lawyers in the time-honoured way, being charged at an hourly rate, with no cap and simply not knowing what you are committing to'.

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proceedings were 'an abuse of the court's process', and whether the conduct of the claimant, or a person acting on his behalf with his knowledge, or was 'likely to obstruct the just disposal of the proceedings 44.15(c)(ii)'.

[24] It is largely that set out in the Law Society's detailed paper of February 2016 in response to the consultation exercise concerning *Alternative Methods for Funding Money Damages Claims*.

- There now is an opportunity to introduce controls — for example, limits on percentage costs, etc. — on the unregulated system of CFAs that currently exists in order to ensure protection of the public.
- CFAs and QOCS will increase access to justice. Recognised concerns associated with costs wars/satellite litigation are unlikely to surface to any material degree in a small jurisdiction like this. This disposes of the desire, in some quarters, to await the out-workings of the Jackson reforms in England and Wales before making any changes here.
- The Association of Personal Injury Lawyers favours CFAs as the best option to replace legal aid so that plaintiffs can continue to retain 100% of their damages. It adds that ATE has not yet properly been developed in Northern Ireland and QOCS, if supplemented by ATE, may be an even better option. However, understandably, it draws attention to the uncertainty surrounding the circumstances in which the plaintiff may lose the protection e.g. when the claim is found on the balance of probabilities to be fundamentally dishonest[25].

6.47 Our view is that, unlike the issue of fixed fees in the High Court where the arguments are clear, much more work and research needs to be carried out in order to establish the potential for, and consequences of, changes by introducing in this jurisdiction conditional fees, qualified cost shifting and after-the-event insurance.

6.48 This is a classic example of where we should hasten cautiously and scrutinise the outworking and experience of other jurisdictions before we make our own determinations. If some of these measures were introduced, who should bear success fees, what percentage uplift should be permitted, when should QOCS costs protection be lost, should damages be a permissible source of increased fees, is satellite litigation a real risk and how inviolable is the principle that lawyers should not have a financial stake in the outcome of litigation are but some of the issues that need more detailed analysis? Moreover, a change to allow CFAs and QOCS would require substantial legislative change as well as changes to the Rules of Court and such changes would need to be more evidence-based than we believe to be the current situation.

6.49 Perhaps any such proposed changes would first merit a pilot scheme — for example, with CFAs being introduced for a period of time in respect of a specified class of county court proceedings and with the success fee to be applied, possibly, as a percentage uplift in the scale fee recoverable by the winning party.

6.50 Introduction of these costs measures is therefore not without complexity. We consider that they do invite further more detailed discussion and consultation. We believe that a body such as the Civil Justice Council, if introduced, or the Lord Chief Justice in the next twelve months should commission a group led by a High Court judge to explore the possibilities for introduction of these costs measures.

[25] Brighton and Hove Bus and Coach Company Ltd v Brooks & Ors [2011] EWHC 2504 (Admin); Creech v Severn Valley Railway (unreported) [2015] and Oana v O'Duinn (unreported) [2015].

Responses

6.51 The responses to conditional fees, costs shifting and after-the-event insurance have largely been covered in the foregoing paragraphs. We discern in the responses we have received support for our proposal that these aspects of costs require further consideration and approval for our proposal that the matter should be considered by a High Court judge-led group to explore these possibilities in the near future.

Third-party funding

CURRENT POSITION

6.52 The law of champerty had impeded the development of third-party funding in Northern Ireland.

Discussion

6.53 However, as the law of champerty has now been abolished in Northern Ireland as in the rest of the UK[26], third-party funding represents a potential alternative to legal aid and, subject to the terms and conditions attached to such funding, could facilitate access to justice for members of the public.

6.54 Third-party funding appears to have worked well in England and, given its apparent success in matrimonial and other claims, there is no reason to believe that it would not represent a viable alternative in support of certain defamation actions, provided that the financial implications and consequences are fully explained to the plaintiff.

6.55 An issue that will arise will be as to the anonymity of such third parties. In 2015, the Ministry of Justice consulted on proposals to provide courts with financial information to help decide how to award costs in judicial review cases. The Ministry confirmed in July 2016 that it hopes to introduce a declaration model it believes will strike an appropriate balance between providing the court with useful information and avoiding placing claimants under too onerous a duty to reveal details about the financing of their applications. It invited further views on a proposal to provide

[26] The abolition of champerty under the *Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968.* There appears to be no apparent restriction on third-party funding in Northern Ireland, in line with the position in England and Wales. In the latter jurisdiction, third-party funding has been successfully introduced for the benefit of both claimants and defendants, in providing plaintiffs access to justice and defendants a mark for recovery of their costs in the event of a successful defence of a claim. The funding options have recently been extended to lower-value claims and to groups of claims handled by individual law firms.
Although the law of champerty still remains an obstacle to third-party funding in the Republic of Ireland, this has recently been brought before the courts and a judgment in relation to the issue is awaited in the case of Persona Digital Telephony Ltd & Sigma Wireless Networks Limited v Minister for Public Enterprise & Denis O'Brien on 25th July 2016. The Irish Supreme Court, in a 4-1 decision, decided that a third party funding agreement between a plaintiff and an English third party funder, Harbour Litigation Limited, is contrary to the laws on maintenance and champerty under ancient statutes from the 14th century to the *Maintenance and Embracery Act 1634*. The statutory prohibitions on maintenance and champerty have not been repealed in Ireland albeit no criminal prosecution has been brought under such statutes since the foundation of the State. However the court expressly indicated disquiet with the current legislative position.

detailed financial information to defendants and interested parties at the same time it is provided to the court, ensuring equality of arms.

6.56 Responding to the proposal, the Law Society of England and Wales said the provision of financial information to defendants or third parties, including the identity of any third-party funder, should be only in exceptional circumstances. Financial information should be disclosed at the court's discretion only in the event that the claimant cannot meet its liabilities at the end of the case, the society said. The court must also be satisfied that the defendant/interested party has provided sufficient grounds demonstrating justifiable concern that the contributor was exerting control over the litigation.

Court fees

CURRENT POSITION

6.57 We are conscious that there is a civil fees project ('the project') being carried out by the Northern Ireland Courts and Tribunals Service (NICTS). This project began in July 2015 and carried out a review of existing court fees in the civil and family business areas, some of which had not increased in over 10 years. This work culminated in a three-year phased increase to court fees, which commenced on 1 April 2017, when a 10% increase was applied to all fees. The project continues to examine other aspects of fee charging in civil and family business and will look at the introduction of new fees, examine areas where fees have not been reviewed since the 1990s and examine other areas of the business where fees are currently not charged. The civil fees project team has been looking at the requirement to achieve a full cost recovery position in civil and family court fees as outlined in *Managing Public Money Northern Ireland*. This principle of full cost recovery is current government policy. In essence, the aim is that the full costs of running the civil and family courts will be met by fees charged for providing the service.

Discussion

6.58 We are content to defer to the current NICTS project save that we add two cautionary notes. First, the scale of court fees can act as a real impediment to access to justice. Arguably, this has happened in England and Wales. The Registry Trust, a not-for-profit body that compiles statistics on judgments, has admitted soaring court fees in England have contributed to the steady decline in debt rulings against businesses. Figures compiled by Registry Trust show that there were 42,091 county court judgments (CCJs) recorded against businesses in England and Wales during the first six months of 2016, a 19% fall year on year. The total value of CCJs was £149m, a decrease of 12%. Though the total number and value of CCJs fell to its lowest since before the financial crisis of 2008, the average value rose by 8% to £3,550. The number of High Court judgments fell by 50% compared with the first half of 2015 to 33. With the total value rising 36%, the average value increased 27% to £644,000. Care must be taken to avoid similar consequences in this jurisdiction.

6.59 Secondly, we draw attention to a concern that the current emphasis on early negotiations and resolution is bringing about an unintended consequence for NICTS

in terms of lost revenue. For example, in 2015 3,447 writs were issued of which 848 were set down for hearing. A large number of actions are disposed of before being set down (given that the figure for writs issued in the previous year was greater). Out of the 848 that were set down in all the divisions, the numbers set down in the commercial list were 69 and in Chancery 44. The balance of the actions set down is 746 which were in the Queen's Bench general list, which averages just under 40 per week.

6.60 The number of reviews held in each division is not reflected by these figures. Those reviews are achieving their objectives in that actions are disposed of prior to setting down. There is no NICTS charge for a review.

6.61 However, there are clearly a number of cases that have been listed for hearing which have not been set down. This must be so as it is clear that the lists in the Commercial Division and in Chancery are far greater than 69 and 44 respectively. This is a loss of income to NICTS. It should be addressed by ensuring that the date of setting down is before, the same date as, or shortly after, the date upon which the action is listed for hearing. In short, the obligation of setting down must be a condition of the trial date dates being reserved. As part of trial directions from the case-management review the judge may determine that the parties have seven days (or such other period as the judge shall determine) to confirm that the trial dates suit and that the action is set down. In the event that a case is not set down on the date so designated by the court, the case shall be removed from the list and consideration shall be given to striking out the proceedings.

6.62 In the Republic of Ireland, all documents lodged attract a court fee, whether initiating document, affidavit, notice of motion or other document. An application to enter the commercial list is the **only** notice of motion that envisages paying for additional value in the system. That fee is €5,000 compared with €60 for a regular notice of motion. There is no other case-management fee, other than a relatively recent €60 to make an ex parte application[27].

6.63 In England and Wales, similarly, fees are payable for stages prior to a case management role by the court[28].

Responses

6.64 The Association of Personal Injury Lawyers makes the valid point that an ordinary person should not be barred from using the courts because they cannot afford the necessary fees, especially if they have already contributed to the running of the system through the payment of tax. We consider this is a valid argument to make and one that should be borne in mind in this jurisdiction.

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[27] http://www.courts.ie/courts.ie/library3.nsf/pagecurrent/86F3E130183672A080257FB2003DD36A?opendocument&l=en#S1Part4

[28] CPR Part 29 Multi-track.

Proportional cost orders

6.65 The courts in Northern Ireland, exercising their broad discretion on the issue of costs under Order 62 rule 3(3) of the Rules of the Court of Judicature (Northern Ireland) 1980, have been prepared to make costs orders that reflect the conduct of the parties and/or the issues raised[29]. However, there is no statutory or regulatory rule governing the matter**.** The emphasis in England and Wales on this issue of costs is somewhat different from that in Northern Ireland. The provisions of Civil Procedure Rule (CPR) 44.3(2)(a) have preserved the longstanding presumption that a successful party would get their costs, but the whole tenor of CPR 44.3 is that this is only the starting point in any decision about costs and that success alone would rarely be the sole determining factor of liability unless there were no countervailing circumstances of the kind specified in CPR 44.3(4). The appropriate exercise of the discretion under CPR 44.3(2) requires the court to identify what the real issue between parties has been and reflect that in the costs order that it would make. Thus, for example, part 44.3(4) makes express provision for an award of costs in light of the conduct of the parties, whether a party has succeeded on part of the case and Part 36 orders. Northern Ireland has not introduced the CPR Rules. We recommend that such a rule mirroring CPR 44 be introduced into our rules in Northern Ireland to make this issue crystal clear.

Responses

6.66 Whilst the insurance industry response has favoured the introduction of a CPR 44, a number of the professional bodies, including the Bar Council, the Law Society, and the Association of Personal Injury Lawyers all express reservations about the need for a similar rule to CPR 44 that exists in England and Wales. The question is how a system can have both proportionality and fixed fees. The view has been expressed that Order 62 provides the courts with sufficient flexibility.

6.67 We feel that these arguments overlook the need for greater certainty and clarity in the criteria for making proportional cost orders and that a rule similar to CPR 44 provides precisely that degree of transparency that we consider to be missing currently.

Recommendations

1. Scale costs to be introduced in the High Court with four levels depending on complexity of claim, with scope for exceptionality. This requires legislative change. **[CJ13]**
2. Increased use to be made of immediately measured and payable costs for interlocutory proceedings, such costs to be determined by the judge or Master hearing the interlocutory application. **[CJ14]**
3. If scales and bands are not implemented, courts to consider the parties' costs estimates as part of case management. **[CJ15]**

[29] Hazlett v Robinson and others [2014] NIQB 17.

4. Amendments to the Rules of the Court of Judicature to be made to give effect to the first two of the above recommendations. **[CJ16]**

5. An amendment to the rules may assist with the implementation of the proposed third recommendation, though such a practice could be introduced under the court's existing powers of case management. **[CJ17]**

6. The Civil Justice Council, if introduced, or the Lord Chief Justice, in the next twelve months to commission a group led by a High Court judge to explore the possibilities for conditional fees, qualified one-way cost shifting and after-the-event insurance in light of experience elsewhere. **[CJ18]**

7. A new rule to be introduced to mirror, where appropriate, Rule 44 of the English Civil Proceedings Rules dealing with-issue based and proportional costs orders. **[CJ19]**

7

The overriding objective: an efficient and timely process

The overriding objective enshrined in Order 1 rule 1A of the Rules of the Court of Judicature Northern Ireland 1980 ('these rules')[1] is to deal with cases justly. An efficient and timely process lies at the heart of this objective and this chapter, recognising the need for these rules to be revised, sets out some immediate impediments that have surfaced in our discussions.

The Rules of the Court of Judicature (Northern Ireland) 1980

CURRENT POSITION

7.1 These rules are progressively becoming more and more out of date. The reference authority is the 1999 Supreme Court Practice (*White Book*).

Discussion

7.2 Whilst in the course of this Review we have recommended the implementation of a number of disparate extracts from the Civil Procedure Rules in England and Wales, there is a pressing need to revise and update our rules on a more holistic basis if we are to benefit from some of the undoubted advantages that flow from the more up-to-date English rules. There are a number of differences in respect of the same rules between Northern Ireland and England. The position was that it took between 1964 and 1980 to update our current rules. They continue to be informed by changes in England between 1980 and 2000. For the last 15 years we have not had enough volume of cases to bring to light the other aspects that need to be reformed. It has been well beyond the remit of this Review to carry out a comprehensive comparison of our rules with those in England and Wales. It will amount to a very extensive and intensive task but it is one we recommend be carried out by a separate body appointed by the Lord Chief Justice as a matter of urgency. In saying this we recognise that there are many of the English rules that add to costs and do not fit into the Northern Ireland context so any changes are going to require considerable care and involve staffing requirements.

Responses

7.3 We welcome the responses from the profession, which were consistently favourable to such an update and in particular we welcome the offer by both the Bar

[1] The overriding objective 1A. - (1) The overriding objective of these Rules is to enable the Court to deal with cases justly. (2) Dealing with a case justly includes, so far as is practicable - (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate to - (i) the amount of money involved; (ii) the importance of the case; (iii) the complexity of the issues; and (iv) the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

Council and the Law Society to contribute to the composition of any reviewing body and to the work to be carried out.

Pre-action protocols

CURRENT POSITION

7.4 It is clear that in litigation, fairness requires that each side must be able to make an objective and reasonable assessment of not only their own case but also the case put forward by the other side before any discussions can take place. No legal team is going to settle a claim without being able to fairly assess the strength and weaknesses of its own case and of the defence being put forward by its opponent.

7.5 In the modern era, the days of a party keeping his cards close to the chest and then surprising an opponent, or just as importantly, letting an opponent believe there is an ambush staked out, are, or should be, long gone. Today, quite understandably, it is cards face up on the table before any settlement negotiations can commence.

7.6 At present the process is necessarily slow. There is a perfunctory letter of claim. The service of the writ follows and this tells the defendant very little. The unilluminating statement of claim is often followed by an unhelpful defence and a notice for further and better particulars. Disclosure of medical evidence is followed by a request for records. If a claim for financial loss is made, there then follows a search for vouching documentation. Months, even years, can pass without either side having the necessary confidence that it can make a fair and objective assessment of the strengths and weaknesses of the other side's case, a prerequisite for discussions. Hence delay, uncertainty, postponed settlement discussions and increased costs.

7.7 The situation has been alleviated to a material extent by the invocation of pre-action protocol letters in various divisions in the High Court and county court but the contents and requirements therein need revisiting and strengthening.

7.8 There have been a number of new pre-action protocols in England and Wales dealing with clinical negligence, professional negligence, personal injury claims and defamation. In the pre-action protocol for personal injury claims, the original pre-action protocol had a number of key features, including the following:

- A letter of claim, providing the defendant with the information necessary to decide liability.
- A time limit for the defendant to make a decision on liability.
- Provision, where liability was admitted, for the defendant to be given information on quantum and then have a window in which to settle the claim, so as to avoid court proceedings.
- Clear timescales, which, if they have not been met by the defendant, would justify the claimant issuing court proceedings.

- Better provision of information, where liability was not admitted, so the claimant could properly assess the merits of any defence before incurring the costs of court proceedings, including reasons for any denial as well as any alternative case being put forward and the provision of documents relevant to liability.
- Joint selection of experts (reflecting the intention of the practice direction — pre-action conduct — for the parties to try and agree a single expert, not a joint expert, whenever possible).
- Encouragement towards alternative dispute resolution (ADR).

7.9 The new personal injury pre-action protocol contains a revised template for the letter of claim. The requirements for the letter of claim include the following:

- The letter does not require the claimant's National Insurance number to be given. Many practitioners have already been holding back details of this kind until the letter has been received and the relevant insured identified to minimise the risk of identity theft.
- The letter should state the functional limitations of the injuries suffered by the claimant. That will help the defendant to allocate the claim to the appropriate level of claims handler and also help assess rehabilitation needs.
- The letter should now identify the documents, from the standard lists in the protocol, considered relevant. This is intended to avoid the defendant having to spend time tracking down the necessary documents to provide by way of disclosure.

7.10 There is a template letter of response. Included in this letter are the following:

- The response should now help identify any parties against whom the claim should be directed.
- The letter provides standard wording, reflecting the terms of the protocol so there is no ambiguity about the nature of any admission of liability. There is a reference in admitted cases to the information about which medical experts the claimant proposes to instruct. It is worth emphasising this does not change the current practice of the claimant nominating a number of experts for the purpose of a joint selection, without being obliged to identify which experts are instructed.

Discussion

7.11 Our view is that a fresh mind-set is required of practitioners in the Queen's Bench Division (QBD) and elsewhere. The goal must be to achieve a fair resolution as early as possible in the process and, in doing so, keeping costs and expenses proportionate to the nature of the claim. Delay causes injustice, increases costs and breeds resentment.

7.12 It seems essential that there is more proper engagement early on in the process. This should require the plaintiff to fairly disclose the case they are making both in respect of liability and quantum. It also calls for the defendant to provide an open response, setting his cards on the table.

7.13 If the legal system in Northern Ireland wishes to create circumstances where early settlement is possible, then the QBD and the county court require new pre-action protocols that should incorporate the best features of England and Wales pre-action protocols and our own pre-action protocols. They should include cost penalties for those who fail to comply. These should include:

- A detailed letter of claim accompanied by the police report or the health and safety report (it makes sense to have a template that can be followed). We recognise that on some occasions police reports may not be readily available and the protocol will be complied with if a phrase such as 'we are obtaining a police report and will let you have a copy as soon as we receive it' provided of course that this is followed through.
- Disclosure of any medical reports.
- Disclosure of relevant medical notes and records.
- Disclosure of any vouching documents of financial loss.

Responses

7.14 As with virtually all of the contents of this chapter, the responses to this aspect were favourable. The Bar Council did raise one concern about the apparent encouragement towards ADR at this stage on the grounds that it was liable to delay the process. We fail to see the strength of this in that ADR is now a fundamental part of the system of civil justice and it should be embraced as one avenue of resolution at the earliest stage possible.

Court reviews

7.15 We record at this stage that we are in favour of reviews of all cases to be initiated not later than nine months after the *issue of the writ*. The rationale behind this proposal is that it will avoid cases becoming stuck in the system without apparent movement and will ensure that potential log jams are robustly addressed timeously.

Case-management hearings

CURRENT POSITION

7.16 The key to an efficient and timely process is identifying those cases that can be settled (and, of course, the vast majority of cases can and do eventually settle) and then giving the parties the necessary tools and encouragement to effect a settlement as soon as possible. With those actions that, for a variety of reasons, are incapable of being settled, the court's goal must be to arrange a trial as fairly, efficiently and as

speedily as possible while ensuring that the court's directions achieve a fair and just contest.

Discussion

7.17 The current thinking means that —

- The parties have to set out their cases clearly and fairly as soon as possible. Failure to do this will prevent either the parties or the judge from getting to grips with the case as soon as possible;
- There has to be limited discovery of 'necessary' documents early on to assess the strengths and weaknesses of the opponent's case;
- An early detailed case-management hearing (CMH) at which the judge should be able to give tailor-made directions is an imperative. It allows the judge to control the time to be given to the case, the limits of discovery, expert evidence, control of costs and possible ways of achieving resolution.

7.18 There should only be one CMH in most cases. It should take place within a specified timescale from entry of appearance, organised by the court at the very outset of any proceedings, with such subsequent case-management reviews as may be deemed necessary, and a pre-trial review (PTR) if required. The CMH will allow for full and detailed discussion both in and outside court. It is envisaged that such a hearing will require at least 15 to 40 minutes. Parties should be required, prior to the hearing, to prepare directions for the disposal of the case. If these cannot be agreed, then the court should be in a position to impose directions upon the parties.

7.19 In very complicated cases, there may be a further review before trial. Reviews, however, can be carried out on request if issues arise, as they can do during preparations for trial.

7.20 Failure to observe the time limits set out in the directions, unless leave is given prior to the time limit expiring, should result in cost penalties. The Bar Council has raised some concerns about this in that such directions risk introducing into case management a relaxation of rules and orders[2]. However, this perhaps ignores the need to ensure that case management hearings and the directions given need to have teeth if the wheels of case management are to be properly oiled. Whilst directions may not bear the seal of court orders, decisions or judgments, they are an integral part of the court process and management system and cannot be evaded without penalty.

7.21 Thus, in summary, the purposes of early court management by the court are as follows:

- To achieve, if possible, in cases capable of settlement, early resolution.

[2] Caldwell and Anor (practising as Caldwell Warner Solicitors) v Morgan Walker Solicitors LLP [2010] NIQB 115 at para [22].

- In cases that cannot be resolved, to allow the judge to control the litigation early on to ensure a fair and just outcome for both parties by, for example, controlling costs and/or the use of expert evidence.
- To ensure that contested claims get on for hearing as soon as possible and that the rules of engagement mean that there is equality of arms and fairness.
- To cut costs by, for example, ensuring that the use of experts is carefully confined to those cases where they are necessary and by abolishing multiple reviews.

7.22 The whole culture of early disclosure — cards on the table and an early case management review — is one that requires cultivation. The stick-and-carrot approach will necessarily have to be adopted, with both litigants and their advisors being left in no doubt that ignoring the pre-action protocol of early disclosure, etc. will result in punitive court sanctions. The new regime should bed down quickly with the uniform approach of all judges in all the divisions.

7.23 The fresh emphasis on case management should be reflected in an addition to our current rules dealing with the overriding objective in rule 1 to mirror rule 1.4(2) of the Civil Procedure Rules in England and Wales. It provides as follows:

> Court's duty to manage cases
>
> 1.4
>
> (1) The court must further the overriding objective by actively managing cases.
>
> (2) Active case management includes –
>
> (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
>
> (b) identifying the issues at an early stage;
>
> (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
>
> (d) deciding the order in which issues are to be resolved;
>
> (e) encouraging the parties to use an alternative dispute resolution (GL) procedure if the court considers that appropriate and thereafter facilitating the use of such procedure;
>
> (f) helping the parties to settle the whole or part of the case;
>
> (g) fixing timetables or otherwise controlling the progress of the case;
>
> (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
>
> (i) dealing with as many aspects of the case as it can on the same occasion;
>
> (j) dealing with the case without the parties needing to attend at court;
>
> (k) making use of technology; and

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

Early determination of any question of law or construction of any document

7.24 Order 14A of the Rules of the Supreme Court, as it used to apply in England and Wales but never applied to Northern Ireland, is an application for disposal of a case on a point of law[3].

7.25 The requirements for employing the procedure under this Order are the following:

- The defendant must have given notice of intention to defend.
- The question of law or construction is suitable for determination without a full trial of the action.
- Such determination will be final as to the entire cause of action or any claim or issue therein.
- The parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination[4].

7.26 The ambit of Order 14A and the principles governing it are as follows[5].

- An issue is a disputed point of fact or law relied on by way of claim or defence.
- A question of construction is well capable of constituting an issue.
- If a question of construction will finally determine whether an important issue is suitable for determination under Order 14A and whether it is a dominant feature of the case the court ought to proceed to so determine such issue.

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[3] Order 14A Rule 1 states:
"(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that –
(a) Such question is suitable for determination without a full trial of the action, and
(b) Such determination will finally determine (subject to only any possible appeal) the entire cause or matter where any claim or issue therein.
(2) Upon such determination the court may dismiss the cause or matter or make such Order or judgment as it thinks just.
(3) The court shall not determine any question under this Order unless parties have either –
(a) Had an opportunity of being heard on the question.
(b) Consented to an order or judgment on such determination.
(4) The jurisdiction of the Court under this Order may be exercised by a Master.
(5) Nothing in this Order shall limit the powers of the court under Order 18 Rule 19 or any other provision to these rules."

[4] see 14A/4/4.

[5] Discussed by the Court of Appeal in (Transcript No. 94/487 [No. 14/387]). Korso Finance Establishment Anstalt v Wedge & Ors At 14A/4/5 of the Supreme Court Practice.

- Respondents to an application under Order 14A are not entitled to contend that they should be allowed to hunt around for evidence for something that might turn up in discovery which could be relied upon to explain or modify the meaning of the relevant document. If there were material circumstances of which the Court should take account in construing the document, they must be taken to have been known and, could only be such as were known, to the parties when the agreement was made. In absence of such evidence the court should not refrain from dealing with the application.

7.27 It is right to say, of course, that under the wide power to hear a preliminary issue under Order 33 of the Rules of the Court of Judicature 1980, with the permission of a judge, a question of law that could lead to final judgment is a classic preliminary point. Order 5 rule 4(2) provides power to determine the construction of a document. Moreover, one must be wary of the danger of preliminary points not turning out to be short cuts and the factual base for the application would have to be agreed.

7.28 However, experience amongst practitioners revealed that Order 33 applications were fraught with difficulty. Applications were usually resisted at the Masters court and often followed by a contested appeal — all to determine if a discrete point existed and if it would be fair to proceed separately. The process can be cumbersome, lengthy and often unproductive.

Discussion

7.29 We cannot see any reason why Northern Ireland legal practitioners should not have the benefit of this summary procedure. There is no harm in having different powers expressed in different ways. They are not mutually exclusive. The new procedure would be clearer, more efficient and would lead to a more expeditious disposal of disputes. Order 14A can be a swift inexpensive knockout blow, for example, for unmeritorious claims at writ stage if the point at issue is legally unsustainable without having to explain all the various issues surrounding Order 33.

7.30 An Order 14A application can surface long before the case-management stage whereas Order 33 issues rarely surface at such an early stage. We appreciate its ambit is very narrow and it is likely to be invoked in limited circumstances. However, one could see its value in a case that involved, for example, a construction of a will or a rent review clause, etc.

Practice directions

CURRENT POSITION

7.31 Practice directions and practice notes are enormously useful in streamlining the process and focusing minds. They speed up the process and lend themselves to more efficient procedures.

7.32 However, there is a serious overlap and at times replication across the divisions of some practice directions. Others have lain dormant for some time and are now both out of date and irrelevant.

Discussion

7.33 Practice Directions proliferate. They need to be refined and co-ordinated. We recommend that the Office of the Lord Chief Justice should progress the work to assemble a composite register of all current practice directions.

7.34 We further recommend that in future any practice direction issued by a judge or Master should require the *imprimatur* of the Lord Chief Justice who will refer this to his office for the purpose of ensuring there is a consistency of approach across the divisions with such a practice direction.

Appeals

7.35 Any party to the proceedings who is dissatisfied with any decree (or any part of a decree) by the county court made under its civil jurisdiction may appeal from that decree to the High Court. It is a rehearing. Save for an appeal by case stated to the Court of Appeal, the appeal is final[6]. An appeal from any judgment, order or decision of the Master is to a High Court judge in chambers. The appeal is a complete rehearing; new evidence may be adduced; and the judge exercises his own discretion *de novo*[7].

[6] Article 60(1) of the *County Courts (NI) Order 1980* ('the 1980 Order') provides that any party to the proceedings who is dissatisfied with any decree (or any part of a decree) by the county court made under its civil jurisdiction may appeal from that decree to the High Court. The appellant must lodge a notice of appeal within 21 days from the date the decree was pronounced in court. The appeal is heard by a Single Judge of the High Court sitting in court. An appeal under art. 60 is a rehearing; the High Court judge hears the case and evidence *de novo* and is neither bound nor influenced by the county court's decision or findings on the evidence before the lower court. Except for an appeal by way of case stated to the Court of Appeal under art. 64 of the 1980 Order (see below), the decision of the High Court in an appeal under art. 60 is final.

[7] S. 70 of, and schedule 4 to, the *Judicature (NI) Act 1978* ('the 1978 Act') provide for the appointment of statutory officers (a Master). S. 55(2)(e) permits the Rules of the Court of Judicature ('RCJ') to prescribe which business and jurisdiction of the High Court and Court of Appeal may be transacted or exercised by a Master; paragraph (e) goes on to permit that the RCJ may also provide for the review of any jurisdiction exercised by a Master. The review mechanism is found in Order 58 rule 1 RCJ and takes the form of an appeal from any judgment, order or decision of the Master to a High Court judge in chambers. The appeal is a complete rehearing; new evidence may be adduced; and the judge exercises his own discretion *de novo*. Where, however, the impugned decision is either:

(i) any judgment, order or decision of the Master (QBD) or Master (Chancery) given or made on the hearing or determination of any cause, matter, question or issue tried before or referred to him under Order 36 rule 1; or
(ii) an assessment of damages by the Master (QBD) under Order 37 or otherwise;

rather than the above general right of appeal to a judge in chambers, instead the review mechanism is a right of appeal from the Master directly to the Court of Appeal (Order 58 rule 4).

7.36 There is a statutory right of appeal (with no need for leave to appeal) for interlocutory appeals from the county court to the High Court. This matter overlaps with issues arising in the case of personal litigants.

Discussion

7.37 We consider there should be an express requirement that leave is necessary in relation to interlocutory orders. A series of interlocutory appeals can delay and frustrate the hearing of a civil bill and cause considerable unrecoverable costs. There may well be jurisdiction to stay an appeal pending the outcome of the civil bill under the High Court's inherent jurisdiction and on the same principles as to satellite litigation. However, courts should not be driven to such lengths and a simple requirement for leave is all that is required. Whilst the Law Society is in agreement with this proposal, the Belfast Solicitors' Association and the Bar Council oppose the need for leave. The reasoning for this was not clear and did not address the mischief that currently exists whereby a series of interlocutory appeals can delay and frustrate the hearing of the civil bill. We can see no reason why such an innovation should not be introduced. The standard required would be that leave would only be granted if it was felt there was an arguable case.

Witness statements

CURRENT POSITION

7.38 In Northern Ireland there is no practice or procedure requiring the exchange of witness evidence between the parties in clinical negligence actions. It is noted that the use of witness statements is common, for example, within employment tribunals and coroners' courts. In clinical negligence cases, the absence of witness statements means that expert evidence is prepared, on both plaintiff's and defendant's side, without the expert having the benefit of witness evidence from relevant parties.

7.39 Witness statements and depositions are commonplace in England and Wales. The court has wide powers to control evidence by giving directions that may exclude evidence and limit cross-examination. The general rule is that any fact that needs to be proved by the evidence of a witness is to be proved at trial by oral evidence. However, evidence may be allowed by video link or other means. The witness statement containing the evidence that the witness would be allowed to give orally will be served as the court directs. The witness statement must comply with the requirements of the Civil Procedure Rules. It must be verified by a statement of truth. Witness statements are exchanged by direction of the court.

7.40 In England and Wales witness statements are prepared or drafted by solicitors and often with input from counsel. Witness statements will be provided to counsel for advices in respect of them. There is mutual simultaneous exchange of witness statements.

7.41 In this jurisdiction it would be considered by some inappropriate for counsel to be involved in drafting statements.

7.42 In Scotland witness statements are called precognitions and remain privileged throughout the claim. The only requirement is to identify the witnesses to be called to give evidence during the proof by lodging a list of witnesses. The list must be lodged a specific period of time before the trial as stipulated by the procedure relevant to the claim. There is no requirement to exchange witness statements between the parties.

7.43 The position is similar in the Republic of Ireland. Witness statements remain privileged between the parties during the course of proceedings. There is no obligation to exchange.

Discussion

7.44 Two of our subgroups gave particular attention to this issue, namely the Queen's Bench group and the clinical negligence group. It is accepted that the preparation of witness statements can be difficult for both sides, for example, in a clinical negligence case. The aim to have a statement in the words of the witness is laudable but usually impractical. Experience in tribunals demonstrates that traps can lurk in a statement that may afford fertile grounds for cross-examination at trial. Although defendants' statements prepared for witnesses who are clinicians are meant to deal with matters of fact, the temptation is to include opinion evidence. That should not occur.

7.45 Mixed views concerning the use of witness statements have emerged. Whilst it is accepted that the preparation of such statements would lead to an increase in the cost of preparation of a hearing, it is not disputed that witness statements would help to clarify the factual matrix of a claim for the experts before they report, particularly in claims, for example, dealing with the issue of consent in clinical negligence claims. Moreover, witness statements would be particularly useful for witnesses of fact (e.g. clinicians and nurses) whose evidence is uncontroversial, a step that would save both time and costs apart from the even more important respect of releasing such witness to perform their critical duties.

7.46 If evidence is uncontroversial, greater use should be made of *The Civil Evidence (Northern Ireland) Order 1997* to present evidence by way of statement. Somewhat surprisingly, little use seems to be made of Civil Evidence Order process.

7.47 Accordingly courts should encourage of the use of witness statements and the use of *The Civil Evidence (Northern Ireland) Order 1997* at case-management hearings in appropriate cases.

7.48 In addition however the Rules should be amended to provide courts with the power to order the use of witness statements. The professions, whilst not being opposed in principle to witness statements, caution that it may increase costs and observe that in England and Wales such statements tend to be anodyne or seen as fertile ground for cross-examination. In particular, the Law Society and the Bar Council are opposed to the courts having power to order the use of witness statements. We are of the view that if the principle of witness statements is correct —

which in our opinion it clearly is — then the courts should have the discretion in appropriate cases to order such statements if the reasons against so doing do not have a satisfactory foundation. The logic of the situation must be that if we accept witness statements in principle, then unreasonable opposition to them should be subject to the power of the court to enforce their use in particular cases.

Lodgement/payment in

7.49 In Northern Ireland the system of lodgement exists to enable a defendant to make a payment into court in satisfaction of the plaintiff's claim. The timing of the payment in is regulated by the court rules.

7.50 In the Republic of Ireland the system of payment in is governed by the *Civil Liability and Courts Act 2004*, which introduced 'formal offers'. Whilst this came into effect in 2004, it is in practice never used in clinical negligence cases, and rarely used in other personal injury cases. In effect the plaintiff in a personal injury action may, after a prescribed date, serve a notice in writing of an offer of terms of settlement on the defendant. The defendant can do likewise. A copy of the formal offer is then, after the expiration of a prescribed period, lodged in court by the parties. The terms of the formal offer are not communicated to the judge in the trial until after judgment has been delivered. The court then has the power, when considering the making of an order as to the payment of costs, to have regard to the terms of the formal offer and the reasonableness of the conduct of the parties in making same.

7.51 In England and Wales there is provision for the so called Part 36 offer under the Civil Procedure Rules. If a claimant makes an offer, which is not accepted but which is equalled or exceeded at trial, he/she will be awarded interest on damages (up to 10% above base rate), costs on the indemnity basis from the end of the 21-day window for acceptance of the Part 36 offer, interest on those costs (up to 10% above base rate) and an additional amount on damages (up to 10%). If the defendant makes an offer that the claimant fails to exceed at trial, the defendant pays the claimant's costs up to the end of the 21-day window and the claimant pays the defendant's costs thereafter (subject to the limit of damages awarded). Responses from the insurance industry favour the introduction of a Part 36 provision in Northern Ireland. The Association of Personal Injury Lawyers asserted that the Part 36 provisions have demonstrated benefits in terms of settlement rates and have helped to keep cases out of court and prevent the eating up of court resources in England and Wales.

7.52 In Scotland an offer to settle may be made by way of tender. These are lodged at court and have adverse costs consequences for a party failing to beat it. The pursuer is allowed a 'reasonable' period of time to accept a tender. A tender can be withdrawn at any time prior to acceptance without leave of the court. If a pursuer declines to accept a tender that has been lodged and he takes the case to a conclusion, the tender will be opened by the court at the end of the case. A comparison is made between the amount of the award that has been made and the amount tendered. If the pursuer fails to beat the tender, the court will find the

pursuer liable for costs from the point at which the pursuer should, with the benefit of hindsight, have accepted the tender.

Discussion

7.53 There was no consensus in our discussion on this issue. Defendant practitioners tend to take the view that lodgements should be available to defendants throughout the conduct of proceedings in order to put pressure on plaintiffs prior to trial. Plaintiff practitioners tend to take the view that there should be a mechanism available to the plaintiff to make an offer to settle similar to the provision in either the Republic of Ireland or in England and Wales.

7.54 There is a strong view that Part 36 lodgements are entirely inappropriate in personal injury cases and are a practice from a different time. They are used to exert pressure on an injured person seeking compensation and are particularly inappropriate where the financial position of the defendant is so much stronger than the position of the plaintiff. That is the position in most cases. It is particularly unfortunate in personal injury cases where legal aid is now seldom available and a plaintiff cannot afford to proceed or take the risk of not beating an offer that may be at the lower end of range of value. For my own part, I have sympathy with that view and accordingly I am not recommending the introduction of a Part 36 provision allowing lodgements at any time beyond the limited opportunity that our rules provide for.

7.55 On the other hand there was universal belief in our committees that there is much to be said for introducing into our rules provision for a plaintiff to make an offer of settlement within the same timescale as our present lodgement system. If the plaintiff subsequently equals or exceeds that offer, that plaintiff should receive, in addition the award, interest at judgment rate and/or indemnity costs from the date of the offer. Our responses demonstrated wide approval for such a development.

Claimants under 18 without legal representation

7.56 We note with grave concern information that reached us via a *Freedom of Information Act 2000* request by a firm of solicitors in July 2016 that the Compensation Recovery Scheme, under the aegis of Department for Communities, has recorded between 174 and 213 claimants per year under 18 years of age between the years 2011-14 (114 up to October 2015) who had resolved their road traffic cases without legal representation. *Prima facie* there has been no court approval of the figures agreed or the sums invested for these minors. Further investigation of this development is merited at government level and if necessary legislation to outlaw the practice.

7.57 The Association of British Insurers helpfully responded that it had reviewed the information provided by members at the time of their investigations and set out details of settlement bands for those cases identified as having been settled with an unrepresented minor. Different insurers provided information originally relating to different value bands and therefore it was only able to provide an indication of the

value of these cases. In addition to the information provided by its members, it received information from a non-member firm regarding their cases.

- Out of the 1,157 cases identified, 288 were settled with an unrepresented minor.
- Two hundred and seventy-eight of the 288 claims settled with an unrepresented minor were under the value of £3,000. Out of these claims 136 were under the value of £2,000.
- Eight cases were settled between a value of £3,000 and £3,500. One case was settled for £5,000 and one exceptional case was settled for £15,000.
- Information provided by the insurer that settled the £15,000 claim was that the claimant was three months away from his 18th birthday and insisted with his father that they did not want to use a solicitor and did not want to wait until the claimant was 18 to receive damages.

7.58 We are concerned that this trend will increase. It is our view that serious consideration be given to introducing legislation to make court approval of legal settlements of financial cases involving minors mandatory.

Responses

7.59 Subject to the riders that we have included in the paragraphs above, there was general approval in all of the responses for the changes adumbrated in this chapter.

Recommendations

1. A comprehensive comparison of our High Court and county court rules with those in England and Wales be carried out by a body appointed by the Lord Chief Justice as a matter of urgency. **[CJ20]**
2. New pre-action protocols incorporating the best features of England and Wales pre-action protocols and our own pre-action protocols be drawn up. **[CJ21]**
3. Reviews of cases be initiated nine months after *issue* of the writ. **[CJ22]**
4. There be one case-management hearing in most cases to take place within a specified timescale from entry of appearance, organised by the court at the very outset of any proceedings with such subsequent case-management reviews as may be deemed necessary, and a pre-trial review (PTR) if required. **[CJ23]**
5. Failure to observe the time limits set out in the directions at CMH, unless leave is given prior to the time limit expiring, should usually result in heavy cost penalties. **[CJ24]**
6. No statutory or regulatory changes be put in place to implement **CJ22** Implementation be speedily introduced through the exercise of the court's existing case-management powers under Order 1 rule 1A of the Rules of the Court of Judicature 1980 and the inherent jurisdiction of the court. **[CJ25]**

7. Order 14A of the Rules of the Supreme Court be introduced into our rules. **[CJ26]**

8. A composite register of all the practice directions be drawn up by the Office of the LCJ. **[CJ27]**

9. Any practice direction issued by a judge or Master to require the *imprimatur* of the Lord Chief Justice. **[CJ28]**

10. An express requirement that leave is necessary in relation to interlocutory orders appealed from the county court to be determined on paper save where the court hearing the appeal accedes to a request for an oral hearing or determines that such a hearing is necessary. **[CJ29]**

11. Courts to encourage of the use of witness statements and the use of *The Civil Evidence (Northern Ireland) Order 1997* at case management hearings. **[CJ30]**

12. The rules be amended to provide courts with the power to order the use of witness statements. **[CJ31]**

13. The rules be amended to provide for a plaintiff to make an offer of settlement within the same timescale as our present lodgement system. If the plaintiff equals or exceeds the offer, that plaintiff to receive interest on the award at judgment rate and/or indemnity costs from the date of the offer. **[CJ32]**

14. The rules be amended to include a provision on the court's duty to manage cases mirroring CPR rule 1.4(2) in England and Wales. **[CJ33]**

15. Legislation to be brought forward to compel a requirement for court approval for all legal cases involving a settlement or award of damages to minors. **[CJ34]**

8

Modernising the court procedures

Social Media—Tweeting /YouTube

CURRENT POSITION

8.1 With reliance on traditional media (for example, newspapers, magazines, radio and television) declining, Internet websites have become the media of choice for private and public-sector organisations seeking to engage with the public, to share information and promote their services.

8.2 Most, if not all, courts are now using technology and recent years have seen the development of Northern Ireland Courts & Tribunals Service (NICTS) website designed to promote accessibility to and greater understanding of the courts and how they operate; this includes plans to launch a judiciary website in late 2017. We have been helped in our endeavours by a number of articles and papers charting this development[1].

8.3 Such websites typically provide information to assist practitioners, court users, party litigants, and the media and also include users' guides, court rules and practice notes, access to court judgments and other reference material with links to advice, mediation, alternative dispute resolution (ADR) and online services.

8.4 In that respect, the NICTS website is no different from any others, offering a limited range of online solutions designed to improve accessibility for customers wishing to use search facilities, lodge small claims, complete jury notices relating to eligibility for jury service, track cases, or pay fines. Promotion of online services is likely to feature strongly in the work to progress the recommendations flowing from the service delivery review carried out by NICTS in 2015.

8.5 Most recent data indicates that usage of NICTS online services is continuing to improve with 57% of the 10,073 small claims applications lodged in 2016 having been submitted electronically and 48% of the 28,600 jury notices lodged in 2016 having been completed online. Recent figures also indicate that approximately 60,000 visits were made to the NICTS website during each quarter of 2016.

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[1] 1. The Digital Strategy for Justice in Scotland. The Scottish Government, 2014
2. Report of the Scottish Civil Courts Review, The Scottish Civil Courts Review September 2009
3. The Ministry of Justice Digital Strategy. The British Government 2012
4. Electronic Courts – DLS October 2015 Kathryn Minnis
5. International Journal for Court Administration. Social Media and the Courts – A Practical Guide for Court Administrators. Norman H Meyer Jr. June 2014
6. Public Law 2015. Social Media and Court Communication. Alysia Blackham and George Williams
7. Digital Justice Board/Causeway Management Board – Causeway update paper July 2015
8. Justice Northern Ireland: Digital solutions strategy 2015 – 2040
9. Service Delivery Review Report. Service Delivery Review Team September 2015
10. Gov News Direct – The Struggles of Going Paperless – 2015 Survey

8.6 Clearly, recent years have seen a massive shift in how people access and share information in a digital age, altering the way in which government and the courts transmit information and manage communication. Approximately 50% of the world's population is under 40 years of age, which means that in developed countries this group has grown up not knowing a world without personal computers or the Internet. This has resulted in a growing population that primarily communicates via technology.

8.7 For many of the younger generation, the routine use of email and traditional, often non-interactive, websites is no longer the media of choice for accessing or sharing information. Increasingly, this generation is adopting social media as their primary means of communication with the trend progressively towards using text messaging, electronic chat, Facebook and Twitter. Public expectations have also changed dramatically in recent years. Interactions with businesses, government and other bodies must be quick, easily accessible, achieve a fast resolution and be available around the clock.

8.8 While social media now provides a new means by which courts can promote openness and accessibility, technologies such as Facebook and Twitter also present a new set of challenges as they are designed specifically to encourage dialogue and on-going interaction between participants rather than acting merely as a broadcast mechanism. Beyond communication with litigants, courts have traditionally relied on the delivery of judgments as their main means of direct communication with the legal and outside world. This limited approach has led to the public's view of the courts being increasingly informed by media reporting or experiential accounts of litigants.

8.9 The position is, however, beginning to change, with court proceedings in the UK Supreme Court, Scotland and the High Court of Australia now being televised. These courts are also beginning to experiment with the use of social media.

8.10 Social media has the potential to significantly enhance court communication processes and can provide an effective means for the direct delivery of judgments and court information to internal and external audiences. Facebook now has 1.44 billion monthly active users worldwide. It is estimated that over 50% of the UK population is registered on Facebook or Twitter and social media generally is used by 94% of 16- to 24-year-olds and 54% of all adults in the UK, creating huge potential for the courts to extend the reach of traditional communications while also increasing transparency and accessibility of court processes via more direct contact streams.

8.11 Its use also has the potential to increase public confidence in and understanding of the courts and how they operate by providing the public with an opportunity for direct engagement with the courts in a neutral setting. Social media provides a direct channel of communication to the general public that would allow the courts to publish their own information on issues, while also giving them a voice and an opportunity to address adverse media coverage or distortions.

8.12 UK courts are only just beginning to embrace social media, although most courts currently have only an indirect presence. Rather than individual courts appearing on social media platforms, UK courts have consolidated their presence via the UK Judicial Office and the Judicial Office for Scotland.

8.13 In Northern Ireland the Office of the Lord Chief Justice (LCJ) has recently set up a Twitter page for the NI judiciary similar to that already in operation in England and Wales and Scotland to send out notifications that summaries of judgments have been published with a link attached. That will serve to augment the excellent work currently performed by Mrs Alison Houston in the Office of the LCJ in producing widely acclaimed summaries of key judgments.

8.14 The United Kingdom Supreme Court (UKSC) engagement with social media might be seen as reflective of its relative youth, its desire to build a public profile and to establish its judicial legitimacy. In the UK, only the UKSC has its own presence on both Twitter and YouTube. However, it is using its account mostly to tweet information about court judgments and on occasion court news. There is no presence on Facebook or engagement via blogs.

8.15 We have closely considered the use of Twitter by the Supreme Court. Tweets are used by the UKSC to alert users to new judgments. Only the barest facts of the case are described — but the 'tweet' is often accompanied by a link to a live feed so that the users can either watch the judgment being delivered or follow the link to the full text.

8.16 The UKSC has informed us that it publishes a provisional list for the whole term in advance of the commencement of that term. Its website also carries current case profiles that list the agreed facts and issues and some other practical details of the hearing. These are drafted by the UKSC's judicial assistants and cleared with the parties, where necessary.

8.17 The most visited page of the UKSC website is the judgments section. This is followed by the listings and case summaries pages (around 65,000 visits per month). There is no reliable information about the profile of the web audience. Most of the users of the UKSC blog (which is not produced by the UKSC) are lawyers and law students because of its relatively technical nature[2].

[2] Short examples of what is tweeted appear below:
Determinations of applications for permission to appeal to UKSC considered in December — available to view online http://ow.ly/XD4rq
Jgt Wed 0945: R v Taylor: [2016] UKSC 5, Is it s14A *Theft Act* offence if 'stolen' van involved in accident but driver not at fault? http://ow.ly/XD4l4
Jgt Wed 0945: In the matter of B: [2016] UKSC 4, Should UK exercise inherent jurisdiction to order child's return as ward of court? http://ow.ly/XD44W
UKSC dismisses Youssef's appeal v SoSFCO: Foreign SoS decision to add Youssef to UN asset freezing list was lawful. Regina (Youssef) v Secretary of State for Foreign and Commonwealth Affairs [2016] 2 WLR 509

8.18 While the UKSC's use of social media reflects a commitment to accessible court processes and recognition of the importance of social media as a communication tool, it is still using this media primarily to transmit information.

8.19 By contrast, the Australian courts have been early adopters of social media. Six of the nineteen courts in Australia now have an individual social media presence, with Australian courts increasingly appearing on Twitter and some courts now also having a presence on YouTube. Of all of the Australian courts, the Supreme Court of Victoria is most actively engaging with Twitter and other social media, not only using it to share information but also to respond to criticism of the court, present the courts' perspective and respond to questions. Chief Justice Marilyn Warren of the Supreme Court of Victoria recently stated in 'Open Justice in the Technological Age', *Monash University Law Review,* vol. 40, 2014:

> 'The courts must develop constructive strategies to engage with new technology if they are to guarantee open justice for all members of the community. Open justice in the technological age means the ability of the community to view or access information about court proceedings through the internet or social media as well as through traditional print and electronic mediums.'

8.20 US courts are generally seen as more outward-looking than those in the UK or Australia. The public election of judicial officers has resulted in the US courts engaging more strongly with social media to the extent that of the 84 courts found to be using social media, 44 appeared on Facebook, 64 on Twitter and 45 on YouTube. The state appellate and trial courts in the US have also made wide use of social media with approximately 50% of the states' highest appellate courts, together with the administrative offices of the courts, using one or more of these platforms: Facebook, Twitter, YouTube and Flickr, with Twitter being the most popular.

8.21 Posting videos on visual media-sharing sites in the USA court system is the most popular method of using social media to share information with personal litigants. These short videos, usually one to six minutes, educate litigants about what to expect when filling out forms, filing documents with the court, or appearing in court. Addressing the common questions of self-represented litigants, these videos help both litigants and court staff.

8.22 Personal litigants can review the videos at their convenience as they prepare their cases. Better-prepared litigants ask court clerks and judges fewer questions and proceed more quickly. Because the video scripts have been thoughtfully prepared and thoroughly reviewed, court staff can refer litigants to the videos and avoid situations where they may unintentionally provide legal advice instead of legal information[3].

[3] The Indiana Supreme Court was one of the first courts to post videos for self-represented litigants on a visual media-sharing site. Their YouTube channel was established in September 2008. Literally scores of videos have been posted covering a variety of issues, including representing oneself in a family law matter, mediation, and foreclosure-settlement conferences. These videos were viewed over 147,000 times within four years (see www.youtube.com/user/incourts).

8.23 Courts use social-networking sites, such as Facebook, MySpace, and LinkedIn, to assist self-represented litigants. Like most other institutions using these tools, courts are rarely creating new material to post on social-networking sites. More often, they link to existing materials to remind people that these resources are available and to encourage them to share the information.

Discussion

8.24 The potential for social media to improve court communication channels is clearly evident but use of social media is not without its challenges.

8.25 A recent Australian survey of 64 judges, court staff and academics working in judicial administration highlighted 20 key concerns regarding social media. In ranked order these were:

- Juror misuse of social media (and digital media) leading to aborted trials.
- *Sub judice* issues/breach of suppression orders (by tweets, Facebook or other social media) that go viral and the difficulties associated with enforcement of restraining orders.
- Increased risk of cyberstalking/opportunities for invasion of privacy or intimidation/bullying of the private lives of court case participants, including victims, jurors, judges, workers.
- Misrepresentation of court work and activity to a community that may not understand the processes or issues involved/rapid spread of misinformation about trial processes and courts.
- Disclosure of information to witnesses or others waiting outside or inside court.
- Difficulty in testing authenticity and credibility of social media journalism/lack of verification of social media publications.
- Need to educate judges, court staff, the public and media, risk of disenfranchisement of people and institutions that do not use social media.
- Using social media to communicate court decisions and engage with the community.
- Improper recording of court proceedings, confidential matters, evidence.
- Defamatory statements that go viral on social media, creating the spectre of increased litigation.
- Using social media to enhance court procedure (e.g. service via Facebook).
- The use of social media posts as relevant evidence.

Similarly, the California Administrative Office of the Courts has posted videos on YouTube about such matters as mediation and arbitration, small claims court, and restraining orders etc. Between 2009 and 2011, videos on this channel were viewed 4,400 times.

- Difficulty in ascertaining ownership of information sources on social media.
- Public expectation that courts will adopt social media quickly/effectively.
- Impact of social media on court orders, including orders relating to social media use, jury directions, sentencing.
- Social media can be distracting in court/potential for disruption of court activity.
- Whether to have central control of court communications.
- Need for information technology systems/staff to support social media (lack of resources for social media officers).
- Failure of courts to use social media affects timeliness of news.
- Locating the origins of the user/tweeter/contributor.

8.26 In response to problems that might arise from social media use by external users, the courts have introduced rules, policies and training programmes to set clear parameters for its use while also incorporating sanctions for any breaches of requirements.

8.27 In 2014, in response to concerns that modern technology may be posing an increasing threat to the fairness of trials, it became a criminal offence in England and Wales for a juror to use social media sites in violation of the instructions of the court, to share website information with other jurors or to decide a case on the basis of evidence not heard in court. Penalties also apply to jurors who post messages about cases on social media sites or engage in other conduct prohibited by the court.

8.28 As regards news reporters using mobile devices to access the Internet from inside courtrooms, different approaches have been adopted, from banning the use of all electronic devices to allowing unrestricted use. In this jurisdiction, the Lord Chief Justice recently agreed that the media can use Twitter in court and his office has issued guidance about this (see paragraph 8.50).

8.29 In short, tweets have a number of benefits:

- They provide an instant, short synopsis of a judgment, which quickly identifies whether that case may be of assistance in a practitioner's area of practice.
- It alerts practitioners to judgments that have been appealed. This would assist practitioners who may be relying upon authorities without realising this.
- The ability to re-tweet allows Twitter users to pass the synopsis to others who may be interested.
- They allow the users to pass comment on the case so that others may see they have an interest.

- Given budget cuts and the increase in self-represented litigants, courts are looking for cost-effective ways to reach the public and educate them about the legal system.
- The courts want to prevent litigants from becoming mired in the process, which wastes resources and frustrates litigants. Because of their potential reach and the minimal investment needed to start projects, social media can help courts serve their customers.

8.30 Courts should consider using Twitter as an online help desk. This has been extremely successful for a wide range of businesses. Staff could refer people to online resources to answer questions such as 'Where can I find a lawyer?', 'What self-help services exist?' and 'When is the court open?' Answers would be public and searchable, so others would also benefit from each question answered.

8.31 Social media such as YouTube allow courts to conduct outreach programmes online and to reach the public where they are already congregating, leveraging the limited resources courts have to support the self-represented and increasing access to justice. We consider that many of these benefits would also be applicable in Northern Ireland. The six benefits outlined above at paragraph 8.29 would assist courts, practitioners and personal litigants in our own jurisdiction. In addition:

- It has the benefit of instantaneous notification. Sometimes judgments do not appear on the NICTS website for some weeks. Secondly, whilst the names of cases and judges are identified, often the subject of the judgment is not.
- It advertises the breadth and range of work carried out in Northern Ireland.

8.32 Clearly, usage of modern media in and by the courts is evolving and will continue to do so as technology advances. We recommend the implementation and development of a social media strategy regarding usage that, as a minimum, clearly sets out behavioural requirements and will go some way to define the manner and extent to which it is used by the courts. The world is in the middle of a technological and communications revolution and social media is here to stay. It is fundamentally changing the way in which we interact and communicate with each other. It offers new challenges as well as opportunities for the court to promote better understanding of how it functions, thereby enabling it to become more accessible and transparent.

Electronic banking

CURRENT POSITION

8.33 We remain mired in a period suited to cheques and ledgers rather than an era of digital transfers. We still cling to the traditional method of granting a three-week stay for damages. It is a tradition that usually means that the money is received considerably later than four weeks after the cheque that arrives late has cleared a number of accounts.

8.34 We came across a typical example where, in a catastrophic birth injury case, an interim payment well in excess of £1 million was made but it was agreed that there should be a stay of four weeks. Such parents need the money without delay.

DISCUSSION

8.35 In the age of electronic money transfers, there should be a much shorter stay on monetary awards than the traditional stay of three weeks[4].

8.36 There is nothing in the rules about a three-week stay, but a rule change that made it clear that the period of a stay would ordinarily be a matter of days rather than weeks would be of assistance.

Nomenclature

CURRENT POSITION

8.37 Currently, the judiciary are addressed as follows:

- The Lord Chief Justice, Lords Justice of Appeal and High Court judges are addressed in court as 'My Lord' or 'My Lady'.
- The Recorder of Belfast, the Recorder of Londonderry, county court judges and, in practice, district judges on the civil side are addressed in court as 'Your Honour'.
- District judges (magistrates' courts) and lay magistrates are addressed in court as 'Your Worship'.
- Masters in the High Court are addressed in court as 'Master'.
- Coroners are addressed in inquests as 'Sir' or 'Madam'.

8.38 Children are referred to in the rules as 'under a disability'.

8.39 The current practice is to blandly refer to 'people with mental illness'.

DISCUSSION

8.40 We must not underestimate the resonance of simple language. We have considered whether in the twenty-first century such traditional modes of address are out of keeping with a modern court system, smack of being obsequious and simply serve to underline the view of the court setting as something forbidding or quite alien to the experience of ordinary people. In an era where we increasingly see personal litigants, should courts not be more informal and user-friendly?

8.41 Hence, the alternative would be a generic 'Judge' (as is the case in the Republic of Ireland) or 'Your Honour' throughout all tiers.

8.42 On the other hand, there is the argument that these titles add an appropriate and necessary degree of formality and solemnity to proceedings and serve to

[4] See Browne (Elizabeth) who sues as the personal representative of the estate of Leslie Browne (deceased)) v Sandra Murray and Michal Marcak Stephens J [2015] NIQB 95

delineate the different divisions of the courts, which might otherwise be lost in the public mind. For example, the High Court has a constitutional significance in the legal system and to impose on it a generic name could blur that distinction.

8.43 The views we canvassed in the legal profession and judiciary varied enormously across these two differing arguments. Interestingly, the Reference Group, representing the public, expressed the view that the public at large were not at all exercised by the matter, although probably a more generic approach would match a more modern approach.

8.44 I consider that this is a subject to be approached as *tempo adagio* rather than *tempo allegro*. Perhaps, therefore, now is not quite the moment for change, but I suspect the appetite for change will soon gather momentum with the growing modernity in the court system. It will be a subject for consideration by the Civil Justice Council in the future. Therefore, there is no recommendation on this matter at this juncture.

8.45 However, children should not be referred to in the rules as 'under a disability'. They are children or young persons.

8.46 Moreover, persons with mental illness should be referred to as 'protected persons'. However, the response from the Law Centre for Northern Ireland disagrees that persons with mental illness should be referred to as 'protected persons' as this language could 'increase' stigma. This is a matter that should be considered by the NICTS.

Open justice — making notes in court

CURRENT POSITION

8.47 Some confusion became evident during our Review on the issue of notetaking in court. The public, and indeed some members of the legal profession, were unclear whether there was a right for the public to do this.

DISCUSSION

8.48 It is a feature of the principle of open justice that those attending public hearings should ordinarily be able to make notes of what occurred unless there is good reason why notetaking was not to be allowed.

8.49 Notetaking by members of the public is unlikely to interfere with the due administration of justice. That right, however, was subject to the control of the court, which, for good reason, might withdraw the liberty to make notes. The paramount question for the judge, if considering withdrawing that liberty, would be whether the notetaking in question would be likely to interfere with the proper administration of justice[5].

[5] Ewing v Crown Court sitting at Cardiff & Newport [2016] All ER (D) 77 (Feb).

8.50 Following a public consultation exercise in Northern Ireland, the Chief Justice has decided that notetaking by members of the public is permitted unless the judge considers in an individual case that there is compelling legal reason to derogate from this aspect of open justice and deny permission. They are not, however, permitted to take notes on electronic devices (although journalists and legal representatives can). Only accredited journalists will be able to use live text-based communications (LTBC) from court and they can do this without making an application. Members of the public are not permitted to use LTBC and should switch off all electronic devices when entering court. A Practice Note has been issued to this effect.

8.51 We see no basis for further action on this matter and have no recommendation to make.

Requests for CD recordings or transcripts of recordings of court proceedings

8.52 There was further confusion about the rights of the public and thus personal litigants to have access to CD recordings or transcripts of recordings of court proceedings.

8.53 Once again, there is no room for confusion. Northern Ireland Courts and Tribunals Service Office Notice N01/4016 makes it clear. In complex or lengthy trials, a judge may direct that daily transcripts or CDs be provided to the parties before the next hearing. The court clerk should advise the Court Reporting Unit (CRU)[6] as soon as possible, providing the case number, defendant's name, solicitor's contact details and, if the full day's hearing is not required, a note of what should be transcribed.

8.54 Where a judge directs that a transcript is to be provided, it will be prepared by the court transcription service providers and uploaded to the CRU. The CRU will download the transcript and email a copy to the judge and the relevant court office. Court staff should only email the transcripts to parties who use a secure email address.

8.55 The judge should remind the parties that the transcript /CD should only be used for the purpose of the proceedings and should not otherwise be copied or further transmitted. This is particularly important where there is some form of reporting restriction or it concerns a family case.

8.56 There is no fee payable for transcripts / CDs where a judge has directed they should be provided in ongoing proceedings.

8.57 Requests in all other cases should be made to the Central Office, Royal Courts of Justice in accordance with the 'Guidance on Requests for an Audio Recording or Written Transcript of Court Proceedings'.

8.58 All requests should be accompanied by the full details of the case (including ICOS number), detailed reasons for the request, including the purpose for which the

[6] Court Reporting Unit: CourtReportingUnitAdmin@courtsni.gov.uk.

material is required, and whether the request is for the whole or a specific part of the proceedings.

8.59 The request will be considered and, if a CD is approved, the applicant will be required to pay an upfront fee of £25.00[7] and to sign an undertaking before the CD will be processed. The prescribed fee will be applied to all requests unless the applicant is eligible for remission or exemption of the fee[8]. The applicant will be required to pay the balance of the fee (if any) before the CD will be provided.

8.60 Hence, again we make no recommendation in this matter.

Shorter judgments

CURRENT THINKING

8.61 If the public is to have genuine access to justice and retain confidence in the justice system, judgments need to be clear and concise.

8.62 Lord Neuberger, the President of the Supreme Court, recently said[9] the increasing appearance of the self-represented litigant has accelerated the need to improve the clarity of judgments. He made the following points:

- The increasing appearance of the self-represented litigant has accelerated the need to improve the clarity of judgments.
- Crucially, this includes the parties to the litigation and future litigants (who will often be self-represented) and (when they are not) their advisors. This emphasises the need for courts at all levels to explain, as clearly and as concisely as possible, the facts, issues, outcome and reasons.
- Limiting the intended readership to lawyers, judges and academics was 'myopic'.
- Every judgment should be sufficiently well written to enable interested and reasonably intelligent non-lawyers to understand who the parties were, what the case was about, what the disputed issues were, what decision the judge reached, and why that decision was reached.
- Judges should include a short summary at the start of each judgment and provide guidance to its structure and contents.
- Judges should take a more 'rigorous approach' to cutting the length of judgments and should limit the use of dissenting or concurrent judgments unless they improve understanding of the leading one.

[7] £25.00 is the fee prescribed for a CD audio recording of up to one hour of the proceedings. The fee for transcripts is 78p per folio in criminal trials and 68p per folio in civil trials.

[8] http://www.courtsni.gov.uk/en-GB/Publications/UsefulInformationLeaflets/Documents/Exception-Remission-NICTS-fees/Do-I-have-to-pay-fees.pdf

[9] the annual Bailii lecture in November 2012.

DISCUSSION

8.63 Lord Neuberger's musings were shared by many members of the committees. Equally, it has to be recognised that the concept of an independent judiciary dictates that it is for each judge when writing a judgment to decide on its content and length and this Review should not attempt to circumscribe the way in which judgments are given. The Northern Ireland Court of Appeal has made it clear that a broad discretion is vested in judgment writers and just because an argument advanced by a party is not set out in full and the reasons for its dismissal given in detail does not mean it has not been given adequate consideration. Moreover, busy dedicated judges in the civil justice system seeking daily to produce judgments in timely fashion do not always have the luxury of reserving and refining judgments.

8.64 That said, we consider that judges should remain aware of the growing number of personal litigants in our system in the modern era and judgments should be crafted with them in mind.

Case/court officers

8.65 We have considered proposals to make use of Designated Judicial Officers (DJOs) or case officers of different levels of qualifications and experience to perform mainly routine, simple functions currently performed by judges and Masters. These officers would not be judges themselves, but their performance of functions currently performed by judges would be under judicial supervision, and subject to litigants' rights of review by a judge.

8.66 Judges, and particularly Masters, currently spend a great deal of their time processing a plethora of time-consuming but simple tasks such as consensual amendments of pleadings, remittal applications, minor extensions of time, minor amendments of orders under the slip rule, minor amendments of title, applications for disclosure and other minor interlocutory applications, taking a case out of the list for obvious health reasons, etc. In addition, the current emphasis on personal litigants being fully informed at the outset of the various alternatives open to them and the complexities facing them could all be profitably dealt with by court officers following a pro forma routine. Similarly, ensuring that those under a disability are properly catered for from the outset could fall within their remit.

8.67 The concept is not a new one. They are used in both the Republic of Ireland and England and Wales. In online dispute resolution proposals there are stages before a judicial figure is reached. Moreover, a number of developments in the tribunals and civil courts in England offer inspiration for alternative approaches to dispute resolution. Most notable of these is the use in some tribunals of legally qualified and suitably trained registrars — originally legal advisors from magistrates' court — to undertake case-management decisions, allowing judicial time to be focused on hearings. Judges are an expensive resource and it is vital that we make the best use of their judicial expertise. 'Are we making best use of

administrators and legally qualified registrars to undertake those aspects of case management that do not require a high level of judicial expertise?'[10]

8.68 In England, registrars currently carry out case-management functions in the special educational needs and disability and mental health jurisdictions of the Health, Education and Social Care Chamber, the General Regulatory Chamber, the Administrative Appeals Chamber and the Employment Appeal Tribunal. They not only speed up case management and reduce the risk of hearings being adjourned, but they free up judicial time for hearings.

8.69 Lord Justice Briggs accepted as part of his civil justice review, in an adapted form, the recommendations of an earlier JUSTICE working party that proposed a new dispute resolution model for civil claims. The working party recommended the introduction of legally qualified registrars (now termed Case Officers) who would be responsible for proactively case-managing disputes as well as actively resolving the majority of cases through a combination of mediation and early neutral evaluation. Judges would continue to resolve those issues that require judicial expertise. This model was designed to significantly increase access to justice for litigants in person — both those recently denied legal aid and those who, whilst never eligible, would equally never have been able to afford a lawyer. Under the current system, if individuals are unable to obtain legal assistance and representation, they may be at a significant disadvantage.

DISCUSSION

8.70 Consideration of this concept yields a number of issues that require careful consideration:

- Whether DJOs shall have authority to resolve live issues as to substantive rather than merely procedural rights.
- The extent to which (both in an online court and the existing courts) DJOs should have case management authority.
- The requirements for legal qualifications, experience and training of DJOs for different types of function.
- The nature and extent of rights of review by a judge.
- Whether there are no-go zones where the involvement of DJOs would be inappropriate, regardless of value or importance of the issues.
- How and by whom DJOs would be supervised and managed.

8.71 We are in favour of the introduction of DJOs/Case Officers provided their work is purely procedural, they are adequately trained, they are appointed from a reasonably high level within the Northern Ireland Civil Service and are always subject to review and appeal, upon request, by a judge or Master. When introduced they would reduce the number of civil hearings taking place and free up judges and Masters to focus on matters of real substance. Much of the work performed by DJOs

[10] Senior President of the Tribunals Annual Report 2014 per Lord Justice Sullivan.

could be online and thus they would also reduce a number of the time-wasting tasks presently imposed on the legal profession, who have to attend costly but perfunctory court attendances.

Responses

8.72 The responses to this chapter virtually all received welcoming approval. The one area that proved controversial was the suggestion of designated judicial officers. The Law Society, the Bar Council and the Association of District Judges for Northern Ireland all expressed concern that any such appointments must be operationally separate and independent of the Executive and raised fears that the proposal marks a departure from the judicial role in an adversarial system. The Bar Council drew attention to the difficulty of distinguishing between purely procedural matters and more substantive issues requiring judicial expertise and authority.

8.73 We are satisfied that these fears are addressed not only by designating only simple uncontroversial tasks to these DJOs, but by maintaining performance of these functions under judicial separation and always subject to a litigant's right of review by a judge. This provides a fail-safe system.

Recommendations

1. Listing information to be added to the Twitter page recently set up to provide for the Northern Ireland judiciary to publish summaries of cases and judgments emanating from the Northern Ireland Court of Appeal. **[CJ35]**
2. NICTS to use YouTube as a means of outreach to personal litigants with explanatory videos. **[CJ36]**
3. NICTS to consult with the judiciary, the Office of the Lord Chief Justice and other stakeholders in considering the future development of a social media strategy. **[CJ37]**
4. Courts to insist on electronic transfers of damages wherever possible. **[CJ38]**
5. A rule to be introduced to the effect that the period of a stay would ordinarily be a matter of days. **[CJ39]**
6. Children not to be referred to in the rules as 'under a disability'. They are children or young persons. **[CJ40]**
7. Persons with mental illness to be referred to as 'protected persons'. **[CJ41]**
8. The growing presence of personal litigants in the system be a consideration in the mind of all judgment givers. **[CJ42]**
9. DJOs/Case Officers to be introduced. **[CJ43]**

9

Alternative Dispute Resolution and Mediation

Current position

9.1 Mediation has been available in this jurisdiction as a means of dispute resolution since in or about 1994 and has increased significantly in popularity in the civil courts generally over the past five years or so. Many solicitors, barristers and judges have attended training courses made available by a range of suppliers. In truth, civil justice reform and alternative dispute resolution (ADR) are intertwined. It has already been brought within the formal framework of civil procedure by developing pre-action protocols and the introduction of a rule granting stays for mediation.

9.2 Mediation is generally understood to be a process in which parties in dispute engage, on a voluntary basis, and enter into a contract with an independent mutual facilitator who is engaged, under the terms of that mediation contract, to endeavour to assist the parties in dispute to communicate effectively and negotiate settlement terms that then become binding when reduced to writing and signed.

9.3 Mediation is a form of ADR, and other forms of ADR include direct negotiations (round-table), negotiations between lawyers, early neutral evaluation (by an independent appointee — outcome usually non-binding), expert determination (by independent appointee — outcome usually agreed to be binding), online dispute resolution (ODR) (this may take a variety of forms), and contractual and statutory dispute resolution (arbitration and adjudication).

9.4 There is no requirement at present for a mediator to have undertaken any training, but it is considered desirable that mediators in all areas should have obtained training in the core skills. It is the view of the Law Society that some measure of training should be obligatory for all mediators. Training is useful for all areas of law in which mediation is practised and may be essential in some areas of law. Proof of training is regarded as attractive in the market place.

9.5 It is recognised that in this jurisdiction there is also a long tradition of negotiation, and in a small jurisdiction leading litigation lawyers with an established reputation, expertise and independence are often chosen as mediators by disputing parties. Nevertheless, it is important that the core skills for mediation be recognised and practised. There is a large pool of experienced mediators already available and a steady supply of others pursuing training and experience.

9.6 At present, there is no standard form for commencement of mediation or other form of ADR. There is no particular stage of a dispute at which mediation/ADR is required to be considered. Most frequently, the issue of mediation arises after proceedings have issued and a court is reviewing the progress, or directions are being considered by the parties or the court. Parties are frequently

encouraged and, in some instances, required to consider mediation. However, it is not mandatory to participate in mediation or any other form of ADR. In some instances, the parties agree to mediate prior to the institution of proceedings but this occurs less frequently.

9.7 In the High Court, mediation is increasingly used in civil and commercial cases. In most areas of High Court civil jurisdiction, mediation is encouraged by either standard protocols or directions at review hearings. Normally this occurs at a stage when the pleadings have substantially defined the issues.

9.8 There appears to be a largely positive response to encouragement to consider mediation and, when undertaken, it enjoys a significant success rate. There is a lack of published statistical information but, in general, practitioners regard it as an increasingly attractive option.

9.9 Major positive features are:

- The flexibility available in mediation, with different models being available depending on the area of law, the value, and the needs of the participants.
- Communications between parties at a mediation, whether written or oral, are without prejudice and therefore enjoy the same protections that attach to without-prejudice negotiations. This status will be confirmed in the mediation agreement and will apply to position papers or other documentation that is produced and exchanged at the mediation. Generally, mediators prohibit any audio or visual recording at mediations and usually also it is made clear to the parties that the mediator's own notes will not be made available to the parties.
- To be effective, and in recognition of the without-prejudice status, the content of what was discussed and parties' and the mediator's views and opinions of what occurred during a mediation are not to be disclosed to the court.
- There may be limited exceptions to this, which would be the same exceptions to the without-prejudice protection afforded to negotiations, and the parties to the mediation (including the mediator) may all agree to waive the protection of the mediation process, or a court may have to consider the terms of a mediation settlement for enforcement purposes.
- Confidentiality. The benefit of confidentiality is that there should be no publication of the issues in the dispute or indeed about the fact that there is a dispute (this may be important to parties engaged in a commercial dispute).
- Confidentiality is also essential for meetings in the course of a mediation between mediator and one party; each party can repose trust in the mediator that information disclosed to the mediator will not be disclosed

by the mediator to the other party without prior authority from the party making the disclosure.

- The retention of control of the outcome by the parties.
- The greater feeling of ownership of the process by the parties.
- Whilst the mediation process is relatively informal, the process is controlled by the mediator. The mediator's skill is to put parties in a position where they focus upon their interests rather than their strict legal rights. The process is voluntary and the mediator does not have any role in making any legal or factual findings, and a good mediator will engage directly with the actual parties in the dispute and not only through the parties' legal representatives.
- A benefit, therefore, is that parties should feel empowered by the mediation process and have a direct role in discussing and assessing the issues and the options and opportunities for resolution.
- The faster speed.
- The lesser cost as compared with traditional litigation.
- Factors may be included in mediation that are not strictly relevant to the legal issues/arguments, and a solution may be explored that goes well beyond the limited remedies available in a court.
- There is often a greater chance of preserving a business or contractual relationship when a solution is explored at mediation that allows each participant to feel it has obtained a benefit from an agreed outcome rather than being the recipient of a court verdict with a winner and a loser. Issues relevant to resolving a dispute may go beyond the pleaded case, which will necessarily be framed around legal principles applied to the factual matrix. In mediation, there is often an opportunity to take a commercial/business view and perhaps preserve or develop business relationships that could otherwise be at risk of damage as a result of the adversarial nature of the court process.
- The extent of the options available within mediation/ADR, which may include a neutral evaluation, early facilitation, mediation or other models or a combination of same.

9.10 The disadvantages of mediation/ADR that are most frequently put forward are:

- First, the lack of means of penalising a party that agrees to mediation but does not make a genuine effort to achieve resolution, and rather uses the experience to gather further information about an opponent's case or appetite for litigation.
- Secondly, if the mediation is unsuccessful, it simply adds a further layer of cost to the other costs of the court proceedings.

- Thirdly, the need for confidentiality is sometimes seen as a lack of transparency or loss of an opportunity to create a precedent.

9.11 Whilst mediation of commercial disputes has been relatively popular for several decades in some other jurisdictions (notably the United States, Canada, Australia and some European countries), it has been somewhat slower to gain traction within the UK and the Republic of Ireland (ROI). It is also probably fair to comment that the uptake of mediation in commercial disputes has been somewhat slower in Northern Ireland (and ROI) than in England and Wales and Scotland. Mediation is rarely used in personal injury cases in the High Court in this jurisdiction and experience suggests it has proved unnecessary to consider it, as the vast majority of personal injury cases settle without the need for formal mediation due to the well-established practice of joint consultations at appropriate stages. Of course, personal injury cases are not confined to the High Court jurisdiction, but experience in the lower courts suggests that the number of cases there is diminishing and negotiation disposes of the bulk of those that remain.

9.12 In practice, mediators have been chosen by parties from the ranks of the two legal professions in Northern Ireland although there have been a number of mediations where mediators from outside Northern Ireland (again usually legal professionals) have been appointed. The Northern Ireland Law Society, though the Dispute Resolution Service (DRS), has been involved in the training and certification of mediators for many years and maintains a panel of those mediators. In January 2017 the DRS received accreditation from the Chartered Trading Standards Institute for consumer mediation within the European consumer mediation Directive. The DRS mediators are required to adhere to the DRS code of practice and the EU code of conduct for mediators. The mediation services offered by the DRS in respect of consumer mediation under the European consumer mediation Directive are delivered free of charge to the consumer.

9.13 The Bar of Northern Ireland has also, more recently, set up a mediation panel and arranged for training of barristers to be mediators (Barrister Mediation Services). Both bodies have, therefore, established a cohort of accredited mediators who are obliged to have undertaken the appropriate training in the principles and practice of mediation and are obliged to comply with an appropriate code of conduct. It is understood there are also a small number of members of the local legal profession who are providing a mediation service but who may not have undergone the training or accreditation by the professional body. Mediation, not being a regulated activity, can be provided by non-legally qualified persons, and to practise as a mediator one need not be trained or accredited. In addition to the Dispute Resolution Service and Barrister Mediation Services, there are other commercial providers of mediation services operating in Northern Ireland[1].

[1] For example Juris Resolutions Limited offers a comprehensive online service with a website https://www.jurisresolutions.com/ where consumers can learn about, evaluate, price, select and pay for the service that they need. It offers private individuals and legal professionals a professional service that includes a secure electronic portal for document service and use.

9.14 The most usual form of mediation in cases with a High Court value is to have all parties in attendance at a suite of rooms hired for the day/part day, with the mediator moving between the parties or representatives to facilitate a resolution. On occasions, mediation endures beyond a single day and/or involves the use of videoconferencing facilities. The parties agree, with input from the mediator if required, whether expert witnesses should be in attendance, whether position papers and/or opening statements should be exchanged and on the applicable procedure generally. However, as indicated above, it should be borne in mind that mediation/ADR is a very flexible process and may be adapted as required.

9.15 The current situation is that mediation/ADR are rarely used in low-value cases, whether in the small claims or district judges' court or county court jurisdictions. The type of elite mediation service most frequently used, as described in the preceding paragraph, is generally not considered to provide a cost-effective option in low-value cases. This underlines the importance of recognising the potential for a form of time-limited or fixed-cost mediation to be employed, which would be more suitable to a low-value case.

ENGLAND AND WALES

9.16 Mediation has been a popular option in civil and family courts in England and Wales for almost 20 years. The availability of public funding through the Legal Services Commission under the *Family Law Act 1996* encouraged substantial use of mediation in the family courts. Following the recommendations of Lord Woolf in his Access to Justice Report in 1994-96, the Civil Proceedings Rules governing civil and commercial litigation required parties to co-operate with each other and the court in seeking to achieve the overriding objective. It also gave power to the court to have regard for the conduct of the parties (including in respect of mediation) when making decisions about costs. Thereafter, the courts generally strongly encouraged parties to mediate and a party is not entitled to ignore a recommendation by a court to mediate without provision of an explanation. However, while entitled to encourage mediation strongly, the courts may not order parties to participate in mediation.

9.17 A variety of schemes have been undertaken to attempt to encourage mediation in low-value cases. The UK Government recruited senior HM Courts and Tribunals Service (HMCTS) managers to act as mediators for low-value cases and provided administrative assistants.

9.18 There is a central body with limited powers, namely, the Civil Mediation Council. This body introduced an accreditation scheme whereby the council recognises certain training courses as providing suitable training for mediators. There is no real sanction for failure to achieve a recognised training course and many mediators operate entirely outside the auspices of the Civil Mediation Council. Nevertheless, as its existence has become more widely known and publicised, more providers of training have sought to come under its umbrella.

9.19 In 2014, the Ministry of Justice (MOJ) introduced a system of compulsory mediation information and assessment meetings (MIAMs) for separating couples whereby the parties had to participate in same before they were allowed to bring family proceedings. This is a rare instance of compulsory mediation and follows the example of mandatory schemes in other jurisdictions, including Australia, New Zealand, USA and Scandinavia.

9.20 The Court of Appeal in England has a mediation scheme for non-family work administered by the Centre for Effective Dispute Resolution (CEDR).

9.21 CEDR is responsible for:

- nominating mediators;
- preparing a mediation agreement;
- liaising with the parties over mediation arrangements.

9.22 The court remains responsible for the composition of the panel and for any adjustment to the fees payable. The panel includes mediators from a varied range of disciplines, including commercial, personal injury, insurance, shipping, employment, intellectual property, etc.

9.23 During the first year of its operation, from May 2004, the scheme achieved a settlement rate at mediation of 68%.

9.24 A Lord/Lady Justice considering an application for permission to appeal is expressly required to consider whether the matter is suitable for mediation.

9.25 If so, the Civil Appeals Office will send details of the case to CEDR, who will write directly to the parties seeking agreement to arrange a mediation hearing.

9.26 The full court may also propose mediation where there are outstanding issues and a possibility of further litigation.

9.27 Parties are not obliged to take part in the scheme and are free to terminate the mediation by informing the Civil Appeals Office or CEDR at any time without giving any reason.

9.28 The current fee for a mediation is £850 plus VAT per party. This includes:

- covering CEDR administrative work;
- four hours' preparation;
- up to five hours' attendance by the mediator.

9.29 Legal aid funding is available where cases are within its scope.

9.30 Mediations can take place anywhere in England and Wales to suit the parties, and are almost always completed within four months of referral to CEDR, avoiding any need to stay the appeal.

9.31 A pilot scheme is currently testing the usefulness of using mediation more often in the Court of Appeal in England. Certain types of appeal are referred automatically for mediation, unless the judge granting permission to appeal considers mediation inappropriate in the particular circumstances of the case.

9.32 The types of appeal being tested are appeals in:

- personal injury;
- clinical negligence;
- contractual claims where no more than £450,000 is at stake in the claim;
- inheritance disputes where the value of the estate is £500,000 or less and
- boundary disputes.

9.33 Any party to an appeal can decline to take part in mediation, but an unreasonable rejection of mediation may be taken into account when determining what costs orders to make at a subsequent appeal hearing.

9.34 The promotion of ADR has been included within the overriding objectives of the Civil Procedure Rules at rule 1.4(2).

SCOTLAND

9.35 A Review of Scottish civil courts by Lord Gill found the courts system to be slow, inefficient and expensive. For many years there have been various mediation schemes in certain courts, such as that used at Edinburgh Sheriff Court for small claims and summary cause cases.

9.36 The devolved administration provided funding to encourage the use of mediation. An independent Standards Board was set up to oversee every type of mediation. It is run by staff at the Scottish Mediation Network and they operate a Scottish Mediation Register with admission requiring a certain standard to be achieved by aspiring mediators.

9.37 The Scottish Mediation Network has introduced a general code of practice for mediation in Scotland and there is a system for badging regulators, whereby those who exceed the minimum standards may be badged as experts in particular forms of mediation.

REPUBLIC OF IRELAND

9.38 The use of and availability of mediation in the Republic of Ireland appears to follow a similar pattern to that in Northern Ireland. It has gained traction in commercial litigation and disputes in more recent years, especially with encouragement from the Irish Commercial Court.

9.39 As in this jurisdiction, it is not compulsory. However, in relation to consumer disputes, suppliers of consumer services are obliged to identify a provider of mediation services. There is no obligation to engage in a mediation even though such providers must be identified. This is in compliance with the EU Directive (see paragraph 9.53 below).

9.40 A pilot scheme has recently commenced and has been in operation for a few months. This is available nationwide for commercial disputes. It has the support of the Courts Service of Ireland but is administered by Chambers Ireland (the equivalent of the British Chambers of Commerce).

9.41 In the pilot scheme, each of the four supporting organisations (that is, the Law Society, the Bar Council, the Mediators' Institute of Ireland and the Institute of Arbitrators) provide five mediators to assist in the scheme. Information suggests the scheme has enjoyed only a modest take-up to date[2].

9.42 Legislation is proposed to enshrine the principles of mediation into law. However, this proposed legislation is still at Bill stage only[3].

9.43 The aim and purpose of the proposed Bill is to allow for mediation as a viable and effective alternative to litigation for those involved in civil disputes, thereby reducing legal costs, speeding up the resolution of disputes and relieving the stress involved in court proceedings.

9.44 The Bill will require solicitors and barristers to advise any person intending to commence legal proceedings to give consideration to using mediation as an alternative means of resolving disputes.

9.45 Solicitors will be required to provide the client with information concerning mediation services, together with an estimate of legal costs should they proceed with the litigation and an estimate of costs if the client is unsuccessful in those proceedings.

9.46 The Bill requires that any person commencing civil proceedings must provide the court with a written statement confirming that their solicitor has advised on the possible use of mediation.

9.47 The Bill will allow a court to have regard to any unreasonable refusal by a party to consider mediation where such a process had, in the court's opinion, a reasonable prospect of success when awarding costs in those proceedings.

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[2] An interesting decision was made by Mr Justice Cross in the High Court in Dublin on the 16 December 2015 in the matter of Gaffney v DePuy International Limited. The case involved a personal injury claim alleging that the plaintiff was provided with a defective hip implant by DePuy, which was the subject of a recall in August 2010. The Order made by Mr Justice Cross relates to all other cases listed for trial before the High Court arising from the same set of circumstances, or such proceedings not yet listed for trial.
Mr Justice Cross, after hearing arguments over a number of days on motion brought by DePuy International Limited, approved of an ADR (alternative dispute resolution) process in his Order and directed that no further proceedings in the litigation would be listed for hearing, save by application to the court.

[3] Please see link to the Bill: Mediation Bill 2017

9.48 A court can invite the parties to consider mediation or one party to the litigation can bring an application in this regard. Where the matter is referred to mediation as a result, the mediator provides an agreed summary report to the court but the overall confidentiality of the process is to be maintained.

9.49 Where a matter is referred to mediation, the statute of limitations will be put on hold from the date on which the dispute is referred to mediation and for a further 40 days after the mediation process ends.

9.50 Proceedings can be stayed in favour of mediation.

9.51 Two matters of particular interest further arise from this Bill. First, it very strongly encourages mediation but is balanced. Solicitors and counsel are required to advise about mediation as an option to be considered — surely sensible. The involvement of the parties in the process is seen as critical to an enduring resolution and to the integrity of the process.

9.52 Secondly, there is no consensus in the legal profession opinion in Northern Ireland whether we should expect mediators to have undergone training. In England, there is an increasing trend towards tightening up of the need for accreditation with initial training/update practice required as well as CPD points. The Civil Mediation Council requires mediators each year to have performed two leading mediations and to have six CPD points. The argument is that solicitors/barristers are not mediators without the appropriate training. On the other hand, experience has shown in Northern Ireland that a number of distinguished barristers, without formal training, have successfully completed mediations.

EU requirements

9.53 The EU Directive on Civil and Commercial Mediation covers cross-border disputes[4] and introduced requirements to ensure access to simple, efficient, fast and low-cost methods of resolving domestic and cross-border disputes arising from sales or service contracts. ADR procedures should comply with consistent quality requirements applicable throughout the EU.

9.54 The purpose of the Directive is, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair ADR procedures.

9.55 The Directive applies to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming

[4] Directive 2013/11/EU of 21 May 2013. This Directive and Regulation (EU) No. 524.2013 are interlinked legislative instruments. Regulation (EU) No. 524 2013 provides for the establishment of a new ADR platform that offers consumers and traders a single point of entry for the out of court resolution of online disputes through ADR entities which are linked to the platform and offer ADR through quality ADR procedures.

from sales contracts, or service contracts, between a trader and consumer in the EU through intervention of an ADR entity. The requirements for the ADR entity are set out in terms of expertise, independence, impartiality and other requirements.

9.56 Pursuant to the Directive, the UK Government has introduced *The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015,* which set out the legal requirements for the ADR approval process, and how an ADR organisation must apply to one or more of the relevant UK competent authorities for certification.

Discussion

COMPULSORY MEDIATION

9.57 It is not considered that there should be any general requirement for compulsory mediation in the civil courts in this jurisdiction. Our reasoning is as follows.

9.58 First, such a general, wide-ranging requirement would interfere unduly with the right of parties to access the courts.

9.59 Secondly, there is insufficient evidence of any significant problem in the High Court in this jurisdiction to justify the introduction of such a radical and untested requirement.

9.60 Thirdly, introduction of compulsory mediation would require a very substantial infrastructure and funding regime.

9.61 Fourthly, a requirement for compulsory mediation would be damaging to the civil justice system generally, in that it would downgrade the importance of a transparent civil justice system that performs an important social function, with the development of common law and precedent visible to all. Private dispute resolution schemes have a part to play, but parties should not be required as a general rule to participate in same, if they wish to have their day in court. It is important that in properly considering the cost of access to the courts, the benefits of the court system should not be downplayed.

9.62 As a general rule, it is best to maintain mediation as a valuable voluntary supplement to the court system, rather than force parties to choose it in preference to the court system[5].

9.63 However, we do feel there is great merit in much of the proposed legislation in the Republic of Ireland. It would have the following advantages:

- It would change the culture of our thinking at a stroke and ensure that mediation is seen as a viable and effective alternative to litigation for those

[5] This is well supported by Lord Dyson, who contributed a paper to a conference held in Belfast organised by the Law Society of Northern Ireland's Dispute Resolution Service and others in May 2014.

involved in civil disputes, thereby reducing legal costs, speeding up the resolution of disputes and relieving the stress involved in court.

- It would oblige solicitors and barristers not only to advise any person intending to commence legal proceedings to give consideration to using mediation as an alternative means of resolving disputes, but solicitors would be required to provide the client with information concerning mediation services, with an estimate of legal costs should they proceed with the litigation and an estimate of costs if the client is unsuccessful in those proceedings.
- To enforce these provisions, any person commencing civil proceedings must provide the court with a written statement confirming that their solicitor has advised on the possible use of mediation and a court shall have regard to any unreasonable refusal by a party to consider mediation where such a process had, in the court's opinion, a reasonable prospect of success when awarding costs in those proceedings.
- Where a matter is referred to mediation, the statute of limitations will be put on hold from the date on which the dispute is referred to mediation and for a further 40 days after the mediation process ends.
- Its presence would serve to encourage the Law Society, Bar Council, judiciary and all groups providing legal training, including the Institute of Professional Legal Studies, to co-operate to provide better education for mediation to all its members and the public.

COMPULSORY MEDIATION IN LOW-VALUE CASES

9.64 Whilst we are opposed to compulsory mediation as a general rule, it is considered that there may well be merit in the idea of a pilot scheme for compulsory mediation in *low-value* civil cases of up to initially £5,000, with a possibility of expansion thereafter to £10,000 if the pilot scheme proved successful. The district judges support this in the small claims court.

9.65 At present, the very type of case that most needs a less costly alternative to the courts — that is, low-value cases — does not have such a system[6]. Therefore, small claims are a natural area for consideration of mediation as a more proportionate means of dispute resolution. Although members of the legal profession may be willing to act as mediators on a voluntary basis for the purposes of a limited pilot scheme, it would be necessary for a funding regime to be established if it was decided to implement compulsory mediation in low-value cases after such a pilot scheme.

9.66 As we have discussed in chapter 4, the Civil Justice Council in England in February 2015 recommended online dispute resolution for low-value civil claims in England and Wales and the Briggs Report in England essentially adopts this. The main recommendation was that HMCTS should establish a new Internet-based court

[6] As Lord Neuberger said in his speech at the Civil Mediation Conference on 12 May 2015, in relation to concerns about access to justice, the reality is that large organisations and wealthy individuals can look after themselves.

service known as HM On Line Court (HMOC). HMOC would provide a three-tier service with tier 1 providing online evaluation, tier 2 providing online facilitation and tier 3 providing online judges for civil claims under the value of £45,000. We have already recommended in chapter 4 a pilot scheme in Northern Ireland aimed at and designed for this jurisdiction.

9.67 A note of caution needs to be added. Ms Shaw-Brown from England, who is a CEDR accredited mediator and to whom we have spoken (see paragraph 9.73 below), informed us that the Ministry of Justice still use small claims mediators in their scheme who are members of court staff with a fairly brief two-day training in mediation. They are tasked with dealing with small claims on a free service. This system contains frailties in that the small claims mediators operate over the telephone on a basis of half/one hour with no papers. The mediation does not lead to a written agreement and some do not really regard this as mediation at all. The service is inundated with people seeking to avail of it. However, it is important to appreciate that the court staff are not accredited mediators, only briefly trained and perform mediation in perhaps five/six claims per day. If we are to effectively implement the same system in Northern Ireland, we must not make the same mistakes.

MEDIATION GENERALLY

9.68 Save for this pilot scheme in respect of low-value cases, it is considered that mediation should remain optional. The current system, whereby courts may strongly encourage but not order mediation, should be continued. Refusal by a party to consider or participate in mediation without any adequate explanation should be capable of penalty by use of cost orders where, for example, there has been a flagrant and time-wasting refusal to engage[7].

9.69 Moreover, similar to the CPR in England, we favour a rule requiring the court to keep ADR under consideration at every stage in the proceedings.

9.70 However, it should be recognised that, in general, a party that is engaged in mediation should not be penalised because the mediation has been unsuccessful. Mediation is a form of without-prejudice negotiations and confidentiality is important in that process. Therefore, necessarily, the information available to a court attempting to assess responsibility for a failed mediation will be limited. It is generally undesirable that the confidentiality of the mediation process should be put at risk for purposes of some form of costs penalty. Indeed, mediation is clearly, as a without-prejudice communication, entitled to the legal protection that goes with this label. Furthermore, a standard mediation agreement, which is a contractual document, will normally set out the obligation imposed on the parties and on the mediator to respect the confidentiality of the mediation process.

[7] PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ. 1288 where the English Court of Appeal imposed cost sanctions on a party who had simply ignored the suggestion of mediation.

Personal litigants

9.71 The pilot scheme for compulsory mediation and the voluntary online ODR pilot scheme in small-value cases should be of benefit to personal litigants. It will be important to ensure that the online system is sufficiently simple and straightforward for a personal litigant to navigate and a means of assistance should be available, online or in person if necessary, to assist the personal litigant to participate properly in both processes.

9.72 It is recognised that a personal litigant presents a significant challenge to the operation of mediation procedure as well as traditional court procedure. However, a sufficiently flexible process should be capable of achieving a satisfactory resolution. There is a particular need for care in explaining the terms of any proposed mediation agreement to a personal litigant.

9.73 As well as having the benefit of input from a highly distinguished and experienced subgroup in Northern Ireland, we have had the benefit of discussions with Ms Shaw-Brown from England who is a CEDR accredited mediator. Ms Shaw-Brown had experience for over 10 years in organising LawWorks mediation providing pro bono civil and commercial mediation to those unable to afford to pay for it, utilising a panel of volunteer accredited mediators. She is currently working at the Garden Court Mediation in a similar role, albeit for a commercial provider.

9.74 It was her experience that most members of the public know little about mediation. It is our belief that this is also the position in Northern Ireland. A great deal of this pro bono mediation service was taken up explaining just what mediation was, how it worked and the provisions of mediation as well as persuading people to engage in mediation. The first contact was often over the telephone ascertaining whether or not they wished to mediate. Information was sent to them in writing. This preliminary advisory stage was intensive before actually getting down to the mediation itself. She had no trouble at all finding pro bono mediators who were prepared to offer their services for free. These were all accredited mediators working, for example, for CEDR/Judicial Arbitration and Mediation Services. There was a cadre of approximately 200 mediators all over England and Wales comprised of people who believed in the concept of mediation.

9.75 Consideration needs to be given as to whether there might be a role in Northern Ireland for a front-line advice body, such as the Citizens Advice Northern Ireland, Advice NI or the Law Centres, who could apprise people of the contents/benefits of mediation and then pass them on to the appropriate mediator, provided their volunteers were aware of the realities of mediation.

9.76 HMCTS in 2006 decided to provide mediation principally because the courts were overloaded with work. It launched the National Mediation Helpline. The idea was that the courts would send people to the National Mediation Helpline and thereafter feed them into the mediation organisations. A number of other providers had joined. The helpline would take the enquiries and then pass people on to the appropriate provider. The information appeared on the main MOJ website.

Unfortunately, in 2014, as part of the austerity cuts, such helplines were closed down. However, there is still a reference to mediation on the MOJ website.

9.77 Where people could pay, they did so. There was a fixed fee scale for cases valued up to £50,000. The figures were circa £225 plus VAT for a four-hour mediation with the lowest fee being £50 plus VAT for one-hour telephone mediation.

9.78 Finally, it is not considered that the concept of virtual courts or paperless courts gives rise to specific needs or problems in respect of mediation/ADR. The present experience is that papers in mediations are well controlled with only a core bundle being provided to the mediator. Technology is effectively used to assist the process, whenever required, whether by means of electronic access to other more extensive records, video link access, telephone conferencing, etc. It is anticipated that advances in technology will continue to be incorporated in the mediation/ADR process without need for specific provision.

Promotion of ADR

9.79 We consider that an additional boost to the concept of mediation would be achieved by mirroring the approach of England and Wales in CPR rule 1.4 by including the promotion of ADR within the overriding objective at Order 1 of our current rules dealing with the court's duty to manage cases. We have already set out the proposed new rule in chapter 7 dealing with case management.

9.80 There exists in Northern Ireland a mediation council of sorts. This requires fresh life to be breathed into it in order to mirror the very effective Civil Mediation Council in England and Wales. This body would not only serve to provide guidance on appropriate standards but would increase public awareness of mediation, especially amongst small and medium-sized businesses, insurers and central and local government bodies.

9.81 There now exists in England an authoritative handbook (first published in 2013) on ADR entitled *The Jackson ADR Handbook*. The Judicial College in England issued copies of the first edition to all judges dealing with civil work[8]. A second edition was published in November 2016 describing a number of initiatives that have emerged since 2013. This handbook should be made available in Northern Ireland to all judges dealing with civil work.

Responses

9.82 There was a general consensus as to the benefit of mediation and to the vital role it now plays in the justice system. This reflects a cultural change in the legal firmament and firmly entrenches the concept in our system of law.

9.83 The legal professions — the Bar Council, Belfast Solicitors' Association and the Law Society and the Law Centre NI— were opposed to the notion of *compulsory*

[8] See lecture by Sir Rupert Jackson 'Civil Justice Reform and Alternative Dispute Resolution' given to the Chartered Institute of Arbitrators 20/9/2016.

mediation at any level. They clung to the purity of the principle that mediation should be optional and maintained as a valuable voluntary supplement to the court system. The Bar Council also raised the question of the costs of introducing compulsory mediation for cases under £5,000 in a constrained financial climate. Interestingly, the Association of District Judges of Northern Ireland, who are essentially at the coalface in dealing with claims under £5,000, whilst opposing the notion of compulsory mediation in all cases up to £5,000 combining small claims court and some district judge civil bills, were supportive of the introduction of compulsory mediation solely into the small claims court.

9.84 I still remain convinced that small claims are a natural area for a consideration of mediation as a more proportionate means of dispute resolution. Such low-value claims need to be accessible on a low-cost basis and susceptible to resolution without the stress, costly, and time-consuming nature of proceedings before a judge. This small exception to the general notion that mediation should be voluntary is the necessary adjunct to the notion of efficient, cost-effective and proportional justice. The pilot scheme would soon reveal the benefits of such a step.

9.85 The Bar Council alone was disinclined to agree with an approach that includes a right to impose cost sanctions where a party refuses to consider or participate in mediation without adequate explanation. Insofar as they saw this as a means of creating mandatory mediation, it profoundly misunderstands the concept. The sanction would only arise where a party wilfully refuses to even consider or indeed wilfully frustrates the notion of mediation and the case clearly is suitable for such a step. There may be perfectly good reasons why mediation should not have taken place or where it has broken down despite genuine efforts on the part of the litigants. No sanctions would arise in such instances. Failing to provide a cost sanction in the circumstances adumbrated would lead to situations where parties deliberately defied or abused opportunities to mediate in cases that clearly cried out for such a solution with all the attendant waste of time and costs.

9.86 The Bar Council and the Law Society express reservations about imposing a statutory duty on legal representatives to advise any person intending to commence legal proceedings to give consideration to using mediation as an alternative means of resolving disputes. The fear was that this approach could become little more than a tick-box exercise, which, having been completed, might have a detrimental effect on the parties being requested to consider mediation at a later and more appropriate stage in the process.

9.87 I consider that these arguments fail to recognise the need to continue the change in our cultural thinking to ensure that mediation is seen as a real and effective alternative to litigation for those involved in civil disputes. We need to enshrine in our thinking at the earliest opportunity that mediation is an alternative means of addressing disputes at an earlier stage and in a less adversarial environment than that which currently obtains. By following the example of the Republic of Ireland and providing a legislative foundation for this cultural change, real progress will be made in our legal system. As the Law Centre NI and the

Association of British Insurers pointed out, court should be reserved for cases where there is a true dispute and where other less adversarial methods have proved of no avail.

Recommendations

1. The Law Society, Bar Council, judiciary and all groups providing legal training, including the Institute of Professional Legal Studies, in this jurisdiction to co-operate to provide better education for aspiring lawyers, practising lawyers and all the public on the benefits of mediation, and the flexibility available in terms of the appropriate mediation model and mediator. **[CJ44]**
2. Compulsory mediation to be introduced and limited to a pilot scheme in low-value cases up to £5,000 initially. **[CJ45]**
3. Otherwise mediation to remain optional. **[CJ46]**
4. Courts to retain the right to impose costs sanctions where a party refuses to consider or participate in mediation without adequate explanation. The County Court Rules should be amended to permit the county court to impose such sanctions. **[CJ47]**
5. Rules, similar to the Civil Procedure Rule requiring the court to consider at every stage in proceedings whether an alternative dispute resolution is appropriate, to be introduced. **[CJ48]**
6. All barristers and solicitors undertaking mediation to be advised to undergo a form of training that incorporates the core skills of mediation. This is not obligatory. **[CJ49]**
7. A Northern Ireland body, along the lines of the UK Civil Mediation Council or the Scottish Mediation Network, to provide accreditation for suitable forms of training for mediators. **[CJ50]**
8. A code of conduct, similar to that introduced by the UK Civil Mediation Council, to be introduced by the equivalent body in this jurisdiction. **[CJ51]**
9. Barristers and solicitors acting as mediators to be required to adhere to this code of conduct, although responsibility for breaches of such a code to be regarded as matters for discipline within the existing disciplinary procedures for each branch of the profession. **[CJ52]**
10. A pro bono mediation service to be set up for those unable to afford mediators. **[CJ53]**
11. Legislation to require solicitors and barristers to advise any person intending to commence legal proceedings to give consideration to using mediation as an alternative means of resolving disputes. **[CJ54]**
12. The inclusion of the promotion of ADR within the overriding objective at Order 1 of our current rules. **[CJ55]**

13. *The Jackson ADR Handbook* be made available in Northern Ireland by the NICTS to all judges dealing with civil work. **[CJ56]**

10

Disclosure

Current position

10.1 At present, disclosure is governed by Order 24 of the Rules of the Court of Judicature (Northern Ireland) 1980 as amended. In broad terms, disclosure or discovery is the process by which parties to proceedings disclose to each other by list the existence of relevant documents and, colloquially, is used to describe not only the disclosure but also the production and inspection of the documents. 'Document' is widely defined to include not just traditional paper documents but also photographs, videos, digital recordings, disc content, emails, texts and any other means by which information is recorded and stored. In addition to this, Order 26 makes provision for discovery of facts (as opposed to evidence) by answers to questions known as interrogatories.

10.2 Order 24 provides for automatic disclosure by list after close of pleadings, which gives rise to a continuing duty to make disclosure as documents come to light throughout the course of proceedings, including during the trial. Interestingly, in its response, the Association of Personal Injury Lawyers recorded that 'feedback from England and Wales is that the duty of continuing disclosure (CPR31.11) needs to be tightened, as it is frequently abused by defendants'. The Rules stipulate the format of the list by which disclosure is made, whereby the maker of the list identifies the documents being disclosed and will produce those they had but no longer have and those that they have but object to production for reasons such as privilege.

10.3 Lists may be verified by affidavit. Provision is made for discovery of particular documents — or 'specific discovery' — where one party contends that another has relevant documents that it has not disclosed on its list and which are necessary for the fair disposal of the case or the saving of costs. It is in the area of specific discovery that most disputes requiring interlocutory application by summons arise.

10.4 Order 24 also makes provision for pre-trial discovery and discovery of relevant documents in the possession of an entity that is not a party to the proceedings (non-party discovery) in personal injuries cases only, pursuant to sections 31 and 32(1) of the *Administration of Justice Act 1970*.

10.5 Concerns have been raised about the volume of material produced on discovery in many actions, conventionally presented to the other parties and the court in loose binder files.

10.6 In particular, in large commercial litigation and clinical negligence cases a vast number of documents is disclosed, many of which are not actually referred to at trial. The costs of assembling, reviewing, inspecting and copying these documents form a significant part of the costs of an action. These concerns are most relevant in

the larger clinical negligence cases and commercial type actions, and are likely to be of less significance in, for example, other parts of the Chancery Division's workload, such as in probate actions, specific performance actions or title disputes, but they can surface in the most mundane of cases.

10.7 A routine employer's liability action where liability is in dispute will produce a range of documents such as personnel files, records relating to training, risk assessments, maintenance and prior complaints, in addition to medical records and documents relating to claims for financial loss.

10.8 In a clinical negligence claim, documents will usually include the entirety of the hospital records, possibly from a number of different hospitals or parts of the same hospital, in addition to general practitioners' records, physiotherapy records, mental health records and the like.

10.9 In most cases the volume will require at least one, and probably more, loose binder files, but when the action comes to hearing the issues will often turn on perhaps just 10 to 40 pages of what might be hundreds and even thousands of pages of disclosed documentation. This places a significant and increasing burden upon parties collating documentation to provide to their legal team, upon the legal representatives recognising their strict duties to the court with respect to full disclosure, and to courts — and in particular judges — managing the documentation both before and at trial. Needless to say, this adds significantly to the cost and length of an action.

10.10 At present in Northern Ireland, the test of relevance is as set out in the Peruvian Guano test:[1]

> 'It seem to me that every document relating to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences...'

Discussion

10.11 This discussion is, of course, predicated on the principles and recommendations we have made in chapter 3 on paperless/paper-light courts and must be read in that context. Thus, for example, greater use of digital technology during the pre-trial process, including disclosure of documents, should produce a reduction in labour-intensive paper processes and a concomitant increase in efficiency and a reduction in cost both to the state and to litigants. However, one of

[1] Compagnie Financiere du Pacifique v Peruvian Guano Co [1882] 11 QBD 55 as per Brett LJ.

the dangers of the paperless court is that masses of documents are simply dished out online and hence this chapter is an apposite restraint on that occurring.

10.12 Whether managed digitally or conventionally, the increasing use of discovery and the volume of documentation produced in even quite routine or relatively modest cases raises the question whether or not the whole approach to discovery requires re-assessment. There has been little change in the rules or the underlying principles despite the numerous changes in practice in the last 30 years. In this jurisdiction, those principles remain broadly the same in both county court and High Court irrespective of the nature of the case.

10.13 Therefore, the question arises, should consideration be given, for example, to a system of discovery that has greater regard to issues of proportionality of discovery to the individual case, rather than the current same-size-fits-all approach? In other words, discovery might be limited depending upon the size and complexity of a case. Another approach might be to consider again the test of relevance, or perhaps a combination of these approaches. We have not contemplated the European approach, which is often to have no disclosure at all, but we have considered innovative ways to reduce the burden.

10.14 The need for change in this jurisdiction was recognised in the final Report of the Civil Justice Reform Group (The Campbell Report) in 2000[2], which found:

> '112. The present test for determining which documents are discoverable is unsatisfactory, but the Group has as yet been unable to decide what other criteria would provide a satisfactory, less costly and less cumbersome alternative. The Group would welcome further suggestions as to how this problem should be addressed. [IR 62] The responses to the Interim Report suggest that there is no consensus on this issue. Some commentators indicated that discovery, as currently defined, was unproblematic, some that problems would emerge no matter what definition was applied, while others suggested distinct definitions of their own. The Group has concluded that some attempt needs to be made to retreat from the present situation where all too frequently no stone is left unturned in an expensive and largely wasteful exercise. As stated in the Interim Report, the Group was initially drawn to a definition that encapsulated "relevance". This was, in part, inspired by a recent and successful innovation of the Litigation Reform Commission of Queensland. By now recommending a definition that demands that only documents which are directly relevant to an issue in the proceedings are discoverable, the Group acknowledges that simplicity will not necessarily produce clarity. However, the proposed test avoids the need to create different steps in the discovery process – no "basic" or "advanced" models are suggested. Furthermore, the Group emphasises its intention to prevent discovery of documents which may simply lead to a train of inquiry enabling a party to advance his own case or damage that of his opponent. Although the Group is reluctant to proceed to narrow or broaden this basic definition further, the Civil Procedure Rules provide an illustration of the type of documents that may be relevant i.e. all documents on

[2] The Civil Justice Reform Group, *Review of the Civil Justice System in Northern Ireland: Final Report*

which the party relies and all documents which could adversely affect his own case, adversely affect another party's case or support another party's case.

113. **The Group recommends that only documents which are directly relevant to an issue in the proceedings should be discoverable.'**

10.15 There have been different shades of opinion expressed in the course of this Review as to how this long-standing problem of disclosure should be addressed. Some have argued that no matter what test for discovery is used, the costs of reviewing documents by the party making discovery are likely to be similar. The client has to identify all the documents that might be relevant to the matter in question (under the Northern Ireland test), or all the documents that might support their case, might support someone else's case, or might undermine their own case or another party's case, and their lawyers have to review those documents to decide whether or not they comply with the test. Indeed, a test of relevance might be easier for a client to apply in identifying papers to supply to their solicitor, or for a litigant in person to apply.

10.16 There is a school of thought, as illustrated by the response of the Bar Council, that the test for discovery should not be altered but that the focus be shifted to early case management of the process. Better management of the process of inspection and preparation of trial bundles will better control costs at this stage than adjusting the test for discovery. The whole culture of early disclosure, 'cards on the table' and an early case-management review is one that requires cultivation. The stick-and-carrot approach will necessarily have to be adopted, with both litigants and their advisors being left in no doubt that ignoring the pre-action protocol of early disclosure, etc. will result in punitive court sanctions.

10.17 The Chancery subcommittee suggested a variation on the existing process. Their suggestions merit detailed analysis and are as follows. At an early review of the action, the parties and the court should actively consider how best to deal with the discovery and ask the following questions:

- Should there be discovery at all?
- If there should be discovery, should discovery be confined to certain issues (i.e. no general discovery, but specific discovery only)?
- If there is to be discovery, should there be general discovery?

10.18 They proposed that general discovery would not be automatic in writ actions, albeit that might be the usual order made.

10.19 However, there should be scope for the parties to seek a trial without discovery, or for a trial with specific discovery only if that is a more proportionate and cost-effective means of dealing with the case.

10.20 In originating summonses and in simplified trials, the presumption might be that discovery would not be ordered, unless it was likely to be of assistance to the issues to be determined. The option would be open to order specific discovery on certain issues, rather than general discovery.

10.21 The mechanics of production and inspection of documents ought to be more closely managed to minimise unnecessary duplication and production of documents. At the first review, each party should have a rough idea of the number of pages their discovery will involve.

10.22 If each party's documents are less than, say, a thousand pages or four lever arch files, documents should be provided for inspection in a paginated bundle. Thus, each party would have a paginated discovery bundle, which would mean that parties could when preparing the core bundle, or adding to it, identify precisely the document to be used.

10.23 If the documents are more than the limit, then each party should make their documents available for inspection by the other side, rather than to photocopy all documents.

10.24 Inspection should take place by a lawyer who is sufficiently versed in the issues of the case, who can then identify the documents of which they want copies. Those copies can then be arranged in a paginated discovery bundle, again so that each party can identify exactly the document required at an early stage. If, after inspection, it is apparent that a party has documents that it intends to rely on which have not been sought by the other side, those documents should be added to the relevant discovery bundle.

10.25 In cases where the initial scoping exercise carried out by the parties suggests that the volume of discoverable documents will be exceptionally large, technology-assisted review should be used where that is likely to be more cost-effective or more time-efficient than human review only. It is likely that further experience will be required to judge the number of documents at which technology-assisted review becomes more cost-effective and more time-effective than manual review. In addition, it is likely that practitioners will require CPD/training in the use of technology-assisted review. As matters stand at the present, it will only be in the most exceptional cases that the volume of documents will justify the use of technology-assisted review.

10.26 If additional documents are disclosed, either because they come to light after initial discovery, or because there is an application for further and better/specific discovery, or because the issues in the action change, those documents will be added to the paginated bundle, and assigned appropriate numbers.

10.27 At trial, the parties would be expected to prepare a core bundle consisting only of the key documents likely to be referred to at trial. The parties would not be expected to make copies of all the discovery for the judge or for witnesses, though parties may wish to have the discovery accessible so that they can add to the core bundle.

10.28 It is likely that costs sanctions will be necessary to ensure compliance.

10.29 A different school of thought, primarily found in the Queen's Bench subgroup, favoured more radical change with replacement of the Peruvian Guano test.

10.30 In England and Wales, following on from the Woolf reforms, the Civil Procedure Rules (CPR) replaced the Peruvian Guano test with provision for 'standard disclosure following a 'reasonable search', all subject to the proportionality tests contained in the overriding objectives. Part 31.5(1) of the CPR makes provision for automatic disclosure orders for standard disclosure unless the court directs otherwise. A form N265 for standard disclosure is completed by the defendant directing them to their duties under the standard disclosure provision.

10.31 Further, the court may limit standard disclosure or even dispense with it entirely (Part 31.5(1)(b)). The parties in a case may do so by agreement in writing under Part 31.5(1)(c). Standard disclosure is defined at Part 31.6 so as to require a party to disclose only those documents that: that party relies on; or adversely affect its own case; or that of another party or supports another party's case; or is a document of a type required to be disclosed by a relevant practice direction.

10.32 The *Pre-Action Protocol for Personal Injuries Claims*, which is to be read in conjunction with the main CPR (See BO-001 CPR) provides lists of what constitutes fast-track or standard disclosure for various types of case in various categories, including road-traffic, highway, tripping, or workplace accidents, etc.

10.33 Thus, the difference between the two approaches to discovery was this[3]. The Peruvian Guano test is a much wider test than that for standard disclosure. What was now required in England was that, following only a "reasonable search" (CPR 31.7(1)), the disclosing party should, before making disclosure, consider each document to see whether it adversely affects their own or another party's case or supports another party's case under the standard disclosure and associated reasonable search rules. It was possible for a highly material document to exist that would be outside standard disclosure but within the Peruvian Guano test. Or such a document might be one that would not be found by a reasonable search. No doubt such cases are rare. But the rules sacrificed the 'perfect justice' solution for the more pragmatic standard disclosure and reasonable search rule, even though in the rare instance the 'right' result may not be achieved.

10.34 The possibility of incomplete disclosure leading to injustice led to the amendment of the CPR in England and Wales in 2002. CPR 31.12 now specifically enables the court to make an order for 'specific disclosure'. Under paragraph 5.5 of Practice Direction 31A, the court may, on an application for specific disclosure, direct a party to carry out a search for (and disclose) any documents that it is reasonable to suppose may contain information that may 'enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure; or *lead to a train of enquiry which has either of those consequences*' (emphasis added).

[3] Jacob LJ in Nichia Corporation v Argos Limited [2007] EWCA Civ 741.

10.35 This last provision in paragraph 5.5 of the Practice Direction to CPR 31 was implemented by a 2002 amendment to the CPR, reintroducing the Peruvian Guano test in certain circumstances. As a result, the CPR contains a fail-safe mechanism for those cases where the standard disclosure and reasonable search rules fail to achieve perfect justice[4]. The rules, therefore, ensure that injustice as a result of too rigid an approach to disclosure is avoided by preserving entitlement to make a specific discovery application on Peruvian Guano lines in an appropriate case. Research conducted on behalf of the then Department for Constitutional Affairs into the operation of the Civil Procedure Rules in 2005-06 (12) found that the disclosure system was working well, with specific disclosure applications much reduced from the position prior to the introduction of CPR. However, current initiatives in England and Wales might suggest that this early assessment was perhaps optimistic and the problem of the increasing burden of discovery is at least as much a feature in that jurisdiction as here.

10.36 In October 2015, pilot schemes commenced in the Commercial Court and Technology and Construction Court in London, the aim of which is to achieve shorter and earlier trials for business litigation by the introduction of shorter trial or flexible trial procedures. Part and parcel of these pilot schemes will be recognition that comprehensive disclosure and a full oral trial on all issues are often not necessary for justice to be achieved. Arguably, that recognition applies to all civil litigation.

10.37 Any system aimed at simplifying the discovery process, whether by limiting its scope having regard to issues such as cost and proportionality to the individual case, or the tailoring of it to the needs of a particular case or type of case, would require to be integrated into a wider case-management structure, beginning perhaps with automatic orders emanating from the court at a certain stage, but with provision for actual judicial case-management input by a procedural judge such as a district judge (civil) or Master/Judge, if required. The thread running through this proposal – as with so many of the suggested reforms in this Review—is that it be judge led in most instances. We do not hesitate to say that if it is to work effectively where it is most likely to be required namely in our new property and business hub in the High Court (see chapter 17) and bring about the potential for vast savings in costs and time it may well require the appointment of a further High Court judge in this area. An Irish judge has already indicated to us the difficulty that the proposal might encounter in Ireland solely because of lack of commercial judges to deal with it.

10.38 The present system, based largely on the concept of relevance, encourages ever increasing searches for any document that might be relevant to the issues,

[4] In the case of Digicel (St Lucia) Ltd and others v Cable & Wireless plc [2008] EWHC 2552 (Ch) Mr Justice Morgan expressly stated that: 'an order for specific disclosure … is not confined to a case where the respondent is in breach of an obligation to give standard disclosure. The court can make an order for specific disclosure even where the respondent has properly complied with its obligations to give standard disclosure but the applicant satisfies the court that such disclosure is "inadequate" or that the case is one where something more than standard disclosure is called for'.

placing an inordinate and disproportionate burden in terms of time and cost on parties to litigation. This should be replaced by a system based upon the principles of standard disclosure and reasonable search that apply in England and Wales, with the safeguard of an application for specific discovery on Peruvian Guano lines, if appropriate. This brings the additional benefit of consistency, which is particularly important in commercial litigation.

10.39 I favour and recommend the latter approach, not simply because it has successfully worked in England, but primarily because I believe a profound cultural change in our approach to disclosure will only come about if we enshrine it in our rules and unequivocally relegate the Peruvian Guano approach to specific cases where need is established in advance before a judicial figure. In recommending this I recognise that whilst it should operate smoothly in the run of the mill cases the larger cases, which are small in number in this jurisdiction, may still throw up familiar difficulties. It is in these cases where, robustly applying the criteria of proportionality /expedition/costs, a bespoke judge-led approach and determination invoked, for example after exchange of witness statements, will invariably pay dividends.

Pre-action disclosure

CURRENT POSITION

10.40 Pre-action disclosure of documents is relatively limited in Northern Ireland compared with England and Wales. It is dealt with under the provisions of the *Administration of Justice Act 1969* (c58) s. 21 and pre-action disclosure of documents under the *Administration of Justice Act 1970* (c31) ss. 31 to 35. Relevant associated Rules of the Court of Judicature are Order 29 r. 9 and Order 24 r. 8.

10.41 In particular, under s. 31 of *The Administration of Justice Act 1970* (c31) pre-action disclosure of documents is limited to cases where the subsequent proceedings would involve a claim in respect of personal injuries or death[5].

10.42 In England and Wales, this limitation has been removed[6]. One of the success stories emanating from the introduction of Civil Proceedings Rules in England and Wales appears to be in relation to pre-proceedings disclosure[7].

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[5] It provides as follows: 'On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court in which a claim in respect of personal injuries to a person or in respect of a person's death is likely to be made, the High Court shall in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have had in his possession custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—

(a) to disclose whether those documents are in his possession, custody or power; and

(b) to produce to the applicant such of those documents as are in his possession, custody or power.'

S. 32 provides for 'Extension of existing powers of court to order disclosure of documents, inspection of property, etc.'

[6] (i) *The Supreme Court Act 1981* (c54) (now re-named *The Senior Courts Act 1981*) repealed the relevant sections of the *Administration of Justice Act 1969* s. 21 (1)-(4) and also s.31 of *The Administration of Justice Act 1970*.

(ii) S.33 of *The Supreme Court Act 1981* (now *The Senior Courts Act 1981*) provided a hybrid of the previous provisions as follows. The limitation was included.

Powers of High Court exercisable before commencement of action

10.43 In this jurisdiction the conventional defendant's response to requests for pre-action discovery has been based on a concern about fishing expeditions, with plaintiffs' solicitors looking to see what they could find before deciding whether they had a case or not. In a modern litigation system where a cards-on-the-table ethos is encouraged the legitimacy of such a stance must be open to question.

10.44 Provision for such applications already exists in s. 31 of the *Administration of Justice Act 1970* and Order 24 r. 8 of the Rules.

10.45 Further, the pre-action protocol for personal injuries cases issued in 2009 and the subsequent clinical negligence protocol have made parties, and the courts, more receptive to such applications than previously.

10.46 The question is whether it should be necessary for plaintiffs to make formal applications to the court under the s. 31 procedure, or whether there is scope for automatic entitlement to such disclosure. The fear of fishing expeditions, arguably previously overrated in any case, would be met by the requirement of a detailed letter of claim along the lines of that currently required in the clinical negligence protocol, which the defendant can legitimately argue to be necessary if they are to be in a position to form a view as to what documents they ought to disclose prior to commencement of proceedings. The experience in England and Wales under the

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(1) On the application of any person in accordance with rules of court, the High Court shall, in such circumstances as may be specified in the rules, have power to make an order providing for any one or more of the following matters, that is to say—
(a) the inspection, photographing, preservation, custody and detention of property which appears to the court to be property which may become the subject-matter of subsequent proceedings in the High Court, or as to which any question may arise in any such proceedings; and
(b) the taking of samples of any such property as is mentioned in paragraph (a), and the carrying out of any experiment on or with any such property.

(2) On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court in which a claim in respect of personal injuries to a person, or in respect of a person's death, is likely to be made, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—
(a) to disclose whether those documents are in his possession, custody or power; and
(b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—
(i) to the applicant's legal advisers ; or
(ii)to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
(iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

Section 8(1) of the *Civil Procedure Act 1997* provided that the Lord Chancellor may by Order amend the provisions of section 33(2) of the *Senior Courts Act 1981,* or section 52(2) of the *County Courts Act 1984* (power of the court to order disclosure etc. of documents where claim may be made in respect of personal injury or death) so as to extend the provisions to circumstances (a) where other claims may be made, or (b) generally.
Section 8(2) provided that, 'The power to make an order under this section is exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.'
(iv) By art. 6 of *The Civil Procedure (Modification of Enactments) Order 1998*, the provisions of s. 52(2) were amended to omit the words, 'in which a claim in respect of personal injuries to a person, or in respect of a person's death is likely to be made'. In Burrells Wharf Freeholds Ltd v Galliard Homes Ltd [1999] 22 EG 82 the court rejected the submission that art. 6 of *The Civil Procedure (Modification of Enactments) Order 1998,* which removed the former restriction to personal injuries cases, was *ultra vires*.

[7] John Peysner and Mary Seneviratne, *The Management of Civil Cases: The Courts and post-Woolf Landscape,* London, 2005, Department for Constitutional Affairs Research Series: 'In general this was working well and contributing to diversion from litigation, by giving the claimant's solicitor material that established either that there was no claim or that there was a claim leading to a settlement during the pre-action protocol phase.' p.21

CPR would seem to be that this works to all parties' benefit in that the poor or hopeless case can be identified without the expense and time required in issuing proceedings. This can only be to everyone's benefit, including defendants', who at present would rarely ever recover the cost of hopeless cases in any event.

10.47 The pre-action disclosure of documents under CPR Rule 31.16 and how this has developed in England and Wales is set out in Paul Matthews and Hodge M Malek (2017) *Disclosure* (5th edn), Sweet & Maxwell, at page 87 et seq. Also *The Civil Court Practice 2016 (The Green Book)* at pages 46-40.

The English *Green Book (2016)* page 46 CPR 31.16 states that:

> '(d) disclosure before proceedings have commenced is desirable in order to —
>
> (i) dispose fairly of the anticipated proceedings;
>
> (ii) assist the dispute to be resolved without proceedings; or
>
> (iii) save costs.'

Discussion

10.48 There was a spread of views about introducing a similar proposal in Northern Ireland to that in England. Pre-action disclosure can, and does, put businesses to considerable expense and inconvenience in relation to proposed claims that may never see the light of day. The Civil Procedure Rules in England have a different test from our rules. The former are based on a test of 'desirability' whilst our rules[8] provide that discovery is not to be ordered unless it is 'necessary' for disposing fairly of the matter or for saving costs. Our rules provide for the general principle that discovery of documents must be focused on issues that have actually been pleaded in extant litigation. Accordingly, the suggestion was made that any change in this must be on the basis of exceptionality.

10.49 In a time of an ever growing body of litigants in person who may not fully comprehend the obligations of confidentiality, there would be potential to use such applications as a device to acquire information (rather than for the purposes of proposed litigation).

10.50 Notwithstanding these legitimate concerns, I perceive a compelling logic in adopting the English approach in this instance. We are in the era of cards-on-the-table litigation where artificial and technical impediments should not lie in the path of access to justice. Moreover, appropriate pre-action disclosure can lead to early recognition that a case is hopeless and thus a saving of costs and time. It is increasingly difficult to justify giving preferential treatment to personal injury and fatal cases in modern times. The fears raised, for example, in commercial cases can be aired in any case before a judge where ulterior motivation is suspected.

10.51 I therefore recommend amendment to s. 31 of the *Administration of Justice Act 1970* (c31) whereby pre-action disclosure of documents is limited to cases where the

[8] O24 rules 8 and 9.

subsequent proceedings would involve a claim in respect of personal injuries or death. This limitation should be removed and the provisions should apply to all civil actions.

10.52 Moreover, there should be automatic entitlement provided there has been compliance with the pre-action protocol.

Responses

10.53 With the exception of the Bar Council, all the other responses we have received on this matter accept the need for the narrower approach to disclosure and in particular welcome the recommendation to provide for automatic pre-proceedings disclosure of relevant documents. It is worthy of note that the Law Society, whilst considering that the arguments between retaining the existing test and those for introducing the new test are 'finally balanced', comes to the conclusion that 'in light of the proposal in Recommendation 152 to create a business hub, there would be considerable merit in harmonising as closely as possible the test for disclosure in Northern Ireland as closely as possible with that in England and Wales'.

10.54 The Bar Council favours retention of the Peruvian Guano test in all cases on the basis that a change would dilute the obligation to provide discovery in a range of cases and would see the application of different standards for disclosure in different types of cases.

10.55 I consider that the Bar Council response fails to address the arguments raised by the Queen's Bench subgroup set out at paragraphs 10.29 et seq. of this chapter and in particular the retention of the right of any party to make a specific application on Peruvian Guano lines in an appropriate case. In short, Peruvian Guano is not lost. It is simply unnecessary in the vast majority of cases coming before the court with all the attendant burdens of time, cost and effort placed on parties to litigation. It is not without significance that those who bear the greatest burden in carrying out these tasks — for example, the Law Society and the Belfast Solicitors' Association — present no objections to the proposed changes.

Recommendations

1. Order 24 of the Rules of the Court of Judicature to be amended to introduce a system of disclosure based upon CPR 31.7(1) and the principles of 'standard disclosure' and 'reasonable search' in place of the Peruvian Guano test based on relevance, whereby the disclosing party would consider each document to see whether it supports their case, adversely affects their own or another party's case or supports another party's case. **[CJ57]**
2. Specific provision to be made so as to enable the court in an appropriate case to order specific discovery of documentation by reference to the Peruvian Guano test in circumstances where standard disclosure is inadequate or that the case is one where something more than standard disclosure is called for. **[CJ58]**

3. Order 24 of the Rules of the Court of Judicature to be amended to provide for automatic pre-proceedings disclosure of relevant documents, upon production by the plaintiff of a letter of claim of sufficient particularity as to enable the defendant to ascertain the nature of the case being made. **[CJ59]**

4. Such amendment to the Rules to be supplemented, if necessary, by a protocol or practice direction. **[CJ60]**

5. Amendment to be made to s. 31 of the *Administration of Justice Act 1970* (c31) to remove the current limitation of pre-action disclosure to cases of personal injuries or death. **[CJ61]**

11

Experts

Current position

11.1 There is no doubt that the search for justice can be enhanced by the use of expert witnesses in the appropriate case. An expert can give opinion evidence, *inter alia*, on technical matters that will assist the court in reaching a fair determination of a dispute. The court may not have the training and/or the experience necessary to reach a proper conclusion on a particular issue. Expert opinion evidence can assist it in that search. Experience suggests that the use of expert opinion in civil cases is on the increase. However, all too often, expert witnesses are used as a comfort blanket. Their use in all cases requires close scrutiny.

11.2 In general, opinion evidence is inadmissible in the courts. The exception to this rule is where a properly qualified expert is asked to express an opinion on a matter within their expertise in which the court does not possess such expertise. The reasoning behind the admission of expert opinion evidence is to ensure that the court can reach a fully informed decision[1].

11.3 The qualification used by the courts to consider whether expert opinion evidence should be admitted is whether the witness has acquired by study or experience sufficient knowledge of the subject to render their opinion of value in resolving the issue before the court. The expert should have a 'special acquaintance' with a relevant 'body of knowledge or experience' so that their opinion is of assistance to the court[2].

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[1] The following test was set out by King CJ in the Australian case of R v Bonython [1984] 38 SASR 45:

> 'Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. The first question may be divided into two parts:
>
> (a) whether the subject matter of the opinion is such that a person without instruction or experience in that area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area; and
>
> (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.
>
> The second question is whether a witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.

[2] ibid

11.4 The task of an expert witness in litigation is to express an opinion within their expert competence on matters susceptible to such an opinion relevant to litigation. The expert expresses that opinion on facts agreed, proved or to be proved by evidence. In addition to expressing their opinion, the witness may give actual evidence of matters of which they have first-hand knowledge. Once the primary facts on which their opinion is based have been proved by admissible evidence, an expert is entitled to draw on the work of others as part of the process in arriving at its conclusion[3].

11.5 It is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self-defeating[4].

11.6 These duties form the basis for the declaration that all experts have to sign on submitting their evidence to court in, for example, the Commercial Court.

11.7 As a number of respondents to our preliminary report have emphasised, there are a number of great advantages in having experts in civil cases. They include:

- Most cases where experts are employed at an early stage settle and thus do not take up court time.
- Experts have skills that legal professionals are not capable of invoking.
- Experts often meet prior to making their reports and this in itself can lead to resolution.
- Experts do take their primary obligation to the court seriously and typically invite the solicitor retaining them to explain to the client that the primary duty is to the court. Such measures serve to protect the integrity of the process whereby expert witnesses must perform their duties to the court.
- In such matters as conveyancing issues, only a minority of cases reach the court after expert evidence has been retained and, as one practised expert witness recorded, it is rare that such a witness is called to give evidence or be cross-examined.
- The expert witness can often bring clarity to complex issues to the benefit of all concerned.
- There are cases where the provision of an expert report, when disclosed to the other parties' professional advisors, results in the case resolving at an early stage. An expert witness, properly instructed and taking seriously the expert's primary duty to the court, can perform the role of an early neutral evaluation.

[3] Mr Justice May in Larby v Thurgood [1993] ICR 66

[4] Whitehouse v Jordan [1981] 1 WLR 246 per Lord Wilberforce. See also Cresswell J in the Ikarian Reefer [1993] Vol. 2 Lloyd's Law Reports at page 69.

11.8 Expert evidence can give rise to a number of difficulties. These include:

- Failure, refusal or inability on the part of an expert to understand the nature of the duties and obligations they owe. It is all too common an occurrence for an expert to proceed on the basis that their duty to their client far outweighs any duty they may owe to the court. This failure is, at least in part, due to a lack of training as to the role an expert witness performs when they give evidence in a civil court. The paramount duty that an expert witness owes to the court is often forgotten when the expert witness's imperative is to ensure the success of their client in a particular dispute.
- Experts can be and often are prohibitively expensive. Their costs are often uncontrolled. By the time the experts' costs have been quantified the case is over. It is too late for the court to intervene and to seek to exercise the necessary control. Often the costs of the experts exceed all the other costs. Experts' costs are one of the reasons for the substantial increase in the cost of high-end litigation.
- We are not alone in our profound concern about the cost of experts. In recent years there have been statements of concern in many jurisdictions about the disproportionate cost of civil litigation and the use of expert witnesses. In England, the UK Supreme Court has regularly raised the issue[5]. In the responses to consultation in the Scottish Civil Courts Review some respondents, including the Scottish Legal Aid Board, expressed their concern about the increased reliance on experts in litigation and the consequent cost[6].
- Experts can prolong trials. Their evidence can be slow. Their cross-examination can be laborious, painstaking and can take an inordinate amount of time. These problems are not peculiar to any one division in the court system and need to be tackled across all the divisions. There should be a uniformity of approach in civil justice.
- They are often quite unnecessary and really amount to an attempt to usurp the function of the court**.** Two illustrations suffice to make this point. The only assistance of an engineer in the majority of road traffic cases is to map the area, provide sight lines and give the relative times and speeds of both vehicles to the point of impact. Evidence from an expert that goes beyond that is rarely admissible or helpful although there are exceptions[7]. Secondly, accountancy evidence is costly and often amounts

[5] Kennedy v Cordia (Services) LLP [2016] UKSC 6

[6] *Report of the Scottish Civil Courts Review* (2009) vol 1, chapter 9, para 64; The concern was also discussed in the *Taylor Review: Review of Expenses and Funding of Civil Litigation in Scotland* (2013) chapter 4, paras 59-95**.**

[7] Browne (Elizabeth) who sues as the personal representative of the estate of Leslie Browne (deceased)) v Sandra Murray and Michal Marcak Stephens J [2015] NIQB 95. Recently, in Pora v The Queen [2015] UKPC 9; [2016] 1 Cr App R 3, para 24, the Judicial Committee of the Privy Council in an appeal from New Zealand, stated: 'It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however,

to no more than a simple arithmetical exercise that could be quite easily performed by solicitor or counsel.

11.9 There have been many changes made inside and outside this jurisdiction in respect of expert evidence. These include:

- The immunity of an expert witness from civil claims was removed[8].
- Cost budgeting was advocated by Lord Justice Jackson in his review of civil litigation.
- Concurrent evidence, also known as 'hot-tubbing', has been introduced from Australia into a number of courts in the United Kingdom.
- The use of assessors/court appointed experts has been tried in many cases and joint experts are now more common.

11.10 Before turning to a discussion of these issues, we record that our thinking on the issues raised in this chapter has been both informed and influenced by Practice Direction (PD) No. 1 of 2015 on expert evidence issued by the Queen's Bench Division (Commercial), which came into effect on 1 June 2015, a copy of which is appended in appendix 4. As well as setting out requirements in relation to expert evidence, the PD gathered together relevant materials and thus contains:

- The Ikarian Reefer Rules.
- The Code of Practice for Experts issued by the Academy of Experts and the Expert Witness Institute.
- The Practice Direction on the expert's declaration.

11.11 This PD was issued after consultation with the Commercial Court Liaison Group that was chaired by Lord Justice Weatherup as the Commercial Judge at that time and comprised representatives of barristers, solicitors and Commercial Court staff.

Discussion

11.12 Perhaps matters could be improved immeasurably without new rules or regulations if solicitors at the start of every case asked themselves the following four questions, namely:

- Do we need an expert?
- Is the expert we propose to retain appropriately qualified and independent?
- Does the expert know what their duties are?
- Does the expert report help us to prove the case when acting for the plaintiff or to disprove the case when acting for the defendant?

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the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case.'

[8] Jones v Kaney [2011] UKSC 13.

Accreditation

11.13 The problem of an expert witness's lack of understanding of the duties they owe to the court can only be remedied by education and training. The Commercial Practice Direction referred to above at paragraph 10 provides 'ordinarily, the court will expect an expert witness to have obtained a form of accreditation as an expert witness'. The thinking behind the PD was that it would be preferable that accreditation was accorded by a body other than the professional body of the expert witness. It is not accreditation in their expertise but accreditation in their capacity as an expert witness that is required. The professional body may not feel qualified to accord such accreditation. There are, however, expert witness bodies that might more appropriately accord such accreditation, for example, the Academy of Experts and the Expert Witness Institute.

11.14 When this PD was introduced the requirement for accreditation came to the attention of the Academy of Experts in London. They arranged an introductory seminar for expert witnesses in Belfast in September 2015 with a view to attracting those experts who might seek such accreditation. The staff of the academy are regular visitors to Northern Ireland to hold seminars in all aspects of the work of expert witnesses.

11.15 The operative word in the PD is 'ordinarily' the court will expect accreditation. This means that in most cases unless the expert has received the necessary training, they cannot be accredited and therefore are unable to give evidence in court.

11.16 There is much to be said for only those experts who can prove that they have been properly trained, and thus achieved an acceptable accreditation, being given permission to offer expert testimony. In the post-consultation Report published by the Department of Justice entitled: *Examining the Use of Expert Witnesses Appearing in the Courts in Northern Ireland* (the Report), the Department is supportive of such an approach.

Case-management reviews

11.17 The English precedent is that permission is required from the court in the first place before an expert report can be relied on or called to give oral evidence and to justify the cost[9]. This is the case in England even where the party has instructed an expert pre-issue and then wishes to instruct the same expert to prepare evidence for the court proceedings. We consider that a less prescriptive system should be introduced whereby the judge (or Master) should be in a position to determine at the first case management review (CMR) the issues in the case and review the necessity for any expert evidence. In many cases, expert evidence is not necessary. If expert evidence is necessary, then the judge/Master should have the power to set a budget taking into account the issues involved and the amount at stake. They can ensure that the costs of expert witnesses are not disproportionate. It is interesting to note

[9] Part 35.4 of the Civil Procedure Rules.

that the Commercial Practice Direction at paragraphs 18 to 24 provides for 'cost budgets for expert witnesses'. Therefore, in that division the court may require a party instructing an expert to produce a cost budget setting out projected costs which must be approved by the court. It is anticipated that this exercise will be conducted at an early stage of case management. We consider this practice should extend across other divisions.

11.18 The Report (see paragraph 11.16) suggests that the way forward is hourly rates for expert witnesses. Experience suggests that hourly rates can cause problems because they encourage an expert to take as long as possible and/or to follow every possible avenue of enquiry.

11.19 Given the different types of experts' reports, it may be difficult to lay down a rule that applies to all of them. However, there may be a number of standard reports where there would be a standard fee. An example of this would be an orthopaedic surgeon's report in a road traffic accident. A further example might be a standard rate for solicitors who take on the task of calculating financial loss rather than the more costly exercise of employing accountants. It may even be possible to have a number of different bands in respect of different types of reports depending on their complexity.

11.20 Another alternative would be to make an exception for reports that were particularly complicated in some of the more arcane areas.

11.21 In any event, there must be control by the court and in particular by the judge conducting the case management conference (CMC). The whole aspect of experts' costs and, in particular, of any expert's fee, needs to be addressed at the earliest possible stage and given careful consideration by the judge as to what is a fair, reasonable and proportionate fee in all the circumstances. Whatever system is adopted, whether it is an hourly rate or a standard fee, ultimately the judge holding the CMC must be able to control the costs of the experts if they deem it appropriate to do so. In most standard run-of-the-mill cases, such perusal may be little more than perfunctory but the power to intervene, for example in catastrophe cases, must be available.

Joint experts

11.22 One way of streamlining the court process and cutting down on costs is to have a joint expert. In theory this should present a successful alternative to the usual trench warfare between experts, saving on costs and the length of hearings.

11.23 The problem arises when the parties cannot agree on the instruction of a joint expert, the facts upon which their instruction are to be based, the questions they are to be asked to answer or when the parties or one of the parties disagree with their final conclusion. It is usually not possible to prevent a party, at their own expense, from calling their own expert at the trial, if they refuse to accept the joint expert's conclusion and yet will comply with Article 6 of the European Convention on Human Rights. The Commercial Practice Direction at paragraphs 15 to 17 provides

for the engagement of a single joint expert. Most importantly, at paragraphs 41 to 44, the PD provides for the instructions to single joint experts. The PD requires a reason that a single joint expert should not be appointed and that, in the absence of agreement, the court may identify the single joint expert. The PD also encourages agreed joint instructions but if that is not possible the separate instructions must be copied to the other party. The PD at paragraphs 45 to 48 provides for the conduct of the single joint expert and at paragraph 49 for the cross-examination of the single joint expert.

11.24 That said, however, the issue of joint experts remains a sensitive one. In the last analysis, we consider the plaintiff should ultimately be free to instruct an expert of their own choice. A clear distinction must be drawn between joint selection of an expert on the one hand, which should be encouraged wherever possible, and on the other joint instruction of the expert.

11.25 The process of joint selection in England is set out in the Pre-action Protocol for Personal Injury Claims[10]. The plaintiff chooses and sends to the defendant a list of acceptable experts and the defendant has a set period in which to raise objections. If objections are raised, the plaintiff selects another from its list. If parties cannot mutually agree on an expert, the parties are free to select any other of their choosing. The expert jointly chosen is jointly selected but not jointly instructed[11]. Giving the opportunity to object to a proposed expert does not mean that the party waives the privilege attached to that report or that they must disclose the report to the defendant. We recommend such an approach in Northern Ireland and favour its inclusion in the Personal Injuries Pre-action Protocol. It has the enormous advantage of eliminating experts objectionable to one party and with this an obvious barrier to the prospect of agreeing the expert evidence[12].

11.26 The instruction of a joint expert *can* be invoked if both parties buy into their instruction and can agree on their identity and their terms of reference. It has enormous potential in the right cases to assist in their timely and inexpensive disposal.

Concurrent evidence

11.27 Concurrent evidence involves expert witnesses giving evidence together, being cross-examined by the judge, then by each other and finally by counsel. It is colloquially known as 'hot-tubbing' and it promotes consensus. It is regularly used in the Commercial Court and the Commercial Practice Direction at paragraph 79 expressly provides for concurrent evidence. Lord Justice Weatherup records 'It is undoubtedly a great advantage in terms of saving time and expense'.

11.28 It has a number of advantages:

- The experts seem more prepared to try to reach a joint conclusion.

[10] Paragraph 7.2-7.11.
[11] Carlson v Townsend [2001] EWCA Civ 511.
[12] Per Brown LJ ibid.

- It has the capacity to dramatically cut down the amount of time spent in court listening to experts and thus reduce costs[13].
- It reduces the chance of an expert obfuscating in an answer.
- It stops counsel going after red herrings because of a suspicion that their own lack of knowledge is due to the expert equivocating or dissembling. In other words, because each expert knows their colleague can expose any inappropriate answer immediately, and also can re-enforce an appropriate one, the evidence generally proceeds directly to the critical, and genuinely held, points of difference. Sometimes these differences may be profound and, at other times, the experts may agree that they are disagreeing about their emphasis but the point is not relevant to resolving their real dispute.
- The experts are free to ask each other questions or supplement the other answers after they are given. The only rule is that the expert who has the microphone has the floor.
- Generally, the experts co-operate with one another and freely and respectively exchange their views. Often this will see them arriving at a consensus that becomes clear throughout the process.
- All the experts on the topic are together in the witness box at the one time, answering the one question on the same basis. This is a world away from traditional cross-examination of each expert and the various parties' cases, sometimes happening days, if not weeks, apart where a raft of other evidence has been interposed. The judge is able, just as a lawyer is, to understand the issue.

11.29 The disadvantages are as follows:

- It requires a considerable investment of time by the trial judge who has to ask the initial questions. They must fully understand the issues at stake. Helpfully Lord Justice Weatherup responded as follows 'I do not consider this to be a significant disadvantage. What is required is that the judge should read the expert's report in advance together with the minutes of the meeting that should have taken place between the experts. That is something I would have expected the judge to do in any event if the expert witnesses were to give their evidence consecutively'.

[13] The Hon. Justice Peter McClellan, 'Concurrent Evidence', *Effectius Newsletter,* Issue 14, 2011: 'essentially a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a cooperative endeavour to identify the issues and arrive, where possible, at a common resolution of them. Where resolution of issues is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without the constraints of the adversarial process and in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in public.'

- It also plays into the hands of a domineering expert who can dominate the discussion. Of course this is a matter in respect of which the judge should be alert and should be managed by the judge.
- If the experts are determined to follow the party line, it simply wastes time.
- Time restraints can mean that discussion remains at a relatively superficial level, thus limiting its value. Of this Lord Justice Weatherup said 'I believe this concern to be misplaced. First of all, time restraints need not be imposed. The judge will manage the discussion and the time required based on difficulty of the subject matter. Indeed, I have found that, without exception, the giving of concurrent evidence to require significantly less time than I believe would otherwise have been required by the former method of receiving such evidence. In any event I have not found that concurrent evidence results in superficial discussion. The focus, and it is the role of the judge to provide that focus, would be on the points of disagreement between the experts. This inevitably drives the discussion to the very heart of whatever separates the experts'.

11.30 However, the experience of judges in Northern Ireland in the Lands Tribunal[14], Chancery, Commercial and Queen's Bench Division is on the whole a positive one in most cases. When expert witnesses do give concurrent evidence, in most cases the outcome is to promote agreement and certainly to save time. We commend its increased use in appropriate cases.

Court assessor

11.31 The appointment of a court assessor or court-appointed expert can work well in the rare cases when the court has to deal with esoteric or highly technical issues. It prevents well-qualified experts retained by the parties from bamboozling the trial judge. It can also break the logjam where the experts for the parties have reached an impasse. This is especially so where one of the experts is behaving in a particularly unreasonable fashion.

11.32 However, the danger of the court-appointed expert is that they assume the role of the judge and that they end up usurping the judge's function and effectively deciding the case. The Report confirms that the appointment of a court-appointed expert is very much a matter for the judge conducting the CMC.

[14] The Lands Tribunal for Northern Ireland recently deployed it for the first time in Brickkiln Waste Ltd v Northern Ireland Electricity [2015] RVR 197 in a claim for compensation for the grant of a necessary wayleave. The Member, giving judgment, stated: 'It is also worth noting that, at the request of the respondent and agreed to by the claimant, a procedure known as "hot tubbing" was introduced for the first time in the Tribunal, to allow the experts to give concurrent evidence. It was generally agreed that the "hot tubbing" experiment was a success in that it provided a quicker and more efficient means of giving expert evidence to the Tribunal."

Written questions

11.33 A precedent that we found appealing is Part 35 of the Civil Procedure Rules (CPR) in England, whereby written questions can be put to experts by either side. Various precautions are written into the rules, such as:

- The questions must be proportionate.
- The questions can only be put once.
- The questions must be put within 28 days of receipt of the report.
- The questions must be for the purpose of clarification (unless the court gives permission for anything else or the other side agrees).
- Where one party puts a question and it is not answered, the court can exclude that part of the evidence or impose cost consequences.

11.34 The Commercial PD in Northern Ireland at paragraphs 61 to 66 provides for written questions to experts. They must be sought within 28 days of receipt of the expert's report and the expert should provide written answers within 28 days of receipt of the questions.

11.35 The advantage of this provision is that it enables a party to obtain clarification of a report prepared by an expert instructed by their opponent. Questions should not be asked that would require new investigations or tests or to expand significantly on the report or conduct a form of cross-examination by post, including questions on the expert's credibility, unless the court gives express permission[15]. The expert can ask the court for directions if the questions are considered excessive or onerous. The English provisions do not fix a time for response and any rule that is introduced in Northern Ireland should follow the precedent set by the Commercial Practice Direction.

11.36 There are some disadvantages in adopting such a step, as the English experience has shown:

- Defendants frequently flout the 28-day rule.
- Questions frequently go beyond the notion of clarification.
- Defendants on many occasions demand disclosure of the plaintiff's full medical records before they can ask questions under Part 35.6 despite the fact that this is not a rule in law as the medical expert will already have seen the relevant documents[16]. Such demands may also have human rights implications[17].

[15] Mutch v Allen [2001] ALL ER D 121 refusal to allow question whether wearing a seatbelt would have minimised the effects of the accident
[16] Bennett v Compass Group UK and Ireland Limited and another [2002] EWCA Civ 642.
[17] OSC Group Ltd v Wells [2008] ECHC 919 (QB).

- Defendants may mislead the plaintiff by demanding that all documents referred to by the expert are disclosable[18].

11.37 To be forewarned is to be forearmed and doubtless with the English experience in mind any such abuses would be stoutly resisted from a very early stage in the life of such a rule in Northern Ireland.

Sanctions

11.38 To make expert evidence work well, the experts must know the risks they run if they do not fulfil their obligations and duties to the court. The following sanctions are available:

- A personal costs order against the expert[19].
- Disallowing in whole or in part the expert witness's fees.
- Reporting the expert to their professional body[20]. This is another advantage of ensuring that only accredited expert witnesses can give evidence.
- The Commercial PD includes the additional sanction of directing that the expert's report or evidence be inadmissible. Furthermore, the PD draws attention to extreme cases where there might be issues of contempt, perjury or professional negligence.

11.39 In short, the court must feel free to discipline any errant expert in order to raise standards and ensure compliance with the duties that the expert has sworn to uphold.

Expert shopping

11.40 One of the present evils of civil litigation is 'expert shopping'. The party retains an expert but finds that the expert's opinion is not to their liking. The draft report is not going to win the day. The solicitor then retains another expert and so on until they obtain a report that suitably promotes their client's case.

11.41 The means of addressing this mischief drew conflicting views during our Review and in the responses to the preliminary report. There were those who felt the proper course is to remove litigation privilege from all letters of instructions and all draft reports or correspondence with any proposed expert. This would mean that, as part of the discovery process, the other side will be able to see any draft report of an expert, even if that expert has ultimately not been engaged to give evidence at the trial.

11.42 A further suggestion was that this should be extended to include the right of access to any draft report, preliminary report or advice given by any expert

[18] CPR 35.10 expressly confirms the court will not order disclosure of a specific document unless it is satisfied there are reasonable grounds to consider the statement of instructions was inaccurate or incomplete.
[19] see Phillips v Symes (a Bankrupt) (Expert Witnesses: Costs) [2004] EWHC 2330 (Ch)
[20] see Pearce v Ove Arup Partnership & Ors [2001] EWHC Ch 481.

appearing at the trial and which has been produced in the course of preparing the final report for the court. This would mean that a party would lose any advantage from effectively arranging a 'beauty parade' before engaging his expert for the trial or from attempting to school or influence the expert after the production of the preliminary report. It would also mean that it would be much more difficult for a party's legal advisors to put pressure on an expert to change or alter their original opinion that they have expressed in writing, without proper justification.

11.43 This approach was strongly adopted by the insurance industry responses. In particular, the NFUM made the point that, since Order 25 of the Rules of the Court of Judicature imposes an obligation on the defendant to share all medical evidence they obtain with the plaintiff, it should naturally follow that the plaintiff's duties should mirror that of the defendant, with an equal obligation to share all medical evidence they obtain on the basis of a cards-on-the-table approach to modern litigation.

11.44 The competing view was that this was all a step too far and represented a direct challenge to and incursion into the principle of professional privilege, which has been a hallmark of evidence in the civil justice system. It might also contribute to defensive reports and communications that were perhaps less than candid.

11.45 For my own part, I am not as yet persuaded by the former argument. We are, of course, in a new era of open justice, joint selection of experts, reduced costs, swifter resolution and a cards-on-the-table approach. No longer can we tolerate evidence tailored to the paying party's interests. Civil justice is not a game but a search for the truth. A defendant in personal injury cases must always produce their medical report on the plaintiff, irrespective of its strength or weakness. On the other hand, I consider that it is currently a step too far to deprive a plaintiff of the opportunity to obtain pre-action advice about the viability of their claim that they would be at liberty to discard if they did not agree with it. Professional confidentiality has a long history and I fear ingenious methods of circumventing such disclosure would perhaps challenge the integrity of our system. However, this is a topic that has strong arguments on either side and will merit being revisited[21]. This is another example of where a detailed analysis of the situation in a wider consultation could be carried out at the behest of a Civil Justice Council in the fullness of time.

11.46 The key to most, if not all, of these changes is early intervention from the court in setting the rules of engagement for the expert witnesses (but only if expert evidence is required) at the first CMR. Case management offers a means by which the court can encourage parties to avoid leading evidence on matters that are not contentious; for example, by agreeing a statement of fact that explains background matters, which are not the subject of written pleadings, to the court. There may be

[21] See counter-view in Edwards-Tubb v JD Wetherspoon PLC [2011] EWCA Civ 136, where the Court of Appeal in England determined that in a situation where the plaintiff has obtained a medical report from expert A, but chooses not to rely on it and then seeks leave to rely on evidence of expert B in the same field, the court will usually order disclosure of A's evidence before the party can rely on expert B.

matters that can readily be agreed, thereby allowing parties' experts to concentrate on contentious matters. Solicitors with expertise in personal injury actions may use such statements as the basis for agreed evidence in other actions and thereby save expense.

11.47 An important component of the first CMR is to ensure that the court has powers to require experts to meet in advance of any hearing. The Commercial PD at paragraphs 68 to 73 explicitly deals with this and indeed it is part of the fabric of most civil actions nowadays. It is important that a minute of such meetings should be prepared recording agreement and disagreement. The minute should be completed and signed at the conclusion of the meeting. The mischief to be identified in delaying the completion of the minute is that it was being circulated to solicitors after the meeting, and amendment were being made and the expert refused to sign until authorised by the solicitor. This confused the different duties of the expert and the solicitor. It is important in this context that the solicitors should not instruct experts on how they should deal with matters within their expertise.

11.48 Hence the CMR should be held as soon as possible after proceedings are commenced. This will necessitate a sea change in the approach to pre-action protocols by both the plaintiff and the defendant's legal representatives. If there is not early intervention by the court, then control is lost and it becomes impossible for the court to manage issues such as expert evidence as effectively as possible.

Responses

11.49 This chapter excited a number of robust responses. On the issue of accreditation, whilst the Bar Council, the Law Society and the Law Centre were generally in favour of the notion of accreditation, a number of forensic accountants — Harbinson Mulholland, ASM Chartered Accountants and GMcG Chartered Accountants questioned the need, suggesting that experts should be able to demonstrate their necessary experience and understanding of their duties at a court hearing. It was felt that, beyond the expert's declaration, it would be difficult to design a course to provide the necessary training for forensic accountants.

11.50 We feel that these concerns can be met by adopting the approach of the Commercial PD of 'ordinarily' requiring proof of accreditation thus protecting the necessary judicial discretion to waive the need where experts are manifestly fully qualified while at the same time protecting the public against those who require accreditation before their evidence is to be admitted.

11.51 Some criticisms were voiced as to the right of a judge to determine at the first case-management review the necessity for expert evidence. A number of points surfaced. First, the Bar Council and the Law Society argued that the necessity for experts is a matter for the parties and that the use of unnecessary experts can be visited with court sanctions in the last analysis. Secondly, experts are often productively retained before proceedings are even issued. Thirdly, the need for experts may only emerge as the case progresses and that the case-management stage may be too early a posting.

11.52 These arguments perhaps fail to recognise the need to address the disadvantages that presently exist in the system with experts and to which we have adverted earlier in this chapter. Control of experts is crucial if we are to address the disadvantages we have adumbrated and in particular the need to reduce the cost of litigation and the length of trials. Courts will of course be flexible in considering the issue of experts, particularly where they have already been retained. Moreover, as the Commercial PD at paragraph 9 recognises, there is a distinction between the 'expert advisor' and the 'expert witness'. A party may engage an expert to advise prior to the commencement of proceedings or may engage an expert to advise after the commencement of proceedings but not to act as an expert witness. Moreover, the issue of expert retention can be revisited at any stage in the proceedings, provided good reason can be produced to the court. If we are to have an efficient and cost-effective system providing access to all whatever the state of their wealth, then courts must have the power to restrain unnecessary use and expense of witnesses.

11.53 The power of the courts to set a budget taking into account the issues involved and the amount at stake was generally approved by the legal profession. The forensic accountants countered that it can be difficult to estimate costs at the outset of a case. However, the notion of fixed costs is a concept whose time has come and which the public is entitled to expect. Experts must fall in with the trends of fixed costs to ensure that those who eventually will have to pay the bill have at the outset full notice of what the consequences of retaining an expert may be. Proportionality must enter into the concept of justice and costs must reflect this concept.

11.54 The concept of joint experts found favour with most of the professional lawyers, albeit the Belfast Solicitors' Association and some individual solicitors shared the concerns of the forensic accountants that they present difficulties with presentation. The fact of the matter is that a single joint expert will not be appointed provided good reason is given. The Commercial PD rightly encourages agreed joint instructions but if that is not possible the separate instructions must be copied to the other party. Provision is made for cross-examination of the single joint expert and for the conduct in general of the single joint expert's report.

11.55 The Bar Council expressed concerns about the extended use of concurrent evidence or 'hot-tubbing'. It drew attention to the Civil Justice Council Report in England entitled *Concurrent Expert Evidence and 'Hot-Tubbing' in English Litigation since the 'Jackson Reforms': A Legal and Empirical Study*.[22] *Inter alia*, this report raised concerns around the need to ensure that the parties have a sufficient opportunity to test the expert's views where a 'hot-tub' is used and in particular the need for counsel to be given sufficient opportunity to test the opposing expert's view. Procedural fairness may be endangered where legal representatives feel inhibited from challenging the views of experts.

[22] Civil Justice Council *Concurrent Expert Evidence and 'Hot-Tubbing' in English Litigation since the 'Jackson Reforms': A Legal and Empirical Study*, July 2016.

11.56 These arguments failed to recognise not only the obvious advantages in terms of time and expense, but the experience in our own Commercial Court as evidenced in the views of Lord Justice Weatherup. Provided, as will inevitably be the case, judges are alive to the dangers of counsel not being given sufficient opportunity to test the expert's views, and the judge properly focuses on the points of disagreement between the experts, we can see no disadvantage to the system in this process being invoked.

11.57 There was virtually unanimous approval of recommendations 6, 7 and 8 dealing with the power of the court to appoint an assessor, to invoke disciplinary measures against errant experts and to provide written questions to experts provided there are safeguards to ensure it is not abused.

Recommendations

1. Only those experts who can prove that they have been properly trained and thus achieved an acceptable accreditation to be given permission to offer expert testimony. **[CJ62]**
2. The judge (or Master) to determine at the first case-management review the necessity for any expert evidence. **[CJ63]**
3. If expert evidence is necessary, the court to be empowered to set a budget taking into account the issues involved and the amount at stake. **[CJ64]**
4. Courts, in appropriate cases, to encourage use of selection of joint experts. **[CJ65]**
5. The extended use of concurrent evidence. **[CJ66]**
6. Greater use at the case-management stage of the power to appoint a court assessor or court-appointed expert in dealing with highly technical issues. **[CJ67]**
7. Increased use of disciplinary measures against any errant expert. **[CJ68]**
8. A rule to provide for written questions to experts. **[CJ69]**

12

Personal litigants

Current position

12.1 No one who is familiar with the practice of law in this jurisdiction can be unaware of the huge number of personal litigants (PLs) involved in the court system at all levels. This is a phenomenon that has increased enormously within the last number of years and presents a significant challenge to the legal system. Our legal system is one designed for lawyers, where the courts rely on practitioners to ensure that clients are properly advised on the law and their options. In the event of legal proceedings being required, lawyers ensure that cases are both properly prepared and presented to ensure the expeditious use of court time to achieve fair and just outcomes.

12.2 At the outset, it is important to recognise that access to justice is a fundamental principle that applies equally to personal litigants and those who are represented. Nothing should be done that unfairly reduces access to justice to personal litigants and any steps taken in relation to the management of personal litigants in the legal process must be proportionate and legitimate.

12.3 It must be recognised that there is no single version of a personal litigant. It can include small businesses, large companies and institutions who choose to represent themselves in legal proceedings. They appear both as defenders and initiators of actions.

12.4 The perception currently is that many personal litigants are people who do not have access to legal aid or financial resources to bring a claim. Thus, the importance of a properly funded legal aid system cannot be underestimated in considering this matter. Regrettably, the court's experience is that increasingly there is a number of personal litigants who have an unhealthy obsession with the issue involved and a lack of perspective or realistic expectation. The courts are thus from time to time confronted with persistent unmeritorious claims and vexatious litigants.

12.5 The figures made available by the Northern Ireland Courts and Tribunals Service (NICTS) suggest a very high percentage of personal litigants. Looking at the combined figures for the county court, Court of Appeal, High Court and magistrates' court, there were over 19,000 in 2010, over 15,000 in 2011, over 14,000 in 2012, over 13,000 in 2013 and over 13,000 in 2014 (see appendix 5). Furthermore, the figures have to be seen in the overall context of a reduction in the total number of cases dealt with: the figures indicate that there were 49,000 in 2012, 45,000 in 2013 and 45,000 in 2014.

12.6 The figures do not disclose matters such as:

- A profile of the litigant, whether an individual, company, small business, etc.
- The percentage of all civil cases in which a personal litigant is involved in each division of the High Court;
- Whether or not the personal litigant was successful;
- How many of the lower-tier cases resulted in an appeal;
- The extent to which any costs orders, etc. are unenforced or unenforceable;
- The percentage of court time taken up by cases involving personal litigants in each division of the High Court;
- The percentage of successful outcomes in mediation involving personal litigants.

12.7 Whilst much of the analysis of personal litigants is to a degree anecdotal, albeit based on the considerable experience of professional practitioners, a survey of time spent dealing with cases in the Royal Courts of Justice involving personal litigants was carried out by the Office of the Lord Chief Justice (OLCJ) in November 2016. Whilst this was just a snapshot for a month and excludes time spent by Court of Judicature judges, nonetheless it is a helpful indicator of the situation that confronts us. The main findings were;

- Staff time:
  - In November 2016, staff spent seven hours 40 minutes explaining to *persons who* have *yet to commence proceedings*, how to do this, including how to complete forms, what forms are required, cost, etc. While most of these calls take a short time, this adds up and there may be merit in looking to see if there is a better way of dealing with these (e.g. more information be available online, a role for nidirect, a central phone point for RCJ enquiries);
  - Even when a *PL has commenced proceedings*, there are still requests for advice about discovery, requests for copies of documents, advice on amendments, etc. In November 2016, these accounted for 19 hours 30 minutes of staff time.
  - OLCJ staff spent a total of three hours 30 minutes dealing with correspondence from PLs and a threat to a member of staff by a PL.
  - *In total, staff spent 30 hours 40 minutes dealing with queries from PLs in November 2016.*
  - In respect of one PL, staff spent 10 hours 35 minutes dealing with a variety of requests. This was outside the time spent in court dealing with the case concerning his mother. He subsequently lodged judicial review (JR) proceedings.

- Masters' time:
    - In November 2016, Masters spent 39 hours and 27 minutes dealing with personal litigants.
    - Cases involving PLs required more time in general as the Master had to explain the procedures or the PL would not listen or could not understand. Examples include a matrimonial review before one Master which took 30 minutes but which she felt would have taken five minutes if the person was legally represented. Similarly, one Master referred to a number of matrimonial reviews or Queen's Bench hearings that took much longer as a PL was involved (in particular one Queen's Bench hearing took one hour and 20 minutes but he felt that if two counsel had been involved it would have lasted 10 minutes).
    - The documentation submitted by PLs is often voluminous or not relevant. In one Queen's Bench Hearing, the PL produced a 94-page affidavit (without exhibits). The Master had to adjourn the case to another date in order to read the affidavit.
    - Arguments presented in court can sometimes be purposefully devoid of merit and designed to take up the court's time with a view to obtaining further adjournments.
    - PLs may not understand what is required by discovery, which can often lead to the case being adjourned and taking longer.
    - PLs often did not do what they had been directed to do at the last hearing, meaning that the next listing was a waste of court time.
    - Some PLs refuse to communicate with the other side, which inevitably slows down proceedings. In one case, Master Sweeney had to speak to a PL about his conduct in his communications with his wife's solicitors.
    - On the issue of PLs with fee exemption bringing multiple claims, RCJ staff have identified those PLs who have brought the most repeat applications and the dates when those cases were before the court. This will in turn help to identify the number and types of application and the number of hearings associated and the number of judges or Masters who dealt with them. This may give more evidence to support the point that some PLs are bringing repeat (and often vexatious) applications.

12.8 Major drivers of civil justice include the need to avoid delay, reduce expense and at the same time preserve access to justice. There is an overall duty to provide an appropriate amount of resources to litigation. Whilst we must ensure that the focus on personal litigants is that they have needs that require to be addressed in a sensitive and proportionate manner, there can be little doubt that personal litigants can result in significant delays and usually in increased costs. In terms of delay, they can slow down the litigation process. Cases may take longer because of the need to explain the process and procedure involved in litigation and because of the way

personal litigants conduct their cases. Frequently, cases are needlessly brought to court because of a failure to obtain proper early advice. Cases that might otherwise have been settled are not settled. In addition, there is an increased tendency for personal litigants to appeal decisions at first instance, thereby adding to delay and expense involved in appellate courts.

12.9 Associated problems include lack of finality for successful clients who have been sued by personal litigants, a failure to implement interlocutory orders, particularly with regard to costs, and a perception on behalf of represented parties that the courts indulge or are unduly favourable to personal litigants.

12.10 This, of course, is counterbalanced by the perception on behalf of many personal litigants that the court is hostile to them and they interpret a familiarity between the lawyers and the court as being an indication of prejudice against them. They are generally unaccustomed to an adversarial process, which involves the challenging of the arguments and submissions.

12.11 Arising from this perception is the increase in the number of complaints against both judges and lawyers, which have the potential to have a corrosive effect on the administration of justice.

12.12 The issue of expense should not be ignored. Cases that run longer involve greater costs in terms of judges and court staff. It also means that other cases are not dealt with. Personal litigants are often engaged with public bodies who incur great expense in defending unmeritorious claims and are unable to recover any costs.

12.13 The present justice system is premised on most people being legally represented. The combination of complex law, complicated procedures and the adversarial approach of courts and some tribunals means that litigants in person present as much of a challenge to the system as the system does to litigants in person. The system must be changed in relation to both the functioning of the courts and tribunals and the provision of information and assistance to prospective litigants. The system must adapt to user needs with different working methods, including online information and call centres.

12.14 The Judicial Working Group on Litigants in Person chaired by Mr Justice Hickinbottom, which reported in July 2013, set out the importance of a positive approach to litigants in person in its report and in particular stated:

> '2.5 … We consider it vital that, despite the enormous challenge presented, judges are enabled and empowered to adapt the system to the needs of litigants in person, rather than vice versa.'

12.15 The *Chancery Modernisation Review: Final Report,* carried out by Lord Justice Briggs, and which reported in December 2013, set out the problem as the 'entrenched attitude that litigants in person are a problem to be managed away, rather than a group of court users with as much right to an intelligible and useable process as the majority who are professionally represented'. He wrote:

'9.13 In that respect, I consider that three common misconceptions need to be put to one side at the outset. The first is that a shared concern about the unfairness of current practice and procedure vis a vis litigants in person can be properly addressed merely by taking steps on the periphery to ameliorate them. Access to justice is not provided by making practice and procedure only moderately unfair to litigants in person, rather than (as at present) seriously unfair to them.

9.14 The second misconception is to think that the unfairness to litigants in person inherent in practice and in procedure can be satisfactorily addressed at trial (or at some significant interim hearing) simply by the patience, courtesy and investigative court-craft of the experienced judge. In many cases, if not the vast majority, it would be by then too late because the cumulative hurdles that litigants in person will by then have failed satisfactorily to overcome will have left them with insuperable disadvantages by the time they get to trial or to a hearing.

9.15 The third is that written descriptions of practice and procedure truly intelligible to the average litigant in person can be satisfactorily formulated by lawyers …'

12.16 The potential scale of this problem must not be underestimated. Whilst the Human Rights Commission has indicated that research suggests courts cope better when both parties are unrepresented (see the Trinder research), that has not been our own experience in Northern Ireland. We make no apology for citing *in extenso* the recent comments and experience of a High Court Judge in England[1] in a libel action with two personal litigants

'114. Litigation between two litigants in person places great demands upon the court. … As is commonly the case … the papers in this case were presented to me in four separate bundles in no chronological order. In addition I had to search the court file for documents which the parties had not themselves produced or included in the bundles prepared for the hearing, but which were obviously relevant. This is work which is normally done by lawyers representing the parties, and it is usually done by junior lawyers.

115. But if the work is not done by or for the parties, it still has to be done by someone in order for the case is to be tried justly. Masters and judges have no legally qualified assistants, and so in practice they must do the work themselves, if they can.

116. However, it is a waste of resources for this elementary work to be done by judges and Masters. One of the reasons why in England and Wales there are relatively few judges compared with the numbers in civil law jurisdictions is that the courts are administered on the assumption that necessary preparatory work will be done by or on behalf of the litigants and at their expense. If it is not done at the expense of the litigants, then it must be done, if at all, at the expense of the state.

117. There will be significant budgetary and resource implications if the courts are to provide, free of charge to the litigant, and through the costly time of Masters or Judges, services to those who cannot, or who choose not to, instruct

[1] Mole v Hunter [2014] EWHC 658 QB.

solicitors and barristers that they would receive at a small fraction of the cost from lawyers of the junior level appropriate for such work.

118. To understand and decide this case I have not only had to devote to this case a disproportionate amount of the resources of the court. I have also had to deploy experience gained from practice at the Bar in this field of the law. Defamation is a specialist area of the law with which very few judges have any familiarity. The Masters acquire some experience in the course of their work, and, when they are able to do so, they give to litigants such prompting as they are able to give consistently with their duty to maintain judicial impartiality. But in practice any judge who was not a specialist in the field could not realistically be expected to attempt to do justice in a dispute such as the present one. Such a judge would require significantly more time to do the preparatory work, and would be likely to require more knowledge of the law and practice in this field than could be acquired in the time available.'

12.17 The NICTS website contains a link to a 2014 publication entitled *A guide to proceedings in the High Court for people without a legal representative*. This publication contains a number of appendices with checklists for those involved in civil litigation and judicial review proceedings. It was drawn up with the help of a number of persons and bodies in the voluntary sector but even it has received criticism for being insufficiently plain and comprehensible for non-lawyers.

12.18 Pro bono work is a feature of the legal landscape. What is it? Pro bono legal work means free legal advice or representation. It is provided by barristers on a referral by advice agencies, accredited by the Bar of Northern Ireland, or by solicitors working on a pro bono basis to individuals or community groups who cannot afford to pay for that advice or representation and where legal aid or other funding is not available. No payment is made to the barrister or solicitor, regardless of the outcome.

12.19 The Bar of Northern Ireland Pro Bono Unit (the Unit*)* has been established by the Bar of Northern Ireland to provide free legal advice and representation in deserving cases for those who cannot afford the legal help that they need, and who cannot obtain assistance from any other source. Pro bono legal work has always been an integral part of membership of the Bar of Northern Ireland, as part of its work in providing access to justice and meeting otherwise unmet legal need. It can involve:

- Giving advice either in the form of a written opinion or verbal advice at consultation;
- Representing individuals or community groups in any court or tribunal in Northern Ireland, the European Court of Justice or the European Court of Human Rights or the Supreme Court of the United Kingdom when the cause or matter being adjudicated upon emanates from Northern Ireland; or
- Providing assistance with mediation.

12.20 The Pro Bono Unit does not to date routinely collate and retain statistics of its pro bono work. However, helpfully the unit indicated that its records reveal that, between May 2015 and June 2016, 37 applications were sought of which 21 were on the civil side. One on the civil side was taken on. However, of those not supported disposal often included provision of informal advice/guidance on, for example, processes and procedures together with suggested referrals to other funding/support agencies or solicitors.

12.21 The Law Society does not run a separate pro bono unit. However, solicitors have some involvement with the pro bono unit operated by the Bar. The Belfast Solicitors' Association (BSA) responded to us also by saying 'the members of the BSA already do vast amounts of pro bono work. This work is increasingly hard to subsidise as the amount of paid work (and the remuneration from paid work) is reduced by both the market place and, in particular, changes to legal systems, regulation and funding'. The society does not collate statistics on pro bono work that solicitors carry out. However, there is a culture in the profession to do pro bono work if the client and the issue are considered by the solicitor to be meritorious.

12.22 The courts have been proactive in dealing with the ever increasing number of personal litigants and the challenges they present to the courts. Early firm case management with PLs in mind has become an integral part of the legal landscape. In the High Court, when an action is initiated by a PL the matter is referred to a judge within six weeks for the purposes of case management. The Court of Appeal routinely sets aside days to case-manage and review only cases involving PLs. This case management is seen as the key to the best running of a case involving a personal litigant.

International developments and research

12.23 The United States, Canada, Australia, New Zealand and the United Kingdom have all carried out research on self-represented litigants. The research has addressed issues such as:

- What are the key characteristics of self-represented litigants?
- Why are they self-represented?
- What effect does their lack of representation have on them, the other party, the court process, the judiciary, court staff, lawyers and others?
- To what extent is information and resources accessed by self-represented litigants?

12.24 The findings of the aforementioned international studies have strong common themes. In the international studies, cost has been the most common reason cited by self-represented litigants for appearing without a lawyer. Other reasons for self-representation have included self-represented litigants' perceptions that the case was straightforward enough to represent themselves and because the litigant believed they knew their case better than a lawyer. A previous bad experience or

distrust of lawyers has also been commonly cited by self-represented litigants in family cases in some of the international studies.

12.25 The international studies have broadly found that self-represented litigants in the courts often do not understand court process and procedures. This leads them to make mistakes, such as presenting irrelevant and excessive material, making errors when filing and writing documents. Their lack of understanding of the law and court processes is believed to increase hearing times and case progression in the court because court staff, lawyers and judges guide the litigants through the process and spend more time explaining procedure.

12.26 The studies also found that litigants had frequently sought advice from court staff, community law centres, the Internet, and family and friends for information on court procedure, process, applications, affidavits, case law and general case advice. Thus, for example, California, a state from which we can learn valuable lessons, has a system of court-led self-help centres providing timely and cost-effective processing of cases involving self-represented litigants. The centres include an attorney and other qualified staff who provide information and education to self-represented litigants about the justice process, and who work within the court to provide for the effective management of cases involving self-represented litigants.

Discussion

12.27 It is important not to conflate personal litigants with vexatious personal litigants, albeit both exist in the system. It is not a binary situation — that is, someone who has legal representation and someone who does not and, by implication, never had access to legal advice.

12.28 Research on *Litigants in Person in Private Family Law Cases* by Liz Trinder and others (November 2014) for the Ministry of Justice looked at the evidence concerning PLs in private family law cases in five courts in England and Wales, including behavioural drivers, experience and support needs[2].

12.29 The research found that PLs often start with legal representation then lose it, usually for financial reasons, and, in some cases, access support through advice centres, McKenzie Friends, etc. Many PLs were responding to legal action rather than initiating actions. The vast majority of PLs in the private family cases were not vexatious.

12.30 There is no evidence before us to suggest a markedly different finding in Northern Ireland in ordinary civil law cases. Non-vexatious personal litigants may be in the majority and accordingly it is necessary to devise discrete approaches for both vexatious personal litigants and non-vexatious litigants.

[2] The work covered the period January to March 2014 prior to the removal of private family law from scope in England and Wales. The research was both quantitative (observations, interviews with PLs, lawyers, judges and court officials) and qualitative (examination of tiles, statistics, available information, etc.).

12.31 The difficulty that arises in analysing the issue of PLs is the lack of accurate statistics and empirical data. The Law Society and the Bar Council, for example, have emphasised that the recording and collating of rigorous data to inform future research is essential in line with the best principles of evidence-based policy making and an approach that looks at the system holistically. Hence, we welcome the research into the needs/experiences of PLs that commenced in April 2016 for a period of two years conducted by the Northern Ireland Human Rights Commission and Ulster University School of Law. It will involve observations in the family courts and bankruptcy proceedings, interviews with PLs, judges, lawyers *et al*, an analysis of the characteristics of PLs and how they become PLs in the first place.

12.32 The research will also provide a human rights analysis of the right to representation under art. 6 of the European Convention on Human Rights (ECHR) and the running of a legal clinic for some PLs to provide signposting and process advice on how the courts work, etc. to see if this is of any value. We observe that the Bar Council have voiced concerns that this could become an alternative route for PLs to obtain legal advice that fails to address the fundamental issue of the absence of legal aid and the need for the expertise of the legal profession.

12.33 Finally, the research will look at what materials and other sources of support are used by PLs and the information provided by the courts. This will be the first in-depth research into the issue in Northern Ireland and the first research of its kind to measure the impact of legal support for personal litigants. This research will help to redress the current lack of information about PLs in the Northern Ireland context.

12.34 The issue of personal litigants is thus part of an on-going process of inquiry and our recommendations will probably need to be revisited in light of the unfolding research now being carried out and the experience of others closely involved with personal litigants. For example, the President of the Appeals Tribunals from Northern Ireland has reminded us that tribunal members have contact on a daily basis with people suffering from a wide range of disabilities, both physical and otherwise. Many of these people attend without representation. The tribunals seek to train members to be receptive to the individual needs of all such appellants. Each month they consider in excess of 700 appeals in respect of disability-related benefits. They have wide experience of making the venues user-friendly for the needs of disabled people and those who are self-represented[3]. It is a classic case of a task for the Civil Justice Council[4] as time passes.

12.35 The reasons for the increase in PLs are clearly multi-factorial but a most important issue is the lack of public funding and, in this context, the cut-backs to legal aid may well be a false economy. Legal aid work by solicitors and barristers

[3] The President of Appeals Tribunals Northern Ireland has introduced a *Code of Practice for Tribunal Representatives* dated 1 October 2015. The advent of welfare reform in Northern Ireland provides an opportunity to further develop representation at the tribunals. The President is currently liaising with the Law Society with a view to providing CPD training for solicitors in respect of the work of the tribunals, welfare reform and the code of practice. We also note the recommendations proposed by Professor McKeever of the University of Ulster *Supporting Tribunal Users: Access to Pre-Hearing Information, Advice and Support in Northern Ireland.*

[4] See chapter 25.

acts as an essential filter and provides a diagnosis and containment of PLs, ensuring a great number of disputes are resolved without legal proceedings. Such work also deters an unquantified number of unmerited cases from entering the court system. In this context we acknowledge the importance of the Green Form Scheme, which is particularly useful in areas of law where representation is not available through legal aid. Not only does it provide a way for solicitors to furnish free advice at a preliminary stage but from an equally important perspective, Green Form is absolutely crucial. It pays for interpreters for those with limited English and medical reports for those with disabilities and/or poor health requiring medical reports to support their claim.

12.36 It is a truth universally acknowledged by virtually all our respondents to the preliminary review that the time and expense taken up by PLs in the court often outweighs the savings achieved by limiting legal aid to the most impoverished people only. We share the view expressed by the Law Centre (NI) that it would be beneficial for government to conduct research of the courts' experience of managing PLs. A cost-benefit analysis research would inform policy making to great advantage and we recommend that this step be taken alongside considerations for cutting legal aid. The fact of the matter is that many people who have legal grievances are denied the opportunity to express these through proper legal challenges because they cannot afford it. This may contribute to a culture in which aggrieved persons assume the right to take legal action whether the case has merit or not. There is some evidence of the damaging result of this, with the appearance of some utterly hopeless and vexatious claims prosecuted in the court by misguided PLs while an unknown quantity of meritorious cases may not be pursued because of a lack of funding.

12.37 The personal litigant problem in Northern Ireland has differences from that in other jurisdictions. Whilst there is little empirical evidence of this, anecdotally our respondents felt this was because, many plaintiff practitioners in Northern Ireland already provide an *ad hoc* pro bono service for 'meritorious' cases. The 'merit' issue is of significance when discussing PLs.

12.38 Experience shows also that some PLs have already passed through several legal offices, and the pro bono units, and are unrepresented not because they cannot afford legal advice, but because they have refused to accept legal advice or have refused to accept that their cases have no prospect of success.

12.39 A report by Citizens Advice in November 2015[5] looked at the issue of PLs in the family courts in England. The report identified eight ways to improve the process of going to the family court alone, which we believe have an equal resonance for our civil courts and should fully inform our approach in Northern Ireland:

- Litigants in person need a clear way to navigate through the court process.
- Information should be easy to find, consistent, reliable and user-friendly.

[5] "Standing Alone: Going to the Family Court without a lawyer".

- Paperwork and processes should be designed with the layperson in mind.
- The physical court environment must help, not hinder, litigants in person.
- Litigants in person need the tools to cope with pre-trial negotiations.
- Guidance for legal professionals needs universal adoption.
- People need more information to make the most of lawyers' services.
- Evidence requirements should not be a barrier to those not eligible for legal aid.

12.40 The report makes three key recommendations about how courts, professionals and other service providers can address these challenges:

- Litigants in person need access to reliable advice and information to determine the validity of their case; investigate alternatives to court; progress their case through different stages; represent themselves effectively; and deal with outcomes.
- Processes, physical courts and professionals' behaviour should respond to the increased numbers of litigants in person by ensuring best practice for working with laypeople is provided consistently.
- Support for vulnerable people should be more easily accessed. Vulnerable groups, such as people with mental health problems, should be signposted to appropriate services.

12.41 We consider the following steps should be taken as a matter of priority.

12.42 First, a frequent theme throughout our responses has been the need for NICTS to revise its present website and provide a genuine and easily accessible information hub for PLs. It should be couched in appropriately plain language with an emphasis on information, education, what the courts expect and how the court will assist the PL. It should not assume the PL is a vexatious litigant. Litigants in person need a clear way to navigate through the court process. Information should be easy to find, consistent, reliable and user-friendly. Paperwork and processes should be designed with the layperson in mind.

12.43 There is no good reason why that hub should not complement 'over the counter' support and the use of social media, such as YouTube, and provide short videos on aspects of bringing a claim to court, for example:

- a rudimentary guide to the forms, pleadings, applications and skeleton arguments that have to be completed in the court process;
- a basic guide to court etiquette;
- the stages through which cases progress;
- the importance of time limits for applications and appeals;
- alternatives to the court process;

- a description of the court environment/how the court is to be addressed, etc.;
- rudimentary guidelines as to how evidence is taken and obtained in the civil justice court system;
- voluntary and pro bono help that is available;
- the use of McKenzie Friends;
- signposts to services for the vulnerable;
- cost implications of the legal process;
- the consequences of refusal to obey court orders.

A good example of this is that the Law Centre (NI) is currently working on an information video that guides claimants through the Personal Independence Payment appeal process. It is planned to distribute the video through social media, including through YouTube.

12.44 The NICTS should conduct a review of current forms to ensure they are appropriately plain and comprehensive for all court users. There should be a move away from the conventional printed fact sheets and towards something more interactive which would be more productive. Professor Smith OBE, a proponent of the Dutch Rechtwijzer website[6], has said, 'The best sites, like the Dutch one, are turning themselves around so they ask questions of the user and identify exactly what the user wants. Airline websites don't give you a suite of timetables, they ask you where you want to go.

12.45 Secondly, the court process itself must adjust to the arrival of PLs. Wherever possible, a single judge should be assigned to deal with all cases involving a particular PL. This would have the advantage of consistency and the accumulation of experience in dealing with that particular PL. An early case-management hearing (CMH) in all proceedings involving personal litigants should be regarded as a necessity in most instances. The Law Society has raised an interesting suggestion: namely that a memorandum of understanding style form should be signed by each PL (as well as reference to the potential of a McKenzie Friend) outlining how interaction with the court and legal representatives will take place, e.g. how to contact the court, the quality and tone of engagement, preparation of documents, etc. The judge at the CMH should, for example:

- Take time to ensure that the PL has exhausted the possibility of professional representation (particularly if the case involves points of law), advise as to the benefits of legal advice and the availability of pro bono and voluntary services and explain that represented parties are the ideal in the interests of justice. Judges will of course be careful not to set unrealistic expectations in this regard.
- Outline what is expected from all parties.

[6] See chapter 3.

- Explain what the case is essentially about.
- Relate the options to resolve the case outside the court as well as inside the court.
- Outline the nature of the process, including the importance of timetabling, pleadings, skeleton arguments, etc., so that there are no unrealistic expectations.
- Give an indication that the court may set specific court times for hearings involving personal litigants — or indeed any litigant whether represented or not.

12.46 Some PLs may have a disability, such as mental health problems. The *Equal Treatment Bench Book* (supplied to all judges) is an invaluable tool for guidance in such instances. All judges should be fully familiar with and guided by the current 2013 edition. They should be alert to PLs who may have a disability, such as an autistic spectrum condition, and be ready to convene early ground rules hearings so that appropriate adjustments to procedures to accommodate this disability can be introduced from the outset. Moreover, judges should be alert to language barriers and the need to ensure that, in cases where each party has required its own translator, professional interpreters retained have been appropriately vetted, qualified and trained.

12.47 It may well be that if the proliferation in PLs continues in Northern Ireland, the courts will have to consider fresh approaches to cases where PLs are present. The traditional adversarial approach may not meet the needs of justice in such circumstances.

12.48 In England, both the Judicial Working Group on Litigants in Person[7] and the *Chancery Modernisation Review*[8] suggested that one way to maintain access to justice for unrepresented, unassisted and often unadvised litigants in person was for judges to take a more interventionist or inquisitorial approach. This was echoed by the Lord Chief Justice in England and Wales in a lecture to JUSTICE in March 2014 when he cited *The Judicial Working Group on Litigants in Person: Report*[9].

12.49 A practical example is found in the approach of a High Court judge in England in a recent libel action mentioned in paragraph 12.16 above where two personal litigants contested the matter[10]. The judge said:

> '111. Because both sides were litigants in person, I conducted the hearing by asking first Ms Hunter and then Ms Mole about each of the matters complained of in the counter claim. I then gave each of them an opportunity of asking questions of the other. Ms Mole chose to ask no questions. I then went through the chronology of events as I understood them to be, inviting each of them to correct or complement the understanding I had formed on my own reading of

[7] Chaired by Mr Justice Hickinbottom, which reported in July 2013
[8] Carried out by Lord Justice Briggs, which reported in December 2013.
[9] At paras 2.10, 5.11 and page 33 in his speech launching JUSTICE's new strategy.
[10] Mole v Hunter [2014] EWHC 658 QB.

> the papers and to make their submissions. Before doing this I invited each party for their consent to the procedure I proposed to adopt… I also indicated that I also proposed to hear both applications before me before making a ruling on either of them.
>
> 112. This procedure may be an example of what Lord Thomas CJ referred to in a lecture to JUSTICE the week after this hearing (on 4 March 2014) when he cited The Judicial Working Group on Litigants in Person: Report at paras 2.10, 5.11 and page 33. This Report recommended[11] that there be consideration of:
>
> 'Introduction of a specific power into CPR Rule 3.1 that would allow the court to direct that, where at least one party is a litigant in person, the proceedings should be conducted by way of a more inquisitorial form of process than in civil proceedings where both or at least one party is represented'

This English approach was adopted in October 2015, and, as the Bar Council point out, it is early days yet to assess its full effect.

12.50 We have to be careful of the dangers of introducing a continental style inquisitorial aspect that is foreign to our common-law adversarial approach without defining precisely the limits of that interventionist notion. However, there are a number of possibilities available for proffering genuine and informed assistance to PLs, which include the following:

12.51 There are opportunities for a development of the pro bono concept. Many of the problems arise long before the case reaches court, with PLs confused and bewildered with the process of paperwork and pleadings necessary to start and process a claim. We recommend the Law Society and the Bar pursue the idea of jointly agreeing to provide a pro bono service similar to that afforded by many legal firms in London, on an appointment system organised by the court offices, perhaps two afternoons per week in the local courts, to assist with preparation of (as distinct from acting as an advocate in court) cases for PLs.

12.52 A recent judgment in England[12] suggests solicitors are constrained, in terms of their professional duties, to effectively 'unbundle' service to provide pro bono services in complex matters. This arguably limits the ability to provide a pro bono service. Assistance as opposed to representative service is apparently not currently viable because it is not possible to obtain insurance cover for such a service in Northern Ireland, although the Law Centre has obtained cover for pro bono employment and social security representation. However, the concept continues to work for solicitors in London and we consider greater efforts should be made to resolve this issue with the insurance industry, who themselves would benefit from such help being available in terms of reduced costs of hearings, etc. Ulster University clinical law programme performs excellent work along these lines (echoing the approach of universities in England), although we recognise that care needs to be taken in foisting this challenging task on very young lawyers[13]. Professor Gráinne

[11] The Judicial Working Group on Litigants in Person: Report at paras 2.10, 5.11 and page 33.
[12] Preston v Raleys Solicitors [2015] EWCA Civ 400.
[13] The Ulster Law Clinic has a website: http://www.ulster.ac.uk/lawclinic/

McKeever, School of Law, has said: 'The University of Ulster is leading the way in postgraduate law provision and is one of the only law schools across Britain and Ireland to offer hands on training in social security law. The Ulster Law Clinic provides a unique and invaluable service to tribunal users and highlights the university's commitment to making a real difference to individuals and communities across Northern Ireland. The Clinic has built partnerships with legal communities to maximize its impact and works closely with local solicitors. Our students also volunteer in the pro bono Legal Support Service in the Law Centre (NI) and in Citizen's Advice. In an increasingly competitive economic climate, the University of Ulster is working on the most effective and creative methods of equipping law graduates with relevant, key skills that will ensure they can excel in their future careers.'

12.53 Wolverhampton County Court has had great success piloting a Legal Companion Scheme that provides litigants with support from third-year law students or law graduates doing their legal practice course. The Wolverhampton model is one that has been adopted by different law schools in the UK. The scheme originated in Stoke with a collaboration between Stoke County Court and the Law Faculty at Keele University. Known as the Community Legal Outreach Collaboration Keele (CLOCK), law students help with the completion of civil and family forms and support litigants in hearings with notetaking, although they do not give legal advice. Students gain invaluable experience in dealing with clients and they are able to provide additional support to litigants in person who are not entitled to legal aid and where there is no other support available. It is worthy of note that:

- Wolverhampton County Court set up a meeting with the judiciary, the Law Faculty at Wolverhampton University and local professionals to see how they could take forward the concept. Local solicitors and barristers were invited to be involved in training the students, and court staff members delivered training on completing various legal forms.
- Once the first group of legal companions were ready to work, the legal companion desk in the Wolverhampton County Court foyer went live for a trial run. The scheme has proved to be very successful and apart from holidays and exam times, legal companions have been present at court every day since.
- Legal companions are available for two two-hour sessions each day to assist litigants in person with completing forms. Arrangements can be made in advance if support is required at hearings. Legal companions have also helped refresh the court's forms and information room to make them more user-friendly. On quiet days, legal companions are able to observe civil and family hearings[14].

[14] The Designated Family Judge, Her Honour Judge Helen Hughes said, 'The Family and Civil Judges at Wolverhampton Combined Court Centre welcome the Legal Companions Scheme. The presence of trained, volunteer legal companions will be a very useful source of support to our many litigants in person and the Companions will acquire useful experience to assist in their future careers. We look forward to supporting the development of the Scheme'.

- The legal companion scheme is now fully operational following very positive feedback and an official launch.

12.54 We encourage the law departments in our universities and law school to consider this precedent.

12.55 There is the potential for a contract to be put in place with a voluntary sector provider, such as Citizens Advice Northern Ireland, or Law Centre (NI) (who have expressed an interest in exploring this concept), to have an office in the Royal Courts of Justice (RCJ) — as occurs in RCJ in London — with a lawyer in it. This provides back-up for the lawyer and a guarantee of independence for the PL, but cost could be a stumbling block. It perhaps risks being a victim of its own success as more people decide not to pay for a lawyer when there is a free one available. There would be a need to circumscribe boundaries of service provision quite ruthlessly, setting, for example, a maximum of meetings. The Housing Rights model in the repossession court is similar (but includes advocacy) and works well.

12.56 In England and Wales, the Legal Aid Agency provides funding for face-to-face legal advice and 'on the day' representation and advocacy at court. The Legal Aid Agency has waived the normal financial eligibility requirements for legal aid funding. Many of the providers of the service are, therefore, solicitors rather than non-legally qualified employees. If a similar scheme were developed in Northern Ireland, the standard of advice and representation provided to PLs in possession matters would be likely to improve. We recommend the Legal Services Agency to consider this precedent. One alternative, of course, would be to provide more funding for Housing Rights Service or other providers in the voluntary sector.

12.57 Court staff could provide information but not advice. This may be of limited utility and may be of concern to court staff who fear getting it wrong. It might also throw up insurance issues.

12.58 Comprehensive online information and templates could be provided. This is the approach in several US states. We have gone some way down this road. However, is passive information provision enough to solve the problem?

12.59 In cases where at least one party is unrepresented, counsel or the solicitor should develop a practice of identifying themselves by name when announcing their appearance before the court.

12.60 We should introduce an express rule requiring the represented party to send to any litigant in person legal authorities that are adverse to the represented party's case.

12.61 We should introduce an express rule requiring the represented party to send to any litigant in person the form to be filled in to apply to be assisted by a McKenzie Friend, together with the practice note in relation to McKenzie Friends and any associated documents.

12.62 An option that particularly attracts us is that operated in Australia, where each state has an unrepresented co-ordinator who is a lawyer whose sole function is to provide paperwork and logistical assistance to PLs. They would, therefore, perform the task that judges currently do at reviews but in a much more comprehensive manner and in a more relaxed, informal environment. They make a note of their advice, which is sent to the court and the PL. We have considered a pilot scheme along these lines in the RCJ. This lawyer would have an advisory, not an adjudicatory role. Careful thought would have to be given to:

- The cost and level of resource required to meet the need with one or more co-ordinator — do they need to be rotated in light of the challenging nature of the task or even security issues?
- The boundaries of advice they can give (purely procedural?).
- Who employed the co-ordinators — Office of the Lord Chief Justice, the Departmental Solicitor's Office (DSO) or possibly the voluntary sector?
- Does the provision of advice given to the court as well as to the client create suspicion among PLs?
- That such a service works in co-operation/collaboration with existing services within the voluntary sector such as Housing Rights and the Law Centre (NI).

12.63 A business case approach with savings in terms of court time, hearings, costs, efficiency, etc. should be invoked at an early stage if this course recommends itself. A pilot scheme as proof of concept with advisory assistance, or practical help from DSO, seems sensible.

12.64 An alternative method of producing the same result would be the contracting out of a pilot scheme on the English model to the voluntary sector, with the NICTS defining the service requirement closely and retaining a high level of control. Buying in a service provider with infrastructure, proven expertise and professional supervision and support experienced in this client base could prove extremely effective. It would also be in line with the cross-sectoral partnership working ethos of the new Programme for Government.

12.65 We agree that advantage could be gained from pursuing a civil dispute resolution service. We consider that research should be undertaken as to the feasibility of a panel of court-appointed mediators tasked with the job of mediating early where PLs are involved. The costs of the mediators would fall on the public purse and would not be limited to professionally qualified lawyers. Other disciplines whose experience is germane to a particular issue could be used. However, the costs of this need to be carefully scrutinised. Mediation may be of assistance in litigation involving well-resourced litigants. Sight should not be lost of the costs attendant upon any mediation. In most cases, the costs of the mediator are borne by the parties equally and, unless they agree to the contrary, each one bears their own costs. The costs of paying for a mediator are not inconsequential. We doubt such expenditure would be within the means of a PL and it would be unfair to visit the entirety of the

costs of a mediation on a represented party. However, it could be that pro bono mediators would provide this service

12.66 We also consider that research and enquiries should be made of the insurance industry to see what insurance-based schemes would be available to deal with mediation and dispute resolutions involving PLs or, indeed, costs incurred in traditional litigation.

12.67 On the issue of pro bono representation, we take this opportunity to recommend the implementation in Northern Ireland of the equivalent to s. 194 of the *Legal Services Act 2007,* which allows pro bono cost orders to be made where a client represented pro bono wins their case. These costs are then paid to The Access to Justice Foundation, which uses the money to support pro bono initiatives. The Bar, Law Society, Public Interest Litigation Strategy Project and Law Centre NI are already on record as supporting such an initiative.

12.68 More could be done to make personal litigants fully aware of the services that might be available. The Bar Council and the Law Society should take steps to publicise the services, and the courts should expressly draw it to the attention of PLs at the outset of cases.

12.69 Whilst there clearly is a need to improve arrangements for PLs, equally courts must not lose sight of the need to ensure that the party with legal representations is not unfairly penalised because of the measures invoked to assist the PL. Thus, for example, judges must be prepared to firmly adhere to time limits under the rules and impose time limits for submissions, cross-examinations and the length and content of skeleton arguments. Interlocutory orders should be strictly enforced. In a time of austerity, this is essential so that undue cost is not imposed on both the public sector and the private sector where, in the latter case, actual costs of lengthy litigation at the hands of PLs may threaten the viability of a business.

12.70 The issue of PLs is of such dimensions that both the judiciary and the legal professions need continuing training to hone their skills in addressing this growing phenomenon. The Judicial College, in collaboration with the Civil Justice Council in England and Wales, has launched the first in a series of modules on managing a case involving litigants in person. These are designed to be short, practical and thought-provoking. Our Judicial Studies Board (JSB) and the Civil Justice Council (once established) should liaise on a similar project here in Northern Ireland in addition to the training that is already provided.

Vexatious litigants

12.71 A vexatious litigant is a person who:

- commences proceedings many times against the same person for substantially the same reasons; and/or
- has sued a wide range of individuals or institutions for matters that are identical or have no legal validity; or

- brings litigation solely to harass or subdue an adversary.

12.72 Vexatious proceedings worldwide are usually characterised and accompanied by[15]:

- complex pleadings;
- a widening circle of defendants as litigation proceeds;
- frequency of striking out of part or all of the statements of claim;
- Inability to accept unfavourable decisions;
- escalating extravagant or scandalous claims (frequently involving allegations of conspiracy or fraud);
- failure to pursue proceedings once instituted.

12.73 Courts in England and Wales have the means of escalating the sanctions against a litigant who makes applications to the court that are 'totally without merit'[16]. Civil restraint orders (CRO) allow courts to forbid applications for court hearings without the permission of a judge. There are three types of CRO: limited, extended and general, with different scopes of application. Further applications totally without merit can lead to withdrawal of the right of appeal. Harassment of the court and court officials can lead to a penal prohibition notice, prohibiting the litigant from contacting or approaching the court without permission. HM Courts Service maintains a list of vexatious litigants.

12.74 Under the *Courts Reform (Scotland) Act 2014*, replacing the *Vexatious Actions (Scotland) Act 1898,* the Lord Advocate can apply for an order to prevent any person accused of vexatious litigation from raising any and all legal proceedings unless they obtain the leave of a judge sitting in the Outer House, having satisfied the judge that such legal proceeding is not vexatious. A list of people who have had such an order brought against them is published on the Scottish Courts and Tribunals Service website.

12.75 The Scottish Civil Courts Review recommended that the civil courts in Scotland should have powers similar to those in England and Wales in relation to civil restraint orders, and a proposal to that effect is part of the *Courts Reform (Scotland) Act 2014*.

12.76 In the Republic of Ireland (ROI), a court may, of its own motion or on application, order that no proceedings, either of a certain type or at all, may be issued by a certain person without leave of that court or some other court, for a specified time, or indefinitely.

12.77 Thus, whereas in England and Wales the Civil Procedure Rules (CPRs) give judges the power to issue a CRO against individuals who have issued multiple court

[15] The High Court of New Zealand in Attorney-General v Collier [2001] NZAR 137 (HC)
[16] CPR Practice Direction 3C to CPR rule 3.11

claims or made multiple applications that are totally without merit, no such power exists in Northern Ireland.

12.78 However, under the *Judicature (Northern Ireland) Act 1978*, the Attorney General for Northern Ireland has the power to seek an order from the High Court that an individual be declared a vexatious litigant where they have 'habitually and persistently and without any reasonable ground instituted vexatious legal proceedings' in the High Court or in any lower court or tribunal.

12.79 We consider that that the civil courts in Northern Ireland should have powers similar to those in England and Wales in relation to civil restraint orders.

12.80 Most of the members of the legal fraternity, including the Law Society and the Bar Council to whom we have spoken, are of the view that the abatement of court fees for any litigant, whether represented or not, should be abolished forthwith in all civil proceedings (save in family law cases) and a modest charge imposed for each proceeding issued. The current abatement system can encourage endless and vexatious litigation and is potentially discriminatory of represented litigants in similar financial circumstances to personal litigants. This is the system that currently operates in ROI where, save in family proceeding (an exception with which we concur) there is no abatement of court fees. The preferred approach, therefore, is a non-waiver of fees, given that there are a number of other options for obtaining funding, such as legal aid (which is based on a merits approach), pro bono services from the Bar, etc.

12.81 In making this representation, we are conscious of the argument that most PLs are not vexatious, that this might appear to chime more with the perspective that litigants in person are a problem to be managed away, and that there has been a great deal of research conducted in the field of personal litigants engaging in the tribunal system where there can be complex law and significant implications.[17] Both the Attorney General and the Human Rights Commission have voiced their concerns about this proposal. It is argued that abolition of waiver of fees fails to identify the vexatious litigant. It is suggested that a merits-based approach is preferable. The problem is, however, that operating such a system on a merits basis, where usually legal aid will have been refused on a merits basis if the financial tests have been met or where a solicitor has already declined to act, does create practical difficulties of how that assessment is to be made. Who is to make it? At what level is it to be made? In short, a merits-based approach is theoretically possible but practically unlikely

12.82 Most respondents seemed to agree that we need a robust approach to waiver at least for serial litigants/repetitive claimants who have no interest in the waste of public money and distress caused to respondents involved in numerous hopeless proceedings. Attention must be given to such public legitimate concerns so that the exemptions can be disapplied in such instances. Fees paid could be reclaimed if the plaintiff is successful.

[17] http://www.lawcentreni.org/Publications/SupportingTribunalUsers2011ELECTRONICVERSION.pdf

12.83 Even if legislation proves too difficult or controversial to meet such abuses, at the very least appeals should be subjected to an abolition of waiver of fees. By the time the appeal has been reached, the party in question will have had an opportunity for a full hearing before at least one judge/Master and, accordingly, access to justice has not been denied.

12.84 Finally, PLs provide fertile ground for joint working between government departments and the legal fraternity, particularly through the Civil Justice Council. The results of the current research being undertaken in Northern Ireland on PLs should be specifically considered by the Civil Justice Council and further recommendations made. In the interim there is no reason why bodies such as the Bar Council and the Law Society should not draw up a joint protocol governing the approach to PLs ensuring that best practice for laypersons is consistently provided.

Responses

12.85 Subject to the riders contained in the foregoing paragraphs, most of the responses to this chapter as published in the preliminary review have been uniformly positive.

12.86 Some existing concerns are as follows:

- The proposal at paragraph 12.48 et seq. and recommendation CJ70 for a more interventionist judicial approach, according to the views of the Law Society and Bar Council, smack of special arrangements for personal litigants tipping the procedural balance in favour of the unrepresented client against the represented client in circumstances where there should not be two sets of rules[18].
- The Bar Council and the Attorney General suggest it might have the unintended and undesirable result of making it more attractive to litigators without lawyers.
- The Attorney General approached the matter from a different angle indicating that there is a strong argument for more judicial intervention in a wide variety of cases and so the right to an inquisitorial approach should not be confined to cases without lawyers. If a judge assesses that justice will be best served by switching to an inquisitorial approach, then that step should be taken.
- The Association of District Judges was opposed to the introduction of this inquisitorial power in the county courts because, it argues, the adversarial system of justice has always prevailed in this jurisdiction.

12.87 Notwithstanding these arguments, I conclude that investing the court with powers to adopt this approach will not mean that it occurs in every instance and no PL can be guaranteed that this will occur. Hence there is no in-built advantage to a person acting without representation. However, when it becomes clear during the

[18] See Smith and Hughes v Black [2016] NICh 17 per Horner J.

course of a hearing that without invoking this power a case is potentially going to become unmanageable or unduly elongated or expensive the case in favour becomes unanswerable.

12.88 The Bar Council have expressed concern that early case-management hearings involving PLs will add to the potential costs of the proceedings in terms of delay to other cases and demands on judicial time. We do not find this argument sustainable. Experience has shown that early case management of cases involving PLs is an invaluable tool in focusing attention on the salient issues, determining the relevance of documentation and fixing timetables. Without such a process, the potential for a disorganised approach with all the attendant waste of costs and time is enormous.

12.89 The concept of an unrepresented co-ordinator, set out in paragraph 12.62 et seq., raised concerns on the part of the Bar Council in terms of cost and the need to distinguish between a purely advisory role and an adjudicative one.

12.90 The Bar Pro Bono Unit has recorded that whilst undoubtedly many solicitors undertake pro bono work on an ad hoc basis and engage counsel on a similar pro bono basis, a formalised equivalent pro bono scheme for the solicitors' profession would likely make a significant difference in the number of cases the Bar Unit could take on and support. Discussions have been entered into between the two professions on this issue and we strongly encourage that development.

12.91 We are satisfied that all of the measures advocated in this chapter, including the suggestion of an unrepresented co-ordinator not only contribute to ensuring that litigants in person are not seen as a problem to be managed away but are a group of court users with as much right to an intelligible and useable process as those who are legally represented. By taking steps to render sufficient assistance to PLs to ensure that this process is properly managed, it will prove cost-effective whatever the initial outlay in order to achieve this end. The role of the co-ordinator will be closely defined and it will be made perfectly clear that there is no adjudicative aspect to the duties.

Recommendations

1. Courts to invoke early case-management hearings in all cases involving personal litigants (PLs). **[CJ70]**
2. All judges to be familiar with and guided by the current *Equal Treatment Bench Book* with reference to PLs under a disability. **[CJ71]**
3. A specific power to be introduced into the Rules of the Court of Judicature Northern Ireland 1980 to allow the court to direct that, where at least one party is a litigant in person, the proceedings be conducted by way of an inquisitorial form of process. **[CJ72]**
4. Where at least one party is unrepresented, counsel or solicitor to develop a practice (if necessary subsequently enforced by a rule change) of:

- Identifying themselves by name when announcing their appearance before the court.
- Requiring the represented party to send to any litigant in person legal authorities that are adverse to the represented party's case.
- Requiring the represented party to send to any litigant in person the form to be filled in to apply to be assisted by a McKenzie Friend, together with the practice note in relation to McKenzie Friends and any associated documents. **[CJ73]**

5. Invocation of the Australian model of an unrepresented co-ordinator with the appointment of a lawyer by the Northern Ireland Courts and Tribunals Service whose sole function is to provide paperwork and logistical assistance to PLs. **[CJ74]**

6. The unrepresented co-ordinator to co-ordinate an online advice line and to provide accessible and easy-to-understand guidance for personal litigants in the county court and the High Court. **[CJ75]**

7. The Legal Services Agency to introduce a similar face-to-face service for limited assistance as presently exists in England. **[CJ76]**

8. Strong encouragement and assistance to be given by the Law Society to projects such as that implemented by Ulster University to assist personal litigants. **[CJ77]**

9. NICTS to build on the research currently being carried out into PLs and to obtain accurate background statistical evidence on PLs in our civil justice system. **[CJ78]**

10. Rigorous data recording practices to be established across each tier of the civil court system and in each geographical division. **[CJ79]**

11. Provision of feedback from PLs in a formal questionnaire issued at all tiers to measure their experience and suggested improvements. **[CJ80]**

12. NICTS to revisit its current website to establish a single authoritative website providing an online objective information hub in civil law cases with an added emphasis on plain and simple language and support given to vulnerable people. **[CJ81]**

13. Paperwork and processes to be designed with the layperson in mind. NICTS to conduct a review of current forms to ensure they are appropriately plain and comprehensive for all court users. **[CJ82]**

14. Vulnerable groups, such as people with mental health problems, to be signposted to appropriate services. **[CJ83]**

15. The current High Court Guidance to Personal Litigants to be redrafted in a format and language that are more readily understood by PLs. A similar document should be provided for the county court. **[CJ84]**

16. A move away from the conventional printed fact sheets provided by NICTS and a more interactive approach to be adopted. **[CJ85]**

17. The civil courts in Northern Ireland to have powers similar to those in England and Wales in relation to civil restraint orders. **[CJ86]**

18. The abatement of court fees for all litigants to be reconsidered at least on the basis that fees for appeals be not waived. **[CJ87]**

19. Steps to be taken by NICTS to publicise the availability of pro bono assistance and alternative remedies for resolution of disputes, including mediation or negotiation. **[CJ88]**

20. A panel of court-appointed mediators to be drawn up to assist where PLs are involved. **[CJ89]**

21. Both the Bar and the Law Society to draw up a joint protocol governing the approach to be adopted to personal litigants, ensuring that best practice for working with laypeople is provided consistently. **[CJ90]**

22. Implementation in Northern Ireland of the equivalent to s. 194 of the *Legal Services Act 2007* permitting pro bono cost orders to be made where a client represented pro bono wins their case. **[CJ91]**

23. Court staff, lawyers and judges to receive regular training for dealing with problems with PLs. NICTS to consider training and delegating one staff member in each civil court office to deal with such issues. **[CJ92]**

24. The results of the current research being undertaken in Northern Ireland on PLs to be specifically considered by the Civil Justice Council and further recommendations made. **[CJ93]**

13

McKenzie Friends

Current position

13.1 The case of McKenzie v McKenzie[1] established that a personal litigant may have a 'McKenzie Friend' (MF) to provide moral support, take notes, help with case papers and quietly advise on points of law and procedure or questions the litigant may wish to raise with witnesses[2].

13.2 Generally, a litigant in person who wishes to have a McKenzie Friend should be allowed to do so unless the judge is satisfied that fairness and the interests of justice do not so require.

13.3 The court can prevent a McKenzie Friend from continuing to act as such where the assistance given is inimical to the efficient administration of justice, for example, where the friend is indirectly running the case or using the litigant as a puppet.

13.4 A McKenzie Friend has no right to act as such: the only right is that of the litigant to have reasonable assistance.

13.5 A McKenzie Friend is not entitled to address the court. If they do so, they become an advocate and require the grant of a right of audience under the provisions of the *Legal Services Act 2007* which replaces s.27 of the *Courts and Legal Services Act 1990*.

13.6 Amongst the points to emerge were:

- Litigants have the right to have reasonable assistance from a lay person, sometimes called a McKenzie Friend.
- Litigants assisted by MFs remain litigants in person.
- MFs have no independent right to provide assistance.
- They have no right to act as advocates or to carry out the conduct of litigation.
- What they may do is:
    - provide moral support for litigants;
    - take notes;
    - help with case papers;

[1] http://www.ucc.ie/law/restitution/archive/englcases/mckenzie.htm

[2] R v Leicester City Justices ex parte Barrow [1991] QB 260, R v Bow County Court ex parte Pelling [1999] 1 WLR 1807 and Paragon Finance plc v Noueiri (Practice Note) [2001] 1WLR 2357 have approved these principles.

    - quietly give advice on any aspect of the conduct of the case.
- What they may not do is:
    - act as the litigant's agent in relation to the proceedings;
    - manage litigants' cases outside court, for example by signing court documents; or
    - address the court, make oral submissions or examine witnesses.
- A litigant who wishes to exercise this right should inform the judge as soon as possible indicating who the MF will be.
- The proposed MF should produce a short curriculum vitae (CV) or other statement setting out relevant experience, confirming that they have no interest in the case and understand the MF's role and the duty of confidentiality.
- If the court considers that there might be grounds for circumscribing the right to receive such assistance or a party objects to the presence of or assistance given by an MF, it is not for the litigant to justify the exercise of the right. It is for the court or the objecting party to provide sufficient reasons why the litigant should not receive such assistance. When considering whether to circumscribe the right to assistance or refuse an MF permission to attend, the right to a fair trial is engaged. The matter must be considered carefully and the litigant should be given a reasonable opportunity to argue the point. The proposed MF should not be excluded from that hearing and should normally be allowed to help the litigant.
- A litigant may be denied the assistance of an MF because their provision might undermine, or has undermined, the efficient administration of justice. Examples of circumstances where this might arise are:
    - the assistance is being provided for an improper purpose;
    - the assistance is unreasonable in nature or degree;
    - the MF is subject to a civil proceedings order or a civil restraint order;
    - the MF is using the litigant as a puppet;
    - the MF is directly or indirectly conducting the litigation;
    - the court is not satisfied that the MF fully understands the duty of confidentiality.

13.7 On 5 September 2012, the Lord Chief Justice issued a Practice Note[3] (the Practice Note) that closely followed an earlier model of a 2010 Practice Guidance in England and Wales[4]. In essence, it provides:

[3] 2/2014.

[4] On 12 July 2010 the President of the Family Division in England and Wales (Sir Nicholas Wall) issued a new Practice Guidance (as opposed to Practice Direction), 'McKenzie Friends (Civil and Family Courts)' endorsed by the Master of the Rolls (Lord Neuberger). The Guidance applies to: 'civil and family proceedings in the Court of

- There is a presumption in favour of permitting a personal litigant to have reasonable assistance from a McKenzie Friend.
- McKenzie Friends may be permitted rights of audience in very exceptional circumstances.
- McKenzie Friends must observe strict confidentiality in relation to information acquired and documents seen in relation to the proceedings.
- A personal litigant may be denied the assistance of a McKenzie Friend because it may undermine the efficient administration of justice.
- The proposed McKenzie Friend should provide a CV or statement to the court setting out their experience, their lack of personal interest in the case and their understanding of the role and the duty of confidentiality.
- Personal litigants may enter into lawful agreements to pay fees to McKenzie Friends. Only in the event of the court granting a right of audience are such fees potentially recoverable from the opposing party as disbursements under Order 64 r. 18.
- S. 106(4) of the *Judicature (Northern Ireland) Act 1978* expressly recognises the inherent power of any court or judge to grant rights of audience[5].

13.8 It is clear from the authorities that an important distinction is to be made between someone who provides the kind of support to a litigant in person discussed in the McKenzie case and someone who:

- purports to act on behalf of the litigant in person;
- addresses the court and/or examines witnesses;
- purports to act as the agent of the litigant in relation to the proceedings or conducts the litigation.

13.9 The Practice Note provides as follows in respect of rights of audience:

> '14. Courts should be slow to grant any application from a personal litigant for a right of audience or a right to conduct litigation to any lay person, including a McKenzie Friend. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.
>
> 15. Only very exceptional circumstances will justify the grant of a right of audience to a lay person, including a McKenzie Friend. Examples are health problems or disability issues which preclude the personal litigant from

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Appeal (Civil Division), the High Court of Justice, the County Courts and the Family Proceedings Court in the Magistrates' Courts'.

[5] In R v Bothwell [2006] NICA 35 the Court of Appeal addressed the issue of solicitor advocates' rights of audience. Since the application did not come within the special provision for solicitors in the *Judicature (Northern Ireland) Act 1978*, the grant of rights of audience was a treated as a matter within the court's inherent power to be exercised as a matter of its discretion, the test for which was 'whether it is necessary in the interests of justice'.

addressing the court or conducting litigation where qualified legal representation is not available to the personal litigant.

16. The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional McKenzie Friends or who seek to exercise such rights on a regular basis, whether for reward or not, will equally **only** be granted in exceptional circumstances. To do otherwise would be to subvert the will of Parliament[6].'

13.10 Both the 2010 Practice Guidance in England and Wales and the 2014 Practice Note in Northern Ireland recognise that personal litigants can enter into lawful agreements to pay fees to McKenzie Friends.

13.11 The procedural rules that govern the availability of lay support to personal litigants in Scotland expressly provide:

'It is a condition of such permission that the named individual does not receive from the litigant, whether directly or indirectly, any remuneration for his or her assistance.'[7]

13.12 It is evident that the restrictions on the availability of publicly funded legal services have contributed to the growth of an industry of fee-charging McKenzie Friends. Since the guidance in 2010 in England and Wales, there have been two separate reports into the effect of this phenomenon on the provision of legal services – the Legal Services Consumer Panel Report[8] and the Ministry of Justice Report. The Human Rights Commission have questioned as to whether there is any evidence of this in Northern Ireland, but we can see no basis for a dissimilar trend from that which clearly is occurring in England and Wales.

13.13 Following those reports, the Lord Chief Justice of England and Wales and the Judicial Executive Board invited Mrs Justice Asplin to convene a working group to examine the issue and suggest possible reform. Their findings and recommendations form the basis of a consultation paper published in February 2016[9]. The working group's conclusions provide the basis for a consultation on possible reform and replacement of the Practice Guidance with, for example, rules of court or updated Practice Guidance[10].

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[6] In the case of Re Thompson Treacy J refused applicant's application that her father should be granted rights of audience: 'The contention that she would be unable to represent herself because she would be too shy and/or tongue tied is, in my view, in the light of what I have previously said, too slender a basis to justify departing from the long standing system regarding rights of audience before the Court of Judicature now enshrined in s.106 of the Judicature Act.'

[7] *Legal Services (Scotland) Act 2010*; *Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993; Act of Sederunt (Rules of the Court of Session) 1994.*

[8] *Fee-Charging McKenzie Friends*, April 2014.

[9] *Reforming the Courts' Approach to McKenzie Friends.*

[10] The consultation for that process closed on Thursday 19 May 2016.

13.14 The principal recommendations of the working group are as follows:

- There should be a change in nomenclature from 'McKenzie Friend' to 'court supporter'.
- The Practice Guidance should be replaced by rules of court.
- A standard form notice should be signed by the McKenzie Friend, including a code of conduct.
- The new rules should contain a prohibition on remuneration.

13.15 The working group in England has proposed: 'the provision of reasonable assistance in court, the exercise of a right of audience or of a right to conduct litigation should only be permitted where the McKenzie Friend is neither directly nor indirectly in receipt of remuneration.'

Discussion

13.16 We endorse the current principles that govern the right to reasonable assistance and those relating to the grant of rights of audience and the conduct of litigation. The support offered by individuals who act as McKenzie Friends in a voluntary capacity, who provide emotional and practical support for litigants, take notes and generally assist with case papers and organisation, plays an important function in the justice system. It is regrettable that we do not have evidence of how many McKenzie Friends regularly appear in court and this is something that the Northern Ireland Courts and Tribunals Service (NICTS) should investigate. The benefit of McKenzie Friends is particularly relevant for litigants who are unable to afford paid legal assistance and even more so in light of the continuing impact of austerity measures.

13.17 We do not, however, share the view of the *Report of the Access to Justice Review Part Two*[11], that there should be a 'more flexible approach to their discretion to authorise a McKenzie Friend'[12] and recommending that 'The court's powers to authorise McKenzie Friends should be liberalised'[13].

13.18 We fear this conflates the 'reasonable assistance' role with that of the lay advocate. There is, of course, no *'discretion'* in relation to reasonable assistance — it is a right of the personal litigant unless there are strong reasons to disallow it. There are completely different considerations at play when one considers the grant of the right of audience or the right to conduct litigation. Fundamentally, these are the preserve of qualified and regulated professionals and any departure from this must be justified by exceptional or special circumstances.

13.19 The Bar Council in Northern Ireland share the view of Sarah-Jane Bennett, Head of Policy, Legal Affairs, Practice and Ethics at the Bar Council in England, who has recently been reported as saying it is inevitable that individuals — namely fee-

[11] Department of Justice (Northern Ireland), September 2015.
[12] Para 7.46.
[13] Recommendation 11.

paid McKenzie Friends — have sought to fill the vacuum of lack of legal aid left by the fundamental shift in legal aid funding. However, not a great deal is known about fee-paid McKenzie Friends, how many there are in England and Wales, what types of services they are offering, what kind of experience and expertise they have, whether they are insured, or how they impact the administration of justice or the outcome of their client's cases.

13.20 The Asplin Working Group rightly points out that the court's jurisdiction to permit a litigant in person reasonable assistance has been recognised[14]. There is a common law right to receive reasonable assistance from any third party in proceedings that take place in open court, while for cases held in private the court has a discretion to allow a third party to provide a litigant in person with reasonable assistance.

13.21 However, the removal of legal aid from critical areas of the civil justice system has opened a market to individuals whose involvement might not always serve the best interests of litigants, unlike barristers and solicitors who are professionally obliged to act in their clients' best interests. The Bar Council in Northern Ireland — and indeed its counterpart in England — is concerned about McKenzie Friends offering paid-for services in a professional capacity, particularly where they seek to exercise a right of audience. There is potential for unqualified, uninsured and unregulated fee-paid McKenzie Friends to have a negative impact on individual litigants as well as the administration of justice[15]. The current view is that there is already a sufficient variety of regulated legal professionals, including barristers, who are able to meet market demand in flexible and accessible ways and who provide qualified, regulated and insured legal services. Adding another layer of unregulated professionals will also create unnecessary confusion in an already highly competitive market as to who can do what, what qualifications are required and what standards are expected. We note a report in 2015 from the House of Commons Justice Committee entitled, *Impact of changes to civil legal aid under Part I of the Legal Aid, Sentencing and Punishment of Offenders Act 2012,* which stated:

> 'We are concerned that in encouraging the use of McKenzie Friends may in some circumstances amount to a counsel of despair: individuals who cannot afford properly regulated legal advice and feel unable to adequately put their own case could find themselves disadvantaged if relying inappropriately on people without legal qualifications.'

13.22 The Bar Council in England and Wales has commissioned field research to be undertaken by an independent team led by Dr Leanne Smith from Cardiff University, to consider the role of fee-paid McKenzie Friends in the family courts, the type of work undertaken by fee-paid McKenzie Friends, how fee-paid McKenzie Friends handle court work, the experience of clients of McKenzie Friends, why they instructed a fee-paid McKenzie Friend and the nature of the service they receive. Dr

[14] At least since the decision of Collier v Hicks [1831] 2 B & Ad 663.
[15] The recent decision of Re Baggaley [2015] EWHC 1496 (Fam) provides an example of how this can play out in the family court.

Smith's *A study of fee-charging McKenzie Friends and their work in private family law cases* was published in June 2017.

13.23 We find no strong view in Northern Ireland that there is any requirement to change the nomenclature of McKenzie Friend to, for example, "court helper" or "litigation friend". Whilst some have emphasised the continuing requirement to ensure courtrooms are not alien environments and the benefits of plain, simple language, most feel that the removal of this nomenclature — which is the word source of much advice and legal authority online for personal litigants — would be to their disadvantage and might suggest an unfounded change in the rules.

13.24 The approach proposed by the working group in England and Wales to the creation of specific rules of court to codify the principles and the applicable procedures has much to commend it. The law in this area has developed through case law and the use of practice notes. An amendment to The Rules of the Court of Judicature (NI) 1980, in terms similar to that proposed in the English Civil Procedure Rules, would bring certainty and clarity to the law. It would also serve to prescribe the precise steps that a personal litigant needs to take in order to avail of reasonable assistance, or to seek the court's permission to be represented by a lay advocate. Parallel rules would need to be adapted, as appropriate, to other courts.

13.25 A standard form notice across all the courts, divisions and tiers (there is already a draft for the Queen's Bench Division — see appendix 6) — containing the necessary CV or statement from the McKenzie Friend and the signed code of conduct, confirming, for example, that they have not received remuneration and are aware of their duties of confidentiality, etc., would ensure that the rights and obligations of both the personal litigant and the McKenzie Friend are clear from the outset. The judge should explain carefully the consequences of non-compliance with the duties. It should be available in multiple languages and should be preferably signed by both the McKenzie Friend and the personal litigant.

13.26 If rights of audience or the right to conduct litigation are sought, then a formal application should be required to the court, at the earliest possible stage of the litigation, supported by evidence of the exceptional circumstances said to justify the grant.

13.27 We believe there is a strong argument that the proposed prohibition on remuneration in England be adopted in Northern Ireland. There are obvious risks to the proper administration of justice in any system that permits fee-charging by unqualified, unregulated and uninsured individuals carrying out important activities in the courts. A balance must be struck between the rights and needs of the personal litigant, the rights of other parties (whether represented or not) and the overall administration of justice. Whilst the Human Rights Commission has questioned the strength of this argument in the absence of empirical evidence, the consensus elsewhere in our responses is that the developments in England and Wales self-evidently will be reflected in Northern Ireland unless steps are taken to meet the danger now.

Responses

13.28 There has been virtually unanimous approval of the entire contents of this chapter in the course of our responses. Concerns were raised by the Bar Council and the Law Society only in regard to the suggestion that a development of a code of conduct and the codification of principles and procedure in relation to McKenzie Friends could inadvertently create the impression of a regulatory environment and steps on the road to McKenzie Friends portraying themselves as part of a regulated profession. The Law Society preferred rather the setting out of expectations in guidance notes that would ensure that the right balance is maintained between empowering judges to manage their own courts and encouraging supportive friends to assist PLs.

13.29 Whilst we recognise the strength of this concern, nonetheless we remain of the view that the importance of ensuring appropriate control and, for that matter, constraint on the use of McKenzie Friends in the midst of what amounts to a growing market, can only be sufficiently emphasised by a specific code of conduct that will apply across the board and thus ensure the gravity of the duties is appropriately emphasised.

Recommendations

1. The principles underlying the right to reasonable assistance, the conduct of litigation and the grant of rights of audience to remain unchanged. **[CJ94]**
2. These principles and the appropriate procedure to be codified in an amendment to court rules. **[CJ95]**
3. A code of conduct for McKenzie Friends to be drawn up. **[CJ96]**
4. McKenzie Friends to be required to complete standard form notices in the case of reasonable assistance, including acknowledgement of not having received remuneration for services, confidentiality and agreement to a code of conduct. **[CJ97]**
5. An application for rights of audience or the right to conduct litigation to be made formally to the court and supported by evidence. **[CJ98]**
6. The effect of the 2014 Practice Direction to be altered by way of statutory change and a prohibition on remuneration of/payment of fees to McKenzie Friends, regardless of the extent of the role being played, save for the payment of necessary expenses such as travel costs. **[CJ99]**
7. The nomenclature of the McKenzie Friend to remain unchanged. **[CJ100]**

14

Disability in the civil courts

Current position

14.1 Justice is a wide concept. It includes justice viewed from the perspective of the system of which the courts are part in ensuring that the indulgence given to one party does not deprive another party of that justice to which they are also entitled. Equality protections are extensive in Northern Ireland and can be traced back to the 1970s when the first fair employment legislation, which focussed on religion, came into being. The scope of the equality protection has evolved over the years. The *Northern Ireland Act 1998,* which was enacted after the Good Friday Agreement, was the first piece of legislation to encompass the various equality strands in the same piece of legislation, although the scope was limited to public bodies. In the rest of the United Kingdom, the *Equality Act 2010* harmonises much of the equality legislation, but similar provision has yet to be made in Northern Ireland.

14.2 Courts 'shall ensure effective access to justice for persons with disabilities on an equal basis with others'— art. 13 of the UN Convention on the Rights of Persons with Disabilities. The courts must comply with its duty to make reasonable adjustments in order to accommodate the needs of claimants. This is bound to be case specific. Unlike other equality groups, it is recognised that in order to achieve fair participation for people with disabilities, positive action may need to be taken to remove barriers not only in the built environment but also for communication and information. The principal legislative requirements in Northern Ireland relating to accessibility of premises and other measures to support persons with disabilities include the following:

- *Disability Discrimination Act 1995* and *2005* and associated codes of practice — *The Disability Discrimination Act 1995* is targeted at ending discrimination for people with disabilities as regards employment; goods and facilities; management, buying or renting of property; and education. From 1 October 1999, service providers have had to make 'reasonable adjustments' for disabled people, such as providing extra support or making changes to the way in which they provide their services. Since 1 October 2004, service providers have had to make other 'reasonable adjustments' in relation to the physical features of their premises to overcome physical barriers to access. Whenever reasonable, policies, practices and procedures must be modified to make court services readily accessible to, and useable by, people with disabilities by removing architectural barriers, by altering existing facilities where feasible or relocating services to an accessible site.
- *Disability Discrimination (Northern Ireland) Order 2006* — the *Disability Discrimination Act 1995* (DDA) was updated as a result of the *Disability Discrimination (Northern Ireland) Order 2006* (DDO) to extend protection

from discrimination to people and situations not previously covered. The DDO:

- Prohibits public authorities from discrimination against disabled people when carrying out public functions.
- Requires public authorities to anticipate the requirements of disabled people and the adjustments that may be needed.
- Placed a new duty on public authorities to have due regard when carrying out their functions to the need to promote positive attitudes towards disabled people and the need to encourage participation by disabled people in public life. Commitment to this legislation is documented in individual disability action plans published by public authorities and submitted to the Equality Commission for Northern Ireland.

On 1 October 2004, Part 111 of the DDA came into force in the United Kingdom, requiring:

- Providers of goods, facilities and services to make physical adjustments to their premises to enable disabled persons to use their services.
- A service provider to take reasonable steps to change either the practice or procedure or physical characteristic of a building that poses a barrier for a disabled person in using the service.

Northern Ireland Act 1998 – s. 75 and sch. 9 to the *Northern Ireland Act 1998* came into force on 1 January 2000 and:

- Placed a statutory obligation on public authorities in Northern Ireland to have due regard to the need to promote equality of opportunity between nine groups, one of which is people with disabilities.
- Ensured statutory obligations are implemented through equality schemes, approved by the Equality Commission, and by screening and carrying out equality impact assessments (EQIAs) on policies.

The *Autism Act (Northern Ireland) 2011* amended the DDA 1995 to add taking part in normal social interaction and forming social relationships to the list of impairments covered by the DDA.

14.3 Disability is difficult to assess and is a complex concept, partly because it can take many forms and partly because general awareness and standards in terms of what constitutes disability varies greatly from person to person and across societies. Thus, for example, autism is a spectrum condition (which includes Asperger's Syndrome) and only around 45% of people with autism have a learning disability. Some people on the autism spectrum have high support needs whereas others do not regard themselves as having a disability at all, instead choosing to self-identify as 'neurologically different'. In addition, the effects on the individual of some of the conditions encompassed by the definition of disability contained in the DDA, such as certain mental health conditions, can fluctuate over time or as a result of changing

circumstances. The types of reasonable adjustments that might be required can, therefore, vary considerably, depending on the person, and may not be static. Consequently, there is no universally accepted definition of disability that meets the needs of all users at all times. A model often used in data collection is that where disability is broadly defined as 'any long-standing disability, illness or infirmity that limits the respondent's activities in any way'. An alternative social model considers the impact of the surrounding environment in which the person lives and how this affects their ability to carry out everyday activities.

14.4 The DDA defines disability as a 'physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities'. The DDO extends the definition of disability to include persons with progressive conditions such as cancer, HIV infection or multiple sclerosis (MS) who are deemed to be disabled from the point of diagnosis rather than from the point when the condition had some adverse effect on their ability to carry out normal daily activities.

14.5 The DDO also removes the requirement in the DDA that a mental health illness must be 'clinically well-recognised' before it can count as an impairment for the purposes of the DDA. The removal of the 'clinically well-recognised' requirement brings DDA coverage for people with mental illness into line with that for those with physical impairments, and persons with mental illness will still need to show that their impairment has a long-term and substantial adverse effect on their ability to carry out normal daily activities.

14.6 Disabilities can be visible or invisible, physical or otherwise. In respect of visible physical disabilities, this can range from serious mobility problems to limited or restricted use of hands, arms and other limbs and speech difficulties presenting challenges to communication, making conversation difficult or impossible. Some speech difficulties can result from neurological conditions such as Parkinson's disease or cerebral palsy, throat cancer surgery or autism. In addition to this, there are a number of 'invisible' physical disabilities, conditions that are not immediately apparent or which are not constantly present but which can cause considerable difficulty, such as back/joint problems and chronic pain. In respect of mobility disabilities, depending on the needs of the individual and the nature of the disability, reasonable adjustments might include: holding the hearing in a more accessible location; or allowing the witness to give evidence via video link.

14.7 Sensory limitations include the following:

- Hearing difficulties or deafness — an extremely helpful response from the British Deaf Association (Northern Ireland) (BDA) entitled 'Access to Justice Consultant' indicated that in October 2015 the BDA had received funding from the Department for Communities to research deaf people's access to the justice sector. Feedback from the BDA's advocacy team indicated that an increasing number of vulnerable 'deaf adults experience significant issues in accessing appropriate legal advice and representation

due to language and communication barriers'. Depending on the needs of the individual and the nature of the impairment, reasonable adjustments might include: allowing the person to sit where he or she can hear better; allowing a telecommunication system to communicate; providing a qualified sign interpreter appointed by the court; or providing an assistive listening system or computer-aided transcription device. In circumstances where a specialist communication aid is required, court staff will require to engage with sensory support organisations in relation to the provision of such equipment.

- Vision impairment or blindness — people who are totally or nearly blind may use a cane or a guide dog to help them get around, or may simply rely on their other senses and the assistance of others. Depending on the needs of the individual and the nature of the disability, reasonable accommodation may involve: providing forms and instructions in Braille, large print or on audio tape; providing assistance at the counter in filling out necessary paperwork; having written materials read out loud in the courtroom, allowing the person to sit closer than usual if of limited vision, or to provide additional lighting. People who are blind or visually impaired can often be assisted by increasing the size of an object, by changing viewing distance, by improving illumination and contrast in written materials. The more words crowded on to a page and the more similar the ink and paper colour, the more difficult it is to discriminate.

14.8 Cognitive limitations. Examples of developmental disabilities include cerebral palsy, epilepsy, hearing loss, autism, Asperger's syndrome, and genetic defects e.g. Downs syndrome. Examples of cognitive disabilities include attention deficit hyperactivity disorder (ADHD), dyslexia, Alzheimer's disease, aphasia, language delay, brain injury and learning disabilities. Depending on the needs of the individual and the nature of the disability, reasonable adjustments may include: having the court and witnesses speak slowly or write things down, when necessary, repeating information using different wording or a different communication approach, allowing time for information to be fully understood, taking periodic breaks; scheduling court proceedings at a different time to meet the medical needs of the individual; providing a support person at the hearing; or allowing the use of videoconferencing technology rather than requiring the individual to appear in person.

14.9 The most common forms of mental illnesses resulting in psychiatric disabilities are anxiety disorders, depressive disorders and schizophrenia. Depending on the needs of the individual and the nature of the disability, reasonable accommodation may include: scheduling court proceedings at certain times to coincide with medication requirements or effects; presenting information in a different manner so as to be better understood by the individual; changing procedures as they relate to the interaction with witnesses and court staff in the courtroom; eliminating distractions; speaking slowly and distinctly or allowing the use of videoconferencing technology.

Current prevalence of disability

14.10 We make no apology for entering into a somewhat detailed dissertation on the extent of disability in Northern Ireland. It is only by grasping the prevalence of disability that we shall recognise the urgent need for the courts to address it. The Northern Ireland Disability Study 1990 (NIDS), a survey dedicated to collecting information on disability, was conducted in Northern Ireland during 1989-1990 by the Policy Planning and Research Unit (PPRU) of the Department of Finance and Personnel, the predecessor to the Northern Ireland Statistics and Research Agency (NISRA). The NIDS study found a prevalence of disability for adults (aged 16 or over) at 17% and 4% for children (aged 15 and under) in the United Kingdom overall. As the recent new Parliamentary Select Committee Review into how the *Equality Act 2010* is being enforced has revealed, there are more than 11 million people across the United Kingdom who have some form of disability and, as we all live longer, that number is increasing. Already, disabled people make up just under 20% of the population.

14.11 The Northern Ireland Survey of Activity Limitation and Disability (NISALD) was commissioned in 2004 following the completion of a review of existing sources of information on disability in Northern Ireland and is the largest household survey undertaken by NISRA. The survey proceeded on the basic premise that a person is not considered as having a disability just because they have a health condition but instead it is how the interaction between this condition and the environment limits or prevents the individual from taking part in society that creates a disability.

14.12 The first survey report was published in July 2007 and details the prevalence of disability among children and adults living in private households in Northern Ireland. The results also provide information on the type, severity, socio-economic characteristics and experiences and barriers in society experienced by people with disabilities. Initial results published from NISALD show:

- That 18% of the Northern Ireland population of all ages living in private households experience limitations in their daily living as a consequence of a disability or long-term condition.
- Almost two out of every five households in Northern Ireland include at least one person with a limiting disability.
- More than one fifth (21%) of the adults in Northern Ireland have at least one disability, and amongst children 6% are affected by disability.
- There is a clear increase in disability with age, rising to 60% amongst those aged 75 and above. Amongst the very elderly, those aged 85 and above, two thirds are living with a disability or disabilities.
- There is a higher prevalence of disability amongst females than males. Almost one quarter (24%) of adult females living in Northern Ireland households indicated that they had some degree of disability, compared with approximately one fifth (19%) of the adult males.

- The prevalence of disability amongst the very youngest within Northern Ireland households is higher amongst boys than girls. Around 8% of boys aged 15 and under were found to have a disability compared with 4% of girls of the same age.
- The most common types of disabilities reported by adults were associated with chronic illnesses, pain, and mobility and dexterity difficulties. Amongst children, the most common types of disabilities were linked with chronic illnesses, learning difficulties and social/behavioural difficulties.

14.13 We observe that there has been a significant increase in autism diagnosis in recent years (mainly thought to be due to a combination of greater awareness, improved training of professionals and additional resource being applied within health and social care trusts), with the rate of diagnosis of children having quadrupled since 2004 and a greater number of adults now coming forward for late diagnosis. The Department of Health publication, The *Prevalence of Autism (including Asperger Syndrome) in School Age Children in Northern Ireland 2016*, recorded that 4.4% of school age children in NI were identified with autism. Autism NI provided a very welcome response to the preliminary report in which they made the following points: 'currently, inequalities regarding access to services external and internal training for the work force and families, as well as public awareness of ASD, are supported by the failure of our disability legislation to recognise Autism. This situation will be addressed as part of required compliance with the Autism Act (NI) 2011. The Act places a duty upon Government to implement an effective Autism awareness campaign strategy and requires all Government Departments to plan together for Autism and contribute to Autism services. The natural consequences therefore is a requirement to take account of the social and communication barriers faced by individuals with ASD in accessing public services and public facilities'.

14.14 There is no comprehensive register of people with disabilities. However, latest figures published for persons claiming disability benefits in Northern Ireland show a dramatic increase, with the number of recipients having increased by 45% in the last 10 years. Figures show that there are approximately 125,000 (almost one in nine of the population in Northern Ireland) receiving disability living allowance (DLA). DLA provides financial support towards the extra costs of living for those severely disabled people and is not based on disability rather the needs arising from it. The total number of people claiming DLA has risen by 7,400 claims in the last 12 months and by 40,000 compared to 10 years ago. Approximately three quarters of all recipients have been claiming DLA for more than five years, with another 48,410 (14.7%) having been in receipt of DLA for between two to five years. Northern Ireland has consistently always had the highest proportion of claimants per head of population in the United Kingdom. People of working age will be transferred from DLA to PIP over the next few years.

Current participation in the court system by those with a disability

14.15 The absence of empirical data makes it difficult to assess the extent to which persons with a disability are involved in the courts or wider justice system in

Northern Ireland. The only relevant data source available in relation to attendance at courts is the Northern Ireland Courts and Tribunals Service (NICTS) customer exit survey, the most recent having been conducted by NISRA in 2011 at a number of court venues across Northern Ireland. A total of 2,145 customers responded to this survey and of these 161 (7.5%) answered 'yes' when asked if they met the following definition of disability: The *Disability Discrimination Act 1995* defines a disabled person as someone who has 'a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities'.

14.16 A summary of findings from this survey indicates that people with disabilities participate in the justice system in Northern Ireland and that there is representation across all the roles, including involvement in cases as parties, victims and witnesses as well as employees in the administration of justice. The survey results also demonstrate that people with disabilities are involved in civil and family justice beyond the initial event or application through to the delivery of justice in court. People with disabilities were also found to be more likely to be in attendance at court in relation to cases appearing in the civil and family courts. No information was sought about whether any adjustments had been made to enable any of the respondents who declared a disability to access the court building or to take part in proceedings.

14.17 Small claims is an area of civil justice accessed by people without the need to go through a solicitor. The results of this survey also show:

- When making an application for small claims, people with disabilities are much more likely to use the small claims online option.
- Higher proportions of people with disabilities felt that they did not have enough information before coming to court.
- While the information leaflets were useful, they did not provide enough detail.

14.18 The absence of statistics and data in Northern Ireland on the experiences of people with disabilities in society is something that has been highlighted in a number of reports, most notably the recently published draft Report on the Implementation of the Convention on the Rights of Persons with Disabilities in Northern Ireland, which concludes, amongst other things, that the lack of relevant data is having an adverse impact on the formulation, implementation, monitoring and evaluation of policies and programmes designed to give effect to the convention. (The findings in this report are set out in more detail below.)

14.19 However, there are results from the NICTS customer service exit survey carried out in 2011 that indicate that, at that time, 70% of respondents were satisfied with venue access for people with physical needs; 54% of respondents were satisfied with venue access for people with learning needs; 58% of respondents were satisfied with venue access for people with hearing impairment; and 54% of respondents were satisfied with venue access for people with visual impairment.

Current programmes and provision for the disabled

14.20 During 2009-2010, NICTS completed disability access audits to assess to what extent the NICTS estate was meeting its obligations under the *Disability Discrimination Act 1995*. A number of recommendations were made for work to be completed to further improve and enhance inclusive access throughout the estate for disabled users. NICTS decided to implement the recommendations, and this was encompassed in commitments made under the Department of Justice (DoJ) equality scheme and associated action plan 2014-15 to deliver improved access to the NICTS estate.

14.21 As a result, a phased programme of work was commenced to upgrade the NICTS estate resulting in improvements to facilities across the court estate, including courthouses in Antrim, Ballymena, Craigavon, Coleraine, Dungannon, Armagh, Newry, Newtownards and Downpatrick. A number of key recommendations were also made in relation to the Royal Courts of Justice, Belfast (RCJ) to improve access into the main building, the Great Hall and courtrooms, and to assist easier circulation throughout the corridors. In those instances where physical adjustments to premises were either deemed unfeasible or proved cost-prohibitive (due to the architectural limitations in the most part), consideration was given to alternative ways of providing services — for example, by re-locating the point of service to an accessible ground-floor level or to a venue that had facilities that met the needs of the individuals.

14.22 The DDA element of the programme of works to the NICTS estate typically included installation of induction hearing loops; automatic door openings; DDA-compliant door handles and handrails; access ramps; wider witness boxes to accommodate wheelchairs; designated disabled toilets that are universally accessible; passenger lifts; additional signage and colour contrast in paint schemes to highlight doorways and stair treads.

14.23 In respect of the RCJ, work was prioritised in consultation with the Customer Service Forum representative from Disability Action, and reference to responses to the customer survey that suggested that heavy doors throughout the building posed a barrier to access. Actions to address this issue were prioritised in phase 1 of the programme, with three types of doors being installed — automated; fire; and swing. New closure fittings were installed on some courtroom doors and a new interface installation and software upgrade on the existing fire system installation was completed to enable the 'Held Open' doors at each floor level to be activated. Work to the ground floor Masters' courtroom was also completed to make it the designated accessible courtroom in the RCJ.

14.24 Plans to carry out further DDA works to the RCJ under phase 4 had to be temporarily suspended in 2014 as a consequence of financial constraints across all Northern Ireland Civil Service (NICS) departments that resulted in manpower resource within Estates Branch having to be diverted to progress other measures targeted at delivering budgetary savings for the agency.

14.25 We warmly applaud the Law Society's new Legally Able Group, launched on 5 October 2016 to provide meaningful support for those who face challenges relative to disability whether as members of the profession, members of the wider legal community or interfacing with the legal community. The Law Society has indicated it will swiftly consider what additional awareness raising training is required in the wake of our proposals at CJ104, CJ105, CJ107, CJ109 and CJ110 below.

14.26 We also note with strong approval the action taken by the President of Appeal Tribunals in Northern Ireland who is taking steps to train members to be receptive to the individual needs of applicants and appellants before them. Positive moves are being taken to make the hearings venues user-friendly to the needs of disabled people. Their Belfast headquarters are currently being refurbished and it is expected that hearing rooms will be made totally receptive to the requirements of disabled appellants. A code of practice for tribunal representatives has been introduced and is worthy of careful reading. The president is currently liaising with the Law Society with a view to providing CPD training for solicitors in respect of the work of the tribunals, welfare reform and the code of practice.

Current interpreter provision

14.27 NICTS also has arrangements in place to ensure interpreter provision for the courts in Northern Ireland in order to meet art. 6 of ECHR and DDA requirements. Any person charged with a criminal offence has the right to be informed promptly, in a language that they understand, and in detail, of the nature and cause of the accusation against them and to have the free assistance of an interpreter if they cannot speak the language used in the court. It is also unlawful for service providers, including NICTS, to treat disabled people less favourably than other people for a reason related to their disability, which includes people with a speech or hearing impairment.

14.28 In cases prosecuted by the Public Prosecution Service (PPS), the cost of supplying an interpreter for defendants at first court appearances is met by the PSNI. The cost of providing in-court interpretation for defendants at second and subsequent hearings is met jointly by NICTS, PPS and DoJ. NICTS currently arrange and pay for an interpreter to support a non-English speaking defendant in criminal cases prosecuted by all other agencies (for example, TV Licensing, Driver and Vehicle Licensing, Crown Solicitor's Office, in extradition proceedings). If a deaf or hearing-impaired defendant requires the assistance of a British Sign Language (BSL), Irish Sign Language (ISL) or other language service professional (LSP), the same arrangements apply.

14.29 In relation to civil and family proceedings, when an action is privately funded, the party requiring the services of an interpreter must normally make the arrangements and meet the costs. NICTS do, however, arrange foreign-language interpreters for non-English speaking parties in civil and family courts in alleged domestic violence cases or cases involving children and in committal cases where the individual whose liberty is in jeopardy does not understand or speak English.

14.30 NICTS also arrange and pay for interpreters in all civil, family, coroners, tribunal hearings and enforcement of judgments interviews for deaf and hearing-impaired persons to ensure fullest compliance with the DDA and UN Convention on the Rights of Persons with Disabilities. Where a person has multiple communication difficulties, such as deaf-blindness or speech and hearing disabilities, NICTS will work with them to ensure that their interpretation needs are met as effectively as possible. Telephone interpreting services are currently available at all public counters. Generally, interpreter provision in Northern Ireland mirrors that already in place in England and Wales. In addition, if a document needs to be translated for the purposes of the court, procedures are in place to facilitate this.

14.31 In the period 2014 to 2016, interpreters were requested in 10,176 cases in the courts in Northern Ireland. The majority (10,140) related to provision of foreign-language interpreters. BSL interpreters were requested in only 54 cases (0.5% of the total) and ISL interpreters in only 4 cases (0.04% of the total), with the majority of BSL interpreters' requests (44) being for cases listed at Laganside Courts.

Current information provision (including guidance materials)

14.32 NICTS has produced a range of information leaflets covering court-related activities and processes — for example, jury attendance, small claims, divorce and separation, youth courts, etc. These leaflets and links are available on the NICTS website and in hard copy from NICTS by post or at court office counters. In addition, the website also provides information, including access details for those with a disability, about each of the courthouses for people coming to a court building. It is worth recording that the Law Society, as part of the Connecting with our Community pilot initiative to promote greater access to information about the profession of solicitors, has to date produced 36 leaflets on a range of services provided by solicitors in Irish, Arabic, Portuguese, Chinese, French, German, Polish, Spanish and Czech.

Current guidance relating to mental health conditions and other disorders

14.33 The Department of Justice has been working on a series of guides to assist all professionals working in the criminal justice system who may come into contact with persons having a specific condition — for example, autism or mental health disorders — that makes them vulnerable. The first guide to be produced is *Autism: a guide for criminal justice professionals*[1] which was developed in collaboration with the National Autistic Society and published in 2014. The second guide to be produced is *Mental Health & Wellbeing and Personality Disorders: a guide for criminal justice professionals*[2] which was developed in collaboration with MindWise and published in 2016.

[1] https://www.justice-ni.gov.uk/sites/default/files/publications/doj/autism-guide-may-2015.pdf

[2] https://www.justice-ni.gov.uk/sites/default/files/publications/doj/Mental%20health%20%20Wellbeing%20and%20Personality%20Disorders%20-%20A%20guide%20for%20CJS%20Professionals%20February%202016.pdf

14.34 In discussion, the representative from MindWise referred to the Court Defendant Support pilot, which unfortunately had to be suspended because of lack of funding. While it was running, this scheme provided additional support to defendants with mental-health issues, to help get them to court through initiatives such as court visits, talking to solicitors about an individual's mental health condition, avoidance behaviour and the difficulties this is likely to present in terms of securing their attendance at court hearings.

Current special measures provision

14.35 *The Criminal Evidence (Northern Ireland) Order 1999* specifies a range of measures that can be made available on application to children; witnesses with a mental disorder or a significant impairment of intelligence and social functioning, a physical disability or disorder; and those who are suffering fear and distress in connection with giving evidence in the criminal courts such as the use of screens, live link, removal of wigs and gowns, evidence in private, the use of intermediaries and aids to communication.

14.36 The Northern Ireland Law Commission (NILC), in its report entitled *Vulnerable Witnesses in Civil Proceedings*, published in 2011, considered the issue of the use of special measures in civil proceedings based on research that suggested that victims and witnesses in civil proceedings should be entitled to the same support as victims and witnesses in criminal proceedings. The NILC report considered that current law and practice gives limited protection to witnesses who may have difficulties giving evidence in civil proceedings and recommended that a scheme of special measures be put in place on a statutory basis in relation to civil proceedings in Northern Ireland. NILC recommended:

- That child witnesses under the age of 18 years should be eligible for special measures and that the entitlement is automatic.
- That people suffering from mental illness, personality disorder or physical disability should be eligible for special measures if the quality of their evidence is likely to be diminished because of that illness, disability or disorder.
- That special measures should be available to persons where evidence may be diminished because a person is suffering from fear or distress as a result of testifying.
- A number of factors that the court must take into account when satisfying itself that the quality of evidence given by a witness may be diminished by fear or distress of testifying in proceedings including:
    - the nature and circumstances of the matter to which the proceedings relate;
    - the nature of the evidence that the witness is likely to give;
    - the age of the witness;

- the relationship between the witness and any party to the proceedings;
- race, domestic and employment circumstances of the witness, religious beliefs or political opinion and sexual orientation;
- any behaviour towards the witness by any party to the proceeding; members of the family or associates; or any other person who is likely to be party to the proceedings.

14.37 The special measures recommended by NILC in civil proceedings include: the use of screening; the removal of gown and wigs in civil proceedings; video recording of witnesses' evidence-in-chief in limited circumstances in relation to private and public law proceedings under *The Children (NI) Order 1995*; the use of intermediaries; the use of communication aids; that witnesses who give evidence by way of a live television link can avail of the services of a suitably trained supporter in the live television link room.

14.38 Articles 17 and 41 of *The Criminal Evidence (Northern Ireland) Order 1999*, as amended by the *Justice Act (Northern Ireland) 2011*, provide for the use of an intermediary for vulnerable individuals where their use is likely to improve the quality (completeness, coherence and accuracy) of the evidence given by a witness. For a defendant, this would apply where their use would enable a defendant to participate effectively as a witness giving oral evidence in court and also help to ensure a fair trial. It is, of course, for the judge to decide if an application for an intermediary is granted.

14.39 Registered intermediaries (RIs), who are communication specialists, were introduced into the criminal justice process in Northern Ireland in May 2013. RIs are professionals with specialist skills in communication, coming from backgrounds such as speech and language therapy and social work. They are required to pass accredited training, are bound by a code of practice and code of ethics and are subject to a complaints procedure. Taken together, this ensures that RIs have the necessary skills to assist those with communication difficulties to give their evidence**.** RIs are available in criminal cases for victims, witnesses, suspects and defendants, at police interview and court stages.

14.40 The RI scheme in Northern Ireland was initially introduced on a pilot basis in Belfast Crown Court and following evaluation was later extended to all Crown Courts. The second evaluation report, published in August 2016, showed that 383 requests were made in the period from 13 May 2013 to 31 March 2015. A breakdown of the requests indicates:

- the majority, 121 requests, related to persons with a learning disability;
- ninety-seven requests related to children;
- fifty-three requests related to persons with autistic spectrum disorder; and,
- thirty-five requests related to persons with mental health issues.

14.41 There is currently no comparative scheme in place in Scotland and while RIs are provided for victims and witnesses in criminal proceedings in England and Wales, eligibility has yet to be extended to include defendants. Statistics provided by the Ministry of Justice show that during the six-month period from October 2015 to March 2016 there were 4,958 requests for RIs in England and Wales. A breakdown of these requests shows that the majority related to children, followed by persons with a learning disability, persons with mental-health issues and persons with physical disabilities. In respect of analysis of these requests, it should be noted that a witness may have been recorded as having more than one condition. Precisely the same type of young person and those with disabilities are present in the family and civil courts. Why are they not afforded the same facilities?

Current disability awareness

14.42 Disability awareness training has been provided for the judiciary in Northern Ireland[3]. Further refresher training is planned and consideration is also being given to the development of e-learning disability awareness training packages for judges.

14.43 The judiciary also have access to the Judicial College's *Equal Treatment Bench Book*, which provides detailed guidance for judges and judicial office holders on equal treatment in respect of such matters as race, belief systems, children, disability, women and sexual orientation[4].

14.44 A draft summary *Report on the Implementation of the Convention on the Rights of Persons with Disabilities in Northern Ireland,* produced by Disability Action, was published in December 2015. Results indicate that 24.8% of adults and 5.4% of children in households reported that their day-to-day activities were limited because of a long-standing health problem or disability. The report highlights that there is still much to be done to meet the needs of disabled people in society. Amongst the priorities identified for action are:

- awareness raising;

[3] Much work has been done by the judiciary in the area of physical disability, mental disability and equality awareness to ensure that the judiciary is properly trained in and apprised of the relevant issues. Some recent examples include:

- JSB workshop on equality awareness, 4 March 2016.
- Dealing with litigants with mental health issues – 24 February 2016.
- Dealing with litigants with mental health issues – 16 September 2015.
- The Law Through Interpreters – A Presentation of Rights, Evidence and Procedure in Multilingual Courts – 17 June 2015.
- Cybercrime workshop – 27 May 2015 and 24 February 2015.
- Getting the Balance Right: Children and the Court – 24 January 2015.
- Vulnerable Witnesses – Tuesday 18 November 2014.
- Judicial Restrictions and Media Access to and Reporting of Court Proceedings – 21 October 2014.
- The most recent training workshop took place in March 2016, delivered by Judge Hugh Howard, a Regional Tribunal Judge in England who is also designated a Diversity and Community Relations Judge.

[4] The full text of the 2013 *Bench Book*, with 2015 amendments, is available on the NICTS Judiciary website and includes a general approach for judges to adopt when considering potential disability issues and guidance on how these might be overcome so that all parties in proceedings can participate as required.

- accessibility;
- independent living and being included in the community;
- freedom of expression and opinion and access to information;
- participation in public and political life;
- statistics and data collection.

14.45 The report highlights:

- Much more needs to be done to increase awareness of disability and tackle stereotypes.
- The absence of any requirement for public bodies to monitor or evaluate disability action plans, which, amongst people with disabilities, means that these are often seen as little more than paper exercises that make no real impact on their lives.
- Persons with disabilities continue to experience issues with access to transport and physical access to premises and public spaces.
- The impact of welfare reform and access to care and support are two main areas of concern for disabled persons in terms of being able to live independently and be included in the community. Evidence points to welfare reform in particular having a significant impact on the lives of people with disabilities in Northern Ireland.
- Accessible communication continues to be a barrier to disabled people accessing their right to freedom of expression and opinion, despite the Northern Ireland Disability Strategy having a strategic priority in relation to increasing accessibility/inclusiveness of communication so that people with disabilities can access information as independently as possible and make informed choices.
- Signage, public address systems, the Internet, telephones and many other communication channels are generally designed for people who can hear, see and use their hands easily; therefore making these media accessible to people with disabilities can require some ingenuity.
- While the strategy states that the Department of Finance (DoF) will produce a plan with specific actions to promote digital inclusion for people with disabilities, there has been no progress in this area, notwithstanding that people with disabilities in Northern Ireland are less likely to access the Internet than their counterparts in the rest of the UK.
- There are two recognised sign languages, Irish Sign Language (ISL) and British Sign Language (BSL), but there are currently only 15 fully qualified interpreters in Northern Ireland serving a population of approximately 5,000 sign-language users and thousands of people with whom they communicate.

Discussion

14.46 Our approach to this issue was based on:

- what is currently provided to support those with disabilities or special requirements, including policies, guidance and procedures developed to support their understanding of and full participation in the court process;
- input from external organisations on what gaps or problems people with disabilities routinely encounter;
- apparent gaps in current provision and to consider, in consultation with external organisations, how these can be addressed;
- a review of information currently available about access to civil and family justice, how this is communicated and how it can be improved;
- information not currently available to all users and how this can be addressed.

14.47 Our discussions have been guided by a number of immensely well-informed individuals and groups[5].

14.48 It was helpfully suggested during discussions with interested parties that minor changes to initiating documentation and prescribed forms in civil and family proceedings — for example, small claims applications, C1 applications in the family court, writs, Certificate of Readiness in the county court, Notice of Setting Down, etc. — should be considered as a means of collating data and identifying at an early stage whether either party to proceedings has additional requirements in terms of participating fully in proceedings or attending court.

14.49 While serving to promote the interests of disabled persons, it is felt that such a measure will also prompt legal representatives to consider their client's needs at the outset, thereby affording sufficient time for liaison with the court and other organisations regarding any adjustments required.

14.50 Again to improve data collation, NICTS is currently developing processes to assist Disability Liaison Officers (DLOs) at each court venue to record details of requests made for reasonable adjustments, and actions taken on foot of such requests and outcomes.

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[5] Pauline Leeson and Alan Sheeran (Children in Northern Ireland)
Kevin Doherty (Disability Action)
Rosaleen Dempsey (Royal National Institute for the Blind)
Janet McGookin and Vivienne Fitzroy (Royal College of Speech and Language Therapists)
Brian Symington and John Carberry (Representatives from Deaf Community)
Mirjam Bader (MindWise)
Andrew Kirkpatrick (Law Society for Northern Ireland)
Terence Dunlop (Secretary to the Judicial Studies Board for Northern Ireland)
Pamela Carole Dickson BA

14.51 We are concerned at the temporary suspension of DDA works. It is crucial that NICTS take immediate steps to complete the programme to the RCJ to ensure access to justice for the disabled is not physically impeded. Moreover, it is of cardinal importance that a disability access audit be carried out in Laganside and at all other court locations that were not included in the overall disability audit.

14.52 In discussions, interested parties strongly stressed the need to ensure effective arrangements for deaf people attending court through the use of properly accredited sign language interpreters. The low number of fully qualified sign language interpreters can make provision difficult and it was suggested that deaf people should also be afforded the opportunity to train and undertake an interpreter role in the courts.

14.53 Access to information for wheelchair users at some court venues soon emerged as a gap in our current provision alongside difficulties making contact with Disability Liaison Officers or Customer Service Officers (CSOs).

14.54 In response, a list of DLO/CSO telephone contact details has now been published on the NICTS website and shared with the nidirect exchange.

14.55 Individual courthouse information leaflets have also been updated to include these details.

14.56 Information leaflets are provided in alternative fonts and formats on request and there are also a number of useful links included on the NICTS website to other key business areas that users can access for assistance in progressing business through the justice system.

14.57 The NICTS website also contains reference material and useful forms for matters relating to proceedings in the civil and family courts. Current website design and content could certainly benefit from review in terms of provision for visually and hearing-impaired customers.

14.58 Later this year, NICTS will request that the web development team in nidirect re-develop its Internet website, not only to give it a fresh appearance but also to comply with the WCAG (Web Content Accessibility Guidelines 4.0). WCAG is developed in co-operation with individuals and organisations around the world, with a goal of providing a single shared standard for web content accessibility that meets the needs of individuals, organisations, and governments internationally. Work is currently under way to consolidate the NICTS website into the main DoJ website, which is likely to be constrained by the corporate style of this website (www.justice-ni.gov.uk). The new site is expected to go live before the end of this year.

14.59 WCAG:

- aims to make web content more accessible to people with disabilities;

- has 14 guidelines that are organized under four principles: perceivable, operable, understandable, and robust. The NICS is in the process of improving their compliance to WCAG AAA standard. When the new NICTS website is developed, it will be at least WCAG AA compliant.

14.60 We applaud the MindWise Court Defendant Support pilot. When, hopefully, this programme is reinstated it should be extended to those with similar conditions in the civil and family divisions.

14.61 We note that the recommendations of the NI Law Commission in relation to special measures in civil proceedings have yet to be implemented in either the civil justice or family justice context. We have visited this issue in the Family Justice Review. We can see no reason why the recommendations of the NILC in this regard should not be implemented if we are to comply with our domestic and international obligations to ensure that the disabled are not to be deprived of real access to justice.

14.62 There is currently no funded scheme in England and Wales for the provision of registered intermediaries in the civil and family courts, although there is anecdotal evidence to suggest that registered intermediaries have been engaged to support people in a small number of civil and family justice matters. In discussions with interested parties, it was suggested that deaf people be afforded the opportunity to train and undertake the role of intermediary in the courts. When the next appointment scheme is launched, it should be drawn to the attention of all organisations who support people with disabilities.

14.63 It was acknowledged by participants in discussion that the use of RIs in criminal proceedings was a positive intervention that has been successful in enabling those with communication difficulties, who would normally struggle to be understood, to be interviewed and give evidence in a way that best suits their needs. It was strongly felt that intermediaries can also be of assistance to deaf and blind people and to those with speech impairment and other communication difficulties as they could provide useful input in relation to early identification of individual requirements so that steps can be taken to ensure appropriate communication supports are in place. It was strongly felt that the intermediary scheme should be extended so that similar support is available for all those who need it in the civil and family courts.

14.64 A recent case in the Court of Appeal in Northern Ireland involving an autistic applicant in a Fair Employment Tribunal[6] observed that the contents of the *Equal Treatment Bench Book* must become part of the culture of all court hearings, with specific reference to the need to accommodate those with a disability. That case sets out a number of guiding principles that a court should observe in such cases, including the invocation of an early 'ground rules hearing' to ensure the proceedings are tailored to the disability in question.

[6] Galo v Bombardier Aerospace UK [2016] NICA 25

14.65 The findings outlined in the draft *Report on the Implementation of the Convention on the Rights of Persons with Disabilities* in Northern Ireland are very much in keeping with concerns raised in the course of our discussions with those voluntary and public-sector representatives providing support to disabled people and at meetings with hearing and visually impaired groups.

14.66 The absence of data on the number of persons with disabilities using court services in Northern Ireland and their experiences clearly inhibits the DoJ's ability to make an informed assessment of current demands, work to meet all needs and develop policies and programmes designed to improve experiences for disabled persons in the justice system.

14.67 While some attempts are now being made to record details of contact made with DLOs at local court level, it is acknowledged that much more needs to be done in order to ensure that the needs of disabled people are fully understood and at the forefront in the future design and delivery of court services. Moving to capture information about additional requirements for those with disabilities at the stage proceedings are initiated or notified as ready for hearing will provide a useful first step.

14.68 During the course of discussions with interested parties, issues were also raised in relation to access to information for persons with disabilities, in particular those with sensory impairments. The importance of ensuring inclusive provision of information about court proceedings and court hearings in a user-friendly way, using appropriate language and format, were stressed alongside the need to consider additional supports for deaf and blind people and those with communication difficulties seeking to access information and services, including online alternatives.

14.69 The use of various media, including SMS/text messaging and social media sites such as Twitter, YouTube and Facebook, to communicate information to parties, groups and their representatives was also suggested as many disability groups already have a presence on these media sites.

14.70 In considering how information can be made more universally accessible, there is clearly much that voluntary-sector support organisations such as the Royal National Institute of Blind People, Action on Hearing Loss (formerly RNID), and the Royal College of Speech and Language Therapists (RCSLT) can offer by way of advice, practical support and best practice to promote effective communication with people with disabilities.

14.71 It is essential that, where reasonable adjustments are required to support attendance at court or participation in court proceedings, these are identified at the earliest possible opportunity. It is important, therefore, that legal practitioners, frequently the first point of contact for people coming to court, play a proactive role in identifying the precise nature of the reasonable adjustment required and take steps to ensure that the DLO at the relevant court office is notified accordingly in

advance of the case being listed for hearing. The changes proposed to court documentation above will prompt legal practitioners to consider individual requirements at an early stage.

14.72 DLOs have already been instructed to record the nature and frequency of requests for reasonable adjustments so that common and exceptional requests are documented and shared to inform and support best practice while also providing a means by which to monitor the types of disabilities requiring adjustments, so that this information can be used to better inform and influence policy decisions.

14.73 Training and raising awareness have been recurring themes covered in the course of discussions with interested parties. It is a strongly held view amongst those supporting disabled people that everyone coming into contact with disabled persons attending court — most particularly the judiciary, legal practitioners, court staff and ancillary contractors — should receive disability-awareness training. RNIB, Action on Hearing Loss, RCSLT and other voluntary sector organisations supporting the disabled are keen to work with the Law Society and Bar Council on improving awareness/training for practitioners and would greatly welcome the opportunity to liaise with the Judicial Studies Board regarding the delivery of e-learning, audio/visual and interactive online training packages for the judiciary.

14.74 An example of one such training package developed by RCSLT is 'The Box Training' e-module, which is awareness-raising training that can be undertaken by anyone in the courts or legal profession, designed to enable participants to screen for speech, language and communication issues. The training also includes strategies to promote better understanding of and communication with individuals who experience such difficulties. Youth Justice Agency staff recently completed this training, which is delivered online and can be followed up with direct face-to-face engagement with participants.

14.75 In November 2015, RCSLT launched the My Journey My Voice communication disability exhibition designed to promote and heighten awareness of communication disabilities across a diverse range of people with communication needs, including those with a learning disability, persons who have had a stroke, and those with specific neurological conditions. My Journey My Voice is a powerful photographs and stories exhibition featuring the photographic portraits and audio recordings of individuals who have a communication disability, as they tell listeners about a favourite journey in their own words. The exhibition is currently touring Northern Ireland at various venues, is available at no cost as an exhibition and would provide a valuable backdrop for any public event hosted by NICTS/departments.

14.76 It is important that all professionals and participants in the civil justice system have a means of ready access to the available literature on this issue, including:

- Equal Treatment Bench Book;
- Department of Justice Disability Action Plan 2014-15;

- Department of Justice Equality Scheme July 2015;
- The Advocate's Gateway Toolkit 13 – Vulnerable Witnesses and Parties in the Family Courts;
- The Advocate's Gateway Toolkit 17 – Vulnerable Witnesses and Parties in the Civil Courts;
- The Northern Ireland Law Commission Report – Vulnerable Witnesses in Civil Proceedings 2011
- Report on the Implementation of the Convention on the Rights of Persons with Disabilities in Northern Ireland;
- Access to the Courts: A Resource Guide to providing reasonable accommodations for People with Disabilities;
- First report from the Northern Ireland Survey of people with Activity Limitations and Disabilities July 2007;
- NICTS Customer Exit Survey 2011;
- NICTS website;
- Ministry of Justice, Usage Statistics for Witness Intermediaries Scheme Matching Service (October 2015 to March 2016);
- Department of Justice Northern Ireland, Registered Intermediaries Schemes Pilot Project post-project reviews (January 2015 and August 2016).

14.77 The Chair of the Civil and Family Review Group attended separate meetings with blind and deaf people and some with serious spinal injuries to hear first-hand accounts of their experiences and the barriers that they encounter when attempting to access services. The following key matters emerged from discussion with those who attended these sessions:

- Seventy-four per cent of people aged over 80 have a significant dual sight and hearing loss. It is important to remember that everyone has different requirements.
- The provision of Braille facilities only is an inadequate support for most visually impaired people. The problem is that whilst children who are born blind or become blind whilst still very young are introduced to Braille at school and pick it up, older people, particularly those who have acquired visual impairment, find it more difficult to feel the braille type and, therefore, do not read Braille. Alternative methods have to be considered. Moon is a simpler version of Braille but is still not widely used by older people with acquired vision loss.
- It was strongly felt by deaf people that the justice system excludes them and needs to change. This was most particularly felt in relation to jury service, where any deaf person requiring an interpreter is effectively excluded from participating on a jury because to do so would, allegedly,

require a thirteenth person to be in the jury room while the jury is deliberating, which is not currently permitted. The British Deaf Association (BDA) records that legal challenges to exemptions for deaf people carrying out jury service has led to a number of public commitments to end this discrimination 'which were, ultimately, not taken forward. Most recently, in late 2011, the Government's Office for Disability Issues (ODI) submitted in their initial report to the UN on the UN Convention on the Rights of Persons with Disabilities that the prohibition on Deaf Jurors should be reviewed'[7]. Although technically outside the scope of this Review, the Chair undertook to raise this matter directly with the Northern Ireland Assembly Justice Committee. Similarly, issues were raised by blind people who made reference to the lack of sensitivity of court staff in dealing with people who are visually impaired and who wish to discuss their problems of serving on the jury. This again emphasises that awareness training is absolutely vital for court staff across all front-line services.

- One of the main complaints by both hearing and visually impaired people who attend courts is that they are not adequately supported through the court process. Insufficient information is available on how to access interpreter services; little explanation is given to them in advance regarding the layout of the court, what persons are present in court, where they are positioned and who is speaking. This again emphasises the need for judges, legal and health professionals and court staff to be trained in the needs of the hearing and visually impaired.
- Access to justice means having proper access to solicitors. Solicitors' premises are often not designed to allow easy access in old buildings nor are adequate arrangements in place to facilitate solicitors' initial consultations with hearing and visually impaired clients. BDA has asserted that the *Disability Discrimination Act*, which came into effect in 1995 and has been amended a number of times since by Regulations implemented in Northern Ireland, makes it unlawful for service providers to discriminate against disabled people in certain circumstances. The BDA report asserts 'those who are Deaf are recognised under the DDA and therefore, solicitors/barristers are responsible for the booking and payment of sign language interpreters as noted in the Law Society's statement'[8].
- The court should give very clear reasons for its decision on the amount of compensation, as people do make comparisons and if disabled persons get vastly different amounts for what appear to be the same injury it can cause resentment.

[7] See "Access to Justice Consultation Northern Ireland by BDA" at page 10.
British Deaf Association (Northern Ireland), *Access to Justice Consultation Northern Ireland,* Belfast, 2016, p. 10
[8] http://www.lawsociety.org.uk/support-services/advice/practice-notes/providing-services-to-deaf-and-hard-of-hearing-people/

- In terms of the physical access to court premises, the disabled person should be briefed beforehand about access to the court for the disabled person, car parking spaces, entrances, toilet facilities, etc. In our climate, special disabled entrances and ramps need to be covered. Many premises do have internal steps and, therefore, individual lifts but there is often no one present to operate these. The disabled person should have the facility to do a dry run in the facilities prior to the hearing. At the very least, lifts should be clearly labelled as regards to how they function as many people are too anxious on the day of the court to take these things on board easily.
- Disabled toilets are an absolute necessity and these toilets should not be used as storage rooms as they so often are.
- There should be someone present in the court building with the specific task of assisting disabled people.
- As regards entering the courtroom itself, disabled people want to be able to enter inconspicuously with a pre-assigned space. Table heights should be such as to accommodate a wheelchair and the table should not have anything sticking out underneath the tabled surface which might impede a wheelchair. A straightforward plain table of the right height is needed. An example of good provision is Omagh Social Security Tribunal Office, which has been described as being excellent in the terms of access, wide doors, turning spaces for wheelchairs and there being sufficient space to accommodate a wheelchair and not to crowd other non-disabled people.
- It is reassuring to disabled people to have some disabled people on the court staff. This would help them to realise that they were not being syphoned off'.
- It was strongly felt by both groups that intermediaries can be of assistance to deaf and blind people, provided they are properly trained. An intermediary can be important in ascertaining just how quickly a particular client can pick up information — for example, to emphasise to the court that merely reading out something to the witness may not be sufficient to allow them to comprehend it and they may need more time. Intermediaries would also be helpful in ensuring in advance that the needs of hearing and visually impaired people are met by NICTS. Preparation in advance is crucial. Solicitors who are not trained in the potential needs of their hearing and visually impaired clients may not be aware of the need to nor how to ascertain just what precisely is required for their client to engage appropriately in the proceedings in which they are involved. Ensuring that everything works smoothly, that all the necessary equipment/software is in position, is necessary to dispel fear and discomfort.
- It may be that the problems of gaining access to courts could be met by virtual reality courts, where a blind person could more comfortably attend in their solicitor's offices with direct Skype or telephonic links to the courtroom. Some blind or deaf people, on the other hand, may wish to

exercise their personal choice and avoid isolation and exclusion by actually attending the court venue. The availability of personal choice is vital.

- People have true access to justice only if adequate facilities are available. Signs on toilets in all court buildings should have Braille or Moon with elevated signage in large letters on a contrasting background to assist visually impaired people to be able to attend the proper toilet with minimal aid and embarrassment.
- There is a basic protocol for people attending with guide dogs and assistance dogs, and the security and court staff are made aware of what this is. It is important to remember that assistance and guide dogs are working dogs and their trainers/owners will be in a position to convey this to front-line staff and legal and health professionals.
- The use of technology to assist visually impaired people to access documentary evidence and court documentation is crucial. The RNIB and SENSE are two bodies both of whom have professional technical officers who are fully aware of current software and equipment that can be used to assist the visually impaired to participate fully in the court process.
- It may well be that such equipment can be hired from time to time as and when it is required to avoid the cost of buying in such software, which can quickly go out of date or exist in many versions. Systems such as penfriend and software, which provides a voice-over for documents in the system with headphones, are but two examples of the kind of software that are vital for people with a visual impairment to be able to participate fully in the system. This is a highly specialised area and it is strongly recommended that NICTS immediately take steps to discuss in detail with RNIB and SENSE technical support groups how this aspect can be taken forward. Similarly, large print should be made available and CDs should be provided of all judgments on request.

14.78 Finally, we welcome the fact that during the course of this Review the Lord Chief Justice has agreed to appoint a Diversity Judge whose role will include disability issues. The Bar Council and the Law Society should follow a similar path.

Responses

14.79 The proposals in this chapter received universal and overwhelming support. Bodies such as the Bar Council welcomed the opportunity presented in this chapter to liaise with voluntary support bodies in relation to the training of counsel. The specialist Bar Associations deliver a range of training already to practitioners working in the civil courts and indicate that they could work in partnership with these voluntary organisations to develop a relevant programme of work in due course.

Recommendations

1. Prescribed forms in civil and family proceedings to be used to identify if a party to proceedings requires adjustments to be made to facilitate their participation in proceedings and attendance at court. **[CJ101]**
2. The Department of Justice and the Northern Ireland Courts and Tribunals Service to develop systems to capture information on the number of disabled persons in the justice system to inform policy development and support best practice. **[CJ102]**
3. NICTS to take immediate steps to complete the programme of DDA works to the Royal Courts of Justice and also carry out a disability access audit at Laganside Courts and any other court locations not previously included in the disability access audit. **[CJ103]**
4. NICTS and DoJ to carry out a comprehensive review of web-based information and guidance to identify and implement all changes necessary to ensure full compliance with accessibility guidelines/standards. **[CJ104]**
5. NICTS to upgrade its website to include links to various disability support organisations; the Northern Ireland Law Commission recommendations to be adopted; and the relevant department(s) to expedite implementation of the Civil Evidence Bill. **[CJ105]**
6. The use of intermediaries to be extended to support those with communication difficulties in the civil and family courts. **[CJ106]**
7. The principles set out in Galo v Bombardier to be applied in all cases involving those with a disability. At the earliest case-management hearing available, judges should facilitate a party with a disability requesting a judge-led discussion about what reasonable adjustments are required throughout the proceedings. **[CJ107]**
8. Closer liaison with 25 voluntary support organisations in the provision of training to judges, the legal profession and all front-line staff who are dealing with physically disabled and hearing and visually impaired people attending court. **[CJ108]**
9. NICTS to consider hosting the Royal College of Speech and Language Therapies My Journey My Voice exhibition at a public event organised by NICTS to promote and heighten awareness of communication difficulties. **[CJ109]**
10. The Law Society to arrange training for solicitors, and the Bar Council to arrange for training for barristers in physical disability, hearing and visual awareness problems and that a list of solicitors and barristers who have undergone such training be made available so that those who are physically, hearing and/or visually impaired can make an informed choice regarding legal representation. **[CJ110]**
11. NICTS to liaise with professional technical officers in RNIB, SENSE and Action on Hearing Loss when considering technology requirements to

support visually impaired and deaf persons to participate fully in court proceedings. **[CJ111]**

12. Judicial Studies Board, Bar Council, Law Society and NICTS to have readily and easily available for consultation relevant literature on the disabled. **[CJ112]**

13. The Bar Council and Law Society to follow the example of the judiciary and appoint a member in charge of disability issues. **[CJ113]**

15

Court of Appeal

Current position

15.1 The major part of the work of the Court of Appeal is criminal in nature. In 2015, 57 civil appeals were lodged, as opposed to 91 criminal appeals (which includes 14 criminal matters in the Divisional Court).

15.2 By virtue of s. 35(1) of the *Judicature Act (Northern Ireland) 1978,* the Court of Appeal has jurisdiction to hear an appeal from any judgment or order of the High Court or a judge thereof. A 'judgment' includes 'order, decision or decree' (s. 120). This general jurisdiction, however, is subject to a plethora of caveats.

15.3 There is arguably an unnecessary premium placed on the extensive oral process in the appeal system in many cases that are wholly unmeritorious and which, therefore, incur a needless waste of costs and take up a disproportionate time in being heard. There is also a failure to invoke appropriate online steps that would be more efficient and cost-saving. There seems little justification for an insistence on the need for notices of appeal or applications for leave to appeal/endorsement with service being physically lodged in the court office.

15.4 Under the *Judicature (NI) 1978* and other statutory provisions, there are instances:

- of no appeal to the Court of Appeal (see appendix 7);
- of an order granting unconditional leave to defend an action in the High Court;
- of leave to appeal being required[1] (e.g. an interlocutory order in the High Court);

[1] Section 35(2)(g) of the 1978 Act provides that an appeal from the High Court judge in interlocutory decisions (whether at first instance or on appeal from the Master) lies to the Court of Appeal with leave of either the High Court judge or the Court of Appeal. Leave, however, is not required:
(i) where the liberty of the subject or the residence of or contact with minors is concerned;
(ii) where an injunction or the appointment of a receiver is granted or refused;
(iii) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Acts (as defined in s. 4 of the *Companies Act 2006* in respect of misfeasance or otherwise;
(iv) in the case of a decree nisi in a matrimonial cause, a conditional order in a civil partnership cause or a judgment or order in an admiralty action determining liability;
(vi) in such other cases as may be prescribed being cases appearing to the Rules Committee to be of the nature of final decisions.

Leave of either the High Court or the Court of Appeal is required to appeal any decision of the High Court under *The Insolvency (NI) Order 1989*.

Leave of the High Court is required in order to appeal either a 'consent order' or an order 'as to costs' only. A refusal by the judge to grant leave is not appealable; similarly, the grant of leave is also not appealable.

- where leave is not required (e.g. an order granting or refusing the appointment of a receiver).

15.5 The Court of Appeal has inherent jurisdiction to strike out an appeal that is hopeless[2].

15.6 In England, in addition to a provision to refuse leave to appeal by a Single Judge made on the papers, with a discretion to permit an oral hearing of the application, a declaration may be made that the proposed appeal is 'totally without merit'. The effect of such a declaration is to bring the appeal to an end. It appears that these declarations are considered to have been underused in England. The language is said by some to constitute a 'discourteous rebuke'. Perhaps an alternative categorisation would be of assistance. It is not proposed that any such option should be available in Northern Ireland.

15.7 Where leave to appeal is required, the threshold has generally been a low one based on a refusal where there is no reasonable prospect of success[3].

15.8 The standard that applies to appeals from the Upper Tribunal, as set out in The *Appeals from the Upper Tribunal to the Court of Appeal Order 2008* is that:

- the appeal would raise an important point of principle or practice; or
- there is some other compelling reason for the Court of Appeal to hear the appeal

15.9 This threshold follows the English approach to second appeals adopted in s. 55 of the *Access to Justice Act 1999*.

15.10 Appeals from tribunals, the magistrates' court and the county court to the Court of Appeal may be by way of 'case stated' under various statutory provisions and Order 61 of the Rules of the Court of Judicature applies. The statutory provisions are not uniform (see appendix 7).

15.11 The use of case stated from an industrial tribunal met with criticism in the House of Lords in 2009[4]. An alternative was introduced by Order 60B of The Rules of

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[2] Valentine, para. 40.06; Burgess v Stafford Hotel Ltd [1993] 3 All ER 222.

[3] Gillen LJ in Moffatt v Moffatt [2015] NICA 61 at paragraph [13] stated that 'It is well established law that the test to be applied on a leave application is that leave should be granted unless there is no realistic prospect of success on appeal'. See Smith v Cosworth Casting Processes Ltd. Practice Note [1997] 1 WLR 1538.

[4] SCA Packaging v Boyle [2009] UKHL 37**.** Article 22(1) of The Industrial Tribunals (NI) Order 1996 ('the 1996 Order') provides that a party who is dissatisfied on a point of law with a decision of the Industrial Tribunal may, 'according as rules of court may provide', either:

(a) appeal therefrom to the Court of Appeal, or
(b) require the tribunal to state and sign a case for the opinion of the Court of Appeal.

However, Order 94 rule 2(1)(i) RCJ provides that appeals under art. 22 of the 1996 Order shall be brought by way of case stated, with the leave of the Court of Appeal, in accordance with Order 61.

Order 60B Rule 1 RCJ, however, provides that, except where the Court of Appeal has given leave to appeal by way of case stated under Order 94 rule 2(3), an appeal to the Court of Appeal from an industrial tribunal under

the Court of Judicature: Appeals from the Industrial Tribunals and Fair Employment Tribunal by serving a Notice of Appeal stating the questions of law. The criticisms made of the Case Stated process have equal application to all forms of Case Stated.

15.12 There are appeals from the High Court on interlocutory matters as well as substantive appeals by way of rehearing.

15.13 The current position about appeals in England, and the relevant thresholds, is largely inapplicable to Northern Ireland because it is based on the various track systems introduced in the wake of the Woolf report[5]. However, the nature of appeals to the Court of Appeal has much to recommend it and is potentially applicable to our system.

15.14 Where the appeal is from the county court or High Court, permission to appeal is required either from the court that made the impugned decision or the appellate court, except where the appeal is against[6]:

- a committal order;
- a refusal to grant habeas corpus; or

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art. 22 of the 1996 Order shall be brought by notice of appeal that must state the questions of law on which the appeal is brought.

The reason for the insertion of Order 60B RCJ and its provision for an appeal on point of law stems from the House of Lords observations of the case stated procedure in SCA Packaging Ltd v Boyle [2009] UKHL 37 (subsequently reiterated by Morgan LCJ and Girvan LJ in Rogan v South Eastern Health and Social Care Trust [2009] NICA 47.)

SCA concerned the definition of 'disability' within the *Disability Discrimination Act 1995*. All judges made obiter comments about the inappropriateness of the case stated procedure for appealing the tribunal's decision. The proceedings had been commenced in 2001, and the matter was an appeal in respect of the tribunal's decision on a preliminary point – the substantive issues of the case still had to be heard. Part of the delay had been caused due to disagreements between the parties as to the wording of the case stated. Lord Hope (at paragraphs 11 – 17) explained that the purpose in a case stated of laying out the facts found and the reasons for the decisions is based on the assumption that these details are not always given in full by the decision maker when making the decision. In the present case the written decision contained all the material that was necessary for the determination of the appeal. The requirement for the tribunal to draft the case stated causes delay in the processing of the appeal. The lack of a prescriptive procedure (beyond the mere basics) in Order 64 of the Rules of the Court of Judicature meant that even more delay was caused due to conflict between the parties over the accuracy of the case stated as drafted. His Lordship proposed that the procedure in Scotland (as contained the Rules of the Court of Session 1994) should be adopted in Northern Ireland. These Rules include a specific timeframe for each step of stating a case, including 14 days for the respondent to propose additional questions, 21 days for the tribunal to decide on what questions the case should be stated, 14 days for the preparation of the case, 21 days for amendments to be proposed, 28 days for the case then to be finally settled and so on. Baroness Hale (at paragraph 75) said that the case stated procedure has 'nothing whatever to commend it', and it is the Court of Appeal and not the tribunal that should decide 'which issues are worthy of its attention'. She concluded by stating that she hoped the court rules would be changed to provide for an ordinary appeal procedure in these cases. Lord Brown (at [79]) called the case stated procedure 'an absurdity', Lord Neuberger (at [84]) said that, in the present case, the case stated procedure had proved 'worse than unsatisfactory' and 'inappropriate in principle'.

[5] In England and Wales a uniform procedure for appeals to, *inter alia*, the High Court and the Court of Appeal (Civil Division) are governed by sections 54-57 of *The Access to Justice Act 1999* ('the 1999 Act'), Part 54 of the Civil Procedure Rules Part 52 ('the CPR') and Practice Directions 52A-52E.
[6] Part 52.3(1)(a) CPR.

- a secure accommodation order made under s. 25 of the *Children Act 1989.*

15.15 There is no exclusion of this provision in relation to appeals from the Master[7]. It would, therefore, appear that permission is also required to appeal a decision of the Master either to the High Court or the Court of Appeal.

15.16 Permission to appeal may only be given where either:[8]

- the court considers the appeal would have a real prospect of success; or
- there is some other compelling reason why the appeal should be heard.

15.17 The appellate court may consider an application for permission either on the papers or at a hearing. Where permission is refused on the papers the appellant may, within seven days of notification of the refusal, request the decision to be reconsidered at a hearing[9]. There is no appeal against a decision to either grant or refuse permission to appeal[10]. Permission to appeal can be given limiting the issues to be heard and subject to conditions (for example, security for costs)[11]. Moreover, if, when refusing permission on the papers, the appellate court considers the appeal to be without merit, it can order that the person seeking permission may not request the decision to be reconsidered at a hearing[12].

15.18 In relation to the requirement of permission, Sweet & Maxwell's *Civil Procedure: The White Book Service 2014* comments:

> '… The justification for this almost universal requirement for permission is to be found in Ch.4 of the Bowman report. The anomalies in the old rules are swept away. Unmeritorious appeals are filtered out at an early stage, thus protecting both parties from unnecessary costs. Also a convenient opportunity is provided for case management at an early stage.'[13]

15.19 Where the appeal is against a decision of the High Court hearing an appeal from the county court, the application for permission must be made to the Court of Appeal. In such circumstances, the Court of Appeal will not give permission to appeal unless it considers that the appeal would raise an important point of principle or practice, or there is some other compelling reason[14]. There is also provision for the High Court on appeal (or the county court on appeal) to transfer the appeal to the Court of Appeal where the High Court (or the county court, as the case may be) considers the appeal raises an important point of principle or there is some other compelling reason[15].

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[7] See, for example, PD52B.
[8] Part 52.6(1)(a) and 52.6(1)(b) CPR.
[9] Part 52.4(2) CPR.
[10] Section 54(4) of the *1999 Act.*
[11] Part 52.6(2)(a) CPR.
[12] Part 52.4(3) CPR.
[13] Volume 1, paragraph 54.4.1
[14] Part 52.6(1)(b) CPR and PD 52A, para 4.7.
[15] Part 52.18(2).

15.20 The appeal is limited to a review of the decision of the lower court unless either a practice direction makes different provision for a particular category of appeal, or the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing[16]. Furthermore, unless otherwise ordered, the appellate court will not receive oral evidence or evidence that was not before the lower court[17].

15.21 The English experience has demonstrated increased time required to deal with applications for leave to appeal, with the written process taking one third of the time required for the oral process. It is anticipated that the vetting process proposed in relation to all civil appeals will reduce the overall time committed to civil appeals.

15.22 Case management in Northern Ireland is very much to the fore in the Court of Appeal process. All cases are listed for review and date fixing in front of two judges, albeit when subsequent reviews are necessary it may not be before the same judge or judges. Specific days are allotted to exclusively manage appeals involving personal litigants.

15.23 Nonetheless, experience has shown that some streamlining of the current process is required to address such recurring problems as:

- non-compliance with directions;
- failure to consider alternative dispute resolution (ADR);
- manifestly unsustainable grounds of appeal;
- an unnecessary proliferation of documentation;
- unrealistic time frames for hearings;
- failure to crystallise the issues;
- a resultant waste of costs.

15.24 We have already addressed the drive towards paperless courts and the use of social media in the courts in chapter 3. The recommendations contained therein apply with equal force to the Court of Appeal and do not require repetition here. Thus, for example, a Court of Appeal site should inform the public of the nature of appeals at hearing.

15.25 Civil appeals to the UK Supreme Court (UKSC) are under section 42 of the *Judicature (Northern Ireland) Act 1978,* which requires the leave of the Court of Appeal or the UKSC. At present, applications to the Court of Appeal for leave to appeal to the UKSC are made at an oral hearing. This is a process that is time-consuming and generates costs.

15.26 The present approach to such applications reserves the grant of leave to appeal to those cases where there is a conflict of authority at the domestic level or

[16] Rule 52.21(1)(b).
[17] Rule 52.21(2)(b).

with European authority. This does not echo the approach of the UKSC to the grant of leave as set out in UK Supreme Court Practice Direction 3 at paragraph 3.3.3:

> 'Permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal.'

15.27 More generally, the civil work undertaken in the High Court in personal injury, commercial, chancery and family is managed by the judge allocated to each area and those judges appointed to provide support. There is no overall management of the different components of civil work.

Discussion

15.28 Some appeals have found their way into the Court of Appeal lists for hearing that do not warrant consideration by the Court of Appeal. Accordingly, further measures are required to scrutinise the appeals that are to enter the lists for hearing.

15.29 We consider leave to appeal should be required in every appeal to the Court of Appeal. The Attorney General raises the point that the traditional distinction dating from the late nineteenth century has been that parties are permitted one appeal as of right and any further appeal is controlled by the final appellate court. Whist recognising the value of this distinction, we consider that in conformity with changing times there is no need to preserve this principle in the Court of Appeal where an earlier hearing has been obtained and where the proceedings have been recorded or there is a written decision by the trial judge setting out the reasons for the decision. This is particularly apposite where the party who has been refused leave to appeal by the Single Judge on a written application may proceed to an oral hearing before that Single Judge for leave to appeal.

15.30 Application for leave to appeal should be made in writing and determined by a Single Judge. The decision may be to grant leave on some or all grounds or to refuse leave.

15.31 We do not at this time favour the 'totally without merit' declaration adopted in England. It is perhaps too draconian and, unsurprisingly, is considered to have been underused in England.

15.32 There is much to be said for the argument that a party who has been refused leave to appeal by a Single Judge on a written application may proceed to an oral hearing before a Single Judge for leave to appeal[18].

[18] The English position is as follows 'The appellate court may consider an application for permission either on the papers or at a hearing. Where permission is refused on the papers the appellant may, within 7 days of notification of the refusal, request the decision to be reconsidered at a hearing.[8] There is no appeal against a decision to either grant or refuse permission to appeal.[9] Permission to appeal can be given limiting the issues to be heard and subject to conditions (e.g. security for costs).[10] Moreover, if, when refusing permission on the

15.33 However, we see no basis for a right of appeal against a grant or refusal of leave by that Single Judge.

15.34 We consider the threshold for leave to appeal is too low, based as it is on a refusal where there is no reasonable prospect of success. The number of wholly unmeritorious appeals currently coming before this court must be controlled in the interests of efficient use of time and saving of unnecessary costs.

15.35 We propose that the appropriate standard should be that:

- the appeal would raise an important point of principle or practice; or
- there is some other compelling reason for the Court of Appeal to hear the appeal.

15.36 We find no reason to justify differing from the English approach in the case of second appeals and tribunal appeals. The remission of fees to those on benefits has contributed to some litigants choosing to appeal almost everything because it costs them nothing and can buy them more time. Some tend to treat those appeals as stays, although that is not automatically the case, as we should all bear in mind. In these cases it can amount to a charter to use our system of justice to abuse those who have the misfortune to be caught up in their litigation. It achieves the exact opposite of justice for those who are abused.

15.37 In any event, it is a waste of time and resources that parties who have had a hearing before the Master and a re-hearing on appeal before a High Court judge or Upper Tribunal judge can then proceed to ask the Court of Appeal to hear the case again, without any leave being required if the order was a final one. Moreover, the requirement that there should be leave to appeal to the Court of Appeal in relation to interlocutory orders but not in relation to final orders of the High Court is out of date. The distinction between a final order and an interlocutory order is a rather fine distinction. The absence of an automatic right of appeal may also allow judges to deal with these cases expeditiously and without lengthy written judgments.

15.38 We are satisfied that the higher threshold adopted for Upper Tribunal appeals (see paragraph 15.8 above) should extend to all second appeals and to all tribunal appeals to the Court of Appeal.

15.39 It is, therefore, proposed that the higher threshold adopted for Upper Tribunal appeals should extend to all second appeals and to all tribunal appeals to the Court of Appeal. This will need a fairly simple amendment to the *Judicature Act*.

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papers, the appellate court considers the appeal to be without merit, it can order that the person seeking permission may not request the decision to be reconsidered at a hearing.[11]'

[8] Part 52.4(2) CPR [9] Section 54(4) of the 1999 Act [10] Part 52.6(2)(a) CPR [11] Part 52.4(3) CPR

15.40 If there is not to be a universal threshold based on that presently applied to Upper Tribunal appeals, the Order 60B rule 1 of the Rules of the Court of Judicature alternative to case stated[19] should be available for all appeals from tribunals and the magistrates' court and county court on points of law to the Court of Appeal.

15.41 We have concluded that appeals from the High Court on interlocutory matters as well as substantive appeals by way of re-hearing should not only require leave in all cases under the leave to appeal process outlined above, but there should be a raised threshold for appeal to 'a real prospect of success' or 'some other compelling reason' for the Court of Appeal to hear the appeal.

15.42 It is anticipated that the vetting process proposed in relation to all civil appeals will reduce the overall time committed to civil appeals.

15.43 Applications for an appeal out of time should be in writing and be dealt with by a Single Judge alongside the application for leave to appeal with the same right to an oral hearing before a Single Judge.

15.44 However, to ensure the principle of fairness prevails, we propose that on an application made out of time, where the Single Judge finds that there are no grounds to extend time but leave would otherwise be granted, the application should proceed to the full court.

15.45 Case management. Turning to case management, there should be a system of early case-management hearings by a Single Judge of all cases where leave to appeal has been granted.

15.46 We propose that time slots should be allocated for case-management hearings at which all parties attend. Directions will be issued by the Single Judge as to the conduct of the appeal. It may be necessary in some instances to have more than one case management hearing to manage compliance with directions. The same Single Judge should, as far as is practicable, engage in the case management of any particular case. This may result in that Single Judge being unable to hear the substantive case.

15.47 Alternative dispute resolution**.** The first matter in case management may be a consideration of alternative dispute resolution, in particular mediation. It is recognised that mediation will probably have been considered at first instance and may have been rejected as unsuitable or may have been unsuccessful. Accordingly, the opportunities for mediation at the appeal stage may be limited but nevertheless the prospects of mediation should be a consideration on any leave being granted to appeal. This was successfully invoked recently in an appeal involving the Bar Council of Northern Ireland and the Department of Justice. Resort to mediation is a

[19] Order 60B rule 1 RCJ provides that, except where the Court of Appeal has given leave to appeal by way of case stated under Order 94 rule 2(3), an appeal to the Court of Appeal from an Industrial Tribunal under art. 22 of the 1996 Order shall be brought by notice of appeal that must state the questions of law on which the appeal is brought as set out in paragraph 15.35 above).

regular feature in the Court of Appeal in England and Wales and there is no reason why it should not become a feature in our jurisdiction.

15.48 Personal litigants. Particular case-management issues arise when a party to the appeal is a personal litigant, particularly the appellant. Case management is already a feature of appeals involving personal litigants. It is anticipated that case-management hearings involving personal litigants will require longer time slots and more case-management hearings.

15.49 Documents. An aspect of case management that requires particular attention concerns the documents to be used at the hearing. The tendency has been to burden the court with unnecessary documents, to provide books with duplicate documents and to engage in late production of some necessary documents. Consideration of the identity of the necessary documents relied on by all parties and the collation of all those documents will be an essential task in the case-management process.

15.50 Non-compliance with directions. We consider that the only sanctions that have any effect in this area are those that impact on the fees to be recovered. It is proposed that a practice direction should spell out that non-compliance with directions by a party or by solicitors may result in costs being ordered against the party in default or against the solicitor if the fault lies on their part or of their counsel or of their expert witnesses. This may also involve a calculation of the court costs wasted. Further, the practice direction should spell out that such default costs may be required to be paid within a stated time in advance of the substantive hearing and confirmed by receipt from the receiving solicitor. We note the Bar Council welcome the opportunity to contribute to any consultation on the drafting of a practice direction on this recommendation.

15.51 A legally aided party will have protection. However, the solicitor at fault would not. Order 62 rule 11 of the Rules of the Court of Judicature (Northern Ireland) 1980 (the Rules) provides for the personal liability of solicitors for costs incurred unreasonably or improperly or wasted by failure of reasonable competence and expedition. While not limited to the work of the Court of Appeal, we would propose that consideration be given to:

- removing the protection of the legally aided party responsible for wasted costs;
- extending personal liability for wasted costs to counsel;
- extending the penalty in costs where oral evidence was not reasonably necessary under Order 62 rule 10A to those cases where it was not reasonably necessary to give any evidence orally.

15.52 We note that the Bar Council queries the evidence base for the recommendations set out in paragraph 15.51 above. This is largely on the basis that there is no evidence of the number of wasted costs orders that have been made against solicitors under Order 62 rule 11 in order to demonstrate that further reform is necessary in this area through the extension of personal liability to counsel. This

concern perhaps fails to recognise the wind of change that is to be introduced. Non-compliance, which often has been ignored in the past and hence there may well have been very few wasted cost orders, must change if we are to enter into an era where compliance with directions is more rigidly enforced.

15.53 Costs management**.** The overriding objective of the Rules includes saving expense and dealing with the case in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party. It is proposed that a practice direction should state that the Single Judge may consider the costs that have been incurred in the dispute and the costs that are likely to be incurred on any appeal in making case-management decisions and for that purpose may require the parties to furnish such costs or estimated costs. The Commercial Practice Direction on expert evidence provides for costs budgeting for expert witnesses. It is not proposed that there should be overall costs budgeting in the Court of Appeal but that the amount of costs incurred or to be incurred may be ordered to be provided to the court.

15.54 Hearing management**.** The overriding objective also requires the court to deal with the case by allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases. The Single Judge should fix not only the time allotted to the hearing of the appeal but also the periods within the allotted time that each party has to make submissions and replies so that a hearing timetable is produced in every case.

15.55 The Briggs Report on Civil Courts in England and Wales[20] *[Civil Courts Structure Review: Final Report]* considered the operation of their Court of Appeal and is considering options that include the greater use of two-judge courts, increased deployment of deputies, transfer of classes of appeal to the High Court, raising the threshold for the obtaining of permission to appeal and reducing or removing the right of oral renewal of permission application after refusal on the documents.

15.56 It is not considered that all these options translate into Northern Ireland. In relation to each of the English options:

- It is proposed that there be more frequent use of the members of the High Court to sit on appeals. That already occurs in this jurisdiction.
- It is not proposed that there be greater use of two-judge courts. The volume of work does not render this necessary in this jurisdiction.
- The increased deployment of deputies is not an option in Northern Ireland.
- The transfer of classes of appeal to the High Court is considered neither necessary nor appropriate.

[20] https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf

- The raising of the thresholds for the obtaining of permission to appeal is proposed as outlined above.
- Reducing or removing the right of oral renewal of permission applications after refusal on the documents is not proposed.

15.57 We observe, however, that a working group led by Lord Justice Briggs did report to the Court of Appeal in England in March 2016 as planned on some of these matters. Its recommendations were approved and a slightly revised set of proposals was due to go before the Civil Procedure Rules Committee in May 2016. They will be asked to launch a public consultation on the proposals, which will be supported by an analysis that will replicate most of what the working group put before the full court in March. A full consultation paper, which (assuming that the Committee so decides) will be published soon and will also contain the fruits of the time and motion study referred to in the *Civil Courts Structure Review Interim Report* fully audited and approved by Professor Dame Hazel Genn. Some of the issues it will be considering include:

- Should be current right to the oral renewal of an application for permission to appeal be removed or attenuated.
- Should the Court of Appeal become a second appeals court, save for appeals from the High Court, with a leapfrog route where issues of general importance are involved.
- What appeal types could properly be transferred to the High Court or to High Court judges.

15.58 This is a development that classically would be considered in the fullness of time by our own Civil Justice Council[21], if appointed, and might trigger further consideration of reforms.

15.59 In the interests of time and costs, applications for leave to appeal to the UKSC should be made in writing and the grant or refusal of leave may be made by the issue of an Order, with the Court of Appeal convening an oral hearing only where it is considered necessary to do so[22].

15.60 Our view is that the current approach to such applications is out of step with the approach of the UKSC to such appeals. It is proposed that the grant of leave to appeal should reflect the approach of the UKSC to the grant of leave as set out in Supreme Court Practice Direction 3 at paragraph 3.3.3.

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[21] See chapter 25.

[22] Currently in the English Court of Appeal, the Court of Appeal can deal with an application permission to appeal by written submission.

15.40 A party must, in relation to a submission:

(a) Fax a copy to the clerk to the presiding Lord Justice; and

(b) File four copies in the Civil Appeals Office no later than 12 noon in a working day before the judgment is handed down.

15.41 A copy of a submission must bear the Court of Appeal case reference, the date the judgment is to be handed down and name of the presiding Lord Justice.'

15.61 In order to co-ordinate and manage the overall approach to, and possible further reform of, civil cases in the High Court, one of the Lords Justice should be given overall management of all the areas of civil work. That Lord Justice would serve on the Civil Justice Council.

15.62 Finally, much more use should be made of electronic service of documents in the Court of Appeal, including endorsement of service, notices of appeal or leave to appeal. Already there is provision for electronic service of skeleton arguments, authorities, other materials and this development should be extended to embrace virtually every form of documentation in this court subject to the continuation of hard copy core bundles.

Responses

15.63 Apart from the Belfast Solicitors' Association who have said simply 'the BSA cannot support any reduction in the current rights of parties to appeal' and the Association of Personal Injury Lawyers who felt that some further clarity on the appeal rights is required, every other respondent on this issue agreed with the thrust of the suggestions encapsulated in this chapter, including the Bar Council and the Law Society.

Recommendations

1. Leave to appeal to be required in every appeal to the Court of Appeal. **[CJ114]**
2. Application for leave to appeal to be made in writing and determined by a Single Judge. The decision may be to grant leave on some or all grounds or to refuse leave. **[CJ115]**
3. A party who has been refused leave to appeal by a Single Judge on a written application to be able to proceed to an oral hearing before a Single Judge for leave to appeal. **[CJ116]**
4. There to be no right of appeal against a grant or refusal of leave by the Single Judge. **[CJ117]**
5. The higher threshold adopted for Upper Tribunal appeals to extend to all second appeals and to all tribunal appeals to the Court of Appeal. **[CJ118]**
6. If **CJ117** is not implemented as a universal threshold based on that presently applied to Upper Tribunal appeals, the Order 60B alternative to Case Stated to be available for all appeals from tribunals and the magistrates' court and county court on points of law to the Court of Appeal. **[CJ119]**
7. Appeals from the High Court on interlocutory matters as well as substantive appeals by way of 're-hearing' not only to require leave in all cases under the leave to appeal process outlined above but there to be a raised threshold for appeal to 'a real prospect of success' or 'some other compelling reason' for the Court of Appeal to hear the appeal. **[CJ120]**
8. Applications to appeal out of time to be in writing before a Single Judge determining the application for leave to appeal with the same right to an oral

hearing before a Single Judge in the event of refusal. Cases where the appeal otherwise appears to have merit and matters turns on delay should be permitted access to the full court for a determination. **[CJ121]**

9. Where the Single Judge finds that there are no grounds to extend time but leave would otherwise be granted, the application should proceed to the full court. **[CJ122]**

10. There be a system of early case-management hearings by a Single Judge of all cases where leave has been granted. **[CJ123]**

11. Time slots to be allocated for case-management hearings at which all parties attend. Directions will be issued by the Single Judge as to the conduct of the appeal. The same Single Judge should, as far as is practicable, engage in the case management of any particular case. **[CJ124]**

12. The Single Judge to fix not only the time allotted to the hearing of the appeal but also the periods within the allotted time that each party has to make submissions and replies so that a hearing timetable is produced in every case. Case-management hearings involving personal litigants to be given longer time slots and more case-management hearings. **[CJ125]**

13. The prospects of mediation to be a consideration on any leave being granted to appeal. **[CJ126]**

14. The identity of the necessary documents relied on by all parties and the collation of all those documents to be an essential task in the case-management process. **[CJ127]**

15. A practice direction to spell out that non-compliance with directions by a party or by solicitors may result in costs being ordered against the party in default or against the solicitor if the fault lies on their part or of their counsel or of their expert witnesses. Default costs may be required to be paid within a stated time in advance of the substantive hearing and confirmed by receipt from the receiving solicitor. **[CJ128]**

16. Removal of the protection of the legally aided party responsible for wasted costs. **[CJ129]**

17. Extension of personal liability for wasted costs to counsel. **[CJ130]**

18. Extension of the penalty in costs where oral evidence was not reasonably necessary under Order 62 rule 10A to those cases where it was not reasonably necessary to give any evidence orally. **[CJ131]**

19. A practice direction to state that the Single Judge may consider the costs that have been incurred in the dispute and the costs that are likely to be incurred on any appeal in making case-management decisions and for that purpose may require the parties to furnish such costs or estimated costs. **[CJ132]**

20. Applications for leave to appeal to the UK Supreme Court (UKSC) to be made in writing and the grant or refusal of leave be made by the issue of an Order,

with the Court of Appeal convening an oral hearing only where it is considered necessary to do so. **[CJ133]**

21. The grant of leave to appeal to the UKSC to be granted where the application, in the opinion of the Appeal Panel, raises an arguable point of law of general public importance that ought to be considered by the UKSC Court at that time. **[CJ134]**

22. A Lord Justice to be given overall management of all the areas of civil work. That Lord Justice shall serve on the Civil Justice Council. **[CJ135]**

23. Development of the process of electronic service of all documentation. **[CJ136]**

16

The county court and small claims court

Current position

16.1 The *Judicature (Northern Ireland) Act 1978* introduced a three-tier system within the county courts of Northern Ireland for determining civil disputes:

- The county court jurisdiction: a court determining civil cases with a value between zero and £30,000. County court judges determine cases between £10,000 and £30,000. (District judges sitting in the county court have jurisdiction up to £10,000.) In defamation and slander cases, a plaintiff may commence any action in the county court, regardless of its potential value, provided that they do not *claim* more than £3,000, though in practice a defendant could apply to remove the action to the High Court under s. 31(5) of the *Judicature Act* on the basis that the proceedings could in all the circumstances be more appropriately heard and determined in the High Court. Under the *County Court (Amendment) Rules (Northern Ireland) 2013*, the scale costs for county court libel and slander actions are fixed.
- The district judges sitting in the county court (hereinafter described as 'district judges) determine civil cases up to £10,000, although in an assessment of damages application to the district judge, the jurisdiction is £30,000.
- The small claims court is governed by Order 26 of the County Court Rules. It is a separate court within the county court (hereinafter described as 'the small claims court') determining consumer cases with a value up to £3,000 subject to certain exclusions. All personal injury and road traffic cases are excluded from the small claims jurisdiction, unlike the position in England and Wales where personal injury cases up to £1,000 and road traffic cases are included.

County court jurisdiction

16.2 Currently civil proceedings in Northern Ireland in the county court are commenced by a civil bill (issued in the county court), or a small claims application form (issued in the small claims court). The county court deals with civil cases with a quantum of up to £30,000. At present, there are 18 county court judges. There are four district judges, one of whom is assigned to sit in Belfast. Leaving aside the technical distinction between assigned and peripatetic judges, there are five county court judges assigned to Belfast, one each to six outlying divisions, and an additional assigned judge to Craigavon, leaving six other judges.

16.3 In simplistic terms, when issuing civil proceedings in the county court, a plaintiff:

- First decides that the case falls within the jurisdiction of the county court, that is, that the quantum of the case would not exceed £30,000. The former need for a plaintiff to decide in what division the civil bill would need to be issued has now been changed by the introduction of the single jurisdiction (see paragraph 16.35 below).
- Particularises a sum claimed, by way of damages, on the face of the civil bill.
- If £10,000 or less is claimed, the matter will be issued and listed before the district judge of the relevant division.
- If £10,000 to £30,000 is claimed, the matter will be issued and listed before the county court judge of the relevant division.

16.4 Once each case has been issued and served in the relevant court/division, and if the matter is defended, the parties will begin taking substantive steps in each.

16.5 One such step can be an application before a Master of the High Court to remove or remit an action (that is, apply to move a case that has been commenced in the High Court to the county court, or vice versa). Such an application can be made by consent. If contested, it will be listed for hearing, and representations made by each party. If the judge/Master hearing the case decides that the matter was commenced in the wrong court, and it should either be removed or remitted, an order will be made to that effect.

16.6 Currently, it would appear that cases that could, or should, be commenced in the county court may be being commenced in the High Court. This may be for a variety of reasons, including the following:

- The plaintiff views the quantum of its case as higher than it is.
- The case is commenced by a personal litigant who is not familiar with the process, and has not chosen the correct court and/or division to commence the case.
- The plaintiff's advisors and/or the parties would prefer to have the matter litigated in the High Court (for example, due to perceived complexities and/or a perceived potential to recover higher damages, for costs purposes, ease, or speed).
- The plaintiff views the case as one that lends itself to an Order 14 application.

16.7 Not only does this lead to removal/remittal applications before the Master as mentioned above, but it means that the High Court may be routinely dealing with, and judges may be routinely hearing, cases that could or should be heard in other forums.

16.8 If one or both parties make(s) a removal remittal application, and a hearing ensues, the matter will be heard and determined by a judge/Master. Therefore, subsequent to such a hearing, the case will be in the correct venue.

16.9 However, this is not determinative. There may be cases where both parties will not make such an application, as both parties wish for the matter to remain in the High Court (perhaps due to, *inter alia*, the reasons set out above). The case will, therefore, remain in the wrong forum. Cases can only be remitted from the High Court to the county court (as opposed to the district judge's court). There are likely to be cases that should be remitted to this forum. The case may be of the necessary quantum, and therefore not lend itself to a remittal application, but be of limited complexity.

16.10 Equally, cases that should be commenced in a certain division of the county court may be commenced erroneously in another. Moreover, cases that should not be heard in the small claims court, but should be in the county court (due to, for example, complexity, or the nature of the issues and/or cause of action raised) may be commenced therein, and vice versa.

16.11 Further, once a party has decided in which venue to issue proceedings, and those proceedings are defended, they then begin in earnest (for example, with review hearings, listing dates being given, etc.). Once the process is commenced there is often little opportunity for the parties to put on the brakes to, for example, engage in alternative dispute resolution without incurring further costs, further review dates, etc.

16.12 The above may lead to, *inter alia*, the following consequences:

- cases being listed and/or heard in the incorrect courts;
- certain divisions being overburdened with cases that are not appropriate for them;
- High Court judges hearing cases of little complexity and/or low quantum;
- lack of pausing the proceedings to engage in alternative dispute resolution (perhaps especially in the county courts), leading to higher costs and less opportunity for the parties to engage in such a course of action;
- increased workload for court office staff;
- increased costs for both parties.

The equity jurisdiction

16.13 The provisions in respect of the county court jurisdiction are contained within the *County Courts (Northern Ireland) Order 1980* and the County Court Rules (Northern Ireland) 1981. There have been a number of revisions subsequently, the most important of which was the raising of the general civil jurisdiction to £30,000 pursuant to *The County Courts (Financial Limits) Order (Northern Ireland) 2013*. Notably, despite the alteration to the general civil jurisdiction, there was no associated alteration to the £45,000 limit applicable to what may generally be termed matters of equity (this is dealt with later below).

16.14 The jurisdiction of the county court in respect of equitable matters is governed primarily in arts. 11 to 20 of the County Court Order[1].

16.15 Historically, the county court had jurisdiction in matters pertaining to the recovery of land or where the title of the land came into question up to an annual value, where the land contained a specified hereditament of £3,200 or, in any other case, £500. This was altered by *The Rates (Consequential Provisions) Order (Northern Ireland) 2007,* which provided that the valuation limits in respect of the county court jurisdiction was up to a capital value of £400,000 or a net annual value of £4,060.

16.16 The distinction between the two pertains to the nature of the property insofar as a property with an ascertainable net annual value (NAV) relates primarily (pursuant to art. 39 and 39A of *The Rates (Northern Ireland) Order 1977*) to commercial property, whereas the capital value relates to property comprising a dwelling house. In respect of land *simpliciter*, it is the NAV that is appropriate rather than the capital value.

16.17 Rather oddly, and for reasons that are not especially clear, where the claim relates to specific performance in respect of the sale of land, the ceiling for the county court jurisdiction is for cases where the consideration is £45,000 or less, thus obviously limiting the jurisdiction of the county court in such matters to small parcels of agricultural land or distressed properties.

16.18 Generally, the jurisdiction of the county court, insofar as it relates to matters pertaining to wills and the administration of estates, has a cap of £45,000 in respect of any property other than land. Where there is land or real property, the county court has a jurisdiction up to £400,000; however, anecdotal evidence suggests that any dispute involving an estate approaching said value(s) is referred to the Chancery Court.

16.19 The county court also, pursuant to art. 14(c), has jurisdiction in respect of mortgagee suits and in relation to charges/mortgages generally. However, there is little or no evidence of actions for possession ever being issued in the county court. It must be assumed that this is primarily because jurisdiction is expressly conferred on the High Court by Order 88 of the Rules of the Court of Judicature (NI) 1980 and, further, by the fact that the relief under *The Administration of Justice Acts 1970* and *1973* is only exercisable by a judge or Master sitting in the High Court.

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[1] In essence, they provide for as follows:

i. Article 11 – Recovery of legacies, annuities.

ii. Article 12 – Actions for recovery of or involving title to land.

iii. Article 13 – Injunctive relief.

iv. Article 14 – A collection of the most common equitable relief sought i.e. specific performance, mortgage claims, claim for partition, partnership disputes, applications under *The Settled Land Acts* etc.

v. Article 15 – Contentious Probate.

vi. Articles 16–18; -Matters involving administration, accounts in respect of estates, etc.

16.20 The county court, in respect of partnerships, has a jurisdiction up to £45,000. Claims under *The Settled Lands Act* have a limit pertaining to a value of the real estate of less than £45,000. Claims under the *Trustee Act (Northern Ireland) 1958* are permissible where the value of the property does not exceed £45,000.

16.21 The county court has a jurisdiction in respect of partition suits in respect of land up to a value of £400,000, pursuant to the amendments referred to above.

16.22 Therefore, despite the raising of the general civil jurisdiction to £30,000 pursuant to *The County Courts (Financial Limits) Order (Northern Ireland) 2013,* there was no associated alteration to the £45,000 limit applicable to what may generally be termed matters of equity.

16.23 The primary limits on the county courts jurisdiction appear, in the main, to be financial. Otherwise, pursuant to both art. 34(1) of the *County Court Order* and s. 86(2) of the *Judicature Act,* the county court has the power to exercise all of the express and inherent powers of the High Court.

16.24 In 2015, a total of 1,555 originating cases were issued in the Chancery Division. The figure does not include proceedings before the Bankruptcy Master when a total of 1,784 proceedings were issued[2]. By way of comparison, in July to September 2015 a total of 30 equity cases were lodged in the county court in Northern Ireland (the same as in the period July to September 2014) but only 15 were disposed of in July to September 2015, compared to 26 in July to September 2014[3].

16.25 By way of comparison, the County Court Bulletins for the four quarters in 2015 show a total of 140 equity cases being lodged in the county court in Northern Ireland, and a total of 110 being disposed of, with 202 equity cases remaining outstanding as at December 2015. The county court jurisdiction is contained within *The County Courts (Northern Ireland) Order 1980* and the County Court Rules (Northern Ireland) 1981.

16.26 The financial jurisdiction of the county court in equity matters generally is thus not clear, with varying limits depending on the relief of either £15,000, £45,000 or £400,000. By way of example, pursuant to art. 11(4), a civil bill for the recovery of any legacy/annuity is governed by the gross value of the estate up to £45,000 or to any claim brought by a legatee up to £15,000, regardless of the estate.

16.27 The level of equity business disposed of in the county court is disappointingly low, as the county court could provide a cost-effective alternative venue for proceedings of lower value. The anecdotal experience of the members of the Chancery Group Sub-Committee, which was not contradicted during the responses to the preliminary review consultation process, was that the low rate of disposal of

[2] As per information supplied by Karen Campbell as of 2 February 2016.
[3] County Court Bulletin July to September 2015 Research and Statistical Bulletin 25/2015 Provisional quarterly figures R. Redmond 13 November 2015.

proceedings in the county court was contributed to by insufficient resources to hear equity matters in the face of pressing Crown Court and Family Care Centre cases, and the practice of fixing equity cases for hearing on the same day as a number of other matters, rather than fixing a special day (or number of consecutive days).

District judge jurisdiction

16.28 The district judges sit as judges in all three tiers — in the county court, district judges sit regularly as a deputy county court judge.

16.29 There are four district judges in the county court in Northern Ireland. District judges have a general power to try any action within the relevant monetary jurisdiction. Any order, decision or determination by the district judge is embodied in a decree for all purposes (including the right of appeal) and has the like effect as a decree of the county court judge.

16.30 When trying such actions, district judges have all the powers of the county court judge, including the power to grant final injunctions in civil matters. They also deal with interlocutory matters, including discovery, inspection and replies to particulars.

16.31 District judges also:

- Undertake the assessment of damages and costs in any case where default judgment has been marked. This assessment can be of damages up to the limit of the county court jurisdiction of £30,000.
- Hear defended and undefended applications for possession of dwelling houses and commercial premises taken by statutory bodies, housing associations, commercial and private landlords.
- Hear cases involving anti-social behaviour, squatting, succession or sub-letting in addition to claims for arrears of rent.
- Must ensure that the statutory requirements and protocols have been followed and may have to make balanced determinations on tenants' applications for stays of enforcement.
- Deal with applications within the small claims jurisdiction of £3,000, save for excluded matters. The range of cases is varied, often technical and increasingly complex.
- Hear virtually all applications relating to regulated consumer credit agreements.

Small claims court jurisdiction

16.32 When issuing civil proceedings in the small claims court, the plaintiff first decides if the value of the claim is not more than £3,000 and does not fall within one of the excluded claims — for example, a claim for personal injuries.

16.33 A Notice of Application for a Small Claim is completed and filed in the relevant county court division.

Statistical analysis

16.34 The figures from the last quarter of business volumes in the county court and district courts in 2015 in appendix 9 illustrate the following:

- A high volume of business in Belfast.
- Levels of business in outlying divisions suggest that amalgamation of civil business among these divisions would be beneficial.
- A very consistent 60:40 split between district judges (up to £10,000) and county court judges (over £10,000).
- Save in Belfast, the high volumes reflect several factors, particularly hearing loss cases, and also anecdotal evidence that the higher consistency and efficiency in Belfast attracts civil bills if plaintiffs can choose venue. (Hearing loss cases require a higher degree of case management but little judicial hearing time as most, when managed rigorously, resolve.)
- Craigavon disposals level is very high and may reflect a clearing out of dead wood.

16.35 The single jurisdiction of the county court was introduced on 31 October 2016 pursuant to the *Justice Act (Northern Ireland) 2015*[4]. The Lord Chief Justice has designated three administrative divisions for differing types of work.

Discussion

COUNTY COURT JURISDICTION

16.36 The county courts, including the district judges sitting in the county court, have sought to provide access to justice with expedition, a minimum of complexity and at a proportionate cost. The fixed-costs scale is the envy of other jurisdictions. The view amongst practitioners is that our county courts generally provide an efficient and effective system of access to civil justice. Parties are able to have their disputes heard within a relatively short time of commencement of proceedings, hearings take place before experienced judges who are able to assess the credibility of the parties and the various witnesses who give oral evidence and neither the hearings nor the pleadings are unduly lengthy. In addition, the legal costs are relatively low and they are also predictable by virtue of the statutory scales.

16.37 Our county court system should not be associated with the concerns expressed in the county courts in England and Wales (E&W) about the speed, fairness and the disproportionate cost of litigation. In some measure, our fixed costs avoid many of the problems that are the subject of debate in E&W. One view is that our history, politics, legal history, geography and economy differ from E&W to such

[4] http://www.legislation.gov.uk/nisr/2016/317/made/data.pdf

a degree that we must consider Northern Ireland solutions to any perceived Northern Ireland problems.

16.38 However, a number of recurring themes emerged in the course of our Review:

- Especially in county courts outside Belfast, mixed lists of criminal, family and civil cases often result in civil cases not being reached or, if reached, are not concluded on the day and are adjourned, perhaps for several weeks. On occasions, even cases listed with priority are not reached. As recently as December 2016 this Review was provided with details of such an unacceptable situation occurring in a major court where no additional judicial resources — temporary or permanent — was available to solve the problem. The Bar Council response to our preliminary review has observed that practitioners have expressed significant concern about this matter.
- The level of equity business disposed of in the county court is disappointingly low. The Bar Council response records 'the experience of the profession has been that it is often difficult to obtain adequate time to allow for equity matters to be dealt with in the county court with particular problems in obtaining a special day or consecutive days in which cases can be heard'.
- Both equity and licensing cases have proved difficult to efficiently timetable.
- These problems were highlighted by the Bar Council as far back as 2010, in the course of a consultation on a proposed jurisdictional change to the county court. It seems that under the current arrangements, where priority is understandably given to the overwhelming bulk of mixed lists being made up of criminal cases sitting with juries, this situation is unlikely to change.
- There is a perception amongst the professions that personal injury claims in the county court attract lower awards of damages than if pursued in the High Court albeit the number of successful appeals on quantum to the High Court is not discerned to be high. This is a concern that has surfaced in the responses from the professional bodies of both the Bar and the solicitors' profession. However, a strong argument can be made that, provided judges are given some training on higher awards and there is sufficient resource to indicate a proven capacity to handle civil and equity claims in a timely and efficient manner, there is no logical reason why the county court should not handle substantially larger claims.
- Several of the courthouses have inadequate consultation facilities, with consultations often occurring in crowded, cramped conditions in close proximity to persons awaiting their criminal cases to be called.
- Inadequate use of modern technology — including email/telephonic conferences, etc. — for review hearings, leading to, at times, lengthy waits

in court for very short hearings in a jurisdiction where there is no provision for payment for such attendances.

- Inadequate implementation of the system of pre-action protocols now in use in the county court. The *raison d'être* of pre-action protocols is to elucidate the issues in dispute, so that both parties can focus on what is relevant instead of wasting their time on matters that will not arise, should a case proceed to trial. In the county court, at present, plaintiffs are left to guess what defence is being raised. It is argued by some solicitors that currently plaintiff solicitors are setting out detailed claims by way of pre-action protocol letters and again in their Replies to Notice for Further and Better Particulars. Yet, despite the protocol stating that if liability is denied the defendant must state with sufficient clarity and detail the reasons for the denial, this is not happening in many cases. The defendant insurance companies allegedly are not complying with the ineffective protocols and are regularly introducing major issues, such as causation, after having admitted liability openly. On the other hand, the responses from insurance companies to our preliminary review indicated grave concern that the pre-action protocol in its current form does not provide for disclosure by the plaintiff of medical evidence, notes and records, vouching documents for financial loss or discoverable documents. Insurers were concerned that there has been a disproportionate emphasis on defendants' and insurers' non-compliance with current protocols when all they are seeking is a mutually acceptable cards-on-the-table approach to be adopted by both parties at the earliest opportunity in order to facilitate early resolution of claims. As an addendum to their arguments, they also indicate that the letter of claim should include identification of the relevant insurer through the Motor Insurance Database or Employers' Liability Trace Office and that the initial letter of claim should be sent to that insurer. With no sanctions imposed for breach of the protocol, when a detailed denial is not forthcoming the only recourse is to issue court proceedings. We are satisfied there should be costs sanctions for such non-compliance.
- The argument made on behalf of the plaintiffs is that without a defence, clearly stating the basis on which a claim is being defended, the plaintiff's lawyers are left in a situation of having to be prepared to deal with each and every eventuality. In a low-cost fixed-cost environment this should be regarded as intolerable. With a proposed increase in county court jurisdiction, there would be even more at stake in the county court jurisdiction. It is unfair that only one party is required to set out its case by way of replies to the defendant's Notice for Particulars, yet the defendant does not have to make any declaration in relation to what issues they intend to raise. The present arrangement represents trial by ambush and runs contrary to the accepted cards-on-the-table approach. It wastes time and costs by having the party who is left in the dark preparing for a case that they might never have to meet.

- To a degree, the plaintiff's Notice for Particulars of Defence has helped but is apparently limited as many are so vague that knowledge of the real defence remains uncertain.
- A solicitor has advised that in one instance their opposition argued that the requirement for a Notice of Particulars is only in complex cases and they will not pay the costs of them. If there was a procedure whereby the defendant had no choice but to file a defence, there would be no ambiguity or costs argument and this would assist in creating a balance between the parties. In addition, it might serve to put pressure on parties to narrow the issues from the outset, allowing cases to be dealt with expeditiously and proportionally.

16.39 On the other hand, most county court judges and district judges felt the current system works tolerably well and the necessity to draft defences in the county court would introduce another level of costs and additional delay into a system that is bereft of either factor.

Discussion

16.40 I consider that if there is an increase in the jurisdiction in the county courts, this question of adequate notice of defences must be addressed. I suggest that a solution is to insist that a questionnaire be completed by defendants as part of the pre-action protocol. If this is not possible, for reasons that need to be stated by the defendant, that questionnaire would require to be finalised prior to any case review being completed, and certainly prior to service of certificates of readiness[5].

16.41 That questionnaire, the subject of an amendment to the County Court Rules, would be in simple form along the lines of:

- Is liability admitted in full? Y/N

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[5] County Court Rules (CCR) Order 8 Rule 3

(1) In any proceedings commenced by civil bill in which a notice of intention to defend has been served the plaintiff shall, subject to paragraph (1A) and after the conclusion of all interlocutory matters, request the chief clerk to enter the proceedings for hearing by delivery to the chief clerk at his office of a certificate of readiness in Form 43 and shall, at the same time, cause to be served on the other party or parties to the proceedings a copy of the certificate of readiness.

(1A) Subject to paragraph (1B), a certificate of readiness may not be delivered to the chief clerk until the expiry of 21 days following the date of service of the notice of intention to defend.

(1B) The plaintiff must notify the defendant in writing of his intention to lodge the certificate of readiness no later than 14 days prior to lodging the certificate. (added SR 2013/19 on 25 Feb 2013)

(2) In any proceedings in which a notice of intention to defend has been served the chief clerk shall, if no certificate of readiness has been delivered to him within a period of 6 months immediately following the date of service of the notice of intention to defend, list before the judge or district judge (as the case may be) and notify the parties accordingly and the judge or district judge (as the case may be) may issue such directions concerning the future conduct of any such proceedings as he considers appropriate including, in particular, an order that the proceedings be stayed or dismissed.

- Is there any allegation of contributory negligence? Y/N. If yes, please set out the basis of the allegation or allegations of contributory negligence.
- If liability is being denied, set out full details with the relevant particulars.

16.42 To address the other anomalies, some more fundamental structural change is required. First, there must be a fresh priority to civil and family cases. The only way to change the present thoroughly unsatisfactory position is to establish perhaps at least three Civil (and Family) Centres that will be given over exclusively to the hearing of such cases on given dates. There is a strong incentive to maintain a local assigned judicial presence to maintain the tradition of an assigned judge, to maintain consistency in approach and to facilitate local discussion and solutions to problems.

16.43 There is no reason why the allocation of criminal, civil and family business needs to follow identical geographic patterns. Neither does it need to follow a geographical pattern established for magistrates' court business (although Petty Sessions appeals and family transfers will have to be linked).

16.44 However, we must always be conscious of access to justice and remember that, outside of greater Belfast, public transport is not always very good. Careful thought and consideration, with wide consultation, would be necessary before designating the respective locations. Such locations would have the advantage over the High Court that they could be flexibly relocated on occasions if another courthouse was available for a hearing with a large number of local witnesses, etc.

16.45 There would, therefore, be two cadres of judges, one dealing with criminal (Crown and Petty Sessions appeals), the other dealing with civil (civil bills, equity, licensing and family).

16.46 The suggested structure for the civil cadre could be five/six judges. Three would be permanently based in Belfast. Venue would be determined as it is now — defendant's residence or place of business, location of land, or cause of action arising. There would be a reasonably flexible approach to transfer of cases from other areas, on grounds of complexity, need for courtroom facilities, etc.

16.47 The other three judges would ideally sit in two/three judge venues dealing with business in a fortnightly pattern in three outlying centres. We will need to scrutinise the available data as to the number of cases arising from certain geographic areas to enable a more informed decision as to boundaries, judicial allocation, etc.

16.48 One judge would take responsibility for overseeing and managing the overall equity list and, if it proved necessary, another would take overall responsibility for overseeing and managing the other civil lists. Thus, if a gap appeared in one location, cases might be speedily transferred to ensure timely and efficient hearings. Assignments to such posts might perhaps be for an 18-month/three-year period initially. If such judges became free — for example, the scheduled case or cases collapsed — they could flexibly help out with other work. A further added advantage of a specific civil jurisdiction would be that it would give an added

incentive to those aspirants for judicial preferment who currently might find the prospect of spending most of their time hearing criminal cases to be somewhat unwelcome

16.49 Since the publication of our preliminary Civil Justice Review, and perhaps encouraged by it, we note with approval that steps have been taken in an attempt to dispel any notion that there is a non-priority of civil business at the county court level. Accordingly, the Lord Chief Justice has recently assigned His Honour Judge Devlin as a civil judge, giving him responsibility for co-ordinating civil business throughout the province. The advent of the single jurisdiction means that there is a greater flexibility. During the Trinity Term of 2017, a pilot scheme has been set up for a Civil Hearing Centre in Armagh Courthouse with cases previously being dealt with in Armagh, Craigavon, Newry and Dungannon feeding into it. One week per month will be allocated for this business. It is proposed that all civil and equity business from these areas mentioned will be dealt with during those weeks by HH Judge Devlin in Armagh. The pilot will be evaluated during the summer vacation and feedback obtained from practitioners and other interested parties. Staff under his direction will reformulate the lists and solicitors will be advised of the changes. The judge may take the opportunity to list other business for review during this term to consider the state of readiness of cases. We strongly welcome this attempt to centralise civil and equity business so as to improve the service that the judiciary and Court Service can deliver to assisted parties. This is a very important first step towards the proposals we have indicated being fully implemented.

16.50 There is general agreement that the county court works extremely well. Judges are highly experienced and extremely skilled in what they do. Provided there is proven capacity, along the lines mentioned in paragraphs 16.46-16.48 above, there is no reason why their civil jurisdiction should be confined to the current relatively low limits. With a modest amount of training in the higher value cases, such judges are more than capable of dealing with cases at least up to a level of £60,000 to £75,000 and it is to that bracket that we suggest raising the county court limit. In our earlier Civil Justice Review we had fixed the figure at £75,000 but in light of the representations that we have received, as set out in our 'Responses' section below, we reduced that possibility to perhaps £60,000. The level for defamation and slander cases should be raised to £10,000. It is, of course, lower than their counterparts in England but is a good starting point. Whilst I recognise that there is some opposition to this change within the Bar, I believe that those concerns are founded to a great extent on the anomalies that presently exist in the system. If those anomalies are adequately addressed — in my view the *sine qua non* of the change — there is no reason why the expertise at this level should not be profitably exploited.

16.51 Such increases overall in the county court would also serve to ensure that the High Court will be a real centre of excellence, hearing only cases of very high value, multiparty actions, clinical negligence cases, judicial review, defamation (perhaps where the claim is over £10,000), appeals or cases of sufficient complexity, precedent value or importance to merit hearing in that division. Such cases will be heard even

more timeously than at present whilst placing less operational burden on the higher court structure.

16.52 An attendant reform would be that the granting of the power of removal from the county court to the High Court should be vested not only in High Court judges and Masters but additionally in county court judges and district judges. The parties can choose in which forum to make the application, although in most cases it will probably be more expedient to make it in the county court. The change proposed will require amendment of s. 31 of the *Judicature (Northern Ireland) Act 1978,* which is the basis of the present jurisdiction and power to remove[6].

16.53 Remittal from the High Court would, of course, remain only with the Master, with both remittal and removal being subject to appeal, albeit we consider both appeals should be an instance of paper exercises before a High Court judge, with a discretionary oral hearing being within the power of the High Court. Whilst the Bar Council observed no delay in the current system, that ignores the extra time and extra costs necessarily taken up with current oral hearings.

16.54 More use could and should be made of the county court's equity jurisdiction. There should be a radical increase to the county court's financial jurisdiction in equity matters at least comparable to the rest of the civil jurisdiction. Relief under the *Administration of Justice Acts 1970* and *1974* should not be exercised only by a judge or Master sitting in the High Court but should be extended to county court judges. The chancery sub-group recommended postponing the level of increase in the equity business until a wider array of suggestions from chancery and other practitioners emerged and the responses on that subject have been digested. I am content with that suggestion, given that the principle of uplift is clearly recognised. No definitive figure emerged during the responses to our own consultation process and therefore this is a matter that requires further consultation before the actual figure is determined.

16.55 The financial jurisdiction of the county court generally should be remodelled and clarified so that the present confusion is removed. Before recommending precise figures for the changes to the equity jurisdiction, I would await the expression of wider consultation process indicated above.

16.56 However, once again, an extension to the county court's equity jurisdiction would be of little use unless sufficient judicial resources were available to manage such equity business consistently across all divisions.

16.57 It is generally accepted that the protocols[7] in the High Court and county court are working relatively well at present in large measure. The purpose of protocol procedure is to assist the parties to avoid the need for, or to mitigate the length of complexity of, civil proceedings by encouraging:

[6]As to the current power to remove a case from the County Court to the High Court see Cunningham v CCPSNI [2016] NICA 58.

[7] The Pre-Action Protocol for the county court can be found at page 599 of the County Court Rules.

- Fair and timely settlement of disputes prior to commencement of proceedings.
- Early and full disclosure of information about the dispute.
- The narrowing of issues to be determined should the case proceed to litigation[8].

There needs to a balanced regime that incentivises early disclosure by all parties and which provides for meaningful sanctions in the event of non-compliance.

16.58 However, a number of amendments need to be considered in the county court to address concerns that have emerged in discussion, and will arguably improve the protocols' fairness and efficiency. The overriding issues with the protocols are as follows.

16.59 To a degree, the plaintiff's Notice for Particulars of Defence has helped in eliciting the defence being raised but plaintiffs' solicitors still feel this is limited, as many replies are so vague that the case to be met is still uncertain. This is particularly important when allegations of fraud or dishonesty arise. Defendants should be expected to plead any allegation of dishonesty on the basis of clear instructions and credible evidence.

16.60 Questionnaires are used for case reviews and prior to service of certificates of readiness, but they need to be more focused.

16.61 There continues to be an issue with defendants failing to disclose information, and failing to comply with the rules for automatic discovery. The disclosure provisions within the pre-action protocol need to be tightened to prevent plaintiff solicitors being ambushed by late disclosure of vital documents.

16.62 At paragraph 9 of the protocol, there should be a provision for the plaintiff to issue applications for pre-action disclosure where there is no reply from the defendant within 21 days. The requirement to disclose documents must be tightened, and we propose that the protocol include a provision at paragraph 12 that if the defendant denies liability or alleges contributory negligence, they must enclose with the letter of reply all (rather than the current wording of 'any') documents in their possession. A non-exhaustive list of disclosure documents should also be annexed to the protocol, as is the case in England and Wales, and where such documents do not exist, the defendant should complete a form for standard disclosure.

16.63 Plaintiff solicitors also often struggle to recover pre-proceedings costs. The procedural changes have meant that more work must be done pre-issue, but at the same time there is no guarantee that the plaintiff solicitor will be able to recover the costs for this work.

[8] We note the mandatory pre-action protocol system for personal injuries recently introduced in Scotland: http://www:legislation.gov.uk/ss1/2016/215/pdfs/ssi20160215en.pdf

16.64 Paragraph 9 of the protocol should be amended so that 'the plaintiff is entitled to proceed to issue court proceedings', so that it is clear that the letter of claim is part of proceedings, and the plaintiff solicitor is able to recover costs as such.

16.65 There must be greater clarity in the protocol as to what is meant by an admission of liability to ensure that defendants provide sufficient information to the plaintiff solicitor pre-trial. We suggest that paragraph 10 should be amended to state that: 'The defendant's solicitor/insurers will have a maximum of three months from the date of acknowledgement of the letter of claim to investigate without leave of the court for an extension in exceptional circumstances'.

16.66 The defendant's insurer/solicitors should reply by no later than the end of that period, stating if liability is conceded by admitting that the accident occurred, that the accident was caused by the defendant's breach of duty, and the plaintiff suffered loss and there is no defence under *The Limitation Order (Northern Ireland) 1989*. If liability is denied, the defendant's solicitor/insurers must state this with sufficient clarity and detail so that the plaintiff is made aware of the defendant's case, including if the fault lies with, or an indemnity is claimed from, another.

16.67 There should be improved clarity in the protocol at paragraph 4, which should state that a letter of claim should 'contain details of the medical evidence then available (with an undertaking to provide any subsequent medical evidence as soon as possible), details of financial loss incurred, credit hire arrangements, etc, even where such details are necessarily provisional', so that time is not wasted on gathering exact details of loss before the claim has even begun. We also feel there is merit in the insurance companies' request that, wherever possible, a relevant insurer should be identified by the plaintiff at this early stage and a copy of the initial letter of claim sent to that insurer.

16.68 In this context we are further of the view that the current time limit restrictions within the county court regarding when a lodgement can be made are too restrictive and render the process ineffective. At present, a lodgement can only be made within 28 days of the service of medical evidence in personal injury cases. This does not give the defendant any realistic opportunity to arrange their own medical evidence (average time for return of a medical report being often appreciably in excess of this) and so places the defendant at a disadvantage in seeking to resolve any matter. We consider that at least this period of 28 days should be increased to 56 days.

16.69 The general county court direction — that all interlocutory applications should normally be dealt with on paper by email or by post — requires a consistent approach across all of the jurisdictions. This is a view expressed particularly strongly in the response of the district judges. A guidance note informing the parties to a case how the court expects applications to be dealt with should be published forthwith. All such applications should be presented in writing by one side or the other. If the other side does not object, they should proceed to the judge to be dealt with administratively. The vast bulk should be dealt with in this way. If, however, one

side or the other objects to the application being dealt with administratively, or if the judge directs, then the matter need not be dealt with administratively and a hearing can be arranged. Currently, e-mails do pass between the Office and the solicitors, and between the judge and the Court Office, but **not** between the judge and the solicitors, unless there are special circumstances such as where the Office sends on a particular email from a solicitor or party for the court's attention. In line with the recommendations in chapter 3, straightforward applications — for example, some reviews, date fixing, simple interlocutory applications (particularly if uncontested)[9] — should be dealt with by email or telephone conference, subject to the right of parties to request an oral hearing or the judge to direct such a hearing when appropriate.

16.70 We observe, however, that this exhortation should not diminish the importance of certain judicial-led reviews that are a key component of an efficient system. An illustration of this is that where six months after the notice of intention to defend has been served there is still no Certificate of Readiness (COR), the cases are listed at a COR review. If a direction is given when the plaintiff is to serve the COR and there has been a failure to comply, it will then be listed at a review called the COR default list where it may be struck out. Oral hearings at such reviews should normally continue. Similarly, where an early case-management hearing is necessary it will usually require an oral hearing.

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[9] Interlocutory Application CCR Order 14. Part 1 - *General procedure* [subst. SR 2013/19 on 25th Feb 2013 save in pending proceedings]

1—(1) Where by any enactment or by direction of the court any application in the course of an action or matter is expressly or by implication authorised to be made to the court or to the judge or to the district judge or chief clerk, the following provisions shall apply –

1. (a) the application shall be made either in or out of court and either ex parte or on notice in accordance with the terms of the relevant enactment or direction.

(b) in the absence of any provision to the contrary the application shall be determined by the judge (or district judge as the case may be) without a hearing, unless –

(i) either party requests a hearing; or

(ii) the judge (or district judge as the case may be) otherwise directs;

(c) where either party requests that the application be dealt with by way of hearing, the party shall specify the reasons;

(d) a party may within 14 days of service of the application, object to the application being determined without a hearing by filing in court, a notice in writing specifying the reasons;

(e) an objection made under sub-paragraph (d) shall be served on the other party;

(f) unless an objection to the application being dealt with without a hearing is received within 14 days of service of the application on the other party, it will be assumed that the other party consents to the application being determined without a hearing (unless the judge or district judge otherwise direct);

(g) where a request for a hearing under sub-paragraph (b) or an objection under sub-paragraph (d) is received, the application or objection shall be placed before the judge or district judge for consideration who may –

(i) Determine the application without a hearing and make such order as he considers just; or

(ii) Direct that the matter be listed for hearing;

(h) where an application is made on notice –

(i) the notice shall be in writing and shall be served on the other party and filed in the Office before the beginning of a period of two days ending on the day of the hearing of the application unless the judge or district judge or chief clerk dispenses with notice or gives leave for shorter notice; and

(ii) the party serving the notice shall be responsible for ascertaining that the judge or district judge or, as the case may be, the chief clerk will be available to hear the application on the day, at the time and in the place for which notice is served;

(iii) make any other order as he thinks fit.

DISTRICT JUDGE JURISDICTION

16.71 Since we have proposed an increase in the jurisdiction of the county court to something in the range of £60,000, it would seem logical to increase the jurisdiction of the district courts pro rata to £25,000. In any event, district judges are now regularly sitting as deputy county court judges with a jurisdiction up to £30,000 in quantum cases and are thus highly experienced in dealing with cases at this level.

16.72 There has been discussion as to whether a specific financial jurisdiction for district judges is artificial and unnecessary as district judges hold concurrent appointments as deputy county court judges and sit in that role on a very regular basis. It seems incongruous that district judges should, as is the current situation, spend a great deal of their time hearing civil bills as deputies (without which service the county court system could not efficiently function) and yet that *de facto* position is not recognised as a matter of statutory reality. I therefore propose that there be a single tier of 'civil judges' of the county court exercising the full civil jurisdiction of the county court. Similar proposals have been made in England and Wales, albeit that district judges there do not hold a concurrent appointment. Whilst this might well merit some change in their salary to reflect this, the role of district judges (civil) would still, of course, be wholly distinct from county court judges in so far as the former have no criminal jurisdiction.

SMALL CLAIMS COURT JURISDICTION

16.73 Consideration has been given as to an increase to the small claims jurisdiction from the current £3,000 and the invocation of such small cases that involve personal injuries and road traffic accidents. There is a divergence of views. Some think the current limit is set at the right level as it is a 'small' claim and, given the recent trends in the Retail Price Index, the £3,000 jurisdiction remains at the right level to reflect the type of goods a consumer might be able to litigate about properly without recourse to lawyers using the informality of the small claims procedure. There is also concern that to increase the financial jurisdiction may result in more lawyers being instructed for the 'non–consumer' party, risking inequality of arms for those consumers not legally represented.

16.74 The main concern expressed is that the simple procedures of the small claims court are not suitable for the complexities of road traffic and personal injury litigation and there is the risk that liability issues may be determined in the small claims court, giving rise to significant personal injury claims. An additional concern is the equality of arms between an unrepresented applicant and a respondent supported by an insurance company and represented by lawyers.

16.75 The counter view is that a jurisdiction of £3,000 is too low, particularly compared with England and Wales where the general small claims track is £10,000, and that increasing the jurisdiction will allow the benefits of the small claims procedure to be available to more claimants.

16.76 It is acknowledged that there are different procedures in place in England and Wales with regard to small claims, such as allocation and direction hearings, which

result in a considerable additional burden on administration and judicial time. Additionally, in England and Wales, there are allowances in the small claims court for costs, expenses and expert reports.

16.77 Consistent with the proposal that we have a voluntary pilot scheme for online dispute resolution (ODR) cases pitched at £5,000, I consider that the current level is too low and does not reflect the realities of economic life and the increases we are proposing elsewhere. I propose an increase of the jurisdiction of the small claims court to £5,000.

16.78 Whilst I recognise the firmly held view expressed by the insurance industry in response to the preliminary Civil Justice Review to the effect that there is no logic in excluding road traffic and personal injury cases from the small claims court and the voluntary pilot scheme for on-line dispute resolution, I remain of the view that personal injury and road traffic cases should continue to be excluded**.** These cases are best dealt with by our county courts, which, unlike England and Wales, provide a speedy and just environment to resolve what can be often complex cases with precedent value at a very modest cost to the 'at fault' party.

16.79 In particular, I harbour concerns as to the concept of equality of arms in personal injury and road traffic cases. These are cases where the insurance companies may often have legal representation because of the nature of the cases whereas the litigant in person will not. The NFU Mutual response claimed that there is now a prevalence of accident-management companies and so plaintiffs in the majority of RTA cases are legally represented. We have received no firm statistical evidence of this and our concerns remain outstanding. Moreover, the introduction of road traffic and personal injury claims to the small claims court would necessitate the introduction of complex rules that would impact on the simplified nature of this court to its detriment.

16.80 I am encouraged that the County Courts Rules Committee in Northern Ireland introduced on 13 February 2017 a new lower-end costs bracket for awards of damages in the county court of up to £500. This should bring in the majority of all low-value road traffic cases in which only an excess is claimed at an even more proportionate cost. We recognise the concern raised by the Association of Personal Injury Lawyers (APIL) that some employers' liability claims that settled for £500 will often require the same amount of work as an employer's liability claim settling for £2,500 and thus in the former case a solicitor will not be properly remunerated. However, the fact of the matter is that, save in exceptional cases, the amount of damages has been the traditional yardstick by which costs are measured in all tiers in all divisions. We see no basis for changing this.

16.81 Mediation has a definite role to play in all courts and is specifically identified in the County Court Rules[10]. It should continue to be promoted in the small claims

[10] CCR Order 14 — Interlocutory applications *Part II – Mediation [added SR 2011/58 on 25 March 2011]*

Interpretation
12. In this part of this Order –

court in order to resolve as many cases as possible out of court. In England and Wales, if the claim is a small claim (under £10,000) and both parties so request, the case is remitted to the free Small Claims Mediation Service. The staff team try to book the case for one-hour telephone mediation by a HM Courts & Tribunals Service employee (trained in mediation). Nonetheless, the small national team of only 14 mediators achieve a remarkable current success rate in settling 70% of the cases referred to them. Unfortunately, despite conducting up to five of these simple mediations a day, there are only enough mediators to service 35% to 40% of the national demand.

16.82 The Small Claims Mediation Service was launched, originally as a pilot scheme, and fully established in 2014. It is managed as described above. This is at present the only mediation routinely provided by the civil courts. It is yet to become fully effective since it has insufficient mediators to meet even half of the relevant demand, and there is no budgeted resource to expand it.

16.83 The Northern Ireland Courts and Tribunals Service, in consultation with the district judges and the Law Society, had considered the introduction of a telephone mediation pilot in Belfast similar to the system in England and Wales, save that it might be managed by members of the Law Society acting as volunteers. This proposal seems to have atrophied because of inherent difficulties of unpaid volunteers always being available. Given the proposal for ODR (see chapter 4) with its built-in mediation process, which may consume available mediation resources at this level, perhaps no further step needs to be taken in this regard in the existing parallel small claims court.

16.84 There is a school of thought that cases under the value of £250 should not be justiciable in our court system. The cost and time expended on such cases is wholly disproportionate to their value. There are a number of consumer-type forums for dealing with such cases outside the court system. We have obtained statistics on the

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(a) "an ADR process" means mediation, conciliation or another dispute resolution process approved by the judge, but does not include arbitration;
(b) "Judge includes a District Judge; and
(c) "party" includes the personal representative of a deceased party.

Adjournment of proceedings for the purposes of ADR
(13) (1) Without prejudice to rule 4, the judge, on the application of any of the parties or of his own motion may, when the judge considers it appropriate and having regard to all the circumstance of the case, order that proceedings or any issue therein be adjourned for such time as the judge considers just and convenient and -

(a) invite the parties to use an ADR process to settle or determine the proceedings or issue; or
(b) where the parties consent, refer the proceedings or issue to such process, and may, for the purposes of such invitation or reference, invite the parties to attend such information session on the use of mediation, if any, as the judge may specify.

(2) Where the parties decide to use an ADR process, the judge may make an order extending the time for compliance by any party with any provision of these Rules or any order of the judge in the proceedings, and may make such further or other orders or as the judge considers will facilitate the effective use of that process.

number of civil bills and small claims received during 2016 where an amount claimed was less than £250:

	2016
Number of small claims received with amount claimed less than £250	1,970
Total small claims received	10,085
Number of civil bills received with amount claimed less than £250	24
Total civil bills received	10,684

16.85 This became a subject of controversial response. The Belfast Solicitors' Association, for example, stoutly argued that there should not be any limit in the amount that an individual should be able to claim, particularly since £250 is a sum of money that is substantial to many members of the public and can represent, for example, the cost of a malfunctioning laptop or incorrectly applied bank charge. Moreover, insurance excesses are often under £250 and the recovering of an excess is often the only loss through which a party can commence an action to determine liability Such cases might also include complicated credit hire cases. Looking at the matter from a wider angle, there is also a danger that there will be parts of the commercial world that will not sign up to the existing voluntary alternatives and may ignore consumer rights and other rights below £250. We have to consider whether this sends out the wrong message as to the role of the state and the courts.

16.86 Accordingly, this is a concept that requires further wider consultation and consideration at government level. We make no recommendation at this time.

16.87 Finally, it is not the intention of this chapter to focus on technology or ODR for smaller-value cases that have already been addressed in chapters 3 and 4.

Responses

16.88 Subject to the various riders that we have included in the paragraphs above, by far the greatest controversy arising out of this preliminary chapter was the question of the increase in jurisdiction. Originally our proposal had been that the increase of the county court jurisdiction should be £75,000. A number of bodies — the Bar Council, the Law Society, Belfast Solicitors' Association, the Limavady Solicitors Association, the Association of Personal Injury Lawyers and at least one High Court colleague — all opposed an increase in the jurisdiction. The reasons can be summarised in the following points:

- The county court is not geared to lengthy complex cases, pleadings and the calling of experts.

- The courthouses where the county court sits do not have the capacity for larger numbers with inadequate consultation rooms, car parking, modest technical capacity.
- The increased number of cases will lead to delays and backlogs.
- No research has been carried out to establish the effect on the High Court volume of work should the jurisdiction of the county court be raised to £75,000.
- The High Court requires a volume of cases to give direction and to maintain experience. There is a danger that the QB Division would be so depleted that such a function would be substantially diluted.

16.89 It is right to say, however, that most of the objectors were open to the concept of specialist civil and family centres and that even if the jurisdiction is not lifted, the opportunity to create such specialist civil and family centres should not be wasted.

16.90 On the other hand, bodies such as all the insurance companies, the district judges and the county court judges all favoured an uplift in the jurisdiction. So far as the latter two were concerned, however, they were adamant that any uplift could only be realised if there was sufficient resources and manpower made available to carry out the increased work. It was emphasised that there was already a heavy burden on county court judges and that whilst the extra work would provide for welcome variation and stimulation, further judicial resources would have to be made available. Moreover, the suggested period of three years for a county court judge to be committed to civil work should not be at the expense of condemning other county court judges to a diet solely driven by criminal cases. There would need to be flexibility of work and commitment.

16.91 We welcomed the expanse of views on this matter, but we remain committed to the need to increase the jurisdiction of the county court in the modern era. We are the only jurisdiction in Ireland or the United Kingdom where the jurisdiction of the county court is so low. We have an excellent cadre of county court judges who are highly experienced practitioners in the past and, with an element of training, will have no difficulty dealing with high-level civil cases in precisely the same manner that they have adjusted so successfully to high-level criminal cases despite in many instances a lack of previous experience.

16.92 Moreover, the numbers as indicated in the data below illustrate that the work will not be overwhelming. Whilst these figures may not include general damages cases that are settled at this level on confidential terms, nonetheless they illustrate figures that are well within the capacity of the 18 county court judges that we have.

	2014	**2015**	**2016**
Number of writs received with amount claimed between £30,001 and £75,000	111	61	96
Number of writs received with amount claimed between £30,001 and >£75,000	150	65	96
Total writs received	3,658	3,062	3,091
Number of writs disposed with amount awarded between £30,001 and £75,000	136	165	163
Number of writs received with amount claimed between £30,001 and >£75,000	17	6	8
Total writs received	4,858	3,808	3,034

16.93 Finally, in deference to the views that have been expressed, we have reduced our recommendation from £75,000 to £60,000 (a figure still very substantially below that of the courts in Scotland and England and Wales) for courts at this level. However, we have no doubt that a subsequent review in future years will undoubtedly lead to a further increase in this figure.

Recommendations

1. Not less than three Civil (and Family) Centres to be set up given over exclusively to the hearing of civil bill and equity cases, provided sufficient judges are made available. **[CJ137]**
2. Not fewer than five county court judges to be assigned for 18 months/three-year periods to deal exclusively with civil and equity matters in these centres, provided adequate funding and resources are made available. **[CJ138]**
3. Provided **CJ136** and **CJ137** are implemented, the county court civil jurisdiction to be raised to £60,000, subject to **CJ139** below. **[CJ139]**
4. The county court jurisdiction not to include defamation cases over the value of £10,000, judicial review cases, most clinical negligence cases and other cases that are certified by the county court judge or Master of the High Court as of particular importance or of exceptional complexity. **[CJ140]**
5. A radical uplift in the level of the equity jurisdiction. **[CJ141]**

6. The power of removal from the county court and district court to the High Court to be vested in county court and district judges. Remittal from the High Court to remain with the Master. Appeals on these matters to be paper exercises before a High Court judge with a discretion to order an oral hearing on request. **[CJ142]**

7. Power to order relief under the *Administration of Justice Acts 1970* and *1974* to be extended to county court judges. **[CJ143]**

8. Defendants to be required to answer a questionnaire setting out the defence before the Certificate of Readiness is granted. **[CJ144]**

9. The pre-action protocol to be amended as follows:

    - paragraph 4 to state that a letter of claim should 'contain details of medical reports currently available (with an undertaking to provide any subsequent medical evidence as soon as possible), details of financial loss incurred, credit hire details etc even where such details are necessarily provisional'. Moreover, wherever possible, the insurers should be identified and a copy of the initial letter of claim sent to that insurer. **[CJ145]**

    - paragraph 9 to provide for the plaintiff to issue applications for pre-action disclosure where there is no reply from the defendant within 21 days unless good reason is provided. **[CJ146]**

    - paragraph 9 of the protocol to be amended so that 'the plaintiff is entitled to proceed to issue court proceedings to ensure clarity that the letter of claim is part of the proceedings'. **[CJ147]**

    - paragraph 12 should be amended to provide that if the defendant denies liability or alleges contributory negligence, they must enclose with the letter of reply 'all' (rather than the current wording of 'any') documents in their possession. **[CJ148]**

    - A requirement for a non-exhaustive list of disclosure documents to be annexed to the protocol. Where such documents do not exist, the defendant should complete a form for standard disclosure. **[CJ149]**

    - paragraph 10 to be amended to state that: 'The defendant's solicitor/insurer to have a maximum of three months from the date of acknowledgement of the letter of claim to investigate without leave of the court for an extension in exceptional circumstances.' **[CJ150]**

    - The defendant's insurer/solicitors to reply within three months stating whether liability is admitted, addressing causation and the *Limitation Act 1980* if relevant. If liability is denied, the defendant's solicitor/insurers to state with clarity the defendant's case. **[CJ151]**

    - Insertion of an objective to include the promotion of rehabilitation treatment for best litigation practice. **[CJ152]**

10. Greater use to be made of online technology, email or telephone conferences for straightforward reviews, adjournment applications and date fixing, subject to the right of the judge to direct or the parties to request an oral hearing where appropriate. **[CJ153]**

11. A single tier of 'civil judges' of the county court exercising the full civil jurisdiction of the county court. **[CJ154]**

12. If **CJ154** above is not implemented, an increase to the district judge's jurisdiction to £25,000. **[CJ155]**

13. An increase in the small claims court jurisdiction to £5,000, with personal injury and road traffic cases excluded. **[CJ156]**

14. An increase in the lodgement period from 28 days to 56 days under the County Court Rules. **[CJ157]**

17

A business and property hub for Chancery, Commercial and judicial review

Current position

17.1 We have set out the current roles of the Chancery Division (chapter 18), Commercial Division (chapter 19) and the Judicial Review court (chapter 20.)

17.2 They act separately from each other and each is headed by a separate divisional head. There is no overlay between them and no overarching judge to co-ordinate common aspects of their work.

Discussion

17.3 In the context of these three divisions, we have considered conceptually the prospect of a business and property-type court in the widest sense carved out of the conventional work performed by these courts. The purely private non-commercial matters, family property and family trusts in the Chancery Division and conventional judicial review cases involving the liberty of the subject will remain as before. However, a new hub for disposal of business and property cases falling within these divisions will be created. The term 'business' will be a broad one, covering a wide range of the sort of business and property-related cases that were heard in the Chancery Division and Judicial Review courts as well as the other more typical business and property cases in the Commercial Court.

17.4 Thus, for example, such a business hub would be serviced by four or five designated judges with primary responsibility for these three divisions. These judges, whilst individually in some instances retaining responsibility for their individual discipline in these three areas, will adopt a flexibility of approach allowing them, when free or designated to do so, taking over cases from any of these three business areas. Such claims would be allocated to a designated judge at the time of the first case-management hearing (CMH) or earlier if necessary.

17.5 This might reduce the number of judges currently assigned to the Queen's Bench Division. That division will, of course, continue to maintain its pivotal role in the civil justice system, but if our proposed increase in the county court jurisdiction occurred the volume of work might well be reduced to some extent, allowing it to concentrate on cases of complexity, including issues of high-value cases, defamation, clinical negligence, etc.

17.6 Similarly, we propose to reduce the heavy burden placed on the current Judicial Review Judge by ensuring that specialist areas should be assigned to other divisions both within this business hub and without. Consequently, for example, all family/education matters that are the subject of judicial review should be transferred immediately to the Family Justice Judge. Planning cases/procurement

cases/ judicial review of regulatory matters, etc. should be assigned to judges within this hub. Those involving non-commercial matters, such as family property or family trusts, should be assigned to the Chancery Division and matters of criminal moment should perhaps be assigned to the judge with primary responsibility for criminal cases.

17.7 This will have the twin advantage of not only lightening the current over burdensome load on the Judicial Review Judge, but also bring about a wider breadth of experience, expertise and approach to the whole concept of judicial review. It will also serve to free up the Judicial Review Judge to play a full role in the operation of this business hub.

17.8 Similarly, the increase proposed in the county court equity jurisdiction will free up the Chancery Judge to some extent.

17.9 Our aim is not only to create a situation that chimes with the timescales and efficiencies that are emerging in England and Wales — and which we have recommended, for example, in chapters six to eleven — but to create a scenario in which Northern Ireland, with all the advantages of a small jurisdiction and fewer cases, is at the leading edge of timely, efficient and cost-saving disposal of business cases that will attract the confidence of the business community. The presence on the proposed Civil Justice Council (see chapter 25) of representatives from the business community will underline and influence this development. In truth, we have judges in Northern Ireland in these areas who are not only modern and innovative in their thinking but committed to establishing Northern Ireland as the cutting edge in such legal disputes.

17.10 More generally, the civil work undertaken in the High Court in the Queen's Bench, Commercial, Chancery and Family divisions is managed by the judge allocated to each area and those judges appointed to provide support. There is no overall management of the different components of civil work. We need a senior judge to co-ordinate the work in these areas (see chapter 15).

17.11 Cases can be, and already are, heard much more swiftly than in England and should allow us to build upon our reputation for less costly, swifter commercial litigation.

Developments in England

17.12 Since the publication of the preliminary Civil Justice Review in Northern Ireland in October 2016, the Judicial Press Office in England and Wales announced on 13 March 2017 that, from June of 2017, Special Civil Courts are to be known as the 'Business and Property Courts of England and Wales'.

17.13 The Business and Property Courts will be, for England and Wales, the new dispute resolution jurisdictions and will act as a single umbrella for business specialist courts across England and Wales.

17.14 It will encompass

- the specialist courts and lists of the High Court;
- the Commercial Court;
- the Technology and Construction Court;
- The courts of the Chancery Division (including those dealing with financial services, intellectual property, competition, and insolvency).

17.15 The new arrangements will preserve the familiar practices and procedures of these courts, whilst allowing for more flexible cross-deployment of judges with suitable expertise and experience to sit on appropriate business and property cases.

17.16 The new structure together with the Financial List and Shorter and Flexible Trials Schemes (SFT) (see below) is aimed at enhancing the UK's 'already respected reputation for international dispute resolution; and will play a part in ensuring that Britain continues to provide the best business court based dispute resolution service in the world served by a top class independent judiciary'.

17.17 There will also be Business and Property Courts in Birmingham, Manchester, Leeds, Bristol and in Cardiff, with expansions to Newcastle and Liverpool likely in the future. The new arrangements aim to enhance the connection between the specialist business property work undertaken in the regions and in London.

17.18 Lord Thomas of Cwmgiedd, the Lord Chief Justice of England and Wales, said:

> 'The judiciary is committed to maintaining Britain's reputation as the best place in the world for court based dispute resolution. These changes will ensure that our courts and judiciary continue to lead the world in this field.'

17.19 The Lord Chancellor, Elizabeth Truss said:

> 'I strongly support the changes the Lord Chief Justice, Chancellor of the High Court and President of the Queen's Bench Division are taking forward. It is absolutely vital our legal services continue to lead the world and remain the first choice for business. These Business and Property Courts will be based in our great cities across England and Wales supporting businesses across the country.'

17.20 Sir Brian Leveson, President of the Queen's Bench Division said:

> 'Cross deployment of judges across the Chancery and Queen's Bench Divisions for the purposes of the Financial List has demonstrated the real value of flexible deployment in appropriate cases.'

17.21 Sir Geoffrey Vos, Chancellor of the High Court of England and Wales said:

> 'These new arrangements show that modernising the courts through innovation and flexibility can bring benefits to international and domestic businesses. This is yet another example of judicial innovation making the courts more effective for those using them.'

17.22 We were extremely grateful to Mr Justice Flaux, Mr Justice Burton and Professor Roy Goode who gave of their time and experience to discuss with us the Shorter Trials Scheme (STS) and the Flexible Trials Scheme (FTS)[1] now operating in the Rolls Building in London.

17.23 The STS was intended to involve tight control of the litigation process by the court in order to resolve disputes on a commercial timescale. An application to transfer a case to an STS has to be made to a judge.

17.24 The case would be managed by a docketed judge with a trial date fixed for not more than eight months after the case-management conference (CMC) and a judgment six weeks thereafter. We observe that the time scales for all cases in our own Commercial Court are usually already much speedier than this.

17.25 The maximum length of the trial would be four days, including reading time. Costs would be assessed summarily.

17.26 A court has power to transfer an existing case into the STS and to transfer a case out of the STS if it is within it[2].

17.27 The overriding objective expressly included, as far as practicable, was to save expense and deal with cases in ways that were proportionate, allotting to a case an appropriate share of the court's resources.

17.28 Having an appropriate case conducted on the STS was likely to reduce the cost to the parties and free up the court's resources to make them available to other litigants.

17.29 Since transferring a proper case into the scheme was likely to save expense, deal with the case proportionately and allot to it an appropriate share of the court's resources[3], it provided an express basis on which the court could make the necessary order. That reasoning also applied equally to a transfer out in a proper case. Our Order 1 rule 1 of the Rules of the Court of Judicature (Northern Ireland) 1980 would serve the same purpose.

17.30 It could well be disproportionate to require a further round of pleadings or amendments simply because the case should be transferred. STS was for business cases[4].

17.31 The term 'business' as used in para 2.2 of Practice Direction 51N (see footnote 199 below) was a broad one, covering a wide range of the sort of cases that were heard in the Chancery Division.

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[1] This was a pilot set up by Practice Direction 51N in England and Wales, which came into force on 1 October 2015 and is due to run for four years.

[2] Family Mosaic Home Ownership Ltd v Peer Real Estate Ltd [2016] EWHC 257 (Ch).

[3] CPR r.1.1(2)(e).

[4] See paragraph 2.2 of PD51N.

17.32 The contrast was between cases in the widest sense and purely private non-commercial matters such as family property and family trusts.

17.33 All STS claims would be allocated to a designated judge at the time of the first CMC or earlier if necessary[5].

17.34 The term 'designated' simply referred to the fact that cases in the STS were docketed so that, so far as possible, all the case management and the trial were dealt with by the same judge.

17.35 Further directions could be given at the CMC and there is no need to require the parties to amend their existing particulars of claim or defence.

The new approach

17.36 In considering applying this new approach to our proposed business hub, a former very experienced Commercial Judge in Northern Ireland indicated that he generally fixed a maximum hearing time of five days in every commercial case. If at the fixing of the case the parties asserted that five days was too short for the case, then the court set about making arrangements to limit the time to five days — for example, directing written opening/witness statements to stand as evidence in chief/concurrent expert evidence/agreed evidence/time allocated to particular points or particular parties, etc. His experience was that, in 95% of cases that ran, the limit was met — where it was not, it was usually a case involving a personal litigant. He questioned whether we should we have a special scheme for short trials when we should encourage it as the norm.

17.37 Rather, he proposed, and we agree, that a special scheme be set up for the exceptional case that it is thought cannot achieve the norm or which has the potential to be processed with exceptional speed and efficiency. If the parties were able at an early CMC to agree and identify limited disclosure/absence of or limited interlocutories/agreed witness statements/limited pleadings/time limited oral evidence/concise written submissions on the key issue(s) and guaranteed short hearing, then such cases would be fast-tracked or prioritised within the hub in a manner and with a speed far in excess of even the English STC. With four or five judges within this hub, a judge will always be available to convene a CMC and hear such cases, even at short notice.

17.38 In so doing, we will be able to potentially offer a cheaper, speedier and more efficient procedure perhaps than anywhere else in Ireland or the United Kingdom, ensuring costs are proportionate in straightforward disputes and making Northern Ireland a magnet for businesses seeking our type of system. The role of representatives of commerce on the Civil Justice Council will ensure we are *au fait* with possible refinements of the model as time goes on.

17.39 Within this hub the judges will, of course, be well versed in the advantages of alternative dispute resolution (ADR) and mediation. With early and incisive CMCs,

[5] See paragraph 2.2 of PD51N.

which will be afforded in every case, possibilities of resolution outside court will be swiftly explored.

17.40 In this context, we draw attention to chapter 18, wherein the advantages of early neutral evaluation (ENE) are extolled in the Chancery setting. ENE uses an independent expert to assess the merits of the case in the hope of providing the parties with an objective appraisal, or a reality check, concerning their prospects of success. Although ENE is not binding upon the parties like mediation, unlike mediation — where a mediator is not supposed to provide an assessment of the parties' respective positions — the parties can draw on the knowledge and experience of the expert to better understand the merits of the claim.

17.41 The advantage of such a process over mediation itself in a Chancery case is that a judge will evaluate the respective parties' cases in a direct way. They may well provide an authoritative (albeit provisional) view of the legal issues at the heart of the case and an experienced evaluation of the strength of the evidence available to deploy in addressing those legal issues. The process is particularly useful where the parties have very differing views of the prospect of success and perhaps an inadequate understanding of the risks of litigation itself. The presence of a number of judges within the proposed hub would afford the benefit of assessment by a judge who could stand aside if the process broke down without delaying the proposed hearing.

17.42 The new cultural shift inherent in a new business and property hub will encourage a more widespread appreciation of the need to treat ADR as an integral part of the process, rather than an optional extra. It will enable the court and the parties to build ADR into the process, both by identifying the most appropriate time for it to be undertaken and by ensuring that, at that time, the parties are not so heavily engaged in compliance with directions for trial preparation that ADR has to be left on one side.

17.43 Moreover, the court may be able to adapt its case-management directions in ways calculated to maximise the likelihood of a successful outcome of ADR; for example, by procedures that more economically lead to the parties having the requisite information for effective ADR, by comparison with the more expensive procedures designed only to produce that result by the time of trial[6].

17.44 Within the structure of the hub, a greater hands-on involvement by the judges would be likely to lead to the development of experience as to the choice and timing of ADR with which the court could assist litigants lacking that depth of experience.

17.45 In order to ensure the new business hub works speedily and efficiently, a senior judge should take responsibility for co-ordinating the listing and assignations within this hub.

[6] This mirrors the views expressed in the Chancery Modernisation Review Report prepared by Lord Justice Briggs (December 2014).

Responses

17.46 The concept of a Business and Property Court has received overwhelming support from all who responded on this matter. In particular, both the Bar and the Law Society welcomed the recommendation for the creation of a business and property hub. The business representatives on our Reference Committee were universally and enthusiastically in favour of the concept.

17.47 Understandably, the Bar cautioned that it was vital that such a hub be properly resourced and the idea that this should be serviced by four or five designated judges *must* be adopted if this recommendation is to be pursued. They emphasised the importance of identifying at an early stage relevant cases and assigning those to a designated judge at the time of first case management or before if possible.

17.48 In terms of resources being made available, both the Bar Council and the Law Society cautioned that the availability of extra resources should not pre-suppose an increase in the jurisdiction of the county court, a matter for which they both have reservations. Both emphasised that a more appropriate approach would involve the appointment of additional judicial resources dedicated to working in this hub.

17.49 The Bar also drew attention to the established provisions that already exist under Order 29 of the Rules of the Court of Judicature (Northern Ireland) 1980 to allow for the court to order an early trial in appropriate cases.

17.50 Encouragingly, both branches of the profession welcomed the opportunity to contribute further to a consultation and any proposed practice direction in the event of a business and property hub concept being implemented. We consider their input would be very important in such an innovative scheme. We also are satisfied that the role of the Civil Justice Council, and the lay members on that Council, should have an input into the final dispensation.

Recommendations

1. A new business and property hub comprising suitable cases in the Commercial, Chancery and Judicial Review courts to be set up, serviced by four or five designated High Court judges with a senior judge having overall responsibility for listing and designation. **[CJ158]**
2. Such claims to be allocated to a designated judge at the time of the first CMC or earlier if necessary. **[CJ159]**
3. Judicial Review cases in appropriate instances to be assigned to specialist judges. **[CJ160]**
4. A practice direction to be drawn up by the Commercial, Chancery and Judicial Review Judges, with input from the Bar Council and Law Society, outlining, in a simple procedure, that:

- Priority will be given to exceptional cases that are prepared to adhere to limited disclosure, pleadings, interlocutories, etc. with the aim of full disposal within days or at most weeks of the issue of proceedings.
- Special measures will be adopted for cases calculated to last over five days to reduce where possible the hearing time. **[CJ161]**

18

The Chancery Division

Current position

18.1 Litigation in the Chancery Division involves a broad range of subjects[1]. A list of all the various types of relief that are sought before the Chancery Division is difficult, but in the main the following are ascribed to the Chancery Judge:

- actions for declaratory relief;
- claims for injunctive relief, including 1) applications to restrain the presentation of a winding up petition; 2) final or perpetual injunctions, which cannot be determined by the Master;
- claims for specific performance;
- claims under the *Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979* ('the Order 1979')
- appeals from the Master(s) (Chancery and Bankruptcy);
- claims in relation to charitable dispositions;
- disputes regarding wills, including capacity;
- delivery up of papers from a solicitor;
- claims for rectification;
- claims for partition;
- intellectual property disputes;
- matters pertaining to insolvency that cannot be heard by the Master;
- approval of settlements in respect of minors or patients;
- construction summonses;
- matters pertaining to company disputes, minority shareholder disputes, etc.

18.2 These thus range from family disputes, perhaps in the context of family provision or probate, to disputes between individuals, perhaps in a specific performance suit, to substantial litigation between commercial parties.

18.3 Many of the originating processes in the Chancery Division address the 'melancholy consequences of debt and improvidence',[2] such as bankruptcy petitions, or proceedings for repossession of the family home, either at the instance of a secured creditor or an insolvency practitioner.

[1] Generally, the jurisdiction of the Chancery Division is defined by Order 1 Rule 10 of the Rules of the Court of Judicature (Northern Ireland) 1980.

[2] Per Nourse LJ, Re Citro (A Bankrupt) [1990] 3 All ER 952

18.4 Such cases do not so much concern the resolution of a dispute between parties, but concern the authorisation for the coercive power of the state against an individual. Reforms that seek to ensure that issues between parties to a dispute are properly identified and ventilated ought not to have the side effect of adding to the cost and delay in a process to which there is no answer. In addition, the potential for loss of the home is highly emotive, which has led to particular issues with personal litigants in the Chancery Division.

18.5 In the circumstances, many of the proposals for other divisions in the High Court will also be applicable to the Chancery Division. There will be other issues that may need tailoring to meet the requirements of the range of cases found in the Chancery Division.

18.6 The High Court's inherent jurisdiction is both substantive and procedural, comprising its power to resolve disputes and liabilities at common law or equity[3]. Insofar, however, as the High Court is subject to any statutory restrictions, such provisions are contained in the *Judicature (Northern Ireland) Act 1978*. The Chancery Court has been relatively pro-active in attempting to govern and regulate its own procedure[4] where the Rules arguably need supplementing and there are presently a large number of practice directions created specifically for the Chancery Division — it must be said, however, that many are honoured more in the breach than the observance.

18.7 There are clearly matters being currently heard in the Chancery Division in the High Court that could and should be heard elsewhere (see chapter 17).

18.8 The Chancery Master plays a very important role in the process. In the main, proceedings before the Master tend to relate to:

- Order 88 applications that deal with actions by mortgagees and mortgagors;
- applications for stays pursuant to the *Administration of Justice Acts 1970* and *1974*;
- interlocutory applications pertaining to actions before the Chancery Judge;
- assessment of damages;
- actions for accounts and enquiries;
- applications pursuant to Order 85 (actions for the administration of a deceased's estate or for the execution of a trust, including constructive trust, claims for declaration of trust or declarations as to equitable title).

18.9 The Master specifically does not have jurisdiction to deal with matters relating to:

[3] See Valentine on Civil Proceedings in the Supreme Court at paragraph 1.0.

[4] Belfast West Power Ltd and another v Belfast Harbour Commissioners and another [1998] NI 112.

- criminal proceedings, review of taxation of costs, the approval of transactions;
- applications under s.s 40, 56, 57 and 61 of the *Trustee Act (Northern Ireland) 1958*;
- summonses in relation to the construction of a document or question of law[5];
- applications under the *Solicitors (Northern Ireland) Order 1976* (which includes the solicitor's delivery of summonses);
- applications under the Order 1979;
- applications under the *Married Women's Property Act 1882*[6];
- the right to grant injunctions[7].

18.10 In practice, the allocation of proceedings between Chancery Master and Chancery Judge works well. The Master is in a position to deal with most interlocutory matters and Order 88 cases where the issues can be dealt with in a half-day to a one-day hearing. The Master has power to transfer a matter to the judge if they believe that the complexity of the matter, or the likely time needed to resolve the issues, require it.

18.11 At present, all applications pertaining to solicitors are assigned to the judge. Many of these applications concern applications for delivery of a solicitor's file, where the legal issues are well established and where no new points of principle arise. These cases take up time in the judge's reviews and summonses list, or occupy short hearings, when they could equally well be processed by the Master.

Discussion

18.12 We have dealt with the county court equity jurisdiction in chapter 16.

18.13 We have addressed in chapter 24 the issue of extending to the role of the Lands Tribunal the task of assessing compensation issues when the level of expertise required merits that level of hearing. We do not believe this would duplicate the process operated in this division because it would only arise where the expertise that exists in the Lands Tribunal justified it and where the judge or Master deemed it appropriate.

18.14 We have been made aware through the Chancery of significant differences in practice and procedure as between this court and its counterparts in our sister jurisdictions in relation to possession proceedings. Whilst we are satisfied our procedures are designed to ensure fairness and balance between the parties, the fact remains that that lender plaintiffs have to contend with significantly different approaches. For example, the registration of loan book transfers and, in

[5] Order 44, Rule 11(4).
[6] Proceedings are automatically assigned to the Chancery Division pursuant to Order 93 rule 1 and cannot be remitted to or removed from the county court, they are reserved exclusively for hearing by a judge.
[7] unless agreed – Order 44 rule 11(1)(f).

consequence, the substitution of plaintiffs and consequent entitlement to possession orders, are matters handled entirely differently in Northern Ireland as compared to the approach in England and Wales. Scotland again is entirely different. There are other significant differences.

18.15 In the spirit of this Review, where we have been anxious to learn from other jurisdictions, we are convinced that this important topic would benefit from an observation visit by the Chancery Master with some of our English counterparts. Such research would add value longer term to the operations of the Chancery Division.

18.16 As in other divisions, there is a general feeling amongst Chancery practitioners that, on occasions, unnecessary time is taken up with an excess of reviews of cases. Such reviews, with the current paper system, involve the lifting and moving of bulging lever arch files from office to chambers to court and back to office with concomitant work from the legal profession.

18.17 Such reviews dictate:

- a necessity to read through extensive files;
- having counsel attend;
- delays to court time as counsel may be in other reviews in other courts, wasteful for what may turn out to be something that could be dealt with online;
- often needless repetition of issues;
- lack of input and failure to actually address the proper questions that need
- to be dealt with at the review.

Increased costs

18.18 This is all extremely wasteful. While personal attendance is likely to be necessary for the initial review identifying all the issues in detail, the case-management hearing and for a final hearing, a number of other reviews in the Chancery Court could be disposed of by online hearings. As set out in chapter 3, use should be made of modern methods, such as Skype, and any other viable means of electronic communication. If personal litigants or, indeed, practitioners did not have the relevant technical equipment to make use of online or digital hearings, we think it would be worthwhile to investigate the possibility of setting up a few select hearing centres where litigants (personal or otherwise) could have access to the necessary equipment to use online/electronic communications.

18.19 We see no reason why reviews or interlocutory applications require the attendance of counsel and solicitors in the court. The waiting time and travelling time is lost time for which a losing party has to pay. Anything that reduces the time element can be nothing but an advantage.

18.20 There is, therefore, no reason why the majority of such reviews, if they are necessary at all, could not be dealt with by online reviews (or even by an email exchange) and resolution of applications arising in interlocutory stages of cases. Points could be directed to the parties a few days in advance of the date fixed for the review by email with a resumé of the points going to be argued, the contentions of the parties and an explanation of the steps taken in the meantime to advance the matter.

18.21 Such a cultural change could logically be provided, if necessary by practice direction, that the court should be able online to give the necessary directions — perhaps in the first instance on a provisional basis but finalised if the parties do not object.

18.22 There should only be an oral hearing of a review if the judge directs it or one of the parties requests it. In that event, the court could make an appropriate order for costs if the matter did not merit an oral hearing or if a party's challenge to the court's proposed direction is not upheld.

18.23 Such a system would need the keeping of a diary in relation to the individual cases to ensure that they are kept under review and progressed to trial.

18.24 This concept in the Chancery Division chimes with the recommendations for online resolution of disputes and could be run as a pilot early on without the need to change rules of court and using the existing computer systems.

18.25 The proposals for case management set out in chapter 7 are primarily aimed at writ actions and other matters that will come before the judge in the first instance, rather than with bankruptcy petitions or Order 88 summonses returnable before the Master in the first instance, where there is not expected to be any substantial dispute.

18.26 However, we endorse the application of these principles in the Chancery Division. In particular, the case-management process should be streamlined to have one early, detailed review to manage all issues to trial of the action. There should be a more proactive case-management approach, expected to commence shortly after proceedings have issued. In-depth issues would be discussed at the initial review with fully briefed counsel presenting same to the court with the expectation of fixing a date for trial set in stone, and so negating the need for multiple reviews — unless specifically requested by the parties and possibly requiring the permission of the court. As ever of course there must be room for flexibility and, as the Law Society and Bar Council encourage, provision should be made for referral back to the case-management judge if fresh issues arise in the course of litigation.

18.27 In particular:

- There should be a requirement for a detailed letter of claim and detailed response.
- The writ will then be issued.

- That will trigger a case-management review (CMR) on a Friday.
- The parties will be allocated an appropriate period up to one hour.
- There should be a trial date and agreed directions or imposed directions for the trial.
- This might include cost-capping on experts, early neutral evaluation, etc.
- The hearing date will be fixed in stone and it will be the parties' obligation to comply with directions to ensure settlement or hearing on the date as fixed.
- Discovery will be limited in cases where there is a limited factual dispute.
- There will be increased judicial management of the discovery process to consider whether discovery should be limited to certain issues, or to ensure that discovery is in fact necessary.
- There will be a presumption that there will be no general discovery in originating summons cases.
- There will thus be one review, one hearing and thereafter control from the court of the proceedings, including costs, often exercised by email.

18.28 We add one cautionary note about this proposed more proactive approach, which has already been raised in chapter 6[8]. Writ actions that commence in the Chancery Division only come to the attention of the presiding judge when the matter is nearing readiness for trial, that is having been set down in compliance with Order 18 of the Rules of the Court of Judicature and the appropriate fee of £400 paid. On foot of this payment, parties are obliged to comply with the Practice Direction (PD) 5/2010, and it is only after this is completed pursuant to the PD that the matter is listed for review before the Chancery Judge. Depending on the subject matter of an originating summons, the presiding judge may or may not convert same to a writ action, and if so, the process above is replicated.

18.29 Should the early case-management approach be adopted, there is a high risk that the setting-down fee may never be recovered (if parties settle prior to hearing) and that parties will have had the benefit of input from the court without having paid any (case-management) fees. If a date for hearing were to be provided prior to the setting-down fee being paid, it would be likely that parties will be reluctant to pay the fee until immediately prior to the date (in the hope of settlement).

18.30 The current position allows for cost recovery of judicial time and administrative functions, based on the payment of the setting down fee. This would not occur if the fee were 'abandoned'. Business volumes are monitored in direct correlation to fees and if the fee were abandoned, the loss of revenue and downward impact may necessitate the Northern Ireland Courts & Tribunals Service (NICTS) to compel a reduction in resources (that is, administrative staff), albeit that the same judicial and administrative functions are being discharged.

[8] Chapter 6 at paragraph 6.50.

18.31 It may be more appropriate in the circumstances to consider the case-management fee much sooner in the process than at setting-down stage. This would undoubtedly require a rules change as aspects of Order 18 may be rendered redundant[9].

18.32 Subject to definition of the detail of proposed scales and bands, this division favours the introduction of scale costs with four bands/levels depending on complexity of claim, with scope for exceptionality as set out in chapter 6. Notwithstanding the recommendations of this specialist Chancery sub-committee, the Bar Council has raised concerns about the concept of banding. The position is that the case would be assigned to one of the four levels at the initial review, with scope for revision later, taxation within the bands and for taxation in exceptional cases.

18.33 As advocated in chapter 6, increased use should be made of immediately measured and payable costs for interlocutory proceedings in this division, albeit care should be taken to ensure that this does not create a perverse incentive to run up significant costs on such hearings.

18.34 If scales and bands are not implemented, the court should consider the parties' costs estimates as part of case management to ensure that directions concerning the scope of discovery, expert evidence and trial management are proportionate to the value of the case.

18.35 The Office of the Lord Chief Justice should use Twitter to advise of judgments in this division and to provide a synopsis and link to each judgment given to complement the existing practice of publishing judgments on line and providing judgment summaries.

18.36 There is anecdotal evidence to suggest that in many cases the cost of a plenary trial with full general discovery and oral evidence on all issues is a barrier to access to justice, and that litigants might prefer a more streamlined and less costly form of proceeding. There is no reason why discovery could not be limited by direction of the judge in cases where there is a limited factual dispute.

18.37 All that said, we of course recognise that while the Chancery Division deals with a number of matters 'on the papers', in originating summonses that procedure is not apt if there is any dispute of fact, even though the dispute of fact may only involve a comparatively small part of the case.

18.38 In post-bankruptcy applications, a form of simplified trial operates in many cases. All applications, such as applications for possession and sale, or to set aside a transaction at an under value or a preference, are commenced by originating application and affidavit. If a replying affidavit discloses a factual dispute, directions can be given as to attendance for cross-examination (which is usually limited to what

[9] See also chapter 6 at paragraphs 6.50

is truly at issue between the parties) and as to what documents are disclosed. Once again, an early CMR can determine this.

18.39 The Shorter Trials Scheme pilot in England and Wales, with the amendments suggested in chapter 17 in Northern Ireland, would be an attractive option for the Chancery Court and represent a useful tool for dealing expeditiously with suitable cases.

18.40 Similarly, a process similar to Order 14A should be introduced for determination of points of law and would be of great assistance in this division

18.41 In some Chancery cases, there is a need for production of original documents of title or there is a need to consider original documents where, for example, there is a suggestion that a signature has been forged. Save for exceptional cases such as these, however, we see no reason for the Chancery Division to take a different course from the other divisions of the High Court on this issue of paperless/paper-light courts[10].

18.42 Whether the court process becomes entirely paperless or continues to make use of hard copies, it is vital that the paper-light ethos continues in the interim, with parties ensuring that there is a relevant core bundle of documents for trials, and ensuring that only the key authorities are reproduced.

18.43 Concerns have been raised about the volume of material produced on discovery in many actions. These concerns are most relevant in the larger, commercial-type actions, and are likely to be of less significance in other parts of the Chancery Division's workload, such as in probate actions, specific performance actions or title disputes[11].

18.44 We repeat the need for better management of the process of inspection and preparation of trial bundles in order to better control costs at this stage than adjusting the test for discovery. A more actively managed process of discovery would help to reduce cases where there is a large volume of documents. Discovery should be limited in cases where there is a limited factual dispute with an increased judicial management of discovery process to consider whether discovery should be limited to certain issues, or to ensure that discovery is in fact necessary.

18.45 In originating summonses, common in the Chancery Division, and in simplified trials, the presumption might be that discovery would not be ordered, unless it was likely to be of assistance to the issues to be determined. The option would be open to order specific discovery on certain issues, rather than general discovery.

18.46 We advocate the importance of the parties to a dispute trying to reach a resolution by agreement. Chapter 9 of this Review has dealt in detail with the virtues

[10] See chapter 3.
[11] See chapter 10.

of mediation/early neutral evaluation and it clearly has a role in Chancery work. Advantage could be gained from pursuing a civil dispute resolution service.

18.47 The benefits of early neutral evaluation (ENE), perhaps a lesser utilised forum for alternative dispute resolution (ADR), is gathering importance[12]. It is regularly deployed in ancillary relief matters in the family court in Northern Ireland. In a recent case in the Chancery Division in London[13] where mediation had stalled due to the parties' strongly held perceptions, the court *gave directions* for the parties to engage in ENE and how the court's functions and powers may assist in this process, as well as the associated advantages and disadvantages.

18.48 As we pointed out in chapter 9, ENE uses an independent expert to assess the merits of the case in the hope of providing the parties with an objective appraisal, or a 'reality check', concerning their prospects of success. Although ENE is not binding upon the parties like mediation, unlike mediation where a mediator is not supposed to provide an assessment of the parties' respective positions, the parties can draw on the knowledge and experience of the expert to better understand the merits of the claim.

18.49 The advantage of such a process over mediation itself in a Chancery case is that a judge will evaluate the respective parties' cases in a direct way. They may well provide an authoritative (albeit provisional) view of the legal issues at the heart of the case and an experienced evaluation of the strength of the evidence available to deploy in addressing those legal issues. The process is particularly useful where the parties have very differing views of the prospect of success and perhaps an inadequate understanding of the risks of litigation itself.

18.50 Usually, one might see the parties instruct an ENE expert, such as a specialist solicitor or barrister, in the same way as a mediator through a commercial organisation. We pause to observe that in the context of Chancery proceedings in Northern Ireland, we have at least two recently retired senior judges with a wealth of experience in Chancery matters. This may even be used in conjunction with mediation to facilitate prompt negotiations. Alternatively, the concept of the business hub adumbrated in chapter 17 would ensure judges were available for this process without prejudicing the ability of the parties to secure a timely trial with a separate judge within that hub in the event of ENE not providing a solution

18.51 For example, in the recent English case (see paragraph 18.47 above) the parties agreed that *the court* should undertake the ENE. This marks a significant departure from the court's normal role in litigation, which is to guide the parties through to trial, where a binding decision will be made. There may be two key elements that make this model so valuable: first, the judicial weight of the evaluator; and, secondly, that there is no additional cost to the parties. It is often difficult to persuade parties to speculate on mediation where there is additional cost. Whilst

[12] Is early neutral evaluation the start of a new way of resolving probate disputes? Douglas Houghton, Associate Solicitor, Irwin Mitchell LLP.
[13] Seals & Anor v Williams [2015] EWHC 1829 (Ch) per Norris J.

there would be an additional cost within the court system, it may well be the case that the disposal rate within the Chancery Division may make such a scheme cost-effective.

18.52 ENE is not a novel idea in the Chancery setting, having previously been endorsed[14] in the Chancery Modernisation Review (CMR) prepared by Lord Justice Briggs (December 2014). We entirely endorse the new cultural change in conflict resolution that he expressed.

18.53 The word 'early' does not necessarily mean that ENE should be attempted too soon. If ENE is invoked prematurely, there may be insufficient information to hand, making the process futile. It would serve only to increase and waste costs. Conversely, it does not mean ENE cannot be used later on when court proceedings are greatly advanced. To a certain extent, embarking upon ENE later on in the process may have greater benefit as the parties may have already thoroughly prepared their cases.

18.54 A balance needs to be struck in marshalling sufficient evidence so that the expert can understand the parties' respective positions and to make the process credible, whilst at the same time keeping it cost-effective. Indeed, we may see judicial ENE or ENE become the norm after the parties have performed their initial investigations into the validity of the will, where a claim involves an allegation of undue influence or lack of testamentary capacity, or once all information relevant has been disclosed in a claim under the Act. However, each case will be different and the timing of an ENE would have to be considered on a case-by-case basis

18.55 Nevertheless, with the court's continual emphasis on minimising costs and, in certain instances, the difficulties potential claimants may face in funding claims, judicial ENE or ENE may provide would-be litigants with the opportunity of obtaining a preliminary view upon the merits of their dispute that may lead to a quicker resolution, thus avoiding the costs of a trial. In the context of contentious probate cases, this is particularly relevant where the parties may find it hard to appreciate the strengths and weaknesses of their case when they are shrouded in grief; and the size of the estate, whilst significant to those involved, can quickly be eroded in legal costs while another party may have a strong claim with the means to pursue it all the way.

18.56 Parties should not be discouraged from using specialist solicitors/barristers or retired judges to engage in ENE or alternative methods of ADR at an early stage, but judicial ENE offers an additional option as the parties may feel more comfortable following the views of a judge than another lawyer. Whilst the use of specialist solicitors and barristers should not be dismissed, engaging a judge in this role might give the parties faith, at least in the parties' perceptions, that the ENE is accurate, thereby giving credibility to the process. This is something that would arguably provide greater comfort to those involved in contentious probate proceedings.

[14] At paras 5.6—5.16

18.57 However, it should be noted that for a judge to be appointed in the ENE process, proceedings must have been issued, otherwise the court would have no jurisdiction to oversee ENE as things stand. This could, however, change if the courts were to take a pioneering role and offer judicial ENE, similar to Financial Dispute Resolution in a family context, without the need for court proceedings to be afoot.

18.58 The current position in the Chancery Division, as with all other divisions in the High Court, is that there is no provision for cost budgeting/costs management as part of case management, use of summary assessment of costs, or use of fixed costs. There is no management of costs in advance. The only control of costs is taxation of costs at the conclusion of the case, which often leaves litigants faced with an unexpectedly large bill.

18.59 While there is provision in Order 64, rule 7 for an award of costs in a lump sum amount, this power is rarely used as a means of summary assessment of costs. Instead, parties have to await the end of litigation until costs can be taxed. This means that interlocutory costs orders often cannot be enforced until the conclusion of the proceedings, and that interlocutory costs orders are not an effective sanction to ensure compliance with the court's case-management orders and directions.

18.60 There is no formal provision for fixed costs in the Chancery Division. Where litigation takes the form of a money claim, counsel's fees are often marked by reference to an uplift on the Comerton scale.

18.61 The factor of particular relevance to the Chancery Division is the high prevalence of matters where there is litigation over a fund, and the costs fall to be paid from that fund, rather than to be borne by the losing party. Areas where costs fall to be paid from a fund include bankruptcy matters (where the trustee's costs come out of the bankrupt estate), and matters concerning trusts and estates. In such cases, there is often a danger that the value of the fund can become exhausted if legal representatives do not exercise self-discipline over costs.

18.62 We have already addressed the question of costs in chapter 6 of this Review. The principles and issues therein discussed largely apply to this division. In particular, subject to definition of the detail of proposed scales and bands, we favour the introduction of scale costs with four levels depending on complexity of claim, with scope for exceptionality. The case would be assigned to one of the four levels at the initial review, with scope for revision later, and scope for taxation within the bands and in exceptional cases for increased use to be made of immediately measured and payable costs for interlocutory proceedings. The introduction of four bands of fixed costs, depending on the value or complexity of the case, could be used rather than an *ad valorem* scale in proceedings in the Chancery Division. The use of such scales will be familiar to practitioners from the procedure in the county court.

18.63 If scales and bands are not implemented, the court should consider the parties' costs estimates as part of case management to ensure that directions

concerning the scope of discovery, expert evidence and trial management are proportionate to the value of the case.

18.64 Fixed costs would only address legal costs, and would not address the costs of expert witnesses, which are often a considerable part of the costs of complex litigation in the commercial list or Chancery Division. The principles set out in chapter 11 dealing with the costs of experts have direct application in this division.

18.65 There are no inherent or intrinsic features to distinguish a personal litigant (PL) in the Chancery Division from any other division of the High Court. Some differences may arise but these are differences of form rather than substance and, in the main, relate to the type of case that comes before the Chancery Division.

18.66 Emphasis must be given to a difference that does, however, arise with regard to the very emotive claims that now find themselves before the Chancery Court, *viz.* the prospect of the loss by the family of the family home. Many of these cases have resulted from imprudent lending and imprudent borrowing and, as economic strictures on the economics of the property market become less, then this type of litigation will, in all probability, decrease. Notwithstanding this expectation, we consider that such claims will arise in the Chancery Division for the foreseeable future.

18.67 Hence, there is a sizeable percentage of cases where pro bono advice is given to litigants in the Chancery Division. Examples of these are the Housing Rights Service, Citizens' Advice Bureau and Christians against Poverty. The Housing Rights Service is the main provider of pro bono assistance in the Chancery Division, with their statistics stating that Housing Rights provided court representation to PLs at 1,400 court hearings in 2014-15. With this in mind, it is a division that requires firm case management either by a Master or a judge to bring home to a PL the reality of a bad case with a meaningful, detailed review, held at an early stage of the proceedings, and the PL and any advisors should attend that review.

18.68 There are, however, no specific recommendations for this division on PLs beyond those set out in chapter 12.

Responses

18.69 Understandably since the architecture of this chapter was created by specialists in this division from the Bar and solicitors' professions, it has been met with general approval. The main area where controversy has arisen is in the area of discovery. Both the Bar Council and the Law Society continue to echo concerns in this sphere of limited discovery. It is their contention that parties have wide existing powers to seek and resist discovery and that with proper application of the current rules and consideration of available cost penalties, this should be sufficient. As those who have contributed extensively to this chapter recognise, however, the mischief of inordinate, often irrelevant, costly and time-consuming disclosure needs to be met in the modern context of litigation and in light of the admonitions in Order 1 rule 1 in terms of efficiency and cost saving. We have to introduce a new culture of disclosure

if this problem is to be solved so long of course as there is some flexibility within the system. This change of culture needs to be judge-led and hence the need for increased judicial management of the discovery process and measures be put in place to reduce the burden and cost of the exercise.

Recommendations

1. The county court to have a designated equity judge to manage and hear all equity business in Northern Ireland. **[CJ162]**
2. Power to be given to refer matters of disputed valuation to the Lands Tribunal, and the Lands Tribunal to be given the necessary jurisdiction to determine such references. **[CJ163]**
3. The Master to be given power to hear applications for delivery of a solicitor's file where there are no points of legal principle (a role similar to rule 3.1(2)(m) of the Civil Procedure Rules, which empowers the court 'to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective'). **[CJ164]**
4. The case-management process to be streamlined to have one early, detailed review to manage all issues to trial of the action. **[CJ165]**
5. Courts to strongly encourage the merits of early resolution through mediation and early neutral evaluation. **[CJ166]**
6. A process similar to Order 14A to be introduced for determination of points of law. **[CJ167]**
7. Discovery to be limited in cases where there is a limited factual dispute. **[CJ168]**
8. Increased judicial management of the discovery process to consider whether discovery should be limited to certain issues, or to ensure that discovery is in fact necessary. **[CJ169]**
9. A presumption that there be no general discovery in originating summons cases. **[CJ170]**
10. Introduction in the Chancery Court of scale costs with four levels depending on complexity of claim, with scope for exceptionality. The case would be assigned to one of the four levels at the initial review, with scope for revision later and taxation within the bands. **[CJ171]**
11. Increased use to be made of immediately measured and payable costs for interlocutory proceedings. **[CJ172]**
12. If scales and bands are not implemented, the court to consider the parties' costs estimates as part of case management to ensure that directions concerning the scope of discovery, expert evidence and trial management are proportionate to the value of the case. **[CJ173]**
13. The Office of the Lord Chief Justice to use Twitter to advise of judgments and to provide a synopsis and link to each judgment given to complement the

existing practice of publishing judgments online and providing judgment summaries in appropriate cases of public interest in the Chancery Division. **[CJ174]**

19

The Commercial Division

Current position

19.1 The commercial list was announced by the then Lord Chief Justice, Lord Hutton, on 29 June 1992. Its purpose was to expedite the progression of commercial actions. Cases are included in the commercial list at the direction of the judiciary. On inclusion, the Commercial Judge issues a set of directions and then further sits at regular intervals to progress the case management of the litigation. The result of this is to streamline commercial actions, avoid unnecessary delay and ensure that commercial court users, and the business community as a whole, receive an optimum service[1].

19.2 Entry. Entry into the commercial list is currently governed by the provisions of Order 72 rule 1(2) of the Rules of the Court of Judicature (NI) 1980, which provides that commercial actions are defined as:

> 'any cause relating to business or commercial transactions and, without prejudice to the generality of the foregoing words, any cause relating to contracts for works of building or engineering construction, contracts of engagement of architects, engineers or quantity surveyors, the sale of goods, insurance, banking, the export or import of merchandise, shipping and other mercantile matters, agency, bailment, carriage of goods and such other causes as the Commercial Judge may think fit to enter into the Commercial List'

19.3 It is evident, therefore, that any High Court action that falls into the definition may be entered into the commercial list, albeit that inclusion is a matter for the

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[1] The principal court rules and practice directions that cover the business of the commercial list are:
Order 72 RsCJ (NI) 1980 – this is the primary Court of Judicature Rule governing the commercial list.

Commercial Practice Note 1 of 2013: this is the primary practice direction governing the commercial list and was introduced by the then Commercial Judge, Lord Justice Weatherup, on 21 December 2012. It provided clarification for the entry of cases into the commercial list and solidified the role of the Commercial Master in hearing interlocutory matters.

Commercial Actions Scott Schedules: as part of practice note 1 of 2013, this provides the basis for the use of, and the co-operation of the parties in the provision of, Scott Schedules to assist the court.

Pre-Action Protocol for Commercial Actions: as part of practice note 1 of 2013 this sets out the pre-action protocol which the parties must follow in order to promote the early understanding of each party's case and to see if litigation can be avoided.

Summons Court Commercial List. Masters Practice Direction 3 of 2013: provides for a designated Commercial List Summons Court to sit each Friday and sets out how the Court will function.

Expert's Declaration 7 of 2014: this provides for the wording of the expert's declaration and joint statement declaration in the minutes of experts' meetings.

Practice Direction 1 of 2016: provides the up-to-date amendments to the Practice Direction 6/2011 concerning Court of Judicature in Northern Ireland practice requirements for skeleton arguments and related documents, appeal books and trial/ core bundles.

Commercial Judge to determine. He does so, upon request to the Registrar, 'having regard to the amounts involved or the issues concerned in those actions'.

19.4 In looking at whether more definition should be brought to the criteria for entry into the commercial list and, in particular, whether such admission would be restricted to cases of particular value and/or complexity, the current experience in other jurisdictions is instructive.

19.5 In the Republic of Ireland (ROI), the Commercial Court has existed as a separate division of the High Court since January 2004. Admission to the commercial list is not mandatory — rather, it is a matter for the parties to apply to be included within the list. The Commercial Judge will convene a hearing to determine whether a matter should be so included. Such an application can only be made in the case of 'commercial proceedings', which are defined as any claim not less than €1 million that arises out of:

- a business dispute;
- construction of a business document;
- sale or purchase of commodities;
- import or export of goods;
- carriage of goods;
- provision of professional services;
- business agency;
- operation of financial markets;
- insurance;
- the exploitation of natural reserves;
- the construction of vehicles or vessels.

19.6 Intellectual property disputes and the judicial review of regulatory decisions also come within the definition of 'commercial proceedings' and they have no financial limit.

19.7 In addition, the Commercial Judge retains a discretion to admit any other case to the commercial list as he considers appropriate 'having regard to the commercial and any other aspect thereof'.

19.8 The most recent statistics available[2] reveal that 148 new cases were admitted to the commercial list in ROI in 2015 (171 in 2014), of which 111 cases were disposed (a similar number in 2014). Disposal time was as follows:

Liberty to enter list (motion)	The time from the issue of a summons to the first return date before the High Court	Date immediately available
Full hearing	The time from the first return date to the date of the full hearing	One week to four months, depending on time required for hearing

19.9 These figures are somewhat startling when compared to the *Northern Ireland Judicial Statistics (2015)*[3], which state that the average time from receipt of a commercial action to disposal is 146 weeks (118 weeks in 2014).

19.10 There may, however, be a number of reasons for the significant divergence between the case disposal timescales:

- There are, and have been, a large number of applications for summary judgment to the Commercial Court in ROI arising out of the banking and financial crisis. Such applications are frequently unopposed or dealt with in short form and this may serve to skew the statistics;
- In Northern Ireland, it is mandatory to seek to admit a commercial action to the commercial list. In ROI, litigants may, if they wish, leave their case in the 'ordinary' lists and not subject it to the same strictures and rigours of case management;
- All High Court actions (that is, disputes over £30,000) come within the commercial list jurisdiction in Northern Ireland whilst generally only those over €1 million come into the list in ROI. This may explain why a similar number of actions (175) entered the commercial list in Northern Ireland in 2014 as entered that in ROI;
- In Northern Ireland, the plaintiff's solicitor is obliged to endorse the writ of summons with the words 'In the opinion of the plaintiff's solicitor this is a commercial action' and, therefore, the Registrar is alerted to the case at its commencement. In ROI, however, one can apply to have a case admitted to the commercial list at any time up to the close of pleadings or completion of filing of affidavits. It is quite possible, therefore, that a considerable number of weeks or months will have elapsed between commencement of proceedings and entry into the commercial list, which will not be taken account of in the statistics.

[2] Courts Service Annual Report 2015

[3] Courts and Tribunals Service: Judicial Statistics 2015

19.11 Nonetheless, it may be thought that the stricter criteria for entry into the commercial list in ROI have permitted those cases that are admitted to be processed very swiftly and efficiently.

19.12 In England and Wales, Civil Procedure Rules 58.1(2) defines a commercial claim as 'any claim arising out of the transaction of trade and commerce and includes any claim relating to —' and a list of types of claim that is almost identical to that contained in Order 63A in the Republic of Ireland (see paragraph 19.5 above) appears thereafter.

19.13 A claimant commencing proceedings in a commercial claim must mark them 'Queen's Bench Division, Commercial Court' and the Registry then enters the case in the commercial list. Entry is, therefore, mandatory and occurs at the commencement of proceedings.

19.14 Lower-value or less complex commercial disputes can be heard in the Mercantile Courts, which are based in eight regional centres throughout England and Wales.

19.15 The Technology and Construction Court (TCC) exists separately within the Queen's Bench Division and it hears cases relating to construction and engineering disputes as well as professional negligence and IT disputes. Generally, it will not hear disputes with a value below £250,000 unless some particular issue of law or complexity arises.

19.16 Some 1,100 cases are commenced in the Commercial Court each year and around 500 in the TCC. The average time from issue to trial is between 50 and 60 weeks.

19.17 It should be noted that the fee to issue any proceedings with a value above £200,000 in the Commercial Court, the Mercantile Court or the TCC is £10,000.

19.18 Case management. In any Commercial Court system, there exists a highly developed style of case management. Once again, the current situation elsewhere is instructive. In ROI, Order 67A recognises three principal types of case review:

- An initial directions hearing;
- A case-management conference;
- A pre-trial conference.

19.19 The initial directions hearing, as its name suggests, is intended to set a timetable for pleadings, interlocutory steps, lists of issues, expert evidence and alternative dispute resolution (ARD).

19.20 The case-management conference (CMC) is to 'ensure that the proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the costs of the proceedings'. It affords an opportunity for the judge to identify the

issues of both fact and law that are actually in dispute and thereby prescribe the best means by which the disputes are to be resolved.

19.21 The pre-trial conference then allows the judge to ensure that the case is ready to be heard and fix the logistical arrangements for trial in terms of lists of witnesses, provision of witness statements, use of technology, etc.

19.22 In England and Wales, a case-management conference is held following the exchange of pleadings and, in order to facilitate this, the parties are obliged to produce a neutral list of issues of fact and law. This is used by the court to determine such matters as the scope of disclosure, the factual evidence required to be heard, the need for and extent of expert evidence and whether any preliminary or separate issues ought to be heard.

19.23 At the CMC, the judge will settle a list of issues, fix the pre-trial timetable and consider the question of alternative dispute resolution. The court will also fix dates for progress monitoring that require the parties to provide information to the court on compliance with the various directions.

19.24 When considered appropriate, the court will convene a pre-trial review between four and eight weeks before the date fixed for trial. This can address such issues as the order of witnesses, the length of cross-examination and the need for any information technology at trial.

19.25 In Australia, a fundamental change across all jurisdictions is the move away from the parties having complete control of proceedings to one in which the court takes greater control of litigation proceedings. The development has given rise to the concept of the 'Managerial Judge' — that is, the court has greater power in facilitating the swift disposition of cases.

19.26 Mediation. The current position of mediation in this division in Northern Ireland is as follows. Commercial disputes that are litigated in the commercial list are generally of a reasonably significant or very significant financial value and the cost to the parties of attempting mediation, with the potential for settlement achieving a very significant saving in cost and time to the parties, is generally a relatively modest and worthwhile investment. Success rates claimed by mediators and organisations providing mediation services may vary, but even taking a very conservative view, it would seem that, more often than not, parties in commercial disputes who engage in a mediation process achieve a concluded settlement, either at or not long following a mediation.

19.27 Therefore, mediation enjoys good prospects of both saving parties' time and expense (with more time and expense saved by parties by engaging in mediation at the earliest appropriate stage) in the Commercial Court and, therefore, with a consequent saving in judicial time and lessening the burden on court resources.

19.28 Aside from the efficiency and cost-effectiveness of mediation, other benefits of the process and practice of mediation in this division are generally acknowledged to

be that it is: (1) without prejudice to the parties' legal rights (important if mediation is unsuccessful); (2) a confidential process; and (3) a flexible procedure, capable of delivering creative, flexible outcomes that go beyond those that can be delivered by a judgment. In mediation, there is often an opportunity to take a commercial/business view and perhaps preserve or develop business relationships that could otherwise be at risk of damage as a result of the adversarial nature of the court process.

19.29 Mediation of commercial disputes has been relatively popular for several decades in some other jurisdictions (notably the United States, Canada, Australia and some European countries). It is the view of practitioners in this division that it has been somewhat slower to gain traction within UK and ROI. It is also probably fair to comment that the uptake of mediation in commercial disputes has been somewhat slower in Northern Ireland (and ROI) than in Great Britain.

19.30 Whilst the Northern Ireland Law Society's dispute resolution service has been involved in the promotion of mediation and has provided mediation training courses (more recently through the Institute of Professional Legal Studies (IPLS), since the 1990s), it has perhaps been only in the last four to five years that mediation has started to gain more widespread popularity. Parties in actions in the commercial list are frequently encouraged, when appearing at reviews, to actively consider engaging in mediation.

19.31 In addition, encouragement to consider mediation is within the practice direction and specific provision is made within the Rules of the Court of Judicature for an order staying proceedings to allow mediation to take place. In practice, mediators have been chosen by parties from the ranks of the two legal professions in Northern Ireland, although there have been a number of mediations where mediators from outside Northern Ireland (again, usually legal professionals) have been appointed. The Bar of Northern Ireland has also, more recently, set up a mediation panel and arranged for training of barristers to be mediators (Barrister Mediation Services). Both bodies have, therefore, established a cohort of accredited mediators who are obliged to have undertaken the appropriate training in the principles and practice of mediation and are obliged to comply with an appropriate code of conduct. It is understood there are also a small number of members of the local legal profession who are providing a mediation service but who may not have undergone the training or accreditation by the professional body. Mediation, not being a regulated activity, can be provided by non-legally qualified persons, and to practise as a mediator one need not be trained or accredited. In addition to the dispute resolution service and Barrister Mediation Services, there are other commercial providers of mediation services operating in Northern Ireland.

19.32 Over the last few years, Invest NI has been working with the Law Society and Bar Council to help solicitors and barristers develop new markets for their services, in recognition of the changing nature of demand for legal services in Northern Ireland. This project is part of a wider initiative and is intended to ensure that

Northern Ireland's legal sector benefits from, and supports, wider growth in the local economy[4].

19.33 The project's findings so far on the positive side are:

- Northern Ireland shares the general advantages of the other UK jurisdictions (that is, a strong and independent judiciary, a well-educated legal profession, the benefits of common law, a shared time zone, proximity to the European Union, English language, etc.). In particular, the shared legislative base with England and Wales in key company law and commercial areas is a major advantage.
- Northern Ireland can offer cost-effective dispute resolution services: qualified mediators from both professional backgrounds are considerably less expensive than their English counterparts and litigation remains an option for small and medium enterprises (SMEs), who are being priced out of the courts in England and Wales.
- The market for commercial mediation is growing[5]. The commercial list is seen by the professions as a major selling point. Whilst of course there may be considerable delays if solicitors postpone transferring cases to the Commercial Court, the fact of the matter is that once they get there and are case-managed by the Commercial Judge, they reach trial or resolution much sooner than our English or ROI counterparts.

19.34 However, although the legal sector in Northern Ireland is small and individuals are well known to each other, there is little experience of collaborative working in the sector. This is becoming more important as Northern Ireland now needs to showcase what it can do to the outside world. One outcome that may emerge from the project is a more formalised approach to cross-sectoral working through the creation of a standing group that will take an interest in maintaining the ongoing competitiveness of Northern Ireland's dispute resolution offer and in its promotion. The creation of a Northern Ireland Civil Justice Council is a key recommendation of this Review and thought would need to be given to any possible overlap or complementarity of also creating a group focused on external promotion of Northern Ireland commercial dispute resolution.

19.35 Disclosure. We have discussed the problems of the current disclosure regime in chapter 10. It is recognised that the most contentious interlocutory issues between

[4] This may include, for example, supporting the dispute resolution needs of inward investors, encouraging local exporting businesses to use Northern Irish dispute resolution clauses in their cross-border contracts, preparing for potential corporate taxation changes and better marketing of Northern Ireland's dispute resolution capabilities. The Department of Justice has joined the project steering group, and a reference group of around 20 practitioners from both sides of the profession is playing a leading role in generating ideas. The intention is that this group will develop during the course of the project into a more permanent network that will maintain an interest in continuing to monitor and implement its recommendations.

[5] The Centre for Effective Dispute Resolution (CEDR) estimates that the mediation market grew by 9% in 2013-14 and that 9,500 commercial mediations with a total value of £9 billion were conducted in the UK.

parties in the Commercial Court concern discovery/disclosure and more particularly specific discovery once lists are exchanged[6].

19.36 The traditional laws governing discovery/disclosure in most Commonwealth countries are broadly similar in that they require all relevant documents and information to be disclosed to opposing parties at an early stage of proceedings.

19.37 Very real concern in the legal community and in this division has been expressed to us that the discovery process is now being overused. Wild fishing expeditions, since any material that might lead to the discovery of admissible evidence is discoverable, seem to be the norm.

19.38 Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some practitioners' trial strategy.

19.39 Interlocutories. Currently these tend to follow the conventional path of oral hearings before a Master and/or judge.

Discussion

19.40 Entry. We consider that the current arrangements for admission to the commercial list in Northern Ireland are satisfactory. With the proposed increase in jurisdiction in the county court, there is no obvious need for a higher financial threshold such as exists in ROI. The small number of cases of that value in Northern Ireland simply would not merit such a change.

19.41 We also conclude that the current system of early mandatory entry for all commercial disputes into the commercial list should be retained. This is the best method of ensuring that cases are dealt with expeditiously and in accordance with the overriding objective.

19.42 Case management. We recognise that there are certain cases that, by virtue of their value, complexity or urgency, may require some form of priority in the commercial list. It was concluded that this should principally be accommodated by early firm case management.

19.43 However, certain changes should be made in the present system of case management. We saw much merit in the three main review hearings set out in the ROI's Order 67A. Such review hearings, it is anticipated, would take longer than the present reviews but would provide a more focused means of identifying the issues in dispute and the most appropriate means of case disposal.

19.44 It is, therefore, recommended that each case in the commercial list should be subject to:

[6] Order 24 rule 7 RsCJ (NI) 1980.

- An initial directions hearing shortly after entry into the list. This will probably echo the current list of directions issued by the Commercial Judge dealing with a range of issues, including the timetabling of pleadings.
- A case-management conference after the completion of pleadings. This will not only be beneficial in terms of providing a judge with greater oversight of the case, but will further narrow the issues with directions probably being agreed in advance by the parties in order to maximise the opportunities presented by this conference.
- A pre-trial review around four weeks before hearing.
- Helpfully, the Bar Council have suggested that a practice direction could be drafted to place a duty on legal representatives to advise the client of the costs associated with pursuing litigation in the court by the time of the case-management conference stage in order to help encourage the parties towards settlement, negotiation or mediation.

19.45 We observe that the Commercial Judge will need to allocate a particular amount of time to these reviews. In the case of the CMC, it may be that at least 30 minutes is necessary in order to settle a list of issues, make consequential directions and consider the possibility of ADR. It may be that the court would consider listing CMCs in particular time slots on a Friday. It would be hoped that the reduction in the number of reviews generally would permit this to be accommodated.

19.46 The move to fewer, more detailed, reviews will also require substantial input from legal representatives. It is essential that they co-operate on drawing up lists of issues, identifying a sensible approach to discovery and brief experts only where necessary and proportionate. In order for the review system to function effectively, it is also necessary that the representatives with carriage of the case attend the review hearings.

19.47 Parties to disputes would, of course, still be able to make interlocutory applications to the Master (or the judge in certain cases) and/or to seek a review from the court if some issue or problem arises. It would be up to the legal representative to justify why a review, aside from the three prescribed, is necessary in any given case.

19.48 Consideration should also be given to a paper-based system of progress monitoring where the judge can be informed and updated on compliance with the directions that were made at the review hearings.

19.49 We have considered the shorter and flexible trial procedures so efficiently organised in London (and addressed in chapter 17). We do not require such a system because any case in our Commercial Division that is ready for or requires a swift trial is easily accommodated in a much shorter timespan than that contemplated even by the English timetable (no later than eight months).

19.50 However, we did recognise that there are certain cases that, by virtue of their value, simplicity (for example a net point to be determined) or urgency, may require a form of priority in the commercial list. It was concluded that this can be accommodated by an early case management when these cases can be fast-tracked for a short hearing, provided pleadings are adequate, disclosure is limited, interlocutories are confined, etc., as outlined in chapter 17.

19.51 Mediation. The current pre-action protocol for commercial actions makes provision for alternative dispute resolution. The pre-action meeting outlined in the protocol is a point at which the parties should consider whether some form of alternative dispute resolution would be more suitable than litigation. It highlights that a pre-action meeting shall be treated as 'without prejudice' save that a party attending may be required to disclose to the court when and where a meeting took place and the identity of those attending, the identity of any party who refused to attend and the grounds for refusal, the terms of any agreement between the parties and the consideration given to alternative dispute resolution. If a pre-action meeting did not take place, a party may be required to disclose to the court the reason a meeting did not take place. Although the concept of mediation is currently working well in this division in Northern Ireland, we have to recognise that there are significant challenges to overcome.

19.52 The demand for dispute-resolution services is not footloose but must have a connection to the jurisdiction or be drawn by a particular expertise or legal advantage not available elsewhere. Northern Ireland's legal professions have not had a market that has allowed them to develop specialist commercial expertise, although new economic clusters are now emerging that will encourage this to happen over time. As local exports grow and in the wake of Brexit, solicitors will also increasingly find themselves advising clients on cross-border commercial contracts and will need a convincing story to tell on why Northern Ireland should be chosen as the law or forum in dispute-resolution clauses.

19.53 The professions have been keen in the past to emphasise the differences between Northern Ireland law and English law in order to protect the local market from competition, but there is potentially much greater business to be gained by highlighting the overlap and Northern Ireland's strengths as a lower cost, SME-friendly jurisdiction applying UK law. This requires a change in how the jurisdiction views itself and how it is promoted to the rest of the world.

19.54 Moreover, although there is a growing list of qualified mediators, there is a danger that the schemes put forward by the Bar Council and the Law Society are largely targeted at a domestic audience and not joined up. This contrasts with the approach taken in ROI, England, Scotland and elsewhere, where efforts have been made to convey clear messages about how dispute resolution fits with the wider economic advantages of the jurisdiction.

19.55 As far as mediation is concerned, it may be helpful to consider the introduction of a special fast-track process for resolving disputes in court if

mediation is unable to resolve the dispute. This would help to increase the competitiveness of Northern Ireland mediation but clearly lies within the prerogative of the court.

19.56 We consider that the growth in successful outcomes to commercial mediations indicates that there is an alternative to litigation, especially at a time when court resources are being put under pressure. To encourage the momentum of mediation, we consider that there should be a requirement for parties to exchange letters at an early stage setting out their proposals/objections to mediation. We note that courts in England are increasingly highlighting that all proposals of alternative dispute resolution must be taken seriously by the parties or they may risk being penalised with cost sanctions[7]. It is our view that this approach should be echoed in Northern Ireland's Commercial Court in an effort to discourage unreasonable conduct by parties pursuing litigation.

19.57 We strongly endorse the Commercial Judge's encouragement of mediation and other forms of ADR, such as early neutral evaluation (ENE). ENE would have particular appeal within the context of the business hub adumbrated in chapter 17. The Commercial Judge recently invoked this concept in a highly complex commercial action with the help of another High Court judge. We note the Bar Council recommend the development of guidance in relation to the ENE and the Commercial Bar Association welcomed the opportunity to contribute further to this aspect of the Review. More frequent use of early neutral evaluation complements an outstanding recommendation from the Stutt Report on *The Report of Access to Justice (2)* in relation to the Law Society and the Bar co-operating to promote the use of ENE by their members and to consider the merits of establishing panels of experienced lawyers to provide an ENE service and protocol for their instruction.

19.58 Where mediation fails, the courts should, as indicated in paragraph 19.55 above, wherever possible fast-track those cases in order to keep up the momentum of resolution. This ties in with the concept of fast-tracking of short uncomplicated net issue cases, a step that can be invoked at any one of the stages indicated at paragraph 19.44.

19.59 Disclosure. The problems of vast swathes of disclosure can have a particular resonance in this division and thus we must trespass to some extent on the discussion of this concept already set out more generally in chapter 10. In order to facilitate the development of automation as an effective tool in the process of disclosure, the law needs to keep up to date by prescribing new legal concepts and methodology, specifically tailored to such technological innovation. The use of automated search technology, such as keyword searches and concept searches, may prove to be an efficacious and economical resource to aid such disclosure. The law of disclosure in the context of electronic documents should make a fundamental shift

[7] Reid v Buckinghamshire Healthcare NHS Trust [2015] EWHC B21 and Bristow v The Princess Alexander Hospital NHS Trust and Others [2015] EWHC B22 (Costs) where the judge has held that cost sanctions for unreasonably refusing to mediate can apply equally to the unsuccessful party if that party unreasonably refuses to mediate.

away from manual review and endorse with greater confidence the disclosure of electronic documents primarily through the process of keyword searching.

19.60 However, particularly in this division, we must be wary lest the volume, number of locations, and data volatility become significantly greater in electronic disclosure than in conventional disclosure of paper documents.

19.61 It is a fairly obvious proposition that such keyword searches can be critical in aiding the disclosure process by quickly and effectively trawling through a mass of electronic documents to pinpoint potentially relevant ones. They are extremely significant in the disclosure process because parties may be allowed to discharge their legal obligations of disclosure by only turning over all documents that are identified by the keyword search. The keyword search thus obviates the need to conduct full ocular review.

19.62 It may prove insufficient to only use simple keyword searches. Simple searches may result in the failure to find important documents that ought to be disclosed and simple searches may find excessive quantities of irrelevant documents that, if disclosed, would place an excessive burden in time and cost on the party to whom disclosure is given. Thus supplementing keyword searches by searching for categories of documents — for example, documents exchanged via key personnel — may prove useful.

19.63 One example of technology that is increasingly an option in England is predictive coding, which allows computers to predict particular document classifications based on coding decisions made by the lawyers running the claims in question. However, whilst this potentially brings cost savings, it does have limitations in very complex multi-issue cases where no one seed set will cover all the issues in dispute[8].

19.64 A targeted legal framework should be put in place to facilitate the use of keyword searches as an effective mechanism for the review and identification of documents to be disclosed.

19.65 The Singapore High Court took precisely such an approach to keyword searching in Global Yellow Pages[9]. There, the court endorsed the use of technology, especially automated computer search tools, to cope with the burgeoning volume of discoverable documents.

19.66 In particular, the use of keyword searches with Boolean operators[10] was highlighted as a familiar and easily accessible tool that can aid in the identification and retrieval of relevant documents.

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[8] The recent case of Pyrrho Investments Ltd v MWB Property & Ors [2016] EWHC 256 (Ch) saw the English courts approve the use of predictive coding for the first time.

[9] The largest search engine in Singapore.

[10] A type of search allowing the user to combine key words with operators such as AND or NOT to provide more relevant results.

19.67 There are two keys to these developments. First, a recognition that this area is likely to continue to evolve in the future and a programme of effective training in e-disclosure for judges, legal representatives and other relevant stakeholders is crucial if the further steps towards the use of automated search technology is to be taken in Northern Ireland. Secondly, lawyers must encourage their clients to overcome the combative mind-set that is inherent in the adversarial nature of litigation and to focus instead on collaborating with the opposing party, at least during the stage of disclosure, in order to achieve collective savings in terms of time and costs[11].

19.68 As set out in chapter 10, many courts in Australia have done away with orders for general discovery in favour of discovery by categories of documents. Parties are expected to have developed a discovery plan encompassing the number, nature and significance of the documents that might be discoverable. The court may intervene at any point during these procedures. The courts may regulate the discovery process, taking into consideration such factors as time, inconvenience and the importance of the documents to the subject in question[12].

19.69 In short, courts need to take a more interventionist role to avoid having trolley loads of documents being wheeled into court when hardly any of them are likely to be referred to and when every page will add to the cost of the litigation.

19.70 One way to clarify the real issues in a particular case, in relation to which discovery may be limited, would be to introduce a requirement on the party seeking discovery to submit a written statement of the issues. This could mean, for example, filing and serving a statement of issues for discussion at an initial directions hearing or case-management conference as discussed above. The statement could set out in narrative form the factual issues that appear to be in dispute between the parties, as well as any legal issues and the conclusions that the parties wish the court to draw. To identify which of these issues matters most to the party seeking discovery, the statement could be tiered in order of importance. This statement may give a better indication than the pleadings of which are the main facts in issue and which are subordinate or collateral facts in issue, as well as the essential ingredients in the cause of action or defence.

19.71 Discovery by categories works well in this division if the parties take the time and expense to define the categories carefully and sort the disclosed documents into the correct categories, and if the issues in dispute are sufficiently well defined that the documents are amenable to classification.

19.72 Interlocutories. We consider that the procedures in place in the Commercial Court, wherein the Master will take interlocutory matters and deal with them under the Masters' Practice Direction No 3 of 2013, but with the Commercial Judge retaining the power to call in interlocutory matters to be dealt with by him, works well.

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[11] See the first instance decision of Breezeway Overseas Ltd v UBS AG [2012] SGHC 41.

[12] Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd [2003] FCA 174.

19.73 In cases where expedition is required (for example, public procurement challenges or adjudication enforcement under Order 14 RsCJ (NI)), the judge tends to deal with these himself under the Commercial Practice Note 01/03.

19.74 The Commercial Judge has found favour with the use of Scott Schedules to summarise and deal with disputed interlocutory applications, for example: specific discovery; interrogatories; compelling proper replies; or other such applications where the parties have opposing views on a number of diverse issues.

19.75 A Scott Schedule can assist the court's accessibility to the issues in one short document instead of wading through sometimes bulky affidavits and exhibits. We do not consider that the use of Scott Schedules can dispense with the need to present evidence in affidavit form but merely to summarise that evidence in an accessible format for disposal.

19.76 We are of the view that some consideration could be given to amending Commercial Practice Note 01/03 to provide for Scott Schedules in suitable interlocutory applications.

19.77 We consider that the powers of the Commercial Judge under Order 72 and the specific interlocutory proceedings Orders in the RsCJ(NI) are sufficiently robust that the court can provide for detailed tailoring, for example: electronic discovery; limited discovery to be proportionate to the issues; confidentiality rings, etc.

19.78 Online dispute resolution (ODR). The role of online dispute resolution may well be beneficial in the context of low-value disputes in which a 'robust' determination is considered a distinct advantage, set against the considerable expense and time engaged in a conventional court setting. This must be viewed against the complexity and the value of the issues at stake. It should be noted that the sub-group producing a discussion paper for this division, whilst supporting the concept of ODR, did propose a wait-and-see policy on developments in England and Wales before introducing our own ODR pilot. This is a proposal well suited to being monitored by a Civil Justice Council

19.79 Invest NI has suggested ODR has become more than a theoretical discussion, as other jurisdictions begin to implement innovative new approaches. Any consideration of this in Northern Ireland could usefully include small commercial claims as this could potentially open up a new market for local commercial mediators. Providing access to such a new international market could also make the introduction of changes domestically more palatable.

Responses

19.80 We received a number of very constructive and encouraging suggestions from the Bar Council and the Law Society arising out of the contents of this chapter in the preliminary Civil Justice Review. We have embraced most of the important points in the narrative of the paragraphs in this chapter.

Recommendations

1. Each case in the commercial list to be subject to:
    - an initial directions hearing shortly after entry into the list;
    - a case-management conference after the completion of pleadings;
    - a pre-trial review around four weeks before hearing. **[CJ175]**
2. A requirement for parties to exchange letters setting out their proposals/objections to mediation. **[CJ176]**
3. Fast-tracking of short uncomplicated net issue cases. **[CJ177]**
4. Fast-tracking of cases where mediation has failed. **[CJ178]**
5. More frequent use of early neutral evaluation. **[CJ179]**
6. The use of automated search technology, keyword searches and predictive coding in complex disclosure issues together with extensive training programs in their use. **[CJ180]**
7. Parties to be encouraged to closely co-operate during the early stages of the disclosure process. **[CJ181]**
8. Implementation of the concept of a disclosure plan at the outset of the disclosure process. **[CJ182]**
9. Implementation of the concept of a written statement of issues by any party seeking disclosure. **[CJ183]**
10. Amendment of Commercial Practice Note 01/03 to provide for Scott Schedules in suitable interlocutory applications. **[CJ184]**
11. Consideration to be given to the commencement of the Online Dispute Resolution Advisory Services in low-value commercial claims. **[CJ185]**

20

Judicial Review

Current position

20.1 The procedure for judicial review in Northern Ireland does not deviate significantly from the England and Wales model save that the legal aid funding in England has altered as has the option of delegating a judicial review to the Upper Tribunal in certain circumstances. Accordingly, many of the recent papers on reform of judicial review in England carry a resonance in this jurisdiction[1].

20.2 Transfer of business. Currently, the complement of work in this division includes applications that have as their subject matter issues that are within the jurisdiction of more specialist courts such as family law, commercial law and planning and should be transferred to those courts for hearing. Little transfer takes place.

20.3 Criminal/civil causes distinction. There is currently a clear distinction between criminal/civil proceedings in judicial review. The practical effect of the determination that an application is a criminal cause or matter is that the only appeal right available to the applicant requires certification that a point of law of general public importance is involved, as well as leave of the court of first instance or the UK Supreme Court (UKSC). In this jurisdiction, there is no reason to believe that the provision of a right of appeal to the Court of Appeal in such cases would significantly increase the workload of the court. The requirement to appeal directly to the UKSC now seems anomalous[2] and has been the subject of adverse judicial comment.

20.4 Pre-action protocol. Pre-action protocols have been in operation in this field since its inception in Practice Note 1/2008 (revised on 10 October 2013).

20.5 Granting leave to apply for judicial review. Too much court time is taken up with the hearing of applications for leave. The leave stage has recently moved away from the quick-filter mechanism it was designed to be.

20.6 Leave hearings. Currently, leave hearings are unlimited in hearing time and are generally listed along with cases for full hearing.

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[1] *Reforms to Judicial Review in the Criminal Justice and Courts Act 2015: Promoting Efficiency or Weakening the Rule of Law?* Alex Mills [2015] Public Law 584; DoJNI consultation paper on proposal on time limits for judicial review; DoJNI summary of responses on above consultation paper; and Westminster Legal Policy Forum transcript of an event entitled *The future of judicial review – assessing the impact of changes to funding, costs and procedure 15th July 2015.*

[2] JR 47 [2010] NIQB 14

20.7 Promptness. Order 53 rule 4(1) of the Rules of the Court of Judicature (NI) 1980 states:

> 'An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.'

20.8 Following the Department of Justice's consultation on this matter in 2015 the Department has indicated that the time limit should be amended to remove the requirement of promptitude.

20.9 Costs**.** At present, the following rules apply to the award of costs in judicial review proceedings.

20.10 Costs are rarely granted to an applicant where an application is resolved prior to the grant of leave[3].

20.11 The award of costs to a respondent is even less common prior to the grant of leave. This appears to be an acknowledgment of the fact that court rules envisage the leave stage of judicial review proceedings to be an *ex parte* procedure and it is only in the last 15 years or so that *inter partes* leave hearings have become the norm.

20.12 Where a case is discontinued after the grant of leave but prior to a full hearing, the award of costs will depend on the circumstances of and reasons for the discontinuance[4].

20.13 Where a case runs to full hearing and judgment is delivered, the usual litigation costs principles apply, namely that the award of costs is a matter for the court's discretion, but costs will normally follow the event.

20.14 The court's power to make protective costs orders is a matter of particular importance in judicial review, given that issues of fundamental constitutional and human rights significance can arise in such cases. That power has been recognised and exercised in this jurisdiction[5]. Protective costs arrangements (that is, agreement on the costs of litigation prior to its commencement, which obviates the need for a court order) are becoming more common.

20.15 Personal litigants. Personal litigants do not seem to be as common in judicial review as they are in other areas. However, it is recognised that personal litigants could become more prevalent in the Judicial Review Court in the future.

Discussion

20.16 Transfer of business. Judicial review applications that have as their subject matter issues that are within the jurisdiction of more specialist courts — such as

[3] But see e.g. Re McTaggart [2012] NIQB 79.
[4] See e.g. Re Family Planning Association's Application for Judicial Review [2013] NIQB 108.
[5] See e.g. Re Ciara Thompson's Application for Judicial Review [2010] NIQB 38.

family law, some aspects of criminal law, commercial law, chancery matters and planning — should be transferred to those courts for hearing.

20.17 The consensus is that the decision to transfer should be taken by the Judicial Review Judge.

20.18 There are two views about the timing of transfer. The first is that judicial review cases should be managed by the Judicial Review Judge until close to the point of hearing; and the second that the cases should be transferred to the specialist court at an early stage for case management in that court. There are pros and cons to each of these respective approaches, but it seems to us that in order to implement swift, efficient case management in the appropriate forum the latter argument is preferable and the assignment should be made by the Judicial Review Judge as soon as papers come before the judge.

20.19 Once judicial review cases are transferred to the specialist court, it was felt that they should be reviewed separately from the ordinary business of that court.

20.20 Criminal/civil causes distinction. There is no reason to retain this distinction, which is complex and now anachronistic, and it should be abolished. This could be achieved by a relatively straightforward statutory amendment to the *Judicature (Northern Ireland) Act 1978*[6]. Rules of court should permit a Divisional Court to be assembled in any case where a Single Judge considers it necessary, however.

20.21 Pre-action protocol. It was considered that there would be merit in reviewing the pre-action protocol to incorporate any learning from the operation of that protocol since its inception in Practice Note 1/2008 (revised on 10 October 2013).

20.22 Granting leave to apply for judicial review. There would be merit in returning to the system currently envisaged by Order 53 rule 4, that is, that leave can be granted on the papers and will be so granted in appropriate cases, with an oral hearing arranged only if the judge is minded to refuse leave. We should, however, retain the benefit of the current system when direction/timetabling is addressed at the leave stage.

20.23 There is a view that there should be an *inter partes* hearing in any case in which there is not, on the papers, a clearly arguable case that leave should be granted on all grounds. The contention is that in these circumstances the leave hearing ensures an opportunity for the proposed respondent to contest leave if there is not clearly an arguable case and, further, provides an opportunity for the grounds of challenge to be narrowed and focused (with the benefit of reducing unnecessary costs) and to timetable the filing of affidavits and give other directions.

[6] Re Barry Morgan [2015] NIQB 60 per Morgan LCJ at [9].

20.24 The counter-argument advances concerns about the suggestion that a hearing would be required if not every single ground appears to the judge to be arguable. There will often be some grounds that are weaker than others and, if leave is being granted in the case, the holding of a leave hearing in all cases as suggested is likely to dilute significantly the return to the Order 53 rule 4 approach, with additional costs and time being taken up that are disproportionate to the mischief identified.

20.25 We are satisfied that there should not be a facility to refuse leave on the papers because of the need for a process that is compatible with art. 6 of the European Convention on Human Rights and Fundamental Freedoms. In addition: (i) it may have a 'chill effect'; (ii) issues may arise about the grant of legal aid for leave applications; and (iii) very few cases are so clear-cut that not much would be gained by it.

20.26 A system could be adopted whereby reasons are given for a 'minded to refuse' indication on the grant of leave that would allow any subsequent oral hearing to focus on the issues that are of concern to the court.

20.27 We are of the view that a system whereby the proposed respondent to an application for leave to apply for judicial review should be required to submit a notice of objection, or notice of resistance, in answer to the application, would over-complicate matters and add time and cost to the procedure in circumstances where the respondent's response to a pre-action protocol letter should be sufficient in this regard. However, there should perhaps be greater emphasis on compliance with the pre-action protocol and costs penalties where it is not adhered to.

20.28 Leave hearings. We discussed the system in Dublin whereby a day is set aside for leave hearings and those hearings do not last any longer than 40 minutes each, unless a special request is made in advance for a longer slot.

20.29 Practitioners in this jurisdiction were not convinced of the need for this. It was considered that the need for leave hearings should be reduced by the adoption of the process suggested above and that leave hearings thereafter would adequately be dealt with by the current system of dispersal throughout the list.

20.30 However, it should be made clear that, unless a special request for more time is sought and granted, leave hearings should normally not last beyond 11 o'clock on any morning. Beyond this time they risk impinging on the time set aside for hearing of full applications for judicial review. The Bar Council response raised concerns that the court may have difficulty adhering to such a short window of time. This perhaps fails to recognise that leave hearings should normally be brief unless a special request is made in advance for a longer slot.

20.31 A practice of not listing more than two leave hearings on a day when there is also a substantive hearing listed would assist in this regard.

20.32 Promptness. There were divergent views amongst practitioners on this issue. Practitioners on the government side were of the view that, in certain contexts, a

promptitude requirement was necessary to ensure that time-critical decisions were not unduly impeded. Illustrations include planning decisions. Others, including the Bar Council and the Law Society, agreed with the thrust of the department's consultation process to the effect that the promptness requirement should be abolished. I favour the latter argument, largely because it delivers a measure of certainty and clarity into a somewhat vague aspect of our law.

20.33 Costs. The practitioners consider that the current costs regime works well and is sufficiently flexible to cater for the many different scenarios that arise in judicial review, save that it may be appropriate to provide greater flexibility as to when a protective costs order should be granted than is presently provided for in case law governing this issue.

20.34 We pause to observe that there is no reason why more use should not be made of administrative decision making in the Judicial Review Court, namely decisions made by way of applications in writing to the court where decisions can be taken without the need for court appearances.

20.35 Personal litigants. Recognising that personal litigants could become more prevalent in the Judicial Review Court in the future, in the event that Northern Ireland Courts and Tribunals Service (NICTS) guidance or other guidance is being produced for personal litigants generally, it would be prudent to include some guidance in relation to judicial review within any such publication.

20.36 We endorse the setting aside of a special day(s) as required for the hearing of such cases. The Court of Appeal has begun to adopt this practice and it appears to result in a more efficient processing of court business in cases where professional legal representatives are engaged. The Bar Council has queried how often the special days would be invoked and have suggested they should be on a fairly infrequent basis to ensure that a disproportionate amount of time is not taken up with them.

20.37 In England and Wales, HM Courts and Tribunal Services recently published *Administrative Court judicial review guide 2016*. This guide provides a general explanation of the work and practice of the Administrative Court. It is designed to make it easier for parties to conduct judicial reviews in the Administrative Court, by drawing together into one place the relevant statutory provisions, rules of procedure, practice directions, and case law on procedural aspects of judicial review. It provides general guidance as to how litigation in the Administrative Court should be conducted in order to achieve the overriding objective of dealing with cases justly and at proportionate cost.

20.38 The guide has been prepared with **all** court users in mind, whether they are persons who lack legal representation (known as 'litigants in person') or persons who have legal representation. All court users are invited to follow this guide when they prepare and present their cases.

20.39 Whilst the practitioners who appear most often in the Judicial Review Court in Northern Ireland are familiar with practice and procedure, we can see the

advantages of producing a guide for personal litigants and others who may use the court. However, it seems to us that if such a guide is to be produced it would be a significant undertaking and would most appropriately be done as a discrete project managed and resourced by NICTS rather than by additional burdens placed on judicial and practitioner resources. We note that the English guide runs to 152 pages in length, however, and a shorter, less intimidating, version may be more helpful in assisting personal litigants.

20.40 Paperless courts. Practitioners recognised that where large volumes of material are involved and need to be to hand throughout a case, then a paperless system can be invaluable. However, there was a feeling amongst these practitioners that paper-light courts rather than paperless courts might be a more realistic aspiration in judicial review, where evidence is by way of affidavit and there is perhaps much more reference to the trial bundle than in other courts, with brief pleadings and more oral evidence. In that regard, a practical step that could be taken is the imposition of earlier deadlines for the provision of trial bundles to allow for the agreement of core bundles. For my own part, I reiterate the conclusions in chapter 3 that the march towards paperless courts is inevitable and the paper-light concept is but a stage on the way to that goal. Judicial review will be part of that process.

20.41 Mediation/alternative dispute resolution (ADR). The practitioners who made up the sub-group on judicial review did not consider there was a particular need for mediation/ADR in judicial review proceedings in Northern Ireland. Generally, the question in judicial review proceedings will be whether a public law decision was lawful or not. Arguably, that is generally not something that can be resolved by mediation or ADR.

20.42 Having said that, the group accepted there may be particular cases or types of case that could benefit from mediation/ADR. Some special educational needs cases could, for example, fall into this category. There has been a recent example of successful mediation in high-profile judicial review proceedings involving a dispute about fees between the Bar Council and the Department of Justice. The practitioners considered that mediation/ADR is best considered on a case-by-case basis in judicial review.

20.43 I share the views of our wider committees who thought that this view was too confined. I would welcome stronger endorsement of the use of ADR both pre-action (as advocated in the Judicial Review Pre-Action Protocol) and once leave has been granted but before the substantive hearing, including the greater use of time-limited stays. Such encouragement could be applied, with beneficial effects, not only to planning and compensation challenges[7] but also to cases concerning community care

[7] The Killian Pretty Review 2008 into the English planning system recommended that 'greater use of alternative dispute resolution approaches should be encouraged at all stages of the planning application process where this can deliver the right decisions in a less adversarial and cost efficient way.'
The joint report from the Planning Inspectorate and the National Planning Forum from June 2010 recommended that mediation should become a part of the planning process.

and education disputes, particularly where due process issues are involved over, for example, adequacy of consultation and reasons.

20.44 Difficulties will, of course, arise and in certain circumstances ADR will be obviously unsuitable from the outset. For example, the respondent would sometimes have the difficulty of not being entitled to reverse the decision, either at all or without the consent of a notice party who had been granted a planning permission.

20.45 Moreover, some practitioners consider there to be a tension between the constitutional and supervisory role of judicial review, on the one hand, and the private and confidential nature of mediation on the other. The principle that judicial review is an important constitutional check on the power of government does not, for some, sit easily with the idea that disputes could be settled in a confidential mediation[8].

20.46 However, this may be more of a theoretical problem than a real one. Save in a few cases, what a claimant is trying to achieve in a public law challenge is the best outcome for that particular claimant. There is, therefore, no principled reason why that outcome should be achieved by way of judgment rather than a mediated settlement. The fact that many judicial review claims settle suggests that having a public airing of the issues is not, for most claimants, a priority.

20.47 In private law disputes, parties are free to reach settlements that are based on their interests rather than legal entitlements; it can be rather different in a judicial review claim. There can be issues to consider such as *vires*, resources and issues of wider public interest that might limit the scope for settlement. It seems to us, however, that this concern can, in the vast majority of cases, be met by having a mediator who is familiar with the powers and decision-making processes of the public body in question or with the area of law in dispute.

20.48 In practice, there is no reason why many judicial review disputes cannot settle without requiring any sort of intervention from the court. The nature of the remedies in judicial review is such that public bodies can avoid the challenge simply by agreeing to reconsider and come to a fresh decision. This is often the quickest and

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In 2011 the Public Law Project published *Mediation in Judicial Review: A practical handbook for lawyers*. This can be found at http://www.nuffieldfoundation.org/sites/default/files/files/MJRhandbookFINAL.pdf.
There is now a short guide to mediation in planning, which was endorsed by the then Minister for Planning, Department for Communities and Local Government.

[8] Indeed, the special status and function of public law was recognised in the 2001 UK Government pledge to use ADR to resolve disputes involving government departments wherever possible. The pledge specifically excluded public law and human rights disputes. The exclusion reflected the then Lord Chancellor Lord Irvine's view that, while ADR has an expanding role within the civil justice system, 'there are serious and searching questions' to be answered about its use and that it was 'naïve' to assert that all disputes are suitable for ADR and mediation. Examples cited by Lord Irvine included cases concerning the establishment of legal precedent, administrative law problems, and cases which 'set the rights of the individual against those of the state'. These, he said, must be approached 'with great care'.

cheapest way out of a dispute for a public body. In this context, mediation has perhaps a role to play in public law disputes[9].

Responses

20.49 Subject to the riders encapsulated in the narrative of this chapter, responses to this chapter have been universally in favour of the changes proposed. This is unsurprising, given that the conclusions in this chapter were helpfully informed by the work of practitioners in judicial review from both bodies of the legal profession.

Recommendations

1. Judicial review applications that have as their subject matter issues that are within the jurisdiction of more specialist courts to be transferred to those courts for hearing. **[CJ186]**
2. Such transfer to occur at an early stage for case management in that court. **[CJ187]**
3. The criminal/civil causes distinction in judicial review to be abolished by a statutory amendment to the *Judicature (Northern Ireland) Act 1978* save that rules of court should permit a Divisional Court to be assembled in any case where a Single Judge considers it necessary. **[CJ188]**
4. The judicial review pre-action protocol to be revised. **[CJ189]**
5. Leave to apply for judicial review to be granted on the papers, with an oral hearing arranged only if the judge is minded to refuse leave. There should not be a facility to refuse leave on the papers. This development should retain the benefit of directions/timetabling being given when leave is granted. **[CJ190]**
6. A greater emphasis on compliance with the pre-action protocol and costs penalties where it is not adhered to. **[CJ191]**
7. Unless a special request for more time is sought and granted, leave hearings not to last beyond 11 o'clock on any morning. **[CJ192]**
8. A practice of not listing more than two leave hearings on a day to be instituted. **[CJ193]**
9. The promptness requirement for judicial review proceedings to be abolished. **[CJ194]**
10. Special day(s) to be set aside for reviews and hearings of cases involving personal litigants. **[CJ195]**
11. The production by the Northern Ireland Courts and Tribunals Service of a guide for personal litigants and others who may use the Judicial Review Court. **[CJ196]**

[9] 'Alternatives To Litigation In Public Law Disputes' by Katie Scott and Tom Tabori 2016.

12. Greater judicial encouragement of alternative dispute resolution in appropriate judicial review cases together with a more flexible approach to protective costs orders. **[CJ197]**

21

Defamation

Current position

21.1 The essential purpose of defamation law is to protect an individual's reputation from harm caused by the publication or broadcast of false and damaging statements. The remedies include damages but, significantly, might also include a right to a public apology, both of which vindicate the reputation.

21.2 Despite globalisation of many legal issues, defamation laws do not transcend borders but rather each country is regulated by different legal rules. In addition to the global multi-jurisdictional legal structure, the issues at stake are vast, subjective and intrinsically *sui generis*.

21.3 Defamation law is considered one of the more complex legal disputes to resolve, not only because of the myriad of personal issues that the litigants seek to address together with the intrinsically personal nature of the damage alleged to have been caused, but also because of the fact that the issues at stake will of themselves evolve as society develops and values, morals and opinions change. There is no tick-box standard and no definitive procedural objective list.

21.4 The question of what is or is not defamatory changes with attitudes, and the question can only be answered in accordance with current social and moral opinions of that particular society.

21.5 Costs. The absence of legal aid for defamation actions, in common with the rest of the UK and the Republic of Ireland (ROI), restrictions on legal insurance, access to alternative funding and the restrictions placed on lawyers working on a no win, no fee basis by the Law Society (unlike England and Wales and the ROI) have had, and continues to have, significant ramifications in terms of access to justice for the ordinary man in the street. The question of costs has been discussed in chapter 6, but some specific concerns arise in the context of defamation.

21.6 Personal litigants (PLs). While obviously the withdrawal of civil legal aid has had a major bearing on the growth of personal litigants in general litigation, that cannot apply in the case of defamation where legal aid has not previously been available to litigants. Quite often the lawyers have had to take an early view as to whether or not they believe the case is meritorious. There has always been an argument that higher-level costs were appropriate, which is a factor in driving clients from lawyers (unwise as it may seem).

21.7 If the litigant cannot fund the litigation from ready and available resources, the lawyers may proceed on a speculative basis knowing that if the claim is successful the plaintiff will be awarded damages and the costs will follow the event.

21.8 There has been no great change in this landscape other than that there is an increase in interlocutory matters coming before the courts and as a consequence of same perhaps there are more requests for interim payments from solicitors to their client as solicitors are no longer willing to incur such substantial costs up front where the client in turn is not in a position to make payments in advance.

21.9 Online dispute resolution (ODR). This concept has been discussed in chapter 4. Its unfolding developments require specific consideration in the unique circumstances of defamation actions.

21.10 Juries. Section 62(2) of the *Judicature (Northern Ireland) Act 1978* provides that if any party to the action *so requests,* an action in which a claim is made in respect of libel shall be tried with a jury (empanelled with some limited rights of challenge without cause). The way in which trial by jury is requested is governed by the Rules of the Court of Judicature (Northern Ireland) 1980. Order 33, rule 4(1) provides that the party setting the action down for trial must specify the mode of trial that they request. If the party setting the action down requests a trial without a jury, then any other party may, within seven days after receiving the notice of setting down, lodge a request in the appropriate office that the action be tried with a jury and must, within 24 hours after lodging such a request, send a copy thereof to every other party.

21.11 If that procedure is followed and trial with a jury has been requested, then a counter-application can be made for the action to be tried without a jury. The court *may* order that the action or any issue of fact in the action shall be tried without a jury *if it is of opinion* that such trial (a) will substantially involve matters of account; (b) will require any protracted examination of documents or accounts or any technical, scientific or local investigation which cannot conveniently be made with a jury; (c) will be unduly prolonged; or (d) is for any special reason (to be mentioned in the order) unsuitable to be tried with a jury[1]. The onus is on the party applying to establish one of the grounds (a) to (d) to persuade the court to exercise discretion.

21.12 There is, therefore, currently a presumption in favour of a jury in defamation actions unless the parties agree that a jury is not required.

21.13 Defamation law in England and Wales has been amended[2] by the *Defamation Act 2013* (s. 11) so that, in effect, trials of defamation cases will be without a jury unless the court orders otherwise.

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[1] *Judicature (Northern Ireland) Act 1978 s. 62(1)(2)*

[2] Defamation law in England and Wales has been amended by *The Defamation Act 2013*. S. 11 provides as follows:

'Trial to be without a jury unless the court orders otherwise.'

In s. 69(1) of the *Senior Courts Act 1981* (certain actions in the Queen's Bench Division to be tried with a jury unless the trial requires prolonged examination of documents etc) in paragraph (b) omit 'libel, slander'.

The import of s. 11 was considered by Warby J in Yeo v Times Newspapers Ltd [2014] EWHC 2853. In that case the application for a jury trial was made on behalf of the defendant newspaper. Without analysing the reasoning of Warby J he refused the application and it seems tolerably clear from his judgment that the residual discretion to order a jury trial in defamation actions is unlikely ever to be exercised. The consensus amongst the legal

21.14 By virtue of the above, the starting point for actions in England and Wales that include libel or slander claims is reversed. No longer is there a right to a jury trial, subject to a timely application and exceptions with a residual discretion. Instead such actions are subject to the general rule contained in s. 69(3) that an action 'shall be tried without a jury unless the court in its discretion orders it to be tried with a jury'.

21.15 It is recognised that, in general terms, in a jury trial the judge has responsibility for legal issues arising, with the jury having primary responsibility for issues of fact. In practical terms, the above division of responsibility is not always clear-cut. Further, in many media cases the Reynolds qualified privilege defence is deployed on behalf of the defendant. Unless there are factual disputes involved in that defence, the defence of qualified privilege is a matter for the judge alone. Therefore, on an increasing basis over the years the function of the jury has diminished and that of the judge increased. This state of affairs reflects a portion of the argument that was ultimately accepted in England and Wales and which led to the effective abolition of juries.

21.16 Mediation. As in most areas of civil law, the position in defamation in this jurisdiction is that alternative dispute resolution (ADR) is an optional alternative to traditional litigation. The Pre-Action Protocol in Defamation (the Protocol) introduced in 2011 expressly encourages consideration of ADR[3].

21.17 There is no standard form for commencement of mediation or any other form of ADR. Consideration and use of ADR are not confined to pre-action and, indeed, the issue currently arises most frequently after commencement of proceedings when directions are being considered by the parties or the court or the progress of proceedings is being reviewed.

21.18 There are no available statistics on the use of ADR in defamation cases, but the perception is that reference to the Press Complaints Commission (formerly) and now the Independent Press Standards Organisation is the most frequently used alternative to litigation and that mediation or other forms of ADR are rarely used.

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commentators on the subject is that s. 11 has effected the statutory abolition of jury trial in defamation actions in England and Wales.

[3] '3.7 The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation and if so, endeavour to agree which form to adopt… claims should not be issued prematurely when a settlement is still actively being explored.'

3.8. It is not practicable in this protocol to address in detail how the parties might decide which method to adopt to resolve their particular dispute. However, summarised below are some of the options for resolving disputes without litigation:

Discussion and negotiation;

Early neutral evaluation by an independent third party (for example, a lawyer experienced in the field of defamation or an individual experienced in the subject matter of the claim);

Mediation – a form of facilitated negotiation assisted by an independent neutral party;

Reference to the Press Complaints Commission (an independent body which deals with complaints from members of the public about the editorial comment of newspapers and magazines) or the professional body of the defendant. The Northern Ireland Law Society has information regarding qualified mediators.

3.9. It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR but in a desire to resolve disputes in a cost-effective and timely way it is actively encouraged."

Inquiries to defamation practitioners in ROI and England and Wales suggest a similar current practice and usage in those jurisdictions to that described above.

Discussion

21.19 I have been particularly wary in this field not to cross the boundary between review and policy making. It is not appropriate for me as a member of the judiciary to comment on matters of government policy. As a judge, my role is to uphold the law in force from time to time. I am conscious that the Northern Ireland Executive was considering the possibility of fundamental changes to the law in this jurisdiction to bring it into line with the law in England and Wales. I am also aware of the contents of the report of Dr Andrew Scott[4], which may influence this outcome.

21.20 It is not the role of this Review to enter into that debate on policy. Nevertheless, it is an accepted convention that it is appropriate for the judiciary to comment on matters relating to the administration of justice and for the judiciary to point to possible unintended consequences of proposed government policy. The following paragraphs should be read in that context.

21.21 Costs. The general consensus of practitioners working in this field would be that allowing lawyers to accept instructions on a no win, no fee basis could improve access to the courts for those plaintiffs with limited financial means. We have dealt with this aspect of costs in chapter 6.

21.22 In order to ensure that the concept of no win, no fee arrangements are more palatable to opponents of this regime, practitioners should be encouraged to ensure best practice in so far as costs estimates are concerned and ideally to be in a position to provide the other parties and the court with an estimate of costs wherever required at a case management hearing along the lines set out in chapter 6.

21.23 While there was a school of thought amongst some defamation practitioners in favour of exploring the option of conditional fee arrangements (CFAs) that are currently available in England[5], it was generally acknowledged that CFAs had been subject to serious criticism as a result of several law firms seeking a 100% mark-up on their fees. The recommendation in England is now that the success fee be capped at 10% of the damages awarded and plaintiffs' practitioners on our subgroup thought that insufficient to match the risk of taking on such cases. We therefore adopt the approach of further investigation advocated in chapter 6 on this subject.

21.24 The law of champerty has now been abolished in Northern Ireland as in the rest of the UK[6]. Third-party funding represents a potential alternative to legal aid,

[4] "Reform of Defamation Law in Northern Ireland" published in June 2016.

[5] The point was made that had there not been a provision in England that allowed practitioners to take on cases on a CFA basis then legal developments would have been hampered. For example, the landmark privacy decision in the Naomi Campbell v Mirror litigation may have taken much longer to come to fruition, if that claim could not have been progressed on a CFA basis.

[6] See paragraph 6.53 at footnote 26.

and, subject to the terms and conditions attached to such funding, could facilitate access to justice for members of the public.

21.25 Third-party funding appears to have worked well in England and, given its apparent success in matrimonial and other claims, there is no reason to believe that it would not represent a viable alternative in support of certain defamation actions, provided that the financial implications and consequences are fully explained to the plaintiff.

21.26 We were also persuaded that there would be value in a meeting between the Law Society and the Taxing Master in order to discuss and obtain clarification regarding the approach towards costs in defamation actions in Northern Ireland. It is necessary to ascertain whether the perception widely held that such costs are taxed at a significantly lower rate than in England and RoI is correct, notwithstanding that the complexity and expertise involved in prosecuting such actions is identical throughout the jurisdictions.

21.27 Online dispute/resolution. The concept of online resolution has been addressed in chapter 4. We consider that in the context of defamation actions ODR is generally inappropriate, save perhaps:

- in simple transactional-type cases where there was available an opt-out of the ODR and opt-in to the traditional court system; or
- for very straightforward subsequent case-management reviews; or
- straightforward interlocutory applications such as unless orders and the latter with a right to an oral hearing on request.

21.28 The reasons why ODR is generally inapplicable to most substantive aspects of defamation cases are as follows:

- The majority of communications between the parties is in writing and parties must, therefore, be careful when considering the choice of words and tone of any written submissions. Meanings and words are at the core of the complaint. In relation to a multi-jurisdictional claim or an Internet defamation action, for example, where parties may reside in different parts of the world, a language barrier would make ODR an impossible dispute resolution process.
- Unlike a purely transactional dispute, the complainant's remedy is not a calculated sum of money or even a best alternative to a negotiated settlement, but is instead an objective and inexact science in determining the most appropriate remedy that might be required to vindicate reputation or indeed to find in favour of the defence.
- Whilst legal experts could be available during an ODR process when a specialised knowledge of the law is required, the lawyers would be required for much more than mere consultative purposes. Given the limited scope of the ODR written procedure in a defamation action, it is

believed that there would be no bridging of a gap between the ODR procedure and face-to-face consultations.

- If ODR were utilised in defamation actions, then invariably all actions would at an early stage require a lawyer's intervention and/or court management, thereby duplicating processes with no costs benefits of the ODR procedure.
- One of the purposes of ODR is to avoid a traditional courtroom or hearing and instead allow parties to settle their dispute online. In spite of ODR systems providing facilities for judges, mediators, or negotiators to handle disputes, the complexity of a defamation action makes it impossible to avoid oral hearings to include witness evidence as to what words were meant or understood to mean, whether an individual is identified from the words complained of and how and to what extent the words caused that complainant injury to their reputation and feelings.
- Given that the objective of a defamation action is to obtain public vindication as well as compensatory relief, ODR does not provide any benefit or enhancement for access to justice. ODR would not afford more efficient access to justice in defamation actions.

21.29 Interlocutory hearings. Even interlocutory hearings create unique online problems. Interlocutory applications specific to defamation often include:

- identification summons to determine whether an ordinary person could have identified the complainant from the publication or broadcast complained of;
- meanings summons to determine the ordinary and innuendo meaning as understood by a reasonable person reading or listening to the words complained of;
- Khanna subpoena to compel disclosure of relevant discoverable information that may or may not assist the defence of an action and which is in the possession, custody and control of a non-party;
- applications to determine the appropriate mode of trial;
- strike-out applications in terms of certain aspects of the pleadings, such as one of the complex defences or complaints asserted by a party.

21.30 Whilst there are generic, straightforward interlocutory applications in defamation, mostly pre-trial applications can be complex and often involve the necessity of oral evidence to assist parties and the court in finding their conclusion.

21.31 Moreover, the interlocutory applications in defamation actions are usually matters of fact and not of law and as such by their very nature often require witness evidence and cannot be determined by a documentary procedure.

21.32 Whilst the straightforward generic applications can be processed through online determination with the right of oral hearing at the discretion of the judge,

nonetheless we are concerned that, in most cases, preventing an oral hearing would in fact impede access to justice by precluding the right to give evidence as to when an individual may or may not have been identified or how they felt. Similarly, to prevent oral submissions and questions arising in relation to what is considered an ordinary or innuendo meaning at a certain time in society could prejudice both parties in the litigation.

21.33 Khanna subpoenas may concern documents that include, or are alleged to include, commercially sensitive material or that which is subject to public-interest immunity and may require oral submissions in order to ascertain what may or may not be discoverable in order to assist or damage a case.

21.34 Active case management with the parties present is of particular assistance in such cases because of the presence of juries and the importance of identifying the relevant questions and the structure of the case.

21.35 Further, the advent of Order 82 rule 3A(1)[7] in 1999 introduced applications to determine meaning prior to trial. These have proved useful, not just to enable the court to ensure that the case issues are properly crystallised, but also as a means by which the parties can bring an intense focus to the issues, with the potential both for resolution and a saving of costs and court time.

21.36 One way, however, to enhance due process and effect a saving on costs and increase efficiency in this arena might be the use of case management and reviews conducted by video link, email or telephone, particularly if the parties or their solicitors live a considerable distance from the court.

21.37 Moreover, while defamation/privacy cases may be especially suited to active court management, there are a number of more routine steps that are important in every case and which may often be overlooked or not addressed at all, causing unnecessary delay. They could easily be perfected online. These could include:

- orders for general discovery pursuant to Order 24 rule 4 of the Rules of the Supreme Court (Northern Ireland) 1980;
- orders for further and better particulars pursuant to Order 18 rule 14;
- orders requiring a plaintiff to set a case down for trial pursuant to Order 34.

21.38 Additionally, the court could expand the circumstances in which directions are made online. There is already an effective informal system in place whereby counsel can directly communicate with the presiding judge about such matters as skeleton arguments, the timing of witnesses, the commencement of court and a

[7] 3A(1) – 'At any time after the service of the statement of claim either party may apply to a judge in chambers for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings.
3A(2) 'If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the pleadings, he may dismiss the claim or make such other order or give such judgment in the proceedings as may be just.'

range of related trial matters. Under the current Senior Queen's Bench Judge, there has also been an increasing emphasis on email communication with the judge via the office. One party will address the judge using the central office email, while ensuring that all relevant parties are copied in to the communication. Invariably, the judge will address and communicate a response, which will, in many cases, obviate the necessity for a formal review and thereby save time and legal costs.

21.39 We recognise that there are a number of potential pitfalls to reliance on online communication, which might include:

- increasing the administrative workload on judges. If easier online access is facilitated and encouraged, the profession must ensure that it is not abused or improperly utilised;
- the special circumstances that apply when a case involves a personal litigant;
- risks associated with relevant parties not being copied in to important communications or failure in email delivery;
- expanding communication to areas that properly require a more in-depth consideration by the court;
- introducing an informality that circumvents the role of pleading and undermines transparency and clarity.

21.40 It seems likely that the growth of online communication will continue unabated. In general, the benefits to the profession in this area have been considerable, particularly as the legal professions are now accessing information in the same manner. We feel that the most appropriate method of ensuring consistency, fairness and transparency is to develop a protocol that could evolve into one or more practice directions. The court could thus give guidance on the circumstances in which online communication would be required or invited with the overall aim of increasing efficient access to justice and reducing legal costs.

Juries

21.41 The question of the presence of juries in defamation actions is again a matter for the legislature. However, we observe that, notwithstanding the changes to the jury system in England and Wales, two primary remaining functions of a jury are extremely important in the context of this jurisdiction. They are:

- Its role in finding whether or not the plaintiff had been defamed. Juries in Northern Ireland have been traditionally considered the best fact finder to judge what words or statements mean in the local context with its unique history and whether or not they are considered defamatory in any particular case.
- The assessment of damages.

21.42 In the context of Northern Ireland, where the importance of a measure of direct public involvement in the legal system should never be underestimated, we find convincing the words of Lord Denning who said as far back as 1966.[8]

> 'It (trial by jury) has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake – then trial by jury has no equal.'

21.43 It is worthy of note that each member of the defamation sub-group who primarily acted for media clients agreed that juries should remain.

21.44 However, in recognition of some of the difficulties as outlined in paragraph 21.15 that may be experienced by juries in this complex area of law, we recommend that the powers of the judge under the Judicature Act s. 62(1)(2) be expressly expanded to include a broad discretion to order trial without a jury in matters of exceptional complexity lest the present catch phrase of 'special specified reason' be inadequate to meet the needs of the present-day complexities of jury trial.

21.45 We find a logical difficulty in understanding why there has been the abolition of challenges to a jury in criminal cases save for cause but not in civil cases such as defamation. The right to challenge jurors in all civil cases, including defamation, save for cause, should be removed.

21.46 Meanings. Whilst we repeat that it is not the role of this Review to attempt to influence the policy decision on the implementation of reforms carried out in England, one of which was to introduce a new test of *serious* harm, we do draw attention to anecdotal evidence of a possible unintended consequence of so doing. At a session of a Four Jurisdictions Conference in 2016[9] on defamation, and particularly the reforms brought about in England and Wales by the *Defamation Act 2013,* a senior English QC contended that the serious harm test contained in s. 1 of the 2013 Act had added to costs, added to complexity and had led to a position of uncertainty. The question of seriousness had become a preliminary trial in a number of cases, with costs of £450,000 in one case and some £400,000 in another in relation to that preliminary issue alone. These costs have to be seen in the context of a ceiling for damages for defamation of £400,000. If the aim of the 2013 Act was to simplify and to reduce costs, this suggests it has failed in respect of the reform contained in section 1.

21.47 Without exception, all the lawyers in the defamation subgroup accepted that the current legal authorities governing the law in Northern Ireland[10] provide the court with the common-law powers to deal with a *real and substantial tort* and the appropriate level of seriousness, not as a matter of impact and evidence but as a result of the intrinsic character of the words used.

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[8] Ward v James [1966] 1QB 273 at 295;

[9] Four Jurisdictions Conference in 2016 with an address on defamation by Justin Rushbrooke QC of the Bar of England and Wales.

[10] Thornton v Telegraph Media Group (No 2) [2010] EWHC 1414 and Jameel and Anor v Wall Street Journal Europe (No 2) [2006] UKHL 44.

21.48 In the course of responses to the preliminary Civil Justice Review we have not been presented with any evidence from practitioners in Northern Ireland acting in defamation cases to show that there is 'libel tourism' — that is, that claimants are deliberately choosing to sue in this jurisdiction because of the different law from that which operates in England.

21.49 Irrespective of the test to be applied, one matter of procedure does commend itself to us in the interests of efficiency and time saving. Through the industrious researches of the defamation sub-group on the process in Australia and discussions in a telephone conference with an Australian judge Justice David Beach, we discovered that following the Uniform Defamation Laws Reform 2006, throughout courts in Australia meaning is often considered at the *start* of the proceeding to increase efficiency. If the judge did not establish that a defamatory meaning was capable of arising at the start of the proceeding, a jury may be empanelled before they have any work to do — that is, decide whether the defamatory meaning was, in fact, capable of arising. It is also efficient because defences do not need to be considered until it has been established that the article is, in fact, defamatory. The process is essentially designed to streamline the defamation process.

21.50 In our own courts, Mr Justice Stephens[11] has held in a defamation action, without serious objection from the parties, that it would be appropriate to have a preliminary issue in relation to meaning and identification. He deemed that the issues in relation to meaning and identification were relatively simple and could be hived off to be dealt with by a jury without inconvenience. If those issues were determined in favour of the more serious single meaning contended for by the plaintiff, then the defendant will not rely on its defence of justification, which is predicated on what the defendant asserts is the lesser meaning. So it is only if the jury find that the single meaning is that advanced by the defendant that it would seek to justify. The conduct of the trial would be assisted by having meaning and identification determined *at the outset,* given that it could reduce the scope and expense of further proceedings.

21.51 Mediation. It is felt by practitioners that the limited use of ADR, and particularly mediation, in defamation as an alternative to traditional litigation is due to a lack of public awareness and a degree of reluctance, or at least caution, on the part of lawyers practising in this area of law. Better publication of the existence, and potential benefits, of the various forms of ADR in defamation is required. Stronger judicial encouragement to include warnings of potential costs penalties should also be employed.

21.52 We are satisfied, however, that, in the area of defamation at least, ADR should not be compulsory. Factors that militate against the introduction of a compulsory scheme include:

- attempts to impose compulsory ADR have been largely unsuccessful in other jurisdictions;

[11] Stokes v Sunday Newspapers Limited (No 2) [2016] NIQB 1 at paragraph 35.

- there is insufficient evidence of any need for such a radical change;
- a compulsory scheme would require substantial infrastructure and a funding regime.

21.53 On the other hand, we believe that ADR in this area of law should be strongly encouraged. Refusal by a party to consider or participate in mediation, without any adequate explanation or reason, should be capable of penalty by use of costs orders in obvious flagrant cases. The 2011 Pre-Action Protocol in Defamation should be amended to make it clear that cost sanctions may be employed against those who refuse to consider participation in ADR without adequate explanation or reason. It should also indicate that the Northern Ireland Law Society and the Bar Council have information on the pool of appropriately qualified mediators for defamation cases.

21.54 Nevertheless, in the absence of evidence of bad faith, a party that has engaged in mediation should not be penalised because the mediation failed as that would involve an unwarranted intrusion into the conduct of the mediation itself. It must be borne in mind that mediation is a form of without-prejudice negotiations and confidentiality is vitally important to that process.

21.55 The increasing numbers of personal litigants provide a major problem in this complex area of law. The difficulties managing traditional defamation court litigation are no less challenging in most forms of ADR. It is felt that any changes to assist personal litigants in traditional litigation, such as attempts to make the procedure less difficult and more accessible for them, should be echoed in any publications, forms, guidelines or procedures for the various forms of ADR. The range of ADR options and the flexibility within those options, such as the nature of mediation model to be applied, should make it a particularly valuable and attractive alternative to litigation for personal litigants.

21.56 Personal litigants. As set out in chapter 12, more statistical evidence is required on the numbers of PLs involved in defamation proceedings and the outcomes of actions involving them. For example, it would be helpful to have some statistical survey carried out illustrating the number of defamation proceedings brought both in the High Court, and, for that matter, the county court, on an annual basis involving at least one PL either from the outset of the proceedings or, indeed, for that matter, as the proceedings continue and representation is dispensed with during the course of the proceedings.

21.57 Chapter 12 relays the experience of both judges and practitioners and reveals that PLs are appearing in the courts in ever increasing numbers and with greater frequency. The reasons behind this are adumbrated in that chapter. An additional reason in this area of litigation is that it is easy for disgruntled individuals to post defamatory allegations on the Internet. These publications can be very damaging if the person making the allegation succeeds in attracting any viewers. In the past, it was more difficult for disgruntled individuals to be able to inflict serious damage to the reputations of those with whom they were in dispute.

21.58 All of the proposals previously made in this Review about PLs apply perhaps with even greater force in this area of the law, especially when juries are in play. The need for simplification of the process in the court rules and court procedures to make their growing involvement more manageable and productive is vital.

21.59 The proper approach to the phenomenon of increasing PLs in defamation actions perhaps lies in:

- Alternative means of financing, for example no win, no fee and third-party funding. If it is the case that such funding is not forthcoming, then it is likely that the number of PLs will inevitably grow and place an even further strain on court resources as the system for administration of justice currently is not designed for unrepresented parties.
- An early review system with firm case management from the outset. Summary disposal should be actively encouraged at an early stage where cases are self-evidently wholly unmeritorious
- Encouragement of more pro bono participation by the professions, especially in the field of assisting with pleadings and disclosure.
- Some changes in mind-set, particularly with a view to a more flexible approach to court rules, perhaps particularly with regard to such formal matters as pleadings, when PLs are involved. The use of simple plain English in protocols, court rules and procedures should be strongly encouraged.
- The power to invoke a more inquisitorial role by a judge as has already been addressed in chapter 12[12].
- A recognition that an increasing resort to interlocutory hearings (which may lead to requests by solicitors for interim payments) requires firm case management and early determination. Such applications may be pushing PLs to the forefront as solicitors are no longer willing to bear the costs risk, accruing as it does throughout a protracted period leading up to the trial.
- Encouragement of the process of ADR, albeit that it is not clear how successful ADR has been in the defamation arena, given the nature of the remedy that is often sought by the claimant — that is, vindication of reputation.
- A proactive and robust approach to vexatious litigants.

Responses

21.60 Once again, in the wake of this chapter being prepared with the aid of extensive input from legal experts in the field of defamation, there has been general approval for the approach adopted therein.

[12] Mole v Hunter [2014] EWHC 658 (QB).

Recommendations

1. Reviews (other than the first review and case-management hearings), where appropriate, to be conducted by video link or Skype, telephone or email. Court hearings for further reviews should be reserved for exceptional circumstances. Parties, upon agreement and with the approval of the judge, may proceed to pre-trial case management through an agreed Order for Directions. **[CJ198]**
2. Consideration to be regularly given to the disposal of generic, straightforward Queen's Bench interlocutory applications through online determination with a right of an oral hearing on request by either party. **[CJ199]**
3. The right to challenge jurors in civil proceedings, save for cause to be removed. **[CJ200]**
4. Jury trials in defamation cases to be retained but the powers of the judge to be expanded to include a discretion to order trial without a jury in matters of complexity. **[CJ201]**
5. The 2011 Pre-Action Protocol in Defamation to be amended:
    - to make it clear that cost sanctions may be employed against those who refuse to consider participation in alternative dispute resolution without adequate explanation or reason; and
    - to indicate that the Northern Ireland Law Society and the Bar Council have information on the pool of appropriately qualified mediators for defamation cases. **[CJ202]**
6. Consideration to be given at the outset of a trial for the jury to determine simple matters that may permit the flow of the trial thereafter to be more focused, less time-consuming and, therefore, cheaper. **[CJ203]**
7. A more flexible approach to court rules, perhaps particularly with regard to such formal matters as pleadings, when personal litigants are involved. **[CJ204]**

22

Clinical negligence

Current position

PAPERLESS COURTS

22.1 There is no paperless court in Northern Ireland at the present time. Arrangements for paperless trials in clinical negligence cases have been set up, but the cases settled in advance of hearing and in such circumstances no case actually proceeded.

22.2 Disclosure of medical records from Directorate of Legal Services is now by way of digital disc. Records from other sources, in particular general practitioners, still tend to be received in hard-copy format.

22.3 In Scotland, the courts have yet to move to paperless trial. Evidence is lodged with the court and placed in the court process up to a specific period of time before the proof. In the Republic of Ireland, e-discovery has applied in commercial cases, with some case law rising. E-discovery does not apply in medical negligence cases, where the volume of documentation is miniscule by comparison.

22.4 The Queen's Bench Clinical Negligence Liaison Sub Committee (QBCNSC) of practitioners is in favour of paperless courts in clinical negligence cases.

22.5 Whilst there are accepted to be difficulties with the introduction of such a court, those difficulties could and should be overcome. While introducing a 'guillotine' in terms of the use of paper was considered likely to be counter-productive at the outset, use of a paper-light core bundle should still be used by the court and the parties as a transitional stage. That should be limited, in the vast majority of cases, to no more than 100 pages.

INTERLOCUTORIES AND REVIEWS

22.6 The present practice in Northern Ireland is that interlocutory hearings and reviews are, by and large, conducted by way of oral court attendance hearings. There is a facility, within the Masters Review Procedure, to elect to proceed by way of a telephone review, with the consent of all parties. The majority of reviews, however, continue by way of oral hearing.

22.7 There is no facility at the present time in Northern Ireland for cases to be formally reviewed by the judge other than by way of oral hearing, although in individual cases where the parties consent, an agreed Order for Directions can issue.

22.8 In Scotland, the situation is similar: review hearings taking place before the open court. In the Republic of Ireland, interlocutory hearings (motions for directions) proceed by way of oral hearing and arguments.

22.9 In England and Wales, unless there is a substantial degree of agreement, it is unlikely that the Masters will hold a telephone case-management conference. However, if all directions are agreed and a suitable consent order is drawn, then the matter may be dealt with by post or email, although a telephone conference may be held if there are issues to be discussed, but that will not result in a hearing of more than 30 minutes.

22.10 Parties need to ensure that all papers are directed to the Master in good time to assist the determination of any issues that may arise. As in Northern Ireland, a draft of proposed directions may be sent to the Master. There are model directions for clinical negligence cases and they are similar to the directions that operate in this jurisdiction.

22.11 As regards interlocutory hearings in England and Wales, the said applications may be moved by telephone where a telephone conference-enabled court is involved. In such circumstances, an interlocutory hearing with a time estimate of less than one hour will be conducted by telephone unless the court otherwise orders. In practice, the clinical negligence Masters in the Royal Courts are increasingly making orders on telephone hearings, but will only do so if a draft of the proposed order is supplied as an emailed attachment.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

22.12 ADR has been considered in chapter 9. The QBCNSC has considered the issue of mediation/ADR in this genre of cases. Overall resolution of a claim (negotiations/discussions/mediation/arbitration) was viewed as a positive thing when it comes at a stage when the parties know what the case is about — that is, after the exchange of expert evidence. In Northern Ireland, the court has the power to ask the parties to consider mediation, but it cannot compel it at this point. If the parties do not wish to mediate, then they cannot be forced to do so. However, all the previous comments we have made throughout these chapters about the benefits of mediation and the need for strong judicial encouragement with cost consequences for those who flagrantly ignore the possibility apply in this instance.

ACCREDITATION

22.13 In Northern Ireland, there is no requirement for a solicitor to hold any particular qualification in order to litigate a clinical negligence case. It is, however, noted that in this jurisdiction to practise, for example, in Children's Order work, the individual solicitor must be certified as a Children Order Panel member. Applicants are required to submit a formal application, they must attend a short course, undertake an exam and thereafter an interview. Subject to qualification, they are appointed for a period of two years and can be re-accredited thereafter.

22.14 In England and Wales, the situation has changed in recent years. Prior to the retreat of legal assistance, in order to avail of legal-aid funding, the practitioner applying on behalf of the client had to be a member of the Legal Services Commission Clinical Negligence Panel. Practically, that meant that in order to gain that qualification, the individual practitioner also had to be accredited by Action

against Medical Accidents (AvMA), the medical accidents charity. Since then, the availability of legal aid has been significantly restricted in England and Wales and the market has opened up again. There is now no restriction on who may take a clinical negligence case, and there has been an influx of new firms bringing clinical negligence claims, since the introduction of fixed fees for personal injury claims made them less lucrative[1]. Our clinical negligence subgroup considered that this has led to a reduction in the quality of litigation in that jurisdiction.

22.15 There is no requirement in either Scotland or in the Republic of Ireland to hold any particular accreditation. Our group asserted that all clinical negligence lawyers can advise of cases, in their experience, that have either been incorrectly withdrawn or settled below value because of a lack of experience on the part of the lawyer taking the case. Generally, inexperience does not manifest on the defendants' side.

EXPERT INSTRUCTION

22.16 The use of single joint experts varies throughout the jurisdictions. Single joint experts are rarely used in Northern Ireland and only then with the agreement of the parties. Whilst the experts owe a duty to the court, even in cases where liability has been admitted, there is a wide variation between experts reporting on behalf of the plaintiff and those reporting on behalf of the defendant.

22.17 In England and Wales, the court has the power to direct that evidence is to be given by a single joint expert in an action. If the parties cannot agree who should be the single joint expert, the court may select the expert from a list prepared or identified by the instructing parties or direct that the expert may be selected in such other manner as the court may direct. It is noted that the use of single joint experts in clinical negligence cases is rare, save in relation to certain categories of quantum experts[2]. In England and Wales, where there are a number of defendants the court may order one joint expert for all defendants on liability/causation. This occurs very rarely as there are often arguments between the defendants on breach of

[1] In England the distinguished Queen's Bench Master Cook, giving his personal opinion at a seminar at 7 Bedford Row in the course of 2016, is reported to have said there were more 'non-specialist firms' moving into clinical negligence, lacking the necessary understanding or experience. He added: 'This causes very real difficulty and extra cost for the defendant firms that have to deal with them, and impacts on court resources… The irony is that under the legal aid system the quality of solicitors undertaking clinical negligence work was assured by the requirement of panel membership.'

[2] In Oxley v Penwarden [2001] CPLR1 the Court of Appeal supported the flexibility of the Clinical Negligence Pre-Action Protocol for clinical disputes with regard to expert evidence and confirmed that the CPR does not provide a presumption that a single joint expert will be instructed in every case, particularly in clinical negligence claims where causation of injury is at issue. The use of single joint experts in clinical negligence cases has caused problems in England and Wales as was highlighted in the case of MP v Mid Kent Healthcare NHS Trust [2001] EWCA Civ 1703. In that case the claimant wanted a non-medical single joint expert to attend a conference with counsel in the absence of another party. The Court of Appeal refused consent on the grounds that all contact with the single joint expert must be transparent and such an expert's report would usually be the only evidence that he would give and one party could not be fairly permitted to test it before trial without the involvement of the other. The court took the view that usually there should not be a need to amplify or test the report of a single joint expert at trial by cross-examination. In certain cases, however, that will result in an injustice and the court may consider it appropriate to allow the single joint expert to attend a hearing prior to trial for the purpose of cross-examination.

duty/causation. In respect of the quantum issues, there is frequently one expert retained by joint defendants.

22.18 There is no provision in Scotland for the instruction of joint experts. As in Northern Ireland, the use of joint instruction of a single expert is rare in Scotland, but there is a well-used procedure in Scottish civil courts for lawyers to submit a joint minute of the evidence on which both sides agree.

22.19 The position is similar in the Republic of Ireland. There is no power to order the instruction of a single joint expert in the Republic of Ireland although, on occasions, the parties may agree, on an *ad hoc* basis, to do so. A single joint expert may be appointed where there is no real dispute concerning the evidence likely to be produced, or in lower-value cases in relation to quantum. It is not the practice that single joint experts are retained to address matters such as accountancy, care or occupational therapy. The reality is that reports produced in high-value and complex cases dealing with these issues are, in the opinion of the profession, rarely possible to produce on a single joint expert basis. If single joint experts are appointed to address such matters other than by agreement, then there is a very real risk of injustice to individual plaintiffs arising from such instruction.

SCALE FEES FOR EXPERTS

22.20 The use of scale fees for experts, instructed to report to the court, is rare throughout the United Kingdom and the Republic of Ireland. Scale fees do not apply in Northern Ireland. A plaintiff lawyer, with the benefit of a legal-aid certificate, will be required to obtain prior authority from the Legal Services Agency in relation to the instruction of an expert. The Legal Services Agency exercises a cost control at the time of instruction. The Legal Services Agency will require the plaintiff's solicitor to obtain quotes in relation to the preparation of an expert report from at least two, and more frequently three, suitably qualified experts. Instruction is then based upon the value.

22.21 In such circumstances, the costs of retention of an expert are controlled. In the event that the claim is successful, the defendant has the benefit of that mechanism for controlling costs. Likewise, when experts are retained by a privately paying client, that privately paying client will wish to secure value for money in the production of a report. It is commonly the case that a series of quotes will be obtained before an expert is instructed. Scale fees do not apply in the Republic of Ireland, Scotland or England and Wales.

WHERE CLINICAL NEGLIGENCE CASES SHOULD BE HEARD

22.22 In Northern Ireland, clinical negligence cases with a value of less than £30,000 are being heard in the county court. There are difficulties with clinical negligence cases proceeding in the county court. Such cases can be included in lists with other cases. There is a risk that they will not be reached. In the event of adjournment, significant witness expenses, involving experts from outside the jurisdiction, will be incurred. It is difficult to secure listing for more than one consecutive day. In

practice, the majority of clinical negligence cases are moved within the jurisdiction of the High Court.

22.23 In England and Wales, where the case is heard is determined by value and complexity. Some smaller claims can be heard in the county court.

22.24 In Scotland, reforms of the civil court system were implemented in September 2015. There are two levels of civil court in Scotland. The Court of Session is based in Edinburgh and the Sheriff Courts are throughout Scotland. A claim of less than £100,000 must be raised in the Sheriff Court, but there is no upper limit. The Court of Session deals with claims valued over £100,000. There is also a new All-Scotland Sheriff Court to deal with personal injuries, which will sit in Edinburgh. Its jurisdiction is for personal injuries between £5,000 and £100,000.

22.25 In the Republic of Ireland, clinical negligence cases can be heard in all of the courts: District, Circuit and High Court. The value means that most cases are heard in the High Court but the recent increase in the Circuit Court to a monetary jurisdiction of €65,000 has led to more Circuit level cases. People nonetheless still generally try to issue in the High Court. This is because of greater efficiency of the system and more specialist judges. All clinical negligence cases are heard in the High Court in Dublin, by practice direction. The clinical negligence sub-committee considered this matter, and it was the consensus opinion of that group that the High Court is generally preferable for clinical negligence cases, although the county court could be used in some more straightforward matters.

WITNESS STATEMENTS

22.26 We have already explored the position on witness statements in chapter 7. However, the concept does have a particular resonance with the complexities of clinical negligence and hence we have revisited it again in this context.

Discussion

PAPERLESS COURTS

22.27 There is an agreed recognition that there is use of an excessive amount of paper in court, particularly the main hearings in clinical negligence cases. There should be a core bundle of materials of perhaps no more than 100 pages in clinical negligence cases subject to some flexibility at the judge's discretion. Subject to the requirement of the use of a core bundle, paperless courts should be introduced in this class of cases to effect costs savings and efficiency. We emphasise, as we did in earlier chapters, the need to equip a court or courts with the technology required since moving to a paperless court concept is dependent upon this.

INTERLOCUTORY HEARINGS AND REVIEWS

22.28 We consider that there are real cost savings to be realised by all parties in the event that interlocutories and reviews are conducted by telephone. Reviews (other than the first review) should be conducted by video, telephone or email, with court hearings reserved for exceptional circumstances. We have been informed that there

has not been a great uptake of the current offer of telephone review hearings in front of the Master. If this reluctance continues, we recommend moving to a stage where telephone hearings are positively directed by the Master or judge. A trial system whereby the review hearings are by telephone only with assigned time slots being given to solicitors has now been trialled since the preliminary Civil Justice Review. The Master reports that initially this worked extremely well and he is optimistic that such a system will be successful. There has been a temporary hiatus arising out of staffing issues that, hopefully, will be soon ironed out and this process will successfully continue. Parties may agree to dispense with the requirement for an oral hearing and proceed simply by way of an agreed Order for Directions.

22.29 Interlocutory hearings could be conducted by video, telephone or email in straightforward matters. Oral hearings with court attendance should be reserved for those cases where disputed and/or substantial issues arise. We recognise that in the field of clinical negligence typically interlocutory hearings are not simple and that these recommendations may in the event apply only to the less typical cases. One concern that has been raised is the need for reassurance that videos, e-mails and telephone calls are not being recorded/shared and later, for example, displayed on the Internet. Lack of understanding and the need for time limitation may also arise in hearings with unrepresented parties. Consequently, the discretion of the court will need to be exercised carefully in deciding whether such hearings should be conducted by telephone, video or email.

ALTERNATIVE DISPUTE RESOLUTION

22.30 It is the opinion of the clinical negligence sub-committee that what is actually required is an opportunity to consider the settlement/resolution of an action as and when liability has been determined. The issue of liability is the key. Realistically, in clinical negligence matters, that will not occur until such time as exchange of medical evidence has taken place and, potentially, experts have met, produced Scott Schedules and agreed same.

22.31 At that point, if liability has been admitted or it is clear that liability will accrue, then in those circumstances the sub-committee felt that it would be beneficial to have an opportunity to consider whether the case can be disposed of by way of negotiation, discussion or mediation.

22.32 At the present time, cases are listed for negotiations approximately eight weeks prior to trial. It is felt that the parties would benefit from an earlier listing for negotiations, prior to the expenses of trial being incurred. However, the listing of the action for hearing should not be dependent upon the parties seeking to resolve the case by alternative means.

22.33 The view of the practitioners on the clinical negligence sub-committee was that this period should be some six to nine months prior to trial after close of pleadings, exchange of evidence and preparation of expert schedules. This time period was built in to allow for the difficulties that are involved with setting a mediation up and making sure, for example, that particularly in complex cases

experts are all available on the same date, etc. The judicial view has been that this period should be three months in line with the aspiration of the Queen's Bench Division to provide swift and effective litigation to parties. This is particularly the case in clinical negligence cases where they do take longer to set up and it is not unusual for litigation to be considering events from several years before. It seems to us that there is much to be said for the judicial view and whilst typically in particularly complex cases the Master fixing the trial date might allow a period of six to nine months, a period of three months between negotiations and trial should be the aspiration. Accordingly, a recommendation to embrace both aspects is that a period for negotiation/discussion/mediation should be provided after close of pleadings, exchange of evidence and preparation of experts' schedules within a suitable time, typically, although not always, three months, depending on the complexities of the case. It is considered that proper case planning, by way of case-management direction, would permit the life cycle of the case to be organised so as to permit negotiations/alternative dispute resolution to take place at a sufficient distance from trial to ensure that if the discussions were successful, there would be significant costs savings in terms of witness and trial expenses.

ACCREDITATION

22.34 The issue of accreditation, ultimately, is about access to justice for vulnerable members of society. Most views, with the exception of the Bar Council and the Law Society, that were expressed on this topic were in favour of a system of accreditation for clinical negligence lawyers, both solicitors and barristers.

22.35 The professions should be responsible for accreditation. There ought to be a right of appeal if accreditation is refused. In the event a party remains dissatisfied, then the usual administrative remedies may be considered. It is important that accreditation does not act as a bar to the admission of junior and inexperienced members of the professions to the panel nor to the development of the said junior professionals in this field of practice. In the circumstances, there ought to be a mechanism to permit panel qualification at a junior level in the first instance. The bar should not be set so high as to exclude all parties except those capable of financing training and obtaining qualifications. As regards the Bar, it is not considered necessary for a QC to be accredited. The qualification of QC is in itself a badge of excellence.

22.36 A counter-argument surfaced within the Northern Ireland Bar, where it was asserted that compulsory accreditation will be regarded as another obstacle for young barristers. It is for the solicitor to identify the barrister competent to deal with the initial stages of a case, drafting of pleadings, interlocutory applications, etc. The Bar Library system operates on the basis that younger counsel have access to more senior members to assist them and advise them. The Bar is made up of independent practitioners. Issues will arise as to whether the professional body has any power to require accreditation or certify in respect of same.

22.37 I consider that the introduction of a system of accreditation for solicitors and junior counsel who wish to practise in the area of clinical negligence is crucial in the

interests of the public at large. No longer can we tolerate such highly complex and high-value cases being left in the hands of those who have not demonstrated an expertise in this specialised field. This should not apply to senior counsel, who wear the badge of excellence by virtue of their professional status. It should be a simple task for the professions to set up a mandatory accreditations system in clinical negligence. It could, for example, amount to a series of lectures on various aspects of clinical negligence that those who wish to carry out this work must attend. We understand that in the past the Bar has provided six-week courses for chancery and commercial work barristers. Something similar, but on a mandatory basis, should be provided for clinical negligence. This would ensure that clinical negligence work was kept open to all, save that this form of training and accreditation was required to ensure that the standard of knowledge with regard to medical procedures and anatomy was kept up to the necessary standard. In short, a system of masterclasses should be the necessary accreditation required. Even this modest measure would be less intrusive than previously had been the case in England where the Legal Aid Board were the gatekeepers and solicitors required accreditation in order to secure a legal-aid certificate.

EXPERT INSTRUCTION

22.38 The proposal to instruct a single joint expert (as opposed to joint *selection* of joint experts that we encourage in chapter 6) may be attractive in principle to some; however, it is felt that, in practice, it will be extremely difficult to apply. It will be difficult for parties to agree to the instruction of a single joint expert. It will require a significant change in the mind-set on the part of experts reporting to the courts. It is felt that the introduction of a requirement to instruct a single joint expert will give rise to a host of secondary litigation concerning instructions and the reports, when received. In short, we consider that the court should have the option to request the parties to consider the use of a single joint expert wherever possible, but the court should not have the power to order the use of a single joint expert unless agreed by the parties.

SCALE FEES FOR EXPERTS

22.39 We are persuaded that if scale fees in clinical negligence cases are introduced in Northern Ireland, then experts used in clinical negligence work, from a plaintiff perspective, who predominantly come from outside the jurisdiction, may well be deterred from undertaking work in Northern Ireland because it does not pay at a rate or level equivalent to other jurisdictions. Such a two-tier system is already beginning to develop as a consequence of costs restrictions imposed by the Legal Aid Agency in England and Wales[3]. Experts in those jurisdictions are refusing now to take on legal-aid work at reduced rates because private fees remain at previous levels.

[3] The distinguished Queen's Bench Master Cook giving his personal views at a seminar hosted by 7 Bedford Row in the course of 2016 expressed concerns about government plans to push ahead with fixed costs in clinical negligence cases worth up to £250,000. Master Cook said he believed fixed costs should not be extended beyond claims worth £50,000 without first engaging in 'proper scrutiny' of the effects.

22.40 However, we have already dealt in chapters 6 and 11 with the issue of expert fees. Those comments and recommendations still obtain in the field of clinical negligence. Thus, for example, case-management reviews need to be focused upon the need for expert evidence and/or the cost of same (including expert costs budgeting). Courts should encourage, where appropriate, the selection and use of joint experts and concurrent evidence. Ultimately, the judge holding the case-management hearing must be able to control the costs of the experts if they deem it appropriate to do so. In most standard run-of-the-mill cases, such perusal may be little more than perfunctory but the power to intervene, for example in catastrophe cases, must be available.

WHERE CLINICAL NEGLIGENCE CASES SHOULD BE HEARD

22.41 If our recommendations are accepted, the jurisdiction of the county court will rise to £60,000. Nonetheless, clinical negligence litigation will usually, by reason of complexity and/or value, proceed in the High Court. Cases may be considered in the county court, if sufficiently straightforward. However, we consider that, given the complexity of such cases, county court judges should usually refer such cases up to the High Court, save in those few cases where they are considered straightforward and without the usual accompanying complexity.

WITNESS STATEMENTS

22.42 It is accepted that the preparation of witness statements can be difficult for both sides in a clinical negligence case for the reasons set out in chapter 7.

22.43 Whilst it is accepted that the preparation of such statements could lead to an increase in the cost of preparation of a hearing, it is not disputed that witness statements would help to clarify the factual matrix of a claim for the experts before they report, particularly in claims, for example, dealing with the issue of consent.

22.44 Moreover, evidence from a witness statement would be particularly useful for witnesses of fact in this genre of case (for example clinicians and nurses) whose evidence is uncontroversial and greater use should be made of *The Civil Evidence (Northern Ireland) Order 1997* to present it by way of statement. Somewhat surprisingly, little use is currently made of the Civil Evidence Order process.

Responses

22.45 Responses to the civil justice preliminary review were generally favourable on this chapter subject to two areas.

22.46 First, both the Law Society and the Bar Council raised concerns about accreditation. The Law Society cautioned that moving towards a mandatory arrangement should be weighed against the fact that professional training already requires demonstration of core skills and that the gaining of experience for junior solicitors is critical. Making the system mandatory, it was contended, may impact on the ability of junior solicitors to gain appropriate experience under the supervision of a Master due to the reducing area of work available. The society points to the general professional obligation for solicitors only to take on work that is within their

skills and competencies to conduct. The general professional obligation is a cornerstone of the Solicitors' Practice Regulations 1987 and the risks involved in stepping outside these boundaries in terms of client care are evident. Moreover, it asserts that the professional training received by solicitors in the requirement to undertake continuing professional development acts as a counter-weight towards following a model based on accredited specialisms across all areas of law.

22.47 The Bar Council were of the view that a system of compulsory accreditation for junior counsel only would also represent a significant hurdle to the development of younger members of the profession in this field of practice. It asserted that barristers learn about skills and good judgement from sitting as a junior behind a senior counsel, and mandatory accreditation might have the potential to undermine the opportunities that would be available for barristers to gain valuable learning experience.

22.48 We consider that these objections, whilst genuinely held, perhaps misunderstand the nature of the accreditation process that we suggest. The accreditation would be created by the professions themselves and would be built around mandatory attendance at a series of masterclasses. These would be provided on an annual basis perhaps and therefore any delay in solicitors or barristers becoming sufficiently accredited would be very short term and, depending on the commitment to attend these lectures, could prove to be invaluable from the public's point of view. We are satisfied that they would have a very beneficial impact on the quality of representation and increase true access to justice for vulnerable members of society in the future.

22.49 Accreditation is an idea whose time has come in such areas and it is highly significant that outside the views expressed by the legal profession, all other members of our committees representing the public voiced strong approval for accreditation in this field. Registration legislation currently in being will involve a means of assessment to perform publicly funded work. The professions should be pro-active in terms of dealing with this and not have it forced upon them. The future is designed for specialists in this area of which clinical negligence is a classic example.

22.50 Secondly, whilst the use of single joint experts and witness statements has been welcomed by the professions, they raise concerns about the suggestion that the courts be empowered to impose such a requirement in individual cases.

22.51 If, as we believe to be the case, case management should be increasingly judge-led the cultural change required in the civil justice system inexorably points to the court being empowered in the last analysis to enforce these changes where the parties simply cannot agree. Clearly in most instances the approach jointly advocated by the parties will carry great weight. But, ultimately, if the mind-set does not change and the use of single experts does not gather momentum, it may well be necessary to introduce a power to the courts to order this to happen. In the meantime, we are satisfied that the ethos may well change in the wake of strong

encouragement by the courts in appropriate instances. Hence, whilst we consider that currently it is important that the courts be empowered to order witness statements in obvious cases, it may not be necessary to empower the court to order single experts in the hope that a mind-set will gradually develop whereby the parties agree such use. Ultimately, however, if this does not develop, then courts will require to be empowered to order single experts in appropriate instances.

Recommendations

1. Movement to a paperless court concept, accompanied by the concept of paper-light provision, to be encouraged in clinical negligence cases. **[CJ205]**
2. Reviews (other than the first review and case-management hearings) to be conducted by video, telephone or email, with court oral hearings reserved for exceptional circumstances. **[CJ206]**
3. Parties to be permitted, with the approval of the court, to agree to dispense with the requirement for an oral hearing and proceed by way of an agreed Order for Directions, subject to court approval of the directions. **[CJ207]**
4. Interlocutory hearings to be conducted by video, telephone or email in straightforward matters, subject to the discretion of the court. Oral hearings with court attendance to be reserved for those cases where substantial issues arise. **[CJ208]**
5. After the exchange of liability reports/financial loss information, parties to be encouraged to engage in settlement discussions at an early stage with emphasis on resolution rather than the form of the resolution. **[CJ209]**
6. A period for negotiation/discussion/mediation to be provided, after close of pleadings, exchange of evidence and preparation of expert schedules, typically, but not always, three months prior to trial, depending on the complexities of the case. **[CJ210]**
7. A system of accreditation for solicitors and junior counsel who wish to practise in the area of clinical negligence to be introduced, perhaps in the form of mandatory attendance at masterclasses organised by the professions. **[CJ211]**
8. Consideration of the use of a single joint expert to be encouraged wherever possible. **[CJ212]**
9. Clinical negligence cases usually to be heard in the High Court. Only to be heard in the county court if sufficiently straightforward. **[CJ213]**
10. Courts to encourage the use of witness statements in appropriate uncontroversial instances and to have the power under the rules to order their use. **[CJ214]**

23

Licensing

Current position

23.1 Alcohol is not an ordinary product, and the sale of it must be regulated to ensure the protection of public health and the preservation of public order. The nature of the licensing legislation in Northern Ireland is different from other jurisdictions in Great Britain and the Republic of Ireland.

23.2 The licensing regime in Northern Ireland has unique statutory aspects. The licensing of premises retailing intoxicating liquor was originally under the control of the Department of Health, then the Department for Social Development (DSD) (recently renamed the Department for Communities), reflecting the close connection with health and social well-being.

23.3 Relatedly, the licensing of premises for entertainment has been under the supervisory appellate control of the courts in Northern Ireland.

23.4 The licensing of premises for the purposes of gaming and bookmaking has similarly been under the control of the Department for Communities, reflecting the legislature's concern to control and secure responsible gambling in the jurisdiction.

23.5 The discussion on licensing reform is well-trodden ground. There have been detailed assessments of legislative change following the introduction of the *Licensing Act (Northern Ireland) 1971* and by Orders in Council in 1978, 1986, 1989, 1990, 1996 and 2006.

23.6 The principal amendments enacted by *The Licensing (Northern Ireland) Order 1996* included the following:

- mixed trading was reintroduced;
- the compulsory afternoon break in the permitted hours on a Sunday was abolished;
- the permitted hours for off-licences were extended;
- additional permitted hours were allowed for licensed premises providing entertainment or food or both;
- the prohibition on a restaurant having a bar was abolished;
- children, in the company of an adult, were to be allowed in certain licensed premises that are certified in that respect when intoxicating liquor is available for sale; and
- licensed premises were permitted to open outside the permitted hours for any purpose that does not involve the sale of intoxicating liquor.

23.7 Amongst the proposals and amendments to the legislation was a root-and-branch reform of *The Registration of Clubs (Northern Ireland) Order 1996* that expressly introduced checks and accounting systems to defeat criminality in the supply of intoxicating liquor and, in particular, links to paramilitary groups.

23.8 It is helpful to remember that the licensing system is not confined to issues of health and social conduct.

23.9 The legislature continues to monitor and respond to liquor licensing issues. *The Licensing (Northern Ireland) Order 1996* permits 11 different types of licence, listed at art. 5(1):

> 'Art 5. - (1) Without prejudice to Article 80, the premises in which the sale of intoxicating liquor is authorised by a licence shall be premises of one of the following kinds -
>
> (a) premises in which the business carried on under the licence is the business of selling intoxicating liquor by retail for consumption either in or off the premises;
>
> (b) premises in which the business carried on under the licence is the business of selling intoxicating liquor by retail for consumption off the premises;
>
> (c) an hotel;
>
> (d) a guest house;
>
> (e) a restaurant;
>
> (f) a conference centre;
>
> (g) a higher education institution;
>
> (h) a place of public entertainment;
>
> (i) a refreshment room in public transport premises;
>
> (j) a seamen's canteen;
>
> (k) an indoor arena.'

23.10 As recently as 1 September 2016, the legislation was further amended to introduce a twelfth category: outdoor sports stadia of regional significance.

23.11 The then Department for Social Development carried out an extensive review of liquor licensing policy and assessed the licensing regime in 2005-06. It received significant and substantial public and political response.

23.12 The consultation ran from October 2005 – January 2006 and sought opinion on the following:

- the introduction of licensing objectives;
- the transfer of the liquor-licensing system to local government;
- an extension to the opening hours for licensed premises;
- relaxation of the 9.00pm restriction on children in licensed premises and registered clubs for family events;

- introduction of a penalty points system for breaches of law;
- replacing the 12 categories of liquor licence with a dual system of personal and premises licences;
- the abolition of the surrender provision; and
- relaxation of the regulatory system for registered clubs.

23.13 The consultation process resulted in over 900 responses from individuals and bodies who responded to the proposals from every part of society. In relation to the 645 who responded to the proposal to transfer powers from the courts to councils, 92.9% were against this proposal and only 5.75% in favour (with 1.4% neutral). Of all political parties, only one was in favour. Of the (then) 21 councils, 15 were opposed to the proposal.

23.14 Apparently, there was little appetite politically or from the licensed trade for substantial change, and strong opposition was received in particular for the abolition of the surrender provision.

23.15 Following on from the consultation, in November 2008, the then DSD Minister, Margaret Ritchie, announced her plans to make changes to current licensing and clubs law. These changes were to be introduced in a two-stage approach.

23.16 The first stage resulted in the *Licensing and Registration of Clubs (Amendment) Act (Northern Ireland) 2011,* which includes a number of stricter enforcement measures to address growing problems of public health, disorder and underage drinking.

23.17 A Licensing and Registration of Clubs (Amendment) Bill was introduced in the Assembly on 19 September 2016. The purpose of the Bill is to tackle practices within the licensed trade that could contribute to alcohol misuse, building on measures in current licensing law to help address the concerns surrounding alcohol consumption and contribute towards a reduction in alcohol-related harm. It includes:

- restrictions on advertising of alcoholic drinks in supermarkets and off-sales;
- introduction of occasional additional late opening for certain licensed premises;
- extension of drinking-up time;
- minor change to Easter opening hours;
- alignment of alcohol and entertainment licences in licensed premises allowed late opening; and
- changes in relation to children on licensed premises and registered clubs.

- It is anticipated that, given the requirement for Assembly scrutiny, any changes to the law are unlikely to take effect until next year. Since the Assembly is not at present functioning, there has been no Committee for Communities scrutiny of this Bill since 26 January of 2017.

23.18 Underpinning each of the broad licensing regimes, the courts have been concerned with proper control of the premises, consonant with the legislature's requirement that there be strict control mechanisms in place.

23.19 There are approximately 3,500 premises with liquor licenses (including hotels, restaurants, conference centres). There are approximately 500 registered clubs. Many of these premises have entertainment licences, although most of these entertainment licences are processed without the appellate jurisdiction of the courts being engaged. There are also approximately 1,500 gaming outlets, including bookmakers and gaming arcades.

23.20 The interests and involvement of the public in licensing matters has long been recognised in the statutory framework. The statutory right of any person owning, residing or carrying on business in premises in the vicinity of an applicant for a licence underpins the approach that, in licensing applications, the *lis* is between the applicant for the licence and the court, and the courts welcome the involvement of objectors in assisting in the scrutiny of applications and the proper control of premises the subject of the licensing regime.

23.21 Against this backdrop, the courts in this jurisdiction have developed an approach to objectors whereby the courts rarely make awards of costs against objectors to the grant (or renewal) of a licence, whether liquor, gaming or entertainment. The statutory requirement that an objector may object a week before the hearing of the application, setting out in brief form the basis of the objection, again demonstrates a desire to provide access to the public in the licensing process. That approach, in fact, facilitates public access to the system because objectors are not burdened by the risk of an award of costs should they be unsuccessful.

Discussion

23.22 The potential transfer of responsibility for liquor licensing from central to local government is yet another issue that is essentially for the legislature to determine as a matter of policy, which may be considered at some point in the future. Our role is confined to alluding to possible unintended consequences of a legal nature that might arise.

23.23 Whilst we did hear from those who favoured such a transfer of responsibility, our licensing subgroup, made up of practitioners in this field, recorded that:

- Local councils are presently grappling with the enormous challenges thrust upon them by the transfer of planning powers in April 2015. Those responsibilities now include setting up development plan processes

against a backdrop of significant failures to meet departmental deadlines for such processes.

- There is, furthermore, a clear distinction that can be made between the councils' specialist departments dealing with building control/fire safety and entertainment/arcade licensing where there are no issues of need, vicinity and adequacy. In this regard, one council has been the subject of a judicial review challenge, wherein the challenge asserts that the council has overstepped its legislative function.
- Rather than saving court time and simplifying the licensing code, transferring the same to councils at first instance will lead to appeals, judicial reviews and additional expense and will complicate rather than simplify the process.

23.24 Given the basis upon which the licensing regime has evolved and operated in this jurisdiction, and the public desire for strict control in the context of health and safety, there are concerns to protect and underpin the integrity of the system. We need to guard against a situation where there is less scrutiny that opens the risk of matters escaping the proper attention of the courts to the detriment of professional practitioners, the public and the justice system.

23.25 In short, the sub-group noted that the proposal for transfer has been the subject of repeated rigorous public consultation. It has not been the subject of detailed scrutiny within the framework of the Review and we should be cautious before treading in this area. I agree and, accordingly, no recommendation is made on this topic.

23.26 We have discussed applications in which there is an absence of material proofs and, further, where records are deficient due to the necessity at present to maintain paper records in the context of five-year renewals. There is scope for significant reduction of paper and space required for the maintenance of such records.

23.27 There is much to be said for the invocation of a fresh paperless approach in licensing applications, provided there is reliability of both the computer system and the communication of documents and materials to the judiciary. Relatedly, it is imperative that the users of the court system are able to engage with a co-ordinated computer system that allows access to, and use of, the software that it operates.

23.28 In all contested cases, there is likely to be a requirement for some measure of hard-copy documents involving the parties, and it is probably sensible for the court to have a set also. However, there are areas where the paperless concept would increase inefficiency and reduce costs. This is particularly the case in the district judges' courts.

23.29 The main areas of licensing in the district judges' courts relate to renewals, protection orders and transfers.

23.30 The renewal process is held every five years in September (the next date being September 2017). Renewals can be approved by the Clerk of Petty Sessions unless one of the statutory bodies or a member of the public raises an objection. There is no good reason why the required paperwork should not be prepared and communicated electronically for such applications.

23.31 There is an additional benefit to this process, because records (including plans and statutory documents) can be retained securely without the need for cumbersome paper records being retained at various court offices.

23.32 The system could be developed to permit appropriate access (for a suitable administration fee) allowing interested parties to access the materials. This would further free up court time that is presently wasted in arranging inspection, removal of materials for copying, and the risk of loss of those materials. Materials have indeed been lost over the years, causing confusion and resulting in litigation.

23.33 Secondly, the system of protection orders is a speedy process (four days' notice) that only becomes contentious where the police object (they being the only statutory notice party apart from the court).

23.34 The court receives proof of interest, the application and licence. There is not much to streamline. However, again there is no reason why the materials grounding the application could not be provided electronically and retained by the court system in that manner with the same benefits.

23.35 Thirdly, transfer applications have more in the way of paper proofs and again there is no good reason why that could not be made paperless.

23.36 The statutory regime already provides for many applications to be processed on paper by the Clerk of Petty Sessions, provided the statutory proofs are in order, particularly in the instance of renewal applications.

23.37 There may be scope for uncontested applications (and particularly renewals) to be dealt with in virtual reality district judges' courts by videoconferencing. However, as most applications for a licence are made by persons in the court division where the premises are located, there may be no material difference for the applicant in terms of attending court and having the application processed quickly.

23.38 The treatment of licensing cases in the county court and High Court, particularly where they are the subject of commercial objection, is plainly contentious but represents a fraction of the administrative work in licensing.

23.39 The sub-group of licensing practitioners that presented a paper for our consideration contended that various planning witnesses prepare and present their cases very differently. There is legal input into their research and, consequently, whilst the researches are objective, what they examine involves considerable legal work product. There have been many licensing cases where, for example, an applicant's expert produces a relatively short report that deals simply with

population growth and not a great deal else. There have been instances of experts not presenting their case with as much material as other experts have produced.

23.40 Consequently, where the other side's expert is given the benefit of a party's legal work product in advance, arguably this might result in unfairness and is contrary to the system that runs at present.

23.41 Given the importance attached to social control and scrutiny of applications, the Bar Council, although interestingly not the Law Society, contended that there is a risk that applicants and objectors alike could find themselves disadvantaged by removing the ability of parties to use discretion or judgement as to when they should or should not exchange reports or when they should furnish reports to the court.

23.42 We do not agree. We are in an era of cards-on-the-table, open, cost-efficient, speedy and transparent justice. The days of 'trial by ambush' are over. Not only should all courts, including licensing courts, direct at case-management conferences that expert reports be exchanged in advance, but experts should meet in advance and agree areas of dispute wherever possible so that the time of the clients and the courts is not taken up by wasteful combative style proceedings at the expense of the key issues in dispute being identified from an early stage. We therefore recommend the early exchange of expert reports and expert meetings in contested licensing cases. The applicant's solicitor should take responsibility for circulating an agreed minute of the experts' meeting pre-trial.

23.43 As the statutory regime provides, renewal applications are often processed by the court clerks where there are no objections lodged, although there is an important role to be played by electronic maintenance of records for proper public scrutiny, saving both significant time, physical space and costs.

23.44 The collective experience of the licensing sub-group was that it is not appropriate, even for uncontested licensing applications, in the county court, to be heard in virtual reality courts. That of course would not preclude live link/Skype technology being encouraged where individual parties or witnesses reside outside the relevant division so long as the substance of the case was heard in an actual court. In the county court, statutory licensing days are fixed so that the licensing judge in each division can monitor and control the grant and regulation of licences in their jurisdiction. County court judges for each division are uniquely well placed to oversee this process, as the same judge deals with civil and criminal work in their division and often brings that experience to the licensing court.

23.45 Having to present formal proofs in court when applicants and professional witnesses must testify in open court on licensing day, when other licensees and licensing practitioners are present, of itself gives each division's licensing judge the benefit of monitoring and controlling licensed premises and having an overview of same, which ultimately is in the best interests of the public and ensures the intention of the parliament is met.

23.46 We are prepared in this instance to bow to the views of those closest to this genre and to accept that in the county court the format of licensing day should remain basically as it is.

23.47 However, a wholly different issue is the number of licensing days. A significant source of complaint has been the tendency to concentrate all licensing days into one day in the week. This inevitably means there are substantial gaps — in some instances, months — between licensing days, which often has adverse commercial consequences for applicants. This should change.

23.48 There is also a school of thought that with modern methods of mobility, the concepts of 'vicinity' and 'inadequacy' are hopelessly outdated.

23.49 On the other hand, it is important to confine the breadth of objection, and these concepts have provided the effective legal means of doing so. The contents of paragraph 23.20 bear repeating. The interests and involvement of the public in licensing matters has long been recognised in the statutory framework. The statutory right of any person owning, residing or carrying on business in premises in the vicinity of an applicant for a licence underpins the approach that in licensing applications the *lis* is between the applicant for the licence and the court. The courts welcome the involvement of objectors in assisting in the scrutiny of applications and the proper control of premises is the subject of the licensing regime. To remove that limit might only serve to widen unreasonably the bracket of those who might wish to object with attendant increased length of hearings and higher costs.

23.50 A further argument emerged to the effect that in this modern era it is unnecessary to have a system of surrendering existing licences (especially since this does not occur with restaurant licences).

23.51 The counter-argument is that the need for surrender of licence is a further justifiable measure of built-in control on licensing applications. There is, moreover, a significant potential impact upon the economy. Liquor licences are securitised with many lending institutions, with liquor licences currently valued at between £75,000 and £100,000 as a broad guide.

23.52 Modern economic activity has changed radically, and issues such as the necessity for the restraining influence of concepts such as vicinity, adequacy and surrender are matters that require to be considered by the legislature in that context. This is legislation that would merit an early review.

23.53 Concerns have been raised that some objections in licensing cases to the grants or provisional grants of licences are driven by the desire to delay possible competition or for the purposes of being bought off and are not in the public interest. The extent of such objections is not clear, but it does fuel a recommendation made in any event that courts should require objections to be substantively pleaded and substantiated as soon as possible.

23.54 We found no convincing reasons to change the costs system.

Responses

23.55 Subject to the Bar Council concern about disclosure of expert reports in advance of trial, the contents of this chapter received universal approval from those who responded to it.

Recommendations

1. In the district judges' courts, the required paperwork to be prepared and communicated electronically for renewals, protection orders and transfers applications. **[CJ215]**
2. Records (including plans and statutory requirements) to be retained electronically and thus securely without the need for cumbersome paper records being retained at various court offices. **[CJ216]**
3. A system to be developed (for a suitable administration fee) allowing interested parties to access the materials online. **[CJ217]**
4. Greater encouragement to be given for additional use of the existing statutory regime for many applications to be processed on paper by the Clerk of Petty Sessions, provided that the statutory proofs are in order, particularly renewal applications. **[CJ218]**
5. Live link/Skype technology to be encouraged where individual parties or individual witnesses reside outside the relevant division. **[CJ219]**
6. Experts to be directed to exchange reports and attend a minuted experts' meeting pre-trial. **[CJ220]**
7. Licensing days to be more often and spread out over the year. **[CJ221]**
8. Courts to insist that objections are substantively pleaded and substantiated as soon as possible. **[CJ222]**

24

The Lands Tribunal

Current position

24.1 The Lands Tribunal was established by the *Lands Tribunal and Compensation Act (Northern Ireland) 1964*. It is a court of record and consists of the President and a Member, currently Mr Justice Horner and Henry Spence.

24.2 The Lands Tribunal was established primarily to determine issues regarding compensation for the compulsory acquisition of land and to include other matters such as appeals against valuations for rating purposes. Its role has somewhat expanded and contracted in the following years, with one example being that currently appeals in respect of domestic rates are heard by the Northern Ireland Valuation Tribunal, albeit with an appeal to the Lands Tribunal. In the main, the Lands Tribunal deals with issues regarding:

- restrictive covenants and their modification or extinguishment pursuant to the *Property (Northern Ireland) Order 1978*;
- matters under *The Business Tenancies (Northern Ireland) Order 1996* in respect of disputes between landlords/tenants;
- compensation pertaining to land compulsorily acquired or the alleged misfeasance by statutory undertakers[1]; and
- commercial rates appeals.

24.3 The overlap between the Chancery Courts and the Lands Tribunal is relatively slight and the main overlap, if it happens at all, occurs whenever declaratory relief is sought in the Chancery Court in respect of the unreasonableness of a landlord to consent to any alienation or some improvement to the property. In the alternative, pursuant to art. 26 of *The Business Tenancies (Northern Ireland) Order 1996*, the Lands Tribunal has itself jurisdiction to consider whether or not the landlord has acted reasonably in withholding his consent.

24.4 There also exists some overlap with the Commercial Court when attempts are made to obtain compensation in respect of works/damage carried out by statutory undertakers. It appears that sometimes the point over jurisdiction is taken by practitioners and on other occasions it is simply ignored.

24.5 The process before the Lands Tribunal is, as most practitioners are aware, relatively informal. One of the most important distinctions, however, is that there

[1] Any dispute in respect of damage to property caused by the Department for Infrastructure, Northern Ireland Water, Northern Ireland Electricity, etc. in the execution of works is normally determined by the Lands Tribunal and there exists no common law right of action — see art. 242 of *The Water and Sewerage Services (Northern Ireland) Order 2006* and *Roads (Northern Ireland) Order 1993,* arts. 5(6), 19(3), 45(5), 47(3).

exists no express discovery or disclosure process in the Lands Tribunal, although this is often agreed on a mutual basis.

24.6 In the Chancery Division, it was noted that, from time to time, issues of valuation arise, particularly in repossession cases and bankruptcy cases. These issues frequently cause such cases to become protracted. The determination of a question of valuation is one that does not fall as easily within the expertise of a legally trained Master or judge than with one trained as a valuer. The Lands Tribunal would seem to be the obvious choice for such matters, and we recommend that the powers of the Lands Tribunal be extended to provide valuation determinations in this and other suitable matters.

24.7 We refer to a similar recommendation that has been made in the preliminary Report of the Family Justice Review in the context of ancillary relief[2].

Responses

24.8 Both the Law Society and the Bar Council question whether there is any need for the implementation of these recommendations. They raise concerns as to whether this would only result in delays and additional costs. The Bar Council assert that there is no evidence that Masters or judges in the Chancery Division (or any other division) are not ruling on valuations in a fair manner or that this referral will lead to better and quicker outcomes.

24.9 There is absolutely no reason why these proposals should lead to either delay or more expense. The power to refer to the Lands Tribunal would only be invoked in those instances where Masters or judges in their discretion consider that more appropriate specialised expertise lies with the Lands Tribunal than within their own remit. It is highly significant that the trigger for these proposals emanates from Masters and members of the judiciary in both the civil and family jurisdictions who have stressed the advantage of such powers in circumstances where they feel justice can be properly done with the benefit of the expertise found in the Lands Tribunal. With some advanced planning at case-management hearings, it will soon become obvious which cases require this assistance. The exercise could often be done on paper or, where a hearing is necessary, it could be structured at the case-management hearing so that it runs in parallel with the hearing of the case itself. Hence no additional time or cost would be incurred with a modest degree of preplanning. It would serve to guarantee a fairer and more accurate outcome for litigants in specialised areas of assessment.

Recommendations

1. Power to be given to refer matters of disputed valuation to the Lands Tribunal, and that the Lands Tribunal be given the necessary jurisdiction to determine such references. **[CJ223]**

[2] The power of referral of valuation matters to the Lands Tribunal. **[FJ64]**

2. Jurisdiction to be conferred on the Lands Tribunal to determine questions of valuation referred to it by the High Court. **[CJ224]**

25

Civil Justice Council

Current position

25.1 For many years now, criminal justice has commanded by far the greater share of the attention of Ministers and legislators. Criminal procedure has been regularly advanced by legislation. Law reform in the field of civil justice has proceeded by a way of sporadic changes in the light of the recommendations of disparate bodies, piecemeal provisions in the *Law Reform (Miscellaneous Provisions) Acts* and by the procedural reform recommended by the Rules Committee in the Rules of the Court of Judicature. The unfolding narrative of civil justice has been, by turn, halting and digressive. A fragmentation in Executive responsibility for civil justice has perhaps contributed to this sense of civil apathy.

25.2 Changes of this kind constitute reform by way of *ad hoc* responses to individual problems. It is, in a sense, a form of legislative crisis management. The Rules Committee has done invaluable work over the years, largely due to the members of the committee and also monitoring of problems that emerge in the operation of the rules of court. However, little has been done to require a look at the broad picture of civil justice overall.

25.3 The Civil Justice Reform Group (the Group) *Review of the Civil Justice System in Northern Ireland* in June 2000, carried out after the Woolf Review,[1] was persuaded that there was a real need for a Civil Justice Council (CJC) in Northern Ireland. They were influenced by strong support for this by those responding to the interim report and by valuable work undertaken by the CJC in England and Wales. The reform group considered that a Civil Justice Council could only have a useful role if it was truly independent and properly funded.

25.4 With arresting clarity, the review said 'It must have adequate resources for its work, which should include the publication of high quality and influential research. Furthermore, it should be able to rely on the practical assistance of the Northern Ireland Court Service, most importantly, in the provisions of detailed and accurate statistical information relating to the civil justice system'.

25.5 It was instructive for our purposes to look in some detail at what exactly was proposed by Lord Justice Campbell in 2000.

25.6 A Civil Justice Council was to be established under the chairmanship of the Lord Chief Justice (LCJ) or his nominee and with a representative membership including:

- a judge of the Supreme Court of Judicature[2] and nominated by the LCJ;

[1] *Access to Justice: Final Report* 26 July 1996 by Lord Woolf.
[2] Now of course 'the Court of Judicature'

- two judges of the county court;
- a Master of the Supreme Court nominated by the Society of Masters;
- a district judge nominated by the Association of District Judges;
- two practising members of the Northern Ireland Bar;
- two practising members of the Law Society of Northern Ireland;
- two members of the Northern Ireland Court Service;
- not less than four and not more than six other persons appointed by the LCJ.

25.7 These additional appointed members were to be selected on the basis of their experience in and knowledge of consumer affairs, the advice sector, legal academia or litigant representation.

25.8 The Group broadly supported the adoption of the remit established for the English Civil Justice Council by s. 6(3) of the *Civil Procedure Act 1997*.

25.9 Whilst it was envisaged that the council would initially be concerned with taking forward recommendations contained in the final report of the Civil Justice Reform Group, its continuing role was to be in keeping civil procedure under constant review, thus avoiding the need for wholesale re-appraisal at sporadic intervals.

25.10 In the course of its investigation, the Group had been surprised at the lack of research conducted in the area of civil justice. A major objective for the Council was to undertake and encourage such research, with a view to assessing the strengths and weaknesses of aspects of the system.

25.11 The Group further encouraged the Council to periodically report on its progress.

25.12 In recommending the establishment of such an active body, tasked with maintaining and progressing the work of the civil justice system, the Group emphasised the necessity of adequate funding being made available to support the Council's endeavours.

25.13 More specifically, the Group had proposed that the remit of the Civil Justice Council for Northern Ireland was:

- to consider whether the civil justice system in Northern Ireland was as accessible, fair and efficient as possible and for that purpose;
- to consider how best to implement the proposals of the Civil Justice Reform Group;
- to review the proposals of the Civil Justice Reform Group within two years of the final report;

- thereafter to review the workings of the civil justice system every five years;
- to consider any proposal that may affect the working of the civil justice system;
- to advise the LCJ and the judiciary upon the development of the civil justice system;
- to refer proposals for changes in a civil justice system to the LCJ and the appropriate rules committees;
- with the consent of the LCJ, to commission research into matters affecting the civil justice system;
- to be a purely advisory rather than a decision-making body. It was to monitor the reform and progress of the civil justice system.

25.14 The Group supported the Council's independence by providing that its practising legal members should be nominated by their professional bodies and in order to ensure that the Council properly represented the members of the public in maintaining and developing the civil justice system, the Group recommended six to eight members also be drawn from outside the judiciary, the practising legal profession and the Court Service.

25.15 The report concluded:

> 'The Group was persuaded there is a real need for a Civil Justice Council in Northern Ireland. The Group was content with the suggestions by the Civil Justice Committee in its interim report to emphasise that the Council is purely an advisory rather than a decision-making body. The Council should be independent, adequately resourced and supported in its activities by the Northern Ireland Court Service.'

Discussion

25.16 For some reason, this recommendation has been shrouded in disregard and a Civil Justice Council has not been set up. Not only do we find this disappointing but we observe that it runs against the tide of many other jurisdictions who have set up similar, highly successful bodies, as described below.

ENGLAND AND WALES

25.17 In his final report, Lord Woolf recommended that a Civil Justice Council (CJC) should be established to contribute to the development of his proposed reforms. This was implemented soon afterwards[3].

[3] Under s. 6 of the *Civil Procedure Act 1997* the CJC is charged with:
- keeping the civil justice system under review,
- considering how to make the civil justice system more accessible, fair and efficient,
- advising the Lord Chancellor and the judiciary on the development of the civil justice system,

25.18 Membership of the CJC must include:

- members of the judiciary;
- members of the legal profession;
- civil servants concerned with the administration of the courts;
- persons with experience in and knowledge of consumer affairs;
- persons with experience in and knowledge of the lay advice sector;
- persons able to represent the interests of particular kinds of litigants, for example, business or employees;
- The Master of the Rolls as Head of Civil Justice and the Deputy Head of Civil Justice are *ex officio* members of the CJC. The Head of Civil Justice is the chair.

25.19 The Civil Justice Council has a full Council of 26 members (including those appointed *ex officio*). A Civil Justice Council Executive, comprising the Chair, Deputy Head of Civil Justice, three Council members, and a representative of MoJ, makes management and planning decisions. Six committees currently exist: Alternative Dispute Resolution, Access to Justice (including responsibility for the Fees Consultative Panel and Public Legal Education Working Group), Housing and Land, Clinical Negligence and Serious Injury, Expert Witnesses, and Rehabilitation. In the past, there was also a Costs Committee and Working Group, as well as a Pre-Action Protocol Committee. The membership of the committees varies between five and 14 members.

25.20 Its remit extends to keeping the whole civil justice system under review and considering how to make it more accessible, fair and efficient. It is for this reason that it has looked at the funding of litigation, pre-action protocols, rehabilitation in the context of personal injury cases, and codes of conduct for experts. It has performed a negotiation and facilitation role in relation to the development of pre-action protocols, agreements in relation to predictable costs, fees for experts in low-value cases, and in mediating an agreement in the 'Costs War'[4]. It has commissioned its own research on questions involving costs and multi-party actions.

25.21 In February 2008, the Justice Minister commissioned an independent review of the CJC[5]. The main findings of the report of the review were that the concept of

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- referring proposals for changes in the civil justice system to the Lord Chancellor and the Civil Procedure Rule Committee, and making proposals for research.

[4] In April 2013 the Master of the Rolls asked the Civil Justice Council's Costs Committee to carry out an evidence-based study of solicitors' current hourly rates and make recommendations to reform the existing rates.

[5] The terms of reference were:

- To review the role and performance of the CJC and make recommendations.
- To evaluate the continuing need for a body to perform the role and functions of the CJC as set out in the *Civil Procedure Act 1997.*
- To review whether a non-departmental body like the CJC remains the most appropriate form of body to carry out those functions.
- To assess the past effectiveness of the CJC.
- To consider ways in which the CJC could be made more effective.

the CJC was sound and that a significant strength was its extensive and diverse practitioner expertise. Its proposals were generally well grounded and practical; it provided a neutral environment for contacts between the judiciary and other civil justice stakeholders; it had been successful in getting different interests to sit down together and engage in constructive dialogue and had played an essential mediating role[6].

25.22 The clear conclusion of the review was that the CJC continued to have a distinctive contribution to make to the civil justice scene and that an arm's-length body chaired by the Master of the Rolls was the right form to discharge the functions laid down in the *Civil Procedure Act 1997*.

25.23 We enjoyed the privilege of a generous exchange with the chair of the CJC, Lord Dyson, and the following instructive points emerged:

- He had no firm views on whether the CJC should be statutory or non-statutory. On the one hand, there is a time-consuming process of persuading officials every three years that the CJC is justified and that money is being well spent in light of the statute. On the other hand, the statutory basis does convey recognition by parliament that this is a body of importance.
- A senior judge as chair is perhaps in the best position to lead the remit in what is, after all, a fairly technical area at times, albeit involving broad policy, provided there is lay representation on the Council.
- The CJC covers a wide range of topics, and the government regularly consults with it. An example is the current proposal to abandon damages in whiplash cases. The executive of the CJC does work closely with departmental officials. Resources are declining and the CJC, comprised mainly of lawyers and judges, is a fairly inexpensive way to work and the government does look to the CJC for advice.
- The lay representation is important, making up perhaps as much as one quarter of the Council, notwithstanding that much of the work is of a technical nature.
- There is a very small budget for the CJC in England and Wales — perhaps £40,000. Much of the work is done by lawyers and judges in their free time. That budget is largely spent on events and conferences that have been highly successful — for example, a conference was recently arranged on litigants in person.
- It has a secretariat.
- In the interests of openness and transparency, arguably the minutes should perhaps be provided online so that the public can know about it.

[6] https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/

- The CJC has an Executive Committee that draws up the agenda, which is scrutinised by the overall committee. The CJC meets four times per year.
- There is a system of sub-committees and working groups. The chair appoints people to those committees and decides who will serve on them. Occasionally, they have academics and perhaps they should use more of these.
- There is a selection process to be selected for the CJC.

SCOTLAND

25.24 Following *The Report of the Scottish Civil Courts Review* of 2009 (the Report), which strongly recommended the setting up of a Civil Justice Council, and after a consultation process, the Scottish Government enacted the *Scottish Civil Justice Council and Criminal Legal Assistance Act 2013*, which set up a civil justice body with a remit and membership not dissimilar to that of the CJC in England and Wales, but which also has responsibility for drafting the rules of court.

25.25 Members of the Council are drawn from the judiciary; both branches of the profession; and lay members, who may include individuals with experience of the Scottish civil courts, and representatives of advice services and consumer organisations. The Chief Executive of the Scottish Civil Service or a senior official of the Scottish Government also serves.

25.26 It is supported by a suitable secretariat, with personnel of sufficient seniority and experience to co-ordinate the work of the Council and its working groups; assist with the planning and organisation of its work; commission or undertake research; carry out consultations, both formal and informal, with interested parties; provide policy support and advice to the Council and the working groups; and draft rules for approval by the Court of Session.

25.27 Interestingly, the Report recommended that, prior to its formal creation by statute, the CJSC should be set up on a shadow basis in order to oversee the implementation and recommendations made in the Review.

AUSTRALIA

25.28 In Australia, as far back as 4 October 2008, in his Justice Statement of 4 October 2008, the Attorney General of Australia announced that the Department of Justice would develop a proposal for a Civil Justice Council to monitor the performance of the civil courts and drive further reform, following the setting up of a Commission and reforms proposed by the Victorian Law Reform Commission. The remit, functions, membership and secretariat of that statutory body would closely resemble the English and Scottish models.

CANADA

25.29 The Canadian Forum on Civil Justice (CFCJ) was created under *The Canada Corporations Act 1998*[7] in response to recommendations presented in the Systems of Civil Justice Task Force Report of 1996.

25.30 Its formal objects are, once again, familiarly couched in terms of seeking to improve the civil justice system in ways and means, including, but not restricted to, the following:

- collecting in a systematic way information relating to the system for administering civil justice;
- carrying out in-depth research on matters affecting the operation of the civil justice system;
- promoting the sharing of information about the use of best practices;
- functioning as a clearing house and library of information for the benefit of all persons in Canada concerned with civil justice;
- developing liaisons with similar organisations in other countries to foster exchanges of information across national borders; and
- taking a leadership role in providing information concerning civil justice reform initiatives and developing effective means of exchanging this information.

25.31 The Forum consists of a board and advisory board, members of which include leading members of the Bar, government, court administration, the judiciary, legal academia and the lay public[8].

Discussion

25.32 In Northern Ireland, we are clearly falling behind the lead given by these other jurisdictions. The sheer length of this Review and the number of recommendations contained therein illustrate that a comprehensive, overarching review of civil justice in this jurisdiction has been left outstanding for far too long in our view.

25.33 With piercing clarity, the point is well made in the Victorian Law Reform Commission Report[9] on this topic when it said:

> 'Review and reform of the civil justice system is a complex undertaking. It is necessary to take into account the rights and interests of a diverse range of participants, including litigants large, small and self-represented, the legal profession, government and the courts. Reform initiatives may have unforeseen consequences, or may require modification in light of practical experience. They should therefore be subject to ongoing review and evaluation to ensure their

[7] As a result of the 1996 the Canadian Bar Association's Taskforce on Systems of Civil Justice recommendation.
[8] Canadian Forum on Civil Justice http://cfcj-fcjc.org/ at 4 March 2008.
[9] The Victorian Law Reform Commission Civil Justice Review Report March 2008 page 712 at para 4.4.

objectives are being met. The collection of relevant data is also required to inform the reform and policy process. The commission proposes the establishment of a new body to carry out these responsibilities.'

25.34 We therefore endorse the recommendation made by the Campbell Committee that there should be a Civil Justice Council for Northern Ireland. It would amount to a much belated, brave venture in inter-disciplinary synthesis opening up new horizons. It is a concept that prizes self-critical vigilance whilst remaining a rich terrain for the scholar of ideas.

25.35 The functions of such a Council would be to take forward the recommendations in this review, to keep the structures and processes of the civil justice system under constant review, to react promptly to change, to carry out research and to promote law reform in the field of civil justice in timely fashion. It would do so by anticipating problems rather than by reacting to them. The aim would be to apply a coherent philosophy of civil justice and devise a strategy with clear long-term aims.

25.36 Such a body would require a secretariat, with a high-level membership under the chairmanship of the Lord Chief Justice or senior judge and with a wide remit.

25.37 As in music, exaggeration of small detail accompanied by a sweeping glissandi can prove distracting. Hence, at this stage some general comments on its remit will suffice. It would:

- take forward the recommendations in this review;
- carry out detailed monitoring of the work of the courts;
- carry out or commission research;
- receive regular statistical analysis;
- receive representations from interested parties;
- generally promote the case for reform;
- monitor research and reform in other jurisdictions, benefiting from such work instead of having always to learn its own lessons;
- identify areas in need of reform, including amendments to statutory provisions and rules;
- oversee the establishment of education and training programmes in the civil justice system.

25.38 Some of our number expressed the view that the CJC could be restricted to the department representatives, the judiciary, Bar Council and Law Society representatives (perhaps with the power to second outside assistance from others as needs arise). Most, however, including me, are firm in the view that this would be too narrow. As in all the examples in other jurisdictions considered by us, a CJC does require representation of lay members, including representatives, for example, from the Consumer Council, insurance industry, academia, chambers of commerce,

voluntary sector, etc. Such a body requires to be citizen-facing. However, considering its remit, which involves a great deal of technical work, a majority of lawyers would be vital.

25.39 Members of the CJC would be appointed for their expertise and experience — not as representatives of the entities or organisations for which they work. They will, therefore, perform their tasks unconstrained by tribal loyalty and will not act as pious guardians of their own professed disciplines exhibiting all the carapace of true professionals. If I may be permitted to say so in the course of this Review, the two committees that I have been privileged to chair during this process have been paradigm examples of how this concept can successfully achieve such an outcome.

25.40 A CJC, however, would still require the presence of the rules committees to implement the changes required with the technical know-how and drafting skills to perfect this.

25.41 Differing views have emerged as to whether this should be a statutory body as in England and Scotland. In looking at this issue, we found no ledger of fact bearing only one interpretation. The arguments in favour of a statutory body are as follows:

- Most other jurisdiction with such Councils are on a statutory basis.
- There is no reason why it could not be overseen by one government department.
- Funding may be more easily provided for an accountable, transparent, statutory body. Recurring resourcing/funding/support issues should not be dismissed lightly, given current financial constraints. If funding is secured for a statutory body, then it is less likely to be withdrawn.
- Having clear demands set in terms of accountability, governance arrangements, business planning and annual reporting are increasingly creatures of this time and context.
- A statutory basis lends more weight to its proposals.

25.42 The arguments in favour of a non-statutory body are as follows:

- It is difficult to see why the lengthy process of legislation to put an advisory body on a statutory footing necessarily adds any great value to its recommendations or weight to its authority.
- A statutory body reduces the inherent flexibility of a non-statutory body.
- Importantly, a statutory body will have a prescribed membership that might not be sufficiently flexible (and contain a statutory remit to be policed that can be a tool to rein in creative and novel thinking.) It might restrict the CJC's ability to adapt to changing circumstances.
- A host of complicating and time-consuming factors emerge with a statutory body. For example, which department sponsors it? Regular filing

of accounts and other processes, such as dealing with Freedom of Information requests and anything else that may come with legal status, can take up valuable time and energy.

- The influence and authority of the CJC will be achieved by having the right chairperson and distinguished members making well-constructed recommendations rather than the complications of statutory underpinning.
- Statutory bodies can be expensive. Our understanding, albeit anecdotal, is that, for example, the Law Commission costs £1m annually. Proposals for a volunteer-based CJC with a judicial chair and a small budget along the English lines would be infinitely cheaper. Even if we were to opt for an independent chair (which we oppose), we see no immediate technical reason why someone could not be paid on a contract-for-services basis to chair a board a couple of days a month even if the board is not statutory. This is likely to be cheaper (paid on a daily-rate basis) than a full-blown statutory body. There would have to be a tender/open competition process, but it would really be no different from engaging any other consultant or, say, independent audit committee members.

25.43 I consider the arguments at this time for a non-statutory basis to be the stronger. I propose simply that a CJC should be established at this time on a non-statutory basis to prove the worth of the concept. This should be regarded as an urgent imperative that could subsequently be transformed onto a statutory basis in the fullness of time.

25.44 The Public Protection Arrangements in Northern Ireland (PPANI) provide a useful analogy for this approach. These started out as a voluntary arrangement (known as Multi Agency Sex Offender Risk Assessment and Management, or MASRAM), which brought together police, probation, prisons, housing and social services. In October 2008, the arrangements were provided for in law through *The Criminal Justice (Northern Ireland) Order 2008*, which specifies the agencies that have a duty to co-operate to ensure effective assessment and management of the risks posed by certain sexual and violent offenders. While PPANI is a structure rather than a statutory body, the similarity is that it brought a number of interests together initially on a voluntary basis and then was placed on a statutory footing.

25.45 The advantage of this approach was that it allowed the Department of Justice and agency participants to review and refine the model before the legislation was drafted, so that the legal underpinning was based on established best practice. Had it been made statutory from its inception, it is likely that the legislation would have subsequently had to be amended, since agencies might have been less eager to commit to certain actions before working relationships had been properly established[10].

[10] In a 2011 report on PPANI, the Chief Inspector of Criminal Justice stated: 'Public protection arrangements at an operational level have worked well and there is clear evidence that the current arrangements are stronger that what had been in place. A stronger legislative base has underpinned and strengthened current arrangements.

25.46 Even if the statutory basis argument were now to win the day, there is no reason why we should not follow the Scottish precedent and, prior to its formal creation by statute, the CJC should be set up forthwith on a shadow basis in order to oversee the implementation and recommendations made in this Review.

25.47 An efficient civil justice system will achieve many economies that will more than justify the cost of the Council. Our recommendations in this chapter are capable of early and straightforward implementation, and this should be instituted as soon as possible.

25.48 If this CJC is set up as we envisage it ought to be, it will illustrate two crucial component themes of this Review. First, it represents a novel and inclusive method of involving citizens actively in the civil justice system, making it more accessible and comprehensible to the public at large. Secondly, it will constitute another judge-led exercise where government and the legal fraternity co-operate to advance the cause of civil justice.

Responses

25.49 The proposal for the creation of a Civil Justice Council has received undiluted approval from every respondent, including, for example, the Law Society, the Belfast Solicitors' Association, the Bar Council, the Association of Personal Injury Lawyers, the insurance industry, the Attorney General, the Law Centre, the Human Rights Commission, etc. The need for a Civil Justice Council is clearly overwhelming and an imperative that is long overdue.

25.50 We welcome bodies such as the Bar Council highlighting the need for careful consideration as to its composition, funding and remit and, striking the inclusive nature of our fresh approach to justice, I consider that such bodies as the Bar Council and the Law Society should be consulted in the very near future before final details are completed.

Recommendation

1. A Civil Justice Council comprising membership of the legal profession, judiciary, government departments and lay members to be set up as a matter of high priority in the first instance as a non-statutory body. **[CJ225]**

The arrangements in Northern Ireland compare favourably with what exists elsewhere in Great Britain and the Republic of Ireland.'

26

Non-Ministerial Department (NMD)

Current position

26.1 The Review of Civil and Family Justice provides an opportunity to consider afresh the governance arrangements for the Northern Ireland Courts and Tribunals Service (NICTS) and whether, as has been proposed by both the current and former Lord Chief Justices, it should be reconstituted as a non-ministerial department (NMD).

26.2 In the preparation of this Report, the Review Group considered whether this matter should fall within the scope of the Review and it concluded, on balance, that it should. This was on the basis, first, that it seemed sensible to look at the structures for overseeing the work of the courts alongside the other proposals for structural reform in respect of civil and family justice business, such as the creation of a Civil Justice Council[1] and a Family Justice Board. Secondly, as is explained below, a consideration of the optimal oversight arrangements for the courts was thought to be of direct relevance to our terms of reference, given that 'making better use of available resources' is part of the aim of this Review.

26.3 Prior to the devolution of responsibility for policing and justice functions in April 2010, the (then) Northern Ireland Court Service was a separate civil service and was funded through the Lord Chancellor's Department. On devolution, it was established as an executive agency of the Department of Justice. In 2012, courts and tribunals policy functions were transferred to the department and the senior management team of NICTS was restructured to reflect the organisation's specific focus on operational delivery.

26.4 The idea of an NMD was first raised with the Northern Ireland Assembly on 2 October 2007, when Lord Kerr (who was at that time the Lord Chief Justice) attended a meeting of the Assembly and Executive Review Committee, an ad hoc committee that had been established to conduct an inquiry into the devolution of policing and justice matters. Lord Kerr contended that an NMD model:

> '…provides the maximum safeguard for judicial independence, and it will also provide administrative efficiency.'

26.5 NMDs are government departments in their own right that deal with matters for which direct political oversight has been judged to be either unnecessary or inappropriate.

26.6 The two distinguishing features of NMDs, according to Cabinet Office guidance[2], are that they have budgetary independence, since they negotiate their

[1] See chapter 25.

[2] Cabinet Office Categories of Public Bodies: A Guide for Departments, B – Non Ministerial Departments. Similar guidance is published by the Department of Finance for Northern Ireland.

finance directly (money voted directly by Parliament), and that they do not have their own Minister. They are accountable to Parliament through their sponsoring Ministers and are headed by senior civil servants. There is usually a statutory appointment that is often made by government ministers.

26.7 Thus, Cabinet Office guidance[3] states that 'NMDs do not answer directly to any government minister. They have their own accounting officers, their own Estimates and annual reports, and settle their budgets directly with the Treasury. However, some ministerial departments must maintain a watching brief over each NMD so that a minister of that department can answer for the NMD's business in parliament and, if necessary take action to adjust the legislation under which it operates. A framework document should define such a relationship'.

26.8 An NMD may operate as a government department in its own right, or operate along the lines of an executive agency, where they are structured in line with an agency board (headed by a chief executive, who is often supported by a management board) but remain a separate government department.

26.9 The Cabinet Office lists 22 NMDs for England and Wales, most of which fulfil a regulatory or inspection function. Examples are the Charity Commission for England and Wales and HM Revenue and Customs (HMRC). The Charity Commission is an NMD that answers directly to the UK Parliament and is governed by a board that is assisted by the chief executive and executive team. HMRC is an NMD that in size and profile more closely resembles a Minister-led department than other NMDs. The chief executive is the Permanent Secretary.

26.10 In Northern Ireland, there are six bodies that operate as an NMD, one of which is within the justice sector. The Public Prosecution Service (PPS) was designated as an NMD in April 2010. Funding is provided by the Northern Ireland Assembly through the Department of Finance and, as Accounting Officer for the service, the Director of Public Prosecutions is responsible for ensuring that the public monies provided are used efficiently and effectively. All members of staff are Northern Ireland civil servants. The PPS management board supports the director in his leadership of the PPS and in reaching decisions on the strategic direction of the PPS, the development and implementation of appropriate strategy and in meeting his corporate governance responsibilities. The board comprises the director (as chair), deputy director, three senior assistant directors and two non-executive directors. The PPS prepares its own annual report and resource accounts under the Government Financial Reporting Manual and other guidance as directed by the Department of Finance. The other local NMDs are the Food Standards Agency, the NI Assembly Commission, the NI Audit Office, the NI Authority for Utility Regulation and the NI Public Services Ombudsman.

[3] Cabinet Office Categories of Public Bodies: A Guide for Departments, B – Non Ministerial Departments. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80075/Categories_of_public_bodies_Dec12.pdf

Experience in other jurisdictions

26.11 The Courts Service of Ireland and the Scottish Courts and Tribunals Service both operate under an NMD model. The Chief Justice in the Republic of Ireland and The Lord President of the Court of Session are the chairpersons of the respective boards. Both boards have a majority representation by the judiciary. The function of the board is to provide strategic leadership for the organisation. Responsibility for the day-to-day running of business is delegated to the chief executive, who acts as the accounting officer. The chief executive is supported by a senior management team (of civil servants) comprising chief executive officers (such as a Chief Finance Officer and Chief Operations Officer). Both the Irish and Scottish Courts Services have a number of committees, such as Audit and Risk and Finance Committees, to provide specific assurance, scrutiny and advice to the judicially led board. Membership of these committees again includes the judiciary. The active participation of judges from across the judicial tiers is seen as essential.

26.12 The Courts Service of Ireland is an independent state agency that is governed by a board consisting of the chairperson plus 16 other members, nine of whom are members of the judiciary who provide representation for each court tier. There is also a staff representative, a representative of the Minister of Justice, and representatives from the legal professions, trades unions and the business world. A number of the judicial members of the board are elected by the judges of the Supreme Court, the Court of Appeal, the High Court, the Circuit Court and the District Court.

26.13 In Scotland, the board comprises the chairman and 13 other members, seven of whom are selected from the judiciary. The non-judicial members are the chief executive, an advocate member, a solicitor member and three persons external to the justice system. In both jurisdictions, therefore, there is a judicial majority on the board.

Discussion

26.14 The case for an NMD has two key components. Budgetary independence has historically made the NMD an attractive form for bodies that require the appearance of a degree of independence from ministerial intervention. It follows, then, that it would be entirely appropriate, and in the interests of judicial independence, for NICTS to sit at some distance from the Department of Justice — similar to the arrangements already in place for the Irish Courts Service and the Scottish Courts and Tribunals Service — as an NMD headed by a judicially led board.

26.15 It is arguable, however, that in times of austerity an even more important consideration is the need for difficult strategic decisions on the deployment of scarce resources to be informed by those with direct operational experience, through a judicial board structure. Such a structure would place more authority and responsibility on the judiciary, by sitting on the board, for the leadership of the organisation and the administration of courts, with the responsibility for the day-to-

day running of the courts being delegated to the accounting officer, answerable to the Judicial Board.

26.16 The most common objection to NMD status is that it results in limited parliamentary accountability since there is no responsible Minister (although there can be a sponsoring Minister) which, it is asserted, could leave the organisation open to risks associated with poor governance.

26.17 There are, however, different forms of accountability, which are generally categorised as 'sacrificial' (being held to account) or 'explanatory' (giving an account). For example, in a speech he delivered at Nottingham Trent University on 16 April 2008, entitled 'Judicial Independence and Accountability: Pressures and Opportunities', The Honorable Sir Jack Beatson concluded that:

> 'To voluntarily offer a form of "explanatory" accountability for the matters that are the responsibility of the judiciary is not inconsistent with the requirements of judicial independence.'

26.18 It could, in fact, be argued that conferring responsibility for the oversight of the administration of the courts onto the judiciary would enhance the level of public accountability that is provided; a distinction can always be made between the matters on which judicial independence is sacrosanct, such as adjudicatory responsibilities, and those for which such explanatory accountability might be required.

26.19 The point was made by some respondents to the preliminary Report that judicial independence was the foremost priority and that this must not be undermined in any debate about structural change. We agree entirely that maintaining public confidence in the independence of the judiciary is of paramount importance. However, we saw no evidence of there having been any adverse impact on public confidence in judicial independence in those jurisdictions in which an NMD model has been adopted. We are satisfied, therefore, that the public perception of judicial independence in this jurisdiction would not be undermined by the creation of a judicially led NMD. It would be important in this regard, of course, to ensure that there are clear lines of demarcation between civil service administrators and the judiciary, drawing on the experience of how this has been achieved elsewhere.

26.20 If NICTS were to operate as an NMD, part of the Judicial Board's leadership responsibilities for the organisation would be to prepare and publish a strategic plan, a business plan and annual reports.

26.21 The new NMD would have responsibility for the functions that support the operation of courts and tribunals in Northern Ireland but not for courts and tribunals policy functions, which would remain with the Department of Justice. It is a well-established principle that the judiciary do not comment on matters of policy, consistent with the separation of powers, though judges can advise on the operational implications of policy proposals. The NMD concept is, therefore, a

response to the question of how best to organise and manage operational court business rather than an attempt to place responsibility on the judiciary for courts policy. Given that it is an important strategic decision, however, it would require cross-cutting political agreement, as indeed would a number of other recommendations made in this Review.

26.22 As a first step in the creation of an NMD, therefore, ministerial commitment would be required from the Justice Minister. This would be followed by a policy consultation by the department and, following ministerial agreement to the department's proposed way forward based on the outcome of such consultation, the department would have to seek support from the Justice Committee before instructing the Office of the Legislative Counsel to prepare draft legislation and introducing a Bill to the Assembly. The policy and legislative process is likely, therefore, to take a number of years and the earliest an NMD could be established would be towards the end of the next Assembly mandate.

26.23 In addition to underpinning legislation, a framework document would be required to define the respective roles of the NMD, the Northern Ireland Executive and the Assembly. The document would also clearly delineate the lines of demarcation between the judiciary and civil service administrators within the NMD. This would prescribe the process for budget approval with the Executive, including, for instance, whether the Department of Justice or Department of Finance should act as sponsoring department. A shadow board could be established closer to the time of the establishment of an NMD in order to oversee its implementation and provide for a more seamless transition.

26.24 While the debate on NMD status in 2010 tended to centre on the protection of judicial independence, the advent of austerity is likely to shift the agenda firmly towards how best to ensure the effective delivery of courts services within declining resources.

26.25 The creation of an NMD would place additional responsibilities on the judiciary in Northern Ireland, and on the Lord Chief Justice in particular as the chairman of the NMD Board, at a time of significant financial challenges. However, the Lord Chief Justice's view is that a judicially led board could better manage these challenges if placed in the role of decision maker in respect of where spending cuts should fall, as opposed to having such cuts imposed by the department.

26.26 There are a number of practical matters that would need to be considered, including the following:

- **Governance**. As noted above, there is a range within which an NMD model can fall, depending on how arm's length from government it is decided the NMD should be.
- **Structures**. Decisions would be required on the composition of the board and its sub-groups, including how judicial members would be selected, and the staffing structure.

- **Status of Staff**. NMDs are staffed by civil servants. At present, all NICTS staff are members of the Northern Ireland Civil Service and fall under the policies set by the Department of Finance (formerly Department of Finance and Personnel), having gained NICS status when the then Northern Ireland Court Service was converted into an executive agency of the Department of Justice in 2010. It will need to be determined whether staff in an NMD would retain their terms and conditions of service as part of the NICS.
- **Shared Services.** NICTS's position as an NMD would mean that it would need to be confirmed whether it would continue to come within the scope of the NICS Shared Services agenda.

26.27 In order to help inform the development of an NMD model, the Lord Chief Justice has established a Judicial Executive Group with representation from all judicial tiers, including tribunal judiciary and the lay magistracy. The Group currently meets once a term and has the potential to be converted into a shadow NMD board in due course. The Group has received informative briefings from the chief executive officer of the Courts Service of Ireland and the chief executive of the Scottish Courts and Tribunals Service on their experiences of operating within an NMD. They made, inter alia, the following points:

- The NMD model, which has been operating in the Republic of Ireland (ROI) since November 1999 and in Scotland since April 2010, has received the seal of approval from all concerned.
- In both jurisdictions, the NMD model incorporates a level of judicial leadership and control whilst at the same time maintaining a measure of accountability to the Oireachtas and the Scottish Parliament respectively on matters relating to the efficient use of public funds and the effective administration of the courts. Such accountability does not extend to how judicial functions are exercised.
- Funding is allocated by the Department of Justice and Equality (in ROI) and the Scottish Parliament and the Ministers may be provided with information for use in responding to questions on the justice system for which they have general responsibility when they appear before the Oireachtas or parliament.
- The involvement of the judiciary in the decision-making process has proved fruitful; for example, improvements in digital technology have sprung from changes advocated by the judiciary.
- No problem or difficulty has arisen on the question of judicial independence. That has been reserved without dissent.
- In both jurisdictions, a shadow board was set up in advance of the invocation of the NMD model.
- This has been a thoroughly successful enterprise in both jurisdictions.

26.28 These briefings have helped to shape the Group's initial thinking on what would be involved in re-engineering our current arrangements and have highlighted clearly the potential benefits of an NMD, which is regarded as the appropriate business model by both administrators and judges alike.

Recommendations

1. The Department of Justice to bring forward legislation to re-constitute the Northern Ireland Courts and Tribunals Service as a non-ministerial department (NMD), with a view to having an NMD in place by the end of the forthcoming Assembly mandate. **[CJ226]**
2. The respective roles and responsibilities of the Northern Ireland Executive, Northern Ireland Assembly, the judiciary and civil service administrators under an NMD model to be clearly set out in a new framework document. **[CJ227]**
3. In the interim, the judiciary to continue to plan for the creation of an NMD, working closely with officials in the Department of Justice and the Northern Ireland Courts and Tribunals Service. **[CJ228]**

27

Conclusion

Conclusion to the Civil Justice Review

27.1 As society modernises, so must the institutions that serve it if they are not to degrade or fall into disuse. A properly functioning justice system to which citizens have effective access in order to determine and vindicate their rights is a mark of a liberal democracy committed to the rule of law.

27.2 Accessibility, however, is not an unchanging construct. We need to simplify the ways in which justice is done, empowering citizens to vindicate their rights and put their case forward. If a citizen comes through the system, they should be able to negotiate it at their convenience, using the tools and technology they apply in other parts of their life.

27.3 To that end, the judiciary should have modern, flexible, digital tools and problem-solving techniques to help them get to hear the heart of the case quickly, making fair and just determinations resolving wrong decisions or weeding out the hopeless case. In short, the judiciary must be supported by modern, transparent processes that are consistent, and allow for like cases to be treated alike.

27.4 This Civil Justice Review endeavours to be a comprehensive review programme. It has been neither an inspection, nor an attempt to hold the current system to account. There are other arrangements in place for those functions. Rather, we have sought to be another welcome new voice in the chorus of change that is clearly echoing through the legal corridors. Already, almost unnoticed in the niches and hollows of the legal system, swathes of the legal fabric are changing. Vast numbers of lawyers are changing their behaviour and discovering new forms of delivering justice. These changes deserve measured discussion. We can no longer be unthinkingly formulaic in our approaches to the law. As Voltaire said '*Le mieux est l'ennemi du bien*'. We do have a good system currently, but it is not the best and we must not allow the safety of a good system to become the enemy of the best system that we can create.

27.5 The focus of the Review was to identify opportunities for modernisation and reform and to encourage greater collaboration and joined-up thinking. These proposals must not be seen as mere displacement therapy or an alternative to finding the answer to the much bigger and harder question of the kind of law that is needed for the twenty-first century.

27.6 If these recommendations are carried out, justice in the civil system will look and feel different in the future. The new justice will meet and indeed hopefully exceed the expectations of the public in an innovative system that implements, perhaps in an incremental manner, steps that will change the legal landscape for the next generation and beyond. These new technologies and service improvements

have the capacity not only to benefit court users but also to change the core values of civil litigation. It will make litigation more proportionate, more efficient, speedier, less costly, decidedly outcome-focused, more accessible and comprehensible than it has ever been, changing the way we determine the facts and decide the case[1].

27.7 Our proposals are predicated on the premise that the present system is in many respects rooted in a system that the Victorians would have recognised. It is struggling with volumes of paper requiring swathes of space dedicated to files that largely remain unread. The suggested remedies recognise that there has been a revolution in digitisation and that the legal world is facing changes that are coming thick and fast.

27.8 Online access, together with online pleadings and an online system for commencing and thereafter managing the minutiae of the process, is clearly the direction of travel. This will require amendments to the rules making provision for a fresh, simplified procedural code.

27.9 Even within this context there must be firm judicial control of disclosure and case-management systems to ensure that the problems of today are not merely replicated in an online form. Virtual hearings will in some parts of the system become part of the legal furniture, enabling lawyers, parties and witnesses to participate in traditional hearings by telephone, Skype and videoconferencing. We make it clear, of course, that these developments will never replace full oral hearings in the conventional manner in substantive trials.

27.10 Our aim has been to identify enablers for change, recognising that if we do not face up to it and introduce change, we will limp along in a state of managed decline. We need to design a system that embraces a new culture and a fresh way of working with papers in electronic form, available to all, stored in a central cloud coupled with online case management, virtual reality courts and alternative processes and fora for solving the problems that the civil justice system throws up.

27.11 Low-value cases should be dealt with quickly and cheaply, completely online in certain instances. Unnecessary escalation of disputes should be emphatically discouraged and kept out of court wherever possible with increased emphasis on mediation and early neutral evaluation. In more complex business and commercial disputes, the courts will offer a range of approaches in keeping with the ethos of the community from which they emanate enabling the judge and the litigants to decide on the most appropriate procedure for the resolution of the dispute.

27.12 We recognise that the engine of the civil justice system does not need to be driven exclusively by the concept of resolution within the physical confines of a court presided over by a judge. Our fresh approach crystallises less adversarial and less combative methods of avoiding and minimising disputes as well as solving them.

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[1] This *Civil Justice Quarterly* 2010 Viktória Harsági quoting from a report of the World Congress of the International Association of Procedural Law in Rio De Janeiro in 2007.

27.13 No one must be left behind in this new endeavour. Personal litigants, the disabled, the poor, the weak and the vulnerable all must be fully accommodated within the changing system. To make the justice system genuinely accessible, procedures and remedies should be available and intelligible to non-lawyers. People with disabilities should never feel excluded because they cannot attend a physical courtroom or handle documents or traditional procedures. Likewise, people who are not comfortable with the new technology must always be supported.

27.14 Overseeing these changes there needs to be a body such as the Civil Justice Council, made up of representatives of all the main stakeholders in the civil justice system, which will monitor progress and recommend further changes as necessary. Moreover, the architecture and governance of the system outlined herein hopefully illustrates the benefits of judicial leadership in such a task and the creation of a non-ministerial department, similar to the arrangements in Scotland and the Republic of Ireland, would reflect this development.

27.15 Tight budgets will inevitably force courts to use technology more often and more efficiently to preserve scarce resources. However, everything will be dependent on government investment in a competent and relevant software programme fit for purpose in the modern age and carried out on the basis of an investment that will produce medium and long-term savings on a scale hitherto unknown. There must be a decisive shift towards preventative spending, with a decided focus on improving outcomes for citizens and supporting transformational change, which will nurture and sustain long-term efficiency measures to avoid a fistful of spending reviews overlaid by a thin patina of strategy.

27.16 This is neither a time for a fitful exercise in repetitive cliché nor inevitable acquiescence in inferior solutions. Our Report has sought to be sharply hewn, inventively structured and unnervingly written. Equivocal formulations drip in irony if they follow emphatic demands for change. We need to avoid the fate of the Emperor Galba of whose brief rule Tacitus said *capax imperii nisi imperasset* — everyone thought him capable of ruling until he did so. If this Review is to escape the enormous condescension of posterity, it is imperative that we avoid the charge that everyone thought this system capable of reform until we did so.

27.17 As courts look to the future, there are many uncertainties, but at least one thing is for certain. The pace at which new issues and new challenges arise will not abate; rather, it is likely to accelerate. Our court system should be optimistic about its ability to shape that future. To quote Emerson, even if 'things are in the saddle and [appear to] ride mankind,' court systems can and should be right there in the saddle with them. Judges, court administrators, technology experts, lawyers and the public at large will all play a role in determining the shape of this future. If those who work in and with the court system remain engaged, have sufficient resources, and do their jobs well, most if not all of the pending challenges can be overcome.

27.18 We conclude by citing an extract from the recent document *Transforming Our Justice System* by the Lord Chancellor, Lord Chief Justice, Senior President of

Tribunals, September 2016, which encapsulates the reform programme currently being implemented in England and Wales and which captures the spirit of our proposals: 'This will be a justice system with people's needs and expectations at its heart. The transformation of the courts and tribunals across the country will be based on three core principles that build on its established strengths: Just, Proportionate and Accessible'.

Appendix 1

Terms of Reference

Review of Civil and Family Justice

Introduction

1. The Lord Chief Justice has commissioned a Review of Civil and Family Justice, to be led by a Lord Justice of Appeal.

2. Since the last comprehensive review of the civil justice system in Northern Ireland was completed in June 2000, the landscape within which the civil and family courts operate has changed substantially and there is a growing demand for the speedier resolution of business against a backdrop of declining resources. In addition, a judicially led review of the Civil Justice System in Scotland was undertaken in 2007-09, the outcome of which was published in September 2009 as the *Report of the Scottish Civil Courts Review*, and there is a programme of civil justice reform planned for England and Wales, which is also being judicially led. These recent developments in GB have highlighted a number of potential opportunities, many of which should be capable of a local application. It is considered timely, therefore, to assess to what extent current arrangements in this jurisdiction are fit for purpose in a modern context.

3. The aim of the Review is to look fundamentally at current procedures for the administration of civil and family justice, with a view to:

    - improving access to justice;
    - achieving better outcomes for court users, particularly for children and young people;
    - creating a more responsive and proportionate system; and
    - making better use of available resources, including through the use of new technologies and greater opportunities for digital working.

4. The Review will proceed from the premise that the courts should be reserved for business that cannot be resolved through alternative means. It is recognised that additional capacity outside the courts would need to be created for such alternative approaches to be successfully implemented, and the Review will seek to provide an evidence base and clear rationale for potential new working practices that might better meet customer expectations in a modern justice system.

5. The outcome of the Review will be a report for the Lord Chief Justice to forward to the Department of Justice with recommendations designed to inform the direction of policy development in this area in the next Assembly mandate,

building on any relevant findings in the report of the *Access to Justice Review Part Two* when published. This will highlight where legislative reforms would be required as well as the identifying 'quick wins' that could be implemented on an administrative basis. The Department of Finance & Personnel and Department of Health, Social Services & Public Safety will be engaged, as appropriate, on matters relevant to their responsibilities.

Scope of the Review

6. The main areas to be covered by the review are as follows:

- the jurisdiction of the small claims and county courts;
- the types of business that should be conducted within these jurisdictions;
- the use of mediation and other forms of alternative dispute resolution, including online options (for example, online dispute resolution);
- opportunities to facilitate and provide support to unrepresented parties;
- the workings of the family justice system;
- the scale costs system and options for the proportionate recovery of costs;
- opportunities for more proportionate use of evidence;
- opportunities to streamline court procedures and improve case management, including for the transfer of business between court tiers and the potential for a single entry point for all non-criminal claims;
- invocation of modern technology into the court process.

Duration

7. The Review will commence in September 2015 and be completed by no later than September 2017.

Methodology

8. A Review Group will be established to:

- examine current levels of business in the civil and family courts and how these are being managed;
- look at best practice and experience in other comparable jurisdictions;
- consider the adequacy of currently available data on civil and family caseloads;
- investigate the potential for closer collaborative working with voluntary-sector providers;
- identify potential business improvements;
- highlight areas where legislative reform is required;
- assess the potential equality implications of any proposals, with a view to ensuring there is no adverse differential impact for any section 75 groupings; and
- identify training and development needs.

9. The Review will be substantially informed by the views of interested stakeholders. A Reference Group will be established to allow external

stakeholder groups to provide their input, and members of the public will be encouraged to contribute on the basis of their personal experiences.

10. The Review Group will, in consultation with relevant members of the judiciary, develop a series of issues papers covering key themes within and across the various court divisions and tiers within the civil and family justice system. The issues papers will be shared with the Reference Group and made available online, as a means of providing the basis for an informed and inclusive debate. The Review Group will then produce an interim report, which will be made publicly available, and consider views on this before publishing its final report.

Governance arrangements

11. The Review Group will be chaired by Lord Justice Gillen and include the following membership:

- Mr Justice Horner
- The Recorder of Belfast
- The Presiding District Judge (Civil)
- The Presiding Master
- Gerry McAlinden QC, Bar Council nominee
- Arleen Elliott, Law Society nominee
- Laurene McAlpine, Department of Justice
- Laura McPolin, Department of Finance
- Eilis McDaniel, Department of Health
- Paul Andrews, Chief Executive of the Legal Services Agency
- Paula McCourt, Northern Ireland Courts and Tribunals Service
- Maura Campbell, Principal Private Secretary to the Lord Chief Justice

12. The Reference Group will include nominated representatives from:

- Advice NI
- Association of British Insurers
- Citizens Advice
- Chamber of Commerce
- Children's Law Centre
- Federation of Small Businesses
- Consumer Council
- Family Mediation NI
- Health and Social Care Board
- Law Centre
- Law Society/Bar dispute resolution services
- Mediation NI
- NI Commissioner for Children and Young People
- Northern Ireland Council for Ethnic Minorities
- Northern Ireland Guardian Ad Litem Agency (NIGALA)
- NI Human Rights Commission

- National Society for the Prevention of Cruelty to Children (NSPCC)

13. The Office of Lord Chief Justice will provide the secretariat for the Review.

Appendix 2

CIVIL AND FAMILY JUSTICE REVIEW –
REPORT BY SUB-GROUP ON DIGITAL COURTS AND JUDICIAL CASE MANAGEMENT

DATA PROTECTION ISSUES TO BE CONSIDERED

1. The Data Protection Act 1998 (DPA)

The DPA implemented EU Directive 95/46/EEC on the protection of individuals with regard to the processing of personal data and the free movement of such data. The DPA imposed broad obligations on those who collect personal data, as well as conferring rights on the individuals about whom data is collected. Since breaches of the DPA can result in criminal as well as civil liability, no organisation can afford to ignore the DPA obligations and it's right that these issues are considered as part of the Civil and Family Justice Review.

The key issues in the DPA can be summarised, as follows:-

- **Data subject**

  'Data subject' is defined as any individual about whom personal data is processed.

- **Personal data**

  'Personal data' is defined as information which is being processed by means of equipment that operates automatically in response to the instructions given for that purpose, or is recorded with the intention that it should be processed by means of such equipment; the DPA applies to automated data (that is, information stored on a computer) and also, to certain paper records in an organised manual filing system. In the leading case of *Durant v. Financial Services Authority* [2013] EWCA Civ. 1746, the Court of Appeal emphasised that there are two elements in the definition of 'personal data.' In addition to showing that the individual can be identified from the information, the information must:-

  a) relate to the individual in a way which might affect his privacy, whether in his personal or family life, or in his business or professional capacity;
  b) have the individual as its focus;
  c) be information of a biographical nature, namely, which goes beyond the recording of the individual's involvement in a matter or an event that has no personal connotations.

  Although *Durant* remains the starting point, it must be read in conjunction with further guidance given by Article 29 Working Party (the European Information Commissioners) and technical guidance issued by the (ICO). In *R (Kelway) v. The Upper Tribunal (Administrative Appeals Chamber) and Northumbria Police* and *R. v. Independent Police Complaints Commission* [2013] EWHC 2575 (Admin) the Court held that, although Durant is the leading authority on the meaning of personal data, it is limited to a particular factual scenario, and the other tests must also be applied. In 2014, in the case of *Edem v. The Information Commissioner and Another* [2014] EWCA Civ. 92, the court directed that you should follow the ICO technical guidance and go further than *Durant* in determining if information constitutes personal data.

- **Processing**

The DPA imposes obligations upon those who process personal data. Processing is defined to include obtaining, recording, holding, using, disclosing or erasing data.

- **Data controller and data processes**

Currently, under the DPA, all of the obligations fall on the data controller. A data controller is defined as a person (either alone, jointly or in common with other people) who determines the purpose for which and the manner in which any personal data is, or is to be, processed. A data processor processes personal data only on behalf of a data controller. It would be important to clarify whether the Court Service and various parties to proceedings are data controllers or data processors. Much will depend on whether the parties and the Court Service have actual control over the processing of the personal data.

- **The eight data protection principles**

Schedule 1 of the DPA sets out the number of data protection principles that require that personal information:-

a) must be fairly and lawfully processed;
b) must be processed for limited purposes;
c) must be adequate, relevant and not excessive;
d) must be accurate and up to date;
e) must not be kept for longer than is necessary;
f) must be processed in line with the data subject's rights;
g) must be secure;
h) must not be transferred to other counties without adequate protection.

- **Section 35 of the DPA**

Section 35 sets out an exemption to the non-disclosure obligations under the DPA. The non-disclosure obligations are defined in Section 27(3) and (4) of the DPA. The non-disclosure exemptions restrict certain rights of individuals in relation to the processing of their personal data and limit the duties of organisations when processing that data. In short, the non-disclosure provisions include the requirement to comply with the first data protection principle (but not including the duty to satisfy one or more of the conditions for processing the second, third, fourth and fifth data protection principles as set out above). Section 35 relates to disclosures required by law, or made in connection with legal proceedings and specifies that:-

a) personal data are exempt from the non-disclosure provisions, where the disclosure is required by, or under any enactment, by any rule of law, or by the Order of a Court.
b) personal data are exempt from the non-disclosure provisions, where the disclosure is necessary – (i) for the purpose of, or in connection with any legal proceedings (including prospective legal proceedings); or (ii) for the purpose of obtaining legal advice, or (iii) is otherwise necessary for the purpose of establishing, exercising or defending legal rights.

It is important to note that Section 35 is not a legal ground for disclosure of personal data. It merely allows a data controller to disclose personal data which it holds to the extent that this is necessary in connection with any legal proceedings, or for the purpose of obtaining legal advice.

It is likely that a firm of solicitors, disclosing their clients' personal data in accordance with their instructions would be acting as a data controller. I would refer you to the ICO guidance – 'Data controllers and data processors: what the difference is and what the governance implications are.' Given the broad range of information proposed to be captured through digital disclosure, it would be worthwhile reminding the professions that the 'necessity test' must be met.

Section 35 does not provide an exemption from the seventh data protection principle, namely, that personal information must be secure. Given the high volume of reports of lost or stolen laptops, computers or pen drives, the ICO have stated that in the future, where loss occurs as a result of a failure to use encryption software, regulatory action may be pursued. In November 2015, the CPS were fined £200,000 by the ICO after laptops containing videos of police interviews were stolen from a private film studio. The videos were being edited by a Manchester-based film company so that they could be used in criminal proceedings. The ICO investigation found that the videos were not being kept securely.

It may also be worthwhile taking into account a proper data retention and destruction policy as part of your project. Arguably, once proceedings have concluded, the Section 35 non-disclosure exemptions are no longer applicable and data held by the Court Service or, indeed, the individual solicitors, would be subject to the requirements of principle five, namely, personal information should not be kept for longer than is necessary. Most solicitors firms adopt a process that client data should be kept for seven years to avoid any claims or litigation in respect of the case, but careful consideration would need to be given to the appropriate period for the Court Service to retain documents.

- **Social media and the DPA**

  I note the discussion within your draft report in respect of the use of social media in the Court Service. I would refer you to the ICO guidance: 'Social networking and online forms – when does the DPA apply?' This guidance highlights that the "*domestic purposes*" exemption, which often applies to online forms, does not cover organisational use and, therefore, if the Court Service were to use social media, they must ensure that such use complies with the requirements of the DPA.

2. *Reform of the EU data protection regime*

On 15th December 2015, the European Parliament and Council of the European Union reached an informal agreement on the text of the GDPR. It is likely that once the Regulation has been formally adopted by the Parliament and Council in early 2016, with a two year period to achieve compliance. Like the Data Protection Directive and the DPA, the Regulation will apply to the processing of personal data, wholly or partly, by automated means, or other than by automated means, if the data forms part of, or intended to form part of a relevant filing system.

This reflects the intention that, although the concept of data protection is closely related to information technology systems, the protection of individuals is not dependent upon the techniques used. A filing system is defined as any structured set of personal data which is accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis. A link to the text can be found http://www.consilium.europa.eu/en/policies/data-protection-reform/

The GDPR will introduce a number of new concepts and approaches, with the aim of being more future-proofing and forward looking than the DPA/Directive. The most significant changes can be summarised, as follows:-

- greater harmonisation – there will be a single legal framework that applies across all EU member states, leading to a more consistent set of data protection compliance obligations from one member state to the next;
- expanded territorial scope – non-EU businesses will be subject to the GDPR if they offer goods or services to EU data subjects, or monitor EU data subjects' behaviours;
- increased enforcement powers – currently, fines are set under national law and the maximum in the UK is £500,000. The GDPR will significantly increase the maximum fine to €1 million or 2% of annual turnover, whichever is the greater.

3. Consent

To benefit from consent, it must be freely given, specific, informed and explicit and demonstrated either by a statement or a clear affirmative action. The Court Service and/or the professions will not be in a position to continue to rely on implied consent on the part of their clients, and the profession may need to be educated on ensuring that both plaintiffs and defendants understand fully the discovery process, the exchange of documents and the digital use of their documents, so far as they constitute personal data.

4. The difference between data controllers and data processors will become more academic

Under the GDPR, there will be direct compliance obligations for processors.

5. Strict data breach notification rules

The Commission text requires businesses to notify all data breaches without undue delay and, in any event, within twenty-four hours. The Parliamentary text proposed "*without undue delay and up to seventy two hours*." It is likely that the final text will agree that all data subjects will have to be notified "*without undue delay*" and it would be worthwhile, as part of the planning for digital Courts and judicial case management, to give proper consideration to a data breach response plan (including designating specific roles and responsibilities, providing training to employees within the Court Service and to the professions generally, and help preparing a template notification form).

6. The right to be forgotten

Individuals will have the right to request that organisations delete their personal data in certain circumstances (for example, if the data is no longer necessary for the purposes for which they were collected). This is a statutory recognition of the *Google Spain SL and Google Inc. v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzales*, Case C/13/12, 13th May 2014. The Court, in that case, ruled that an individual has a right to rectification, erasure or blocking of information and a right to object to the processing of information in certain circumstances. It is not difficult to anticipate that the Court Service may receive requests from individuals that their information is deleted, either during or at the end of a case, and consideration should be given as part of your project to whether additional time and resources would be required to ensure that these issues are appropriately addressed. This may also link into the issues which you are discussing about the use of social media.

Clare Bates
Carson McDowell LLP, 18.2.16

Appendix 3

Queen's Bench - Remittal & Removal Applications Disposed in 2014 - Final Orders Made		
	EXPARTE REMITTED ON CONSENT	136
	EXPARTE REMOVED ON CONSENT	4
	MISCELLANEOUS FINAL ORDER (JUDGE)	1
	REMITTAL ORDER (REFUSED)	57
	REMITTAL ORDER	103
	REMOVAL ORDER (GRANTED)	30
	REMOVAL ORDER (REFUSED)	2
	STRIKE OUT ORDER	127
	Total	**460**

Appendix 4

PRACTICE DIRECTION NO. 1 OF 2015

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION (COMMERCIAL)

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EXPERT EVIDENCE

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Introduction

1. This Practice Direction applies to all proceedings in the Commercial List with effect from 1 June 2015. On that date Practice Direction No 6 of 2002 "Commercial List Practice Direction: Expert Evidence" shall cease to have effect.

2. When an expert has been instructed to give or prepare evidence for the purposes of court proceedings the expert owes a duty to assist the court on matters within his or her expertise and this duty overrides any obligation to the party from whom the expert has received instruction or by whom the expert is to be paid. A statement of the expert's duties, known as the Ikarian Reefer Rules, is set out in Appendix 1.

3. Expert witnesses should follow the best practice set out in the Code of Practice for Experts issued by the Academy of Experts and the Expert Witnesses Institute and attached as Appendix 2.

4. Experts should sign the Experts Declaration as contained Practice Direction No. 7 of 2014 and attached as Appendix 3.

5. Experts should be mindful of the overriding objective of the Rules of Court which is to enable the court to deal with cases justly, which includes, so far as is practicable –

(a) Ensuring that the parties are on an equal footing.

(b) Saving expense.

(c) Dealing with the case in ways which are proportionate to -

(i) the amount of money involved.

(ii) the importance of the case.

(iii) the complexity of the issues.

(iv) financial position of each party.

(d) Ensuring that it is dealt with expeditiously and fairly.

(e) Allocating to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

6. Experts should have regard to the objectives of the Pre-Action Protocol for Commercial Actions –

(a) To encourage exchange of early and full information about the prospective legal claim.

(b) To enable parties to avoid litigation by agreeing a settlement of the claim before commencement of proceedings.

(c) To support the efficient management of proceedings where litigation cannot be avoided.

7. Ordinarily, the court will expect an expert witness to have obtained a form of accreditation as an expert witness.

8. Experts should be aware that any failure to comply with the Rules of Court or the directions of the court or this Practice Direction, or any

excessive delay for which they are responsible, may result in the parties who instructed them being penalised in costs, or debarred from relying upon the expert evidence. In addition the expert may be held responsible for wasted costs and may have some or all fees and expenses disallowed.

9. Advice from an expert before proceedings are started which the parties do not intend to rely upon in litigation is likely to be confidential and this Practice Direction does not apply to that advice. Similarly this Practice Direction does not apply where, after the commencement of proceedings, experts are instructed only to advise (e.g. to comment upon a single joint expert's report) and not to prepare evidence for the proceedings. The expert's role then is that of an expert advisor.

10. However this Practice Direction does apply if experts who were formerly instructed only to advise are later instructed as an expert witness to prepare or give evidence in the proceedings.

11. Model Forms of Experts Reports have been produced by The Academy of Experts (www.academy-experts.org) and the Expert Witness Institute (www.ewi.org.uk). A Model Form of Expert Witness CV has been produced by the Academy of Experts.

12. Some professional bodies have produced guidance for members acting as expert witnesses, for example the Royal Institution of Chartered Surveyors RICS Practice Statement and Guidance Note 'Surveyors acting as Expert Witnesses' (http://www.rics.org/uk/).

The need for an expert witness

13. Those intending to instruct an expert to give or prepare evidence for the purpose of civil proceedings should consider whether expert evidence is necessary.

14. Any party intending to call an expert witness or witnesses, or to serve reports from experts, should notify this intention at the earliest opportunity at review before the Commercial Judge. Any party should be prepared to explain the justification for retaining an expert and the relevance of his/her expertise. Note the limited need to engage expert witnesses in legal negligence actions and if in doubt an application may be made to the court.

15 Active consideration should always be given to the appointment of a single joint expert for the purposes of the litigation or for the purposes of dealing with any one or more separate issues. Any party should be prepared to provide the Commercial Judge with the reason that a single joint expert should not be appointed.

16. When the parties are unable to agree on the identity of the single joint expert the court may, after hearing the parties, identify the single joint expert.

17. The parties should bear in mind that there may well be cost implications for the use of unnecessary expert evidence and, in appropriate cases, for the unjustifiable refusal to agree to the appointment of a single joint expert.

Costs Budgets for Expert Witnesses

18. The court may require a party instructing an expert to produce a costs budget setting out the projected costs of engaging the expert to produce a report and to attend as a witness and for any other purpose in the proceedings.

19. The costs budget shall set out the projected costs in such manner as may be directed by the court.

20. The court will be concerned to establish that the engagement of the expert will be in conformity with the overriding objective (set out at paragraph 5 above) and in particular that the experts costs are proportionate.

21. Where the court directs a costs budget, the report of and the oral evidence of the expert will not be admitted by the court unless the costs budget has been approved by the court.

22. The failure to produce a costs budget when directed by the court may result in the report of and the oral evidence of the expert being declared inadmissible.

23. The costs charged by the expert must not exceed the costs budget without the prior approval of the court.

24. The court may approve an increase or a decrease in the costs budget.

Duties and obligations of experts

25. Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code. However when they are instructed to give or prepare evidence for civil proceedings they have an overriding duty to help the court on matters within their expertise. This duty overrides any obligation to the person instructing or paying them. Experts must not serve the exclusive interest of those who retain them.

26. Experts must provide opinions that are independent, regardless of the pressures of litigation. A useful test of 'independence' is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators.

27. Experts should confine their opinions to matters which are material to the disputes and provide opinions only in relation to matters which lie within their expertise. Experts should indicate without delay where particular questions or issues fall outside their expertise.

28. Experts should take into account all material facts before them. Their reports should set out those facts and any literature or material on which they have relied in forming their opinions. They should indicate if an opinion is provisional, or qualified, or where they consider that further information is required or if, for any other reason, they are not satisfied that an opinion can be expressed finally and without qualification.

29. Experts should inform those instructing them without delay of any change in their opinions on any material matter and the reasons for this.

The appointment of experts

30. Before experts are instructed or the court's permission to appoint named experts is sought, it should be established whether the experts:

a. have the appropriate expertise and experience for the particular instruction;

b. are familiar with the general duties of an expert;

c. can produce a report, deal with questions and have discussions with other experts within a reasonable time, and at a cost proportionate to the matters in issue;

d. are available to attend the trial, if attendance is required; and

e. have no potential conflict of interest

31. Terms of appointment should be agreed at the outset and should normally include:

a. the capacity in which the expert is to be appointed (e.g. party appointed expert or single joint expert);

b. the services required of the expert (e.g. provision of an expert's report, answering questions in writing, attendance at meetings and attendance at court);

c. time for delivery of the report;

d. the contractual basis on which the expert's fees and expenses will be charged and paid (e.g. daily or hourly rates and an estimate of the time likely to be required, or a fixed fee for the services), which contractual basis should not conflict with the duties and responsibilities of the expert;

e. travelling expenses and disbursements;

f. cancellation charges;

g. any fees for attending court;

h. time for making the payment;

i. whether fees are to be paid by a third party;

j. if a party is publicly funded, whether the expert's charges will be subject to assessment; and

k. guidance that the expert's fees and expenses may be limited by the court.

32. When necessary, arrangements should be made for dealing with questions to experts and discussions between experts, including any directions given by the court.

33. Experts should be kept informed about deadlines for all matters concerning them. Those instructing experts should send them promptly copies of all court orders and directions that may affect the preparation of their reports or any other matters concerning their obligations.

Instructions to experts

34. Those instructing experts should ensure that they give clear written instructions (and attach relevant documents), including the following:

a. basic information, such as names, postal and email addresses, telephone numbers and any relevant claim reference numbers;

b. the nature of the expertise required;

c. the purpose of the advice or report, a description of the matter(s) to be investigated, the issues to be addressed and the identity of all parties;

d. the pre-action protocol correspondence, the pleadings, those documents which form part of disclosure and witness statements and expert reports that are relevant to the advice or report, making clear which have been served and which are drafts and when the latter are likely to be served;

e. where proceedings have not been started, whether they are contemplated and, if so, whether the expert is being asked only for advice;

f. an outline programme, consistent with good case management and the expert's availability, for the completion and delivery of each stage of the expert's work; and

g. the dates of any negotiations, mediation, court hearings (including any reviews) as appropriate, any requirements for the attendance of experts at or the production of information by experts for any negotiations, mediation, court hearing (including any review), the dates fixed by the court or agreed between the parties for the exchange of experts' reports and any other relevant deadlines to be adhered to;

h. bringing to the attention of the expert this Practice Direction.

35. Opposing parties instructing different experts should seek to agree, where practicable, the instructions for the experts, and that they receive the same factual material. Solicitors should ensure that the expert has access to all relevant information held by the parties, and that the same information has been disclosed to each expert in the same discipline.

Acceptance of instructions by experts

36. Experts should confirm without delay whether they accept their instructions.

37. They should also inform those instructing them (whether on initial instruction or at any later stage) without delay if:

a. instructions are not acceptable because, for example, they require work that falls outside their expertise, impose unrealistic deadlines, or are insufficiently clear. Experts who do not receive clear instructions should request clarification and may indicate that they are not prepared to act unless and until such clear instructions are received;

b. they consider that instructions are insufficient to complete the work;

c. they become aware that they may not be able to fulfill any of the terms of appointment;

d. the instructions and/or work have, for any reason, placed them in conflict with their duties as an expert. Where an expert advisor is approached to act as an expert witness they will need to consider carefully whether they can accept a role as expert witness; or

e. they are not satisfied that they can comply with any directions of the court that have been made.

38. Experts must neither express an opinion outside the scope of their field of expertise, nor accept any instructions to do so.

39. Where an expert identifies that the basis of his instruction differs from that of another expert, he should inform those instructing him.

40. Experts should agree the terms on which they are to be paid with those instructing them.

Instructions to single joint experts

41. The parties should try to agree joint instructions to single joint experts, but in default of agreement, each party may give instructions. In particular, all parties should try to agree what documents should be included with instructions and what assumptions single joint experts should make.

42. Where the parties fail to agree joint instructions, they should try to agree where the areas of disagreement lie and their instructions should make this clear. If separate instructions are given, they should be copied to their other instructing parties.

43. Where experts are instructed by two or more parties, the terms of the appointment should, unless the court has directed otherwise, or the parties have agreed otherwise, include a statement that all the instructing parties are jointly and severally liable to pay the experts' fees and, accordingly, that experts' invoices should be sent simultaneously to all instructing parties or their solicitors (as appropriate).

44. Where instructions have not been received by the expert from one or more of the instructing parties, the expert should give notice (normally at least 7 days) of a deadline for their receipt, after which period the expert

may, if practicable, begin work with or without the delayed instructions. If instructions are received after the deadline or further instructions are received after beginning work on the report the expert should consider whether it is practicable to complete the report without adversely affecting the timetable for delivery of the report and without greatly increasing the costs. An expert who decides to issue a report without taking into account instructions received after the deadline must inform the parties, who may apply to the court for directions. In either event the report must show clearly that the expert did not receive instructions within the deadline or received further instructions, as the case may be.

Conduct of the single joint expert

45. Single joint experts should keep all instructing parties informed of any material steps that they may be taking by, for example, copying all correspondence to those instructing them.

46. Single joint experts have an overriding duty to the court. They are the parties' appointed experts and the duties owed to the parties are owed to all parties equally. The experts should maintain independence, impartiality and transparency at all times.

47. Single joint experts should not attend a meeting or conference that is not a joint one, unless all the parties have agreed in writing or the court has directed that such a meeting may be held. There also needs to be agreement about who is to pay the experts' fees for the meeting.

48. Single joint experts should serve their reports simultaneously on all instructing parties. They should provide a single report even though they may have received instructions that contain conflicts. If conflicting instructions lead to different opinions (for example, because the instructions require the expert to make different assumptions of fact), reports may need to contain more than one set of opinions on any issue. It is for the court to determine the facts.

Cross-examination of the single joint expert

49. Single joint experts may give oral evidence at trial. All parties may ask questions. In general, written questions should be put to single joint experts before requests are made for them to attend court for the purpose of cross-examination.

Experts Requests for Directions

50. Experts should normally raise any need for further directions with those by whom they are instructed but in appropriate circumstances they may ask the court for directions. Unless the court otherwise orders any such request shall be furnished to the instructing party at least 7 days before any application to the court. Any such application to the court should be by letter to the Commercial Office including therein, inter alia, the title of the case, the case number, the name of the expert, copies of any relevant documents and/or correspondence and full details of the request for instructions.

Experts' access to information held by the parties

51. Experts should try to ensure that they have access to all relevant information held by the parties, and that the same information has been disclosed to each expert in the same discipline. Experts should seek to confirm this soon after accepting instructions, notifying instructing solicitors of any omissions.

52. If experts require information which has not been disclosed, they should discuss the position with those instructing them without delay, so that a request for the information can be made and, if not forthcoming, an application can be made to the court.

53. Any request for further information from the other party made by an expert should be in a letter to the expert's instructing party and should state why the information is necessary.

Experts' reports

54. The content of experts' reports should be governed by their instructions and general obligations, any court directions, and the experts' overriding duty to the court. The report should identify the individual who prepared the report and any individuals who contributed to its preparation.

55. In preparing reports, experts should maintain professional objectivity and impartiality at all times.

56. The details of experts' qualifications in reports should be commensurate with the nature and complexity of the case. It may be sufficient to state any academic and professional qualifications. However, where highly specialised expertise is called for the report should include the detail of particular training and/or experience that qualifies them to provide that specialised evidence.

57. Where tests of a scientific or technical nature have been carried out, experts should state:

a. the dates the tests were undertaken and the methodology used; and

b. by whom the tests were undertaken and under whose supervision, summarising their respective qualifications and experience.

58. When addressing questions of fact and opinion, experts should keep the two separate. Experts must state those facts (whether assumed or otherwise) upon which their opinions are based. Experts must distinguish clearly between those facts that they know to be true and those facts which they assume.

59. Where there are material facts in dispute experts should express separate opinions on each hypothesis put forward. They should not express a view in favour of one or other disputed version of the facts unless, as a result of particular expertise and experience, they consider one set of facts as being improbable or less probable, in which case they may express that view and should give reasons for holding that view.

Sequential exchange of experts' reports

60. Where there is to be sequential exchange of reports the defendant's expert's report usually will be produced in response to the plaintiff's. The defendant's report should then:

a. confirm whether the background set out in the plaintiff's expert report is agreed, or identify those parts that in the defendant's expert's view require revision, setting out the necessary revisions. The defendant's expert need not repeat information that is adequately dealt with in the plaintiff's expert report;

b. focus only on those material areas of difference with the plaintiff's expert's opinion. The defendant's report should identify those assumptions of the plaintiff's expert that they consider reasonable (and agree with) and those that they do not; and

c. in particular where the experts are addressing the financial value of heads of claim (for example, loss of profits), the defendant's report should contain a reconciliation between the plaintiff's expert loss assessment and the defendant's, identifying for each assumption any different conclusion.

Written questions to experts

61. Any party may seek clarification of an experts report by directing written questions to the expert by forwarding the questions to the party instructing the expert within 28 days of receipt of the expert's report. Copies of the questions should be forwarded by the party to the expert and to all other parties who have received the experts report.

62. Written questions must only relate to the clarification of the experts report, must be proportionate and may only be issued on one occasion.

63. Experts should provide written answers to the party instructing the expert, to be forwarded to the party asking the question and all other parties who have received the experts report within 28 days of the party receiving the questions.

64. Experts have a duty to provide written answers to questions from parties seeking clarification of the experts report. Where they fail to do so within the time required or at all, the court may debar a party from relying on the report. The party and the expert may be responsible for wasted costs and may have some or all related fees disallowed.

65. Experts' answers to questions become part of their reports. They are covered by the statement of truth, and form part of the expert evidence.

66. Where experts believe that questions put are not properly directed to the clarification of the report they should discuss the questions with

those instructing them and, if appropriate, those asking the questions. Attempts should be made to resolve such problems without the need for an application to the court for directions.

Experts' Withdrawal

67. Where experts' instructions are incompatible with their duties, through incompleteness, a conflict between their duty to the court and their instructions, or for any other reason, the experts may consider withdrawing from the case. However, experts should not do so without first discussing the position with those who instruct them and considering whether it would be more appropriate to make a written request for directions from the court. If experts do withdraw, they must give formal written notice to those instructing them.

Discussions between experts

68. The purpose of discussions between experts should be, wherever possible, to:

a. identify and discuss the expert issues in the proceedings;

b. reach agreed opinions on those issues, and, if that is not possible, narrow the issues;

c. identify those issues on which they agree and disagree and summarise their reasons for disagreement on any issue; and

d. identify what action, if any, may be taken to resolve any of the outstanding issues between the parties.

69. Arrangements for discussions between experts should be proportionate to the value of cases. In some cases telephone discussion or an exchange of letters may suffice.

70. Those instructing experts must not instruct experts to avoid reaching agreement (or to defer doing so) on any matter within the experts' competence. Experts are not permitted to accept such instructions.

71. At the conclusion of any discussion between experts a minute should be prepared setting out:

a. issues that have been agreed and the basis of that agreement;

b. issues that have not been agreed and the basis of the disagreement;

c. any further issues that have arisen that were not included in the original agenda for discussion; and

d. a record of further action, if any, to be taken or recommended, including if appropriate a further discussion between experts.

72. The minute should be agreed and signed by all the parties to the discussion at the conclusion of the meeting.

73. Agreements between experts during discussions do not bind the parties unless the parties expressly agree to be bound. However, parties should give careful consideration before refusing to be bound by such an agreement and be able to explain their refusal should it become relevant to the issue of costs.

Amendment of reports

74. Where experts change their opinion, whether following a meeting of experts or as a result of new evidence or for any other reason, they must inform those who instruct them by addendum to their report explaining the reasons. Those instructing experts should inform other parties as soon as possible of any change of opinion and forward the addendum to those who have received the report.

Attendance of experts at court

75. Those instructing experts should ascertain the availability of experts before trial dates are fixed; keep experts updated with timetables (including the dates and times experts are to attend), the location of the court and directions of the court; and inform experts immediately if trial dates are vacated or adjourned.

76. A party instructing an expert may apply to the court, on notice to all other parties, for leave to present expert evidence by video link.

77. Experts have an obligation to attend court and should ensure that those instructing them are aware of any dates to avoid and that they take all reasonable steps to be available.

78. Experts should normally attend court without the need for a witness
summons, but on occasion they may be served to require their attendance. The use of witness summonses does not affect the contractual or other obligations of the parties to pay experts' fees.

Concurrent evidence

79. The court may direct that experts of like disciplines give their evidence at trial concurrently. The experts will then be questioned together, firstly by the judge based upon disagreements recorded in the minute of the joint meeting of experts and then by the parties' advocates. Concurrent evidence can save time and costs, and assist the judge in assessing the difference of views between experts. Experts need to be aware that the court may order concurrent evidence.

Sanctions

80. The parties and solicitors and experts should be aware that sanctions might apply because of a failure to comply with the Rules of Court, this Practice Direction or the directions of the court.

81. Whether or not court proceedings have been commenced a professional instructing an expert, or an expert, may be subject to sanction for misconduct by their professional body or regulator.

82. If proceedings have been started the court may:

a. impose cost penalties against those instructing the expert.

b. direct that an expert's report or evidence be inadmissible.

c. order that the expert be responsible for wasted costs.

d. order that some or all of the experts fees and expenses be disallowed.

83. Experts should also be aware of other possible sanctions:

a. In more extreme cases, if the court has been misled it may invoke general powers for contempt in the face of the court. The court would then have the power to fine or imprison the wrongdoer.

b. If an expert commits perjury, criminal sanctions may follow.

c. If an expert has been negligent there may be a claim on their professional indemnity insurance.

Mr Justice Weatherup

Judge of the Commercial Court

11th May 2015

Appendix 5

Number of Court Cases disposed that involved a Personal Litigant, by Court Tier: 2010 to 2014

Court Tier	2010	2011	2012	2013	2014
Court of Appeal (Civil)	16	10	29	26	19
Magistrates' Court	1,413	1,194	1,039	960	967
High Court	3,388	3,569	2,096	1,863	1,834
County Court	14,559	11,207	11,188	10,438	10,264
Total	**19,376**	**15,980**	**14,352**	**13,287**	**13,084**

Source: Integrated Court Operations System (ICOS)

Appendix 6

APPLICATION FORM TO BE COMPLETED BY AN INDIVIDUAL WHO WISHES TO PROVIDE ASSISTANCE TO A LITIGANT AS A McKENZIE FRIEND

A. IDENTIFICATION OF THE CASE IN WHICH YOU WISH TO PROVIDE ASSISTANCE	
CASE REFERENCE NUMBER	
NAME(S) OF PLAINTIFF(S)	
NAME(S) OF DEFENDANT(S)	
NAME(S) OF THIRD AND SUBSEQUENT PARTIES (if any)	

B. IDENTIFICATION OF THE PERSON WHO WISHES TO PROVIDE ASSISTANCE AS A McKENZIE FRIEND	
FULL NAMES	
ADDRESS	
EMAIL ADDRESS	
TEL NO.	
C. INFORMATION ABOUT THE PERSON WHO WISHES TO PROVIDE ASSISTANCE AS A McKENZIE FRIEND.	

D. IDENTIFICATION OF THE PERSON WHOM YOU WISH TO ASSIST	
INSERT FULL NAMES OF THE PARTY TO THE LITIGATION WHOM YOU WISH TO ASSIST	

E. UNDERTAKING BY THE PERSON WHO WISHES TO PROVIDE ASSISTANCE AS A McKENZIE FRIEND

I, the undersigned, confirm that I:

- Have no personal interest in the case in which I will be providing assistance;

- Am aware of, and will comply with the Practice Note (4/2014) issued by the Lord Chief Justice on 5 September 2014 which is entitled "McKenzie Friends (Civil and Family Courts)";

- Will observe strict confidentiality in relation to any documents I have sight of and in relation to any information I hear in relation to the proceedings;

- Unless stated otherwise below, will not be seeking or receiving payment of any fees for any assistance or services provided by me;

  (If you do intend to enter in to any agreement to be paid fees for the service you provide then provide full disclosure of the nature of this agreement, attaching supplementary documents as required)

- Unless stated otherwise below, will not be seeking to be granted a right of audience in relation to this case;

  (If you do intend to seek to be granted a right of audience in relation to this case please confirm so below. Please note that before your undertaking to act as a McKenzie Friend can be approved, you must provide full details of any request that you have made to be granted a right of audience to the Court in question along with any and all evidence including all relevant documentation that has been submitted to the Court or other regulatory body in support of your request. Any such documentation must be attached to this form.)

- Have fully and honestly responded to all of the questions and statement contained within this form and accept that any inaccurate or misleading statements may result in the removal of any permission to act as a McKenzie Friend in this case.

Appendix 7

Section 45(4) of *The Judicature Act 1978* stipulates that there is no appeal to the Court of Appeal in the following circumstances:

(a) from any judgment of the High Court in any criminal cause or matter (such an appeal lies directly to the Supreme Court);
(b) from an order allowing an extension of time for appealing from a judgment or order (although it appears that an appeal does lie from an order *refusing* an extension of time)
(c) from an order of a judge giving unconditional leave to defend an action;
(d) from a judgment or order where a statutory provision declares the judgment or order of the High Court to be final;
(e) from a decree absolute where the aggrieved party could have, but did not, appeal the decree nisi on which it is founded;
(f) from a dissolution order under *The Civil Partnership Act 2004* where the aggrieved party could have, but did not, appeal the conditional order on which it is founded;
(g) except as provided by Part I of *The Arbitration Act 1996*, from any decision of the High Court under that Part;
(h) from the decision of the High Court on any question of law, whether on appeal or otherwise, under sections 140 to 156 of *The Representation of the People Act 1984*;
(i) from a decision to grant or refuse a certificate for a 'leap-frog' appeal to the Supreme Court under section 14 of *The Administration of Justice Act 1969*;

Furthermore, common law provides that there is no appeal in the following circumstances:

(a) If the parties have agreed not to appeal and that is recorded in the order of the High Court;
(b) If the point on the appeal is academic or hypothetical;
(c) If the judge sat as an arbitrator;
(d) If by consent of the parties the judge decided a matter outside his judicial capacity or jurisdiction;
(e) From a purely administrative decision (e.g. as to a place and time of sitting, or that a case be listed before a particular judge);
(f) From the rulings of fact or law on which the judge based his decision;
(g) By a party against an undertaking given by him embodied in a court order;
(h) By a party who has forfeited his right of appeal by conduct following the judgment which renders the appeal inequitable.

Appendix 8

Appeals by way of Case Stated to the Court of Appeal

1. An appeal by way of case stated is an appeal on a point of law whereby the court or tribunal being appealed is required to state its findings of fact, the issues of law, and a question of law for the Court of Appeal to answer.

2. The power to appeal by way of case stated to the Court of Appeal is normally found in the legislation establishing the inferior court or tribunal. The most common examples of appeals by way of case stated are from the Magistrates' Court, pursuant to Article 146 of the *Magistrates' Courts (NI) Order 1981* ("*the 1981 Order*"); from the County Court, pursuant to Article 61 of *The County Courts (NI) Order 1980*; and from the High Court (in an appeal from the County Court) pursuant to Article 64 of the *1980 Order*.

(i) Case Stated by the Magistrates' Court

1. Any party to a summary proceeding dissatisfied with any decision of the court upon any point of law involved in the determination of the proceeding or of any issue as to its jurisdiction may apply to the court to state a case. The appellant must lodge the application to state a case within 14 days of the impugned decision being given. Upon receipt of the application the judge must state a case unless they are of the opinion it is frivolous. If the judge refuses to state a case the appellant can apply to the Court of Appeal to order the judge to do so; such an application must be made by Notice of Motion to the Court of Appeal within 14 days of the judge refusing to state a case.

(ii) Case Stated by the County Court

2. Any party dissatisfied with the decision of a county court judge upon any point of law may appeal the decision by way of state a case. The appellant must lodge the application to state a case within 21 days of the decision being given. The judge must state a case unless they are of the opinion that the application is frivolous, vexatious or unreasonable. If the judge refuses to state the case the appellant can apply to the Court of Appeal for an order directing the judge to state a case; such an application must be made by Notice of Motion to the Court of Appeal within 14 days of the judge refusing to state a case.

(iii) Case Stated from the High Court (in an appeal from the County Court)

3. Article 60 of the County Court (NI) Order 1980 provides that any party to civil proceedings in the County Court can appeal the decree to the High Court (see above). Article 64 of the 1980 Order then goes on to provide that where the High Court is hearing an appeal from the County Court under Article 60, any party to the appeal can require the High Court Judge to state a case on a point of law arising out of the appeal.

140. The procedure for an appeal by way of case stated from the High Court in an appeal from the County Court is found in Order 61 RCJ. The requisition to state a case must be lodged within 44 days of the impugned decision being given. Valentine makes the following observations on the procedure:

"If the High Court judge refuses to state a case, there appears to be no right to challenge his resolution of the appeal. The order which he makes on appeal cannot be appealed to the Court of Appeal under section 45 *supra*, because the decision on an appeal under Article 60 is expressed to be final. *Semble*, his refusal to state a case is not a 'judgment or order' within the meaning of that section. No decision by a High Court judge can be challenged by judicial review …"

Appendix 9

Number of ordinary civil bill cases received by judicial level: October - December 2014

	Case Judicial Level			Percentage split	
	County court judge	District judge	Total	County court judge	District judge
Antrim	69	110	179	39%	61%
Ards	68	176	244	28%	72%
Armagh and South Down	56	96	152	37%	63%
Belfast	833	956	1789	47%	53%
Craigavon	59	105	164	36%	64%
Fermanagh and Tyrone	78	96	174	45%	55%
Londonderry	26	102	128	20%	80%
Total	**1189**	**1641**	**2830**	**42%**	**58%**

Number of ordinary civil bill cases received by judicial level: October - December 2015 [p]

	Case Judicial Level			Percentage split	
	County court judge	District judge	Total	County court judge	District judge
Antrim	62	99	161	39%	61%
Ards	35	150	185	19%	81%
Armagh and South Down	43	78	121	36%	64%
Belfast	632	965	1597	40%	60%
Craigavon	56	94	150	37%	63%
Fermanagh and Tyrone	54	58	112	48%	52%
Londonderry	37	69	106	35%	65%
Total	**919**	**1513**	**2432**	**38%**	**62%**

Source: ICOS

[P]Data are currently provisional

Total number of ordinary civil bill cases disposed, by amount awarded: 2010

Court Division	Amount Awarded						
	Unliquidated	Less than £1000	£1000-2999	£3000-4999	£5000-£9999	£10000+	Total
Antrim	411	76	166	171	126	24	974
Ards	526	120	273	235	140	21	1315
Armagh and South Down	326	82	164	126	126	23	847
Belfast	1496	184	577	478	335	40	3110
Civil Processing Centre	2991	2	4	5	4	0	3006
Craigavon	349	100	216	155	120	21	961
Fermanagh and Tyrone	355	67	180	149	112	26	889
Londonderry	307	63	192	144	109	13	828
Total	6761	694	1772	1463	1072	168	11930

Total number of ordinary civil bill cases disposed, by amount awarded: 2011

Court Division	Amount Awarded						
	Unliquidated	Less than £1000	£1000-2999	£3000-4999	£5000-£9999	£10000+	Total
Antrim	302	79	153	162	122	32	850
Ards	466	84	310	272	155	26	1313
Armagh and South Down	231	41	131	92	127	24	646
Belfast	1711	173	547	417	294	37	3179
Civil Processing Centre	2321	3	11	15	7	0	2357
Craigavon	356	92	214	156	144	14	976
Fermanagh and Tyrone	301	61	118	108	100	15	703
Londonderry	257	58	142	117	96	10	680
Total	5945	591	1626	1339	1045	158	10704

Total number of ordinary civil bill cases disposed, by amount awarded: 2012

Court Division	Amount Awarded						
	Unliquidated	Less than £1000	£1000-2999	£3000-4999	£5000-£9999	£10000+	Total
Antrim	494	52	164	155	127	21	1013
Ards	403	64	260	232	183	22	1164
Armagh and South Down	196	43	143	95	99	18	594
Belfast	1818	165	574	480	307	40	3384
Civil Processing Centre	1796	12	28	24	17	1	1878
Craigavon	292	75	216	148	124	17	872
Fermanagh and Tyrone	263	43	125	106	97	13	647
Londonderry	243	64	133	134	78	12	664
Total	5505	518	1643	1374	1032	144	10216

Total number of ordinary civil bill cases disposed, by amount awarded: 2013

Court Division	Amount Awarded						
	Unliquidated	Less than £1000	£1000-2999	£3000-4999	£5000-£9999	£10000+	Total
Antrim	289	54	147	132	134	23	779
Ards	265	57	256	262	205	43	1088
Armagh and South Down	159	44	123	99	114	20	559
Belfast	963	142	530	505	413	82	2635
Civil Processing Centre	1147	11	44	29	21	8	1260
Craigavon	214	52	174	153	139	32	764
Fermanagh and Tyrone	194	46	154	100	124	24	642
Londonderry	237	44	154	134	87	18	674
Total	3468	450	1582	1414	1237	250	8401

Total number of ordinary civil bill cases disposed, by amount awarded: 2014

Court Division	Amount Awarded						
	Unliquidated	Less than £1000	£1000-2999	£3000-4999	£5000-£9999	£10000+	Total
Antrim	239	46	134	95	117	47	678
Ards	277	70	297	271	236	83	1234
Armagh and South Down	181	32	146	84	102	48	593
Belfast	1654	177	628	472	467	153	3551
Civil Processing Centre	1038	13	26	19	20	5	1121
Craigavon	197	65	173	162	131	40	768
Fermanagh and Tyrone	272	33	129	99	87	52	672
Londonderry	210	28	105	71	62	27	503
Total	4068	464	1638	1273	1222	455	9120

Source: Integrated Courts Operations System (ICOS)

In 2015 a total of 1555 originating cases were issued in the Chancery division. The figure does not include proceedings before the Bankruptcy Master when a total of 1784 proceedings were issued[1].
By way of comparison in July–September 2015 a total of 30 Equity Cases were lodged in the County Court in NI (the same as in the period July–Sept 2014) but only 15 were disposed of in July–Sept 2015 compared to 26 in July-Sept 2014[2].

According to the County Court Bulletin for July–Sept 2015;

Table 10: Equity cases and applications disposed

		Court result - CCJ	Court result - DJ	Non court disposals	Total
Case	Antrim		1		1
	Ards	1			1
	Armagh and South Down			1	1
	Belfast	2		1	3
	Craigavon	1			1
	Fermanagh and Tyrone	2			2
	Londonderry	5	1		6
	Total	11	2	2	15
Application	Antrim	1			1
	Ards	1			1
	Armagh and South Down	2		3	5
	Belfast			2	2
	Fermanagh and Tyrone		1		1
	Londonderry			1	1
	Total	4	1	6	11

Table 11: Outstanding equity cases

Case	Antrim	18
	Ards	27
	Armagh and South Down	33
	Belfast	51
	Craigavon	10
	Fermanagh and Tyrone	48
	Londonderry	15
Total		202

[1] As per information supplied Court Office as of the 2 February 2016.
[2] County Court Bulletin July to September 2015 Research and Statistical Bulletin 25/2015 Provisional quarterly figures R. Redmond 13 November 2015.

Glossary

ADR *see* alternative dispute resolution

affidavit

A written statement made in the name of a person (based on facts within his/her own knowledge) who voluntarily signs it (in the presence of an authorised person), having sworn or affirmed that it is true.

alternative dispute resolution (ADR)

Ways of attempting to resolve disputes so as to avoid litigation. Mediation is the primary form of ADR

Anton Piller order

This is an order of the High Court (which may be made *ex parte*) for the detention and preservation of the subject matter of a cause and/or documents relating to it. Such an order (named after Anton Piller KG v. Manufacturing Processes Ltd. [1976] 1 All E. R. 779) may compel one party to allow the other to enter his/her premises. Unlike a search warrant it cannot be executed by force, but the failure of a party to comply with such an order amounts to contempt of court.

Assigned Judge

This phrase ordinarily refers to a judge who is specifically assigned by the Lord Chief Justice or other presiding judge to conduct a particular type of court business. Thus *e.g.* in the High Court there is an assigned Commercial Court judge

champerty

Champerty is the carrying on of an action in the name of another by agreement with them, but at one's own expense/risk, with a view to receiving a share of the damages awarded in the event that the action is successful.

Civil Bill

This is the name of the document or written instrument that, when issued and served on another party, constitutes the commencement of proceedings in the county court (which sits below the High Court in the hierarchy).

Comerton scale

The Bar Council issues from time to time a list of going rate Brief and Negotiation Fees: Queen's Bench Personal Injuries Actions, 2008, known as the Comerton scale which is recognised by the courts as representing a reasonable market rate for work carried out by members of the Bar in this sphere.

CPD

This stands for continuing professional development and refers to the ongoing training that members of both branches of the legal profession (as well as numerous other professions) must undertake annually in order to comply with the requirements of their professional bodies — the Bar Council and the Law Society — and ensure their continued competence to perform the role.

disclosure

See **'discovery'** below.

discovery

A process whereby the parties to court proceedings disclose to each other all documents in their possession, custody or power relating to issues in those proceedings.

early neutral evaluation

A process, provided both privately and occasion by the court, in which an early indication is given of what the outcome might be if the mater were to be finally adjudicated in court.

equity

This term, meaning 'fairness', refers to a particular set of legal remedies and associated procedures. The doctrines and procedures associated with equity were developed alongside the common law. Such remedies are generally available only when a legal remedy is insufficient or inadequate as in some way unfair or oppressive. The law of trusts was developed in equity. Equity was traditionally administered in the English Court of Chancery, presided over by the Lord Chancellor (hence its name). In this jurisdiction the Chancery Division of the High Court primarily dispenses equitable remedies where appropriate. Certain equitable remedies are also available in the county court.

equity scale

As with the Comerton scale (see above), this scale represents the going rate for work done in connection with equity matters. Equity is a body of law that sits alongside the ordinary common law and governs matters such as trusts.

empanelled

In the context of a jury trial (*e.g.* in a defamation action) the act of empanelling is the process of selecting and swearing in of the people who will form the jury — or panel of jurors — for that trial

endorsement

Literally endorsement refers to writing on the back of an instrument and may be used in a number of contexts. The Endorsement on a Writ of Summons (a first step in a legal action in the High Court) sets out the Statement of Claim giving details of the claim that the plaintiff is making against the defendant(s).

ex parte

This can refer either to an application in a judicial proceeding made: (1) by one party in the absence of the other(s) or, less commonly, (2) by an interested person who is not a party to proceedings. The former meaning is contrasted with an application or hearing that is *inter partes (*the Latin for 'between the parties').

habeas corpus

This refers to a form of proceeding before a Divisional Court of the Queen's Bench Division of the High Court against a person who detains another in custody where the court is asked to order that person to produce or 'have the body' (the literal meaning of the Latin term) of that person before the court. It is a form of proceeding largely used in relation to those who are detained by the police or other law enforcement agencies but may also be used in relation to detention under Mental Health legislation.

hereditament

This refers to property that would ordinarily fall to pass to the owner's heir in the absence of a will. Hereditaments can either be corporeal — visible and tangible objects such as land and houses — or incorporeal — intangible objects such as tithes or easements (rights of way over land).

injunction

An injunction is an order or decree of the court by which a party to an action is required (enjoined) to do or refrain from doing a certain act (see **Mareva injunction** below by way of example). **Injunctive relief** simply refers to the relief or remedy that the applicant for an injunction is seeking.

interlocutories

This refers to proceedings taken during the course of an action that are incidental to the principal object of the action. Thus an application for **discovery** (see above) of specific documents (*e.g.* medical notes and records) may be described as a form of interlocutory proceeding.

interrogatories

These are the requirement on a party to give answers to certain stipulated matters related to the proceedings. A party to an action may apply to a Master in the High Court by **summons** (see below) for an order giving him/her leave or permission to

serve interrogatories on any other party requiring that party to answer them on **affidavit** (see above).

insurers' scale

This is the published list of scale legal costs that the insurance companies publish from time to time representing their view of the appropriate levels of professional remuneration for solicitors in personal injury claims falling within the jurisdiction of the High Court.

inter partes

See entry for ***ex parte*** above.

Jeremiad

A doleful complaint about the present state of things (in allusion to *The Lamentations of Jeremiah the Prophet*, a book of the Old Testament)

Lis

This is a Latin legal term for a suit or action where there is an issue between parties in dispute.

litigant in person

An individual, company or organisation that is a party to legal proceedings but not represented by lawyers.

McKenzie Friend

A friend or advisor, other than a legal representative, who may, with the permission of the court, sit with a party to proceedings in court to give advice and assistance and to help take notes but who cannot speak in court on behalf of that party. The term comes from a judgment of that name.

Mareva injunction

Where debt proceedings are taken against a party the court may grant a Mareva injunction (named after Mareva Compania Naviera SA v International Bulkcarriers SA [1980] 1 All ER 213 to prevent the defendant from removing assets from the jurisdiction before the trial of the matter.

notice of motion

An instrument by which a party brings a matter (whether freestanding or related to existing proceedings) before the High Court in order to 'move' or make some application. The Notice will ordinarily be served on the party or parties affected by the application. Appeals to the High Court from other tribunals are often required by the rules of court to be brought by Notice of Motion, as are applications for interim relief in connection with existing proceedings.

online dispute resolution

The use of technology to assist the resolution of disputes between parties.

Order 14

This is a reference to Order 14 of the Rules of the Court of Judicature (which govern the High Court). It provides for summary judgment to be given in favour of the plaintiff where the defendant offers no defence.

Order 64

This Order of the Rules of the Court of Judicature makes provision for the dates/times of the sittings, vacations and office hours of the Court of Judicature.

Order 85

This is an Order of the Rules of the Court of Judicature providing for the administration, under the direction of the court, of the estate of a deceased person or for the execution, under the direction of the court, of a trust.

Order 88

This is an Order of the Rules of the Court of Judicature providing for the foreclosure or redemption of any mortgage. Most commonly 'Order 88s' are sought by financial institutions against borrowers who have defaulted on their mortgage payments in order that the institution may obtain possession of the mortgaged property and recover the value of the monies advanced under the terms of the mortgage.

Order for Directions

As part of its case management function — to ensure efficient progression of a case — a court may give directions that certain actions to be undertaken by the parties or others who may assist the court (*e.g.* the filing in the court office of a report by a certain date). There can be specific directions hearings for this purpose and any directions given by the court become the subject of an Order for Directions.

originating application and affidavit

Certain types of post-bankruptcy applications before the Chancery Court, such as an application for possession and sale of land are commenced by way of a simplified form of proceeding known as originating application and affidavit. The affidavit sets out the factual basis underpinning the application.

originating summons

This is one possible means by which proceedings may be begun — or originated — in the High Court. Other possible modes are: a **Writ of Summons** (see below); and a **Petition** (see below). An originating summons is a document issued by the court at the instance of the plaintiff summoning the defendant to appear before the court and answer the claim that is made against them.

peripatetic judge

A peripatetic judge is one who moves around courthouses in different geographical areas to deal with court business rather than being permanently based in one court venue or geographical area. A resident judge, by contrast, is one who ordinarily only hears court business in their own courthouse or geographical area.

Peruvian Guano test

This is a legal test for determining the extent of disclosure that must be made by a party to another party under the discovery process (see 'Discovery' above). It was first formulated in the case of Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55 by Lord Justice Brett.

petition

A formal statement addressed to a court by which the petitioner 'prays' (asks for) remedy or relief. Thus, for example, proceedings for divorce and bankruptcy are commenced petition.

plaintiff

This is a person who brings a legal action before a court (the defendant being the description given to the person named as the opponent in the action).

pleadings

These are written or printed statements delivered alternately by the parties in an action to one another until the questions of fact or law to be decided in the action have been ascertained. These will include: statement of claim; defence; reply; notice for particulars.

pre–action protocols

These set out how the courts expect parties to behave prior to commencement of any claim. They are primarily designed to assist the parties to resolve disputes without recourse to starting proceedings in court.

privilege

In general terms a privilege is an exceptional or extraordinary right, immunity or exemption enjoyed by persons often in virtue of their office or status. Thus, MPs enjoy parliamentary privilege. In relation to a person's reputation (ordinarily protected by the law of defamation) a defamatory statement may be subject to privilege (affording the statement maker a defence) in certain circumstances. This can either be: 1. absolute, *e.g.* there is an absolute privilege for statements made in the course of judicial proceedings; or 2. qualified, thus news and other journalistic reports enjoy qualified privilege if they can be justified on public interest grounds (see **Reynolds qualified privilege defence** below).

relief

The remedy sought by a plaintiff or applicant in an action *e.g.* a decree or damages or an **injunction** (see above).

Reynolds qualified privilege defence

This is the defence that news outlets may seek to rely on which in effect asserts that otherwise defamatory or invasive reporting of an individual may be justified on grounds of public interest. It takes its name from the defamation proceedings in Reynolds v Times Newspapers Ltd and Others [2001] 2 AC 127 in which the House of Lords listed the factors that would assist a court in determining the test of whether the public interest defence was applicable on the facts of the case.

save for cause

This phrase, literally meaning 'except for good reason', applies to the process by which a party in a jury trial may challenge the presence of a juror on the jury. This right of challenge may be: 'peremptory' (*i.e.* it is not necessary to state a reason for requiring the juror's exclusion) as is the case in defamation proceedings; or the challenge may unavailable 'save for cause' (*i.e.* except where the party can establish a valid reason why the juror should be excluded), which is the case in criminal trials.

Scott schedule

This is a table used when damages are sought for substandard work in building disputes to bring particularity to the various aspects of the claim and to determine how the value of the claim is made up. Standardly, in the first two columns the schedule itemises each aspect of alleged substandard work comprised in the claim and the amount that the plaintiff says it will cost to remedy it. The next two columns are then completed by the defendant builder allowing for a response to the allegation and the defendant's own estimate of the cost to make it good. A fifth column is reserved for the judge's comments/conclusions. A simple example of a Scott schedule appears below:

No.	Alleged Defect	Claimant's Cost Estimate	Defendant's Response	Defendant's Cost Estimate	Reserved for Judge's Use
1	The bath is not level — the water does not run out	£150	It slopes slightly towards the plug as it must	£25	
2	The power shower electrics are not	£300	I did not do the electrical work	£75	

	earthed				
3	Tiles have been damaged around the foot of the basin. The bathroom has to be retiled	£1,000	I did crack a few tiles which are out of sight but can be easily replaced	£100	

simpliciter

This is the Latin word for 'simply' and is used in certain contexts by lawyers to signify something in its simplest form without addition. Thus 'land simpliciter' may be used to mean land without any buildings on it.

stay

A stay of proceedings is a suspension of proceedings in an action ordered by the court. Proceedings may be stayed either: temporarily — until something necessary or ordered by the court is carried out; or permanently — where it would be improper to proceed.

sui generis

A Latin phrase meaning unique; in a class or group of its own; not like anything else.

suit

The name for any legal proceeding of a civil kind brought by one party against another or others, particularly used in equity and divorce.

summons

A document issued from an office of the High Court calling upon the person to whom it is directed to attend before a judge or other officer of the court (see below for '**Writ of Summons**'). In the High Court a summons represents one possible mode of making an application to a judge or Master in chambers for a decision on interlocutory matters prior to hearing the substantive issues in the action. A **Notice of Motion** (see above) is another possible mode.

taxation (of costs)

The process of examining and, if necessary, reducing the bill of costs of a solicitor. This is carried out by the Taxing Master in the High Court and in the county court is part of the function of district judges.

Tort

This refers to an act that causes some harm to a determinate person constituting the breach of a duty owed to that person for which the remedy is a common law action for damages. The term also refers to the body of laws governing such matters (in contrast to *e.g.* contract law or equity).

Unless Order

This is an order of the High Court ordering something punitive against a party, *e.g.* the striking out of a defence, *unless* the defendant carries out some required action within a stated period such as disclosing certain documents to the party seeking them in **interlocutory proceedings** (see above).

vires

This is a Latin term meaning 'powers' and it relates to the ability of a body to exercise powers normally by reference to the statute (often referred to as an 'enabling statute') that created the body and/or gave it its functions. Thus if a body acts in a way that exceeds the powers that it has been given in law it is said to have acted *ultra vires* (outside its powers) and therefore unlawfully. If it has acted in a way permitted by the law it is said to have acted *intra vires* (within its powers).

winding up petition

This is a petition (or request) to the court for the winding-up of a business or company or partnership *i.e.* putting an end to its trade or activity and realising its assets and discharging its debts and liabilities.

writ

Any document in the Queen's name and issued under the seal of the Crown, a court or an officer of the Crown commanding the person to whom it is addressed to do or refrain from doing some act. A Writ of Summons is such a document issued by an office of the High Court at the instigation of the plaintiff for the purpose of giving the defendant notice of the claim and requiring an answer to it. It represents the first step in an action.

A note of gratitude

I would like to thank the following people, who have been tireless in their commitment to this task, unendingly assiduous in addressing the issues and selflessly met and consulted for hours on end in order to complete this work well ahead of schedule.

Review Group

The Honourable Mr Justice Horner

His Honour Judge McFarland, Recorder of Belfast

Her Honour Judge Smyth

Presiding Master McCorry

Master Sweeney (High Court Matrimonial)

Presiding District Judge Brownlie

District Judge (Magistrates' Court) Meehan

Paul Andrews, Chief Executive, Legal Services Agency

Maura Campbell, Principal Private Secretary to the Lord Chief Justice

Arleen Elliott, Law Society of Northern Ireland

Gerry McAlinden QC, Bar Council of Northern Ireland

Laurene McAlpine, Deputy Director, Civil Justice Policy Division, Department of Justice

Paula McCourt, Chief Clerk, Laganside Courts, Northern Ireland Courts and Tribunals Service

Eilís McDaniel, Director of Children and Family Policy, Department of Health

Julie McGrath, Secretary to the Review

Laura McPolin, Civil Law Reform Division, Department of Finance

Wendy Murray, Northern Ireland Courts and Tribunals Service

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Civil justice subcommittees

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