

# New Case Management Rules

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Implications of New Order 63C and Rules governing Conduct of Trials  
Stephen Dowling BL

# Overview

- Two new Statutory Instruments
- **S.I. 254 of 2016 – Conduct of Trials.**
  - Primarily targets changes relating to hearing of Trials.
  - Mainly applies to proceedings under case management.
- **S.I 255 of 2016 – Order 63C. Case Management.**
  - Brings in **Pre-Trial** Case Management to Chancery and Non Jury Matters
  - Wholesale implementation of Commercial List Rules
- **Commencing October 2016**

# Why Case Management?

- **Current Problems**

- Cases not settling until trial
- Trials excessively long
- Long lead in times

- **Success of Commercial List**

- 148 admitted and 111 resolved in 2015
- But other lists (e.g. Chancery list) dispose of a lot more (2,310 initiated and 679 resolved)

- **Is Case Management Enough?**

- Judicial resources not necessarily there.

# Order 63C - Structure

- **Applies to Chancery and Non-Jury cases**
  - Other lists can be designated by President
  - Shows the progress of case management across many fields
    - Commercial, Judicial Review, Competition, Court of Appeal, Supreme Court
- **Three tier case management**
  - Pre-Trial Directions – Case Management “Lite”
  - Case Management Order – Full blooded Case Management
  - Pre – Trial Conferences (**Mandatory**)

# Conduct of Trials (S.I. 254) – Structure

- **Brings in Management of Specific Aspects**

- Experts
- Assessors
- Modular Hearings
- Time at Trial

- **These apply *in addition* to Order 63C.**

- Assessor and Time at Trial apply to all cases.

Note: S.I. 254 also touches on other matters such as non party discovery/information and video link evidence which is beyond scope of this talk.

# Order 63C – Pre-Trial Directions

- **Case Management “Lite”**

- Rules, 4 and 5. Judge may make any direction

“as appears just and convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs”.

- **Directions are wide ranging**

- Include directions as to
  - pleadings, amendments,
  - discovery, inspection,
  - fixing issues, modular trials,
  - alternative dispute resolution,
  - timetables.

# Getting Pre-Trial Directions

- **No gateway provision**
  - Rule 5. Need motion of one party OR
  - Judge's "own motion"
    - Therefore need a proceeding with return date (injunction, motion)
- **Which Judge?**
  - Judge is the "List Judge" who is assigned by the President to manage Chancery or Non Jury Matters
- **Timing of Application**
  - No time limit expressed
  - Will delay be a factor?
    - In Commercial Court it is before close of pleadings
    - Pre-trial delay taken into account.

# Directions of Note

- **Pleadings Timetable: Rule 5(XIV)**

- **List Judge can**

fix a timetable for the completion of pleadings, interlocutory applications and other pre-trial steps, and may for that purpose adopt any proposed timetable agreed by the parties or submitted by a party (which may be in the Form 1 in Appendix JJ) if satisfied that it is reasonable.

- **No “ongoing” directions return date.**

- **Seek liberty to apply.**

Step or event	Date or estimated date
Summons issued Summons served on the defendant Appearance entered Statement of claim delivered Any notice for any particulars required of statement of claim delivered	
Any further particulars of statement of claim delivered Defence delivered Any notice for any particulars required of defence delivered Any further particulars of defence delivered Plaintiff’s request for discovery delivered Defendant’s request for discovery delivered Defendant’s response to Plaintiff’s request for discovery delivered Plaintiff’s response to Defendant’s request for discovery delivered Any motion for discovery/inspection issued Affidavits as to documents to be exchanged Inspection of discovery to occur by Any expert reports to be completed by Any expert reports to be exchanged by Meeting of experts to be held by Memorandum of experts <sup>1</sup> to be provided by Joint report of experts <sup>2</sup> to be provided by Any further particulars (e.g. of special damages) delivered on Any notices to admit facts/documents to be delivered by Any replies to notices to admit facts/documents to be delivered by Papers for trial ready to be lodged in Court	



# Directions of Note

- **Preliminary Issues v Modular Trials**
  - Rules 5 (ii) and 5 (ix)
    - fixing any issues of fact or law to be determined in the proceedings;
    - an order in accordance with new Order 36, rule 9(2);
- **Order 36, rule 9 [Conduct of Trials]**
  - New provisions expressly allowing for modular trials of questions of fact.
  - Allows the Judge to specify nature of evidence, witnesses and experts required at the module

## Relevant Case law

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*Weaving v PNC* [2012] 4 IR 681

*Cork Plastics v. Ineos Compound U.K. Limited* [2008] IEHC 93

*Campion v South Tipperary Council* [2015] IESC 79

# Directions of Note

- **Meetings of Experts**
  - Rules 5 (x) expressly incorporates new Order 39, rule 61 (see further below)
  - Experts to meet up “privately” and produce joint report
- **Experts must impartially “take account” of other expert’s view.**
- **Is Joint Report binding?**
  - Not binding in Commercial List, but not expressly stated in new Order 39, rule 61

## *Duties of Experts*

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*Lett v Wexford Borough* [2007] IEHC 195, [2012] IESC 14

*James Elliott Construction v Irish Asphalt* [2011] IEHC 269

*New Rules make express provision for Duties – Order 39, rule 58*

# Directions of Note

- **Interrogatories**

- Rule 5(vi) allows for delivery of interrogatories.
- Commercial List Rules have additional provision allowing for delivery of interrogatories without leave.
- This is not contained in Order 63C – notable omission.

- **Recent Court of Appeal Decision**

- Suggests more relaxed approach
  - No need for special exigency to deliver interrogatories.
  - Use “should be encouraged”

## *Recent case law*

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*McCabe v Irish Life Assurance* [2015]  
IECA 239

# Directions of Note

- **Alternative Dispute Resolution**
  - Rule 5(xiii) directly invokes power to stay proceedings for ADR under rule 56A
- **Recent Court of Appeal Decision**
  - When is opposition to mediation appropriate?
    - Is mediation capable of determining the issues in the proceedings (e.g. is there a novel point of law?)
    - What surrounding circumstances
      - Existence of relevant interlocutory orders
      - Expense of ADR, particularly if unsuccessful
      - Extent to which ADR might narrow down issues

## *Recent case law*

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*Atlantic Shellfish v Cork Co. Co & Ors*  
[2015] IECA 283

# Order 63C – Enhanced Case Management

- **Case Management Order – Rules 6 to 8**
  - Made where List Judge is satisfied that the case is suitable because of
    - Its complexity or
    - The number of parties or
    - The volume of evidence
    - Or other special reason
- **Who can apply**
  - Judge, of his own motion or on application can make the order
- **When?**
  - At any stage prior to the trial of the proceedings

# Order 63C – Enhanced Case Management

- **Case Management Conference**

- Enhanced case management done through case management conferences
- Chaired by “List Judge” or Judge he nominates with approval from President
- Purpose of the conference is to ensure (inter alia) issues defined, pleadings served, particulars and discovery completed, witness and Expert Statements Exchanged
- Directions can be given in relation to Modular Trials.

# Order 63C – Enhanced Case Management

- **Preparation for Case Management Conference**
  - Onerous task
  - Case summary comprising
    - Agreed outline of case
    - List of issues
    - Agreed statement of issues
  - All pre-trial documentation in chronological sequence

# Order 63C – Pre-Trial Conference

- **Mandatory Mini Case Conferences – Rule 9**
  - Apply to *all* cases where no case management order has been made (unless List Judge decides otherwise).
  - Occurs after the case is “set down”
  - Rule 14 suggests this will be heard before Trial Judge, unless “interest of justice” dictate otherwise
- **Purpose**
  - To “certify” case ready for trial (takes certification out of hands of lawyers) (Rule 14, 15)
  - To give directions including directions in relation to
    - Expert Evidence
    - Management of time at trial
    - Modular hearings



# Order 63C – Pre-Trial Conference

- **Preparation for Pre-Trial Conference**
  - Pre-trial conference questionnaire to be filled out (Appendix X No.3)
  - Same form as Commercial List (but never used)
  - Trial Booklet comprising (inter alia)
    - Case summary
    - All expert reports
    - Pleadings
    - Authorities
    - Submissions

# Witness Statements

- **Applies to all Chancery and Non Jury Matters**
  - Don't need to be subject to case management direction.
  - Must be delivered, unless directed otherwise
- **Delivered 30 days prior to trial (unless directed otherwise)**
- **Simultaneous exchange**
  - Arguably puts Defendant at disadvantage.
  - Provision for “supplemental statement” (rule 17(2))
- **Statements can be treated as evidence in chief, in exceptional circumstances.**

## *Case law from Commercial List*

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*Moorview Developments v First Active*  
[2009] 2 IR 788 & [2009] IEHC 214

*The Leopardstown Club Ltd v Templeville Developments Ltd* [2010] IEHC 52

*Smart Mobile v Comreg* [2006] IEHC 338

## Conduct of Trials – New Rules

- **Experts**
- **Assessors**
- **Time Management**
- **Mode of Trial**

# Conduct of Trials – Experts

- **Pleadings**

- **New Order 20, rule 12 & 22 requires that a statement of claim or defense to**
  - *“disclose an intention... to offer expert evidence”* and to
  - *“state succinctly the field of expertise”* and
  - *Describe the matters on which expert evidence is to be given*
- **No reference to consequence of non compliance**
  - No doubt an order striking out a pleading is a possibility

# Conduct of Trials – Experts

- **Management of Experts – New Order 39, Rule 58**
  - Expressly prohibits testimony from a second expert in same field (rule 58(3)).
  - Provision for Single Joint Expert
    - Individual to be selected from list provided by parties
    - Provisions for remuneration of expert
  - UK Case law
    - Joint Expert should not be appointed where issues so important to likely outcome *S (A Minor ) v Birmingham Health Authority* [2001] Lloyds's Rep Med 382.
    - A party who is unhappy with a joint expert can cross-examine him, but cannot get a second expert unless permission granted. See *Daniels v Walker* [2001] 1 WLR 1382, CA and *Cosgrave v. Pattison* [2001] 2 CPLR 177

# Conduct of Trials – Experts

## ▪ Interrogation of Expert Witnesses

- Written Questions can be put to experts in advance of trial (Order 39, rule 58)
  - 28 days after report served
  - Answers shall be treated as part of report
  - Failure to answer to result in exclusion of evidence
- Private Meetings between experts (Order 39, rule 61) (discussed above)
- Hot tubbing – Debate amongst experts
  - Each expert provides summary and court referees a debate between them
  - May create logistical challenges

# Conduct of Trials – Assessors

- **Order 36, rule 41**
  - Can be appointed on application or of Judge's own motion
  - Directions for fees can be given
  - Directions for whether they will be there for entire time or at points of the trial.
  - *Hansfield v Irish Asphalt* [2010] IEHC 330
  - If Assessor provides report, advice or information to the Court it must be shared with parties.

# Conduct of Trials – Time Management

- **New Rule 42 of Order 36**
  - Court or “officer of Court” can require reasoned estimate of
    - Length of Hearing
    - Time of examining and cross examining each witness
  - List of witnesses to be furnished.
  - Re-Examination limited to new “matters” arising in Cross
- **Duplication of evidence can lead to cost consequences**

## *Case law on Costs Consequences*

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*C.O'R v M.O'R [2000] IEHC 66*

*Woodquay Properties v Leo W.Wilson Associates Ltd [2011] IEHC 23*

*Woodquay Properties v Leo W.Wilson Associates Ltd [2011] IEHC 23*



# Conduct of Trials – Time Management

- **New Rule 42 of Order 36**
- **Management by Trial Judge**
  - Trial Judge Make orders limiting time
    - for opening, closing, examination and cross of witnesses
    - Time spent on particular issues
  - If the Trial Judge is also the Judge chairing pre-trial conference, he could arguably make these directions then

## *Case law on Time Management*

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*O'Brien v Moriarty Tribunal* (Supreme Court, 12 July 2016)

# Case Management – the ultimate consequence?

- Can Case Management result in strike out and exclusion of evidence?
- See *Moorview v First Active* [2008] IEHC 274

“Where there has been material but not very significant non-compliance [with Case Management Directions], and in the absence of any significant prejudice, the court should attempt to deal with the matter in a way which would not interfere with the entitlement of the party concerned to call whatever evidence it feels may advance its case. Orders for costs or other procedural measures may be the appropriate remedy.

Where prejudice is caused then the court should see whether it is possible to remove or significantly ameliorate that prejudice by any further procedural measures and if it be so possible then the court should refrain from depriving the party concerned of the entitlement to lead whatever evidence it might wish.

However, where there is significant failure to comply with case management directives, the court needs to put in the balance....the need to insure that there is a least broad compliance with case management procedures if the undoubted advantages for the administration of justice....is to be retained

...[A] point will, necessarily, be reached where to afford any further indulgence to a party would create a likely expectation among parties generally of a level of indulgence which could only undermine case management.”

# Appealing Case Management Decisions

In *PJ Carroll & Ors v Minister for Health and Children & Ors* [2005] 1 I.R. 294., Geoghegan J., in the Supreme Court, stated:

“Most orders by way of case management in the Commercial Court are, to some extent, of a discretionary nature and in practice most of them would be unappealable. I would take the view that as a general rule this court should be slow to interfere with case management type orders in the Commercial Court unless there is a clear error of law involved or the managing judge has clearly not exercised his or her discretion correctly.”

In *Re Irish Life & Permanent* [2012] IESC 32, Clarke J stated

“Ordinarily it would seem to me that it would be necessary for this Court to be satisfied that the relevant measures under appeal created a substantial risk of significant procedural unfairness coupled with the likelihood that no remedial action could be put in place either by the trial judge or by this Court on appeal which would have the effect of significantly remedying any unfairness which might be demonstrated to have occurred.

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