

KENT CARTY UPDATE

Autumn Newsletter

September 2016

New High Court Pre-Trial Procedures and Rules on Case Management and Expert Evidence

From the 1st October 2016, two new Statutory Instruments (SIs) will come into effect in the High Court.

These are SI 254/2016 and SI 255/2016, and both are designed to implement better case management of litigation and ensure quality and efficiency in dealing with expert evidence.

Statutory Instrument 255/2016 introducing Pre-Trial Procedures and Case Management

SI 255/2016 introduces new pre-trial procedures to be applied in Chancery and Non-Jury actions. The rules will also apply to proceedings designated by the President of the High Court, but will not apply to Personal Injury or Jury actions, or to proceedings in the Commercial or Competition Lists.

The Court Rules contain the following new provisions:-

Pre-Trial Procedures

The Rules permit the Court to make Orders at the pre-trial stage, on its own motion, or upon the application of a party to the proceedings, with regard to the conduct of the proceedings to ensure that the proceedings are progressed in a manner that is *“just, expeditious and likely to minimise the costs of the proceedings.”*

To implement the new pre-trial procedures, the President of the High Court may appoint a Judge, known as a List Judge, to oversee pre-trial preparation of the proceedings.

The Judge may make Orders directing the extent to which pleadings are required, whether proceedings are heard on affidavit, fix issues of law and/or fact for determination, consolidate proceedings, and fix of a time-table for completion of pleadings, interlocutory applications and/or pre-trial steps.

Parties may also be directed to provide to the Court:

- i) A list of the persons to give evidence;
- ii) Particulars of any matters of a technical or scientific nature;
- iii) A reasonable estimate of the likely time for preparation for the trial and cross examination of witnesses;
- iv) Particulars of any Arbitration or ADR process, to include Mediation.

Case Management

The Rules permit the Court to make a Case Management Order where the List Judge is satisfied that the proceedings should fall under such an order because of their *“complexity, the number of issues or parties, the volume of evidence or other special reason.”* Where a Case Management Order is made, the List Judge is obliged to fix a date for a Case Management Conference (CMC).

***In DPP V Yusuf Ali
Addi [2004] 16 CC 47
Hardiman J. held
“the role of the expert witness is not to supplant the tribunal of fact, but to inform the Tribunal so it may come to its own decision”. The new rules set out the overriding duty to the Court of the expert witness.***

The purpose of a CMC is to ensure that the steps to prepare the case for trial are carried out in an efficient and timely manner that results in fewer costs, and ensure the following: -

- i) All issues as to law and fact are clearly defined;
- ii) All pleadings, affidavits and statements of issues are served;
- iii) All applications for particulars, requests for admissions, notices to admit documents or facts and replies thereto are completed;
- iv) All applications for relief of any interlocutory nature are made by the parties;
- v) All written statements of witnesses and expert reports have been served;
- vi) Any previous case management directions on steps to be taken have been completed.

Solicitors are expected to prepare case booklets for the CMC and attend (along with Counsel where appropriate). On the conclusion of a CMC a Certificate of Readiness will be issued by the Court and a final Court Order will be made directing that the case be set down for trial.

Pre-trial Conferences

In cases where no Case Management Order exists, the Rules provide that a Pre-Trial Conference (PTC) shall be ordered once the proceedings are set down for trial. The PTC will determine the procedural steps that are required to prepare the case for trial. The Court may dispense with a PTC if it is satisfied that the case is ready for trial.

There is a requirement that four days before a PTC commences, each party must provide a completed Pre-Trial Questionnaire, in the format directed by the Court, together with a trial booklet that includes an indexed chronology of the following:-

- A.
 - i) A list of the persons principally involved;
 - ii) A case summary and chronology of relevant events;
 - iii) Copies of pleadings, affidavits, statements of issues, documents or extracts therefrom where agreement has been reached;
 - iv) A booklet of expert reports or of a single joint expert;
 - v) A glossary of technical terms;
 - vi) Any other document directed by the Court;
- B. A book of exhibits appropriately numbered;
- C. Concise witness submissions on points or issues of law; and
- D. A book of authorities.

Statutory Instrument 254/2016 on the Conduct of Trials and Expert Evidence

In an article published in The Parchment, in Autumn 2015, the writer highlighted the urgent need for reform concerning the admissibility of expert evidence in Court and the role and function of expert witnesses. The decision of Mr. Justice Barton in *Waliszewski v. McArthur* was cited, where an expert witness had been criticised for lack of candour.

The new rules in introducing procedures that deal extensively with expert evidence in proceedings are to be welcomed and will ensure the benefit of having reliable expert evidence available to the Court in a more efficient manner.

The Rules require both a Plaintiff and a Defendant who intend to rely on expert evidence at trial to disclose that in their pleadings (Statement of Claim and Defence) when filed, and to summarise the field of expertise being relied upon and the matters on which such evidence is to be offered. This Rule does not apply to personal injury actions but applies to all other types of cases.

The decision of Barton J. in Waliszewski v. McArthur [2015] IEHC2 64 is a salutary reminder of the need for expert witnesses to act with candour. Barton J. held in dismissing the Plaintiff's claim that his expert doctors evidence to the Court was "reprehensible and to be deprecated".

The role of the Expert Witness and Evidence to be presented in an efficient way

The Rules expressly recognise that the overriding duty of the expert is to assist the Court in relation to matters within his or her field of expertise, and prevail over any obligation to any party paying the fee of the expert.

Experts are also required to disclose any possible connection or interest with the party retaining them and to provide a statement acknowledging their overriding duty to the Court.

The Rules contain provisions designed to ensure that expert evidence is presented in an efficient manner and is restricted to evidence relevant to allow the Court to determine the proceedings. In this regard, the Court can make the following orders: -

- i) Direct experts to clearly identify their fields of expertise;
- ii) Fix time periods for delivery of expert reports;
- iii) Appoint a single joint expert by agreement or direction of the Court;
- iv) Delimit the number of experts in a particular field of expertise.

Ability to post questions on Expert Reports and ‘Debate among Experts’

The Rules also provide for a party to put concise written questions concerning an expert’s report to that expert subject to the overriding obligation that the questions are not disproportionate and unnecessary. The time limit for raising written questions is 28 days after service of the expert report, and the questions must be relevant to a clarification of the issues raised in the expert’s report.

Any answers that an expert provides as part of this procedure are to be treated as part of his/her expert report.

The Rules provide for a new procedure where two experts contradict each other. In this case, the Court, by motion at a Pre-Trial Conference, may direct the experts to meet privately, without the presence of any party or legal representative, to discuss their proposed evidence. The experts are also requested to agree a joint report setting out points of agreement and disagreement for the Judge to consider. Having considered the joint report, the Judge may examine or cross-examine the experts or may direct that a “debate among experts” occur.

This procedure for hearing evidence has been extensively used in other Common Law jurisdictions and is colloquially known as “*hot tubbing*”.

Conclusions and the future

The new rules are to be welcomed. Used effectively, they will bring focus on the matters in dispute before the trial and provide for greater transparency in High Court litigation, relegating to the footnotes of history the days of trial by ambush in respect of expert witnesses.

For further information in relation to the new rules and for a more detailed presentation please contact Gavan Carty at gavancarty@kentcarty.com or Margaret Cordial at margaretcordial@kentcarty.com

The impact of the new rules remains to be seen on a practical level. The rules differ from the CPR Pre-Action protocols in the UK insofar as the expert conference may take place at a later stage in proceedings.

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