

Ireland's New Commercial Court In Action

A Briefing

The Commercial Court was set up in January 2004 as a division of the High Court. In this briefing we highlight key features of the Commercial Court and its workings to date and we explain how it has changed the litigation landscape in Ireland.

Key Features of the Commercial Court

- New efficiency in the resolution of commercial disputes in Ireland.
- A division of the High Court established to deal specifically with commercial cases.
- Special application must be made to enter the Commercial List and only certain cases will be admitted.
- Cases dealt with swiftly: short deadlines and costs penalties.
- Broadly drafted rules designed to give the Court maximum flexibility in the management of cases.
- Rules provide for directions hearings, case management conferences and pre-trial conferences.
- Court can adjourn proceedings to facilitate mediation, conciliation or arbitration.
- No pre-action protocols.
- Exchange of summaries of oral evidence and experts' reports in advance of the hearing; procedures new to litigation in Ireland.

The workings of the Commercial Court to date

The most striking features of the Commercial Court are the speed with which cases can progress to trial and the nature of proceedings the Court is willing to hear.

Five weeks is the average time from entry into the Commercial List to allocation of a date for trial. This has been achieved by the use of directions as to the exchange of pleadings, the rigorous application of short deadlines and the imposition of costs orders. For unprepared plaintiffs and reluctant defendants this element of speed

has been an influencing factor in the early resolution of cases in the Commercial Court.

The range of cases that has appeared in the Court's list so far has been remarkable. Under its rules the Court has jurisdiction to deal with several defined categories of commercial proceedings (see below). It also has a general discretion to hear cases outside those categories that it regards as suitable. For example, this firm has successfully applied for the listing of proceedings related to public procurement law. The proceedings concerned a challenge to the award of a national infrastructure PPP/PFI contract and as such were considered appropriate for entry into the Commercial List. This case also demonstrates the speed of the Court's operations. It was disposed of, on a preliminary time bar point, within eleven weeks of the issue of proceedings. This stands in stark contrast to previous similar disputes where uncertainty and lack of rigour in the procedures applied by the High Court led to significant delays and consequent market uncertainty.

The Commercial Court has been particularly suitable for cases in which the plaintiff seeks declaratory relief such as trust related matters. These are cases where the parties generally have no interest, tactical or otherwise, in delaying the proceedings and welcome the prospect of obtaining prompt guidance from the courts. We have a number of cases in the Commercial List in which trustees of pension schemes have applied to court for guidance in relation to the construction and operation of trusts. One of these - the first case heard in the Commercial Court - was heard and determined within a fortnight of the commencement of proceedings.

The Commercial Court has the benefit of new rules relating to costs. It has not been slow to use them. For example, a plaintiff who unsuccessfully sought an interlocutory injunction to prevent the sale of a property by a receiver failed to deliver its detailed statement of claim within the time directed. In reprimanding the plaintiff for this default, the Court availed of its power to summarily award and measure costs against it.

In its first nine months of operation the Commercial Court has earned a reputation for its 'no nonsense' approach to commercial litigation. It is too soon to offer a detailed description of the Court's practice but, having been involved in about one third of its case load to date, we can report that it has been an excellent, although challenging, forum in which to litigate.

The Court's new rules can be accessed at www.courts.ie

January to July 2004 – some facts and figures

- 23 applications for admission to the Commercial List; 21 granted.
- 14 cases disposed of, through settlement or court order following trial or hearing of preliminary point.
- 6 significant preliminary issues have been dealt with by the court.
- 7 written judgments have been delivered.
- 5 weeks is the average time from entry into list to allocation of a trial date.

Making it into the Commercial List

We have mentioned above that there are two broad categories of cases which may be heard by the Commercial Court; cases falling into a defined list and cases which come within a discretionary category. The defined list includes inter alia insurance, re-insurance and intellectual property proceedings. Where a case does not fall within the defined list, the judge can exercise his discretion to admit it to the Commercial Court if he considers it appropriate to do so. An example of a case admitted on this basis is a pending challenge to the constitutionality of legislation relating to the advertising and display of tobacco products.

All applications for entry into the Commercial List must be accompanied by a certificate from the solicitor on record for the applicant stating that the proceedings fall within the definition of 'commercial proceedings' in the court rules. Mr. Justice Kelly, the Court's senior judge, has made it clear that solicitors are obliged to identify precisely, by reference to the rules, the category of case they are seeking to have admitted to the List. A number of applications were initially refused because the certificate grounding the application was too vague and sought to classify the case under a number of categories.

Not all cases will be considered suitable for this Court and in some instances it may be difficult to assess with certainty whether an application for entry into the Commercial List will succeed. The Court has in some cases rejected such applications and has awarded costs against the unsuccessful applicants.

Mediation, Conciliation or Arbitration?

The Commercial Court rules permit the judge to adjourn proceedings to enable the parties consider whether the proceedings ought to be referred to a process of mediation, conciliation or arbitration. This is the first time in Ireland that court rules have referred to 'mediation' or 'conciliation', apart from in a family law context, and it is in line with a new awareness in this jurisdiction of the benefits of alternatives to litigation.

The Court may not direct parties to submit to an alternative form of dispute resolution. Instead where the judge identifies that an alternative route might be considered by the parties, he can facilitate that option by permitting the adjournment of proceedings. Although participation is not mandatory, there may be cost implications if one of the parties adopts an unreasonable or obstructive position in the context of considering these alternatives.

There have been no instances to date in which the court has invoked this power. Perhaps this is because cases are dealt with so expeditiously in the Commercial Court that there is no obvious benefit to the parties in considering a different approach which might bring about an early resolution of the dispute.

Definition of Commercial Proceedings

New court rules define “commercial proceedings” as proceedings in respect of a claim or counterclaim for damages, where the value of the claim is not less than €1,000,000 arising from or related to any one or more of the following:

- a business contract or business dispute / construction of a business document
- the purchase or sale of commodities / export or import of goods
- the carriage of goods by land, sea, air or pipeline
- the exploitation of oil or gas reserves or any other natural resource / the construction of any vehicle, vessel or aircraft
- insurance or re-insurance
- the provision of services (not including medical, quasi-medical or dental services or any service provided under a contract of employment)
- the operation of markets or exchanges in stocks, shares or other financial or investment instruments, or in commodities

The following cases also fall within the definition of commercial proceedings irrespective of their value:

- intellectual property cases;
- an appeal or application for judicial review of a regulatory decision where the judge considers that the appeal or application is appropriate for entry in the Commercial List;
- proceedings which the judge of the Commercial List, having regard to the commercial and any other aspect thereof, considers appropriate for entry in the Commercial List.

Changing the litigation landscape – opportunities and challenges for litigants, their advisers and opponents

Our experience of the Court to date leads us to make the following observations:

- **Pre-litigation tactics**

The speed and efficiency of the Court have a very real impact on pre-litigation tactics. Claimants contemplating a case with no serious intention of pursuing it to trial now need to consider the implications of a successful application by a defendant to transfer it to the Commercial List. Equally, claimants considering an application to have their case dealt with in the Commercial Court will have to be ready for the organisational and evidential demands of an early trial.

- **Pre-emptive procedures**

The Court has demonstrated a willingness to use procedures designed to narrow the issues between the parties or, indeed, to pre-empt the need for trial. In contrast to normal practice, it has welcomed the opportunity to deal with preliminary issues and applications to strike out on time bar grounds and on the basis that the proceedings disclose no stateable cause of action. This has resulted in the early determination of a number of cases and may also have contributed to a high level of early settlements.

- **Frontloading of costs**

The Court's procedures demand immediate preparation of cases. This requires the deployment of greater numbers of legal and other advisers than is normally needed for case preparation in Ireland. This immediate need to prepare thoroughly for any case likely to be entered in the Commercial List means that legal and management costs will be incurred by all parties at an early stage with little opportunity to avoid these costs unless settlement can be achieved.

- **A demanding environment for clients**

When compared to cases in the normal High Court lists, cases in the Commercial List involve a marked increase in preparatory work. This may result in significant disruption to the day-to-day running of clients' businesses.

New Costs Rules

New rules permit the Commercial Court to make costs orders in respect of any pleadings which contain unnecessary matter or are unnecessarily lengthy. This is designed to focus solicitors and counsel on drafting pleadings with more specificity than has been the practice up to now. In addition, the rules provide that the Court may make costs orders where there is a delay or default by any party in complying with a deadline.

The Court has also exercised its discretion to award the costs of unsuccessful interlocutory applications against applicants whereas the general practice of the High Court is to reserve the costs of most interlocutory applications.

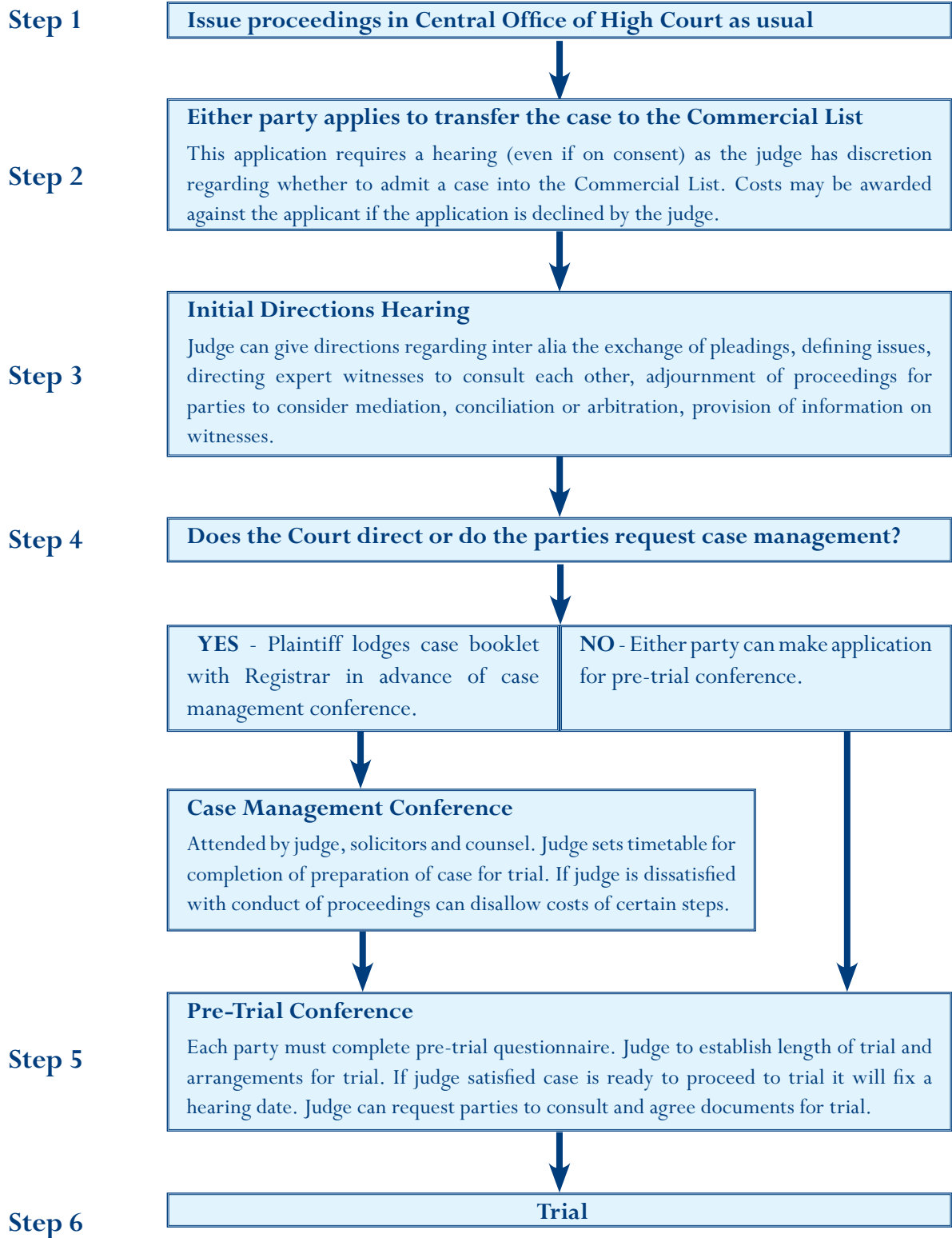
In its work to date the new Irish Commercial Court has applied a uniquely commercial approach to business disputes. This is welcomed by lawyers who have the resources to deal with the rigours of the Court's directions and short deadlines. Clients have also welcomed the new Court and have been impressed with the speed with which their disputes have been resolved.

Aiming for and achieving the efficiency evident in the Commercial Court's practice carries some collateral risk

that speed may lead to unfairness or injustice. We think the risk has so far been avoided in Ireland.

Established in January 2004, the Commercial Court has no backlog of cases in its List. This has no doubt contributed to its ability to determine cases in very short time frames. Only time will tell whether the Court will continue to have this ability if it becomes an increasingly popular forum in which to litigate.

Commercial Court *Essential Steps*



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