Commercial Litigation

This first edition of Commercial Litigation aims to provide a first port of call for clients and lawyers to start to appreciate the issues in each jurisdiction. Each chapter is set out in such a way that readers can make quick comparisons between the litigation terrain in each country, determining the differences between, for example, the disclosure procedure in England and Wales and the US system of discovery. In some cases the litigation procedure will seem very familiar. In other cases it may seem like another world, not just another country.

A remarkable breadth of jurisdictions is covered, while the contributors are all leading lawyers in their countries and are ideally placed to provide practical, straightforward commentary on the inner workings of their respective legal systems.

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Foreword

Andrew Horrocks  Clyde & Co LLP

One of the likely consequences of any financial crisis is an increased appetite for disputes and court statistics from England and Wales reveal complex litigation as showing strong signs of growth. Jurisdictional principles become ever more, rather than less, complex and litigants often find themselves involved in disputes in jurisdictions where they and their usual lawyers may have limited understanding of how the local legal system works. Sophisticated litigants are also becoming increasingly aware of the benefits that bringing a claim in a jurisdiction more favourable to their cause of action can have, even if that means parties litigating somewhere unfamiliar.

This is the first edition of European Lawyer’s Commercial Litigation title, part of its Reference series. Its objective is to create a single starting point of reference for clients and lawyers who may become involved in such disputes. Each chapter is designed to be set out in such a way that readers can make quick comparisons between the litigation terrain in each jurisdiction, determining the differences between, for example, the disclosure procedure in England and Wales, and the US system of discovery. In some cases the jurisdictions have marked similarities and procedure will seem very familiar. In other cases the litigation procedure may seem like another world, not just another country.

The contributors to the book are all leading lawyers in their jurisdictions and are ideally placed to provide practical straightforward commentary on the inner workings of their respective legal systems. Their very kind contributions are greatly appreciated. We have been particularly pleased to have been able to gather such a breadth of contributors for this new book, from just about every major jurisdiction in the world. I would also like to express my thanks to all those at The European Lawyer, who have worked tirelessly to bring together the chapters, and have assisted hugely in the editorial process.

Obviously a work of this nature will not allow for in-depth analysis or provide neat solutions for every problem encountered by litigants. The book is intended rather to provide a first port of call so readers can start to appreciate the relevant issues in each jurisdiction. I hope that it will assist all who come to use it, and I will be happy to receive suggestions for future editions.

London, November 2011
1. PRE-ACTION

1.1 Rules prior to the start of formal proceedings

In general, parties to potential litigation are not required to conduct themselves in accordance with any rules prior to the start of formal proceedings.

Exceptionally, certain legislation requires pre-action conduct. This includes the Consumer Credit Act 1995 and the binding Code of Conduct on Mortgage Arrears 2010. Typically these provide for certain information and latitude to be given to potential defendants.

However, although not strictly required, it is good practice to issue a detailed letter to the prospective defendant(s) before commencing proceedings through the service of an originating summons. Such a letter before action should indicate the nature of the claim and request the defendant provide the relief sought for the matters complained of within a relatively short time-frame. Failure to issue such a letter can occasionally result in costs’ penalties being imposed.

There is no general duty on the parties to discuss the claim or exchange documents prior to commencing proceedings or to attempt to resolve the dispute without recourse to litigation. Any failure to do so will not generally be reflected in costs’ orders made subsequently in the proceedings.

1.2 Time limits

Limitation periods for bringing claims are dictated by the Statute of Limitations Act 1957 as amended. Actions founded on contract, quasi-contract or tort (except personal injury) cannot be brought after six years from the accrual of the cause of action.

A personal injury action must be brought within two years from the date on which the cause of action accrued or the date from which the claimant first obtained knowledge or ought to have obtained knowledge that the claimant had sustained a significant injury caused by the act or omission of defendant.

A defamation action (encompassing oral or written defamation) cannot be brought after the expiration of one year or such longer period as the court may direct, not exceeding two years from the date on which the defamatory statement is first made.

Other miscellaneous limitation periods include 12 years for an action for the recovery of land, two years for most admiralty cases and three years where strict liability attaches for damage caused by defective products.

There are special rules for minors and the estates of deceased persons. The limitation period does not apply to fraud cases.
2. PROCEDURE AND TIMETABLE IN CIVIL COURTS

2.1 Commencing proceedings
Proceedings are commenced by the issue from a court office of an originating writ of summons (of varying types), a petition or an originating notice of motion. Usually the proceedings are deemed to commence from the time the relevant document issues from the court office, not the time it is served on the defendant.

2.2 Main steps after claim formally commenced
Once a claim has been formally commenced by the issuing of the initiating documentation such as a summons, this documentation must be served on the defendant. The defendant is then usually required to enter an appearance within a short number of days. An appearance simply acknowledges the claim and indicates an intention to defend it. However, it is critical to raise any jurisdictional issues at this stage by entering an appearance ‘under protest’ if jurisdictional arguments are to be advanced.

Following the entry of an appearance, in most proceedings the claimant then has a short period to deliver more comprehensive details of its claim. This is usually done through delivery of a statement of claim, or points of claim, which is a document setting out the facts that the claimant alleges give rise to its cause(s) of action.

2.3 Defendant’s response
Having received the statement or points of claim, the defendant may serve a notice seeking particulars of the claim. This takes the form of a list of questions seeking further details in order to properly understand the basis of the claim.

When replies to this notice are delivered, the defendant then has a further short period within which to deliver its defence, and, if appropriate, its counterclaim. The claimant can in turn serve a notice seeking particulars of matters pleaded in the defence and this must be replied to by the defendant.

From this point it is open to either of the parties to set the matter down for trial. However, in appropriate cases the claimant may choose to deliver a reply to the defence. Moreover, it is very common for there to be mutual requests for discovery of documents and a trial will not occur until the discovery process is complete.

2.4 Timetables
At every stage there are mandated timetables for delivering or responding to documents. If these are not adhered to, the party seeking to procure compliance can apply to court and compliance is usually directed. It is rare that a failure to comply with timetables results in the total loss of the right to prosecute or defend an action. Most commonly, the consequence is that the defaulting party must bear the costs of the application required to procure compliance.

The timescales for actions prior to a trial or substantive hearing at first instance varies widely depending on the court hearing the matter and the nature of the process commenced.
A Commercial Court has been in operation since 2004 and has had considerable success in speeding up the resolution of commercial cases. The Commercial Court will usually accept claims with a value exceeding €1 million which relate to commercial matters, although it can waive this threshold. It will also accept cases relating to intellectual property law.

In most proceedings the parties control the timetable since default by one party will go unchecked, absent a court application by another party. In the Commercial Court, the Court actively manages the timetable.

2.5 Expediting the timetable
It is generally possible to expedite the normal timetable to trial if sufficient objective urgency can be demonstrated. This is done by appropriate application to a senior judge. For matters involving personal liberty or constitutional matters or other matters of public importance, resources are allocated as a matter of priority

It is also possible to obtain provisional or protective orders prior to a trial where there is a commercial urgency and where the court accepts that the status quo should be preserved (or altered) pending a trial.

3. DOCUMENTARY EVIDENCE
3.1 Disclosure
There is no obligation to disclose documents unless an opposing party obtains an order directing discovery of documents. Absent such an order, it is up to each party to produce at trial the documents it believes will assist it in proving its case. Those documents may then be admitted into evidence if the documents are proven as evidence, usually by their author or recipient confirming their validity.

However the seeking of discovery orders is commonplace and where it is ordered, such orders change the obligations of the parties.

A party must comply with an order for discovery made against it. An order for discovery requires the party to list in an affidavit all documents which fall into the categories ordered to be discovered. Usually this is all documents relevant to the case which are in the possession, custody or power of that party. This includes documents which may damage a party’s case.

There is also a separate duty on a party’s lawyers to ensure that full discovery is made and that a party does not suppress documents it does not wish to disclose.

A party making discovery must also identify documents which they have had but no longer have. Apart from this obligation, there are no penalties for destroying documents, although certain evidential inferences are likely to be taken where there has been wilful destruction of documents.

A failure by a party to make proper discovery can result in:
(i) an order directing further and better discovery;
(ii) the striking out of a claim or defence as the case may be;
(iii) the imprisonment of the deponent for contempt or sequestration of the assets of the deponent or the party on whose behalf the deponent swears the affidavit; or
(iv) a criminal prosecution for perjury.

Once the affidavit with the list of documents is supplied, the other party is entitled to inspect the original documents (and to receive copies) except for those documents which are privileged (either because the documents constitute legal advice or relate to information conveyed on a ‘without prejudice’ basis). Such documents are exempt from production, although they must be identified.

### 3.2 Exchange of electronic documents

The High Court rules expressly provide that where the discovery ordered includes electronically stored information and the court is satisfied that this information is held in searchable form and can be provided in the manner referred to without significant cost to the party from whom discovery is requested, the court may further order that the documents or classes of documents specified be provided electronically in the searchable form in which they are already held.

Alternatively, where the court is satisfied that such documents or classes of documents could not, if provided electronically, be subjected to a search by the party seeking discovery without incurring unreasonable expense, it may order that the party ordered to make discovery make available inspection and searching facilities using its own information and communications technology system, so as to allow the party seeking discovery to avail of any search functionality available to the party ordered to make discovery.

Any such order may include such provision or restriction and be subject to such undertakings from any party as the court may consider necessary to ensure that documents, discovery of which has not been ordered, are not accessed or accessible, and otherwise to safeguard the information technology system concerned. Such an order may include a provision that the inspection and searching of documents shall be undertaken by an independent expert agreed between the parties, or appointed by the court instead of being undertaken by the party seeking discovery. This discretion is aimed at addressing the concerns of litigants in relation to confidentiality, copyright and security.

Where such order makes provision for inspection and searching of documents by an independent expert, the party seeking the order must indemnify such expert in respect of all fees reasonably incurred by him, and these fees form part of the costs of the proceedings of that party. Therefore, litigants should carefully consider the potential costs exposure they face in relation to electronically stored information before seeking it.

### 3.3 Withholding documents

All documents in the categories ordered to be discovered must be listed in the affidavit making discovery. However, parties are entitled to refuse to produce discovered documents which attract legal professional privilege. Such privilege attaches to confidential communications which pass between lawyer and client and were created for the sole or dominant purpose of giving or seeking legal advice and to confidential communications made in
contemplation of litigation or after litigation has commenced for the sole or
dominant purpose of such litigation.
This privilege applies to advice from lawyers whether they are barristers,
solicitors or in-house counsel. Exceptionally, this privilege will not attach to
advice from in-house counsel on matters of EC competition law which come
before the European courts.
Furthermore documents created to support or record ‘without prejudice’
negotiations also attract privilege. Communications will be excluded under
this rule where they are made as part of genuine negotiations to resolve a
dispute on the understanding at the time that they would not be disclosed
to the court if a settlement agreement is not reached.

4. WITNESS EVIDENCE
4.1 Exchange of witness statements
As a general rule, unless agreed otherwise, litigants are not required to
exchange witness statements and, instead, witnesses will give oral evidence
in open court. This consists of the witness initially giving evidence-in-chief
by answering non-leading questions from the party calling him or her. Then
the witness will face cross-examination from the opposing side.
In cases before the Commercial Court, the parties are required to serve
signed statements of their witness evidence upon the other side prior to trial. A
witness’s statement may be directed to stand as the witness’s evidence-in-chief,
and the witness will then give oral evidence at trial in reply to supplementary
questions and cross-examination. However, this occurs rarely in practice.

4.2 Witnesses and evidence at trial
If a witness lies, the witness can be subject to immediate and summary sanction
for contempt. This would include imprisonment or sequestration of assets. The
witness can also be subject to separate criminal prosecution for perjury.

4.3 Forcing witnesses to attend
A party may apply to court for a subpoena (witness summons) to compel a
witness to attend court for the purposes of giving evidence and producing
certain documents. Any witness, properly served with a subpoena, who fails
to attend court can face contempt of court proceedings. Only witnesses
served with a subpoena within the state can be compelled to attend and give
evidence. For non-resident witnesses, relevant evidence may need to be
taken on commission in other jurisdictions if local law so permits.

5. EXPERT EVIDENCE
5.1 Admissibility
Expert evidence is admissible in relation to all matters where a peculiar level
or type of skill and judgment is required in order to explain issues before
the court. This may include an analysis of scientific, technical or financial
matters or the expected competency standards and practice of professionals
such as doctors, stockbrokers, bankers, lawyers etc.
5.2 Exchange of evidence pre-trial
The exchange of evidence will depend on the court and the nature of the proceedings. The Commercial Court rules provide for the exchange of witness statements where it is intended to rely on the oral evidence of that witness at the hearing. In reality there is little difference between expert reports and expert witness statements. Accordingly, the practice is to exchange expert reports rather than drafting separate expert witness statements.

In the absence of an agreed timetable the claimant must provide statements to the defendant one month prior to the trial and the defendant must provide statements seven days prior to the trial.

In personal injury cases, the rules provide that the claimant must within one month of the service of the notice of trial disclose a schedule of all reports and statements of experts whom it is intended to call. The defendant must then furnish a similar schedule to the claimant following which reports must be exchanged by the parties. The definition of ‘report’ is broad and includes materials such as maps, drawings and graphs referred to in the report itself. If no expert reports exist the party should certify this in writing.

5.3 Expert evidence
Experts may be called to give oral evidence at trial and are liable to be cross-examined. Sometimes the parties agree to accept an expert’s report as uncontested evidence but if any issue arises with the expert’s report the expert will be required to give evidence, explain the report and face cross examination.

5.4 Payment of experts
Experts are paid by each party or jointly by all sides where a joint expert is agreed. Expert witnesses, like any other witness, are required by law to tell the whole truth on an issue on pain of perjury. Moreover, while paid by the party hiring them, they owe their duty to the court.

6. ENDING A CLAIM/ALTERNATIVE DISPUTE RESOLUTION

6.1 Ending a claim pre-trial
A claim most commonly ends because the parties reach a settlement. Alternatively, a claim can end when judgment is given it is unilaterally discontinued by a claimant or when a defendant consents to the reliefs sought against him.

If a claimant chooses to unilaterally discontinue a claim, the claimant will be automatically liable for the payment of his opponent’s costs of the action.

In addition, the Irish courts have the power to strike out any claim on the basis that it discloses no reasonable cause of action or is shown to be frivolous or vexatious, or where the proceedings amount to an abuse of process.

The courts can also grant summary judgment in favour of claimants thereby ending a claim.

6.2 Alternative dispute resolution (ADR)
Judicial appraisal or court led negotiation does not occur. Otherwise, there is no limitation on the mechanisms available to promote or achieve a
settlement. Direct negotiation remains the most common form to achieve settlement but the use of mediation is also widespread.

7. TRIAL

7.1 Main stages of a civil trial
A civil trial will commence with the claimant’s opening submissions in which the claimant (usually through his lawyer) outlines the basis of his case. After the opening submissions, each witness the claimant wishes to call gives evidence in turn.

The witnesses first give their evidence-in-chief by answering non-leading questions put to them by their own side. The witness is then cross examined by each opposing party. After cross examination, the witness is subject to ‘re-direct’ from its own side to clarify anything which has arisen in cross examination. At any time the judge may intervene to ask his own questions.

When all of the claimant's witnesses have given evidence the claimant rests his case and the defendant can either apply to dismiss the case by direction or call its own witnesses. If the defendant wants to call witnesses, the defendant's witness undergoes the same process of giving evidence. After the witness evidence concludes, each side makes its legal submissions.

7.2 Public hearings
Under the Irish Constitution justice must be administered in public, subject to special and limited cases. Such exceptions are mandated by legislation and include family law cases, refugee asylum cases, cases involving official secrets, certain criminal cases (eg, sexual offences or where there is a danger of witness intimidation). The most important exception, from a commercial perspective, is proceedings which involve business secrets and the disclosure of confidential information. This might include restrictive covenant cases involving client lists, details of inventions, patents etc.

Despite this constitutional provision, court documents such as witness statements and pleadings are not available to the public unless the documents have been opened to the court at a hearing. However, there is an online database which demonstrates what pleadings have been filed when and by whom but the content of the pleadings is not available.

8. REMEDIES

8.1 Pre-trial remedies
The courts have a wide discretion to grant pre-trial remedies, the most usual of which would be an injunction – an order from the court commanding a party to cease certain behaviour or to do something.

Other remedies which may be available are an Anton Pillar order (an order allowing a claimant to enter the premises of another party to inspect and remove evidence prior to trial where a strong likelihood has been established that important material may be destroyed or removed), or a Mareva injunction (a freezing order restraining a party’s use of assets where it can be demonstrated that there is a real risk of dissipation of those assets in an effort to frustrate judgment).
In making such orders the court will be mindful of ensuring all parties’ rights are protected given that the issue at dispute remains unresolved. Therefore, such orders are usually made on terms and/or coupled with undertakings from the party seeking the order to make good losses if the party is ultimately unsuccessful at trial.

Other orders which can be made prior to a trial include orders for non-party discovery, the taking of evidence on commission, the provision of interrogatories or directing the trial of a preliminary issue.

### 8.2 Final remedies
Available remedies include: damages, exemplary damages, permanent injunctions, declarations, rescission, rectification, restitution, specific performance of a contractual obligation, the taking of an account, disgorgement of profits and a wide variety of orders aimed at righting wrongs found at trial or otherwise giving practical effect to the judgment of the court.

### 9. ENFORCEMENT
There are a number of ways in which judgment for damages can be enforced:

(i) a judgment mortgage can be registered against all legal and equitable interests of the judgment debtor in freehold and leasehold property, which can then be used as a basis to exercise a Power of Sale in satisfaction of the judgment debt;

(ii) an examination order can be applied for to compel a judgment debtor to go before the District Court to have their means examined;

(iii) an instalment order can be secured which compels the judgment debtor to pay a debt (and the costs of securing payment of that debt) in instalments;

(iv) the claimant may direct the sheriff or county registrar to attempt execution of a judgment by seizure of goods;

(v) an order of garnishee may be sought directing a payment due to the judgment debtor to be paid to the judgment creditor;

(vi) a receiver by way of equitable execution may be appointed; or

(vii) in the Commercial Court, it is common for debtors to be promptly required to deliver a sworn statement of affairs in aid of execution and for wide ranging orders to be made to assist a claimant in executing a judgment.

### 10. APPEALS
#### 10.1 Defeated party
At least one level of appeal lies from the decision of all courts, usually to the directly superior court. The Supreme Court is the final appellate court.

There are various time limits which apply for the making of an appeal from the various courts and there is a developed body of jurisprudence about the ability to make an appeal out of time.

#### 10.2 Procedure for appealing
The basic procedure is to serve a notice of appeal on the opposing parties specifying the grounds of appeal. Appeals from lower courts to the High Court or to the Circuit Court usually involve a full rehearing.
An appeal from the High Court to the Supreme Court will generally be on a point of law. The Supreme Court will review the submissions and transcripts of evidence of the High Court hearing, but will not generally re-open matters of fact.

11. COSTS/FUNDING

11.1 Fees
The amount charged is primarily a matter of contract between the client and his representatives. However, the High Court can exercise a supervisory jurisdiction and clients may ask to have their solicitors and barristers fees reviewed by a Taxing Master of the High Court.

Often in litigation, the client will engage a solicitors’ firm which will charge an hourly rate. However, the solicitor may charge based on the complexity of the matter, the urgency of the matter, the difficulty or novelty of the questions raised, the skill, labour, specialised knowledge and responsibility involved, the number and importance of the documents prepared or examined, the value of the case to the client, the time reasonably spent on the matter and the places and circumstances in which the case is to be pursued.

11.2 ‘No win, no fee’ arrangements
Lawyers may enter so-called ‘no win, no fee’ arrangements with their client, so long as the lawyers’ fees are not set in proportion to the quantum of any prospective damages award. Most personal injuries litigation is conducted on this basis for claimants.

11.3 Contingency fees
Contingency fees are prohibited by statute in Ireland save where the claim is for a liquidated monetary amount. This arises most commonly in debt collection cases where commission arrangements are common.

11.4 Third-party funding
Third-party funding arrangements are generally not permissible in Ireland as being contrary to the old common law doctrines of champerty and maintenance. The exception to this is where a party has a genuine interest in the litigation. A common example of this in a commercial setting is where a creditor of an insolvent company funds a liquidator to make a claim against directors or other parties for the benefit of the liquidation generally.

11.5 Insurance
Legal expenses insurance is available in Ireland and commonly arises in professional indemnity cover in the professions such as medicine, law and accountancy, and is also a common feature in directors and officers’ liability insurance policies. It is also possible for claimants to obtain opponents’ legal costs insurance to insulate themselves from the costs of an unsuccessful claim.

11.6 Costs orders
The general rule is that costs follow the event and the unsuccessful party is
ordered to pay the successful party's costs (Order 99, Rule 1(4) RSC). However, the court has discretion in this regard and can tailor costs awards in a number of scenarios. For example, costs may be apportioned when a party has been partly successful. Costs may not be awarded at all where a court takes a dim view of a successful party's conduct or has a particular sympathy for a losing party or where a case of exceptional public importance is taken.

If the parties cannot agree the amount of costs to be paid pursuant to a costs order, the amount will be determined by a Taxing Master of the High Court.

12. COLLECTIVE ACTIONS
12.1 Collective litigation
There is no provision to bring a collective or class action. Most commonly where there are groups of claimants, all will commence a claim but the court may direct that one or two ‘pathfinder’ cases be heard first to try and clarify certain issues and to promote settlement of the balance of the claims. However, there is no obligation to so settle and absent settlement, each individual claim must be brought.

There is provision for representative actions, whereby in circumstances where a number of parties share the same interesting in a matter, one of those parties may sue or be sued, on behalf of, or for the benefit of, all parties involved. This facility is little used in practice.

13. SPECIAL FEATURES
A notable feature of personal injury litigation in Ireland is the Personal Injury Assessment Board (PIAB) introduced by the Act of the same name in 2003.

The Act requires that all personal injuries actions must be referred to PIAB prior to court proceedings being issued. The Board provides an independent assessment of personal injury claims for compensation following road traffic, workplace or public liability accidents where the respondent is not disputing liability and consents to PIAB's jurisdiction. If the respondent rejects PIAB's jurisdiction, the matter proceeds through the courts in the ordinary course.

Claims are assessed using the medical evidence from the claimant. If necessary, PIAB has jurisdiction to order a report by an independent doctor appointed by it. PIAB will assess the damages arising by reference to the report(s) and a standard table of quantum which sets out recommended rates for certain injuries. If either of the parties rejects PIAB's assessment, then the parties may pursue the matter through the courts instead. However the court will bear PIAB's assessment in mind when making any costs orders in the case.

Referral to PIAB stops time running for the purposes of the Statute of Limitations, and time does not start running again until six months after PIAB has issued an authorisation.

PIAB is, in most cases, a far cheaper process relative to litigation, with reported savings of 46 per cent on average to the cost of a claim. Furthermore, PIAB has had success with speedy resolution of disputes: ordinary litigation in court can take approximately three years to settle a claim compared with an average of nine months to settle a personal injury claim through PIAB.
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