



An tSeirbhís Chúirteanna
Courts Service

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Secretary

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Submission to the Judicial Planning Working Group

Dear Secretary,

I am pleased to have been asked to make a submission on this very important topic. The matters under consideration by the working group are of considerable importance to the proper functioning of the administration of justice.

Background to the Office of the Legal Costs Adjudicators:

The Office of the Legal Costs Adjudicators is a relatively newly established office. Part 10 of the Legal Services Regulation Act 2015, the 2015 Act, established the office, the Act being commenced on 7 October 2019. The Office came into being on that date, replacing the previous Office of the Taxing Masters.

In essence the Office is tasked with adjudicating on disputes relating to legal costs. Whilst most of these disputes arise from court cases, the Office also adjudicates upon legal costs arising from arbitrations, receiverships and increasingly in regard to disputed costs between a legal practitioner and their own client. Having a fully independent office, attached to the High Court is an important means of affording parties exposed to a liability for legal costs, whether by Court Order or by other means, or arising from a dispute as between a legal practitioner and client, an important process in a fully functioning democracy and compatible with access to justice. Decisions of Legal Costs Adjudicators are subject to review by the Superior Courts.

The 2015 Act, imposes significant additional burdens and although, the Act has provided for three Legal Costs Adjudicators, being a Chief and two other Adjudicators. There are significant additional responsibilities which arise for the Chief Legal Costs Adjudicator, which did not arise for previous Taxing Masters, such as the requirements, for the preparation of an Annual Report, an Annual Business Plan and a Strategic Plan, which must be modified every three years. The Reports are made to the Courts Service, published as part of the Annual Report and are laid before the houses of the Oireachtas.

The 2015 Act, also imposes obligations for the creation and maintenance of a Register of Determinations. This means that over time, a body of determinations on legal costs, will be

publicly available and will provide for greater transparency and visibility as to how legal costs are determined. The Act also provides for the preparation and publication of Functional Guidelines. The nature of the work surrounding the Adjudication process, is significant and greater than the role of the former Taxing Masters. The 2015 Act, mandates for a detailed verification exercise when examining claims for legal costs and expenses ¹.

There are currently three Legal Costs Adjudicators, a Chief Legal Costs Adjudicator and two Legal Costs Adjudicators.

These submissions are based on the experience of the Office in dealing with disputes relating to legal costs, and in particular, costs incurred in Superior Court litigation. Given the volume of costs dealt with by the Office, we are in a unique position to see the direct impact that the operation of the courts can have on legal costs. It has long been recognised that legal costs are a key factor in access to justice. It is also important to point out that the Legal Costs are made up of solicitors and barristers fees, but also expert witnesses fees and expenses and outlays, VAT of 23% has also to be factored in to looking at legal costs in the round.

Having reviewed the terms of reference of the Working Group, there are some issues which the Office does not deal with and so I have not made any submission on that issue.

Term of Reference 1

“To consider the number of and type of judges required to ensure the efficient administration of justice over the next five years in the first instance, but also with a view to the longer term.”

Whilst the number and type of judges is a policy matter to be addressed by the Government, the Judiciary and the Courts Service and other stakeholders, it is the case that any increase in Judicial output, will have a direct and immediate impact on the workload within the Office of the Legal Costs Adjudicators.

By way of example, 2020 represented the first year of full operation of the Office. A total of 830 new Legal Costs Adjudications were commenced. The comparable figure for 2019 was 602. The sums submitted for Adjudication increased from €89.7m in 2019 to €113.2m in 2020.

It is reasonable to assume, that when the pandemic restrictions are lifted and the Courts return to full function, that the throughput of cases will increase. This will lead to an increase in the matters referred for Adjudication.

Currently waiting times for an Adjudication are at an all-time low of 4-6 weeks. This greatly assists the efficient administration of justice by ensuring that the final stages of litigation, i.e. the costs, are dealt with in a fair, efficient and prompt manner.

Should there be an increase in judicial output without the necessary additional resources being provided to this Office, it is inevitable that these hard won efficiency gains will be reversed to the detriment of all concerned.

¹ Schedule 1 and s.155 of the Legal Services Regulation Act, 2015 and the Superior Courts (Costs) Rules, 2019 (SI 584 2019)

The 2015 Act provides for a limited appointment of both the Chief Legal Costs Adjudicator and the other Legal Costs Adjudicators to 7 and 5 years respectively². It is unclear what the policy behind this change is. Previously Taxing Masters were permanent appointments. This was changed in 2011 providing for a 5-year term and was continued in the 2015 Act.

The Office is tasked with the independent adjudication of legal costs. Our independence is a core and fundamental aspect of what we do and it is vital that those appearing before us have no concerns regarding our independence. Whilst I am happy to say that there have been no instances of direct attempts to influence an Adjudicator, there is a concern of structural undermining of our independence by the imposition of terms limits.

For example, the State is the single largest participant in litigation in the Superior Courts. Consequently, the State is also the most frequent participant in Adjudications. It is also the case that the State is often involved in the larger cases that come before this Office. There is an obvious structural bias inherent in a situation where an Adjudicator is called upon to adjudicate on the liability of the State to pay costs, frequently claimed in the millions, when that same Adjudicator may, or may not be re-appointed to their position by the Government.

To ensure no such structural issue arises, it is submitted that the previous position should apply whereby appointments are made on a permanent basis.

Term of Reference 2

To consider the impact of population growth on judicial resource requirements.

As stated above, any increase in judicial resources resulting in an increase in outputs will have a direct impact on the workload of the Office and necessitate a consequential increase.

Term of Reference 3

To consider, having regard to existing systems, the extent to which efficiencies in case management and working practices could help in meeting additional service demands and/or improving services and access to justice.

It is a fact, that there can be occasions when the unavailability of a Judge can give rise to an increase in legal costs. This arises in cases where a case may be due for hearing, the parties and their legal advisers and witnesses are assembled and the case does not get on for a hearing. This has a knock on effect of increasing the costs to the party who is found liable to pay the costs of the opposing side, in circumstances, where such a party is blameless in the matter.

The availability of case management, although time consuming and a drain on judicial resources, would have many benefits, such as ensuring adherence to time limits for delivery of pleadings, addressing deficiencies or inefficiencies on the part of parties to litigation, the timely compliance with Rules of Court and focusing on trial scheduling and management. It is recognised not every case will need or require case management. There may be arguments

² Provision is made for re-appointment by the Government for a single further term.

in favour of compiling threshold factors, which would not be engaged until a certain point is reached.

It is also recognised that creating case management protocols, would place an additional burden on the judiciary, but a greater use of remote platforms and the filing of documents electronically, by use of pre-structured forms, may ease the administrative burden. Alternatively, the utility of placing this responsibility on suitably senior and qualified judicial assistants or registrars, under the supervision of the list judge may be a cost effective alternative, with matters of controversy being referred back to the judge concerned.

Such a process would also create a record of procedural steps, which will assist the trial judge, when considering where the ultimate liability for an Order for costs should lie.

This does not arise as of now, save that the parties focus their minds when a case is being determined. When the Court undertakes an assessment of the factors identified within s. 168 and s.169 of the Legal Services Regulation Act, 2015, Order 99 of the Rules of the Superior Courts (Costs) 2019, and the applicable and recent developed jurisprudence on the point.³ In many, if not most proceedings, it is for the parties to make separate submissions to the Court. Such a process has also the potential to increase legal costs, as additional work is required both on the part of the legal practitioners to the litigants and on the Court. A more comprehensive Court record, perhaps an electronic case note, would also be of assistance.

It is the direct experience of this office that proper case management significantly reduces the costs of litigation. It is our/my submission that the ultimate savings in court time and legal costs incurred, would more than offset any initial increase in workload in dealing with case management issues.

Term of Reference 4

To evaluate the estimated impact of the Covid-19 pandemic on court caseload in the short, medium, and long term and strategies for reducing waiting times to significantly improve on pre-Covid levels.

The pandemic and consequent public health measures caused by Covid 19 have demonstrated an agility on the part of the Office of the Legal Costs Adjudicator and its staff to adapt quickly to new changes in practice, procedures and systems. I preface these remarks by pointing out that the Office of the Legal Costs Adjudicator, save for e - licencing, was to my knowledge the first Courts Service Office to adopt, promote and almost exclusively transfer to a remote platform for application for the filing of documents and applications for Adjudication electronically.

In addition, and due to the adaptation and use of remote hearings to be conducted, for cases which are suitable for a remote hearing, has resulted in a full complement of adjudications of legal costs being heard, determinations being issued electronically and the subsequent follow-up procedures leading to certificates of determination of all being transferred to an electronic

³ *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183 (08 July 2020)

platform. This is done by the use of electronic means and by the use of postage and document exchange facilities.

The provision of facilities for remote working for support staff of the office has proven that the staff are adaptable and prepared to engage positively with the changed working environment. Whilst occasionally certain administrative tasks which are by their nature heavily paper-based have slowed certain processes in the main inasmuch as is possible normal service has been resumed.

However, an increase in the number of judges and the greater throughput of cases will inevitably give rise to greater demands on the office of the Legal Costs Adjudicators. In that regard if there is an exponential growth in the throughput of cases due to the appointment of more judges it is certain that additional Legal Costs Adjudicators and support staff will be required.

The use of remote hearings, active case management and supervision by the Legal Costs Adjudicators, have increased the work load on individual adjudicators, but the benefits have been obvious. The lead time for the obtainment of adjudications has improved and is currently 4-6 weeks.

It is also the opinion of the Legal Costs Adjudicators that when public sittings are resumed, that much of the remote hearings will be continued, as for case management hearings, it has been demonstrated to be of considerable benefit to practitioners, avoiding the expense associated with travel, facilitating specific time based appointments and hearings. The consequence of parties waiting around to get on for hearing, has practically ended. This has economic efficiencies and also plainly, public health benefits.

The Legal Costs Adjudicators are currently and have been, since June 2020, hearing remote cases from the hearing rooms at the Office, to ensure that the proceedings are held in public in accordance with the Act of 2015⁴, to facilitate the recording of proceedings on the Digital Audio Recording system (DAR) and to ensure security of parties' original documents, observation of GDPR responsibilities and access to the original court documents and files.

However, certain cases are simply unsuitable for a remote hearing and require a physical hearing. This can be due to the number, volume and complexity of the documents. Whether witnesses have themselves files and papers. Whether the hearing could potentially be rendered unfair, due to technological limitations on the part of participants, such as lack of broadband connection, inability to utilise technology and access to documents, or they may be persons under a disability for whatever reason, which would render proceedings with an Adjudication on Costs to have the potential to be an unfair process. Where any such potential scenario arises, these are managed actively on a case by case basis, so as to ensure the integrity and fairness of the process.

Term of Reference 5

To examine the experiences of other jurisdictions (particularly Common Law areas), and obtain accurate and up to date information on judicial practices and case management systems, together with caseload data in relation to Irish courts.

⁴ See s.156 (4) of the Legal Services Regulation Act, 2015.

I do not consider that we have much to offer in this term of reference.

A comparative review of legal costs and practices and procedures was undertaken in the Report entitled a Review of the Administration of Justice report and in particular chapter 9 thereof.

The Chief Legal Costs Adjudicator was consulted about the concept of developing certain proposals for fixed scale costs, and contributed in a very small way in the review contained within Chapter 9.

Term of Reference 6

To consider the costs associated with additional judge numbers, including salaries, allowances, judicial support staff and chambers.

I do not consider that the office of the Legal Costs Adjudicators would have any role in respect of expenses associated with additional Judges, support staff and Chambers.

It is noteworthy, however that the sums raised by way of Court duty in the Office of the Legal Costs Adjudicators, payable at the rate of 8% together with stamp duty payable on applications for Adjudications are significant.⁵ In this regard, the associated costs of any increase in adjudications undertaken by this office, would be covered by the increase in sums payable by way of Court and Stamp Duty.

Term of Reference 7

To review forthcoming and proposed policy and legislative reforms that may impact on the requirement for judge numbers including;

- a. Recommendations of the Civil Justice Review**
- b. The O'Malley Review on victims of crime**
- c. Family Justice Reform**
- d. Review of Legal Aid financial eligibility criteria**
- e. Courts Service Modernisation Programme**
- f. Commencement of relevant provisions of the Assisted Decision Making Capacity Act 2015**
- g. Judicial Appointments Commission Bill**
- h. PfG commitment to establish a new Planning and Environmental Law Court**
- i. Insolvency Review**
- j. Economic development.**

⁵ See SI Number S.I. No. 530/2019 - Supreme Court, Court of Appeal and High Court (Fees) (Amendment) Order 2019

Having regard to (a) above and having regard to the matters in the report entitled “Review of the Administration of Civil Justice” and in particular chapter 9 thereof.

It is to be noted that some of the recommendations in this chapter suggest that the office of the Legal Costs Adjudicators would be involved in having a role in setting certain scale work for pre-determined work and legal charges. If this is so it is likely to be extremely time consuming and is likely to impact on the resources of Legal Costs Adjudicators available to sit and hear adjudications and issue determinations.

Term of Reference 8

To make recommendations for developing judicial skills in areas such as white collar crime.

If there were any training courses identified and available which would assist Legal Costs Adjudicators in the exercise of their function these should be made available. If any new platforms or technologies are being introduced, then appropriate training should be made available to the staff in the Office and the Legal Costs Adjudicators concerned.

Term of Reference 9

To make recommendations on relevant issues such as judicial workload, barriers to entry, efficiency gains, and speed of access to justice.

A significant barrier to entry and for the acceptance of a position of a Legal Costs Adjudicator concerns the relatively short periods of appointment in the case of a Chief Legal Costs Adjudicator seven years and in the case of a Legal Costs Adjudicator five years.

The position does not carry any security of tenure beyond these periods and as such to attract people of appropriate calibre and who would possess the likely professional experience, as required by the terms of the Legal Services Regulation Act, 2015⁶. These are the minimum requirements of the Act. The likelihood is, that any suitable candidate is likely to be at a high point in their career. Consistent with the aim of having the best qualified candidates applying for such positions, this is an unattractive term of appointment. A senior person likely to have the experience and skill set necessary to take on this position is likely to be at a senior position in their respective career. For them to leave it for such a short period of time would make any re-entry into that profession problematic.

Term of Reference 10

To consider the implications of Brexit on the courts in regard to judicial resources and potential increased workloads arising.

⁶ See s.148 of the 2015, Act, in the case of a solicitor, a barrister or a legal cost accountant, not less than a 10-year period of practice.

I reiterate the point made above that any increase in judicial appointments is likely to lead to an increase in demand for the services of the Office of the Legal Costs Adjudicators

I would conclude this submission by offering any further assistance or clarification of the matters referenced herein.

Yours sincerely



Paul M Behan

Chief Legal Costs Adjudicator