



Improving the administration of Irish civil justice

Submission to the Judicial Planning Working Group

26 July 2021

1. Introduction

Ibec is Ireland's largest lobby group and business representative organisation. We campaign for real changes to the policies that matter most to business. Policy is shaped by our diverse membership, who are home grown, multinational, big and small and employing 70% of the private sector workforce in Ireland. Our 36 trade associations cover a range of industry sectors. With six offices around Ireland as well as an office in Brussels, and over 240 staff, Ibec communicates the Irish business voice to key stakeholders at home and abroad. Ibec also provides a wide range of professional services and management training to members on all aspects of human resource management, occupational health and safety, employee relations and employment law.

2. The business imperative for efficient civil justice

Ireland's civil justice system and the efficient administration of the courts play an important role in enhancing the country's attractiveness as a place to do business. The Commercial Court in particular enjoys a well-earned reputation for international commercial litigation, administered by judges with experience and expertise in relevant case law. However, commercial litigants are experiencing increasingly long delays in securing justice. The Court's diary is consistently booked up to six months in advance, and there can be even lengthier gaps between the conclusion of proceedings and delivery of judgements in more complex cases. This is indicative of a capacity shortage that is only partly attributable to current public health restrictions. Indeed, we understand that Covid has catalysed some welcome innovations in the way that Commercial Court conducts its business. For example, remote hearings have enabled more efficient administration of interlocutory hearings for all parties concerned. In this context, Ibec was surprised to learn that High Court practice direction HC89, allowing consent orders to be made by exchange of email rather than requiring all parties to attend court, has recently been revoked. We would welcome clarification on whether such attendance could henceforth be virtual rather than physical.

The recent report of the Review of Administration of Civil Justice highlighted the relatively high costs of civil litigation as a deterrent for individuals and small businesses seeking legal redress in Ireland. In many cases, our members have found themselves defending civil suits where there is little prospect of costs recovery from unsuccessful plaintiffs. Given this

constraint, it is incumbent on the courts to expedite the case management process through pre-trial protocols and the avoidance of repeated adjournments.

While legal costs are the most visible aspect of procedural inefficiency, there are other factors that indirectly impose even higher costs on sections of the business community. Two in particular have consistently been raised by our members as being of concern.

The first factor is an apparent upward trend in High Court challenges to development planning consents by An Bord Pleanála. The country urgently needs to address a wide range of infrastructure deficits as outlined in the National Development Plan. Envisaged projects include large scale housing developments and associated utility services such as water, sewage, energy, transport, and communications. Typically, such schemes undergo detailed public consultations and environmental impact assessments before planning consent is sought. Even where a judicial review results in the original consent being upheld, plaintiffs are protected from exposure to defence costs by virtue of the Aarhus Convention, regardless of the weakness of their case. Even before the impact of Covid-19 restrictions, such legal proceedings had the potential to delay much-needed infrastructure projects by many months. Ibec is not seeking to restrict access to the courts for parties with a genuine material interest in planning outcomes, provided they have a realistic prospect of success, but, as previously mentioned, we do consider that the legal process is unduly slow.

Ibec has long campaigned for a dedicated planning division in the High Court, and we welcome the establishment of the new Planning and Environment Court. It must be adequately resourced with senior judges having relevant prior Commercial list experience, and also by suitably skilled support staff. Ibec hopes that the establishment of this Court will reduce waiting times for planning related hearings, although we are concerned that this desired outcome might be frustrated by a concomitant increase in the ease, and hence frequency, of vexatious legal challenges.

The second indirect cost factor relates to personal injury litigation, whether actual or threatened. Ibec has long campaigned for the Book of Quantum to be compiled by senior judiciary rather than PIAB. We therefore welcomed the establishment of the awards guidance committee of the Judicial Council. We understand that there was a brief surge of applications last year by litigants seeking court hearings based on the previous PIAB

guidance. However, we hope that it will become increasingly clear to injured parties that there is nothing to be gained by challenging PIAB's assessment for general damages. Consequently, there should be a gradual tailing off of such cases being listed. Correspondingly fewer court resources would then be tied up preparing for cases that almost invariably get settled on the steps of the court. Our members thereby hope for a reduction not only in legal defence costs, but also in liability insurance premiums.

3. Comments on recommendations of the Civil Justice Review

Case management

Ibec accepts that the introduction of pre-action protocols and other case management procedures in the High Court, while permitted in statute, would require additional staff resources to implement. However, we consider that there is merit in the suggestion that this could be achieved in part by expanding the cadre of Deputy Masters with case management powers, possibly combined with the role of Registrars. Failure to invest in these reforms would be a false economy. For example, Ibec understands that the frequency of sittings in the Master's Court has reduced in recent months with the consequence that time-sensitive applications are instead being directed to the High Court Ex Parte list. If this is correct, it does not constitute an effective use of the High Court's time. It is noteworthy that the judiciary of Northern Ireland, by contrast, includes no less than seven full-time Masters of the High Court, most of whom are assigned to a particular Division.

Pleadings

Notwithstanding Ibec's view that the proportion of personal injury awards being challenged by litigation needs to be reduced, there are clearly opportunities to streamline the process by placing obligations on plaintiffs to provide relevant facts such as pre-existing medical conditions, by mitigating the need for testimony by expert witnesses, and by discouraging unnecessary adjournments.

Grounds for judicial review

Ibec strongly supports the recommendation that legislation should be introduced to ensure the need for substantial grounds, including a demonstrated interest in the subject matter and a reasonable prospect of success. We welcome the proposed exclusion of minor

clerical errors or omissions from being amenable to judicial review. The terms ‘vexatious’ and ‘unfounded’ may no longer be in current use, but the High Court should be able to quickly strike out cases that amount to an abuse of process and/or are bound to fail.

Digitalisation of litigation proceedings

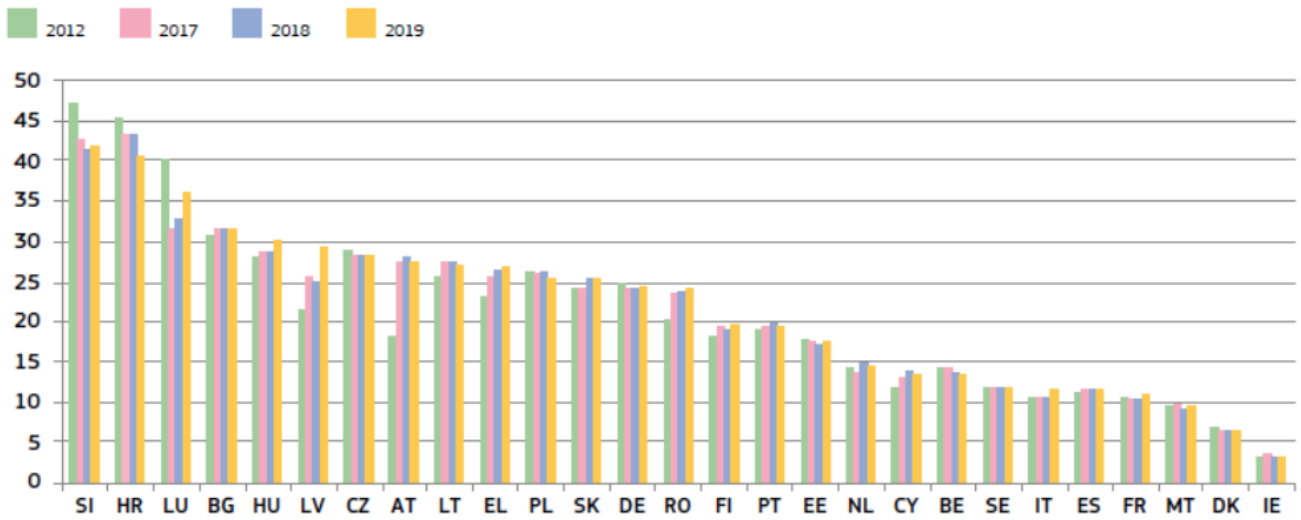
The response of business and industry to the Covid epidemic includes new ways of working, including much wider use of videoconferencing and electronic data sharing. We would support the vision set out in the 2019 Capability Review, whereby the existing CSOL platform would be significantly upgraded. To make a convincing case for permanent additional judges on the Bench, it is necessary to be able to demonstrate efficient use of existing resources. Information technology, remote hearings and e-litigation can all play a role in this.

4. Long term resource constraints

There is anecdotal evidence of chronic under-capacity in the High Court that will not be relieved by the lifting of Covid restrictions. Indeed, as the High Court President has suggested, there may well be a large wave of applications related to debt and property possession over the next few years as the Government’s Covid related business supports are withdrawn. Ibec understands that the frequency of business liquidations in 2020 and 2021 has been far lower than in previous years, implying a huge reservoir of pent-up insolvency. Ibec therefore recommends that the Department of Justice should undertake a forward-looking analysis of the expected case load of the High Court. It should also seek advice on the potential damage to the Irish economy if the long delays currently being experienced by civil litigants were to worsen as a consequence of inadequate resources.

Finally, it is also worth benchmarking Ireland against other European countries, especially in terms of the number of judges currently employed by the State. Within the EU, Ireland appears to be an outlier. The most recent figures published by the Council of Europe CEPEJ Evaluation Report paint a stark picture for Ireland, with just 3.3 judges per 100,000 population. As the following chart from the *2021 EU Justice Scoreboard* illustrates, this is far lower than all other member states, including the Common Law jurisdictions of Malta and Cyprus. Ibec estimates the corresponding ratio in England and Wales to be circa 5.5 per 100,000 population.

Figure 32 Number of judges, 2012-2019 (*) (per 100 000 inhabitants) (source: CEPEJ study)



A comparison of non-judge staffing levels in the courts across the EU also suggests significant under-resourcing in Ireland, which has only 60% of the per-capita median.

5. Recommendations

For the reasons outlined above, Ibec strongly supports the appointment of several additional judges to the High Court, over and above the five new ones recently approved by the Minister for Justice. The cost of employing them would be far less than their value to the State and in particular to the international business community.

It is vital, however, that a majority of these new judges are competent to deal with commercial law cases and that all of them are familiar with efficient High Court procedures. Last but not least, they should not be burdened by routine work that could instead be undertaken by Deputy Masters, at least one of whom should be exclusively assigned to the Commercial Court.

I would be happy to provide further clarification on the foregoing if required.

Danny McCoy, CEO Ibec