



# THE BAR OF IRELAND

*The Law Library*

## Submission by Council of The Bar of Ireland on Draft Order 99 and Related Issues

25th July 2018

## **PART 1: EXECUTIVE SUMMARY**

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,200 practising barristers.

The Bar of Ireland is long established and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

In approaching this submission, the Council is cognisant of the provisions of the *Legal Services Regulation Act 2015* and is supportive of the new costs regime that will be implemented upon the commencement of Part 10 of that Act. The Council provides these submissions to assist the drafting of the new Order 99 of the Rules of the Superior Courts that will be required upon the commencement of Part 10 of the 2015 Act.

## **PART 2: OBSERVATIONS ON PARTICULAR ISSUES**

### **PROPOSED ORDER 99 RULE 7(2)**

The Bar of Ireland considers that the original provisions of Order 99 Rule 1B(5) should be retained. This rule was the basis for Practice Direction HC 71 which allowed for payments on account of costs pending taxation. The Practice Direction allowed for speedier recovery of costs for both clients and practitioners alike.

It is submitted that the High Court should retain a discretion to direct that reasonable payments on account of costs be made prior to taxation in appropriate circumstances. The Bar Council considers that a clause to ensure that the Court can direct that a specified proportion of the adjudicated costs are paid upon such conditions and undertakings as appear to the Court to be appropriate should be inserted into the Rule so that High Court Practice Direction 71 could be retained and/or re-issued in due course. Indeed, there may be some utility in incorporating the Practice Direction into the proposed Order 99.

### **LODGMENTS**

The Bar of Ireland submits that any tender or lodgment delivered pursuant to the proposed Order 99, Rule 57(1) following an application for adjudication of costs should not be a global lodgment.

In that regard, the Bar of Ireland considers that the lodgment should be broken down between (a) solicitor's fees, (b) barrister's fees and (c) disbursements to enable the claimant accept any items which can be agreed upon. This would reduce the matters in dispute between the parties and allow for more efficient disposal of any remaining items of costs at taxation.

This observation is made in light of s.154(5) of the *Legal Services Regulation Act 2015* where it recognises that a barrister is a separate legal entity entitled to refer a bill of costs to adjudication. The fees charged by a barrister do not appear to be treated as outlay on the solicitor's bill of costs. Hence, the Bar of Ireland contends that the separation of these matters is appropriate and cost-effective having regard to the provisions of the Act itself.

The Bar of Ireland submits that in any tender or lodgment delivered in a costs adjudication involving a barrister's fee a copy of the tender or lodgement should be served directly on the barrister by the party making the lodgement or tender. This would create greater transparency in the cost adjudication process and would reflect the intention of the legislature in recognising barristers as a separate legal entity as defined under the *Legal Services Regulation Act 2015*.

Accordingly, the Bar of Ireland requests that provision is made in the Rules for the serving of such a lodgment on the barrister concerned.

The Bar of Ireland notes that a lodgment and tender procedure would require an amendment to s.27 of the *Court and Court Officers Act, 1995* and suggests that any such Head of a Bill to deal with same should be provided to the Bar of Ireland in due course so that it could make any appropriate submissions in relation to same before it is enacted.

## **TIME LIMITS**

The proposed Order 99 does not set time limits for the presentation of party and party bills of costs. The Bar of Ireland considers that this presents potential difficulties, particularly for barristers who may be dependent on the actions of his or her instructing solicitor in progressing the matter.

In the case of legal practitioner/client bills of costs, there is an express requirement at section 152(1) of the 2015 Act that such bills of costs should be prepared and signed "*as soon as practicable*" after concluding the provision of legal services.

Section 154 of the 2015 Act contains no express time limit within which the bill of costs should be furnished. However, the bill is to be furnished in "*a form and manner*" consistent with, inter alia, "*any rules of court relating to the preparation and furnishing of bills of costs in a case to which this subsection refers*" (section 154(1) (c)).

The Bar of Ireland proposes that there should be an express provision in the new rules that the bill of costs in party and party matters should be provided as soon as practicable and with an outside time limit of 6 months after the making of the relevant award of costs.

While cognisant of the workloads involved for all concerned, a time period would be helpful in speeding up the conclusion of the legal cost recovery process, thereby speeding up the recovery of fees for barristers and bringing finality to the costs adjudication process in a timely manner.

In England and Wales the position is that where the court does not summarily assess costs at the conclusion of a hearing (by reference to a Statement of Costs) it will order detailed assessment by a costs officer. Detailed assessment proceedings are commenced by the receiving party serving on the paying party a notice of commencement and a copy of the bill of costs (as set out in Rule 47.6 of the Civil Procedure Rules (England and Wales)). The time limit in England and Wales appears to be set at **three months**.<sup>1</sup>

Where the receiving party fails to commence detailed assessment proceedings within the period specified, the paying party may apply for an order to the court requiring the receiving party to commence detailed assessment proceedings within such time as the court may specify. There are also time-limits imposed in the Rules for the receipt of Points of Dispute to the Bill of Costs submitted and for any replies to same. In England and Wales the time periods are mandatory. A costs accountant may be involved in the preparation of the party-to-party bill of costs.

The Bar of Ireland considers that it would be useful and progressive for a time-limit to be inserted into the Rules within which a party-to-party bill of costs should be presented and that the time period be mandatory. It suggests the introduction of a time-period of **6 months** for the presentation of the Bill of Costs concerned.

Any variation from the prescribed time period should, in the absence of agreement between the parties, be made to the Legal Costs Adjudicator. The Rules should specify that the Legal Costs Adjudicator can give such directions on the matter as appear appropriate, including in relation to the extension of time limits, the delivery of relevant documentation etc. and also in relation to the costs of any such application to him/her for a variation of time.

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<sup>1</sup> The time limit for commencing detailed assessment proceedings is three months from the date of the judgment/order/award/determination/service of a notice of discontinuance/dismissal of an application to set aside a notice of discontinuance (as applicable). In the case of acceptance of an offer to settle, the detailed assessment must be commenced within three months after the right to costs arose (rule 47.7).

## **ORDER 99 AND WASTED COSTS ORDERS**

Draft Order 99, rule 8 appears to be an updated version of Order 99, Rule 6 of the existing Rules. Draft rule 8 applies to legal practitioners, including barristers. It applies, like the current rule, where there has been a failure to attend personally to a matter or to be properly prepared for trial. It now also applies where there has been a failure to deliver any paper necessary for the use of the court which is required by the Rules, a Practice Direction or direction of the Court.

The Bar of Ireland is, however, concerned that there is a lack of a specified procedure or process for such applications within the proposed rule itself. The current rule and draft rule are silent as to how and when a court is to deal with an inquiry of this nature. In other words, there appears to be a lack of a clear procedure to be adopted by the Court in such circumstances and this might create complications for the court and the legal practitioners concerned, especially if the inquiry is directed at one of the legal practitioners in the legal team concerned but not the other.

The existing Order 99, Rule 7 and the proposed draft Order 99, Rule 9 permits the court either to afford a practitioner an opportunity to state why they should not pay such costs or refer the matter to the Legal Costs Adjudicator for inquiry.

Given the consequences of the proposed draft rule the Bar of Ireland considers that consideration should be given to the insertion of a similar provision in draft rule Order 99, Rule 8. This procedure should be specified in the rule itself.

## **CONCLUSION**

The Bar of Ireland provides this submission to assist in the drafting of the new Order 99 of the Rules of the Superior Courts. Representatives of the Bar of Ireland are available to provide any further information that is requested or required in relation to the submission and/or to meet with relevant parties to discuss any matters set out therein.

The Council also looks forward to further engagement with the legal costs adjudicators and the Rules Committee as they draft any guidelines and/or procedures that are legislated for under the Legal Services Regulation Act 2015 and expresses the hope that engagement on those guidelines/procedures will be of assistance to all concerned. In that regard it notes that Appendix W of the draft Order 99 may benefit from further discussion and possible refinement within a reasonable time after the new Order 99 comes into operation.

Finally, the Bar of Ireland reserves its position to make further submissions on the new draft Order 99 before it is signed by the relevant Minister in due course.



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