

ARTHUR COX

The New Court Rules



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The New Court Rules

SI 254 of 2016 Rules of the Superior Courts
(Conduct of Trials) 2016 (“**Conduct of
Trials**”)

SI 255 of 2016 Rules of the Superior Courts
(Chancery and Non-Jury Actions and Other
Designated Proceedings: Pre-Trial
Procedures 2016) (“**Pre-Trial**”)

(Currently Suspended)

Conduct of Trials

In operation from 1 October 2016

SI 254 of 2016
Conduct of Trials

Pleadings

Expert Witnesses

Non-Party
Information

Mode of Trial

Assessors

Time Management

Video Link

Conduct of Trials

Expert Evidence & Pleadings:
Order 20 Rule 12(1), Order 21, Rule 23(1)

Apply to all High Court proceedings except personal injury actions

Statement of
Claim/Defence:

- If intend to offer expert evidence at trial, must disclose intention to do so in pleading
- *“State succinctly the field of expertise... and the matters on which expert evidence is intended... to be offered.”*

Conduct of Trials

- Level of detail required in the pleadings is unclear
- Possible significant expert input at early stage
- Challenges for routine litigation and lay litigants
- Complex litigation will benefit from early clarity
- Consequences of non-compliance?

Conduct of Trials

Expert Evidence
Order 39, Rules 57 to 61

Expert Witnesses
Order 39, Rule 57

**Applies to all High
Court proceedings**

- Duty of experts to assist the court – duty overrides duty to party paying the expert
- Expert's report must include a statement acknowledging this duty and disclosing matters giving rise to a potential conflict of interest

Conduct of Trials

Expert Witnesses Order 39, Rule 58

**Applies to all High
Court proceedings**

- Expert evidence restricted to that reasonably required to enable Court to determine proceedings
- Parties may be required by the Court to identify fields in which expert evidence is required and, where practicable, name of proposed expert
- Court can determine the field of expertise in which, or the proposed experts by whom, evidence may be given
- Court may direct the retention of a “single joint expert” where two or more parties wish to offer expert evidence on a particular issue

Conduct of Trials

Expert Witnesses Order 39, Rule 58

**Applies to all High
Court proceedings**

- Absent agreement on a joint expert, Court can select joint expert from a list provided by the parties or direct that the expert be selected otherwise
- Court can direct terms on which, and manner in which, joint expert is instructed and can require any party to pay a specified sum in respect of expert fees
- Prohibition on testimony from a second expert in a particular field of expertise unless for special reason the Court permits this. Court must be satisfied evidence of second expert is “*unavoidable*” in order to do justice between the parties.

Conduct of Trials

Expert Witnesses Order 39, Rules 59-61

Applies to Commercial, Competition and cases “in which an order may be made under Order 63C, Rule 4” (currently suspended)

- A party may serve written questions on an expert representing another party or on the single joint expert (rule 59) in relation to the contents of their reports. Expert replies form part of the expert’s report. If the expert fails to reply without justification, his evidence, or part of his evidence, may be excluded.
- No obligation to answer questions which are disproportionate, unnecessary for the determination of any matter at issue in proceedings or outside expert’s field of expertise.
- The Court may order a private meeting between conflicting experts, following which a joint report must be prepared (for the Court and the parties) identifying areas of agreement and disagreement (rule 61).
- Following consideration of joint report, Judge may require examination or cross-examination of the experts or apply “debate among experts” (or “hot tubbing” as it is commonly described) led by Judge. If “hot-tubbing” is applied, examination and cross-examination only after “hot tubbing” is complete and only if Judge directs this.

Conduct of Trials

- Welcome attempt to streamline, eliminate duplication and improve the quality of expert evidence , but some rules may be problematic in practice.
- Role of the Court in determining what expert evidence is to be adduced and by whom – impact on right of a litigant to call such evidence in support of his own case as (s)he considers appropriate?
- “Hot-tubbing” has been welcomed (and criticised) in other jurisdictions. Limited role of the parties’ lawyers envisaged by our rules and the significant erosion of the right of examination and cross-examination is a serious concern.
- Significant number of grounds upon which an expert can refuse to answer questions - could lead to disputes and interlocutory applications.

Conduct of Trials

Non-Party Information Order 31, Rule 30

Applies to all High Court proceedings

Supplements
Non-Party
Discovery and
Interrogatories

- The Court may order a non-party who has access to “*information which is not reasonably available to a party*” to prepare a document recording that information and make this available to the parties and the Court.
- Court order must specify the information or classes of information to be disclosed.
- Court order must also direct non-party to specify information which is no longer in party’s control and what has happened to it and any information in respect of which non-party claims entitlement or duty not to disclose.

Conduct of Trials

Order 31, Rule 30 Procedure

- Applicant must seek voluntary disclosure by letter. If the non-party fails or refuses to make disclosure or ignores or declines the request for voluntary disclosure, the applicant can apply to Court on notice to the non-party.
- Applicant must set out grounds on which he believes:-
 - The information sought is not reasonably available to the moving party
 - The information could not have been obtainable through discovery or interrogatories under Rule 29
 - The information sought is reasonably available to the non-party
 - The information is likely to support the case of the moving party or adversely affect the case of another party
 - Disclosure of the information sought is necessary to dispose fairly of the claim or to save costs
- Court can only make an order where the information sought is likely to support the case of the moving party or adversely affect the case of another party and disclosure of the information sought is necessary in order to dispose fairly of the claim or to save costs
- Court can decline to make order if it is not in the interests of justice that the information be disclosed.

Conduct of Trials

Mode of Trial Order 36, Rule 9

Order 36, Rule 9(1)

Applicable to “any cause or matter”

Order 36, Rule 9(2)

Applies to Commercial, Competition and cases “in which an order may be made under Order 63C, Rule 4” (currently suspended)

- General power of Court to make directions concerning the order in which questions or issues of fact or law should be tried (Order 36, Rule 9(1))
- Court may make directions as to the modules in which those questions or issues should be tried (and their sequence), may specify the nature of the evidence or the witnesses (including experts) required to enable the Court to determine the questions or issues in each module and may direct legal submissions for each module (Order 36, Rule 9(2))

Conduct of Trials

Trials with Assessors
Order 36, Rule 41

The Role of Assessors
Order 36 Rule 41

**Applicable to all High
Court proceedings**

- *“Trials with assessors ... shall take place in such manner and upon such terms as the Court shall direct”*
- Assessors assist the Court in understanding or clarifying a matter or evidence in respect of which the assessors have skill and experience

Conduct of Trials

Order 36, Rule 41

- Assessors are appointed by the Court of its own motion or on the application of a party to the proceedings
- Court may direct the assessor to prepare a report (for the Court and the parties) or to attend the whole or part of the trial or take such part in the proceedings as the Court directs
- Court determines fees to be paid to assessors and fees shall form part of the costs of the proceedings. Provision for fees to be paid upfront.

Conduct of Trials

Management of Time at Trial Order 36, Rule 42

Order 36, Rule 42

Applicable to all High Court actions

- The High Court “*may require any party to proceedings to provide a reasoned estimate of the time likely to be spent in the trial of the proceedings, including a list of the witnesses intended to be called by that party and an estimated time for the examination or cross examination... of each witness...*”

Conduct of Trials

Order 36, Rule 42

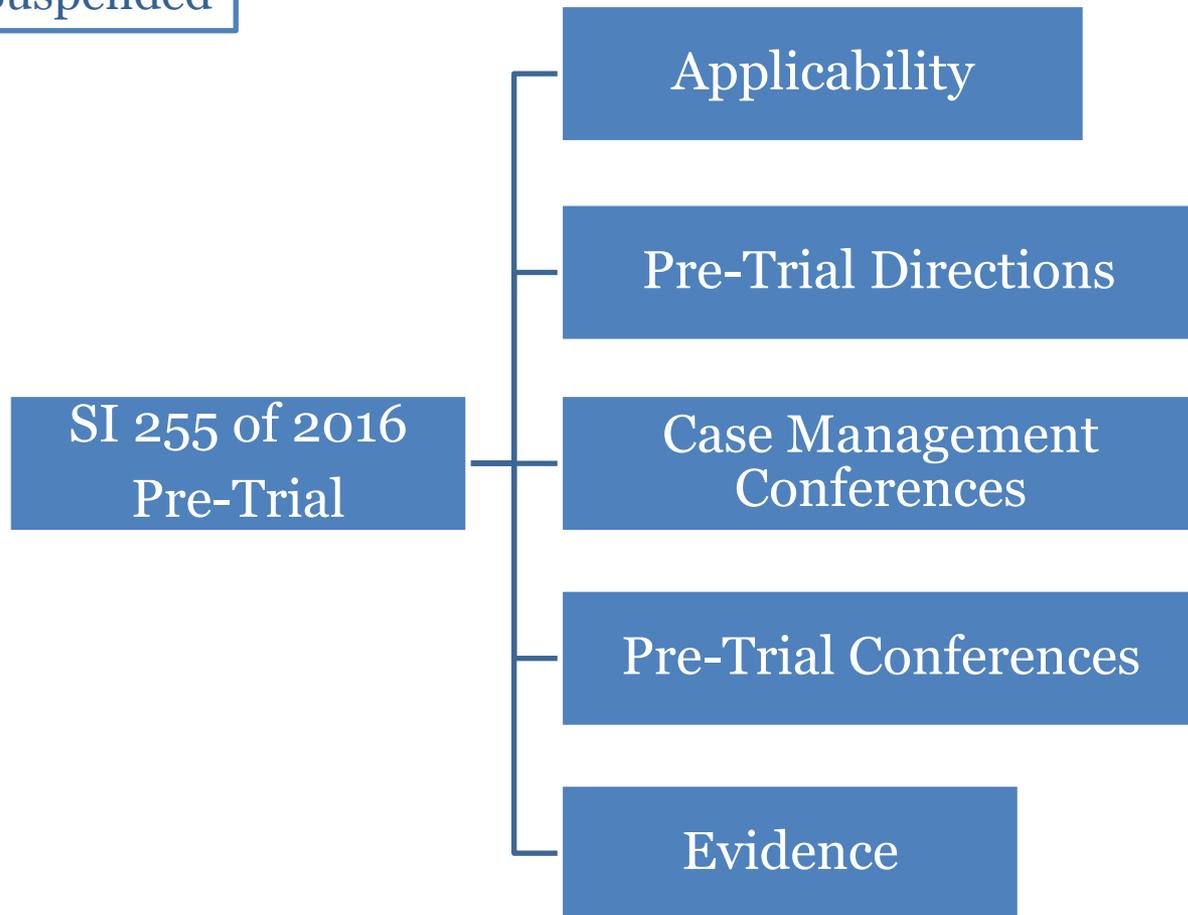
- The Trial Judge, having considered the materials and heard the parties, may make such directions “*as are expedient for the efficient conduct of the trial consistently with the requirement of justice*”, to include:-
 - directions relating to time limits for each aspect of the trial including examination and cross-examination
 - directions as to issues on which Court requires evidence, as to the nature of the evidence required and as to the manner such evidence is to be put before the court
 - Potential adverse costs implications for calling unnecessary or duplicative witnesses

Conduct of Trials

- Any reform which shortens the length of trials is a positive development, but application of the time management rules for trial will need to be approached carefully by the High Court.
- Curtailment of the right to cross-examine in particular is a cause for concern.
- Similarly, the idea that the Court could decide not to hear a witness whom a party judges necessary to advance its case, is problematic.
- Frequent appeals on time management decisions may result.

Pre-Trial

Currently Suspended



Pre-Trial

Order 63C Applicable proceedings

- Chancery Proceedings
- Non-Jury proceedings
- Other proceedings which the President of the High Court may designate - however this does not include:-
 - Personal Injury
 - Jury
 - Commercial or
 - Competition law proceedings

Order 63C was due to come into operation on 1 October 2016 but is currently suspended

- Once in force, Order 63C will apply to proceedings commenced before this date

Pre-Trial

Pre-Trial Directions Order 63C, Rules 4-5

- Directions similar to those which may be given by the Commercial Court including timetables for the exchange of pleadings, discovery, witness and expert statements and a whole range of issues prior to trial.
- Unlike in the Commercial Court where an application for entry includes an application for directions, ensuring that a timetable is set fairly early on in the proceedings, directions will not fall to be made under Order 63C unless a party applies for directions or there is an interlocutory application pending before the Court and the Court makes directions of its own motion.
- No rule permitting delivery of interrogatories without leave unlike in the Commercial Court Rules.

Pre-Trial

Case Management Conferences Order 63C, Rules 6-8

- Case management may be directed by the Court of its own motion or on application of the parties.
- Case Management Conference (CMC) to be held with Judge and the Solicitor or Counsel for each of the parties to ensure that the proceedings are prepared for trial fairly, expeditiously and cost effectively.
- CMC ensures that issues are defined, pleadings are served, all applications for interlocutory relief are made, discovery is exchanged and all witness statements (fact and experts) are served in advance of the trial.
- Books to be prepared for CMC, which must include agreed outline of case, chronology, statement of issues and of issues in dispute and pre-trial documentation in chronological sequence.
- Similar to CMC provisions in Commercial Court Rules.

Pre-Trial

Pre-Trial Conferences Order 63C, Rule 9-13

- Pre-trial conferences are mandatory and are to occur in all cases after the case is set down or, if applicable, after all CMC orders have been complied with unless dispensed with by the List Judge where “*the issues are sufficiently clear and the proceedings are otherwise ready for trial*”
- Pre-trial questionnaire to be lodged four clear days in advance
- Plaintiff solicitor to prepare trial books in advance to include dramatis personae, case summary, chronology, pleadings, affidavits, documents, expert reports, witness statements, submissions and authorities
- Court will identify outstanding steps to trial and arrangements for trial
- Court to issue a certificate of readiness

Pre-Trial

Expert Evidence Order 63, Rule 14(6)

- Requirement to notify other party of intention to call expert evidence on setting case down for trial or the fixing of a trial date (and in the case of a defendant within 30 days of relevant event)

Evidence Order 63, Rule 17

- Requirement to serve witness statements and expert reports not less than 30 days prior to the trial (Rule 17(1))

Pre-Trial

- Extension of Commercial Court Rules to other types of proceedings welcome step.
- Judicial resources crucial to implementing changes – available?
- Early directions hearing and strict adherence to directions key driver of change in Commercial Court, not case management or pre-trial conferences (under utilised).
- Directions hearing not compulsory under the new rules. Amend to provide automatic early listing for directions in all cases?
- Necessity for compulsory pre-trial conference in all cases, save where dispensed with by List Judge? How does List Judge come to determine this?
- Balance between ensuring litigants fully committed and prepared before initiating litigation/advancing to trial and limiting access to the Courts through disproportionate requirements?

New Practice Direction

HC68

Legal Submissions for all High Court proceedings

In force since 1 October 2016

- Submissions to be presented with headings, be a concise summary of oral submissions to be delivered and should refer to all authorities to be relied on.
- Submissions to be in prescribed font and format, to follow a template and to be no longer than 10,000 words (including the chronology).
- A chronology is to be included as an appendix by Plaintiff. Defendant should state in its submissions whether this is agreed and, if not, should produce chronology identifying points of differences.
- Specific rules with respect to Books of Authorities and order in which authorities should appear. Only authorities to be referred to in oral argument should be included and should not exceed 10 cases without leave of Court.

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Thank you for your time

Q & A