Recovery of Litigation Costs: Overview (Ireland)

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A Practice Note providing an overview on rules and practice related to the recovery of litigation costs in Ireland. It covers how parties can obtain a costs order from the court, interest on a costs award, security for costs, and whether a court can order the payment of a costs order in foreign currency or in instalments. It also considers the enforcement of contractual costs provisions and how courts address costs related to an interim application, the costs of appeal, and in the context of a settlement.

This Note also looks at the how effective Ireland's legal costs framework is in managing the costs of litigation, and the recent developments and legislative reforms related to this topic.

Often the excessive costs of protracted litigation may deter a party from bringing, defending, or pursuing legal proceedings, even if the party has a compelling case and a good chance of winning in court. This is particularly the case in jurisdictions where costs are recoverable by the successful party. In other jurisdictions, the lack of an effective legal framework to manage litigation costs can sometimes lead to a steady increase in false, frivolous, and speculative lawsuits.

It may not be possible to recover all litigation and legal costs incurred by a party. Recovery of costs incurred by a party in litigation from another party is subject to the rules of the court or other regulations.

This Note provides an overview of the rules relating to the recovery of costs in Ireland. It covers:

- Whether and, if so, how costs are recoverable.
- What costs are for the purposes of recoverability.
- How to obtain a costs order from the court.
- Other orders that the court may make regarding costs, including interest, security for costs, set-off, payment in instalments, and costs orders in foreign currency.
- How courts enforce contractual costs provisions.
- How courts address costs related to an interim relief application, on appeal, and in the context of a settlement.
- Enforcement of costs orders.

This Note also looks at how effective Ireland's legal costs framework is in managing litigation costs, and any recent developments and legislative reforms related to this topic.

Litigation Costs

Legal costs are costs incurred by a party in relation to legal matters, involving both contentious and non-contentious work, including money paid to lawyers and third parties. Litigation costs are a specific category of legal costs and may be defined as costs incurred by a party during or in connection to litigation, including pre-action legal costs that the party has paid to its solicitors, counsel, or third parties. At certain interim stages of a proceeding where interlocutory motions are required or at the conclusion of a proceeding, courts have discretion regarding the question of costs. However, the general rule is that costs follow the event. The court may order one party to pay all or sometimes a portion of another party's costs, depending on the circumstances of the case and the conduct of the parties throughout the course of the proceeding.

Rules and Practice

The main legislation and rules governing regulation of legal costs include:

- *The Legal Services Regulation Act, 2015* (LSRA).
- Order 99 of the *Superior Courts Rules (SI 1986/15)* (RSC), as amended.
- Order 66 of the *Circuit Court Rules* (CCR), as amended.
- *Order 53 of the District Court Rules* (DCR), as amended.

Lawyer's Duty to Inform Clients About Costs

Pursuant to section 150 of the LSRA, lawyers must give their clients an indication as to the cost of litigation. Prior to the commencement of section 150, solicitors were required under section 68 of the Solicitors (Amendment) Act, 1994 to provide clients with either:

- The particulars of the actual charges in writing.
- An estimate of the charges.
- The basis on which charges would be made for the legal services provided.

Part 10 of the LSRA provides greater transparency for the legal fees and costs charged by legal practitioners. Section 150 of the LSRA places increased responsibility on solicitors to advise (and keep advised) their clients in advance regarding the costs they will incur in relation to their litigation, or where this is not reasonably practicable, the basis upon which costs are to be calculated. This is commonly known as a section 150 notice. These requirements now also extend to barristers.

The section 150 notice must contain:

- The amount of legal costs incurred to date.
- A statement of duty to issue an updated section 150 notice to the client detailing any factors leading to any significant increase of costs.
- Details of the amount of VAT to be charged.
- A cooling off period of up to ten working days.

For contentious work, the section 150 notice must also provide:

- At each stage, either an outline of the associated costs, the likely costs, or the basis of costs calculation, including the likelihood of having to engage a barrister, an expert, or providers of other services.
- If a barrister, expert witness, or other service provider is required for litigation, the solicitor must outline the basis of costs from the third-party service provider and same must be approved by the client.
- Details of the legal and financial consequences of discontinuance of or withdrawal from a proceeding.
- Information regarding the circumstances in which the client would likely be required to pay the costs of one or more other parties to the litigation. The section 150 notice also must outline the circumstances in which it is likely that the costs of the legal practitioner would not be fully recovered from other parties to the litigation

Solicitors may enter into an agreement with their client regarding the amount or the manner of payment of all or part of the legal costs payable by the client for the services to be provided. This commonly arises in circumstances where, for example, a service level agreement is entered into between a firm and a large corporate client, due to the volume or frequency of instructions. In those circumstances, there is no requirement on the firm to provide a separate section 150 notice in each individual matter where the legal agreement contains all the particulars required in a section 150 notice.

Obtaining a Costs Award

At the conclusion of the hearing, either of an interim application or the final hearing of the substantive action, the court invites Counsel to address the court on the question of costs. While the court has the discretion to award the costs of and incidental to a proceeding, the general rule is that costs follow the event (section 169(1), LSRA).

This rule also generally applies to interim applications, however, depending on the circumstances of the application, the court may reserve the question of costs to the trial of the action. In this case, the trial judge decides who should bear the costs of the earlier interim application, or orders that the costs be costs in the cause, meaning the successful party at the hearing will also be awarded the costs of that particular interim application. If a costs order is made against a party at the interlocutory stage, it is common for that party to apply for the order to be stayed pending determination of the action.

Determining Which Party Pays the Costs

Unsuccessful Party

There may be occasions where a successful party may not be awarded all its costs of prosecuting or defending the action. Section 169(1) of the LSRA provides that in exercising its discretion on the question of costs, the court can consider the nature and circumstances of the case and the conduct of the proceedings by the parties. When considering the parties' conduct, section 169(1) provides several factors for the court to consider, including, but not limited to:

- The conduct of the parties before and during the proceedings.
- Whether it was reasonable for a party to raise, pursue, or contest one or more issues in the proceedings.
- Whether a successful party exaggerated their claim**.**
- Whether a party made an offer to settle the subject matter of the proceedings, and if so, the date, terms, and circumstances of that offer.
- Whether the parties were invited by the court to settle the claim, by mediation or otherwise, and the court is of the view that one or more than one of the parties was unreasonable in refusing to engage in the settlement discussions or in mediation.

Section 21 of the *Mediation Act, 2017* (Mediation Act) confers powers on the court, in making an award of costs, to have regard to whether a party unreasonably refused to consider or attend mediation, where they were invited to do so by the court.

Where a party is successful against one or more parties to a proceeding but not all of the parties, depending on the circumstances, the court may order that the successful party must pay all or some of the costs of the party against whom they have not succeeded.

Pursuant to Order 26 of the RSC, if one of the parties discontinues or abandons their claim throughout the course of the proceeding after the proceedings have commenced (including an appeal), that party is automatically liable to pay the reasonable

costs incurred of any other party in the defence of the proceedings until the date of discontinuance, unless the court orders otherwise or the parties agree otherwise.

Successful Party

The usual costs order is for the payment of party and party costs, which generally represents about 60% to 70% of the reasonable costs actually incurred or discharged, and which were necessary for the conduct of the matter. Party and party costs orders are most commonly seen in practice and generally do not account for all of a party's legal fees. Therefore, it is invariably very difficult in practice for a party to fully recover all of its costs from the opposing party.

However, Order 99, Rule 10(3) of the RSC provides that the court may, where it thinks fit, specifically order or direct that costs be adjudicated on a legal practitioner and client basis. Also known as solicitor and client costs, these are the legal costs payable by a client to their solicitor as a matter of contract and usually exceed the amount of costs which the unsuccessful party is obliged to pay under a party and party costs order. In other words, solicitor and own client costs are the most expensive for any litigant, in circumstances where they will cover additional services provided by the solicitor. These additional services include correspondence, meetings, and telephone calls with the client at the client's request, giving regular updates, and dealing with other issues which may or may not be relevant to the case. These costs may have been reasonably incurred, but they may not have been necessary. It is for this reason that solicitor and client costs are more severe and only ordered in exceptional cases. For example, this may be ordered by the court to reprimand the losing party for conduct during the proceedings. There would have to be good reason for the court to make an order on that basis (or indeed, on the more severe and exceptional solicitor and own client basis), for example such as a blatant or serious breach of an order of the court, that results in serious prejudice to the other party.

Where a party is successful only with respect to part of the claim, the court will exercise its discretion having regard to the conduct of the parties and whether it was reasonable or unreasonable to pursue a particular issue in the case.

Recoverable Costs

An order for costs usually directs that the costs be adjudicated (in the case of Superior Court proceedings) or taxed (in the case of Circuit Court proceedings) in default of agreement. Adjudication is the method by which the costs of proceedings instituted or determined in the Superior Courts are assessed. Taxation is the method by which the costs of proceedings instituted or determined in the Circuit Court are assessed. If the parties cannot agree on the amount of costs to be paid, then a vouched bill of costs detailing the successful party's costs is referred to the Legal Costs Adjudicator (or the County Registrar in the Circuit Court) for determination. As a rule, costs reasonably incurred and those of a reasonable amount are recoverable. The Legal Costs Adjudicator takes into consideration the entire circumstances of the case and the context in which the costs arise. In addition to the solicitor's professional fee and counsel's fee, costs reasonably incurred include:

- Necessary disbursements throughout the course of the proceedings, such as court filing fees.
- Commissioner for Oaths" fees for witnessing affidavits.
- Postage and sundry fees.
- Printing and photocopying.
- Process server fees.
- Expert witness fees.
- Stenographer fees.

Determining What Amount Is to Be Paid

The Legal Costs Adjudicator has jurisdiction to determine the amount of party and party costs to be paid arising from an order of the Superior Courts (High Court, the Court of Appeal**,** or the Supreme Court). The County Registrar has jurisdiction to determine the amount of costs to be paid in the Circuit Court (referred to as taxation)**.** District Court costs are dealt with by the trial judge. Both the successful party and the party ordered to pay can apply to the Legal Costs Adjudicator for the costs to be adjudicated.

The steps for applying for the costs to be adjudicated include:

- Prepare the Bill of Costs and provide a copy to the other party together with all supporting documentation to attempt to reach an agreement on the costs. This can be achieved via the party's solicitor but usually a costs accountant is engaged given their expertise in the area and familiarity with costs likely to be awarded on adjudication.
- If the costs cannot be agreed or can only be partially agreed, either party can apply for the costs to be adjudicated. Order 99 of the RSC sets out the procedure when applying for an adjudication, including:
    - the form to be used; and
    - the documents which should be enclosed with the application, for example the bill of costs, any vouchers or receipts evidencing disbursements, counsel's fee notes, or timesheets. This can now be completed via the Courts Service online platform, where the party's solicitor has an online account.

If the application is accepted it will be given a return date, which is the first date upon which the matter will appear before a Legal Costs Adjudicator. The issued application then needs to be served on the other party within 14 days of the return date. While the adjudication will normally proceed on the first return date, the Legal Costs Adjudicator has the power to adjourn the adjudication and to give directions as they consider fit for the expeditious and cost-effective determination of the adjudication. For example, the Legal Costs Adjudicator may direct the delivery and exchange of written submissions for the purposes of the adjudication.

The burden of proof is on the party filing the application to justify the work completed and that the charges incurred were reasonable.

As a rule, the successful party in the adjudication can recover its costs of the adjudication.

Fixed or Capped Amount of Recoverable Costs

If a party institutes and prosecutes proceedings in the High Court that could or should have been prosecuted in a lower court, as a rule, if successful, that party will recover from the other party or parties such costs as would be allowable in the appropriate lower court.

In addition, the unsuccessful defendant may be awarded the additional costs that were incurred because of having to defend the case in the higher court. These costs may be set off against the successful party's costs.

Under Order 53 of the DCR, in District Court proceedings (where the monetary jurisdiction cannot exceed EUR15,000), only where appropriate under special circumstances, the only lawfully imposed costs are the costs specified in each scale in the *Schedule of Costs* annexed to the DCR (together with VAT and any necessary outlay). The scale for undefended cases is used when an unsuccessful respondent was not legally represented at the hearing unless the court orders otherwise.

In small claims disputes (claim does not exceed EUR2,000), the parties are responsible for their own costs and witness expenses.

Costs and Settlement

If parties are in negotiations to settle a dispute, they are free to agree on who should bear the legal costs of the proceedings. Generally, for the purposes of finality, the agreed settlement sum is an "all in" figure, meaning that it also comprises a contribution towards the other party's costs. Any deed of settlement executed by the parties detailing the terms of settlement would normally contain a boilerplate provision that the parties are to bear their own costs of and incidental to the deed of settlement.

If the substantive action is settled but the parties disagree regarding costs, the parties can agree that the costs be taxed in default of the agreement. If the parties are unable to later reach an agreement regarding costs, the matter would be referred to adjudication or taxation, depending on the case. If the matter is sent for adjudication, the parties may request mediation to reach an agreement regarding costs.

While mediation is a voluntary process, section 21 of the Mediation Act confers powers on the court to consider whether a party unreasonably refused to consider or attend mediation when invited by the court, either on the court's own motion or on the application of the opposing party. A party should carefully consider any Calderbank offer (a settlement offer made on a "without prejudice save as to costs" basis) made by the opposing party during the proceeding and the potential costs consequences of rejecting the Calderbank offer, particularly considering section 169(1) of the LSRA. (See *Determining Which Party Pays the Costs*.)

Other Matters Relevant to Recovery of Costs

Costs on Interim Relief Applications

A party can claim costs related to an interim application granted in their favour, pending determination of the final costs. The court can:

- Award the costs of and incidental to the application and direct that the costs be adjudicated in default of agreement.
- Reserve the question of costs of the application to the trial of the substantive action.
- Order that costs be costs in the cause, meaning whichever party is ultimately successful at the hearing of the substantive action will be awarded the costs of the interim application.

Courts commonly either:

- Reserve the question of costs of the application subject to final determination of the case.
- Order the costs be costs in the cause.

Either of these actions can add to the uncertainty for both parties in going to a full hearing. In addition, the award of costs of an interim application can often be viewed by clients as a win. This can sometimes be viewed as a tactical advantage which may encourage the other party to enter negotiations regarding the substantive matter. On the other hand, the party against whom any costs order is made can seek a stay of the order pending determination of the substantive action. It helps alleviate the immediate pressure of an impending costs negotiation or adjudication running parallel to the substantive case.

Costs on Appeals

The appellate court has discretion to decide the question of costs of an appeal, however the general rule that costs follow the event also applies. In addition to dealing with the substantive issues under appeal, the appellate court can either vary or affirm the costs order made in the substantive action (by the lower court), depending on the circumstances of the case. Any order as to costs in an appeal from an order of the Circuit Court to the High Court will be subject to taxation by the appropriate county registrar in the relevant Circuit, who in that instance will have all the powers of the Legal Costs Adjudicator. In addition, the costs of a Circuit Court appeal to the High Court will be taxed in accordance with the lower Circuit Court scale.

Interest

Courts have discretion to award interest on costs from the date of the award to the date of agreement of the costs between the parties, or where no agreement is reached, the date of the adjudication. The current applicable interest rate is 2% per annum.

Costs Provisions in Contracts

It is common for contracts to contain provisions that the opposing party will be liable for the legal costs of the party seeking to enforce a term of the contract where proceedings are necessary. However, in general, the determination of liability for legal costs is considered a matter for the court to decide.

Security for Costs

Courts have the power to order a claimant to pay money into the court, or provide a bond or guarantee, as security for the opponent's costs of litigation:

- For the High Court, under Order 29, RSC.
- For an appeal to the Supreme Court, under Order 58, Rule 11, RSC.
- For an appeal to the Court of Appeal, under Order 86, Rule 9, RSC.

Section 52 of the Companies Act 2014 allows the court to order security for costs as against a plaintiff that is a private company limited by shares governed by that Act. The court has no jurisdiction where the plaintiff company is an unlimited company incorporated within the state or a company registered outside of the jurisdiction.

The following circumstances are pre-requisites to a court granting security for costs:

- In the case of an individual plaintiff, they must be ordinarily resident outside of the jurisdiction (although they may be temporarily resident), excluding Northern Ireland and the defendant must establish a defence on the merits.
- In the case of a plaintiff company, there must be credible evidence that there is reason to believe that the company will be unable to pay the defendant's costs if successful.

Payment of Costs by Instalments

There is no specific provision granting the power to direct payment of costs by instalments, but Order 99, Rule 5 of the RSC provides that the court may require payment of costs immediately, even if the proceedings have not concluded. In making this order, the court may direct payment of:

- A gross sum in lieu of taxed costs.
- A specified portion of the taxed costs.
- Taxed costs from or up to a specified stage of the proceedings.

Set-Off

Order 99, Rule 6 of the RSC provides that a set-off for damages or costs between parties may be allowed, despite the solicitor's lien for costs in the particular cause or matter in which the set-off is sought.

Staying a Costs Order

A stay on a costs order is usually granted in the context of an interim application. However, a party may also apply for a stay on a costs order following the final determination of a proceeding, for example in the case of a lay litigant with little or no money or in an appellate court where the substantive issue is under appeal.

Costs on Lawyers and Non-Parties

The court can impose costs orders on lawyers whose conduct has been improper or negligent or on non-parties who have acted unreasonably. If the case cannot proceed because of the neglect, failure, or omission of the legal practitioner, the court may order the legal practitioner to personally pay the other party such costs as the court deems appropriate. For example, incorrect procedures used during the litigation that result in a failure to adhere to time limits imposed by the court or a failure to have witnesses available to attend court on the day of a hearing, resulting in an adjournment, may warrant imposition of costs on the legal practitioner.

Foreign Currency Costs Order

There is no provision in the RSC or the LSRA for the court to make an order for costs in foreign currency.

Enforcement

The successful party can apply for an execution order, to the court that originally issued the costs order, to enforce a costs order:

- Once the Legal Costs Adjudicator's determination comes into effect.
- When a certificate of determination is produced by the Legal Costs Adjudicator.
- Once the determination is not the subject of a review under the LSRA.

The most common methods of enforcement of a monetary order (including an order for costs) are:

- Registration of the judgment in the Central Office of the High Court, resulting in the publication of the fact of the judgment by credit referencing agencies.
- An order for execution against goods directing the Sheriff or County Registrar to seize and sell the judgment debtor's goods to satisfy the judgment.
- An instalment order whereby the judgment debtor is examined under oath in court as to their means and the court may thereafter order that the debt be paid by way of weekly or monthly instalments.
- Registration of a judgment mortgage as against any interest held by a judgment debtor in real property.

Effectiveness of Legal Costs Regime

Solicitor and Client Relationship

The enactment of the LSRA and the duties imposed by section 150 of the LSRA has created greater transparency for clients on the potential costs of protracted litigation, in particular in the higher courts. Parties can effectively budget and plan in advance for the duration of the litigation.

The additional obligations imposed by section 150 related to litigation services ensures that the client is well informed regarding any potential financial exposure from an adverse outcome in the proceedings. For the legal practitioner, where a section 150 notice has been sent at the outset of the matter (and updated where necessary thereafter), and the client later disputes any bill of costs issued at the determination of the matter, the LSRA sets out very strict timeframes within which the client must notify the legal practitioner that the bill of costs is disputed. The LSRA sets forth very clear guidelines that the legal practitioner can follow to attempt to resolve the dispute, or where that is not possible, refer the bill to adjudication.

Litigation Costs Generally

There are several positive steps that have been taken to minimise the costs associated with litigation and guarantee access to justice, including:

- The establishment of the Commercial Court in January 2004, a division of the High Court dealing with commercial cases of more than EUR1 million in value. There are strict case management rules, meaning that cases are dealt with swiftly, leading to early trials and ultimately reducing the risk of costs accumulating unnecessarily.
- The enactment of the Mediation Act which promotes the early resolution of disputes by mediation as an alternative mechanism to court proceedings, thereby eliminating the further unnecessary accrual of litigation legal costs.
- The development of online services by the Courts Service and associated practice directions in selected areas allowing users to lodge certain applications online, for example applications for leave to appeal to the Supreme Court, applications for legal costs adjudication, and eLicensing facilities for licensing applications.

However, there is still a lot of work to be done to minimise and manage the costs associated with litigation in Ireland.

Recent Developments or Reforms

The Implementation Plan on Civil Justice Efficiencies and Reform Measures (Implementation Plan) was announced by the government in May 2022 and sets out the proposed approach to reforming the administration of civil justice in Ireland. The Implementation Plan was accompanied by the Report of the Review of the Administration of Civil Justice (Civil Justice Report), published in December 2020. The Civil Justice Report was the result of a review group chaired by the former President of the High Court, Mr. Justice Peter Kelly. The Report makes over 90 recommendations to achieve easier, cheaper, and quicker access to civil justice by the improvement of court procedures and reducing costs and delays. The Implementation Plan outlines seven work streams based on the themes of the Report.

Two key areas identified for costs management are:

- The reform of the current discovery system. The discovery system contributes to the accumulation of costs in litigation, especially in more complex commercial disputes.
- Advancement of measures to reduce the costs of litigation, including costs to the State.

The members of the review group preparing the Civil Justice Report were unable to agree on whether a legal scale of costs should be introduced and if so, whether it should be mandatory. In that regard, the Department of Justice commissioned economic research in this area, resulting in a recommendation by the Bar Council of Ireland and the Law Society of Ireland for a system of non-binding guidelines for legal practitioners, as opposed to a scale of costs model. The recommendation suggests that such non-binding guidelines would offer flexibility, fairness, and speed, in circumstances where no litigation case is the same. Further, it was noted that the statistics show that legal fees paid to barristers and solicitors have in fact fallen in recent years.

The Implementation Plan identifies late 2024 as the target by which the proposed reforms will be implemented.

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