EXHIBIT 84

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THE HIGH COURT

[2006 No. 62 COS]

IN THE MATTER OF FLIGHTLEASE (IRELAND) LIMITED (IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF THE COMPANIES ACTS 1963 – 2005
AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 280 OF THE COMPANIES ACT 1963

PAUL McCANN AND STEPHEN AKRES, JOINT LIQUIDATORS

APPLICANTS

JUDGMENT of Mr. Justice Clarke delivered 15th June, 2006.

1. Introduction

1.1 The applicants ("the joint liquidators of Flightlease") have sought a number of orders under s. 280 of the Companies Act 1963 which would have the effect of permitting them to distribute the assets of Flightlease (Ireland) Limited ("Flightlease") without reference to a claim submitted by Swissair Schweizerifche Luftverkehr-Aktiengesellschast in

Nachlassliquidation ("Swissair") or alternatively an order which would have the effect of expediting any challenge to, or appeal from, the rejection by the joint liquidators of Flightlease of proof in respect of a claim of Swissair which rejection occurred on the 18th October, 2005.

1.2 The background to that application stems from the fact that most of the creditors of Flightlease (being all creditors to whom Flightlease acknowledges indebtedness through the joint liquidators) have entered into a wind-down agreement on 22nd December, 2003 for the purposes of providing for the orderly winding down of Flightlease and the distribution of the realised assets in accordance with the terms of that agreement. In the events that have happened the only outstanding potential claim in respect of Flightlease, not covered by the agreement, comes from Swissair, all other issues having being disposed off. Therefore all that remains standing in the way of the distribution of the assets of Flightlease in accordance with the terms of the wind-down agreement is the Swissair claim. It is in that context that the joint liquidators of Flightlease have sought the substantive orders to which I have referred.

1.3 Both Flightlease and Swissair are ultimately subsidiaries of SAirGroup. Swissair itself is in a form of debt restructuring liquidation in Switzerland. The liquidator of SAirGroup is also the liquidator of Swissair and an intermediary company in the chain of ownership of Flightlease viz Flightlease AG.

1.4 In the context of the liquidation of Swissair, an application is currently before the Swiss courts seeking the return of certain moneys paid by Swissair to Flightlease. Questions have arisen between the respective liquidators of Flightlease and of Swissair as to the recognition that would be afforded by the courts in this jurisdiction (including having regard to the fact that Flightlease is in liquidation) to any judgment that might be obtained by Swissair against Flightlease in the Swiss courts. An early resolution of that recognition question appeared to be in the interests of all parties. From the perspective of the joint liquidators of Flightlease an early decision has to be taken as to whether to participate in the proceedings currently before the Swiss courts. If it were to be clear that the courts in Ireland would not recognise the judgment of the Swiss court as being binding upon the joint liquidators of Flightlease, then it might well be appropriate for the joint liquidators to take the view that they should not participate in the Swiss proceedings. Furthermore, for reasons which will become clear in the course of the judgment, the very participation by the joint liquidators of Flightlease in the Swiss proceedings has the potential (on one view of the law) to confer a jurisdiction on the Swiss court which would be recognised by the courts in this jurisdiction and which would not otherwise arise.

1.5 Similarly from the perspective of the liquidator of Swissair, the pursuit of the claim in the Swiss courts as against Flightlease may well be perceived to be of little value unless it is clear that a successful resolution of those proceedings in favour of Swissair would be recognised in this jurisdiction so as to bind the joint liquidators of Flightlease to take account of the judgment and order of the Swiss court in the distribution of the assets of Flightlease.

1.6 Given that there was perceived to be a significant urgency (having regard to the stage which the relevant proceedings had reached in Switzerland) to the parties being in a position to deal with this matter on an informed basis, I accepted an application on behalf of the joint liquidators of Flightlease to the trial of a preliminary issue in the following terms:-

> "Whether, in the event that the order sought by Swissair Schweizerifche Luftverkehr-Aktiengesellschast in Nachlassliquidation (in debt restructuring liquidation) the "claimant" against Flightlease (Ireland) Limited (in voluntary liquidation) (the "company") in the Swiss proceedings was granted, that order would be enforceable in the State".

1.7 The parties agreed to a highly accelerated exchange of pleadings by way of points of claim and points of defence, so that the issues arising on those pleadings could be heard within a short number of days of the direction that a preliminary issue be tried. Both parties and their advisors are to be commended on the manner in which this matter has been dealt with.

2. The Issues

2.1 On foot of the exchange of those pleadings it became clear that the following individual issues arose:-

(i) Whether the order sought would be excluded from enforcement under common law as arising from a proceeding in bankruptcy or insolvency. It was contended by the joint liquidators of Flightlease that such an exclusion arose and that, therefore, the order of the Swiss court would not, on that ground alone, be enforced in this jurisdiction.

(ii) In the event that the answer to (i) is no, a second question arose on the pleadings as to whether, under Irish rules of conflicts of laws, the order of the Swiss court would be recognised on the basis of a "real and substantial connection" test (as contended for by the liquidator of Swissair) rather than the narrower test summarised in Dicey (to which I will refer in due course).

(iii) In the light of the proper test different questions as to whether the test found to be appropriate was met on the facts of the case would also arise.

(iv) Arising from a rejoinder to the points of defence, which was filed on behalf of the joint liquidators of Flightlease, a further issue arose as to whether the order sought by Swissair in the Swiss proceedings would be unenforceable in the State having regard to the fact that there had been no appeal against the notice of rejection of the claimant's proof of debt in the liquidation under Irish proof of debt procedure.

2.2 The early trial of the preliminary issue was facilitated by the absence, at least for the purposes of the preliminary issue, of any dispute on the facts. Insofar as material to the issues to which I have to decide the following factual matters (including matters of Swiss law) were accepted by the parties for the purposes of the preliminary issue.

2.3 Under the federal statute on Swiss debt enforcement and bankruptcy a claim of the nature brought by Swissair against Flightlease in the Swiss proceedings can only arise where:-

> (i) the transaction in question was carried out during the period of five years prior to the granting of the debt restructuring moratorium;
> (ii) the transaction was carried out with the intention of either putting certain creditors at a disadvantage or favouring certain creditors to the disadvantage of others; and

> (iii) it was apparent to the other party that the transaction was carried out with the intention described at (ii) above.

2.4 For the purposes of assessing whether there was a real and substantial connection between Switzerland and the cause of action the subject matter of the Swiss proceedings (being the test contended for by Swissair) the following particularised facts were accepted:-

> A significant part of Flightlease's commercial decisions were made in Switzerland by Swiss members of the board of Flightlease, such as Lukas Kencht and Frank Schwabe. The offices at Balsberg (in Switzerland) thus constituted a fixed place of business of Flightlease and/or constituted a place from which the representatives of Flightlease carried on the business of Flightlease on a regular and ongoing basis.

2.5 In relation to an alleged presence on the part of Flightlease in Switzerland at the time of the commencement and service of the Swiss proceedings (which, as will be seen, is the relevant time for the purposes of the rule identified in Dicey to which I have referred above) the following facts were agreed:-

> In February 2002, shortly after a debt restructuring moratorium had been granted to several companies of the former Swissair Group, SAirlines (a wholly owned subsidiary of SAirGroup) sold its participation in the Volare Group. In the context of this sale the following two settlement agreements were concluded to settle debts which certain Companies of the Volare Group owed against several companies of the former Swissair Group:

- settlement agreement of 1 February 2002 between (1) SAirGroup, Flightlease, Mindpearl A.G., Swissair Swiss Air Transport Company Limited and (2) Air Europe S.p.A., Volare Airlines S.p.A. and Volare Group S.p.A.;

- settlement agreement of 1 February 2002 between (1) Atraxis Switzerland A.G. (now Atrib Switzerland in bankruptcy), SR Technics Switzerland, Swissport International A.G. and (2) Air Europe S.p.A., Volare Airlines S.p.A. and Volare Group S.p.A.
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> These settlement agreements were amended by an amendment agreement dated 15 November 2002 and further amended on 1 August 2003.
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> Additionally SAirLines, Flightlease, Atrib Switzerland in bankruptcy, SR Technics Switzerland and Swissport International A.G. provided a specific mandate to SAirGroup by separate agreement of 12 November 2002 to act as their agent in the collection of monies from the Volare Companies and in the distribution of those monies to the parties concerned as further explained in the next paragraph. The mandate agreement of 12 November 2002 is governed by Swiss law. SAirgroup, being the parties' agent, has a presence in Switzerland.

> The settlement agreements and amendments provide for periodic instalment payments in favour of Flightlease, Atraxis Switzerland in bankruptcy, SR Technics Switzerland, Swissport International A.G., Deutsche Bank AG, SAirLines and SAirGroup. These agreements further provide that all monies received from the Volare companies shall be paid to SAirGroup in a special bank account in Switzerland. The parties further authorised SAirGroup, as their agent and representative to undertake all necessary steps to collect the monies from the Volare Companies and distribute them to the parties in accordance with an agreed distribution schedule.
>
> Regular (although often delayed) payments have been made to SAirGroup, as the parties' agent, in pursuance of the said agreements. The monies collected by SAirGroup have in turn been distributed by SAirGroup to the beneficiaries concerned, including Flightlease.
>
> Some payments are still outstanding from the Volare Companies. SAirGroup, as the parties' agent and representative, is acting on behalf of the beneficiaries (including Flightlease) in the collection of these outstanding monies. The activities of SAirGroup in this regard include the enforcement of a bank guarantee and the submission of a proof of debt in the insolvency proceedings of the Volare Companies.

2.6 On the basis of those facts I now turn to the issues.

3. <u>The First Issue</u>

3.1 The joint liquidators of Flightlease place reliance on a passage from the 1927 edition of Dicey's Conflicts of Laws where the author states:-

> "An action *in personam* may be defined positively … as an action against a person with a view to enforce the doing by him of some particular thing e.g. the payment of damages for a breach of contract or for a tort; under this head comes (*inter alia*) every common-law action, whether on contract or tort, also every equitable proceeding, the objective of which is to compel the doing or not doing of a particular thing, as e.g. the specific performance of a contract …
> It may be well, though hardly necessary, to add that an action *in personam* does not include any proceedings which are not in strictness and "action" at all, such as a proceeding for divorce, judicial separation, restitution of conjugal rights, or for a declaration of nullity of marriage or of legitimacy, or a proceeding in bankruptcy …"

Paragraph 11-002 of the current (13th) Edition of Dicey and Morris contains a similar statement.

3.2 I have no doubt that the passage quoted represents the law in this jurisdiction. It is clear that a proceeding in bankruptcy is not, in itself, an action against an individual. Indeed the bankruptcy itself (whether individual or corporate) involves the collecting in of the assets of the insolvent individual or entity and their distribution in accordance with the appropriate

rules. It is, of course, the case that for the purposes of the orderly conclusion of any insolvency it may be necessary to determine the liabilities and entitlements of the insolvent person or entity as against third parties. In a corporate insolvency a liquidator may claim that the company is owed money by a third party. The third party may dispute such a liability. The question of the existence or otherwise of the liability may be determined, as a matter of procedure, within the insolvency or, in accordance with a permitted procedure in this jurisdiction, a court having authority over the insolvency may authorise separate proceedings to be commenced and, if appropriate, defended to resolve such issues. Similar disputes may arise between an insolvent individual and a third party as to the ownership of assets which, if owned by the individual, might be properly taken into account for the purposes of determining the entitlements of all creditors.

3.3 There can be little doubt that even if such claims by or against the insolvent person or entity are determined, as a matter of procedure, within the insolvency process, orders made as a result of such claims could not, by that fact alone, lose their status as judgments *in personam*. The fact that, in accordance with the procedural law of the relevant jurisdiction, a claim of an insolvent company to (for example) moneys owing, is determined within the insolvency proceedings rather than independent proceedings would not, in my view, affect the proper characterisation of any award made as being one *in personam* against the party from whom the moneys were claimed. It is the insolvency process itself, involving the gathering in of assets and their distribution in accordance with the appropriate insolvency law, that is the process which is not properly regarded as *in personam*. Determinations made, whether within or outside that process, concerning the entitlements or liabilities of the insolvent person or entity are not, in my view, properly characterised as being a proceeding in bankruptcy or insolvency in the sense in which that term is used in the above passage therefore Dicey.

3.4 It is in that context that the decision of this Court in *Dyer v. Dulan* (Unreported, High Court, Keane J., 10 June, 1993) must be considered. The order of a Massachusetts Court sought to be enforced, arose out of a personal insolvency and involved a determination, made under the provisions of s. 523 of the United States Federal Bankruptcy Code, and which followed from a finding of fraud or the like, to the effect that a pre-bankruptcy debt remained due notwithstanding the normal extinguishment of all liabilities on bankruptcy. Keane J. found the relevant order enforceable on the basis of residence on the part of the debtor within Massachusetts at the time of the bankruptcy proceedings.

While the point raised in these proceedings does not appear to have been argued in *Dyer*, nonetheless is a case where an order against an individual made in the course of bankruptcy proceedings has been enforced in this jurisdiction under common law rules.

3.5 However while accepting that, in principle, some orders made in insolvency proceedings may be enforced counsel on behalf of the joint liquidators of Flightlease argued that the nature of the claim brought in the Swiss proceedings in this case is much more closely connected to the insolvency proceedings such as to bring it within the exclusion identified in Dicey. In that context it is said that the substance of the order enforced in *Dyer* was simply an order made to recover a debt. It is clear from the facts referred to above (para 2.3) that in order for Swissair to succeed it will be necessary for the Swiss court to be satisfied that the transaction in favour of Flightlease was carried out for

the purposes of effecting what, in the analogous jurisdiction of the courts in Ireland in respect of liquidations, might be seen as similar to a fraudulent preference. The transaction must have occurred during the period of five years prior to the commencement of the insolvency proceedings. Thus it is said, correctly, that proceedings of the type contemplated can only arise where there is an insolvency and an insolvency process before the courts.
3.6 While that much is true it does not, it seems to me, at the end of the day, take away from the substance of the order which will be made, which is to the effect that on foot of the application of the relevant Swiss law, Flightlease will, if it is unsuccessful, be ordered to pay a liquidated sum of money back to Swissair. While some weight must be attached to the fact that the relevant proceedings could only have arisen in the event of an insolvency it seems to me that greater weight must be attached to the nature of the order to be made.
3.7 Similar orders could be made in this jurisdiction even in circumstances where there was no insolvency. For example moneys can be paid out by a solvent company which are paid *ultra vires* to a third party. Where that third party was aware that the company did not have the power to pay the moneys, same can be ordered to be repaid. Such an order would, in my view, be clearly an *in personam* order against the recipient. Therefore orders requiring persons to repay monies to a company can be *in personam*. It is the character of such an order that seems to me to be the principle factor in determining whether it can properly be described as *in personam*. Notwithstanding, therefore, the fact that the particular circumstances giving rise to the making of the order in the Swiss proceedings could only occur in the event of the company concerned being the subject of insolvency proceedings, I am nonetheless satisfied that any order which might be made should properly be characterised as an *in personam* order and its enforceability should, therefore, depend on the application of the appropriate rules for the recognition of *in personam* orders at common law.

4. Recognition in Common Law

4.1 As noted earlier there are two competing contentions as to the appropriate basis upon which the common law in this jurisdiction should recognise an *in personam* order of a foreign court. Flightlease argues that the traditional test as set out in Dicey (and in particular Rule 36) represents the current law in this jurisdiction. Swissair contends that the courts in this jurisdiction shall follow the lead of the Canadian courts and adopt a “real and substantial connection” test. There can be little doubt that, heretofore, it is likely that any person considering the matter would have had regard to Dicey. Many of the judgments of the courts in this jurisdiction in various areas connected with private international law have, over the years, placed reliance on Dicey and adopted its rules as representing the common law in this jurisdiction. It would, therefore, be a fair characterisation of the argument put forward on behalf of Swissair, to suggest that it amounts to a contention that there should be a relatively significant alteration to what have heretofore been regarded as the appropriate principles applicable to the recognition of foreign judgments *in personam*. For that reason it seems to me that it is appropriate to consider whether such an important question actually arises on the facts of this case before considering the merits or otherwise of the competing arguments as to the proper test.
4.2 So far as compliance with a “real and substantial connection” test is concerned I am

satisfied that if same were to be found to be the correct test it would be met on the facts of this case.

4.3 The agreed facts referred to above (paragraph 2.4) make clear that Flightlease had, at the time of the transaction which gives rise to the claim before the Swiss courts, a fixed place of business in Switzerland from which representatives of Flightlease carried on its business on a regular and ongoing basis. The transaction involved a payment by another company within the same group which was also based in Switzerland. The issues in the case centre around the knowledge and intention of both the paying company and Flightlease as to the effects of the payments on the creditors of Swissair. In those circumstances there clearly is a real and substantial connection between the claim and Switzerland. If, therefore, the "real and substantial connection" test is found to be the proper test applicable it seems to me that I would necessarily have to find that an order of the Swiss court would be recognised in this jurisdiction under the common law *in personam* rules.

4.4 However if Dicey Rule 36 is applicable then it is clear that the relevant time for considering jurisdictional questions is the time of the commencement of the proceedings. By that time Flightlease was in liquidation. Its affairs were, therefore, in accordance with Irish law, conducted by the joint liquidators. The fact as set out above (paragraph 2.5) as occurring at or around the time when the proceedings were commenced seem all to relate simply to the making of payments in favour of various companies including Flightlease through a bank account in Switzerland. It seems to me clear that what was involved, so far as Flightlease was concerned, was simply a mechanical action on the part of an agent who had no decision making powers and who simply collected money already owing and paid it on in accordance with the relevant agreements referred to in that paragraph.

4.5 It seems clear on the authorities that such a state of affairs does not give rise to a presence in the jurisdiction of Switzerland at the relevant time sufficient for the purposes of conferring a jurisdiction on the Swiss courts in accordance with Dicey Rule 36. *Okira & Co. Ltd. v. Forsbarka Jernverks AIB* (1914) 1 K.B. 715 is authority for the proposition that to be present by an agent, the agent must do business for the principal and that in order to do so the agent concerned must make business decisions. From the lengthy list of criteria specified in *Adams v. Cape Industries Plc.* [1990] Ch. 433 it seems clear that the actual conduct of business by the agent at the relevant time is highly material. In this case no business was actually conducted at the relevant time other than by the joint liquidators who were not present in Switzerland.

4.6 Therefore it is clear that in the event that Dicey Rule 36 represents the common law in this jurisdiction, it would not be appropriate to afford recognition to any judgment in the Swiss proceedings against Flightlease.

4.7 It is therefore clear that the question of whether the common law rules in this jurisdiction for the enforcement of a judgment of the type sought by Swissair in the Swiss proceedings against Flightlease would afford recognition to such judgment depends upon the test to be applied. If it is the real and substantial connection test then recognition should be afforded. If the test remains that as set out in Dicey Rule 36 then recognition should not be afforded. It is, therefore, necessary to determine which is the appropriate test and I now turn to that issue.

5. <u>The Test</u>

5.1 In *Rainford v. Newell-Roberts* [1962] I.R. 95 Davitt P. adopted the views expressed in

Cheshire - Private International Law (1945 edition) to the effect that jurisdiction to render a judgment actionable in Ireland exists only where either the defendant was present in Ireland at the time of the action or where the defendant has submitted to the jurisdiction. The passage from *Chesire* quoted with approval, corresponds to the grounds set out in Dicey's Rule 36. Sub-rules (ii) to (iv) of Rule 36 concern questions of when a party may be said to have submitted to the jurisdiction of the foreign court by bringing a claim or counterclaim, entering a voluntary appearance or contracted to submit to jurisdiction. No such issues arise in this case. Therefore insofar as relevant to the issue which I have to decide, Dicey Rule 36 boils down to a contention that an action *in personam* can, in the absence of submission to jurisdiction of the type to which I have referred, only be enforced as a foreign judgment where the judgment debtor was, at the time the proceedings were instituted, present in the country concerned.

5.2 Swissair draws attention to recent developments in the jurisprudence of the Canadian courts and in particular the decisions of the Supreme Court of Canada in *De Savoye v. Morguard Investments Limited* (1990) 3 SCR 1077 and *Salndahna v. Beals* (2003) 3 SCR 416.

5.3 In *De Savoye* the Supreme Court of Canada considered whether a judgment obtained by the respondents in Alberta could be enforced against the appellant in British Columbia. The case therefore, strictly speaking, concerned the analogous issue of the recognition by the courts of one province within a federal country of judgments obtained in another province. The Supreme Court of Canada placed some reliance on the decision of the House of Lords in *Indyka v. Indyka* (1969) 1 AC 33 where it was established that the English courts would recognise a divorce decree granted in a foreign country where there was a real and substantial connection between the petitioner for the divorce and the country exercising the jurisdiction. The jurisprudence in respect of the recognition of foreign divorces in the United Kingdom by means of a real and substantial connection test did not develop significantly by virtue of the fact that the issue was overtaken by statutory intervention.

5.4 The Supreme Court of Canada came to the conclusion that the traditional English common law test (which is the test set out at Dicey Rule 36) should no longer represent the common law of Canada.

5.5 The following passages from the judgment of La Forest J. seem to embody the rationale in taking that approach:-

> "the common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century. This principle reflects the fact, one of the basic tenets of intentional law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside jurisdiction. Great Britain, and specifically its courts, applied that doctrine more rigorously than other states; see *Libman v. The Queen*, which deals with the question in its criminal aspect. The English approach, we saw, was unthinkingly adopted by

the courts of this country, even in relation to judgments given in sister-provinces.

Modern states, however cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of this jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected.

But a state was under no obligation to enforce judgments it deemed to fall outside the jurisdiction of the foreign court. In particular, the English courts refused to enforce judgments on contracts, wherever made, unless the defendant was within the jurisdiction of the foreign court at the time of the action or had submitted to its jurisdiction. And this was so, we saw, even of actions that could most appropriately be tried in the foreign jurisdiction, such as a case like the present where the personal obligation undertaken in the foreign country was in respect of property located there. Even in the 19th century, this approach gave difficulty, a difficulty in my view resulting from a misapprehension of the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, may necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind."

Later La Forest J. continued:-

"As Dickson J. in Zingre v. The Queen, citing Marshall C.J. in The Schooner Exchange v. M'Faddon, stated, 'common interest impels sovereigns to mutual intercourse' between sovereign states. In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. Von Mehren and Trautman have observed in 'Recognition of Foreign Adjudications: A Survey and A Suggested Approach' (1968), 81 Harvard Law Review 1601, at p. 1603: The ultimate justification for according some degree

of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted.'

Yntema (though speaking more specifically there about choice of law) caught the spirit in which private international law, or conflict of laws, should be approached when he stated: 'In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in other words, to mediate in the questions arising from such commerce in the application of the local laws'. As is evident from throughout his article, what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.

This formulation suggests that the content of comity must be adjusted in the light of a changing world order. The approach adopted by the English courts in the 19th century may well have seemed suitable to Great Britain's situation at the time. One can understand the difficulty in which a defendant in England would find himself in defending an action initiated in a far corner of the word in the then state of travel and communications. The Symon case, supra, where the action arose in Western Australia against a defendant in England, affords a good illustration. The approach, of course, demands that one forget the difficulties of the plaintiff in bringing an action against a defendant who has moved to a distant land. However, this may not have been perceived as too serious a difficulty by English courts at a time when it was predominantly Englishmen who carried on enterprises in far away lands. As well, there was an exaggerated concern about the quality of justice that might be mated out to British residents abroad; see Lord Reid in The Atlantic Star.

The world has changed since the above rules were developed in 19th century England. Modern means of travel and communication have made many of these 19th century concerns appear parochial. That business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the

> European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.
>
> However that may be, there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view, there never was and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of injustice, necessity and convenience to which I have already adverted. Whatever nomenclature is used, our courts have not hesitated to cooperate with courts of other provinces where necessary to meet the ends of justice."

Finally, in relation to the case before the court La Forest J. said the following:-

> "I am aware, of course, that the possibility of being sued outside the province of his residence may pose a problem for a defendant. But that can occur in relation to actions *in rem* now. In any event, this consideration must be weighed against the fact that the plaintiff under the English rules may often find himself subjected to the inconvenience of having to pursue his debtor to another province, however just, efficient or convenient it may be to pursue an action where the contract took place or the damage occurred. It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a 'power theory' or a single situs for torts or contracts for the proper exercise of jurisdiction."

5.6 In substance the judgment in *Salndahna* simply made what was implicit in the judgment in *De Savoye* explicit, that is to say that the logic of the views of the court expressed in *De Savoye* necessarily require that the principle be extended to the recognition of foreign judgments and not merely to the recognition of the judgments of one province in the courts of another.

5.7 It is clear, therefore, that the courts in Canada have taken the view, for the reasons set out above, that the principles which evolved in the English courts, and are encapsulated in Dicey Rule 36, are outdated and require to be changed. On that basis the court adopted the test of "real and substantial connection", which the House of Lords had indicated as applicable in the case of matrimonial proceedings, as appropriate to the recognition of

foreign judgments.
5.8 The real question which I have to decide is as to whether this court should follow suit.
5.9 Before addressing that question two points need to be noted. Firstly counsel were not able to refer to judgments from any other common law jurisdictions which suggested that common law courts generally have followed the Canadian lead. Indeed there has been some academic commentary which cautions against adopting that course. It would, therefore, not be correct to describe the area under consideration as one where there has been a broad acceptance in the common law world of a new direction. For the time being Canada appears to be an exception.
5.10 Secondly it is of some relevance to note that limited consideration was given to the real and substantial connection test by the Irish courts in *K.D. v. M.C.* [1985] I.R. 697. In that case an appellant in divorce recognition proceedings sought to urge upon the court the adoption of the "real and substantial connection" test (placing reliance on *Indyka*). However, as appears from the judgment, the point had not been raised in this court and the substantive decision of the Supreme Court was to the effect that it would not be appropriate, in all the circumstances, to embark upon a consideration of the applicability of the test – the matter not having been raised at first instance. It is fair to say, therefore, that no concluded view was expressed on the test. As in the Untied Kingdom, issues were overtaken by statutory intervention and the Irish courts do not appear to have ever reached a final view as to the appropriateness of adopting the real and substantial connection test as a matter of the common law recognition of foreign divorces.
5.11 However I find some assistance from the judgment of McCarthy J. at p. 705 where he says the following:-

> "The ground of appeal propounded, amended so as to substitute the name of the respondent in the decree of divorce granted in England for the petitioner, would involve, essentially, not a re-hearing of the petition, but a fresh and totally different hearing, seeking to establish facts showing a real and substantial connection between the parties to that divorce and the United Kingdom (the so called *Indyka* principle) and, as a preliminary to such further inquiry, persuade this court to declare, upon a theoretical set of facts, that decisions of both this court and the former Supreme Court were fundamentally wrong, notwithstanding that the law of this country and the actions of citizens of this country, based upon that law, have assumed it to be as so stated at least since 1957. In that context, public policy is not confined to the status of a child as here, but extends to the affairs of the community as a whole over the last decade (since *Gaffney v. Gaffney* [1975] I.R. 133 or over 28 years since *Mayo Perrott v. Mayo Perrott* [1958] I.R. 336). In my judgment, it would be utterly wrong to embark upon such an inquiry".

5.12 While it is clear from the above passage that McCarthy J. was concerned principally with setting out the reasons why it was not considered appropriate to enter into a consideration of the ground of appeal at all, there is nonetheless assistance to be had from

the point made that persons will order their affairs based upon a view as to the law (based, where appropriate, on legal advice). Just as persons would have made decisions concerning marital status based on the then existing view as to the law in Ireland relating to the recognition of foreign divorces, so also would persons sued in foreign jurisdictions have made important decisions as to whether to participate in those proceedings on the basis of a view as to whether such judgments would be recognised in Ireland.

5.13 It seems to me that McCarthy J. was emphasising that a radical change in the common law had the potential, in some cases, to create significant effects (including retrospective effects) on many parties (and not just the parties before the court) and should not, therefore, be lightly engaged in. I fully agree with that view.

5.14 It is inherent in the common law that it will necessarily evolve to meet new circumstances and that, in the course of any such evolution, new principles may, in time, be developed to reflect the changing world in which the law has to operate. To that extent a gradually evolving common law system can, in certain circumstances, have advantages over a more rigid statutory regime where change can only occur after a full statutory process and may be too late to meet the needs of individual cases. The other side of the some coin is, however, that decisions as to the common law declare the law as it was at the time of the events giving rise to the proceedings in which the issue arises. A radical change in the common law has, therefore, the potential to have a retrospective effect which would not, in the ordinary way, arise in the event of a statutory amendment. It was the potential injustice of such an effect that McCarthy J. was referring to in the passage which I have quoted.

5.15 Subject to the overall limitation that the courts in this jurisdiction could not, in any event, engage in an alteration in the common law which amounted to legislation (an issue not raised by the parties in this case), the courts remain free to allow for the orderly evolution of common law principles. However the passage from McCarthy J. which I have quoted seems to me to be a reason for exercising significant caution where an over radical alteration in common law principles is suggested.

5.16 Having regard to that caution and to the fact that there does not, as yet, appear to be any real consensus in the common law world as to a need for a change in the direction identified by the Supreme Court of Canada, I have come to the view that the change that would be effected by accepting the argument of Swissair in this case would have the potential to do more harm than good. It would amount to a departure from the clear acceptance, as long ago as 1962, by the courts in this jurisdiction that the common law of Ireland was, in this area, as identified by the leading United Kingdom commentators.

5.17 In all the circumstances it seems to me that it would be inappropriate to engage in such a radical restructuring of the common law which could have the effect of adversely affecting, in a retrospective way, parties who had ordered their affairs (by for example not participating in foreign proceedings) on the basis of a reasonable understanding of what the law currently was.

5.18 In those circumstances I have come to the view that Dicey Rule 36 represents the common law in this jurisdiction for the recognition of foreign *in personam* judgments and, for the reasons set out above, I am satisfied that, on the basis of the application of that test, recognition would not be afforded to any judgment obtained in the Swiss proceedings. I propose to so hold.

6. Question 4

6.1 In those circumstances it does not seem to me that the fourth question arises. As this, in turn, involves potentially important issues I do not think it appropriate for me to deal with that question in circumstances where it does not appear to me to arise. I fully accept the principle that it is desirable that all issues which have the potential to effect the orderly distribution of the assets of an insolvent person or entity should, where possible, be determined by the courts of one jurisdiction. The reasons in favour of such an approach are obvious.

6.2 However on the facts of this case the issue involves the orderly conduct of two separate liquidations (that is to say those of Swissair and Flightlease) which are properly in the course of being conducted in two separate jurisdictions. Precisely how such a matter should be resolved I would prefer to leave to a case where the resolution of the issue would be decisive on the facts.

6.3 In those circumstances I would propose answering the issue raised in the preliminary issue by indicating that recognition would not be given by the Irish courts to any judgment obtained against Flightlease in the Swiss proceedings.

EXHIBIT 85

REPORT

MULTI-PARTY LITIGATION

(LRC 76-2005)

IRELAND
The Law Reform Commission
35-39 Shelbourne Road, Ballsbridge, Dublin 4

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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975.*

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 74 Reports containing proposals for reform of the law; 11 Working Papers; 37 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 26 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in Appendix C to this Report.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners.

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In October 2004, the Commission held a seminar on multi-party litigation as part of the consultation process. The Commission would like to thank all those who attended and contributed to the seminar.

The Commission would also like to express its gratitude to those who made written submissions on the content of the Consultation Paper, namely the Competition Authority; the Association of Personal Injury Lawyers; Free Legal Advice Centres (FLAC); the Consumer Policy Unit of the Department of Enterprise, Trade and Employment; Professor Vince Morabito from the University of Monash, Australia; and Erwin Mediation Services.

In the course of the researching and writing of this Report, the Commission held a number of informative meetings and discussions with individuals and representatives of interested bodies. In this regard, the Commission would like to thank Dr Christopher Hodges from the University of Oxford; Mr David Clarke, McCann FitzGerald; the Irish Insurance Federation; the Competition Authority; the Litigation Committee of the Law Society of Ireland; as well as the members of the judiciary who gave of their time and expertise.

However, full responsibility for the content of this publication lies with the Commission.

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INTRODUCTION

1 The Law Reform Commission's Second Programme of Law Reform contained a reference to *class actions and representative actions taken in the public interest*.[1] Accordingly, a Consultation Paper was published entitled *Multi-Party Litigation (Class Actions)*.[2] A period of consultation followed which has led to the publication of this Report.

2 The Consultation Paper opened with a discussion of the procedures currently available in Ireland to deal with multi-party litigation. The discussion pointed to the need for procedural reform in the area. To this end, a comparative review of selected multi-party procedures from a variety of jurisdictions was undertaken. On consideration of the options, a form of class action procedure was provisionally selected as being most appropriate in the Irish context.

3 This Report is the product of the work carried out at the Consultation Paper stage, further developments and research in the area and a process of consultation undertaken since. Chapter 1 of the Report outlines the need for procedural reform in this area of the law. The Commission draws on the experience to date of multi-party litigation in this jurisdiction and sets out the procedures within which it has operated. Chapter 2 sets out the details of the envisaged multi-party litigation procedure tailored to meet the litigation needs of the jurisdiction. In Chapter 3 the issue of funding multi-party litigation is considered. Chapter 4 provides a summary of the recommendations contained in the Report. Appendix A contains the Commission's draft Rules of the Superior Courts to give effect to the principal recommendations in the Report. Appendix B contains further draft legislative amendments following from the recommendations in the Report.

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1 A copy of the Second Programme of Law Reform may be viewed at the website of the Law Reform Commission: www.lawreform.ie.

2 LRC CP 25-2003. Hereafter referred to as "the Consultation Paper."

CHAPTER 1 MULTI-PARTY LITIGATION IN IRELAND AND PRINCIPLES FOR REFORM

A Introduction

1.01 Multi-party litigation refers to instances where a collection or group of cases shares characteristics sufficient to allow them to be dealt with collectively. The central, common feature will vary with the group, but will militate in favour of a collective or group approach. This feature may be found in a question of law or fact arising from a common, related or shared occurrence or transaction. The definition of the combining force necessary to commence a multi-party procedure is intended to be as flexible a concept as the overriding principles of administrative efficiency and fairness will permit. Part B of this Chapter outlines the different forms of multi-party litigation, including private actions. Part C outlines current arrangements for dealing with multi-party litigation, notably the test case and the representative action. Part D explores Irish experience with multi-party litigation. Finally, Part E sets out the principles which the Commission considers should form the basis for reform in this area.

B Scope of Report

1.02 Multi-party litigation can arise in a variety of situations. In order to highlight the exact area of multi-party litigation relevant to this Report, it is important at the outset to explain the various scenarios in which multi-party issues may arise. These different instances of multi-party litigation can be broadly categorised as follows:

- Public actions
- Organisation actions
- Litigation Avoidance
- Private actions

(1) Public Actions

1.03 Certain public officials are empowered to institute litigation on behalf of a wide group of affected individuals. The particular office in question will dictate the possible scope of the cases taken.

1.04 One example of such public representative litigation is found in the role of the Attorney General regarding relator actions. The office of the Attorney General is governed by Article 30 of the Constitution and section 6

of the *Ministers and Secretaries Act 1924*. Section 6 includes among the functions and duties of the Attorney General, "the assertion or protection of public rights." This role as "guardian of the public interest" has enabled the Attorney General to institute litigation on behalf of would-be litigants who might otherwise lack the required standing. The fiat or consent of the Attorney is necessary and its grant is entirely discretionary.[1] While the Attorney General will at all times remain the *dominus litis* in the proceedings, the procedure itself is often merely facilitative in nature and is limited in a number of respects:

> "The grant of the Attorney General's consent to the relator action simply means that the relator has been conferred with the necessary standing in order to permit him to litigate an arguable case, and this does not necessarily imply approval of the proceedings."[2]

Thus the costs and expenses of the relator action will lie with the individual litigant. As Collins and O'Reilly explain:

> "Any undertaking in the proceedings as to damages or otherwise are invariably given by the relator. The universal practice of the Attorney General is to require an undertaking from the proposed relator to pay any costs that may be awarded and to indemnify the Attorney General in that regard."[3]

Furthermore, the relator procedure is not a means of securing damages, but has traditionally been limited to the declaratory or injunctive relief.

1.05 Another notable example of a public action which may serve as a substitute for multi-party litigation is found in the jurisdictions of the Director of Consumer Affairs and of the Competition Authority to institute proceedings on behalf of consumers. For instance, under the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* the Director may apply to the High Court for an order prohibiting unfair terms in consumer contracts.[4] In addition, where the Director institutes criminal proceedings under the *Consumer Information Act 1978*, an award of damages may be made in favour of a consumer who has given evidence in

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1 See, for example, the judgment of Judge Sheridan in *Dunne v Rattigan* [1981] ILRM 365, 367. However, Hogan and Morgan envisage circumstances in which a challenge to a decision to refuse might be possible: *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 763-764.

2 Hogan and Morgan, *Administrative Law in Ireland* (3rd ed Round Hall Sweet & Maxwell 1998) at 758-759.

3 Collins and O'Reilly, *Civil Proceedings and the State* (2nd ed Thompson Round Hall 2004) at 281.

4 Regulation 8(1) of the 1995 Regulations.

the prosecution, without the need to bring separate proceedings. Similarly, the Competition Authority may institute criminal proceedings and claim civil damages in respect of anti-competitive practices under section 14 of the *Competition Act 2002*.

(2) Organisation Actions

1.06 It may be possible for certain organisations to take proceedings that could otherwise be instituted by a number of individuals. These organisations are often pressure groups or public interest groups deemed to have a sufficient interest in the case to overcome any issues in relation to standing.

1.07 In England and Wales an action was instituted by the environmental organisation Greenpeace in connection with the British Nuclear Fuel Ltd (BNFL) reprocessing plant at Sellafield. The court considered that Greenpeace held a sufficient interest in the outcome of the case to amount to standing:

> "I have not the slightest reservation that Greenpeace is an entirely responsible and respected body with a genuine concern for the environment. That concern naturally leads to a bona fide interest in the activities carried out by BNFL at Sellafield and in particular the discharge and disposal of radioactive waste from its premises and to which the respondent's decision to vary relates."[5]

In this case the court gave particular weight to the advantages of a representative case over the alternative of individual actions:

> "It seems to me that if I were to deny standing to Greenpeace, those it represents might not have an effective way to bring the issues before the court. There would have to be an application either by an individual employee of BNFL or a near neighbour. In this case it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace. Consequently, a less well-informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties."[6]

1.08 A similar approach was taken recently by Gilligan J in *Irish Penal Reform Trust v Minister for Justice, Equality and Law Reform*.[7] Thus an

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5 *R v Pollution Inspectorate, ex parte Greenpeace (No 2)* [1994] 4 All ER 329, 350 *per* Otton J.

6 *Ibid* at 350.

7 High Court, 2 September 2005.

appropriate organisation action may effectively dispose of multiple individual or potential individual cases. However, the question of standing may operate as a major obstacle. Moreover, the possibility of damages is not available and must be sought, if at all, by individual litigants who, as in the *Irish Penal Reform Trust* case, join the proceedings.

(3) Litigation Avoidance

1.09 On occasion it may be appropriate to deal with a group of individual actions in a way that avoids the need to litigate the issue. This may arise where a question of public interest is a stake. Where the objective is to facilitate a remedy, a non-litigious route may provide a more sensitive and efficient means of resolution. These schemes will often operate on an *ad hoc* basis and be designed to cater specifically for the features of the scenario. Such approaches will usually be set up under the initiative of the State.

1.10 An obvious example of litigation avoidance is to be found in no-fault compensation schemes. In the aftermath of the Thalidomide pharmaceutical scandal of the late 1950s and early 1960s, arising from which thousands of children were born with profound physical and other disabilities, a fund was established by the British and Irish governments to provide some level of compensation for the persons involved. A different approach was taken in the aftermath of a major fire in 1981 in a Dublin nightclub, the Stardust, in which over 40 people were killed and many hundreds injured. Here, when it emerged that conventional personal injuries litigation might result in limited awards, a non-statutory no-fault scheme of compensation was initiated in order to ensure that the victims of the fire and their relatives would receive appropriate compensation. Since the Stardust example, a number of differing statutory no-fault compensation schemes have been initiated to deal with mass cases of personal injury, including, for example, injury arising from infected blood products supplied by State bodies[8] and also in respect of physical and non-physical injury suffered by people who had been in residential institutional care.[9] These responses indicate that litigation may not be the only route by which mass claims may be successfully resolved.

1.11 On other occasions, Alternative Dispute Resolution (ADR) has been used successfully as a method of dealing with multi-party scenarios without resorting to litigation. Thus, where it emerged in the late 1990s that a number of hospitals in the United Kingdom had, for many years, retained the organs and other body tissue of infants without the consent of their parents and guardians, ADR methods were used successfully to resolve some

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8 See *Hepatitis C Compensation Act 1997.*

9 See *Residential Institutions Redress Act 2002*.

of the cases outside the courts. While, indeed, claims for damages might be appropriate in certain cases, it may also be that an ADR resolution to the matter, in which the parents and guardians receive an appropriate explanation and apology, could offer a non-litigious way to resolve the 'dispute'.[10]

1.12 Another method of litigation avoidance with potential implications at a multi-party level relates to prevention through regulation. While the role played by regulation in the arena of multi-party litigation may not be as immediately apparent, the impact of effective regulatory mechanisms will often work to prevent the wrong arising in the first place and thus head off the need for any form of multi-party litigation from the outset. Furthermore, regulation will often relate to areas in which the potential for multiple parties is great, such as pharmaceutical product safety and consumer regulation. Viewed in these terms, regulation plays a central role in multi-party litigation. Certain regulatory and standards agencies, such as the Irish Medicines Board, the Office of the Director of Consumer Affairs, and the National Standards Authority of Ireland are therefore noteworthy background actors in an analysis of multi-party litigation.

1.13 In addition, the State Claims Agency (SCA) is required to identify risks which might lead to future claims against public bodies. It is empowered to liaise with State bodies to ensure that foreseeable risks are managed and controlled in an appropriate fashion and in this way it plays an important preventative role. As a direct result of the army deafness claims, discussed below, the 1997 *Report of the Review of the Law Offices of the State* recommended the establishment of the SCA. The SCA was established in 2001 under the aegis of the National Treasury Management Agency.[11] As well as its preventative role, the general management function of the SCA in relation to mass claims against the State is important in the context of this Report. The SCA is currently responsible for managing civil claims involving most government departments, claims in connection with medical treatment in hospitals in the State, and its remit may be extended to deal with personal injuries claims against local authorities. It is, in effect, responsible

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[10] For instance, the group litigation concerning organ retention by Alder Hey Hospital (comprising about 1,100 claims) was settled by way of a three day mediation through the Centre for Effective Dispute Resolution (CEDR). The settlement included financial compensation but it was accepted that the ability to discuss non-financial remedies ensured a successful conclusion. The families involved produced a 'wish list' and this resulted in the provision of a memorial plaque at the hospital, letters of apology, a press conference and contribution to a charity of the claimants' choice. See *Monitoring the Effectiveness of the Government's Commitment to Using Alternative Dispute Resolution (ADR)* (Department of Constitutional Affairs, 2003), available at http://www.dca.gov.uk/civil/adr/adrmon03.htm.

[11] Part 2 of the *National Treasury Management Agency (Amendment) Act 2000.* See also the State Claims Agency website at www.stateclaims.ie.

for making decisions on whether to settle such claims or whether to defend them in court. In that sense, one of its primary roles is to make the most efficient use of public resources, particularly by minimising the cost involved. Accordingly, the SCA has been involved in the management of both individual and mass litigation.[12]

(4) Private Actions

1.14 The main focus of this Report is on private multi-party actions and not on those forms of multi-party litigation as set out above.[13] This refers to procedures which enable a group of individuals to institute, of their own initiative, proceedings which are designed to deal with that group collectively. Unlike either the public action or the organisation action as set out above, the issue as to whether or not the private multi-party action is pursued rests with the collection or group of individuals. There is thus no reliance on the whim or inclination of separate bodies which may be unwilling or inappropriate to pursue the particular set of proceedings. Instead, the individual will be able to act independently to pursue his or her action collectively with others.[14]

1.15 While private multi-party procedures provide the focus of this Report, it is not intended that any recommended approach would supersede the role played by other forms of multi-party procedure. However, the alternative procedures set out above are, by their nature, limited. By empowering the individual to institute and mobilise the group proceedings, it is considered that a structured private multi-party procedure will

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12 Among the mass litigation being managed by the SCA are over 2,000 potential claims by employees and former employees of State bodies who were exposed to asbestos during their employment. In a large number of such cases it would appear that liability may arise, particularly where exposure has led to symptoms of ill health. In such cases, the SCA is required to secure the most efficient and cost-effective means of disposing of such claims, particularly in relation to the associated legal costs. This has led to discussion of appropriate legal costs where a number of litigants are represented by the same firm of solicitors. In addition, where the persons involved have not developed physical symptoms of ill health from exposure to asbestos, the SCA has selected a number of test cases to determine whether any liability exists. Thus, the decision of the Supreme Court in *Fletcher v Commissioners of Public Works in Ireland* [2003] 1 IR 465, in which it was held that no liability arose in the absence of physical symptoms of ill health, has served as a test case for a large number of cases in which similar claims have been lodged but which were stayed pending the outcome of the decision in that case.

13 Among the leading texts in this area to which the Commission has referred are Hodges, *Multi-Party Actions* (Oxford University Press, 2001); Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004); Zuckerman, *Civil Procedure* (LexisNexis UK, 2003); Loughlin and Gerlis, *Civil Procedure* (Cavendish Publishing Ltd, 2004).

14 This, of course, will depend on the case group being sufficiently similar.

complement representative forms of multi-party litigation. Of course, there may be a degree of overlap between the procedures, and indeed a reformed private multi-party procedure might on occasion provide a potential private route to reach a remedy for those who previously would have looked to public or organisation actions as the only way forward. Nevertheless, the recommendations contained in this Report are not intended to provide a 'single fix' response to multi-party litigation; these alternative forms of multi-party procedure will continue to provide useful approaches in appropriate circumstances. It is against this wider background that the Commission approaches the issue of reforms to civil procedure involving multiple claims.

C Current Approaches to Multi-Party Litigation

(1) Introduction

1.16 Private multi-party procedures are not a novel concept in this jurisdiction. An analysis of what is in place at the moment may be useful in order to appreciate more fully the necessary direction of reform proposals. At present there are two principal routes open to pursue privately driven multi-party litigation. These are:

- The representative action; and
- The test case.

1.17 An analysis of these procedures will therefore inform the recommendations made later in this Report. We will set out briefly the features of these current approaches and focus on their respective strengths and weaknesses. This has been done in greater detail in the Consultation Paper.[15]

(2) The Representative Action

1.18 The current representative action procedure is set out in Order 15, rule 9 of the *Rules of the Superior Courts 1986* which states:

> "Where there are numerous persons having the same interest or matter, one or more such persons may sue or be sued, or may be authorised by the court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested."

1.19 Order 15, rule 9 is of questionable utility for most instances of multi-party litigation. This stems primarily from a number of limitations

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[15] Representative actions: see Consultation Paper paragraphs 1.01 – 1.17; test cases: see Consultation Paper paragraphs 1.31 – 1.35.

that have been read into the procedure.[16] These restrictions may be summarised here as follows:

- Remedies available: these are limited to injunctive and declaratory relief; damages may not be sought in a representative action.
- Same interest requirement: very strict requirements have been read into the nature of the link that must exist between the parties to a representative action.
- Absence of civil legal aid: section 28(9)(a)(ix) of the *Civil Legal Aid Act 1995* excludes from the remit of civil legal aid any application "made by or on behalf of a person who is a member, and acting on behalf of a person who is a member, and acting on behalf, of a group persons having the same interest in the proceedings concerned."

1.20 The combined effect of these factors has reduced any potential that the representative action offers as a meaningful multi-party procedure. A particularly serious limiting feature of the procedure lies in the unavailability of damages as a remedy. Any multi-party litigation procedure which will be of general use must offer the opportunity for the recovery of damages where this is appropriate. With its parameters so strictly set, the representative action has remained an underused and largely overlooked means of dealing with the demands of multi-party litigation.

(3) The Test Case

1.21 The limitations which shroud the representative action stand in stark contrast to the flexibility of the test case approach. As a result, the test case has been used quite often in multi-party litigation in Ireland. In fact, the nature of the test case does not merit description as a procedure. It is instead the application by analogy of the findings in one case to the facts of others.

1.22 The test case scenario may arise in one of two ways. Firstly, the test case may be chosen from a pool of litigants as the most appropriate to go forward as an exemplar. This presupposes a degree of organisation among the pool. Alternatively, where the pool has a less coordinated approach, the outcome of a vanguard case will be awaited by others and will provide guidance as to the possible outcome of later actions. Here, while there is no express coordination, the cases will nonetheless be aligned, and the initial judgment will in effect operate as a test case.

1.23 In either of these scenarios, the test case plaintiff will, at least formally, act solely in his or her own interest. They are not burdened by

[16] For a more extensive discussion on representative actions, see Consultation Paper paragraphs 1.01 – 1.17.

responsibilities or duties toward the rest of the pool or group either in the institution of the proceedings or any subsequent trial process. In these circumstances, the priority of the test case plaintiff will be to dispose of the individual action as profitably and as comprehensively as possible. There is no obligation to notify those with similar claims nor may it be in the interests of the test plaintiff to do so. Accordingly, potential plaintiffs outside the pool from which the test case was selected may only learn of proceedings, if at all, through media reports of the outcome. This may have consequences for every other potential litigant involved other than the test plaintiff. In particular, the court hearing the test case may not have an accurate picture as to the scope of the litigation in mind when arriving at a judgment; future plaintiffs may not have an opportunity to secure equal awards of damages despite having equally meritorious claims; and the defendant will be faced with continued exposure to future claims plus, where they are unsuccessful in their defence, the possibility of a full set of costs for each of the claims dealt with.

1.24 In the context of this Report, the test case gives rise to two particular concerns, namely the incalculability of global liability and the duplication of resources with regard to the generic or common issue.

(a) Incalculable Figure of Global Liability

1.25 The test case plaintiff will have their award of damages judged on the merits of their individual case and potentially without regard to the peripheral actions which may or may not be aware of ongoing proceedings. This may have negative consequences for both putative plaintiffs and the defendant.

1.26 Of course, in practice the court may be aware of a group of cases waiting in the wings for the resolution of the test case. However, where future plaintiffs have, for whatever reason, not yet instituted proceedings, this will almost certainly lie outside the path of vision of the test case trial judge. As a result, when future claims go forward to be settled on the basis of the test case guidelines, there may simply not be enough in the pot to go around, at least at a level proportionate to the test case award. This may be of particular concern where the defendant is a private body.

1.27 In any event, even in circumstances where the trial judge is aware of the presence of further claims which are set to turn on the outcome of the individual case, it is arguable that the court may not be in a position to look beyond the facts and circumstances of the case before it in determining an appropriate award against the defendant. This uncertainty with regard to total liability will also have implications for the defendant who will remain exposed to a potentially unquantifiable expense in terms of direct damages, costs and commercial uncertainty.

(b) Duplication of Resources

1.28 Where there are multiple cases revolving around a generic issue, each component case will usually operate on at least two levels:

- The generic issue between the cases which will often constitute the binding force behind the test case approach; and
- The discrete issues involved in individual cases.

1.29 The generic issue which arises throughout the group of cases will involve a large degree of overlap in terms of the work done. This will be reflected in the costs incurred. Of course, where separate representatives are working simultaneously on the generic issue, duplication will occur. Such overlap in resources is a natural by-product of the test case approach and may prove to be particularly costly where expert witnesses become involved. On the other hand, where a single lawyer oversees several cases within the group, there will be even more immediate scope for duplication as regards the generic issue.[17] The test case approach encourages, even if it does not validate, the multiplication rather than the division of costs for the generic issue among the members of the group. This is principally because the test case is not a recognised, and therefore controlled, procedure. Each case within the group is regarded as an independent unit requiring individual and separate attention. In this way, the test case fails to acknowledge the overlap among the group on the generic issue and thus allows for a separate billing of costs for individual cases.

1.30 Of course, the defendant will be eager not to be charged several times for work already carried out once. It is the understanding of the Commission that where costs are to be paid by the State as the defendant in a test case, there is likely to be an element of negotiation in an effort to arrive at a final and accurate reflection of the costs incurred. Undoubtedly, this will also be the case if the defendant is a private party, for instance in a products liability case. Where negotiation proves unsuccessful, there remains the option of involving the Taxing Master to settle the issue of costs. Often a compromise solution will be reached which lies somewhere between the two positions regarding plaintiff costs. In this way, the final figure payable will represent a middle course: the defendant will achieve a reduction in the initial bill without perhaps having to go to taxation, which may involve additional outlay and save very little in the long run; and the plaintiff representative(s) will achieve a certain boost above and beyond the costs incurred in the litigation of the generic issue in the light of duplication. Critically, what this arrangement does not disclose is an accurate reflection

[17] See paragraphs 2.80 – 2.87 below.

of the plaintiff's costs. While the parties involved may be satisfied with the final outcome on a case-by-case basis, this model leaves a lot to be desired in terms of transparency and cost efficiency.

1.31 This analysis presupposes a single lawyer dealing with numerous cases within a test case approach. It is undisputed that there will be outlay in terms of financial and other costs on a case-by-case basis which is not apt for division among the caseload. This may result from distinct issues arising from individual cases, or on foot of administrative costs involved in dealing with the individual files. Of course, in many test cases, there will be several lawyers dealing separately with cases falling within the pool or group. The scope of the work will cover not only distinct issues but also the generic, binding issues. Naturally, the input as between separate lawyers will not be handed from firm to firm, and work on the generic issue, including expert testimony, will require to be undertaken by each separate representative firm. Under these circumstances it is arguable that a degree of duplication is inevitable. However, where it is possible to pool the work on the generic issue, these inefficiencies might be avoided.[18]

(4) Complementary Nature of Envisaged Procedure

1.32 The focus on the efficient and effective disposition of cases or issues within those cases underlines the need for flexibility in any proposed reform. In this respect, the Commission envisages a minimalist, non-exclusive procedural model which allows for freedom of manoeuvre both within its own parameters and, where appropriate, to separate procedures. With this in mind, a *replacement* to current private multi-party approaches to litigation, in particular the test case, is not recommended. The test case model will undoubtedly continue to provide the most appropriate vehicle for the resolution of multi-party litigation in certain circumstances, particularly where the fact scenario at issue fails to meet the official prerequisites of a reformed procedure, but where the defendant wishes nonetheless to deal with the cases collectively. Thus it is important to preface any reform proposals by stating clearly that the Commission's recommendations concerning multi-party litigation are not intended to replace the test case model, but rather to provide an alternative approach where this is more appropriate.

(5) Report Recommendation

1.33 The Commission recommends that its proposals for multi-party litigation are not to be considered as replacements for existing procedures, particularly the test case, but rather as providing an alternative procedure where this is more appropriate.

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[18] See paragraphs 2.80 – 2.87 below.

D Case Studies of Multi-Party Litigation in Ireland

(1) Introduction

1.34 The details of particular instances of multi-party litigation to date in this jurisdiction will highlight both the need for reform in this area of procedure and the case-by-case, random approach by which such litigation has been treated. A consideration of certain multi-party litigation case-studies will place the reform proposals contained in this Report in an empirical context.

(2) Social Welfare Equality Cases

1.35 An early example of multi-party litigation in Ireland arose from the late implementation of the 1978 *Directive on Equal Treatment in Social Welfare*,[19] which required the State to ensure that social welfare payments contained no discrimination on grounds of gender or marital status. The relevant provisions of the Irish social welfare code had provided, for example, that certain social welfare payments were payable to married men only and not to married women, while others were payable at a higher rate to married men than to married women. The 1978 Directive required the State to remove these discriminatory provisions by December 1984, but the relevant legislative changes[20] did not come into force until December 1986. In the aftermath of the failure to implement the 1978 Directive, approximately 11,200 married women out of a total possible group of over 69,000 married women instituted proceedings claiming to be entitled to certain benefits which, prior to December 1984, had been payable to married men only, or in respect of which higher payments were made to married men, and seeking to have the relevant payments made to them.[21] Many of these claims were supported by the non-governmental Free Legal Advice Centres (FLAC).

1.36 *Cotter and McDermott v Minister for Social Welfare (No 1)*[22] and *Cotter and McDermott v Minister for Social Welfare (No 2)*[23] were, in effect, test cases for many of these 11,200 litigants. In these proceedings the European Court of Justice held that the 1978 Directive had direct effect from December 1984 and that the two plaintiffs were entitled to the same payments as married men from that date. The State settled these two

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19 Directive 79/7/EEC, 19 December 1978.

20 *Social Welfare Act 1985*.

21 See the judgment of Carroll J in *Tate v Minister for Social Welfare* [1995] 1 IR 418. See also Cousins, "Equal Treatment in Social Welfare: The Final Round?" (1995) 4 IJEL 195.

22 [1987] ECR 1453.

23 [1991] 1 ECR 1155.

specific cases without admission of liability, but also settled a further 2,700 claims which had already been initiated and which appeared to be similar.[24] As a result, approximately 8,500 claims remained to be dealt with – as well as the further 58,000 married women who had not initiated proceedings. In a further test case involving 70 of these women, *Tate v Minister for Social Welfare*,[25] the High Court found in 1995 that they too were entitled to the relevant payments together with interest from December 1984.

1.37 The 70 plaintiffs in *Tate* did not seek to prove the extent of each individual plaintiff's entitlement, and it was agreed for the purposes of the proceedings that this would be dealt with by the Department of Social Welfare in the light of the Court's decision.[26] As a result of the decision in the *Tate* case, the government made a public announcement that the relevant payments, totalling approximately £265 million including interest, would be made to the entire group of 69,000 affected married women.[27]

(3) The Army Deafness Claims

1.38 Beginning in the early 1990s, thousands of claims of hearing-loss were initiated by serving and former members of the Defence Forces. These cases became known as the 'army deafness claims'. Many of the claims were instituted on behalf of the plaintiffs by a limited number of firms of solicitors. As with the social welfare equality cases, the overwhelming majority of these claims were initiated on a 'deferred costs' basis, sometimes but misleadingly referred to as a 'no win, no fee' basis.[28] It became clear from a number of initial claims, which might be described as informal test cases, that the Defence Forces, and consequently the State, was liable on the substantive issue in that it had been negligent in relation to the prevention of noise-induced hearing loss with regard to serving and former members of the Defence Forces.

1.39 When the scale of the claims became apparent, a number of litigation-related initiatives as to the quantum of liability were put in place. For example, when disputes emerged over the appropriate test for measuring noise-induced hearing loss, as opposed to the loss of hearing arising from normal deterioration with age, the Department of Health established an Expert Group to determine the appropriate standard test for measuring hearing disability and tinnitus arising from hearing loss. By consent, all

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24 See *Tate v Minister for Social Welfare* [1995] 1 IR 418, 431.

25 [1995] 1 IR 418.

26 [1995] 1 IR 418, 430.

27 Cousins, "Equal Treatment in Social Welfare: The Final Round?" (1995) 4 IJEL 195 at 203.

28 For a discussion of deferred costs, see paragraphs 3.08 - 3.12 below.

army deafness claims were adjourned in 1997 pending the outcome of the deliberations of the Expert Group. The Report of the Expert Group, referred to as the 'Green Book', was published in 1998 and the standards which it recommended were incorporated into the *Civil Liability (Assessment of Hearing Injury) Act 1998.*

1.40 In another significant test case after the enactment of the 1998 Act,[29] the State was invited by the Supreme Court to propose a general scale of damages which would be used to calculate the quantum of damages in relation to all army deafness claims. With some minor adjustment to the scale proposed by the State, the Supreme Court, in effect, set out a scale for all remaining cases. As a result, the government established an Early Settlement Scheme under which the overwhelming majority of the army deafness claims were settled. As to the legal costs involved in these claims, the Chief State Solicitor's Office developed an *ad hoc* scheme in order to provide for the payment of fees, which took some account of the large number of claims involved and, to some extent, the duplication of costs involved resulting in an approach which was regarded as fair and reasonable for the disposal of these cases.[30]

(4) Concluding Comments

1.41 The social welfare and the army deafness claims are examples of multi-party litigation which had to be managed without the benefit of a formal structure for such litigation. It is clear that, even without a formal structure those involved in the litigation recognised the need to apply by analogy some elements which might be found in a more structured process.

1.42 In the social welfare equality cases, a relatively small number of legal firms were involved in managing litigation and were involved in the selection of lead or representative cases (*Cotter* and, later, *Tate*) to litigate issues that were in common with other similar cases: these would be described in a formal multi-party action procedure as generic issues. These lead cases formed the basis for the administrative settlement of other cases which fell within the generic issues which had already been litigated. The total number of cases involved in the social welfare cases, the equivalent of a register of cases, was also quite well understood by those involved and this facilitated the administrative settlements that followed from the lead litigation.

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29 *Hanley v Minister for Defence* [1998] 4 IR 496.

30 By April 2005, a total of 16,736 claims for hearing loss had been received. Of these, 15,490 had been disposed of mainly by way of settlements. By 2005, the total cost of the claims had reached €278 million including €93 million in plaintiffs' legal costs. The cost of settling remaining claims was estimated to be €15 million. See presentation by the Minister for Defence to the Oireachtas Select Committee on Justice, Equality, Defence and Women's Rights, 24 May 2005.

1.43 In the army deafness claims, most of the litigation was also managed by a relatively small number of legal firms. Initially, the litigation was being dealt with on a case-by-case basis, with the consequent lack of consistency which would have been present had there been a transparent multi-party litigation process available. The parties involved ultimately put in place an *ad hoc* process which involved lead or representative cases on the key generic issue, namely the measurement of damages for noise-induced hearing loss. The army deafness litigation also involved a novel feature, the Early Settlement Scheme, which included arrangements for dealing with the costs in a manner regarded as fair and reasonable by both sides in the litigation.

1.44 The Commission fully acknowledges that the parties involved in these instances of multi-party litigation adapted to the lack of a formal structure in a remarkably positive and flexible manner. Indeed, it can be said that these examples indicate that parties will, for good reasons of justice and efficiency, seek to apply, even informally, some of the essential elements of formal multi-party procedures even where they do not exist. In that respect, it might be argued that there is no need for a formal structure to supplement existing procedures because litigants will devise means of resolving issues in a suitable manner. However, the Commission is strongly of the view that *ad hoc* arrangements, which depend on the consent of willing parties, are no substitute for a formal structure which would facilitate a transparent procedure for dealing with such litigation.

1.45 It might also be suggested that the introduction of any multi-party action procedure will only encourage 'claims inflation' and that it would therefore be preferable to leave the current arrangements in place. The Commission does not accept this argument given that the absence of such a procedure has certainly not precluded the initiation of many instances of multi-party litigation, such as those already discussed. Indeed, in recent years, many other mass actions have been initiated or otherwise required to be dealt with through litigation or alternative dispute resolution (ADR) arrangements.[31] These include: the asbestos 'worried well' or 'fear of disease' cases; prisoner 'slopping out' cases; pension entitlement cases; nursing home health cost cases; medical malpractice cases; and organ retention cases. It is the view of the Commission that such cases would benefit from a formal structure to be set out in Rules of Court rather than *ad hoc* solutions. The use of Rules of Court rather than primary legislation is consistent with the principles set out in the Government's White Paper, *Better Regulation*.[32]

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31 On the use of ADR, see paragraphs 1.09 – 1.13 above.

32 Government of Ireland, 2004, available at www.betterregulation.ie.

(5) Report Recommendation

1.46 The Commission recommends that a formal procedural structure to be set out in Rules of Court be introduced to deal with instances of multi-party litigation.

E Principles Underlying Reform in Multi-Party Litigation

1.47 The challenge for multi-party litigation is to find an appropriate balance between procedural efficiency and broad procedural fairness. It would appear futile to construct a procedure which neglected the individual case in pursuit of exclusively collective or group solutions. Such an approach would remain unused by litigants and would give rise to many more legal issues than it might solve. On the other hand, the objective underlying any multi-party procedure is to render the system as efficient for the collective group as the demands of individual fairness allow for. In the Commission's view, the present system fails to achieve this balance to the detriment of all parties involved.

(1) Procedural Fairness and Practicality

1.48 The need for procedural fairness forms a core element in any reform of multi-party litigation. From the perspective of plaintiffs, where individual grievances are consolidated for the purpose of administrative efficiency, the boundaries of the procedure will be dictated by the individual cases within the collective group. Any devised procedure should, in the Commission's view, facilitate and certainly not hinder the resolution of individual actions. Where the process is sidelined into legitimate concerns arising out of a perceived lack of a full hearing of individual issues, the procedure will no longer serve its purpose.

1.49 In addition, any proposal in this area faces a more pragmatic limitation. Most instances of multi-party litigation involve not only central issues common to the collective group, but also a web of distinct issues at an individual or sub-group level. Any attempt to deal conclusively with these issues *en masse* would be to over-reach the potential of the procedure and to render the entire process unmanageable. This would similarly work to defeat the underlying rationale of efficiency. While a single procedural structure under the management of a designated judge may be capable of dealing with the entirety of the caseload, it will be most important to divide up the various elements of the case into convenient categories which lend themselves to collective resolution.

1.50 It is also important from the defendant's perspective that any reform of the current arrangements for multi-party litigation meets the test of procedural fairness. Given the lack of transparency in current arrangements,

any reform should produce a level of improvement, both in removing doubts as to the future potential scope of the litigation and in an appropriate reduction of associated costs.

(2) Procedural Efficiency

1.51 This term relates to savings that may be made without impacting on the central issue of the procedural fairness and practicality already discussed. Where, within the scope of multi-party litigation, there exists a core issue which applies to each case, a consolidation may be appropriate.

1.52 This core or generic issue will consist of a point touching upon each case within the entire collective group at hand. A straightforward example might be the issue of defendant liability. As to the generic issue, there may be two levels of potential savings to be made in delivery or transactional costs. Firstly, the outlay in terms of monetary or other resources necessary to litigate the consolidated generic issue may be much less than if this groundwork were conducted on an individual basis. The more frequently the same work is repeated on an individual case basis, the higher the final costs will be throughout the collective group. Secondly, whether or not the issue reaches court, the cost of representation as well as the lesser issue of administrative court costs may be reduced considerably. Whether there are numerous legal representatives acting on behalf of a single litigant or whether a single legal representative has many cases to cover, the cost will naturally be much greater than if a single representative is acting on behalf of the group. Of course, each of these savings depends on the consolidation of both the generic issue and also the legal representation.

1.53 It should be clear from this discussion that the resolution of the generic issue may not signal an end to the proceedings. Where it does not, the group may have to splinter into sub-groups or perhaps even down to individual actions in order to draw a line under the group of cases. While this issue impacts on the procedural fairness of the approach,[33] it also has implications in terms of protecting the efficiencies achieved. The extent of the splintering will depend on the nature of the case. In his discussion of Group Litigation Orders (GLOs) – a form of multi-party litigation in England and Wales – Hodges neatly summarises the projected scope of any multi-party procedure:

> "The claims which are managed in a co-ordinated fashion under a GLO remain no more than a collection of *individual* claims, each of which must ultimately be resolved. The objective is to dispose of all the claims as effectively and as swiftly as possible. In deciding on a managerial mechanism to move forward resolution of all the individual claims, the paramount consideration is that

[33] See paragraphs 1.48 – 1.50 above.

> the court must be satisfied that the selected approach will be *dispositive* of as many cases or issues as possible in as efficient and proportionate a manner as possible."[34]

The Commission supports the objectives for multi-party litigation procedure contained in this passage.

(3) Access to Justice

1.54 The principle of access to justice has traditionally formed a central rationale behind the introduction of multi-party procedures. Under individual litigation (or, for that matter, with a test case model as discussed above), costs are calculated for the entirety of the case on an individual level. With this approach, potential exposure to costs orders may present a real disincentive to the institution of proceedings in the first place.[35] By contrast, where the cost of litigating the generic issue is calculated on the basis of a single incident and spread across the members of the group, there will be substantial savings to be made at an individual level.

1.55 While access to justice is a laudable principle, it is important to avoid inferring unrealistic and ultimately unwelcome guarantees from its status as a constitutional slogan. The right of access to the courts is a long-recognised constitutional principle. In *Macauley v Minister for Posts and Telegraphs*,[36] it was decided that, in the context of access to the courts, the necessity of getting the consent of the Attorney General before suing a Minister was an infringement of the personal right of the citizen under Article 40.3 to have access to the courts.

1.56 However, this constitutional right of access has never been considered absolute. To date, the right of access has largely operated to prevent unreasonable impediments being placed in the way of the individual wishing to litigate. This is not to say that a clear and unrestricted path need be provided for the litigant. Certain obstacles are necessary in the interest of the smooth operation of the judicial process and for the vindication of the rights of the other parties to the litigation. For instance, the court may strike out an action as frivolous or out of time[37] and litigation will usually attract stamp duty payable by the litigant.[38] So long as these impediments are not

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34 Hodges, *Multi-Party Actions* (Oxford University Press, 2001).

35 See the discussion on deferred payment of fees, the limitations of civil legal aid and legal expenses insurance in Chapter 3 below.

36 [1966] IR 345.

37 The Statutes of Limitation aim to strike the appropriate balance between the right to litigate and the interests of certainty and protection from stale grievances.

38 See *The State (Commissioner of Valuation) v O'Malley* High Court, 27 January 1984 where McWilliam J concluded that a requirement to enter into a recognisance of £5 before pursuing an appeal under the *Valuation (Ireland) Act 1852* did not infringe the

unreasonable they are considered to be at one with the constitutional principle of access to the courts.

1.57 It is against this backdrop that the issue of access to justice in the context of multi-party litigation must be viewed. A careful balance between the avoidance of undue impediments to legitimate litigation and the filtration from the system of frivolous actions is required. While savings will be made on an individual basis on foot of the consolidation of the collective group, there will remain an element of risk and potential financial exposure which exists in all forms of litigation. Nevertheless, given the efficiencies and consequent savings flowing from multi-party procedure as envisaged, the Commission intends that meaningful access to justice will be strengthened through reform of this area.

1.58 The Commission is especially conscious of developments in this respect in case management of litigation generally. For instance, Order 63A of the *Rules of the Superior Courts 1986*, inserted in 2004,[39] sets down detailed and innovative procedures, including judicial case management, for commercial proceedings in the High Court. The elements of Order 63A concerning judicial case management were greatly influenced by the reforms recommended in the United Kingdom in two Reports on civil procedure in the mid-1990s by Lord Woolf.[40] The Woolf Reports led to the enactment of the UK *Civil Procedure Act 1997* and the *Civil Procedure Rules 1998* (CPR). The general intention behind the CPR is to improve access to justice and to reduce the cost of litigation by means including the use of judicial management. The essential principle underlying judicial case management is the promotion of active judicial involvement in the progress of litigation in order to encourage appropriate resolution as quickly as possible, whether by way of settlement or a hearing before the court. This principle was accepted by the Working Group on a Courts Commission[41] and the Committee on Court Practice and Procedure recommended in 2003 that any further Rules

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right of access to the courts. The issue of access to justice in the context of the payment of court fees has resulted in the abolition of stamp duty for certain forms of litigation, such as family law. For some general comments on this topic, see *Murphy v Minister for Justice, Equality and Law Reform* [2001] 2 ILRM 144.

39 Inserted by the *Rules of the Superior Courts (Commercial Proceedings) 2004* (SI No. 2 of 2004). These rules came into effect on 5 January 2004.

40 See Lord Woolf, *Access to Justice, Interim Report* (1995) and Lord Woolf, *Access to Justice Final Report* (1996). Both of these Reports are available on the website of the United Kingdom's Department of Constitutional Affairs: www.dca.gov.uk.

41 See Working Group on a Courts Commission, *Second Report: Case Management and Court Management* (1996), its *Working Paper: Conference on Case Management* (1997) and its *Sixth Report: Conclusion with Summary* (1998).

of Court should enable the development of case management.[42] The Commission's approach to multi-party litigation is based on this general move towards case management for all litigation. The specific content of the Commission's proposals discussed in Chapter 2 of this Report have been greatly informed by this context.

1.59 The Commission has approached reform of multi-party litigation on the basis of these three principles and therefore recommends that procedural fairness for the plaintiff and defendant, procedural efficiency in terms of resources and time savings, and promotion of access to justice together form the starting point from which procedural reform in this area takes shape.

(4) Report Recommendation

1.60 The Commission recommends that reform of current procedures to deal with multi-party litigation should be based on the following principles: procedural fairness for the plaintiff and defendant; procedural efficiency; and access to justice.

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[42] Committee on Court Practice and Procedure, 28th Interim Report, *The Court Rules Committees* (2003) at 51.

CHAPTER 2 PROPOSALS FOR REFORM

A Introduction

2.01 The proposals as set out in the Consultation Paper and the submissions received since its publication form the basis for the discussion of reform in this Chapter. While many of the features of the procedure proposed in the Consultation Paper remain, the Commission has made a number of important changes and has also explored some additional procedural aspects. However, the underlying basis for reform in the area remains as set out in the Consultation Paper, namely procedural fairness, efficiency and access to justice in multi-party litigation. It is intended that the procedure recommended should draw on the experience of other jurisdictions in order to tailor the most appropriate procedure for this jurisdiction.

B Terminology

(1) Consultation Paper Recommendation

2.02 The Consultation Paper recommended the introduction of a particular form of class action procedure. This recommendation drew aspects from the models adopted in many jurisdictions to form a procedure suitable for the Irish legal system.[1]

(2) Discussion

2.03 The Consultation Paper provisionally favoured a completely new form of multi-party procedure over a reformed representative action or a Group Litigation Order (GLO), the latter being the form of multi-party action introduced in England and Wales.

2.04 In the course of the consultation process which followed the publication of the Consultation Paper, a number of concerns were raised regarding the proposed class action procedure. These concerns focused principally on the features of the class action regime as typically implemented rather than on the procedure *per se*. High on the list of concerns expressed were the aspects of the procedure regarding the opt-in/opt-out debate and the proposal to introduce a contingency fee

[1] Consultation Paper paragraph 3.23.

arrangement. The Commission took the view in the Consultation Paper, and confirms the view in this Report, that the wholesale incorporation of the US model of a class action procedure would be inappropriate for the Irish legal system. This is equally true of many of the other comparative procedures set out in the Consultation Paper. Nevertheless, there are also valuable aspects of these procedures which have been developed in the light of experience and which may function well within the Irish legal system.

2.05 As has already been noted, the Consultation Paper did not recommend the introduction of a US class action procedure.[2] Variants of the US class action have been introduced in many common law jurisdictions, each designed to accommodate the relevant national legal culture. However, given the popular connotations associated with the concept of a class action, the Commission has concluded that it is appropriate to use another term for any reformed procedure proposed. In this respect, the term 'Multi-Party Action' (MPA) will be used in this Report in order to avoid any possible confusion and to highlight the distinctions between what is in place in other jurisdictions and what is under consideration in this Report.

2.06 It has already been noted in Chapter 1 that the reform under consideration here is not intended as a 'one size fits all' monolithic approach to multi-party litigation.[3] It is expected, for example, that situations will continue to arise where the test case approach might be utilised. It is also important to reiterate that the procedure is not envisaged as a one-stop means of disposing of multiple cases in their entirety, but instead as a means of dealing with the common or generic issues that arise as among the collective group. This generic issue may, of course, prove dispositive of the case as a whole, but it may also be necessary for the collective group to splinter.[4]

(3) Report Recommendation

2.07 *The Commission recommends that the proposed procedure for dealing with multi-party litigation shall be called a Multi-Party Action (MPA).*

C Opt-in v Opt-out

(1) Introduction

2.08 Having clarified the possible scope of any reformed multi-party procedure, it becomes important to determine the extent of the collective

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2 Where the term 'class action' is used in the context of the Consultation Paper, this is to be read in the broad sense of the procedure and not to be confused with the US style class action procedure.

3 See paragraph 1.32 above.

4 See paragraph 1.53 above.

group, that is to say, how many cases will be involved. This boils down to the crucial question of whether an opt-in or an opt-out approach is preferable.

(2) Consultation Paper Recommendation

2.09 The Consultation Paper sought views as to whether the adoption of an opt-in or an opt-out system was most appropriate. The Commission expressed a tentative preference for an opt-out system.[5]

(3) Opt-in v Opt-out: An Explanation

2.10 To explain briefly the difference between the two systems, an opt-out approach involves notification of the collective group after certification that the matter is suitable to be dealt with by an MPA followed by a period during which an individual may choose to exclude their claim from the collective group. Thereafter, anyone who has failed to exercise the right of opt-out will be deemed part of the group and will be bound by subsequent group findings. This is the approach typical in jurisdictions where a class action procedure has been introduced.[6] Further variants of the approach have been recommended by certain law reform agencies, most significantly those of Ontario in Canada and the State of Victoria in Australia, where judicial regulation of the opt-out system has been advocated. Indeed, there exists in the United States a category of cases in which where a class action has been certified for declaratory or injunctive relief, opting out is not permitted at all.

2.11 An opt-in system reflects more closely the traditional view of litigation which requires the litigant actively to initiate proceedings before being considered a fully-fledged member of the collective group. From this point onwards, the interest of an included litigant is tied to the collective group and any finding will bind the individual. This is the approach adopted in England and Wales under the GLO procedure, albeit with a slight caveat that the litigant's claims may be consolidated to a group action by order of the court.[7]

2.12 A compromise approach involves conferring on the court the discretion to decide whether to follow an opt-in, opt-out or, indeed, a more flexible approach.[8] There could be an entirely open judicial discretion without any default procedural system, or, alternatively, there may be

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5 Consultation Paper paragraph 4.77 – 4.78.

6 For example, in the United States.

7 *Civil Procedure Rules,* Rule 19.11(3)(b).

8 For a discussion of this approach see the Consultation Paper at paragraphs 4.76 - 4.77.

included a procedural provision for either an opt-in or opt-out as explained above, with an in-built judicial discretion to deviate where appropriate.

(4) The Arguments

(a) Access to Justice

2.13 The tradition of litigation in this jurisdiction follows an opt-in model. In general, the onus lies on the litigant to institute proceedings, in the absence of which it will be assumed that no such intention exists.

2.14 One of the attractions of an opt-in system lies in its familiarity or, conversely, in the unfamiliarity of the opt-out approach. An opt-out regime would require a dramatic shift away from the traditional voluntary method of instituting litigation. The idea of compelling an individual to take steps to withdraw from litigation that they never undertook sits uneasily with the traditional concept of litigation. Thus, the real possibility arises that individuals may become involved unwittingly in litigation.

2.15 On the other hand, it is arguable that the opt-out model serves certain social policy objectives in improving access to justice for those who, for a myriad of socio-economic reasons, such as the perceived impenetrability of the legal system or the costs involved in pursuing a claim, are less likely to have recourse to the courts and whose valid legal claims accordingly remain unsatisfied. Through the creation of structures which encourage collective resolution instead of individual action, the opt-out procedure would ensure that certain cases which would otherwise have remained unheard will be dealt with. In this way, opting out also ensures that defendants are held liable for the full measure of the damages they have caused rather than escaping that consequence simply because a number of group members fail to take the steps necessary to opt-in.

2.16 Most jurisdictions that have considered procedural change in this area have adopted an opt-out model in multi-party litigation, based at least partly on a concern to improve access to justice. This argument is based on the principle of providing those whose claim is too small to warrant the risk and expense of an individual action with access to litigation through the particular aggregation mechanism in operation. Thus, the Ontario Law Reform Commission made the following comment to refute the individualist stance of those favouring an opt-in regime:

> "A fundamental problem with this argument is that its relevance is restricted to injured persons having individually recoverable claims that will allow them the luxury of choosing whether or not to sue the defendant. For persons having claims for smaller amounts, an opt out regime cannot be criticised on this basis, because they could not sue the defendant in any event. Rather than deprive them of choice, the opt out class action affords them

> compensatory redress otherwise unattainable due to insurmountable economic obstacles."[9]

2.17 It is arguable that this reasoning does not apply in the Irish context. There already exists a mechanism whereby smaller claims may be litigated without the costs commonly associated with individual recourse to the courts. The Small Claims Court (operating through the District Court) has been in place for some time and is designed specifically to deal with claims of low monetary value expeditiously and without disproportionate expense.[10] In any event, where an opt-in regime is adopted there will be no bar to low value claims joining the group provided other prerequisites are met. Litigants with small value claims will be able to join the collective group and benefit from the efficiencies drawn from the procedure. On this basis, the opt-in/opt-out debate has less to do with access to justice, and instead turns on the questions of effective notice and the funding of such actions. In any event, the in-built efficiencies will help to promote access to justice among the individual members.[11]

2.18 Where one is dealing with a multi-party action dispersed over a wide area it may be difficult to communicate the commencement of the group to many of those affected. Thus, in order to ensure the expeditious closure of the issue, an opt-out system may serve general policy interests. However, in this jurisdiction where the pool of potential litigants is relatively small, an organised and targeted means of notification should serve the objective of widespread reach and obviate the need for an opt-out approach. In short, the geographic and demographic profile of Ireland does not warrant an opt-out system.

2.19 A more general issue is the constitutional backdrop to the Irish context. Many jurisdictions have introduced a class action procedure as a great equaliser under the banner of access to justice. However, it is as least arguable that the right of access to the courts involves a corresponding and converse right of non-access or, in other words, a right not to be compelled to litigate. Of course, there may be a right to opt-out provided, but where this is not taken or where it is not known of, the individual's case may be inextricably linked to the collective group. There may also be implications for personal property rights, insofar as a cause of action may attract the constitutional protection afforded to other forms of private property.

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9 Ontario Law Reform Commission, *Report on Class Actions* (1982) at 480 - 481.

10 See McHugh, *Small Claims Court in Ireland: A Consumer's Guide* (Firstlaw, 2003)

11 See paragraph 1.54 – 1.59 above.

(b) Closure

2.20 Opt-out systems appear to commend themselves in terms of finality. At one stroke the major share of putative cases can be dealt with, and defendants can predict, with some certainty, closure of the issue. This may be welcome not only as an efficient and speedy answer to the problem, but may also be more commercially appealing. From the outset, the defendant will be aware of the extent of the plaintiff group. This may also prove beneficial for the plaintiffs in that the defendant may be amenable to settlement. Where the defendant is a company dependent on its good name and reputation in the market, the sooner a line can be drawn under a multi-party claim which attracts public attention the better. Indeed, in some cases this may prove a more dominant concern than the issues of liability and damages.

2.21 Closure may also be beneficial to the functioning of the judicial system, which has an interest in encouraging the efficient disposal of the litigation. Under an opt-out system the courts are more likely to be spared the slow-drip effect of identical factual or legal issues arising in a series of separate cases. Of course, courts frequently deal with identical issues arising in separate cases, but where the procedure allows for the collective disposal of these issues there will be a valid interest in encouraging the grouping of the cases to the greatest extent possible.

2.22 However, there is likely to be a large degree of overlap between those who remove themselves from an opt-out group and those who fail to join under an opt-in regime. In both instances, the vast majority of those intending to litigate will be drawn in. Cost sharing as well as administrative and logistical ease will ensure this for the most part. As for absentees from the collective group, profiles may vary, though in terms of litigation closure the most pertinent group will be those who decide to institute proceedings individually. It seems unlikely that many would choose actively to avoid a group where costs are reduced dramatically unless there is an intention to take individual proceedings. Financial exposure may be more limited as a result. Alternatively, where the onus is reversed and the individual is no longer obliged actively to absent themselves from the collective group, but must instead actively join, it is more likely that those who fail to join will simply not have any intention to litigate, certainly not from within the collective group and quite likely not at all. In other words, the percentage of those opting out who intend to pursue individual litigation will be greater than the percentage of intended individual litigants among those failing to opt-in. Thus, it is at least arguable that the opt-out regime does not ensure greater closure as it filters from the group those with a greater predilection for individual litigation. Although absenteeism may be greater in an opt-in regime, having passively avoided the collective group, the subsequent litigation drag may be less extensive. In these terms, the most that an opt-

out system can offer is a more concrete indication of the scope of the collective group involved insofar as those outside the group will be on record.

2.23 In any event, where the objective is one of finality, it may be rather short-sighted to compare and contrast the opt-in/opt-out debate as involving diametrically opposed concepts. It should be borne in mind that an opt-in regime will not leave the litigation door interminably open. In particular, the *Statute of Limitations* guarantees a point of closure, albeit a little further off in the distance, thus ensuring that the threat of litigation will not hang perpetually over the defendant or the system.

(c) Judicial Discretion

2.24 This model is certainly appealing in terms of flexibility. This flexibility has led to its being favoured by both the Woolf Report in England and Wales[12] and by the South African Law Commission.[13] However, when the Alberta Law Reform Institute considered the issue, it concluded that "judicial choice places the parties in a position of uncertainty because they do not know in advance which procedure will be followed; and it invites litigation over the procedural choice."[14] The Consultation Paper echoed this reasoning. On balance, it was considered that the gain in terms of flexibility would be outweighed by losses in terms of uncertainty. The concept of any proposed procedure would be much less clear, and the burden to the nominated judge above and beyond what might already be an administratively laborious task was considered unjustified.[15]

2.25 Having considered this matter, the Commission has concluded that it is possible to use a limited judicial discretion in order to gain some of the advantages associated with the opt-out approach. This would draw on the model currently in use in England and Wales where, although the norm is an opt-in system, an individual action taken whilst a group action is ongoing may be referred by the trial judge to the court in charge of the relevant GLO. The Commission considers that this mechanism would ensure the greatest possible degree of closure within an opt-in model. Where a trial judge is convinced of the reasoning behind a decision to institute a separate individual action, the case may be allowed to continue unhindered. However, where it is considered that the case could be dealt with within the rubric of the MPA, an appropriate order by the trial judge may be made to

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12 Lord Woolf, *Access to Justice* Chapter 17, paragraph 46.

13 South African Law Commission, *Report on the Recognition of Class Actions and Public Interest Actions in South African Law* Project 88 (August 1988).

14 Alberta Law Reform Institute, *Class Actions* Final Report No. 85 (December 2000) at paragraph 242.

15 Consultation Paper paragraph 4.76.

this effect. Unnecessary duplication of court and defendant resources may be avoided in this way.

(5) Report Recommendation

2.26 *The Commission recommends that the Multi-Party Action procedure would operate on the opt-in principle, subject to a power of the court to oblige an action to be joined to an existing Multi-Party Action.*

D Joining the Multi-Party Action and Register

(1) Discussion

2.27 Having settled in favour of a general rule of opt-in, it is appropriate to explore next the question of how a claimant wishing to join the group might be added to the MPA. This stage is avoided in those jurisdictions adopting an opt-out approach. However, as Mulheron remarks: "If an opt-in arrangement is to be adopted, then how the class members validly opt-in must be clear and unambiguous".[16]

2.28 The class action is distinguishable from other forms of group litigation such as GLOs as a result of the status of those on the class action register. In class actions, there will be only one plaintiff known as the class plaintiff. The remainder of the class will be represented in the true sense of the word in that they will play no part in proceedings, will not be named parties to the action and will merely have the results of the representative plaintiff's case applied to their circumstances. In these circumstances, and in particular where an opt-out regime is in operation, the question of joining the class is relatively straightforward. Because there will be no part played by the represented party, the individual claimant need only join the class register in order to commence an action for their purposes.

2.29 A different approach is evident in the GLO procedure. Under a GLO the parties appearing on the register are not represented to the same extent as those under a class action. Each individual will be a named party in any eventual set of proceedings. This difference marks not only a conceptual divergence between the two procedures but also has important practical ramifications. In particular, the interface between the individual and the representative nature of the proceedings is at issue.

2.30 To this end, the GLO procedure in England and Wales could have invoked two possible avenues for the purposes of commencement. Having already decided to adopt an opt-in model, the question arose as to how a claimant could enter their name on the register and consequently at what

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[16] Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Approach* (Hart Publishing, 2004) at 100.

point the *Statute of Limitations* would stop to run against the claim. On the one hand, the Woolf Report preferred the more simple option of requiring only the direct entry of the claimant's name onto a group register rather than the issuing of a separate set of proceedings for each possible action.[17] This approach would involve a copy of the individual claim being sent to the manager of the register together with a request for entry on the register. This form would specify the grounds on which the criteria for joining the register had been met. Where doubts arose as to whether a particular claim should be entered, a reference could be made to the court which would rule on the issue. The *Statute of Limitations* would stop running as against the claim from the time of entry on the register.

2.31 There was considerable uncertainty at the outset as to the proper form of commencement procedure. This was clarified some 18 months after the GLO procedure was implemented, when the drafters rejected the above approach. Despite its advantages in terms of simplicity, Lord Woolf's preferred model was eschewed in favour of a scheme whereby each claim would be issued separately before entry on the register.[18] It was considered preferable, in this respect, to maintain direct court supervision over the significant issue of the *Statute of Limitations*, which would, under the terms of the procedure actually adopted, follow the traditional rules. Any party to the case may make an application for entry on the register which will be determined by the judge with reference to the GLO criteria.

2.32 On balance, the Commission has concluded that the approach adopted in England and Wales is best suited to the Irish context. Judicial control over entry onto the register and the important implications this would have in terms of the *Statute of Limitations* militate heavily in favour of maintaining the traditional rules which require each claim to be issued separately.

(2) Report Recommendation

2.33 *The Commission recommends that the Statute of Limitations will not stop to run against each claim until that case has been filed in court in the normal way. This will be followed by judicially controlled entry onto a Multi-Party Action register.*

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17 Lord Woolf, *Access to Justice* Chapter 17, paragraph 23.

18 See Practice Direction 19B paragraph 6.1A. The change took effect on 2 December 2002.

E Certification

(1) Consultation Paper Recommendation

2.34 The Consultation Paper recommended that the point at which an action becomes an MPA should be subject to judicial certification.[19]

(2) Discussion

2.35 The certification stage marks the gateway to the establishment of an MPA register. The requirement to have the proceedings certified by a judge is a feature common to all multi-party litigation procedures including the class action and GLOs. A judicial determination that the criteria for a multi-party procedure have been met is an important means of ensuring fairness among the parties and consistency in practice across the board.

2.36 In order to ensure parity, it is important that certification may be sought by either party to the individual action. In keeping with the judicial management role in the procedure and the underlying goals of systemic fairness and efficiency, the Commission recommends that it should also be possible for a court to certify an MPA of its own initiative.

(3) Report Recommendation

2.37 *The Commission recommends that the point at which an action becomes a Multi-Party Action should be subject to judicial certification, whether at the initiative of the parties or on the court's own initiative.*

F Cause of Action

(1) Consultation Paper Recommendation

2.38 The Consultation Paper recommended a requirement that pleadings disclose a cause of action.[20]

(2) Discussion

2.39 It is a fundamental requirement in any civil claim that a cause of action be disclosed. Where this is not demonstrated, the action may be struck out under Order 19, rule 28 of the *Rules of the Superior Courts 1986* as "vexatious or frivolous". It is clear that this requirement applies to instances of multi-party litigation and the Commission reiterates the view expressed in the Consultation Paper that it should constitute a precondition to certification.

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19 Consultation Paper paragraph 4.56.

20 Consultation Paper paragraph 4.28.

(3) Report Recommendation

2.40 *The Commission recommends that the pleadings in a Multi-Party Action disclose a cause of action.*

G Minimum Number of Parties

(1) Consultation Paper Recommendation

2.41 The Consultation Paper recommended a requirement that there must be an identifiable class of at least ten persons at the time of certification.[21]

(2) Discussion

2.42 The provisional recommendation contained in the Consultation Paper aimed at striking a balance between two factors, namely:

- The fact that at certification, knowledge as to the extent of the group will be necessarily limited; and
- The desire to avoid wasted resources brought about by applications for patently inappropriate certifications, particularly where joinder under existing Rules of Court or individual actions would offer a more efficient procedural route.

2.43 It may be argued that the benefits of the certainty of the fixed minimum number approach outweigh its rigidity. The question of a minimum number by way of precondition will depend on where priorities lie as between these two considerations.

2.44 Most jurisdictions do not incorporate a fixed minimum number prerequisite. The relevant legislation in Ontario and British Columbia requires an 'identifiable class',[22] while for a federal class action in the US, no minimum number is mentioned. Instead, under Rule 23 of the *Federal Rules of Civil Procedure*, the class must be too numerous for practical joinder.[23] Similarly, under the GLO procedure in England and Wales, no minimum number is mentioned in the relevant GLO Practice Direction. The flexibility that these approaches allow for requires the certifying judge to come to a decision as to whether certification is appropriate given the scope (both known and anticipated) of the collective group. There is thus no need for a numerical prerequisite because the issue is implicitly built into other questions that the court addresses. In any event, identifying a set number of class members at this initial stage, before the register is even running, is

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21 Consultation Paper paragraph 4.32.

22 Ontario CPA section 5(1)b; British Columbia CPA section 4(1)b.

23 Rule 23(a) *Federal Rules of Civil Procedure*.

somewhat premature. By contrast, a simple precondition of an identifiable class will allow the party seeking certification to set out a likely group of potential claimants. From this, the judge may draw inferences in order to decide the appropriateness of the procedure without having to resort to a numerical threshold so early in the action. The flexibility of this option is in keeping with the general rationale and structure of the procedure.

2.45 The Consultation Paper noted the potential waste of resources arising from the lack of any minimum number requirement.[24] This related to the resources that would be expended in the preparation for and hearing of a certification application that resulted in a denial of certification on that basis. It also referred to the possible impression of a flood of MPAs being taken, where this number consisted largely of unsuccessful certification applications. Nonetheless, the emphasis placed on flexibility in the procedural structures in this Report militates against a set number threshold. The Commission considers that once experience has been developed in the area, the incidence of spurious applications for certification will be minimised and accordingly recommends that this should most appropriately be left as a matter of judicial discretion, based on a consideration of the issues both known and anticipated.

(3) Report Recommendation

2.46 *The Commission recommends that there be no minimum number requirement for certification of a Multi-Party Action, but that this would be a matter to be taken into account by the court in the context of considering whether the Multi-Party Action offers a fair and efficient means of resolving the issues both known and anticipated.*

H Common Interest

(1) Consultation Paper Recommendation

2.47 The Consultation Paper recommended a requirement that the claim or defence of the class members raises common issues of fact or law.[25]

(2) Discussion

2.48 It is essential that in order for a group procedure to be appropriate there must be some degree of commonality. Where this is not the case, conventional litigation on an individual basis is more suitable. Far from involving savings, an MPA in which no degree of commonality exists would undoubtedly increase costs.

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[24] Consultation Paper paragraph 4.30.

[25] Consultation Paper paragraph 4.36.

2.49 The issue therefore becomes one of degree. Two questions arise in this regard:

- The degree of commonality necessary as between the cases in the group; and
- The predominance of the common issues over the individual issues within the group of cases.

2.50 With regard to the extent of commonality necessary, it is useful to refer to the representative action procedure in Order 15, rule 9 of the *Rules of the Superior Courts 1986* as interpreted. The criteria which have been read into this procedure have severely limited its usefulness. Indeed, the commonality threshold necessary for a representative action to proceed has been set particularly high, and a standard of *sameness* as opposed to mere *commonality* may more accurately describe the requirement. Essentially, the courts have only been willing to contemplate a representative action procedure in circumstances where the interests as among the group are indistinguishable. This has prevented use of the procedure for all but a tiny category. Thus, a broader, more flexible interpretation of commonality is required in any proposed MPA procedure.

2.51 A second connected issue relates to the attention placed on the commonality of *interest* rather than on a generic *issue*. The instances in which a group of litigants have a true common interest in an action will be limited and the size of the group will be equally limited. In any event, in terms of any form of multi-party litigation, it is irrelevant whether individuals have similarity of interest if the distinct issues of the individual cases will have to be dealt with separately. This is especially so given the Commission's view that efficiency should be considered to be a priority of the procedure. It may be that different interests arise from a single transaction or occurrence which involves a generic issue. To refuse certification solely on the basis of a lack of a common *interest* would be contrary to the original rationale behind the procedure. Even if the certifying judge were to interpret an interest in a more flexible way, the Commission considers that the term is unnecessarily misleading. The explicit focus of this requirement should rest on the issues to be litigated.

2.52 The general thrust of the Commission's proposals in this respect is to ensure flexibility. To restrict the court's flexibility by circumscribing the concept of commonality would reduce its ability to decide the matter on the basis of the facts of the particular case at hand. This is of particular relevance given the wide range of facts and circumstances that may be contained in any group of cases. The Commission therefore favours a broad concept of commonality. In practice this may take the form of either an exacting or an embracing requirement for the group when applied to the facts presented to the certifying court. It is important that the chosen

procedure provides optimum efficiency. The best decision as to the scope of commonality will be made by the certifying court in the context of a particular group.

(3) Report Recommendation

2.53 *The Commission recommends that the cases for which certification is sought should give rise to common issues of fact or law rather than be required to show strict commonality.*

I Predominance of Common Issues

2.54 Where a US federal class action is filed seeking damages, the court must be satisfied that the common issues involved predominate over the distinct issues. The Consultation Paper did not recommend that a court be satisfied that the common issues predominate over the distinct issues as a requirement for certification.[26]

2.55 A number of points arise in this context. The Consultation Paper noted that it may prove difficult at the outset to gauge with sufficient certainty whether common issues predominate because this assessment will be taking place at a very early stage in the case.[27] A related issue concerns the possibility of satellite litigation arising out of the predominance question. Parties might challenge the original certification decision on the grounds of lack of predominance either on the basis of the facts as they stand at the certification stage or at a later date. This focus on collateral issues would delay the progress of the litigation and accordingly increase overall costs.

2.56 If predominance was to be recommended as a prerequisite for certification, other issues would also arise. For instance, the Report of the Ontario Law Reform Commission set out four tests for predominance.[28] States within the US have also had to grapple with whether they should adopt a dualist approach as under Rule 23(b)(3) of the *Federal Rules of Civil Procedure* in the US where the question of commonality is assessed followed by an evaluation of predominance, or whether these stages should be merged.

2.57 The Commission has concluded that the question of predominance is best approached in the broader setting of a requirement that the procedure constitutes an efficient and fair means of resolving the cases.[29] To favour a predominance test after advocating a very flexible approach to commonality

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[26] Consultation Paper paragraph 4.35.

[27] Consultation Paper paragraph 4.35.

[28] Ontario Law Reform Commission, *Report on Class Actions* at 337 - 340.

[29] See paragraphs 2.69 – 2.73 below.

might reasonably be regarded as inconsistent. The over-arching principle of flexibility to achieve maximum efficiency militates against rules that unduly fetter the procedure. As the Ontario Law Reform Commission pointed out:

> " … the lack of predominance will not always offset the savings in time and money to be secured by determining the common questions in a single proceeding. Nor does the fact that the common questions do not predominate over the individual questions necessarily diminish the *res judicata* effect of the class action with respect to the common questions."[30]

(1) Report Recommendation

2.58 *The Commission does not recommend a requirement that common issues predominate over individual issues in a Multi-Party Action.*

J Adequate Representation

(1) Consultation Paper Recommendation

2.59 The Consultation Paper recommended that there should be a representative or lead case which would fairly and adequately represent the interests of the multi-party litigants.[31]

(2) Characteristics of Representatives Cases

2.60 It is paramount to the functioning of the MPA that the choice of representative or lead case for the group be made with great care. The Consultation Paper considered a non-exhaustive list of factors which should be taken into account when the decision is being made.[32] This included:

- The absence of any conflict with the interests of other group members, at least in relation to the common issues of law or fact;
- A plan or scheme for the proceedings and a methodology for presenting and advancing the group interests;
- A means of notifying group members of the existence and conduct of the proceedings;
- Adequate legal representation for the group.

2.61 Unlike the federal certification procedure in the US,[33] the Consultation Paper did not recommend a separate requirement of typicality

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30 Ontario Law Reform Commission, *Report on Class Actions* at 346.

31 Consultation Paper paragraph 4.42.

32 Consultation Paper paragraph 4.45.

33 Rule 23 *Federal Rules of Civil Procedure*.

on the part of the representative. Instead, it recommended that the issue of typicality might be one of the factors to be taken into account in deciding on a lead case.[34] The Commission continues to take this view. Typicality should not be elevated to an iron-clad precondition, but should fit into the discretionary power of the court at the certification stage.

2.62 In order to ensure the fair representation of the group, it is essential that the choice of lead case be made on a consensual basis. It is likely that this requirement will be of limited scope in practice, as it is envisaged that the vast majority of applications for certification will be plaintiff-led. The original plaintiff's case, if appropriate, may prove to be ideal as a lead. Where this case is not considered adequately representative by the court, it should not prove difficult to find a lead among what is essentially a willing audience. However, particular problems may be encountered with defendant-led certification as there is likely to be less goodwill on the part of the claimant group. Unlike the plaintiff-led certification, the individual claimants will not have voluntarily collectivized into a group register. Assuming that a lead case is deemed necessary for certification, it may prove impossible to certify despite the fact that an ideal lead case exists. The individual claimant selected may not be comfortable with the newly conferred role or may be otherwise unwilling to stand over the register. Judicial compulsion over an uncooperative and potentially obstructive lead case would be counterproductive and constitutionally dubious. Under these circumstances, certification would have to be refused.

(3) Report Recommendation

2.63 *The Commission recommends a requirement that a representative or lead case should be selected to litigate a specific issue which will fairly and adequately represent the interests of the individual litigants in the Multi-Party Action.*

(4) Number of Lead Cases

2.64 One of the most important decisions to be made at the certification stage is the number of lead cases to be put forward as representative of the generic issue. In the Consultation Paper, the Commission provisionally recommended that there would be an upper limit of three lead cases.[35] Having considered the matter again, the Commission now favours a more flexible approach. In particular, the Commission notes that an inappropriate choice at this stage may have serious implications for the success of the MPA. In England and Wales, the management court is charged with this function under the *Civil Procedure Rules 1999* (CPR):

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34 Consultation Paper paragraph 4.41.

35 Consultation Paper paragraph 4.37.

> "The management court may include directions providing for one or more of the claims to proceed as test claims."[36]

2.65 This process is designed with flexibility in mind. For instance, it may be appropriate for a single lead case to be selected and put forward as representative of the generic issue in question. However, this strategy may be jeopardised where an inappropriate or weak lead case is selected (something which may become apparent only in retrospect) or where the selected case is subsequently settled.[37] The danger of the lead case unilaterally settling is dealt with in rule 19.14(1) of the CPR in England and Wales:

> "Where a direction has been given for a claim on the group register to proceed as a test case claim and that claim is settled, the management court may order that another claim on the group register be substituted as the test claim".

However, were this to occur, the selection and processing of a further lead case could incur losses in terms of time and money. It is therefore important that the register is screened carefully at the outset and that a sufficient number of lead cases be chosen or kept in reserve.

2.66 It is clear from the permissive language of CPR rule 19.14(1) that the concept of a lead case, or lead cases for that matter, is not an essential component of a GLO. There might very well be instances where the vehicle of an MPA is useful, but where the strategy of a lead case in inappropriate. This may occur where the generic issue in the case is considered by the nominated judge to be straightforward and not deserving of a separate (albeit aggregate) set of proceedings. Here, the MPA might still be certified but each case dealt with individually so that the benefit of the register might be retained without an inefficient hearing and processing of the generic issue by means of a lead case.

2.67 A central and defining characteristic of the certification process must be flexibility. The choice of whether or not a lead case is appropriate will rest on the circumstances of the group and will depend on careful scrutiny of the register and selection on the direction of the court.

(5) Report Recommendation

2.68 *The Commission recommends that the issue of the number or need for lead cases be left to the discretion of the court.*

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[36] CPR, Rule 19.13(b).

[37] See paragraphs 2.92 – 2.98 below.

K An Appropriate, Fair and Efficient Procedure

(1) Consultation Paper Recommendation

2.69 The Consultation Paper recommended that the class action be an appropriate, fair and efficient procedure.[38]

(2) Discussion

2.70 This is an overarching precondition which is intended to offer maximum flexibility to the certifying judge in coming to a decision regarding any particular collective group. As such, it encapsulates the essence of the procedure as an option in multi-party litigation. It is, therefore, not simply dependent on a number of technical requirements being met, but must be suitable in the sense that, in its totality, the procedure offers an appropriate vehicle with which to pursue the litigation efficiently.

2.71 In reaching a recommendation on the issue, the Consultation Paper set out a non-exhaustive list of relevant factors which may prove instructive to the certifying judge.[39] These factors are:

- Whether an MPA will promote fairness among the parties;
- Whether it will involve efficient use of judicial fairness;
- Whether it will secure access to justice for potential members or whether a significant number of them have a valid interest in individually controlling the prosecution of separate actions;
- Whether the procedure will be manageable from the administrative standpoint of the court;
- Whether the common issues of fact or law will be amenable to uniform resolution and whether those issues predominate over any individual issues;
- Whether the issues raised have been the subject of any previous or pending proceedings or tribunal investigations;
- Whether other procedural avenues of redress are available and, if so, whether they would prove less practical or efficient.

2.72 The Commission continues to take the view that these factors are generally consistent with the principle of flexibility which should be central to certification. It will be noticed that this list contains some factors which were rejected as individually determinative issues at certification earlier in this Report. Indeed, it is at this level that any outstanding objections or

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38 Consultation Paper paragraph 4.46.

39 Consultation Paper paragraph 4.45.

observations as to the appropriateness of the procedure in the given circumstances should be taken into account.

(3) Report Recommendation

2.73 *The Commission recommends that in deciding whether to certify proceedings as a Multi-Party Action, the court must be satisfied that a Multi-Party Action would be an appropriate, fair and efficient procedure in the circumstances.*

L Defendant Multi-Party Actions

(1) Consultation Paper Recommendation

2.74 The Consultation Paper recommended that the proposed procedure should make provision for defendant multi-party litigation.[40]

(2) Discussion

2.75 This refers to the possibility of a scenario where the MPA register comprises not plaintiffs, but defendants. Where a plaintiff or group of plaintiffs has a related claim against numerous defendants, the economies involved in a group register may still hold true. This should be distinguished from the situation where a defendant has sought certification in order to bring together numerous claims brought against it.[41] In the case of defendant MPAs, the certification process would be plaintiff-led, but the register would consist of defendants.

2.76 To illustrate the contours of a possible defendant MPA, the facts of *Irish Shipping v Commercial Union Insurance*[42] are instructive. Here, a shipowner, who was entitled to an indemnity from a bankrupt charterer, sought to recover from the charterer's liability insurers. As was customary in the industry, the insurance cover was provided by numerous different insurers. The Court of Appeal allowed the shipowner to proceed by way of a representative action against the lead underwriter on behalf of the 77 insurance companies concerned.

2.77 The Consultation Paper pointed to added difficulties that might be encountered in attempting to certify a defendant MPA.[43] These included:

- The criterion of 'common issues' may need to be more strictly applied; and

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40 Consultation Paper paragraph 4.150.

41 See paragraph 2.62 above.

42 [1991] 2 QB 206.

43 Consultation Paper paragraph 4.148.

- It may prove more difficult to find a defendant willing to represent the class.

2.78 Nevertheless, where the certifying court is of the opinion that an MPA represents an appropriate, fair and efficient procedure, there seems little reason why the procedure should not be sufficiently flexible to accommodate such instances. It is envisaged that defendant MPAs would constitute a very small fraction of MPAs overall. However, where the certifying court is satisfied that the criteria for certification have been met, in particular the requirement that the MPA represents an appropriate, fair and efficient procedure, there is no reason to exclude the possibility of defendant MPAs.

(3) Report Recommendation

2.79 *The Commission recommends that the proposed procedure should make provision for defendant Multi-Party Actions.*

M Legal Representation – Single Solicitor?

(1) Consultation Paper Recommendation

2.80 While a separate recommendation was not made on this issue, the Consultation Paper did indicate that in coming to a decision regarding the choice of lead case to be put forward, the certifying court should have regard to the provision of adequate legal representation for the group.[44]

(2) Discussion

2.81 When initiating proceedings, individual plaintiffs who later constitute an MPA may have consulted different solicitors at the outset. If a generic issue MPA were to be dealt with by a number of legal representatives acting independently for their respective clients, many of the savings associated with an MPA would be lost. Duplication would necessarily occur through the resolution of the same issue on many different fronts. Differences of opinion might also arise relating to the direction and management of the generic issue, which could result in the breakdown of the MPA. It is therefore clear that a single representative dealing with a generic issue is an essential factor in the effective functioning of the procedure. In many cases, there will be a single solicitor dealing with the complete register from the outset. Where this is the case, the issue of duplication will not arise. Otherwise, two approaches are possible:

- Voluntary nomination;
- Judicial nomination.

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[44] Consultation Paper paragraph 4.39.

(a) Voluntary Nomination

2.82 Voluntary nomination would obviously require a great deal of cooperation between the legal representatives involved. Provision for such a system of nomination is to be found in the GLO Practice Direction in England and Wales:

> "It will often be convenient for the claimants' solicitors to form a Solicitors' Group and to choose one of their number to take the lead in applying for the GLO and in litigating the GLO issues."[45]

2.83 In order for this system to work effectively, a coordination mechanism is necessary. In England and Wales, the Law Society has played this role through the Multi-Party Action Coordination Service, which facilitates cooperation between solicitors and can channel potential claimants who contact the Law Society to the relevant legal representatives.[46] The Group Litigation Practice Direction specifies that once the GLO has been certified, a copy of the Order should be sent to the Law Society.[47] The Law Society's involvement is purely facilitative and neutral in nature. It in no way influences the nomination process but is informed of the outcome and acts administratively to refer cases to the solicitor who will be in charge of the register.

2.84 The administrative role played by this coordinating body is central to the operation of the MPA procedure. The Law Society of Ireland and the Courts Service would both be in a position to carry out this function. However, as the papers in relation to the MPA will already have been filed with the Courts Service, the Commission considers that it is the institution best placed to successfully carry out the coordination task in this jurisdiction. Thus, the Courts Service should be informed of the identity of the nominated legal representative for the generic issue. The Courts Service will then be in a position to refer any enquiries to that solicitor.

(b) Judicial Nomination

2.85 Where voluntary nomination has failed to produce a lead solicitor or where the chosen nominee is considered inappropriate by the court, the certifying judge may be empowered to impose its own solution. The recommendation in Lord Woolf's *Access to Justice* Report is reflected in Rule 19.13(c) of the *Civil Procedure Rules*:

> "Directions given by the court may include - …

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45 Practice Direction – Group Litigation, paragraph 2.2

46 See www.lawsociety.org.uk.

47 Practice Direction – Group Litigation paragraph 11(1).

(c) appointing the solicitor of one or more of the parties to be the lead solicitor for the claimants or defendants."

It is clear that any judicial nomination must prevail over a voluntary election, but in general the voluntary and judicial methods can (and do in England and Wales) work in tandem.

2.86 While it may be necessary in the interests of the integrity of the procedure that the generic issue is handled by a single legal team, the same factors do not apply where the group fragments into distinct sub-groups or even individual actions for the purposes of more discrete aspects of the cases. In relation to these distinct issues, there is no reason why separate representatives cannot be accommodated. Alternatively, and this will most probably be the case where the group is of a more modest size, a single representative could deal with both the generic and the distinct issues arising throughout the group.

(3) Report Recommendation

2.87 *The Commission recommends that a single legal representative be responsible for the representation of the generic issue of the Multi-Party Action. Nomination of this lead solicitor may take place on the basis of a voluntary or judicial appointment and will require judicial approval. Separate legal representatives may be responsible for discrete issues within the group on either a sub-group or individual level.*

N Cut-Off Dates

(1) Discussion

2.88 Once an MPA has been certified, the judge dealing with the issue will have to decide a cut-off date after which no name can be added to the register without the express authorisation of the court. This will be necessary to guard against the threat of an interminable accumulation of names over time. Of course, any subsequent claim may be taken on an individual basis, but experience in England and Wales has demonstrated a tendency to look critically on such claims, particularly having regard to the *Statute of Limitations*.

2.89 The need for a cut-off date to be set in line with the nature of the case is set out in the GLO Practice Direction in England and Wales:

> "The management court may specify a date after which no claim may be added to the Group Register unless the court gives permission. An early cut-off date may be appropriate in the case of 'instant disasters' (such as transport disasters). In the case of

consumer claims, and particularly pharmaceutical claims, it may be necessary to delay the ordering of a cut-off date."[48]

2.90 The Commission agrees that it is appropriate that this decision, which is heavily dependent on the facts of the particular collective group, be a matter for the nominated judge. The choice of a cut-off date will need to balance the argument for a lengthy period as against that favouring a more stringent cut-off. While the unregistered plaintiff will argue in favour of the lengthy period, the more exacting timeframe may hold benefits for the collective group and/or the defendant interest. Where, in the interests of justice, the cut-off date will fall is a question best answered at certification.

(2) Report Recommendation

2.91 *The Commission recommends that at the certification stage, the court will determine a cut-off date beyond which entry on the register will require the authorisation of the court.*

O Register Lock-In

(1) Issue

2.92 Once the cut-off date set at certification is passed, the extent of the multi-party group will be apparent to members of the register, to the defendants and to the court. Where lead cases are selected, the interests of the rest of the collective group will depend on the effective litigation of those individual cases. Time and money will be invested in the name of the MPA to this end. The danger arises of individual members of the MPA subsequently opting out and jeopardising the wider interests of the collective group. This may become a particular hazard where the chosen lead case bows out of the register. Where the lead case does leave, this may necessitate a further nomination and involve the loss of much of the work already carried out leading to an increase in costs which runs counter to the efficiency-oriented rationale central to the procedure. Alternatively, if the collective group is weakened sufficiently in terms of number or quality of cases, the disintegration of the entire MPA may follow.

2.93 This scenario may arise in at least two sets of circumstances. Firstly, the litigant may have second thoughts and decide at a late date that he or she wished for whatever reason to pursue the litigation individually. Otherwise, the individual litigant may leave the group on foot of an individual settlement offer from the defendant. This approach may be used strategically by the defendant to 'cherry pick' those cases considered most

[48] Practice Direction – Group Litigation paragraph 13.

central to the register and to settle them in an effort to undermine the viability of the entire MPA register.[49]

2.94 In response to this danger, it may be possible to include within the MPA procedure a mechanism designed to prevent the individual litigant from opting out of the group in these circumstances – this mechanism is referred to as a 'lock-in'.

(2) Discussion

2.95 At the heart of the MPA procedure lies a careful balance between the interests of the individual and those of the collective group. By opting in to the procedure, the individual litigant benefits from the efficiencies and also from the reinforced position that comes through an MPA. That there may involve a degree of curtailment on the individual's control over his or her case in the interests of the collective group is understandable. This is particularly so in the context of an opt-in system where the individual litigants have been informed of the terms of the procedure from the outset.

2.96 That said, the opt-in system is intended as a flexible mechanism and not as a trap from which, once entered, there may be no escape. Therefore, the question of some form of lock-in mechanism must attempt to strike a compromise between the interests of the individual and those of the collective group in these circumstances. The Commission considers that this potential conflict is best dealt with through careful timing. The point at which the lock-in activates should not occur so early in proceedings as to unfairly fetter the freedom of manoeuvre of the individual, nor so late as to jeopardise the integrity of a well-established MPA register. The Commission has concluded in this respect that the filing of the defence presents an appropriate point at which to trigger the lock-in. Once this stage is reached, a good deal of work will have been carried out which will militate against a subsequent restructuring of the group.[50] At the same time, the individual litigant will have had ample opportunity to consider his or her position within the group and to explore any possibility of an individual settlement.

2.97 The merits of flexibility in the context of the overall MPA procedure have been outlined already in this Report. The introduction of a lock-in mechanism is intended to provide for a compromise between the interests of the individual and those of the collective group. However, where a compromise solution aims conceptually to strike a balance between

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[49] These central cases will often be the elected lead cases. The criteria for isolating a case used by the defendant at this stage will often converge with that used by the certifying court at the selection of the lead case.

[50] The MPA register may, of course, collapse for other reasons not associated with individual cases opting out of the register.

legitimate interests, as is the case here, an overly rigid approach to this compromise may lead to injustice in practice. Thus where an individual litigant wishes for whatever reason to opt-out of the group beyond the filing of the defence, the Commission considers that the permission of the court should be sought. In this regard, the court may choose in its discretion to make a costs order penalising the individual litigant for the delay in opting out and for the potential harm caused to the MPA proceedings.

(3) Report Recommendation

2.98 *The Commission recommends that where individual litigants wish to remove themselves from the register after the filing of the defence, the authorisation of the court must first be sought.*

P Global Settlement

(1) Introduction

2.99 The term 'global settlement' refers to an offer by a defendant to settle the entirety of the MPA. This should be distinguished from the discussion above which focused in part on an offer of settlement for individual litigants within the group.[51]

(2) Consultation Paper Recommendation

2.100 The Consultation Paper recommended that the settlement or discontinuance of a class action be subject to the approval of the court.[52]

(3) Discussion

2.101 The Consultation Paper recommendation must be viewed in the context of a provisional, though not recommended, preference for an opt-out procedure.[53] Thus in its discussion of global settlements, the Consultation Paper drew analogies with the requirement for the court to approve a settlement made on behalf of a minor. Indeed, in the context of an opt-out regime this analogy seems logical. Those who have become unwittingly involved in the group litigation by reason of failing to opt-out will not be in a position to influence the terms or acceptance of the offered settlement. In these circumstances the court, by approving the settlement, would be acting in the interests of this disenfranchised section of the register. However, the same logic does not stand up where, as in this Report, an opt-in system is recommended.[54] There will be no members of the group analogous to the

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51 See paragraphs 2.92 – 2.98 above.

52 Consultation Paper paragraph 4.89.

53 See Consultation Paper paragraph 4.77.

54 The reasons for the change in recommendation from the Consultation Paper stage are set out at paragraphs 2.08 – 2.26 above.

infant plaintiff.[55] All of those on the register will have opted in and will have been made aware of the terms of the MPA from the outset. The terms and conditions upon which a settlement is to be accepted or rejected should be a matter for the determination of the group and should be made clear from the point of opt-in. This is in keeping with the generally self-regulatory nature of the register in the context of which final court approval appears cumbersome and inappropriate.

2.102 Nevertheless, there may be a role for the certifying court in ensuring that the group has agreed these issues amongst itself. This should be a question asked of the group at certification. An affirmative answer should help to avoid future challenges to the acceptance or rejection of the settlement by disgruntled individual litigants. In exceptional circumstances, where the collective group has proved unable to agree these points itself, the certifying judge may be requested to set the terms and conditions for acceptance of the settlement by the group. Individual members may also seek the relief of the court in the event of allegations of unjust or oppressive application of the agreed terms of acceptance of the settlement. However, in none of these circumstances would the final approval of the court of the proposed settlement be necessary.

(4) Report Recommendation

2.103 *The Commission recommends that the terms upon which a settlement would be accepted or rejected should be agreed by the individual members of the group at the opt-in stage. The court should be made aware of the terms of this agreement and will have the jurisdiction to set the terms of acceptance or rejection of the settlement only in exceptional circumstances.*

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[55] Save, of course, where there is an infant individual plaintiff on the register. In these circumstances, the same rules as to court approval of infant settlements will apply.

CHAPTER 3 FUNDING A MULTI-PARTY ACTION

A Introduction

3.01 The success of a multi-party litigation procedure, in terms of its functioning and effectiveness, is closely linked to the availability of funding arrangements to cater for its particular demands. While this is, to a certain extent, true of all forms of litigation, it is of central importance to multi-party litigation for a number of reasons.

3.02 Firstly, the procedure aims to improve access to justice for the individual litigant. Traditionally, multi-party procedures such as the class action have been promoted on the basis that litigants, whose claim would otherwise lack the viability to justify the pursuit of an individual claim, could join their right of action to sufficiently similar litigants thereby pooling costs and ultimately receive a proportionate slice of any final award.

3.03 Secondly, for the defendant, a funding arrangement which encourages those with a claim to process it collectively, serves a dual purpose. On the one hand, it will help to draw a line under the litigation and bring welcome closure to a potentially lingering countdown to the relevant limitation period. This slow-drip of litigation may have far-reaching commercial implications particularly in industries where reputation and certainty are cherished. On the other hand, where a dependable and appropriate funding mechanism is in place the chances of a successful defendant being able to recoup their costs may be enhanced.

3.04 Thirdly, the potential savings in terms of efficiency which would flow from a multi-party procedure would benefit the judicial process as a whole. The interest of the judicial system in the effective functioning of a procedure to deal with multi-party litigation will inform its support for an appropriate funding package to promote use of the procedure.

3.05 This Chapter will therefore explore the various possible funding arrangements best suited to complement the MPA procedure as set out in Chapter 2. The Commission begins with a brief overview of how litigation is commonly funded at present. This will be followed by a discussion of particular costs issues flowing from the MPA procedure, namely the division of costs between the group members. Finally, we will set out funding mechanisms which have been devised in other jurisdictions and which have proved to be of particular use in their respective multi-party procedures.

3.06 While an understanding of appropriate funding arrangements is central to a full appreciation of how an MPA would operate in practice, for the most part this Chapter is discursive rather than aimed at specific recommendations. The introduction of novel funding arrangements for civil litigation would have a wide-ranging impact beyond the scope of MPAs and should be discussed in the context of a broad review of civil litigation funding as occurred in the early 1990s in England and Wales. The focus of this Report lies with the economies offered for all parties by the MPA procedure. These will continue to apply regardless of special funding arrangements. However, were a more global review of civil litigation funding to be undertaken, the arrangements as set out in this Chapter may provide options for reform and ultimately assist in the smooth operation of the MPA procedure.

B Current Funding Arrangements

(1) Introduction

3.07 Conventionally, at the commencement of litigation, each party will instruct a solicitor to act on their behalf. At this stage, the solicitor is obliged to issue a written account of the breakdown of the costs to the client. This may include certain fixed costs as well as hourly rates to act as a reference for the client as to the overall cost which will usually fall due at the close of the case.[1] This written account is commonly referred to as a 'section 68 letter', introduced through section 68 of the *Solicitors (Amendment) Act 1994*.[2] At the close of the action, the presiding judge will make an award of costs. This will, almost without exception, follow the event. In other words, the award will be made in favour of the successful party. Accordingly, the unsuccessful party will face a double financial burden, having to meet both sets of costs in the action.

(2) Deferred Payment

3.08 Many instances of litigation operate through an agreement between the client and the solicitor, commonly known as a 'no win, no fee' arrangement. However, this frequently used label is potentially misleading and requires additional explanation. In the context of costs following the event, the term 'no win, no fee' suggests that where the client is unsuccessful in the relevant action, the solicitor will absorb their legal fees. In fact, these agreements do not, at least formally, insulate the client from costs in the event of an unsuccessful claim. Instead they merely defer the payment of these costs until the close of the action. In this way the client need not pay

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1 On occasion, payment of certain interim costs may be requested.

2 It should be noted that a section 68 letter does not foreclose the possibility of referring costs to taxation by either the client or the solicitor.

for the representation at the outset of the litigation, but the solicitor is at liberty to pursue the client for these costs. In reality this scenario will often tally with the substance of a no win, no fee arrangement as the solicitor may decide against the pursuit of these costs.[3] However, the costs remain as a debt due and owing as between the client and solicitor.

3.09 Besides the obvious potential financial benefits of the deferred payment over the no win, no fee arrangement for the solicitor, there are valid reasons as to why this debt must remain due and owing on the client. Firstly, the conditions for recovery of costs from an unsuccessful defendant have implications for the terms of the agreement between the solicitor and the client. Where the costs order is made in favour of the client, the solicitor will recoup their fees from the defendant. Of course, even under the terms of a true no win, no fee arrangement, the successful solicitor would look to the defendant for costs. However, the costs liability of the unsuccessful party to an action reflects the risk of exposure undertaken by the successful party. In order for the claimant's solicitor to receive costs from the defendant, it must be the case that the claimant would have been liable for these costs had the action been taken unsuccessfully and costs had followed the event. Under a true no win, no fee arrangement, the claimant in these circumstances would have been exposed to potential liability for the defendant's costs, but not for those of their own representatives as these would have been absorbed by the solicitor in accordance with the terms of the agreement. Thus in order for the successful party to recoup legal costs, the agreement between the claimant and the solicitor must be phrased in terms of deferment rather than indemnity.

3.10 Secondly, the deferred payment system may be regarded as a mechanism for the solicitors of claimants to avoid charges of champerty and maintenance. In a case decided by the Irish House of Lords, *Kenny v Browne*, Lord Clare LC explained briefly the concept:

> "It is a crime at common law to maintain a suit in which the man maintaining is not interested, and the particular species of maintenance of which the appellant has been guilty is called champerty – that is maintaining a suit in consideration of having some part of the thing in dispute".[4]

3.11 The status of the offence in modern Irish law has been confirmed more recently in *Fraser v Buckle*[5] where the Supreme Court refused to

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[3] Similarly, the pursuit of costs by the successful defendant in these circumstances is unusual, though not unknown. The State Claims Agency is currently seeking to recover costs from about 500 plaintiffs who brought asbestos-related 'worried well' claims: see *Annual Report of the National Treasury Management Agency 2004* at 38.

[4] (1796) 3 Ridg. Par. Cas. 462, 498.

[5] [1996] 1 IR 1.

enforce a champterous contract governed by the law of England and Wales as it was deemed contrary to public policy in Ireland. A no win, no fee arrangement would tie the financial interests of the solicitor to the outcome of the dispute. Although under the terms of such a no win, no fee agreement, the client would likely be obliged to pay for certain administrative costs in the running of the action, their ultimate indemnification as to the legal fees incurred by their representative might raise the spectre of maintenance and champerty. By terming the agreement as a deferred payment, this possibility is avoided.

3.12 These arrangements have provided an important funding system for both individual and multi-party litigation in this jurisdiction for some time. It is envisaged that deferred payment arrangements would continue to provide an important facilitative mechanism under the proposed procedure as set out in Chapter 2.

(3) Civil Legal Aid

3.13 The tradition of civil legal aid in this jurisdiction is significantly less generous than that which prevailed at least until recently in England and Wales. The theoretical possibility exists, under the guidelines for civil legal aid, for the funding of personal injury litigation where the other relevant criteria for assistance are met. However, while personal injury litigation is not expressly excluded from the remit of aid under the *Civil Legal Aid Act 1995*, the reality of the funding available to the Legal Aid Board has meant that any such application albeit within the set criteria would almost certainly be unsuccessful. Thus a body of so-called MINELAs[6] developed. They represented the gap between a restrictive civil legal aid system and a notoriously expensive and risky litigation culture. While in England and Wales the decision to roll back civil legal aid required a funding structure to take its place,[7] in Ireland where no such reduction was necessary as it had never been in position in the first place, a less structured alternative to civil legal aid developed. Thus the lack of civil legal aid played a significant role in the development of other facilitative mechanisms such as the deferred payment, discussed already, which developed in an *ad hoc* and lawyer-driven manner in order to cater for the market left without any form of legal expenses assistance.

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6 'Middle Income Not Eligible for Legal Aid'. This is a term coined under the civil legal aid system in England and Wales. In fact, its relevance to the Irish experience is doubtful given the fact that even those fulfilling the financial criteria for civil legal aid were very unlikely to successfully seek aid unless their case fell within a very limited number of categories, notably family law and more recently asylum law.

7 This was to come in the form of Conditional Fee Arrangements – see paragraph 2.59 below.

(4) Insurance

3.14 Besides the possibility of reaching a deferred payment arrangement with legal representatives and the very remote chance of successfully applying for civil legal aid, there exists a funding route known as Before the Event (BTE) legal expense insurance. This is a relatively inexpensive means of providing cover for both sets of costs in the event of an unfavourable costs order. While certain household and motor insurance policies include BTE legal expenses insurance as an extra, there is no rooted tradition of BTE insurance in jurisdictions where, as a rule, costs follow the event. However, BTE legal expenses insurance is much more widespread in jurisdictions where each party takes care of their own costs regardless of the outcome of the case.[8]

3.15 The rule as to the division of costs as between the parties to litigation in these jurisdictions has helped to foster a tradition of legal expenses insurance. This is understandable given the greater likelihood of an individual at some point facing a costs bill arising from litigation. If BTE legal expenses insurance were to become more widespread in the jurisdiction, this could act as a potential means of financing MPA litigation. Its operation in this jurisdiction would of course differ significantly from that prevailing in jurisdictions where costs do not follow the event. However, in the light of the established status of the costs following the event rule, a sudden escalation in such insurance cover would appear unlikely.

C Liability of Individual Members

(1) Introduction

3.16 The liability of individual members of an MPA is a preliminary issue impacting on the MPA group at two stages:

- In potential financial outlay at the institution of proceedings depending on the funding arrangement in operation;
- In the risk of liability flowing from a costs order made against the MPA group at the close of proceedings.

3.17 The issue comes down to a question of whether each of the individuals within the collective group should bear a share of the expense which may arise in either of these events or, alternatively, whether the entire liability should rest on the lead or representative case.

3.18 For convenience, these approaches may be described respectively as the *shared liability approach* and the *representative liability approach*.

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[8] Germany and the US are notable examples of such jurisdictions.

3.19 It is important at the outset to highlight the fact that this section deals only with the MPA costs as to the generic issue. The costs accruing on distinct issues in individual cases are not affected, and will remain with the relevant individual action or sub-group.

(2) Consultation Paper Recommendation

3.20 The Consultation Paper declined to make a final recommendation on the liability of individual members of the group in the event of a costs order being made against the group. Instead, views were sought on the issue in order to inform a recommendation in the final Report.[9]

(a) Representative or Shared Liability?

3.21 The issue of whether liability for costs should be shared among those on the register or should rest solely with the lead or representative case goes to the heart of the form that the procedure will take. Although the most evident manifestation of the route chosen will be purely financial, the choice of representative or shared liability will also prove telling as to the general philosophy behind the particular multi-party procedure and also as to the wider procedural context within which the procedure will operate.

3.22 The class action model functioning in the US has adopted the representative liability approach. Where a class plaintiff is appointed, that litigant will act in a purely representative manner with minimal involvement from the other group members as a body. This is the class action *par excellence* in operation. The individual members of the group risk no exposure to financial liability and thus join the class free from any sense of responsibility. In order to understand how such a system can function, it is necessary to appreciate the background procedural context. In the US, class actions are almost exclusively financed through contingency fees. These arrangements will be explored in depth later in this chapter,[10] but for now it suffices to say that under the terms of a contingency fee arrangement, where a class action is unsuccessful no liability for the costs of the class lawyers will accrue. These costs will, instead, be absorbed by the lawyers themselves. This takes care of the initial outlay. However, the costs of the legal representation for the defence are not dealt with through the class contingency fee. It would certainly appear unjust were the class plaintiff in these circumstances to be faced individually with liability for the entire bill for the defendant's costs. Furthermore, it is highly unlikely that any individual litigant would step forward and accept the role of class plaintiff with the huge risk factor that would entail.[11] The designation of a class

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9 Consultation Paper paragraph 4.111.

10 See paragraphs 3.54 – 3.58 below.

11 Of course, a straw man could be utilised here, but this would be equally unfair to a successful defendant.

plaintiff must, of course, be consensual. This dilemma is not encountered within the legal costs culture of the US where costs do not as a rule follow the event. Instead, both parties to the litigation take care of their own respective costs regardless of the outcome of the case. Of course, this contrasts with the costs regime which operates in the Anglo-Irish legal system whereby, other than in exceptional circumstances, costs follow the event, meaning that the unsuccessful party to litigation will foot the bill for both sides. Thus, in the US, where a class is unsuccessful in its action, the defendant's legal costs will remain the sole responsibility of the defendant. This explains why the class plaintiff is willing to go forward as the representative. In practice, although the class plaintiff has liability for the costs of the group, he or she will make no payment, but instead will litigate in a consequence-free environment to the same extent as the other members of the group.

3.23 The GLO regime in England and Wales has retained its allegiance to the principle that costs should follow the event. Although many GLOs operate through a conditional fee arrangement which will, like the contingency fee discussed above, insulate the litigant group from liability for their own costs should the action prove unsuccessful, the system is clearly distinguishable from the US class action. Should the GLO fail, the court is very likely to make an award of costs against the group. In these circumstances, were the representative liability model to be followed, the group may experience serious difficulty in the consensual nomination of a lead case. While the risk of incurring a costs order is often insured against using a form of legal expenses cover, the premium due on that insurance might also work as a disincentive against accepting the role of the lead case in a representative liability system. Thus the GLO procedure has adopted a shared liability approach and holds each action on the register liable. This feature marks a conceptual shift from the unitary approach of the class action towards a more independent and sovereign understanding of the component litigants in multi-party litigation. It also requires a more responsible attitude on an individual level with regard to risks inherent in litigation.[12]

3.24 A further issue relevant to the choice of a representative or shared liability model is the question of opt-in/opt-out. In the US class action, an opt-out model is the norm. As discussed in Chapter 2, this involves the very real potential for claims to fall within the remit of the collective group without the individual concerned even having knowledge of the litigation. Were the liability to be shared among the collective group, a real injustice could flow from the fact that an unwitting class member may be held liable for costs incurred without his or her consent. In these circumstances, and certainly in the context of the general US costs tradition as set out above, it

[12] This responsibility may ultimately manifest itself through a costs order.

is understandable that the US class action procedure adopted a representative liability model. On the other hand, where, as in England and Wales, an opt-in model is adopted, the danger of oblivious exposure to liability for a group member is avoided. The individual must take an active step towards becoming involved in the GLO. With this voluntary involvement comes a degree of responsibility which is common to almost all instances of litigation. While under a shared liability model there may be a small degree of 'wastage' in terms of legitimate cases opting not to join the group because of potential financial exposure no matter how small, this may be balanced by the policy objective of dissuading the pursuit of unmeritorious claims which will benefit under the shared liability model.[13]

3.25 In this jurisdiction, the circumstances mirror most closely the situation in England and Wales. The Commission does not propose that the traditional rule of costs following the event should be altered and an opt-in model has been recommended in Chapter 2. The Commission has therefore concluded that the procedure should not be structured in such a way as to deter an appropriate lead case from consenting to that role.

(3) Equal or Proportionate Liability?

3.26 Where the remedy sought through the MPA is an award of damages, the different cases appearing on the register will usually have different values. Each will use the structure of the MPA to resolve the generic issue at the heart of the group, but final awards following from individual resolution of distinct issues may differ significantly. Accordingly, the question arises as to whether the generic costs should be divided equally by the number of cases on the register, or whether they should be separated out in proportion to the value of the individual claim.

3.27 It must be kept in mind that where an order for costs has been made against the collective group, it is highly likely that the MPA has failed and that no award of damages will be made regardless of the differing values. The projected value of the claims will, in these circumstances, be largely academic and highly speculative. As a result, a fair costs differential as between the individual claims will prove very difficult to calculate. Each claim will have benefited from the joint enterprise to the same extent if the issue is viewed solely at the point of the resolution of the generic issue. The individual costs incurred at later stage will not be pooled as among the group. Where the generality of such an approach is likely to cause injustice to collective group members, the court may be empowered to alter the contribution share in an effort to soften the impact of the rule. This is the

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[13] This should also be considered with reference to the small claims procedure, as well as with regard to the costs arrangements and the possibility of insurance cover for the collective group as outlined at paragraphs 3.50 – 3.53 below.

approach set out in the Practice Direction and Rules governing GLO procedure in England and Wales[14] and is in keeping with the overarching flexibility of the MPA procedure as envisaged in this Report.

3.28 However, the issue of value may be more relevant to pre-litigation funding where, for example, an insurance premium is sought or the case is pursued on a deferred payment basis. While the value of the award sought may differ from the outset, the function of the group or indeed of the court at this juncture will not involve an assessment of the actual value likely to result from the claim. Thus where preliminary costs are incurred, it would appear appropriate that these should be shared equally among those on the register. However, in order to avoid any potential for injustice this general principle might lead to and in keeping with the flexibility of the MPA procedure, the Commission considers that this rule may be varied at the instigation of the court.

(4) Joint and Several Liability?

3.29 Where liability is to be shared in equal measure among the group, the next question that arises is whether this should be considered joint and several or, alternatively, several but not joint. The essential difference between the two concepts will manifest itself where a party defaults on its obligations. Under a joint and several liability scheme, the group as a unit is liable and thus the contributing members of the group must meet the shortfall. This shortfall will increase with the number of defaulters, but will be spread among the contributing group. The proportion of the overall payment due from the defaulting party will be transferred into a debt between the contributing and defaulting parties. Under a several liability regime, the liability does not attach to the group, but instead individually as between the group members. Thus any shortfall would not be picked up by the contributing members, but, in the terms of an MPA, would remain a debt as between the litigant and the defendant.

3.30 This issue of costs will arise mainly in circumstances where the MPA group has failed in its case and is faced with an award of costs. The deferred costs of the MPA legal representative as well as those of the defendant may be at issue. If insurance cover for the MPA is possible and availed of, the issue of whether joint and several liability applies will be unimportant. The costs of any insurance premium will have been divided among the parties on the register at the outset and the possibility of a default will not arise.

3.31 The approach adopted to joint and several liability will be of particular importance to the successful defendant seeking to be reimbursed for its costs. Having expended money defending the unsuccessful case

[14] See Practice Direction – Group Litigation Part 19B1, paragraph 12.4 and rule 48.6A.

instituted through the MPA, the defendant will rightfully feel entitled to repayment. On the other hand, the joint liability of the members of the register goes somewhat against the grain of the facilitative nature of the MPA procedure. The possibility arises that individual litigants will be discouraged from joining the register in the knowledge that they may be faced with a share of the bill due from another party. This would, of course, be avoided were individual proceedings to be instituted.

3.32 The relevant procedure in England and Wales provides for a default of several, but not joint liability. Rule 48.6A of the *Civil Procedure Rules 1998* reads:

> (3) Unless the court orders otherwise, any order for common costs against group litigants imposes on each group litigant several liability for an equal proportion of those common costs.
>
> (4) The general rule is that where a group litigant is the paying party, he will, in addition to any costs he is liable to pay to the receiving party, be liable for –
>
> > (a) the individual costs of the claim; and
> >
> > (b) an equal proportion, together with all the group litigants, of the common costs.

This GLO procedure clearly allows for the court to alter the default procedure as set out, but has on balance come down in favour of encouraging the individual to join the register.

3.33 With conflicting interests at work as between encouraging the registration of individual cases on the one hand and offering the successful party the best chance possible of recovering their costs on the other, policy objectives may provide guidance. In this jurisdiction, the current approach to the issue of joint and several liability has tended to follow a policy-driven line which works to the benefit of the successful party. Here, that will be the defendant. Secondly, the MPA procedure has been designed principally as an enabling device to facilitate efficient litigation. This enabling mechanism should work in the interests of all parties and should at all times be guided by principles of justice. Where a default on a costs contribution has occurred among those on the register, both the contributing parties and the defendant will be innocent of wrongdoing: those contributing will have paid their share while the defendant will have been vindicated. The issue becomes one of where the loss should lie. The MPA member will have accepted a degree on responsibility in become involved in the litigation group in the first place. Further, it is important not to overstate the potential chilling effect of joint liability. Group members will have benefited from the efficiencies of the MPA procedure and the overall costs should accordingly be much lower. Any shortfall in the eventual costs order will be shared

among the solvent members of the collective group, a factor which is likely to spread the added contribution between many parties. It is also important to remember that under a scheme of joint and several liability, the debt of the defaulting party covered by the co-litigants is not deleted but only shifted. It remains a debt due and owing which may be pursued by the contributing party at a later date.

3.34 In the light of these factors, the Commission recommends that a scheme of joint and several liability would provide the most appropriate and just method of placing and distributing the risk of default on an order for costs made against the MPA. Where this approach gives rise to the potential for injustice, the Commission recommends that the court may alter the general rule.

(5) Report Recommendation

3.35 *The Commission recommends that costs involved in the litigation of the generic issue of the Multi-Party Action be shared in equal measure as among the constituent members unless the court considers that in the interests of justice in the particular case this rule should be varied. As a general rule, liability for these costs will be deemed to come under a scheme of joint and several liability.*

D Methods of Funding Multi-Party Litigation

(1) Introduction

3.36 This Part will discuss funding arrangements which are of particular relevance and potential use in the field of multi-party litigation. It will consider the funding structures used in other jurisdictions and focus on those which have proved to be of particular use in the context of multi-party litigation.

(2) Consultation Paper Recommendation

3.37 The Consultation Paper recommended that restrictions should not be placed on the ability of lawyers to represent class plaintiffs on a no win, no fee[15] basis within the framework of the Law Society Regulations. Views were also sought as to the enactment of legislative provisions which would allow the court to approve contingency, speculative or uplift fee arrangements in MPAs.[16]

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15 This terms should be clarified to mean deferred payment as explained at paragraphs 3.08 -3.12 above.

16 Consultation Paper paragraph 4.122.

(3) Deferred Payment

3.38 As one of the primary means of financing both individual and multi-party litigation at present, it is important to consider how deferred payment[17] would operate within the context of the MPA procedure as outlined in this Report.

3.39 The deferred payment arrangement would provide an important funding option in order to commence the MPA without the need to raise funds at the outset. This is not to say that groups making use of the MPA mechanism would not choose to raise a fighting fund to finance their MPA. Nor is it to suggest that no outlay will be required from the individual members of the group. Administrative costs may be sought from individuals. This allows for a method of balancing the facilitative nature of the procedure against the danger of encouraging the pursuit of unsustainable cases which might arise where the litigation entails no costs risk.

3.40 At the outset of the litigation and before opting into the group, it is important for individual litigants to consider the financial implications of the MPA they are signing up to. While access to justice provides a strong rationale behind the introduction of a reformed procedure, this does not equate with a risk-free litigation procedure. Savings in terms of the spread of costs among the group and the reduction in costs flowing from the efficiencies of the procedure will themselves have a positive impact on access to justice.[18] The subtraction of duplicated costs as well as inherent savings on items such as expert evidence will have a significant role in reducing the overall cost of the litigation.[19] Of course, as with the deferred payment schemes currently in operation, the claimant's legal representative may seek payment of costs from any members of the group in the event of an unsuccessful MPA. This will also be true for the defendants in such circumstances.

(4) Civil Legal Aid

3.41 Civil legal aid provides a state-funded means of financing civil litigation. The Legal Aid Board is charged with administering the fund.[20] The stated aim of the Board is to deliver a range of civil legal services at low cost to people unable to fund such services from their own resources.

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17 For an explanation of deferred payment, see paragraphs 3.08 – 3.12 above.

18 See paragraph 3.35 above on the division of costs on a joint and several liability basis.

19 Of course, this will also work to the benefit of the defendant where the MPA is successful and costs follow the event.

20 Information on the Legal Aid Board can be found at www.legalaidboard.ie. All figures quoted in this section are current at the time of publication.

Applicants are assessed as to both their means[21] and also as to the merits of their case.[22] While some contribution may be sought from the applicant, the appropriate level is tied to both the form of assistance provided and the means assessment and operates within specified maximum contributions.[23]

3.42 Civil legal aid is a limited resource and, as such, the Board will prioritise funding on both an individual case-by-case basis and also through the application of general criteria.[24] This process of prioritisation is assisted somewhat by a statutory prohibition on the funding of certain general categories of case as set out in the *Civil Legal Aid Act 1995*. Section 28(9)(a)(ix) provides the most pertinent of these exclusions for the purposes of this Report. It reads:

> "Subject to any order made under *subsection (10)* and to the other provisions of this subsection, legal aid shall not be granted by the Board in respect of any of the following matters: …
>
> any … matter as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings."

The strictures of this general exclusion may be mitigated through the application of section 28(10), which allows for the disapplication of any of the grounds for exclusion by order of the Minister for Justice, Equality and Law Reform with the consent of the Minister for Finance.

3.43 Section 28(9)(a)(ix) has traditionally been used to exclude representative actions from the general ambit of civil legal aid and has arguably contributed to the under use of that particular form of multi-party litigation.[25] However, the wording of the section may be sufficiently wide to

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21 At present, an applicant must have a disposable income of less than €13,000 per annum and a disposable capital of less than €320,000. See www.legalaidboard.ie.

22 The Board must be satisfied, before legal aid is provided, that it is reasonable to take or defend proceedings having regard to the merits of the case. The stated criteria include an assessment of the probable cost to the Board of providing legal services measured against the likely benefit to the applicant in the event of success.

23 For example, if an applicant's disposable income is determined at less than €8,300 a minimum contribution of €6 for legal advice and €35 for legal aid will be sought. The maximum contribution applicable to the provision of advice and legal aid are €100 and €1,210 respectively.

24 Section 5(1) of the *Civil Legal Aid Act 1995* recognises these restrictions within which the Board operates. It reads: "The principle function of the Board shall be to provide, *within the Board's resources* and subject to the other provisions of this Act, legal aid and advice in civil cases to persons who satisfy the requirements of this Act" (emphasis added).

25 See paragraphs 1.18 – 1.20 above.

cover the concept of an MPA. Therefore the issue arises as to whether this general exclusion should be altered so as to allow for the possibility of a legally aided MPA.

(a) Consultation Paper Recommendation

3.44 The Consultation Paper recommended that class plaintiffs who are otherwise eligible should be entitled to apply for civil legal aid.[26]

(b) Discussion

3.45 From the outset, it should be borne in mind that the Consultation Paper recommendation was made in the context of a different procedure to that proposed in this Report. However, for the purposes of the question of legal aid, the same issue arises. Any provision of legal aid would cover only the issue generic to the group. Peripheral, individual issues would fall subject to a separate assessment for legal aid. Moreover, because of the in-built efficiencies in the MPA procedure, the extent of the outlay necessary would not be commensurate to the number of cases dealt with. Thus, although the application of legal aid to an entire MPA might ultimately dispose of numerous cases, the actual bill would not reflect its widespread impact. This concept of financial efficiency of scale goes to the heart of the recommendations in this Report.

3.46 Of course, this is not to suggest that the costs of funding an MPA would be equal to the funding of an identical case on an individual basis. The procedural structures and notification as set out in Chapter 2 would not come without incurring certain administrative costs. While these costs would arguably work to the benefit of the plaintiff collective group, the defendant and the judicial system, it is difficult to identify a sound reason for the additional Legal Aid Board expenditure. If the plaintiff representative satisfies the criteria for the provision of legal aid, should the rest of the collective group be permitted to 'piggy back' on that source of funding? In other words, if the representative plaintiff is an eligible applicant under the relevant criteria for civil legal aid, should the Legal Aid Board cover the cost of the entire MPA? While the added costs in administering the MPA might be small in comparison with potential legal costs of litigating each case individually, this is not a relevant consideration for the question of legal aid. The question of legal aid for the portion of the collective group which did not satisfy the means and merit-based criteria would never have arisen. Moreover, the operation of a fully legally aided procedure in circumstances where the lead or representative plaintiff was an eligible legal aid recipient might result in the deliberate nomination of such an individual as a representative plaintiff. While this would insulate the rest of the group, it might prove detrimental to the Legal Aid Board and also the case in general

[26] Consultation Paper paragraph 4.125.

insofar as a weaker representative case might be put forward. Although the certification process charges the court with the nomination of an appropriate representative case, the temptation on the part of the collective group to promote the legal aid eligible case may be a factor.

3.47 With this in mind, the Consultation Paper made it clear that the feasibility of such an extension to the civil legal aid system to cover the entire group was "beyond the scope of the current discussion."[27] The recommendation was based on a much more modest premise: that where an individual eligible for civil legal aid became attached to a register, that person may be able to apply for civil legal aid in order to cover their proportion of any eventual costs order made against the group. However, this would also touch on the exclusion as contained in section 28(9)(a)(ix) of the *Civil Legal Aid Act 1995*. The wording of that section as covering any individual who is a *member* of a group action would probably operate to exclude the eligible MPA member. To this extent, the section would require amendment.[28]

3.48 The Commission recognises the constraints within which the Legal Aid Board operates and as such is aware that the prioritisation of cases will, in practice, often work to exclude actions falling under an MPA. However, where the possibility of legal aid is open to those litigating in an individual capacity, there seems no sound basis for its blanket exclusion where the same individuals take advantage of the efficiencies as offered by an MPA. To hold otherwise would be financially illogical and might work to discourage eligible litigants from opting in to the group and potentially expose the Legal Aid Board to the greater expense of an individual action. In the context of this Report, the Commission considers that any fears of a funded plaintiff acting as a mark for costs represent something of a red herring. In circumstances where a costs order is made against the collective group, the Commission has already recommended that each group member be held liable for an equal share of the costs and the legal aid would only go to cover the share due from the eligible member. Although the Commission has also been recommended that collective group members would be liable on a joint and several basis, the Legal Aid Board does not as a rule fund the

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27 Consultation Paper paragraph 4.124.

28 It is noteworthy that further amendments to the exclusions as contained in subsection 9 may be necessary in the light of recent jurisprudence from the European Court of Human Rights. In *Steel and Morris v United Kingdom* (15 February 2005), the Court held that the blanket denial of legal aid in defamation cases in the United Kingdom constituted a violation of the individual's right to a fair trial as protected by Article 6 of the Convention. Ireland at present also excludes defamation from the ambit of civil legal aid under section 28(9) of the 1995 Act.

successful party's costs where a costs order is made against a funded party.[29] Thus there will be little incentive to promote the legally aided litigant to the position of lead or representative plaintiff in order to single them out as a mark for costs.[30]

(5) Report Recommendation

3.49 *The Commission recommends that the Civil Legal Aid Act 1995 be amended to make provision for the funding of an otherwise eligible group member for his proportion of any eventual costs order.*

(6) After the Event Legal Expenses Insurance

3.50 While Before the Event (BTE) legal expenses insurance provides an inexpensive means of cover in the event of litigation, where the claimant is not covered in this way, there remains the possibility of After the Event (ATE) insurance cover. As the name suggests, ATE insurance denotes a policy taken out following the occurrence giving rise to the litigation. As such, this form of insurance is typically much more costly than cover taken out before the event. Its availability will depend on a merits-based analysis carried out by the insurance company. However, for an MPA, once in place, ATE insurance will provide a means of securing the costs for both the claimant group and the defendant. Typically, where a costs order is made against the defendant, the premium paid for the ATE insurance will be included in the defendant's costs.[31]

3.51 It is the understanding of the Commission from discussions it has had that, at present, no ATE legal expenses insurance product is available on the Irish market. However, such policies have been available in England and Wales and have been used in the context of GLOs. In this regard, the ATE insurance available in England and Wales is closely tied to the Conditional Fee Arrangement in operation there.[32] They provide a neat and secure guarantee of payment for a successful defendant and offset the insulation

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29 See section 36 *Civil Legal Aid Act 1995* which states that in these circumstances the successful party's costs will not be met by the Fund. Thus civil legal aid offers cover only to the extent of the eligible party's costs. A funded litigant must also consider the possibility of a costs order being made against them. Where such a costs order is made, the costs of the successful party will rest with the funded litigant. Of course, this possibility is reduced significantly by the assessment criteria used by the Board. It should be noted that this general rule is subject to the discretion of the Board to make an *ex gratia* payment.

30 See paragraph 3.35 above.

31 See *Callery v Gray (No 1)* [2001] 1 WLR 2112; and *Callery v Gray (No 2)* [2001] 1 WLR 2142.

32 See paragraph 3.59 below.

from costs for the claimant provided for by the Conditional Fee Arrangement.[33]

3.52 Conditional Fee Arrangements do not at present exist in this jurisdiction. However, in the interests of security for defendants as well as claimants, the MPA system militates in favour of legal expenses insurance cover. This would also complement the use of deferred payment schemes in largely the same way. Within the context of an MPA as discussed in Chapter 2, while the ultimate cost of cover would naturally be determined by an actuarial analysis by the insurance provider,[34] the cost of the premium could be divided among those opting into the collective group.

3.53 While the general issue of legal expenses insurance does not lend itself to a final recommendation within the confines of this Report, the Commission notes the potential benefits that such an ATE insurance policy would hold out for both the claimant group in an MPA and for defendants.

(7) Contingency Fee Arrangements

3.54 Contingency fees in a broad sense refer to agreements between a client and a legal representative under the terms of which, the payment of the legal representative's fees is *contingent* upon the successful outcome of the case for the client. Most jurisdictions allow for some form of contingency fee. Ireland, however, does not have such a funding mechanism, and as noted above, the term deferred payment offers a more accurate description of agreements often casually referred to as no win, no fee.

3.55 Contingency fees are fairly controversial creatures. While they enable recourse to litigation without exposing the client to financial risk and accordingly assist principles of access to justice, detractors point to the tendency for their facilitative nature to encourage frivolous litigation and "entrepreneurial lawyering".

3.56 The term "contingency fee" covers a broad family of financial arrangements for litigation. The no win, no fee is perhaps the most straightforward example. However, in an effort to reflect the inherent risk for the legal representative under the terms of such an agreement, and to encourage the market for such fees, many jurisdictions have allowed for an uplift on the basic fee chargeable in the event of success. Two such uplift arrangements are identifiable and while they are, strictly speaking, both

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[33] It is noteworthy, that where costs follow the event, the argument in favour of ATE insurance is much greater. If, as in the US, each party takes care of their respective costs, the need for a mechanism to secure the successful party's costs no longer exists. In any case, in such jurisdictions the BTE market penetration is much higher as explained at paragraphs 3.14 – 3.15 above.

[34] This could be subject to a review by the Taxing Master.

contingency fees proper, it is useful to draw attention to their distinct features by the use of separate terms:

- Contingency Fees (as based on the US model); and
- Conditional Fee Arrangements.

The difference between these two models is based on the method used to calculate the appropriate uplift.

(a) US Model Contingency Fees

3.57 Contingency fees as most commonly understood calculate the uplift as a percentage of the final award.[35] This links directly the financial interest of the lawyer not only to success of the action but also to the quantum of an eventual award. Criticism lodged against such contingency fees often draws attention to the potential for abuse arising out of this scenario and to the financial incentive for the lawyer to inflate artificially the value of the claim in order to maximise his or her return. Where this occurs a potential conflict of interest arises between the best interests of the client and those of the lawyer.[36]

3.58 Multi-party litigation in many jurisdictions, and particularly the class action in the US, has depended heavily on this form of contingency fee to finance the action. While this percentage-based contingency fee has the potential to operate to the benefit of the group, the danger of abuse has cast a very long shadow over its reputation and has led to the development of more controlled forms of contingency fee.

(b) Conditional Fee Arrangements

3.59 In contrast with this jurisdiction, England and Wales has traditionally enjoyed a generously funded civil legal aid fund. However, this system had begun to prove very costly and was reviewed in the early 1990s. As part of this package of review and by way of response to criticism that any reduction in civil legal aid would effectively exclude swathes of the most vulnerable sections of society from the judicial process, a mechanism was introduced to redistribute the cost of this assistance away from the State

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35 While this percentage usually amounts to approximately 30%, claims that wholly disproportionate fees have been charged are not uncommon. This may prove particularly problematic where the client is vulnerable and may not fully appreciate the extent of the uplift at the outset of the litigation.

36 Stories abound of lawyers driving an inappropriate settlement in order to reduce the hours required to run a case while ensuring the percentage cut of the award. This percentage cut need not be measured against an award based on an actual pay-out. In the past, settlements based on coupons from the defendant company have been reported with the lawyer receiving a payment based on the monetary value of the coupon settlement.

and toward the legal sector itself. This funding arrangement eventually took the form of the Conditional Fee Arrangement (CFA). This was designed to operate in a similar way to the US model of a contingency fee, but with an important difference in the calculation of the uplift due to the successful lawyer. Under the terms of a CFA, a solicitor would agree to forego his or her fee in the event of failure, on the condition that they would receive their basic fee plus an uplift if the action were to prove successful. These funding arrangements have been available since 1995 and have been used effectively to finance many GLOs. It is important at this point to reiterate the distinction between the CFA and the contingency fee as set out above. Whereas, a US-style contingency fee calculates the eventual uplift as a percentage of the award received by the client or group of clients, the CFA uplift is measured as a percentage of the basic fee of the solicitor. Thus, while the solicitor's interest is tied to the eventual outcome of the action,[37] it is not tied to the eventual size of the award. Moreover, CFAs have tended to be much more closely regulated than their contingency fee counterparts in the US. At present, the maximum uplift chargeable is set at 100% of the basic fee which, according to the recommendations of the Law Society of England and Wales, should not represent more than 25% of the eventual award of damages to the client.

(c) Conclusions

3.60 The general issue of contingency fees lies beyond the remit of this Report. The possible introduction of such funding arrangements ought to be viewed against the wider backdrop of a general analysis of civil litigation funding as was the context for their introduction in England and Wales. However, were contingency fees to be introduced into this jurisdiction, the Commission notes their potential use in the financing of MPAs. Conditional Fee Arrangements in particular offer a controlled enabling mechanism for the financing of litigation in the light of the limits of civil legal aid at present.

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[37] As indeed will usually be the case under a deferred payment in practice.

CHAPTER 4 SUMMARY OF RECOMMENDATIONS

1. The Commission recommends that its proposals for multi-party litigation are not to be considered as replacements for existing procedures, particularly the test case, but rather as providing an alternative procedure where this is more appropriate. [paragraph 1.33]

2. The Commission recommends that a formal procedural structure to be set out in Rules of Court be introduced to deal with instances of multi-party litigation. [paragraph 1.46]

3. The Commission recommends that reform of current procedures to deal with multi-party litigation should be based on the following principles: procedural fairness for the plaintiff and defendant; procedural efficiency; and access to justice. [paragraph 1.60]

4. The Commission recommends that the proposed procedure for dealing with multi-part litigation shall be called a Multi-Party Action (MPA). [paragraph 2.07]

5. The Commission recommends that the Multi-Party Action procedure would operate on an opt-in basis subject only to a power vested in the court to oblige an action to be joined to an existing group. [paragraph 2.26]

6. The Commission recommends that the Statute of Limitations will not stop to run against each claim until that case has been filed. This will be followed by judicially controlled entry onto the register. [paragraph 2.33]

7. The Commission recommends that judicial certification of a Multi-Party Action be considered a necessary preliminary step to the commencement of a Multi-Party Action. [paragraph 2.37]

8. The Commission recommends a requirement that the pleadings in a Multi-Party Action disclose a cause of action. [paragraph 2.40]

9. The Commission recommends that there be no minimum number requirement for certification of a Multi-Party Action, but that this would be a matter to be taken account of by the court in the context of considering

whether the Multi-Party Action offers a fair and efficient means of resolving the issues both known and anticipated. [paragraph 2.46]

10. The Commission recommends that the cases for which certification is sought should give rise to common issues of fact or law rather than be required to show strict commonality. [paragraph 2.53]

11. The Commission does not recommend a requirement that common issues predominate over individual issues in a Multi-Party Action. [paragraph 2.58]

12. The Commission recommends that a representative or lead case for a Multi-Party Action should be selected to litigate a specific issue which will fairly and adequately represent the interests of individual litigants in the Multi-Party Action. [paragraph 2.63]

13. The Commission recommends that the issue of the number or need for lead cases be left to the discretion of the court. [paragraph 2.68]

14. The Commission recommends that in deciding whether to certify proceedings as a Multi-Party Action, the court must be satisfied that a Multi-Party Action would be an appropriate, fair and efficient procedure in the circumstances. [paragraph 2.73]

15. The Commission recommends that the proposed procedure should make provision for defendant Multi-Party Actions. [paragraph 2.79]

16. The Commission recommends that a single legal representative be responsible for the management of the generic issue of the Multi-Party Action. Nomination of this representative may take place on the basis of a voluntary or judicial appointment and will require judicial approval. Separate legal representatives may be responsible for discrete issues within the group on either a sub-group or individual level. [paragraph 2.87]

17. The Commission recommends that at the certification stage, the court will determine a cut-off date beyond which entry on the register will require the authorisation of the court. [paragraph 2.91]

18. The Commission recommends that where individual litigants wish to remove themselves from the register after the filing of the defence, the authorisation of the court must first be sought. [paragraph 2.98]

19. The Commission recommends that the terms upon which a settlement would be accepted or rejected should be agreed by the individual

members of the group at the opt-in stage. The court should be made aware of the terms of this agreement at certification. The court will have the jurisdiction to set the terms of acceptance or rejection of the settlement only in exceptional circumstances. [paragraph 2.103]

20. The Commission recommends that costs involved in the litigation of the generic issue of the Multi-Party Action be shared in equal measure as among the constituent members unless the court considers that in the interests in the particular case this rule should be varied. As a general rule, liability for these costs will be deemed to come under a scheme of joint and several liability. [paragraph 3.35]

21. The Commission recommends that the *Civil Legal Aid Act 1995* be amended to make provision for the funding of an otherwise eligible group member for his or her proportion of any eventual costs order. [paragraph 3.49]

APPENDIX A DRAFT RULES OF THE SUPERIOR COURTS (MULTI-PARTY ACTIONS)

DRAFT RULES OF THE SUPERIOR COURTS (MULTI-PARTY ACTIONS) 2005.

1. The Rules of the Superior Courts are hereby amended by the insertion of the following Order after Order 18:

"Order 18A

Multi-Party Actions

Definitions

1. In this Order, unless the context or subject matter otherwise requires

(a) "Multi-Party Action" means the procedure by which existing proceedings involving multiple parties, whether as plaintiffs or defendants, which give rise to Multi-Party Action issues are placed on a Register after certification and are thereafter dealt with and determined in accordance with this Order;

(b) "Multi-Party Action applicant" means a party to existing proceedings who applies for certification of a Multi-Party Action;

(c) "Multi-Party Action issues" means common or related issues of fact or law which arise in a Multi-Party Action;

(d) "Nominated judge" means the judge nominated by the President of the High Court to deal with a Multi-Party Action;

(d) "Register" means the Multi-Party Action Register;

(e) "Lead solicitor" means the solicitor assigned the role of legal representative for and acting on behalf of the members of the Register;

(f) "Lead case" means a case selected from the Register in order to determine any Multi-Party issue or issues.

Certification

2. Before applying for certification of a Multi-Party Action, the Multi-Party Action applicant shall consult the Courts Service to ascertain whether any previously certified Multi-Party Action is relevant to the application for certification.

3. An application by the Multi-Party Action applicant for certification under this Order shall be made initially to the President of the High Court by motion, on notice to the other party or parties.

4. At the hearing of the application, the President of the High Court shall nominate a judge of the Court to deal with the certification and, in the event of certification, to deal with all subsequent matters arising in the Multi-Party Action.

5. In deciding whether proceedings should be certified as a Multi-Party Action, the nominated judge shall consider, in particular, whether in the light of the common or related issues of fact or law arising -

(a) there are or are likely to be multiple cases giving rise to Multi-Party Action issues; and

(b) a Multi-Party Action offers an appropriate, fair and efficient procedure for the resolution of the Multi-Party Action issues.

6. Where a Multi-Party Action is certified under this Order, the nominated judge shall make an Order called a Multi-Party Action Order.

7. Where appropriate, the parties who were involved in the proceedings which were included in the application for certification shall be entered on the Register and shall thereafter be referred to as members of the Register.

Content of a Multi-Party Action Order

8. A Multi-Party Action Order shall –

(a) establish a Register;

(b) specify the Multi-Party Action issues which arise or are likely to arise in the Multi-Party Action;

(c) specify the criteria on which permission to be entered on the Register shall be considered by the nominated judge;

(d) specify a date after which parties may not be added to the Register.

9. A Multi-Party Action Order may –

(a) contain directions on publication of the making of the Multi-Party Action;

(b) direct that, from a specified date, proceedings which give rise to one or more of the Multi-Party Action issues shall be referred to the nominated judge for determination;

(c) direct that after a specified date, no party may be removed from the Register without the permission of the nominated judge.

Joining the Multi-Party Action Register

10. Where a Multi-Party Action Order has been made, a party may join the Register only after issuing proceedings and having applied to the nominated judge to be entered on the Register.

11. All applications for entry on the Register shall be made to the nominated judge.

12. Notwithstanding rule 8(d), the nominated judge may enter any proceedings on the Register where this is considered necessary for the appropriate, fair and efficient resolution of the Multi-Party Action issues.

Directions

13. For the purposes of the appropriate, fair and efficient resolution of the Multi-Party Action issues, the nominated judge may give directions including –

(a) specifying the details to be included in the documents grounding an application for entry of proceedings on the Register;

(b) any necessary directions concerning the specific Multi-Party Action issues;

(c) any further directions necessary for the appropriate, fair and efficient resolution of the Multi-Party Action issues.

Lead Solicitor

14. After the expiry of the date specified in accordance with rule 8(d), the parties to a Multi-Party Action shall consult and endeavour to agree to the appointment of a lead solicitor.

15. Where the appointment of a lead solicitor is agreed to in accordance with rule 14, the appointed lead solicitor shall apply to the nominated judge for appointment.

16. If the parties have failed to agree to a lead solicitor or if the nominated judge fails to approve the lead solicitor appointed under rule 14, the nominated judge shall hear submissions as to the appointment of a lead solicitor for the Register and shall make an appointment accordingly.

17. Provision may be made by the nominated judge for the appointment of more than one lead solicitor to represent the Multi-Party Action issues.

Lead Cases

18. After the appointment of the lead solicitor, the nominated judge shall arrange for the holding of a case conference with a view to deciding whether to select a lead case or lead cases for the resolution of a Multi-Party Action issue or issues.

19. In selecting a lead case or lead cases, the nominated judge shall be satisfied that it fairly and adequately represents the interests of all those on the Register.

Effect of a Multi-Party Action Order

20. Where a judgment or order is made in a lead case on the Register in relation to one or more of the Multi-Party Action issues -

(a) that judgment or order shall be binding in all other proceedings that are entered on the Register at the time the judgment or order is given, unless the nominated judge orders otherwise;

(b) the nominated judge may give directions as to the extent to which the judgment or order is binding on the parties in any proceedings which are subsequently entered on the Register.

Compromise of Proceedings

21. Proceedings involving a member of the Register may be compromised or settled only where the terms of the compromise or settlement have been agreed in writing by the members of the Register at or before the time that they become members of the Register.

22. The nominated judge shall be informed of the existence of the terms of such agreement on the application for certification and at any subsequent application to join the Register.

23. Where the terms on which the proceedings are to be compromised or settled are not agreed between the parties, the nominated judge shall convene a case conference to arrange for the terms to be agreed, if required, by mediation.

24. In the absence of agreement arising from such mediation, the nominated judge shall specify the terms on which proceedings are to be compromised or settled.

Costs

25. Any relevant costs incurred in the Multi-Party Action proceedings shall be divided equally among the members of the Register, unless the nominated judge orders otherwise.

26. Members of the Register shall be jointly and severally liable for costs.”

APPENDIX B DRAFT CIVIL LEGAL AID (AMENDMENT) BILL 2005

DRAFT CIVIL LEGAL AID (AMENDMENT) BILL 2005

entitled

AN ACT TO AMEND THE CIVIL LEGAL AID ACT 1995

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

ARRANGEMENT OF SECTIONS

Section

Short title

1. This Act may be cited as the Civil Legal Aid (Amendment) Act 2005.

Amendment of section 28 of Civil Legal Aid Act 1995

2. Section 28(9)(a) of the Civil Legal Aid Act 1995 is amended by the insertion of the following after section 28(9)(a):

> "(aa) "Multi-Party Actions" within the meaning of the Rules of the Superior Courts (Multi-Party Actions) 2005 shall not be regarded as designated matters."

APPENDIX C LIST OF LAW REFORM COMMISSION PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984)	€0.13
Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No 3-1977, Civil Liability for Animals (November 1977)	€3.17
First (Annual) Report (1977) (Prl 6961)	€0.51
Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27
Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harbouring of a Spouse (December 1978)	€1.27
Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harbouring of a Child (February 1979)	€1.90

Working Paper No 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	€1.27
Working Paper No 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	€1.90
Second (Annual) Report (1978/79) (Prl 8855)	€0.95
Working Paper No 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (Prl 9733)	€0.95
First Report on Family Law – Criminal Conversation, Enticement and Harbouring of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	€2.54
Working Paper No 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	€2.22
Fourth (Annual) Report (1981) (Pl 742)	€0.95
Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	€1.27
Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
Report on Illegitimacy (LRC 4-1982) (September 1982)	€4.44
Fifth (Annual) Report (1982) (Pl 1795)	€0.95

Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	€1.90
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	€1.27
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	€1.90
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	€3.81
Sixth (Annual) Report (1983) (Pl 2622)	€1.27
Report on Nullity of Marriage (LRC 9-1984) (October 1984)	€4.44
Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54
Seventh (Annual) Report (1984) (Pl 3313)	€1.27
Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	€1.27
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	€3.81
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	€2.54
Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	€3.17

Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	€3.17
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Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (October 1985)	€2.54
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Consultation Paper on the Crime of Libel (August 1991)	€13.97
Report on the Indexation of Fines (LRC 37-1991) (October 1991)	€8.25
Report on the Civil Law of Defamation (LRC 38-1991) (December 1991)	€8.89

Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39-1991) (December 1991); (4) Service of Completion Notices (LRC 40-1991) (December 1991)	€7.62
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An Examination of the Law of Bail (LRC 50-1995) (August 1995)	€12.70
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Consultation Paper on Statutory Drafting and Interpretation: *Plain Language and the Law* (LRC CP 14-1999) (July 1999)	€7.62
Consultation Paper on Section 2 of the Civil Liability (*Amendment*) Act, 1964: *The Deductibility of Collateral Benefits from Awards of Damages* (LRC CP 15-1999) (August 1999)	€9.52
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