New Civil procedure Rules to take effect at the beginning of the new Court season

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Some argue that the most important change imported by the new Civil procedure Rules to take effect at the beginning of the new Court season is the addition of the “statement of truth“ by which pleadings and other documents to be filed in Court ,are to be “verified” by the parties or the lawyers acting for them in an action (Rule 22 of the New Civil Procedure Rules) as this discourages frivolous claims and inconsistent/ unfounded allegations. The additional caution required when drafting a document to be submitted to Court and verified in such a manner, can limit the disputed facts and effectively save time and costs.

As the New Rules are all about shortening the period it takes to bring a claim to a resolution without delay and unnecessary costs (see for example the definition of the “primary purpose in Rule 1.1) the importance of this novel development, should not be understated. Although it is doubtful whether it is a “popular” one, it can prove useful if applied and adhered to correctly.

One could argue though, that other changes are even more important.

The more “active” role of the Court in the handling of a case (see for example Rule 1.5 , Rule 3.1 and Rule 3.2) combined with the more “busy” pretrial stage (see for example Rule 3.9 , and the provisions in Rules 10 and 19) is certainly of the highest importance as the relevant provisions all but revolutionize the way things are to be done by both the Court and the parties regarding actions to be filed from the 1st of September and onwards.

The parties are required to take steps even before a claim is filed by exchanging specific demand and response letters and adhering to pretrial protocols and afterwards to reveal their cause of action or defence and even evidence by which it is to be proved at a very early stage. The new duties/ powers of the Court and the burdens imposed on the parties and the practitioners representing them, seem to aim at getting all the participants in an action to do much more in order to either settle a claim (partly or wholly) or prepare a case better, for a speedier trial. Again, some practitioners used to slower / longer proceedings may find this new approach somewhat “burdensome” and in practice these new steps will work fully only if the schedule of the Court allows for scheduling the cases faster than in the recent past.

It would be impractical to cite here all the important additions and changes to be implemented, but I would dare say that probably one "favourite" changes/additions of law practitioners, has to be the provision in the Rules themselves about the type of Interim orders that the Court may issue (Rule 25).

Although it was consistently stated in many Supreme Court judgments that the Court's discretion to issue Interim Orders (especially under Section 32 of the Courts of Justice law 14/60) was wide, our Courts took a "conservative "approach as to mandatory orders and orders that were also sought as "final" remedies, which were issued sparingly.

It was always considered by our Courts to be (too) drastic to order a party to do something compared to refrain from acting in a certain way. One could of course argue that certain "merely" prohibitive or "freezing" orders, may be much more drastic than mandatory orders.

In practice, a freezing / Mareva type of order for example, would be granted more easily, even on the basis of an ex parte application and before the defendant was heard, if urgency was demonstrated, whereas an order for disclosure of information even if ancillary to the requested freezing Order and probably equally urgent to obtain, was harder to get.

The broad wording of Section 32 which specifically refers to the power to issue mandatory orders, was interpreted in by our case law and the consensus was that its scope is very wide and that the Court can issue any order it deems just and equitable, provided the requirements of the law are satisfied (see for example BP Holdings Ltd v. Kitalidis (No. 2) (1994) 1 CLR. 694 and Seamark Consultancy Services Ltd v. Lasala (2007) 1(A) CLR 162).

It could therefore be argued that the Courts were always empowered to issue any type of order that would serve the purposes of justice.

Many judges were nevertheless hesitant/reluctant to issue mandatory disclosure orders other than Norwich Pharmacal type of orders which were usually issued / directed against third parties such as service providers, against whom no substantial claim was being promoted.

Other Interim orders such as the appointment of a Receiver for example, were also notoriously hard to obtain.

This may not be the case from now on though, as for the first time the Civil procedure Rules specify in Rule 25 the types of orders the Court may issue.

These include an Order ordering a party to disclose the location of any assets that have been frozen, but also of assets that may be frozen by an order and such an order can be issued at any time, even before a claim is filed (if it is urgent or there are special circumstances justifying this) but also after a judgment has been issued.

Other provisions of order 25 provide specifically for additional Interim remedies / "weapons" that Claimants may use, which in the past were rarely given, such as search Orders, the possibility to receive, save or in certain occasions even sell property and more.

There are even "samples" of Orders provided in the Rules including the carve outs that an order may provide for. The wording employed in such samples is obviously not mandatory and the practitioners should be careful in tailoring the orders they may request and as a common problem is the practical application of both the provisions of an Order as well as of the provisions of carve outs by some institutions such as Banks, caution must be exercised to make an order easier to apply and police in real life circumstances.

A common problem litigators used to face in certain types of claims was/is that in certain situations the exact amount to be claimed/the damages caused by the breach or wrongdoings of a defendant (for example in cases of passing off) is uncertain, as the evidence proving it is only available to the defendant.

It may be the case that it is only the defendant who is aware how much they have “earned” to the detriment of the Plaintiff. Practitioners faced with such situations often asked either for exemplary (or “punitive”) damages alleging that a defendant acted in a fraudulent / “calculative” manner in order to deprive the Plaintiff from the means of proving the damage caused (which were rarely awarded) and/or for “account” from the defendant, as one of the Remedies claimed.

Our Courts had serious practical difficulties in granting the later remedy, as according to the current Rules, the Court cannot issue a partial judgment following the hearing of an action and then after an account is provided, issue a second “supplementary“ judgment on the basis of such an account or even conduct a “further” hearing if the account is disputed.

This problem can now be dealt with, by invoking the specifically provided for (under Rule 25) power of the Court to issue “at any stage” an Order by which the defendant is required to provide an account related to the dispute.

A party can chose the proper stage at which such an order may be requested depending on whether the damage has been crystalized at the time of the filling of the claim or whether it is continuous.

As always, with every new possibility / power new, responsibilities arise.

Both the Courts and the legal practitioners should use the orders provided for under the new Rule 25 and the New Rules in general, only whenever this is necessary and make sure whenever such an order is requested without notice, that the wording of the order is not too restrictive/oppressive for the defendant.

It is not uncommon of course for a person / entity to find out that an Interim order has been served on their Bank for instance, freezing their accounts or on the land registry blocking a transaction they are involved in or in which they have an interest, without prior service on them. In cases where an order was issued without notice and has not been served, then a defendant or a third party affected by the order (without becoming a party to the action that is without prior leave to intervene in the proceedings) may apply to have that such an order is set aside or be amended (Order 23.14).

An applicants' joy for having secured an Interim order without notice wrongly may be short lived, as the new Rules make as sure as possible that applications for the issue of orders are to move faster than under the older rule's regime.

The Judge is under a duty and the parties are bound to assist the Court (by proposing / agreeing to timelines) to schedule on the Directions date, all the Interim steps to be taken (that is the filling of an opposition, any applications for cross examination, any supplementary evidence and written addresses) and the hearing date (Rule 23.10-23.12).

The time the parties have to address the Court is determined / limited by the Court and so is the length of their written addresses.

Overall the new Rules provide the tools to a Claimant to protect their lawful rights and interests but also safeguard the right of a Defendant / Respondent to oppose any Interim order issued, without delays.

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