

INSTITUTION OF PROCEEDINGS THE STATUTE OF LIMITATIONS

Sara Phelan BL highlights the procedural differences between the High Court and the Circuit Court in respect of the institution of proceedings for the purpose of the Statute of Limitations.

The Statute of Limitations, 1957 and the Statute of Limitations (Amendment) Act, 1991¹

The Statute of Limitations, 1957 and the Statute of Limitations (Amendment) Act, 1991 provide for certainty in the area of litigation and ensure that there will not be perpetual litigation on the subjects of tort, contract, title and so on.. In other words, the Statutes of Limitations 1957 and 1991 [hereinafter referred to as "the Statutes"] impose limitations of time upon existing rights of action. Thus, it is advisable from a Plaintiff's point of view that proceedings, in respect of any cause of action for which a limitation period exists, are instituted within the period of time prescribed by the Statutes.

However, failure to institute proceedings within the relevant period may not be fatal to the Plaintiff's claim and the Statutes (and the fact that a Plaintiff's claim is statute-barred) must be specifically pleaded in the Defence. It is thus a matter of choice

that the Statutes may be classified as being 'procedural' as opposed to being 'substantive' or 'jurisdictional'.

This 'procedural' classification applies where the Statutes merely effect the Plaintiff's remedy and not the Plaintiff's right or cause of action *per se*, but in other circumstances, where a right is extinguished by the passage of time, such a limitation goes to the cause of action itself and in such a situation the Statutes may be classified as 'substantive'.

Thus, in order to ensure that a Plaintiff's claim is not statute-barred, proceedings should be instituted within the period or time limits prescribed by the Statutes and it is important to note that there are procedural differences between the High Court and the Circuit Court in respect of the institution of proceedings for the purpose of the Statutes.

Institution of Proceedings in The High Court

The Rules of the Superior Courts, 1986 (S.I. No. 15 Of 1986)

Generally speaking, civil proceedings in the High Court are instituted by originating summons² which must be issued out of the Central Office of the High Court³. The summons is deemed to be issued when it has received the High Court seal and record number⁴ and, prior to being issued, the proceedings are recorded or entered in a Cause Book in the Central Office, numbered, dated, authenticated and sealed⁵. Once the summons has been issued, time has been stopped for the purpose of the Statutes.

“In order to ensure that a Plaintiff's claim is not statute-barred, proceedings should be instituted within the period or time limits prescribed by the Statutes and it is important to note that there are procedural differences between the High Court and the Circuit Court in respect of the institution of proceedings for the purpose of the Statutes.”

for the Defendant whether he wishes to raise or waive the Statutes! If the Statutes are not pleaded in the Defence then a court generally has jurisdiction to hear the Plaintiff's claim (unless, of course, if after the expiry of the limited period the Plaintiff's cause of action no longer exists) and it is on this basis

Once issued in accordance with the Rules of the Superior Courts, 1986, a summons has a life span of twelve months and remains valid during the currency of the twelve months following the date of issue⁶. The summons may be served upon the Defendant/s at any time during that twelve month period

and if, for some good reason, the Defendant (or any of a number of Defendants) has not been served with the summons within the twelve month period then the Plaintiff may apply to the Master of the High Court (within the twelve month period) for leave to renew the summons or to the High Court (outside the twelve month period) for leave to extend time for leave to renew the summons. Once a summons has been so renewed, it remains in force and is available to prevent the operation of the Statutes from the date of the issuing of the original summons⁷.

It is important to note however, that for the purpose of the Statutes, time has been stopped once the summons has been issued, and service of the summons per se or the mode of service thereof is not relevant for the purpose of the Statutes.

Institution of Proceedings in The Circuit Court

Unfortunately, the institution of proceedings in the Circuit Court for the purpose of the Statutes is neither as simple nor as straightforward as the High Court procedure. In order to fully comprehend the differences in procedure between the High Court and the Circuit Court it is helpful to examine the history behind the procedure in the Circuit Court (and the inter-relationship between issue and service) prior to examining the current procedure.

The Circuit Court Rules, 1930 (08/02/1930)

The Circuit Court Rules, 1930 (which came into operation on the 1st day of January, 1932) provided that civil proceedings in the Circuit Court should be instituted or commenced by the issue of a Civil Bill (unless otherwise provided for by Statute or by the said Rules)⁸.

Issue

Order 6 of the Circuit Court Rules, 1930 (entitled "Service and Entry") laid down the procedure for the issue of a Civil Bill and by virtue of the said Order a Civil Bill was deemed to be issued when it was handed to or sent by post to a Summons Server for service on the Defendant or Defendants⁹.

Service

Service of a Civil Bill was to be effected by the Summons Server upon the Defendant personally wherever he was to be found within the jurisdiction, or at the Defendant's residence and upon the Defendant personally or upon some relative or employee of the Defendant being over the age of sixteen years and apparently resident there¹⁰.

Substituted service was permitted in suitable cases¹¹ and imperfect service was permitted to be deemed good, again in suitable cases¹². It should be noted that Order 6 was silent as to when issue of such a Civil Bill was deemed to have occurred and may have pre-supposed that the Civil Bill would have been handed to (or posted to) the Summons Server prior to difficulties with respect to service arising. Thus, issue of the Civil Bill would have occurred prior to an application to Court (a) in respect of substituted service or (b) to deem service good.

In special circumstances and for good cause shown the Court was permitted to allow service of any Civil Bill or other document to be effected by a person other than a Summons Server, and in such case the service of such a Civil Bill was deemed to be the institution of the proceedings¹³.

Thus, unless otherwise permitted by the Circuit Court, routine service of a Civil Bill was to be effected by a Summons Server and the issue of the Civil Bill (for the purpose of the Statutes) occurred when the Civil Bill was handed to or sent by post to a Summons Server for service on the Defendant or Defendants.

The Circuit Court Rules (Service of Originating Documents By Post) Order, 1944 (09/12/1944)

The Circuit Court Rules (Service of Originating Documents by Post) Order, 1944 altered the Circuit Court Rules, 1930 to the extent that Order of 1944 permitted service of any Civil Bill, Originating Summons (or other originating document by which proceedings in the Court are instituted) to be effected by sending a copy of the same to the Defendant or other person to be served, by registered pre-paid post addressed to such person at his last known residence or place of business. Such originating document was to be posted by the Plaintiff or other person instituting the proceedings, or by his Solicitor, or by any other person acting on his behalf. The time, date and place of posting was to be endorsed upon the original and the certificate of registration of the postal packet containing the copy was to be annexed or appended to the original before the same was lodged in the Circuit Court Office or filed with the County Registrar¹⁴.

Issue

Such document was deemed to have been issued when the copy of the same was posted¹⁵.

Service

Unless the contrary was proved, service of such document was deemed good upon proof that the postal packet containing the copy of the same was properly addressed, registered and posted, and such document was deemed to have been served at the time when such postal packet would in the ordinary course of post have been delivered¹⁶.

It should be noted that this Order only had effect where a Judge, by Order, declared the same to be in force in respect of a specified area comprised within the Circuit to which he was for the time being assigned and for a specified period not being longer than one year¹⁷.

Thus, routine service of a Civil Bill could now be effected by sending a copy of the same to the Defendant or other person to be served, by registered pre-paid post addressed to such person at his last known residence or place of business and issue of the Civil Bill (for the purpose of the Statutes) was deemed to have occurred when the copy of the same was posted.

Naturally, service of a Civil Bill could also be effected by a Summons Server and in accordance with the provisions of the Circuit Court Rules, 1930.

The Circuit Court Rules, 1950 (S.I. No. 179 of 1950)

The Circuit Court Rules, 1950 (which came into operation on the 2nd day of October, 1950) repealed the Circuit Court Rules, 1930 and the Circuit Court Rules (Service of

Originating Documents by Post) Order, 1944. Again, by virtue of the Circuit Court Rules, 1950, proceedings were to be commenced or instituted in the Circuit Court by the issue of a Civil Bill in accordance with the Rules)¹⁸.

Issue

Order 10 of the Circuit Court Rules, 1950 (entitled "Service and Entry") laid down the procedure for the issue of a Civil Bill¹⁹ and Order 10 rule 1 (entitled "Issue of a Civil Bill") stated that a Civil Bill was deemed to be issued when;

1. it was handed or posted to a Summons Server, or other authorised person, for service on a Defendant or Defendants, or on his or their Solicitor, who had undertaken in writing to accept service thereof and enter an appearance thereto, or
2. when the appropriate Court Orders in relation to substituted service²⁰ or service by person other than Summons Server²¹ had been made.

Service

Again, service of a Civil Bill or other originating document was to be effected upon the Defendant personally wherever he was to be found within the jurisdiction, or at the Defendant's residence within the jurisdiction personally upon the husband or wife of the Defendant, or upon some relative or employee of the Defendant over the age of sixteen years and apparently resident there²².

A Solicitor could undertake in writing to accept service of a Civil Bill and in such case service on such Solicitor was to be sufficient, provided that he did at the time of service indorse on the original Civil Bill his acceptance of service thereof and his undertaking to enter an appearance thereto²³.

Substituted service was permitted if the Plaintiff was from any cause unable to effect prompt personal service, or such other service as was prescribed by the Rules²⁴ and in any case, the Circuit Court was permitted to declare the service actually effected sufficient²⁵. As previously stated at sub-paragraph 2 above, issue of a Civil Bill in such cases occurred when the appropriate Court Orders in relation to substituted service²⁶ or service by person other than Summons Server²⁷ had been made, but Order 10 rule 11 of the Circuit Court Rules, 1950 is silent as to when issue takes place when the Court declares the service actually effected sufficient. It should be noted that Order 6 of the Circuit Court Rules, 1930 was not only silent on relationship between issue and imperfect service, but also on the relationship between issue and substituted service.

Thus, unless otherwise permitted by the Circuit Court, routine service of a Civil Bill was to be effected by a Summons Server and issue of the Civil Bill (for the purpose of the Statutes) occurred when the Civil Bill was handed to or sent by post to a Summons Server for service on the Defendant or his Solicitor or when the appropriate Court Orders in relation to substituted service or service by person other than Summons Server had been made.

By repealing the Circuit Court Rules (Service of Originating Documents by Post) Order, 1944 and by not providing for the service of an originating document by registered pre-paid post, the Rules of the Circuit Court, 1950 effectively restored the position in relation to the issue and service of a Civil Bill to that of the Circuit Court Rules, 1930.

This anomaly was to remain in being for the next fourteen years until the enactment of the Courts Act, 1964.

The Courts Act, 1964

The Courts Act, 1964 deals with certain procedures in the District Court and the Circuit Court. It is not applicable to the Superior Courts.

Section 7 of the Courts Act, 1964 lays down the procedure for the service of court documents by post and applies in relation to the service of Circuit Court documents and District Court documents (including originating documents) in any area whenever and so long as no Summons Server stands assigned to that area by the County Registrar for the county in which the area is situate²⁸.

By virtue of Section 7 of the Courts Act 1964, service of a Circuit Court document or a District Court document can now be effected by sending a copy of the document by registered pre-paid post in an envelope addressed to the person to be served at his last known residence or place of business in the State and the document may be posted by the person on whose behalf it purports to be issued or a person authorised by him in that behalf²⁹. Service of a Circuit Court document or a District Court document upon a person is deemed to be good service upon the person unless it is proved that such copy was not delivered³⁰.

Section 7(6)(a) of the Courts Act, 1964 is particularly relevant in relation to the issue of proceedings (and the consequent effects of the Statutes) and justifies quoting in full;

- "(a) Where service of a document on a person is effected by sending a copy thereof by registered pre-paid post in an envelope addressed to the person pursuant to subsection (3) of this section-
- (i) the document shall be deemed to be served upon the person at the time at which the envelope would be delivered in the ordinary course of post,
 - (ii) the document shall be deemed to be issued at the time at which the envelope is posted,
 - (iii) the addressing, registering and posting, in accordance with the provisions of subsection (3) of this section, of the envelope may be proved by a statutory declaration (which shall be endorsed upon the original document and shall be made, not earlier than ten days after the day on which the envelope is posted, by the person who posted the envelope) exhibiting the certificate of posting of the envelope aforesaid and stating, if it be the case, that the original document was duly stamped at the time of posting and that the envelope has not been returned undelivered to the sender, and
 - (iv) the time, date and place of posting of the envelope shall be endorsed upon the original document."

Thus, if service of an originating document is to be by registered pre-paid post, the document is not deemed to be issued (and the Statutes have not been stopped) until the envelope is posted.

The Circuit Court Rules (No. 2), 1995 (S.I. No. 216 of 1995)

The next major change in relation to issue and service of originating documents in the Circuit Court was brought about

by the Circuit Court Rules (No. 2), 1995 (which came into operation on the 1st day of October, 1995) when it was hoped to mirror the High Court procedure in respect of the institution of proceedings (i.e. that issue out of the Circuit Court Office and not the handing or posting of the document to the Summons Server or other authorised person³¹ or the posting of the document by registered pre-paid post³² would stop the Statutes).

Order 10 of the Rules of the Circuit Court, 1950 was amended and entitled "Issue of Civil Bill, Service and Entry" as opposed to "Service and Entry" (as was the case with the original Order 10 of the Rules of the Circuit Court, 1950).

Issue

Order 10 rule 2 stated that a Civil Bill or other originating document should be dated with the date of issue, sealed and marked with the record number by the proper officer of the Circuit Court Office and that it was thereupon deemed to be issued. No Civil Bill or other originating document was permitted to be served until the same had been so dated, sealed, marked and issued. However, Order 10 rule 1 of the Circuit Court Rules, 1950 (also dealing with the issue of Civil Bills and discussed above) was not repealed and therefore it is not clear whether Order 10 rule 1 or Order 10 rule 2 governed the issue of Civil Bills!

Service

Order 10 rule 3 of the Rules of the Circuit Court, 1950 was deleted and substituted by a new Order 10 rule 3 which stated that a copy of the Civil Bill or other originating document was to be served by one of the officers duly appointed as Summons Servers by the County Registrar save as provided by Rules 8³³, 9³⁴ and 1735 of Order 10.

Most importantly however, Order 10 rule 3 went on to state that wherever and for so long as no Summons Server in each case stood assigned to any area by the County Registrar of the County in which such area is situate, then service could be effected in the manner prescribed by Section 7 of the Courts Act, 1964.

Unfortunately, Section 7(6)(a)(ii) of the Courts Act, 1964 remained in being and thus superseded Order 10 of the Circuit Court Rules (No. 2), 1995 in respect of the issue of originating documents which were served by registered pre-paid post.

Order 10A of the Circuit Court Rules (No. 2), 1995

It should be noted that the Circuit Court Rules (No. 2), 1995 also introduced an entirely new Order (Order 10A) to the Circuit Court Rules. Order 10A again attempts to mirror the High Court procedure and permits the renewal of a Civil Bill or other originating document in much the same way as Order 8 of the Rules of the Superior Courts allows for the renewal of a summons.

However, there are procedural difficulties in respect of the renewal of a Civil Bill given that it must be validly issued before it can be renewed and if issue depends upon the posting of the Civil Bill then there must be very few cases in which it would need to be renewed (given that service is nearly always consequent upon posting).

An interesting proposition arises whereby if a Civil Bill is issued by virtue of posting same by registered pre-paid post but

service is not effected for some reason (i.e. perhaps the Defendant is no longer residing at that address or is evading service), has the Civil Bill been validly issued for the purposes of the Statutes?

Of course, if service is to be personal or by ordinary pre-paid post then the renewal of a Civil Bill may be necessary, but is personal service (other than by an assigned Summons Server or other such person appointed by the Court) or service by ordinary pre-paid post, valid service in accordance with the rules? If not, then an application must be made to Court to deem the service actually effected sufficient and, as already outlined, Order 10 rule 11 of the Circuit Court Rules, 1950 is silent as to when issue takes place when the Court declares the service actually effected sufficient!

The Circuit Court Rules (No. 3), 1997 (S.I. No. 500 of 1997)

Order 10 of the Circuit Court Rules, 1950 as amended by Order 10 of the Circuit Court Rules (No. 2), 1995 was deleted and revoked and substituted by a completely new Order 10 by virtue of the Circuit Court Rules (No. 3), 1997 (which came into operation on the 22nd day of December, 1997).

Order 10 of the Rules of the Circuit Court, 1950 is now entitled "Issue of Civil Bill or Other Originating Document, Service and Entry".

Issue

Order 10 rule 3 lays down the current procedure for the issue of a Civil Bill and in accordance with Order 10 rule 3 the original Civil Bill or other originating document must be dated with the date of presentation to the Circuit Court Office, sealed, marked with the record number by the proper officer and entered in the cause book and shall thereupon be deemed to be issued, subject to the provisions of section 7(6)(a)(ii) of the Courts Act, 1964.

The new Order 10 makes express reference to Section 7(6)(a)(ii) of the Courts Act, 1964 and thus, where an originating document is to be served by registered pre-paid post it is deemed to be issued at the time of the posting of the envelope and the Statutes are stopped at this point in time.

Service

Again, service of a Civil Bill or other originating document is to be effected by a Summons Server³⁶ upon the Defendant personally wherever he is to be found within the jurisdiction, or at the Defendant's residence within the jurisdiction personally upon the husband or wife of the Defendant, or upon some relative or employee of the Defendant over the age of sixteen years and apparently resident there³⁷

Service may also be effected by registered pre-paid post in accordance with the provisions of section 7(6) of the Courts Act, 1964 as discussed above.

Furthermore, service may also be effected upon a Solicitor³⁸ and the Court may make Orders for substituted service³⁹ and may declare the service effected sufficient⁴⁰ and may, in special circumstances and for good cause shown, permit service of a Civil Bill to be effected by a person other than a Summons Server⁴¹. Order 10 is silent as to when issue of the Civil Bill takes place in these circumstances and thus one must assume

that issue has taken place in accordance with Order 10 rule 3 except when the mode of service has been or is to be by registered pre-paid post!

Obviously the effect of section 7(6)(a)(ii) of the Courts Act, 1964 on the issue of an originating document (and the stopping of the Statutes) is not of any consequence;

- (a) where service of an originating document is by Summons Server (but how many Summons Servers stand appointed by the County Registrars in this day and age?) or
- (b) where service is to be effected by registered pre-paid post and the originating document is issued out of the Circuit Court Office and posted on the same day.

Conclusion

The author understands that representations have been made to the Department of Justice, Equality and Law Reform by the Circuit Court Rules Committee seeking an amendment to the Courts Act, 1964 (and in particular Section 7(6)(a)(ii)

“The author understands that representations have been made to the Department of Justice, Equality and Law Reform by the Circuit Court Rules Committee seeking an amendment to the Courts Act, 1964 (and in particular Section 7(6)(a)(ii) thereof) so that the procedure in respect of issue of an originating document in the Circuit Court may mirror that of the High Court, and that the fact of issue of an originating document (and not service of same or the mode of service thereof) will stop the Statutes.”

thereof) so that the procedure in respect of issue of an originating document in the Circuit Court may mirror that of the High Court, and that the fact of issue of an originating document (and not service of same or the mode of service thereof) will stop the Statutes.

The author contacted the Department of Justice, Equality and Law Reform⁴² and they were in a position to confirm the foregoing and stated that a Courts Bill is due to be published early in this parliamentary session. However, the Department of Justice, Equality and Law Reform were not prepared to comment any further in respect of this matter.

On a different note, a decision is awaited from O'Donovan J. in respect of an appeal from an Order of Her Honour Judge Lindsay in *Ciaran Murphy v. Robert McNamara and Recovery Services and Repairs Limited*, where Judge Lindsay in the Circuit Court held that the Plaintiff's claim for personal injuries was statute-barred due to the fact that service had been effected by registered pre-paid post and the originating document had been posted outside the three year limitation period prescribed for by the Statutes. ¹

- 1 Brady, James C. and Kerr, Anthony, *The Limitation of Actions* (2nd edn., The Incorporated Law Society of Ireland, 1994)
- 2 The Rules of the Superior Courts, 1986 Order 1 rule 1
- 3 The Rules of the Superior Courts, 1986 Order 5 rule 1
- 4 The Rules of the Superior Courts, 1986 Order 5 rule 9
- 5 The Rules of the Superior Courts, 1986 Order 5 rules 7 & 8
- 6 The Rules of the Superior Courts, 1986 Order 8 rule 1
- 7 The Rules of the Superior Courts, 1986 Order 8 rule 1
- 8 The Circuit Court Rules, 1930 Order 2 rule 1
- 9 The Circuit Court Rules, 1930 Order 6 rule 1
- 10 The Circuit Court Rules, 1930 Order 6 rule 4
- 11 The Circuit Court Rules, 1930 Order 6 rule 8
- 12 The Circuit Court Rules, 1930 Order 6 rule 10
- 13 The Circuit Court Rules, 1930 Order 6 rule 14
- 14 The Circuit Court Rules (Service Of Originating Documents By Post) Order, 1944 Rule 3
- 15 The Circuit Court Rules (Service Of Originating Documents By Post) Order, 1944 Rule 5
- 16 The Circuit Court Rules (Service Of Originating Documents By Post) Order, 1944 Rule 4
- 17 The Circuit Court Rules (Service Of Originating Documents By Post) Order, 1944 Rule 1
- 18 The Rules of the Circuit Court, 1950 Order 5 rule 1
- 19 Subject to future modification by the Courts Act, 1964 and the Rules of the Circuit Court (No. 3), 1997
- 20 The Rules of the Circuit Court, 1950 Order 10 rule 9
- 21 The Rules of the Circuit Court, 1950 Order 10 rule 17
- 22 The Rules of the Circuit Court, 1950 Order 10 rule 4
- 23 The Rules of the Circuit Court, 1950 Order 10 rules 8 & 21
- 24 The Rules of the Circuit Court, 1950 Order 10 rules 9 & 10
- 25 The Rules of the Circuit Court, 1950 Order 10 rule 11
- 26 The Rules of the Circuit Court, 1950 Order 10 rule 9
- 27 The Rules of the Circuit Court, 1950 Order 10 rule 17
- 28 The Courts Act, 1964 Section 7(2)
- 29 The Courts Act, 1964 Section 7(3)
- 30 The Courts Act, 1964 Section 7(4)
- 31 The Rules of the Circuit Court, 1950 Order 10 rule 1
- 32 The Courts Act, 1964 Section 7(6)(a)(ii)
- 33 Relating to the acceptance of service by Solicitor
- 34 Relating to the substitution of service
- 35 Relating to service by person other than Summons Server.
- 36 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rule 5
- 37 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rule 6
- 38 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rule 10
- 39 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rules 11 & 12
- 40 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rule 13
- 41 The Rules of the Circuit Court, 1950 as amended by the Rules of the Circuit Court, (No. 3) 1997 Order 10 rule 17
- 42 On the 8th day of February, 2000