All that is Shiny and New in Cohabitation.

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Standing here this afternoon before this very impressive gathering, I am once again reminded of how much Alexis Mina BL owes me!

I am grateful to the Family Lawyers Association for inviting me to speak at the annual CPD-fest; it has been organised and run with the panache and efficiency that has been the hall mark of Clare Feddis's stewardship of the Association.

First, an apology. The title is misleading. There is nothing Shiny and New in Cohabitation. Sorry to disappoint you all. This is what happens when you pick a catchy title for the talk first and set about adding the content later. However, seeing as how we are all gathered I thought that it might be useful to look again at Cohabitation and to consider some issues which I have seen arise in the context of cases or which have been discussed over idle cups of coffee.

I thought I would firstly look at whether Cohabitation is truly a creature of Family Law at all; then, whether it is permissible or desirable to mix claims on pleadings, and lastly I will look the feasibility of trying to run preliminary issues or achieve modular trials on the gateway issues of fact in Cohabitation cases.

The Act is in force 7 years, having come into force on the 1st January 2011 (S.I. No. 648/2010 - Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 (Commencement) Order 2010).

There are no more than a handful of written decisions:-

- DC v DR (High Court, Ms. Justice Baker)[1];
- MW v DC (Court of Appeal)[2];
- MO'S V EC (Circuit Court).[3]

[1] [2015] IEHC 309
[2] [2017] IECA 255
[3] An unreported Circuit Court decision of Horgan P, Jan 2015

Somewhat oddly or perhaps unluckily, in none of the cases do we find much by way of an exposition by the Court of the philosophical or strategic intent behind the legislation. The first deals with a claim under Section 194 (an application for provision from the estate of a deceased Cohabitant); the second thoroughly analyses a very narrow issue, namely how strictly one is to interpret the two year period required by Section 172(5) (a) of the 2010 Act. It is a Statutory interpretation case as much as anything else. The third case comes closest to the sort of analysis I have in mind. In that case, Horgan P says at para 99 the following *'I am satisfied that the term proper provision for a qualified cohabitant must be read in the context of a statutory redress scheme and having regard to the vulnerability of the individual Applicant in each case'*.

Apart from the clues which we can take from Judge Horgan's remark en passant in para 99 of that judgment, in large part, most of what we know and think about Cohabitation is taken from our collective experience of dealing with these cases on the ground. As I have said, there is little or nothing to tell us whether we are getting it right or wrong in how we are approaching and interpreting the legislative provisions. Even the term 'collective experience' is somewhat misleading, because it is made up of a thousand separate experiences, with perhaps very few of those experiences being held in common. The exchange of ideas among colleagues can assist, of course. But there is a randomness about who we exchange ideas with. We must also bear in mind that there will be regional differences too, so that how Cohabitation cases are approached in Donegal may be different to how they are approached in Cork, (although, as we know, <u>everything</u> is approached differently in Cork).

Is Cohabitation 'Family Law'?

There are many good reasons to consider that the law relating to Cohabitants is part of the code of Family Law. But is it? Should we consider it to be a code apart?

The reason why I think that it is useful to look at this afresh, is that I have a concern that in advising clients on matters of strategy and in considering what would be an acceptable approach to settling such cases, the temptation can be simply to consider what would happen in an analogous Judicial Separation/Divorce scenario and apply a notional discount.

There are sound reasons why unconsciously we might do so. Our instincts are calibrated by our experience. We are in a family law list, dealing in large part with specialist family law

solicitors and counsel, and our case is due to be heard by a Judge who has just done 10 family law cases and is about to do 10 more. Would it be unreasonable to suggest that a certain Family Law Think may be imported into how such cases are dealt with?

Although it has been said by Baker J that this legislation is ‘part of the nexus’ of family legislation, there are objective reasons to consider that the Cohabitation code is quite different from the Family Law Code. The Cohabitation code is not Judicial Separation light; it is not low-cal Divorce. Although administered in the same court buildings and by the same judges who preside over Judicial Separation and Divorce claims, the reality is that the law as it relates to Cohabitants is not the same as the prescriptive legislative schemes which regulate Marriage and Civil Partnership breakdown.

A review of the Dáil debates on the Bill is instructive. Dermot Ahern TD, the then Minister for Justice described the Bill as providing a “redress scheme”; elsewhere he alluded to the “safety net” which was being provided for an economically dependent cohabitant. The redress scheme, he said, is a response in law to a growing need for protection of vulnerable Cohabitants. It is not designed to redistribute the property or finances of a couple who split up; it is designed to mitigate hardship where a relationship ends leaving one former cohabitant financially vulnerable. Brendan Howlin TD drew the attention of the House to the far more limited provisions of the redress scheme than Civil Partnership provisions or marriage. “The scheme”, he said, “focuses primarily on addressing a number of areas in which cohabiting couples are vulnerable such as the protection of residential tenancies and maintenance rights”.

Other pointers:

- In the Circuit Court claims under the 2010 Act come before the ‘Circuit Court’ whereas claims under the 1989, 1995 and 1996 Acts come before the ‘Circuit Family Court’.

- A claim under the 2010 Act is initiated by Cohabitation Civil Bill as opposed to a Family Law Civil Bill.

- There are different Court rules to the Rules that govern Family Law cases:

- In the Rules of the District Court, it is Order 54A, inserted by S.I No 17 of 2016;
- In the Rules of the Circuit Court, it is Order 59A inserted by S. I. No. 385 of 2011;
- In the Rules of the Superior Courts, it is Order 70 B inserted by SI 348 of 2011.[4]

- The description of maintenance payable under Part 15 of the Act as “compensatory maintenance” whereas the counterpart regime of support under Parts 5 and 12 of the Act dealing with Civil Partners uses the terms “maintenance order” (part 5) and “periodical payments and lump sum Orders” (part 12).

- Unlike the regimes that provide for Civil Partners and Spouses respectively, there is no provision for ‘interim maintenance’ or ‘maintenance pending suit’ for Qualified Cohabitants.

- It is a curiosity of the drafting of the act that the term ‘proper provision’ is only used in connection with claims under Section 194 and not generally.

> ‘(3) The court may by order make the provision for the applicant that the court considers appropriate having regard to the rights of any other person having an interest in the matter, if the court is satisfied that proper provision in the circumstances was not made for the applicant during the lifetime of the deceased for any reason other than conduct by the applicant that, in the opinion of the court, it would in all the circumstances be unjust to disregard’.

By contrast Section 173 (2) is as follows

> *‘(2) If the qualified cohabitant satisfies the court that he or she is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship, the court may, if satisfied*

[4] High Court Practice Direction (HC 51/2009) does not encompass the 2010 Act.

that it is just and equitable to do so in all the circumstances, make the order concerned'.

A further pointer to difference of mind set required when approaching the claim of a Cohabitant is the likely tax treatment of any lump sum that might be ordered by the Court pursuant to section 175 of the 2010 Act. It is the opinion of some tax experts that a lump sum would not be exempt from tax in the hands of the recipient if it were paid pursuant to Section 175 of the Act.

Starting with the Finance Act, (No 3) 2011 and concluding with the Finance Act, 2013 one can trace the following.

By the Finance Act, (No 3) 2011, The Taxes Consolidation Act, 1997 was amended. Those amendments are in the first schedule to the 2011 Act. It is in the usual column format. The first column typically shows the wording as it is, (referring to spouses, husband, wife etc. as the context requires), the second as it is now to be read. All the amendments are directed at incorporating Civil Partners and former and widowed Civil Partners so that they have an equivalence with Spouses for the purposes of that Act. These is no mention of Cohabitants. They were not given such equivalence.

By the Finance Act, (No 3) 2011, The Taxes Consolidation Act, 1997 was further amended. Parts 44A and 44B were inserted following Part 44.

Part 44A deals with the tax treatment of Civil Partnerships. Within Part 44A, Section 1031J deals with the maintenance of Civil Partners living apart. Within that section "maintenance arrangement" is defined. A payment made under a maintenance arrangement is subject to income tax in the hands of the recipient and can be deducted by the payor in computing her or her total income.

(a) '*The individual making the payment:*

(i) Shall not be entitled on making the payment to deduct and retain out of the payment any sum representing any amount of income tax on the payment, and

(ii) Shall, if he or she makes a claim in that behalf in the manner prescribed by the Income Tax Acts, be entitled, for the purposes of those Acts, to deduct the payment in computing his or her total income for the year of assessment for which the payment is made,

and

(b) The payment shall be deemed for the purposes of the Income Tax Acts to be profits or gains arising to the individual receiving the payment, and income tax shall be charged on that individual under Case IV of Schedule D in respect of those profits or gains'.

By Section 103 the Finance Act, 2013, Section 1031J was itself amended so as to redefine the term "maintenance arrangement". By this re-definition only payments which are "annual or otherwise periodical" are subject to income tax. You can see similarly favourable considerations for the purposes of Capital Gains Tax and Capital Acquisition Tax also. Accordingly, so the argument goes, lump sums paid pursuant to Court Order between Civil Partners are exempt from income tax and are thus treated in the same manner as lump sums between separating or divorcing spouses.

Part 44B deals with the tax treatment of Cohabitants. Section 1031Q (which defines a maintenance arrangement between cohabitants as being an Order under Section 175 of the Act), was not re-defined by the Finance Act, 2013. It follows that lump sums paid between co habitants following a Court Order under Section 175 of the Act of 2010 are not exempt from income tax. The payer may claim tax relief against such payments, the payee will be liable to tax on sums thereby received.

This analysis was accepted by Horgan P in the **M.O'S v E.C.** case quoted above[5].

The distinction between the tax treatment of payments between Civil Partners on the one hand and Cohabitants on the other as above described might be an oversight. On the other hand, it might be further confirmation that the entire scheme is very different to a scheme premised on

[5] Footnote 3 above

the ending or dissolution of a relationship based on Marriage or Civil Partnership. On the view outlined above, it does appear as though the Oireachtas when revisiting the definition of "maintenance arrangement" in 2013 to align the tax treatment of lump sums made between separating/divorcing spouse and similar payments made between separating civil partners deliberately chose not to extend that definition to Cohabitants. That separating co-habitants did not have the same tax treatment extended to them might be further evidence that there are in fact two very different schemes combined in the one legislative enactment. If we accept that the scheme available to qualifying cohabitants is one which provides a safety net to separating couples who qualify within the scheme as argued for above, then the decision of the Oireachtas to distinguish between the tax treatment of lump sums for civil partners on the one part and cohabitants on the other makes complete sense.

Is it suitable or appropriate to mix claims?

We have all of us been confronted with a variation of the following scenario: Unmarried couple with young children, living together more than five years, mum stays at home or has a part time job to dovetail with school time, relationship breaking up, disagreement about what are the best arrangements for the children - perhaps there are Domestic Violence issues also.

When considering the drafting of pleadings, do you bring an omnibus claim, issuing a single set of proceedings for relief under the various applicable acts? Or, do you issue a Cohabitation Civil Bill in the Circuit Court and a Family Law Civil Bill in the Circuit Family Court to deal with everything else? The temptation is of course to do the former. Although stamp duty on Cohabitation proceedings isn't a consideration - a nod to the 'family law' code - at first blush there are probably economies and efficiencies to be had in having all of the claims made in the one set of proceedings.

In my experience, family law clients can very often be very involved – overly involved even - in the formulation of the pleadings. They are often asked to produce a history of the relationship and having done so find it difficult to accept that much of it might not find its way into the civil bill. The temptation to cut and paste the narrative furnished by the client is very strong. The structure of fees (whether for solicitors or counsel) militates against the discriminating approach to clients instructions.

But is it permissible to simply shovel everything onto the one civil bill? Even if it is permissible, is it desirable that we should do so? The answer may lie in how we view pleadings and the purpose they serve.

In **Mahon v. Celbridge Spinning Co. Ltd[6].** 1 Fitzgerald J. stated:-

> *"The whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence at the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to*

[6] [1967] I.R.1

> *be ascertained from the pleadings. In other words a party should know in advance, in broad outline, the case he will have to meet at the trial*[7]*."*

McDermott J in **Quearney v Allied Irish Banks plc**[8]**,** endorsed that view saying

> *'The purpose of pleadings is to establish the basis upon which any particular relief is claimed and to define the issues between the parties'.*

He might have been remembering his time at the matrimonial bar, when he said,

> '*The Rules of the Superior Courts regulate pleadings because not every grievance amounts to a cause of action no matter how keenly felt or extensively set out'*[9].

The risk is that if we simply upload the narrative of the relationship onto a Civil Bill (any Civil Bill) the *issues* are never defined properly or get lost. The differentiation between Civil Bills, the different rules that govern different pleadings, are designed I think to guide us towards applying some critical forethought to the claims being advanced, the discrete issues giving rise to the claims and how the proceedings might be resolved.

The presumed efficiency of lumping everything onto the one Civil Bill may in fact lead to lengthier and more costly litigation, because the failure to differentiate between the different claims runs the risk of confused and muddled thinking.

I went looking at Odgers on 'The Principles of Pleadings and Practice in Civil Actions in the High Court of Justice', 1906 (6th edition) and found the following:

> *'The system of pleading introduced by the Judicature Acts is in theory the best and wisest, and indeed the only sensible, system of pleading in civil actions. Each party in turn is required to state the material facts on which he relies; he must also deal specifically with the facts alleged by his opponent, admitting or denying each of them*

[7] at p. 3.
[8] [2015] IEHC 858
[9] At paragraph 34

in detail; and thus the matters really in dispute are speedily ascertained and defined. Some such preliminary process is essential before the trial.

How is it, then, that it is the fashion to decry our modern pleadings, to treat them as waste-paper, and to deplore the loss of the ancient method with its counts and pleas known by fantastic names, half Latin and half Norman-French? There are many reasons why the new system has not yet met with the success which it deserves. It has hitherto been worked mainly by men educated under the former practice. The modern system has never *been so thoroughly taught to the younger generation of pleaders. Moreover, the reform was not, in one or two instances, sufficiently thorough. Some antiquated fragments of the old procedure remain (such as the plea of Not Guilty by Statute) which destroy the symmetry of the modern rules. There is yet another reason why our present system of pleading does not work so well as it should. Each party in turn ought to admit clearly or to deny expressly each fact alleged by his opponent. But counsel cannot do this unless he is fully instructed as to the actual facts. The solicitor cannot fully instruct counsel as to the facts without thoroughly getting up the case; and the taxing master always discourages his doing so at this stage. The amount allowed for Instructions for Defence and Reply is wholly inadequate to recompense the solicitor for the time and labour involved in properly instructing counsel how to plead. Hence admissions which ought to be made are not made'.*

This is what the Superior Court Rules say about pleadings (Order 19)

'The plaintiff shall, subject to the provisions of Order 20, and at such time and in such manner as therein prescribed, deliver to the defendant a statement of his claim, and of the relief or remedy to which he claims to be entitled. The defendant shall subject to the provisions of Order 21, and at such time and in such manner as therein prescribed, deliver to the plaintiff his defence, set-off, or counter-claim (if any), and the plaintiff shall, subject to the provisions of Order 23, and at such time and in such manner as therein prescribed, deliver his reply (if any) to such defence, set-off, or counter-claim. Such statements shall be as brief as the nature of the case will admit, and the Taxing Master in adjusting the costs of the action shall, at the instance of any party, or may without any request, inquire into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same.

A defendant in an action may set-off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgement in the same action, both on the original and on the cross claim. But the Court may, on the application of the plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof'.

Back to Odgers in 1906

'The defendant's counterclaim need not relate to or be in any way connected with the Plaintiff's claim, or arise out of the same transaction. It need not be an action of the same nature as the original action, or even analogous thereto. If the defendant has any valid cause of action, legal or equitable, against the plaintiff, there is no necessity for him now to bring a cross-action, unless his counterclaim be of such a nature that it cannot be conveniently tried by the same tribunal or at the same time as the plaintiff's claim.

Every cross-claim of whatever kind can be pleaded as a counterclaim. It does not matter what the amount of it may be. It may be for either liquidated or unliquidated damages.

The issues of fact raised by claim and counterclaim respectively must, as a rule, be tried together. <u>And only one judgment will be given on both claim and counterclaim</u>.

To my mind these extracts from Odgers and the Rules remind us that pleading is both an art and a discipline. It is my personal view that one should not combine a claim for relief under the 2010 Act with relief under the Family Law Acts. That is not to say that the trial of the two or more civil bills shouldn't be heard together, or sequentially, but as a pleading discipline, I believe it is preferable to separate out the claims.

Preliminary Issues and Modular Trials.

Potentially onerous disclosure obligations are triggered once a claim for redress is made pursuant to Part 15 of the 2010 Act. Is it right, fair or appropriate that an Applicant, who might ultimately be found not to be a qualified cohabitant (and therefore not entitled to redress) should nevertheless be entitled to the full, unvarnished financial details of the Respondent in advance of that gateway finding?

Very quickly, we might review the various strands of the disclosure obligations.

Statute

Section 197 of the 2010 Act is as follows:

> ***197***.*— (1) In proceedings under this Part, each of the qualified cohabitants shall give to the other the particulars of his or her property or income that may be reasonably required for the purposes of the proceedings.*
>
> *(2) The court may direct a person who fails or refuses to comply with subsection (1) to comply with it.*
>
> *(3) A qualified cohabitant who fails or refuses to comply with subsection (1) or a direction under subsection (2) commits an offence and is liable on summary conviction to a class C fine, or to imprisonment for a term not exceeding 6 months, or to both.*

Superior Court Rules

Order 70B of the Rules of the Superior Courts, the specific rule which deals with Civil Partnership & Cohabitation, provides at Rule 5

> '(iii) *"An Affidavit of Means of the Applicant shall be served with the Verifying Affidavit grounding the proceeding and the Affidavit of Means of any Respondent or any other party shall be served with the Replying Affidavit in the proceeding unless otherwise ordered by the Master or*

the Court. Subsequent to the service of an Affidavit of Means either party may request the other party to vouch all or any of the items referred to therein within twenty-one days of the said request".

(iv) In the event of a party failing properly to comply with the provisions in relation to the filing and serving of an Affidavit of Means or failing properly to vouch the matters set out therein, the Court may, on application by Notice of Motion, grant an Order for Discovery and/or make such Order as the Court deems appropriate and necessary, including an Order that such party shall not be entitled to pursue or defend as appropriate such claim for ancillary relief under the Act save as permitted by the Court and upon such terms as the Court may determine are appropriate or the Court may adjourn the proceedings for a specified period of time to enable compliance with any such previous request or Order of the Court'.

High Court HC51/2009, (which is a Practice Direction governing claims under the Judicial Separation and Family Law Reform Act, the Family Law Act 1995 and the Family Law (Divorce) Act, 1996), does not encompass proceedings under the 2010 Act. However, as you will be aware, that Practice Direction is quite prescriptive of the nature and extent of the financial disclosure which is ordinarily expected of parties in the context of proceedings under those Acts. See paragraph 5 thereof. To return to the 'Family Law Think' theme, it is perfectly likely that that the requirements of the Practice Direction might be imported into a consideration of the disclosure obligations in a disputed Cohabitants case.

In the Circuit Court, Order 59A of the Circuit Court Rules (the comparable rule)

17. (1) Without prejudice to:

(a) the right of each party to request and/or make application to direct the delivery of further particulars or information;

(b) the right of each party to make application to the Court for an Order of Discovery; and

(c) the jurisdiction of the Court pursuant to section 142 and section 197 of the Act,

in any case where financial relief under the Act is sought, the parties shall file Affidavits of Means in accordance with rules 6 and 9 in respect of which the following sub-rules shall apply.

(2) In all cases where a Defence and/or Counterclaim has been filed (save for a Defence pursuant to rule 10(6)) each party shall, unless the other party dispenses in writing with the requirement of vouching, vouch his Affidavit of Means, in the manner specified in Form 51C, within 28 days of the date of filing of the Respondent's Affidavit of Means or 21 days before the date fixed for a case progression hearing, whichever is earlier.

(3) In all cases where a Defence has not been filed and a case progression hearing has been listed, each party shall vouch his Affidavit of Means within such time as the County Registrar shall direct.

(4) In the event of a party failing to file, serve, or properly vouch the items referred to in, their Affidavits of Means as required by these Rules—

(i) the Court, on application by notice of motion, and, in accordance with section 34(1) and the Second Schedule of the Courts and Court Officers Act 1995, the County Registrar, on application by notice of motion or in the course of case progression, may make an Order enlarging the time within which the party in default must file or serve an Affidavit of Means and/or vouch (in such manner or on such terms as the Court or the County Registrar, as the case may be, directs) the items referred to in any Affidavit of Means or may make an Order for Discovery, or

(ii) the Court may make such other order as the Court deems appropriate and necessary (including an order that such party shall not be entitled to pursue or defend as appropriate a claim for any ancillary reliefs under the Act save as permitted by the Court upon such terms as the Court may determine are appropriate and/or adjourning the proceedings for a specified period of time to enable compliance) and furthermore or in the alternative an order pursuant to

section 142(2) of the Act or, as the case may be, section 197(2) of the Act, may be sought in accordance with rule 23.

18. The Affidavit of Means shall set out in schedule form details of the party's income, assets, property, financial resources, debts, liabilities, financial obligations and financial responsibilities wherever situated and from whatever source and, to the best of the deponent's knowledge, information and belief the income, assets, property, financial resources, debts, liabilities, financial obligations and financial responsibilities wherever situated and from whatever source of any dependent child of the party and shall be in accordance with the form set out in Form 51 or such modification thereof as may be appropriate.

39. Order 59, rule 4(38) shall apply, with the necessary modifications, to civil partnership law proceedings and to cohabitation proceedings and the Forms 37L, 37M and 37N modified accordingly shall be used in case progression in civil partnership law proceedings and in cohabitation proceedings.

Form 37L as we are all aware is very prescriptive as to the type of documentation which is presumed to be made available

All items in the Affidavit of Means of the parties shall be properly vouched to the other party. Such vouching shall, where relevant, include, but is not limited to, the following:

(i) Statements including credit cards statements from each and every bank or other financial institution at which an account has been maintained or funds otherwise held by, to the order or for the benefit of the party concerned, whether in that party's name or otherwise, for a period of one year prior to the date on which the Civil Bill was issued;

(ii) Detailed particulars of the assets and liabilities of each party (including benefits accruing and liabilities arising under any contingency) in existence at the commencement of, or acquired or incurred during the period of one year prior to the date on which the Civil Bill was issued;

(iii) Copies of any guarantees/indemnities given by or existing in favour of either party;

(iv) Copies of all tax returns returned by the party concerned for the last complete tax year ending in the period of one year prior to the date on which the Civil Bill was issued and for

any subsequent complete tax year, and of assessments to tax made upon the party concerned for that tax year or those tax years, together with supporting documentation and balancing statements;

(v) P60s for the party concerned for the last complete tax year ending in the period of one year prior to the date on which the Civil Bill was issued and for any subsequent complete tax year together with pay slips for any subsequent period showing the pattern of income during that subsequent period and up to the date of vouching and any deductions at source therefrom;

(vi) Sets of full annual accounts for the last complete year of trading ending in the period of one year prior to the date on which the Civil Bill was issued (audited where required by law together with, where such accounts are required by law to be audited but audited accounts have not been produced for that period, the most recent audited accounts) of any company, partnership, profession or business in which any party has a shareholding or interest, save for a company which is publicly quoted in a recognised exchange, or as otherwise directed by the County Registrar;

(vii) Detailed particulars of any grants, subsidies, payments from any public fund or agency, or similar benefits for a one year period;

(viii) Detailed particulars of any pension and insurance/assurance policies or their equivalent;

(ix) Detailed particulars of any settlement, trust or other instrument of equivalent effect of which the party concerned is settlor, beneficiary or a potential beneficiary;

(x) Detailed particulars of any benefits received under any of the instruments mentioned at (ix);

(xi) Vouching shall be for the period from the date which is one year before the date on which the Civil Bill was issued to date unless otherwise directed by the Court or by the County Registrar, or agreed between the parties.

The above sets out the statutory basis on which financial disclosure is required and the particular Rules of Court complementing the same.

It may be seen therefore that simply by issuing proceedings where you claim to be a cohabitant and a qualified cohabitant very considerable and invasive (and not to say expensive) disclosure obligations are immediately triggered.

In the interpretation of the limits of these Statutory and Rules based obligations, it has been the experience on the Family Law side that the Courts have been reluctant to define the limits of disclosure required, given the statutory, and in the case of Divorce constitutional imperative to ensure that proper provision is made for the parties and, where applicable, their children. There is ample case law from the Superior Courts on this issue[10]. In assessing the scope of the disclosure obligations that arise under the 2010 Act, and efforts to define limits to a particular situation I have often felt that there is a tendency among practitioners (and the Court) to import into their considerations and advices the dicta that emanate from this line of authorities.

So the proceedings have been issued and served, the disclosure obligations have been triggered, but you are instructed by the Respondent that there is no way the Applicant will establish that he or she is a cohabitant or a qualified cohabitant. Your client assures you that it is clear cut – it never is – and complains, why should I have to go to all this trouble when the claim will fall flat on its face?

This is where I come to the idea of the 'gateway' and the analogy I draw is with Judicial Separation and Divorce.

We are all aware that it is only possible to get financial relief from the Courts under the 1995 Act and the 1996 Act ancillary to a Decree of Judicial Separation or a Decree of Divorce, as the case may be. The granting of the Decree might be described as a gateway to relief. Leaving aside jurisdictional issues - local jurisdiction issues such as whether the proceedings have been

[10] See for example A(A) v A(B); A(B) v A(A) [2014] IESC 49; SQ v TQ, Unreported Keane J. June 2014 and QR v ST [2016] IECA to name but three. See also Livesey v Jenkins [1985] 1AC 424; Prest v Petrodel [2013] 2 AC 415, wherein principles surrounding the need for full disclosure are discussed; those principles have been endorsed by the Irish decisions on the subject.

issued on the correct circuit, or wider jurisdiction issues such as ordinary residence in the state - in both Judicial Separation and Divorce proceedings, one has to prove that there is a valid marriage and to take an easy example, that there has been no normal marital relationship between the parties for one year prior to the institution of the within proceedings. Once the Court is satisfied of these two matters of fact then, and only then, can it embark on a consideration of the provision that will flow from the Decree of Judicial Separation being granted. A similar but slightly different exercise is undertaken in the context of a Decree of Divorce being applied for. These issues might collectively be called "gateway issues".

Occasionally, but in my experience rarely, the Family Law Courts have embarked on trials of the gateway issues prior to embarking on the provision aspect of matters[11].

It seems to me that there might be an argument in some cases to consider whether the Court should be asked to hear and determine the issues surrounding the status of 'cohabitant' and 'qualified cohabitant' before it tries issues centering on the quantum and composition of financial redress.

But then, take a look at Sections 172 and 173. I have set out below both sections and have highlighted in red the issues of fact which need to be proved.

Cohabitant and qualified cohabitant.

172.— (1) For the purposes of this Part, a cohabitant is one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.

(2) In determining whether or not 2 adults are cohabitants, the court shall take into account all the circumstances of the relationship and in particular shall have regard to the following:

(*a*) the duration of the relationship;

(*b*) the basis on which the couple live together;

[11] See for example S v S, Abbott J., [2009].

(*c*) the degree of financial dependence of either adult on the other and any agreements in respect of their finances;

(*d*) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;

(*e*) whether there are one or more dependent children;

(*f*) whether one of the adults cares for and supports the children of the other; and

(*g*) the degree to which the adults present themselves to others as a couple.

(3) For the avoidance of doubt a relationship does not cease to be an intimate relationship for the purpose of this section merely because it is no longer sexual in nature.

(4) For the purposes of this section, 2 adults are within a prohibited degree of relationship if—

(*a*) they would be prohibited from marrying each other in the State, or

(*b*) they are in a relationship referred to in the Third Schedule to the **Civil Registration Act 2004** inserted by ***section 26*** of this Act.

(5) For the purposes of this Part, a qualified cohabitant means an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period—

(*a*) of 2 years or more, in the case where they are the parents of one or more dependent children, and

(*b*) of 5 years or more, in any other case.

(6) Notwithstanding *subsection (5)* , an adult who would otherwise be a qualified cohabitant is not a qualified cohabitant if—

(*a*) one or both of the adults is or was, at any time during the relationship concerned, an adult who was married to someone else, and

(*b*) at the time the relationship concerned ends, each adult who is or was married has not lived apart from his or her spouse for a period or periods of at least 4 years during the previous 5 years.

173.— (1) A qualified cohabitant may, subject to any agreement under ***section 202*** , apply to the court, on notice to the other cohabitant, for an order under *sections* ***174*** , ***175*** and ***187*** or any of them.

(2) If the qualified cohabitant satisfies the court that he or she is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship, the court may, if satisfied that it is just and equitable to do so in all the circumstances, make the order concerned.

(3) In determining whether or not it is just and equitable to make an order in all the circumstances, the court shall have regard to—

(*a*) the financial circumstances, needs and obligations of each qualified cohabitant existing as at the date of the application or which are likely to arise in the future,

(*b*) subject to *subsection (5)* , the rights and entitlements of any spouse or former spouse,

(*c*) the rights and entitlements of any civil partner or former civil partner,

(*d*) the rights and entitlements of any dependent child or of any child of a previous relationship of either cohabitant,

(*e*) the duration of the parties' relationship, the basis on which the parties entered into the relationship and the degree of commitment of the parties to one another,

(*f*) the contributions that each of the cohabitants made or is likely to make in the foreseeable future to the welfare of the cohabitants or either of them including any contribution made by each of them to the income, earning capacity or property and financial resources of the other,

(*g*) any contributions made by either of them in looking after the home,

(*h*) the effect on the earning capacity of each of the cohabitants of the responsibilities assumed by each of them during the period they lived together as a couple and the degree to which the future earning capacity of a qualified cohabitant is impaired by reason of that qualified cohabitant having relinquished or foregone the opportunity of remunerative activity in order to look after the home,

(*i*) any physical or mental disability of the qualified cohabitant, and

(*j*) the conduct of each of the cohabitants, if the conduct is such that, in the opinion of the court, it would be unjust to disregard it.

In light of the above, how feasible might it ever be to ask the Court to determine this issue in advance of the financial issues of the case being tried?

Preliminary issues.

Firstly, the Rules of the Superior Courts (both Order 25 and Order 34, in their slightly differing ways) provide for trials of preliminary issues of law and **not** issues of fact. Indeed, for a preliminary issue of law to be set up properly, the parties have to agree on a factual matrix against which the issue of law is to be determined. Delaney and McGrath, in their most recent iteration of Civil Procedure in the Superior Courts note as follows:

> *'It is clear from the authorities that the trial of a preliminary issue will only be ordered in limited circumstances where a discrete issue or issues arise in proceedings that can be conveniently tried by reference to agreed facts and the determination of which may dispose or substantially dispose of the entire action or otherwise be likely to lead to a substantial saving in time and costs. The classic example of where that test may be met is where a defendant pleads that the proceedings are statute barred although the trial of the issue as to whether the proceedings are statute barred will not be ordered where the plaintiff alleges fraudulent concealment requiring the determination of contested facts'*[12].

[12] see paragraph 14-13 thereof.

The issue as to whether a person is a cohabitant or qualified cohabitant is almost entirely an issue of fact and in the circumstances not a matter which would be suitable for a *preliminary issue* in the narrow use of that term.

Modular Trials

The Court has its own jurisdiction, an inherent jurisdiction, to direct a modular trial. For example, a trial of liability followed by a trial of quantum (assuming the issue of liability is established in the first place). This jurisdiction has been augmented by Order 36 rule 9 of the Rules of the Superior Courts as inserted by Statutory Instrument No. 254 of 2016. It provides

> *"(1) Subject to the provisions of the preceding rules of this Order, the Court may in any cause or matter, at any time or from time to time order:*
>
> > *(a) that different questions of fact arising therein be tried by different modes of trial;*
> >
> > *(b) that one or more questions of fact be tried before the others;*
> >
> > *(c) that one or more issues of fact be tried before any other or others."*

This would appear to provide a Rules-based basis upon which a modular or split trial may be ordered[13]. I am frankly uncertain what the difference between 'questions of fact' and 'issues of fact' are, but I am sure it could be teased out.

In **Cork Plastics (Manufacturing) v Ineos Compound U.K. Ltd[14]**., a judgement delivered before the change to the Rules as adverted to above, Clarke J said as follows:

> *'It is, therefore, in my view, unnecessary to consider the precise provisions of the rules of Court. The somewhat narrow circumstances in which a formal preliminary issue can be directed under the rules of Court are identified in the*

[13] Order 63A, rule 5 entitles the Court to give such directions regarding the conduct of the proceedings as appears convenient for the determination of the proceedings in a manner which is '*just, expeditious and likely to minimise the costs of those proceedings*'.
[14] [2008] IEHC 93

jurisprudence with precision for good reason. Experience has shown that the formal separation out of a preliminary issue can often make the apparent shortest route, the longest way home. However, the conduct of complex litigation in a modular fashion is not the same thing as the formal separation of preliminary issues. Rather it involves the Court exercising its inherent jurisdiction as to how a single trial of all issues is to be conducted. Is the whole trial to be conducted at one go, or should the Court proceed to hear and determine certain issues in advance of others? Dealing with the single trial in such a modular fashion is simply the exercise by the Court of its inherent jurisdiction to order the manner in which a trial is conducted'.

Further on he said:

'The perceived advantage of a modular trial is that, if the result of earlier modules goes in one way, subsequent modules may either become unnecessary or may be capable of being dealt with in a much more focused fashion. Thus, the most common division between liability issues and quantum issues can give rise to a saving of court time and expense in the event that the Plaintiff does not succeed on liability. In those circumstances, of course, neither the parties nor the Court are put to the time and expense of having to deal with quantum issues which do not arise. However, such a result, of course, is only a possibility. If the Plaintiff succeeds, then quantum will have to be dealt with in any event. Where the litigation is straightforward and relatively concise, then there is every risk that time and expense will be added by a modular trial in the event that the Plaintiffs succeed. In simple and straightforward litigation which might be expected to last one or a small number of days at hearing, should all issues be tried together, there is a real risk that separating the issues into, for example, liability and quantum questions, could lead to more time being spent in Court and significant additional expense being incurred by the parties in having to reassemble on a second occasion'.

'Therefore, in any straightforward litigation, and in the absence of some unusual feature (such as, for example, the unavailability of quantum witnesses which might otherwise lead to an adjournment), the risk that the proceedings

will be longer and more costly if divided will be seen to outweigh any possible gain in Court time and expense in the event that the Plaintiff fails on liability'.

Very recently, in **Szczurowski, -v- Noonan**[15], the Court relied on the Cork Plastics case as being the main authority on the considerations around whether or not to direct a modular or split trial.

As an aside, when I was looking for cases dealing with modular trials I came across **Sheehan v Flynn & ors**.[16] The Judgment is mostly taken up with considerations as to whether in the context of the particular litigation between the parties, a modular trial should be directed. But what shines out to me is that Twomey J has some very interesting, not to say challenging, observations about the allocation of Court resources in private disputes between private persons. He also articulates and acknowledges the challenge, in terms of allocation of scarce Court resources, posed by lay litigants, both with and without private means. That philisophical discussion is one for another CPD event.

In respect of Modular trials, a 2016 Judgment of Barrett J in **White v The Bar Council of Ireland, the Minister for Justice and Equality, Ireland and the Attorney General** [17] helpfully draws together the applicable principles:

'Modular Trial

23. It seems to the court that the law applicable to whether or not the court should order the modular trial of an action, at least so far as applicable to the case at hand, can be summarised in the following nine principles:

> *[1] The court can, in the exercise of its inherent jurisdiction to maintain control over the conduct of trials before it, direct a modular trial where some of the issues are separated out. (**Dowling v. Minister for Finance** [2012] IESC 32, para.5.1).*

[15] an ex tempore judgment of Mr. Justice Tony O'Connor delivered on the 5th day of February, 2018.
[16] [2018] IEHC 188
[17] [2016] IEHC 283

*[2] The conduct of litigation in modular fashion is to be distinguished from the formal separation of preliminary issues. It involves the court exercising its inherent jurisdiction as to how a single trial of all issues is to be conducted, be it (a) at one go (i.e. via a unitary trial), or (b) with the court hearing and determining certain issues in advance of others (i.e. on a modular basis). (**Cork Plastics Manufacturing v. Ineos Compound U.K. Ltd.** [2008] IEHC 93, para.2.3).*

*[3] In deciding whether to order a modular trial, the court should determine what is just and convenient by reference to a broad and realistic view which should include the avoidance of unnecessary expense and the need to make effective use of court time. The court should accord due weight to the public interest and not place undue regard on perceived tactical advantages and disadvantages of the parties concerned. (**Cork Plastics**, Clarke J., para.2.5).*

*[4] The default position is that there should be a single trial of all issues at the same time. (**Cork Plastics**, Clarke J., para.3.1).*

*[5] In any straightforward litigation, and in the absence of some unusual feature, such as, for example, the unavailability of quantum witnesses which might otherwise lead to an adjournment, the risk that the proceedings will be longer and more costly if divided will be seen to outweigh any possible gain in court time and expense in the event that a plaintiff fails on liability. (**Cork Plastics,** Clarke J., para.3.3).*

[6] Factors relevant to determining whether to order a modular trial include (i) the complexity and length of the likely trial, (ii) the likely relative length and complexity of the respective modules which might be proposed, (iii) the need to insulate a party, who is involved with some issues only, from the expense and time of having to attend a lengthy trial, (iv) whether the approach to the calculation of damages will differ significantly depending on how liability is made out and the way in which various of defence may be resolved; (v) what is to

*happen in relation to any possible appeal; (vi) the extent to which there may be overlaps in the evidence that is relevant to the proposed modules; (vii) any real suggestion that true prejudice (rather than a perceived tactical prejudice) might occur by the absence of a unitary trial; and (viii) other special or unusual circumstances that may arise on the facts of any individual case and which need to be given all due weight. (**Cork Plastics**, Clarke J., paras. 3.4, 3.6, and 3.9-13).*

*[7] A court in determining whether or not to order a modular trial can usefully ask itself the following four questions: (i) are the issues to be tried by way of preliminary module readily capable of determination in isolation from the other issues in dispute between the parties? (ii) has a clear saving in the time of the court and the costs that the parties might have to bear been identified? (iii) would a modular order result in any prejudice to the parties? (iv) is the motion a device to suit the moving party or does it genuinely assist the litigation by being of help to the resolution of the issues? (**McCann v. Desmond** [2010] 4 IR 554, 558).*

*[8] It would defeat the purpose of a modular trial if a party could easily and for little good reason seek to re-open matters already determined in an earlier module when the court came to consider later modules. (The potential for this latter event to arise will of course impact on the initial decision whether or not to go for modular trial). (**Inland Fisheries Ireland v. O'Baoill** [2015] IESC 45, para.5.3).*

[9] Perhaps a point more relevant to the conduct of modular trials than a factor of relevance to the determination as to whether to order modular trial, a court should not, without good and strong reason, enable any finding from an earlier module to be revisited at a subsequent module. In particular, the formal findings of the court on the specific issues which were to be, and were, determined on an earlier module should only be re-opened in exceptional

> *circumstances. To do otherwise would be to risk procedural chaos and to defeat the purpose of a modular trial. (****Inland Fisheries Ireland v. O'Baoill*** *[2015] IESC 45, para.5.3). The potential for the last-mentioned predicament may, it seems to this Court, impact on a trial judge's assessment, pursuant to McCann, as to whether issues are properly capable of determination in isolation from the other issues in dispute'.*

In light of the above, in my view a Court would refuse an application for a modular hearing in most cases. Further, it does not follow that if a modular hearing is directed, that this would bring down the shutters on the process of financial disclosure in the meantime. For example, if the application was made very early on in the proceedings, the Court might feel that it couldn't properly assess the merits of the application until the considerations set out by Barrett J could be met. Apply too early, you may be told that the application is premature, apply too late, whereas you may succeed in obtaining the modular trial, that may not entail a suspension of financial disclosure.

And finally…..

I think that part of the attraction of an event such as this (apart from the savage amount of CPD points on offer) is the opportunity for colleagues to meet and trade stories of successes and failures from the war front. The more jaded among us, might be forgiven for thinking that we've heard it all, that there's nothing new under the sun and that the delight is in the re-telling and re-hearing of familiar tales. But believe me, there are always new tales.

I came across an old book called "A second miscellany at law". In a chapter called "A Crazy Quilt", the author muses that not all marriage proposals are orthodox. He quotes Lord Wheatley who, whilst giving Judgment in 1959, said the following:

> *'In the course of experience one has encountered many strange circumstances, but in my personal experience, and I should imagine in the experience of the Court, this is the first time a proposal of marriage has been made under cross examination".*

It seems that it was only while being cross examined by his soon to be ex-wife's Counsel, that the Respondent in a Scottish divorce action first raised the issue of marriage with his Co-Respondent. History doesn't record her answer; presumably it was marked 'without prejudice'!

And I am quite sure that none of us has been asked to advise on the problems involved in the separate marriages of female Siamese twins. In the same book, there is mention of a report from 1797 of the arguments and the decisions in a sadly fictional case on the subject. Showing a rare judicial wisdom the judge of the consistory court held that the marriages were valid and ordered both husbands *"to cohabit with your Wives and to lie in bed each on the side of his own Wife. I hope, Gentlemen, you will seriously consider that you are under a stricter tye than common Brothers-in-law; that being, as it were, Joint Proprietors of one common Tenement, you will so behave as good Fellow-lodgers ought to do, and with great modesty each to his respective Sister-in-law, abstaining from all further Familiarities than what Conjugal Duties do naturally oblige you to. Consider also by how small limits the Duty and the Trespass is divided; lest, while ye discharge the duty of Matrimony, ye heedlessly slide into the sin of Adultery"*.

Thank you.

Paul McCarthy SC.

Biographical note.

Called to the Bar in 1989; took Silk in October 2016. Specialising in provision cases.