
CHAPTER 12

Corporate Litigation

12.1 Introduction

12.1.1 In its first work programme the Review Group was asked to look at the case for establishing a Companies Court, i.e. a dedicated forum for dealing with company law within the legal system. The Group approached this issue through consideration of two interlinked objectives: (a) the case for dedicated treatment of company law within the High Court system; and (b) the case for improved management of dispute resolution in the area of company law.

12.2 Approach of Review Group

12.2.1 The focus of the Review Group's interest in this chapter is on business-to-business and business-to-State litigation. As such, the Group's concern is exclusively on the administration of civil law in the High Court. The Group considers the area of criminal acts and omissions under the Companies Acts in Chapter 8. Summary offences under the Companies Acts have usually been prosecuted by the Minister¹ and by the CRO (for filing offences) in the District Court. It is also relevant to note, for example, that the 1999 (No 2) Act gives the Registrar and creditors the right to apply to the Circuit Court rather than the High Court for the restoration of a company that has been struck off.²

12.2.2 It is important to note that the Review Group is not proposing reforms to this area because of a general perception of problems and inadequacies currently applying. The Group received no submissions which referred in specific terms to inefficiencies in the courts regarding delays or process. Neither did the Group receive any submissions reflecting concerns about the lack of specialised company law expertise in the administration of justice. Some anecdotal comments were offered by the IBEC representative on the Review Group which reflected some perceptions in business that, in dealing with company law issues, the Irish courts were less consistent than in other jurisdictions and that unforeseen delays sometimes happened during the progress of cases.

12.2.3 The Review Group does not, however, see its task of evaluating the best approach to corporate litigation as being concerned solely with the solving of current problems. The Group takes the view that Ireland, to complement its world-class economy, should have both a world-class companies code and legal structures and processes geared to efficient dispute resolution. It is from this perspective that the Review Group approached the issue of corporate litigation.

12.2.4 The context is that Ireland has, since 1997, experienced the fastest and most sustained period of growth in its history.³ The economy has undergone structural change and an enormous increase in economic activity, much of it of a complex and sophisticated nature and much also having a strong international dimension. This will inevitably lead to a greater incidence of commercial/company law disputes presenting before the courts for resolution. Moreover, the increasing use of e-commerce makes it even more imperative that disputes are resolved in a timely manner.

12.2.5 The Group wishes to make a case for improving the efficiency of commercial dispute resolution for companies already established in Ireland. The Group considers such can be viewed as an economic activity in itself, leading over time to a more frequent choice of the Irish courts as a forum for commercial litigation, particularly by those international firms which have set up in Ireland.

1 With very limited exceptions, summary offences which were prosecuted by the Minister will in future be prosecuted by the Director on foot of the 2001 Act.

2 See s 46 of the 1999 (No 2) Act which repeals and substitutes ss 12, 12A, 12B, 12C and 12D of the 1982 Act.

3 Irish GNP has grown by 9.4% in 1997, 7.9% in 1998, 8.2% in 1999 and 10.4% in 2000. Estimated GNP growth for 2001 is 5.2% (Source: Department of Finance Monthly Economic Bulletin, February 2002).

12.3 The organisation of the courts

- 12.3.1 Article 34 of the Irish Constitution, *Bunreacht na hÉireann*, makes provision for the administration of justice "in courts established by law by judges appointed in the manner provided by the Constitution." Article 38 of the Constitution provides that the existing courts and judges are to exercise the same jurisdiction as heretofore "unless otherwise determined by law." The Courts (Establishment and Constitution) Act 1961 gives effect to the provisions of Article 34 by establishing a Court of Final Appeal and Courts of First Instance. Provision was made for the establishment of five courts, namely, a Supreme Court, a High Court, a Court of Criminal Appeal, a Circuit Court and a District Court. The Act sets out the constitution of these courts and makes provision in relation to their organisation. Section 10(3) of the Courts (Supplemental Provisions) Act 1961 as amended, provides that "it shall be the function of the President of the High Court to arrange the distribution and allocation of the business of the High Court."
- 12.3.2 The number of ordinary judges of the High Court is fixed from time to time by Act of the Oireachtas. There are currently 26 High Court judges being the President of the Court and 25 ordinary judges. Of this number, 22 are in the High Court (having regard to the various tribunals and a Commission). Eighteen judges are currently assigned by the President of the High Court to civil work and four judges are assigned to criminal work. There are a number of legislative provisions for jurisdiction in certain matters to be vested in the President of the High Court and for assignment by the President of a judge or judges to particular areas of the work of that court. *The Rules of the Superior Courts*⁴ provide for the assignment by the President of a judge or judges to certain areas of the work of that court, e.g. on chancery, company law matters, bankruptcy, winding-up matters and examinerships.
- 12.3.3 Although separate divisions are no longer provided for in legislation, the High Court conducts its business through cases being heard in a number of lists. In practice, it appears that until the end of the 1970s judges were assigned particular areas of work and there was very little interchangeability. The fast changing jurisdictional landscape has meant that whilst the business of the High Court is still conducted through various lists, judges are now more frequently rotated. All judges are now required to deal with all kinds of litigation. It can be argued that a system without divisions and permanent assignments allows for flexibility in the allocation of judges where and when needs are perceived, and allows for judges to gain a range of experience. On the other hand, from the litigator's point of view the greater specialisation of judges in complex areas (such as company law) is more likely to be seen as an advantage.
- 12.3.4 Many changes in society, legislation and the economy have occurred in the past twenty years. These have been reflected in the type and volume of the business of the High Court and have affected the way business is conducted. The many problems that have beset the courts in this period are detailed in the Reports of the Working Group on a Courts Commission (WGCC), which was established in October 1995. The changes that occurred during this period include the huge increase in the volume of litigation, new areas of litigation and increased complexity of many areas of litigation. In the area of company law, the lengthy recession of the 1980s lead to a marked increase in insolvency matters, mortgage suits and applications by financial institutions for possession of lands. This situation was met by setting up a separate *Examiner's court motion list*⁵ and a separate *Chancery special summons list*. Noteworthy also is the appointment of extra judges to the Supreme Court and the resultant reduction in times for hearing of appeals. Currently, two Supreme Courts can, and frequently do, sit simultaneously.

⁴ Rules of the Superior Courts 1986 (SI No 15 of 1986).

⁵ The Examiner referred to is the Examiner of the High Court, a High Court official, not an examiner appointed to a company under the 1990 Amendment Act. See also 12.5.13.

12.4 The Working Group on a Courts Commission

12.4.1 The complex issues which have arisen in law and the administration of justice over the past few decades were set out by the WGCC in its concluding report (November 1998):

"The problems for the court today are not simply the result of the cases having become lengthier and more complex, although that is undoubtedly a factor. In recent decades whole new fields of law have opened up and inevitably, the Supreme Court, as the final court of appeal, has been deeply involved in the relevant law. This has been particularly the case in relation to constitutional law, family law, judicial review, European Union law, competition law, employment law and anti-discrimination law."

12.4.2 Apart from the development of these areas of the law, there has been an enormous increase in the number of cases coming to the courts in traditional areas of the law, i.e. criminal law, personal injuries and commercial and chancery cases. To cope with this greatly increased volume of cases, the number of High Court judges has increased fourfold in the past twenty years and the volume of appeals coming to the Supreme Court has also increased correspondingly.

12.4.3 The case for dedicated treatment of particular matters in the court is always complex, having regard to concerns about specialisation and continuity on the one hand and flexibility on the other. The WGCC did not deal specifically with the case for a dedicated commercial court. It did consider the issue of a dedicated court in the family law area and recommended that a Family Law Division should be set up in the High Court, the Circuit Court and the District Court. The WGCC also recommended the introduction of a full system of case management in this area, and that judges should be assigned by the Court Presidents to the Family Law Divisions on the basis of their experience, legal knowledge, inclination and temperament. Each judge should be prepared to spend at least one law term in the Family Division, but judges should not be assigned permanently to family law. Judges should be enabled to attend meetings and seminars, particularly in regard to newly enacted legislation, in the family law area. The Courts Service Strategic Plan 2000 to 2003 sets out strategies to develop and implement short, medium and long-term plans for the provision of family law court services.

12.4.4 It is also of relevance to note that the WGCC in its report on *Case Management and Court Management* (July 1996) concluded that serious consideration needed to be given to the creation of a Division of the High Court (the WGCC used the term "small Division") to deal with bankruptcy, company liquidations and matters arising from the Examiner's List. The Commission felt that this Division could be created as a pilot scheme. The report noted the efficacy of the "specialised modern caseload management system" in modernising the operation of the Examiner's Court. Currently, insolvency matters are heard in the Chancery lists, the Examiner's court motion list and the bankruptcy list. In practice, insolvency matters, whether motions, petitions or substantive hearings are usually heard by a small number of judges.

12.4.5 The report of the WGCC noted the proposals for case management in the UK in the Woolf Report (1996) *Access to Justice*⁶ and drew the conclusion that pursuing such an approach in Ireland would, inter alia, entail consideration as to whether:

"... the High Court should sit in specialised divisions (commercial, chancery, insolvency, judicial review, personal injuries and family law) with a senior judge in each division exercising the case management responsibilities for that division."

12.4.6 It is clear that the WGCC was prepared to consider the creation of Divisions within the High Court on the basis of the merits of such Divisions. This is despite the fact that separate Divisions are no longer provided for by legislation.

12.5 Current organisation: chancery/commercial/company law matters⁷

12.5.1 Each of the lists set out below has either a chancery/commercial/company law or insolvency law content. A number of these lists are linked to each other either by reason of content or procedure or by virtue of currently having the same judge assigned to two or more of these lists. The Review Group recognises that the assignment of specific judges to take charge of specific lists has brought benefits of consistency and continuity. The lists are:

- (i) the non-jury list;
- (ii) the judicial review list;
- (iii) the Chancery lists (1 and 2);
- (iv) the Chancery special summons list;
- (v) the Examiner's court motion list;
- (vi) the bankruptcy motion list

Company law matters

12.5.2 A very extensive range of company law matters is heard in the Chancery Courts. These include applications for the appointment of provisional liquidators and examiners to companies, the hearing of petitions to wind up companies, and applications to confirm reduction of share capital, to restore a company to the register, or to sanction a compromise or arrangement. Companies Acts matters are initiated by petition or originating notice of motion.

12.5.3 Currently there are two "main" Chancery lists, *Chancery 1* and *Chancery 2*. A *Monday list*⁸ is held in both of these courts. This list usually comprises:

- (i) matters for mention;
- (ii) petitions pursuant to the Companies Acts (usually creditors' petitions for winding up);
- (iii) motions/ Companies Acts matters where direction is required; and special summonses.

12.5.4 From Tuesday to Friday of each week these Courts are mostly concerned with the hearing of actions. Lengthy or complicated matters not suitable for the *Monday list* are also heard from Tuesday to Friday. If deemed sufficiently urgent, such matters can be adjourned from the *Monday list* to the following Thursday to see if a hearing date can be given within the next week, otherwise such motions are transferred into the next list to fix dates (see below). The practice has been to allocate Revenue matters to *Chancery 1* and matters relating to intellectual property rights including patents matters to *Chancery 2*. The Chancery Courts hear a combination of "pure" chancery matters, company law matters and "commercial" type matters where equitable relief is one of the remedies sought. Proceedings in the Chancery Courts or where equitable relief is sought are initiated by petition, summons or originating motion. Orders, which provide for the taking of accounts and inquiries by the Examiner (other than in mortgage suits), are also usually made in these lists.

The non-jury list

12.5.5 The *non-jury list* is presided over by a specifically-assigned senior judge. The bulk of the business of this list consists of cases, which would elsewhere be described as "commercial" cases. Other matters heard in this list include matters relating to planning and development and certain probate matters. Similar to practice in the Chancery lists, there is a *Monday list* and from Tuesday to Friday cases and motions not suitable for the *Monday*

⁷ For the purpose of clarity, it is important to distinguish between "company law" cases (which term is usually used in this jurisdiction to denote applications under the Companies Acts) which are dealt with in the Chancery lists, and commercial cases. In England and Wales, Northern Ireland and Scotland, which have dedicated Commercial Courts, the term "commercial case" is generally used to indicate a case relating to the supply or exchange of goods or services, banking, insurance or other financial services, and the carriage of goods, in which the principal remedy sought is the common law remedy of damages. These types of cases also make up the bulk of our non-jury list. In Northern Ireland, in cases where injunctive or other equitable relief is sought, the case may be dealt with in the Commercial List or in the Chancery List as the parties or the presiding judge decide. In this jurisdiction, commercial and company lists are dealt with in separate lists, but where a "commercial" case requires equitable relief it is usually dealt with in the Chancery list.

⁸ In weeks where there is a public holiday on a Monday, the *Monday list* is deferred to the following Monday.

list are heard. The *non-jury list* is at present combined with the judicial review list and presided over by the same judge. Currently, this list is supported each week (Tuesday to Friday) by three other judges assigned by the President.

Current practice in the Chancery and non-jury lists

- 12.5.6 Each law term, a hearing for a *list to fix dates* takes place in each of these lists in which cases in the list are allocated dates for hearing the following term. This list is comprised of: (i) actions which have been set down for hearing and are accompanied by a certificate of readiness from counsel or solicitor; and (ii) motions and other matters, e.g. special summonses in the case of the Chancery lists, are transferred into the lists for hearing.
- 12.5.7 The *certificate of readiness* takes the form of a letter from counsel certifying that the case is ready for hearing. This means that all preliminary matters such as discovery have been dealt with, that outstanding issues such as motions or orders have been disposed of or complied with and that the pleadings have closed. This certificate is filed in the Central Office of the High Court and placed with the papers which were lodged in the Central Office when the case was set down for hearing. The case is then transferred into a master list of certified cases to await the next *list to fix dates* and the assignment of a hearing date.
- 12.5.8 At the *list to fix dates* hearing, counsel is required to indicate to the court the length of time the trial will take and other relevant matters, e.g. whether the trial is on all issues or simply an assessment of damages. The advance notice of the holding of a *list to fix dates* and the list of cases therein is published in *The Legal Diary* approximately two weeks in advance of this date. Once the list for hearing has been fixed for the following term the list is published in *The Legal Diary*, together with the day and date assigned to each case and the estimated time each case will take (the latter piece of information having been supplied by counsel to the court at the fixing of the list).
- 12.5.9 Once a trial date has been given, the possibility of settlement is increased and a "back-up" case from further down the list will also be fixed for each date. The parties to this case will be aware that they will only be heard if the case ahead of them settles on the day. (Judicial review cases and cases stated do not have the same potential for settlement as other cases).
- 12.5.10 Periodically, a call-over of uncertified cases is held in relation to each of these lists. "Uncertified" means that the case has been set down, that the pleadings are closed but that for various reasons senior counsel is not ready to certify it as ready for hearing. The current practice of the court is to ask for an indication of when the case will be certified and to seek an explanation of why it was set down, if not ready for trial. For a number of years past it has been the practice to have a combined call-over of both *Chancery lists*, an innovation that has increased the efficient administration of both of these lists.
- 12.5.11 The weekly management of the *non-jury* and *Chancery lists* is dealt with by a call-over of each of these lists on Thursday mornings by the judge having charge of the lists. As a general rule, all matters which are ready for hearing in these lists are currently being allocated dates in the following term.
- 12.5.12 The High Court rises for approximately 15 weeks of the year, including all of August and September. During these vacations, the capacity to deal with litigation is reduced with one or two duty judges sitting to hear urgent matters.

Examiner's court motion list – bankruptcy list – Chancery special summons list

- 12.5.13 The Examiner's Office is attached to the High Court and is mainly concerned with chancery and company law matters. The Examiner deals in the main with court liquidations and associated matters. In the mid-1980s an *Examiner's court motion list* was established to deal with the increasing volume and complexity of cases in this

area. *The bankruptcy list* has also been assigned to the judge having charge of *Examiner's court motion list*. These two lists have benefited from a great degree of constancy in the judges assigned to them. The *Examiner's court motion list*, since its inception as a separate list, has only been assigned to a small number of judges sequentially. In the event that the assigned judge was unavoidably absent and unable to take the list it has invariably been assigned to a judge similarly experienced in chancery and company matters.

- 12.5.14 A third Chancery list, known as the Chancery special summons list was also established in the mid-1980s in response to an unprecedented increase in proceedings by mortgagees seeking sale and/or possession of lands. For the past number of years this list has been assigned to the judge assigned to take the *Examiner's court motion list* and the *bankruptcy list*.

12.6 Courts Service

- 12.6.1 The key recommendation of the WGCC, in its concluding report, was for the establishment on a statutory basis of an independent and permanent body, the Courts Service, to manage a unified court system. This has been done on foot of the Courts Service Act 1998, which provides for the establishment of an independent Courts Service with a unified organisation and structure to manage the courts. The functions of the Courts Service are to:

- (i) manage the courts;
- (ii) provide support services for the judges;
- (iii) provide information on the courts system to the public;
- (iv) provide, manage and maintain court buildings; and
- (v) provide facilities for users of the courts.

The Courts Service manages the courts under the direction of its Board, which determines policy.

- 12.6.2 The Review Group appreciates that the Courts Service has been established relatively recently and, in consequence, is not yet in a position to provide the range and degree of data which is available from jurisdictions with longer-established Courts Services. Such data would allow the Group to draw more definitive conclusions. In a lecture to the Law Society of University College Cork on 23 March 2001 Chief Justice Ronan Keane noted that it is difficult to get accurate and up to date material on court delays. The Chief Justice pointed out that in a civil case "a delay of a year or more can lead to drastic changes in circumstances and considerable hardship." In this context, the Group notes and welcomes the establishment of an information office within the Courts Service which includes a statistics unit. The Group, moreover, very much welcomes the commitment of the Courts Service to:

"[T]he production of statistics which will assist the public, the media and professionals in understanding the range of cases being dealt with through the Courts, allow for the evaluation of changes evident from the statistics and enable policy makers as well as the [Courts] Service to be proactive in dealing with such changes."⁹

- 12.6.3 The Review Group welcomes the fact that in its strategic plan the Courts Service identifies "willingness to change" as one of its values. To that end, the Service commits itself :

"[T]o constantly and honestly review the performance of the organisation and the quality of the service [the Courts Service] provide and embrace and promote the necessary change to ensure our ongoing effectiveness."

⁹ Courts Service Strategic Plan 2000 – 2003 (published November 2000). The Courts Service is required by s 7 of the Courts Service Act 1998 to prepare a strategic plan for submission to the Minister for Justice, Equality and Law Reform for approval and, after approval, laying before the Houses of the Oireachtas. The Strategic Plan reflect a process of public and user group consultation. A new plan will be prepared and issued every two years.

12.6.4 It is a matter of particular interest to the Group that the Courts Service has undertaken :

"[T]o assess and examine the need for the establishment of a commercial court and advise the Minister for Justice, Equality and Law Reform accordingly."

Recent developments

12.6.5 Consistent with the above, the Review Group notes that the Committee on Court Practice and Procedure¹⁰ is currently considering the case for a commercial court. The Group hopes that the views expressed in this report – which draw on a wide range of users of the court services for commercial litigation purposes and their experience - can be of assistance to the Committee in formulating its conclusions. The Group remains willing to be of further assistance if required. The Courts Service has already established a statistics unit and the first annual report dealing with its work was published in earlier this year. The Courts Service is also developing a template for the collection of Companies Acts statistics.

12.6.6 The Review Group welcomes the establishment by the Courts Service of a Working Group on the Jurisdiction of the Courts with terms of reference to carry out a root-and-branch examination of the organisation of the courts system and to recommend any necessary changes to allow for the fair, expeditious and economic administration of justice - including the creation of new, or the alteration of existing, jurisdictions. The work of the Group will be carried out in three modules: criminal law; civil law; and general changes in structures required as a result of recommendations in civil law and criminal law.¹¹

12.7 Other common law jurisdictions

12.7.1 The Review Group notes that, generally speaking, company/commercial law is treated distinctly from other areas of civil law in most common law jurisdictions:

England and Wales	Chancery Division, Companies Court, Commercial Court within the Queen's Bench Division
Australia	17 Standing Committees assist in administration of Federal Court: one of these Committees deals with Corporations
New Zealand	Separate Commercial List in High Court
Delaware, USA	Chancery Court

England and Wales

12.7.2 As in Ireland, the structures in other jurisdictions can be complex. For example, in England and Wales the principal business of the Chancery Division¹² comprises corporate and personal insolvency disputes, business, trade and industry disputes, the enforcement of mortgages, intellectual property matters, copyright and patents, disputes relating to trust property and contentious probate actions. The major part of the Chancery Division caseload involves business disputes of one kind or another. The Companies Court is a part of the Chancery Division. Applications in the High Court under the UK Companies Act 1985, the UK Insurance Companies Act 1982 and the UK Insolvency Act 1986, in relation to companies registered in England and Wales, must be commenced in the Companies Court. The Companies Court deals predominantly with the compulsory liquidation of companies and other matters under the UK Insolvency Act 1986. Registrars deal with most proceedings in the Companies Court but certain proceedings are heard by judges. The Commercial Court within the Queen's Bench Division is largely concerned with matters regarding contracts relating to ships, insurance, carriage of

10 The Committee on Court Practice and Procedure is an advisory committee to the Minister for Justice, Equality and Law Reform on the operations of the courts.
 11 Courts Service press release 10 January 2002
 12 The Chancery Division is one of the three parts, or Divisions, of the High Court of Justice; the other two being the Queen's Bench Division and the Family Division.

cargo and the construction and performance of mercantile contracts. Other matters dealt with involve banking, international credit, contracts relating to aircraft, the purchase and sale of commodities and the practice of arbitration and questions arising from arbitrations.

12.7.3 In England and Wales, there has been an interesting recent development in respect of the Commercial Court. The Lord Chancellor,¹³ Lord Irvine, commissioned a *Commercial Court Feasibility Study* to examine the potential for establishing a new Commercial Court in London to handle a wide range of high value and international commercial litigation and to develop Britain's role as a global centre for dispute resolution.¹⁴ The study set out to assess the feasibility of a new way to deal with commercial disputes using the latest information technology and international communications, capable of attracting legal business from around the world. The study also explored the scope for any new court to be self-financing, drawing no subsidy from any other part of the civil justice system. The study includes work currently dealt with by the Commercial Court, the Admiralty Court, the Technology and Construction Court, the Patents Court and the Companies Court. The study explored:

- the scale and type of commercial litigation in England and Wales;
- the broad size of the world market;
- the prospects for growth of the market;
- the scope for attracting an increased share of the world market;
- factors which determine litigants' choices of jurisdictions;
- costs and funding options of developing and operating a new court;
- the benefits to court users and the to UK economy;
- the benefits to the public purse;
- the impact on commercial litigation outside London.

The study programme in the UK and abroad involved consultation with the (British) Court Service, the judiciary and the legal profession and with commercial interests including those with extensive international operations.

12.7.4 *The Commercial Court Feasibility Study* was completed in February 2001.¹⁵ It is worth noting that a substantial concern of the report is to maintain or improve the UK share of the global commercial disputes resolution market. The study found that the market wants a reduction in the total cost of litigation and an improvement in the user-friendliness and accessibility of the system as a whole, while retaining its current strengths around the quality and enforceability of judgments. One of the options considered in the report focuses on delivery by the state of an integrated High Court litigation service to businesses, whether domestic or international. The study proposes the creation of a common infrastructure to support the operation of the courts providing services to business, i.e. the Commercial, Admiralty and Technology and Construction Courts in the Queen's Bench Division and the Patents and Companies Court in Chancery. The intent would be to provide a model of operation that is suitable for all business-to-business and business-to-State civil litigation. As such, the focus is on underlying business processes and technologies used to support the operation and management of the courts. Distinct listings and, indeed, existing Divisions would continue. Alternative options put forward were : (a) to focus on constructing a purpose-built (physical) commercial court and back-up facilities available for business litigation; and (b) the creation of an integrated dispute resolution centre covering litigation, arbitration and alternative dispute resolution (ADR).

Scotland

12.7.5 In Scotland, an interesting model for the transaction of commercial litigation was set up in the Court of Session¹⁶ in 1994. In broad terms, the objective is to enable specialist judges to handle commercial cases quickly and

13 The Lord Chancellor is responsible for the effective management of the courts, the appointment of judges, magistrates and other judicial office holders, the administration of legal aid, the oversight of a varied programme of Government civil legislation and reform in such fields as family law, property law, defamation and legal aid.

14 Press release (Lord Chancellor's Department, 9 November 2000).

15 Commercial Court Feasibility Study, (Lord Chancellor's Department, February 2001).

16 The Court of Session is the Scottish equivalent of the High Court.

flexibly. The impetus for this initiative was the report of a working party, which had consulted widely among commercial interests. The objective is to meet the recognised demand for a procedure which enables such litigation to be dealt with expeditiously and without undue technicality, with an appropriate level of expertise, and in a manner consistent with fairness and the proper consideration of the issues.

- 12.7.6 In the Scottish system, three judges have been nominated as commercial judges, for whom commercial business will have priority. One of the three is available full time for commercial work. The other two have their programme of work arranged so that one of them is available for commercial business if required. The rules of procedure are adapted in such a way as to give the judges an active role in progressing the cases and in determining how the issues are to be addressed.
- 12.7.7 New commercial rules have been drafted on the basis that parties should recognise that there is a joint interest in securing the efficient disposal of business and with a view to developing a co-operative approach in practice. In the exercise of their extended role, the judges are required to proceed on information given to them by the parties, for example, as to the time needed for preparation. From the court's perspective it is essential that the judges should be given accurate information to enable reasonable and realistic allowances to be made: the corollary is that the parties will be expected to adhere to what is fixed by the judge in the light of the information provided.
- 12.7.8 Generally, the rules have in view disputes of a business or commercial nature, in the ordinary sense of those expressions, relating to matters such as the supply or exchange of goods or services, banking, insurance and other financial services and the carriage of goods. In the first instance, the procedure is elective but the court has power to resolve differences of opinion between parties.
- 12.7.9 The court encourages a free flow of information and views between the court and the business community about the practical operation of the commercial court. A users' committee allows discussion of the issues. Its members include the commercial judges, representatives of the legal profession and representatives from commerce and industry.

Australia

- 12.7.10 In Australia, company law has been complicated by the respective competences of federal and state governments. Uniformity has been achieved with the Corporations Act 1989 and the Australian Securities Commission Act 1989 and the subsequent passage of legislation by each state applying these federal statutes as their own law. There was a cross-vesting of jurisdiction giving the Federal Court of Australia and each state Supreme Court jurisdiction with respect to civil matters arising under the Corporations Law of all jurisdictions.¹⁷

Victoria, Australia

- 12.7.11 The individual Australian States are more appropriate comparator jurisdictions to Ireland than the Commonwealth (federal) legal system as regards history, size and volume of litigation. In Victoria, for example, with effect from 1 February 2000 the judges and masters of the Supreme Court of Victoria (equivalent to the High Court of Ireland) have operated in three Divisions:
- (i) the Commercial and Equity Division;
 - (ii) the Criminal Division; and
 - (iii) the Common Law Division.

17 This solution has been complicated by the judgment of the High Court of Australia in *Re Wakim* [1999] HCA 27 (17 June 1999). The High Court of Australia decided that the cross-vesting provisions of the Commonwealth Corporations Act and the various state Corporations Acts that purported to give the Federal Court jurisdiction to hear and decide cases arising under the Corporations Law were unconstitutional. The High Court held that the Federal Court did not have the power to decide matters that were exclusively within the jurisdiction of the states. Since the Corporations Law is legally state legislation this decision meant the Federal Court could not hear or decide Corporations Law cases.

The express purpose of this change was to increase the efficient use of judges and masters of the court, to improve the system for litigants and their lawyers and to provide greater specialisation within the court. It is intended that this system will tap the particular expertise of judges and materially improve the efficiency of caseload management. Judges have been allocated to these Divisions for an initial period of three years. There will be, however, some exchange of judges between Divisions. The area of competence of the Commercial and Equity Division includes Corporations Law and matters arising principally out of ordinary commercial transactions.

New Zealand

- 12.7.12 In New Zealand, the High Court has jurisdiction over major crimes and civil claims involving more than NZ\$200,000 (€93,288 approx.). It also deals with judicial reviews of administrative action and admiralty proceedings. In the past few years a number of initiatives have been implemented with the aim of improving the court's efficiency, effectiveness and accessibility. These include the establishment of a separate Commercial List for faster resolution of commercial matters. This list deals with proceedings of a general commercial nature, including disputes relating to intellectual property, arbitration and construction of documents disputes.

Delaware, USA

- 12.7.13 In Delaware in the United States, the Chancery Court has a national reputation among the US business community and is responsible for developing case law in Delaware on corporate matters. It is the only court in the United States that is devoted almost exclusively to the resolution of corporate law cases. The Chancery Court has five judges. The judges are each appointed for a 12-year term and sit individually. There are no juries, no punitive damages and its jurisdiction is limited (no crimes, no torts). It largely adjudicates business problems: contracts including licensing agreements, partnership agreements, corporation law matters and fiduciary duties generally. The Chancery Court provides fast, expert adjudication in subject areas requiring expertise in its special jurisdiction areas. It is not unusual for the validity of a hugely complex corporate decision to be determined in Chancery within 60 days and the appeal decided in another 60 days.¹⁸ The courts do not take vacations comparable to those in Ireland. There is both a highly-developed corporation law and a large body of judgments, which together help to bring predictability and reasonable certainty to legal interpretations. The existence of this dedicated business court and its attendant established body of laws is commonly cited as one of the incentives for companies to incorporate in Delaware. More than half of the Fortune 500 companies and half of the companies listed on the New York Stock Exchange are incorporated there. The highly-developed case law with written precedents brings a significant degree of predictability which is helpful to corporate planning and decision-making. The income derived by Delaware from corporations franchise tax and the employment resulting from incorporation-linked services means that the state legislature places a high priority on keeping its corporations statute current and related administrative and support services efficient and effective.

Northern Ireland

- 12.7.14 The Queen's Bench Division in Northern Ireland has a Commercial List, the operation of which has been described by Brian Kerr J as follows:¹⁹

"The Commercial List was established in 1992 by the introduction to the Rules of the Supreme Court (Northern Ireland) 1980 of Order 72²⁰...The introduction of Order 72 was prompted – to a significant extent at least – by representations made by the commercial community in Northern Ireland about the cumbersome and protracted nature of commercial litigation in our jurisdiction. This Order and its implementation have been the legal community's reaction to those representations and its own acknowledgement of the need to streamline and adapt traditional proceedings – particularly at the preparatory or interlocutory stage – to cater for the particular requirements of commercial action."

18 Source: Delaware, the Corporate Choice, (Delaware Department of State).

19 Case management in the Commercial List in the Queen's Bench Division as described by Mr Justice Brian Kerr, Judge of the High Court, Northern Ireland, at a Conference on Case Management held by the Working Group on a Courts Commission in November 1996.

20 Order 72, Rule 1(2) of the rules of the Supreme Court (Northern Ireland) includes within the definition of a commercial action such diverse matters as building contracts, insurance, banking, sale of goods and shipping.

Kerr J continued:

"As a matter of practice, actions enter the Commercial List by two routes. Firstly and usually, parties will apply to me through the Commercial Office to have an action included in the List. Less commonly, the Registrar of the Commercial List will carry out a trawl of actions, which have been set down in the Queen's Bench List and identify actions, which are clearly commercial. These will then be taken into the Commercial List."

12.7.15 The aim of the Commercial List of the Queen's Bench Division, Northern Ireland, has since been set out in Practice Direction 1/2000, as follows:

"[T]o provide those engaged in commercial litigation with a venue and procedures by means of which their disputes may be justly and expediently resolved. The commercial court specifically recognises the importance to the commercial community of economy, efficiency and the maintenance of good business relationships and, accordingly, the court is anxious to encourage serious attempts by the parties to enter into productive negotiations with a view to achieving a mutually satisfactory resolution of the litigation or, at the very least, identification and reduction of disputed issues at an early stage in the proceedings."

12.7.16 Commercial actions are said to include any cases related to business or commercial transactions and, although the rules offer a detailed list of such matters, the commercial judge may include such other causes as he thinks fit to enter. There is a perception that litigating parties elect for the Commercial List because of the expertise built up there. Case management is a key component of the administrative strategy of the Commercial List.

12.7.17 To advise on the operation of the Commercial List the commercial judge is assisted by a commercial liaison committee with two nominees each from the Bar Council and the Law Society. There is also a Commercial List users' panel, drawn from professional bodies, e.g. architects, accountants, and chartered surveyors.

Court structures in the foregoing jurisdictions

12.7.18 The following is a tabular summary of the court structures in selected jurisdictions:

Jurisdiction	Structure	Matters dealt with	No of Judges	Case Management
England & Wales	High Court Chancery Division	Major part of caseload is concerned with business disputes, including: -corporate & personal insolvency -business, trade & industry disputes	17	Yes
Scotland	Court of Session Commercial Action	Any transaction or dispute of a commercial or business nature e.g., banking & insurance transactions, contracts for sale or supply of goods or services	1 full-time 2 part-time	Yes
New Zealand	High Court Commercial List	Proceedings of a general commercial nature, including intellectual property, arbitration & construction of documents disputes	4	Yes
Victoria, Australia	Supreme Court of Victoria Commercial & Equity Division	Mainly corporations matters & matters arising out of ordinary commercial transactions	6	Yes
Delaware, USA	Chancery Court	Business law, corporations law, contracts, fiduciary duties	5	Yes
Northern Ireland	Commercial List, Queen's Bench Division, High Court.	Commercial actions, broadly defined	1 full-time 2 part-time	Yes

12.8 Case management

12.8.1 Case management is a term used to describe processes involving the control of movement of cases through a court or the control of the total workload of a court. Case management in courts is often, but not always, performed by judges. The progress of cases before the courts has always been "managed" in one sense, but traditional adversarial case management left the pace of litigation primarily in the hands of legal practitioners. The court's role was simply to respond to processes initiated by practitioners. In recent years, case management by judges and quasi-judicial officers such as registrars has been evolving rapidly in common law jurisdictions, e.g. the United States and Australia. These forms of case management typically involve the court managing the time and events involved in the movement of cases from commencement to disposition.

Case management in England and Wales

12.8.2 Ireland is not the only common law jurisdiction which has been reviewing both the ways and means of delivering justice. A major reform has taken place in England and Wales on foot of the enquiry by the Rt. Hon. Lord Woolf M.R. into the civil justice system. In his final report, entitled *Access to Justice ("the Woolf Report")*, Lord Woolf identified many defects in the civil justice system; in particular, that civil justice was too expensive and too slow and that there was inequality where parties had different resources. The aim of the civil justice reforms, proposed by the *Woolf Report*, was to remove those defects and to improve access to justice through quicker, cheaper and more proportionate justice. As an integral part of the reforms, the intention is that cases will be more closely monitored through to trial by the judiciary and that differences between High Court and County Court procedures will be removed.

12.8.3 The new unified civil procedure rules derived from the *Woolf Report* recommendations, along with the practice rules which supplement them, came into force on 26 April 1999. To achieve the aims identified in the *Woolf Report*, all procedural decisions will, in future, be guided by the overriding objective stated in Civil Procedure Rule 1.1:

"The Court must deal with a case justly and dealing justly with a case is to include, so far as practicable, ensuring the parties are on an equal footing, saving expense, dealing with the case in ways which are proportionate to the sum at stake, the importance of the case, its complexity and each party's financial position, ensuring expedition and fairness and allotting to each case an appropriate share of the court's resources."²¹

12.8.4 An important principle articulated in the *Woolf Report* is that the structure of the courts and the deployment of judges will be designed to meet the needs of litigants. In Ireland, this would similarly be a key objective from the perspective of the Review Group, with its mandate of simplification and modernisation. It would also be consistent with the strategic management initiative underway in the public service with its focus on quality customer service.

12.8.5 A key objective of the *Woolf Report* is that ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the courts. This means a focus on a managed system of dispute resolution and in particular on the development of judicial case management. The *Woolf Report* recommended that the courts must: (a) decide what procedure is appropriate for each case; (b) set realistic timetables; and (c) ensure that procedures and timetables are complied with.

12.8.6 One year after introduction of the new rules, the UK media reported that a number of surveys had indicated the overall verdict as positive; the reported feedback being that litigation is quicker and more likely to lead to early settlement than a courtroom contest. *The Times*²² quoted the head of litigation at a corporate law firm that conducts an annual access to justice survey as saying:

21 *Chancery Guide*, UK Courts Service website (www.courtservice.gov.uk).

22 2 May 2000.

"The UK legal system historically has been plagued by unsatisfactory delays and expense. The style of dispute resolution is changing as a result of the Woolf reforms; people no longer seek aggressive uncompromising lawyers but those who look for commercial solutions."

- 12.8.7 In taking account of developments on foot of the Woolf reforms the Review Group would, however, note that these are of limited relevance to the Irish system. It is not, in any event, the function of the Group to propose reforms to the Irish civil justice system as a whole. Nonetheless, the Group is of the view that a reform initiative which leads to litigation in the commercial area becoming quicker to resolve and more likely to lead to early settlement would be a very positive development.

Case management in Northern Ireland

- 12.8.8 A key aspect of the Commercial List in Northern Ireland is that the judge is familiar with all the cases, and with the progress of all the cases, on the list. *A Review of the Civil Justice System in Northern Ireland* was published in June 2000. The Group on the Administration of Justice (GAJ), which prepared the report, noted that :

"... evidence from the County Courts, the commercial list and the Chancery Division has persuaded the Group that appropriate case management can serve to promote efficiency in litigation and greater parity between opposing parties."

- 12.8.9 It is relevant to note that whilst the GAJ viewed the principle of judicial case management positively, it also pointed out that :

"The GAJ sought to adopt an approach that would see active judicial intervention only where it is necessary."

- 12.8.10 The GAJ concluded that within the Queen's Bench Division in Northern Ireland only the Commercial List may be said to be subject to a high degree of active judicial case management, under the separate listing and administrative system for dealing with commercial actions introduced in 1992. The GAJ noted that, during 1997, a total of 135 cases in the commercial list were disposed of, as compared with 2,134 in the general list. It was further noted that such actions were often factually complicated, technical and "paper heavy" and that strong management of these actions was a necessary tool for narrowing the issues and promoting efficiency.

- 12.8.11 Case management within the Northern Ireland Commercial List as set out in *A Review of the Civil Justice system in Northern Ireland* is as follows:

"A copy of every pleading (including notices for particulars and replies, interrogatories and replies and lists of documents) must be furnished to the Registrar of the Commercial List not later than two days from service on the other parties. Moreover, as soon as practicable after the close of pleadings, the Registrar refers the action to the Commercial Judge for directions as to the conduct of the case. The Commercial Judge may give directions without a hearing, may receive written proposals from the parties or may hear the parties as he thinks fit. Any party may, at any stage and at his or her volition, make an application for directions as to the conduct of the action. The date for hearing is fixed by the Registrar in consultation with the Commercial Judge, and the Judge may receive written or oral proposals from the parties as to listing. The Commercial Judge also exercises an element of control over the use of expert evidence and may order a party to disclose to the other parties at any time the expert evidence, which it is intended to adduce. The Registrar receives any such furnished evidence no later than two days after disclosure. A further measure of control is exercised over interlocutory proceedings, with all such matters being determined by the Commercial Judge himself, unless he directs otherwise."

Case management in Ireland

- 12.8.12 In Ireland, the Second Report of the WGCC was concerned with case management and court management. With regard to judicial case management, the WGCC noted that, if introduced :

"[I]t would signal a significant transfer of responsibility for the management of civil litigation from the litigants and their legal advisers to the courts."

- 12.8.13 The WGCC also considered administrative case management. Whilst both aspects of case management are now issues to be advanced, primarily by the Courts Service and the judiciary, having regard to the concerns of other stakeholders, it is important to note the current situation. There is at present in operation a system of list management in all of the High Court lists and an extensive range of Practice Directions. In some areas, a degree of judicial and administrative case management already operates.
- 12.8.14 The Review Group notes the commitment of the Courts Service to case management systems which is timely having regard to the comments of the Chief Justice concerning case management in his judgment in *Orange Communication v. The Director of Telecommunications Regulation and Meteor Mobile Communications Ltd.*²³:

"The case has occupied a wholly inordinate amount of court time, both in the High Court and in this Court, it took 51 days in the High Court and 17 days in this Court. This was due in part at least to the absence of appropriate case management structures in the High Court at the time of the hearing. The Working Group on a Courts Commission in their sixth report, having reviewed their previous work on administrative case management, concluded that it should now be regarded as being within the remit of the Courts Service. This case demonstrates that the problem can be indeed acute. If and when the issues had been identified in pleadings and that discovery limited to those issues duly made, a preliminary conference between the judge, counsel and the solicitors should have insured that the issues were clearly understood and that the judge was provided well in advance of the hearing with the relevant documents – so as to avoid the immensely time consuming process of documents being read in court during the opening and indeed throughout the giving of evidence. No doubt it is easier to see with the benefit of hindsight the problems which arose and how they might have been resolved but it may well be that the substantial parties in commercial litigation having access to the best legal advice may be best placed to adopt newer procedures and illustrate their benefits for others."²⁴

- 12.8.15 The Review Group understands that the Presidents of the various courts in Ireland and the Board of the Courts Service are keeping under review international developments in the areas of court and case management, including alternative dispute resolution and the need for appropriate technological litigation support systems. The Civil Procedure Rules of the Courts of England and Wales and the arrangements for hearing and processing commercial litigation in Northern Ireland and Scotland have been the subject of particular scrutiny by the Courts Service. The advance use of information technology for litigation and court administration purposes in other jurisdictions including Singapore and courts in the US is also currently being reviewed. As already mentioned, the Courts Service has set up a Statistics Unit. The statistics available under the present system do not extend, for example, to the provision of information on the duration of company law/commercial cases from initiation to final judgment in the High Court.
- 12.8.16 The comments of the Chief Justice, as set out above, regarding the absence of case management structures illustrate the concerns about commercial litigation that can arise at present. As referred to above, the Review Group welcomes the intention of the Courts Service to implement a civil case management system. The Group further notes that such reforms will need to be adequately resourced as regards personnel, expertise and information technology hardware and software.

Recent developments

- 12.8.17 Recommendations on case management are currently being considered by the Superior Courts Rules Committee. A subcommittee is currently devising rules to facilitate the new court procedures introduced by the 2001 Act.

12.9 Conclusion

- 12.9.1 The current impetus for reform both domestically and in comparator jurisdictions is striking. In the opinion of the Review Group, there is a convincing case for the dedicated treatment of commercial/company law cases in order to achieve efficient and effective dispute resolution. The Group has already referred to the increase in the volume of cases arising for judgment due to the huge increase in economic activity. There is, in addition, a very tangible

23 Supreme Court of 18 May 2000.

24 *ibid.* at page 147 of judgment.

reason for a pending significant increase in the volume of company law cases due, for example, to the likely increase in the number of applications to be made under s 150 of the 1990 Act (restriction of company directors) to the High Court by the Director following the commencement of s 56 of the 2001 Act.

- 12.9.2 One of the two principal issues for the Review Group's consideration in the area of corporate litigation is whether there should be a dedicated treatment of company law matters within the High Court. The Group is of the clear view that this should happen and recommends accordingly.

Commercial Division

- 12.9.3 The Review Group is aware that the method of treatment of disputes (which, while not strictly company law disputes, are disputes of an essentially commercial nature) is a matter of considerable interest to the commercial sector generally. It is striking, looking at the Table provided at 12.7.18, to see how court structures have been developed and refined in recent years in other jurisdictions to facilitate the resolution of disputes of a commercial nature generally as well as of company law simpliciter. It is of interest, for example, to note the establishment of the Commercial and Equity Division in the Supreme Court of Victoria. In the UK, in at least one of the options put forward for a commercial court, the intention is to provide a model of operation that is suitable for all business-to-business and business-to-State civil litigation.

- 12.9.4 It is the opinion of the Review Group that there is a case for the establishment of a Commercial Division within the High Court which would deal with a *Companies list* as well as other commercial cases and we recommend that this should be established.

Companies list

- 12.9.5 Within the Commercial Division the Review Group recommends that a dedicated companies list should be established in the High Court, with a named judge assigned to the list with overall responsibility for that list, and a number of judges named as dedicated back-up. Such a *Companies list* would combine elements of the present *non-jury* and *Chancery lists*. The *Companies list* would facilitate the consideration of company administration and share capital issues in an integrated way.

Improved management of dispute resolution

- 12.9.6 So far as the second principal issue is concerned, improved management of dispute resolution in the area of company law, the Review Group recommends that the judges assigned to the Commercial Division (and within this Division to the *Companies list*) should be encouraged to engage and assist in case management (for example, similar to the Northern Ireland model set out above at 12.8.11), subject to the principle of active judicial intervention only where necessary.

- 12.9.7 The Review Group also recommends that the relevant bodies be asked to put in place the appropriate rules and practice directions to implement this process.

The main arguments in favour of this approach are:

- (i) it would deal with the expressed concerns of Irish business for a dedicated forum for resolving business disputes;
- (ii) it would facilitate the continuing enhancement of written jurisprudence in this area;
- (iii) the existence of this specialist Division, and of a specialised *Companies list* within it, would enhance the sustained development of greater levels of specialised expertise and a greater concentration of such expertise;
- (iv) this should lead to the development of Ireland as an attractive forum for the resolution of commercial and corporate disputes.

12.9.8 The Review Group envisages that on foot of establishing a Commercial Division of the High Court, the President of the High Court would assign overall responsibility for the Commercial Division to a named judge with particular knowledge of the area. Other judges would be assigned to the Division each of whom would in turn assume responsibility for the Companies list as well as such other lists as might be appropriate to such a Division (e.g. a *Competition list*). Whilst the length of any such assignment would be a matter for the President of the High Court, the Review Group believes it is appropriate that the assignment would be for such a period as would allow for the development over time of a settled mode of practice and procedure as well as a body of law.

12.9.9 It would also appear appropriate that there should be practice directions and rules of court intended to promote efficiency in litigation, and designed to deal with cases expeditiously and without undue technicality. In order to achieve these aims there should, in the opinion of the Review Group, be a developing degree of case management, subject again to the principle of active judicial intervention only where necessary. Common sense suggests that existing good practice with regard to specialisation, list management and practice directions should be built on. All of the matters above would obviously require adequate resourcing; notably additional judges, appropriate administrative and support staff, research facilities and aids. The Chief Justice's comments in Cork, which have as a theme the general streamlining of court structures and reform of the existing boundaries within the Irish court system ("a more rational and less cumbersome court system"), make the case for a greater allocation of resources to the courts. In his address the Chief Justice said:

"We do not have enough judges in Ireland to cope with the hugely increased volume and complexity of litigation today. The number of judges per head of the population in Ireland is one of the lowest – perhaps the lowest – in the European Union. That remains a problem which must be dealt with by the executive and the legislature."

Other issues

12.9.10 It is also the opinion of the Review Group that there are a number of other issues which would certainly facilitate the efficiency of commercial litigation and would also help with the wider goal of developing Ireland as a forum of choice for commercial litigation. Because these are somewhat wider than our mandate the Group has not gone into these in detail but we do believe it is relevant to note that progress on these would allow for the transaction of commercial litigation in an optimally efficient and effective way. These issues are:

- (i) Consideration should be given to the provision by the Courts Service of an integrated service to commercial litigants analogous to current proposals being considered in the UK, briefly described at 12.7.3 and 12.7.4.
- (ii) Even if commercial litigation is streamlined, delays can arise in the event of an appeal. The provision of an Appeals Court for commercial cases distinct from the Supreme Court would greatly enhance the delivery of timely judgments.
- (iii) Consideration should also be given to a dedicated commercial court building, as a physical centre for an integrated commercial court service and the commercial courts. Over time it may also be possible to develop alternative dispute resolution or mediation as one element of the service offered to commercial litigants.

12.9.11 The Review Group fully recognises that a decision to establish a Commercial Division would raise issues of policy, organisation and resource allocation in the administration of justice which are beyond the remit of the Group. These issues are matters for consideration by the Courts Service in the first instance and by the Department of Justice, Equality and Law Reform. It seems clear in any event that the Courts Service, in its consideration of the case for a commercial court, is likely to do so having regard to wider issues such as divisionalisation of the High Court.²⁵ It is in this context of examining the best approach for the future with regard to both structures and modus operandi that the Review Group puts forward this set of recommendations as affording the best model for excellent service in resolving disputes in the company/commercial law area.



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12.10 Summary of Recommendations

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12.10 Summary of recommendations

- A Commercial Division should be established within the High Court which would deal with all business-to-business and business-to-State civil litigation. **(12.9.4)**
- Within the Commercial Division a dedicated Companies list should be established in the High Court, with a named judge assigned to the list with overall responsibility for that list, and a number of judges named as dedicated back-up. Such a Companies list would combine elements of the present non-jury and Chancery lists. The Companies list would facilitate the consideration of company administration and share capital issues in an integrated way. **(12.9.5)**
- Judges assigned to the Commercial Division (and within this Division to the Companies list) should be encouraged to engage and assist in case management (for example, similar to the Northern Ireland model set out at **12.8.11**), subject to the principle of active judicial intervention only where necessary. **(12.9.6)**
- Relevant bodies should be asked to put in place the appropriate rules and practice directions to implement the process of setting up the Commercial Division. **(12.9.7)**

